

**DEMOCRATIC OPENING: LAW AND JUSTICE IN THE KURDISH ISSUE\***  
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Turkey has been tackling with the Kurdish issue since the foundation of the Republican regime. Efforts to resolve this issue, which was predominantly marked by armed conflict in the last 25 years, always focused on public order oriented policies. However, such policies further complicated the matter let alone resolving it. When it was understood that the Kurdish issue cannot be resolved through merely a security oriented approach, the political government embarked on a process of seeking other solutions. The process that we are currently debating and which was referred to initially as the “Kurdish Opening” and later as the “Democratic Opening” should be assessed in this perspective. This is a valuable and significant process as it launches among wide segments of the society a debate on the legal, freedom and justice dimension of the issue.

It is possible to assert that the Kurdish issue has two dimensions. It is, on one hand, an issue of democracy, and an issue of justice, on the other. Therefore, all efforts to seek a solution should aim at reinforcing democracy and providing justice for all. In order to reinforce democracy and eliminate injustices, however, there are issues to be taken up in priority in both the constitutional and legal platform:

**CONSTITUTIONAL PRIORITIES IN THE KURDISH ISSUE**

Kurdish issue stems, above all, from Kurds’ deprivation of their fundamental democratic rights. In that respect, it is primarily an issue of democracy. If the Kurdish issue has resulted from lack of democracy, then in order to resolve this issue democracy should be upheld with all its institutions and values. In this respect, it is evident that a new constitution, which takes equality and freedom as a basis, prioritises a democratic approach, upholds rule of law for all and accepts different cultures, will largely facilitate a solution. In a new Constitution upholding these principles; regulations to be made in the preamble and in the field of cultural rights including education in the mother tongue, citizenship, political participation and local administrations will pave the way for a settlement.

An analysis of different Kurdish circles’ demands in Turkey reveals mainly three important demands at the constitutional level; namely, recognition and safeguarding of education in Kurdish mother tongue in the Constitution, amendment of the definition of citizenship based on the “Turkish” ethnic identity and its replacement with a constitutional citizenship understanding that stands at an equal distance to all ethnic identities, and the empowerment of local administrations. To meet these demands, there is need for a framework for settlement that takes democracy as a basis.

Such a settlement framework needs to be based on five principles: (1) rejection of ethnic partiality, (2) recognition of cultural diversity, (3) cultural rights, (4) administrative decentralisation, (5) strengthening of democratic participation.<sup>1</sup> Only a constitution that is built on the understanding of a constitutional citizenship can respond to the settlement framework.

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<sup>1</sup> Mustafa Erdoğan, A framework for a Democratic Solution, Star Daily, 29.08.2009

In constitutional citizenship, it is not any ethnic or religious value that ensures the citizens' allegiance to the State, but the democratic and civil rights that are enshrined in the constitution. Hence, starting from its preamble a constitution upholding constitutional citizenship should be purged of all articles making reference to ethnicity and identity, and respect for different cultures in the society should be embedded in every line of the constitution.

**Preamble:** Constitutions represent, as a whole, a wide series of political values and ideals. These values, which stand as an expression of national ideals, are usually enshrined in the preambles of constitutions. Depending on the political regime of a country, such ideals may vary from the enforcement of democracy, freedom or a welfare state; to socialism, federalism or a religious faith (in Islam).<sup>2</sup> In that respect, the preamble of a Constitution upholding constitutional citizenship should remain committed to the spirit of this understanding, should exclude ethnic or religious references, should contain expressions that recognise, protect and safeguard the multi-cultural aspect of the society and should accept them as richness.

**Citizenship:** In the constitutions of the Turkish Republic, citizenship has been drafted in a nationalist perspective that does not reconcile with the pluralistic structure of the society. The definition of citizenship takes as a basis the expression "Turk" which is an ethnic identity and "excludes" various segments of the society rather than being "inclusive". Today, this understanding of citizenship constitutes one of the biggest obstacles to social stability. Therefore, a constitution targeting the peaceful co-habitation of individuals forming the society should foresee –above all- an alteration of this citizenship understanding and should regulate a constitutional citizenship.

Constitutional citizenship has two fundamental characteristics: First of all, it forbids public authorities from pursuing either explicitly or implicitly policies that wipe out differences and assimilate them. In this approach, citizenship is not construed as an instrument homogenizing the society; on the contrary, it becomes a protective shield that legally safeguards differences. In that respect, it lays the foundations of democratic politics. For, it paves the way for the constitutional safeguarding of civil and political rights of individuals, the recognition of their rights relating to their identities, and a democratic debate of their internal problems without resorting to violence.

The second characteristic of constitutional citizenship is that; the definition of citizenship is free from all sorts of ethnic, religious or cultural connotations. In constitutional citizenship, citizenship is not attributed to any ethnic, religious or cultural identity and as a natural outcome of this situation; it does not privilege someone/some people over the other/others in a pluralistic society where there are differences. In this understanding, the constitution contains pluralistic values and stands at an equal distance to the groups forming the society; thus, all differences are safeguarded in the constitution and the path is cleared for them to sustain and develop their existence.<sup>3</sup>

The definition of "Constitutional Citizenship" does not necessarily need to indicate in the constitution who a citizen is. Instead, it can state that constitutional citizenship is a right and the acquisition or forfeiture of this right will be regulated in a code, that no one can be arbitrarily deprived of citizenship, and that citizens cannot be deported or prohibited from entering the country. In that respect, in the constitution the article concerning citizenship can be regulated in this manner: "Citizenship is a fundamental

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<sup>2</sup> Andrew Heywood, *Politics*, Liberte Publications, 2006, p. 427-428.

