

The Impact of Human Rights Reforms on the Consolidation of Democracy in Turkey

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ABSTRACT

This study seeks to explore whether the human rights reforms undertaken by Turkey in fulfillment with Copenhagen Criteria and harmonization with the EU law has an impact on the consolidation of democracy in Turkey. The notion of human rights is elaborated within the framework of Turkish Constitutions and the political context. Turkey has embarked on an extensive reform process after gaining candidacy status since 1999 which resulted in a number of constitutional and legal amendments to improve the state of human rights. In this regard, the motivation behind rule adoption is also scrutinized with reference to Conditionality Theories. The unit of analysis in this study is three core fundamental rights and liberties; abolition of death penalty, prevention of torture and mistreatment and freedom of speech, which are considered to represent the core fundamental rights and liberties. I will argue that positive impacts of human rights reforms on the consolidation of democracy in Turkey depend on their effective implementation and within time internalization by the society. Effective implementation, on the other hand, depends on a number of external and internal dynamics: determinacy of domestic political actors and civil society, the character of the EU Conditionality and security-related issues such as the ongoing Kurdish separatist terrorism.

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INTRODUCTION

In the academic literature Turkey is often described as ‘partly free’¹, ‘imperfect democracy’² and ‘not a fully consolidated democracy lying in a gray area’.³ It is widely agreed that the most important impediments against the consolidation of democracy in Turkey have been the issue of human rights and the peculiar role of the military in politics. The main reason behind this is considered to be the priority given to survival of state rather than the rights and liberties of the citizens. Consequently, unlike in Western democracies, the military was given a peculiar role of involvement in politics in line with their duty of safeguarding the founding principles of the Turkish state.

In order to understand this condition, it is necessary to take into account the history of the modern Turkish state. The first democratization attempt after the foundation of the Turkish Republic in 1923 led by Atatürk and the Kemalist elite intended to create a political settlement based on the European model of nation-state. Hence, ‘Turkish national identity’ and modernization along Western norms constituted the core tenets of the new Turkish Republic.⁴ These reforms were imposed from top to down and modernization was given precedence over democratization in the initial years of the Republic. This resulted in an authoritarian-republican type of state with priority given to survival of state rather than fundamental rights and liberties of the citizens. However, this is conceivable given the peculiarities of the circumstances; a society defined with an extremely low level of

¹ Freedom House Annual Report 2007, available online at: http://www.freedomhouse.org/uploads/press_release/fiw07_charts.pdf, 25.02.2006.

² F.S Larrabee and I.O Lesser, *Turkish Policy In An Age Of Uncertainty*, 2003, cited in Amichai A.Magen, *EU Membership Conditionality and Democratization in Turkey: The Abolition of Death Penalty As A Case Study*, unpublished Thesis, Stanford University, 2004, 10.

³ Ergun Ozbudun, Turkey: How far from Consolidation?, *Journal of Democracy*, Vol.7, Nr.3, 1996, 124.

⁴ In the cultural sphere, the Latin alphabet was adopted. Education was unified and put under state control, under supervision of the Ministry of Education. Islamic education was eradicated from primary schools from 1933 to 1940. Western style of clothing was adopted along with the Gregorian calendar, European metric system and weekly holiday was changed from Friday to Sunday. In the institutional sphere, the Caliphate was abolished (a Caliph used to stand as the leader of all Muslim peoples). The *tarikats* (religious orders) were banned. The legal system was organized on the basis of the Western law: Swiss Civil Code, Italian Criminal Code and the German Commercial Codes were adopted.

illiteracy, economic backwardness and lack of democratic culture. After all, as Beetham argues, ‘state formation does not necessarily precede democratization’.⁵

The first explicit mention of human rights was made in the 1961 Constitution, which for the first time incorporated full range of fundamental rights and liberties. However, the military coup of 1971 and 1980 would successfully limit the scope of human rights enshrined in the 1961 Constitution and these periods would be marked with extreme violations of human rights until 1987, with transition to multiparty democracy.

From this period on, democratization of human rights has been triggered by foreign powers as a requirement for strengthening inter state relations on matters such as trade or membership in international organizations. This has resulted in elimination of a number of oppressive measures and practices. However, none of the foreign actors has been as influential as the European Union, which has proved to be an anchor for the latest human rights reforms of 1999-2004 that has opened a new era in the sphere of human rights in Turkey. Among all others, death penalty has been abolished, serious measures have been taken for the prevention of torture and mistreatment and many former restrictions on fundamental rights and liberties have been lifted.

In such a context, the research question posed by this study is whether the constitutional and legal human rights reforms adopted under the EU Conditionality have a positive impact on the consolidation of democracy in Turkey. Among the five criteria of Linz and Stepan’s theory of ‘democratic consolidation’,⁶ the criterion of ‘the rule of law’ to ensure legal guarantees for citizens rights and liberties, will be the unit of analysis in this study. Furthermore, the study will seek to explore the motivation behind the adoption of reforms in the framework of rational institutionalism and social constructivism theories. Finally, current state of the aforementioned rights will be elaborated along with prospects

⁵ Beetham, 73.

for internalization with reference to internal and external dynamics (the role of government, security issues emanating from terrorism, public support for the reforms, the EU's stance towards Turkey).

The first chapter introduces the theoretical and methodological framework. The second chapter presents an overview of the concept of human rights in Turkish Constitutions. The third chapter elaborates on human rights reforms in Turkey under the EU Membership Conditionality with respect to abolition of death penalty, prevention of torture and mistreatment and freedom of expression. The fourth chapter provides an analysis of the current state of abovementioned rights in Turkey and the prospects for their internalization.

⁶ Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Eastern Europe, Southern Europe, and South America*, Johns Hopkins University Press, Baltimore, 1996.

CHAPTER 1: THEORETICAL AND METHODOLOGICAL FRAMEWORK

1.1. Main Concepts

In an attempt to better understand the substantive democratization reforms in human rights undertaken in Turkey in fulfillment for a requirement for EU membership, my research will try to inquire and compare the concept of human rights in Turkey on a temporal basis; the situation prior to and after the adoption of the reforms.

1.1.1. *Concept of Human Rights in a Consolidated Democracy*

As stated by Beetham, ‘at the heart of democracy lies the right of all citizens to a voice in public affairs and to exercise control over government, on terms of equality with other citizens’.⁷ Besides political institutions, this requires the guarantee of human rights, as a precondition for people to exercise their willpower over the government. This makes human rights ‘an intrinsic part of democracy’.⁸

Linz and Stepan set five prerequisites for the consolidation of democracy in a state: existence of conditions for a free and lively civil society, a relatively autonomous and valued political society, rule of law to ensure legal guarantees for citizens rights and liberties, a state bureaucracy and an institutional economic society which is neither a command nor a pure market economy.⁹ Rule of law must be embedded in the spirit of constitutionalism as an indispensable condition; respected and maintained by the state and the government, an independent judiciary as well as a strong legal culture in civil society.¹⁰

A comprehensive analysis of basic elements of this sketched theory of democratic consolidation with respect to Turkey is offered by Ozbudun¹¹: Turkey fulfils the criterion of existence of a free and lively civil society, she also fulfils the criterion of a relatively autonomous and valued political society as she had over half a century of experience with

⁷ David Beetham, *Democracy and Human Rights*, Blackwell Publishers, UK &USA, 1999, 92.

⁸ Ibid., 93.

⁹ Linz and Alfred Stepan, 7.

¹⁰ Ibid., 10.

¹¹ Ergun Ozbudun, *Contemporary Turkish Politics: Challenges to Democratic Consolidation*, USA, 2000.

multiparty politics; finally, the criterion of an institutionalized economic society is also fulfilled, especially after 1980 transition to liberal economy. However, with respect to the ‘rule of law’, Turkey does not have a long history of constitutionalism (see Ch 2).

1.1.2. EU Leverage in Democratization in Turkey- Membership Conditionality

Two strategies employed by European Institutions (EU, CoE, OSCE) for influencing state behavior are ‘normative pressure’ and ‘conditionality’. Normative Pressure usually takes the form of advices and recommendations given to a government about a specific policy direction, whereas conditionality is more a ‘carrot and stick policy’ as it links policy changes directly to an incentive.¹² Conditionality has been described as the most effective instrument on rule adoption in candidate states. Three theoretical frameworks developed by scholars to explain rule adoption by states are External Incentives Model, Social Learning Model and Lesson Drawing Model.

External Incentives Model belongs to the school of rational institutionalism and follows the ‘logic of consequences’ based on cost-benefit calculations of the rule-adopting state under the prospects of the external incentive: rewards or sanctions offered by the EU.¹³ According to Schimmelfennig and Seidelmeier, the dynamics of EU Conditionality are best explained by the External Incentives Model.¹⁴

Social Learning Model belongs to the school of Sociological institutionalism and follows the ‘logic of appropriateness’ and processes of persuasion. According to this model, a government adopts EU rules if it is persuaded of the appropriateness of EU rules.¹⁵

¹² Judith G. Kelly, “Introduction”, *Ethnic Politics in Europe: the Power of Norms and Incentives*, Princeton University Press, 2004, 18.

¹³ Schimmelfennig, Frank and Ulrich Sedelmeier, “Introduction: Conceptualizing the Europeanization of Central and Eastern Europe”, (eds) Frank Schimmelfennig & Ulrich Sedelmeier, *The Europeanization of Central and Eastern Europe*, Cornell University Press, 2005, 1-23, 9.

¹⁴ *Ibid.*, 3.

¹⁵ Schimmelfennig and Seidelmeier, 18.

Lesson Drawing Model occurs when a government adopts the EU rules if it expects these rules to solve domestic policy problems effectively without expectation of incentives such as membership or trade agreements.¹⁶

In the limited and partially satisfactory literature, rule adoption in Turkey is usually described within the theoretical framework External Incentives Model¹⁷ whereas a few reiterate the role of other domestic actors such as the civil society and the intelligentsia in rule adoption.¹⁸ The EU leverage on Turkey deserves close consideration particularly since the country's application for full membership in 1963. The harmonization reforms undertaken in 2001-2004 indicate the explicit change in the scope and effectiveness of the EU leverage on Turkey as compared to the period of 1980-1999.

1.1.3. Implementation of Human Rights Reforms in Turkey

The existing literature on this subject is limited due to the fact that democratization reforms in the field of human rights are a recent phenomenon. Therefore, this study aims to investigate the implementation and prospects for internalization of the undertaken reforms along with their possible impact on the consolidation of democracy in Turkey. Consequently, the results of this study will have policy relevance for the related domestic and international actors.

¹⁶ Ibid., 20.

¹⁷ Schimmelfennig, Frank, Stefan Engert, and Heiko Knobel, "The Impact of EU Political Conditionality on Slovakia, Turkey, Latvia", (eds) Frank Schimmelfennig & Ulrich Sedelmeier, *The Europeanization of Central and Eastern Europe*, Cornell University Press, 2005, 29-49, 41; Birsen Erdoğan, "Compliance With EU Democratic Conditionality: Turkey and The Political criteria of EU", paper submitted for ECPR, Standing Group on the European Union Third Pan-European Conference on EU Politics, 21-23 September 2006, Istanbul, Turkey, available online at: <http://www.jhubc.it/ecpr-istanbul/virtualpaperroom/0.42.pdf>, 15.05.2007; Paul Kubicek, "The European Union and Grassroots Democratization in Turkey", *Turkish Studies*, Vol.6, No.3, 361-377, 2005, 361-377.

¹⁸ Natalie Tocci, "Europeanization in Turkey: Trigger or Anchor for Reform?", *South European Society & Politics*, Vol. 10., No.1, April 2005, 73-83; Meltem Muftuler Bac, "Turkey's Political Reforms and the Impact of the European Union", *South European Society & Politics*, Vol.10, No.1, April 2005, 17-31; Ziya Önis, "Domestic Politics, International Norms and Challenges to the State: Turkey-EU Relations in the post-Helsinki Era", *Turkish Studies*, Vol.4, Nr.1, Spring 2003, 9-34.

1.2. Methodology

It is hypothesised in this thesis that positive impacts of human rights reforms on the consolidation of democracy in Turkey depend on their effective implementation and within time internalization by the society. Effective implementation, on the other hand, depends on a number of external and internal dynamics: determinacy of domestic political actors and civil society, the character of the EU Conditionality and security-related issues such as the ongoing Kurdish separatist terrorism.

The state of Turkish democracy will be evaluated within the ‘respect for rule of law’ criterion set forth by the democratic consolidation theory of Linz and Stepan. The dimension of the rule of law in this study will be restricted to the sphere of fundamental rights and liberties. Among all fundamental rights and liberties, the units of analysis in this thesis will be abolition of death penalty, prevention of torture and mistreatment, freedom of expression and the enforcement mechanism for the rule of law; the judiciary.

My analysis of how the EU influences rule adoption in candidate states will be situated within conditionality theories: the theoretical framework of External Incentives Model which belongs to the school of rational institutionalism. This is the best explanatory theoretical framework for the role of EU membership conditionality in inducing change in Turkey given the inception of the reform process after gaining candidacy status in 1999. The impact of EU membership conditionality in democratization of human rights in Turkey is absolute. EU membership received substantial public and elite support both due to the expected financial incentives from membership and the ideal of modernization along the Western norm of democracy.

The concept of ‘human rights’ in Turkey prior to reforms will be elaborated with reference to the Turkish Constitutions in a comparative perspective. To test the implementation of reforms, the Progress Reports of the European Commission on Turkey will be analyzed on a temporal basis: two years prior to reforms 2000, 2001, 2002, 2003,

2004 and the period after the reforms, 2005, 2006 until today and the personal communications I made during my research in Istanbul during 9 – 19 April with a few scholars and experts of some prominent non-governmental organizations active in the sphere of human rights.

CHAPTER 2: THE CONCEPT OF ‘HUMAN RIGHTS’ IN TURKISH CONSTITUTIONS PRIOR TO REFORMS

The rationale behind the process of constitution making is most often creation of a new political order which is precipitated by extraordinary developments such as a lost war or a revolution.¹⁹ The first Constitution of Turkey was made in 1921 after the defeat of the Ottoman Empire in the First World War and the subsequent occupation of her lands by the Entente. The second Constitution, which is regarded to be the first official Constitution, was made in 1924 after the declaration of the Turkish Republic and her international recognition by the Treaty of Lausanne.

The making of 1961 and 1982 Constitutions represent an anomaly as both were prepared after subsequent military takeovers in the process of transition to democracy. Yet the 1961 Constitution is still regarded to be the most democratic Constitution of Turkey whereas the 1982 Constitution as the most undemocratic one. The 1921 and 1924 Constitutions belong to the ‘radical democratic model’, according to which the constitution represents the willpower of the people as agents of democratic revolutions and embodies many of the revolution’s social promises with the purpose of their preservation.²⁰

The 1961 Constitution also bears features of this model as the Constituent Assembly was largely representative of the society. The 1982 Constitution, on the other hand, is an institutionalist settlement; it relies on the power of institutions and not on the willpower of the people. Paradoxically, it expects people to abide by the rules on the assumption that they are for the benefit of all and this is what people would have opted for.²¹ Özbudun argues that the Constituent or Legislative Assembly has neither offered a broad representation of social segments nor undergone a process of negotiations, bargaining and compromise, which he interprets as missed opportunities for establishment of political institutions based

¹⁹ Ulrich K.Preuss, “Constitutional PowerMaking For The New Polity: Some Deliberations On The Relations Between Constituent Power and The Constitution’, 143-164, 143.

²⁰ Ibid., 145.

on broad consensus and consolidation of democracy.²² His argument would be more valid for the 1961 and 1981 Constitutions, because the 1921 Constitution was made under conditions of war, and a more broad representation of people in the preparation of the 1924 Constitution was simply impossible in that societal context with a literacy level of (20%).

It can be argued that in all Turkish Constitutions with the exception of the 1961 Constitution, ideology of survival and the role of the military have predominated over the focus on human rights and the rule of law.

2.1. The 1921 Constitution

The 1921 Constitution²³ was prepared in a situation of national emergency; after declaration of a new Turkish government which culminated in the establishment of Turkish Grand National Assembly on 23rd April 1920 in Ankara.²⁴ The priority was to carry out the National Liberation Movement; to build up an army of the independent armed dissident groups in order to initiate a War of Independence; therefore the Constitution made no mention of human rights. It established a new political settlement; an assembly government endowed with the powers of the executive, legislative and judiciary. Sovereignty was vested in the Grand National Assembly as the sole representative of people. The Grand National Assembly was composed of members elected by associations established for National Liberation Movement in each province; members of Municipality Councils and members of the dissolved Assembly in Istanbul.²⁵ The basis of legislation was sacred law; although it was not the only reference point as the Constitution explicitly incorporated the *modus*

²¹ Ibid., 147.

