THE HUMAN RIGHTS ADVISORY BOARD

The Minority Rights and Cultural Rights Working Group Report

October 2004

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1) THE CONCEPT AND DEFINITION OF MINORITY IN THE WORLD

The concept of "minority" has been used in the world from the sixteenth century down to the present day. When the form of government called absolute monarchy was founded and when, approximately in the same period, religious minorities came into being (Protestants in Catholic monarchies and Catholics in Protestant monarchies), it became necessary for these minorities to be mutually protected and only then did the concept of minority emerge. After 1789, the concept of national minority was to be added to that of religious minorities.

After the European states internally settled the question of protecting these minorities, they turned outwards and engaged in efforts to protect the non-Muslims within the Ottoman Empire and thereby to intervene in Ottoman affairs. As a result, European countries came into conflict with each other and this led to the emergence of the "Eastern Question".

These international protection efforts started in the form of unilateral edicts of protection (for example, the 1598 Edict of Nantes) and bilateral treaties (for example, the 1699 Treaty of Karlowitz), and moved in the nineteenth century to the phase of multilateral treaties (for example, the 1856 Treaty of Paris) and, finally, the foundation of the League of Nations in 1920 ushered in the period of "minority protection under the guarantee of an international organisation". The world continues to be in that phase, and the international mechanism of minority protection is conducted under the umbrella of such organisations as the United Nations, the Council of Europe, the European Union and the OSCE.

2) THE CONCEPT OF MINORITY IN TURKEY, ITS DEFINITION AND CULTURAL RIGHTS

Ever since the period of the League of Nations, the concept of minority has been defined on three criteria: ethnic, linguistic and religious. However, in 1923 in Lausanne, Turkey refused to accept all three of these criteria and managed to have it accepted that its non-Muslim citizens alone constituted a minority and were therefore entitled to international protection of minorities.

Nevertheless, as nearly eighty years have passed since then and the concept, definition and rights of minorities have considerably developed in the meantime across the world, Turkey is now faced with serious difficulties. Moreover, since 1990, minority rights have further widened and strengthened in terms of both space and quality.

These difficulties arise not only from the limited definition in the Treaty of Lausanne. By some sort of reservation it makes to international conventions to which it accedes, Turkey asserts an even narrower principle. In accordance with this "Statement of Interpretation", Turkey asserts in the international arena the restrictions imposed by the 1982 Constitution as well as those in the Treaty of Lausanne and declares that the rights granted by conventions to

which it accedes shall not apply in Turkey if they extend to any minorities other than those recognised in the Treaty of Lausanne or if they are among the rights prohibited by the 1982 Constitution.

Turkey's difficulties in this area can be summed up in two points:

1) This restrictive position of Turkey is increasingly at variance with the current trend in the world. After the interpretation of the UN Human Rights Committee in 1990ies, the trend is not asking a country whether there are any minorities in that country but accepting that there are minorities in that state if there are groups who "differ in ethnic, linguistic or religious terms and consider such difference to be an inseparable part of their identity". However, it is up to the discretion of the nation-state whether or not to recognise them as minorities.

Here, we should immediately note that the European Union has no demand whatsoever from Turkey to give minority status and rights to different cultural groups. The only requirement is equal treatment to all citizens of different cultures. This point should be well understood.

2) Turkey does not duly implement the Treaty of Lausanne either and thus even violates some of the provisions of this founding treaty of its own.

To start with, the rights granted to the non-Muslims are not fully implemented. These rights are allowed only to the three major minorities (namely, the Armenians, Jews and Greeks) and denied to other non-Muslims (for example, the right of education in Article 40 for the Syriacs), while the rights granted -albeit without international protection- by Part III of the Treaty of Lausanne, to people other than these non-Muslims are effectively ignored by the State.

