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NATIONAL SOVEREIGNTY CONCEPT: TURKEY AND ITS INTERNAL MINORITIES

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Résumé : Although it has made enormous human and minority rights reforms during the last two years, Turkey still has a difficult way ahead because the reformists are encountering strong opposition, called "The Sèvres Treaty Paranoia", from those who believe that more minority rights imposed by EU will undermine the national sovereignty (NS) and will even disintegrate the State like they did at the end of the First World War.On the very contrary, in the wake of the 21st Century any State is more likely to become a target of the international society if it doesn't democratize, i.e., respect the sub-identities in the nation; and *vice-versa*. This article deeply explores and analyzes the legal setting and implementation concerning minority rights in Turkey and argues that the State can no more be content with the limited notions of the 1920s. Minority legislation and its implementation have got to be further democratized for a stronger Turkish NS.

The very essence of the idea of a European Union (EU) is no doubt the relinquishment of at least part of national sovereignty (NS) to some kind of central authority representing the Union. Turkey is extremely eager to enter EU but this very essence is yet the least discussed matter among Turks. But nevertheless, it subconsciously occupies the center of their brains and makes itself evident in certain important issues that I shall discuss in this article.

In the anti-imperialist/Marxist atmosphere of the '60s and '70s the Socialists had a quite interesting slogan concerning entry to the Common Market: "*Onlar ortak, biz pazar*", which can be translated as "They Are The *Common* [meaning, Associates], We Are The *Market* [meaning, of course, the ones to be colonized]". Now that Marxism is no more the point of reference, the other side of the coin, Kemalist nationalism, has replaced it. The reason behind the first approach was the fear of being colonized; for the second it is the fear of disintegration. It is assumed that entry to EU (i.e., relinquishing or sharing the NS) will lead to territorial disintegration, which

is thought to be already on the way since the 1980s. After all, these are the very same western European powers which dismembered the Ottoman Empire in 1920 by the Sèvres Treaty; they had then used Ottoman minorities as a tool, now their main focus is again more rights for the same.

Some who share this deep fear are just afraid of losing their age-long privileges, but the majority is sincerely frightened. There is no doubt that the official Kemalist nationalist approach which lies at the very foundation of the Turkish State conceives the sharing of NS as an introduction to disintegration. On the other hand, two important points could be raised against this train of thought. One stems from the fact that Kemalism is a Westernizing ideology, the second is the fact that the interplay between a State's regime and NS has deeply changed in our day.

The meaning of Kemalism and the concept of national sovereignty

It is debatable whether Kemalism, in its essence, is against western Europe: certainly the first two objectives of Kemalism (*par excellence* an 'underdeveloped-country nationalism',[1] are Independence and Modernization. But, in Kemal Atatürk's thinking, the former is mainly a prerequisite for the latter: a strong (modernized) Turkey could only be achieved against the will of the imperialist West. Kemalism is a Modernization Project built around Atatürk's central theme "*Muasır Medeniyet*" (Contemporary Civilization). Contemporary civilization in Kemalism's heyday was represented by the monistic Western Europe of the 1920s and '30s, now it is the pluralistic Western Europe of 21st Century. Therefore, there are two interpretations of Kemalism, that of 'Model 1930s' and that of 'Model 2000s'; a perfect dichotomy.

The concept of national sovereignty NS, the *sine qua non* of the National (centralist) since the 17th Century and of the Nation-State (built on the assumption of a single ethnicity) since the 19th Century, has two different meanings.

1) Inward looking, it means that the Focus of Supreme Loyalty[2] of the society is turned towards the concept of "nation" only. The nation uses this sovereignty through its elected representatives (the Legislation). This

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[1] See my *Azgelişmiş Ülke Milliyetçiliği* [Underdeveloped Country Nationalism], Ankara, Bilgi, 3rd edition, 1996, Introduction and Chapter One; and *Atatürk Milliyetçiliği, Resmî ideoloji Dışı bir İnceleme* [Kemalist Nationalism, An Unofficial Interpretation], Ankara, Bilgi, 5th edition, 1999, passim.

[2] For this concept see my "Kemalism, Islamism, and Globalization: A Study on the Focus of Supreme Loyalty in globalizing Turkey", *Journal of Southeastern European and Black Sea Studies*, Vol. 1, n°3, September 2001, pp.20-50.

definition of NS has it roots in 19th Century Europe and is therefore anachronistic in our time, for there are at least three limitations to its use: One, the nation shares it with two other partners, the Executive and the Judiciary; Two, the use of NS is influenced by the social class structure of the country; the "representation of the nation" is more real when one of the social classes does not dominate all others ("Internal Relative Autonomy")[3] and this is not always the case; Three, and most important of all; the representation of the nation (i.e., democracy) was defined in the 19th Century as "the will of the majority"; in the beginning of the 21st Century it is now defined as "respect for the sub-identities". The majority can no more act as it pleases like a dictator. The overall principle of democracy and therefore the main principle of national integrity requires that ideas, demands, interests etc. of the minority are taken into account. In the age of Globalization, the Nation-State as a mechanism of assimilation is dead.

2) Outward looking, NS is defined as the State's independence restricted only by its own declared will (i.e., international treaties, etc). The root of this meaning of NS is in the absolutist/centralist State model of the 17th Century Europe; therefore it is also anachronistic today. Now we can no more speak of NS but at best of the "External Relative Autonomy of the State", for the use of a State's NS is restricted by other States' presence, regional and global balance of power and, most important of all, by the structure of the international system.

This means that the interplay between the two meanings has radically changed: In the 17th Century, what was important was not how the State acted towards its citizens (internal NS) but how strong it was towards the outside world (external NS). The internal NS was a function of the external NS. In the 21st Century the external NS is now a function of the internal NS. When internal NS (democracy) is strong (i.e., legitimate and non-assimilationist), external NS (independence) is stronger because there is less intervention from the international arena. For instance, Turkey's democracy is now questioned because of torture taking place in police stations; but this interference would be considerably heavier if the custom of killing the adulterous women by stoning (*recm*) was in practice in Turkey. In sum, I think we can reach the conclusion that today the external NS of a state still

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[3] For the concepts of Internal and External Relative Autonomy of the State see my "Devletin İç ve Dış Göreli Özerkliği", *in* Baskın Oran (ed.), *Türk Dış Politikası, Kurtuluş Savaşından Bugüne Olgular, Belgeler, Yorumlar* [Turkish Foreign Policy; Facts, Documents, Comments Since the Independence War], Vol. I (1919-1980), İstanbul, İletişim, 7th edition, 2002, p. 40.

continues to be strong when based on the use of force, but on the very contrary its internal NS is stronger when it is not.

These two points converge on one important conclusion: NS of Turkey is stronger when "Model 2000s Kemalism" is preferred to that of "Model 1930s". The best litmus test for it is the Turkish state's attitude towards its internal minorities.

The concept of Minority and its application in Turkey: Lausanne

Today, the concept of minority is defined as follows: a relatively small group of citizens with different characteristics from the rest of the nation which it considers the *sine qua non* of its identity. Relying on the Lausanne Peace Treaty of 1923 Turkey, recognized as minorities its non-Moslem citizens only. Today not only does it persist in this attitude but it narrows it further by citing its Constitution. Although, especially as a result of international developments after 1990, the recognition of human and minority rights has both expanded geographically and qualitatively, the "interpretative statement" often appended to Turkey's international conventions on human rights reads: "The Republic of Turkey reserves the right to implement the xxx article of this agreement in accordance with the relevant articles of the Turkish Constitution and in accordance with relevant articles and procedures of the Lausanne Peace Treaty and its annexes of 23 July 1923". Two important points should be to evaluate this attitude:

It has been eighty years since the signing of Lausanne. In the meantime the "ethnic, linguistic, religious" criteria came to be universally accepted. Additionally, as a general tendency, the issue of "existence" of a minority in a State is independent of the declaration of that State. On the other hand, the European Convention on Human Rights (ECHR), to which Turkey is a signatory, is in a position to monitor human/minority rights in Turkey. In fact, as we shall see, Turkish Constitutional Court decisions to close down political parties within the context of minorities' issue were considered to be in violation of Art. 11 of the ECHR by the European Court of Human Rights. All these show that the Turkish position based on 1923 has become weak at the beginning of the 21st Century.