<sup>3</sup> Çoşkun, *Constitutional Citizenship*, p.146

right. No religious, linguistic, racial, ethnic or similar other discrimination shall be made in the holding, exercise and forfeiture of this right. The principles governing the acquisition of citizenship right shall be regulated in a code.”<sup>4</sup>

**Cultural Diversity and Cultural Values:** It is imperative that cultural diversity is recognised, first of all, in the preamble of the constitution. Contemporary constitutions contain provisions on this matter. As an example, the draft EU Constitutions contains the provision that the “Union respects cultural, linguistic and religious diversity”, and Article 27 of the Canadian Rights and Freedoms Charter states the following; “The Charter shall be interpreted in a manner that is consistent with the preservation and enhancement of the multicultural heritage of the Canadians”. However, the recognition of cultural diversity in the constitution is not sufficient *per se*. In addition to that, cultural rights should also be safeguarded.<sup>5</sup>

Among those cultural rights, the forth-coming one is education in the mother tongue. A democratic constitution should state explicitly and without room for any hesitation that everyone is entitled to the right to education in the mother tongue. This right should apply to the entire education cycle.

Political Participation; can be made possible by opening democratic mechanisms to the use of all and by abolishing the structures that will undermine the decision-making process.

Although the current constitution enshrines the principle of “justice in representation”, it however triggers a serious problem of representation in the country as a whole and in the densely Kurdish populated areas in particular, due to the existing 10% election threshold. If the voters of a political party that has garnered millions of votes cannot send a representative to the parliament due to the election threshold, then they will feel aggrieved and not represented in the system. When faced with the reality that they are not being represented by the persons for whom they voted and by whom they wanted their demands to be conveyed to the parliament, they will no longer trust the problem-solving function of politics and will lose confidence. This, in turn, will corrode the democratic structure in the long term.<sup>6</sup> For that reason, lifting of the election threshold is the best option for a democratic political participation.

**Empowerment of Local Administrations:** Turkey is one of the most centralised countries of the world. This strictly centralised structure has turned the current relationship between the central government and local administrations into a relationship based on inequality and dependence that functions to the disadvantage of local administrations. Such a relation prevents, on one hand, the rendering of public services to the local people in an appropriate manner and obstructs the communication of local people’s demands to the central authority, on the other. As a result, people feel that the democratic willpower is being fully disregarded, consequently; they have less confidence in the state/government and their sense of belonging is weakened. Turkey needs a much more decentralised and democratic administrative structure in order to redress such weaknesses. This condition can also be met by devolution of enhanced powers to local administrations in the field of law enforcement, health and education and by equipping them with increased financial resources. Actually, the Constitution proposal adopted and made public by the Board of the Turkish Union of Bar Associations advocates with strong justifications that

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<sup>4</sup> Çoşkun, Constitutional Citizenship, p. 151.

<sup>5</sup> Erdoğan, a.g.m.

<sup>6</sup> For the problems stemming from the 10% threshold pls see Vahap Çoşkun; The Barrier to Democratic Demands:10%, Mavi terazi, Issue 3, January-February 2007.

there should be a regional administration in the administrative structure of Turkey.<sup>7</sup> It is widely accepted that legally and financially empowered local/regional administrations can also contribute to the strengthening of a democracy as they will create further alternatives for the solution of people's problems at local level and within democratic processes.

If a new Constitution contains provisions that recognise and safeguard differences according to the principle of constitutional citizenship alongside environmental, economic, social rights and etc., then Turkey will have achieved important progress in the settlement of the Kurdish issue.

## **REALITY AND JUSTICE IN THE KURDISH ISSUE:**

The institutions and rules that emerged with the 12 September 1980 military coup and after 1984, the year in which armed clashes began, led to an unprecedented injustice in the Kurdish issue beyond the current injustices. The actions to be taken so as to remedy these injustices can be summarised under the below headings:

**1. The system of Temporary Village Guards** has been put in place by amending Article 74 of the Village Code No: 442 through Code No: 3715 dated 26.03.1985; with the aim of ensuring life and property security of citizens residing in areas that are not easily accessible by the security forces or where security forces fail to provide sufficient physical protection.

According to the paragraph added to article 74 of the said code through Article 1 of Code No: 3175 dated 26.03.1985; "If there are serious indications of circumstances requiring state of emergency or acts of violence in villages or their surrounding, or if attacks on villagers' life and property increases, then temporary village guards may be employed in provinces to be determined by the Council of Ministers, upon the proposal of the Governor and the approval of the Minister of Interior."

As per this amendment, Temporary Village Guard System began to be implemented in 1985 in the Eastern and South-eastern Anatolia region under the Cabinet decision dated 27 June 1985 and no. 9632. Under the scope of the Temporary Village Guard System which currently applies to 22 provinces, there are in total 58.511 temporary village guards with 5.274 village guards in Diyarbakır, 6.835 in Şırnak, 2.943 in Batman, 2.533 in Bingöl, 3.796 in Bitlis, 3,360 in Mardin, 1.918 in Muş, 4.680 in Siirt, 7.365 in Van, 7.643 in Hakkari, 386 in Tunceli, 1.510 in Adıyaman, 1.881 in Ağrı, 96 in Ardahan, 2.115 in Elazığ, 565 in Gaziantep, 374 in Iğdır, 2.267 in Kahramanmaraş, 578 in Kars, 34 in Kilis, 1.392 in Malatya, 966 in Şanlıurfa<sup>8</sup>. This number has reached 71.907 by 20.03.2009<sup>9</sup>.

The offences committed by the village guards and the number of those who have been dismissed due to those offences amount to some thousands<sup>10</sup>. Finally, the acts

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<sup>7</sup> The Constitution proposal of the Turkish Union of Bar Associations, II. Edition. 2001, TBB publications No:14. p. 79-80.