²² Ergun Özbudun, *Contemporary Turkish Politics: Challenges to Democratic Consolidation*, Lynne Rienner Publishers Inc, USA, 2000, Chapter 3: The Politics of Constitution Making, 49-52.

²³ For the 1921 Turkish Constitution [English version], see <http://www.bilkent.edu.tr/~genckaya/1921C.html>, 09.04.2007.

²⁴ Imperial occupation following the signing of the Sevres Treaty in 1920, in the Ottoman lands- mostly Anatolia, aroused public resistance which paved the way for the formation of a new political order in Anatolia to carry out a National Struggle to liberate the country led by Mustafa Kemal. The new Turkish government was founded in Ankara in 1920 repudiated the Ottoman Empire authority and the Treaty of Sevres which allowed occupation and partition of the country among the Entente.

²⁵ Kemal , “1921 Teşkilât-ı Esasîye Kanunu” [1921 Turkish Constitution], (in) Kemal , *Türk Anayasa Hukuku*, Bursa Ekin Yayınevi, 2000, 45, available online at: <http://www.anayasa.gen.tr/tek-1921.htm>.

operandi of people, customs, and the needs of the time to be taken into consideration in preparation of laws and regulations.²⁶ This was necessary under those circumstances, since the Sharia had served as Constitution of the Ottoman Empire until the adoption of first civil Constitution in 1859.²⁷

Rule of law was enforced by the Tribunals of Independence established by the *Law on Tribunals of Independence* on 26 September 1920 whose members were elected by the National Assembly among themselves²⁸. The penalties under law were; capital punishment, expulsion, hard labor, being kept under custody until the end of National Liberation, payment of the damage, corporal punishment, being displayed in front of public and army, seizure of personal property. The Courts were not in conformity with the principle of judicial independence,²⁹ however, given the extraordinary conditions of the time, especially the double threat against the Liberation Movement posed by imperial powers and the Ottoman administration, they were necessary for the maintenance of order to secure the Liberation Movement.

Nevertheless, the 1921 Constitution is considered to be fully representative of the nation's will. The 1876 Ottoman Constitution was prepared by a Commission determined by the Sultan, the 1924 Constitution prepared in a period of single party hegemony in the

²⁶ Ibid.

²⁷ The first Constitution of the Ottoman Empire was the adopted in 1876 [Kanun-i Esasi]. Unlike in Britain (Magna Carta) there was no Constitution to restrict the role of the Sultan before. The first Constitution of the Ottoman Empire predates to 1876. However, it was suspended in 1878 by the Sultan Abdulhamid. Nevertheless, the Ottoman Empire had her first Parliament in this period, which enjoyed substantial independence from the Sultan. According to Earle, this had inspired the Young Turks for the re-establishment of a parliamentary government. In 1908, Abdulhamid was forced to order the election of a new parliament by the army and the Committee of Union and Progress. However even then the working of the Constitution was curtailed by several reasons : the non-Turkish peoples were not willing to forgo their privileges granted by the Ottoman millet system and were unwilling to serve in the military, a series of wars broke out, the Turco-Italian War of 1911-1912, the two Balkan Wars of 1912-1913, and the Great War of 1914-1918, which set the prioritized matters of national defense and the failure of Great Powers to assist reform in the Ottoman Empire due to their conflicting interests in the Near East. Earle, 76-77, 78,79,80.

²⁸ Three members composed of those elected by the deputies among themselves by secret ballot and a prosecutor.

²⁹ Gözler, "1921 Kanun-I Esasi".

absence of an organized dissidence, the 1961 and 1980 Constitutions, were prepared by Constitutional Assemblies which were not elected by general ballot.³⁰

2.2. The 1924 Constitution

The second Constitution (1924), officially the first Constitution of Turkey established a republican regime and a parliamentary system.³¹ Fundamental rights and liberties were designated in Section V under the heading ‘Public Law of the Turks’.³² Basic rights and liberties were set forth in articles 68-73 including the right to live, freedom of speech, of press, of assembly and association including prohibition of torture and mistreatment. The Constitution adopted the natural law doctrine concerning fundamental rights and liberties and their restriction.³³ Even the definition of liberty was directly taken from 1789 Declaration of the Rights of Man and of the Citizen³⁴ as it read in Article 86:

Liberty consists in the right to live and enjoy life without offense or injury to others. The only limitations on liberty-which is one of the natural rights of all- are those imposed in the interests of the rights and liberties of others. Such limitations on personal liberty shall be defined in strict accordance with the law.

There was no separate provision on death penalty; however it was mentioned in Article 26 which granted the obligation of executing capital punishment sentences to the Grand National Assembly.

Prevention of torture was guaranteed by Article 73 which read ‘Torture, corporal punishment, confiscation and extortion are prohibited’. However, no data is available on the violation of this provision in this period.

³⁰ Gözler, 46.

³¹ Sultanate was abolished right after the victory of Independence War in 1922 by two parliamentary decisions nr.307 (30 October 1922) and 308(1-2 November 1922). Caliphate was abolished on 3 March 1924 by Law nr.431 which also necessitated expulsion of all the members of the Ottoman Dynasty. The Constitution was secularized by abolishing sacred law although the religion of the state was incorporated in Article 2 as Islam.

³² As a unitary nation state all the inhabitants were recognized as Turks. However, article 88 designates the name “Turk” as a non-ethnic, a geographical (people of Turkey) and legal term (citizenship) to be understood to include all the citizens of Turkish Republic without distinction of or reference to race or religion. For the English translation of the 1924 Turkish Constitution, see Edward Mead Earle, “The New Constitution of Turkey”, *Political Science Quarterly*, Vol.40, Issue I, March 1925, 73-100, 96-98.

³³ Kapani, *Kamu Hürriyetleri*, op. cit., s.109; Arsel, *Türk Anayasa Hukukunun Umumi Esasları*, op. cit., s.104; Tanör, *Osmanlı-Türk Anayasal Gelişmeleri*, op. cit., s.256., cited in Gözler, “1924 Teskilat-I Esasiye Kanunu.., 57-75.

³⁴ Gözler, *ibid.*

There was no separate provision on freedom of speech, but it was mentioned in Article 70 together with other freedoms such as freedom of conscience, assembly, private property.

The wording of the articles pertaining to fundamental rights and liberties was short and simple. The criterion for their restriction was embedded in the vague statement; ‘restriction as determined by law’. Only in article 86/2 is this criterion clear, which stipulates that inviolability of the person, the home, freedom of the press, correspondence, association and incorporation can be suspended or temporarily restricted by martial law.

Freedom of expression was curbed by the *Law on the Maintenance of Order (Takdir-i Sükun Kanunu)* enacted on 4th March 1925, upon the uprising led by Sheikh Said in southeastern part of Anatolia. It stipulated that the government, with the consent of the President, is authorized to prohibit all associations, intentions and publications which aim for religious fundamentalism, rebellion, and threatening public order, peace and security. Tribunals of Independence were reintroduced and were operational until 1927. The press and political dissidence were silenced. Left-oriented publications were banned. On 1 May 1925, thirty eight members of the banned Turkish Communist Party were arrested and brought to Ankara to be tried by the Independence Court. Among the arrested was Nazım Hikmet, the well known Turkish poet who managed to flee to Moscow. Furthermore, the Press Law of 1931 brought certain restrictions to freedom of speech, which banned publications in favor of caliphate, sultanate, anarchism and communism and granted the government the right to temporarily close down the publications against national interests.³⁵

Death penalties were mostly carried out during the periods when Tribunals of Independence were operational; 1920-1922, and 1925-1927. According to a source, 1,500

³⁵ www.tarihitebugun.gen.tr/?a=7 - 238k, 22.05.2007.

convicts were executed by the Tribunals of Independence.³⁶ During the Menderes government from May 1950 to May 1960, 46 executions were carried out.³⁷ According to data provided by Gemalmaz, the highest level of executions belongs to the period of 1930-1949, which corresponds to the early years of the Republic when the regime was still in the process of sustaining stability.³⁸ Fundamentalism and communism were perceived as major threats to the regime and harsh measures were taken after the Sheikh Said rebellion, assassination attempt against Atatürk in 1930 and the Menemen uprisings.³⁹

The principle of Constitutional supremacy was not guaranteed due to the absence of a special enforcement mechanism such as judicial review or Constitutional Court.⁴⁰ The National Assembly was endowed with the right to interpret and abrogate laws, mitigate sentences and grant pardons and even execute definitive sentences of capital punishment handed down by the courts (Article 26). This provision is considered to be in contradiction with the principle of separation of powers.⁴¹

However, despite the priority on survival and institutionalization of the new regime, the military was not given constitutional prerogatives. The 1924 Constitution banned the office of deputy for people serving in the military⁴² Therefore, according to a law passed by the Assembly on 19 December 1923, all army officers had to resign from active duty before

³⁶ Mehmet Semih Gemalmaz, "The Death Penalty in Turkey (1920-2001): Facts, Truths and Illusions", *Criminal Law Forum*:13, 91-122, 2002, 112.

³⁷ Ibid., 110.

³⁸ Ibid.

³⁹ The Sheikh Said Rebellion started on 13 February 1925 in a town in southeastern Anatolia and expanded in the whole region rapidly. Oran cites three different views for the Rebellion. According to the first view, it was based on religious reasons, as was denoted by Sheikh Said personally, a reaction to abolition of the Caliphate, and modernization reforms. The second view, which was the Communist view, the reason was the perceived threat to the feudal structure in southeastern Anatolia. According to the third view, it was a Kurdish nationalist movement supported by the British in accordance with their plan to get the oil-rich town Musul which was being negotiated at that time. The Menemen Rebellion was a fundamentalist uprising led by another Sheikh in a province of Western Anatolia in 1930. Oran, *Türk Dış Politikası*, Vol. I, 248, 266.

⁴⁰ However, the Constitutional Court was a new phenomenon at the period as the first Constitutional Court was established in 1920 in Austria, the second in 1948 in Italy and the third in 1949 in Germany hence establishment of a Constitutional Court in Turkey could not be expected.. Gözler, *Hukukun Genel Teorisine Giriş*, 162-164, at <http://www.anayasa.gen.tr/tek-1924.htm>.

⁴¹ Ibid.

⁴² Article 23 'No person may hold simultaneously the office of deputy and any other public office.'

running for the Parliament.⁴³ Moreover, the military was made subordinate to the National Assembly by Article 40 which vested the command of the army in the Grand National Assembly. However, Atatürk trusted in the military as the guardian of the Revolution as manifested in his remarks, ‘whenever the Turkish nation has wanted to take a step up it has always looked to the army...as the leader of movements to achieve lofty national ideals’.⁴⁴ Atatürk’s statement reiterates the prominent role of the military in modernization, referring to its role in foundation of the Republic. Moreover the military had a long legacy as an actor of modernization beginning in the Ottoman period in their efforts introducing the first Constitution in 1876.⁴⁵ All the Presidents of the Republic, except for Celal Bayar (1950-1960) were former senior officers until 1989.

2.3. The 1961 Constitution

The 1961 Constitution was prepared after the first military takeover on 27 May 1960.⁴⁶ It was welcomed by many groups including those of dissidence, students and scholars who believed that the ruling party (Democrat Party) had abused its powers and engaged in a series of anti-democratic practices.⁴⁷

⁴³William Hale, “ Transition to Civilian Governments in Turkey: The Military Perspective”, (in) *State, Democracy and The Military: Turkey in the 1980s*,(ed) Metin Heper and Ahmet Evin, de Gruyter, Berlin, New York, 1988, 159-175, 160.

⁴⁴ George S. Harris, “The Role of the Military in Turkish Politics”, *The Middle Eastern Journal* 19, 1965, 56-59, 56, cited in Hale, 161.

⁴⁵ Hale, 161.

⁴⁶ On 27 May 1960, the National Unity Committee, a revolutionary council established by a group of middle rank officers supported by the former commander of the army who took over the government and declared martial law. One of the officers was Alparslan Türkeş (originally Hüseyin Feyzullah) who would later establish the Far Right (Nationalist Motion Party/MHP)., Oran, *Türk Dış Politikası* Vol.I, 666.,

⁴⁷ The Democrat Party founded by four dissidents originally from the Republican People’s Party (CHP) was formed in 1945, a year which signifies transition to multiparty democracy in Turkey. They came to power with the elections of 1950 and won the next elections of 1957. The anti-democratic practices include: Amendment of the provision of Election Law concerning propaganda to their favor, suppression of judges and civil servants by an amendment to their retirement law which made the early retirement decisions by the government exempt from court investigation, closing down and arresting the President and General Secretary of Turkish Peace Association because they were against sending troops to Korea, sending troops to Korea despite dissidence especially from opposition parties, students and scholars, deteriorating economic situation after 1955s, endowing the Investigation Committee of the Turkish Grand National Assembly with judicial powers, establishment of a ‘Country Front’ for opponents of the Republican People’s Party and announcement of their names through radio everyday, which was considered to form hostile cleavages among the public, and reversing some secular reforms of Atatürk such as lifting the ban on reading of the Ezan (call to prayer) in Arabic, which was read in Turkish before, introducing theology class in school curriculums, suppression of the media organs which criticized the government. The government was also held responsible for the 1956 events

The 1961 Constitution is considered to be the most democratic Constitution of Turkey; it was the first constitution prepared by a Constituent Assembly⁴⁸ and submitted to referendum.⁴⁹

The new Constitution introduced new norms and institutions. To begin with, concepts of ‘social state’ and ‘rule of law’ were introduced in Article 2 as characteristics of the Turkish Republic. Economic and social rights were incorporated and guaranteed in a separate chapter. Above all, the first explicit mention of ‘human rights’ was first made in the 1961 Turkish Constitution which incorporated all the fundamental rights and freedoms known today. This was even reflected in the preamble:

Guided by the desire to establish democratic rule of law based on juridical and social foundations, which will ensure and guarantee human rights and liberties, national solidarity, social justice, and the welfare and prosperity of the individual and society

Human rights was stipulated as the basis of the Turkish Republic in Article 2, ‘The Turkish Republic is a nationalistic, democratic, secular and social State governed by the rule of law, based on human rights and the fundamental tenets set forth in the preamble.’. Furthermore, inviolability of fundamental rights and freedoms was further guaranteed by Article 10 determining them as natural entitlements by virtue of a human being, which read: ‘Every individual is entitled, in virtue of his existence as a human being to fundamental

in Istanbul when a group of people were mobilized by nationalists and the shops belonging to Greek Orthodox Turkish citizens were plundered. Baskın Oran (eds), *Türk Dış Politikası*[Turkish Foreign Policy], İletişim Yayınları, İstanbul, 2004, Vol.I, 493, 546, 560, 666.

⁴⁸ The Constitution was prepared by a bicameral Constituent Assembly: the National Unity Committee, the military chamber and the House of Representatives, the civilian chamber. According to the Law on Constituent Assembly adopted on 13 December 1960, the composition of the Constituent Assembly was determined as follows: Head of State (10), National Unity Committee (18), Provinces (75), Republican Populist Party (49), Republican Peasant Nation Party (25), Bar(6), Press (12), Association of Old Warriors (2), Youth(1), trade unions(6), chambers (10), teachers’ associations(6), agricultural associations (6), universities (12), judicial bodies(12).As the Democrat Party was banned, they were not represented in the Assembly, which is interpreted by Özbudun as a failure to represent half of the Turkish electorate as the supporters of the party. However, the last elections had taken place in 1954 which makes it controversial whether at that time the party had as many supporters. Özbudun, 53.

⁴⁹ **Aybars**, 22. The final draft of the Constitution was accepted by 260 affirmative and 2 abstaining votes in final Constituent Assembly meeting submitted to referendum. Out of an 80% participation in the referendum, 61.5% voted in favor and 38.5% against.

rights and freedoms, which cannot be usurped, transferred and relinquished.’⁵⁰ As was stipulated by Article 11; restriction of rights would be determined by law in conformity with the letter and spirit of the Constitution and even the measures taken for the purpose of public interest, morals and order, social justice and security should not violate the essence of any right or liberty.