Implementation of rights granted by Lausanne

For one thing, these rights are applied to the three largest non-Moslem groups only (the *Rum* – Greek Orthodox, Armenians, and Jews). Smaller Christian groups such as Syriacs are deprived of the right to "establish, manage and control... any ... schools with the right to use their own language... freely therein" mentioned in Art. 40 of Lausanne. Again, for

example, until the practice instigated in January 2003, foundations of Syriacs, etc. were not recognized.[4] Secondly, the rights granted to the three largest non-Moslem groups are not fully implemented either. The notorious 1936 Declaration related to non-Muslim foundations is a clear example of such unlawful practice.[5] The Law on Foundations of 1936, one of the examples of legislation going back to the early Republican Period and still in force today, ordered all the foundations to submit a property declaration listing immovable and other properties possessed by each and every foundation. The underlying reason for this foundations (*vakıf*) law was to reduce the financial resources of the "Islamic" foundations. But, following Atatürk's death, those property declarations were forgotten. When the Cyprus question escalated in the 1970's, the General Directorate of Vakıf's asked non-Muslim foundations to resubmit their regulations called *Vakıfname*. Yet those foundations did not have *Vakıfname*, because of the practice during the Ottoman Empire where such foundations could only be established by individual decrees of the Sultan of the day. The General Directorate of Vakıfs having received negative response from these foundations made a ruling that the declarations of 1936 would be considered their *Vakıfname*. In case these declarations did not carry a special provision entitling the foundation to acquire immovable property, the General Directorate would expropriate all the immovable property acquired after 1936.

The counter argument of the non-Muslim foundations stated that the declarations submitted in 1936 were merely a list of immovable properties possessed by each foundation at that date, but that did not persuade the General Directorate to change its decision. No matter how these properties

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[4] Those who defend this unlawful situation put forward two arguments: for one thing, upon the adoption and the implementation of the Swiss Civil Code in 1926, it is claimed that the leaders of non-Moslem minorities who have attained modern conditions have relinquished the rights granted by Lausanne. Such a statement is invalid for two reasons. One, relinquishment is only restricted to one article (42/1) of Lausanne and, two, such a relinquishment in legal terms in not possible because human and minority rights are granted to individuals and not to groups. Consequently, group leaders cannot disavow those rights on behalf of their members. This is especially true as Art. 37 provides that "no law, no regulation, nor official action shall conflict or interfere with these stipulations nor shall any law, regulation, nor official action prevail over them". In case "prevailing practice" since 1923 would be made a point, it should be known that prevailing practice cannot be a violation of governing laws and treaties.

[5] See Yuda Reyna, Yusuf Şen, *Cemaat Vakıfları ve Sorunları* [Minority Foundations and Their Problems], Istanbul, Gözlem, 1994, pp. 28-33. The decisions of the Supreme Court of Appeals will be investigated below.

were acquired, (purchase, donation, lottery, inheritance etc.) expropriation went ahead. These expropriation acts were in violation of both Lausanne and property rights. The properties were eventually given back to their previous owners or to their inheritors at no cost, and if there were no inheritors, those properties were given to the Treasury at no cost. This practice was ended, as already mentioned above, only in January 2003 when Legislative Harmonization Package with the EU was adopted. I shall elaborate further on this Package.

Thirdly, Turkey does not honor rights that Lausanne stipulates for groups other than non-Moslems. It is generally accepted that according to Lausanne the definition of minority covers non-Muslims only.[6] But the fact that Section III of the text also provides rights to people other than non-Muslims is ignored. These rights can be grouped in four categories:

Group A: Non-Muslim citizens of Turkish Republic (Arts. 38/3, 39/1, 40, 41/1 and 2, 42/1, 43). It goes without saying that rights extended to other three groups apply to this group also.

Group B: Citizens of Turkish Republic who speak languages other than Turkish (Art. 39/5). Rights of this group also include the rights of Groups C and D.

Group C: All Turkish Republic citizens (Art. 39/3 and 4). Rights of this group also include the rights of Group D.

Group D: All inhabitants of Turkey (Art. 38/2, 39/2).

To every one of these four groups of people Lausanne grants different rights that cannot be repealed (Art. 37). Non-Muslims do not have two categories of privileges that the other groups are denied: One is that they have the greatest number of rights and, as Art. 44/1 states, their rights and privileges are placed under international guarantee. Yet, in the final analysis, non-Muslims are only one group among the four mentioned in Section III of Lausanne. As can be seen, this Section introduces rights to "all Turkish citizens" and moreover "everyone living in Turkey". Consequently, Section III of Lausanne is not only a manifest of minority rights, but also of human rights.[7] This can best be studied in Art. 39/4.

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[6] See my "Minorities in Turkey: Concept, Rights, Legislation, Implementation, and Jurisprudence (with Special Emphasis on 1923 Lausanne Peace Treaty Section III)", not yet published.

[7] Objectors to this very important consequence, which I have been advocating for many years, and defenders of the view that Lausanne is only a text determining the rights of non-Muslim minorities, base their arguments on the following points:
1) The fact that the heading of the Section is "Protection of Minorities": According to this view, if the heading states so, there can only be minority rights under it. Yet, there are very clear and basic reasons underlying this heading:

First of all, Principle Allied and Associated Powers primarily started out to solve the minority problems in the central and Eastern Europe, which was one of the causes of World War I. But, at the same time, they granted rights to everybody living in those countries. One of the most important factors behind this was the concern about protecting their own citizens who were trading with these countries. Indeed, Sir Horace Rumbold, British head of delegation in Sub-Commission of Minorities, eventually consented to the demand by the Turkish delegation to limit minority rights to the non-Muslims at the session held on December 23, 1923. Minute no. 9 reads: "Sir Horace Rumbold stated that if the Turkish Delegation agrees that the term "all inhabitants of Turkey" is used instead of the term "minorities" in the paragraph 1 of the new Article 2 [the article was later finalized as Art. 38/1 and 2], he would agree with the usage of the term "non-Muslim minorities". L. Seha Meray (trans. by), *Lozan Barış Konferansı, Tutanaklar, Belgeler*, Set I, Vol. 1, Book 2 (Lausanne Peace Conference, Minutes, Documents), Ankara, Faculty of Political Science, 1970, p.206. It would certainly be hard to find an other text so clearly expressing that the main concern of the Allied States were the European citizens trading in Turkey.

Secondly and more importantly, even though the term "human rights" appeared in the political science literature as early as 1789, it was limited for use in the national context only. This term first appeared in the international field after World War II with Art. 1/3 of the UN Treaty. That is, the term "human rights" was not in use in the international field in the post World War I era. Therefore it could not possibly be used in the heading.

Thirdly, the term "minority" is not a specific term but a generic one. When interpreting a treaty in the context of the 1969 Vienna Convention on the Law of Treaties, non-generic terms used in that treaty are taken with their regular meanings at the time of the signing of the treaty. But it is not enough to limit the regular meaning of the generic terms with the meaning at the time of the signing of the treaty. Regular meanings of such terms have to be determined in line with the subsequent developments in international law over the years. While interpreting the statement "disputes regarding the territorial status of Greece", the International Court of Justice, in its decision of 1978 on the case Greece vs. Turkey concerning the Aegean Continental Shelf, stated that this term should be interpreted according to its meaning in 1978 rather than (as the Greek part argued) its meaning in 1928 or 1923 (para. 77-80). (Interview with Professor Turgut Tarhanlı, February 10, 2003).

Therefore, although the concept of "human rights" did not exist in the international law in 1923 when Lausanne was signed, the term "Protection of Minorities" should be interpreted within the context of "protection of human rights" of which it is a part of.

The fact that the rights were granted only to non-Muslim minorities: This is what Rumbold, Chairman of the Minorities Sub-Commission, stated in his report of January 7, 1923 to Lord Curzon, Chairman of the First Commission and what Lord Curzon said as we read the minute no.19 of the session on January 9, 1923.

Analysis of Art. 39

If one starts from clause 39/5 the full text of the paragraph is as follows: "Notwithstanding the existence of the official language, adequate facilities shall be given to Turkish nationals of non-Turkish speech for the oral use of their own language before the Courts". Three considerations should be kept in mind while considering this clause, as in our day cultural rights issue is in high consideration together with the question of whether the Kurds can make radio and television broadcasts. Firstly, the clause gives to all Turkish citizens the right to use whichever language they choose wherever and whenever except in public offices. It enumerates every possible usage of the language of the period it was written (1922) and accepted (1923). Second, at that time regular radio broadcasts existed only in the USA and television was absent even as a concept. Therefore the expression "in the *press, or in publications of any kind"* should be read as to include radio and television broadcasting also. Thirdly and perhaps most importantly, although this clause concerns all Turkish citizens, it mainly profits Turkish citizens whose mother tongue is not Turkish. For, especially in the year 1922, it is a very

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The most remarkable statement by Montagna in this report, which might support this argument, is as follows: "The Sub-Commission considered that, based on an article of general context (see Article 2 of Draft Bill), the application of these provisions could be limited to non-Muslim minorities. The Sub-Commission considered it impossible to insist that the Muslim minorities be included in the said protection." (L. S. Meray, *op. cit.*, pp.309-310).

