

## **Constitutional Changes of Turkey in 2001 under the Framework of the EU Adaptation Process\***

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### **I. Introduction**

Membership of the European Union has been contained a long process for Turkey. Turkey's first application for associate membership in the European Community was made in 1959. After consecutive negotiations, Turkey signed the "Agreement Creating an Association between the Republic of Turkey and the European Community (the Ankara Agreement)" on the 12<sup>th</sup> of September, 1963. The relationship aiming at the full membership has started with this agreement which entered into effect on the 1<sup>st</sup> of December, 1964.<sup>1</sup> The Additional Protocol of November 1970 provided a timetable for the harmonization of laws with the EU in economic cases. In this context, the Protocol ensured the abrogation of tariffs and the elimination of quantity restrictions. Furthermore, it allowed free movement of persons in the following 12 to 22 years.<sup>2</sup>

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1 The Ankara Agreement predicted three periods of time for the membership and also included free movement of goods, persons, services and capitals, "Accession of Turkey to the European Union", <http://www.en.wikipedia.org>, 1 April 2007; Kemal Kirişci, "Evaluating the Question of Minorities in Turkey in the light of Turkish-EU Relations", *Turkey: the Road Ahead*, Ed. by., Bertil Duner, Stockholm, The Swedish Institute of International Affairs, pp. 109; "Turkey and EU", <http://www.turkishembassy.org>, 1 April 2004.

2 "Turkey and EU", <http://www.turkishembassy.org>, 1 April 2004.

Following these economic developments Turkey applied for full membership on the 14<sup>th</sup> of April, 1987. Ad hoc committee meetings with the European Commission then started as a new phase in reviving the relations. Efforts to make progress in economic integration continued and Customs Union was completed in 1995. The Helsinki European Council of 1999 and the Copenhagen European Council of 2002 also provided a breakthrough in relations and it was declared that Turkey is on equal footing with other candidates. In October 2004, the European Commission in a progress report declared that Turkey fulfilled the Copenhagen political criteria.<sup>3</sup> In the light of these developments, on the 3<sup>rd</sup> of October, 2005, it was determined that accession negotiations should open with Turkey. Turkey has closed the chapters in negotiation and the screening process was accomplished in October 2006. In fact, it is accepted that the long process of Turkey being part of the European Union is progressing from ‘candidate’ phase to ‘accession’ phase.<sup>4</sup>

In that process, Turkey has adopted constitutional amendments which came into force on the 17<sup>th</sup> of October, 2001. The current constitution of Turkey was regulated by constituent assembly after the 1980 military intervention. It was adopted by a constitutional referendum that was polled around % 90 votes of eligible votes.<sup>5</sup>

Almost all non governmental organizations, political parties and opposition groups had criticized the constitution. Proposals for amendments had been prepared by institutions had increased from day to day. In this context, approach of the European Union and society’s expectations about democracy and freedom became the determining factors for 2001 amendments.<sup>6</sup>

## II. The Amendment Process in the Turkish Constitution

### A. Proposal and Debates

The amendment process of constitution differs from the legislative act process.<sup>7</sup> In fact, at least one-third of the members of the

3 “AB Yolunda Türkiye, Genel, Türkiye-AB İlişkileri”, <http://www.tuerkischebotschaft.de>, 21 March 2007.

4 “Tren Kazasına Karşı Fin Önerisi”, <http://www.sabah.com.tr>, 2 April 2007; “Turkey and EU”, <http://www.turkishembassy.org>, 1 April 2004; “EU-Turkey Relations”, <http://www.euractiv.com>, 1 April 2004.

5 Bülent Tanör, Necmi Yüzbaşıoğlu, *1982 Anayasası’na Göre Türk Anayasa Hukuku*, İstanbul, Beta, 2005, pp. 12-20.

6 İbrahim Kaboğlu, “2001 Anayasa Değişiklikleri: Ulusal-Üstü Etkiden Ulusal Tepkiye”, <http://www.anayasa.gov.tr>, 1 April 2007; Tanör, Yüzbaşıoğlu, pp. 34.