<sup>8</sup> For further information, see M. Sezgin Tanrıkulu – Serdar Yavuz, İnsan Hakları Açısından Olağanüstü Hal'in Bilânçosu, Sosyal Bilimler Araştırma Dergisi, (The Toll of State of Emergency as regards Human Rights, Journal of Social Sciences Studies) September 2005, Issue 6, Page 493-521.

<sup>9</sup> The response dated 20.03.2009 and no. 532.02-294 of the Interior Ministry to the parliamentary question.

<sup>10</sup> According to the "Special Report on the Human Rights Violations by Village Guards during the period January 1999 – March 2009" dated 08.05.2009 of HRA, temporary village guards have committed in total 1613 human rights violations during the period January 1999 – March 2009, among which 38 acts of burning villages, 14 acts of village evacuation, 12 acts of harassment and rape, 22 acts of kidnapping, 294 armed assaults, 183 killings, 259 acts of causing injury, 2 people missing, 50

which happened in **Zangirt (Bilge)** village and which amount to massacre appalling the entire society have been perpetrated by village guards and the weapons used are those allotted for them. It is unimpeachable that such security services must be provided by the actual civil servants of the state in States governed by the rule of law. Therefore, the step which must be accorded priority must be putting an end –through a legislative amendment- to the village guard system which was set up due to the armed conflict aspect of the problem.

2. In this mainframe, one of the areas which is subject of extensive violations is far-reaching interventions in the **right to ownership of property** associated with the evacuated settlements. According to a report drafted in 1997 by an investigation committee of the TGNA, the number of settlements evacuated and ravaged in the region (villages, hamlets, and farms) is about 3428. Similarly, it has been found out that at least two million people have been subject to forced migration in these settlements and conflict zones<sup>11</sup>.

Turkey displayed its will for integration to the EU through the “National Program” penned as part of the Accession Partnership (AP) endorsed by the European Council; in this mainframe, “National Program for the Adoption of the European Union *Acquis*” adopted through the Cabinet decision dated 19 March 2001 and no. 2001/2129 was published in the Official Gazette of 24 March 2001 and became effective.

Turkey displayed its will – in its National program- for introducing a legislative amendment for compensating damages arising from fight against terror and thereby remedying the unjust treatments which occurred, and pledged to put this amendment into practise in 2004 in the National Program.

For this purpose, TGNA adopted, on 11.07.2004, the Code no. 5233 on Compensation of Damages Resulting from the Terror and Fight against Terror and this Code entered into force after being published in the Official Gazette dated 27.07.2004<sup>12</sup>. After the duration for application of the provisional article 1 of the Code expired on 25.07.2005, the Code no. 5442 was adopted on 28.12.2005 and deadline for filing application was extended until 03.01.2007<sup>13</sup>.

The Code no. 5666<sup>14</sup> which was adopted after the termination of this period extended the period for filing applications for another 1 year as from 30.05.2007, which is the date of entry into force of this code<sup>15</sup>. Through the Cabinet decision no. 2009/15347, the period for processing the applications filed under the Code was extended for one year as from the expiry of the periods extended through the Cabinet Decision dated 14.07.2008 and no. 2008/13935<sup>16</sup>.

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executions, 70 extortions, 562 acts of torture and maltreatment, 59 acts of custody, 9 acts of causing suicide, 17 acts of burning down woods.

<sup>11</sup> The report drafted by the TGNA “Committee for Investigating the Migration Problem and Evacuated Villages in the South-East” and submitted to the Presidency of the Parliament on 15.01.1998.

<sup>12</sup> Official Gazette; dated 27.07.2004 and No.25535.

<sup>13</sup> Official Gazette; dated 03.01.2006 and No.26042.

<sup>14</sup> Official Gazette; dated 30.05.2007 and No.26537.

<sup>15</sup> For further information, see İç Hukuk Yollarının Tüketilmesi Kuralı ve İHAS’ın 13. Maddesi Bağlamında “Etkili Başvuru Hakkı” Çerçevesinde Türkiye’de 5233 sayılı Yasa Uyarınca Oluşturulan Zarar Tespit Komisyonlarının Hukuki Yapısı, Hukuk ve Adalet Eleştirel Hukuk Dergisi, (The rule of exhaustion of domestic remedies and the legal structure of the Committees for Determination of Damages set up in Turkey under the Code 5233 in the mainframe of “Right to Effective Appeals” in connection with Article 13 of ECHR, Journal of Critical Law, Year 4, Issue 19, Spring 2007, p.233-261)

<sup>16</sup> Official Gazette; dated 03.09.2009 and No.27338.

The failure to finalize the outcomes of the applications despite five years past after the date the Code became effective indicates, on its own, that the compensatory nature of the Code has declined. For this reason, a new adjustment should be made to extend compensation in cash and in kind including moral damages.

3. The past quarter of a century in Turkey became stage to thousands of violations of rights which could be alternately considered as crime against humanity. One of the grave traumas sustained in this context is **murders with unknown assailants and missing persons**. Three powers of the State have displayed differing attitudes towards these violations of rights. The legislature set up investigation committees on different dates. These committees cited, in their reports, important findings and valuable proposals for measures to be taken for settlement. Governments have mostly protected institutions and individuals who committed these violations of rights instead of taking measures required for preventing violations; thereby they shared the responsibility of commission of violations as a policy. Judicial bodies, on the other hand, have deemed it adequate to conduct post-mortem, issue decisions of non-competence, non-prosecution and to drop cases filed due to statute of limitation<sup>17</sup>. In the Public Prosecutors' Offices, there are still thousands of investigation files pending the apprehension of the perpetrators.

Another difficulty is having access to evidence in connection with murders with unknown assailants and people missing. Accused people frequently wait for the statute of limitation foreseen in the Code to expire before they come up<sup>18</sup>.

