ADJUSTMENT TO EUROPEAN UNION: THE CASE OF JUDICIARY

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1. The material included in this thesis has not been submitted wholly or in part for any academic award or qualification other than that for which it is now submitted.

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July, 2009

ABSTRACT

Tuncay KAYAOĞLU ***July 2009***

Adjustment to European Union: The Case of Judiciary

The purpose of this thesis is to examine why Turkish judiciary is slow to adopt reforms made by Turkish governments in order to integrate into European Union. This thesis consists of four main chapters. In chapter one, I look into integration theories in general and their application to Turkey. In chapter two, I tell about the criteria that European Union wants for accession and Turkey's effort to meet those criteria. In chapter three, I talk about why Turkish judiciary is slow to adopt to European Union. In chapter four, I look into European Union's and other groups' criticism against Turkish judiciary.

Key words:

Turkish judiciary, European Union, Turkey, accession.

KISA ÖZET

Tuncay KAYAOĞLU ***Temmuz 2009***

Avrupa Birliği'ne Uyum: Türk Yargısı

Bu tezimde Türk yargısının Avrupa Birliği çerçevesinde çıkarılan yasalara neden uyum sağlamakta zorluk çektiğini anlamaya ve anlatmaya çalıştım. Tezin birinci bölümünde entegrasyon teorileri ve bu teoriler açısından Türkiye'nin durumunu ele aldım. İkinci bölümde Avrupa Birliği'nin istediği kriterler ve Türkiye'nin bu kriterleri karşılamak için attığı yasal adımlardan bahsettim. Üçüncü bölümde Türk yargısının sorunlarından bahsederken dördüncü bölümde de Türk yargısına yönelik diğer kurumların yaptıkları eleştirilerden bahsettim.

Anahtar Kelimeler

Türk yargısı, Avrupa Birliği, Türkiye, katılım.

LIST OF CONTENTS

LIST OF ABBREVIATIONS

AK PARTY	Adalet ve Kalkınma Partisi
ANAP	Anavatan Partisi
CAP	Common Agricultural Policy
CFSP	Common Foreign and Security Policy
CHP	Cumhuriyet Halk Partisi
DSP	Demokratik Sol Parti
ECSC	European Coal and Steel Community
ECHR	Europe Court of Human Rights
EEC	The European Economic Community
EMU	Economic and Monetary Union
EU	European Union
EURATOM	The European Atomic Energy Community
MHP	Milliyetçi Hareket Partisi
NATO	North Atlantic Treaty Organization
NSC	National Secuirty Courts
OECD	Organisation for Economic Co-operation and Development
PKK	Kurdistan Workers Party
RTÜK	The Radio and Television Supreme Council
SSC	State Security Courts
TESEV	Türkiye Ekonomik ve Sosyal Etüdler Vakfı
TCK	Turkish Penal Code
TMY	Anti-Terror Law
UK	United Kingdom

Table List

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INTRODUCTION

The judges in general are suspicious of international treaties when they are in conflict with domestic laws. This skepticism is evident in TESEV's research. Some interviewers considered government's willingness to follow its treaty obligations as actions of foreign law "interfering domestic affairs" and "limiting [Turkish] sovereignty". To a question whether judges and prosecutors take international human rights treaties which Turkey accepted in judicial decisions a majority 53 % of respondents answer negatively. A half of respondents 49 % think unfavorably about re-trails imposed as a result European Court of Human Rights decisions. A bigger portion, 63 %, of respondents was against government's signing additional European charters and human rights treaties.

The above anecdote illustrates Turkish judiciary establishment's anti-European Union position. This anti-European Union attitude of Turkish judiciary is surprising because in Republic history, since 1923 Turkish judiciary has been active in Turkish modernization, and became instrumental in early Republican government's adaptation of European codes, European style courts. However these early reforms implement a judicial culture and system compatible with the classical notion of sovereignty. The traditional notion of sovereignty, which sometimes called Westphalian sovereignty, accepts states are ultimate sources of judicial authority within their boundaries. The progress of European Union is based on "sharing sovereignty" which states share important aspects of their judicial authority with The European Union. With this, The European Union is challenging the traditional understanding of sovereignty and states and organizations that accepts the traditional understanding of sovereignty, like that of Turkish judiciary.