7 Council of ministers and members of parliament propose amendments about

Turkish Grand National Assembly (TGNA) must propose amendments in writing.<sup>8</sup> These proposals are debated twice at the plenary session. Furthermore, a 48 hour interregnum is required between the debates.<sup>9</sup> However, the National Assembly provides only one round of debate for the amendments of the legislative act.

The purpose of the 48 hour interregnum is related to importance of the amendments of the constitution. As a matter of fact, the process of amendments requires expend care and the trend of public opinion must show up within this 48 hour interregnum.<sup>10</sup>

### **B. Adoption**

The constitution requires three-fifths or two-thirds majority of the members of the Assembly for the adoption of proposals. These majorities are based on the process of approval. According to the constitution, the proposals are adopted by three-fifths majority of the members of the Assembly with secret ballots. If the President sends the proposal back to the Assembly, at least two-thirds majority is required for adopting the unchanged proposal.<sup>11</sup> Adoption of the whole articles shall require three-fifths majority at the end of the second debate.<sup>12</sup>

### **C. Approval**

The adoption of proposals requires three-fifths (330 deputies) or two-thirds (366 deputies) majority of all members of the Assembly. If a proposed amendment is adopted by more than three-fifths majority, but less than two-thirds majority and the president does not send it back to the Assembly, the president has no choice except submitting it to a referendum. If the amendment is adopted by a two-thirds majority, the president may approve it or submit it to referendum.<sup>13</sup>

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legislative acts, see, The Constitution of the Republic of Turkey, Article 88. These amendments which may contain one or more members of parliament's signature propose with related legal reason, see, National Assembly Internal Regulation, Article 74.

8 See, The Constitution of the Republic of Turkey, Article 175.

9 See, National Assembly Internal Regulation, Article 93.

10 Ergun Özbudun, *Türk Anayasa Hukuku*, 8. ed., Ankara, Yetkin, 2005, s. 150, 151.

11 See, The Constitution of the Republic of Turkey, Article 175; İbrahim Ö. Kaboğlu, *Anayasa Hukuku Dersleri*, ed. 3, İstanbul, Legal, 2006, pp. 28.

12 See, National Assembly Internal Regulation, Article 94.

13 Kemal Gözler, *Türk Anayasa Hukuku Dersleri*, ed. 4, Bursa, Ekin, 2007, pp. 540; See, The Constitution of the Republic of Turkey, Article 175/4, 5.

When the president sends the proposal back to the Assembly, the unchanged proposal must be adopted at least by two-thirds majority for progression of process.<sup>14</sup>

In conclusion, Article 175 concerning the process of constitutional amendment requires mandatory or voluntary referendum to adopt the amendment. If the proposal is not submitted to a referendum, it is adopted and became definite by the promulgation of the amendment in the Official Journal.<sup>15</sup>

### **III. Evaluation of the 2001 Amendments to the 1982 Constitution**

It is believed that the current constitution was the reaction to the period before 1980 and authority was clearly prevailed in it. However, 2001 amendments which are the most comprehensive amendments in the 1982 Constitution reflect the requirement of fulfillment of the European political and economic criteria and the democratic conception.<sup>16</sup> Moreover, the amendments are evaluated as a product of compromise of supranational effects and national expectations. They were formed by the way of compromise and adopted on the 3<sup>rd</sup> of October, 2001 by the Turkish Grand National Assembly. The amendments which were adopted by a large majority entered into effect on the 17<sup>th</sup> of October, 2001 after its publication in the Official Journal.<sup>17</sup>

#### **A. Fundamental Rights and Freedoms**

##### **1. Restriction of Fundamental Rights and Freedoms**

The arrangement of Article 13 is the most important amendment in the 2001 amendment package. Before the 2001 amendments, Article 13 was a general provision which contained the grounds for restricting all rights and freedoms in the constitution.<sup>18</sup>

14 See, The Constitution of the Republic of Turkey, Article 175/3.

15 Erdoğan Teziç, *Anayasa Hukuku*, ed. 11, İstanbul, Beta, 2006, pp. 165, 166; Article 175/5 of 1982 Turkish Constitution.