In fact, it has been criticized that the exemption applicable for certain offences committed abroad and crime of genocide cited in the Article 76 of the TPC does not equally apply to crimes committed at home<sup>19</sup>.

The problem here is either the failure to identify perpetrators or failure to arrest the perpetrators identified. Concerning this problem related to the statute of limitation in court cases, a step must be taken to add an Article of exception in statute of limitation to the Article 66 of the TPC no. 5237 governing the statute of limitation in court cases. Indeed, files of murders with unknown assailants and of missing people committed before 01.06.2005 will be subject to statute of limitation within 15 years as per the Article 102/2 of the Turkish Penal Code no. 765, and files of those committed after the date of entry into force of the TPC no. 5237 within 25 years as per the Article 66/1-6 of the said Code.

4. **Truth commissions** are defined as bodies established in order to investigate the gross violations of human rights committed by the army or other State powers or armed opposition organizations in a given country. In other words, "truth commissions are investigation bodies set up in order to help the societies -which sustained grave political violence cases or civil war- to settle accounts with the past through a critical stance." Truth commissions are established mostly during a transitional period in a society or just after that. National truth commissions are

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□ Lawyer M. Sezgin Tanrikulu, Devlet Kayıtlarında JİTEM– Ergenekon (Yasama – Yürütme – Yargı), Gencil Hukuk, (JİTEM - Ergenekon in State registers (Legislative – Executive – Judiciary), Journal of Current Law - March-2009, Issue: 3/63.

<sup>18</sup> One of the latest similar examples is the arrival of Mehmet Şener, one of the people accused of Abdi İpekçi murder, to Turkey after 30 years. "Karanlıkta Kalan Sorular", Belma Akçura, Milliyet, 19.08.2009.

<sup>19</sup> Artuk-Gökçen-Yenidünya, TCK Şerhi, Issue 2, Page 1722, Turhan Publishing House, Ankara, 2009.

established and supported mostly by the executive body and rarely by the legislature of the state<sup>20</sup>.

If the incidents sustained are considered from this point of view, the conflict aspect of the issue which led to a devastation-trauma which approaches to the extent of an internal conflict can be thoroughly handled only along with truth commissions independently from/in connection with this issue. Before any legislative amendment; given that parliamentary investigation committees set up under the Article 98/2 of the Constitution are assigned solely with conducting inquiries into a certain issue; TGNA should take a position to establish commissions which will be composed of experts from within and outside the legislative organ and which will be solely in charge of investigating and unveiling the truth as well as submitting proposals to render justice.

**5. Diyarbakır prison** became the symbol of persecution after 1980. Although this persecution culminated in torture of thousands and death of dozens of prisoners between the period 1980 – 1984, this prison has always been gruesome in terms of violations of human rights. As such, it has been cited among the worst prisons in the world. The judiciary has not yet shed light on the incidents of death of 10 remands and convicts and grave injury sustained by 23 remands and convicts on 24 September 1996. It has always been noted by different segments of society that the incidents which occurred in that prison caused the onset of armed conflict process which is still going on.

Among the first compensatory steps to be taken throughout the democratic opening process is doubtlessly putting an end to this function of Diyarbakır prison. However, this step must be taken not due to an urban function but *per se* due to the mentioned nature of this prison. By taking onboard the calls in this direction, Diyarbakır prison should be turned into a human rights museum to house many functions under its roof<sup>21</sup>.

**6.** Another step that should be taken along with the democratic opening is a legislative amendment concerning political crimes and for peace and reconciliation in way to span ongoing trials and finalized convictions as well. The practises have clearly shown that amendments dubbed as codes of “repentance” and implemented so far did not contribute to the settlement of the problem. The provision governing “effective repentance” cited in the Article 221 of the TPC no. 5237 falls short of the requirements of a durable settlement. As the word “amnesty” is not a concept to unblock this process, a legislative amendment to be called “the Code for Equal and Free Participation in Political and Social Life” -which will remove all the consequences of political crimes- should be taken up at the end of this process which may take another a few years<sup>22</sup>.

**7. The trial of children**, who are arrested, detained and punished on charges of attending meetings and demonstrations, causes deep fractures in the society as a whole and these unjust practises are widely questioned by the public opinion. The

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<sup>20</sup> For further information see Prof. Dr. Mithat Sancar, Geçmişle Hesaplaşma (Settling with the Past), İletişim Publications, 1st Edition, 2007.

<sup>21</sup> Diyarbakır’a İnsan Hakları Müzesi (Human Rights Museum for Diyarbakır), Diyarbakır Cezaevi Gerçekleri Araştırma ve Adalet Komisyonu (Commission for Diyarbakır Prison, Investigating the Truth and Justice), Radikal İki, 13.09.2009, No: 674.

<sup>22</sup> Attorney.M.Sezgin Tanrıku, “Türkiye Modelini Arıyor”( Turkey Searching for Its Model), series of articles Milliyet, 06.08.2009.

<sup>23</sup> **Bill Amending the Anti-terror Code introduced on 12.02.2009.**

first step here should be to propose solutions without confronting the children with the judiciary. The practises sustained by the children who are confronted with the judiciary and its related bodies in any way are almost irrevocable. The action which should be initially taken before other amendments is to ensure that the bill which was submitted to the TGNA presidency and which foresees amending the Article 9 and 13 of the Anti-Terror Code becomes a code<sup>23</sup>.

## LEGISLATIVE PRIORITIES IN THE KURDISH ISSUE

In addition to mechanisms and arrangements to remedy grievances, legislative arrangements that will contribute in the settlement of the issue should also be taken up as a priority.