This Draft Bill Art. 2 was later to be finalized as the Art. 38 of the Lausanne Treaty. Curzon's response is as follows: "*... Upon these convincing words, the Sub-Commission agreed to limit the protective measures to non-Muslim minorities only."* (L. S. Meray, *op. cit.*, p.302).

However, the view that the rights were granted to non-Muslims only is incorrect for two reasons. First, according to the general principles of law and also to the Art. 32 of Vienna Convention on the Law of Treaties, preparatory studies and minutes are taken into consideration only if the text of a treaty is not clear. Arts. 37 and 39 are amply clear beyond any ambiguity. Secondly, what was meant by Montagna and Curzon is minority rights "under international guarantee", because that was the only meaning attributed to the term "minority rights" during that period. And Curzon's term "protective measures" refers to "the guarantee of the League of Nations", which was previously mentioned as the most distinctive character of the minority rights concept prevalent during that period. As also previously mentioned, the international guarantee granted with Art. 44/1 of Section III covers non-Muslims only; such a guarantee is not applicable to the rights granted to people belonging to other three groups noted above. As a matter of fact, if the statements of these two western diplomats are read in light of paragraphs 4 and 5 of Art. 39, the whole case will become clearer.

weak possibility that those who had Turkish as their mother tongue would make use of another language in their trade and private intercourse, etc.

It may be said that the purpose of the signatories was not to give rights to Kurds or other Muslims who speak a different mother tongue in Turkey, and in fact many writers in Turkey do say so nowadays. However, it should be kept in mind that the use of different Muslim languages could in no way be a point of objection in the Turkey of 1922; it was a regular practice to submit a written petition in Arabic in Baghdad. Therefore it was not surprising that the Turkish delegation at Lausanne did not object. People to whom I talk about this reality today have great difficulty to understand it. Ankara's representatives in Lausanne bore the mentality of an Empire and they did not see any inconsistency. We now speak with the mentality of a Nation-State and we do not understand. From this point of view, it would also be useful to add that there has been no discussion on this matter in the concerned commission. The text of article 39/4 and 39/5 is not only a true copy of the Poland Minorities Treaty arts.7/3 and 7/4, it is also word for word the same as the article 3/4 and 3/5 of the draft proposed by the Turkish delegation on the 18th December 1922.[8] In other word, Art. 39 is proposed by the Turkish delegation as well.

On the other hand, the following should be made clear to prevent misunderstandings: apart from these two clauses of Art. 39, the Kurds (and other Muslim Turkish citizens whose mother tongue is not Turkish) do not have a positive right (for this term see the end of this subheading), and any right they may have under Lausanne does not fall under international guarantee. In any case, the guarantee of the League of Nations is extinct and it is difficult to claim that the UN has any authority on the matter. However, all these rights are protected under Turkish national jurisdiction because Lausanne Treaty is a part of it. The question of whether the Kurds are a minority or not is interesting in the sense that the official rhetoric and practice refuse to recognize Kurds as a minority just as the nationalist Kurds themselves refuse to be called so. Needless to say, the motives of each side are different. The reason for the official Turkish view is clear: "Lausanne only recognizes the non-Muslims as minorities". The reasons of the Kurds are as follows: 1) This is a degradation because in Turkey the concept of minority has been conditioned by the Ottoman "millet system" which considered the Muslims as the "sovereign nation" and the minorities (non-Muslims) as second-class citizens. 2) The Kurdish nationalists consider themselves to be one of the two founding elements of this nation (together

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[8] See "Draft Resolution Submitted by the Turkish Delegation", L. S. Meray, *op. cit.*, Serie I, Volume 1, Book 2, p. 167.

with the Turks). According to this view, the War of Independence was fought together. However, when the Turks no longer needed the Kurds they forgot them. 3) Most important of all, the Kurdish nationalists consider themselves to be a "people" rather than a minority, which is in theory a category much closer to external "self-determination" (independence).

Which rights were given to which groups at Lausanne? The following answers could be given from today's perspective, when the date and circumstances of the signing of the treaty, its language and spirit, its meaning and purpose are considered. Lausanne is a treaty that defines as minority the non-Muslims only but brings certain rights to some other groups as well though without international guarantee. Therefore the interpretation that Art. 39 brings certain rights to Muslim groups such as the Kurds is correct. Protected by Art. 37, this article clearly answers the allegation that no language other than Turkish can be used for radio and TV broadcasting in Turkey. This interpretation would not harm in any way the official theses of Turkey concerning its stand on minorities issue, because the rights and liberties brought by Art. 39/4 concern not the minorities but "all Turkish citizens". As to the right brought by 39/5, it has been anyway implemented since the beginning of the Republic, with the exception of certain periods, that is the aftermath of the 12th September 1980 military coup.

The aforementioned interpretation of Art. 39 has great benefits for Turkey from four important aspects. Firstly, if Turkey enters the EU, it would have to put aside the points contained in the "interpretative statement" already mentioned. The 1982 Constitution has been amended innumerable times and at present could be defined best as "a worn out cloth that cannot be stitched any more". From the point of view of national sovereignty it is important that the probable change to be undertaken in the "interpretative statement" will not been made because of EU pressure but by national will. To present this change as the "implementation of the founding treaty of Turkey" his will save face. (Lausanne is the founding treaty of the Turkish state because, although the Turkish Republic was founded on October 23rd, 1923, the Turkish state was founded with the international recognition on the signing date of Lausanne, July 24th, 1923; the name of Turkey during the Lausanne negotiations was "The Government of the Turkish Great National Assembly".)

Second, it is important to consider that within the spirit of gradual but speedy democratization in Turkey, broadcasting in every language will be possible in the near future. In fact, from the Leftists to the representative of the grand bourgeoisie TÜSİAD, the inclination of important sectors of the Turkish society has already been in this direction. Therefore, if the transition

is to happen in a smooth way, it should be supported by the vigorous enforcement of the clauses of Lausanne, which have the same enforcement power as the constitution anyway. Of course, there is no need to add that, "broadcasting in every language" should not be considered an obligation upon the State, but rather should be taken as "a liberty of the citizens". That is to say, there is no obligation that such broadcasts should be undertaken by the state radio and television.

Thirdly, it is clear that ample liberties should be given to every citizen in Turkey, and not to the Kurds alone; otherwise new minorities would be created. "Negative rights" (those given to all citizens) will prevent demands for "positive rights" (given only to the members of disadvantaged groups such as minorities to help protect their identities). This will also prevent foreign interference of various intents. The solution applied by France, a country which has always resisted granting minority rights under international guarantee to the point of even denying the very existence of them in the country, is illuminating in this matter: France spreads such rights to all citizens in the form of "negative rights" and brings continual "flexibility" to the principal of not recognizing the minorities.[9]

The fourth point: philosophically considered, there is no doubt that a humanely treatment of citizens will contribute to "unity and togetherness" in Turkey. This unity cannot be realized with "compulsory citizens" who are born here but are not content with the country, but only with "voluntary citizens" quite happy to live here. Undoubtedly it would be an honorable situation for Turkey if its citizens were of the first category not as a result of foreign pressure but by democratic developments introduced by the Turkish State.

Minority legislation and its implementation in Turkey

The minority policy in Turkey is much more restrictive than the official view on the minority concept and rights. The basic elements of this policy are verbally expressed in Art. 3/1 of the Constitution: "The Turkish State, with its territory and nation, is an indivisible entity. Its language is Turkish."

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[9] On this issue see Nicole Guimezanes: "Fransa ve Azınlıklar", *in Ulusal, Ulusalüstü ve Uluslararası Hukukta Azınlık Hakları – Birleşmiş Milletler, Avrupa Birliği, Avrupa Konseyi, Lozan Antlaşması,* ["France and Minorities", in Minority Rights in National, Supranational and International Law – United Nations, European Union, Council of Europe, Lausanne Treaty], Istanbul, Istanbul Bar Association Human Rights Center Publications, 2002, pp. 285-294. (Title of this book will be from here on shortened as *Azınlık Hakları*).

This paragraph which, according to Art. 4 of the Constitution, "*shall not be amended, nor shall its amendment be proposed*" should be studied closely.