16 Mehmet Sağlam, "Ekim 2001 Tarihinde Yapılan Anayasa Değişiklikleri Sonrasında Düzenledikleri Maddede Hiçbir Sınırlama Nedenine Yer Verilmemiş Olan Temel Hak ve Özgürlüklerin Sınırı Sorunu", <http://www.anayasa.gov.tr>, 1 April 2007.

17 "Anayasa Değişikliği", <http://www.belgenet.com>, 21 March 2007; İbrahim Kaboğlu, "2001 Anayasa Değişiklikleri: Ulusal-Üstü Etkiden Ulusal Tepkiye", <http://www.anayasa.gov.tr>, 1 April 2007.

18 Fazıl Sağlam, "2001 Yılı Anayasa Değişikliğinin Yaratabileceği Bazı Sorunlar ve Bunların Çözüm Olanakları", <http://www.anayasa.gov.tr>, 22 November 2007; Çetin Yetkin, "Anayasa Değişikliklerinin Hak ve Özgürlüklere Olumsuz Etkile-

These grounds were ‘the indivisible integrity of the state with its territory and nation’, ‘national sovereignty’, ‘the Republic’, ‘national security’, ‘public order’, ‘general peace’, ‘the public interest’, ‘public morals’ and ‘public health’.

The constitutional amendment provided that the fundamental rights and freedoms can be restricted in pursuant of the specific reasons contained in the relevant articles of the constitution. Before the amendment, Article 13 referred to a cumulative restriction system for fundamental rights and freedoms. However, the new version of Article 13 provides a progressive restriction system and is a general protection clause for fundamental rights and freedoms.<sup>19</sup> In fact, the general provision which contained the grounds for restricting all rights and freedoms is avoided by the new version.<sup>20</sup> The amendment brought the restriction system into consonance with the European Convention on Human Rights in which Turkey is a state party.<sup>21</sup> In this context, the amendment reflects that freedom should be the essence and restriction should be the exception. Also, the restrictions which surpass the principles allowed by the Convention should not be applied.<sup>22</sup>

Article 13 also contains principle of ‘the core of rights and freedoms’.<sup>23</sup> According to this principle, the restriction shall not infringe the core of the rights and freedoms. Another important guarantee

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ri”, <http://www.anayasa.gov.tr>, 22 November 2007; See the previous text of Article 13/1 of the Constitution.

- 19 Necmi Yüzbaşıoğlu, “2001 Anayasa Değişiklikleri Üzerinde Bir Değerlendirme”, *Anayasa ve Uyum Yasaları*, Ankara, Türkiye Barolar Birliği, 2003, pp. 30, 31; See, Tanör, Yüzbaşıoğlu, pp. 42; Fazıl Sağlam, “2001 Yılı Anayasa Değişikliğinin Yaratabileceği Bazı Sorunlar ve Bunların Çözüm Olanakları”, <http://www.anayasa.gov.tr>, 22 November 2007.
- 20 Mehmet Semih Gemalmaz, Haydar Burak Gemalmaz, *Ulusalüstü İnsan Hakları Standartları Işığında Türkiye’de Bilgi Edinme Düşünce-İfade ve İletişim Mevzuatı*, İstanbul, Düşünce Suçu(!?)na Karşı Girişim, pp. 291; Yılmaz Aliefendioğlu, “2001 Yılı Anayasa Değişikliklerinin Temel Hak ve Özgürlüklerin Sınırlandırılmasında Getirdiği Yeni Boyut”, <http://www.anayasa.gov.tr>, 22 November 2007; Mehmet Semih Gemalmaz, *Ulusalüstü İnsan Hakları Hukukunun Genel Teorisine Giriş*, ed. 6, İstanbul, Legal, 2007, pp. 1611.
- 21 The European Convention on Human Rights has also no provision regarding general restriction reasons, Zafer Gören, “Temel Hak ve Özgürlükler-Türkiye Cumhuriyeti Anayasası İçin Reform Önerileri”, *Türkiye’de Anayasa Reformu Prensipler ve Sonuçlar*, Ankara, Konrad Adenauer Vakfı, 2001, pp. 103.
- 22 “Turkey: Constitutional Amendments: Still a Long Way to Go”, <http://www.amnesty.org>, 6 April 2007; Yüzbaşıoğlu, pp. 31.
- 23 The principle of ‘the core of rights and freedoms’ was one of the principles of 1961 Constitution, Article 11. However, 1982 Constitution did not contain this principle and stated ‘requirements of democratic order of the society’ instead of this guarantee; Gemalmaz, pp. 1611.