**8. Freedom of Expression;** The decisions of the judiciary have very clearly manifested the impacts of negative amendments on freedom of expression introduced to TPC no: 5237 that was put into effect on June 1, 2005. The Diyarbakır Bar has stated through its views, criticism and recommendations put forth prior to the adoption of TPC, that Articles 215, 216, 220/8, 288, 301 and 305 should not be adopted in their current versions along with other negative aspects of the Law. The following views were shared with the public opinion;

“The draft bearing an ambiguous and abstract content, does not introduce any novelties to freedom of expression; it is in favour of a system that restricts freedom of thought and expression, attempts to recast political and societal opposition into a narrow frame and abolishes the pluralism principle of democracy; the current version of the draft sanctifies authority; it would pave the way for an atmosphere prone to subjective assessments of enforcement bodies for the definition of crime has not been made clearly which would evidently yield new problems in terms of freedom of thought-expression.”<sup>24</sup>.

Although TPC Article 301 - which led to trials and sentences regarding freedom of expression that were also reflected to the public opinion - have been amended later on<sup>25</sup>, the real problems in the Kurdish issue stem from the abovementioned arrangements in the TPC in addition to Article 301 and the restricting arrangements in Article 7/2.

Freedom of expression should have priority in terms of the legislative arrangements of democratic opening because there are hundreds of sentences still being executed, as well as judicial decisions waiting to be upheld and trials still ongoing. Full freedom of expression is one of the major problems in the discussions on the settlement of the issue. Therefore in the context of democratic opening the priority action to be taken should be the reform of freedom of expression putting forward the consequences of the current implementation.

**9. Names in Kurdish:** The following second sentence in paragraph four Article 16 of the Population Act of 05.05.1972 with no:1587 “*However names which offend the public opinion or do not represent the national culture, moral values, traditions and customs may not be given. The born child shall bear his father’s surname whereas if the child is born out of wedlock he shall bear his mother’s surname.*” was amended through Article 5 of the “Law Amending Several Laws” with no: 4928 put into effect following its publication in the Official Gazette of 19.07.2003 with no: 25173, to read

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<sup>24</sup> Press release of Diyarbakır Bar dated 20.11. 2006 with no: 2006/1226.  
<sup>25</sup> Official Gazette; Date: 08.08.2008, No: 26870.

as follows; *“However names which offend the public opinion or do not represent moral values may not be given. The born child shall bear his father’s surname whereas if the child is born out of wedlock he shall bear his mother’s surname.”*

The Population Act no: 1587 was repealed through Article 71 of The Population Services Law no: 5490 published in the Official Gazette of 29.04.2006 with no: 26153. The abovementioned provision was not included in the Law no: 5490. Therefore there’s no prohibition in the legislation currently in effect, regarding the choice of names.

However we know that the names of thousands of people have not yet been recorded, and that their names known to their neighbourhood and those officially registered are different. Doubtlessly it is possible to launch a lawsuit to change the name however finding a solution without the need for the citizens to deal with the judiciary should be one of the priorities of democratic opening. Therefore a legislative amendment in the form of an additional provision to the Population Law should be introduced in order to facilitate those who are, for any reason, not able to use the names they want, to apply to directorates of birth registry, and change and register their names.

**10. Surname Act:** The way the Surname Act has been drafted is also problematic<sup>26</sup>. Taking into consideration the fact that it is not possible to take new surnames except for those recently admitted to citizenship, the problem is mostly observed in changing surnames through judicial bodies. According to the legislation currently in effect, any individual can apply to Courts in order to change his/her surname into a Turkish-origin name without any legal problems. Whereas the demands of individuals who apply to Courts in order to use a surname with a non-Turkish origin which does not bear any meaning contrary to public order, are rejected. Thus individuals with same legal status may be subjected to different procedures. The application of a Syriac citizen who applied to Midyat Court of First Instance in order to change his surname was found worth examination and the plea was taken to the Constitutional Court where the CC ruled to take up the claim of “constitutional violation” on the merits of the case.<sup>27</sup>

Therefore a new arrangement should be introduced in order to delete the phrase “foreign names of races and nations” in Article 3 of the Surname Act no: 2525 without waiting for the CC decision.

#### **11. Names of Villages:**

As a result of the amendment of Article 1 of the Law of 11.05.1959 with no: 7267 the following phrase has been added to the 2<sup>nd</sup> sub-paragraph under paragraph “d” of Article 2 of Provincial Administration Law no: 5442 put into effect following its promulgation in the official gazette of 18.06.1949 with no: 7236 which regulates the changing of non-Turkish names of villages; *“However; non-Turkish names which lead to ambiguity shall be changed as soon as possible by the Ministry of Interior following the consent of the relevant Provincial Standing Committee.”* Pursuant to this provision names of thousands of settlement units were changed in the last fifty years. Name, is one of the symbols of cultural heritage and cultural difference. In a democratic state governed by the rule of law these differences should be respected and preserved.

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<sup>26</sup> Official Gazette; Date: 02.07.1934, No: 2741.

<sup>27</sup> Application of Midyat Court of First Instance regarding objection through plea dated 10.06.2009 with no: 2009/71, is being discussed on the merits of the case on the basis of the Constitutional Court’s file with case no. 2009/47.

Respecting these differences, Diyarbakır Provincial Council had taken a decision to use the names of districts in Diyarbakır together with their previous names that were changed however this decision had been delivered to judicial bodies upon objection of Diyarbakır Governorate. The Council of State agreed that the Provincial Council was not entitled to decide on this matter thus upheld the decision of Diyarbakır Administrative Court which ruled to cancel Council's decision<sup>28</sup>.

With respect to this problem Article 2 of the Law no. 5442 should be amended. It should be ensured that the names of settlement units and other geographical locations changed after the adoption of law of 11.05.1959 with no: 7267 are used without the need for any specific demands.

