



TURKISH INDUSTRIALISTS' AND BUSINESSMEN'S ASSOCIATION

PERSPECTIVES ON DEMOCRATISATION IN TURKEY

PROGRESS REPORT 2001

Executive Summary

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FOREWORD

TÜSİAD (Turkish Industrialists' and Businessmen's Association), which was founded in 1971, according to the rules laid by the Constitution and in the Associations Act, is a non-governmental organisation working for the public interest. Committed to the universal principals of democracy and human rights, together with the freedoms of enterprise, belief and opinion, TÜSİAD tries to foster the development of a social structure which conforms to Atatürk's principals and reforms, and strives to fortify the concept of a democratic civil society and a secular state of law in Turkey, where the government primarily attends to its main functional duties.

TÜSİAD aims at establishing the legal and institutional framework of the market economy and ensuring the application of internationally accepted business ethics. TÜSİAD believes in and works for the idea of integration within the international economic system, by increasing the competitiveness of the Turkish industrial and services sectors, thereby assuring itself of a well-defined and permanent place in the economic arena.

TÜSİAD supports all the policies aimed at the establishment of a liberal economic system which uses human and natural resources more efficiently by means of latest technological innovations and which tries to create the proper conditions of for a permanent increase in productivity and quality, thus enhancing competitiveness.

TÜSİAD, in accordance with its mission and in the context of its activities, initiates public debate by communicating its position supported by scientific research on current issues.

The following is the report entitled "Perspectives on Democratisation in Turkey, Progress Report 2001-Executive Summary", prepared by Prof. Bülent Tanör.

Prof. Bülent T ANÖR

Born in 1940 in Beylerbeyi, Istanbul, Bülent Tanör completed his secondary education at the Galatasaray Lycee (1951-1959) and his higher education at the Faculty of Law, the University of Istanbul (1959-1963). In 1964, he was appointed research assistant in the Department of Constitutional Law of the same Faculty. In 1969, he obtained a PhD in Law with his thesis "The Freedom of Political Expression and the Turkish Constitution of 1961". In 1978, he became associate professor with his thesis "Social Rights in Constitutional Law".

From 1983 to 1986, as a fellow lecturer at the Faculties of Law of Paris (Nanterre), Dijon, and Geneva, he gave lectures at undergraduate and postgraduate level on "Democracy in the Third World". In 1992, he was promoted to full professorship at the University of Istanbul.

At present, Professor Tanör teaches in the Department of Constitutional Law, Faculty of Law, University of Istanbul.

His works include: Two Constitutions (1961 and 1982); Local Congressional Powers in Turkey (1918 to 1920); Turkey's Human Rights Issue; Liberation - Foundation; Ottoman-Turkish Constitutional Developments (1789-1980); Congressional Powers in Turkey (1918-1920/Sedat Simavi Award, 1998) (All in Turkish); Perspectives on Democratisation in Turkey (TÜSIAD, 1997) (in Turkish and in English).

REFORMS UNDERTAKEN IN THE "POLITICAL", "HUMAN RIGHTS" AND "RULE OF LAW" DIMENSIONS OF DEMOCRATISATION IN TURKEY BETWEEN 1997-2001

Based on the report entitled "Perspectives on Democratisation in Turkey" (PDT), published by TÜSIAD in 1997, the following is an attempt to present a "balance sheet" and a "list of priority demands".

The reasons for creating a "balance sheet", so to speak, are twofold. Firstly, the balance sheet will indicate which of the proposals set forth in the PDT report were accepted as of March, 2001. Secondly, the "balance sheet" will denote which of the proposals were the subjects of the debate over bills presented to the Parliament while it was in session. The two tables below represent the key findings.

Of the propositions set forth in the PDT report, 29 proposed Constitutional amendments and laws have since been implemented, and another 22 have been subject to discussion but have not been accepted by the parliament.