in Article 13 is the ‘principle of proportionality’. This principle includes three basic elements which are sufficiency<sup>24</sup>, proportionality between law and purpose of restriction and the necessity of restriction to fulfill the purpose.<sup>25</sup> Hence, it aims at preventing the restrictions which overstep the limit. In fact, the new version has criteria to define the limit of restrictions and such a limit determines every possible restriction.<sup>26</sup>

According to the new version, the restrictions shall not be in conflict with ‘the requirements of the democratic order of society and secular Republic’. This arrangement shows the stability and the importance of protecting the secular system in the society.<sup>27</sup> Besides, secularism is one of the principles of Atatürk and it takes place in the beginning of the constitution as well as in Article 2 of the Constitution as a requirement of the Republic. Thus, its importance should be evaluated in this context.<sup>28</sup>

Fundamental rights and freedoms shall be restricted ‘only by law’ and with ‘the letter and spirit of the Constitution’. Before the amendment, the article provided that rights and freedoms shall be restricted by law<sup>29</sup>, but the new version contains the adjective ‘only’ to the article for further emphasis. Therefore, the rights and freedoms shall not be restricted by the administrative regulatory act. The restriction only by law is provided not only under this provision but also under the Court decisions.<sup>30</sup> Moreover, the restriction should be in accordance with the text, integrity and sense of Constitution for the fulfillment of criteria of ‘the letter and spirit of the Constitution’.<sup>31</sup>

24 Sufficiency means that law must be conformable to fulfill the purpose, see the Constitutional Court decision, E. 1988/50, K. 1989/27, 23.06.1989.

25 See the Constitutional Court decision, E. 1988/50, K. 1989/27, 23.06.1989, <http://www.anayasa.gov.tr>, 16 April 2007.

26 Gemalmaz, Gemalmaz, pp. 291; Gemalmaz, pp. 1609.

27 Levent Gönenç, “The 2001 Amendments to the 1982 Constitution of Turkey”, *Ankara Law Review*, Vol.1, No.1, 2004, pp. 100.

28 Bertil Emrah Oder, “Enhancing the Human Face of Constitutional Reality in Turkey Through Accession Partnership with the EU”, *Turkey: the Road Ahead*, Ed. by., Bertil Duner, Stockholm, The Swedish Institute of International Affairs, 2002, pp. 85, 86.

29 See the previous text of Article 13/1 of the Constitution.

30 The Constitutional Court referred to Article 13 of the Constitution and stated that the rights and freedoms shall be restricted only by legislative act, See the Constitutional Court decision, E. 1985/21, K. 1986/23, 06.09.1986, <http://www.anayasa.gov.tr>, 16 April 2007.

31 Tahsin Fendoğlu, “2001 Anayasa Değişikliği Bağlamında Temel Hak ve Özgürlüklerin Sınırlanması”, <http://www.e-sosder.com>, 6 April 2007.

The new version of Article 13 is compatible with the system of the European Convention on Human Rights. Also, it is a positive step for democracy and reflects the sensitivity of the society. Therefore, institutions must attach importance to the implementation process.

