

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**COMMISSION EUROPEENNE POUR LA DEMOCRATIE PAR LE DROIT**

**CONSTITUTIONAL IMPLICATIONS OF ACCESSION TO THE EUROPEAN UNION**

**LES IMPLICATIONS CONSTITUTIONNELLES DE L'ADHESION  
A L'UNION EUROPEENNE**

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The European Commission for Democracy through Law (Venice Commission) is an advisory body on constitutional law, set up within the Council of Europe. It is composed of independent experts from member states of the Council of Europe, as well as from non-member states. At present, more than fifty states participate in the work of the Commission.

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La Commission européenne pour la démocratie par le droit (Commission de Venise) est un organisme consultatif en matière de droit constitutionnel, créé au sein du Conseil de l'Europe. Elle est composée d'experts indépendants d'Etats membres du Conseil de l'Europe, ainsi que d'Etats non membres. Plus de cinquante Etats participent aux travaux de la Commission.

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**THE EXPERIENCE OF HALF A CENTURY OF EUROPEAN INTEGRATION**

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**Introduction**

According to conventional doctrine accession to the European Union is a straightforward task from a constitutional point of view. The State acceding to the European Union has to transfer a part of its sovereignty to the European Union (or the European Communities).<sup>1</sup> This transfer is seen as limited, and decisions later taken by EU institutions could (and even should) be tested against the initial transfer. Thus it would be possible for each Member State to assess and identify the limits of membership, integration and cooperation.

Reality, however, is much more complicated and complex. Three of the arising difficulties may be mentioned here.

The first difficulty is to determine how much or which part of national sovereignty should be transferred. The solution to this difficulty depends on the status of integration and cooperation within the Union, of the *acquis communautaire*. But it is not easy to clearly identify the current status of the *acquis*, and it is also notoriously difficult to collect sufficiently reliable information about the finer details of the legal system of candidate states in order to determine what has to be done<sup>3</sup> to achieve thorough implementation of the *acquis*. The volume of the *acquis* has become enormous, and full implementation nowadays demands an examination of all nooks and crannies of the legal order of a state applying for accession to the Union.<sup>2</sup>

Secondly, there is the difficulty that community law presents itself differently in different areas of law. In some areas – for example agricultural and customs law – secondary legislation dominates and the density of norms derived from such secondary legislation is high; in other high-density areas – for example competition law – case law together with provisions of the Treaties is dominant. In other areas – for example the common transport policy area – both legislation and case law are fragmentary and the overall density of legal norms of all kinds is low.

A third difficulty is caused by the fact that community law to a very high degree is law in the making. Even in areas where norm density is high, Community legislation is far from comprehensive and supplementary case law therefore plays an important role. But the substance of case law can be hard to grasp. Court decisions have to be interpreted, agreement about their interpretation is not always easily achieved and may change, and new decisions are turned out by the courts *en masse*. This ongoing process requires continuous screening of national law and changes in it – not only in the law as derived from ordinary legislation and case law, but also in constitutional law. And this applies to all states concerned – Member States as well as states associated with the Union and states preparing for membership. Turkey is affected by this in more than one way, as Contracting Party to the Agreement on Association of 1963<sup>3</sup>, by the decision of 1995 on implementation of the final phase of the Customs Union<sup>4</sup> and with regard to its application for membership of 1987<sup>5</sup>.

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<sup>1</sup> Cf. Hans Peter Ipsen, *Europäisches Gemeinschaftsrecht*, Tübingen 1972, p. 67–78.

<sup>2</sup> Cf. the National Programme for the Adoption of the Acquis at [http://europa.eu.int/comm/enlargement/turkey/docs.htm\(1of2\)](http://europa.eu.int/comm/enlargement/turkey/docs.htm(1of2)) [2001-12-15 17:50:37].

<sup>3</sup> Agreement establishing an Association between the European Economic Community and Turkey (signed at Ankara, 12 September 1963), *Amtsblatt der Europäischen Gemeinschaften* 1964 Nr. 217, *Celex* 264A1229(01); Additional Protocol and Financial Protocol, signed on 23 November 1970, annexed to the Agreement establishing an Association between the European Economic Community and Turkey, *Amtsblatt der Europäischen Gemeinschaften* 1972 L 293, *Celex* 264A1123(01). English versions of these texts and of texts of the Council Decision of 23 December 1963 concluding the Agreement and of the Council Regulation (EEC) No 2760/72 of 19 December 1972 on the conclusion of the Additional Protocol and of the Financial Protocol in

But let me start half a century ago.

## The Beginning

European integration since 1950 has taken place mainly within the structures of the Council of Europe and the European Communities, later the European Union.

The treaties founding these organizations were signed between 1949 and 1957,<sup>6</sup> and between these years the political framework and some ground rules for post-war cooperation were established in Western Europe. As part of that process the 1950s became a decade of political and diplomatic construction work for both the Council of Europe and the European Communities.

In the beginning this work followed well-established patterns both on the European level and on the level of the participating states. The task ahead was identified as to construct rules for peaceful political and economic cooperation of the sovereign states of Western Europe. On the European level established international law had to be the basis for the work to achieve this task, and on the national level the constitutional law of each of the participating states had to provide the necessary tools.

A few years into the 1950s, however, first signs appeared that this approach had to be reviewed on both levels; the conventional ways and means of international law and of the constitutional laws of the European states were obviously not entirely appropriate for cooperation within Europe according to the new treaty systems. Therefore, the cooperating sovereign states could not rely any more on traditional approaches on either level; implementation of the contents of the treaties became a really demanding task. It became clear that the Western European states were encountering new constitutional problems. To solve them, the Member States of both the Council of Europe and the European Communities had to develop *new* methods for international contact, coordination and cooperation and for

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*Collection of the Agreements concluded by the European Communities, volume 3 (Bilateral agreements EEC-Europe 1958–1975), p. 541–683.*

<sup>4</sup> Cf. *Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union, Official Journal of the European Communities (OJ) 1996 L 35/1, Celex 296D0213(01), and Decision No 1/2001 of the EC-Turkey Customs Cooperation Committee of 28 March 2001 amending Decision No 1/96 laying down detailed rules for the application of Decision No 1/95 of the EC-Turkey Association Council, OJ 2001 L 98/31, Celex 201D0283.*

<sup>5</sup> *Bulletin of the European Communities 4-1987, point 1.3.1 and 1.3.2, submission on 14 April 1987 of Turkey's applications for accession and Council decision on 27 April 1987 to acknowledge receipt. – Concerning the current state: 2001 Regular Report on Turkey's Progress Towards Accession. SEC (2001) 1756, 13.11.2001. Earlier reports: 2000 Regular Report from the Commission on Turkey's Progress Towards Accession, 8.11.2000; 1999 Regular Report from the Commission on Turkey's Progress Towards Accession, 13.10.1999; [1998] Regular Report from the Commission on Turkey's Progress Towards Accession. All documents at <http://europa.eu.int/comm/enlargement/turkey/docs.htm> [2001-12-15 17:50:37]. – For the earlier stages of the relations between Turkey and the Union cf. Meltem Müftüleri-Bac, *The Never-Ending Story: Turkey and the European Union*; in Sylvia Kedourie (ed.): *Turkey Before and After Atatürk, Internal and External Affairs*, London and Portland, Oregon, 1999, p. 240–258.*

<sup>6</sup> *Statute of the Council of Europe, London, 5 May 1949, European Treaty Series (ETS) no. 001; at <http://www.coe.int>. Treaty establishing the European Coal and Steel Community, Paris, 18 April 1951; Treaty establishing the European Economic Community, Rome, 25 March 1957, and Treaty establishing the European Atomic Energy Community, Rome, 25 March 1957; consolidated and historical texts at <http://europa.eu.int/eur-lex/en/index.html>.*

domestic implementation of international obligations. This was a task for which there was almost no precedent.

The upcoming problems touched vital functions of all branches of government powers in the Member States and of the relations between each and all of the branches on one side and the European institutions on the other.

At the center of *legislative* policy shaping within the Member States were the national parliaments. Each of them was the supreme sovereign of its country, the people, and accustomed to act accordingly. How could their decisions be coordinated, how could or should these sovereigns cooperate? What could be the role of their counterparts at the European level, the assemblies of the Council of Europe and the European communities?

The national governments, the foremost *executive* institutions of the Member States, had to represent their home states internationally. These governments had to do under domestic constitutional responsibility to their home parliaments, and under this responsibility each government had to represent its Member State within the Council and the Communities. However, at the same time all governments together had to act as institutions of the common organization. What, then, was the meaning of “responsibility to parliament” in this latter context?

Role conflicts were obviously unavoidable. What could or should be done about them and about potential disagreement concerning proper behavior? Should there be a review of potentially disputable or even wrong decisions by international arbitration or by an international court of law? In case of disagreement should the common view or any view of the Member State prevail? Should there be a system of sanctions to enforce a prevailing view?

The methods to deal with these problems of legislative and executive coordination and cooperation have varied widely. Many of the problems are still not solved entirely. But it is worth noticing that these problems were taken astonishingly lightly – almost ignored – in the early years of the Council and Communities. Lately, however, they have continuously been at the center of both the negotiations of the intergovernmental conferences of the European Union and of the negotiations between the European Union and the many states that have applied for membership.

The corresponding problems of the *judicial* powers were somewhat less virulent. They were handled by the judges of the law courts of the Member States and their two counterparts on the European level, the European Court of Human Rights and the Court of the European Communities, the EC Court. And the judges dealt with the problems arising in their domain more systematically and consistently than those arising from legislative and executive coordination and cooperation were taken care of by governments and parliaments.<sup>7</sup> Let me therefore summarize the experience of the half-century since 1950 of constitutional implications of accession to the European Communities and the European Union mainly in the perspective of the *judiciary*. And let me start, not with the European Communities, but with the Council of Europe – a close relative to the Communities, a few years older, not so

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<sup>7</sup> Cf. concerning the role of the EC Court the outstanding analysis by Joseph H. H. Weiler: *The Constitution of Europe*, Cambridge 1999, p. 188–218 (“The least dangerous branch: A retrospective and prospective of the European Court of Justice in the arena of political integration”).

much in the focus of public debate and more diplomatic than its younger kin, but nevertheless a very forceful promoter of European cooperation and integration which has often been working in tandem with the Communities.

### **The European Court of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms**

It had been a both bold and lucky stroke to make the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>8</sup> a cornerstone of the legal system of the Council of Europe. Even bolder was to establish judicial machinery alongside the political one to enforce the provisions of the Convention. How bold and well timed these strokes were become obvious if one compares the Convention-system to the system of the European Social Charter.<sup>9</sup> The Charter is the counterpart to the Convention in the social domain. It is eleven years younger than the Convention, and a revised version was finalized in 1996. But the Charter is supported by much weaker supervisory machinery than the machinery of the judicial institutions enforcing the Convention, and its impact therefore has been much less than that of the Convention.

Among the first cases of the European Court of Human Rights were the *Lawless* case,<sup>10</sup> the cases “*relating to certain aspects of the laws on the use of languages in education in Belgium*”<sup>11</sup>, and the cases of *Matznetter*<sup>12</sup>, *Neumeister*<sup>13</sup> and *Stögmüller*<sup>14</sup> v. *Austria* and *Wemhoff*<sup>15</sup> v. *Germany*. In the Belgian cases the Court held that the relevant Belgian legislation did not comply with Article 14 of the Convention and Article 2 of the first Protocol. In two of the Austrian cases<sup>16</sup> the Court held that there had been a breach of Article 5 (3) of the Convention. And finally, in three of these four cases the Court reserved for the applicants concerned the right to apply for just satisfaction in regard to the violations.

The judgments in these early cases were virtual icebreakers. They established comprehensive international accountability under written law for violations by domestic institutions – any domestic institution – of a sovereign state. The states were parties to the proceedings, not their institutions, and a judgment against a state inevitably put pressure on this state as a whole to prevail over its failing institution regardless of the constitutional position of this institution. This had to be done by available means – legislative, executive or judicial action. If means were not available because of constitutional obstacles, a reassessment of the constitutional situation was inevitable. And since then such reassessments sooner or later have led to constitutional change. The alternative would have been to avoid international pressure by

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<sup>8</sup> *ETS no. 005, Rome, 4 November 1950, now as amended by Protocol No. 11.*

<sup>9</sup> *Turin, 18 October 1961, ETS no. 035; revised Strasbourg, 3 May 1996, ETS no. 163.*

<sup>10</sup> *Publications of the European Court of Human Rights (ECHR) A 1–3; judgment 1 July 1961. These and all other decisions of the Court available even at <http://hudoc.echr.coe.int>.*

<sup>11</sup> *ECHR A 5 and A 6; judgment 23 July 1968.*

<sup>12</sup> *ECHR A 10, judgment 10 November 1968.*

<sup>13</sup> *ECHR A 8, judgment 22 June 1968.*

<sup>14</sup> *ECHR A 9, judgment 10 November 1969.*

<sup>15</sup> *ECHR A 7, judgment 27 June 1968.*

<sup>16</sup> *Neumeister ECHR A 8 and Stögmüller ECHR A 9.*

leaving the Council of Europe. But that has never been a realistic possibility for any of the European states.

During the early years of the judicial activities of the European Court of Human Rights these consequences for domestic constitutional development were not really understood by everyone responsible. Today, the judgments are widely known, but I think they did not get proper attention when they were delivered. There were reasons for this lack of interest both within public institutions of the Member States and citizens in general. Let me mention four.

One of the apparent reasons was that it took the Commission and the Court of Human Rights far too many years of investigation, litigation and deliberation to reach judgments on the merits of the cases before them.

A second reason was that states were parties to the cases, and these states as well as the Commission and the Court conducted business with the tools of careful diplomats. Procedure and confidentiality were considered to be highly important. And there was a desire to avoid potentially spectacular and embarrassing judgments whenever possible. If a violation had occurred it was preferred to seek relief for individuals by means of settlement out of court. Humbling of a failing state by judgment delivered in open court had to be avoided.

A third reason was that government lawyers during these early years were not really accustomed to thoroughly analyze the carefully reasoned and narrowly written early decisions of the Commission and the Court. If a state had not been a party to a case, it could be difficult for its government to get guidance as to possible implications for its domestic legal system.

A fourth reason was the firm opinion in the old democracies of Western Europe that their constitutional order and their legislative, executive and judicial systems met very high standards and could not really be violating human rights. These states could accept that there could be minor deficiencies in old statutes; there could even be mistakes or misconduct of administrative authorities while applying the law in individual cases. But the notion that under a democratic constitution premeditated violations of human rights could be committed or upheld by any branch of government was viewed as not realistic, almost absurd.

However, when the ice had been broken by the early judgments, attitudes to both the Convention and the Court became more open and thoughtful, and gradual convergence of constitutional ideas began in earnest. The changes were not entirely voluntary. Many states had to meet their Waterloo first. It happened early for Austria – in the early cases already mentioned – and rather late for the United Kingdom and for Sweden.

Sweden had signed the Convention in 1950 and ratified it in 1952,<sup>17</sup> but had been reluctant to accept jurisdiction of the Court. This was done in 1966.<sup>18</sup> Ten years later the Court delivered judgments in the first Swedish cases,<sup>19</sup> in which the Court found that Sweden had not violated the Convention. But another six years later, in 1982, the Court found against Sweden in the

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<sup>17</sup> Cf. *proposition 1951:165, utrikesutskottet 1951:11, riksdagens skrivelse 1951:251, Sveriges överenskommelser med främmande makter 1952:35.*

<sup>18</sup> Cf. *proposition 1966:33, utrikesutskottet 1966:3, riksdagens skrivelse 1966:152, Sveriges överenskommelser med främmande makter 1966:75.*

<sup>19</sup> *Judgments of 6 February 1976, Swedish Engine Drivers' Union case, A 20, and Schmidt and Dahlström case, A 21, both concerning Article 11 of the Convention.*

case of *Sporrong and Lönnroth*.<sup>20</sup> More such judgments would follow soon. Some of them found that Sweden consistently violated Article 6 of the Convention by restricting access to court in administrative proceedings.<sup>21</sup>

In these latter judgments the Court did not accept the Swedish constitutional doctrine that domestic administrative courts should not review all administrative decisions and that review could take place only if expressly permitted in legislation. The reason for this restrictive position was to be found in the Swedish interpretation of the doctrine of separation of powers. Administrative courts as part of the judicial branch of government should not interfere with the executive branch. Such interference could occur, if these courts were permitted to review a discretionary decision of the executive branch. The proper constitutional role of administrative courts was therefore in principle conceived as to review the *technical*, not the discretionary aspects of interpretation and application of the law by the executive branch of the government. Administrative decisions, which typically were dominated by discretionary considerations, could therefore be excluded from review by statutory provision.

This constitutional policy was not manifest in the text of the constitution. It was derived from the interpretation of constitutional provisions, but it was enacted in ordinary legislation and as legislative policy firmly embraced by political parties which together had held a considerable and over the years stable majority in the Swedish parliament. When the European Court of Human Rights delivered its judgments on the limitations which Swedish legislation put on access to the Swedish administrative courts, it was therefore a deeply rooted and cherished interpretation of the Swedish constitution which had been put on the block.

The first official reaction to the judgments of the Court of Human Rights was mildly defiant. In 1988 tentative legislation was enacted<sup>22</sup> to allow extraordinary review by the Supreme Administrative Court in some of the matters concerned. But this was a fig leaf and piecemeal approach. It gave access to administrative court proceedings in enumerated cases and their list became longer and longer. But, because the underlying interpretation of the Constitution was unchanged, it failed to outline in *general terms* a solution to the problem of how to correctly implement Article 6 of the Convention and it failed to reach the constitutional standard which the Court of Human Rights had set by its judgments. Therefore the political debate gained momentum whether Sweden could afford to disregard the Convention – which Sweden obviously could not! And in 1994 the resulting pressure led to the transposition of the Convention into Swedish law.<sup>23</sup> This was done by statute almost on the level of the constitutional laws of Sweden. And in 1998 this transposition was followed up by changes in the Administrative Procedure Act<sup>24</sup>, which further facilitated access to administrative courts. But not even today – more than a decade after the judgments of the European Court of Human

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<sup>20</sup> *Judgment of 23 September 1982, A 52, violation of Article 1 of Protocol No. 1 and of Article 6 par. 1.*

<sup>21</sup> *Cf. among others a string of judgments which were hotly debated in Sweden: Judgments of 27 October 1987, cases of Pudas, A 125-A, and Bodén, A 125-B; judgment of 26 May 1988, case of Ekbatani, A 134; judgment of 22 June 1989, case of Langborger, A 155.*

<sup>22</sup> *Lagen (1988:205) om rättsprövning av vissa förvaltningsbeslut.*

<sup>23</sup> *Lagen (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna; in force since 1 January 1995.*

<sup>24</sup> *22 a § förvaltningslagen (1986:223); added to the act by lagen (1998:386) om ändring av förvaltningslagen (1986:223).*



Rights – can one be entirely sure that Swedish constitutional doctrine and Swedish administrative law is fully in line with the European standards set by the Court.<sup>25</sup>

Sweden has not been alone in its struggle for compliance of its domestic law with the Convention. A notable case of similar difficulties has been the United Kingdom, which implemented the Convention in October 2000, when the Human Rights Act 1998, which had been passed by Parliament in 1998, entered into force.<sup>26</sup>

Let me now turn to the European Communities and the European Union.

### **The Courts of the European Communities and the Treaties establishing the European Communities and European Union**

The development in the European Communities had as similarly a quiet and slow start as the development of the human rights system of the Council of Europe and the evolution of its influence on the constitutions of the Member States.

The first court of the European Communities, the Court of the European Coal and Steel Community, decided only a few cases. The judgments of this Court were commonly understood as quite technical in substance and thus unspectacular for those other than practitioners of coal and steel law. But the finer print in some of these old decisions would get immense practical importance only a few years later. One of these decisions to remember is the – then widely unnoticed, but now famous – judgment in the case of *Dineke Algera et al. v. the Assembly*.<sup>27</sup> This decision became the starting point for the development of general principles of European Community law. These principles are now greatly influencing both constitutional and administrative law in many Member States.<sup>28</sup>

In January 1958 the EC Court began its work. Unlike the European Court of Human Rights the EC Court was not conceived as a court of last resort, where individuals could seek relief in cases of violation of their rights, but as guardian of the Treaties. Therefore, references for preliminary rulings according to Article 177 of the then EEC Treaty (now Article 234 EC), actions concerning failure of a Member State to fulfill its obligations under Article 171 of the EEC Treaty (now Article 228 EC), and similar business of the Court with focus on legal argument became the heavy part of the Court's workload.

The first years of the EC Court were not very spectacular. Initially there was similar uncertainty about the role of this Court as there had been about that of the Court of Human Rights.

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<sup>25</sup> Cf. Olof Petersson et al.: *Demokratirådets rapport 1999, Demokrati på svenskt vis, Stockholm 1999*, p. 53–66.

<sup>26</sup> For this Act see Halsbury's *Statutes of England and Wales, Fourth edition, vol. 7 (1999 Reissue), Civil Rights and Liberties*, p. 497–531. The Act entered into force on 2 October 2000. – For the development leading to the transposition see Stefan Schieren: *Die stille Revolution, Darmstadt 2001*, p. 237–271.

<sup>27</sup> 7/56 and 3–7/57, 12.7.1957, *Sammlung 1957 S. 83, 1957 ECR 39*.

<sup>28</sup> Cf. Jürgen Schwarze: *European Administrative Law. Luxembourg and London 1992*. John A. Usher: *General Principles of EC Law. London and New York 1998*. Ulf Bernitz, Joakim Nergelius (editors): *General Principles of European Community Law. The Hague, London and Boston 2000*.

Much of the uncertainty disappeared in 1964, when the EC Court delivered its famous judgment in the case of *Flaminio Costa v. ENEL*.<sup>29</sup>

The case was trivial at first glance: Mr. Costa, the plaintiff, objected to his electricity bill of 1925 lire, which he had received from ENEL, and he took his objections to a judge hearing small claims, the *Guidice conciliatore di Milano*. Underlying this challenge was a far bigger question: Could Italian legislation on nationalizing the electricity industry, which was adopted subsequent to membership of the European Economic Community, take precedence over Community law?

Mr. Costa asked the *Guidice* to apply for preliminary rulings of both the Italian Constitutional Court and the EC Court – of the EC Court under Article 177 of the EEC Treaty (now Article 234 EC) – and the *Guidice* complied.

In a similar case the Italian Constitutional Court found against Mr. Costa's objections by deciding that the *Guidice* would have to apply the subsequent Italian legislation, even though it might have been found to be contrary to the EEC Treaty.<sup>30</sup> Could the EC Court really accept this view?

The Italian government tried to avoid a decision of the EC Court by arguing that the application of the *Guidice* for a preliminary ruling of the Court was "absolutely inadmissible". In substance it defended fiercely the Italian legislation. The EC Court, however, admitted the application and gave quite a different – and for the Italian government shocking – answer to the question which the *Guidice* had asked (or rather: the questions which he should have asked).

Among other things the Court found – and we now think it is settled – that "the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply." According to the Court the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.<sup>31</sup>

The EC Court further declared that "[i]t follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question." And the Court stated that "[t]he transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail."<sup>32</sup>

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<sup>29</sup> 6/64, 15.7.1964, *Sammlung 1964 S. 1251*; 1964 ECR 585.

<sup>30</sup> *Corte costituzionale, judgment no 14, 7.3.1964*; cf. <http://www.cortecostituzionale.it/pron/Pronunce/Massime/Anno%201964/2060.Htm> to 2066.Htm; judgment no 66, 12.7.1965, cf. <http://www.cortecostituzionale.it/pron/Pronunce/Massime/Anno%201965/2424.Htm> to 2429.Htm.

<sup>31</sup> *Costa v. ENEL*, 1964 ECR 585, at p. 593.

<sup>32</sup> *Costa v. ENEL*, 1964 ECR 585, at p. 594.

And lastly, *Costa* established that the subjects of the Community law system “are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal patrimony. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions.”<sup>33</sup>

These elements of the judgment in the *Costa*-case have ever since been guiding for the EC Court.<sup>34</sup>

As for example in the *Stauder*-case arising from Germany,<sup>35</sup> in which the Court decided to protect human rights as part of its development and application of general principles of Community law; or in the *Simmenthal II*-case,<sup>36</sup> again an Italian case, in which the Court found that a national judge’s duty under Community law not to apply domestic legislation that is found to be contrary to Community law had to take precedence over a domestic constitutional duty to refer cases of incompatibility and inapplicability to the national Constitutional Court.

It is not feasible to follow the whole trail of *Costa* here. Only one case can be mentioned, the case of *Francovich and Bonifaci and others v. Italian Republic*,<sup>37</sup> in which the EC Court delivered judgment 37 years later, in 1991.

In *Francovich* the Court had to decide whether a Member State was liable for loss and damage caused to individuals by breaches of Community law by the means of faulty legislation, for example by not fully complying with a directive. The Court ruled that Member States are requested to make good loss and damage caused to individuals by failure to transpose a directive. Once again the Court pointed out that it had “been consistently held that the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals”.<sup>38</sup> Then the Court continued: “The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.

The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on

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<sup>33</sup> So quoted in *Francovich and Bonifaci and others v. Italian Republic*, C-6/90 and C-9/90, 19.11.1991, 1991 ECR I-5357, paragraph 31.

<sup>34</sup> The final judgment of the *Guidice* (4.5.1966) is published in *Europarecht* 1966 p. 360–363 (with comments of Christoph Sasse p. 363–366).

<sup>35</sup> Case 29/69, *Stauder v. City of Ulm*, 12.11.1969, *Sammlung* 1969 p. 419 (p. 425 at paragraph 7) and 1969 ECR 419.

<sup>36</sup> Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*, 9.3.1978, 1978 ECR 629.

<sup>37</sup> *Francovich and Bonifaci and others v. Italian Republic*, C-6/90 and C-9/90, 19.11.1991, 1991 ECR I-5357.

<sup>38</sup> *Francovich*, 1991 ECR I-5357, at paragraph 32, with reference to cases 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*, 1978 ECR 629, paragraph 16, and C-213/89, *Factortame*, 1990 ECR I-2433, paragraph 19.

the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law.

It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.”<sup>39</sup>

Thus, legislative failure to fulfill an obligation is a serious thing under Community law. It not only exposes any failing Member State to the procedure under Article 228 EC (ex Article 171 of the EC Treaty), the failing Member State also becomes liable for loss and damage. The initially mentioned continuous screening of domestic law and its application for non-compliance has become an obligation which is enforced by sanctions. To put it simply:

If parliament – the sovereign representation of the people – does not take the correct decision in time, the Member State may have to pay damages!

It is obvious that it has been a long road from the constitutional concepts of the 1950s and their careful and diplomatic application in the early years of review by the European Commission Court of Human Rights to the constitutional concepts underlying the essence of the judgment of the EC Court in *Francovich*! And the tough *Francovich*-judgment has not at all been a unique case of enforcement of Community law. The *Francovich*-concept was gradually developed in a long line of earlier cases, and it has later been confirmed and extended to even more comprehensive responsibility.<sup>40</sup>

The application of Community law by the Member States has for many years been monitored by the Commission of the European Communities. The results have been published in annual reports. They are not very well known, but should be regarded as mandatory reading for every lawyer specializing in constitutional law. The latest of them, the 18th of the series, covers the year 2000 and was published in July 2001.<sup>41</sup>

In these reports the Commission on hundreds of pages painstakingly lists the progress achieved in implementing directives and known cases of incorrect application of directives. Further, the Commission reports details of infringements of treaties, regulations and decisions and of its infringement procedures; and even the application of Community law by national courts is surveyed in detail.

These comprehensive annual reports can be seen from both a negative and a positive angle. They offer the negative perspective that Member States are failing, and that they are failing frequently. However, a positive aspect is that they are failing in a not too great number of cases and that court proceedings under Article 228 EC seem to be handy tools to achieve desired compliance.

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<sup>39</sup> *Francovich*, 1991 ECR I-5357, at paragraphs 33–35.

<sup>40</sup> Cf. cases C-46/93, *Brasserie du pêcheur v. Federal Republic of Germany*, and C-48/93, *Factortame v. Secretary of State for Transport*, 5.3.1996, 1996 ECR I-1029.

<sup>41</sup> *Eighteenth Annual Report on Monitoring the Application of Community Law (2000)*. COM (2001) 309 final.

There has only been one single exception, the infamous rubbish tip *Kouroupitos* on the Isle of Crete. It has led to two judgments against Greece, the first in 1992<sup>42</sup> and the second eight years later, in 2000.<sup>43</sup> By the latter of these judgments, the Court had to order the Hellenic Republic to pay to the Commission of the European Communities a penalty of EUR 20 000 for each day of delay until the judgment in the first case had been complied with.<sup>44</sup>

So far, these combined judgments against Greece have been a unique exception to the rule that compliance with Community measures may be expected within a not too unreasonable time. But the sheer number of cases of initial and even prolonged failure to comply makes it necessary to ask why there are these delays and why Member States have to be taken to Court to achieve what they have declared themselves willing to do by acceding to the Communities.

The answer may well be that there are formidable constitutional obstacles. Such situations occur quite often, when legislative or executive responsibility is shared by the State and regional or local entities. In cases of this kind the EC Court usually points out that each Member State is free to delegate powers to its domestic authorities as it sees fit and, for example, to implement directives by means of measures adopted by regional or local authorities. But the EC Court also underlines that such division of powers does not release the Member State from the obligation to comply with EC law and, when a directive is in question, to ensure that the provisions of the directive are properly implemented in national law.<sup>45</sup> And it is settled case-law of the Court that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply in such situations.<sup>46</sup>

Let me now come to my conclusions.

## Conclusions

European integration has had a great impact on all levels of the legal systems of all Member States. Implications for constitutional law of the Member States have been many, and, I think it is fair to say, in this area particularly the feeling persists in the Member States that Community rules are “foreign laws”<sup>47</sup>. Constitutions are documentation of the collective political experience of a people, and such experience has deep roots!

But a new picture is developing. Traditionally the state has provided police, defense, law courts, etc., it has levied customs duties and taxes, and it has issued currency. All these

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<sup>42</sup> *Commission v. Hellenic Republic*, C-45/91, 7.4.1992, 1992 ECR I-2509.

<sup>43</sup> *Commission v. Hellenic Republic*, C-387/97, 4.7.2000, 2000 ECR I-5047.

<sup>44</sup> *Commission v. Hellenic Republic*, C-387/97, 4.7.2000, 2000 ECR I-5047, *operational part of the judgment*, paragraph 2. – *Payment of the penalty is reported in COM (2001) 309 final (p. 68)*.

<sup>45</sup> Cf. C-417/99, *Commission of the European Communities v. Kingdom of Spain*, 13.9.2001, at <http://curia.eu.int/>, paragraphs 16 and 37; in case C-71/99, *Commission of the European Communities v. Federal Republic of Germany*, 11.9.2001, at <http://curia.eu.int/>, paragraphs 13 and 16, *Germany is reported to have mentioned the same problem as an explanation. But obviously Germany did not try to use it as a defense, presumably because the position of the EC Court was well known in Germany; cf. Federal Republic of Germany v. Commission of the European Communities*, 12.6.1990, 1990 ECR I-2321, paragraph 13.

<sup>46</sup> C-468/00, *Commission of the European Communities v. French Republic*, 20.9.2001, at <http://curia.eu.int/>, paragraph 10.

<sup>47</sup> Cf. *European Governance. A White Paper. COM(2001) 428 final*, at p. 25.

activities are basic for a state; they are generally understood as part of its core functions and therefore they are both closely regulated in constitutions and deeply embedded in domestic administrative law. But changes in all these areas have already occurred. Common decisions of the Member States have provided the grounds to let the European Communities and the European Union take over much of the described activities, and many provisions in Constitutions of the Member States have of course been changed in the process of doing so. Now we have come so far as to discuss a Constitution for European citizens and the advantages and disadvantages of intergovernmental and supranational governance on the European Union level<sup>48</sup>. But the roots of constitutions are deep and it has taken a lot of time to adjust them to changes in the environment. For half a century that has made membership a difficult task for all Member States both politically and legally. Experience has shown that one never really can tell what will come next.

For all new Member States and Sweden among them it has been difficult to implement the whole *acquis communautaire* with the necessary speed and precision. It has been like riding on a running train with only a vague guess about the train's destination! The unavoidable shock of realizing that much screening of national law remained, even after membership, and that there was no exemption for constitutional law, was eased later by the experience that necessary changes of the cherished letter and custom of the constitution (as well as of the body of administrative law) – unwelcome as these changes were – were not that great. The reason is obvious. The political experience of every people is unique. It may lead to unique – sometimes odd, but explainable – features in constitutional law. But the bulk of constitutional ideas and traditions is common European heritage. It is this heritage and the willingness to acknowledge it as common – and not foreign – which in my view in spite of many obstacles has made European integration a success in the field of constitutional law.

## THE CHALLENGES TO CANDIDATE STATES

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### **I. Introduction**

The challenges to the candidate countries in the current accession process to the European Union may be at least partially understood from the previous experiences of new Member States during accession, first to the European Community, and later to the European Union, and the challenges which those accessions posed. The original six Members of the European Community were increased with the accession of the United Kingdom, Ireland and Denmark in 1973, Greece in 1981, and Spain and Portugal in 1986. In 1995 Sweden, Austria and

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<sup>48</sup> Cf. *The Future of the EU; Declaration of Laeken*; at <http://www.eu2001.be> [2001-12-15 21:00:55]. – *European Governance. A White Paper. COM (2001) 428 final*. – A long list of references concerning the debate on governance is collected in: Olof Petersson et al.: *Demokratirådets rapport 2001, Demokrati utan land, Stockholm 2001*, p. 142–150. To this list I want to add: Wayne Sandholtz, Alec Stone Sweet (editors): *European Integration and Supranational Governance. Oxford and New York 1998*.

Finland likewise entered the European Union. This already extensive experience is even of more interest, given that the new Member States had different levels of economic development and radically different political traditions, and the duration and the characteristics of their negotiation periods prior to accession varied considerably in each case.

Several lessons may therefore be learned from the experiences of these countries that may be applied to the enlargement of the European Union which will take place in the next few years and will affect the thirteen present candidate countries in Central and Eastern Europe and in the Mediterranean area. Nevertheless, this new enlargement also presents special characteristics due to at least two factors. First, the process toward European integration, which has given rise to the European Union, has resulted in an organisation with ever increasing powers and competences and, as a consequence, today demands greater efforts on the part of the candidate countries to adjust their legal and economic structures to the requirements of the Union. And secondly, until relatively recently the majority of the present candidate countries had political and economic regimes which were based on principles fundamentally opposite to those of the European Union and whose effects are still difficult to overcome.

Despite these differences, taking into account past experience as well as the specific demands required in this new integration process, it is possible to enumerate a series of challenges which the candidate countries must meet in order to achieve accession to the Union. Accession will demand numerous profound and complex changes and adaptations in the candidate countries' political, economic and judicial systems, some of which will require constitutional amendments. In conducting an initial analysis of these challenges, it is useful to group them chronologically according to the moment in which they must be met by the candidate countries. In that regard, we can distinguish three phases or stages:

- a) Challenges arising during the preparatory stage, prior to accession. This is the phase in which the bases must be established which will enable the candidate countries to assume the decisive commitments leading to formal accession.
- b) Challenges during the stage of formal accession. Incorporation into the integration process requires modifying the traditional terms defining the structure and competences of each state. Thus incorporation implies taking especially complex decisions of a constitutional nature and, as the Norwegian experience has shown, difficult decisions without a complete guarantee of success.
- c) Challenges in the stage subsequent to formal accession, that is, the phase in which the commitments assumed as a result of incorporation into the European Union are implemented. The new judicial, political and economic context resulting from membership in the Union will often require rearranging the position and functions of the different powers of the state.

To a lesser or greater degree, the response to all of these challenges will require legal reforms, including amendments to legislation and possibly to the candidate countries' constitutions. Certainly, it is not indispensable that these constitutional reforms be implemented in the chronological order alluded to above. For example, they could be implemented in a single package during the preparatory stage to facilitate future accession. They could be implemented successively over a prolonged period of time, or all of the necessary reforms could be made at the moment accession occurs. And some of them may take place once the

countries have entered the European Union. The classification suggested in this report is mainly for explanatory purposes.

## **II. Challenges During the Preparatory Stage Prior to Accession.**

The European Council meeting in Copenhagen in 1993 defined the criteria which applicant countries must meet before they may join the Community. These criteria include:

- The stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and the protection of minorities (political criterion).
- The existence of a functioning market economy as well as the capacity to cope with competitive pressures and market forces within the European Union (economic criterion).
- The ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union (criterion concerning the adoption of the Community *acquis*).