One must take into consideration that, similar to other studies regarding democratisation, the PDT report would not be functional if it were to claim to embody the absolute truth and total perfection. Exercises such as this "balance sheet" should be evaluated accordingly.

Furthermore, it is important to note that some of the changes or initiatives for change in the "balance sheet" result from the conditions arising from the efforts to bring the laws in line with the 1995 Constitutional amendments.

Table 1: Accepted PDT Propositions

Subject	Legislation	Changes
1. "The Acquisition of Assets" by political parties should fall under the provisions of the Law on Political Parties (LPP)	* Article 69 of the Constitution * Article 2 of the LPP	* Article 18/5 of the Law regarding the Establishment of the Constitutional Court and Trial Procedures (4280-3.7.1997) * The amendment of Article 2 of the LPP with the law referring to making the changes (4445-12.8.1999)
2. Prohibitions concerning the formation of political parties	* Articles 68, 69 of the Constitution * Article 5/3 of the LPP	* Repeal of Article 5/3 of the LPP (4445-12.8.1999)
3. Organisation of Political Parties: Women's and Youth branches, organize/function abroad	* Article 68 of the Constitution * Article 7 of the LPP	* Made possible by the amendments to Article 7 of the LPP (4445-12.8.1999)
4. Supervision of the formation of political parties by the chief Public Prosecutor	* Article 69 of the Constitution * Articles 8/final, 9 of the LPP	* Repeal of Article 9 of the LPP (4445-12.8.1999)
5. Membership in a political party: Members of the teaching staff and students in institutions of higher education-groups of age and individuals	* Article 68 of the Constitution * Article 11 of the LPP	* Article 59 of the Law of Higher Education (4278-2.7.1999) * Changes to the LPP (4445-12.8.1999)
6. Primaries	* Article 37 of the LPP	* A partial and marginal addition to Article 37 of the LPP (4381-31.7.1999) for the elections of April 18, 1999
7. Prohibitions on the activities of political parties	* Article 68 of the Constitution * Article 79/b of the LPP	* Repeal of Article 79/b of the LPP which prohibited organising/functioning abroad (4445-12.8.1999)
8. Ban on the auxiliary bodies of political parties	* Article 69 of the Constitution * Article 91 of the LPP	* Repeal of Article 91 of the LPP (4445-12.8.1999)
9. Ban on any form of cooperation between political parties and other organizations/associations	* Article 69 of the Constitution * Article 92 of the LPP	* Repeal of Article 92 of the LPP (4445-12.8.1999)

Subject	Legislation	Changes
10. Status of the dissolved political parties and their members	* Article 69 of the Constitution * Article 95 of the LPP	* Amendment to Article 95 of the LPP in accordance with the Constitution (4445-12.8.1999)
11. Ban on any statements and declarations of political parties made against the military takeover of September 12, 1980.	* Article 97 of the LPP	* Repeal of Article 97 of the LPP (4445-12.8.1999)
12. Conditions to ban parties	* Articles 68, 69 of the Constitution * Article 101 of the LPP	* Amendment to Article 101 of the LPP in accordance with the Constitution (4445-12.8.1999)
13. Dissolution of political parties	* Articles 68, 69 of the Constitution * Articles 102, 103 of the LPP	* Amendment to Articles 102 and 103 of the LPP that requires clearer and more concrete conditions for party closures (4445-12.8.1999)
14. Financial support by the Treasury to political parties	* Article 68/final of the Constitution * Supplementary Article 1 of LPP	* Grant assistance based upon the number of votes received as opposed to the number of seats in parliament (4445-12.8.1999)
15. Abuses by security forces	* Anti-Terrorism Act	* The cancellation of a provision in the law allowing arbitrary use of firearms by security forces
16. Torture	* Articles 243, 245, 354 of the Turkish Penal Code	* Broadening the definition of crimes of torture and maltreatment to punish those found guilty with a harsher sentence (4449-26.8.1999) * Ratification of the European Convention (4327-4.4.1997) * Prime Minister's Circular (3.12.1997) * Arrest and detention by-laws (O.G. 1.10.1998-23480 and 13.8.1999-23785)
17. Personal Inviolability	* Criminal Procedure Law	* Ministry of Justice's Circular concerning virginity tests and allegations of adultery (21.10.1998)
18. Arrest and Detention	* Article 110 of the Criminal Procedure Law	* Amendments to the Criminal Procedure Law (4229-6.3.1997) * By-laws (O.G. 1.10.1998-23480 and 13.8.1999-23785)