The principle of the "Indivisible Unity of the Nation"

In this paragraph, it is quite natural for the territory of the Turkish State to be described as an indivisible entity. No state wants to get divided, and measures to be taken against situations which might lead to a division are legitimate. Since international law also recognizes this, all international instruments on minority rights take two standard measures to prevent division: 1) They use the term "the rights of individuals belonging to minority groups" to emphasize that the rights are not given to groups (collectivity) but to individuals; 2) They are always careful to insert in the texts the following clause: "These rights shall only be exercised with the condition that the territorial integrity of the country is respected ".

But the term "integrity of the nation" is contrary to the very essence of democracy; as Professor Oktay Uygun put it at a symposium organized by Istanbul Bar Association in 2002: "The concept of the indivisibility of the nation is unfamiliar to the Europeans".[10] Because, to say that the nation cannot be divided and that it is monolithic in nature, suggests an assimilation policy shaped by the values and even by the oppressive domination of an ethnic/religious group that dominates the State. The monolithic approach expressed in this paragraph of the Constitution is an expression of the 1930 type nation-state attitude rectified by the September 12, 1980 military coup. This approach inevitably suggests that, except for the ones recognized by Lausanne, there are no minorities in the country and therefore there are practically no minority rights that can be spoken of, and any opposition to this suggestion is punished. This approach is repeated in numerous laws and Turkish legislation is full of examples of this kind of assimilation's nation-state approach. The following are among the many.[11]

Terror is described in Art. 1 of the Anti-Terror Law no.3173 dated 1991 as follows: "Terrorism is any kind of act done by one or more persons belonging to an organization with the aim of changing the characteristics of the Republic (...), damaging the indivisible unity of the State with its territory and nation." Art. 8/1 of the same law has been amended on February 6, 2002 to read as follows (this article is abolished by the Sixth EU Harmonization Package in July 2003): "Written, oral or visual propaganda

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[10] *Azınlık Hakları, op. cit.*, p. 380.

[11] This research is mainly based on the following article: Aynur Ayzit, "Mevzuatın Görünümü" [A General View on the Legislation on Minorities], *in Azınlık Hakları, op. cit.*, pp.242-261. I would like to thank my friends Kaan Esener and Yonca Sunel for their help in reviewing the amendments made in 2003.

and assemblies, meetings and demonstrations aimed at damaging the indivisible unity of the Turkish Republic with its territory and nation will be punished (...). If this act is committed in a form that encourages the use of terrorist methods, the sentence will be increased by a third and in case of repeated commitment of this act, the penalty of imprisonment will not be converted to money penalty." "The indivisible unity of the state with its territory and nation" is also mentioned in the following laws: Art. 8 and Annexed Art. 7 of Law n°2559 dated 1934 on the Duties and Authority of the Police, Art. 5/A of the Law n°2954 on Turkish Radio and Television, Art. 4 of Law n°3984 on the Establishment and Broadcasting of Radio Stations and Television Channels, Arts. 44 and 55 of Law n°2908 on Associations and Arts. 78 and 101 of Law n°2820 on Political Parties.

The important fact in that matter is the following: Claiming that there are minority groups in Turkey based on ethnic and linguistic differences leads to the assumption that this "integrity" is threatened and those who claim it are punished for "separatism and/or destructiveness". As a matter of fact, as will be explained later, the Constitutional Court has banned political parties for violation of the principle of "the indivisible unity of the state with its territory and nation" and for violating the prohibition against "creating minority groups". The said "prohibition (hence, the crime act) of creating minority groups" is expressed in the Law on Associations and Law on Political Parties. Until the amendment on January 2, 2003, Art. 5 of the Law on Associations read as follows: "It is forbidden to found an association with the aim of claiming that there are minority groups in the Republic of Turkey based on racial, religious, sectarian, cultural or linguistic differences or of creating a minority group by protecting, developing or spreading any other language and culture than Turkish (...)". After the amendment on January 2, 2003, this article has been mitigated to a certain extent: "No association can be founded with the aim of creating differences of race, religion, sect or region or creating minorities based on these differences and with the aim of damaging the unitary state structure of the Republic of Turkey (...); in violation of (...) the national security and the public order."

Art. 81 of the Law on Political Parties is a better example in this matter: "Political parties shall not a) claim that there are minority groups in the Republic of Turkey based on the differences of (...); b) aim at and work for damaging the integrity of the nation by creating minority groups in the Republic of Turkey by protecting, developing and spreading other languages and cultures than Turkish." These restrictions in the Law on Political Parties are derived from Arts. 68 and 69 of the Constitution. Art. 68 reads: "The statutes and programs, as well as the activities of political parties shall not be in conflict with the independence of the State, its indivisible integrity with its

territory and nation (...)". And Art. 69 stipulates that the political party will be dissolved "if the Constitutional Court determines that the party in question has become a center for the execution of such activities."

The Principle that "The Language of Turkey is Turkish"

The concept of "the language of the state" is more against the principles of democracy and even of nature. A state can only have an "official language" and people living in that state speak and write various languages, including the official one. Law n°2932 dated 1983 enacted by the September 12 military administration probably constitutes the best example of the harm that can be done to democracy by the desire to protect "the indivisible integrity of the nation" in the linguistic context. Art. 2 of the law prohibited "the declaration, circulation and publication of ideas in a language which is not the first official language of a State recognized by Turkey." Here, the fear that speaking and broadcasting in Kurdish will damage the indivisible integrity of the nation is so strong that the effort put in the wording of the article to avoid the word "Kurdish" is remarkable. The second official language of Iraq was Kurdish at the period and Turkey would not recognize a possible state of Kurdistan. The phrase in Art. 3 "Mother tongue of the Turkish citizens is Turkish language," leaves us with no need to comment on.

This law, which is a clear violation of Art. 39/4 of Lausanne, was abolished in 1991, but Art. 26 ("No language prohibited by law shall be used in the expression and dissemination of thought") and Art. 28 ("Publication shall not be made in any language prohibited by law") of the Constitution, on the grounds of which this law was enacted, resisted until 2001. However, the same approach still prevails in various forms in numerous laws. Art. 42 of the Constitution reads as follows: "no language other than Turkish may be used or taught in institutions of learning for Turkish citizens as a native language". According to Art. 43/3 of the Law on Political Parties, "(...) Applicants for parliamentary candidate positions may not use any language or writing other than Turkish." According to Art. 81, "political parties may not use any language other than Turkish in the preparation and dissemination of their by-laws and programs, in their party conventions, in their open-air and in-door rallies and in their propaganda. They may not use or distribute banners, placards, records, audio and video tapes, brochures and declarations written in languages other than Turkish." These clauses constitute an open violation of the Art. 39/4 of Lausanne. Art. 16 of the Law on Census (no. 1587) states "A child is named by his/her parents. However, names that are not appropriate to our national culture will not be given." This restriction aiming to prevent Kurdish names was valid until June 2003 when it was

amended by the Sixth EU Harmonization Package as to prevent immoral names only. It is difficult to imagine an example that would alienate more people who belong to an ethnic group other than Turkish. On the other hand, the prevailing approach not only bans Kurdish names but names such as "Melisa" or "Eftalya"[12] It is clear that the main aim is not to prevent armed Kurdish nationalism, which has flared rebellions many times, but to prevent cultural diversity itself. The nation-state mentality of the 1930s is preserved.

The Constitutional Court and the Supreme Court of Appeals jurisprudence on Minorities

The Constitutional Court

The Constitutional Court has, among others, the authority to close down political parties. It does indeed ban political parties on the principle of the "indivisible unity of the Nation" mentioned in Part Two of this article.[13] The Court closed down the Turkish Workers Party (TIP) in July 1971 on the grounds that its views and behavior violated the basic principle of the 1961 Constitution expressed in Art. 57 (the indivisible unity of the State with its territory and Nation) as well as the condition expressed in Art. 81 of the Law on Political Parties: "They may not claim that there exists minorities; they may not pursue the goal of disintegrating the Nation by creating minorities." The verdict that closed down Turkey's Toilers' Party (TEP) in May 1980 reads: "Attempting to create a sense of minority in the minds of a certain group of citizens is contrary to the concept of the unity of the State with its territory and Nation". In the same verdict, the Court discussed Art. 83 of the Constitution ("The official language is Turkish") and interpreted this to mean: "In addition to official correspondence, education and national culture should be based on Turkish. In other words, the only national culture in the country is Turkish culture". In the same ruling, the Court stated that the Constitution does not allow behavior that would lead to the disintegration of the Nation based on elements such as [differences of] religion, language or race in a manner contrary to the principles of Turkish nationalism.[14]

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[12] *Cumhuriyet*, January 21, 2003.