The candidate countries must also have created the conditions for their integration by adjusting their institutional organisation, so that European legislation transposed into the internal legal order may effectively be applied by adequate administrative and judicial bodies.

In reality, there is nothing new in these demands. Their principal merit resides in the fact that they summarise the requisites set forth in the Union's founding treaties. In that regard it would suffice to cite Article 2 of the Treaty on European Union (which states the objectives of the Union), or Article 6 (where the basic principles of the Union are set forth). In any case the decisions taken by the European Council at Copenhagen and ratified in subsequent Councils, requiring compliance with a series of requisites prior to accession, appear to be totally justified. The peculiar nature of the European Union, the values on which it is based, the objectives it pursues and the obligations which it imposes on its members make it necessary to ensure that the new countries formally accepted in the process of integration meet the indispensable conditions so that their accession can be effective, precluding social and political tensions and conflicts which failing to do so might create in those countries and in the Member States already belonging to the Union.

Compliance with the Copenhagen criteria affects a wide range of matters. For example, the different aspects of the Community *acquis* alone cover 31 chapters. Moreover, it is evident that compliance will involve a long process, depending on the individual circumstances of each candidate country. From a strictly material or quantitative perspective, there is little doubt that it will be this prior stage in which the candidate countries will have to make the greatest efforts toward their incorporation into the Union, and in which the largest investment in human and material resources will be required<sup>49</sup>.

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<sup>49</sup> For instance, the *2000 General Report* from the Commission on the Republic of Slovakia's progress towards accession (p.15) considered that the Slovakian Parliament should pass no fewer than 231 law bills in order to apply the *acquis*.



The challenges to be met in this stage are not principally of a constitutional nature<sup>50</sup>. As for the political and economic criteria, over the last decades all of the candidate countries have adopted constitutions based on the general principles of a democratic state under the rule of law and on the recognition of a free market economy. For that reason, the majority of the measures to be taken during this preparatory stage may be achieved through administrative or legal reforms of an infraconstitutional nature<sup>51</sup>. As for the third criterion (concerning the adoption of the *Community acquis*), compliance in this phase would be reflected in what has been termed the approximation of national law and Community law, principally requiring legislative reforms or improvements in the efficiency of the administration.

Nevertheless, experience and the periodic reports issued by the European Commission concerning the progress towards accession to the Union of each of the candidate countries demonstrate that during this preparatory phase issues of a constitutional or quasi-constitutional nature may also arise, particularly in relation to the first series of criteria (political criteria).

- a) As an instance, and as an eloquent indicator of compliance, the reports have examined whether the candidate countries have ratified international treaties and conventions in different areas. In the area of human rights, not only is the European Convention on Human Rights a point of reference (including its protocols and particularly Protocol 6 concerning the death penalty), but also the United Nations Covenants of 1966 including the International Covenant on Civil and Political Rights (and its optional protocols concerning all the right to individual communication and the abolition of the death penalty) and the International Covenant on Economic, Social and Cultural Rights. Concerning respect for minorities, the reports also make reference to the Framework Convention for the Protection of National Minorities and to the Convention on the Elimination of All Forms of Racial Discrimination<sup>52</sup>. The ratification of these treaties on the part of the candidate countries which have not yet done so may require constitutional amendments. And even if a constitutional reform is not strictly necessary, it may be advisable in order to reinforce policies to eliminate discrimination which the Commission has observed in some of the candidate countries.

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<sup>50</sup> Although the implementation of the *Association Agreements* has caused some constitutional conflicts. See, as an example, the observations of Barna BERKE concerning Hungary, in *Implementation of the Europe Agreement Competition Provisions. The Constitutional Implications*, Venice Commission, CDL-JU (2000) 43. BERKE (page 4 ff.) quotes a decision of the Hungarian Constitutional Court on the constitutionality of legislation incorporating the *Community acquis* by implementing the Association Agreement of Hungary with the UE.

<sup>51</sup> The European Council of Madrid (1995) stressed the importance of improving the administrative and judicial structures of the Member States: the Helsinki European Council pointed out that the fulfillment of the political criteria was a prerequisite for the opening of accession negotiations.

<sup>52</sup> As an example, the *General Report 2000 on Turkey's progress towards accession*, makes reference to Turkey's position in relation to the *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights* (p.11) as well as to the European Convention and its 6<sup>th</sup> Protocol (p.14), the *Framework Convention for the Protection of National Minorities* (p.14) and the *Convention on Elimination of all forms of Racial Discrimination*. In addition, references may be found in the *General Report 2000 on Slovakia to the ratification by this country of international treaties*, such as the *Convention on Elimination of all Forms of Discrimination against Women* (p. 18-19). In the *Addendum 2001 to the Report on Slovakia*, references are made to the *European Charter of Regional and Minority Languages* (p. 5).

- b) Neither can we exclude the necessity in some cases of reforms affecting structural elements of the apportionment of power, particularly concerning the position of the judicial branch of government and the precise delimitation of civil and military jurisdictions. In that regard the Commission's reports make reference to elements to be taken into account, such as accession to the Statute of the International Criminal Court, which could require a constitutional amendment in some cases<sup>53</sup>.
- c) An additional constitutional dimension, which must be considered, is the need for constitutional reform arising from the fact that the constitutions of the candidate countries may contain clauses which contravene specific mandates of the founding treaties of the Community and the Union. Accession to the European Union would require prior deletion or amendment of such clauses, either immediately before accession or during the preparatory stage.

It is not difficult to find examples of clauses of this type. One example would be clauses restricting the right to participate in elections as candidates or voters to citizens of the country in question<sup>54</sup>. It should be underscored that Article 19.1 of the Treaty establishing the European Community provides that "every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State." Compliance with this mandate would require eliminating any constitutional obstacles which contravene it. As a precedent, when this provision was introduced in the text of the Treaty amended at Maastricht, prior to ratification reforms were required in the constitutions of several Member States, including Spain.

In that regard, before accession it would also be necessary to reform any other constitutional provisions which would hinder or prevent the application of Article 19.1 of the Treaty establishing the European Community, such as those prohibiting non-nationals from belonging to political parties<sup>55</sup>. It is very doubtful that, given the interrelation among all political rights, such type of clauses could be considered compatible with the free and equal exercise of voting rights (to vote and to be a candidate) in local elections, as well as in elections to the European Parliament. Article 19.2 of the EC Treaty provides that EU citizens shall have the right to vote "under the same conditions as the nationals of that State", which would exclude discrimination based on factors as relevant as party membership. This interpretation is also reinforced in Article 123 of the Treaty, which forbids discrimination for reasons of nationality when applying Treaty mandates.

Other amendments required prior to accession would involve those constitutional clauses which prohibit non-nationals from owning certain types of property (for example, land, inland waterways, forests or parks)<sup>56</sup>, since such clauses contravene the principle of non-

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<sup>53</sup> For instance, *General Report Turkey 2000*, p.19.

<sup>54</sup> As example, Art 119 of the Constitution of Lithuania: "Members of local government councils shall be elected for a two year term on the basis of universal, equal and direct suffrage by secret ballot by the residents of their administrative unit who are citizens of the Republic of Lithuania". Many other instances of this reserve may be found in the Constitutions of the other candidate states.

<sup>55</sup> For instance, Art. 48 of the Estonian Constitution, which states that "only Estonian citizens may be members of political parties".

<sup>56</sup> Lithuanian Constitution, Art. 47; Constitution of Bulgaria, Art. 22.1: "No foreign physical person or foreign legal entity shall acquire ownership over land, except through legal inheritance".

discrimination in relation to freedom of movement of persons (including freedom of establishment), free movement of capital, and the freedom to provide services.

Finally, (and as one of many other possible examples) another case of conflict between constitutional mandates and specific provisions of the EU Treaties may be found in the constitutional provisions reserving the right to mint currency to a Central Bank<sup>57</sup>. Given the present stage in the development of a common monetary policy in the European Union, when the new Member States accede to the Union the existence of a single currency and the corresponding powers of the European Central Bank may prove to be incompatible with mandates of this nature.

### III. Challenges During the Accession Stage.

The tasks to be completed during the preparatory phase prior to accession will certainly require significant reforms in the legal systems and in the administrative and economic organisation of the candidate countries, some of which will have constitutional repercussions, as indicated above. However, these changes alone do not imply modifying during that stage the classical elements which define the organic structure of the State, i.e., the principle of sovereignty and the distribution of public functions among the different branches of government. But the situation is quite the contrary if we look at the formal accession stage. In this phase it is generally recognised that, in practice, full integration in the European Union implies transformations in that regard which affect the very structure of the constitution.

When considering the impact of integration into the European Union on the constitutional law of the applicant countries, it is obvious that the inevitable point of departure is the principle of the sovereignty of the State which is present in all of the constitutions of the countries in question. Without the need to reproduce here the main tenets of the classical theory of the State and the traditional concept of sovereignty as *summa ab omnibus soluta potestas*, it will suffice to recall that sovereignty implies the supremacy of the power of the State vis-à-vis any other internal or external powers, and the exercise of a series of functions and tasks traditionally associated with that position of supremacy.

But membership in the European Union necessarily has great consequences for the exercise of powers traditionally derived from the sovereignty of the State<sup>58</sup>. Undoubtedly, from an initial and formal perspective accession to the European Union is tantamount to concluding an international treaty, since signatory States accept a series of obligations which greatly restrict their sphere of autonomy and freedom of action. However, the peculiar characteristics of the European Union, and the obligations resulting from accession imply consequences for Member States that reach far beyond the general terms governing international law and its internal and external applications. “European law” cannot be equated with “international law”, and the classical principles of the latter differ from the ones governing the legal order of the European Union. Terms such as “monism” and “dualism” are not very useful in explaining the relationship between national and European law, or the way in which administrations and courts must apply European regulations and directives.<sup>59</sup> “Derived” or

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<sup>57</sup> *Constitution of Estonia, Art. 111. Constitution of Lithuania, Art. 129.*

<sup>58</sup> *On this subject, see Rainer ARNOLD, National Sovereignty and the European Union, Venice Commission, CDL-JV (2000) 42.*

<sup>59</sup> *See, for instance, BERKE, Implementation... cit. p.2, for the irrelevance of the monist /dualist difference when applied to European Union law.*

“secondary” European law is not “international” law anymore. Its binding force has its own justification, different from the binding force of international norms.

From an organic (or organisational) perspective the European Union has created a new entity (or, rather, a series of entities under the common umbrella of the EU) different from its component States, and having its own powers and functions. From the point of view of normative structure, this has resulted in the creation of an autonomous European legal order, different, although not isolated, from the legal orders of the Member States. Certainly, the process of European integration does not imply the disappearance or loss of significance of the national legal orders, or the lack of relevance of national constitutions as the supreme norms of the Member States. On the contrary, the European Union is based on the plurality of the European peoples and on the need for constitutional and democratic orders in each of them.<sup>60</sup> As stated in *Costa v. ENEL*, both legal orders, European and national, must function in an integrated manner.

The constitutional problems and challenges presented by formal integration into the European Union derive from the need to facilitate the transfer of public functions to European institutions, with the corresponding reduction of the powers of the authorities of the Member States. At least two subjects must be taken into account, each relating to reforms to be performed at the constitutional level by the applicant countries, in order to make constitutional mandates and integration into the European legal order compatible:

A first subject concerns the need for a constitutional clause (“European clause”) that would confer sufficient authority to the treaty-making authorities of the State to enable them to transfer sovereign powers from the State to the organs of the European Union by means of a treaty of accession. Closely related to this subject is the matter of defining the scope of that “enabling clause”, i.e., specifying the powers that may and may not be transferred by means of a treaty of accession, or on future occasions, in the event the Union Treaties are subject to reform.

From a dynamic point of view, the formal accession to the European Union also poses the question as to how to guarantee not only the efficacy and binding force of primary European law in the Member States after accession, but also how to comply with the consequences of the peculiar characteristics of direct effect and primacy of secondary or derived Community law, and to achieve its application on the part of the courts. A specific problem refers to what role, if any, should the national constitutional courts play in reviewing whether the treaty of accession, as well as European secondary law, conform to the mandates of the national constitution.

#### 1. A Constitutional Clause Authorising Transfer of Powers

As for the first topic (that is, the need for a constitutional clause authorising the transfer of powers) the autonomous European legal order, different from the legal orders of the Member States, although integrated and co-ordinated with them, is the result of conferring to the European Communities the exercise of legislative, executive and judiciary powers, initially belonging to the constitutional authorities of the State. This transfer of powers does not imply a loss of independence on the part of the Member States. But it does result in the disempowerment of some of the organs of State in relation to specific tasks and functions

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<sup>60</sup> Article 6 of the European Union Treaty guarantees the Member States' identity.

which have traditionally been associated with the very concept of sovereignty and which were expressly attributed to those organs by the Constitution. As a result of integration into the European Union, the executive, legislative and judiciary bodies of the State relinquish of a part of their powers which, thereafter, will be exercised by those of the EU.

To ensure that this transfer of powers to the EU does not contravene the distribution of powers established in the constitution, a constitutional mandate to that effect is required. This means that a clause within the constitution must expressly empower the treaty-making authorities of the State to ratify a treaty transferring constitutional powers. The clauses governing treaties currently present in many of the constitutions of the applicant countries would not permit the ratification of a treaty which not only establishes new obligations for the signatory states, but also attributes to the organs of a supranational organisation the exercise of functions and powers formerly belonging to the powers of those states.<sup>61</sup>

Therefore, in such cases it is necessary (or least advisable) to enact a constitutional clause (a *European clause*) which would enable powers closely bound to the notion of sovereignty to be attributed to the European Union.<sup>62</sup> In addition to the specific provisions of the Union Treaties and their interpretation by the Court of Justice of the European Community, this clause would provide a basic tool for reinterpreting the constitutional distribution of powers resulting from accession to the European Union. Moreover, from a dynamic point of view, in the event of reform or amendment of the Union Treaties requiring an additional transfer of powers to the European institutions, this enabling clause would be required in order to ascertain whether new attributions could be transferred (and ratified) without the need for further constitutional reform. In other words, a European clause is necessary not only to empower the treaty-making authorities to confer powers, but also to define the scope and limits of that attribution. In that regard, such clauses are, at present, lacking in most of the national constitutions of the candidate countries, a situation which could be defined as a "Constitutional gap". In consequence, there is a generally perceived need for constitutional reform to enact an enabling clause, since the constitutional mandates referring to the ratification of international treaties do not provide for the necessary transfer of powers.<sup>63</sup>

In this respect, the role of the national courts (and mainly, the constitutional court) could be significant as a means of verifying and reviewing the compatibility the mandates of the constitution with the European Treaties. It should be underscored that experiences have already been derived in that regard from the previous reforms of the Treaties, and particularly from the fact that in several cases the national constitutional courts or equivalent institutions of the Member States were obliged to rule as to whether the proposed amendments to the

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<sup>61</sup> Obviously, the situation is and will be changing given the reforms being introduced in the constitutions of candidates countries, the latest being the reform of the Constitution of Slovakia, which entered into effect on July 1<sup>st</sup>, 2001. A complete account on this subject can be found in the report presented to the Unidem Seminar *Intégration Européenne et Droit Constitutionnel*, which took place in Nicosia (Cyprus) 29-30 September 2000. The present report is to a large extent based on the documents presented at this seminar, as well as on the *Concluding Report*.

<sup>62</sup> Constitutional reforms were undertaken to introduce a *European clause* to make it possible to ratify the European Treaties in Austria, Belgium, Finland, France, Germany, Ireland, Portugal, Spain and Sweden. See the document of the Venice Commission *Le Droit Constitutionnel et l'intégration européenne*, CDL-UE (1999) 001.

<sup>63</sup> As an example of a clause of that nature, Article 90.1 of the Constitution of Poland provides that "the Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters".

Treaties conformed to their respective constitutions.<sup>64</sup> In this respect, and transferring the question to the circumstances of accession to the Treaties, the role of the courts or councils charged with reviewing the constitutionality of laws or treaties would be of paramount importance (within the provisions of their respective legal systems) to avoid including in the national legal order provisions that conflict with constitutional mandates. Preventive review of constitutionality (i.e., before the Treaties are ratified) appears to be advisable since it makes it possible to amend the conflicting constitutional clauses before the entry into force of primary European law. Of course, the existence of preventive constitutional review depends on the specific regulations in that regard in each country. In any case, the task of reviewing the constitutionality of primary European law would fall to the national constitutional courts.

As for the specific content of such empowerment clauses, the constitutions of some Member States have chosen to include in the enabling clause a specific reference to the purpose for which it was intended, (i.e., to permit the country to accede to the European Union).

## 2. Guaranteeing the Direct Effect and Primacy of Community Law

An additional constitutional challenge present in the phase of formal accession refers to the techniques for guaranteeing the implementation of primary and secondary Community law, respecting the principles of direct effect and primacy over national law. The transfer of law-making powers to European institutions implies that these institutions will continually produce rules, by virtue of the mandates contained in the Union Treaties. The application and enforcement of these rules (which are different from the Treaties, although derived from their binding force) must be assured in all Member States, even in the case of failure to act on the part of national authorities, or the existence in the national legal order of rules which directly contravene Community laws. The well-known judgements of the Court of Justice of the European Community in the cases *Van Gend en Loos*, *Costa v. ENEL* and *Simmenthal* are generally quoted in this respect.

One technique for ensuring the primacy and direct effect of derived European law could be to enact a specific constitutional clause to guarantee the direct effect and primacy of secondary Community law. Article 29, paragraph 4 of the Irish Constitution could serve as a model.<sup>65</sup> A similar clause has already been included in the Polish Constitution (Article 91, paragraph 3)<sup>66</sup>, as well as in the reform of the Slovakian Constitution which entered into force on July 1<sup>st</sup> 2001.

Strictly speaking, a "primacy clause" would not be necessary to ensure the direct effect and primacy of European law in Member States and, in effect, no such clause is present in the majority of the Member States' constitutions. Indeed, the guarantee of these principles is implied in the mere ratification of the Treaties, since the Treaties include not only provisions

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<sup>64</sup> Thus, decisions 92-308, and 97-394 of the Constitutional Council of France; Declaration of the Spanish Constitutional Court of July 1<sup>st</sup>, 1992.

<sup>65</sup> Art. 29.1.7 of the Constitution of Ireland: "No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership in the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State".

<sup>66</sup> Art. 91.2, Constitution of Poland: "If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws".

concerning the law-making powers of the European Community, but also those concerning the powers of the European Court of Justice, which in exercising those powers has interpreted the provisions of the Treaties and established the principles of direct effect and primacy of European law in the above mentioned decisions. The provisions of the Treaties themselves, their interpretation on the part of the Court, and the binding force of the Court's case law guarantee the direct effect and primacy of Community law. Nevertheless the presence of a "primacy clause" would certainly not be detrimental to the primacy of Community law, and would serve to underscore the commitments undertaken when acceding to the European Union.

#### **IV. Challenges Subsequent to Accession**

From a quantitative perspective, the foregoing would indicate that it is during the phase prior to accession in which the greatest number of changes in the legal systems of the candidate countries will be required. The phase of formal accession will likewise require constitutional changes of decisive importance in the system of legal sources and in the very definition of sovereignty. But the candidate countries will also face significant challenges once they have formally acceded to the Union, when putting the requirements for accession into practice. And these challenges may likewise have constitutional relevance.

An initial problem, which can be observed in the experiences of countries that previously acceded to the Union, concerns the assimilation of the Community acquis, which, upon accession, becomes directly applicable law. Certainly, we must assume that in the preparatory stage prior to accession there will have been an approximation of national law and the acquis, so that in general this assimilation will have already been achieved at the moment of accession. But in many cases, after accession it will be necessary to transpose not only those sectors of the acquis not yet incorporated into the internal legal order, but also the subsequent and continually-increasing Community norms, especially Community directives which must be made enforceable by national legislation. This will require a fair amount of law-making activity on the part of national authorities.

The manner in which these rules are implemented may present some difficulty. If this task is attributed to the legislature, the ensuing workload could occupy a good amount of the sessions of legislative chambers for months, or perhaps even for years. For that reason, the trend in some Member countries has been to have the executive branch of government carry out the greater part of the task of implementing Community rules, introducing techniques enabling collaboration between the legislative and executive branches. Thus, through delegating legislation passed in Parliament, the executive may be authorised to adapt internal law to the provisions of the acquis within a given period of time.<sup>67</sup>

A second post-accession problem concerns the participation of the different branches of government in the formation of European Union policy. The executive has traditionally been charged with directing international policy. However, the importance of the decisions adopted by Union institutions, which exercise powers previously reserved for the institutions of the Member States, and in order to respect democratic principles, it is advisable to have the legislature participate with the executive in the "ascendent" formulation of European policy,

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<sup>67</sup> *Spanish law 47/1985 granted the Government broad powers to transpose the Community acquis into the Spanish legal order prior to accession. The recently reformed Slovakian Constitution also seems to assign a significant role to the Government in that regard.*

defining national proposals to be presented in the corresponding institutions of the Union. This requires constitutional definitions of these new tasks for the legislature, which differ from their traditional functions. Many examples can be found in the constitutions of the Member States.

A third and rather complex question concerns the role of national courts in applying secondary Community legislation. The relevant factor in that regard is that in practice national judges become Community judges, charged with ensuring the correct application of European rules and even with the protection of the provisions contained in the founding Treaties. In effect, the institution which is ultimately responsible for interpreting primary Community law and reviewing the conformity of secondary legislation with the basic rules of the Community is the Court of Justice of the European Communities. But this task is only possible if the Court can count on the collaboration of national judges, fundamentally by applying the procedure provided in Article 234 of the Treaty Establishing the European Community which enables national judges to petition the European Court for rulings concerning the interpretation of the Treaties or the validity of actions taken by the institutions of the Community. This requires providing the adequate means in national procedural law to enable national judges to refer matters to the European Court for preliminary rulings. Thus, national judges do, in effect, act as European judges in cases in which a preliminary ruling from the European Court of Justice is warranted.

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## PRE-ACCESSION STRATEGIES TO THE EUROPEAN UNION

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### **Introduction**

The turn of the millennium has had a highly symbolic value for the European Union. It more or less coincided with the historical challenge of initiating the enlargement process towards ten Central and Eastern European countries (CEEC's), as well as Cyprus, Malta and Turkey. The end of an era traditionally triggers the impulse to make up the balance of past achievements and to reflect upon future prospects. This was no different for the European Union. The so-called "Agenda 2000" of the European Commission played a crucial role in outlining the future directions to be taken.<sup>68</sup> Nearly 50 years of European integration have produced a significant record of success, inciting other countries to apply to join the club. The appeal of the European integration process is best illustrated by the fact that the original six Member States more than doubled in numbers to the current 15 by 1995,<sup>69</sup> whilst 13 more

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<sup>68</sup> COM (97) 2000 final of 15 July 1997.

<sup>69</sup> The original six, namely Germany, France, Italy, Belgium, The Netherlands and Luxemburg, were joined by Denmark, Ireland and the United Kingdom (1973), Greece (1981), Portugal and Spain (1986) and Austria, Finland and Sweden (1995).



countries are nowadays officially candidates for accession to the European Union.<sup>70</sup> Additionally, the Western Balkan countries are now recognised to be “potential candidates for accession”.<sup>71</sup>

The European integration process has not only led to an important increase in numbers but also to profound changes in substance. The scope of the original three Treaties establishing the European Coal and Steel Community, the European Economic Community and Euratom has largely been superseded by the creation of the European Union and the inclusion of new subject matters such as the Common Foreign and Security Policy and Justice and Home Affairs in the 1990s. Among the more tangible achievements are the elimination of both tariff and non-tariff – including physical, technical and fiscal – barriers between the Member States in view of the internal market objective, and the establishment of the Economic and Monetary Union, which has entered into the third phase, with Euro coins and banknotes to be formally introduced on 1 January 2002.

European integration is necessarily and inherently an ongoing process, which requires a constant adaptation in terms of both substance and participants. This became particularly evident in the past decade. The end of the cold war and the dissolution of the Soviet Union radically reshaped the European continent and launched a widespread debate on “deepening versus widening”. The major challenge for the European Union was to change this generally negatively formulated equation into a positive momentum and to ensure that widening and deepening could go hand in hand. This implied finding a way to associate the newly independent countries of Central and Eastern Europe, as well as Cyprus, Malta and Turkey, as closely as possible to the European integration process whilst safeguarding the specific nature of the European integration process and the ability to reinforce it even further. It was clear that the candidate countries needed to undergo fundamental economic, political and legal changes. It was equally apparent that also the European Union itself needed to be reinforced in so far as its scope of action, its specific instruments and the efficiency of its institutions were concerned.

The approach to the enlargement issue was therefore necessarily twofold. On the one hand, there was the issue of the reforms to be made by the candidate countries in order to prepare for accession and the need to determine the framework of assistance to be provided by the European Union. To this end the so-called “pre-accession strategies” were introduced and elaborated upon. On the other hand, also the European Union needed to be prepared for the upcoming major enlargement by virtue of modifications of the EU Treaty. It proved to be easier to agree on the pre-accession strategies to be adopted for the candidate countries than on the fundamental changes to be introduced with respect to *inter alia* the institutions of the European Union. In spite of its stated objectives, the Amsterdam Treaty did not really prepare the European Union for enlargement so that this issue once again was put on the agenda of the Intergovernmental Conference leading up to the Treaty of Nice. The latter, which was signed on 26 February 2001 and is currently in the process of ratification in the Member States, *inter alia* modifies the composition of the institutions in view of the coming enlargement<sup>72</sup> as well

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<sup>70</sup> The respective dates of application for membership are: Turkey (14.4.1987); Cyprus (03.07.1990); Malta (16.07.1990); Hungary (31.03.1994); Poland (05.04.1994); Romania (22.06.1995); Slovakia (27.06.1995); Latvia (13.10.1995); Estonia (24.11.1995); Lithuania (08.12.1995); Bulgaria (14.12.1995); Czech Republic (17.01.1996); Slovenia (10.06.1996).

<sup>71</sup> European Council meeting in Santa Maria da Feira in June 2000.

<sup>72</sup> See the Protocol on the Enlargement of the European Union.

as laying down the future division of seats in the European Parliament and the weighing of votes in the Council with respect to a European Union of 27 members.<sup>73</sup> Except for the sensitive issue of the composition of the Commission, which was once again deferred,<sup>74</sup> the European Union is now formally set to take on board new members. This does not, however, mean that all hurdles have been overcome. As the negative outcome of the Irish referendum with respect to the Nice Treaty has brutally illustrated,<sup>75</sup> a major challenge that has been neglected for too long, and now urgently needs to be addressed, is to find a way to gain support for enlargement also among the citizens of the current Member States.<sup>76</sup>

### **Changing strategies: from association to accession**

The chronology of events over the past two decades shows that the European Union has only gradually accepted the idea that a future – major – enlargement had become inevitable. Faced with the pressing demands for closer association by the newly emerging democracies following the collapse of the Berlin wall, at a time when it had become evident that the European Communities fell short of generally held expectations in adequately reacting to the events at its borders, the initial reaction was one of looking for alternatives to accession. Preference was given to first deepening the European integration process, in particular through the establishment of the European Union by the Treaty of Maastricht in 1993. In order to meet to some extent the expectations of neighbouring European countries new forms of association were conceived of, such as the European Economic Area (EEA) with the EFTA countries (which was eventually not signed by Switzerland) and the Europe Agreements (EA) with those Central and Eastern European countries who sought accession to the European Union.<sup>77</sup> Contrary to prior association agreements that were perceived as an instrument to pave the way for accession, such as the association agreement with Turkey,<sup>78</sup> the newly

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<sup>73</sup> See Declaration N° 20 on the Enlargement of the European Union with respect to the European Parliament, the Council, the Economic and Social Committee as well as the Committee of the Regions. It is mentioned in footnote that “the tables in this declaration take account only of those candidate countries with which accession negotiations have actually started”, which explains why Turkey is not yet included in this exercise.

<sup>74</sup> The precise composition and functioning of the European Commission in a European Union of 27 members still needs to be settled according to the rules laid down in Article 4 of the Protocol on the Enlargement of the European Union. The latter stipulates in essence that in a first phase each Member State will be entitled to one Commissioner whereas as from an enlargement to 26 Member States the Commissioners should be smaller in number than the Member States and be chosen on the basis of a “fair” rotation system which remains to be determined.

<sup>75</sup> Referendum of 7 June 2001. It is significant that, of the (only) 34.7% who participated in the referendum, 53.87 % voted against and 46.13 % voted for the Nice Treaty.

<sup>76</sup> A poll on EU citizen’s support to enlargement, published by Eurobarometer N° 54 on 30 April 2001 and relating to fieldwork in the period November-December 2000, gave the following – rather gloomy – picture: the average support for accession by the 13 candidate countries was only 34 %, with a high 51 % in Sweden and low 22% in France. As for individual candidate countries, EU citizen’s support for their accession was highest for Malta (48% in favour, 30 % opposed) and Hungary (46 % in favour, 32 % opposed) and lowest for Romania (33 % in favour, 45 % opposed) and Turkey (30 % in favour, 48 % opposed).

<sup>77</sup> EA were signed with the 10 CEEC’s on the following dates: Bulgaria (1.3.1993, O.J. L 358 of 31.12.1994); Czech Republic (6.10.1993, O.J. L 360 of 31.12.1994); Estonia (12.6.1995, O.J. L 68 of 9.3.1998), Hungary (16.12.1991, O.J. L 347 of 31.12.1993); Latvia (12.6.1995, O.J. L 26 of 2.2.1998); Lithuania (12.6.1995, O.J. L 51 of 20.2.1998); Poland (16.12.1991, O.J. L 348 of 31.12.1993); Romania (8.2.1993, O.J. L 357 of 31.12.1994); Slovakia (6.10.1993, O.J. L 359 of 31.12.1994); Slovenia (10.6.1996, O.J. L 512 of 26.2.1999).

<sup>78</sup> See for instance Article 28 of the 1963 Association agreement with Turkey, O.J. O.J. N° 217 of 29.12.1964. Similarly association agreements were signed with Malta (O.J. L 61 of 14.3.1971) and Cyprus (O.J. L 133 of 21.05.1977).

conceived forms of association were in essence meant to constitute an alternative to accession. Also the official demand for accession by Turkey in 1987 was countered by the proposal first to invigorate the association regime as established by the association agreement of 1963 and, in particular, the establishment of the Customs Union by 1995 as scheduled.<sup>79</sup>

Association with the European Union is the most far-reaching form of relations with a non-member country as it involves reciprocal rights and obligations, common action and special procedure (Article 310 EC). According to the European Court of Justice in the *Demirel* case, association creates “special privileged links with a non-member country which must, at least to a certain extent, take part in the Community system”.<sup>80</sup> The extent to which third countries are to take part in the Community system is different from one association agreement to another.<sup>81</sup> Whereas the EEA agreement extended the single market to the EFTA countries concerned on the basis of the principle of homogeneity, there was no such far-reaching objective underlying the EA. The latter essentially aimed at establishing a political dialogue and creating, over time, a free trade area.<sup>82</sup> The symbolic, political and economic value of the EA was nonetheless great. The introduction of an association regime stood as a symbol of the effort to achieve closer relations between Western and particularly Central Europe after years of cold war. In this context it was significant that with the Eastern European Republics ensuing from the ex-Soviet Union (except the Baltic States) no association regime was envisaged but instead Partnership and Cooperation agreements were being negotiated.<sup>83</sup> The political and economic value of the association regime lay in the implicit recognition of the fundamental political and economic reforms undertaken by those countries towards democracy and market economy and the creation of a supportive framework through political dialogue and the encouragement of free trade.

The newly conceived association regimes nonetheless proved an insufficient alternative to accession and the “waiting room” policy of the European Union was quickly overtaken by the events. In 1995 already three EFTA countries, namely Austria, Finland and Sweden, officially joined the European Union.<sup>84</sup> The Copenhagen European Council of 1993 had by that time already acknowledged that accession of the associated Central and Eastern European countries was now a “common objective”. This constituted a major change in policy with respect to the careful unilateral formulation used in the early Europe Agreements. The latter

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<sup>79</sup> See the Commission Opinion of December 1989 and the so-called “Matutes Package” of 12 June 1990. The Customs Union was established by Decision 1/95 of the Association Council and entered into force on 31 December 1995, see O.J. L 35 of 13.2.1996.

<sup>80</sup> Case 12/86, *Demirel*, Judgment of 30 September 1987, ECR (1987) 3719, at Para 9.

<sup>81</sup> See for instance also Peers, S., “Living in Sin: Legal integration under the EC-Turkey Customs Union”, *E.J.I.L.* (1996) 411-430, where he systematically compares the Customs Union with Turkey to the EEA and EA.

<sup>82</sup> The free trade objective was to be established on an asymmetric and in the end reciprocal basis but related essentially only to industrial products excluding more “sensitive” products. For a detailed analysis of the EA provisions and the early legal context of EC-CEEC’s relations, see for instance Govaere, I., “Les Communautés européennes face au défi de la transition des pays d’Europe Centrale et Orientale vers l’économie de marché”, *Transitions* (1993) 47-66; Maresceau, M., “Europe Agreements: a new form of cooperation between the European Communities and Hungary, Poland and the Czech and Slovak Republic”, in Muller-Graf (ed.), *Legal adaptation to the market economy of the European Communities*, Nomos Verlagsgesellschaft, 1993.

<sup>83</sup> On those agreements, see for instance Hillion, C., “Institutional aspects of the partnership between the European Union and the newly independent states of the former Soviet Union: case studies of Russia and Ukraine”, *C.M.L.Rev.* (2000) 1211-1235.

<sup>84</sup> For the EEA agreement this implied that only Norway, Liechtenstein and Iceland remain bound as non-EU member countries.

only acknowledged, in preamble, that accession to the European Union was an “objective of the associated country”.<sup>85</sup> As for Cyprus and Malta, it was agreed that negotiations for accession would start six months after the end of the so-called Intergovernmental Conference 1996, leading up to the Amsterdam Treaty.<sup>86</sup>

The Copenhagen European Council of 1993 was a historic landmark as it turned the “if” into a “when” question. It did not provide a concrete answer as to the timing of envisaged accession but rather introduced both political and economic criteria that candidate countries would need to fulfil besides the Treaty criterion of being a “European” state.<sup>87</sup> The expectation was thus created that accession would automatically follow upon fulfilment of those conditions. The political criteria entail respect for democracy and the rule of law, for human rights, and for rights of minorities. Political criteria are since Amsterdam expressly inserted also in the EU Treaty as a condition for (continuing) full membership.<sup>88</sup> The economic criteria, which have up till now not been included expressly in the EU Treaty, relate to the existence of a functioning market economy and the capacity to withstand competition and market forces within the European Union. As the Commission would also underline in Agenda 2000, other important criteria for EU membership include the adoption of the *acquis communautaire*, the administrative and judicial capacity to apply the *acquis* and the ability to take on the obligations of membership including adherence to the aims of a political, economic and monetary union.

### **An embryonic pre-accession strategy**

The *pre-accession strategy* as such was initiated at the Essen European Council of December 1994. The EA were – conceptually – turned into pre-accession instruments and remain the legal basis of the relations with the CEECs until today,<sup>89</sup> whereas the Phare programme became the main financial instrument in the pre-accession strategies. As neither was really conceived to pave the way for accession, additional measures needed to be taken. An important lacuna of the EA was, for instance, that harmonisation of legislation was only envisaged to the extent necessary to facilitate trade and was, in general, not written into the agreements as an absolute and definite obligation.<sup>90</sup> The EA gave little guidance to the associated countries as to how to approximate their legislation in order to attain their ultimate objective, namely accession to the EU. The 1995 *White Paper of the Commission on the Preparation of the associated countries of Central and Eastern Europe for integration into*

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<sup>85</sup> See for instance the EA with Poland and Hungary.

<sup>86</sup> For Malta this decision was taken in Cannes (June 1995) ; for Cyprus in Florence (June 1996).

<sup>87</sup> Article O EU (Treaty of Maastricht).

<sup>88</sup> See Article 49 TEU on the accession of new MS and, significantly, Article 7 TEU on the suspension of rights under the Treaty for failure to comply with the political conditions as mentioned in Article 6 (1) TEU.

<sup>89</sup> See Inglis, Kirstyn, “The Europe Agreements compared in the light of their pre-accession reorientation”, *C.M.L.Rev.* (2000) 1173-1210.

<sup>90</sup> The usual formulation would be that the associated country would “use its best endeavours” or undertake to harmonise its legislation “to the extent possible” to that of the EU. By way of exception, definite and absolute harmonisation objectives were written into the EA with respect to *inter alia* the protection of intellectual and industrial property rights, transport rules and competition rules. This stands in sharp contrast to the harmonisation efforts required under the EEA agreement and whereby the associated EFTA countries were required to take over, from the start, about 1/3 of the *acquis communautaire*.