**12. The letter problem:** Article 2 of the “Law on the Adoption and Application of Turkish Letters” with no: 1353 which regulates that it is imperative to adopt and process writings in Turkish letters in companies, societies and private organisations, and Article 4 of the same which regulates that newspapers, journals and books should be written and published in Turkish letters, are still in effect<sup>29</sup>.

Moreover, although the Law does not stipulate any sanctions Article 222 of TPC with no: 5237 foresees a penal sanction for any practices contrary to this law. It is a known fact that many lawsuits have been launched with respect to this provision some of which are still ongoing<sup>30</sup>.

Adding sounds that do not exist in Turkish into the Turkish alphabet is not the right action to be taken. The arrangements which prohibit the application of letters representing the letters which do not exist in Turkish should be abolished.<sup>31</sup>

### **13. “Kurdology Institute” and “Department of Kurdish Language and Literature”**

Establishment of **Kurdology Institutes and Departments of Kurdish language and Literature** at universities have been once again delivered to the agenda with the democratic opening in connection with the Kurdish issue.

There are Institutes and Departments on various societies and their languages from Far Eastern to Western countries at the universities. In most of the countries where Kurds live, other than Turkey, such institutions are available and for the Kurds living in Federal State of Iraq a senior level of institutionalisation and training opportunities have been provided. In a democratic Turkey these institutions would contribute in the development of a pluralistic democratic culture and societal peace. Integration of

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<sup>28</sup> Judgement of 8<sup>th</sup> Chamber of Council of State, dated 10.06.2009 with case no. 2007/8635 decision no.2009/4200.

<sup>29</sup> Article 2 of the “Law on the Adoption and Application of Turkish Letters” with no: 1353 published in the Official Gazette of 03.11.1928 with no: 1030: “Communication of any kind in all governmental offices and institutions and companies, associations and private communities shall be with Turkish letters”. Article 4: “Applications written in Arabic letters shall be accepted until the beginning of June 1929. As from the beginning of February 1928 all private and official news, statements, declarations, cinema advertisement and all newspapers, publications and periodicals shall be published in Turkish”.

<sup>30</sup> Indictment issued by Diyarbakır Public Prosecutor’s Office with regards to the diary published by Diyarbakır Bar in Turkish and Kurdish and distributed to its members.

<sup>31</sup> Attorney M. Sezgin Tanrikulu, TRT 6 ve Kürtçeyi Kullanma Hakkı (TRT 6 and Right to Use Kurdish), Radikal Daily, 15 January 2009.

Kurds into a pluralistic democratic culture would be possible though active operation of such institutions.

If preparations are launched for the establishment of Kurdology Institutes and Departments of Kurdish language and Literature, misunderstandings in Turkey with regards to this matter would be eliminated. Studies on Kurdish language, history, literature, ethnography and in general Kurdish culture and sociological heritage would not only contribute in developing a better dialogue with other Turkish citizens living in Turkey but also reinforce the feeling of belonging among citizens of Kurdish origin<sup>32</sup>.

Contrary to what is commonly known, there's no legislative barrier before the establishment of the said institutes and departments at universities.<sup>33</sup>

Thus application filed by Mardin Artuklu Institute on this matter to YÖK has been accepted after the name and composition of institution has been changed into "Institute of Living Languages". This decision which does not respond to the request of the applicant university reveals that despite the absence of a legislative barrier there's a strong resistance to it. Therefore this matter should also be regulated in the short term.

**14.** An addition has been made to Paragraph 1 of article 4 of Law no 3984 on "Law on the Establishment of Radio and Television Enterprises and their Broadcasts", which reads: *"Radio, television and data broadcasts shall be conducted within a spirit of public service, in compliance with the supremacy of law, the general principles of the Constitution, fundamental rights and freedom, national security and general moral values. The broadcasts shall be in Turkish language. However, there may also be broadcasts for the purpose of teaching foreign languages, which may have contribution to the formation of universal culture and scientific works, or [for the purpose of] transmitting music or news in those languages."*; and through article 8 of Law no 4771 entitled "Law amending Certain laws" published on 09.08.2002 in the Official Gazette no 24841, which reads: *"Furthermore, there may be broadcasts in the different languages and dialects used traditionally by Turkish citizens in their daily lives. Such broadcasts shall not contradict the fundamental principles of the Turkish Republic enshrined in the Constitution and the indivisible integrity of the state with its territory and nation. The principles and procedures governing these broadcasts as well as their supervision shall be laid down through a regulation to be issued by the Supreme Board [RTÜK]."*

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<sup>32</sup> Decision of Board of Directors of Diyarbakır Bar dated 10.09.2008 with no: 2008/283 and press release of Diyarbakır Bar Assoc. dated 15.10.2008 with no: 2008/1360.

<sup>33</sup> **Additional Article 30 of the Law on the Organisation of Higher Education Institutions no: 2809;** "The Council of Ministers shall be entitled to establish, combine, close down faculties, institutes and colleges attached to universities or change the names of the same upon the proposal of YÖK and MoNE; the cadres, immovables and inventory stocks belonging to the units whose universities are changed shall be transferred to the universities they are attached to without the need for further procedures." According to Article 11 of the heading "Institutes" under the Regulation on Academic Organisation at Universities; "Institutes established at universities and faculties, are units which provide post-graduate studies and carry out scientific research and applications in multiple disciplines that are similar and relevant, and they shall be established pursuant to laws. Institutes shall be composed of several departments. Post-graduate studies at universities shall be organized by institutes that are established for this purpose." According to Article 16 "Departments and Art Departments" of Regulation on Academic Organisation at Universities; "Department and Art Department" is an academic unit where education-training is carried out in at least one branch of science or arts. YÖK shall decide about establishing, abolishing or consolidating departments either directly or on the basis of proposals from universities."