## 2. Abuse of Fundamental Rights and Freedoms

Prohibiting the abuse of fundamental rights and freedoms firstly took place in the 1961 Constitution with the 1971 amendments. The 1982 Constitution widened the scope of this provision. Before the 2001 amendments, Article 14 stated several elements regarding the abuse of fundamental rights and freedoms as 'Violating the indivisible integrity of the state with its territory and nation', 'endangering the entity of the Turkish state and Republic', 'destroying fundamental rights and freedoms', 'placing the government of the state under the control of an individual or a group', 'establishing the hegemony of one social class over others', 'creating discrimination on the basis of language, race, religion or sect', 'establishing by any other means a system of government grounded on these concepts and ideas'.<sup>32</sup> The 2001 amendment related to Article 14 eliminates all of these criteria except the concept of 'the indivisible integrity of the state with its territory and nation'.<sup>33</sup>

The amendments also include only activities which focus on destroying the indivisible integrity of the state with its territory and nation, and democratic and secular state based on human rights. In addition, the new version is compatible with Article 17 of the European Convention on Human Rights and Article 30 of the Universal Declaration of Human Rights.<sup>34</sup> In fact, it is arranged that no

32 See the previous text of Article 14/1 of the Constitution.

33 See, The Constitution of the Republic of Turkey, Article 14/1.

34 Article 17 of the European Convention on Human Rights: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention", Convention for the Protection of Human Rights and Fundamental Freedoms, <http://www.echr.coe.int>, 12 April 2007; Sevtap Yokuş, "Avrupa Birliği'ne Uyumda Siyasi Kriterler Doğrultusunda Türkiye'de Anayasal ve Yasal Dönüşüm Çabaları", *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası*, Vol. LXI, No. 1-2, 2003, pp. 214; İsmet Giritli, "2001 Anayasa Değişikliklerinin Temel Hak ve Özgürlüklere Yansıması", <http://www.anayasa.gov.tr>, 21 November 2007; Birsen Gökçe, "2001 Yılında Yapılan Anayasa Değişikliklerinin Sosyal, Ekonomik ve Siyasal Yönden Değerlendirilmesi", <http://www.anayasa.gov.tr>, 22 November 2007; Yılmaz Aliefendioğlu, "2001 Yılı Anayasa Değişikliklerinin Temel Hak ve Özgürlüklerin Sınırlandırılmasında Getirdiği Yeni Boyut", <http://www.anayasa.gov.tr>, 22 November 2007.

prohibition from the constitution shall be interpreted as entailing to the state or person any right to display activities focused on the destruction of the constitutional rights and freedoms more extensively than established in the Constitution.<sup>35</sup>

The new version of article 14 concerning the abuse of fundamental rights and freedoms provides a protection even against the state. In this context, the arrangement has compatibility not only with the European Convention and other international treaties on human rights but also with the requirements of a democratic and secular Republic.<sup>36</sup>

### **B. Personal Liberty and Security**

Article 19 is arranged under the 2001 amendment package and paragraphs 5, 6 and 9 of this article are amended. Before the amendment, the maximum period to send a person arrested or detained to the court was 15 days. This period is reduced from 15 days to 4 days in case of offences committed as a group.<sup>37</sup> Thereby, the period is arranged as 48 hours in case of offences committed individually and 4 days in case of offences committed as a group. It is compatible with article 5 of the European Convention on Human Rights which provides a reasonable period of time.<sup>38</sup> Therefore, the amendment is an important development for the adaptation of European standards.<sup>39</sup>

According to the article 19/6, the position of a person arrested or detained shall be immediately notified to the next kin. The previous arrangement also required notification but with the exception of peremptory necessity in coming out of scope or subject of an in-

35 See, The Constitution of the Republic of Turkey, Article 14/2.

36 Oder, pp. 86; Rumpf Chr., Verfassungsänderung in der Türkei, Bilkent Üniversitesi, Venedig Komisyonu Sempozyumu, 9 November 2001, pp. 7-8, indorser, Ömer İzgi, Zafer Gören, *Türkiye Cumhuriyeti Anayasasının Yorumu I*, Ankara, Türkiye Büyük Millet Meclisi, 2002, pp. 205; Yüzbaşıoğlu, pp. 33; Gönenç, pp. 101, 102; Mehmet Sağlam, "Ekim 2001 Tarihinde Yapılan Anayasa Değişiklikleri Sonrasında Düzenledikleri Maddede Hiçbir Sınırlama Nedenine Yer Verilmemiş Olan Temel Hak ve Özgürlüklerin Sınırı Sorunu", <http://www.anayasa.gov.tr>, 1 April 2007.