One example of the former case is the so-called "1936 Declaration" and one example of the latter case is the situation regarding Article 39/4 of the Treaty of Lausanne, which provides *"all Turkish nationals"* with the right "*to use any language they wish in commerce, in public and private meetings and in all types of press and publication media*". In other words, government offices are the only exception to that right. On this subject, for example because nobody was allowed to make radio and TV broadcasts in any language they wished, the third Package of Harmonisation was adopted on 3 August 2002, but, since it could not be implemented either, it became necessary to adopt a seventh Package on 30 July 2003. By the end of November 2003, the Radio and Television High Board drafted a Regulation on this issue, which also envisages restrictions as to time and space.

However, if Article 39/4 of the Treaty of Lausanne is implemented, this would automatically put an end to the troublesome controversies such as those over the issue of Kurdish broadcasting, which are unnecessarily wasting Turkey's time. Such a step would bring great benefits to Turkey in four respects:

1) It is certain that Turkey will soon have to abandon the "Statement of Interpretation", which has not been of benefit to Turkey, anyway. It is important –for the concept of national sovereignty- for Turkey to do so at her own will rather than as a result of EU pressure, and this would be done by implementing the provisions of the Treaty of Lausanne, which is Turkey's own founding treaty.

2) It is inevitable that one day everyone will be able to make broadcasts in any language. In transition, rather than trying to pass new and controversial laws, providing the justification

that the provisions of the Treaty of Lausanne, which already have at least constitutional effect, have been implemented would make life much easier for the State.

3) It is obvious that, in order not to create internationally protected minorities in Turkey, it is necessary to grant as wide freedoms as possible to all citizens, and this should apply to "*all nationals of the Republic of Turkey* ".

4) There is no doubt that it would be greatly beneficial for the "unity and cohesion" of the country is the Turkish State treats its own people more humanely. A country of "compulsory citizens" is a weak one. Ensuring the happiness of its people and turning them into "voluntary citizens" would strengthen the State itself. A citizen to be feared the least by the State is a citizen whose rights it acknowledges.

3) RELEVANT LEGISLATION AND PRACTICE IN TURKEY

The legislation on minorities and therefore on cultural rights in Turkey is more restrictive than the concept of minority and the minority rights in the country. The main source of this is Article 3/1 of the Constitution: "*The Turkish State, with its territory and nation, is an indivisible entity. Its language is Turkish.*"

The State being an "*indivisible entity with its territory*" is a very natural and undisputed point throughout the world. However, the concept of the "*indivisible entity of the nation*" is quite alien to a Westerner although it comes natural to us. Because it implies that the nation is monolithic, effectively denying the various sub identities that make up the nation and therefore contravening the essence of democracy. In the area of international human rights, the criteria used in the restriction of rights include "national security" and "territorial integrity" but not the "indivisible entity of the nation". In cases brought to it, the European Court of Human Rights (ECHR) passes judgements of violation on grounds that "asserting the existence of minorities in the country" cannot be prevented.

In addition, it is entirely impossible to understand the phrase "*Its* [the Turkish State's] *language is Turkish*". A State does not have a language, but an *official language*, and citizens of that country speak in various languages and broadcast in these languages in addition to using that official language in their relations with the State. As a matter of fact, in the 1961 Constitution this is expressed as: "*The official language is Turkish*" (Article 3).

When the principle of the "*indivisible integrity of the State with its territory and nation*", which is repeated in countless articles of the Constitution and laws, is interpreted in such a way as to reject cultural sub identities, the legislation in Turkey becomes one that tends to assume that "recognition of sub identities" is meant to disturb the said identity, and therefore to charge those who do so with "separatism and subversion". Important laws such as the Law for the Fight Against Terrorism, the Law on the Duties and Powers of the Police, the Radio and Television Law, the Law of Associations and the Law of Political Parties heavily punish "*creation of minorities by asserting the existence of minorities based on ethnic and linguistic differences*."