Prevention of torture was guaranteed by Article 14, paragraph 4; ‘No individual shall be subjected to ill treatment or torture’ and paragraph 5, ‘No punishment incompatible with human dignity shall be imposed’.

Freedom of speech determined by Article 20 (Freedom of thought) entitled every individual to think and express his thoughts singly or collectively through word of mouth, in writings, drawings or through other media. Furthermore, the Constitution granted considerable autonomy to the universities, broadcasting and television administration and news agencies and for professional organizations having the nature of public institutions. (Autonomous Establishments-articles 120-122)

There was no specific provision on death penalty, however, like the 1924 Constitution, article 64 (The general provisions concerning the duties and powers of the Turkish Grand National Assembly) authorized the Grand National Assembly with execution of definitive death sentences passed by the Courts. The Prime Minister Adnan Menderes, and the ministers Fatih Rüştü Zorlu and Hasan Polatkan were executed by the ‘Supreme Justice Court’, an extraordinary court established by the initiators of the coup, which was by virtue of its establishment against the principle of judicial independence. In this period of 1960- 1971, a total of 25 people were executed, of whom, twenty two were ordinary criminals.⁵¹

⁵⁰ For the 1960 Turkish Constitution [English version], see <http://www.anayasa.gen.tr/1961constitution-text.pdf>, 09.04.2007.

⁵¹ Gemalmaz, “The Death..”, 114.

The military was granted prerogatives for the first time by the 1961 Constitution. The National Security Council was created by Article 111 as an advisory body to the government in security related issues composed of the Ministers, the Chief of Staff, representatives of the armed forces to be presided over by the President. The National Security Council also became an actor in the bi-cameral Legislative.⁵²

Judiciary was strengthened by establishment of the Constitutional Court as an enforcement mechanism (Articles 145-152) and the Supreme Council of Judges to ensure judicial independence (Articles 143-144) to ensure judicial independence. However, it was divided with the creation of military trial for military offenses of military personnel (Article 138) and the Military Court of Cassation (Article 141).

2.4. The 1971 Constitution (1961 Constitution as amended)

Unfortunately the democratic atmosphere endorsed by the 1961 Constitution did not last long. Turkey experienced another coup in 1971; the military issued a memorandum urging the government to resign, and therefore it was regarded as a ‘half-coup’. It was considered to be triggered by the inability of government⁵³ to stop the political violence among the right wing and left wing university student groups.⁵⁴

On March 12, 1971, the then Justice Party government was dissolved and replaced with a transitory government established by Nihat Erim. The amendments made by the one-party government curtailed certain fundamental rights and liberties. Grounds for restriction of rights were increased (Article 11) by inclusion of several provisions such as

⁵² Legislative was made bicameral; besides National Assembly a second one, the Senate of the Republic was introduced. The Senate, as determined by articles 70, 71, 72, 73, was composed of three different groups of members; 150 members elected by general ballot, 15 members appointed by the President of the Republic, and the ex officio members composed of the President and members of the National Unity Committee whose names are listed under law 157 dated December 13, 1960 and the former Presidents of the Republic.

⁵³ Ironically, the elections of 1965 were won by the Justice Party (Adalet Partisi)-the heir party to the banned Democrat Party and the party chairman Demirel became the Prime Minister.

⁵⁴ The right groups began to be organized in the Republican Peasant Nation Party in the same year, headed by Alparslan Türkeş in 1965, and renamed as Nationalist Action Party (MHP) in 1969. The political violence entered into an anarchic phase after burning of the US Ambassador’s car in Middle East Technical University by the Left groups in 1969 and the proliferation of right groups both in a political party and in associations established to fight against communism. Oran, *Türk Dış Politikası*, Vol.I, 670.

safeguarding the integrity of the State with its territory and people, the Republic, national security, public order. Membership of civil servants in trade unions was banned. The provisions on torture and mistreatment and the freedom of speech were not amended, however autonomy of the state television was lifted (art 121) and autonomy of universities was weakened (art 120).

The role of military was strengthened at the expense of judicial independence; military spending was excluded from review by civilian administrative courts and the Court of Account and state security courts were established for dealing with offenses involving security of the State (Article 136).

The period began with violations of fundamental rights and liberties. The military declared martial law and initiated mass seizures among workers and students. According to Oran, the seizures were directed at the democratic/leftist intellectuals, journalists and scholars ‘in an environment where the rightists suddenly disappeared’.⁵⁵ Between 1971 and 1973, seventeen people were executed; 14 ordinary prisoners and three political prisoners⁵⁶; Deniz Gezmiş, Yusuf Aslan and Hüseyin Inan who were representatives of the Leftist students.

Oran interprets the 1971 semi-coup as an attempt to reverse the liberties to post 1961 and an action of rehearsal before the 1980 military coup.⁵⁷ The transitory regime lasted until 1973, and once again ended with the electoral victory of the Justice Party.

2.5. The 1982 Constitution

The 1980 Constitution is considered to be the most anti- democratic Turkish Constitution. It is described as a ‘graveyard for fundamental rights and freedoms’⁵⁸, ‘an

⁵⁵ Ibid. , 57.

⁵⁶ Gemalmaz, “The Death...”, 114.

⁵⁷ Ibid. , 57.

⁵⁸ Baskin Oran, *Türkiye İnsan Hakları İzleme Bilancosu: 2005 İzleme Raporu* [Human Rights Report in Turkey 2005].

order which makes restrictions primary and liberties an exception.’⁵⁹ It was prepared during the military regime following the 1980 coup and lasted until 1983. In this respect the events behind the coup deserve some elaboration. Extreme polarization among the Rightist and the Leftist groups created a state of anarchy and violence which caused 5,000 casualties and a number of wounded three times as much, which was the equivalent of Turkish losses in the War of Independence.⁶⁰ The incompetence of the coalition government of JP (Demirel) and RPP (Ecevit) was considered to be the main reason behind the political deadlock; the escalation of political violence and terrorism between the far right and left groups.⁶¹ Özbudun argues that the six-month political deadlock created by failure to elect a President turned out to be the last straw for the military.⁶² On the other hand, according to another view, the security forces did not take enough measures after declaration of the martial law to fight against political violence deliberately to prepare a legitimate ground for the coup d’état of 1980.⁶³

The military took over on 12 September 1980 and immediately dissolved the Parliament, all the political parties, trade union confederations, and arrested their leaders. All municipalities and provincial councils were dissolved and replaced with the ex-army officers until the next elections.⁶⁴ Martial law was extended to the whole country and lasted

⁵⁹ Personal Communications, with Prof. Serap Yazici, Bilgi University, Istanbul, 18 April 2007.

⁶⁰ Özbudun, *Contemporary Turkish Politics*, 35.

⁶¹ The martial law declared by the government in 1978 failed to serve as a remedy as violence escalated to an insurmountable level after that. The extreme political polarization on the streets was reflected even between the coalition partners of the government. Reciprocal accusations were based on each partner’s attitude with respect to application of justice to the clashing groups; the JP accused the RPP for tolerating the leftist terrorists and the RPP blamed the JPP for tolerating the rightist terrorists. In the meanwhile the government was faced with serious economic problems; largely due to import substitution based growth policy the country was experiencing serious shortages in consumer goods, and high rates of inflation and unemployment. Ibid., 38-40.

⁶² Ibid., 37.

⁶³ Perpetrators of crimes were hardly ever found and arrested in this period. For example, on 1 May 1977, 34 people celebrating the Labor Day were shot dead by gunmen from the dams of luxurious hotels in Taksim but they were not arrested. Demirel and Ecevit, later in some interviews stated that their demands to increase security forces in regions with violent clashes were rejected by the then Chief of Staff Kenan Evren. Although some rightists were also among the victims, majority of the victims were leftist or left-oriented students, journalists, and scholars. Oran, *Türk Dış Politikası*, Vol. I, 671; Gemalmaz, *The Institutionalization*, 7.

⁶⁴ Gemalmaz, 26.

until 1983, in some provinces even until 1986. The new government was formed by the ex-General Ulusu under the authorization of the National Security Council (NSC),⁶⁵ which de facto assumed all the powers of the executive, legislative and judiciary.

The military regime period (1980-1983) is marked with extensive implementation of death penalty, extreme restrictions on freedom of speech, systematic use of torture and ill-treatment, anti-democratic centralization and the lack of effective legal guarantees.⁶⁶

The 1982 Constitution was prepared by a bicameral Constituent Assembly composed of the National Security Council and the Consultative Assembly. The NSC composed of Kenan Evren, the head of the military and the chief commanders of the army, air force, navy and the gendarmerie. Out of 11,640 applicants, 160 members were, according to Gemalmaz, directly or indirectly appointed by the NSC.⁶⁷ The Consultative Assembly was made a symbolic actor as all the draft bills were made subject to the NSC approval. The timing of the Constitutional referendum was combined with presidential elections for which General Evren was the only candidate. The Constitution was approved with mass participation and 91.37% of votes.⁶⁸ However, it was a pretext to legitimize the coup; in fact the secrecy of vote was violated by transparent envelopes, difficulties in case of abstention as was stipulated in Provisional Article 16 of the Constitution⁶⁹ and prohibition of any views or criticisms which might influence voters' decisions.⁷⁰

⁶⁵ The NSC was composed of the Chief of Staff, as the Head (Kenan Evren, also President of Turkey after referendum of 1981), and the chief commanders of the army, air force, navy and the gendarmerie. The NCS enacted 3 legal instruments soon after they seized power; 1) The "Rules of Procedure for the NSC in its Law Making Capacity", 2) The "Law on the Constitutional Order", which temporarily authorized them with the powers of the Grand National Assembly, 3) The "Law on the NSC", which defined the positions and duties of the NSC members in accordance with Law on the Constitutional Order., Gemalmaz, *The Institutionalization*, 8.

⁶⁶ Mehmet Semih Gemalmaz, *The Institutionalization Process of The Turkish Type of Democracy: A Politico-Juridical Analysis of Human Rights*, Amaç Yayıncılık, 1989, 3.

⁶⁷ Gemalmaz, *The Institutionalization Process*, 9.

⁶⁸ According to a view, the high proportion of affirmative votes was to enhance transition to multiparty democracy and get rid of the military regime based on the assumption that the Constitution could be amended later. Personal Communications, Prof Serap Yazıcı, Istanbul Bilgi University, Istanbul, 18 April 2007.

⁶⁹ Provisional Article 16: Persons who fail to participate in the referendum on the Constitution without valid legal or actual reasons despite being entitled to vote and being included in the register of electors and the polling station register compiled for the referendum, shall neither participate nor stand for election in general

The new Constitution did not explicitly ban fundamental rights and freedoms but set a broad boundary for their restriction. General grounds for restriction of rights (Article 13) were substantive; safeguarding the invisible integrity of the state with its territory and nation, national sovereignty, the Republic, national security, public order, public peace, public interest, public morals and public health. For the first time a provision entitled ‘Prohibition of Abuse of Fundamental Rights and Freedoms’(Article 14) was incorporated to safeguard the aforementioned elements from threats posed by fundamental rights and liberties. Grounds for the suspension of the exercise of fundamental rights and freedoms were further extended in times of war, martial law, or state of emergency (Article 15). During the period of 1980-1983, the whole country was under martial law. Consequently, against the very essence of Constitutionalism, the 1982 Constitution was meant to protect the state from the society.⁷¹

Death penalty was for the first time incorporated in the Constitution in article 15/2 and 17/4. Furthermore, it was mentioned in 28 articles of the Turkish Penal Code, in 20 articles of the Military Penal Code, 2 articles in the Law on Treason and 1 article in the Law on Prevention and Prosecution of Smuggling.⁷² The first person executed on 13 December 1980 after the coup was Erdal Eren, a 17-year old political convict. His age was increased by court decision based on a medical bone X-ray. Between 12 September 1980 and 6 December 1984, 49 people were executed; 28 due to political crimes; 20 Leftists and 8 Rightists. The average age of the executed persons was 24.3⁷³. Executions was defended by

elections, by-elections, local elections or referandums for a period of five years following the referendum on the Constitution.

⁷⁰ Ibid., 7.

⁷¹ Ihsan D.Dağı, “Human Rights and Democratization: Human Rights in the European Context”, *Southeast European and Black Sea Studies*, 2001, Vol.6, Nr.5, 51-68, 52.

⁷² Gemalmaz, *The Institutionalization Process*, 47.

⁷³ Gemalmaz, “The Death Penalty in Turkey”, 115.

the General and President Kenan Evren, in his speech in October 1984; ‘Shall we look after the traitors and not hang them?’⁷⁴

Although torture and ill-treatment was prohibited by Article 17/3 of the Constitution, it became a widespread practice in this period. According to data based on Human Rights Association Report of 1988, on 10 November 1980, the publisher İlhan Erdost was beaten to death on the way to Ankara Mamak Prison. The number of people who died under custody and in prisons in 12 September period was 229.⁷⁵

Freedom of speech was seriously curtailed in the Constitution and ordinary law. To begin with, paragraph 5 of the preamble of the Constitution explicitly declared that ‘no protection shall be afforded to thoughts or opinions contrary to Turkish national interests, the principle of the indivisibility of the existence of Turkey with its State and territory, Turkish historical and moral values.....’. Article 26 on Freedom of Expression and Dissemination of Thought in paragraph 5 stipulated that ‘No language prohibited by law shall be used in the expression and dissemination of thought’ and banned all publications or records in contravention of this provision. Article 28/2 stipulated that ‘publication shall not be made in any language prohibited by law’. Article 42 entitled the Right and Duty of Training and Education, in paragraph 9 banned the teaching of any other language than Turkish as a mother tongue to Turkish citizens at any institutions of training or education.

It was aggravated by the Law on Training and Education of Foreign Language (Nr.2923) of October 1983. Art 2/a stipulated that ‘The mother tongue of Turkish citizens cannot be taught in any language other than Turkish’, which was contradictory in itself and a direct violation of the freedom to learn one’s own language. Article 2/c of the same law authorized the Council of Ministers to decide on what foreign languages will be taught in the view of the National Security Council. Furthermore, the Law Nr 2932 (1983) on

⁷⁴ İnsan Hakları Derneği Raporu, 1988 [Human Rights Association Report, 1988] cited in Oran, *Türk Dış Politikası* [Turkish Foreign Policy], Vol.II, 20.

Publications in Languages other than Turkish banned the use of any foreign language other than the first official languages of States. These constitutional and legal provisions explicitly banned the use of Kurdish language.

Publication of any statement of the banned political leaders and any criticism of military regime were made illegal.⁷⁶ The newspapers were banned for 300 days, 303 cases were filed against 13 prominent newspapers, 39 tones of newspapers and magazines were annihilated, 31 journalists were imprisoned, 300 were attacked, 3 were killed, 400 journalists were sentenced to 3,315 years 6 months of imprisonment.⁷⁷

Judicial independence was almost lifted as the judiciary was placed under the supervision of the NSC. The State Security Courts⁷⁸ were re-established to try political offences and crimes against the state. New military courts with extended jurisdictions were established, which were far from being independent as the judges were appointed by and dismissed by the de facto government NSC.⁷⁹ Moreover, the Constitutional Court was made subordinate to the military regime. The Provisional Article 15 banned any ‘allegation of unconstitutionality in respect of decisions and, measures taken under laws or decrees having force of law enacted during this period or under Act No:2324 on the constitutional order’. The Minister of Justice was authorized to appoint judges by Article 159.

The military regime engaged in mass arrests and detentions. During this period, 60,000 people suspected of terrorism or illegal political activities were arrested.⁸⁰ As a result of the “Turkish Nationality Act”, which threatened those who fled abroad due to accusations of crimes against the state, 14,000 people were deprived of citizenship. A total

⁷⁵ Oran, 20.

⁷⁶ Dağı, “Human Rights...”, 53.

⁷⁷ Cumhuriyet Gazetesi [The Republican- daily newspaper,]12 September 1980, available online at <http://belgenet.com -12 Eylül Belgeleri- 12 Eylül’ün 20.Yılı>, 11.05.2007.

⁷⁸ State Security Courts were first established in 1971 and dissolved in 1976.

⁷⁹ NSC Decision No:7, 14 September 1980, cited in Gemalmaz, *The Institutionalization Process*, 14.