*the Internal Market of the Union*<sup>91</sup> proved to be an important instrument in this respect. It is essentially a unilaterally established working document in order to help prepare *all* the candidate countries for accession. The White Paper is limited in scope as it addresses the issue of the approximation of legislation to Community legislation, and not so much case law, relating to certain crucial aspects of the internal market, but not all. It is not drafted so as to respond to specific needs or the specific situation in each associated country, nor does it establish priorities with respect to the – impressive – list of most important measures to be taken in each sector.<sup>92</sup>

Being a unilateral initiative of the EC Commission there was no legal obligation for the associated countries to comply with the White Paper, although it was clear that compliance would be considered *de facto* a prerequisite for accession. This led to the criticism that it was the first time that candidate members were asked to harmonise to such an extent before accession in the attempt to eliminate or to reduce transitional periods afterwards.<sup>93</sup> It was pointed out that this was a radical change in approach as compared to prior accessions, such as those of Spain and Portugal, in which a rather quick accession was followed by long transitional periods in order to allow the new Member State to adapt to the *acquis*. Delaying the accession whilst requiring preparation for full membership beforehand and allowing only a short, if any, transitional period after joining the EU was, however, already the model for the latest enlargement towards Sweden, Finland and Austria in 1995. Under the EEA agreement the associated countries undertook to harmonise their legislation as well as to apply the European Court of Justice case law with respect to not less than one third of the *acquis communautaire*, as from the entry into force of that agreement.<sup>94</sup> The reasons for this change in policy are most likely multiple and relate, *inter alias*, to the lessons learned from prior accession as well as the transition of the EC/EU itself. It is apparent that the more integrated the EU has become, the more candidate countries have to be prepared for accession in order not to create major gaps and unbalances between the Member States.

### **An inclusive accession process based on the principle of differentiation**

In its “Agenda 2000” the Commission addressed the issue of the need for differentiation between the candidate countries. The associated countries themselves held divergent views in this respect. The more advanced countries, such as Poland, were traditionally in favour of an individual approach by fear of seeing their accession delayed because of others. Other countries, such as Bulgaria, not surprisingly advocated a common approach to all candidate countries from Central and Eastern Europe by fear of otherwise getting left behind. In Agenda 2000 the Commission made clear that all candidate countries would be put on the same footing in that compliance with the Copenhagen criteria is a prerequisite for accession for all. The actual application of those criteria to the individual countries then led the Commission to propose opening accession negotiations with a first group of 5 CEEC’s, namely Poland,

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<sup>91</sup> *White Paper on the Preparation of the associated countries of Central and Eastern Europe for integration into the Internal Market of the Union, COM (95) 163 final of 10.05.1995.*

<sup>92</sup> *See the White Paper, Volume 2. Suggestions are made with respect to sequence for each sector, but no priorities are established among the sectors mentioned.*

<sup>93</sup> *See, for example, M. Maresceau.*

<sup>94</sup> *This concerned essentially all the internal market *acquis*, including competition.*

Hungary, Czech Republic, Slovenia and Estonia, as well as with Cyprus.<sup>95</sup> It was thought that those countries would be able to comply with the economic criteria and could possess the requisite administrative and judicial capacity to apply the EU *acquis* in the medium term, if the efforts to that effect were sustained.<sup>96</sup> Differentiation was thus, *de facto*, the essence of the proposal.

The decision to launch the *process of accession* on 30 March 1998 was formally taken at the Luxembourg European Council of December 1997, and was largely based on the Commission's proposals in Agenda 2000. The landmark decision was taken to open accession negotiations with the first group of six countries as singled out by the Commission.<sup>97</sup> However, contrary to Agenda 2000 which proposed to focus on this first group first, the Luxembourg Summit underlined that enlargement is a "comprehensive", "ongoing" and "inclusive" process. It held that the accession process should apply to all candidate Central and Eastern European countries and Cyprus alike, thus also including Slovakia, Bulgaria, Romania, Latvia and Lithuania. This entailed in essence that a single framework for Ministerial meetings with the candidate countries would be established and that the new *enhanced pre-accession strategy* (including giving financial aid to the second group in order to help reduce the gap with the first group of selected CEEC's), as well as the "screening process" with respect to the adoption of the Union *acquis*, should apply to all candidate countries from the start.<sup>98</sup>

At that time it appeared that Turkey was not, as such, included in this "inclusive" accession process. The Luxembourg European Council held that it "confirms Turkey's eligibility for accession to the European Union. Turkey will be judged on the basis of the same criteria as the other applicant states. While the political and economic conditions allowing accession negotiations to be envisaged are not satisfied, the European Council considers that it is nevertheless important for a strategy to be drawn up to prepare Turkey for accession by bringing it closer to the European Union in every field".<sup>99</sup> The most innovative part was that Turkey, together with the other candidate countries, was invited to become a member of the so-called *European Conference*. It was decided that the European Conference would "bring together the Member States of the European Union and the European States aspiring to accede to it and sharing its values and internal and external objectives", and was meant to be "a multilateral forum for political consultation, intended to address questions of general concern to the participants and to broaden and deepen their co-operation on foreign and security policy, justice and home affairs, and other areas of common concern, particularly economic matters and regional co-operation". The first European Conference was held in London on 12 March 1998 but Turkey declined to attend. In this respect it has been pointed out that, whereas the formal initiative to set up a European Conference in essence failed to

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<sup>95</sup> Malta had suspended its application for membership in 1996 and was thus not part of the enlargement process as initiated by the Luxemburg European Council. Malta reinstated its candidature in September 1998.

<sup>96</sup> As for the political criteria the main conclusion to be drawn was that the situation was markedly worse in Slovakia than in other applicant CEEC's, in particular due to the treatment of Hungarian minorities.

<sup>97</sup> The accession negotiations with this first group were officially opened at the London Summit of 12 March 1998 and actually started on 31 March 1998.

<sup>98</sup> See *infra*, part 4.

<sup>99</sup> It was stated that this European strategy for Turkey "consists in: development of the possibilities afforded by the Ankara Agreement; intensification of the Customs Union; implementation of financial cooperation; approximation of laws and adoption of the Union *acquis*; participation, to be decided case by case, in certain programmes and in certain agencies...".

attain its primary objective to remove Turkish dissatisfaction with the accession strategy, it was the reaction in particular by Greece to the 1999 earthquake in Turkey “which helped to create a momentum for change” in the EU-Turkey relations.<sup>100</sup>

The truly inclusive nature of the accession process was underlined at the Helsinki European Council of December 1999. It was held that the 13 candidate countries should participate in the accession process on an equal footing, thereby stressing the fact that Turkey was also formally considered to be a candidate country. It was pointed out that a prerequisite for opening accession negotiations for all candidate countries alike is that they share the values and objectives of the European Union as set out in the Treaties and, in particular, comply with the political criteria as set in Copenhagen. On the basis of the progress reports drawn up by the Commission with respect to the different countries,<sup>101</sup> the Helsinki Summit called for opening the accession negotiations with Romania, Slovakia, Latvia, Lithuania, Bulgaria and Malta.<sup>102</sup> As for Turkey, it was decided that it would benefit from a pre-accession strategy to support its reforms like all the candidate countries, including the establishment of an Accession Partnership.<sup>103</sup>

The differentiation underlying this inclusive accession process is not limited to distinguishing merely two groups of candidate countries by the starting date of the accession negotiations although mention is, in practice, often made of the so-called “Luxembourg group” and “Helsinki group”. The accession negotiations are conducted on a bilateral basis so that further individualisation is possible both with respect to content and timetable. It was already stressed in the conclusions of the 1997 Luxembourg European Council that the “decision to enter into negotiations does not imply that they will be successfully concluded at the same time”, whereas “each of the applicant states will proceed at its own rate, depending on the degree of preparedness”. The unmistakable plea for further differentiation, together with the call for speeding up the preparation of accession negotiations with the second group, already presaged the possibility for countries of the second group to catch up or even to overtake countries of the first group. This principle was expressly reconfirmed at the Feira European Council of December 2000. It was also tested in practice as by July 2001 most members of the Helsinki group had indeed caught up with the Luxembourg group and even overtaken Poland in terms of number of negotiating chapters that were provisionally closed.<sup>104</sup>

### **The enhanced pre-accession strategy: individual accession partnerships and conditional pre-accession assistance**

The stated aim of the *enhanced pre-accession strategy* underlying the accession process is, in line with the prior pre-accession strategy, to enable the applicant states to align to the Union *acquis* as much as possible before accession.<sup>105</sup> The already existing association agreements,

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<sup>100</sup> See Maresceau, M., “The EU Pre-accession strategies: a political and legal analysis”, in Maresceau and Lannon (eds.), *The EU’s enlargement and the Mediterranean strategies*, Palgrave, 2001, pp. 3-28, esp. at p. 6 and 12.

<sup>101</sup> Progress reports of 13 October 1999. See also the Regular report from the Commission on the Progress towards accession, COM (1999) 500 final of 13 October 1999.

<sup>102</sup> The accession negotiations with this so-called “Helsinki group” were subsequently opened in February 2000.

<sup>103</sup> See *infra*, part 4.

<sup>104</sup> See *infra*, part 5.

<sup>105</sup> Conclusions of the Luxembourg European Council of December 1997.

including the EA with the CEEC's, continue to remain the legal basis for the relations between the European Union and the candidate countries. The key feature of the enhanced pre-accession strategy consists in the introduction of a new additional instrument, the so-called *Accession Partnerships*. The objective is to mobilise all forms of assistance to each candidate country in one single framework and so as to help them to prepare fully to meet the Copenhagen criteria.

In spite of what the name may lead to believe, the *Accession Partnership* is essentially a unilateral instrument drawn up by the Commission and based on a Council Decision (established upon proposal of the Commission and after consultation of the candidate country concerned<sup>106</sup>) laying down the priorities, intermediate objectives and conditions as targeted towards each applicant individually.<sup>107</sup> The objectives singled out are rather precise in nature and relate to fundamental matters such as respect for democracy and human rights, macroeconomic stabilisation, industrial, administrative and judicial restructuring, nuclear safety, as well as the adoption of the *acquis*. For their part, the candidate countries were required to complement "their" Accession Partnership by the adoption of a *National Programme for Adopting the Community Acquis* (NPAA). The NPAA stipulate the laws, regulations and other measures which will be taken by the candidate country with respect to each of the priority areas identified in the Accession Partnership as well as a timetable for doing so.

The first Accession Partnerships with all ten CEEC's were decided in March 1998. Each contained short-term priorities to be achieved by the end of 1998 and medium term objectives, which would take more than one year to complete. Among the short term objectives it was, for instance, held that Poland would need to reduce its external debt and implement a new plan to restructure the steel industry; Estonia and Latvia to facilitate citizenship for Russian speakers; the Czech Republic monitor banking and insurance business more closely; Slovakia to hold free and fair presidential, legislative and local elections and adopt laws to guarantee the use of minority languages, etc.<sup>108</sup> Subsequent to the Helsinki Summit conclusions, an Accession Partnership with Turkey was also adopted on 8 March 2001.<sup>109</sup> Among the short-term priorities to be achieved by the end of 2001 are mentioned the need to strengthen the protection of human rights in various domains (such as freedom of expression; freedom of association and peaceful assembly; opportunities for legal redress against all violations of human rights) and alignment to the EU *acquis* in fields such as intellectual property protection, technical standards and public procurement, energy and telecommunications. Turkey submitted its NPAA to the Commission only a few days later, namely on 26 March 2001.

It was decided at the Luxembourg European Council that the enhanced pre-accession strategy for the CEEC's would be financed mainly through the Phare programme, which was to be

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<sup>106</sup> Also the European Parliament needs to be consulted.

<sup>107</sup> On the Accession Partnerships with the CEEC's, see Council Regulation (EC) N° 622/98, O.J. L 85 of 20 March 1998 and the various Council Decisions per country as published in O.J. L 121 of 23 April 1998.

<sup>108</sup> The short term priorities in the updated Accession Partnerships with the individual CEEC's of 1999 (to be achieved in 2000) include, among others, for many countries improving the situation of the ROMA and alignment to intellectual property and public procurement legislation where necessary.

<sup>109</sup> See Council Decision N° 235/2001 of 8 March 2001 on the principles, intermediate objectives and conditions contained in the Accession Partnership with the Republic of Turkey, O.J. L 85/13 of 24.3.2001, implementing Council Regulation N° 390/2001, O.J. 58/1 of 28.2.2001 which is modelled on Council Regulation N° 622/98.



totally reoriented towards pre-accession and its budget significantly increased.<sup>110</sup> Two priority aims were set forth for the reoriented Phare programme, namely the reinforcement of administrative and judicial capacity or institution building (about 30%),<sup>111</sup> and investments related to the adoption and application of the *acquis* (about 70%). This was endorsed and further worked out at the Berlin European Council of March 1999. *Pre-Accession Assistance* now additionally targets structural policies in order to help candidate countries align to infrastructure standards in the fields of transport and environment (ISPA: Instrument for Structural Policies for Pre-Accession<sup>112</sup>) as well as agriculture (SAPARD: the Special Accession Programme for Agriculture and Rural Development<sup>113</sup>). For Cyprus, Malta and Turkey, which traditionally benefited from MEDA financial assistance and not Phare, a different but related system of pre-accession assistance has been conceived of. For instance the Regulation for Pre-Accession Financial Assistance to Turkey seeks to regroup the three existing instruments (namely MEDA II, the European strategy regulation covering measures to promote economic and social development in Turkey and the European strategy regulation covering assistance towards intensifying the EU-Turkey Customs Union) into one single financial instrument which is targeted to the priorities of the Accession Partnership with Turkey.<sup>114</sup>

Pre-accession assistance was, however, made conditional upon fulfilment of three cumulative criteria.<sup>115</sup> First of all, it was stated clearly that the commitments contracted under the Europe Agreements (or the relevant association agreement) must be respected. This once again illustrates the importance the EU continues to attach to those agreements as well as their fundamental role also in the enhanced pre-accession strategy. Financial assistance was also made conditional upon the candidate country undertaking further steps towards fulfilling the Copenhagen criterion. Progress would also need to be made in implementing the Accession Partnership in order to benefit from pre-accession assistance. In particular the last two conditions require a constant monitoring by the Commission and highlight the utmost

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<sup>110</sup> *Figures for pre-accession financial assistance at the time of the Luxemburg European Council amounted to 6.700 million ECU for the period 1995-1999 and 3 billion ECU annually for the period 2000-2006. Currently the PHARE annual budget is 1.5 billion EURO.*

<sup>111</sup> *This includes the so-called "twinning" mechanism. Twinning provides the opportunity for administrations and semi-public organisations in the candidate countries to work with their counterparts in the EU Member States, so as to help them develop modern and efficient administrations which will be capable of implementing the *acquis communautaire* on the same level as the EU Member States. This is to be distinguished from the initiative taken by the Copenhagen European Council to open up certain European Community programmes and agencies to participation by candidate countries in order to familiarise them with Community policies and instruments in practice.*

<sup>112</sup> *ISPA has an annual budget of € 1.040 million and is the responsibility of the Commission DG Regional Policy.*

<sup>113</sup> *SAPARD has an annual budget of € 520 million and is the responsibility of the Commission DG Agriculture.*

<sup>114</sup> *See the explanatory memorandum to the Commission Proposal for a Council Regulation concerning pre-accession financial assistance for Turkey, COM (2001) 230 final, where it is stated that: "In drawing up this proposal, the established principles and objectives developed for pre-accession assistance to the other candidate countries (Central and Eastern European Countries, Cyprus and Malta) have as much as possible been taken into account". Also here it is foreseen that financing will have institution building and investment components. It is stated that the actual budget of financial assistance to Turkey was doubled in 2000 and 2001 as compared to the annual average allocations of the period 1996-1999.*

<sup>115</sup> *On the use of conditionality by the EU in general and underlying the pre-accession assistance in particular, see Lannon, Inglis and Haenebalcke, "The many faces of EU conditionality in Pan-Euro-Mediterranean Relations", in Maresceau and Lannon (eds.), *The EU's enlargement and Mediterranean Strategies: a comparative analysis*, Palgrave, 2001, pp. 97-138.*

importance attached to the screening process undertaken by the Commission and the conclusions drawn in its annual *Report on Progress towards Accession by Each of the Candidate Countries*.<sup>116</sup> To date it has not been considered necessary to invoke the conditionality clause in order to suspend pre-accession assistance.<sup>117</sup>

### **The double feature: on accession partnerships and accession negotiations**

As it was decided to open up the accession negotiations without awaiting a positive outcome of the accession process, the candidate countries find themselves in a rather complex, if not uncomfortable, position. Currently the ten CEEC's, Malta and Cyprus are negotiating the terms of their accession to the EU whilst the EU is, in parallel, still evaluating their capacity to effectively comply with the Accession Partnerships. The latter is not to be taken for granted. In the latest progress report of November 2000 the Commission points to the progress made by the various candidate countries with respect to the findings of the progress reports of 1999 whilst also underlining the shortcomings.<sup>118</sup>

Already in 1999 all candidate countries, but for Turkey, were found to meet the *Copenhagen political criteria* although some progress was still to be made by some countries with respect to the protection of human rights and minorities. This conclusion is largely reiterated in 2000. The Commission's 2000 Progress Report notes positive developments in all candidate countries but guards against the continued prevalence of corruption and the growing problem of trafficking in women and children. It calls for sustained efforts by most countries to improve the situation of the Roma. Turkey is urged to translate its intentions with respect to human rights into concrete measures. As for the *Copenhagen economic criteria*, it is held that only Cyprus and Malta qualify as functioning market economies and should be able to cope with the competitive pressure and market forces in the Union. Estonia, Hungary, Poland, the Czech Republic and Slovenia are regarded as functioning market economies who will be able to sustain competitive market pressure in the short term provided, for the first three, that they maintain their current reform path and, for the last two, that they complete and implement remaining reforms. Also Latvia, Lithuania and Slovakia are considered to be functioning market economies but it is stated that they would need to implement current structural reforms as well as undertake further reforms in order to be able to sustain competitive market forces in the medium term. Neither Bulgaria nor Romania fulfils either of the economic criteria as yet, whilst it is reported that Turkey should improve the functioning of markets and enhance its competitiveness in order to meet the criteria. Besides the political and economic criteria, the *capacity not only to adopt, but also to implement, the acquis* is a major cause of concern to the Commission. In this respect a general warning is issued to the candidate countries. The 2000 Progress Report clearly states that "(d)espite progress in the adoption of the acquis, the candidates' capacity to implement and enforce it properly remains inadequate, in many cases because of weak administrative structures", whilst at the same time calling for a closer

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<sup>116</sup> The last report is entitled 'Enlargement Strategy Paper' and dates from 8 November 2000. A new and updated report is expected to be published in November 2001. The Commission also publishes country-by-country Progress Reports.

<sup>117</sup> This is not surprising as conditionality clauses have more of a proactive – rather than a reactive – role to play. Under normal circumstances they should not be invoked easily, whether they are financial or political in nature. See for instance the political conditionality clauses inserted in the EU Treaty allowing for the suspension of EU membership rights and the political conditionality clauses (or human rights clauses) inserted in the EA and other agreements concluded by the EU in the 1990's.

<sup>118</sup> *Enlargement Strategy Paper: Report on Progress towards Accession by Each of the Candidate Countries*, November 2000.

involvement of civil society – including business, regional and local authorities and professional organisations – in this process.

When speaking of a possible date of accession, reference is nowadays not so much made to the expected date of effective compliance with the Accession Partnerships as to the expected date of conclusion of the accession negotiations. In view of the progress made in the accession negotiations, it is now said to be realistic to expect some countries to take part in the European Parliament elections of 2004 in their capacity of effective EU *members*.<sup>119</sup> The discussion thus seems to have shifted from focusing on accession criteria towards counting the number of chapters of the *acquis* – of the total of 31 chapters – in the accession negotiations that have been provisionally closed with a particular country. This new direction was largely inspired by the presentation of the so-called *Road Map* for the final phase of the accession talks by the Commission in its 2000 Progress Report. The latter is significantly entitled *Enlargement Strategy Paper* and was endorsed by the European Council of Nice (December 2000), all whilst emphasising the principle of differentiation including the possibility of “catching up”.<sup>120</sup> The emphasis placed on the importance of the Road Map has led to some apparent friction between the Commission and the Swedish Presidency with respect to the appreciation of the state of negotiations with Poland. Contrary to prior expectations, the accession negotiations with Poland did not lead to as many chapters being provisionally closed as with all other countries, including the Helsinki group (except for Romania and Bulgaria), which started the accession negotiations much later.<sup>121</sup> On this basis the Swedish Presidency concluded that Poland lagged behind in the accession process. The Commission quickly contradicted this conclusion and underlined that it is the substance of the preparations and negotiations that matters rather than the numbers of chapters that are provisionally closed.

The 2000 *Enlargement Strategy Paper* suggests that “(t)he three conditions for accomplishing the first accessions are the financial framework,<sup>122</sup> institutional reform,<sup>123</sup> and the conclusion of negotiations with those candidates who fulfil all the criteria for membership”. The new enlargement strategy consists, in essence, of spelling out the sequence of the chapters of the *acquis* to be negotiated with the respective candidate countries in 2001 and 2002 and indicating what is considered to be a realistic timetable for completing the negotiations. The Commission is of the opinion that the most advanced countries should be able to conclude the accession negotiations in 2002. The principle remains that the candidates have to accept and apply the *acquis* effectively upon accession. Some concessions are, nonetheless, made

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<sup>119</sup> See the conclusions of the Gothenburg European Council of June 2001.

<sup>120</sup> The so-called “big bang” scenario for accession, whereby all or most candidate countries would adhere to the EU at once, has not unequivocally been endorsed by the EU Member States as some fear a delay of the enlargement process. See for instance on the statement of the Swedish Presidency in this respect, *Uniting Europe*, N° 128, pp. 4-5, of 22 January 2001. This is countered in the same article by a statement of Mr. Landaburu (Commission DG Enlargement and chief negotiator) who maintains that “the Commission rules nothing out”.

<sup>121</sup> See *Uniting Europe*, N° 151, p. 1 of 2 July 2001. The state of accession negotiations at the end of the Swedish Presidency, on 27 July 2001, was as follows. Out of the 31 chapters, the following numbers were provisionally closed with: Poland (17), Hungary (22), Czech Republic (19), Estonia (19), Slovenia (21), Cyprus (23), Latvia (16), Lithuania (18), Slovakia (19), Romania (8), Bulgaria (11), Malta (17), see *Uniting Europe* N° 155, pp. 4-5 of 1 August 2001.

<sup>122</sup> As decided by the Berlin European Council of March 1999.

<sup>123</sup> Modifications introduced by the Treaty of Nice.

towards the negotiation of transitional periods, albeit only exceptionally and on a case-by-case basis. The Commission distinguishes between “acceptable”, “negotiable” and “unacceptable” requests for transitional periods, according to their potential impact on the internal market, whilst reserving the possibility also for the EU to request transitional measures. The latter is important in particular with respect to the chapter on the free movement of persons which is traditionally a very sensitive issue for the EU. A breakthrough was forged recently in the accession negotiations as candidate countries, such as Hungary,<sup>124</sup> Slovakia and Latvia,<sup>125</sup> finally agreed to grant a 7-year transitional period in relation to the movement of labour, as requested by the EU, albeit it on the condition of reciprocity with respect to current Member States. The CEEC’s for their part have also booked successes in negotiating transitional periods, for instance in the field of capital movement with respect to the acquisition of secondary residence and agricultural land.<sup>126</sup> Certain candidate countries have also obtained transitional periods as regards the transposition of specific directives in the sensitive field of environmental protection.<sup>127</sup>

### **Accession prospects**

When all the candidate countries will effectively join the European Union is difficult to predict. The Commission President, Mr. Prodi, has in the past clearly stated that he is opposed to politically motivated accession scenarios and indicated that he was determined to withstand political pressure, if any, from Member States.<sup>128</sup> On 4 September 2001 the European enlargement Commissioner, Mr. Günter Verheugen, reiterated the Commission’s position that any decision as to “who” will join “when” is to be determined solely on the basis of the strict respect of the objective membership criteria and the outcome of the accession negotiations. He stated that it would not be subject to “political horse-trading” among Member States.<sup>129</sup> This is also the position of the current Belgian EU Presidency, who let it be known that “criteria are criteria”.<sup>130</sup> Under this approach, the European Union is currently preparing to take on board 10 new members by 2004.

The 2004 target date for full membership, as set by the Gothenburg European Council, implies that accession negotiations are to be finished with those countries at the latest by the end of 2002. As not all countries, in particular Romania and Bulgaria, will be able to meet this deadline, the Bulgarian President, Mr. Peter Stoyanov, launched the idea recently of a big bang “political membership” in 2004 for all 12 countries that are currently negotiating for accession. This “political” alternative to “full” membership was received by the European

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<sup>124</sup> *Uniting Europe*, N° 149, p. 4, of 18.6.2001.

<sup>125</sup> *Uniting Europe*, N° 151, pp. 2-4, of 2.7.2001.

<sup>126</sup> *This led to closing the chapters on capital movement – for the first time – with the Czech Republic. See Uniting Europe*, N° 148, pp. 4-5, 11.06.2001.

<sup>127</sup> *Different countries have negotiated transitional periods with respect to different directives. See for example Uniting Europe*, N° 148, pp. 5-6, of 11.06.2001, for specifications with respect to Hungary, the Czech Republic and Estonia.

<sup>128</sup> *For the full text of Prodi’s interview, see Uniting Europe*, N° 136, p. 1-4, of 19.3.2001.

<sup>129</sup> *Uniting Europe*, N° 156, p. 2, of 10.9.2001.

<sup>130</sup> *See the account given of a statement by the Belgian Minister of Foreign Affairs, Louis Michel, before the European Parliament, in Uniting Europe*, N° 153, p. 8, of 16.7.2001.

Union as an “interesting” idea which could not, however, be embraced in practice.<sup>131</sup> Bulgaria is now endeavouring to advance its official target date of 2004 for the end of the accession talks to 2003 in order to allow for an accession to the European Union by the end of 2005.<sup>132</sup>

The history of the accession saga and its many adaptations “en route” show that the major decisions on accession strategies were taken at relatively short notice in response to events of a more (geo-) political than legal nature. This comes as no surprise as accession of course is not, nor has it ever been, a legal right or obligation. The question is to what extent new geo-political events may still influence the current road map and enlargement strategies which seem to be nearing their final destination, or give a new impetus to the accession process in relation to Bulgaria, Romania and Turkey. In this respect it is worth mentioning the recent demand for an acceleration of the accession negotiations by Poland subsequent to the dreadful events in New York on 11 September 2001.<sup>133</sup> According to Poland, these events denote the urgent necessity to deepen and to speed up the European integration process, not least with respect to matters such as co-operation at external borders, Europol, asylum and immigration. Commissioner Günter Verheugen, in commenting on these events, underlined that “people will now better understand the need for European integration and enlargement. Crisis and criminal threats are often the fruit of political and economic instability in certain areas. By extending the European Union to the Eastern and Southern part of Europe, by widening our zone of stability and welfare, we are giving the best possible answer to these threats”.<sup>134</sup> Only future developments will show if, and if so to what extent, the destruction of the twin towers in far away Manhattan will indeed impel the construction of a more integrated Europe.

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## LA DYNAMIQUE DES RAPPORTS ENTRE L'UNION EUROPEENNE ET LA REPUBLIQUE DE TURQUIE

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Née par la volonté de ses six Etats membres fondateurs, l'Union européenne a connu quatre élargissements et se prépare à accueillir de nombreux candidats et à modifier, ce faisant, l'architecture du continent européen à l'orée du XXI<sup>e</sup> siècle.

Parmi eux, les Etats de l'Europe Centrale et Orientale qui, ayant recouvré leur indépendance avec la disparition de l'URSS, se sont tournés, comme d'autres avant eux, vers l'Union européenne pour consolider leur démocratie retrouvée et faciliter leur transition vers l'économie de marché.

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<sup>131</sup> *It was in particular pointed out that it came too late as it would now undermine the efforts already undertaken to comply with the accession criteria. See Uniting Europe, N° 130, p. 2, of 5.2.2001.*

<sup>132</sup> *Uniting Europe, p. 3, of 1.8.2001.*

<sup>133</sup> *See Bulletin Quotidien Europe N° 8053 of 22 September 2001.*

<sup>134</sup> *Uniting Europe, N° 157, p. 1, of 17 September 2001.*

Parmi eux, aussi, deux Etats insulaires méditerranéens, Chypre et Malte, depuis longtemps demandeurs.

Parmi eux, enfin, la République de Turquie, compagnon de route de la Communauté économique européenne depuis le début.

Les liens qui unissent la Turquie et l'Union européenne ont, en effet, des racines profondes et présentent des spécificités qui découlent, notamment, de l'évolution que l'une et l'autre connaissent depuis les années soixante.

La Communauté européenne inscrit à son actif la réalisation de son union douanière, le lancement de ses politiques, le parachèvement du marché unique, la création de sa monnaie unique, l'EURO qui, dans quelques semaines, deviendra une réalité palpable pour tous ses citoyens, des progrès en matière de politique étrangère, de défense commune. Elle devient l'Union européenne - un espace de liberté, de sécurité et de justice - et souligne avec force les principes sur lesquels elle est fondée: la liberté, la démocratie, le respect des droits de l'homme et des libertés fondamentales ainsi que l'Etat de droit.

La Turquie poursuit son développement économique et social et avance sur la voie de son affirmation en tant qu'Etat démocratique moderne. Membre de l'Organisation des Nations Unies, de l'Organisation du Traité de l'Atlantique Nord, du Conseil de l'Europe et de la Commission de Venise depuis leur création, elle est associée à la Communauté économique européenne en vertu de l'Accord signé à Ankara le 12 septembre 1963, cinq ans après l'institution de cette dernière.

Ce traité est un des tous premiers *accords d'association* conclu par la Communauté. Il sera suivi de beaucoup d'autres accords, signés notamment avec les pays méditerranéens ainsi qu'avec ceux de l'Europe centrale et orientale, qui portent tous la même dénomination bien qu'ils présentent des caractéristiques très différentes. Cela n'a pas manqué de poser pendant longtemps des problèmes quant à la définition de la notion d'association contenue dans l'article 238 - aujourd'hui 310 - du Traité instituant la Communauté économique européenne, qui autorise la Communauté à conclure avec des Etats tiers "des accords créant une association caractérisée par des droits et des obligations réciproques, des actions communes et des procédures particulières".

Outre le caractère synallagmatique inhérent à tout accord, l'accent était mis, par l'article 310, sur des *actions communes* et des *procédures particulières*, ce qui laissait le lecteur quelque peu sur sa faim.

C'est de la Cour de Justice de la Communauté européenne - appelée par le Tribunal administratif de Stuttgart à répondre à des questions préjudicielles relatives à l'Accord d'Ankara dans une affaire opposant une ressortissante turque, Mme Meryem Demirel, à la Ville de Schwäbisch Gmünd (Affaire n° 12/86, arrêt du 30 septembre 1987, rec. de la Cour, 1987 p. 3751) - que viendra dans un *obiter dictum* un rayon de lumière, la Cour précisant qu'un accord d'association "... *créait des liens particuliers et privilégiés entre la Communauté et un Etat tiers qui doit, du moins partiellement, participer au régime communautaire.*"

Cette formule sera ultérieurement développée pour limiter l'utilisation de la locution « accord d'association » aux cas où les conditions suivantes sont réunies:

1. la création de liens particuliers et privilégiés pluridisciplinaires, autrement dit des liens dépassant la notion d'accord commercial et/ou de coopération économique;
2. des institutions paritaires, propres à l'accord et habilitées à prendre des décisions dans des domaines définis et
3. une durée suffisamment longue pour permettre aux institutions d'agir et à ces liens de se concrétiser.

Ces conditions sont présentes dans l'Accord de 1963, qui s'ouvre par un préambule par lequel les signataires se déclarent "Déterminés à établir des liens de plus en plus étroits entre le peuple turc et les peuples réunis au sein de la Communauté économique européenne", à l'époque les peuples allemands, belge, français, italien, luxembourgeois et néerlandais, ce qui rappelle singulièrement le préambule du Traité instituant la Communauté économique européenne.

Ces mêmes conditions se retrouvent dans les *accords européens*, dernière version des accords d'association, réservés aux candidats à l'adhésion, à la différence toutefois qu'ils établissent une zone de libre échange.

Les Parties Contractantes poursuivent en soulignant leur détermination d'assurer, d'une part, une amélioration constante des conditions de vie tant en Turquie que dans les Six par un progrès économique accéléré et par une expansion harmonieuse des échanges et de réduire, d'autre part, l'écart entre l'économie des Etats Membres et celle de la Turquie, afin de faciliter ultérieurement l'adhésion de cette dernière à la Communauté.

La Communauté économique européenne et ses Etats membres, d'une part, et la Turquie, d'autre part, concluent le préambule en se disant "Résolus à affermir la sauvegarde de la paix et de la liberté par la poursuite commune de l'idéal qui inspire le traité instituant la Communauté économique européenne".

Le cadre des liens est ainsi tracé pour élaborer ensemble un destin partagé des peuples des sept Etats dans une Communauté, qui connaîtra des élargissements successifs.

L'Accord d'Ankara comporte trois phases :

- a) une phase préparatoire permettant à la Turquie de renforcer son économie avec l'aide de la Communauté;
- b) une phase transitoire marquée par la mise en place progressive de l'union douanière et le rapprochement des politiques économiques, et
- c) l'actuelle phase définitive fondée sur l'union douanière et impliquant le renforcement de la coordination des politiques économiques.

Outre sa *nature mixte*, due à la présence des Etats membres et de la Communauté, cet Accord se rapproche aussi du Traité instituant la Communauté économique européenne du fait qu'il énonce les objectifs de l'association et fixe les lignes directrices pour les atteindre.

L'Accord confère, en même temps, les pouvoirs nécessaires au Conseil d'association - composé, d'une part, des membres des gouvernements des Etats membres, du Conseil et de la Commission européenne et, d'autre part, de membres du gouvernement turc - pour prendre les décisions requises par la réalisation des objectifs.

Quant à sa substance, l'Accord prévoit, comme élément central, l'établissement graduel d'une union douanière et il est utile de souligner que ce qui est envisagé dépasse la "partie substantielle des échanges", requise par l'Article XXIV chap. 8 du GATT.

L'Accord d'association prévoit en outre :

- la coordination étroite des politiques économiques des deux Parties Contractantes;
- des dispositions relatives à l'agriculture;
- la facilitation de la libre circulation des travailleurs, des services, des capitaux et de la liberté d'établissement;
- l'extension à la Turquie des dispositions communautaires visant le transport, et
- l'application par la Turquie des principes sur lesquels reposent les dispositions communautaires relatives à la concurrence, à l'imposition et au rapprochement des législations.

L'Accord est complété par un volet financier, qui fera l'objet de protocoles successifs ayant pour objet la réalisation de l'union douanière, la coopération administrative, la promotion de la démocratie, des droits de l'homme et de la société civile, la lutte contre la drogue, le planning familial, la protection de l'environnement et les catastrophes sismiques, sans oublier l'éligibilité aux programmes régionaux méditerranéens.

Cette brève énumération des domaines couverts par l'Accord permet de constater aisément que l'objectif défini par la Communauté européenne et la Turquie, il y a près de quarante ans, dépasse la conclusion d'une union douanière pour envisager un avenir commun embrassant un horizon plus large dont l'objectif ultime est l'adhésion de la Turquie à la Communauté.

La réalisation de l'éventail contenu dans l'Accord de 1963 n'a pas toujours été facile et elle a comporté des hauts et des bas. Il n'en demeure pas moins que l'union douanière est entrée en vigueur le 1er janvier 1996 avec toutes les retombées qu'elle comporte, en particulier, sur le plan douanier, sur la libre circulation des marchandises entre l'Union européenne et la Turquie et, d'une façon plus générale, sur le régime des échanges entre les signataires de l'Accord et les pays tiers.

L'agriculture et les services demeurent, pour l'instant, en dehors de l'union douanière, mais les Parties contractantes poursuivent les négociations afin de les y inclure.

La pratique montre que la transposition dans la réalité des dispositions des accords conclus a rarement présenté l'image d'un parcours sans obstacle. Il s'agit, en effet, de mettre en oeuvre de nouvelles normes en opérant sur un terrain souvent occupé par des mesures législatives et administratives qu'il est nécessaire d'abroger, d'amender ou de compléter.