When the Constitution is such, certain laws and regulations can bring provisions which are not compatible at all with the way in which the term "Turkish" was understood by Atatürk. For example, while listing those who may be involved in acts of sabotage, the "Regulation Concerning Protection from Sabotage", issued on 28 December 1988 and applied until 1991, included non-Muslim citizens of Turkey by referring to them as "*local foreigners (of Turkish nationality) within the country and people of foreign race*". Article 24/1 of Law no. 625 on Private Education Institutions, which concerns the appointment of "Turkish chief deputy principals" to "private schools established by foreigners", is applied also to the schools of

minority who are Turkish citizens. Moreover, Article 24/1 stipulates that this chief deputy shall be "*of Turkish origin and Turkish nationality*" and this provision is still in force.

The fact that non-Muslim citizens were recorded in the book of "foreigners" until the 1940s, that such citizens were taxed more heavily than Muslims under the Wealth Tax Law of 1942 by implementing a list "G" (the initial letter of the Turkish word for "non-Muslim") which was not in the Law, and that admission into military schools and even civilian institutions was subject to the condition of "*being a Turkish national and a member of the Turkish race*" until the 1950s: all this is not simply a thing of the past. Even today, one does not encounter any non-Muslim civil servants in state institutions, including especially the Turkish Armed Forces, the Ministry of Foreign Affairs, the Police and the National Intelligence Agency, excluding universities. These practices seriously prevent Turkey from achieving the position it deserves in the twenty-first century and damage national unity within the country, because they reflect the usage of the term "Turk" in the context of race and even religion.

4) RELEVANT COURT JUDGEMENTS IN TURKEY

The Constitutional Court and Decisions for the Banning (Closing) of Political Parties

With such legislation, the Constitutional Court often adopts decisions to ban political parties.

Nevertheless, it is also true that the Constitutional Court, while making interpretations, ignores certain fundamental concepts of law and thus causes further damage to democracy in Turkey.

For example, in its decision to ban the DEP in June 1994, while stating that *"it would not be meaningful to turn unlimited rights into limited rights and being part of the nation into being a member of a minority"*, the Court ignored the distinction between "negative/individual rights" (equal rights granted to all citizens) and "positive/group rights" (additional rights granted only to disadvantaged citizens). Moreover, that statement by the Court is such as to regard citizens who belong to the majority as first-class and those who belong to a minority as second-class.

Similarly, in its decision to ban the TEP, the Constitutional Court first stated that it was possible to speak of the existence of different identities but maintained its former position by immediately adding afterwards that the assertion of different identities would lead to *"a tendency to break away from the whole in the course of time"* (Decision banning the TEP, Case: 1979/1, Decision Number: 1980/1).

This attitude stems from a fear that recognition of the existence of people from different ethnic, religious, cultural, etc. backgrounds in Turkey would result in the fragmentation of the State.

Relevant Judgements by the Court of Cassation and the Council of State

Unfortunately, some citizens in Turkey are perceived as "foreigners". In addition to such a mistake among ordinary people, it is observed that the Court of Cassation also made (and even insisted on) this serious mistake in its judgements on the so-called "1936 Declaration" concerning non-Muslim foundations.

As a matter of fact, in a judgement delivered in 1974, the Court of Cassation General Assembly of Civil Law Departments stated that *"…foreigners are prohibited from acquiring property in Turkey"* and thus decided that the Balıklı Greek Hospital Foundation, which is a non-Muslim Turkish establishment, was not entitled to acquire property. After the defence

lawyers pointed to this mistake, the same Assembly then said *"It is indeed mistaken to refer in our judgement of approval to 'the laws prohibiting foreigners from acquiring property in Turkey' given the fact that the defendant foundation was established by Turkish citizens"*, but added*: "Therefore, it is now decided that the phrase in question should be removed from the judgement by way of correction, but otherwise… the appeal should be rejected"* (The General Assembly of Civil Law Departments, Case: 1971/2-820, Judgement: 1974/505, Date: 8 May 1974). In other words, the Court of Cassation effectively insisted on its mistake. However, such mistakes are highly damaging to the concept of nation and bring discredit to Turkey in the international area.