Subject	Legislation	Changes
19. Length of Detention	* Article 110 of the Criminal Procedure Law	* Extension of the maximum length limits to the State Security Court detainees (4229-6.3.1997)
20. Religious Education	* National education regulations	* Increasing compulsory education to eight years * the closure of the first three year section of Imam Hatip (Religious) Schools (4306-16.8.1997)
21. Supervision of Quran courses	* By-laws	* Securing the supervision and the enforcement of the Ministry of Education and administrative authorities by amending the related by-laws (20.8.1997)
22. Freedom to organisation	* Public Professional Organisations Law	* Time limitations and the need for a court's ruling for the cessation of public professional organisations' activities (4276-18.6.1997)
23. Freedom of Association	* Associations Law	* Liberalising changes (4279-3.7.1997)
24. Freedom of Trade Unions	* Trade Unions Law	* Narrowing the scope of prohibitions on trade unions' activities (4277-26.6.1997)
25. Trade Union rights of public servants	* Public Servants Law	* Recognition of public servants' trade union rights (4275-12.6.1997)
26. Trial of Civil Servants and Other Public Administrators	* Law on Trial of Civil Servants and other Public Administrators	* Provisional Law on Trial of Civil Servants and other Public Administrators is replaced by the new law which brings a new procedure for the trial of Civil Servants and other Public Administrators but keeps the condition of permission for trial
27. Rule of Law and Judicial Guarantee	* Supreme Council of Judges and Public Prosecutors Law	* Members of the Supreme Council of Judges and Public Prosecutors may not hold other positions/duties (4443-21.7.1999)
28. Independence of the Judiciary, Fair Trial	* Article 143 of the Constitution * State Security Courts Law	* Repeal of the military member of the State Security Courts (4388-18.6.1999 and 4390-22.6.1999)
29. The jurisdiction of the State Security Courts	*Criminal Procedure Law	* Limiting the powers of the State Security Courts (Criminal Procedure Law, 4229-6.3.1997)

Table 2: PDT Propositions which have been subject to discussion but have not yet been accepted by the Parliament in the period between 1997-2001.

Subject	Legislation	Proposals
1. Prohibition for political party support between different parties	* Article 90/2 of the LPP	* Repeal of this section of Article 90/2 of the LPP (The Turkish Grand National Assembly Constitutional Committee)
2. Dissolution of political parties	* Article 69 of the Constitution	* A proposal to amend the Article brings more concrete conditions for the dissolution of political parties
3. Dissolution of political parties	* Article 104 of the LPP	* A proposal to amend the Article brings new conditions for the dissolution of a political party by the reason of being the successor of a dissolved political party
4. Voting abroad	* Article 67/2 of the Constitution	* A proposal with 13 signatories for an amendment in the article
5. Prohibition on political parties over cooperation with each other during elections	* Article 16 of the Law on the Election of the Turkish Grand National Assembly members	* A proposal for an amendment
6. Holding administrative positions in trade unions or professional organizations incompatible with membership in the Turkish Grand National Assembly	* Article 82 of the Constitution	* The proposal of B. Ecevit and 187 of his peers (rejected in the Turkish Grand National Assembly Constitutional Committee)
7. Lifting the exemption on the provision regarding parliamentary irresponsibility and limiting parliamentary inviolability in the Turkish Grand National Assembly	* Article 83 of the Constitution	* The proposal of 292 parliamentarians did not receive the required number of votes in the Assembly
8. The Turkish Grand National Assembly/ Parliamentary investigations	* Article 100 of the Constitution * Article 111 of the Rules of Procedure	* A proposal to amend Article 100 of the Constitution in favor of those being investigated (True Path Party members)