C'est ainsi que la République de Turquie s'est dotée d'un nouveau code douanier et qu'elle a créé un Conseil appelé à traiter les affaires de concurrence, ainsi qu'un Bureau des brevets sous forme semi-publique, dépendant du ministère de l'Industrie et du Commerce. C'est ainsi aussi que la Turquie a légiféré en matière de droits afférents à la protection de la propriété intellectuelle et créé une autorité pour les copyrights. C'est ainsi, enfin, que des discriminations ont été éliminées et que les régimes d'importation ont été harmonisés.

Ces données ne sont pas exhaustives. Elles apportent simplement des indications sur l'œuvre qui est en cours de réalisation en Turquie dans sa marche vers l'Union européenne. Elles font partie du programme comprenant 200 lois, amendements et réformes que le Parlement turc se propose d'approuver dans les cinq années à venir.

Le Conseil européen de Cardiff, en octobre 1998, avait déjà souligné la nécessité de prendre toutes mesures visant l'approfondissement de l'union douanière et la promotion du développement économique et social en Turquie.

Le Conseil européen d'Helsinki a décidé en décembre 1999 d'étendre à la Turquie le bénéfice de la stratégie de pré-adhésion, mise en oeuvre par l'Union européenne afin de fournir aux pays candidats l'assistance multiforme nécessaire pour les aider à réaliser les réformes requises.

Ces réformes sont importantes, car elles ont pour but de faciliter la convergence des pays candidats et de l'Union européenne dans des domaines toujours plus vastes et diversifiés, compte tenu du développement permanent de cette dernière.

En mars 2000, le Gouvernement turc a adopté un programme national de réformes politiques, économiques et sociales pour préparer le pays à son rendez-vous avec l'Europe.

En octobre de cette année 2001, le Parlement turc a adopté un ensemble de 34 amendements à la Constitution de 1982 visant notamment la primauté des traités internationaux sur le droit national, les libertés individuelles et politiques, l'égalité des droits entre les époux, une plus grande liberté dans l'usage des langues, la prévention de la torture, la limitation de la peine capitale au temps de guerre et aux actes de terrorisme.

Pour la République de Turquie, qui a vu naître la Communauté européenne et qui a suivi de très près son évolution, il est aisé de constater le chemin parcouru en quelques décennies.

Le Traité instituant la Communauté économique européenne présente un triptyque comprenant (a) la définition d'une série d'objectifs, (b) la création d'institutions disposant des pouvoirs nécessaires pour atteindre ces objectifs et (c) l'établissement des procédures à respecter. Le tout apportant à la construction un dynamisme qui a produit un droit communautaire dérivé au volume impressionnant et qui a requis, au niveau du droit communautaire primaire, autrement dit des traités internationaux, une succession d'actes de droit international public dont le rythme s'est intensifié dans les derniers lustres.

A la différence des pays fondateurs, les pays candidats à l'adhésion se trouvent - à l'occasion de chaque élargissement - dans la situation de prendre un train en marche, qui ne peut se permettre d'arrêter sa course.

Entre 1973 et 1995, neuf Etats présentant entre eux de grandes différences ont rejoint les Six Etats originaires en effectuant ce saut, à l'occasion de quatre élargissements.

Le convoi est chaque fois plus long et l'opération plus complexe mais, la période transitoire aidant, chaque élargissement peut être considéré comme une réussite.

La construction européenne, entreprise en 1958, a plus de quarante ans et elle est désormais bien connue dans le monde notamment après le parachèvement du marché commun et sa transformation en marché unique, après la création de l'EURO, après la mise en oeuvre de bon nombre de politiques communes et après avoir dessiné ce que sera une politique étrangère et de sécurité commune et engagé une coopération fructueuse en matière d'affaires intérieures et judiciaires.

Au cours de ces années, l'adjectif *économique* qui qualifiait un moment important de l'existence de la Communauté a cessé de représenter l'objectif principal. Un ensemble d'activités bien plus larges et ambitieuses est venu s'y ajouter, d'où le nouveau système des trois piliers élaboré dans le cadre du Traité de Maastricht et composé de la Communauté européenne, de la politique étrangère et de sécurité commune et de la Coopération policière et judiciaire en matière pénale, le tout couronné par l'Union européenne qui assure un cadre de travail unique pour cette rencontre entre le communautaire et l'intergouvernemental.

Désormais, l'Union se donne pour objectifs de promouvoir le progrès économique et social ainsi qu'un niveau d'emploi élevé, d'affirmer son identité sur la scène internationale, de renforcer la protection des droits et des intérêts des ressortissants de ses Etats membres grâce à la citoyenneté européenne, de développer l'Union en tant qu'espace de liberté, de sécurité et de justice.

Désormais, l'Union souligne avec force qu'elle est fondée sur le respect des droits fondamentaux, tels qu'ils sont garantis par la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, signée à Rome le 4 novembre 1950, et tels qu'ils résultent des traditions constitutionnelles communes aux Etats membres en tant que principes généraux du droit communautaire.

Ces précisions, apportées par le Traité sur l'Union Européenne de 1992 et complétées par le Traité d'Amsterdam de 1997 et par le Traité de Nice signé le 26 février de cette année 2001 et actuellement en cours de ratification, donnent une image plus claire et mieux définie de l'Union européenne. C'est l'image d'une organisation internationale originale et particulière, dans laquelle il est possible d'identifier la trilogie des pouvoirs existant dans les Etats modernes et faisant l'objet d'une division entre le législatif, l'exécutif et le judiciaire.

Cette division horizontale des pouvoirs, chère à Montesquieu, est accompagnée d'une autre division de pouvoirs, verticale cette fois, entre la Communauté, ses Etats membres et les autorités infra-étatiques au sein de ces derniers, dans laquelle joue le principe de subsidiarité pour déterminer le meilleur niveau d'action.

L'image est complétée par les pouvoirs accrus du Parlement européen, élu au suffrage universel direct chaque cinq ans; par les pouvoirs attribués au Conseil européen, composé par les Chefs d'Etat et de Gouvernement des Etats membres; par la notion de citoyenneté européenne et les bénéfices qu'elle apporte à chaque national tant à l'intérieur qu'à l'extérieur de l'Union européenne, par la présence de la Commission européenne dont le droit d'initiative, la gestion quotidienne et la vigilance sur le respect du droit communautaire sont les garants de l'acquis communautaire et des progrès futurs.

Le rapport binaire Commission européenne-Conseil des Ministres, qui a caractérisé la Communauté pendant longtemps, évolue vers un rapport triangulaire où le Parlement européen trouve sa place. La forme définitive de l'Union européenne est toutefois encore à trouver et des débats animés ont lieu entre les tenants d'une fédération, d'une confédération ou, plus récemment, d'une fédération d'Etats-Nations, sans négliger la possibilité de formules entièrement nouvelles à inventer.

Dans ce contexte, la question du transfert de compétences - autrement dit de parcelles de souveraineté - des Etats à l'Union Européenne ne manque pas d'être posée et il est bon qu'elle le soit car cela permet d'appréhender pleinement et sa nature et ses effets.

Le transfert est parfaitement visible. Ce qui paraît être moins évident pour de nombreux observateurs c'est que, d'abord, la décision de transférer les compétences est elle-même un acte de souveraineté librement consenti par le Gouvernement qui signe un Traité européen, par le Parlement national qui le ratifie et, si la constitution de l'Etat concerné le requiert, par un référendum populaire. C'est que, en outre, ces transferts équivalent à une mise en commun de souveraineté, qui permet à l'Union européenne et à ses Etats membres d'affirmer sur la scène internationale une identité et un poids politique de loin supérieur à la somme de ses composantes. C'est que, enfin, il suffit de suivre l'actualité internationale pour apprécier les résultats que cette symbiose permet d'atteindre par rapport à ceux qu'il serait logique d'attendre si les Etats membres agissaient individuellement.

Une Conférence intergouvernementale est en préparation, appelée à aboutir à un autre traité, marquant une nouvelle étape sur le chemin d'une Europe, unie pour la première fois de son histoire dans la paix, la liberté et la démocratie, et ce non pas en vertu d'une imposition mais par la volonté de ses gouvernants et de ses peuples, en partant de l'extraordinaire clairvoyance d'un groupe d'hommes d'Etat décidés il y a un demi-siècle à enterrer définitivement la hache de guerre après les horreurs vécues dans deux Guerres Mondiales.

## TURKISH CONSTITUTIONAL LAW AND THE EUROPEAN UNION FROM A EUROPEAN POINT OF VIEW

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### **I. Introduction<sup>2</sup>**

Turkey's attempts to incorporate the "acquis" of Europe reach back to the middle of the 19<sup>th</sup> century. In the course of the "Tanzimat" period, the Ottoman Empire started a process of legal reform, of codification and restructuring the administrative and legal system.<sup>3</sup> Like in other European countries, such as Spain or Italy, this process was effected by the adoption of foreign codes, e.g. the French penal and commercial codes. The structure of the Constitution of 1876 recalled other European constitutions, e.g. the ones of Prussia or Belgium, even some similarities with the Imperial Constitution of Germany 1871 may be stated. In 1924, the new Republic of Turkey shaped her constitutional system very close to the developments which have occurred in other European countries after World War I.

After World War II, Turkey again stood close to the international developments. Turkey was one of the first members of the United Nations as well as of the Council of Europe. Turkey ratified the European Convention on the Protection of Human Rights and entered the NATO early in the Fifties and thus inclined herself to the adoption of the main principles of law, acknowledged by the western European countries. When Turkey ratified the Agreement of Association with the EEC in 1961, a new constitution was adopted, which – until our days – is said to be the most modern constitution Turkey ever has had. Later, Turkey also ratified the UN and European Conventions for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and most of the other international human rights instruments<sup>4</sup>.

Despite such positive steps, administrative and political practice remained behind the constitutional developments. It was not earlier than 1987 that Turkey acknowledged the jurisdiction of the European Commission and, in 1990, the European Court of Human Rights. Turkey hesitated until nowadays with ratifying the International Covenants on Civil

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*Note:* As far as Internet sources are used as references, they may change from time to time. The sources used in this contribution were active on 25 November 2001.

<sup>2</sup> See also Christian Rumpf, *The Turkish Legal Order and Europe - Contribution delivered to a Project of the University of Milan/Italy (L'Europa di Domani verso l'Allargamento dell'Unione, 15–17 February 2001, Milano)*([http://www.tuerkei-echt.de/Turkey\\_Europe.pdf](http://www.tuerkei-echt.de/Turkey_Europe.pdf)).

<sup>3</sup> See Christian Rumpf, *Zur Entwicklung der türkischen Rechtsordnung seit der Reformperiode im Osmanischen Reich, Zeitschrift für Türkeistudien 12 (2) (Journal of Turkish Studies), pp. 199-223.*

<sup>4</sup> See also Christian Rumpf, *The protection of human rights in Turkey and the significance of international human rights instruments, in: Human Rights Law Journal (Kehl), 1993, 14 (11-12), pp. 394-408.*

and Political Rights as well as on Social and Economic Rights (signed in August 2000<sup>5</sup>, but not yet ratified). Further, no measures have been taken towards signature of the European Convention for the Protection of Minorities, though it is difficult to consider the signature of this Convention as a pre-condition for accession, as long as other member states of the EU have not yet signed and ratified this Convention. The jurisdiction of the European Court of Human Rights shows in many respects the deficiencies of implementation of human rights practices in Turkey.

On the other hand, many important steps to the adaptation of the legal and administrative systems have been taken, especially on the economic sector. After some constitutional amendments as well as reforms in the fields of commercial law, the Customs Union came into force with the beginning of 1996<sup>6</sup>. This accelerated visibly the process of accession of Turkey to the EU and, especially, the process of reforms in the Turkish legal order.

Very few politicians and not more than one or two Turkish scholars defended the Constitution as it was. If under the heading IV we comment the amendments critically, we are aware that objection would concern the method (there is no scholarly method, because this contribution has to be understood as a kind of preliminary report) more than the contents and the criticism. But we should emphasize that the quality of a Constitution does reveal itself by its text, but by interpretative practice. So we must be aware that the need for constitutional adaptation to modern constitutional standards as reflected in the European *acquis* does by far not end with the amendment of the text.<sup>7</sup> Nonetheless, a well-elaborated text helps better interpreting in good faith.

## II. The Position of the EU in regard to the Turkish Constitution

For an evaluation of the steps which have been made or are to be made by the Turkish constitution-maker, the last decision of the EU-Council of Ministers seems to be a proper starting point.<sup>8</sup> Of course, the European Charter of Fundamental Rights<sup>9</sup> plays a decisive role when determining the adaptation of constitutional structures to the European *acquis*, though the Charter does only address the institutions of the EU, and the member states only in the case that they implement EU law (Art. 51 of the EU Charter).

By the said decision, the so-called “Accession Partnership” between EU and Turkey has been enforced.

“Accession Partnership” is, in legal terms, not a satisfactory description for a relationship which is actually supposed to be enforced. It might even seem to be created to freeze the EU-Turkey relationships on the level which has been achieved until now. As a matter of fact, such “partnership” had already been installed with the

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<sup>5</sup> The “Covenants” have been signed on 15 August 2000 (<http://www.un.org.tr/25coretraties.htm>), but not yet ratified.

<sup>6</sup> For more information see: Christian Rumpf, *Die Zollunion zwischen EU und Türkei*. *RIW (Recht der internationalen Wirtschaft – Journal of International Commercial Law)* 1997, pp. 46-53.

<sup>7</sup> Cf. the very interesting booklet of Kemal Gözler, *Anayasa Degisikligi Gerekli Mi? 1982 Anayasası İçin Bir Savunma (Is the amendment of the Constitution necessary? Defence of The 1982 Constitution)*, Bursa 2001.

<sup>8</sup> For an overview on EEC/EC/EU-Texts on the accession process cf. “Enlargement: Preparation for Accession - Turkey's pre-accession strategy (<http://europa.eu.int/scadplus/leg/en/lvb/e40113.htm>).

<sup>9</sup> *OJ*, 18 December 2000, C364/1.

Agreement of Association (1963), which is not an ordinary contract for cooperation, but an instrument envisaging accession within a period of time. A first step of enforcement had been made by the Additional Protocol, 1973. Thus, "Accession Partnership" does not mean anything else than the expression of the will by the side of the EU, to obey to an agreement concluded 40 years ago, but under new political conditions. This is not the place to question such new conditions, especially as laid down with the Copenhagen criteria. Politically, it is legitimate to urge "candidate countries" to do somewhat more than to adapt the commercial law to the "acquis", which itself has developed far beyond a mere commercial system of regulations and rules and reached a kind of constitutional structures, including certain understandings of human rights.

The interesting points of the decision of the Council can be found in the Annex to this decision.

First, the Annex recalls the latest history which started with the European Council in Luxemburg 1997, later followed by the European Council in Helsinki in December 1999, passing through a proposal of the Commission for a regulation (26 July 2000)<sup>10</sup>, based on the Council Regulation No. 622/98<sup>11</sup>, which was drafted for the implementation of the financial support for Turkish activities towards accession.

Second, the objective of the Accession Partnership is defined as

„... to set out in a single framework the priority areas for further work identified in the Commission's 2000 regular report on the progress made by Turkey towards membership of the European Union, the financial means available to help Turkey implement these priorities and the conditions which will apply to that assistance. This Accession Partnership provides the basis for a number of policy instruments, which will be used to help the candidate States in their preparations for membership. It is expected that Turkey on the basis of this Accession Partnership adopts before the end of the year a national programme for the adoption of the acquis. This is not an integral part of this Partnership but the priorities it contains should be compatible with it.

Furthermore, the decision stresses that Turkey has to meet the Copenhagen criteria which state that membership requires

- that the candidate State has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities,
- the existence of a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union,
- the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.

and that the *acquis communautaire* has to be incorporated in theory and practice of the Turkish legal order.

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<sup>10</sup> Another proposal for a regulation has been made by the Commission on 25 April 2001.

<sup>11</sup> OJ L 85/1, 20.3.1998.

This is not the place to repeat the whole of the text of the decision. For the purpose of this report it seems to be sufficient to point to the specific constitutional issues. From the point of view of the Council of Ministers the following tasks have to be accomplished by Turkey:

- Strengthen legal and constitutional guarantees for the right to freedom of expression in line with Article 10 of the European Convention of Human Rights. Address in that context the situation of those persons in prison sentenced for expressing non-violent opinions.
- Strengthen legal and constitutional guarantees of the right to freedom of association and peaceful assembly and encourage development of civil society.
- Strengthen legal provisions and undertake all necessary measures to reinforce the fight against torture practices, and ensure compliance with the European Convention for the Prevention of Torture.
- Further align legal procedures concerning pre-trial detention with the provisions of the European Convention on Human Rights and with recommendations of the Committee for the Prevention of Torture.
- Strengthen opportunities for legal redress against all violations of human rights.
- Intensify training on human rights issues for law enforcement officials in mutual cooperation with individual countries and international organisations.
- Improve the functioning and efficiency of the judiciary, including the State security courts in line with international standards. Strengthen in particular training of judges and prosecutors on European Union legislation, including in the field of human rights.
- Maintain the de facto moratorium on capital punishment.
- Remove any legal provisions forbidding the use by Turkish citizens of their mother tongue in TV/radio broadcasting.
- Develop a comprehensive approach to reduce regional disparities, and in particular to improve the situation in the south-east, with a view to enhancing economic, social and cultural opportunities for all citizens.
- Ensure that the conditions are in place for an active and autonomous social dialogue, inter alia, by ensuring that trade union rights are respected and by abolishing restrictive provisions on trade union activities,
- Guarantee full enjoyment by all individuals without any discrimination and irrespective of their language, race, colour, sex, political opinion, philosophical belief or religion of all human rights and fundamental freedoms.

Further develop conditions for the enjoyment of freedom of thought, conscience and religion.

- Review of the Turkish Constitution and other relevant legislation with a view to guaranteeing rights and freedoms of all Turkish citizens as set forth in the European Convention for the Protection of Human Rights; ensure the implementation of such legal reforms and conformity with practices in EU Member States
- Abolish the death penalty, sign and ratify Protocol 6 to the European Convention of Human Right
- Ratify the International Covenant on Civil and Political Rights and its optional Protocol and the International Covenant on Economic, Social and Cultural Rights
- Align the constitutional role of the National Security Council as an advisory body to the Government in accordance with the practice of the EU Member States
- Lift the remaining state of emergency in the southeast.
- Complete alignment of audio-visual legislation and strengthen the capabilities of the independent television/radio regulatory authority.
- Further develop and strengthen JHA institutions with a view in particular to ensuring the accountability of the police.
- Complete public administration modernisation reform to ensure efficient management of Community policies.

### **III. The National Program**

On March 19, 2001, the Turkish government officially adopted the “National Program for adopting European Union Legislation and Regulations (Acquis)” (Ulusal Program<sup>12</sup>). Thus, Turkey fulfilled a formal obligation which has been imposed on the entire candidate countries who wish to access to the European Union. This program shows in details, to which extent Turkey had already reached the “acquis communautaire” and to which extent there is still work to do. It reflects nearly all of the criteria and conditions of accession to the EU.

The National Program contains proposals for 90 new laws and 89 amendments to existing legislation in all. Each section of the Program identifies short and medium term priorities for the legislative work to be done. Actually, the Program does not show the whole of the scope of reforms which Turkey is facing. If we take, for example, the reform of the Civil Code which finally, after more than thirty years of struggle, has come to an end and which goes farther than only guaranteeing equality of women and men, or the reform of the Commercial

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<sup>12</sup> See for the full text in Turkish: <http://www.kobinet.org.tr/kosgebabm/yayinlar/up.html>; <http://ekutup.dpt.gov.tr/ab/ulusalpr/>



Code which is expected to take place within the next two years, or the reform of the Penal Code which is already passing through legislature procedures, it becomes clear that there is a general will and intent to deep structural reforms which reach beyond the demands of the European Union or the Council of Europe. On the other hand, we will see that at the present the “break-through” has not yet taken place.

The National Program addresses – according to a statement of the Turkish government<sup>13</sup> –

“... a wide range of key issues identified as crucial for Turkey’s EU membership. These, including measures in the area of human rights and political freedoms, will require the adoption of 26 new laws and 32 legal amendments. The plan also refers to the need to find a ‘mutually acceptable settlement’ for the Cyprus problem and improvements in relations with Greece, which is urged by the EU.<sup>14</sup> Changes are to be considered in the fields of freedom of expression; political parties law; rights to form associations and engage in peaceful assembly; combating ill-treatment and torture; improving prison conditions; the judiciary; the abolition of the death penalty; cultural life and the use of languages; equal rights for women; ending the state of emergency.”

Part of the National Program is, especially, legislation such as

- the amendment of the Constitution (for details see below IV.)
- abolishment of Article 8 of the Anti-Terrorism Act and Article 312 of the Turkish Penal Code are discussed,
- on political parties
- on the security forces
- on prisons
- on the judiciary, especially criminal procedure including the State Security Courts, as well as courts of appellation
- death penalty

and the ratification of international instruments on human rights. In this respect it should again be mentioned that Turkey is already a party to many of such instruments and that one of the major problems is not the being a party to but the practical implementation of such instruments. On the other hand, the subject of minorities is still handled with great retention.

The Cyprus issue may be mentioned here, but it raises no specific problem as to the internal legal order of Turkey. Bakir Çağlar, in his paper, tries to create a connectivity between this question and the Constitution through the “concept of national security” which is an incident principle of the Constitution. We do not think that this justifies the making the Cyprus question an issue of the constitutional structure of Turkey, neither on the normative nor on

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<sup>13</sup> <http://www.turkishembassy-london.com/eu.htm>

<sup>14</sup> *The Council of Ministers in his decision of 8 March 2001 demands for a settlement until the end of 2004 by application to the International Court of Justice.*

the institutional level. Nevertheless, the solution of this problem might be the keystone for accession, not only if we consider the position of Turkey in this conflict, but also, if we look at the position of the competent EU-organs; this one does unfortunately not reflect a proper approach to the issue.<sup>15</sup>

#### **IV. Amendments of 4 October 2001<sup>16</sup> to the Turkish Constitution<sup>17</sup>**

The package of constitutional amendments has come into force very recently.<sup>18</sup> Although it is not yet sufficient<sup>19</sup>, it has been the most prestigious and most comprehensive step towards leaving the string of constitutional developments which had been set up by the military coup of September 12, 1980, in order to adapt the constitutional structures of Turkey to the main principles of constitutional law which have been acknowledged by all of the European countries willing to access to the European Union. On the other hand, we should also remind the constitutional amendments of 1995, which already had prepared the floor for more political liberalism, especially as far as the space of activities for political parties, but also as the liberties of the trade unions are concerned.

We shall now try to explain the amendments in the light of Turkish constitutional law as well as in the light of the European texts which reflect the *acquis* and the demands of the European Union as well as the member countries which have finally to decide on the accession of Turkey to the EU.

##### **1. Freedom of opinion and expression of ones opinion in the Preamble**

The constitutional guaranty of the freedom of opinion had been shaped, until now, by Articles 25 to 27 and – if we include the freedom of press – Articles 28 to 30. Restrictions and limitations of the execution of such freedoms have been shaped not only with some provisions within these articles, but also with the general provisions of Articles 13 and 14. And finally, the preamble has to be mentioned which is, by Article 176, considered as “integral part of the text of the Constitution”. The preamble may even be considered as one of the most important texts of the Constitution, for it briefly and effectively describes the spirit of the Constitution as a whole. As far as the freedom of opinion is concerned it stipulated before the amendment

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<sup>15</sup> Cf. the judgment of the ECHR, 10 May 2001, *Cyprus vs. Turkey* (Appl. No. 25791/94); Christian Heinze, *On the question of the compatibility of the admission of Cyprus into the European Union with international law, the law of the EU and the Cyprus Treaties of 1959/60, Appraisal Study Munich 1997* (<http://www.mfa.gov.tr/grupa/ad/add/heinze2.htm>); Christian Rumpf, *Die staats- und völkerrechtliche Lage Zyperns*, *EuGRZ 1997* (*Europäische Grundrechte Zeitschrift – European Journal of Human Rights*), pp. 533-546. Furthermore, it is often forgotten that – if we ever take Turkey responsible for the present situation – that there are more parties to the conflict which have to be held responsible: in the first instance Greece but also Great Britain and, of course, the government of the “Republic of Cyprus”.

<sup>16</sup> The later additional amendment of Article 86 of the Constitution, Law No. 4720, 21 November 2001, *Resmî Gazete* No. 24600, 01 December 2001, concerns payment and pension of the members of parliament.

<sup>17</sup> On the Turkish Constitutional law in general see especially: Ergun Özbudun, *Türk Anayasa Hukuku* (Turkish Constitutional Law), Ankara 2000; Kemal Gözler, *Anayasa Hukukuna Giriş*, Bursa 2001; Seref Gözübüyük, *Anayasa Hukuku*, Ankara 2000; Erdogan Teziç, *Anayasa Hukuku*, Istanbul 1998; Christian Rumpf, *Das türkische Verfassungssystem*, Wiesbaden 1996; Tugrul Ansay/Don Wallace (ed.), *Introduction to Turkish Law*, Deventer 1996.

<sup>18</sup> *Resmî Gazete* (Official Journal) No. 24556<sup>bis</sup>, 17 October 2001.

<sup>19</sup> Another package of constitutional amendments was in parliamentary discussion when finishing this report by the end of November 2001.

“The determination that **no protection shall be afforded to thoughts or opinions** contrary to Turkish National interests, the principle of the existence of Turkey as an indivisible entity with its State and territory, Turkish historical and moral values, or the nationalism, principles, reforms and modernism of Ataturk,...”<sup>20</sup>

The highlighted phrase has been amended by “no protection shall be accorded to **activities** contrary...”

As the preamble is part of the constitutional text (cf. Article 176), it at least reveals some importance in the course of interpretation of other constitutional norms. It would be wrong saying that the text of the preamble is of no importance as far as it describes the ideology and the spirit of the whole of the Constitution. Consequently, the guaranty of the fundamental right of free expression of opinions or thoughts is highly endangered if such notions as “Turkish National interests” or “Turkish historical and moral values” are not only taken as normative limitations to the execution of the freedom of expression, but as a justification to deprive the individual of such freedom. When Article 8 of the Antiterror Act passed the judicial control of the Constitutional Court – with the objection of a judge who is today the President of the Republic –, it is the “concept of national security”, which protected this Article from being squashed. It further shows, that this concept which entails also the Turkish perception of a “militant democracy” (Çağlar), is quite different from the German and other concepts of the “wehrhafte Demokratie”.<sup>21</sup>

This change reveals its importance only if it is interpreted in the light of the supposed will of the legislator. The meaning of the notion of “activity” has a very wide range which also may cover typical forms of the expression of ones opinion, such as on the occasion of a demonstration. It is not clear enough if the “active” expression of such opinions shall remain within the scope of possible restrictions or not. And if we consider that the possible reasons for such limitations and restrictions remain untouched, it seems doubtful if the change is going deep enough. It is without any question that a State is allowed to restrain the execution of freedoms and the expression of opinions if certain public interests, especially state security interests are involved. The criteria for this are found Article 10 Para 2 of the European Convention of Human Rights and the jurisprudence of the Strasbourg Court. This has to be emphasized, for the spirit of a constitutional system is shaped much more by the definition of the public interests to justify the limitation and restriction of fundamental rights than the positive guaranty of such fundamental right. If on one hand we admit that a step towards the right direction has been made, on the other hand it is established that the spirit itself, which has been criticized so far, does not seem to have undergone an essential change.

## 2. The General Limits of Fundamental Rights and Freedoms

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<sup>20</sup> Official translation.

<sup>21</sup> See Christian Rumpf, *Das türkische Antiterrorgesetz Art. 8 - Staatsschutz und Gesinnungsstrafrecht im demokratischen Rechtsstaat*, KAS (Konrad-Adenauer-Stiftung) *Auslandsinformationen* 2/1996, p. 27; Jürgen Becker, *Die wehrhafte Demokratie im Grundgesetz*, in: Josef Isensee and others (ed.), *Handbuch des Staatsrechts*, Heidelberg 1992; Helmut Ridder, Art. 21 Abs. 2, No. 25, in: *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland* (Rudolf Wassermann (ed.), *Alternativkommentar*), vol. II, Neuwied 1984. The German concept has been developed especially in relation to the banning of political parties. After the events of 11 September 2001, it again plays a dominant role in public discussion (see a vast number of references in the internet).

The Turkish Constitution of 1961 already had introduced a system of “general” and “special” limitations of fundamental rights and freedoms. This means that beside specific conditions of limitation or restriction laid down in the articles which regulate the specific fundamental right, a general clause for the main conditions of limitation and restriction had been introduced. In 1982, the respective Article 11 had been replaced by Article 13<sup>22</sup>. Thus, a “triple” concept governed the regime of the fundamental rights: “general” and “special” limitations, encountered by “limits of limits”<sup>23</sup>, such as the spirit of the Constitution and the necessities of a democratic society. This system<sup>24</sup> has again changed with the amended and shorter version of Article 13, which now reads:

“Fundamental rights and freedoms may be restricted only on the basis of specific reasons listed in the relevant articles of the Constitution without prejudice to the values defined therein and only by law. These restrictions shall not conflict with the letter and the spirit of the Constitution and the requirements of the democratic social order and the secular republic and the principle of proportionality.”

This amendment of Article 13 reaches to the very heart of the Turkish human rights regime, which may be commented in five eminent points.

- (1) Since the coming into force of the 1982 Constitution, there has been an extensive discussion on the question, if the German concept of the **“guaranty of the core of the respective fundamental right”** (Wesensgehaltsgarantie or “essence of those rights and freedoms”, Art. 52 of the European Charter) or the concept introduced by the 1982 Constitution (see beneath (4)) is the better one. The text is still not very clear, as it recovers the wording of the previous version. But drawing both limits of limits into the same semantic framework, one may incline to the position that the Constitution emphasizes in a stricter manner what the Constitutional Court already has held in several decisions: that the concept of Article 13 entails the concept of “guaranty of the core of the respective fundamental right”. But on the other hand it has to be emphasized, that the kemalist concept, laid down in Article 2, remains upheld by the notion of “letter and spirit”. And when the new text also expressly refers to the “principle of secularism” which is anyway part of the “spirit of the Constitution” (Article 2), this is not more than a reaction to a specific political problem of our times. Nevertheless, the new text enforces a range of possibilities of interpretation which enables the relevant courts, especially the Constitutional Court,

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<sup>22</sup> Former version:

*“Fundamental rights and freedoms may be restricted by law, in conformity with the letter and spirit of the Constitution, with the aim of safeguarding the indivisible integrity of the State with its territory and nation, national sovereignty, the Republic, national security, public order, general peace, the public interest, public morals and public health, and also for specific reasons set forth in the relevant articles of the Constitution.*

*General and specific grounds for restrictions of fundamental rights and freedoms shall not conflict with the requirements of the democratic order of society and shall not be imposed for any purpose other than those for which they are prescribed.*

*The general grounds for restriction set forth in this article shall apply for all fundamental rights and freedoms.”*

<sup>23</sup> Cf. Rumpf, *Verfassungssystem* (note 17) p. 228.

<sup>24</sup> Cf. Rumpf, *Verfassungssystem* p. 219.

to react adequately on any new developments. The new provision seems to be adequate by an European point of view.

- (2) It has especially to be pointed out that a long development of constitutional jurisprudence has now reached to its end. The **principle of proportionality**<sup>25</sup>, which is, nowadays, a well established principle in most of the European legal systems and in the jurisprudence of the European Court of Human Rights as well as of the European Court of Justice, has found its place in Article 13 which is the proper environment for this eminently important means of interpretation and implementation of fundamental rights and freedoms. The constitution-maker thus acknowledged the doctrine which had extracted the principle of proportionality from the general fundamental rights regime, as it has also been done when stipulating Art. 52 of the European Charter.<sup>26</sup> This amendment also shows that from now on, there will be no need to refer to either the principle of the rule of law or the principle of equality<sup>27</sup> or any other attempt to find a proper constitutional basis for the principle of proportionality.
- (3) At this place the concept of “Vorbehalt des Gesetzes”, which – as an institution which has emerged in the tradition of German constitutional law – may be translated as “**reservation of/by law**”, has to be mentioned.<sup>28</sup> This concept is reflected Article 52 of the European Charter as well as in the ECHR, e.g. in its Article 10 Para 2, which says that

“**The exercise of these freedoms**, since it carries with it duties and responsibilities, **may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law** and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”

In this text, two strings of meaning are hidden, which both are elementary within the concept of the rule of law. One string is, that restrictions or limitations may be brought to a fundamental right only by a statute law. This means, that government and administration may, as far as fundamental rights are touched, only act on the basis of a law which empowers the government accordingly. This principle is also called the **principle of legality**. This principle has been emphasized by Article 13 when it says in paragraph 1 “and only by law”. This again has to be seen in the light

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<sup>25</sup> Cf. Rumpf, *Verfassungssystem* p. 232.

<sup>26</sup> When Gözler (note 7) criticizes this step urging to refer to the “necessity of the situation” he seems not to be aware of the fact, that proportionality is something different. Proportionality entails more than “necessity”: suitability and adequacy. If a limitation is “necessary”, but not adequate, it is unconstitutional as the result of a proper balance of interests.

<sup>27</sup> Turkish Constitutional Court in some cases, such as a decision of 21 March 1992, *Resmî Gazete* No. 21478<sup>bis</sup>, 21 January 1993 (Antiterror Act).

<sup>28</sup> Cf. Rumpf, *Verfassungssystem* p. 238.

of Article 91 para. 1, which prohibits the limitation of political freedoms by “decree with the force of law.”<sup>29</sup>

The other string of the meaning of “Vorbehalt des Gesetzes” is, that the Constitution provides for general norms which cannot be stipulated in details in a constitutional text, and therefore leaves to statutory law the completing of a normative notion in the Constitution. This is the point where the Constitution confers to the statutory lawmaker’s discretion and a margin of appreciation, as to what extent and with what content he would implement constitutional rules and principles, including fundamental freedoms and rights, in the social, economic and political practice of the State. Some present provisions and some new amendments emphasize this by using phrases such as “The formalities, conditions and procedures to be applied in exercise of the right to ... shall be prescribed by law.” (e.g. the new Article 26/3).

- (4) A word has to be said in respect to the notion of “**requirements of democratic society**”<sup>30</sup>. Here, Article 13 seems to adopt the system of “limits of limits” of Articles 8 to 11, Para 2, ECHR. But if we read it properly, there is an important difference. The Turkish version means, that a measure which interferes in fundamental rights, shall not be in conflict with the requirements of a democratic society, whereas the ECHR puts it in another way: restrictions have to undergo the test of necessity as they must not only be in conflict with the requirements, but must be required themselves by the necessity of a democratic society. On the other hand, we should not put too much emphasis on this difference. There has, since 1982, accrued a tradition of constitutional jurisprudence in Turkey which applies correctly the “requirements of a democratic society” as “limit of limits”.<sup>31</sup> And by watching again the concept of “Wesensgehaltsgarantie” in the present Constitution, the normative goal of such “limit of limits” is easily reached.
- (5) It seems to be wrong to blame the systematic of the constitution-maker in 1982 when he decided to follow the method of general – special principles. As long as one can hardly imagine that even a modern constitution would be able to enumerate all possible freedoms and rights, it makes sense to provide for general principles of limitation. It is the task of the judge in good faith to apply such principles adequately to the individual case, reflecting counter-principles such as “proportionality”, “protection of the core” or other constitutional principles, rights and duties.

### 3. Prohibition of Abuse of Fundamental Rights

Article 14 has been one of the most discussed articles of the Turkish Constitution.<sup>32</sup> Erroneously, it has often been compared with Article 18 of the German Constitution. The latter stipulates that an individual may be deprived of the exercise of freedoms if he/she abuses a fundamental freedom or right, such freedoms and rights which may be subjected to this article being enumerated therein; it is the Federal Constitutional Court who decides on

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<sup>29</sup> Cf. Rumpf, *Verfassungssystem* pp. 158, 239.

<sup>30</sup> The official translation says: “democratic social order”. This translation is not correct. For the concept of “requirements of a democratic society” see Rumpf, *Verfassungssystem* p. 229.

<sup>31</sup> Cf. Rumpf, *Verfassungssystem* p. 229.