Nevertheless the regulation published by RTÜK following this law, has rendered impossible to make broadcasts although it infringes the said law.<sup>34</sup>

With the aforementioned Regulation, the right to broadcast has been granted exclusively to TRT, even though it has not been enshrined in the law. Besides, the content and the length of the broadcasts have also been limited. After this regulation became effective, TRT -stating that it is a separate, autonomous broadcasting corporation with a specific law of itself- filed a cancellation suit stating that RTÜK cannot assign such a duty to TRT through a regulation, and suspended the execution on its own record. However, the court case filed on the same issue by Diyarbakır Bar Association has been rejected on grounds of unauthorisation (lack of competence).<sup>35</sup>

Since the law has been rendered ineffective through a regulation and vis-à-vis TRT's resistance to broadcast, 4<sup>th</sup> sentence of paragraph 1 of article 4 of Law no 3984 amended through law no 4771 has been rearranged as the following pursuant to article 14 of Law no 4928 promulgated in the Official Gazette no 25173 of 19.07.2003: *"Furthermore, public and private radio and television enterprises can broadcast in languages and dialects used traditionally by Turkish citizens in their daily lives."*

Also following this legal arrangement, RTÜK issued another regulation, which limits the content and length of the broadcast as well as the nature/features of the broadcasting enterprises/institutions<sup>36</sup>.

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<sup>34</sup> Articles 4 and 5, and sub-articles 2, 3 and 6 entitled "Language of the Broadcasts" under the "Regulation concerning the Languages of Radio and Television Broadcasts" published in the Official Gazette no 24967 and dated 18 December 2002, reads as follows: "The main language of broadcasts is Turkish. In the broadcasts, it must be ensured that Turkish is used as a language of communication without distorting its characteristics and rules and that Turkish is promoted as a modern language of culture, education and science."

**Paragraph 2 of Article 5 entitled "Broadcasts in Languages and Dialects Traditionally used by Turkish Citizens in their Daily Lives" and demanded for cancellation reads: "Broadcasts in languages and dialects traditionally used by Turkish Citizens in their daily lives shall be conducted by Turkish Radio and Television [TRT]."**

**Paragraph 3 of article 5 of the said Regulation reads: "In these languages and dialects, broadcasts can be made for adults on news, music and culture in one or more than one language or dialects. Broadcasts can not be made to teach these languages and dialects."**

First sentence of paragraph 6 of article 5 of the Regulation reads: "Radio broadcasts in these languages and dialects cannot be longer than 45 minutes per day and total of 4 hours per week whereas TV broadcasts cannot be longer than 30 minutes per day and two hours per week."

<sup>35</sup> Council of State, General Assembly of Chambers of Administrative Cases Decision no 2004/13 of 15.01.2004 Merits no: 2003/511.

<sup>36</sup> **Articles 4, 5 and 6, and sub-article "Language of the Broadcasts" under Provisional article 1 of the "Regulation concerning Radio and Television Broadcasts in Languages and Dialects used traditionally by Turkish Citizens in their Daily Lives" published in the Official Gazette no 25357 and dated 25 January 2004, reads as follows: "The main language of broadcasts is Turkish. In the broadcasts, it must be ensured that Turkish is used as a language of communication without distorting its characteristics and rules and that Turkish is promoted as a modern language of culture, education and science. Exclusively no other broadcast can be done in language and dialects other than Turkish."**

**Paragraph 2 of article 5 entitled "Principles of broadcasts in the different languages and dialects traditionally used by Turkish citizens in their daily lives", which is sought for cancellation, encompasses the following provision: "In these languages and dialects, broadcasts can be made for adults on news, music and culture."; paragraph 3 of article 5 of the said Regulation reads: "No broadcasts can be made towards the teaching of these languages and dialects."; paragraph 4 of article 5 of the same Regulation reads: "Radio and television institutions that own a public and private national broadcasting license can broadcast in these languages and dialects, re-transmission broadcasts included; radio institutions shall not exceed 60 minutes per day and a total 5 hours per week, television institutions shall not exceed 45 minutes per day and a total of 4 hours per week." Sub-paragraph (a) of article 6 of the same Regulation with the title "Application" reads: "Public and private radio and television institutions shall make an application to RTUK along with the decision of their executive boards concerning the language(s) and/or dialect(s) and the types of programs they wish to broadcast as well as their positioning in the daily broadcasts and monthly and annual broadcasting plans". Provisional article 1 under Section 5 captioned "Miscellaneous" reads: "Till the viewer-listener profile of the different languages and dialects traditionally used by Turkish citizens in their daily lives is determined, only public and special national broadcasting institutions can broadcast in these languages and dialects."**

And following the publication of this regulation, since the broadcasting permissions of local and regional enterprises has been rendered conditional upon identification of viewer profiles, and since this research has not been conducted within almost five years since then, no developments have been observed in this area despite the legal arrangement.

What should be done in order for private broadcasting enterprises to broadcast at national, regional and local level in different languages and dialects is the abolition of this regulation, which is in violation of the Constitution and the laws.

**15. Law no 2954: “Radio and Television Law of Turkey”:** Along with its title, the provision enshrined in article entitled ‘Broadcasts related to the Turkish Grand National Assembly’ which reads: *“Turkish Radio and Television Corporation [TRT] shall transmit a summary of the general assembly meetings of the TGNA through the radio in a balanced and impartial manner. TRT may broadcast TGNA general assembly meetings live (inauguration, oath-taking ceremony etc.). In this regard, the Corporation shall be subject to the restrictions laid down in the TGNA bylaw.”* has been amended through article 6 of Law no 5767 of 11.06.2008 entitled ‘Law Amending the Radio and Television Law of Turkey and the Law on the Establishment of Radio and Television Enterprises and their Broadcasts’<sup>37</sup>.