⁸⁰ Dağı, “Human Rights...”, 53; According to another source, the number of those arrested were 650,000 and 1 million 683 thousand were filed., Cumhuriyet Gazetesi [The Republican- daily newspaper,]12 September 1980, available online at <http://belgenet.com -12 Eylül Belgeleri- 12 Eylül’ün 20.Yılı>, 11.05.2007.

of 30,000 had to flee mainly to Western European countries and became political refugees.⁸¹ The Passport Act, which prohibited passports to those accused of the same reason from leaving the country and thus 388 people were denied passports.⁸²

Most of the arrests and verdicts by military courts or State Security Courts were based on either the information provided by informers or on statements obtained under torture. Informers were protected by the Martial Law Act (Art 18/c) , which ensured concealing the informer's identity and the Law on the Prevention of Offences Against Law and Order (1971), which awarded the informers with money,⁸³ which was an important incentive in the extremely poor economic conditions of the period.

More severe were the amendments made to the Turkish Penal Code (TPC) and the Code of Criminal Procedure (CCP). An amendment to Article 128 increased the standard 24-hour maximum detention period to 15 days in cases involving three or more persons. The constitutional amendment made later to Article 19/5 extended it to 48 hours and 15 days in cases of collectively conducted offenses. The military courts were exceptionally ordered to be severe with 'ideological offences', in other words 'thought crimes', particularly those under articles 141/1 and 141/2 of the Turkish Penal Code,⁸⁴ which explicitly targeted the leftists.

The period ended with 1983 elections when only three new political parties were allowed to run; Nationalist Democratic Party, the Motherland Party, and the Populist Party. Despite the explicit support given to the Nationalist Democratic Party by the military, the

⁸¹ Ibid.

⁸² Ibid.

⁸³ Gemalmaz, *The Institutionalization Process*, 26,23.

⁸⁴ Gemalmaz, *The Institutionalization Process*, 15. Art.141/1: "Whoever attempts to establish or establishes or arranges or conducts and administers the activities of societies in any way and under any name, or furnishes guidance in these respects, with the purpose of establishing domination of a social class over other social classes or exterminating a certain class or overthrowing any of the established basic economic or social orders of the country, shall be punished by heavy imprisonment for eight to fifteen years. Whoever conducts and administers some or all of such societies shall be punished by death". Article 141/2: "Whoever makes propaganda with the purpose of establishing the domination of one social class over others, exterminating any of the social classes, overthrowing any of the established basic economic or social orders of the country, or

Motherland Party won the elections by 45% of the vote, which was considered as a public reaction.⁸⁵ However, the anti-democratic legacy of the 1980 coup was perfectly embedded both in the legal system and in civil life and although gradual improvements took place after return to parliamentary democracy, fundamental democratic changes would be accomplished in the process of harmonization with the EU law after 1999.

totally exterminating the political or legal orders of the State, shall be punished by heavy imprisonment for five to ten years”.

⁸⁵ Gemalmaz, *The Institutionalization Process*, 10.

CHAPTER 3: HUMAN RIGHTS REFORMS IN TURKEY (1983-1997)

3.1. Human rights in the first (weak) phase of European conditionality (1980-1997)

3.1.1. The 1980-1989 Period

Parallel to the ideal of modernization along Western norms since its foundation in 1923, Turkey became a member to all prominent Western Organizations; Council of Europe (1949), OEEC (1948), NATO (1952), CSCE (1979), signatory to the European Convention on Human Rights (1954). Turkey applied to the European Community in 1959, which resulted in an association agreement (Ankara Agreement) in 1963. However, in 1970, the Association Agreement was suspended due to a military takeover and in 1978 the then Turkish Prime Minister Ecevit unilaterally froze the Ankara Treaty, invoking its self-protection clause.⁸⁶

In the period from 1980 to 1999, European conditionality on Turkey did not produce the desired legal and constitutional changes for the improvement of human rights for several reasons. First of all, membership conditionality was not a well-developed policy tool at that time because the European Community was an economic community and Turkey only had an association agreement with the then European Economic Community, which included a vague prospect of full membership, while envisaging gradual establishment of a Customs Union.⁸⁷ Secondly, contradictory reactions to the coup from the USA and Europe oriented the military regime towards the USA than to Europe⁸⁸, which further weakened the EC conditionality. Thirdly, de jure maintenance of death penalty in the European Convention⁸⁹ although not in practice weakened the strength of European efforts against implementation

⁸⁶ Meltem Muftuler Bac, "Turkey's Political Reforms and the Impact of the European Union", *South European Society & Politics*, Vol.10, No.1, April 2005, 17-31, 20.

⁸⁷ Article 28 of the Association Agreement read: "As soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance of Turkey of the obligations arising out of the Treaty establishing the Community, the Contracting Parties shall examine the possibility of the accession of Turkey to the Community. Cited in Bac, "Turkey's Political Reforms", 19.

⁸⁸ Oran, 194.

of death penalty in Turkey. Fourthly, emergence of the PKK terror in 1984 posed another impediment as it necessitated anti-terror measures by the government which had negative consequences for human rights. Above all, the military government, with a significant influence on the government even after transition to multiparty democracy in 1983, perceived European efforts of democratization as an interference in sovereignty and was determined to depoliticize the public in order to prevent re-occurrence of political violence in the country.

Nevertheless, the Council of Europe and the European Parliament exerted considerable normative pressure on Turkey on the issue of democracy and human rights. The efforts of international NGOs, especially Amnesty International and the Turkish political refugees in Western Europe, especially in Germany, played a significant role in keeping the issue on the agenda. The first reaction to the coup on the day it took place came from the European Commission revealing their concerns and expectations on respect for human rights and restoration of democracy.⁹⁰ This was followed by the statement issued by nine foreign ministers of the EC member states revealing similar concerns. Moreover, the European Parliament adopted a resolution on 18 September expressing concern about political and civil rights and the physical safety of detainees. Germany, the second biggest arms supplier to Turkey, stopped arms sales and blocked the delivery of the aid promised under the 1981 OECD aid consortium.⁹¹ Condemnation of human rights violations was followed by France, Britain and the Scandinavian countries in the same period. However, the European reaction was overcome by the US support to Turkey, who even criticized the European countries' approach and lobbied in the Council of Europe to prevent Turkey's

⁸⁹ Death penalty in the ECHR was abolished with Protocol 13 which was opened for signature in 2002 and entered into force in 2003. It is still not ratified by all member states of Council of Europe. For details, see <http://conventions.coe.int/Treaty>, 14.05.2007.

⁹⁰ Bulletin of the European Communities: 9/1980, p.52, cited in Dağı, "Human Rights..", 54.

⁹¹ İhsan Dağı, "Democratic Transition in Turkey, 1980-83: The Impact of European Diplomacy", *Middle Eastern Studies*, Vol.32, no.2 (April 2006), 1-13, 2. According to the author, the majority of political refugees

expulsion. American economic and military aid to Turkey increased substantially in this period; from \$453 million in 1981 to \$704 million in 1982 and \$688 million in 1983.⁹²

The first ‘stick’ shown by the European institutions was the parliamentary resolution of April 1981 concerning the suspension of the fourth financial protocol by the Commission, which jeopardized the future of the association agreement with Turkey⁹³. However, the next month the association council reached an agreement on the draft of EEC-Turkey fourth financial protocol.⁹⁴ Moreover, a month later, aid to Turkey was increased by 94 percent to 600 million ECU; but the release of the aid was made contingent on developments in domestic politics.⁹⁵ A few months later the fourth protocol was suspended due to deteriorating situation in Turkey.⁹⁶ This was the first effective use of ‘stick and carrot’ policy by the Community. The community did not lift the suspension even after the referendum for the new Constitution took place.

Against the background of intensification of debates over Turkey’s expulsion from the Council of Europe, Turkey voluntarily postponed its turn to presidency in the Council. Bilateral relations got even worse towards the end of the year when the military government even proposed to withdraw from the Council of Europe if it was necessary.⁹⁷ On 1st July 1982, Denmark, France, Norway, Sweden and the Netherlands filed an interstate complaint to the European Commission on Human Rights against human rights violations in Turkey invoking violation of the European Convention to which Turkey was a party since 1954. Furthermore, the Parliamentary Assembly passed another resolution threatening to bar Turkish representatives from its sessions on the grounds of banning political parties from

from Turkey sought shelter in West Germany and exerted pressure on the German government on the human rights issue in Turkey.

⁹² Ibid. The only two criticisms from the US in this period were made by the American ambassador to Ankara Hupe on dissolution of all political parties and the US Councilor General in Istanbul by attending the trial of publisher and editor-in-chief of the daily newspaper Cumhuriyet.

⁹³ Official Journal EC, C101/110, 4 May 1981, cited in Dağı, “Democratic Transition in Turkey”, 4.

⁹⁴ Bulletin EC, 5(1981), 53, cited in Dağı, “Democratic Transition in Turkey”, 4.

⁹⁵ Ibid., 5.

⁹⁶ Ibid.

running for elections. In the same year (1982), the European Parliament suspended the Association Agreement with Turkey.⁹⁸

The pressure exercised by the European institutions put the military government into a dilemma; on the one hand they did not want to surrender to the pressure which they perceived as interference in their sovereignty; on the other hand, they were confronted with the risk of distancing from the European institutions against the national ideal of Westernization⁹⁹ In order to preempt further reprisals against the regime, they had to give a timetable for transition to democracy within three years and the first elections were held in 1983 which brought the centre right Motherland Party to power and the chairman Özal became the Prime Minister.

Unfortunately violations of human rights did not end with transition to multiparty democracy in 1983; nevertheless, there have been several improvements. The most important was ‘de facto moratorium’ on death penalty after the last two executions in 1984 as a result of pressure from Europe.¹⁰⁰ The Grand National Assembly did not ratify any death penalties after that although it continued to be issued by the Courts. In April 1987, according to the statistics issued by the Ministry of Justice, there were 5,309 people on trial before the military courts and 1392 held in pre-trial detention. Between December 1978 and April 1988, 61,220 people were sentenced by military courts; more than 700 death sentences were passed by the Courts and 228 death sentences were pending before the Turkish Grand National Assembly.¹⁰¹ In 1984, a petition signed by intellectuals calling for democracy and respect for human rights aroused adverse reaction in the government. The signatories were put on trial, which lasted until 1986 and aroused substantial international reactions.¹⁰² With

⁹⁷ Dağı, “Democratic Transition in Turkey”, 7.

⁹⁸ Bac, “Turkey’s Political Reforms...”, 20.

⁹⁹ Ibid., 12.

¹⁰⁰ Gemalmaz, “The Death Penalty in Turkey”, 95.

¹⁰¹ Gemalmaz, *The Institutionalization*, 21.

¹⁰² Among the signatories were Prof Hüsnü Göksel, Bahri Savcı, Fehmi Yavuz, and author Aziz Nesin, Bilesu Erenus and Esin Afşar, Oran, *Türk Dış Politikası*, Vol.II, 197.

the emergence of the PKK terror in late 1984, European criticisms shifted more to the Kurdish issue and the subsequent human rights violations following the state of emergency measures taken in the Southeastern region.

Turkey applied for full membership in the EC in April 1987 and engaged in a number of legal amendments in the hope for eligibility. As stated by Dağı, ‘the membership application provided the EC with political and legal leverage and a framework of influence within which the Community was able to exert pressure on Turkey.’¹⁰³ The first was ‘The Amendment Law on the Execution of Penalties’ enacted in March 1986, which provided the prison authorities with limited authorization to decide on reduction of sentences. The second was the abolition of internal exile as a punishment.¹⁰⁴ There was no constitutional amendment in this period except for the referendum carried out in 1987 to lift the ban on previous political party leaders in politics (Provisional Article 4 of the Constitution), which resulted in a 51% affirmative votes. On 28 January 1987, the government recognized individual application to the European Commission on Human Rights, which meant voluntary acceptance of a system of checks on the government. In 1988, Turkey signed and ratified the UN and the European Convention on Prevention of Torture. Furthermore, in 1989, the Özal government accepted the jurisdiction of the ECHR. A new issue in this period was the prison conditions and hunger strikes, which received extensive coverage in international organizations’ human rights reports. The common complaints were obstruction of access to lawyers, compulsory prison uniform, and restriction of private conversations with lawyers, and systematic torture and ill-treatment.¹⁰⁵

Consequently, referring to the state of democracy and human rights in the country, the European Community’s response was a small ‘carrot’; operationalization of the Association Agreement.

¹⁰³ Dağı, “Human Rights and Democratization”, 59.

¹⁰⁴ Gemalmaz, *The Institutionalization*, 24.

There are two different views on the reactions and influence of the European institutions over the military coup and the violations of fundamental rights and liberties in the period of military government (1980-1983) and onwards in the Özal period (1983-1987). Gemalmaz claims that the European Institutions did not exert sufficient pressure on Turkey thus the improvements carried out were therefore very much limited in scope whereas Dağı argues that the European institutions did exert significant pressure on the government which resulted in a number of improvements in human rights in Turkey. According to Gemalmaz, considerations such as the attractiveness of the Turkish market following the transition to neo liberal economy¹⁰⁶ and the Cold War context were important factors behind the insufficient reaction of European institutions. Even the recognition of the right to individual petition to the European Court of Human Rights and ratification of the UN and European Documents on the Prevention of Torture were done with some reservations of the Turkish government and lacked domestic legal changes for implementation. For instance, most of the petitions to the ECHR were declared inadmissible in 1988.¹⁰⁷ Besides, in 1988 Turkey still did not recognize the jurisdiction of European Court of Justice under Article 46.¹⁰⁸ Furthermore, the ‘friendly settlement’ in 1987 of the complaint made by the five EC member states in 1982 following a report by the Commission in 1987 was, according to Gemalmaz ‘a clear recognition of the de facto regime by the European organs’.¹⁰⁹ In the final friendly settlement of the text it was stated that ‘in respect of derogations under Article 15, the parties noted with satisfaction that the Turkish government had progressively

¹⁰⁵ Gemalmaz, *The Institutionalization*, 24.

¹⁰⁶ Data on trade transactions covering the years 1961-1980 and 1980-1990 do not show a significant rise in imports from the European countries (Germany, France, Britain, Italy), and this makes this argument difficult to substantiate. Data is obtained from the DIE [State Statistics Institution] pertaining to import and export numbers for the mentioned years. Cited in Oran, *Türk Dış Politikası*, Vol.I, 673, Vol.II, 25.

¹⁰⁷ Gemalmaz, *The Institutionalization*, 33.

¹⁰⁸ Ibid.

¹⁰⁹ Gemalmaz, *The Institutionalization*, 29.

reduced the geographical scope of martial law'.¹¹⁰ However, Article 15 of the Convention which determines the derogations in times of emergency explicitly stipulates that there can be no derogations from Article 2 (the right to live), except in respect of deaths resulting from lawful acts of war, as well as Article 3 (prohibition of torture), Article 4 (prohibition of slavery and forced labor) and Article 7 (no punishment without law). An excerpt from European Press reveals priority of Cold War considerations:

Taking into account the promises that the Turkish government has made, it is intelligent and right that the five countries have withdrawn their official complaint. Turkey is not a democracy according to Western norms and it is certain that the country will still not be one a year and half down the road All the same; there are sufficient reasons to continue to help the Turks and to have confidence in them. This country is surrounded by real and potential enemies: Iran, Iraq, Syria, the Soviet Union, Bulgaria and Greece. Relations with the rest of the Europe and with the US are the only means to come out of this isolation.¹¹¹

Dağı, on the other hand, claims that 'It is impossible to say that European pressure forced the military to restore democratic institutions, however its significance and contribution to the process cannot be denied either'.¹¹²

Obviously, the European institutions had no influence on the human rights practices of the military regime as the European reaction was offset by the US support to the regime, which indicates predominance of Cold War political considerations over human rights. Even in Özal period European leverage on human rights in Turkey remained incremental. The only concrete outcome of the European pressure in this period was the suspension of executions after 1984. However, they could have imposed sanctions on trade¹¹³ or formally require recognition of the ECHR jurisdiction as a policy tool to improve the human rights situation in Turkey. Failure to employ effective sanctions justifies Gemalmaz's argument on prevalence of commercial and Cold War considerations.

¹¹⁰ European Commission of Human Rights, Stock-taking on the ECHR, Supplement 1985, Strasbourg, 1986, 28-30, cited in Gemalmaz, footnote 94, *ibid*.