<sup>32</sup> Cf. Rumpf, *Verfassungssystem* p. 224.

the contents and the scope of such deprivation. Article 14 of the Turkish Constitution, however, has a different approach, for it neither specifies the fundamental rights to be restricted on its basis nor provides for specific sanctions which would stipulate something essentially different from Article 13, if not a kind of justification for some specific legislation on the field of the protection of state security.<sup>33</sup>

The amendment of Article 14<sup>34</sup> is said to follow the example of Article 17 ECHR<sup>35</sup>. In fact, this is true for the second paragraph, whereas the amendment of the first paragraph is not yet satisfactory. The difference consists in the introduction of an element of “activity”. But this slight revision will not put an end to the discussion on its precedent, which has been deemed unnecessary and without sense in a modern system of balance between fundamental rights and public interests, primarily the interest of the State to protect itself from attacks against its democratic principles. Whereas Article 14 made some sense within the character of the Constitution of 1982 as a product of the military coup 1980, there is no need – beside the provisions of Article 13 – for such provision. As a whole, it is neither a kind of a Turkish version of Article 17 ECHR nor a remake of Article 18 of the German Constitution. Finally, it has no similarity with Article 54 of the European Charter. At the end, Article 14 in its amended version is not really satisfying neither from an European nor a Turkish point of view. It should be totally deleted.

#### 4. Personal Liberty and Security

“Personal Liberty and Security” are guaranteed under Article 19 of the Constitution. The amendments are easy to comprehend. In the amended version of Article 19, the phrase “**in the case of offences committed collectively, within fifteen days**” in the fifth paragraph is replaced by the phrase “**in the case of offences committed collectively, within four days.**” The problem had been that most of the state security crimes had been prosecuted under the

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<sup>33</sup> *The old version of Article 14 read:*

*“None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the State with its territory and nation, of endangering the existence of the Turkish State and Republic, of destroying fundamental rights and freedoms, of placing the government of the State under the control of an individual or a group of people, or establishing the hegemony of one social class over others, or creating discrimination on the basis of language, race, religion or sect, or of establishing by any other means a system of government based on these concepts and ideas.*

*The sanctions to be applied against those who violate these prohibitions, and those who incite and provoke others to the same end shall be determined by law.*

*No provision of this Constitution shall be interpreted in a manner that would grant the right of destroying the rights and freedoms embodied in the Constitution.”*

<sup>34</sup> *After the amendment, Article 14 reads:*

*“None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the State with its territory and nation, **or for activities undertaken with the aim of destroying the democratic and secular Republic based on human rights.***

*No provision of the Constitution shall be interpreted in a manner that **grants the State or individuals** the right of destroying the fundamental rights and freedoms embodied in the Constitution, **and of staging an activity with the aim of restricting rights and freedoms more extensively than is stated in the Constitution.***

*Sanctions for persons undertaking activities in conflict with these provisions shall be defined by law”.*

<sup>35</sup> *Article 17 ECHR: “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”*

allegation of “organized crime” which had led to detention periods of up to fifteen days without regard to if actually more than one person had been detained. Additionally, it has often been criticized that there was no practical need for longer periods of detention without referral to the judge other than a possible interest of the security forces in hiding traces of ill treatment.

The sixth paragraph which reads **“Notification of the situation of the person arrested or detained shall be made to the next of kin without delay, except for cases of definite necessity pertaining to the risks of revealing the scope and subject of the investigation compelling otherwise”** is replaced by **“Notification of the situation of the person arrested or detained shall be made to the next of kin without delay.”** By this amendment, the widespread practice of not informing relatives of the detainee at all is hopefully been put an end to.

The phrase **“according to principles of the law on compensation”** is added to the last paragraph on the right to seek compensation from the State provided for persons subjected to treatment contrary to these provisions.

The amendments to Article 19 are possibly highly relevant not only for the theory of normative stipulation, but also directly for the practice. It is crucial for the principles of due process and fair trial that the investigations are under some control from the very beginning of pre-trial detention. Proper and timely information of the relatives do not necessarily endanger the coming out of proper results of an investigation. On the other hand, such information prevents from disappearing and ill-treatment of the detainee, which has unfortunately happened under the existing law. Of course, no prosecutor or police officer will be obliged to inform the relatives about details of the allegations and the course of the investigations, with other words, there has been no obvious and rational public interest to be protected by the existing provisions.

Similarly, the obligation to refer a detainee of organized crime to a judge earlier than fifteen days after the first detention by the security forces does not endanger investigations. The judge will of course consider if there is an adequate justification for the detention of an individual, especially a well-founded suspicion that may justify deprivation of liberty until the investigations have been completed. It is clear – this is a fundamental principle of human rights – that without a well-founded suspicion and at least some evidence the right to liberty of the individual has to prevail (principle of proportionality). If we have a look at the practice, we easily understand the importance: at the beginning, it is more or less the police who decides if there is organized crime involved or not; as a consequence, participants to “illegal” demonstrations have often been detained in this context.<sup>36</sup>

## 5. Privacy

The protection of privacy is warranted by several provisions of the Constitution, Articles 20 to 22.

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<sup>36</sup> *“Illegal” is any demonstration which is held without prior permission as laid down in the respective law. Thus, a merely administrative illegality, by means of the penal sanctions provided for in this law, may, by interpretation of the security forces, turn into “organized crime”. This interpretation is even logical because of the pretended background of the perpetrators and the mere fact that they proceed together – which is a typical implication of every demonstration.*



a) Secrecy of individual life is guaranteed under Article 20<sup>37</sup>.

Amendments to this Article have been brought to two important subjects. The last sentence of the first paragraph has been deleted, to the second paragraph there have been added the classical conditions for the limitation of that right.<sup>38</sup>

Behind this amendment we find a discussion which is also common to other European countries, such as Germany who just amended the famous “G10”<sup>39</sup>: in how far may security forces be enabled to interfere into privacy, be it by means of search or be it by technical means, such as listening telephone or other private conversations. Interference in privacy is, according to the Turkish Constitution, possible on the grounds specified in the text of the Constitution and only on the basis of a law. Essentially, such interference may never take place by a mere administrative act, but only on a written judicial decision. Therefore, this solution presented by the Turkish Constitution seems to be adequate in the light of Article 8 ECHR and does not need further comment.

b) Similarly, the inviolability of domicile is protected by Article 21<sup>40</sup>.

The amendment brought to this provision is similar to the amendment to the previous one.<sup>41</sup> Thus it is sufficient to refer to the comment a). Additionally, the protection of property is now better respected (Art. 1 of Protocol No. 1 to the ECHR).

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<sup>37</sup> *The old version read:*

*“Everyone has the right to demand respect for his private and family life. Privacy of individual and family life cannot be violated. Exceptions necessitated by judiciary investigation and prosecution are reserved.*

*Unless there exists a decision duly passed by a judge in cases explicitly defined by law, and unless there exists an order of an agency authorised by law in cases where delay is deemed prejudicial, neither the person nor the private papers, nor belongings of an individual shall be searched nor shall they be seized.”*

<sup>38</sup> *The amended version reads:*

*“Everyone has the right to demand respect for his private and family life. Privacy of individual and family life cannot be violated.*

*Unless, for the grounds of national security, public order, the prevention of crime, public health, public morals, or for the protection of the rights and freedoms of others, there exists a decision duly passed by a judge in cases explicitly defined by law, or unless there exists a written order of an agency authorised by law in cases where delay is deemed prejudicial, neither the person nor the private papers, nor belongings of an individual shall be searched nor shall they be seized.”*

<sup>39</sup> *Law on the limitation of the privacy of correspondence and communication, 26 June 2001 (BGBl. I p. 1254); cf. German Constitutional Court, 14 July 1999 (1 BvR 2226/94, 1 BvR 2420/95, 1 BvR 2437/95) (<http://www.jura.uni-sb.de/jurpc/rechtspr/19990134.htm>, JurPC Web-Dok. 134/1999, para. 1 – 277; BVerfGE 100, pp. 313 etc.); Turkey has regulated this subject within the Law No. 4422 of 30 July 1999, Resmî Gazete No. 23773, 01 August 1999, on the struggle against organized crime.*

<sup>40</sup> *The old version read:*

*“The domicile of an individual shall not be violated. Unless there exists a decision duly passed by a judge in cases explicitly defined by law, and unless there exists an order of an agency authorized by law in cases where delay is deemed prejudicial, no domicile may be entered or searched, or the property therein seized.”*

<sup>41</sup> *The amended version reads:*

*“The domicile of an individual shall not be violated. Unless, for the grounds of national security, public order, the prevention of crime, public health, public morals, or for the protection of the rights and freedoms of others, there exists a decision duly passed by a judge in cases explicitly defined by*

c) Freedom of Communication and Correspondence is guaranteed under Article 22<sup>42</sup>.

The amendment concerns its paragraph 2.<sup>43</sup> It enforces the freedom of correspondence as a substantial part of privacy as well as of freedom of opinion. Thus, both Article 8 ECHR and Article 10 ECHR are involved. To our opinion, with this amendment, the Turkish Constitution meets the conditions of these articles.<sup>44</sup>

## 6. Freedom of Residence and Movement

Article 23<sup>45</sup> became relevant in Turkish politics when the government restricted, at the end of the seventies, the right to travel abroad on the grounds of the economic situation. The real reason was the fear that Turkish citizens would exhaust hard currency reserves when traveling abroad or moving hard currency capital illegally to foreign countries. This fear had been perpetuated by Article 23 para. 2, where the phrase which concerns grounds “of the national economic situation” has been deleted.

The amendment has been made in respect of Article 2 of Protocol No. 4 to the ECHR. Restrictions for economic reasons – flow of foreign currency back to foreign countries diminishing the foreign currency reserves in Turkey – have been in contradiction not only to the freedom of movement itself, but also been thought as limitation of the flow of capital (one of the four freedoms of the EU treaties). This flow of foreign currency was the only reason for such restrictions and can hardly be considered as appropriate justification of such

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*law, and unless there exists a **written** order of an agency authorised by law in cases where delay is deemed prejudicial, no domicile may be entered or searched, or the property therein seized.”*

<sup>42</sup> Article 22 read:

*“Everyone has the right to freedom of communication.*

*Secrecy of communication is fundamental.*

*Communication shall not be impeded nor its secrecy be violated, unless there exists a decision duly passed by a judge in cases explicitly defined by law, and unless there exists an order of an agency authorised by law in cases where delay is deemed prejudicial.*

*Public establishments or institutions where exceptions to the above may be applied will be defined by law.”*

<sup>43</sup> Article 22 Para. 3 now reads:

*“Communication shall not be impeded nor its secrecy be violated, unless, **for reasons of national security, public order, the prevention of crime, public health, public morals, or for the protection of the rights and freedoms of others**, there exists a decision duly passed by a judge in cases explicitly defined by law, and unless there exists a **written** order of an agency authorised by law in cases where delay is deemed prejudicial.”*

<sup>44</sup> See note 38.

<sup>45</sup> Article 23 reads, the highlighted phrase having been **deleted**:

*Everyone has the right to freedom of residence and movement.*

*Freedom of residence may be restricted by law for the purpose of preventing offences, promoting social and economic development, ensuring sound and orderly urban growth, and protecting public property; freedom of movement may be restricted by law for the purpose of investigation and prosecution of an offence, and prevention of offences. A citizen's freedom to leave the country may be restricted on account of **the national economic situation**, civic obligations, or criminal investigation or prosecution. Citizens may not be deported, or deprived of their right of entry into their homeland.”*

limitation. Instead, the government collects from Turkish citizens, according to a current practice, an amount of hard currency in favour of a fund.

## 7. Freedom of Expression and Dissemination of Thought

This freedom has been the most endangered one in recent Turkish politics. The two best known examples on the statutory law level are Article 8 of the Antiterror Act, which sanctions the dissemination of separatist propaganda, and Art. 312 of the Penal Code which sanctions the incitement of the people, especially on the grounds of race or religion, against the government or the law. In fact, the political discussion is to be conducted much more on the statutory but on the constitutional level. Nevertheless, a constitutional amendment (see also the Preamble and the regime of limitations) was necessary in order to prevent constitutional jurisprudence such as to Article 8 of the Antiterror Act which has passed the judicial control of the Constitutional Court.

As it has been done in the above-mentioned Articles, the main conditions of restriction and limitation which, before, had been part of Article 13, are now inserted into Article 26<sup>46</sup>.

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<sup>46</sup> *Old version:*

*“Everyone has the right to express and disseminate his thought and opinion by speech, in writing or in pictures or through other media, individually or collectively. This right includes the freedom to receive and impart information and ideas without interference from official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, and similar means to a system of licensing.*

*The exercise of these freedoms may be restricted for the purposes of preventing crime, punishing offenders, withholding information duly classified as a State secret, protecting the reputation and rights and the private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.*

*No language prohibited by law shall be used in the expression and dissemination of thought. Any written or printed documents, phonograph records, magnetic or video tapes, and other means of expression used in contravention of this provision shall be seized by a duly issued decision of a judge or, in cases where delay is deemed prejudicial, by the competent authority designated by law. The authority issuing the seizure order shall notify the competent judge of its decision within twenty-four hours. The judge shall decide on the matter within three days.*

*Provisions regulating the use of means of disseminating information and ideas shall not be interpreted as a restriction of the freedom of expression and dissemination unless they prevent the dissemination of information and thoughts.”*

*New version:*

*“Everyone has the right to express and disseminate his thought and opinion by speech, in writing or in pictures or through other media, individually or collectively. This right includes the freedom to receive and impart information and ideas without interference from official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, and similar means to a system of licencing.*

*The exercise of these freedoms may be restricted for the purposes **of protection of 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**, preventing crime, punishing offenders, withholding information duly classified as a State secret, protecting the reputation and rights and the private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.*

*Provisions regulating the use of means of disseminating information and ideas shall not be interpreted as a restriction of the freedom of expression and dissemination unless they prevent the dissemination of information and thoughts.*

Further, a paragraph has been added at the end. For the national and international discussion, however, the most important item is the freedom of expression in one's own language. On the basis of this article, a statute law had been passed in 1983, prohibiting the use of languages which are not "official languages of a State internationally acknowledged by Turkey".<sup>47</sup> This law had been lifted by Article 23 of the Antiterror Act, whereas similar restrictions have been kept in other laws such as the law of associations. In this respect, it should be expected that the new constitutional situation is implemented also on the level of statutory law. One may now say that the new provision is in accordance with Articles 9, 10, 14 and 18 ECHR as well as Article 1 of Protocol No. 12.

## 8. Freedom of the Press

This freedom is especially protected by Article 28<sup>48</sup>, followed by some supplementary guarantees.

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*The formalities, conditions and procedures to be applied in exercise of the right to freedom of expression and dissemination shall be prescribed by law."*

<sup>47</sup> For more information, see Christian Rumpf, *Das türkische Sprachenverbotsgesetz unter besonderer Berücksichtigung der völkerrechtlichen Verpflichtungen der Türkei*, *Orient* 30/1 (1989), p. 413.

<sup>48</sup> Amended version, the deleted part is highlighted:

*"The press is free, and shall not be censored. The establishment of a printing house shall not be subject to prior permission and to the deposit of a financial guarantee.*

***Publication shall not be made in any language prohibited by law.***

*The State shall take the necessary measures to ensure the freedom of the press and freedom of information.*

*In the limitation of freedom of the press, Articles 26 and 27 of the Constitution are applicable.*

*Anyone who writes or prints any news or articles which threaten the internal or external security of the State or the indivisible integrity of the State with its territory and nation, which tend to incite offence, riot or insurrection, or which refer to classified State secrets and anyone who prints or transmits such news or articles to others for the above purposes, shall be held responsible under the law relevant to these offences. Distribution may be suspended as a preventive measure by a decision of judge, or in the event delay is deemed prejudicial, by the competent authority designated by law. The authority suspending distribution shall notify the competent judge of its decision within twenty-four hours at the latest. The order suspending distribution shall become null and void unless upheld by the competent judge within forty-eight hours at the latest.*

*No ban shall be placed on the reporting of events, except by a decision of judge issued to ensure proper functioning of the judiciary, within the limits to be specified by law.*

*Periodical and nonperiodical publications may be seized by a decision of judge in cases of ongoing investigation or prosecution of offences prescribed by law; and, in situations where delay could endanger the indivisible integrity of the State with its territory and nation, national security, public order or public morals and for the prevention of offence by order of the competent authority designated by law. The authority issuing the seizure order shall notify the competent judge of its decision within twenty-four hours at the latest. The seizure order shall become null and void unless upheld by the competent court within forty-eight hours at the latest.*

*The general common provisions shall apply when seizure and confiscation of periodicals and nonperiodicals for reasons of criminal investigation and prosecution take place.*

*Periodicals published in Turkey may be temporarily suspended by court sentence if found guilty of publishing material which contravenes the indivisible integrity of the state with its territory and nation, the fundamental principles of the Republic, national security and public morals. Any publication which clearly bears the characteristics of being the continuation of the suspended periodical is prohibited; and shall be seized by a decision of judge.*

The most doubtful provision within this very long article has, at the end, been deleted. For more comments, see above No. 7.

## 9. Law of the Media

Article 31, which protects especially the accession of individuals and political parties to mass medias and all kind of means of communication, has only been amended by transferring the conditions for limitation from the old Article 13 to Article 31 para. 2. The amendment is therefore a natural result of the amendment of Article 13. In this respect, it is not this amendment, but the statutory law, which has to be discussed, and which is still disputed in Turkey. The practice of the Council of Radio and Television (“RTÜK”) under the respective law is often said to be unconstitutional. As a matter of fact, most of the existing channels already have been closed down once or more often for a period of time on the grounds of disseminating news or information which are not in conformity with the principles of national security, public order or public morals.

## 10. Freedom of Association

Article 33<sup>49</sup> has been amended quite substantially.<sup>50</sup> The right of association was, until now, one of the most critical points of constitutional politics and of Turkish administrative and

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<sup>49</sup> *Old version:*

*Everyone has the right to form associations without prior permission.*

*Submitting the information and documents stipulated by law to the competent authority designated by law shall suffice to enable an association to be formed. If the information and documents submitted are found to contravene the law, the competent authority shall apply to the appropriate court for the suspension of activities or dissolution of the association involved.*

*No one shall be compelled to become or remain a member of an association. The formalities, conditions, and procedures governing the exercise of freedom of association shall be prescribed by law.*

*Associations shall not contravene the general grounds of restriction in Article 13, nor shall they pursue political aims, engage in political activities, receive support from or give support to political parties, or take joint action with labour unions, with public professional organisations or with foundations.*

*Associations deviating from their original aims or conditions of establishment, or failing to fulfill the obligations stipulated by law shall be considered dissolved.*

*Associations may be dissolved by decision of judge in cases prescribed by law. They may be suspended from activity by the competent authority designated by law pending a court decision in cases where delay endangers the indivisible integrity of the State with its territory and nation, national security or sovereignty, public order, the protection of the rights and freedoms of others, or the prevention of crime.*

*Provisions of the first paragraph of this article shall not prevent imposition of restrictions on the rights of Armed Forces and Security Forces officials and civil servants to form associations, or the prohibition of the exercise of this right.*

*This article shall apply equally to foundations and other organisations of the same nature.*

<sup>50</sup> *The new version reads:*

*Everyone has the right to form associations, to become, or to cease to be a member of an association without prior permission.*

*No one shall be compelled to become or remain a member of an association.*

*The right to form associations shall only be restricted on grounds of national security, public order, the prevention of crime, public health and morals, and protection of the rights of others and only by law.*

constitutional practice. The legal regime of the right of associations, beginning with the political parties and ending by students associations or human rights associations has been restrictive to an extent merely incompatible with Article 11 ECHR. Until 1995, the “association” was a notion which primarily caused suspicion. The Constitution and the administrative practice were far from considering association as one of the essentials of a democratic society; this is still reflected in the law of associations. The banning of associations which might develop political activities, be it on the university campus, be it in the field of human rights, was a permanent part of judicial practice. Before the legal and constitutional background, neither the principle of proportionality nor the necessity of a democratic society was enabled to play the role of “limits of limits” in order to diminish the tendency of government and administration to restrict the freedom of association. Together with the amendment of Article 13, the amendment of Article 33 raises the hope of compatibility with the provisions and the related jurisprudence of Article 11 ECHR. It should now be expected that the law of associations would be revised in the light of the amendments.

## 11. Meetings and Demonstrations

Like the freedom of association, the right to assemble not only in the open air, but also in closed places suffered under the failing respect of Turkish governmental and administrative bodies against one of the pillars of public democratic life. The protection under Article 34<sup>51</sup>

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*The formalities, conditions, and procedures governing the exercise of freedom of association shall be prescribed by law.*

*Associations may be dissolved or their activities be suspended by decision of judge in cases prescribed by law. In cases where delay endangers national security or public order and in cases where it is necessary to prevent the perpetration or the continuation of a crime or to effect apprehension, an authority designated by law may be vested with power to suspend the association from activity. The decision of this authority shall be submitted for approval to the competent judge within twenty-four hours. Unless the judge declares a decision within forty-eight hours, this administrative decision shall be annulled automatically.*

*Provisions of the first paragraph of this article shall not prevent the imposition of restrictions on the rights of Armed Forces and Security Forces officials and civil servants to the extent that the duties of civil servants so require.*

*This article shall apply equally to foundations.*

<sup>51</sup> *The old version reads:*

*“Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission.*

*The competent administrative authority may determine a site and route for the demonstration march in order to prevent disruption of order in urban life.*

*The formalities, conditions, and procedures governing the exercise of the right to hold meetings and demonstration marches shall be prescribed by law.*

*The competent authority designated by law may prohibit a particular meeting and demonstration march, or postpone it for not more than two months in situations where there is a strong possibility that disturbances may arise which would seriously upset public order, where the requirement of national security may be violated, or where acts aimed at destroying the fundamental characteristics of the Republic may be committed. In cases where the law forbids all meetings or demonstration marches in districts of a province for the same reasons, the postponement may not exceed three months.*

*Associations, foundations, labour unions, and public professional organisations shall not hold meetings or demonstration marches exceeding their own scope and aims.”*

remained insufficient. With the amendment the Article became shorter.<sup>52</sup> The logic is again to restrain to essential regulation on the constitutional level and to leave details to the law. This means at the same time that the law has to respect the wording and the spirit of the Constitution as a whole. The restrictions stipulated in the former paragraph 2 are not constitutionally founded any more and have, if repeated in statutory law, to be measured with the principles of proportionality and the core of the fundamental right itself. Therefore, the new version seems to be better compatible with Article 11 ECHR than it had been before, amendments on the statutory level will be needed.

## 12. Fair Trial and Due Process

Under this heading, several provisions may be resumed for consideration.

- a. Access to the courts and the right to be heard is regulated in Article 36<sup>53</sup>. In respect to the fundamental rights in trial and legal proceedings, Turkey had, on the constitutional level, already reached European standards. There was – if ever – few need for amending the Constitution in this respect. It is, however, worth to note that Turkey is following international developments, especially pushed forward by the European Commission and Court of Human Rights, accepted by some national constitutional courts (such as the Federal Constitutional Court in Germany), which try to collect specific principles under the roof of the notion of “fair trial” and/or “due process”, which are the core of the principle of the rule of law. Thus, under the new Article 36 paragraph 1, the individual will have a “right to fair trial”. It is not yet clear, if such notion really has a normative meaning of its own beside all other principles such as the “right to sue”, “right to be heard” and others (see Articles 37 to 40).
- b. Improvement may be stated also in respect to Article 38. The old version already had shown a quite high standard.<sup>54</sup> Now, three paragraphs have been added.<sup>55</sup> These

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<sup>52</sup> *It now reads:*

*“Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission.*

*The right to hold meetings and demonstration marches shall only be restricted on grounds of national security, public order, for the prevention of crime, public morals, public health, or for the protection of the rights and freedoms of others, and by law.*

*The formalities, conditions, and procedures governing the exercise of the right to hold meetings and demonstration marches shall be prescribed by law.”*

<sup>53</sup> *The old version reads:*

*“Everyone has the right of litigation either as plaintiff or defendant before the courts through lawful means and procedure.*

*No court shall refuse to hear a case within its jurisdiction.”*

*The first paragraph after the amendment:*

*“Everyone has the right of litigation either as plaintiff or defendant **as well as the right to fair trial** before the courts through lawful means and procedure.”*

<sup>54</sup> *It read:*

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

additional provisions close the circle of principles within the frame of the procedural rule of law. In fact, the second additional paragraph is not new to the Turkish legal practice under the Criminal Procedure Code. But it puts the prohibition of using illegally obtained findings for evidence in a general way which means, that this rule shall be valid for all kinds of procedure where “evidence” has to be presented for a criminal, civil or administrative charge. It has especially to be seen in the light of late news of the Turkish press on the denunciation of politicians by presenting phone conversations which had been listened without authorization or a legal interest.

The prohibition to “imprison” a person “merely on the grounds of inability to fulfill a contractual obligation”, however, repeats exactly the wording of Article 11 of the UN Covenant on Civil and Political Rights and Article 1 of the Protocol No. 4 to the ECHR. This provision could also have been inserted in Article 19.<sup>56</sup> It should not be confounded with the possibility to detain a person as a means of execution of civil court decision for a reasonable time.

### 13. Death Penalty

The discussion in Turkey about the abolition of the death penalty had been extremely influenced by the struggle against terrorism, especially against terrorist groups such as Dev Sol or PKK. After the imprisonment of the leader of the PKK, Abdullah Öcalan, three main wings split the public opinion: the one saying, that the Öcalan case should be a turning point in criminal policy with abolishing the death penalty for any crime; the second saying, that at least crimes of terrorism should be punished with the death penalty and the third wing saying that Turkey should not incline to European pressure and keep the legal situation as it is.

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

*Penalties, and security measures in lieu of penalties, shall be prescribed only by law.*

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

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

*Criminal responsibility shall be personal.*

*General confiscation shall not be imposed as penalty.*

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

*No citizen shall be extradited to a foreign country on account of an offence.”*

<sup>55</sup> *The wording of the added provisions:*

*“The death penalty may only be imposed in time of war, imminent threat of war and for crimes of terrorism.*

*Findings obtained in a manner not in accordance with the law may not be admitted as evidence.*

*No one shall be deprived of his liberty merely on the grounds of inability to fulfill a contractual obligation.”*

<sup>56</sup> Cf. Article 8 of the Czech Charter of Fundamental Rights and Basic Freedoms, 1992 (<http://pravo.pinknet.cz/ustavni/czelistinae.txt>); Article 20 of the Estonian Constitution (<http://www.president.ee/eng/ametitegevus/?gid=10761>).



When Bakir Çağlar in his paper speaks about the “constitutionalisation” of the death penalty, it reflects a certain disappointment about the Turkish constitution-maker. Before the amendment, the problem had been discussed only on the statutory level, as there was no clear regulation on the death penalty, except showing it as an exception to the fundamental right to life. Now, by adopting the provision as cited above (No. 12), Turkey chose the second way to handle the problem. Actually, this choice is not in compliance with Protocol No. 6 to the ECHR, which does not provide for the exception of “crimes of terrorism”. One may admit, as Özbudun in an oral intervention put it, that this version does not hinder the legislator to abolish the death penalty on the statutory level and do so – as the representent of the Foreign Ministry emphasized – in a medium term. But abolishment of the death penalty in a constitutional sense is not confined to the possibility of the legislator to determine the scope and the time of reduction or abolishment, but to insert into the constitution a normative prohibition of death penalty. In view of Protocol No. 6, a clear and unconditional stipulation such as we found it in Art. 102 of the German Constitution (“The death penalty is abolished”) may go too far for a political system which has not suffered from historical experiences such as Germany. Additionally, the experience with the rise-up and the bloodshed caused by the PKK and – more recently – Hizbullah terrorist activities, should explain a certain hesitation of the responsible political parties when trying to explain to their electors that leading terrorists should not be hanged and leave prison after twenty years which is the realistic maximum for lifelong imprisonment. So it seems to be possible to consider the compromise to which the recent amendment has reached to, already as an achievement under the condition that the moratorium (since 1984) of the execution of death penalties is continued. But this does not set the Turkish legislator free from its responsibility to change the present, newly amended text, again.

#### 14. Access to the Courts

Turkey has split up the “right to access to the courts” into two different provisions, Article 40<sup>57</sup> and Article 125. This is not the place for arguing if this makes sense. Actually, Article 125 is confined to action against administrative acts, whereas Article 40 has a broader meaning of “access to the courts” which comprises any kind of courts. On the other hand, the former paragraph 2 (new paragraph 3) seems to deal with the right to sue the State for compensation which is quite similar if not the same as Article 125 para. 7. Nonetheless, if we see both of these two provisions together, one can say that the “right to access to the courts” as a major item of the rule of law has been completed by the amendment.

At the end, the new paragraph 2 should be mentioned. To show to the citizen the way to the court and the periods within which this should be done (instruction on remedies, German: Rechtsbehelfsbelehrung) is an improvement in favor of legal security within the relationship between the State and the citizen. It will work if the legislator implements this rule into the administrative court procedure laws in a manner that periods for action against

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<sup>57</sup> Article 40 reads (the newly added paragraph highlighted):

*Everyone whose constitutional rights and freedoms are violated has the right to request prompt access to the competent authorities.*

***In all of its acts, the State must determine the legal course of action and authorities that may be applied to persons concerned.***

*Damages incurred by any person through unlawful treatment by holders of public office shall be compensated by the State. The State reserves the right of recourse to the official responsible.*

administrative acts should only start running when the instruction on remedies has been provided together with the administrative act.

#### 15. Protection of the Family

Article 41 which deals with the protection of the family as an “institutional right” has been amended in a way which shall guarantee the equality of male and female spouses. This principle has, in the meanwhile, also been implemented within the frame of the reform of the Civil Code which has passed Parliament. Thus, a step towards implementation of Protocols No. 7 and 12 to ECHR has been made. The amendment may also be seen as an accomplishment of Article 10 of the Turkish Constitution which already prohibits any discrimination in the sense of Article 14 ECHR.

#### 16. Protection of Property

Property is protected in a general way under Article 35<sup>58</sup>. This does not hinder expropriation within the framework of Article 46<sup>59</sup>. The amendment constitutes a reaction on unsatisfying practices, such as withholding compensation for years and paying low interests. At the present, there has been a jurisprudence which puts the public servants under a certain pressure to comply with the principles which now are part of this amendment.

#### 17. Social State and Social Rights

The Federal Republic of Germany is proud of having “invented” the “Social State”. We are not sure if this allegation is true in all respects. But with its extensive jurisprudence in this respect, the Federal Constitutional Court was able to fill with life this principle which is often cited in connection with the rule of law – the “social state of law” –, assisted by a vast legislation. Nevertheless, the German Constitution is not a good example for showing how

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<sup>58</sup> This provision reads:

*“Everyone has the right to own and inherit property.*

*These rights may be limited by law only in view of public interest.*

*The exercise of the right to own property shall not be in contravention of the public interest.”*

<sup>59</sup> This provision reads, the added words highlighted:

*“The state and public corporations shall be entitled, where the public interest requires so, to expropriate privately owned real estate wholly or in part or impose administrative servitude on it in accordance with the principles and procedures prescribed by law, provided that compensation **in real terms** is paid in advance.*

*Compensation and the amount of additional compensation as finalized by court judgment shall be paid in cash and in advance. However, the procedure to be applied in paying compensation for land expropriated in order to carry out land reform, major energy and irrigation projects, and housing and resettlement schemes and reforestation, and to protect the coasts and to build tourist facilities shall be regulated by law. In previous cases where the law may allow payment in installments, the payment period shall not exceed five years; in such case payment shall be made in equal installments.*

*Compensation for land expropriated from the small farmer who cultivates his own land shall in all cases be paid in advance.*

*For the remainder of the installments provided for in the second sub-paragraph, and in cases of any standing expropriation payments not honored for any reason, an interest rate equivalent to the highest interest paid on the public debt shall be paid.”*

the principle of the social state should be shaped within a constitutional text. The Turkish Constitution itself seems to be the better example.<sup>60</sup>

a) Right to work

Article 49<sup>61</sup> has been amended<sup>62</sup> not really substantially. It reflects that Turkey has become aware of the fact, that unemployed workers have deserved protection and integration in the economic system. It is not quite clear why the third paragraph has been deleted. A reason may be that such provision could be understood as empowering the state to interfere in worker-employer relations in a way which may be considered un-democratic. In practice, this constitutional provision has lately been implemented by the establishment of a – hopefully – more effective employment administration and an unemployment insurance system.

b) Trade Unions<sup>63</sup>

Article 51, which has already been changed in 1995<sup>64</sup>, was again amended<sup>65</sup>, similarly to the right of associations. First of all, we should mention that the English translation of the

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<sup>60</sup> Cf. Rumpf, *Verfassungssystem* p. 121.

<sup>61</sup> It read before the amendment:

*“Everyone has the right and duty to work.*

*The State shall take the necessary measures to raise the standard of living of workers/employees, to protect them in order to improve the general conditions of labour, to promote labour, and to create suitable economic conditions for prevention of unemployment.*

*The State shall take facilitating and protecting measures in order to secure labour peace in worker-employer relations.”*

<sup>62</sup> ... and reads now:

*“Everyone has the right and duty to work.*

*The State shall take the necessary measures to raise the standard of living of workers/employees **and the unemployed**, to protect them in order to improve the general conditions of labour, to promote labour, and to create suitable economic conditions for the prevention of unemployment.”*

<sup>63</sup> For more information see: Christian Rumpf, *Barrieren auf dem Weg zur Gewerkschaftsfreiheit für Beamte in der Türkei*, EuGRZ 1995, p. 390.

<sup>64</sup> After the 1995 amendment it read:

*“Workers/employees and employers have the right to form labour unions and employers' associations and higher organisations, without prior permission, in order to safeguard and develop their economic and social rights and the interests of their members in their labour relations.*

*In order to form unions and their higher bodies, it shall suffice to submit the information and documents prescribed by law to the competent authority designated by law. If this information and documentation is not in conformity with law, the competent authority shall apply to the appropriate court for the suspension of activities or the dissolution of the union or the higher body.*

*Everyone shall be free to become a member of or withdraw from membership in a union.*

*No one shall be compelled to become a member, remain a member, or withdraw from membership of a union.*

*Workers/employees and employers cannot hold concurrent membership in more than one labour union or employers' association.*

*Employment in a given workplace shall not be made conditional on being, or not being, a member of a labour union.*

Turkish text is misleading, as it makes of the notion “workers” (which has been changed into “workers/employees” in our translation), whereas the Turkish version is speaking about “working people” which comprises also the employees. Thus, all kinds of employees are comprehended as being entitled to claim these rights. On one hand, this provision reflects a hard public dispute, with repercussions within the jurisprudence of the Turkish courts, which has been resolved in favor of trade unions for the civil service. On the other hand, the provision leaves unclear, if workers in the public service should have the right to form trade unions or not, or if it only means that, after workers having been assigned such right to themselves, employees should have such right, too. If we look at the practice, the latter seems to be true.<sup>66</sup>

c) Fair Salary

Briefly, the principle of “fair salary” has been amended by the criteria of “the minimum of living standards of employees”, which have been respected when setting the minimum wage, which already is constitutionally guaranteed (Article 55).

d) Limits of the Social State

The reality of social state policies shows that the budgetary framework of the State may set some limits to the expenses to be made for a far going protection of social rights. Accordingly, the Turkish Constitution has introduced Article 65, the final provision under the heading “The Extent of Social and Economic Rights”.<sup>67</sup> Few have changed by the

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*To become an executive in a labour union or in higher organisations of them it is a prerequisite condition that the workers/employees should have held the status of a labourer for at least ten years.*

*The status, the administration, and the functioning of the labour unions and their higher bodies should not be inconsistent with the characteristics of the Republic as defined in the Constitution, or with democratic principles.”*

<sup>65</sup> ... and now reads:

*“Workers/employees and employers have the right to form labour unions and employers' associations and higher organisations, without prior permission, in order to safeguard and develop their economic and social rights and the interests of their members in their labour relations and shall be free to become a member of, or withdraw from membership in a union. No one shall be compelled to become a member, remain a member, or withdraw from membership of a union.*

*The right to form labor unions and employers' associations and higher organizations shall only be restricted on grounds of national security, public order, prevention of crime, public health and morals and the protection of the freedoms of others.*

*The formalities, conditions and procedures governing the exercise of the right to form labour unions and employers' associations and superior organizations shall be prescribed by law.*

*Workers/employees and employers cannot hold concurrent membership in more than one labour union or employers' association.*

*The scope and exceptions of and limitations in this field to the rights of public employees who do not have the worker status, shall be prescribed by law in accordance with the nature of the service that they provide.*

*The regulations, management and functioning of labour unions and their higher bodies shall not violate the fundamental characteristic of the Republic and the principles of democracy.”*

<sup>66</sup> Cf. Rumpf, *Verfassungssystem* p. 250.

<sup>67</sup> It read until the amendment:

amendment<sup>68</sup>, which obtained a more realistic heading: “The Limitations of the Social and Economic Duties of the State”.

## 18. Citizenship

According to Article 66, “Everyone bound to the Turkish State through the bond of citizenship is a Turk.” The paragraph :

“The child of a Turkish father or a Turkish mother is a Turk. The citizenship of a child of a foreign father and a Turkish mother shall be defined by law.”

has been deleted. Thus, the violation of the principle of equality between men and women has been abolished, the provision being adapted to Article 5 of Protocol No. 7 of the ECHR as well as to Article 1 of Protocol No. 12.