With this legal arrangement, TRT as an institution has been granted the authorization to broadcast also in different languages and dialects other than Turkish. This [prospect], which had been possible in view of the legislation even before the amendment to TRT’s own law, could only be possible on 01.01.2009 with TRT ŞEŞ. However, there is no guarantee that this costly broadcast will continue on sustainable basis. In terms of sustainability, this amendment to the TRT Law should have been penned with such precision and clear expressions that it would be interpreted as a public service, not leaving any discretion to the TRT bureaucracy.

**16. Law no 2820: “Law on Political Parties”:** Article 43 of this law indicates that no languages other than Turkish shall be used orally or in writing; and articles such as the 81st which says *“[political parties] can not claim the presence of minorities based on the differences in national or religious culture or sect or race or language [in the territories of the Turkish Republic]; can not pursue a goal to destroy the integrity of the nation by means of protecting, developing or disseminating languages and cultures other than the Turkish language and culture, nor can they carry out any activities to this end; cannot use any language other than Turkish in the publication and broadcasting of their statutes and programs, in their congresses, in-door or out-door meetings, demonstrations and propaganda”* are still applicable<sup>38</sup>.

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<sup>37</sup> The new legal arrangement introduced through Article 21 of Law no 5767 published in the Official Gazette no 26918 of 26 June 2008 entitled “Turkish Grand National Assembly and Distant Education broadcasts and broadcasts of education and training purposes as well as other broadcasts” reads: “Turkish Radio and Television Corporation shall transmit a summary of the general assembly meetings of the TGNA through the radio in a balanced and impartial manner. Being one of the TV channels allocated to TRT, TRT 3 TGNA TV shall broadcast the activities of the Grand Assembly. The issue to what extent the activities of the TGNA will be broadcast shall be determined in a protocol to be concluded between the TGNA Presidency and DG of TRT. No fees shall be received from such broadcasts. Distant education broadcasts as well as other broadcasts with education or training purposes shall be transmitted through a TV channel allocated to and deemed appropriate by the TRT. The fees and other issues related to transmission shall be determined through a protocol to be concluded between DG of TRT and the relevant institutions. TRT can conduct broadcast in a language or dialect other than Turkish.”

<sup>38</sup> Political parties Law no 2820 promulgated in the Official Gazette no 18027 of 24.04.1983, “Article 43- Pre-candidates shall not make any commitments at a national, local or professional level other than those stated in the party program, decisions of the grand congress and authorized central organs

Apart from these issues, there are other arrangements of restrictive nature in the Political Parties Law. What is to be done is not amending merely these two articles but the Law in its entirety.

**17. Law no 298 on “Basic Provisions on Elections and Voter Registers”:** Article 58 of this law, which prohibits the use of languages other than Turkish in electioneering broadcasts on radio and television, and in other ways of electioneering, is still in effect<sup>39</sup>. In terms of this law as well, this provision, which has been null and void in a sense, should be abolished so as not to provide grounds for different practices.

**18. Law no 805 on “Mandatory use of Turkish language in Economic Enterprises”:** Article 1 of this law, which rules the extension of the mandatory use of Turkish language also to relations (transactions, contracts, and communications) among individuals, is still in effect<sup>40</sup>. It should also be taken into account that a holistic democratic opening should also cover this kind of legal arrangements that are still in effect and the implementation of which is/may be vague.

## **Conclusion;**

Efforts have been exerted to provide [the reader] with limited number of examples on what can be and what should be done within the framework of democratic opening. There is no doubt that this is a non-exhaustive list. What have been raised herein are proposals open to new contributions. The current dimension of the problem reveals that Turkey is very-well experienced in “doing the things that should not be done, and not doing those that should have been done”. In order for the democratic opening to be meaningful, it should be a non-hesitant democracy project accompanied by a will and determination to realize it. We should be able to realize peace and compromise through law and justice without diminishing hope and confidence in this regard.

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and the election statement of the party and shall not use a language other than Turkish orally or in writing.”, “[Article 81](#) –Political Parties: a) can not claim the presence of minorities based on the differences in national or religious culture or sect or race or language in the territories of the Turkish Republic. b) can not pursue a goal to destroy the integrity of the nation by means of protecting, developing or disseminating languages and cultures other than the Turkish language and culture, nor can they carry out any activities to this end. c) cannot use any language other than Turkish in the publication and broadcasting of their statutes and programs, in their congresses, in-door or out-door meetings, demonstrations and propaganda; they cannot use and distribute placards, signs, albums, audio and image recordings, brochures and declarations in languages other than Turkish; and cannot remain indifferent where such acts and actions are performed by others. However, they can translate their statute and programs to languages other than the ones prohibited by law.”

<sup>39</sup> Law no 298 on Basic Provisions on Elections and Voter Registers promulgated in the Official Gazette no 10796 of 02.05.1961, Article 58 - (Amended by article 1 of Law No. 2234 on 17.5.1979) It is forbidden to print Turkish flag and religious statements on handouts and all kinds of printed material used for electioneering purposes. It is forbidden to use any language other than Turkish in electioneering broadcasts on radio and television, and in other electioneering activities.

<sup>40</sup> Law no 805 on “Mandatory use of Turkish language in Economic Enterprises” promulgated in the Official Gazette no 353 of 22.04.1926, Article 1 – All kinds of companies and enterprises of Turkish origin shall keep their account books in Turkish and use Turkish in all their transactions, contracts, and correspondences within Turkey.” <http://www.mevzuat.adalet.gov.tr/html/405.html>