¹¹¹ NCR Handelsblad, dated 11 December 1985, Rotterdam, cited in Gemalmaz, *The Institutionalization...*, 30.

¹¹² Dağı, "Democratic Transition in Turkey", 9.

3.1.2. *The 1989-1997 Period*

Post Cold War period beginning with 1989 was a scene of significant changes in Turkey. To begin with, dissolution of the Communist Bloc stripped Turkey off her comparative advantage - strategic geopolitical situation. In 1989, Turkey's application for full membership was rejected on the grounds of inadequacy of democracy and protection of human rights. The European Union prioritized accession of post communist central eastern European states. The Motherland Party lost power to the coalition government of Social Democratic Populist Party (SHP) and the centre-right True Path Party (DYP), which brought Demirel once again to the political scene.¹¹⁴ Evren's tenure of Presidency ended and Özal was elected the new President by the Parliament.

Two main drives behind the legal and constitutional amendments in the period of (1991-1995) were change of government and membership to the Customs Union. Legal and constitutional changes were a promise made by the coalition parties in their electoral campaigns. Amendment to Article 133 in 1993 is considered to be the most important change concerning freedom of speech as it allowed private radios and television channels, lifting the previous state monopoly. Interestingly, the proposed amendment to remove Provisional Article 15 concerning the ban on the judicial review of the constitutionality of laws passed during National Security rule did not receive enough affirmative votes and could not be removed.¹¹⁵

A legal reform package modified nearly 300 death penalties, reduced other prison terms. Articles 141, 142 and 163 of the Penal Code outlawing communist and Islamist political activities were abolished. Consequently, about 40,000 prisoners including convicts of political crimes were released. Ethnic Kurds were allowed to speak their language in

¹¹³ Data on annual trade transactions pertaining to years 1981-1990 reveals that there has not been a significant change in the amount of transactions with the four members of the EEC; West Germany, France, Britain, and Italy. Cited in Oran, *Türk Dış Politikası*, 25.

¹¹⁴ SHP was chaired by Erdal İnönü, son Ismet İnönü, early President and General in the Turkish War of Independence. DYP was founded by Demirel after the abolition of the ban in 1987.

public and perform their cultural activities. For the first time a State Ministry responsible for human rights was established. The judicial reform made on 21 May 1992 reduced the period of detention to 24 hours without a court appearance, and to 4 days in the case of mass offenses. However, these positive improvements particularly concerning freedom of speech were shadowed by the enactment of the Anti-Terror Law in the same year (1991)¹¹⁶

Given the lack of EU conditionality or normative pressure, the limited constitutional and legal changes of this period pertaining mainly to political rights can only be explained by the desire of the new government to fulfill their electoral promises and strengthen their position in Turkish politics.

The agreement on Customs Union in March 1995 by the EU-Turkey association council initiated a series of amendments to the Constitution due to the European Parliament resolution concerning poor condition of human rights in the country. Consequently, the two notorious (Art 8 and 13) articles of the anti-terror law were amended.¹¹⁷ Amendments related to fundamental rights and liberties were those made in the preamble, which repealed the paragraphs concerning the reasons and ‘legitimacy’ of the 1980 Constitution, and others relaxing the previous restrictions on political parties and labor unions.¹¹⁸

The Customs Union Agreement was approved in December 1995. Turkey was the first country to become a member to the Customs Union without full membership to the EU and thus a great concession was sacrificed which diminished the EU’s incentives to offer Turkey a full membership as the Turkish market was already opened without guaranteeing membership in return.

In this period, the Kurdish problem occupied the agenda in terms of human rights violations along with allegations of torture and death in custody. The EU pressures on

¹¹⁵ 200 “yes” votes, 184 “rejections”, 5 “abstentions”, Özbudun, *Contemporary Turkish Politics*, 68.

¹¹⁶ Dağı, “Human Right...”, 62-63.

¹¹⁷ Ibid., 64.

¹¹⁸ Özbudun, *Contemporary Turkish Politics*, 63-64.

further democratization, human rights and the Kurdish issue exercised through the Commission and the Parliament continued afterwards and the poor human rights record was used as a vindication to refuse candidacy to Turkey at the 1997 Luxembourg Summit. After this point, EU membership prospects waned, coupled with the deterioration of economic situation, this paved the path for the electoral victory of the anti-western Islamist Welfare Party in 1995 elections. Dağı points out to the double-standard human rights policy of the EU with respect to Turkey in this period, arguing that ‘this was partly prompted by the policies of the EU, which pressurized Turkey on the issues of human rights and the Kurdish question, but which at the same time pursued a policy of exclusion towards Turkey’,¹¹⁹

3.2. Human rights in the second (strong) phase of conditionality – post Helsinki period (1999-2004)

European Conditionality gained a new character in 1993. The scope of membership conditions was widened and explicitly defined by the Copenhagen Criteria (1991) in order to preempt any flexibility or deviation from the established norms. Thus the accession criteria became ‘conditional’ and not ‘negotiable’.¹²⁰ Respect for human rights became one of the conditions for eligibility for membership; “Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities’.¹²¹ European Union’s interest in human rights and minority rights in this period grew out of security reasons, largely triggered by the war in former Yugoslavia.¹²² Out of the four conditions of Copenhagen criteria, the first requires existence of institutions for democracy, respect for human and minority rights, rule of law, the second requires existence of a functioning market economy

¹¹⁹ Dağı, “Human Rights and Democratization”, 63.

¹²⁰ Heather Grabbe, *A Partnership for Accession? The Implications of EU Conditionality for the Central and East European Applicants*, EU Working Papers, Robert Schuman Centre, European University Institute, 1999.

¹²¹ Cited in Grabbe, 4.

¹²² Judith G. Kelly, “Introduction”, *Ethnic Politics in Europe: the Power of Norms and Incentives*, Princeton University Press, 2004, 18.

and the third requires adoption of *acquis communautaire*; harmonization of domestic law with the entire body of EU law.

From this period on, two types of incentives at the disposal of European Institutions in shaping government policy have been normative pressure and membership conditionality. Normative pressure, exercised by the Council of Europe and the OSCE has proven to be much less effective in comparison to membership conditionality of the EU, mainly due to the fact that domestic opposition is more responsive to conditionality than to normative pressure.¹²³ In post 1991, however, requirement of CoE membership for EU membership strengthened the leverage of CoE. EU conditionality is a strong incentive by nature because it promises membership; however, the realization of the incentive usually is a long process contingent upon meeting the accession criteria. Hence it is the temporal gap between the promise and operationalization which provides the EU with the strongest leverage in inducing change in domestic policy through use of other incentives such as funding needed in the process of rule adoption and harmonization.¹²⁴

The EU's institutional mechanisms for testing compliance with membership conditionality are; gate-keeping (privileged trade and additional aid, enhanced form of association agreements), benchmarking and monitoring (regular annual reports prepared by the European Commission, decisions providing deadlines for action, and accession partnerships before negotiations to identify gaps in legislation) and finally opening of negotiations which includes opening and closing of thirty one chapters in specified areas in order to complete harmonization process with the *acquis communautaire*, signing of the accession treaty and its ratification by national parliaments and the European Parliament.¹²⁵

In an effort to revitalize the frozen relations after 1997 Luxembourg Summit, the EU included Turkey in the Accession Partnership of 1998, and at the Helsinki Summit of 1999

¹²³ Kelly, 4.

¹²⁴ Grabbe, 9.

granted candidacy status to Turkey. However, opening of accession negotiations were made contingent upon meeting the Copenhagen Criteria. Even granting candidacy status to Turkey was the first strong sign of membership prospect during the past decade and served as a trigger for a number of democratization reforms that could not have been accomplished otherwise. Following the declaration of *Accession Partnership* on March 8, 2001, which designated the areas of reform, a *National Action Program for the Adoption of the Acquis* was adopted on March 19. Furthermore, nine harmonization packages were adopted between 2001 and 2004 to undertake the reforms. The time lag between 1999 and 2001 can be best explained by the inadequate economic conditions induced by the devastating earthquake in summer 1999 and the two subsequent serious economic crisis the country experienced in February 2001 and the problems of coordination and consensus in the coalition government.¹²⁶ The most comprehensive one in terms of constitutional amendments was the first harmonization package adopted and operationalized by the coalition government (DSP (centre-left, ANAP-centre-right and MHP-Far Right) in October 2001 as it included 34 constitutional amendments.¹²⁷ The other packages were adopted and carried out by the AKP (Justice and Development) government who came to power after November 2002 elections. The second harmonization package rather made legal amendments for operationalization of the constitutional amendments. According to Bac, ‘it came as a surprise to the EU because by that time, EU leaders were convinced that Turkey would not be able to fulfill the Copenhagen Criteria’.¹²⁸ In October 2004, the EU decided to open accession negotiations with Turkey.

The main criticisms directed at Turkey were the state of human rights (torture and mistreatment, retention of the death penalty, restrictions on the freedom of expression, state

¹²⁵ Kelly, 20.

¹²⁶ Bac, 24.

¹²⁷ The harmonization packages are available online on official website : www.abgs.gov.tr/indexen.html, 15.05.2007.

security (military) courts, non recognition of minority rights for ethnic Kurds) and the role of military in politics, which is not the scope of this thesis. Amendments to the Constitution have changed the general approach to the restrictions of human rights and liberties and brought about substantial improvements with respect to personal liberty and security, privacy of individual life, inviolability of the domicile, secrecy of communications, freedom of residence and travel, freedom of expression, freedom of the press, freedom of association, freedom of assembly, the right to a fair trial, abolition of death penalty and curbed the role of military through legal amendments. The first harmonization package of October 2001 redefined the general grounds for the restriction of fundamental rights and liberties in the Constitution (1982) in a narrower fashion consistent with the philosophy of Constitutionalism. Hence, in the related Article 13, the ground for restriction was to be determined ‘only by law and on the basis of the relevant articles in the Constitution’, abolishing the previous wide range criteria such as national security, public order, general peace, public interest and public morals, the protection of public health. It was harmonized with Article 10 of the ECHR (Freedom of expression). The same package (Oct 2001) amended Article 14 concerning the prohibition of the abuse of fundamental rights and liberties. For the first time ‘the state’ was incorporated as a possible perpetrator of abuse: ‘.....No provision of the Constitution shall be interpreted in a manner that would enable the State or individuals to destroy the fundamental rights and liberties embodied in the Constitution.....’ Hence it was harmonized with Article 17 of the ECHR (Prohibition of abuse of rights).

Amendments made to the Constitution recognized priority of international law to which Turkey is a party over national law; according to which international agreements

¹²⁸ Bac, 25.

would take precedence in case of a conflict between national and international law.¹²⁹ Furthermore, decisions of the European Court of Human Rights finding Turkey in violation of the European Convention of Human Rights were recognized as a ground for renewal of the trial in civil, criminal, and administrative courts.¹³⁰

Most important of all, for the first time in two decades the amendment by the first harmonization package of 2001 abolished Provisional Article 15 of the 1980 Constitution banning the evaluation of constitutionality of the decisions and measures taken under laws or decrees having the force of law enacted during the period of military regime(1980-1983), however Ozbudun and Yazici argue that it could be a lengthy process as the Constitutional Court was authorized to constitutional review only by way of incidental proceedings and not by way of principal proceedings.¹³¹

3.2.1. Abolition of Death Penalty

Death penalty was abolished in three stages: The first harmonization package of 2001 restricted the scope of death penalty to crimes committed in cases of war, the imminent threat of war or for crimes of terrorism by an amendment to paragraph seven of Article 38. The third harmonization package of 9 August 2002 eliminated the exception of terror crimes, thus abolishing death penalty in peacetime. The eighth harmonization package (7 May 2004) totally abolished death penalty in harmonization with the 13th additional protocol to the ECHR which abolished death penalty in all circumstances. Furthermore, three other references to death penalty in Articles 15, 17 and 87 were removed.¹³² Turkey signed the Protocol 6 to the European Convention on Human Rights which outlaws death penalty in 2003. The ninth harmonization package (24 June 2004) converted death penalty sentences to prison sentences by amending Article 46 of the Penal Code.

¹²⁹ Meltem Muftuler Bac, "Turkey's Political Reforms and the Impact of the European Union", *South European Society & Politics*, Vol.10, No.1, April 2005, 17-31, 24.

¹³⁰ Ergun Ozbudun and Serap Yazici, *Democratization Reforms in Turkey [1993-2004]*, TESEV Publications, 2004, 25.

3.2.2. *Prevention of Torture and Mistreatment*

The first harmonization package (2001) brought a safeguard against the use of illegal means such as torture and mistreatment by invalidating evidence obtained through illegal methods. Thus the additional paragraph to Article 38 (Principles Relating to Offences and Penalties) read; ‘Findings obtained in a manner not in accordance with the law may not be admitted as evidence’. Furthermore, an additional phrase to the same article prohibited deprivation of individual liberty on the grounds of inability to fulfill a contractual obligation. Thus, the amendments harmonized the related legal provisions with Article 1 (Obligation to respect human rights) and Article 3 (Prohibition of Torture) of the ECHR. The second harmonization package (Feb 2002) also modified the Civil Servants Law which required that the damages resulting from torture and mistreatment cases to be paid by Turkey according to the verdict of ECHR shall be claimed from the perpetrators. The fourth reform package (December 2002) eliminated the previous law which required the superior’s permission to try civil servants, lifting the previous obstacle to find and try the torturers. Amendment to Article 245 of the Turkish Penal Code prohibits suspension and conversion of sentences for torture and maltreatment into fines or any other measures. The seventh harmonization package (Aug 2003) placed priority on torture and mistreatment cases by introducing a speedy trial procedure and the requirement that the trials shall continue even during the judicial recess. Furthermore, a new law was passed (Law No.5233) which required the state to pay the damages incurred as a result of terrorist actions or the anti-terror activities of government officials.¹³³

3.2.3. *Freedom of Expression*

Freedom of expression was largely restricted in the Preamble of the Constitution, which stated that “no protection shall be afforded to thoughts and opinions contrary to

¹³¹ Ibid., 31.

¹³² Ozbudun and Yazici, 22.

¹³³ Ozbudun and Yazici 23.

Turkish national interests, the indivisibility of the State with its territory and nation, Turkish historical and moral values; Atatürk's nationalism, his principles, reforms and modernism.”

The amendment by the first harmonization package of 4 October 2001 replaced ‘thoughts and opinions’ by ‘activity’. Thus it was harmonized with Article 10 of the ECHR. Amendment to Article 26 entitled ‘Freedom of Expression and Dissemination of Thought’ lifted the ban on the use of Kurdish language in broadcasting or publications by deleting phrase ‘No language prohibited by law shall be used in the expression and dissemination of thought’. Thus it was harmonized with Article 9 (Freedom of thought, conscience and religion), Article 10 (Freedom of Expression), Article 14 (Prohibition of discrimination), Article 18 (Limitations on the use of restrictions of rights), and Article 1 of Protocol Nr 12 (General prohibition of discrimination) of ECHR. However, several restrictions were added to the exercise of this right, ‘national security, public order, public security, the fundamental characteristics of the Republic, and the protection of the indivisible integrity of the State with its territory and nation.’ The second reform package (Feb 2002) reduced the amount of imprisonment given to perpetrators of a ‘thought crime’¹³⁴ under Article 159 of the Turkish Penal Code from 1-6 years to 1-3 years, which punishes ‘insulting and deriding the Republic, Turkishness, the Grand National Assembly, the Government, the ministries, the military and security forces, and the moral personality of the judiciary’. Similarly, amendment to Article 312 lifted the fines for offences of praising an action considered criminal under the law or speaking positively about it or inciting people to disobey the law and such expressions would constitute a criminal offense only if they may create a danger for public order. Amendments to Article 8¹³⁵ of the Anti Terror Law (adopted in 1991)

¹³⁴ Although it was never designated as a ‘thought crime’ in legal texts, this was the name given to offences incurred as a result of expression of thoughts.