37 See the previous text of Article 19/6 of the Constitution; İsmet Giritli, "2001 Anayasa Değişikliklerinin Temel Hak ve Özgürlüklere Yansıması", <http://www.anayasa.gov.tr>, 21 November 2007.

38 Birsen Gökçe, "2001 Yılında Yapılan Anayasa Değişikliklerinin Sosyal, Ekonomik ve Siyasal Yönden Değerlendirilmesi", <http://www.anayasa.gov.tr>, 22 November 2007.

39 Yüzbaşıoğlu, pp. 33; "Turkey: Constitutional Amendments: Still a Long Way to Go", <http://www.amnesty.org>, 6 April 2007.



vestigation.<sup>40</sup> It is believed that the amendment shall prevent cases of missing persons in pre-trial proceedings.<sup>41</sup> In fact, the notification to the next kin is an absolute requirement in the new version and prevents all of such problems from occurring.<sup>42</sup>

Article 19/7 provided that the state should pay the damages of persons related to the process and mentioned the laws for this payment. However, the amendment requires the payment to be in accordance with the general principles of the compensation law. Thus, the provision shall safeguard the relevant persons' interests.

### **C. The Right to Privacy, Inviolability of Domicile and Freedom of Communication**

In accordance with the arrangement concerning the restriction by specific reasons, Article 20 (The right to privacy), Article 21 (Inviolability of Domicile) and Article 22 (Freedom of Communication) amended compatibility with the European Convention on Human Rights and provided common protection and judicial security for these rights.<sup>43</sup>

According to the amendment regarding these rights, general restriction reasons are 'national security', 'public order', 'prevention of crime', 'protection of public health and morality' or 'protection of rights and freedoms of the others'. The arrangement mentions that there must be a 'judge's decision' duly took into effect. However, in case of a delay having an unfavorable effect, a written order of an authority authorized by law is required.<sup>44</sup>

Before the amendment, there was an exception concerning the right to privacy and the respect of this right. The exception was reserving prosecution and judicial inquiry<sup>45</sup>, but the 2001 amendment abolished this exception.<sup>46</sup> Moreover, before the amendment, the order of an authority authorized by law was the only requirement. According to the new version of the article, the order shall be submitted for a judge's approval within 24 hours. The judge shall

40 Birsen Gökçe, "2001 Yılında Yapılan Anayasa Değişikliklerinin Sosyal, Ekonomik ve Siyasal Yönden Değerlendirilmesi", <http://www.anayasa.gov.tr>, 22 November 2007.

41 Oder, pp. 87.

42 Birsen Gökçe, "2001 Yılında Yapılan Anayasa Değişikliklerinin Sosyal, Ekonomik ve Siyasal Yönden Değerlendirilmesi", <http://www.anayasa.gov.tr>, 22 November 2007.

43 Oder, pp. 87; Yüzbaşıoğlu, pp. 34.

44 See, The Constitution of the Republic of Turkey, Article 20/2.

45 See the previous text of Article 20/1 of the Constitution.

46 See, The Constitution of the Republic of Turkey, Article 20/1.

pronounce the judgment within 48 hours; otherwise, the seizure shall be automatically invalid.<sup>47</sup> This arrangement provides the exercising of rights without delay and hence more effectively.

#### **D. Freedom of Association and Freedom of Assembly and Demonstration**

Turkey has made progress regarding freedom of association and freedom of assembly and demonstration since the 1995, 1999 and 2001 Constitutional amendments.<sup>48</sup> The current provision has specific restriction grounds as ‘national security’, ‘public order’, ‘preventing crimes’, ‘public health and morals’ and ‘protection of freedoms of others’. This arrangement is compatible not only with the amendment regarding the abolition of restriction with general reasons but also with the guarantee of exercising the freedom of association, freedom of assembly and demonstration.<sup>49</sup>

The previous amendment stated that associations, foundations, trade unions and public professional organizations shall not exercise the freedom of assembly and demonstration beyond their subject or purpose.<sup>50</sup> The 2001 amendment abolished this prohibition<sup>51</sup> in consistent with the European standards. Moreover, the freedom of assembly and demonstration is related to the freedom of thought<sup>52</sup>, so the protection of this freedom is critically important for a democratic and secular Republic.