Subject	Legislation	Proposals
9. The Turkish Grand National Assembly/ Revisions to the Constitution	* Article 175 of the Constitution	* Open vote principle for Constitutional Amendments treated favorably in the Turkish Grand National Assembly Constitutional Committee
10. Public Administration/ Relations between central and local administrative authorities	* Various legislations/regulations	* A bill on the division of functions and powers (The Turkish Grand National Assembly Planning and Budgetary Committee)
11. Human Rights	* Article 327 of Criminal Procedure Law and Article 445 of Judicial Procedure Law	* A proposal to add a phrase to these articles. It provides the judgements of European Court of Human Rights as a reason of retrial
12. Capital Punishment	* Turkish Penal Code and some additional laws	* The proposal of Former Minister of Justice H. Denizkurdu to lift capital punishment during peace times looked unfavorably upon.
13. Inviolability, liberty and security of the individual	* Article 31 of the Criminal Procedure Law	* A bill to amend the article to repeal exceptional provisions for the suspected being tried by State Security Courts
14. Freedom of expression	* Article 8 of the Anti-Terrorism Act	* A bill to amend the Article
15. Freedom of expression	* Article 312 of the Turkish Penal Code	* Two bills to amend the Article (One of them is on the floor, the other one is at The Turkish Grand National Assembly Justice Committee)

Subject	Legislation	Proposals
16. Freedom of expression	* Article 159 of the Turkish Penal Code	* Two proposals to amend the article (One of them is on the floor. The other one is at The Turkish Grand National Assembly Justice Committee)
17. Freedom of association	* Associations Law	* A bill to amend some articles of the law
18. Freedom of assembly and demonstrations	* The Law on Assembly and Demonstrations	* The proposal of A. Hacıoğlu and 9 of his peers
19. Trade Union Freedoms (See #6)	* Article 82 of the Constitution	* (See #6) Rejected
20. Trade Union Freedoms/civil servants		* Civil Servants' Trade Union Law (The Turkish Grand National Assembly Planning and Budgetary Committee)
21. Rule of Law and the supervision of the administration		* A bill on the establishment of the Settlement Councils (The Turkish Grand National Assembly Justice Committee)
22. Rule of Law and Judicial Guarantee	* Provisional Article 15 of the Constitution	* A proposal to abrogate the last paragraph of the Article which prohibits to appeal before Constitutional Court for the laws enacted by National Security Council between 1980-1983

The "List of Priority Demands" essentially comprises the initiatives necessary for Turkey's democratization program. This list also prioritizes the necessary reforms and changes in relation to the benefits expected from them.

It is useful to examine previous studies in this area in evaluating this list of priorities. In 1997, TÜSİAD published a report entitled "Perspectives on Democratization in Turkey", which included a survey of the relevant legislation. Its aim was to identify the principal legal obstacles to democratization in Turkey, and to offer strategies for overcoming those obstacles. In 1999, TÜSİAD published a Progress Report on Democratization, which addressed the reforms that Turkey had undertaken between 1997 and 1999 in the areas of politics, human rights and the rule of law.

Efforts of the Turkish Government in the direction of democratization have accelerated since 1999. In this connection, a document entitled "Reforms Necessary for Achieving Compliance with the Copenhagen Political Criteria" was prepared by the Prime Ministry's Supreme Board for Coordination of Human Rights in May 2000.