¹³⁵ Article 8: Written and oral propaganda and assemblies, meetings and demonstrations aimed at damaging the indivisible unity of the Turkish Republic with its territory and nation are forbidden, regardless of the methods, intentions and ideas behind such activities. Those conducting such activities shall be punished with a sentence of between 2 and 5 years' imprisonment and with a fine of between 50 million and 100 million Turkish liras. If the offence of propaganda as mentioned in the foregoing paragraph is committed by a

added the phrase ‘in a manner encouraging methods of terrorism’ to ensure that only propaganda with the purpose of encouraging terrorism is punished. Besides, the duration of bans imposed on radio and television broadcasting institutions for offences defined in the same article was reduced from 1-15 days to 1-7 days. The third harmonization package amended Article 159 of the Penal Code according to which expressions intended to criticize but not to insult have been exempted from punishment.¹³⁶ Furthermore, the same package lifted the legal restrictions on broadcasting in different languages and dialects traditionally used by Turkish citizens in their daily lives and their teaching by private language courses. Protection of private life and the freedom of expression were enhanced. The sixth harmonization package (15 July 2003) abolished Article 8 of the Anti Terror law which penalized separatist propaganda, on the basis of which a number of journalists and publishers were imprisoned. The sixth harmonization package broadened the right to teach, publish and broadcast in languages and dialects by Turkish citizens as was amended by the third harmonization package by permitting such broadcasting both by public and private radio and television channels. The seventh harmonization package (7 Aug 2003) reduced the minimum penalty for the offences defined by Article 159 further from one year to six months. A further amendment to the Law on Foreign Language Education and the Learning of Different Languages and Dialects by Turkish Citizens allowed for the learning of different languages and dialects used by the Turkish citizens in the existing language courses whereas the previous law envisaged new premises for this facility. Furthermore, the legal requirement for National Security Council’s views for determining the foreign

periodical as defined in Article 3 of the Press Law No. 5680, its publishers shall be punished additionally by the following amounts of fine: for periodicals issued at less than monthly intervals the fine shall be 90 per cent of the average real sales of the previous month; for printed works that are not periodicals or periodicals that have just entered the market the fine shall be 90 per cent of the monthly sales of the best selling daily periodical. In any case the fine shall not be less than 100 million Turkish liras. Editors in charge of such periodicals shall be punished with half the sentences awarded to publishers and a sentence of between six months and two years' imprisonment.

¹³⁶ Aydın and Keyman, 28.

languages to be thought was lifted. The ninth harmonization package (24 June 2004) removed the National Security Council's representative from the Censure Board (RTUK).

3.2.4. Reforms Related to The Rule of Law

Among all, the most significant constitutional amendments directly related with the rule of law are the right to a fair trial and the abolition of State Security Courts. State security courts were abolished by the eighth harmonization package. The first harmonization package (Oct 2001) amended Article 36 (Freedom to Claim Rights) adding the phrase 'the right to a fair trial', in harmonization with Article 6 of the ECHR (Right to a fair trial). Amendment to Article 19 (Personal Liberty and Security) reduced the period of detention in cases of offences committed collectively from 15 days to 4 days and abolished the phrase concerning exceptions to notification. Thus the law was harmonized with Article 5 of the ECHR (Right to liberty and security). The amendment made to Article 20 on the Privacy of the Individual's Life lifted another exception by removing 'exceptions necessitated by judicial investigation and prosecution are reserved'. Amendment to Article 40 (Protection of Fundamental Rights and Freedoms) by adding the sentence 'the State must determine the legal course of action and authorities that may be applied to by persons concerned' was meant to facilitate citizens' access to the judicial system. Amendment by the same package to Article 74 (Right of Petition) was extended to include foreign residents in Turkey in accordance with the principle of reciprocity. Amendments to Article 16 of the Anti-Terror Law by the second reform package (Feb 2002) removed the 'up to 7 days' pretrial detention period, the pre-trial detention period was reduced from 7 to 4 days in state of emergency areas and allowed full access of defendants and pre-trial detainees to their counsels. The same package amended Article 107 of the Criminal Procedure Code allowing for informing a relative designated by the detainee of every decision of the detention period and the instructions of the judge. Further amendment to Article 108 reduced pretrial

detention period from 7 to 4 days and informing a relative designated by the person without delay. The fifth harmonization package (23 Jan 2003) introduced amendments to Code of Criminal Procedure and the Code of Legal Procedure concerning retrial on the basis of the decisions of European Court of Human Rights. With the sixth harmonization package (15 July 2003) Article 462 of the Turkish Penal Code allowing for reductions in the case of 'honor killings' was abolished. Furthermore, amendment to Article 7 of the Act on the Human Rights Investigation Commission reduced the maximum time of three months for replies to applications to 60 days.

3.3. Explaining rule adoption in Turkey

Rule adoption in Turkey is described by many scholars within the framework of this model, most probably due to the fact that substantive constitutional and legal changes were undertaken after gaining candidacy status in 1999.¹³⁷ On the other hand, as Bac argues,¹³⁸ this does not mean denying the existence of internal actors for democratization of human rights; such as the intelligentsia, civil society, human rights organizations, who would adopt the EU's human rights rules for the sole reason of appropriateness, in which case rule adoption would be explained by the Social Learning Model. Unfortunately, this was not the case. This was not the case in CEEs either. Tocci offers a similar approach to Bac, arguing that the EU membership conditionality was more an anchor than a trigger for domestic actors pursuing democratization reforms whereby she draws to the role of civil society, the ruling party AKP and the military's positive attitude to the reforms.¹³⁹ Likewise, Önis

¹³⁷ Frank Schimmelfennig, Stefan Engert, and Heiko Knobel, "The Impact of EU Political Conditionality on Slovakia, Turkey, Latvia", (eds) Frank Schimmelfennig & Ulrich Sedelmeier, *The Europeanization of Central and Eastern Europe*, Cornell University Press, 2005, 29-49; Birsan Erdogan, "Compliance With EU Democratic Conditionality: Turkey and The Political criteria of EU", paper submitted for ECPR, Standing Group on the European Union Third Pan-European Conference on EU Politics, 21-23 September 2006, Istanbul, Turkey, available online at: <http://www.jhubc.it/ecpr-istanbul/virtualpaperroom/0.42.pdf>, 17.11.2006; Kubicek, Paul, "The European Union and Grassroots Democratization in Turkey", *Turkish Studies*, Vol.6, No.3, 361-377, 2005, 361-377;

¹³⁸ Bac, "Turkey's Political Reforms...", 18.

¹³⁹ Natalie Tocci, "Europeanization in Turkey: Trigger or Anchor for Reform?", *South European Society & Politics*, Vol. 10., No.1, April 2005, 73-83.

assumes the role of EU membership as an anchor and argues that ‘the real impetus for change needs to originate from domestic actors’.¹⁴⁰ In the case of Turkey, the incomparably weaker bargaining power of these actors in comparison with the EU conditionality left them vulnerable to ignorance, and sometimes even punishment on the grounds of restrictive legal clauses; threatening national security, public order, ...etc. Furthermore, the depoliticized societal culture created under nearly two decades of repressive legal system after the 1980 coup made the society indifferent to human rights issues unless they themselves became the victim.

However, it should also be emphasized that the two earthquakes in 1999 and the two subsequent financial crises in late 2000 and early 2001 increased public support for the EU membership due to the expected material incentives. Coupled with the end of PKK terror in 1999 with the capture of Ocalan, a safe and fertile environment was created for rule adoption.¹⁴¹

Based on a cost-benefit calculation, according to External Incentives Model, when gains from compliance (EU membership) exceed the costs of compliance (adoption costs, possible elite and public opposition), states generally comply to get the reward. The EU employs a strategy of reinforcement by reward and not punishment; thus it does not directly intervene in rule adoption. In case of non-compliance, the states lose the material incentives of membership, assistance or association. The cost-benefit calculations in this model depend on four sets of factors: the determinacy of conditions, the size and speed of rewards, the credibility of conditionality, veto players and adoption costs. *Determinacy of conditions* indicates that the rules must be clear and formal, and legally binding. *Size and Speed of Rewards* refers to the promise of full membership or association and also the temporal distance to get them. *Credibility of Conditionality* is the credibility of the EU’s promise to

¹⁴⁰ Önis, “Domestic Politics...”, 9.

deliver the reward in the case of rule adoption or the threat of withholding the rewards in case of non-compliance. *Veto players and adoption costs*: *Adoption costs* refers to the costs incurred from rule adoption such as opportunity costs of foregoing alternatives and also the possible welfare or power costs for private and public actors. *Veto players* are actors whose agreement is necessary for a change in the status quo. Adoption costs will be high if the EU rules negatively affect the security and integrity of state, the government's power base, and its core political practices for power preservation.¹⁴²

Abolition of death penalty in Turkey could be best explained in this framework. The normative pressure by the Council of Europe in the period of military regime could neither prevent exercise of death penalty nor other gross violations of human rights. Suspension of Association Agreement by the European Commission in 1982 accompanied with suspension of the Fourth Financial Protocol triggered partial behavioral change in the exercise of death penalty; after 1984, although the courts continued to issue death penalties, the National Assembly did not approve them, therefore no one was executed after 1984. Retention of the death penalty in the European Convention on Human Rights until 2002¹⁴³, although it was either abolished in member states or retained de jure¹⁴⁴, further curbed the legitimacy of the European pressure.

A strong motive to operationalize death penalty appeared in 1999 with the capture of Ocalan, the leader of the terrorist organization PKK. After a judicial process, Ocalan was sentenced to death by the State Security Court in Ankara on 29 June 1999 and the decision was confirmed by the Supreme Court of Cassation on 25 November.¹⁴⁵ The decision was

¹⁴¹Paul Kubicek, "The Earthquake, Europe, and Prospects for Political Change in Turkey", *Middle East Review of International Affairs*, Vol.5, No.2, June 2001; Aydin and Keyman, "European Integration...", 11.

¹⁴² Ibid., 12- 16.

¹⁴³ Death penalty was abolished by Protocol No. 13 to the Convention in 2002.

¹⁴⁴Amichai M.Magen, *EU Membership Conditionality and Democratization in Turkey: The Abolition of the Death Penalty as a Case Study*, thesis submitted to the Stanford Program in International Legal Studies at the Stanford Law School, Stanford University, 2003. In 1992, death penalty was retained by 5 of the then 12 member states, however by 1999; it was abolished in all member states as well as candidate states.

¹⁴⁵ "Adalet Apo'dan Kurtuldu" [Justice Got Rid of Abdullah Ocalan], *Hürriyet*, 4 January 2000.

taken to the European Court of Human Rights by the defendant's lawyers and the ECHR. The ECHR declared its decision on 30 November 1999, ten days before the Helsinki Summit (10-11 December). The decision called Turkey to 'take all necessary measures to ensure that the death penalty is not carried out so as to enable the Court to proceed effectively with the examination of the admissibility and merits of the applicant's complaints under the Convention'.¹⁴⁶ However, gaining candidacy status ten days later began to induce changes in political actors' attitude to the issue; on 12th January 2000, Ecevit, Prime Minister and Head of DSP convinced leaders of coalition partners to postpone ruling of an execution decision in the Assembly until the declaration of the Court's decision.¹⁴⁷ This was protested by families of killed soldiers by the PKK immediately on 19th January who went to speak to the President Demirel, who advised them to be patient.¹⁴⁸

The main veto players in this process were the coalition partner Far Right Party (MHP) and families and relatives of the killed soldiers and security forces in the fight against terrorism along with those killed civilians in terrorist attacks. Operationalization of the penalty for Ocalan was among the main issues of the MHP's electoral campaign for May 1999 elections. The party maintained its stance firmly when they became a coalition partner after the elections. It was manifested in the second amendment when the Party opposed abolishing the exceptions of imminent war and terrorism to the death penalty. Before the negotiation, the party chairman and the then Deputy Prime Minister Bahçeli said, "When a debate regarding the amendment is taken up in the Parliament, we'll say 'no'."¹⁴⁹ Therefore the debate on the second amendment induced a dilemma between the coalition partners as DSP and ANAP had to convince MHP in order to pass the amendment. Different reactions

¹⁴⁶ Case of Ocalan v. Turkey (Case No.46221/99), November 1999.

¹⁴⁷ "Apo'nun Karar Haftası" [The decision week for Abdullah Ocalan], Belgenet, Turkish News Portal, www.belgenet.com, 21.05.2007.

¹⁴⁸ "Şehit aileleri Çankaya'da" [Mothers of the Martyr Soldiers in Çankaya], *Yeni Şafak*, Daily Newspaper, 19 January 2000.

¹⁴⁹ Bahçeli: "No Problem In the Coalition", Turkish Press Review, 20.02.2002, available online at: www.byegm.gov.tr/YAYINLARIMIZ/CHR/ING2002/02/02x02x20.HTM - 21k, 21.05.2007.

came from political parties of the time. The DSP was in favor of the carrying out the death penalty for Ocalan in the beginning but changed behavior after the decision was taken to the ECtHR.¹⁵⁰ Far Right MHP did not even want to wait for the ECtHR decision arguing that this would mean humiliation of Turkey and rewarding the terrorist Ocalan, even implicitly criticizing the suspension request of the ECtHR as trying to prevent a decision given by an independent Court.¹⁵¹ As the PKK declared ceasefire upon capture of Ocalan, some factions thought that his execution could re-trigger violence. The Islamist Party (FP) had an ambiguous attitude; the chairman Kutan was of this opinion and announced their support for abolition before the Assembly voting on 1st January,¹⁵² and later on 5th January declared that he was personally in favor of death penalty and accused the coalition government for disregarding the views of opposition parties.¹⁵³ On 6th January, Kutan said that before execution of Ocalan, twenty court decisions on death penalty pending in the Assembly must be operationalized.¹⁵⁴ The centre-right DYP declared their support for abolition of death penalty but not for Ocalan.¹⁵⁵ Similar reactions came from ANAP, despite the request of chairman and Deputy Prime Minister Yilmaz to wait for the ECtHR decision, voices inside the party called for confirmation of the Supreme Court's decision at the Parliament.¹⁵⁶

The President Demirel exhibited a realist attitude as he declared; 'The decision on this issue may not be welcomed by the people, however the state is not an institution to abate hatred and animosity, therefore the decision will be given by utmost discretion',¹⁵⁷, pointing to the superiority of state interests and the decision of the ECtHR. The general negative attitude against lifting the death penalty for Ocalan changed after gaining

¹⁵⁰ Magen, 67.

¹⁵¹ "Asmadan Olmaz" [Execution is must!], *Hürriyet*, 8 January 2000.

¹⁵² "İdam Teroru Azdırı" [Execution Re-Triggers Terror], *Hürriyet*, 1 January 2000.

¹⁵³ "Hak eden asılmalı" [That who deserves must be hanged], *Hürriyet*, 5 January 2000.

¹⁵⁴ "Apo'dan önce 20 idam var" [There are 20 executions before Ocalan], *Hürriyet*, 6 January 2000.

¹⁵⁵ "DYP: İdam kalksın ama Apo asılsın", [Death Penalty should be abolished but Apo must be executed!], *Hürriyet*, 4 January 2000.

¹⁵⁶ "ANAP Zor Durumda" [ANAP in Dilemma!], *Hürriyet*, 5 January, 2000.

candidacy status at the Helsinki Summit.¹⁵⁸ However, it took a longer time for MHP to change its attitude and to reconcile with the other coalition partners, since this would mean a drastic shift from the party's ideology and electoral promises which would upset the voter base and diminish the party's credibility. It can be concluded that the abolition of the death penalty was the most difficult reform the government had to undertake. Interestingly, the military was not a veto player in the reforms process either concerning abolition of death penalty or other measures which to an extent curbed their leverage in politics.¹⁵⁹

With respect to the amendments concerning freedom of expression, amendment to Article 26 lifting the use of Kurdish language in broadcasting, publications, and teaching met with opposition from the MHP on the grounds that this would impair national unity and encourage separatist movements. For the Turkish nationalists, cultural rights to Kurds meant 'giving in to terrorists'.¹⁶⁰

The AKP government declared its stance against violation of human rights and torture as "zero tolerance" and laws amending legal provisions related to prevention of torture and mistreatment were mostly undertaken during the government of the AKP (Justice and Development Party) and did not encounter specific opposition. On the contrary, they were supported by the only opposition party centre-left CHP (Republican People's Party).

Among the most stimulating factors in rule adoption, credibility of conditionality was high despite the ambiguity of membership. Adoption costs have been overcome partly by the European Commission through financial aid and technical assistance.¹⁶¹ Keyman and Aydin claim that Turkey was given small amounts of aid and assistance compared to

¹⁵⁷ "Apo'yu asarsak Batı'dan koparız"[If we hang Apo (Abdullah Ocalan), we will break away with the West], *Hurriyet*, 2 January 2000.

¹⁵⁸ Magen, 71.