[13] For the information given on this subject see the following article by a former member of the Turkish Constitutional Court: Yılmaz Aliefendioğlu, "Azınlık Hakları ve Türk Anayasa Mahkemesinin Azınlık Konusuna Bakışı" [Minority Rights and the Perspective of the Turkish Constitutional Court on the Minorities Issue] *in Azınlık Hakları*, *op. cit.*, pp.218-241 (exact pages references are indicated in the text in parentheses).

[14] Yılmaz Aliefendioğlu, *op. cit.*, pp. 229-230

In this ruling of the Court, there exists a point contrary to the fundamental principles of law and one that may give rise to grave consequences from the point of view of minority rights: "By the relevant articles of Section III of Lausanne, the presence of non-Muslim minorities have been recognized and their rights and privileges have been pointed out. These articles have been determined at the conference following long debates and they are based on a principle of reciprocity whereby the Muslim minority in Greece is entitled to the same rights and privileges."[15] This ruling assumes that if one day Greece withdraws the rights enjoyed by the Turks of Western Thrace, Turkey will also have the right withdraw the same rights granted to its non-Muslims.

But Art. 45 of Lausanne is not an article of "reciprocity"; it is an article of "parallel obligations".[16] Moreover, the article states that Greece will grant its Muslim minority the same rights that are granted to the non-Muslims in Turkey. In other words, it imposes an obligation on Greece. Secondly: Even if we were, for a moment, to interpret Art. 45 of Lausanne as a reciprocity clause, this interpretation would constitute a violation of the Art. 60/5 of the UN Vienna Convention on the Law of Treaties (1969).[17] This article clearly rules out a negative interpretation of reciprocity in the context of human rights. It is not possible to imagine that the Constitutional Court may be unaware of Art. 60/5 of the Vienna Convention.

On July 1991, the Court closed down the Turkish United Communist Party (TBKP) on the grounds that it "violated the indivisible unity of the State together with its territory and Nation. This verdict was ruled by the European Court of Human Rights (ECHR) in January 1998 to be in violation of Art. 11 of the EHRC.[18] The Socialist Party (SP) was closed down in July 1992 for acts violating the indivisible unity of the territory and of the Nation and for violating the Turkish Constitution and the Law on Political Parties n°2820. The Court said in its verdict: "People of every origin live in every part of the country. From a scientific point of view, there are no sufficient [ethnic] characteristics or elements to be considered as minorities". On May 1998, ECHR ruled again that this verdict was violating Art. 11 of the EHRC.[19] The Freedom and Democracy Party (OZDEP) was banned on the same grounds in November 1993. The court ruled that the program of the party, "intends to divide the unity of the Turkish nation (...) into two as Turks and Kurds. It is

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[15] Ibid, p. 230).

[16] Paper delivered by Turgut Turhanlı, *Cemaat Vakıfları, Bugünkü Sorunları ve Çözüm Önerileri* [Minority Foundations, Current Problems and Suggested Solutions], Istanbul, Istanbul Bar Association Publication, 2002. p. 37.

[17] Idem.

[18] Yılmaz Aliefendioğlu, *op. cit.*, p. 230-231

[19] Ibid, pp. 231-232

clear that such clauses in the program aim at destroying the unity of the country and the nation". ECHR found this decision violated Art. 11 of the EHRC.[20] The Socialist Turkey Party (STP) was banned on November 1993 on the grounds that various sections of its program violated Arts. 78/a and 78/b of the Law on Political Parties, and again for its divisive activities aimed at the indivisible unity of the State with its territory and Nation.[21]

When the Democracy Party (DEP) was closed down in June 1994, the Court ruled as follows: "granting minority status based on racial and linguistic differences is not compatible with the integrity of the territory and nation. According to the Court, "there is one State, one whole territory, a single nation" Lausanne recognizes only the non-Muslims as minorities.[22] The Court, on the other hand, stated that Lausanne provided for non-Muslims the possibility of benefiting from the same rights granted to Muslims, and in this manner equality before the law was granted to everyone. It is difficult to understand this because it seems that the Court did not take into consideration the basic distinction between the "negative" rights granted to all citizens and the "positive" rights granted only to few disadvantaged citizens, the non-Muslims in this case. In fact, this is indicated by the sentence used in the verdict: "The futility of transforming unrestricted rights into restricted rights and transforming the very national identity into a minority identity is clear."

The following reasoning is repeated verbatim in many verdicts of closing down political parties: "to create, among citizens that are in such an unprivileged position, the feeling and thought of belonging to a minority, and to demand that they be subjected to a policy of restricted rights, and to expect them to become a minority when they are the very Nation itself, can only be interpreted as a violation of the unity of the Nation.[23] Not only this gives the impression that the Court is unaware of or simply does not take into consideration the distinction negative-positive rights referred to above, but there is here a more disturbing situation. This position of the Constitutional Court, when read between the lines, considers the majority as first class citizens and the minority as second-class citizens. Whether or not this was said on purpose – and I believe that it would be more correct to assume that it wasn't – it is quite difficult to interpret an expression such as, "to transform [the state of being] the very nation itself to being a minority" in any other way.

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[20] Ibid, pp. 232-233
[21] Ibid, p. 233
[22] Ibid, pp. 234-235
[23] Fethiye Çetin, "Yerli Yabancılar" [The Domestic Aliens], *in Azınlık Hakları*, *op. cit.*, p. 80.

The Toil Party (EP) was banned in February 1997 for violating the principle of the "indivisible unity of the State with its territory and Nation". In the following verdict, the Court recapitulates its interpretation that the unity of the Nation was violated by claiming that there are minorities in Turkey: "We understand that, by claiming the existence on Turkish territory of minorities of national or religious culture or of confession, race, or language, the [ultimate] goal of violating the national unity is being pursued by creating minorities through means of protecting, developing, and spreading languages and cultures other than Turkish language and culture"[24].

There are two points that need to be elaborated concerning the closure verdicts just mentioned.

1) The ruling of the Court on TEP provides an explanation of the meaning of the expressions "to suggest that there are minorities" and "creating minorities": "to mention in an objective way that the language or religion of a certain group of citizens within a nation is different from that of other groups does not entail, in and of itself, the claim that 'there exists a minority'. In addition to this, it must be claimed that the community in question must be granted a special legal security for it to maintain its existence and characteristics that distinguish it from the other groups, that is to say there must be an open or covert claim that these people have a right to take advantage of the 'minority legislation'. This (...) is the situation defined and forbidden as 'claiming the existence of minorities'".[25] The ruling, when considered up to this point leads one to think that the Constitutional Court is in tune with contemporary tendencies on the subject of minorities. It considers normal that one may suggest that it exists different identities, and unless it is suggested that these identities have a right to benefit from the minority law, that is unless international protection is called in, it accepts that "No crime has been committed in the way of violating the unity of the territory and nation. If those who claim that there exists minorities do not claim that it is necessary to grant them a special legal guarantee," no crime will be regarded as having been committed.

In fact, instead of demanding such a special assurance (a positive right) it is possible to demand the protection of the different characteristics of the minorities by means of securing a truly democratic situation in the country. And this alternative is quite useful. Because it will both prevent minorities from becoming targets for the majority and it will help bring democracy to the country. But the Court continues exactly as follows in the quotation

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[24] Yılmaz Aliefendioğlu, *op. cit.*, p. 236

[25] Naz Çavuşoğlu, "Azınlık Hakları: Avrupa Standartları ve Türkiye-Bir Karşılaştırma" [Minority Rights: European Standards and Turkey – A Comparison], *in Azınlık Hakları*, *op. cit.*,, pp. 135-136.

where we left off above: "(But) in view of the fact that the term 'creating minorities' is closely related to 'the claim that minorities exist', the former must be interpreted in the same direction as the latter. The conclusion to be reached with such interpretation is that the term 'creating a minority' can only mean 'the creation of the idea, within the community of citizens, that it is necessary for them to benefit from the law of minorities'."[26]

In other words, thinking that it might lead to international protection and that, in turn, this protection might cause the disintegration of Turkey, the Court takes away with one hand what it gave with the other. And in this manner, it protects the indivisible unity of the territory and the nation. But what happens to the concept of law in the meantime is another matter.