## 19. Elections and Political Participation

Elections and the rights thereto are regulated in Article 67<sup>69</sup>. The amendments mark the half way of what the constitution-maker should have done.<sup>70</sup>

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*“The State shall fulfill its duties as laid down in the Constitution in the social and economic fields within the limits of its financial resources, taking into consideration the maintenance of economic stability.”*

<sup>68</sup> ... and now reads:

*“The State shall fulfill its duties as laid down in the Constitution in the social and economic fields within the limits of its financial resources, taking into consideration **the priorities in line with the objectives of these duties.**”*

<sup>69</sup> Article 67 read before the amendment:

*“In conformity with the conditions set forth in the law, citizens have the right to vote, to be elected, and to engage in political activities independently or in a political party, and to take part in a referendum.*

*Elections and referendums shall be held under the direction and supervision of the judiciary, according to the principles of free, equal, secret, direct, universal suffrage, and public counting of the votes. However, the conditions under which the Turkish citizens who are abroad shall be able to exercise their right to vote, are regulated by law.*

*All Turkish citizens over 18 years of age shall have the right to vote in elections and to take part in referenda.*

*The exercise of these rights shall be regulated by law.*

*Privates and corporals serving in the armed services, students in military schools, and convicts in penal institutions cannot vote. The Supreme Election Council shall determine the measures to be taken to ensure the safety of the counting of votes; such voting is done under the on-site direction and supervision of authorized judge.”*

<sup>70</sup> Now, Article 67 reads:

*“In conformity with the conditions set forth in the law, citizens have the right to vote, to be elected, and to engage in political activities independently or in a political party, and to take part in a referendum.*

*Elections and referenda shall be held under the direction and supervision of the judiciary, in accordance with the principles of free, equal, secret, and direct, universal suffrage, and public counting of the votes. However, the conditions under which the Turkish citizens who are abroad shall be able to exercise their right to vote, are regulated by law.*

*All Turkish citizens over 18 years of age shall have the right to vote in elections and to take part in referenda.*

Nonetheless, slowly, the Turkish electoral system approaches European standards. By this amendment, persons sentenced for negligence will be allowed to vote. This amendment has been undertaken in the light of Article 3 of the Protocol No. 1 of the ECHR. On the other hand, in the same light, there is no substantial change. It still seems doubtful if the denial of vote for military personnel is an adequate constraint of the right to vote.

Furthermore, it has to be said that on the statutory level there exists a bar of 10% for political parties to be achieved in the whole of the country. This regulation is contested in public discussion in Turkey as “undemocratic”. The political reason for this regulation was to prohibit a too vast number of parties being elected into the National Assembly as well as not to have regional parties be represented in the Parliament. Thus, especially political parties with a Kurdish background who regularly obtain important majorities in their respective region were not able to gain seats through election. At the present, it is envisaged to pull the bar down to 8%.<sup>71</sup>

## 21. Political Parties

The right to form political parties and to participate thereto is regulated in Articles 68 and 69<sup>72</sup>. The latter one has been amended<sup>73</sup>, especially concerning the issue of the banning of

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*The exercise of these rights shall be regulated by law.*

*Privates and corporals serving in the armed services, students in military schools, and convicts in penal institutions, with the exception of those convicted for negligent conduct, cannot vote. The Supreme Election Council shall determine the measures to be taken to ensure the safety of voting and the counting of votes; such voting is done under the on-site direction and supervision of authorized judge.*

*When there is less than one year for elections, amendments made to electoral laws shall come into force for the second consecutive elections.”*

<sup>71</sup> See e.g. “Yüzde 8 bilmecesi”, in: *Milliyet*, 17 November 2001.

<sup>72</sup> Article 69 read before the amendment:

*“The activities, internal regulations and operation of political parties shall be in line with democratic principles. The application of these principles is regulated by law.*

*Political parties shall not engage in commercial activities.*

*The income and expenditure of political parties shall be consistent with their objectives. The application of this rule is regulated by law. The auditing of the income and expenditure and acquisitions of political parties as well as the establishment of the conformity to law of their revenue and expenses, methods of auditing and sanctions to be applied in the event of unconformity shall also be regulated by law.*

*The Constitutional Court shall be assisted in performing its task of auditing by the Court of Accounts. The judgments to be rendered by the Constitutional Court as a result of the auditing shall be final.*

*The dissolution of political parties shall be decided finally by the Constitutional Court after the filing of a suit by the office of the Chief Public Prosecutor of the Republic.*

*The permanent dissolution of a political party shall be decided when it is established that the statute and programme of the political party violate the provisions of the fourth paragraph of Article 68.*

*The decision to dissolve a political party permanently owing to activities violating the provisions of the fourth paragraph of Article 68 may be rendered only when the Constitutional Court determines that the party in question has become a centre for the execution of such activities.*

*A party which has been dissolved permanently cannot be founded under another name.*

*The members, including the founders, of a political party whose acts or statements have caused the party to be dissolved permanently cannot be founders, members, directors or supervisors in any other*

political parties. At this place, the amendment of Article 149 – within the powers of the Constitutional Court – should be mentioned. Decisions on the dissolution of political parties have to be taken with a majority of the Court of 3/5.

Turkey has a long experience in the banning of political parties. This practice had become one of the most critical points when determining the extent of the implementation of

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*party for a period of five years from the date of publication in the official gazette of the Constitutional Court's final decision and its justification for permanently dissolving the party.*

*Political parties which accept financial assistance from foreign states, international institutions and persons and corporate bodies shall be dissolved permanently.*

*The foundation and activities of political parties, their supervision and dissolution, as well as the election expenditures and procedures of the political parties and candidates, are regulated by law in accordance with the above-mentioned principles.”*

<sup>73</sup> *The new Article 69:*

*“The activities, internal regulations and operation of political parties shall be in line with democratic principles. The application of these principles is regulated by law.*

*Political parties shall not engage in commercial activities.*

*The income and expenditure of political parties shall be consistent with their objectives. The application of this rule is regulated by law. The auditing of the income and expenditure and acquisitions of political parties as well as the establishment of the conformity to law of their revenue and expenses, methods of auditing and sanctions to be applied in the event of unconformity shall also be regulated by law.*

*The Constitutional Court shall be assisted in performing its task of auditing by the Court of Accounts. The judgments to be rendered by the Constitutional Court as a result of the auditing shall be final.*

*The dissolution of political parties shall be decided finally by the Constitutional Court after the filing of a suit by the office of the Chief Public Prosecutor of the Republic.*

*The permanent dissolution of a political party shall be decided when it is established that the statute and programme of the political party violate the provisions of the fourth paragraph of Article 68.*

*The decision to dissolve a political party permanently owing to activities violating the provisions of the fourth paragraph of Article 68 may be rendered only when the Constitutional Court determines that the party in question has become a focus of such activities. A political party will be considered to have become the focus of activities when actions of this type are undertaken intensively by the members of that party and when these actions are discreetly or openly approved by the general assembly or the chairman or the central decision-making or administrative organs or by the General Council of the Party Group at the Turkish Grand National Assembly or by the administrative board of that Group, or when these actions are directly and intentionally committed by party organs.*

*The Constitutional Court may take the decision to deprive the party of State funds, either partially or in full, instead of permanently dissolving the party, according to the gravity of the actions brought before the Court.*

*A party which has been dissolved permanently cannot be founded under another name.*

*The members, including the founders, of a political party whose acts or statements have caused the party to be dissolved permanently cannot be founders, members, directors or supervisors in any other party for a period of five years from the date of publication in the official gazette of the Constitutional Court's final decision and its justification for permanently dissolving the party.*

*Political parties which accept financial assistance from foreign states, international institutions and persons and corporate bodies shall be dissolved permanently.*

*The foundation and activities of political parties, their supervision and dissolution or the denial of state funds to them partially or in full, as well as the election expenditures and procedures of the political parties and candidates, are regulated by law in accordance with the above-mentioned principles.”*

democratic principles in Turkey. Accordingly, there is a vast jurisprudence of the ECHR<sup>74</sup> who only in one case – the case of the Welfare Party<sup>75</sup> – upheld the dissolution of a political party by the Constitutional Court. Actually, on one hand one can say that the Turkish system of dissolving political parties follows the principles of due process and fair trial; it is not a question of political discretion if a suit is filed to the Constitutional Court. On the other hand, it is problematic to handle the dissolution of a political party like any other criminal procedure as it is done under the Turkish system, because political parties, other than associations and trade unions or professional chambers, play a specific role within the development of public opinion and its referral to the competent legislative organs. Furthermore, the criteria and conditions on which the decision to ban a political party may be based, have been too narrow and – as to the notion of “focus of activities” – too uncertain. Third, the dissolution of a party is bound to a qualified majority of the Constitutional Court. This marks the difference between an “ordinary” political or non-political association or organization and a political party.

With the amendment, Turkey tries to find a way to preserve her faith to the system she has chosen as well as to comply with the jurisprudence of the ECHR. The future practice of the Turkish Constitutional Court will bring evidence if this compromise works.

## 22. Right of Petition

The Right of Petition had been reserved to Turkish Citizens. Now, it is ascribed also to “foreigners resident in Turkey in accordance with the principle of reciprocity”. This may be considered as an improvement vis à vis the principle of non-discrimination. Reciprocity, however, is still a constraint which seems, in this respect, to be at least doubtful in a modern democratic system.

Furthermore, the lacking effectiveness of Turkish petition procedures, lasting too long or never ending, shall be fought by inserting the phrase that the result of the petition shall be made known **without delay** to the petitioner in writing. However, we do not believe that this amendment bears any relevance.

## 23. Financial Situation of Members of Parliament

This point is not as eminent for the question of accession as most of the other amendments. Furthermore, the relevant Article 86 has been discussed in a second round in the Parliament and finally passed.<sup>76</sup>

## 24. Amnesty

The political practice of amnesty plays an eminent role in Turkey. In order to aggravate the possibility to pass amnesty laws, Article 87, which deals generally with the tasks and duties of the National Assembly, connects an amnesty law to a qualified majority of 3/5 of the total

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<sup>74</sup> *United Communist Party of Turkey vs. Turkey*, Application 19392/92, 30 January 1998, Reports 1998-I; *Socialist Party vs. Turkey*, Application 21237/93, 25 May 1998, Reports 1998-III; *Freedom and Democracy Party vs. Turkey*, Application 23885/94, 8 December 1999 (all of them to be found in the internet under <http://hudoc.echr.coe.int>).

<sup>75</sup> *Welfare Party vs. Turkey*, Applications 41430/98 and others, 31 July 2001 (*ibidem*).

<sup>76</sup> Law No. 4720 of 21 November 2001, *Resmî Gazete* No. 24600, 01 December 2001.



of the members. The phrase “excluding those individuals convicted for activities set out in Article 14 of the Constitution” has been deleted from the text of Article 87.

Thus, an eternal struggle between the Assembly and the Constitutional Court and, of course, a permanent political discussion has come to an end. Especially the question of equal treatment of “political” and “criminal” offenses has been given an answer to, in favor of the principle of non-discrimination.

On the other hand, Turkish “amnesty policies” will remain a major factor of causing legal uncertainty. The aim of criminal punishment, especially the idea of “general prevention”, has no meaning if criminals may hope to be released within much a shorter period than the law of execution of criminal punishments provides for and which is short enough (less than half-time in the average). The Turkish legislator seems to have difficulties to perceive the meaning of “peace through law”, which of course, in the long run, cannot be upheld by amnesties.

Nonetheless, the importance for the practice of this amendment remains doubtful. The simple reason for this is that the “criminal” amnesty laws passed by the Assembly during the last two decades were not “amnesties” in the technical sense but nothing else than the conditional release of prisoners on parole.

## 25. Promulgation of statutory laws

With a minor amendment of Article 89, it has been made clear that the power of the President of referring a law back to the National Assembly concerns both “full” and “partial” deficiencies of the law; in case of partial deficiency, the Assembly shall – according to the amendment – by now only discuss the deficient articles. The amendment touches much more a general Turkish view of the balance between Parliament and Presidency than specific European ideas of how such a balance should be established.

## 26. Internal Issues of the Parliament

### a) Election of the Speaker of Parliament

Article 94 is amended only in respect of the delay within which the Speaker has to be elected, now five days instead of ten days.

### b) Parliamentary investigation

We will not discuss the amendment of Article 100<sup>77</sup> in detail. The amendment has the purpose to bring more efficiency and less politicization to parliamentary investigation.

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<sup>77</sup> It reads now:

*“Parliamentary investigation concerning the Prime Minister or other ministers may be requested through a motion tabled by at least one-tenth of the total number of members of the Turkish Grand National Assembly. The Assembly shall consider and decide on this request with secret ballot within one month at the latest.*

*In the event of a decision to initiate an investigation, this investigation shall be conducted by a commission of fifteen members chosen by lot on behalf of each party from among three times the number of members the party is entitled to have on the commission, representation being proportional to the parliamentary membership of the party. The commission shall submit its report on the result of the investigation to the Assembly within two months. If the investigation is not completed within the time*

## 27. National Security Council

The National Security Council is said to be the nucleus of crucial political decisions. It is regulated in Article 118<sup>78</sup>, which has undergone some minor amendments<sup>79</sup>.

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*allotted, the commission shall be granted a further and final period of two months. This report shall be submitted to the Speakership of the Turkish Grand National Assembly by the end of this duration.*

*The report shall be distributed within ten days after the date of submission to the Speakership and it will be discussed in ten days after its distribution, and if necessary, the decision may be taken to bring the person involved before the Supreme Court. The decision to bring a person before the Supreme Court shall be taken by secret ballot only by an absolute majority of the total number of members.*

*Political party groups in the Assembly shall not hold discussions or take decisions regarding Parliamentary investigations.”*

<sup>78</sup> This Article read until the amendment:

*“The National Security Council shall be composed of the Prime Minister, the Chief of the General Staff, the Ministers of National Defence, Internal Affairs, and Foreign Affairs, the Commanders of the Army, Navy, and the Air Force, and the General Commander of the Gendarmerie, under the chairmanship of the President of the Republic.*

*Depending on the particulars of the agenda, Ministers and other persons concerned may be invited to meetings of the Council and their views be heard.*

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

*The agenda of the National Security Council shall be drawn up by the President of the Republic taking into account the proposals of the Prime Minister and the Chief of the General Staff.*

*In the absence of the President of the Republic, the National Security Council shall meet under the chairmanship of the Prime Minister.*

*The organisation and duties of the General Secretariat of the National Security Council shall be regulated by law.”*

<sup>79</sup> It now reads:

*“The National Security Council shall be composed of the Prime Minister, the Chief of the General Staff, Deputy Prime Ministers, the Minister of Justice, the Minister of National Defense, the Minister of the Interior, the Minister of Foreign Affairs, the Commanders of the Army, Navy and the Air Force and the General Commander of the Gendarmerie, under the chairmanship of the President of the Republic.*

*Depending on the particulars of the agenda, Ministers and other persons concerned may be invited to meetings of the Council and their views be heard.*

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

*The agenda of the National Security Council shall be drawn up by the President of the Republic taking into account the proposals of the Prime Minister and the Chief of the General Staff.*

*In the absence of the President of the Republic, the National Security Council shall meet under the chairmanship of the Prime Minister.*

Indeed, the role of the military within the Turkish constitutional system has been discussed at least since the military coup of 27 May 1960. After 1980, the role of the military has been even reinforced.<sup>80</sup> One of the main symbols for the predominance of the military in Turkish politics is the National Security Council. Such institution is known to many countries. But in Turkey, the number of members of the military staff within the council in relation to the number of civilians seemed to be somewhat unbalanced. Even if one considers that the Council of Ministers had to take into consideration by priority the decisions of the Council which does not mean being bound to such decisions, the political impact was of a character and a quality which allowed some observations as to the independence of the political organs from military influence. Also the fact that decisions have to be taken unanimously does not change things very much. If military power is – in fact – not under the full control of the civilian government and thus constitutes a power of its own, one cannot expect that civilians would easily vote different within such a council.

By this amendment, the number of civilians in the Council has been increased thus creating a majority against the members of the military staff. Furthermore, the taking into consideration “by priority” has been slightly changed by deleting “by priority”. On the other hand, the principle of unanimous vote has not been changed. One may consider that this hits both military and civilian drafts submitted to the Council. As a matter of fact, the military prevails in such a situation by the pure fact having “force” in the background. The weight of this argument increases under the consideration of the secretariat of the Council being directed by a general. As a consequence, there remains still a question mark behind this amendment.

Beyond the setting of the National Security Council, one should additionally expect some action, be it on behalf of the electoral rights of the military personnel, be it in relation to the delimitation of the competences of the military courts who have still, in some limited respect, jurisdiction over civilians.

## 28. End of the “Meta Constitution”

One of the most important amendments concerns Provisional Article 15<sup>81</sup>. With the new version, the last paragraph of this article is deleted from the text.

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*The organisation and duties of the General Secretariat of the National Security Council shall be regulated by law.”*

<sup>80</sup> See especially Metin Heper/Ahmet Evin (eds.), *State, Democracy and the Military - Turkey in the 1980s*, Berlin/New York 1988.

<sup>81</sup> It read before the amendment (the amendment consists of the deletion of the last paragraph):

*“No allegation of criminal, financial or legal responsibility shall be made, nor shall an application be filed with a court for this purpose in respect of any decisions or measures whatsoever taken by: the Council of National Security formed under Act No. 2356 which will have exercised legislative and executive power on behalf of the Turkish Nation from 12 September 1980 to the date of the formation of the Bureau of the Turkish Grand National Assembly which is to convene following the first general elections; the governments formed during the term of office of the Council; or the Consultative Assembly which has exercised its functions under Act No. 2485 on the Constituent Assembly.*

*The provisions of the above paragraphs shall also apply in respect of persons who have taken decisions and adopted or implemented measures as part of the implementation of such decisions and measures by the administration or by the competent organs, authorities, and officials.*

*No allegation of unconstitutionality shall be made in respect of decisions or measures taken under laws or decrees having force of law enacted during this period or under Act No. 2324 on the Constitutional Order.”*

This amendment means the end of the so-called “Meta Constitution”. After the military coup of 12 September 1980, the military junta (the interim National Security Council) had created a new political system which was reflected in nearly 600 statute laws passed between the coup and 6 December 1983, the day of the first reunion of the newly elected National Assembly under the 1982 Constitution. Some of these laws, such as the law of associations, political parties, trade unions and many others, entailed a notion of democracy which was not compatible with the understanding of “classic democracy” within the “acquis” of the member states of the Council of Europe. Where such laws were even not in compliance with the 1982 Constitution – which already has to be considered as authoritarian and not very friendly towards the protection of fundamental rights – the last paragraph of Provisional Article 15 prohibited the courts to bring such laws to the Constitutional Court. Attempts to do so had regularly been rejected by this court, who did not dare to keep the principle of the rule of law and the principle of democracy – both of them enshrined in the fundamental provisions of Article 2 – higher than a final provision with expressly “provisional” character. Of course, parliament has always been able to amend the laws passed in the period between September 1980 and December 1983. But nonetheless, once the Turkish Constitution had, since 1961, adopted the supervision of the legislator as a condition of a modern concept of the rule of law, the system under Provisional Article 15 fell into contradiction with this concept. As the same concept had been accepted by all of the EU and CE member states, Turkey stood behind with this kind of anachronism. Thus, after this amendment, the door will be open to putting an end to such ambiguity and the Constitutional Court will fulfill its task as a counterpart to antidemocratic and unconstitutional legislation.

Still, one may miss the deletion of this article in the whole. It shows the difficulty of Turkey to question and discuss the military coup and its consequences. From the European point of view one might take the position that the military coup was clearly a breach of the 1961 Constitution and Article 146 of the Penal Code. On the other hand, it is also very difficult to imagine which other remedy could have been brought to political and social problems in the year 1980, where the means of a democratic state obviously failed to cure the disease which pushed democracy and society in a situation of a civil war. Thus, at the end, we should appreciate the step being made and honor it. At least, the Constitution does not suffer any more from constitutional schizophrenia.

## V. Transfer of Sovereignty Rights<sup>82</sup>

Under this heading, we shall finally stress one of the most important features of the accession process. As the EU is a supranational organization which step by step approaches the structures of a constitutional system of its own, with its own powers and competences interfering directly with the national legal systems, it must be considered a *conditio sine qua non* that a candidate for accession to the EU defines its own constitutional system in a way that the execution of sovereignty rights by supranational organs such as the European Commission, the European Council of Ministers or the European Court of Justice does not come into a conflict with constitutional positions of a member state. Where at the very beginning of the European Economic Community one might have seen this item in a more

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<sup>82</sup> Cf. Füsün Arsava, *Geleceğin AB Üyesi olarak Türkiye – Egemenlik Haklarının Devri Sorunu (Turkey as a member of future EU – The Problem of Transfer of Sovereignty Rights)*, *Türkiye’de Anayasa Reformu – Prensipler ve Sonuçlar (Constitutional Reform in Turkey – Principles and Results)*, Konrad-Adenauer-Foundation (ed.), Ankara 2000, p. 71; Christian Rumpf, *Nationale Verfassung und Beitritt zur EU - Beispiel Türkei*, *AÜSBFD (Siyasal Bilgiler Fakültesi Dergisi – Journal of the Faculty of Political Science, Ankara University) 50/1-2 (1995)*, p. 297.

pragmatic way, the experience has shown, that a smooth development of Communities to a European Union could not afford renouncing to the solution of normative problems in respect to the transfer of sovereignty rights.

Of course, there is – in theory – no expressive provision under European law, saying that and how a member state should provide for a normative link between the national and the European legal system. But on the other hand, if we speak about “adaptation” of legal systems to the *acquis communautaire*, if accession is seriously envisaged, such legal system should first of all provide for the direct applicability of European law and administrative acts, adapt its own constitution accordingly.

It must be clearly stated that Turkey did not do her homework in this respect. In order to underline this allegation, we shall have a look to the fundamental provisions of the Turkish Constitutions, dealing with “sovereignty” and the execution thereof. These articles read:

“VI. Sovereignty

ARTICLE 6. Sovereignty is vested in the nation without reservation or condition.

The Turkish Nation shall exercise its sovereignty through the authorised organs as prescribed by the principles laid down in the Constitution.

The right to exercise sovereignty shall not be delegated to any individual, group or class. No person or agency shall exercise any State authority which does not emanate from the Constitution.

VII. Legislative Power

ARTICLE 7. Legislative power is vested in the Turkish Grand National Assembly on behalf of the Turkish Nation. This power cannot be delegated.

VIII. Executive Power and Function

ARTICLE 8. Executive power and function shall be exercised and carried out by the President of the Republic and the Council of Ministers in conformity with the Constitution and the laws.

IX. Judicial Power

ARTICLE 9. Judicial power shall be exercised by independent courts on behalf of the Turkish Nation.”

These provisions reflect a concept of sovereignty which does not comply any more with the principles of membership to the EU. It has been emphasized in the public and scientific discussion before and in the course of the law making process in respect of the constitutional amendments, that the constitutional concept of the European Union is based on the transfer of sovereignty to supranational organs, including administrative, legislative and judicial powers. The German Constitution – to give an example – says in its Article 24:

“(1) The Federation may transfer sovereignty rights to international institutions by law.

(1a) As far as such rights are addicted to the federate states, such states may with the prior consent of the Federal Government transfer such rights to cross-border institutions.

(2) The Federation may for the purpose of maintaining peace participate to an organization which serves collective security; it will consent to restrictions of national sovereignty rights for the purpose of maintaining a continuous order of peace in Europe and between the nations of the world.

(3) The Federation will participate to international arbitration agreements for the general, extensive and binding settlement of international disputes.”

Of course, such provision is not the only possible regulation for the transfer of sovereignty rights. But as long as Turkey does not incline to insert any provision which might be similar to Article 24 of the German Constitution or Article 28 of the Greek Constitution, the constitutionality of the accession to the EU from a Turkish point of view will remain at least questionable. Any jurisdiction of the ECJ will be in contradiction to Article 9 of the Constitution, any act of legislation will be in contradiction to Article 7 and any administrative decision with direct effect on Turkish institutions and nationals will violate Article 8 of the Turkish Constitution. At this place, we shall not go into details, which wording such a provision should have and in which context of the Constitution it should be inserted. We would prefer a provision narrowly connected to the above-cited fundamental provisions, better than within to Article 90 which regulates the position of international agreements in the Turkish constitutional system.

## **VI. Minority Rights**

The amendments of the Constitution deal with minority rights only in one respect. The possibility to ban the making use of the own mother tongue has been abolished. To our opinion, the protection of minority rights must not necessarily pass through the establishment of a kind of institutional protection of what is called “minority rights”. But if Turkey alleges that the protection of minorities passes through the protection of fundamental rights, then it must be clear that the making use of fundamental rights must go far enough to enable the individual to develop and keep its individual identity, defined by the belonging to a specific ethnic group. This is what the EU demands when urging the “protection of minorities”. The Constitution in the new version may, if interpreted accordingly, give way to such practice which may satisfy the European Union. We all know, that other member countries have similar problems. But there are a couple of possibilities to solve conflicts between the needs of personal and social identity of individuals belonging to different ethnic groups, including their liberties, and the need to uphold national security. If we take the example given by Professor Çağlar in his contribution, citing Daniel Cohn-Bendit, we have a wide range between the models of “Barcelona” and the model of “Bagdad” – one standing for a smooth solution, giving regional minorities certain rights in political and administrative autonomy and the other one standing for a strong centralism which would not be bearable under the political, social and legal conditions within the EU. Or we may put it with the OSCE High Commissioner on National Minorities Max van der Stoep who in 1999 on the OSCE-summit in Istanbul is reported to have stated, that the concepts of “internal self-determination” and “non-territorial autonomy” together could ensure better participation in public life without prejudice to the territorial integrity of a state.<sup>83</sup> For Turkey, the French model may be considerable, still within a centralistic concept, where in some sensitive regions such as Corse, Brittany, Alsace or the south (Occitany) school lessons are given to the choice of the pupils in their respective mother tongue.<sup>84</sup>

## **VII. Conclusion**

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<sup>83</sup> *Cit. by Naz Cavusoglu, Cultural Identity: A “Minority Question”, presentation delivered to the symposium “Copenhagen Criteria”, Istanbul 24-25 June 2000.*

<sup>84</sup> *The daily Dernières Nouvelles d’Alsace, 11 November 2001, gives some examples: In 2000, 152,557 out of 12 million pupils have chosen this possibility, more of 70,000 in the south, only some 6,500 in the Alsace.*

Accession to the EU does not mean that all national legal systems have to run synchronically in every respect. On the other hand, the *acquis* means that at least some fundamental principles have to be accepted as common. Some of these principles are even laid down in international or European legal instruments such as the ECHR and the protocols thereto or in the European Charter of Fundamental Rights. If a constitutional text is not in compliance with the wording of such instrument, there remains no way to see such violation in the light of national exception or specialty or within a kind of margin of appreciation which every state without any doubt has within the framework and scope of the wording and the meaning of binding international instruments.

Thus, we can assemble our comments within the following conclusions:

1. The system of guarantees of the fundamental rights and freedoms and their limitation has approached to the exigencies of the EU. Nevertheless we have the feeling that the Turkish constitution-maker has still some problems with the basic principle which is stipulated in Article 1 of the European Charter of Fundamental Rights as “Human dignity is inviolable. It must be respected and protected.” The German example (Article 1 of the German Grundgesetz), on which this provision is based, shows very well that putting this principle on the top of the provisions on the fundamental rights may be of major importance for jurisprudential tradition and the setting of fundamental rights within a constitutional system. In the German constitutional practice, the principle of human dignity has played a most important role in the protection of fundamental rights.
2. The transfer of sovereignty rights has not been regulated; therefore, to our opinion, an eminent precondition for the accession has not yet been implemented.
3. The regime of rights attributed to minorities is not yet satisfying, even if we have to admit that the most important issue – making use of the mother tongue – has been solved at least on the constitutional level.
4. The amendment in respect to the abolishment of the death penalty is not yet compatible with the Protocol No. 6 of the ECHR.
5. The role of the military has not changed essentially.

In other words: the constitutional developments, from the point of view of the European Union<sup>85</sup>, are not yet sufficient to justify a positive decision on the accession of Turkey to the EU. But we still hope, that the responsible politicians in the decisive positions within the Turkish political system will continue working on this development<sup>86</sup> and come, in a second round of constitutional amendments, to more encouraging conclusions.

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<sup>85</sup> *Even if we argue that this “point of view” is going too far and aggravating the accession of Turkey, it is, also in legal terms, a fact which has been established by all of the member states.*

<sup>86</sup> *Of course, not only politicians but also judges and public officers have to fulfill their tasks within their area of competence.*

## DROIT CONSTITUTIONNEL TURC ET INTEGRATION EUROPEENNE : UNE PERSPECTIVE TURQUE

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*"Who watches the watchmen?... The watchmen, of course"*  
(Question et réponse du prof. Mauro Cappelletti)

Acceptée en décembre 1999 par le Conseil européen de Helsinki au statut de pays candidat à l'intégration, mais stigmatisée par la Commission et le Parlement pour ses "graves lacunes" en matière "de droits de l'homme et de respect des minorités", la Turquie va-t-elle (ou peut-elle) s'engager plus avant vers le processus d'intégration à l'Union européenne (UE) ?

Quatre problèmes se dégagent, qui seront brièvement étudiés en quatre notes successives, sous la forme brute de pistes de travail.

**Note I :** Le programme national : L'épreuve européenne et l'exception turque (La question chypriote, la peine de mort, le rôle politique de l'armée, la question des minorités).

**Note II :** Un édifice juridique qui se démarque de la Convention européenne des Droits de l'homme et des normes en vigueur dans l'UE (La doctrine républicaine et l'arsenal juridique, la conception militante de la démocratie).

**Note III :** Les formes étatiques et particularismes régionaux à l'heure de l'élargissement de l'Union ; un défi pour la Turquie ?

**Note IV :** Les critères politiques de Copenhague – Les valeurs fondamentales des sociétés démocratiques : les articles 2 et 3 de la Convention européenne des Droits de l'homme c. la Turquie et la mise en œuvre des arrêts de la Cour européenne et le "droit politique" turc.

1. La Constitution turque, adoptée en 1982 après le coup d'Etat, est considérée par les instances européennes comme un *"instrument répressif faisant obstacle à la démocratisation du système"*.

L'Assemblée parlementaire du Conseil de l'Europe rappelle que la Constitution de 1982 a été élaborée à une époque où la Turquie était sous un régime militaire et qu'elle repose en partie sur des principes qui datent de la création de la République turque en 1923 et **qui ne sont plus conformes aux critères en vigueur au Conseil de l'Europe**<sup>87</sup>.

Les *"Founding Fathers"* de la Constitution ont, en effet, adopté le diagnostic et la conclusion du Rapport de la "Commission trilatérale" (M. Crozier, J. Watanuki, S. P. Huntington, *The Crisis of Democracy*, NY, 1975). L'ingouvernabilité ou la décadence résulte d'un **manque de synchronisation** entre la mobilisation socio-politique et le développement d'institutions autonomes capables de les encadrer. Il faut donc réduire les espaces susceptibles d'être

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<sup>87</sup> Cf. Doc. 9120, 13 juin 2001.



démocratisés et les groupes d'intérêts doivent nécessairement se limiter dans leurs propres revendications. (V. B. Çağlar, "La genèse de la Constitution turque", Espoir, 85, Plon, p. 34 s.)

Certes, le Parlement a approuvé une révision de la Constitution afin de faciliter l'intégration de la Turquie à l'UE, mais de graves manquements subsistent<sup>88</sup>.

Dans le rapport de la Commission pour le respect des obligations et engagements des Etats membres du Conseil de l'Europe de 1999, MM. Barsony et Schwimmer concluaient que la démocratie turque repose sur une constitution marquée par le **legs kémaliste**, adoptée par référendum en 1982 sous le régime militaire. Une des caractéristiques de la Turquie mentionnée dans le rapport de 1999 est "*la glorification de la nation et les forts sentiments nationalistes et patriotiques qui lui sont associés*". Compte tenu de ces éléments, la souveraineté et l'intégrité de l'Etat turc ont tendance à primer sur le respect des libertés et des droits de l'homme.

Le Parlement a adopté, le 4 octobre 2001, un premier "**toilettage constitutionnel**" de 34 articles inspirés du Programme national turc.<sup>89</sup> Toutefois, ce chantier ne sera pas clos en quelques mois. La révision de la Constitution approuvée par le Parlement turc devrait assurer une meilleure protection des droits de l'homme, ramener la période maximum de détention provisoire de quinze à quatre jours, rendre la dissolution des partis politiques plus difficile...

Les organisations des droits de l'homme, le "*Human Rights Watch*" entre autres<sup>90</sup>, ont souligné que ces réformes étaient insuffisantes. Les nouveaux amendements demeurent limités par la "protection de la sécurité nationale, l'ordre public et la sûreté, les principes fondamentaux de la République et l'unité indivisible de l'Etat et de la nation". Ce **toilettage** ne résoudra pas tous les problèmes des droits de l'homme. Si on s'engage effectivement sur la voie de l'UE, il faudra très certainement faire plus que réviser la Constitution de 1982. Il faudra **un acte constituant originaire, initial**.

Le clivage entre les "**Républicains**" stricto-sensus, gardiens de l'orthodoxie ou partisans du système étatique en vigueur dont l'armée se veut la gardienne exclusive, et les "**Démocrates**" (ou Républicains - bis) favorables à une refonte de la norme fondamentale se précise au fur et à mesure que se rapproche l'échéance de l'adhésion à l'UE.

"**L'initiative pour une Constitution civile**", un collectif créé en janvier 2000, a pour objectif de doter la République d'une Constitution qui ne serait pas "imposée du haut", fondée non pas

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<sup>88</sup> L'Assemblée s'attendait à ce que la révision de la Constitution annoncée dans le Programme national turc mène à l'introduction d'un contrôle parlementaire sur le Conseil national de sécurité, à la révision et à l'achèvement du système de protection des droits de l'homme et des libertés fondamentales, à "l'abolition de la peine de mort", à la confirmation de la prééminence du droit et au renforcement du contrôle juridictionnel sur tous les actes administratifs. L'Assemblée avait recommandé aux autorités turques de prendre en considération, pour tout amendement à la Constitution, l'expérience de la Commission européenne pour la démocratie par le droit (la Commission de Venise).

<sup>89</sup> L'adoption de ces amendements s'explique par le fait que l'UE doit publier prochainement son rapport annuel sur les progrès accomplis par la Turquie.

<sup>90</sup> E. Anderson, directrice du département Europe et Asie centrale de l'organisation Human Rights Watch, ne s'est pas trompée; "Le Parlement turc a transformé ce qui aurait pu être un tournant vers le changement en occasion manquée".

sur une "**stratégie exclusionnaire**" mais sur une "**stratégie inclusionnaire**" pratiquée par exemple dans la transition espagnole<sup>91</sup>.

D'autres secteurs de la société civile, comme la **TUSIAD** - association du grand patronat laïque (le Medef turc) -, les organisations (associations et fondations) des droits de l'homme, les organisations et publications pro-kurdes, les associations patronales islamisantes, avec d'autres motivations, militent pour le même objectif.

Même si le rapport des forces est déséquilibré<sup>92</sup>, la Turquie peut-elle être "**plurielle**"?

2. Malgré la reconnaissance de son statut de candidat lors du sommet d'Helsinki en 1999, la Turquie est citée à deux reprises dans le **rapport du Parlement sur la situation des droits de l'homme dans l'UE (1998-1999)** pour le non-respect flagrant des droits de l'homme, qui s'est manifesté sous diverses formes: torture, exécutions sommaires, mauvais traitement des détenus<sup>93</sup>, absence de juridiction équitable et indépendante.

Montrée du doigt dans d'autres études similaires, la Turquie devra radicalement changer cette situation si elle veut prétendre à l'adhésion. Certains paragraphes du rapport précité condamnent les États candidats pour non-application de certaines normes de l'UE. C'est notamment le cas de la Turquie pour ses violations des droits de l'homme et des minorités (par. 68); elle devrait impérativement respecter les **critères de Copenhague** pour entamer les négociations d'adhésion (par. 71).

La situation générale en matière des droits de l'homme en Turquie est toujours soumise à la procédure de contrôle ouverte en 1987 par le Conseil de l'Europe.