¹⁵⁹ Metin Heper, "The European Union, the Turkish Military and Democracy", *South European Society & Politics*, Vol.10, No.1, April 2005, 33-44.

¹⁶⁰ Bac, 25.

¹⁶¹ Aydin and Keyman, 14.

Poland, Romania and Bulgaria.¹⁶² However, aid was increased after the decision to start negotiations.¹⁶³ Schimmelfennig, Engert and Knobel argue that *adoption costs* will be high if the EU rules negatively affect the security and integrity of state, the government's power base, and its core political practices for power preservation.¹⁶⁴ In this regard, adoption cost was high in abolition of death penalty and granting cultural rights to Kurds which was believed to undermine national unity. However, adoption costs diminished with the end of terrorism in 1999.¹⁶⁵

An outstanding characteristic of the political actors in government concerning rule adoption is their dedication to the EU membership irrespective of their ideology. The reforms in 1999 and the first two harmonization packages were adopted in 2001 by the coalition government of DSP (Democratic Socialist Party), ANAP (Motherland Party) and MHP (Nationalist Action Party). This was a coalition of a centre-left, centre-right and the far right party. Interestingly, even the far right party is not against EU membership although it exhibited severe opposition to the abolition of death penalty and the removal of the ban the use of Kurdish language in publications and broadcasting. The AKP, apparently a center right party with Islamic background continued the harmonization process even with stronger dedication after they formed the government in November 2002. Being a single ruling party, rule adoption was much easier in this period without the burden of potential veto players in a coalition.

This demonstrates that the EU membership is a national project of Turkey and is not likely to be jeopardized by any government –except for single rule of MHP(Far Right) may impede the process, although it is not likely to happen in the near future. In fact even the

¹⁶² Under the PHARE, ISPA and SAPARD programmes, Poland received around 470 million euros, Romania 306 million euros and Bulgaria 161 million euros. Ibid., 15.

¹⁶³ Turkey was given 250 million euros as pre-accession financial assistance in 2004, 300 million euros in 2005, and 500 million euros in 2006. Ibid., 16.

¹⁶⁴ Schimmelfennig, Frank, Stefan Engert, and Heiko Knobel, "The Impact of EU Political Conditionality on Slovakia, Turkey, Latvia", (eds) Frank Schimmelfennig & Ulrich Sedelmeier, *The Europeanization of Central and Eastern Europe*, Cornell University Press, 2005, 29-49, 29.

MHP is not against EU membership, but adoption of rules which they believe threaten security of the state.

¹⁶⁵ Aydin and Keyman, 17.

CHAPTER 4: ANALYSIS OF THE CURRENT STATE OF HUMAN RIGHTS AND THE JUDICIARY AS THE ENFORCEMENT MECHANISM AND POSSIBLE CHALLENGES AGAINST IMPLEMENTATION

4.1. The Current State of Prevention of Torture, Freedom of Expression, and the Judiciary as the Enforcement Mechanism

Elaboration of change in formal structures (legal and practical applications) does not suffice to conclude that domestic change has taken place without considering whether it has also led to a change in values, norms and discourses in sphere of human rights in Turkey. Given the novelty of the reforms, it is very difficult to reach a judgment for the time being, yet an inquiry into the practices of torture and mistreatment, freedom of speech and the judiciary as an enforcement mechanism will shed a light on the degree of change attained.

a) Cases of torture and mistreatment used to be the subject of utmost criticisms directed against Turkey at the international level. The first Progress Report on Turkey (1998)¹⁶⁶ mentioned systematic use of torture, disappearances and extra-judicial executions. Majority of the torture and mistreatment cases were reported to have taken place during detention periods in police stations. The factors that exacerbated cases of torture were denial of access for detainees to a legal counsel in regions under a state of emergency (south-eastern Turkey), long periods of police custody, and lack of effective control over the security forces due to the legal requirement which made criminal prosecution of civil servants subject to permission from administrative authorities. The 1999 report mentioned a relative improvement in the aforementioned cases; despite their prevalence, they were not systematic anymore. The decrease in extrajudicial executions was related to the annulment of a legal provision which entitled security forces to ‘fire directly without hesitation at persons who do not stop when warned’. The 2000 report mentioned cases of torture in detention and especially for those ‘suspected of acts of terrorism or separatism’. The 2001 report acclaimed the Constitutional amendments but noted the persistence of torture and ill-

¹⁶⁶ Progress Reports are prepared by the European Commission on an annual basis for candidate countries.

treatment cases. An improvement cited in the report was the prosecutions of officials suspected of torture and ill treatment.¹⁶⁷ In 2004, the government's policy of 'zero tolerance' to torture and the legislation against it were emphasized yet cases of torture persisted. The 2005 Report pointed to the diminishing trend in cases of torture and ill treatment. Furthermore, it referred to the statement by the President of the Council of Europe's Committee for the Prevention of Torture (CPT) which stated that: 'it would be difficult to find a Council of Europe Member State with a more advanced set of provisions in this area'. The latest 2006 report emphasized the declining trend in cases of torture and mistreatment. In my interviews with the NGOs, prevention of torture and mistreatment was also revealed to be an area of substantive improvement. One interviewee related it to the fines paid by Turkey for cases against torture and ill-treatment brought to the ECtHR.¹⁶⁸

Yet punishment of perpetrators of torture and ill-treatment remains a problematic area. According to the 2006 Amnesty International Report, four police officers accused of torture and rape in 1999, have been released due to insufficient evidence after a process of over six year judicial process. Furthermore, the four police officers charged with killing Ahmet Kaymaz and his 12-year old son Ugur Kaymaz in 2004 are reported to be still on active duty. Besides, mistreatment is reported to be prevalent often observed at police violence at the demonstrations.¹⁶⁹ The latest relevant occasion is the excessive arrests at the 1st May Labour Day Celebrations of 2007, where at least 500 people were arrested on charges of being participating in an illegal demonstration.¹⁷⁰

¹⁶⁷ During 2000-2001, 1, 472 proceedings for charges of ill treatment and 159 proceedings for charges of torture were opened against security members. 36 persons were given prison sentences and 50 were expelled from service.

¹⁶⁸ Interview with Dilek Kurban, TESEV, 12 April, 2007. Turkey has paid more than 45 million euros in compensation for the rulings of the European Court of Human Rights since the first personal application in 1993.

¹⁶⁹ The police was reported to have used 'disproportionate force' against demonstrators; particularly targeting leftists, supporters of the pro-Kurdish DEHAP, students and trade unionists and against women at 8 March Women's Celebrations, after which 54 police officers were charged with using excessive force.

¹⁷⁰ www.tnn.net, *Turkish News Portal*, 01.05.2007.

b) Freedom of expression, on the other hand, despite some improvements, remains a ‘gray area’. The 1998 Report cited 91 journalists in prison. Charges against freedom of expression encompassed threatening the unity of state, territorial integrity, secularism and respect for formal institutions of the state and were directed against publications, statements and speeches of journalists, writers, trade unionists or NGO workers. According to the report, restrictions against freedom of expression were exacerbated following the capture of Öcalan. A circular issued by the Ministry of Interior forbade the use of terminology in relation to Kurdish question in press releases and publications by public institutions and organizations. In May 1999, the General Penal Board of the Supreme Court of Appeals increased the related sentences. In September, a law was approved by the President releasing those convicts of freedom of speech by suspending their sentence for three years on the condition that they do not repeat their offences in this period.

In Commission reports of 1998, 1999, 2000, freedom of expression was referred as an area of serious concern. The 2003 report mentioned acquittal and release of several convicts as a result of several amendments to legislation concerning freedom of speech. The report of 2005 indicated the release of prisoners convicted under the old Penal Code although several people continued to be prosecuted and convicted under provisions of the new Penal Code. The report of 2006 pointed to a measure taken by the Ministry of Justice to improve the situation; a circular was issued by the Ministry of Justice to instruct prosecutors to evaluate the cases concerning freedom of expression in line with both Turkish legislation and the ECHR. Furthermore, a monthly monitoring mechanism was established for criminal investigations and court cases against the press and the media.

Nevertheless, prosecutions and convictions against freedom of expression prevail. Central to these is the Article 301 of the New Penal Code, according to which public denigration of Turkishness, the Republic, the state and military organs of Turkey shall be

punishable by imprisonment of between six months and three years. Cases invoking Article 301 are usually due to ideological and narrow interpretations of this article.¹⁷¹ Invoking this article, more than 60 journalists, columnists and scholars were charged for expressing thoughts.¹⁷² Among them were the Nobel-Prize winner Orhan Pamuk and the ethnic Armenian journalist Hrant Dink for insulting Turkishness.¹⁷³ The murder of Dink on 17th January by a Far Right teenager aroused great public reaction and calls for abolition of Article 301. Nevertheless, no official attempt has been made in this regard.

c) An important feature of the rule of law is the status of judiciary, especially its independence. The judiciary has been strengthened through several constitutional and legal amendments, which were also reflected in the Commission reports. Still, excessive workload, inadequate salaries, existence of state security courts, lack of full independence and inconsistent interpretation of the law has been among the main historical problems of the Turkish judicial system.¹⁷⁴

Concerns pertaining to lack of full independence and excessive workload were reiterated in all Progress reports. As a result, state security courts has been abolished and replaced with Heavy Penal Courts. The number of specialized courts such as juvenile courts, family courts, labor courts, traffic courts, cadastral courts and courts of enforcement has been increased. Salaries of judges and public prosecutors have been increased by a law adopted in 2006. In order to facilitate the judicial proceedings, the National Judicial Network Project (UYAP), initiated in 1998 has been operationalized.¹⁷⁵

¹⁷¹ Personal Communications.

¹⁷² Erdogan, 16.

¹⁷³ Birsen Erdogan, 16.

¹⁷⁴ Senem Aydin and E.Fuat Keyman, *EU Conditionality and Rule of Law in Turkey*, Center on Democracy, Development and The Rule of Law, Working Paper, 2006, 1-84.

¹⁷⁵ The project aims to provide a continuous flow of information and documents through a computer network encompassing the high courts, central organizations of the Ministry of Justice, courts and offices of public prosecutors, the Forensic Medicine, detention facilities including prisons. For more details, see www.byegm.gov.tr/YAYINLARIMIZ/kitaplar/turkiye2006/english/154-155.htm - 9k, 25.05.2007.

Yet problems remain. The judiciary has still not gained full independence. The Supreme Board of Judges, the body responsible for appointments and postings, is chaired by the Minister of Justice. Judicial inspectors are liable to the Ministry of Justice rather than to the High Council. The Minister and the Undersecretary of the Ministry of Justice are two of the seven members of the Council with voting rights. The judiciary still has excessive workload and insufficient number of judges and public prosecutors. There is no effective mechanism for the public to complain about judges. The existing procedure requires lawyers to file such a complaint at the High Council for Judges and Public Prosecutors and it is ineffective due to professional concerns of the lawyers. Therefore, the Ministry of Justice is planning to introduce the Ombudsman system to act as a liaison between the public institutions and individuals.¹⁷⁶

The persistence of the obstacles to full independence and impartiality to judicial independence is associated with two factors: lack of strong EU Conditionality and the reluctance of the executive.¹⁷⁷ Despite mention of the problem in all Progress Reports, Aydin and Keyman argue that judicial independence was never required as a ‘formal condition’ in the entry process.¹⁷⁸

Ideological independence is considered to be another area of concern plaguing the effective maintenance of the rule of law. Aydin and Keyman point to lower courts and public prosecutors as veto players in the judiciary due to concerns of national interests, whereas the Higher Courts are relatively more inclined to implement democratic rule of law in the parallel with the reforms and the decisions of the European Convention of Human Rights. These veto players become particularly apparent in cases pertaining to freedom of speech.¹⁷⁹ Aydin and Keyman cite the contentious Conference on “The State of Ottoman

¹⁷⁶ Aydin and Keyman, 26.

¹⁷⁷ Aydin and Keyman, “EU Conditionality....”, 28.

¹⁷⁸ Aydin and Keyman, “EU Conditionality....”, 28.

¹⁷⁹ Aydin and Keyman, “EU Conditionality....”, 28-29.

Armenians during Collapse of the Empire: Academic Responsibility and Democracy Problems”. The Conference which was scheduled to be held in Bogazici University was cancelled as a result of the 4th Administrative Court decision in Istanbul on the grounds of concerns related with the invited speakers and the possible subjectivity of their opinions on the issue. The Conference finally was held in Bilgi University upon reactions from the Prime Minister and opposition party against the anti-democratic Court decision. The Court decision was annulled by the Regional Administrative Court.¹⁸⁰

4.2. Possible Challenges against Implementation

Effective implementation of the reforms depends on external and internal dynamics: determinacy of domestic political actors; the state and the governing elite, civil society, human rights organizations, bureaucracy, judiciary, security establishments, mass public, the character of the EU Conditionality and security-related issues such as the ongoing Kurdish separatist terrorism.

The AKP government has demonstrated an outstanding commitment to the adoption and implementation of reforms. Nevertheless, as Kulahci argues, the EU project cannot be attributed to a particular political party in Turkey because it is a national project.¹⁸¹ After all, the most crucial constitutional reforms were undertaken by the previous coalition government of DSP-MHP-ANAP. Furthermore, the first domestic human rights enforcement mechanisms were also established by this government. In 2000, the Human Rights Presidency, the High Human Rights Board, the Human Rights Consultation Boards and the Investigation Boards were established.

The AKP government was lucky to inherit an extensive set of constitutional reforms which they reinforced by secondary legislation and further embarked on the reforms also increasing the number of domestic enforcement mechanisms. In 2003, a special Reform

¹⁸⁰ Ibid.

Monitoring Group composed of several ministries and government departments was established to monitor implementation.¹⁸² The AKP government's approach of 'zero tolerance' is considered to be influential particularly in prevention of torture and mistreatment. A Committee for the Prevention of Torture was established and intensive human rights training was given to the personnel by the government with the assistance of Council of Europe and the European Commission.¹⁸³ However, the Human Rights Presidency, the High Human Rights Board, the Human Rights Consultation Boards and the Investigation Boards were established were already established during the previous coalition government.

The AKP's commitment to the EU accession and reforms is first and foremost considered to be a means for the party to ensure its survival and consolidate its position in the political arena.¹⁸⁴ Furthermore, the reforms reinforced the legitimacy of the party's emphasis on individual rights and freedoms in its ideology and rhetoric.¹⁸⁵ The dedication of the party leader and Prime Minister Erdogan's to reforms is nevertheless praiseworthy as was revealed in one of his statements when he declared that the reforms were more important for Turkey than the EU accession, and that the reform process would even in case of refusal to open accession negotiations, in which case they would rename the Copenhagen Criteria as 'Ankara Criteria'.¹⁸⁶ As stated by Avci, 'such justification on the part of AKP shows that 'logic of appropriateness' is giving way to behavioral change rooted in the different interpretation of the situation through a learning phase'.¹⁸⁷ Other factors which facilitated the reform process is the fact that AKP is a single party ruling government and

¹⁸¹ Erol Kulahci, "EU Political Conditionality and parties in government: human rights and the quest for Turkish transformation", *Journal of Southern Europe and the Balkans*, Vol.7, Nr.3, December 2005, 387-402.

¹⁸² Aydin and Keyman, "European Integration...", 23.

¹⁸³ Aydin and Keyman, "EU Conditionality...", 24.

¹⁸⁴ Kulahci, 398; Aydin and Keyman, 81.

¹⁸⁵ Aydin and Keyman, 81.

¹⁸⁶ "Ankara Kriterleri der, Devam Ederiz", [We would call them Ankara Criteria and Go Ahead], *Milliyet*, 8 November 2004.

the only opposition party in the Parliament, the CHP, has not been a major veto player in this process as they also support the EU membership.