2) In saying that the principle of the indivisibility of the State with its territory and Nation is violated by stressing racial and linguistic differences, the Court does not deny the existence of the individuals with diverse ethnic roots within the Turkish Nation. In fact, when commenting on the Art. 66 of the Constitution ("anyone who is attached to the Turkish State by way of citizenship is Turkish") the Court pointed out in its ruling on DEP that citizenship and national identity do not mean "the denial of the ethnic roots of the citizens". According to the Court, "the purpose of legal regulations" in this manner is not "the prohibition of diversity and of their languages and cultures." "What is banned is not the expression of the cultural differences and cultural wealth; it is the employment of these with the aim of destroying the unity of the nation and in connection with this, the construction of a new state order based on divisions by means of creating minorities on the land of the Turkish Republic." At this point the Court reveals the concern that, "(...) the demands for the recognition of cultural identities – which initially seem acceptable demands [but] which aim at separatism – will in time incline toward a break from the whole."[27] This situation indicates that a certain fear – which forms the essence of the regulations concerning minorities in Turkey and its interpretation and implementation – also forms the main axis of legal interpretation: this is the fear that the recognition of diverse identities will lead to the disintegration of the State. In this situation, it does not make a big difference whether or not the Constitutional Court recognizes the existence of persons of diverse ethnic origins.

Consequently, the Turkish Constitutional Court considers minority rights not in the context of universal human rights, but in the context of national legislation and international treaties (Lausanne), and it views this concept as a category that is incompatible with "the indivisible unity of the country and

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[26] Ibid, p. 136.
[27] Ibid, p. 127 and 141, footnotes 23-25.

the unitary State."[28] This point of view, which stems from the Constitution and the Law on Political Parties, naturally affects the total behavior of the State on this matter.

The Supreme Court of Appeals

Although the behavior of the Constitutional Court mainly stems from the Constitution and the articles of the Law on Political Parties, this is not valid for the Supreme Court of Appeals, which gives the impression that it is unaware of the highly established principles of law or that it does not take them into account. It is rather difficult to interpret the following ruling samples in any other way.[29] Concerning the 1936 Declaration already mentioned, the Second Legislative Branch of the Court stated the following in the reasoning of its unanimous ruling of 6 July 1971:"It is evident that the acquisition of immovable property by non-Turkish legal persons is forbidden." But the legal person that the Court refers to and bans from acquiring property in Turkey is the Balıklı Rum Hastanesi Vakfı [Balıklı Greek Orthodox Hospital Endowment]; it is not a "foreign" endowment. When the issue was brought before the General Board of Legislation of the Court on May 8th, 1974, the same incredible ruling is repeated. The following year, the Court of Appeals 1st Legal Department reached a similar verdict again: "Except under the conditions specified by either the law no. 1328 or in Art. 44 of the law no. 2762, foreign nationals are forbidden from acquiring real estate in Turkey. Because these decrees concern the public order, there is nothing against the law for the plaintiff institution to challenge the unlawful behavior of the defendant institution, or in taking legal action for the annulment of the unlawful disposal. Therefore, based on the reasons explained above and on the other reasoning indicated in the court verdict, it is unanimously decided that the improper appeals be rejected and the court decision be approved.[30]

A more interesting and more distressing situation for Turkey is the following: The attorneys of the Balıklı Greek Orthodox Hospital Endowment appealed for the re-evaluation of the verdict and the same Branch corrected its ruling in its judgment dated December 11, 1975 (n°E:975/1168; K: 975/12352) as follows: "In spite of the fact that the annexed defendant endowment is founded by Turkish citizens, the reference to 'the laws that forbid foreigners to own real estate' in the decision of approval is due to an error. [The court decides] to delete that phrase by amendment [and]

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[28] Yılmaz Aliefendioğlu, *op. cit.*, p. 237.

[29] Reyna and Şen, *op.cit.*, pp. 90-93; and Fethiye Çetin, *op.cit.*, pp.76-77.

[30] Supreme Court of Appeals, First Legislative Branch ruling dated June 24, 1975, no. 3648-6594

otherwise (...) denies the request for correction of judgment." The importance of this last decision is that it indicates that the Supreme Court of Appeals did not ignore the foreigner-national distinction, and that it considers some Turkish citizens "foreigners" because they are non-Muslim. This practice on the part of the Supreme Court of Appeals, as it will be explained immediately below, will come to an end only when a EU Harmonization Package will be passed in August 2002 and amended in January 2003.

Recent developments concerning minority foundations

The law forming the Paragraph 4 of the EU Harmonization Package mentioned above, passed by the coalition government under Prime Minister Bülent Ecevit rendered a serious setback to this mentality that considers non-Muslim Turkish citizens as dangerous foreigners. "Religious community foundations, weather or not they possess a charter (*Vakıfname*), may acquire real estate by the permission of the Cabinet of Ministers, in order to provide for their needs in religious, charitable, social, educational, sanitary and cultural areas, and they may exercise power of disposal over their real estate. "With the intention of meeting the religious, charitable, social, educational, sanitary and cultural needs of these foundations, real estate proven to be in their possession in whatever manner by tax documents, leases and other documents will be registered with the foundation in case they apply within six months of the date this law takes effect. Real estate donated or willed to the foundation is also covered by the provision of this article."

The mentality mentioned above, while granting the permission to non-Muslim foundations to acquire real estate and to exercise power of disposition over them, labored intensively for the permissions by the "Interior Ministry and Foreign Ministry" be required for registration. Interior Ministry meant police and intelligence organizations, therefore "security problem", and the Foreign Ministry meant that these foundations were considered "foreign". This was prevented by the efforts deployed by Mr. Nejat Arseven, Minister of State responsible for Human Rights, and especially by the Foreign Ministry, but a clause to the effect that the permission would be given by the Cabinet of Ministers could not be prevented. The drawback of this is that while other foundations were able to acquire real estate and exercise their power of disposal over them by the permission of the General Directorate of Foundations, which is an office much lower in bureaucratic hierarchy. This state-of-affairs constituted a violation to various international treaties and agreements starting with Lausanne as well as Art. 10 of the Constitution (principle of equality).

The real drawback, however, emerged with the by-law prepared by the General Directorate of Foundations for the implementation of this law (*Official Gazette* of October 4, 2002 n°24896). This by-law, a concrete manifestation of the persistence of the said mentality, gives the impression that it intends to obstruct in practice the equality that is intended by the law. In fact, it required the non-Muslim foundations to provide an innumerable number of documents, not required for other foundations. What is more significant is that the General Directorate had various means of preventing such documents from reaching the government for consideration. The mentality did not stop there; it required "international reciprocity" for the implementation of the by-law. Apart from the fact that reciprocity is out of question in human rights as already mentioned, it was further possible to observe here that non-Muslim citizens were again regarded as "foreigners". In this case, the law and/or the by-law violated numerous documents of national and international law.[31] Among these the following may be mentioned: Arts. 2, 10, 35, 90/5 of the Constitution; Art. 44 of the Law on Foundations; Art. 4 of the law n°4771 (the Harmonization Law itself); Arts. 37,39/2, 40, 42/3 of the Treaty of Lausanne; Art. 14 of the European Human Rights Convention; Art. 60/5 of the Vienna Convention of the Law of Treaties of 1969.

Efforts made by the coalition government under Bülent Ecevit for the rectification of this situation were continued more intensely by the Justice and Development Party (AKP), which came to power by a wide margin in the elections of November 3, 2002. Especially through the individual efforts of Mr. Ertuğrul Yalçınbayır, Deputy Prime Minister and Minister of State Responsible for Human Rights, equality between non-Muslim and other foundations was achieved to a great extent by replacing "Cabinet of Ministers" by "General Directorate of Foundations" in the text of the law no. 4771/4. In spite of this positive development, the mentality interfered in the by-law phase again. The new by-law of January 24, 2003 required that the applications of the non-Muslim foundations to buy real estate and to exercise power of disposal over them would be decided on "by soliciting the recommendations of the related Ministries and Public Agencies" – something not required from the other foundations. The establishments alluded to here are of course the security and intelligence agencies. This unlawful clause soon bore its fruit: On May 5, 2003 the daily *Radikal*

[31] A detailed analysis on this issue can be found in my Legal Opinion presented to the Turkish Council of State (Supreme Administrative Court): "Legal Opinion on the By-Law Pertaining to the Minority Foundations' Property and Disposal Rights and on General Directorate of Foundations' Circular of October 11, 2002, no.2002/3" (in Turkish; obtainable on request by e-mail).

reported that out of 1813 applications made by non-Muslim foundations for registration of real estate 574 are refused, 579 are found "incomplete" and 226 applications are returned as "unfounded". The next day, the same daily newspaper published a very interesting news, a rather distressing one for Turkish democracy: a "secret" communication sent from a State agency to the Prime Ministry on April 7, 2003 read as follows: "Although the 2 months time limit given to the General Directorate of Foundations for the study of applications is very short, and given the fact that to extend this time limit is rather difficult legally, we consider that the General Directorate will be able to make *a more productive use of this time limit by some administrative methods*. It will be appropriate to evaluate the said applications by soliciting the recommendations of the related Ministries and Public Agencies and after careful examination." (my emphasis).