#### **NOTE I. LE PROGRAMME NATIONAL TURC - L'ÉPREUVE EUROPÉENNE ET « L'EXCEPTION TURQUE »**

Le **Programme national** pour l'adoption de l'acquis communautaire, approuvé en mars 2001 par le gouvernement turc dans le cadre du processus d'adhésion à l'UE, dont les chapitres 1.1 "**introduction**" et 1.2 "**critères politiques**" ont été présentés par le gouvernement comme programme pour le respect des obligations et engagements de la Turquie en tant qu'État membre du Conseil de l'Europe, reflète un compromis délicat entre les forces politiques au pouvoir<sup>94</sup>.

Les engagements pris par le gouvernement représentent des intentions ("*le gouvernement turc prévoit de..*") qui sont formulées avec des délais de mise en œuvre longs et flexibles.

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<sup>91</sup> *La stratégie exclusionnaire de la Constitution turque de 1982 est basée sur une politique "césarienne"; les partis sont interdits et exclus du processus constituant.*

<sup>92</sup> *Les deux partis n'ayant pas franchi, aux élections du 18 avril 1999, le seuil des 10% nécessaires pour être représentés au Parlement sont: le **CHP** - social démocrate - 8.6% (1995: 10.71%) et **HADEP** - pro-kurde - 3.99% (1995: 4.17%). Aux élections locales de 1999, le **HADEP**, parti politique qui a succédé au Parti de la démocratie après l'interdiction de ce dernier, est sorti vainqueur dans 37 villes et villages; il détient la majorité dans neuf districts et il est représenté dans 90% des conseils municipaux. Sur 52 représentants du Conseil administratif local, 26 sont des membres du **HADEP**. La barre des 10% empêche le parti d'avoir des représentants à la Grande Assemblée Nationale.*

<sup>93</sup> *V. aussi, Amnesty International Report 2001 - Turkey.*

<sup>94</sup> *Le parti de l'action nationaliste (MHP), le plus réticent à appliquer les réformes demandées par l'UE (l'abolition de la peine de mort, l'octroi des droits culturels à la minorité) n'a besoin que de trois sièges supplémentaires pour dépasser le "Parti démocratique de gauche" (DSP) du Premier ministre.*

Le Programme national reste flou sur des sujets cruciaux au regard des critères de Copenhague, préalables à l'ouverture de négociations en vue de l'adhésion; le respect des droits de l'homme et des libertés fondamentales, l'abolition de la peine de mort, l'octroi de droits culturels aux "Kurdes", le poids des militaires dans la vie politique et la question chypriote dont le calendrier n'est pas maîtrisé par la Turquie.

## 1. La question chypriote : le plus grand obstacle à l'intégration de la Turquie

*Günther Verheugen*, Commissaire européen chargé de l'élargissement, a récemment affirmé que la question chypriote menaçait l'élargissement de l'Union et constituait le plus grand obstacle à l'intégration de la Turquie.

Les autorités d'Ankara, pour qui Chypre est **une cause nationale**, réclament la reconnaissance de deux Etats indépendants ou un divorce à l'amiable "à la tchécoslovaque" et n'excluent pas la possibilité d'annexer la République turque de Chypre du Nord (RTCN, autoproclamée) si les Chypriotes grecs entrent dans l'Union<sup>95</sup>.

Le Parlement européen qui vient d'adopter la résolution du rapporteur *Jacques Poos*<sup>96</sup> souligne que "le gouvernement de Nicosie négocie au nom de TOUS les Chypriotes et que, lorsque le processus d'adhésion aura été mené à bien, tous ses citoyens feront légalement partie de l'UE".

La résolution souligne également que, si la Turquie mettait à exécution sa "menace" d'annexer le Nord de Chypre, "elle mettrait fin elle-même à ses ambitions de devenir membre de l'UE".

La résolution intérimaire relative à l'arrêt de la Cour européenne des Droits de l'Homme du 28 juillet 1998 dans l'affaire **Loizidou contre Turquie**, le récent verdict de la Cour qui a condamné la Turquie pour diverses violations commises à la suite de l'intervention armée de 1974<sup>97</sup>, la résolution du Parlement européen du 5 septembre 2001<sup>98</sup>, n'ont fait que renforcer la résistance au dialogue des nationalistes turcs et chypriotes.

## 2. L'abolition de la peine de mort et le moratoire de la Turquie

Un moratoire sur les exécutions capitales est en vigueur depuis 1984, mais la Turquie n'a toujours pas signé le Protocole n° 6 concernant l'abolition de la peine de mort. Le "**Programme National**" repousse l'abolition de la peine de mort "au moyen terme" (d'ici cinq ans) et rappelle qu'elle est du "seul ressort de la Grande Assemblée".

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<sup>95</sup> Le Conseil National de sécurité turc a réitéré, le 28 mai 2001, la position de la Turquie: "Un accord acceptable pour les deux parties à Chypre dépend de la reconnaissance de l'égalité souveraine des deux Etats sur l'île", et a rejeté la solution fédérale prônée pour Chypre par les Nations Unies.

<sup>96</sup> Commission des affaires étrangères, des droits de l'homme, de la sécurité commune et de la politique de défense: "Demande d'adhésion de Chypre à l'UE et l'état d'avancement des négociations", Doc. A5-0261/2001, 05.09.2001.

<sup>97</sup> Cf. l'Affaire Chypre c. Turquie (requête n° 25781-94, 10 mai 2001).

<sup>98</sup> V. Aussi, "Cyprus, Country Reports on Human Rights Practices - 2000", The Bureau of Democracy, Human Rights and Labor, February 2001.

La récente révision constitutionnelle n'a pas aboli entièrement la peine de mort, qui pourra encore être imposée dans le cas de "*guerre, menace de guerre imminente ou actes terroristes*". En tout état de cause, il s'agit d'une **constitutionnalisation** de la peine de mort.

### 3. Le rôle politique de l'armée: Un "Gouvernement de l'ombre" et la question de "la souveraineté"

#### 3.1. Le pouvoir politique des forces armées et le "concept de sécurité nationale"

La Constitution de 1982 institutionnalise le pouvoir politique des forces armées, "*Un gouvernement de l'ombre*".<sup>99</sup> Le Conseil national de sécurité<sup>100</sup>, organe décisionnel composé de militaires et de civils, est habilité à présenter au gouvernement des "**avis sur les questions relevant de la sécurité nationale**".

Le "**concept de sécurité nationale**", précisait une récente circulaire de l'état-major général (mars 2000), "*couvre virtuellement toutes les affaires d'intérêt public*", tant en politique étrangère qu'en politique intérieure, la question chypriote, le "*fondamentalisme islamique*", le "*séparatisme kurde*".

Le Programme national met en avant le "*rôle consultatif*" du Conseil de sécurité nationale.

La révision constitutionnelle prévoit une augmentation du nombre de civils au sein du Conseil national de sécurité, une "*mesure cosmétique*" pour faciliter les relations avec l'UE. Le contrôle civil des affaires militaires doit encore être amélioré<sup>101</sup>.

Cette crispation autour du rôle de l'armée et du concept de "**sécurité nationale**" incontournable augure mal de la capacité de la Turquie à procéder aux transferts de souveraineté voulus par l'adhésion.

#### 3.2. La "Constitution composée" et le "réaménagement de souveraineté"

Dans le Rapport national, la perception du droit public de l'Union apparaît comme une synthèse du droit interne et du droit international. Pourtant, à travers les décisions, règlements, directives, les traités à la chaîne et la charte des droits fondamentaux, s'élabore une Constitution réelle de l'Union qui devient l'instance publique sous l'égide de laquelle les Etats membres exercent leur souveraineté, mais à condition qu'un tel exercice soit concerté entre eux.

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<sup>99</sup> Le "**coup d'Etat militaire**" de février 1997, qualifié de "**virtuel**", adresse au gouvernement un véritable ultimatum. Les vingt "*recommandations*" de l'état-major visant à éradiquer la réaction du "**fondamentalisme islamiste**", en commençant par réformer le système éducatif de façon à priver les religieux de l'une de leurs places-fortes dans l'enseignement, aboutira à la démission du Premier ministre islamiste Erdogan et à la chute du gouvernement.

<sup>100</sup> V. La loi sur le Conseil national de sécurité, n° 2945, 9 novembre 1983.

<sup>101</sup> Dans son rapport régulier de 2000 concernant les progrès réalisés par la Turquie sur la voie de l'adhésion, la Commission avait souligné que: "*Le Conseil national de sécurité n'a pas changé de rôle dans la vie politique turque. Ses conclusions, déclarations ou recommandations ont toujours une forte influence sur le processus politique*". Il est à noter également que, contrairement à la réglementation de l'UE, de l'OTAN et de l'OSCE, le chef de l'état-major général est encore responsable non pas devant le ministre de la défense, mais devant le Premier ministre.

Le "**patriotisme de la constitution**", prôné par les partisans du "**républicanisme national**", peut-il permettre de subordonner la souveraineté à cette concertation? C'est une des questions posées par l'UE.

Les dispositions du traité d'Amsterdam entraînent à l'évidence une nouvelle interdépendance des niveaux constitutionnels nationaux et communautaires<sup>102</sup>. Les Etats membres de l'UE ne sont plus maîtres de leurs propres constitutions. Il s'agit d'une restriction de l'autonomie des Etats membres en ce qui concerne leurs ordres juridiques.

Afin de caractériser encore plus clairement la spécificité de ce nouvel ordre juridique, I. Pernice et Franz C. Mayer proposent de concevoir les constitutions nationales et le droit de l'UE comme deux éléments dans un système constitutionnel unique, **composé ou intégré**, ou plus simplement, de considérer cet ensemble de normes constitutionnelles à deux niveaux comme "**la Constitution européenne**"<sup>103</sup>.

Le parti de l'action nationaliste, hostile à un tel changement, s'est mobilisé pour bloquer la révision de l'article 90 de la Constitution qui prévoit que: "*...Les conventions internationales dûment mises en vigueur ont force de loi...*".

Le Parlement turc, au cours des débats sur les amendements à apporter à la Constitution, paraît avoir adopté, après des tergiversations, une interprétation non-flexible du critère d'atteinte aux conditions essentielles de l'exercice de la souveraineté nationale, qui constitue une limite absolue du pouvoir d'intégration. Cette conception de la souveraineté nationale exclut d'une part la participation de la Turquie à une organisation investie de pouvoirs de décision par la voie d'un transfert de compétences convenues par les Etats membres et d'autre part, le dédoublement fonctionnel prévu par la "**Constitution composée**" de l'UE. Il s'ensuit que la conception de la souveraineté nationale, telle qu'elle figure dans la Constitution turque, est **intangible**.

#### 4. La question des minorités

*"Montrer patte blanche pour prétendre à l'entrée dans l'UE"*

Pour l'UE, le respect des minorités est fondamental. Le rapport du Parlement sur la situation des droits de l'homme dans l'UE (1998-1999) précise que ce problème concerne non seulement les Etats membres mais aussi **les candidats à l'adhésion** qui doivent "*impérativement montrer patte blanche pour prétendre à l'entrée dans l'UE*". Deux conventions protégeant les minorités existent depuis le 1er février 1998. Aux yeux de l'Union, la ratification de ces conventions par les Etats membres et candidats est impérative. L'UE a fait figurer dans les accords d'association la clause de suspension en cas de non-respect des droits des minorités<sup>104</sup>.

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<sup>102</sup> Selon O. Beaud, "l'acte fondateur de l'Union, le traité de Maastricht, est un acte **constituant plurilatéral** dont l'objet est d'organiser **des transferts de souveraineté** entre plusieurs Etats", "La souveraineté de l'Etat, le pouvoir constituant et le traité de Maastricht", RFD adm., 1993, p. 1059 et s.

<sup>103</sup> I. Pernice et Franz C. Mayer, "De la Constitution composée de l'Europe", RTD eur., 2000, p. 624 et s.

<sup>104</sup> Sur la nouvelle problématique des droits des minorités v. N. Çavuşoğlu, "Cultural Identity: A 'Minority question'?", İstanbul Üniversitesi Siyasal Bilgiler Fakültesi Dergisi, no 23-24, (2000-2001), p. 91 s.

L'Assemblée du Conseil de l'Europe, comme l'UE, recommande aux autorités turques d'examiner les principes énoncés dans la **Convention cadre pour la protection des minorités nationales et dans la Charte européenne des langues régionales ou minoritaires**, afin qu'elles signent et ratifient ces instruments et appliquent leurs principes à l'égard des différents groupes ethniques qui vivent en Turquie<sup>105</sup>.

En août 2000, la Turquie a signé deux instruments importants dans le domaine des droits de l'homme: le **Pacte international relatif aux droits civils et politiques** et le **Pacte international relatif aux droits économiques, sociaux et culturels**.

La procédure de ratification par le Parlement révélera si certaines dispositions de ces pactes font l'objet de réserves. Toutefois, il reste d'importants instruments en matière de droits de l'homme auxquels la Turquie n'a pas adhéré, notamment le **Protocole n° 6 à la Convention européenne des Droits de l'homme**. La Turquie n'a pas non plus **signé la Convention -cadre du Conseil de l'Europe pour la protection des minorités nationales, ni la Charte européenne des langues régionales ou minoritaires**<sup>106</sup>.

Le rigorisme centralisateur de la Constitution turque fait de la Turquie l'un des pays les plus frileux en termes de reconnaissance du **droit à une identité régionale** et particulièrement à une langue minoritaire<sup>107</sup>.

L'article 81 de la loi 2820 sur les partis politiques dispose que les partis "*ne peuvent arguer de l'existence, sur le territoire national, de minorités nationales ou de minorités fondées sur la différence de religions, de sectes, de races ou de langues*"<sup>108</sup>.

Le Programme national, dans le chapitre de l'octroi de droits culturels à la "minorité" (ou à la population kurde), indique que les "**citoyens turcs**" se voient accorder "**au quotidien**" le libre usage de "différentes langues, dialectes et patois"<sup>109</sup>.

Les articles 26 et 28 de la Constitution ont été modifiés, ce qui lève l'interdiction d'exprimer et de disséminer des pensées "dans une langue interdite par la loi" et devrait permettre la légalisation de la presse et de chaînes de télévision en kurde. Toutefois, **la**

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<sup>105</sup> *L'Assemblée du Conseil de l'Europe recommande aux autorités turques de lever l'état d'urgence dans les quatre provinces du sud-est où il subsiste, de le remplacer par un état d'urgence économique et d'adopter les mesures législatives et administratives qui s'imposent pour garantir le respect des droits fondamentaux des citoyens turcs d'origine kurde dans la région et leur permettre de vivre leur identité culturelle kurde y compris la possibilité d'apprendre le kurde (doc. 9120, 13 juin 2001).*

<sup>106</sup> *Sur les difficultés d'intégration de la Charte, voir le cas français: le Conseil Constitutionnel, dans sa décision du juin 1999, a estimé que la Charte comporte des clauses contraires à la Constitution, notamment du fait du principe de l'indivisibilité de la République et de l'unicité du peuple français (déc. No. 99-412 DC du 15 juin 1999). Le Conseil d'Etat, dans son avis du 24 septembre 1996, avait considéré que la Charte était incompatible avec la Constitution, notamment le principe de l'indivisibilité de la République.*

<sup>107</sup> *Exception faite des minorités reconnues officiellement, ainsi des minorités arménienne, grecque et juive reconnues par le traité de Lausanne.*

<sup>108</sup> *Cf. la loi n° 3984 qui stipule que les émissions de radio et de télévision doivent être diffusées en langue turque ou bien dans une langue qui contribue au développement de la culture universelle et de la science.*

<sup>109</sup> *Dans le cadre du débat qui a lieu sur la question, il a été rappelé que l'article 39 du traité de Lausanne de 1923 interdit "les restrictions à la libre utilisation par un ressortissant turc de quelque langue que ce soit dans la conversation privée, dans le commerce, la religion, dans la presse ou dans les publications de toutes sortes ou lors de réunions publiques".*

**constitutionnalisation** du turc en tant que langue de la République a conduit le législateur à reconnaître l'existence d'une langue publique officielle qui peut être imposée à tout détenteur d'une parcelle de l'autorité publique.

## **NOTE II. UN EDIFICE JURIDIQUE QUI SE DEMARQUE DES VALEURS DE LA CONVENTION EUROPEENNE DES DROITS DE L'HOMME - ET DES NORMES EN VIGUEUR DANS L'UNION EUROPEENNE**

La Constitution introduit une "**Doctrin**e républicaine" et le "Kémalisme" comme **dogme de l'Etat**<sup>110</sup> et établit une **démocratie militante**, qui peut être considérée comme un instrument de limitation des libertés.

### 1. La Doctrine républicaine et l'arsenal juridique

Les principes de la "**Doctrin**e républicaine" sont posés dans divers articles de la Constitution: "L'Etat turc est une République" (art. 1); attaché au nationalisme d'Atatürk et s'appuyant sur les principes fondamentaux exprimés dans le Préambule" (art. 2)<sup>111</sup>; "L'Etat turc forme avec son territoire et sa nation une entité indivisible" (art. 3).

Ces principes sont inaltérables, l'article 4 pose que les trois articles précédents "*ne peuvent être modifiés, ni leurs modifications proposées*". "*Aucune disposition constitutionnelle ne peut être utilisée dans le but de porter atteinte à l'intégrité de l'Etat, à l'indivisibilité de la nation, à la République démocratique et laïque...*" (art. 14). De nombreuses lois forment le "**noyau dur**" de cet édifice juridique, qui se démarque nettement des valeurs de la Convention européenne des Droits de l'homme et des normes en vigueur dans l'UE.

L'**article 312 du Code pénal** prévoit des peines d'emprisonnement assorties d'une interdiction à vie d'exercer des fonctions publiques pour "*incitation à la haine sur la base de critères raciaux ou religieux*". Plusieurs condamnations prononcées aux termes de l'art. 312 contreviennent à l'article 10 de la Convention européenne des Droits de l'homme<sup>112</sup>.

Soulignant un autre aspect de la liberté d'expression, dans l'affaire *Özgür Gündem c. Turquie* 23144/93, la Cour européenne des Droits de l'homme a estimé que la Turquie avait enfreint la Convention en n'offrant ni une protection suffisante ni les mesures d'investigations nécessaires pour protéger la liberté d'expression du journal *Özgür Gündem*.

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<sup>110</sup> *Le dogme se résume en peu de mots; L'intégrité du territoire, l'unité de la nation et la laïcité de la République. Le sens donné au terme de laïcité signifie l'intégration et le contrôle de la religion par les autorités publiques, une "étatisation de l'Islam". La Direction des affaires religieuses, prévue dans la constitution, exerce le contrôle de l'Etat sur une part importante de l'Islam turc. Un parti, le DEP, sera dissout, entre autres causes, et notamment l'accusation de séparatisme, pour avoir préconisé, dans son programme, la disparition de cette direction.*

<sup>111</sup> *"Conformément au concept de nationalisme et aux principes et réformes posés par le fondateur de la République, Atatürk (...), cette Constitution, qui fonde l'existence éternelle de la Nation et du pays de Turquie, et l'indivisible unité de l'Etat turc..." La Constitution affirme qu'aucune activité ne peut se voir accorder protection à l'encontre des intérêts nationaux turcs, du principe d'indivisibilité de l'entité turque (...), des principes des réformes et du modernisme d'Atatürk, et qu'en vertu du principe de laïcité, les sentiments religieux, qui sont sacrés, ne peuvent en aucun cas être mêlés aux affaires de l'Etat ni à la politique".*

<sup>112</sup> *V. notamment: Öztürk c/ Turquie 22479/93, 28/19/99; Ceylan c/ Turquie 23556/94, 08/07/99; İncal c/ Turquie 22678/93, 09/06/98.*

L'article 8 de la loi antiterroriste suscite des critiques dans la mesure où il sanctionne des "délits d'opinion", qu'il ne définit pas de manière suffisamment claire. En raison de ce flou, l'Etat peut s'en prendre arbitrairement à des individus soupçonnés de "délits de pensée", en violation non seulement de leur droit à la liberté d'expression mais aussi de leurs droits à la liberté d'opinion, de conscience, de réunion et d'association pacifiques<sup>113</sup>.

Le Programme national (chapitre 1.2.1), qui engage le gouvernement turc, à court terme, "à revoir l'article 312 du Code pénal turc, "sans porter préjudice aux valeurs qu'il protège", et à revoir les articles 7 et 8 de la loi anti-terrorisme, sous les mêmes conditions, témoigne de la manière singulière dont les autorités turques interprètent les articles 9, 10 et 11 de la Convention européenne des Droits de l'homme.

## 2. La conception militante de la démocratie

La Constitution établit une "démocratie militante" qui s'oppose à toute tendance d'usurpation du pouvoir par les forces extrémistes. Elle établit le régime juridique des partis politiques et interdit les partis qui cherchent à porter atteinte à la laïcité de la République, à l'unité indivisible de l'Etat et de la nation. C'est à la Cour constitutionnelle que revient la mission d'établir que le parti en question est devenu le foyer d'accomplissement de telles activités<sup>114</sup>. La Cour a ainsi développé "une doctrine constitutionnelle" au service de la protection d'une conception militante de la démocratie reposant sur une certaine conception de l'Etat dont les principes de l'unité de l'Etat et de la laïcité constituent des points forts.

La doctrine de la Cour constitutionnelle a été mise en cause par la Commission et la Cour européenne des Droits de l'homme. Le contrôle exercé par la Commission et la Cour est de nature à conduire à la mise en cause de règles constitutionnelles (écrites ou jurisprudentielles)<sup>115</sup>.

Une mesure de dissolution édictée à l'encontre d'un parti politique doit apparaître comme une mesure nécessaire dans une société démocratique soumise en l'espèce à un contrôle européen, qui ne peut, en raison de la valorisation profitant à la liberté d'association politique, être circonscrit à un contrôle réduit. Tout comme en matière de réglementation de la liberté d'expression, les Etats ne disposent que d'une "certaine marge d'appréciation". Les adversaires des idées et positions officielles doivent pouvoir trouver leur place dans l'arène politique. De même, se voient dénier la qualité de buts légitimes de la dissolution d'un parti,

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<sup>113</sup> L'Assemblée parlementaire du Conseil de l'Europe (Doc. 9120, 13 juin 2001) a invité les autorités turques à "accélérer la modification de l'article 312 et à réviser l'article 8 de la loi relative à la prévention du terrorisme dont le libellé actuel imprécis ouvre la voie à l'arbitraire de l'Etat vis-à-vis des journalistes et d'hommes politiques pour avoir exprimé des opinions qui, en vertu de la législation actuelle, pourrait être interprétées comme une incitation au séparatisme, et à éviter de continuer à enfreindre la Convention européenne des Droits de l'homme".

<sup>114</sup> Cf. Bakır Çağlar, 'La Turquie devant la Commission et la Cour européenne des droits de l'Homme', Rapport présenté au Colloque 'La Turquie et l'Europe de la République à nos jours' (Sorbonne, Paris, 6-7 novembre 1998).

<sup>115</sup> Avec les arrêts Ruiz-Mateos et Süßmann, ce sont toutes les juridictions constitutionnelles qui sont sous l'emprise des exigences de la Convention européenne des Droits de l'homme. En tant que "Constitution européenne", la Convention européenne des Droits de l'homme se doit d'avoir valeur de norme suprême, prévalant sur les règles constitutionnelles nationales contraires. En d'autres termes, la liberté constitutionnelle des Etats est placée sous une surveillance étroite.



la doctrine et le programme **séparatistes ou autonomistes** d'un parti politique, pour autant que ce dernier ne soit pas une **organisation terroriste**<sup>116</sup>. Selon la Cour européenne des Droits de l'homme, "la liberté d'association est une valeur bien trop importante pour qu'elle puisse être sacrifiée à la défense des intérêts de l'Etat".

Dans ses arrêts **Parti communiste unifié et autres c. Turquie** (30 janvier 1998), **Parti socialiste et autres c. Turquie** (25 mai 1998) et **Parti de la liberté et de la démocratie c. Turquie** (8 décembre 1999), la Cour affirme que "le fait qu'un projet politique (la création d'un Etat kurde indépendant ou à tout le moins autonome) passe pour incompatible avec les principes et structures actuels de l'Etat turc ne le rend pas contraire aux règles démocratiques. Il est de l'essence de la démocratie", précise-t-elle, de permettre la proposition et la discussion de projets politiques divers, même ceux qui remettent en cause le mode d'organisation actuel d'un Etat pourvu qu'ils ne visent pas à porter atteinte à la démocratie elle-même<sup>117</sup>. En tout état de cause, il ne semble pas que la formule de l'article 11(2) de la Convention couvre la protection de l'indivisibilité du peuple, comme le soutenait le gouvernement turc en invoquant la décision du Conseil constitutionnel français du 9 mai 1991 relative au statut de la Corse<sup>118</sup>.

Une question pertinente était pourtant toujours posée: les partis peuvent-ils être formés sur la base de principes religieux dans une société démocratique, c'est à dire "**pluraliste**", et l'**individu autonome** peut-il s'affirmer dans un **parti non laïque**?

Le procès dit "**d'intention**" est devenu pour l'Europe une sorte d'obligation politique et éthique par peur d'assister impuissant à un "**passage à l'acte**", on en dénonce l'**intention** pour que ce passage n'ait pas lieu<sup>119</sup>.

Dans l'*Affaire Refah Partisi* (Parti de la prospérité), *Erbakan, Kazan et Tekdal c. Turquie*<sup>120</sup>, la Cour européenne des Droits de l'homme estime que les sanctions infligées aux requérants peuvent raisonnablement être considérées comme répondant à un "**besoin social impérieux**" pour la protection de la société démocratique, dans la mesure où les responsables du Refah Partisi, sous le prétexte qu'ils donnaient au principe de laïcité un contenu différent, avaient déclaré avoir l'**intention** d'établir un système multijuridique fondé sur la discrimination selon les croyances, d'instaurer la loi islamique (la Charia) qui se démarque nettement des valeurs

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<sup>116</sup> Aux termes des recommandations de la Commission de Venise, des mesures visant à interdire un parti politique ne peuvent être prises qu'à titre exceptionnel. Ainsi, un parti ne saurait être interdit uniquement pour avoir préconisé un changement pacifique de l'ordre constitutionnel. En outre, un parti ne peut être tenu pour responsable de déclarations faites par ses membres, à moins de les revendiquer comme siennes.

<sup>117</sup> Cf. N. Çavuşoğlu, "Parti Yasaklaması Rejiminde Azınlıklar Problemi: Türk Anayasa Mahkemesi Kararları Üzerine Bir Not", *İstanbul Üniversitesi Siyasal Bilgiler Fakültesi Dergisi*, no 10, (1995), p. 35.

<sup>118</sup> Le Conseil Constitutionnel avait pourtant décidé que "La mention faite par le législateur de 'peuple corse' composante du peuple français est contraire à la Constitution" (Décision no 91-290 DC du 9 mai 1991, loi portant sur le statut territorial de la Corse). Cette interprétation de la Constitution s'est étendue en matière linguistique.

<sup>119</sup> Sept mois après avoir été décidées (janvier 2000), les sanctions appliquées contre Vienne sont levées. Mais, le communiqué des quatorze ajoute que "la nature du FPÖ" (le parti de la Liberté) et son évolution incertaine restent un motif de sérieuse préoccupation, qu'une vigilance particulière doit être exercée à son égard et qu'il faut désormais que l'Europe réfléchisse aux moyens de "**Prévenir, suivre, apprécier et agir dans des situations analogues**". Parmi les pays candidats à l'entrée dans l'union le même problème se pose pour la Turquie avec ses "**Loups gris**".

<sup>120</sup> 31 juillet 2001 (nos 41340/98 & 41342 - 4/98).

de la Convention et avaient **laissé planer un doute** sur leur position quant au recours à la force afin d'accéder au pouvoir et, notamment, d'y rester.

La Cour considère que, même si la marge d'appréciation des Etats doit être étroite en matière de dissolution des partis politiques, le pluralisme des idées et des partis étant lui-même inhérent à la démocratie, **"l'Etat concerné peut raisonnablement empêcher la réalisation d'un tel projet politique, incompatible avec les normes de la Convention, avant qu'il ne soit mis en pratique par des actes concrets risquant de compromettre la paix civile et le régime démocratique dans le pays"**<sup>121</sup>.

### **NOTE III. LES FORMES ETATIQUES ET PARTICULARISMES REGIONAUX A L'HEURE DE L'ELARGISSEMENT DE L'UNION: UN DEFI POUR LA TURQUIE?**

L'avenir de la Turquie, note *Daniel Cohn-Bendit* (président de la délégation du Parlement européen à la Commission UE/Turquie): *"C'est ou Barcelone ou Bagdad. Barcelone, c'est la fédéralisation de la Turquie qui fera du sud-est kurde une sorte de Catalogne à l'intérieur de la République turque; Bagdad c'est le centralisme intégriste kémaliste qui se maintient"*<sup>122</sup>.

L'administration centrale exerce toujours un puissant contrôle sur les administrations locales. Le projet de loi sur les collectivités locales, actuellement à l'étude, ne résoudra pas tous les problèmes.

Au fil des réformes **décentralisatrices** et la mise en oeuvre de l'intégration économique voulue par Bruxelles, les formes étatiques se diversifient. En revanche, la culture dominante, tant juridique que politique de la Turquie, est marquée par **une idéologie jacobine** interdisant toute idée de **"décentralisme"**. Toute revendication identitaire est niée dans le but de maintenir les principes d'unité et d'indivisibilité intangibles<sup>123</sup>. Le pouvoir central étant unique, le pouvoir politique n'est pas divisible et seule la **délégation administrative** est envisageable.

La catégorie classique du **"régionalisme"** n'est plus opératoire pour analyser la multiplication des **"séparatismes"** qui empruntent plus à la **rhétorique nationaliste** qu'aux **revendications décentralisatrices**. Certains, tel le mouvement breton, privilégient la préservation **d'une identité culturelle**, d'autres développent un **discours nationaliste** de type **ethnique** illustré par les organisations basques ou corses. Ces différents particularismes jouent, en commun, **"la carte de l'Europe"**<sup>124</sup>.

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<sup>121</sup> Il est à noter que **le mouvement islamiste** joue un rôle politique important: le parti du Salut national avait réuni 12% des suffrages aux élections de 1973, le parti de la Prospérité atteindra 16% des voix en 1991, puis 19% aux municipales de 1994 (qui lui ont permis de conquérir, entre autres, les municipalités métropolitaines d'Ankara et d'Istanbul). Aux élections législatives de 1995, avec plus de 6 millions de voix, soit près de 22% des suffrages, la Prospérité devient le premier parti, et emporte 158 sièges sur 550 au Parlement.

<sup>122</sup> *Le Monde* du 18 mai 2000.

<sup>123</sup> La Constitution a institué les **cours de sûreté de l'Etat** pour connaître des infractions touchant à l'intégrité territoriale et à l'unité nationale de la Turquie, à son régime démocratique ainsi que sa sécurité étatique. Il est à noter que les juges militaires ont été écartés de ces juridictions en juin 1999 mais le fonctionnement, les pouvoirs, les responsabilités et autres dispositions ayant trait aux procédures suivies par ces juridictions doivent encore être alignés sur les normes en vigueur dans l'UE.

<sup>124</sup> Ce qui explique les réserves des forces armées et du **MHP** sur les amendements à apporter à la Constitution et à la législation turque.

Les premières revendications du mouvement kurde, réapparu en Turquie dans les années 1960 dans le cadre de renaissance du mouvement de la gauche, avaient trait à la reconnaissance de l'existence des Kurdes, aux droits culturels et au développement économique. A la fin des années 1970, la notion d'autodétermination en vint à dominer le discours politique. Le PKK (Parti des travailleurs du Kurdistan) fait encore de l'indépendance de tout le "*Kurdistan*" l'ultime objectif<sup>125</sup>.

Dans l'affaire Zana, la Cour européenne des Droits de l'homme se réfère au **PKK** en tant qu'**organisation terroriste**<sup>126</sup>. Cependant, dans les affaires İncal, 9 novembre 1998, Sürek et Özdemir, 8 juillet 1999 et Gerger, 8 juillet 1999, la Cour n'utilise plus ce qualificatif mais se réfère au **PKK** en tant qu'**organisation illégale**.

#### **NOTE IV. LES CRITERES POLITIQUES DE COPENHAGUE – LES VALEURS FONDAMENTALES DES SOCIETES DEMOCRATIQUES: LES ARTICLES 2 ET 3 DE LA CONVENTION EUROPEENNE DES DROITS DE L'HOMME C. TURQUIE**

Dans son rapport régulier de 1999 concernant les progrès réalisés par la Turquie sur la voie de l'adhésion, la Commission concluait: "*Les événements récents confirment que le pays ne remplit toujours pas les critères politiques de Copenhague. De graves lacunes subsistent dans les domaines des droits de l'homme et de la protection des minorités. La torture, si elle n'est pas systématique, reste une pratique répandue*". Dans le rapport régulier de 2000, il est noté que: "*Par rapport à l'année dernière, la situation sur le terrain ne s'est guère améliorée et la Turquie ne remplit toujours pas les critères politiques de Copenhague*"<sup>127</sup>.

**Le critère politique** de Copenhague laisse plusieurs questions en suspens: quelle conception des droits des peuples, de la laïcité et de la citoyenneté faut-il appliquer ? Celles de la France qui refuse de signer la charte des langues minoritaires, de la Belgique, de la Grèce, de l'Allemagne? Quelle est l'articulation entre le critère politique et la Charte des droits fondamentaux de l'UE ?

La Charte paraît revêtir un **caractère contraignant**, la formulation des droits énoncés utilise l'**indicatif présent**, le chapitre VII de la Charte qui traite de l'articulation de la Charte avec les autres corps juridiques suppose que la Charte soit créatrice de droits. S'agissant de son champ d'application, la Charte vise les organes et les politiques de l'Union, ainsi que les Etats membres. Ces deux principes semblent présider à l'articulation entre la **Charte** et les "**Critères de Copenhague**". Il y a là de quoi creuser un abîme de réflexions entre le **républicanisme national** et le **républicanisme cosmopolite en Turquie**.

#### 1. Les articles 2 et 3 de la Convention européenne des Droits de l'homme c. Turquie

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<sup>125</sup> V. Martin van Bruinessen, "*Nationalisme kurde et ethnicités intra-kurdes*" in *les Etats, Peuples Méditerranéens*, no 68-69. V. aussi M. Verrier, "*En Turquie, un procès au peuple kurde*", *Le Monde diplomatique*, mars-juin 1999.

<sup>126</sup> *Zana c. Turquie* (69-1996/688/880). V. §§ 57 et 58-1.

<sup>127</sup> Voir aussi le rapport du Département d'Etat américain (U.S. Department of state - Bureau of Democracy, Human Rights and Labour) pour 2000.

L'observateur se doit de relever l'accumulation récurrente d'arrêts de la Cour européenne des Droits de l'homme condamnant la Turquie pour violation des articles 2 et 3 de la Convention qui garantit le droit à la vie et prohibe la torture, ainsi que les traitements inhumains ou dégradants<sup>128</sup>.

Dans l'affaire *Aydın c. Turquie*<sup>129</sup>, les observations écrites d'*Amnesty International*, admise à les soumettre en qualité d'*Amicus curiae*, indiquent, en renvoyant à la décision "*Fernando and Raquel Mejia v. Peru*" rendue le 1er mars 1996 par la Commission interaméricaine des droits de l'homme, que "*le viol d'une détenue par un agent de l'Etat en vue de lui extorquer des aveux est considéré comme un acte de torture*"<sup>130</sup>.

Les troubles graves entre les forces de l'ordre et les membres de PKK dans le sud-est ont valu à la Turquie plusieurs condamnations par la Cour qui a tenu à rappeler les principes dégagés dans sa jurisprudence. Selon celle-ci, l'article 2 de la Convention, avec l'article 3, consacre l'une des valeurs fondamentales des sociétés démocratiques qui forment le Conseil de l'Europe<sup>131</sup>.

Les juges ont fait remarquer dans leur arrêt *Mahmut Kaya c. Turquie* que la responsabilité de l'Etat se trouve engagée lorsque la loi n'assure pas une protection efficace ou lorsque les autorités n'ont pas pris des mesures raisonnables pour empêcher la matérialisation d'un risque de mauvais traitement. Les nécessités de l'enquête et les indéniables difficultés de la lutte contre la criminalité terroriste<sup>132</sup> "*ne sauraient conduire à limiter la protection due à l'intégrité physique de la personne*" (arrêt *Dikme c. Turquie*, 11 juillet 2000).