In the light of these three reports, the "List of Priority Demands" can be stated as follows*:

INVIOABILITY OF THE INDIVIDUAL – THE RIGHT TO LIFE

1) The practice of capital punishment should be limited to conditions of war or imminent threat of war, as stated in the Appendix Protocol No. 6 of European Convention on Human Rights. Turkey has not carried out any death sentences since 1984. Many countries, in the process of abolishing the death penalty, have experienced a "transitional stage" similar to that which Turkey has undergone in this period. It must be acknowledged that long-term or life imprisonment is not necessarily less onerous than capital punishment—provided that populist sentiments and abuse of amnesty laws do not dilute such punishments. It is not necessary to legislate a new Criminal Code in order to abolish capital punishment outside conditions of war or imminent threat of war; approval of Appendix Protocol No. 6 of European Convention on Human Rights and the enactment of a law outlining the nature of the transformation to be applied in connection with existing capital punishment legislation will be sufficient in achieving the desired goal.

* This list comprises the priorities set forth before the approval of the National Program of Turkey for the Adoption of the Acquis.

FREEDOM OF EXPRESSION

2) Article 8 of the Anti-Terrorism Act (ATA) dealing with "Propaganda against the Indivisibility of the State" and Article 312 of the Turkish Penal Code (TPC), both of which restrict freedom of expression, must be amended.

There are no obstacles to the repeal of Article 8 of the ATA, as the existing provisions of the criminal legislation are sufficient to deal with provocation of criminal activity in respect of propaganda in favor of terrorist organizations. Article 8 is aimed solely at punishing crimes of thought and must therefore be abolished.

Article 312 of the TPC need not be repealed in its entirety. Similar provisions exist in almost all countries. This Article penalizes the praising of an action that constitutes a legal offence, the encouragement of civil disobedience (first paragraph), or incitement of resentment and enmity on the basis of class, race, religion, sect or regional difference (second paragraph). Article 312 has been the subject of much justified criticism in Turkey because it has been used in prosecuting exploitation of religion ever since Article 163 of the Criminal Code was repealed. The Preamble to the Constitution, as well as its 14th and 24th articles, outlaw the abuse of religion and empower the legislature to provide the necessary measures to that effect. Hence, there has to be new legislation specific to the abuse of religion, while the first paragraph of Article 312 should be repealed and the second paragraph reworded to reflect the criteria of the concept of "clear and present danger". These alterations would have the desired effect of eliminating "crimes of thought".

Freedom of expression is not only a legal issue. It also contains educational and philosophical dimensions. In order to accord formal recognition to the principle of "freedom of thought", the number of Imam-Hatip high schools (imam training schools) should be limited to those necessary to provide the required number of religious functionaries. Female students should therefore not be admitted to such schools.

COLLECTIVE FREEDOMS

3) Commentary on and critique of the Associations Act are set out in TÜSIAD's special report on this matter (*The Draft Associations Act*, TÜSIAD, 1997) and in the

above-mentioned reports on democratization (Perspectives on Democratization in Turkey, 1997 and the Progress Report of 1999). Pursuant to the findings of these reports, the existing law should be re-examined in its entirety. A more appropriate solution would be the drafting of a new Associations Act.

4) The Law on Assembly and Demonstrations should be amended in order to limit the power of the local representative of the central authority to postpone lawful assembly and demonstrations indefinitely. The period of discretion should be reduced to between 24 to 48 hours.

POLITICAL PARTIES AND ELECTIONS

5) In terms of its contribution to the improvement of party democracy, the holding of primaries open to all members with mandatory participation should become the rule.

Article 81 of the Law on Political Parties (entitled "Prevention of Creation of Minorities") must be repealed in its entirety. There are various laws sufficient in their effects to assure the integrity of the state. Article 81 has been used as legal grounds for dissolving political parties loyal to the unitary state. Especially after the defeat of the separatist terrorist movement, the repeal of this article will serve to reintegrate some political actors to the system. In fact, in the *Democratic Peace Movement Party* case, the Constitutional Court did not recognize Article 89 of the Law on Political Parties (title of which is "Protection of the Status of the Department of Religious Affairs") as sufficient grounds to dissolve a political party. One could similarly reach the same conclusion with regard to Article 81 of the Law on Political Parties. In this case, a radical and democratic solution requires an amendment in the Law to clarify the status of the several provisions which are no longer acceptable reasons to dissolve political parties.