One must confess that this is a very rare piece of 'bureaucratic style' and it would probably be quite difficult to find a more refined example of intervention by a State agency to hinder the rights of citizens by extralegal means. What's more, this State agency here that discriminates on religious grounds happens to be the National Security Council where the Armed Forces, staunchest defenders of secularism in Turkey, are very influent. The document is signed: "General Fethi Tuncel, Head Assistant to the Secretary General of the National Security Council". (This kind of intervention by NSC will be at least theoretically restricted by the Seventh Harmonization Package of August 2003)

Practical and theoretical foundations of the situation regarding Minorities in Turkey

From the scholar to the politician, from the journalist to the high court judge the subject of minorities is considered from a very narrow angle. The main parameters of this position may be summed up as follows:

1) Instead of keeping abreast of the developments of the minority concept and the minority law in the world, this view is still entrapped in 1923; moreover, its interpretation of Lausanne is either wrong or incomplete. Turkey has been a signatory to documents of human and minority rights, specifically with the documents of the OSCE. In the world of today, groups of individuals that are different from the majority in various respects and that intend to maintain such differences as a *sine qua non* element of their identity, are considered "minorities". Henceforth, Turkey cannot pretend that these developments in the field of minority rights never took place; this is neither a remedy nor a possibility. The subject of mis- and incomplete interpretation of Lausanne has already been sufficiently explored, and we

will not repeat this here. It will, however, be necessary to point out that in Turkey there is a serious problem of not knowing, or not wanting to know, the concepts of negative and positive rights.

2) The recognition of different identities and the granting of minority rights are thought or considered to be the same. As indicated earlier, the former is an objective situation: If there is a different group in specific respects, and if this group considers such differences as an inalienable part of its identity, it is meaningless to ask whether or not there is a minority there; there is a different identity, and therefore, a minority. But to grant minority rights is within the jurisdiction of the State. Not recognizing different identities in order not to grant minority rights leads to a crippled democracy and what's more, this leads to the alienation of the minority from the State, and it therefore paralyzes national integration.

3) As a result of confusing "internal self-determination," which means asking for democracy, and "external self-determination," which implies disintegration, the recognition of different identities and the disintegration of the state are assumed or considered to be the same.

4) In a national society, "uniformity" and "unity" are considered the same concept. What's more, many people don't understand or refuse to understand that the former is gradually destroying the latter. Failing to realize that the conditions and the concepts of the 1930's have completely changed in the OSCE world, bears critical consequences for a State. The refusal to recognize different sub-identities in today's world might bring to the point of disintegration the State that represents the dominant identity. Here what is in question is a failure to, or the desire not to, understand the terms of "sub-identity" and "supra-identity" and the relations between the two.

5) When referring to Turks as a nation, it is not noticed or there is a reluctance to notice, that the term "Turks" also refers to an ethnic group. This state of affairs, which will be separately discussed below, is due to a failure to notice, or to admit, that the nation-building phase of Kemalist nationalism, in as much as it essentially rests on territorial foundations, nevertheless contains within itself significant elements pertaining to blood and even religion.

To sum up what we learn from the above observations: If Democracy comes under threat or the State faces disintegration, it is legitimate to impose restrictions as defined by the European Court of Human Rights. But the restrictions imposed in Turkey do not fall under this banner. Even when there is no instance of resorting to violence, the slightest difference is deemed as a threat; a name such as "Melissa" can be prohibited as already mentioned. It appears that the state is apprehensive of recognizing the diversity of its peoples, fearing that other demands might follow, which then

might lead to its disintegration, thus the State puts severe restrictions on expressing one's different identity. What is being prohibited here is diversity itself. The main reasoning for this stems from the 1930s interpretation of the concept of the nation-state, which doesn't allow for diversity. This conduct stems from two foundations: the theoretical foundation is the relationship between the supra-identity and sub-identity in the Republic of Turkey and the historical and political foundation is the "Sèvres Syndrome".

Theoretical Foundation: The relationship between the supra-identity and sub-identity in the Republic of Turkey

The relationship between the two identities in the Ottoman Empire and its successor the Republic of Turkey is quite instructive. There were many sub-identities in the Ottoman Empire: Turk, Kurd, Georgian, Abkhaz, Armenian, Albanian, Greek, Jewish, etc. These were recognized by the authorities and more importantly none of them were identical with the main umbrella of "Ottoman" identity. Except for a decrease in the number of non-Muslims, this representation of sub-identities has remained the same after the founding of the Republic. But the supra-identity has changed to "Turkish". This identity is the same with the most important of sub-identities, the "Turkish" sub-identity, giving other sub-identities (especially the Kurds) the feeling of being left out.

The concept of "Turk" is based not on race but on culture. Even though the nationalist ideology of the State was at its most rigid form had been thoroughly enforced in the 1930s, the main criterion for incoming refugees was "to be attached to the Turkish culture" and not "to be Turk". President Mustafa Kemal himself had underlined his choice of the "subjective" identity (the one chosen by the individual) against the "objective" identity (the one that comes with the birth) in his dictum pronounced in his 'Tenth Year Speech'. He said: "How happy is the one who calls himself a Turk", rather than saying, "How happy is the one who is born/who is a Turk".

But on the other hand the term "Turk" has there are three different meanings: 1) someone who is bound to the Turkish Republic through the bonds of citizenship; 2) a new Nation that is being molded; 3) an ethnic group of Central Asian origin. The first has a territorial meaning, the only one that could build a nation in a society as complex as Turkey. But Turkey, influenced both by European racist theories that swept the world in the 1930s and the Kurdish uprisings of the period, rather underlined the third meaning (race) at least from time to time. The desire to get rid of the psychology created by the term "Sick Man of Europe" has also been a factor. However, there have been in creating extreme cases. In the 1930s, in order to prove that the Turks belonged to the highest echelon of human beings, skull

measurements were made. For example, the great architect Mimar Sinan's coffin was opened up in August 1935 to make "biological and morphological" investigations on his skeleton.[32] But Mimar Sinan was a Christian youth who was converted to Islam to serve the Ottoman State. The Law on Settlements no. 2510 of 1934 used the term "Turkish race". Until the 1950s, the main criterion of entering military schools was "to belong to the genuine Turkish race (*Öz Türk Irkından Olmak*)", later replaced by "to be a Turkish citizen".

This attitude is not a thing of the past. Today people say "Our ethnic brethren abroad (*Yurt dışındaki soydaşlarımız*)" when referring to Turkish minorities outside Turkey, demonstrating that the factor of "Turkish ethnicity" is quite important in defining identity in Turkey. Furthermore, Art. 66 of the Turkish Constitution ("Everyone bound to the Turkish State through the bond of citizenship is a Turk") leaves no alternative for asserting any other sub-identity. Moreover, this supra-identity incorporates religion as much as ethnicity. Because of the still existing influence of the Millet system, one has to be a Muslim or even a Sunni Muslim in order to be considered a Turk. When one speaks of non-Muslims in Turkey, one never says to as "Turks" but "citizens (*vatandaş*)", meaning non-Muslim citizens. Even the most educated and progressive Muslim Turk never refers to a non-Muslim as a Turk, but as a Greek, Armenian, etc.

In recent history this situation has not been confined to the man-in-the-street but reflected deep into national policies as well. Until the 1940s, non-Muslim citizens were registered in "*Ecanip Defterleri*" (Foreigner Registry). When listing the groups who were most likely to make sabotages, the "By-Law on Protection from Sabotages" published on December 28, 1988 included the non-Muslims in the following words: "Domestic foreigners (Turkish citizens) and those from other races in the country".[33] Today still, Art. 24/1 of the Law no.625 on Private Institutions of Education which stipulates that a Turkish Assistant Director is to be assigned to "Schools opened by foreigners", is also applied to the minority schools. The main problem is, the said article specifies that this assistant director has to be "of Turkish origin and a Turkish citizen".

A recent and blatant example of this discrimination came in February 2003 when a lawsuit to annul the land registry of a non-Muslim minority school building was filed. A petition filed on behalf of the Treasury against the Surp Haç Armenian Lycée Foundation contains the following paragraph: "By a

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[32] Utkan Kocatürk, *Atatürk ve Türk Devrimi Kronolojisi, 1918-1938* [Chronology on Atatürk ve theTurkish Revolution, 1918-1938], Ankara, Türk İnkılap Tarihi Enstitüsü,, 1973, p. 373.