The civil society in Turkey has attained a significant position in post 1995 with the abolition of the previous law banning them from engaging in political activities in 1995. The number and influence of NGOs have grown particularly after 1999 as the EU membership has provided them with the necessary legislation to work effectively and the EU funds to expand their activities.¹⁸⁷ Consequently, they became a major norm entrepreneur in the post-Helsinki process.¹⁸⁸ For instance, the ARI Movement, among the most prominent, has embarked on a number of projects aimed at internalization of reforms especially after 2002.¹⁸⁹ Of particular significance is their project for creating human rights awareness among the Youth, which is a noteworthy endeavor for reform internalization given the fact that they constitute 70.8% of the entire population.¹⁹⁰ The Helsinki Citizens Assembly's latest projects on Roma Rights, improvement of the state of refugees in Turkey, the mapping of torture cases in Turkey and the book on Women's Legal Rights in both Turkish and Kurdish, which has been distributed nationwide to promote women's awareness are among the valuable endeavors for internalization.¹⁹¹

However, these NGOs have produced their anti-counterparts. Lack of a culture of donorship¹⁹² which renders the NGOs dependent to a large extent on EU funds¹⁹³, induces

¹⁸⁷ Gamze Avci, "Turkey's EU Politics: What Justifies Reform?", (in) Helene Sjursen(ed), *Enlargement in Perspective*, ARENA, University of Oslo, 142, cited in Aydin and Keyman, "EU Conditionality...", 82.

¹⁸⁸ In 1938, there were 205 associations in Turkey, in 1960 18,598 and in 2004 the number rose to 100,000, of which 4,524 were foundations., Diba Nigar Göksel and Rana Birden Güneş, "The Role of NGOs in the European Integration Process: The Turkish Experience", *South European Society and Politics*, Vol.10, No.1, April 2005, 57-72,58.

¹⁸⁹ Non- governmental organizations like TUSIAD (Turkish Industrialists and Businessmen Association), IKV (Economic Development Foundation), IHD (Human Rights Association), Helsinki Citizens' Assembly, Liberal Thinking Society and the ARI Movement have conducted common projects with EU partners, lobbied for Turkish accession in the EU and put pressure on the government to adopt several reforms. Önis, "Domestic Politics...", 20.

¹⁹⁰ Göksel and Güneş., 61.

¹⁹¹ Personal Communications with Ebru İlhan, ARI Movement, 17 April 2007, Istanbul.

¹⁹² Personal Communications with Ebru Uzpeder, Helsinki Citizens Assembly, 18 April 2007, İstanbul.

¹⁹³ Göksel and Güneş., 67.

suspicion among the Euro-skeptic and nationalist faction that they serve the EU interests by shaming the country particularly with regard to sensitive issues such as human and minority rights. As a counteract, several nationalist NGOs have been established in opposition to the EU such as the “Human Rights Association of Terror Victims and Mothers of Martyrs” [Terör Mazlumları ve Şehit Anneleri İnsan Hakları Derneği], “Turkish World Human Rights Association” [Türk Dünyası İnsan Hakları Derneği]¹⁹⁵.

There has been a substantial rise in the number of human rights advocacy groups has in recent years. However, the oldest and the prominent ones are the Human Rights Association (IHD), the first organization founded in 1986 and its sister organization Human Rights Foundation (TIHV) in 1990. The TIHV is engaged mainly in providing legal and social aid to victims of human rights violations and monitoring human rights violations.¹⁹⁶ Both the TIHV and IHD lack ‘grassroots support’, however, the IHD suffers a kind of legitimacy problem among the public due to their identification mainly with Kurdish activists and left wing groups.¹⁹⁷ IHD is considered to trim Turkey’s human rights problem to the Kurdish issue.¹⁹⁸ Another issue Cizre draws upon is the dependence of foreign funding, reiterating the fact that it is the case for NGOs in non-Western contexts. She states that main donors of the TIHV are the European Commission, the Swedish Support Committee for Human Rights in Turkey, the United Nations Volunteer Fund for Victims of Torture, part of which is transferred to the IHD.¹⁹⁹ According to Cizre, this situation bears

¹⁹⁴ EU funding to the Turkish NGOs was approximately 177 million euros in 2000, 214 million euros in 2001, 250 millions in 2004, and estimated to be 300 millions in 2005 and 2006., Göksel and Güneş., 71.

¹⁹⁵ Cited in Oran, *Türkiye İnsan Hakları İzleme Bilancosu: 2005 İzleme Raporu* [Human Rights Report in Turkey 2005], 13. Oran also criticizes the government for appointing members of these groups to Human Rights Advisory Boards.

¹⁹⁶ They have 5 rehabilitation centers in Turkey where they provide victims with medical treatment and a documentation center. For details, see <http://tihv.org.tr>, 25.05.2007.

¹⁹⁷ Umit Cizre, “The Truth and Fiction About (Turkey’s) Human Rights Politics, *Human Rights Review*, October-December 2001, 55-78, 73.

¹⁹⁸ Cizre, 73; Personal Communications; This is what I felt when I was told by a member to go to the southeast region in order to conduct a research on human rights in Turkey.

¹⁹⁹ Cizre, 74.

two unfavorable consequences; alienation from the native environment and ideological clash between the left-oriented human rights advocacy groups and their donors.²⁰⁰

Bureaucracy and judiciary do not constitute major actors in rule adoption; however their role in implementation is a crucial one. In the case of Turkey, it is considered that the opposition forces in bureaucracy and judiciary, as was elaborated in the previous section, pose an obstacle to implementation of reforms.²⁰¹

In general, the EU membership is favored by the mass citizenry for the expected material and geopolitical benefits.²⁰² In Turkey, public support for the EU membership in 2002 was as high as 68%.

A national survey conducted in May and June in 2002, in early period of reforms, reveals some insights about the attitude of public to the democratization reforms in human rights.²⁰³ The findings show that 82% of the respondents approved establishment of conditions for freedom of thought and expression. Unfortunately only 38% approved abolition of death penalty, however when asked about their opinion if abolition of death penalty was the only condition to join the EU, 62% expressed approval, which shows the strength of membership incentive. Abolition of laws which prevent receiving education in one's native language received 42% approval and 47% non-approval and similarly abolition of laws preventing broadcasting in one's native language received only 41%, which showed an alienation to minority rights concerning language.²⁰⁴

²⁰⁰ Cizre, 74.

²⁰¹ Aydin and Keyman, "EU Conditionality and Rule of Law in Turkey", 12; Personal Communications in Istanbul.

²⁰² Andrew Moravcsik and Milada Anna Vachudova, "National Interests, State Power, and EU Enlargement", *East European Politics and Societies*, 17, 2003, 42-57.

²⁰³ "Turkish Opinion on Membership to the EU", <http://www.tesev.org.tr/eng2002/index.php>, 15.05.2007. The survey was conducted with 3060 respondents in urban and rural settlements with interviewees 18 years of age and older.

²⁰⁴ Ibid.

A recent survey based on a nationwide representative sample indicates highly positive attitude to democratic values.²⁰⁵ 76.9% of the respondents asserted that democracy may have problems but it is better than any other regime. 73.2% of the respondents were against the use of torture in detention regardless of the type of crime whereas 14.6% were in favor and 10.7 were indecisive. 79.9% were against the restriction of freedom of speech.²⁰⁶ On the other hand, according to the latest Eurobarometer poll, the level of Turkish public support for EU membership has declined to 41%.²⁰⁷ The 79.9% support for democracy and 41% support for EU membership may serve as a preliminary indication of the internalization of democracy irrespective of EU membership.

However, the EU membership project has created a peculiar pattern of polarization in Turkey. Önis argues that it has, for the first time, united the Islamists, who used to be inclined to the Islamic World, and seculars.²⁰⁸ The seculars, on the other hand, are divided;²⁰⁹ the pro-EU faction associate EU membership with the Kemalist ideal of modernization along the Western lines, whereas anti-EU faction capitalize on the loss of sovereignty and minority rights as threats to the notion of nation-state. The latter suspect that the AKP's strong commitment to the reforms as a descendant of an Islamist party aims to reduce the influence of the army to accomplish their 'hidden Islamic agenda'.²¹⁰

A nationalist backlash has developed due to several issues that have set the agenda in the harmonization process; identity politics concerning the Kurdish and Alevi citizens, a new strategy for the Cyprus issue, claims of 'genocide' brought up by several EU member

²⁰⁵ Ali Çarkoğlu and Binnaz Toprak, *Değişen Türkiye'de Din, Toplum ve Siyaset*, [Religion, Society and Politics in a Changing Turkey], TESEV Publications, November 2006.

²⁰⁶ Ibid., 51.

²⁰⁷ Eurobarometer 66, available online at:

http://ec.europa.eu/public_opinion/archives/eb/eb66/eb66_tr_exec.pdf, 29.05.2007.

²⁰⁸ Önis,

²⁰⁹ Kulahci, 396.

²¹⁰ Ihsan Dağı, "Transformation of Islamic Political Identity in Turkey: Rethinking the West and Westernization", *Turkish Studies*, Vol.6, No.1, 21-37, March 2005, 32.

states and the developments in the Middle East.²¹¹ In this regard, several hypotheses have been elaborated; that the country was made vulnerable to foreign occupation, the foreign powers are trying to re-implement the Sevres Treaty, foreign missionaries are trying to Christianize the public and increased foreign investments and property acquisition raised considerable suspicion.²¹² Particularly the fears of disintegration and imperialism emanating from the reasons cited above have unified the Right and the Left into an unprecedented anti-EU coalition.

In fact, inherent absence of a perception of human rights for the sole reason of being entitled to these rights by virtue of being a human being reduces the perception of human rights to the reforms undertaken for the EU membership. At this point, the open-ended character of the EU membership incentive and the inconsistencies of the EU policy towards Turkey²¹³ strengthen this anti-EU coalition and impair the legitimacy of reforms particularly with respect to minority rights and freedom of expression, and abolition of death penalty.²¹⁴

As I have argued earlier, the end of PKK terrorism had produced a fertile ground for reform adoption in 1999; however, the situation was reversed with its resurgence in late 2004.²¹⁵ This has unfavourable consequences particularly for the mainly Kurdish population in the region. It has brought to the problem of internal displacement back to the

²¹¹ Ziya Önis, "Turkey's Encounters with the New Europe: Multiple Transformations, Inherent Dilemmas and The Challenges Ahead", *Journal of Southern Europe and The Balkans*, Dec.2006, 1-26., 23.

²¹² Çarkoglu and Topraki 16.

²¹³ The EU membership credibility is on the decline due to inconsistencies such as 'open-ended' character of negotiations, the 'absorption capacity' debate, and the explicit opposition of France and Germany who insist on a 'privileged partnership'. In general, the arguments against Turkish membership centers on the size, identity and geographical location of the country. Since 29 November 2007, accession talks have been suspended on eight chapters due to the stalemate concerning opening of ports and airport vessels to Greek Cypriot vessels. Of the many inconsistencies are the EU's contradictory stance against two perpetrators of crimes against humanity; the Croatian General Ante Gotovina and Ocalan. Capture of Gotovina was imposed as a requirement to start the accession talks with Croatia whereas the EU member countries (Italy and Greece) attempts to provide a refuge for Ocalan received no reaction from the EU. Senem Aydin Düzgit, *Seeking Kant in the EU's Relations with Turkey*, TESEV Publications, December 2006, 23.

²¹⁴ Aydin and Keyman, "EU Conditionality...", 80.

²¹⁵ The Kongra-Gel (Kurdistan People's Congress), successor to the PKK, announced the end of ceasefire in late 2004 and clashes with the security forces in south eastern region as well as bomb explosions in western coastal towns and metropolitan centres have been threatening security.

agenda²¹⁶ along with the extrajudicial killing of Ahmet Kaymaz and his 12-year old son in late 2004 and the bombing of a bookstore in Semdinli by a network of local and higher level security forces in cooperation with a renegade member of PKK.²¹⁷ Furthermore, the culmination of terrorist attacks since 2005 has aroused ‘uneasiness’ among security forces towards the new laws which were declared as ‘too permissive’.²¹⁸ In June 2006, this induced a partial return from the adopted reforms, which is most evident in adoption of *Law on Amending the Turkish Anti-Terror Law* in 2006. The most contentious articles of the new Law are; Article 5, which increases penalties for the press for separatist propaganda, Article 11 and Article 14 which bring additional protection for security forces and Article 16 which entitles the security forces to shoot terrorists after they warn them to surrender. The new law was adopted in consensus with the opposition party but received substantial opposition from a number of intellectuals and NGOs.²¹⁹

²¹⁶ A large number of villages have been evacuated by the security forces in order to fight against the PKK. According to government sources, between 355-370,000 people have been displaced. cited in Volkan Aytar, “An Overbearing Past, a Promising ‘Current’ and a Bleak Future? Balancing Citizens’ Rights and Security in Turkey”, An Assessment Report, TESEV, February 2006, 7.

²¹⁷ Ibid., 14.

²¹⁸ Volkan Aytar, “A Bleaker Future Now? Report on the New amendment to the Anti-Terror Law”, TESEV, July 2006, 3.

²¹⁹ Ibid., 8-10.

CONCLUSION

In this thesis, I aimed to investigate whether the constitutional and legal human rights reforms adopted under the EU membership conditionality have a positive impact on the consolidation of democracy in Turkey. Consolidated democracy was conceptualized as the maintenance of legal guarantees for citizens' rights and liberties by referring to the criterion of the rule of law. Given their abundance, citizens' rights and liberties were confined to three core fundamental rights and liberties; abolition of death penalty, prevention of torture and mistreatment and freedom of speech. The selected rights as the unit of analysis were considered to be representative of fundamental human rights. Furthermore, the role of the judiciary was incorporated within the concept of the rule of law as an essential means of enforcement mechanism.

A comparative evaluation of Turkish constitutions was presented in order to evaluate the notion of human rights and enforcement mechanisms. The evaluation reflected the peculiarity of predominance of survival concerns over full exercise of human rights. That the Turkish Constitutions prioritized the state over individuals was against the inherent nature of constitutionalism. Human rights was particularly politicized and restricted with the 1980 Constitution made under the auspices of a military regime.

The impact of the EU on democratization of human rights in Turkey was elaborated on the basis of two instruments devised to change state behavior; normative pressure and conditionality. Evaluation of EU influence on human rights policies of Turkey on a temporal basis; prior to and post 1999 has demonstrated that conditionality gives external powers more leverage on inducing state behavior than normative pressure. This was evident in the Turkish case when violations of human rights continued despite European pressure during the military regime and induced only partial change after transition to multiparty democracy in 1983. On the other hand, after Turkey was granted candidacy status at the

Helsinki Summit of 1999, she embarked on an unprecedented reform process in fulfillment of the Copenhagen Criteria and harmonization with the EU law. This resulted in thirty four constitutional amendments which completely lifted the death penalty, extended the measures against torture and partially removed restrictions on the freedom of speech and independence of the judiciary. Depending on this fact, the motivation behind rule adoption was explained by referring to the External Incentives Model which belongs to the school of rational institutionalism and follows the ‘logic of consequentialism’.

Thus, I infer that prospects of strong incentive, which is in this case, EU membership, assigns a strong leverage on the EU for democratization of human rights and reduces the influence of domestic opposition in the rule adopting state. This was most apparent in the case of abolition of death penalty in Turkey when the motive behind the execution of this law was strong after the capture of the PKK leader Ocalan. Abolition of death penalty and outstanding decrease in cases of torture and mistreatment has been major improvements in fundamental rights and liberties.

Yet problems remain in the field of freedom of speech and judicial independence. Incompetence to remove the restrictions in these realms is related to ideological reasons, legacy of strong authoritative state tradition and lack of sufficient conditionality.

The case of Turkey shows that domestic actors; politicians and civil society have played a significantly positive role in the process of rule adoption and implementation despite some setbacks in bureaucracy and judiciary. On the other hand, the resurgence of separatist terror poses a major obstacle to implementation and even induces the government to take measures against the spirit of reforms.

In the light of the data and arguments presented by this study, the positive impact of the undertaken reforms’ on improving the level of democracy in Turkey is an undeniable fact also supported by the European Commission’s Progress Reports as well as the changing

scope of applications to the ECHR from matters of violations of fundamental rights and liberties to property rights.²²⁰ Above all, the relevant constitutional amendments have redefined the notion of human rights; unlike the previous Constitutions-with the exception of 1961-they have increased the sphere of fundamental rights and liberties vis-à-vis survival concerns of the state. However, given the novelty of the reforms and the threat posed by separatist terror, their impact on the consolidation of democracy remains to be seen.

²²⁰ Prior to 2000, complaints on Turkey were mostly on political matters concerning the right to life, freedom of expression, prohibition of torture, right to liberty and security whereas recent applications pertain to property rights: some 70% of the applications filed after 2000 are about delays in the payment after nationalization of private property, violation of property rights and delays in court proceedings. Ercan Yavuz, "European court verdicts place heavy burden on Turkey" *Today's Zaman*, 28 February 2007.

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