Although this question of the "1936 Declaration" was corrected in the fourth EU Harmonisation Package which was adopted on 2 January 2003, the injustice still continues in practice. As a matter of fact, it became necessary to deal with the same issue in the sixth Harmonisation Package which was adopted on 19 June 2003. In practical terms, no result has yet been achieved.

Finally, although the 1936 Declaration has been abolished, it is simply grave that the Treasury, in the legal action it brought in February 2003 against the Surp Haç Armenian High School Foundation, based its claims on a decision of the "Minorities Sub-Committee at the Ministry of Interior". When it is a question of property owned by citizens whose religion happens to differ from the majority religion, reference is made to such a sub-committee, which is not part of the legal order of the State. It is probably difficult to find a more striking example of ethnic and religious discrimination.

As for the administrative judiciary, the Second Administrative Court of Istanbul referred to a Turkish citizen of Greek-Orthodox origin as a *"Turkish citizen of foreign nationality"* (Case: 1995/1271, Judgement: 1996/552, Date: 17 April 1996). Moreover, when this very interesting term, which was the basis of the Court's judgement, was brought to the attention of the Twelfth Department of the Council of State, it was not regarded as a valid ground for appeal, and the Department unanimously upheld the judgement of the local court (Case: 1997/2217, Judgement:1997/4256, Date: 24 December 1997).

5) BACKGROUND OF THE SITUATION IN TURKEY

It is clear that the question of minorities analysed in this Report is handled from a very narrow and deficient perspective in Turkey. The fundamental reasons for this viewpoint may be summarised as follows:

1) Rather than keeping track of developments in the world with regard to the minority concept and law, Turkey is stuck with 1923 and moreover interprets the Treaty of Lausanne incorrectly/deficiently.

2) Recognition of the different identities of a minority and granting minority rights are considered/assumed to be the same. However, the former implies an objective situation while the latter is a matter of discretion for the State.

3) "Internal self-determination", which means democracy, is considered identical with "external self-determination", which means fragmentation, and consequently the recognition of different identities is treated to be the same as the territorial fragmentation of the State.

4) With respect to nation oneness and unity are considered to be the same and they are not aware of the fact that the former is gradually destroying the latter.

5) While speaking of the Turks as a nation, it is not realised that the term "Turkish" also denotes an ethnic (even religious) group.

These facts have two causes, one of which is theoretical and the other historical/political.

The Theoretical Cause: The Relationship between the Supra identity and Sub identities in the Republic of Turkey

While replacing the Ottoman Empire after it collapsed, the Republic of Turkey completely inherited the sub identities that existed within it (the various ethnic, religious and other groups). However, while the supra identity in the Empire (the identity accorded by the State to its citizens) was "Ottoman", it emerged as "Turk" in the Republic of Turkey.

This supra identity tends to define the citizen with race and even with religion. For example, when "our kinsfolk abroad" are mentioned, people of ethnic Turkish origin are meant. In addition, it is clear that one must also be a "Muslim" in order to be considered a "Turk" because our non-Muslim compatriots are referred to not as "Turks" but simply as "citizens". In Turkey, nobody uses the word "Turk" when talking about, say, a Greek or Jewish citizen because they are talking about a non-Muslim citizen. Regrettable examples of this in state practices are sufficiently given above.

This situation alienated the other sub identities who do not consider themselves of the Turkish race and created problems. This wouldn't have happened had the supra identity been "Türkiyeli" ("*being from Turkey*"). Because then it would have embraced all sub identities equally without involving ethnic, religious etc. aspects, since it is fully based on "territory" and completely ignores "blood".