[33] Fethiye Çetin, *op.cit.*, pp.70 and 75.

decision taken by the Subcommittee for Minorities of the Interior Ministry that monitors the activities of minorities in regard to national security, the foundation under the name Surp Haç is not legitimate, (...) for this reason the annulment of the title deed of the foundation's immovable property and its registry on behalf of the Treasury is thereby requested."[34] That is to say, the Republic of Turkey views its own non-Muslim citizens like suspect foreign nationals and even sets up a state institution to monitor them: The Subcommittee for Minorities. This committee doesn't take place in the State apparatus nor is there any information about it, but its decisions on behalf of protecting "national security" is cited as evidence in court proceedings. This is a little bit extreme for a non-fascist country. As a result, the supra-identity of "Turkishness" (*Türklük*) has alienated both the non-Muslims and the Kurds, the second most important sub-identity after the Turks. But if the supra-identity had been designated as belonging to the Republic (*Türkiyelilik*) and if Atatürk had instead declared "How happy is the one who belongs to the Republic of Turkey", by giving emphasis to a territorial basis in conformity with the "subjective identity", no theoretical conflict with a sub-identity would have been created. M. Kemal had used the territorial supra-identity during the 1919-22 War of Liberation, emphasizing the word "Turkey" (The People of Turkey, The Nation of Turkey, The Army of Turkey, The Youth of Turkey, etc.)[35] instead of "Turkish" (Turkish Nation, Turkish Army, etc). After the declaration of the Republic in October 1923 he started using the second set of terms, quitting the first one. Had he not done so, this would have contributed positively to the integration process.

At the threshold of the 21st Century, some people and institutions do not want to reform this supra-identity in a way to reflect contemporary developments. To continue this obstruction, they are resorting to what Prof. Vamık Volkan refers to as a "chosen trauma": The Sèvres Syndrome.

Historical and Political Foundations: The Sèvres Syndrome

The Ottoman Empire had to sign the Peace Treaty of Sèvres after its defeat in the First World War. The repercussions caused by the dissolution of the empire in the peoples' psyche remain to this day and have even increased. ASALA (Secret Armenian Army for the Liberation of Armenia) and PKK (Kurdistan Labor Party) terrorism in the 70s, 80s, and 90s gave the impression that the Armenians and the Kurds would complete a dismemberment left unfinished by the unapplied Sèvres Treaty. The

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[34] *Agos* (Istanbul weekly published by the Armenian community in Turkey), n°361, February 28, 2003.

[35] Baskın Oran, *Atatürk Milliyetçiliği...*, *op. cit.*, pp. 209-211, footnote 343a.

burgeoning Iraqi Kurdish organizations in the "safe haven" created in northern Iraq were another matter of concern. The fact that these acts were received with sympathy in Western countries gave the impression that Turkey's allies were participating in this dismemberment. The syndrome turned into paranoia.The ASALA terror ended in the mid-1980s. The ensuing Armenian Genocide resolutions have receded in the last years. PKK terror came to an end after the capture of PKK leader Öcalan in February 1999. But the Sèvres paranoia is being inflamed at every minor incident. There are many examples of this paranoia some of which are highly interesting: American doctors collect blood samples from Turkish citizens as groundwork for establishing a Pontus Greek state in the Eastern Black Sea region. Jewish converts to Islam in the 17th Century called *Dönme* or *Sabetaycı* in Turkish have never abandoned their real identity and exert enormous influence in Turkey. United States wants to establish a Kurdish state in northern Iraq that will split territory from southeastern Turkey. Phanar Greek Orthodox Patriarchate is buying up property in Istanbul in order to create a second Vatican, etc.

In such an atmosphere even the slightest request for asserting one's identity is being interpreted as trying to divide the country and is therefore subsequently suppressed. While the EU is considered a terminal station in the realization of Kemalism's quest for Contemporary Civilization (the *Muasır Medeniyet* already mentioned in the Introduction), Turkish State denies that the 1930 conditions are now gone, so that it can curtail the very fact that its stand stemming from the "1930s Model" of Kemalism has become obsolete with the progress and realities of the 21st century. This can hardly be the solution in both domestic and foreign policy. With this attitude, democratization in Turkey is belated and the outside intervention on behalf of protecting minorities becomes inevitable.

With the advent of accession to the European Union, minority rights reform in Turkey has entered in a positive phase. This process is a continuation of legal reforms enacted by Kemalism through a "revolution from above" in the 1920s and 30s that aimed to modernize the country. Inasmuch as there was great resistance to Kemalist reforms enforced in the 1920s and 30s "from below" in the form of a religious reaction, there is and will be a "from below" opposition to these reforms. The interesting thing is that, the "sons" of those who reacted in the 1930s (the ruling Justice and Development Party in August 2003- AKP) are pushing for a reform from above, while the "sons" of those who made this revolution from above in the 30s are now reacting from below in the form of "Sèvres Paranoia", as we have already seen concerning the Subcommittee for Minorities, etc.

But the march towards the Contemporary Civilization nevertheless continues. When these lines were written on August 2003, provisions for more advanced human rights were passed in seven EU Harmonization Packages. The Package articles relating to minority rights can summarized as follows:

- Second Harmonization Package (26 March 2002): Ban on publishing in a language prohibited by law was repealed from the Press Law ;
- Third Harmonization Package (03 August 2002): Law on Learning and Teaching of Foreign Languages was changed so as to lift restrictions on the right to learn languages and dialects traditionally used by Turkish citizens. Law on Establishment and Broadcasts of Radio and Television Channels was changed so as to lift restrictions on broadcasts in different languages and dialects traditionally used by Turkish citizens. Freedom of expression was brought in line with the norms of the European Convention of Human Rights with the modification of Art. 159 of the Turkish Penal Code. Law on Foundations was amended so as to enable non-Muslim foundations to acquire immovable property with the authorization of the Council of Ministers. An amendment was made to the Code of Criminal Procedure that will enter into force within a year as to allow for retrials in civil and penal law cases.
- Fourth Harmonization Package ("Copenhagen Package" 02 January 2003): Law on Foundations was amended to replace "Council of Ministers" by "General Directorate of Foundations", as it is the case with other foundations. The related by-law entered into force on 24 January 2003.
- Fifth Harmonization Package (23 January 2003): The Code of Criminal Procedure and the Code of Legal Procedure have been amended as to allow for retrials for cases finalized at the time the Package's entry into force, and for applications made after that date.
- Sixth Harmonization Package (19 June 2003): With an amendment to the Anti-Terror Law (ATL), use of force or violence becomes the prerequisite in definition of the crime of terror; also Art. 8 of the same law is repealed to expand freedom of thought and expression. According to the amendments to the LEBRTC, both private and public radio and TV stations can broadcast in languages dialects used traditionally by Turkish citizens in their daily lives. The application period allowed for non-Muslim foundations to acquire real estate currently in their possession is prolonged. Related articles of the Law on Construction are rephrased to address the needs for places of worship of different religions and faiths. The amendment made to the Law on Census removes the restrictions that were imposed on naming the children. Provisions that make re-trial possible in the light of the decisions of the ECHR for administrative law cases are introduced.

- Seventh Harmonization Package (30 June 2003): With an amendment to Art. 159 of the TPC minimum penalty for those who "openly insult and deride Turkishness, etc." is reduced, also freedom of expression is further ensured by allowing for expressions of thought solely aiming to criticize, with no intention or insult, etc. The scope of Art. 169 of TPC, concerning the crime of assisting and abetting a terrorist organization is further limited. Cases related to torture and maltreatment shall be handled without delay according to a new article added to the CCP. Learning of the different languages and dialects used traditionally by Turkish citizens in their daily lives is further relaxed. Opening particular classes within existing language courses is now rendered possible.

As will be noticed, some of these improvements were already present in earlier Packages. On the other hand, their process of application might be somewhat painful. This is because the "establishment" is resisting to modernization "from above". Just as the Kemalist revolution from above encountered a reaction from below in the form of religious reaction, this time a reaction from below, which should be rightly baptized as "Sèvres Paranoia", is strongly opposing the EU Harmonization Packages.

But in a Turkey where the European Court of Human Rights is slowly becoming a Supreme Court above the Turkish Court of Appeals and where the national court decisions violating the European Convention of Human Rights are subject to retrial, a comeback seems most unlikely.