Moreover, before the amendment, association memberships and resignations were not arranged as a constitutional guarantee.<sup>53</sup> The new version provides everyone with the right to form associations, affiliations with associations and resignations.<sup>54</sup> The word “everyone” in the provision includes legal persons. Hence, legal persons can also form associations as well as affiliation with associations.<sup>55</sup> Within the framework of this amendment, democratic and participant perception shall improve during the EU adaptation

47 See, The Constitution of the Republic of Turkey, Article 20/2.

48 Tanör, Yüzbaşıoğlu, pp. 34.

49 Oder, pp. 90; Yüzbaşıoğlu, pp. 37.

50 See the previous text of Article 35/5 of the Constitution.

51 See The Constitution of the Republic of Turkey, Article 34.

52 Duman İ. H., *Anayasa Sözlüğü*, Kartal, 19946 pp. 565, indorser, İzgi, Gören, pp. 368.

53 See the previous text of Article 33/1 of the Constitution.

54 See, The Constitution of the Republic of Turkey, Article 33/1; Yılmaz Aliefendioğlu, “2001 Yılı Anayasa Değişikliklerinin Temel Hak ve Özgürlüklerin Sınırlandırılmasında Getirdiği Yeni Boyut”, <http://www.anayasa.gov.tr>, 22 November 2007.

55 See the legal ground of Article 33 of the Constitution.

process and provide the effective guarantee for individuals' rights and freedoms.

### **E. Fair Trial**

Article 36 of the Constitution provided that everyone has the right of litigation either as a plaintiff or a defendant through lawful means and processes. As provided in the previous provision, there is a guarantee only concerning claim and defend rights.<sup>56</sup>

In the 2001 Amendment package, the provision was amended in conformity with the European Convention on Human Rights.<sup>57</sup> As a matter of fact, the principle of "fair trial" was added into the provision. Thereby, it provides everyone the right of fair trial in addition to the right of litigation.<sup>58</sup>

The right of fair trial requires open trials, independent and neutral courts and judges, equitable trials, and reasoned decisions.<sup>59</sup> Hence, the amendment is a positive step for protecting fundamental rights and freedoms. It shall provide the guarantee of duly exercising rights in a democratic and secular Republic.

## **IV. 2004 Constitutional Amendment Package**

### **A. Abolition of the Death Penalty**

In accordance with Article 38 in the 2002 constitutional amendments, the death penalty shall not be inflicted except in times of war, imminent threat of war and terrorist crimes.<sup>60</sup> This arrangement took place in the provision in compliance with Protocol No. 6 to the European Convention on Human Rights. Moreover, in conformity with Protocol No. 4 to the European Convention on Human Rights<sup>61</sup>, it is added that restriction of freedoms shall not be imposed by reason of contractual obligation.<sup>62</sup> Within the

56 See the previous text of Article 36/1 of the Constitution.

57 The new version is compatible with Article 6 of the European Convention on Human Rights, Yılmaz Aliefendioğlu, "2001 Yılı Anayasa Değişikliklerinin Temel Hak ve Özgürlüklerin Sınırlanmasında Getirdiği Yeni Boyut", <http://www.anayasa.gov.tr>, 22 November 2007.

58 See, The Constitution of the Republic of Turkey, Article 36/1.

59 Y. Zabunoğlu, "Adil Yargılanma Hakkı ve İdari Yargı", *Yargı Reformu 2000 Sempozyumu*, İzmir Barosu, pp. 314 et seq., indorser, İzgi, Gören, pp. 417.

60 "Anayasa Değişikliği (Görüşme Süreci)", <http://www.belgenet.com>, 21 March 2007.