6) Two reforms are urgently needed in the area of elections. The first is the removal from the Election Law of prohibitions on cooperation and alliances between political parties. The second is the introduction of a two-round system in the election of mayors. The first has been the subject of several proposed bills. There is broad consensus on the second matter. Finally, the national electoral threshold should be lowered to 5%, as in other countries: in the last election the current system resulted in the invalidation of six million votes.

TURKISH GRAND NATIONAL ASSEMBLY (TGNA)

7) Parliamentary irresponsibility and the existing inviolability for parliamentarians should be reformulated under the heading of "parliamentary immunities". Parliamentary irresponsibility provides that members of Parliament may not be held responsible for words, statements or votes made in the course of parliamentary activities. The exception in the Constitution in this connection ("unless the Assembly decides otherwise on the proposal of the Presidential Council for that sitting") should be removed and absolute irresponsibility should apply. Parliamentary inviolability, designed to enable members of Parliament to carry out their functions without pressure or threat, should be re-formulated. The shield of inviolability should not be an obstacle to judicial inquiry or legal process. This protection should only be available in the case of arrest, detention and detention on remand, as the function of parliamentary inviolability is to protect members of Parliament so that they may perform their duties unhindered. Beyond this, judicial inquiry and the legal process should not be considered as disrupting the proper duties of members of Parliament.

THE NATIONAL SECURITY COUNCIL

8) In "Perspectives on Democratization in Turkey" and its Progress Report, it was proposed that the National Security Council (NSC) be eliminated as a constitutional body and its sphere of activity be restricted to national defence (as it was prior to 1960), parallel to the practice in all democratic countries. Although this proposal was not included in the List of Priorities in the Progress Report, the issue is now of immediate importance as there have been increased demands in this direction, originating especially from EU circles. The report "Reforms Necessary to Achieve Compliance with the Copenhagen Political Criteria", prepared by the Prime Ministry's Supreme Board for Coordination of Human Rights, does not contain a radical solution. It seeks to increase the number of civilian members in the NSC with an amendment to the Constitution, and to change the required legislation (the NSC Law and NSC General Secretariat Law). These measures are appropriate. It is possible to limit the Council's authority without resorting to Constitutional change, by only amending the aforementioned laws.

THE JUDICIARY AND THE RULE OF LA W

9) Establishment of a judicial police organization, extension of guarantees provided by the Criminal Procedure Law to suspects being tried by State Security

Courts, and constitutional changes to provide for an independent judiciary (especially in the context of the Supreme Council of Judges and Public Prosecutors) constitute the priority issues which remain to be resolved.

10) Exemptions from judicial review should be revoked, as they are damaging to the rule of law. All administrative acts (especially of the Supreme Council of Judges and Public Prosecutors and the Supreme Military Council) should be subject to judicial review. Constitutional provisions preventing decrees in force in the state of emergency region from being brought before the Constitutional Court should be removed and the final paragraph of provisional Article 15 of the Constitution, which exempts decisions or measures taken under laws or decrees introduced during the period of military rule between 1980-1983 from constitutional jurisdiction, should be abrogated.

11) As discussed in the Report prepared by Prime Ministry's Supreme Board for Coordination of Human Rights, the right to appeal before the Constitutional Court should be more widely available, in particular to political party groups in the TGNA, and other institutions.

HARMONIZATION TO SUPRANATIONAL LAW

12) In order to fulfill the requirements for full membership in the European Union and other international institutions, a clause has to be added to the Constitution relating to sovereignty and the use of sovereignty by authorized agencies. A similar provision was proposed in the draft written by the Constitutional Committee of the Advisory Assembly, charged with undertaking the preliminary preparations for the 1982 Constitution.

13) A bill must be enacted to provide that judgements of the European Court of Human Rights may serve as a basis for retrial and the correction of judgements.