## 2. La mise en oeuvre des arrêts de la Cour européenne et le "droit politique" turc

La Commission, dans son rapport régulier de 2000, juge nécessaire d'intégrer dans la législation turque des mesures permettant de remédier aux conséquences des condamnations

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<sup>128</sup> On relèvera les déclarations et les engagements du gouvernement à l'occasion du règlement amiable intervenu après une plainte du Danemark relative aux doléances d'un citoyen danois d'origine turque affirmant avoir subi des mauvais traitements de la part des autorités turques alors qu'il se trouvait détenu en Turquie; "Le gouvernement turc regrette la survenance de cas occasionnels et individuels de torture et de mauvais traitements... Les articles 243, 245 et 354 du code pénal turc ont été amendés afin de redéfinir et prévenir la torture et les mauvais traitements en conformité avec les conventions internationales... afin d'assurer la poursuite de ces réformes, le gouvernement s'engage à apporter de nouvelles améliorations dans le domaine des droits de l'homme" (Requête no 34382/97, 5.4.2000).

<sup>129</sup> V. arrêt *Aydın c. Turquie*, 25 septembre 1997.

<sup>130</sup> Rapp. No 5/96, affaire no 10.970. Cette référence à une décision de la Commission interaméricaine confirme l'interaction croissante entre les normes internationales relatives à la protection des droits de l'homme.

<sup>131</sup> V. entre autres: *Salman et İlhan c. Turquie*, 27 juin 2000; *Demiray et Gül c. Turquie*, 21 novembre et 14 décembre 2000; *Mahmut Kaya c. Turquie*, 28 mars 2000; *Ertak et Akkoç c. Turquie*, 9 mai et 10 octobre 2000; *Timurtaş et Akkoç c. Turquie*, 13 juin et 10 octobre 2000.

<sup>132</sup> La Cour, à l'instar de la Commission, admet pourtant l'existence d'une situation exceptionnelle de nature à menacer la vie de la nation dans le sud-est de la Turquie: "Les incidents mortels sont chose courante dans le sud-est de la Turquie en raison de manque de sécurité qui y règne" (arrêt *Kaya*, arrêt *Gülgeç* du juillet 1998). Dans son arrêt *Aksoy c. Turquie* (3.7.1997), la Cour avait déjà noté "que l'ampleur et les effets particuliers de l'activité terroriste du PKK dans le sud-est de la Turquie ont indubitablement créé dans la région concernée un danger menaçant la vie de la nation".

que la Cour européenne a jugées contraires à la Convention<sup>133</sup>. Ces mesures doivent notamment garantir la restitution des droits civils et politiques lorsqu'ils ont été réduits par la condamnation, la réouverture de la procédure et la suppression des mentions figurant dans le casier judiciaire.

Le principe de la **prééminence** du **droit** que les Etats contractants se sont engagés à respecter en ratifiant la Convention européenne des Droits de l'homme reste inopérant si l'ordre juridique d'un Etat contractant ne protège pas la mise en oeuvre des arrêts de la Cour européenne. L'accès au juge au sens de l'article 6 de la Convention exige que le mécanisme de recours individuel instauré par l'article 34 de la Convention soit efficace.

La Cour, dans plusieurs affaires, a rappelé à la Turquie<sup>134</sup> que, pour que le mécanisme de recours individuel soit efficace, il est de plus haute importance que les requérants, déclarés ou potentiels, soient libres de communiquer avec les institutions de la Convention<sup>135</sup>.

Sur les quarante pays signataires de la Convention douze Etats ont des législations leur permettant la réouverture ou la révision d'une décision judiciaire à la suite d'un arrêt de la Cour européenne des Droits de l'homme. Sept autres Etats ont admis de telles mesures dans le cadre d'affaires spécifiques.

Enfin, selon le Conseil de L'Europe, "nombreux sont les Etats qui n'ont pas encore été confrontés à la nécessité de rouvrir des procédures internes mais dont la loi et la pratique rendent une telle hypothèse envisageable".

Deux pays étaient récalcitrants: la France (la jurisprudence HAKKAR) et la Turquie (l'affaire LOIZIDOU et l'affaire İNCAL et al.). En France, l'Assemblée Nationale et le Sénat viennent d'adopter la loi n° 2000-516 permettant la possibilité d'un procès en révision<sup>136</sup>.

La Turquie avait été condamnée par la Cour européenne pour non-respect du droit à la propriété après avoir refusé d'accorder à une ressortissante chypriote, *Mme Titina Loizidou*, la possibilité de jouir des propriétés qu'elle possède sur la partie turque de Chypre (Kyrenia)<sup>137</sup>. La Turquie a refusé de se soumettre à cette condamnation et au versement de l'indemnité.

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<sup>133</sup> Dans son arrêt *Hornsby c. Grèce* du 19 mars, la Cour a précisé que l'exécution d'un jugement ou arrêt, de quelque juridiction que ce soit, doit être considérée comme faisant partie intégrante du "procès" au sens de l'article 6 de la Convention. L'affaire concernait deux décisions du Conseil d'Etat consécutives à un arrêt de la Cour de justice des Communautés européennes (qui avait condamné l'Etat grec interdisant à des ressortissants britanniques d'ouvrir une école privée, à Rhodes). **L'arrêt montre que la Convention européenne peut jouer en renfort du droit communautaire.**

<sup>134</sup> V. arrêt *Akduvar c. Turquie* du 16 septembre 1996; les arrêts *Salman et İlhan c. Turquie* rendus le 27 juin 2000. Dans le même sens, les arrêts *Taş et Bilgin*, des 14 et 16 novembre 2000.

<sup>135</sup> Dans ses arrêts, *Salman c. Turquie*, *Bilgin et Demiray c. Turquie* rendus les 16 et 21 octobre 2000, la Cour tient compte des circonstances particulières de la cause et envisage la vulnérabilité des plaignants.

<sup>136</sup> V. le Titre III, intitulé: "Du réexamen d'une décision pénale consécutif au prononcé d'un arrêt de la Cour européenne des Droits de l'homme".

<sup>137</sup> Dans son arrêt sur le fond, la Cour a dit que le refus de l'accès de la requérante à ses biens relevait de la "juridiction" au sens de l'article 1 de la Convention et était imputable à la Turquie. Elle a aussi constaté une violation de l'article 1 du Protocole no 1 à la Convention en ce que la requérante avait perdu la maîtrise de ses biens et toute possibilité d'user et de jouir de sa propriété. Compte tenu de son constat que la requérante a subi dans ses droits patrimoniaux une ingérence injustifiée **imputable à la Turquie**, la Cour a estimé devoir octroyer une indemnité au titre de l'article 50 (*Loizidou c. Turquie*, requête n° 15318/89).

La Turquie est stigmatisée par le Comité des Ministres du Conseil de l'Europe pour ne pas se conformer à ses obligations découlant de cet arrêt:

*"Rappelant sa Résolution intérimaire DH (2000) 105, dans laquelle il a déclaré que le refus de la Turquie d'exécuter l'arrêt de la Cour témoignait d'un mépris manifeste pour ses obligations internationales, à la fois en tant que Haute Partie Contractante à la Convention et en tant qu'Etat membre du Conseil de l'Europe et a insisté fermement, compte tenu de la gravité de la question, pour que la Turquie se conforme pleinement et sans retard supplémentaire à cet arrêt; Déplorant très profondément le fait que, à ce jour, la Turquie ne se soit toujours pas conformée à ses obligations découlant de cet arrêt; Soulignant que tout Etat membre du Conseil de l'Europe reconnaît le principe de la **prééminence du droit** et le principe en vertu duquel toute personne placée sous sa juridiction doit **jouir des droits de l'homme et des libertés fondamentales**; Soulignant que l'acceptation de la Convention, **incluant la juridiction obligatoire de la Cour et le caractère obligatoire de ses arrêts** est devenue une condition pour être membre de l'organisation; Soulignant que la Convention est un système de garantie collective des droits protégés, se déclare résolu à assurer par tous les moyens à la disposition de l'organisation, le respect des obligations de la Turquie en vertu de cet arrêt, elle appelle les autorités des Etats membres à prendre les mesures qu'elles estiment appropriées à cette fin"<sup>138</sup>.*

Dans sa Résolution intérimaire ResDH (2001) 106 relative aux *affaires Incal et al.* (Atteintes à la liberté d'expression en Turquie), le Comité des Ministres:

*"Notant que, selon le gouvernement turc, une réforme du code de procédure pénale serait nécessaire pour rouvrir les procédures litigieuses et remédier aux violations; Regrettant qu'une telle réforme, annoncée en septembre 1999 par le Ministre des Affaires Etrangères de la Turquie, ne soit toujours pas prévue dans l'immédiat et qu'aucune mesure ad hoc n'a encore été prise dans l'attente de l'adoption de ladite réforme; Invite instamment les autorités turques, sans délai supplémentaire, à prendre des mesures ad hoc permettant d'effacer rapidement et intégralement les conséquences des condamnations des requérants contraires à la Convention dans les affaires mentionnées et décide de reprendre l'examen de ces affaires lors de chacune de ses réunions jusqu'à l'adoption des mesures individuelles requises; Encourage les autorités turques à mener à bien les réformes globales envisagées pour rendre le droit turc conforme aux exigences de l'**article 10** de la Convention".*

## **POUR NE PAS CONCLURE**

"Il y a un paradoxe intéressant dans les échanges entre l'UE et la Turquie en matière de démocratie et droits de l'homme. Pour l'essentiel, la position de Bruxelles à cet égard se fonde sur le travail du Conseil de l'Europe. Ce qu'on oublie souvent, même à Ankara, c'est que la Turquie est membre du Conseil de l'Europe depuis le tout début ou presque".

### **Lord Russell-Johnston, Président de l'Assemblée parlementaire**

*"Le droit de pouvoir déposer une demande d'adhésion ne confère pas le droit à l'adhésion"* rappelle à ce sujet l'un des derniers rapports du Commissariat général du Plan (français). *B. Chesnelong*, de la Fédération internationale des droits de l'homme (FIDH) ne s'est pas trompé:

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<sup>138</sup> Résolution intérimaire ResDH (2001) 80 relative à l'arrêt de la Cour européenne des Droits de l'homme du 28 juillet 1998 dans l'affaire *Loizidou* contre la Turquie.

*"La Turquie voudrait bénéficier d'un statut sur mesure. Elle ne veut pas comprendre que c'est à elle d'entrer dans le moule de l'Europe et non l'inverse".*

La connaissance du rôle de l'Union exige un effort particulièrement difficile de la part du juriste turc. Il lui faut maîtriser la "crispation nationale" qui l'empêche de comprendre ce que signifie l'adhésion future à l'UE, qui reste encore largement un "objet politico-juridique non-identifié"<sup>139</sup>.

Pourtant, il est permis de croire que l'influence de la Constitution non-écrite de l'UE est largement bénéfique: dans l'ensemble, elle joue plutôt le rôle de "Téveilleur de conscience" juridique dont la Turquie a besoin pour se débarrasser de ses archaïsmes et rester fidèle aux valeurs essentielles des démocraties libérales. Cependant, la question des critères d'appartenance à l'espace public européen ne saurait être uniquement de nature constitutionnelle.

La démocratie exige que deux espaces idéologiques ou deux camps s'opposent face aux électeurs. Ce n'est pas le cas de la Turquie d'aujourd'hui, parce qu'un camp a pratiquement disparu de la scène politique. La gauche est absente du débat sur les grands enjeux de la société, elle ne réagit pas aux décisions ou non-décisions gouvernementales, elle ne défend aucun bilan et ne présente aucun projet sérieux.

Le problème de la Turquie, candidat à l'adhésion, est de passer à une nouvelle génération politique, à la mobilisation citoyenne face aux gouvernements. Cela suppose la montée en puissance de nouveaux acteurs de la société civile.

## **NOTE COMPLEMENTAIRE**

Dans ses rapports annuels adoptés le 13 novembre 2001, la Commission européenne souligne les progrès substantiels réalisés par l'ensemble des pays candidats en vue de respecter les critères d'adhésion à l'UE.

S'agissant de la Turquie, la Commission propose une nouvelle étape basée sur une préparation plus soignée en vue de satisfaire à toutes les exigences de l'adhésion. Cela dit, *« tous les candidats continuent de remplir les critères politiques, **excepté** la Turquie même si elle réalise également des progrès comme en témoigne la récente et importante réforme constitutionnelle »*. Dans ce contexte, la Turquie est encouragée à intensifier et à accélérer son processus de réforme politique et économique, conformément aux critères d'adhésion et aux priorités définies dans le '**Partenariat d'adhésion**' pour la Turquie adopté par l'UE au début de l'année.

La Turquie doit être également disposée à contribuer à la solution du problème de Chypre et des divergences sur la politique européenne de sécurité et de défense (PESD).

De plus, la Turquie *« doit prendre les mesures nécessaires pour s'assurer que les récents amendements constitutionnels se traduisent en améliorations concrètes en ce qui concerne les*

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<sup>139</sup> Le Parlement européen, dans sa résolution sur l'emprisonnement d'Akın Birdal (B5 -0352,0358,0368,0379 et 0385/00) souligne que "la réincarcération de M. Birdal (président de l'Association turque des droits de l'homme - İHD) constitue le signe évident que les autorités turques sont loin de comprendre ce que signifie leur adhésion future à l'UE".

*droits de l'homme* ». Enfin, la Commission propose un examen détaillé de la législation turque et du calendrier de mise en conformité à l'acquis.

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## THE EU NATIONAL PROGRAMME : CONSTITUTIONAL IMPLICATIONS

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**Mr Daryal BATIBAY**  
**Ambassador,**  
**General Director of Multilateral Affairs,**  
**Turkish Ministry of Foreign Affairs**

I welcome the opportunity to address you on the occasion of this Seminar on the Constitutional Implications of Accession to the European Union. At the outset, I wish to pay tribute to the Venice Commission and Bilkent University, and Professor Özbudun in particular, for launching this initiative which is of paramount importance.

I am confident that our deliberations here will produce a positive impact on the ongoing discussions regarding the political shape Europe is destined to take. In many respects, European integration may now be considered an accomplished fact, at least to a great extent. A single market and, for most member states, a common currency have been realised. On the other hand, the political form the European Union will finally take is yet to be shaped. That is why a constitutional debate is relevant and, indeed, indispensable.

It is also my firm belief that international as well as regional organisations play a profoundly significant role by providing the ground for dialogue and for further improvements of international standards, thus promoting through dialogue and co-operation respect for human rights and democracy, based on international norms and instruments. And undoubtedly, alongside the United Nations, the Council of Europe and the European Union are leading organisations in that regard. But in light of the topic of my address, it is natural that I will focus on the relationship between the commitments Turkey undertook in its National Programme and the recent constitutional amendments adopted by the Turkish Parliament.

The Union's commitment to promoting human rights and fundamental freedoms is evident particularly in article 177 of the Treaty establishing the European Community, whereby it is stated that "Community policy (...) shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms".

Turkey's dedication to the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, the values upon which the European Union has also been founded, precedes the emergence of the Union. It is however obvious that Turkey's initial attachment and later the endorsement in Helsinki of its candidacy to the European Union have remarkably helped to move forward the liberalisation process in Turkey.

We note with satisfaction that the European Union's Annual Report on Human Rights (2001) recognises this fact as well. The Report stresses the Union's positive stance with respect to



Turkey's intentions to proceed with substantial reforms on human rights issues and the expectation for the full realisation of Turkey's intentions. We tend to regard the reasoning adopted by the Union as encouraging.

I now wish to elaborate on the process through which Turkey's stated commitment to complying fully with international norms pertaining to human rights and fundamental freedoms is translated into action, with special emphasis on the National Programme and its constitutional implications. Nevertheless, I would absolutely be remiss if I failed to refer to Turkey's long-standing legitimate fight against terrorism, its political, economic and social consequences, as well as the present international climate of heightened tension.

Everybody is well aware that since the early 1980s Turkey has had to endure separatist terrorism of an utterly indiscriminate and most violent character, which aimed at disrupting its territorial integrity and political unity. During this period, it is hard to say that Turkey's legitimate concerns have received the proportionate sympathy, let alone the support that they deserved. While some countries extended a helping hand to Turkey, others somehow opted to refrain from fulfilling their international obligations to co-operate against terrorism.

The full suppression of terrorism in Turkey has not been achieved yet. But we can confidently state that Turkey's legitimate fight against terrorism has reached a successful stage. Meanwhile, Turkey has had to bear extremely high costs. Over thirty thousand lives have been lost. Billions of dollars that have apparently been spent to sustain the fight against terrorism could have been allocated to further upgrading economic and social development.

At this juncture, I believe it would be worthwhile to recall that Turkey has always persistently maintained its resolve to implement an extensive programme of human rights even while combating terrorism. Turkish governments have always remained fully committed to undertaking constitutional and legal amendments and translating them into action with a view to removing existing shortcomings and moving ahead in line with the aspirations of its people as well as in compliance with its international obligations.

Obviously, the simultaneous fight against terrorism compelled Turkey to exercise restraint and maintain a rather cautious policy in that regard. Consequently the progress achieved had to remain in moderate terms. Now that the Government has to allocate less resources to combating terrorism it has already started moving faster towards achieving the goals as laid down in the National Programme.

It would therefore be most appropriate to take into consideration the long-lasting and costly fight against terrorism and the trauma the Turkish society suffered when judging Turkey's performance in regard to liberalising its democratic structure. All these have adversely affected the national psyche.

As for the international scene, apparently the unprecedented terrorist attacks in the United States of 11 September constitute a milestone in the history of international relations. Their profoundly tragic consequences are still fresh in our minds. As the United Nations Secretary General noted, the attack was aimed at one nation and wounded an entire world. It was an attack on all humanity, and all humanity has a stake in defeating the forces behind it.

We fully agree with those who assert that terrorism has no particular religion, race, colour or language. We must continue to resist attempts to attach religious or ethnic prefixes to terrorist

acts. We must also persistently avoid attempts to portray the fight against terrorism as a “struggle between different cultures”. In our view, the theory of the so-called “clash of civilisations” is an utter misrepresentation, which carries the danger of translating into a wave of backlash against a particular faith or ethnic group.

Resolution 1373, adopted by the United Nations Security Council on 28 September 2001, is a significant step forward. We believe that complementary steps should follow. In this context, as another major step, we might consider the convening of an international conference or special session of the United Nations General Assembly where the matter of terrorism can be discussed in all its aspects. The final objective should be the adoption of a global convention that provides an express and universally accepted definition of terrorist acts. It should also lay down the possible sanctions against terrorist activities.

With regard to Turkey’s performance in the field of human rights, please allow me first to stress once again that Turkey does not hesitate to confess to its own deficiencies while trying to remove those both in line with the preferences and the aspirations of its people as well as in compliance with the criteria enshrined in international instruments, including the Copenhagen criteria as reflected in the National Programme. The members of the Government have on occasions reiterated expressly that alignment with the European Union *acquis* is a priority for the Government. It should therefore be understood that full membership of the European Union is to be a catalytic factor in stepping up efforts aimed at catching up with the criteria envisaged by the Union *acquis*. It is also evident that the prospect of membership of the European Union is driving the moves towards greater political liberalisation in Turkey.

The constitutional amendments recently adopted by the Turkish Parliament, which comprise the revision of almost one fifth of the Constitution, may be regarded as the most substantive achievement in Turkey’s preparations for accession to this date. This is a further confirmation of the existence of a broad-based political will for European Union membership in Turkey.

On the other hand, we must also admit that the changes undertaken still fall short of the target set in the National Programme. In order to be able to judge them correctly, while bearing in mind the negative impact of Turkey’s long-lasting fight against terrorism as I explained, we should not fail to take into account the international conditions under which those changes were given effect. This was defined most eloquently in the Financial Times article, entitled “Turkish Rights”, on 5 October 2001, and I quote: “In the present international climate of heightened tension, it is reassuring to see Turkey pressing ahead with constitutional changes to improve the protection of human rights make its laws more liberal.”

The Government has already expressed its continued resolve and reiterated that, in terms of both constitutional and legal amendments, the efforts would not stop there and that it regarded this as an ongoing process.

The recent constitutional amendments introduce new provisions in line with the priorities formulated in the National Programme, such as freedom of thought and expression, prevention of torture, strengthening of democracy and civilian authority, freedom and security of the individual, privacy of the individual life, inviolability of the domicile, freedom of communication, freedom of residence and movement, freedom of association and equality between men and women.

It is unquestionable that all amendments should be seen as an important and comprehensive step towards achieving the target set by the National Programme. Nevertheless, I believe that one provision rightly deserves to be highlighted. This particular provision pertains to the pre-trial detention. The amendment to the Constitution brought the time a person can be held in police custody in line with the criteria in the European Convention on Human Rights (Article 5 of the ECHR entitled "Right to Liberty and Security"). The amendment also fulfils Turkey's commitment to "review Article 19/6 of the Constitution" in the medium term (Political Criteria 2.1.4 "Pre-trial detention"). A corresponding amendment to Article 128 of the Code on the Criminal Procedures will reduce the time spent in custody to four days maximum.

Another provision I wish to touch upon is related to the death penalty. We know that most critics are of the view that not scrapping the death penalty entirely is a "missed opportunity". I tend to disagree with this definition.

Let us recall that Turkey undertook in the National Programme to consider the abolition of the death penalty in the medium term (Political Criteria 2.1.8 "Abolition of the death penalty"). It is true that at this stage the death penalty has not been abolished. But, the sentence "the death penalty may only be imposed in time of war, imminent threat of war and for crimes of terrorism" was added to the article. Thus, it now applies only to terrorist crimes and in times of war or imminent threat of war.

Bearing in mind that the scars of terrorism, which Turkey had to endure, are still fresh, I believe it would be fair to present this amendment as a rather courageous step forward towards fulfilling entirely the commitment undertaken in the National Programme in this regard.

Now the preparations are underway to introduce harmonisation bills that will bring various laws into line with the amended Constitution. In this context, the Package of Legislative Amendments Related to Fundamental Rights and Freedoms has been undertaken by the Government with a view to initiating the process of harmonisation of the relevant articles of the Turkish legislation with the new provisions of the Constitution, in line with the commitments that the Government had undertaken in the National Programme.

Meanwhile, Turkey has also continued to take steps towards becoming a signatory to the basic international instruments aimed at the protection and promotion of human rights. In this framework, Turkey signed both the "International Covenant on Civil and Political Rights" and the "International Covenant on Economic, Social and Cultural Rights". The "Convention on the Elimination of All Forms of Racial Discrimination" has recently been submitted to the Parliament for approval. With the ratification of those three instruments, Turkey will become party to all the six fundamental United Nations instruments in the field of human rights.

Before I conclude, I wish to reiterate that Turkey has repeatedly proven its resolve and shown its will in making progress towards achieving universal values. It is true that deficiencies still exist. But, encouraged by the sincere enthusiasm of the overwhelming majority of its people, the Government will persistently continue to make progress towards eradicating those defects. And the commitments undertaken in the National Programme and the prospect of the European Union membership will continue to constitute further driving forces towards this end.

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## CONCLUSIONS

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**Ms Nanette A.E.M. NEUWAHL**  
**Professor of European Law, Montreal University**

Ladies and Gentlemen,

It is a great honour for me to be here, with the Venice Commission, which fulfils such an important role in the dissemination of information about an increasing awareness of fundamental values. The applicant countries to the EU are almost all undergoing a process towards greater democracy, and a comparative study of the constitutional aspects of EU accession is both useful and extremely important. I hope that the outcome of this discussion is of interest to all the applicant countries as well as the EU itself.

I am proud to be able to speak in the capacity of general rapporteur at a conference on this topic hosted by a prestigious young university in the capital of a country whose civilisation, people and culture I greatly admire.

As a general rapporteur at this conference, my reflections are largely the result of what I have heard during these two days of meetings. In the short time which is available to me it is not possible to deal with everything that has been said. Instead, I shall attempt to concentrate on what I perceive as the main points – as one speaker put it: *repetitio juvat* –, while adding a little bit of my own salt.

But before doing so let me first say a word about the title of this symposium: “Constitutional implications of accession to the European Union”, especially in relation to Turkey.

All applicant countries are in a process of constitutional change. The objective of change is not merely to enable the smooth functioning of the common market or to allow the introduction, perhaps one day, of a single currency. The objective of constitutional change is also the adoption of western values of democracy and the rule of law. This is a matter which has been firmly on the agenda of the Central and Eastern European countries, as these values have led to peace and security.

Turkey is basically a functioning democracy already. For the EU, it is important to help Turkey to consolidate itself as a strong democracy with which it can do business and with which it shares fundamental values. Turkey would qualify as a Member State of the European Union even though its territory is for the most part outside Europe. Perhaps Europe’s geographical boundaries are shifting; however, I believe that this is without political objections.

The discussions have concentrated mainly on constitutional changes of all kinds which would allow accession to the EU to take place. This should not detract from the larger picture. As several commentators have pointed out, the changes are worth striving for in themselves.

One of the striking things at this symposium was the confusion, if not disagreement, among speakers on the question whether particular constitutional amendments would be absolutely

required in order for Turkey (or for that matter, any other applicant state) to become a member of the EU, or whether they could be temporarily or entirely dispensed with. The boldest in ruling out any shortcomings was perhaps Christian Rumpf from the Max Planck Institute, when he stated that the accession of Turkey without increasing the powers of Parliament and without adequate procedural provisions on transfers of sovereignty would be like connecting a 110-volt electricity cable onto a 250-volt network. I have sympathy for this view inasmuch as a country that joins the EU should not have constitutional provisions which contradict the EU's fundamental characteristics. Mr Rumpf and others also mentioned some other constitutional changes which would be required, and to which I will return later.

More than one commentator has asked the question: why would one need any constitutional change for accession to the European Union? Professor Hans-Heinrich Vogel from the University of Lund looked at this question from the viewpoint of the case law of the Court of Justice of the European Communities, and he points out that the existence of constitutional obstacles may lead to delays in implementing Community law and ECJ judgments. In Case C-468/00, *Commission v. France*, the ECJ states that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with EC law.

The European Community can now impose periodic or other financial penalties for failure to comply with EC Law (Article 228 EC), in addition to the possibility of individuals requesting "Francovich liability" (Cases C-6/90 and C-9/90). However, should extensive use of these instruments be made, the image of EC law as an effective legal order, and of the Member States as faithful members, would be compromised. For this reason alone it is worth insisting on the adoption of constitutional laws which would facilitate the application of Community law before a candidate enters into the Community.

Some people may wonder how constitutional obstacles are to be seen in the light of the principle of supremacy of Community law as in *Costa v. ENEL* and the second *Simmenthal* case. It is true that in the case of a conflict between the EC treaty and a provision of the Constitution of a Member State, as a matter of Community law the latter gives way. But that does not mean that therefore, it is not necessary to eliminate, as far as possible, any national rules that might prejudice the application of Community law. Any delay in the application of Community law on the part of acceding Member States would in practice be a unilateral detraction from the *acquis communautaire* which the current Member States would not want to accept.

Mr Luis Lopez Guerra of the Spanish General Council of the Judiciary has pointed out among other things that the accession process today demands greater efforts on the part of the candidate countries than in the past, both because the EU has moved so far beyond what it was some 40 years ago or at the first, second, and even third enlargements, and because the candidate countries have had political and economic regimes that were in certain ways opposite to those of the EU.

Indeed, the EU has evolved from an international organisation for regional economic integration into a political structure more similar to a confederation or – if one were to coin a new term – an intergovernmental federation. The EU is still evolving: there is much talk now on the adoption of a written EU Constitution, of which the Charter of Fundamental Rights of the EU is likely to become a part. Also, respect for democracy and the rule of law have been inscribed in the Treaty on European Union, and procedures have been included – and are

being improved – to ensure that they are observed. The extent of economic integration is unprecedented, culminating in an economic and monetary union for a core of Member States.

Professor Inge Govaere from Ghent describes how the economic pre-accession strategy of the EU is meant to help candidate countries to prepare themselves for accession, in particular by raising the level of their competitiveness so as to be able to withstand the pressures of the common market, as well as by advising them on the *acquis communautaire*. She also notes that the more integrated the EU has become, the more candidate countries have to be prepared for accession in order not to create major gaps and imbalances between Member States. Transition periods are only reluctantly accepted.

As Mrs Jonczy-Montrastruc of the European Commission Legal Service pointed out, the process of accession is in the end a political one. The European Commission does not negotiate but, by monitoring the applicant Member States, guides them as to the strategy which is best suited to achieve the desired result. On the eve of the accession the Commission will be in a position to recommend, or not to recommend, the accession of the candidate to the EU and its Member States. I presume that in some cases, this could be a conditional recommendation.

The EU does not provide a list of the constitutional implications of accession. These can be tentatively divided, as Mr Guerra Lopez has divided them, into pre-accession changes, simultaneous changes and changes arising after accession. One may note that while the adoption of all changes before accession may be preferable, this may not always be feasible.

In the pre-accession stage, there is obviously no legal requirement of constitutional amendment; at most there may be a political one. Changes may be desirable at this stage because they show that a country is satisfying basic criteria for admission and this helps to persuade the EU, or rather its Member States, to ratify an accession treaty.

In order to achieve the accession, however, the Constitution of an acceding Member State must allow the state concerned to conclude treaties of the (supranational) nature of the EC Treaty and the Treaty on European Union. If this is not the case, constitutional amendment would be required at the latest at the same time as accession. Transfers of sovereignty must be rendered possible, ideally on an ongoing basis. The limits of such transfers of power can be provided for, and a preventive role by the national Constitutional Court in the process of constitutional review should be defined. If the accession treaty is deemed unconstitutional, either the treaty or the Constitution would need to be amended. Also after accession, a number of constitutional issues may arise, and some Member States' case law has reserved the power of their courts to assess the compliance of EU law with fundamental principles laid down in their constitutional law. Institutional implications for the national executive and legislature may need to be addressed only after the entry into force of the accession treaty, but they are best examined in advance.

It is worth noting, as Mrs Jonczy-Montrastruc has pointed out, that not all constitutional changes need to be laid down in the Constitution of an acceding Member State. Some aspects can be regulated in the treaty of accession or in the act of ratification of the acceding Member State. This presupposes, of course, that the Constitution concerned allows this to occur, because otherwise such acts would remain without effect. It is for this reason that the constitutional empowerment of the Turkish Parliament to transfer sovereignty may need to be provided for explicitly. Empowerment of the courts could, arguably, be regulated in an act of

accession or even a special law – it being understood that there are reasons to tackle this sooner rather than later. Ratification of human rights instruments too is technically speaking not a matter for constitutional amendment.

Many speakers have referred to constitutional and other amendments that were necessary, useful and/or urgent. I will not repeat them all here. I shall instead refer to the full report of the Venice Commission. Rather, I shall focus for a second on the disappointment of some of the speakers with the fact that some amendments of the Turkish Constitution have been voted down by the Turkish Parliament. This includes the rejection of a provision on the protection of minorities, a failure to eliminate the death penalty, and the existence of an *eminence grise* in form of the National Security Council.

The argument has been made that these aspects can be explained by the common heritage of the Turkish people or the fact that the Turkish Constitution, like any Constitution, is the product of national characteristics, including Kemalism and its resulting particularity of “militant democracy”. If this is the case, could this be acceptable for entry into the EU?

Several commentators have expressed doubt about this issue, and it was in particular Professor Bakir Çağlar from Istanbul University who expressed grave reserves about the non-respect of democratic principles due to these and other shortcomings of the Turkish Constitution.

No matter what the recommendations of the European Commission would be if a second round of constitutional amendments in Turkey did not remedy the shortfalls, the citizens of the current EU Member States will have difficulty in accepting any shortcomings in such important fields.

Professor Çağlar has suggested that it is difficult for candidate Member states to see what the political criteria of Copenhagen actually mean: for instance, what does the EU mean by the right of peoples, secularism or citizenship; are the contents of those notions determined by France, which refuses to sign the Framework Convention for the Protection of National Minorities; or by Belgium, Greece, or Germany? Whose standards need to be followed? The answer is: the standards of all the Member States, as they can all vote against accession, and entry into the EU can never be guaranteed. But there is some comfort in the thought that these values are worth pursuing independently of EU membership, and many people in Turkey, thankfully, reason that way. Like Mr Batibay from the Turkish Ministry of Foreign Affairs, I too congratulate Turkey on the great progress already made.

I personally am a proponent of the EU membership of Turkey, as I think this is in the interest of both Turkey and the EU. The current customs union and the association agreement are only part of what the co-operation and partnership could be. The provisions on flexibility of the Treaty on European Union allow Turkey to take part in some of the aspects of the EU while remaining sovereign in other respects.

I now should like to say a word on the concept of transfer of sovereignty and whether that is something to be afraid of.

Mr Armando Toledano Laredo, Honorary Director General at the European Commission, spoke about the advantage of “pooling sovereignty”, which created a new dimension, a new force in international relations. The EU is stronger than the sum of its individual Member

States. Mr Toledano called it a shared asset, or, even more eloquently in French: a *bijou commun*.

In spite of this, there exists some anxiety in acceding Member States about a transfer and corresponding loss of national sovereignty. This was demonstrated by several questions in the audience, and it is demonstrated too by some of the case law of the Court of Justice of the European Communities which speaks about the transfer of sovereignty, albeit in restricted fields. The European institutions do not only exercise new powers, they also do this to the exclusion of the Member States. In certain fields the Community's powers are exclusive virtually from the outset – the common commercial policy was mentioned –; in other fields their powers become exclusive after the exercise of competences.

This is acceptable as long as the result is legitimate, that is: democratically enacted and/or otherwise subject to principles of good governance. It is of no use in my view to pretend that the sovereignty of the Member States is not affected by the European integration process. The impact on the freedom of the Member States is clear, it is voluntary and it is for the benefit of the peoples of Europe. It is this impact which makes EU law unique, and which achieves what nation states have not been able to achieve: peace between their nations.

In order to attain this objective it is not necessary, as one participant put it, to “give up control”, as there are various ways in which EU law safeguards Member State competences and Member States' essential interests, and national identities. Limitation of sovereignty, therefore, would take place only where action by the European institutions is better than action by the Member States individually or collectively (the subsidiarity principle).

A lot has been said about the implications of accession for the constitutions of the acceding Member States from the viewpoint of the need to improve the latter. Comparatively little has been said about the negative implications which accession can have for democratic values, although some of the commentators have hinted at existing shortcomings of the EU in terms of transparency, access to governmental information and even, in theory, protection of human rights. The EU itself can still improve on these fronts and in fact, the debate on the future of Europe is bound to take these aspects into account. Democracy, therefore, is not only a set of rules or institutions to be acquired by Member States, but also an asset worth striving for in continuation at all levels of government.

To conclude, I just want to say a word or two about Cyprus. It may not seem absolutely necessary to speak about Cyprus here, because we are dealing with constitutional issues. Yet Professor Çağlar finds it necessary to remind us of the recent position of Commissioner Verheugen that the Cyprus question is the greatest obstacle in the integration of Turkey into the EU. Indeed, there is reason to believe that instability of this island will lead to the impossibility of the enlargement process.

In my opinion, Member States have a duty towards their peoples to seek to achieve the objectives of the Treaties, and discrimination according to nationality if not compatible with this. Therefore, should it be decided that Cyprus does not accede, this should not lead to the exclusion of any other candidate country. This leads to the following two conclusions: (1) accession of Cyprus is best shelved until a solution is found, and (2) all accessions need to be considered on their own merits.



**This being said, I should like to restate that the contributions by all participants were very stimulating and I hope they will provide an incentive to wider public debate.**

Finally, although the European integration experience may be unique, in my view the challenges which face Europe are in no way unique, and the values which Europe stands for are a contribution to problems facing many parts of the world.

The events of 11 September 2001 have shown that no State can close in on itself and forget about what is going on in other parts of the world. They also underline the value of the Turkish experience of a secular, democratic society. Turkey is the only country in the world to prove that there is no inherent incompatibility between Islam, democracy and economic development: Turkey is a bridge to Asia and a particularly important bearer of the values of democracy.

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The enlargement of the European Union is one of the most important political questions at the beginning of this millennium. Accession to the European Union involves major constitutional modifications, if not formally at least in substance. Adapting to Union law is one of the principal themes of constitutional debate in candidate States.

This volume, after a comparison of the situation in the member States of the Union, examines the challenges which candidate States face and the Union's approach to them. On the occasion of Turkish constitutional reform, adopted in the context of European integration, this volume studies more specifically the relationship between the European Union and Turkey and its repercussions on constitutional law in that country.

L'élargissement de l'Union européenne est une des questions politiques les plus importantes de ce début de millénaire. L'adhésion à l'Union entraîne des modifications constitutionnelles majeures, sinon formellement, du moins sur le fond. L'adaptation au droit de l'Union est un des thèmes principaux du débat constitutionnel des Etats candidats.

Le présent ouvrage, après avoir présenté de manière comparative la situation dans les Etats membres de l'Union, examine les défis posés aux Etats candidats ainsi que l'approche de l'Union à l'égard de ceux-ci. A l'occasion de la réforme constitutionnelle turque, adoptée dans le contexte de l'intégration européenne, il étudie plus spécifiquement les relations entre l'Union européenne et la Turquie et leur incidence sur le droit constitutionnel de ce pays.