61 Article 1 of Protocol No. 4 to the European Convention on Human Rights states not to divest of a right by reason of contractual obligation, Necmi Yüzbaşıoğlu, *Anayasa Hukukunun Temel Metinleri*, ed. 3, İstanbul, Beta, 2005, pp. 257.

62 Preamble of Article 38, İzgi, Gören, pp. 428.

framework of the amendments, the arrangements to limit the death penalty had been regarded by the world as a positive and necessary step for Turkey to be part of the European Union.<sup>63</sup>

Protocol No. 6 to the European Convention on Human Rights regarding the abolition of death penalty was signed by Turkey in 2003. Turkey also ratified Protocol No. 13 to the Convention in 2004. Under these developments, death penalty was completely abolished on the 22<sup>nd</sup> of May, 2004. In addition, the expression of 'death penalty' was removed from the Constitution through the amendments of related provisions and completely abolished under all circumstances. Thereby, the right to live shall be guaranteed.<sup>64</sup>

### **B. Priority of International Treaties**

Within the context of the 2004 constitutional amendment package, Article 90 concerning approval of international treaties was amended and a sentence was added to the last paragraph.<sup>65</sup> As stated in the last paragraph, "In the event of dispute between national laws and international treaties relating to fundamental rights and freedoms duly put into force, by reason of differences in provisions on the same matter, the provisions of international treaties shall prevail".

The Court of Appeal and the Council of State has already applied the provisions of the European Convention on Human Rights and the other international treaties on human rights. Especially in most of the recent judgments, the Court of Appeal has directly applied the international treaties on human rights. That means the amendment put Turkey's case law into writing for this issue.<sup>66</sup>

Within the meaning of this amendment, the courts rendering judgments have an obligation to take into consideration and apply these treaties' provisions.<sup>67</sup> So, this arrangement is also to be

63 "Turkey Moves to Limit Death Penalty, Part of Bid to Join Europe", <http://www.select.nytimes.com>, 10 April 2007.

64 Erdener Yurtcan, *Uyum Yasaları 2001&2004, Anayasa Değişiklikleri*, İstanbul, Kazancı, 2004, pp. 356, 357; "Turkey-Abolitionist", <http://www.handsoffcain.info>, 10 April 2007; Zafer Üskül, "Latest Constitutional Amendments Are Positive", <http://www.bianet.org>, 10 April 2004.

65 The last paragraph of Article 90 arranged that international treaties duly put into force have statutory effect. These treaties shall not be appealed to the Constitutional Court, on the ground of unconstitutionality.

66 Tanör, Yüzbaşıoğlu, pp. 472.

67 Tülay Tuğcu, "The Place of the European Convention on Human Rights in Turkey", On the Occasion of the New Judicial Year of the European Court of Human Rights, Strasbourg, 20 January 2006, pp. 5.

accepted as an effective step to guarantee the exercising of the fundamental rights and freedoms. In order to prevent complications in the implementation process, it is believed that under this amendment the harmonization of the Turkish Constitution's provisions and the supranational human rights law is needed.<sup>68</sup>

## **V. Conclusions**

The 2001 amendments were the most comprehensive amendments in the Turkish Constitution. In fact, the arrangement concerning restriction was made compatible with the European Convention on Human Rights and other international treaties on human rights. It shall provide an effective step to guarantee the exercising and protection of fundamental rights and freedoms.

The amendments should also take into account the arrangements regarding the abolition of the death penalty and the priority of international treaties. Moreover, all of these developments reflect the efforts of Turkey in making progress toward the European Union adaptation process.

Consequently, the 2001 amendments were a forward step in becoming consistent with the European Union standards. It was based on the requirements concerning a democratic and secular Republic and society's expectations. However, Turkey should continue to make efforts to fulfill the requirements of democracy and harmonize the related arrangements with the European Union.

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68 Zafer Üskül, "Latest Constitutional Amendments Are Positive", <http://www.bianet.org>, 10 April 2004; Tanör, Yüzbaşıoğlu, pp. 475.



## Droit Privé