The definition of citizenship in the 82 Constitution is much narrower than the one in the 1924 Constitution of Atatürk. The 24 Constitution used the term "the people of Turkey". This definition recalls the supra identity which we named as "Türkiyeli" since it also refers to the territories on which the people live. This supra identity will embrace all sub identities living on these territories without any exception and it will ensure that the concepts of "nationality" (being of a particular ethnic origin) and "citizenship" (the legal bond between the individual and the State) are taken up as separate and independent concepts, which used to be considered as identical terms. There is no doubt that a nation composed of "voluntary citizens" would be much more willing to embrace the State.

The Historical and Political Cause: The Sèvres Syndrome

It is known that in the early 1990s Turkey suffered from a "Sèvres Syndrome" that the country was about to disintegrate. It is disturbing, and weakening the nation, that such an argument is still put forward and even turned into paranoia. Those who argue that a Pontus State will be founded in the Eastern Black Sea region, that Turkey is governed by the Converts, or that the Phanar Patriarchate seeks to establish a Vatican-like state in Istanbul, are trying to create such an atmosphere of paranoia.

This atmosphere results in interpreting even the most innocent demands for identity in Turkey as a desire to divide Turkey and wants to immediately suppress them. This situation also invites interventions by the major Western countries because it is contrary to democracy, which Turkey has willingly agreed to implement effectively in order to join the EU. Delaying of democracy in one's own country through such paranoia is not a service to Turkey. In particular, when it is a question of reforms to be introduced concerning the use of Kurdish, there is immediately talk about the fragmentation of Turkey, it is said that this will give new life to terrorism, and efforts are made to prevent all types of reform in such an atmosphere of

paranoia. And those who do so fail to see that some circles could again be led into perceiving terrorism as the only option if reforms are hindered.

Nevertheless, the process of preparations for EU membership has brought the question of minority rights in Turkey into a very positive process despite everything. This process is a direct extension of the legal reforms that Kemalism introduced in the 1920s and 1930s by "top-down revolution" to modernise the country.

Just as violent bottom-up reactions were displayed against the Kemalist top–down revolution in those years, reactions are arising today to the Harmonisation Packages. The mentality that feeds on the "Sèvres Paranoia" is fiercely resisting the reforms.

CONCLUSION

Anatolia, which has been home to very different cultures for many centuries, is also a cradle of great cultural and historical wealth. Following the Ottoman period with its concept of Islamic brotherhood and with a variety of identities, considerable steps were taken to create a homogenous nation with a single culture in Turkey. However, the different identities and cultures have continued to exist as a rich mosaic on the territories of Anatolia.

That policy, which was very natural in the 1920s and 1930s when the Kemalist revolution was made, is now outdated as a requirement of Atatürk's own thesis of "Contemporary Civilisation". Today, contemporary civilisation is not the Europe of the 1920s and 1930s but the Europe of the 2000s. Now, it is essential to review the existing concept of citizenship and to adopt the multi-identity, multi-cultural, democratic, free and pluralistic social model of contemporary Europe.

Accordingly, it is necessary to define the political and legal status of free, independent individuals who can easily use their creative capacities and cultural rights and who are conscious of their rights and obligations. This definition, which is sought to be made in a piecemeal fashion through the EU Harmonisation Laws, is possible by screening all of our laws and putting into practice the principles of:

a- The right to individual freedoms,
b- The right to enjoy freely economic and social opportunities,
c- The right to participate in government, and
d- The right to cultural pluralism.

In the context of implementing these principles:

1) The Constitution of the Republic of Turkey and all related laws must be rewritten so as to have a liberal, pluralistic and democratic content and with the participation of all organisations of civil society.

2) The rights of people with a different identity and culture to protect and develop their identities (such as the rights of publication, self-expression and education) based on equal citizenship should be guaranteed.

3) The central government and local governments must be made transparent and democratic, based on public participation and control.

4) International conventions and basic instruments that include the universal norms of human rights and freedoms, particularly the Framework Convention of the Council of Europe, must be signed, ratified and implemented without reservation. From now on, no reservations or statements of interpretation that would mean a denial of the sub identities in Turkey must be made to international conventions.