The new sovereignty of The European Union is compatible with that neofunctionalist theories envisioned. These theorists argued that cooperation on technical issues will eventually spillover non-technical issues like political, social and legal systems of member countries. As I develop later, The European Union's growing supranational legal authority demands members states to transfer legal

authority by accepting supremacy of European judicial bodies like The European Court of Justice and The European Court of Human Rights. Turkish judiciary finds these demands unacceptable. In this, Turkish judiciary seems to have an understanding of The European Union advocated by intergovernmentalist theories of European integration. Intergovernmentalism argues that states are building blocks of international organizations with their sovereign authority. These organizations should respect sovereignty of its member states. Intergovernmentalist suggests that The European Union in essence should not differ much from that The United Nations when it comes respecting domestic legal arrangements and sovereignty of its members. Intergovernmentalist subscribes the traditional notion of sovereignty and Turkish judiciary seems to have an understanding of The European Union compatible with intergovernmentalism.

The issue of sovereignty was not a major one for the most of Turkish membership process. For one thing, Turkish initial application dates back 1960s where European judicial bodies were weak and Turkish elite, including its judiciary did not perceive it as a threat to Turkish sovereignty. Also, since Turkish membership was slow The European Union's intrusive demands on Turkish judiciary and its reform became stronger since late 1990s. These demands reached its highest with Copenhagen Criteria. The criteria are the establishment of democracy and rule of law. But it includes some specific demands including the abolition of state security courts, establishment of family courts, major reorganizations of courts, harmonization of Turkish criminal, commercial, and civil laws with that European Union. As I develop later, European demands do not leave much room for Turkish judiciary avoid the implementation of these demands or interpretation of them into Turkish domestic context as the Turkish judiciary thinks it has the sovereign judicial authority to do so.

In addition to concerns about sovereignty, there have been other concerns of Turkish judiciary. I develop three major practical concerns of Turkish judiciary. Firstly, while always an important political force, aligning itself with the state establishment; Turkish judiciary became increasingly politicized with the AK Party's

coming to power in 2002. It sees itself as the guardian of principle of Turkish secularism against what they perceive religious and reactionary cadres of AK Party. Secondly, reflecting its commitment of to the traditional understanding of sovereignty, Turkish judiciary embraces a culture of state-centrism. In this state-centrism, they see themselves as agents of state, acting on behalf and in favor of the state rather than agent of people, acting on the behalf of people and in favor of people against state. Finally, subsequent Turkish constitutions which Turkish judiciary was central in their preparations under the military governments allocate significant powers to Turkish judiciary, enabling and securing its autonomy. Turkish judiciary sees The European Union's demands eroding its constitutional privileges.

I develop my explanation of Turkish judiciary's reluctance in implementing The European Union demands in four parts. First, I examine integration theories (neofunctionalism and intergovernmentalism) with an emphasis on their understanding of state sovereignty. Second, I describe the process of Turkish membership to The European Union both to provide a historical context and to illustrate The European Union's judicial demands with its Copenhagen Criteria. Third, I detail The European Union's specific demands for legal harmonization and which of these demands have been implemented by Turkish judiciary. Fourth, I elaborate the practical and political reasons underlying Turkish judiciary's reluctance in implementation of The European Union's legal demands. Fifth, I examine The European Union's reports on Turkish judiciary.

CHAPTER I

1. INTEGRATION

Dreamt by generation of European philosophers and contemporary scholars, there has been a tendency in Europe to unite around a high authority, if not a strong central government. In *United States of Europe*, Haas refers to this dream, "the ideal of a united Europe has been preached by Sully, Cruce, Penn, Saint Pierre, Rousseau and Kant as well as by Lamartine and Victor Hugo."[1] It is, however, nightmares that trigger the action to realize dreams. Haas captures this point when he argues that "It required an era of world wars to stimulate the development of large scale, organized movements advocating the establishment of a united Europe."[2] After the World War I, apart from intellectuals, European politicians began to think on European unity. After the World War II., this idea has increased its "legitimacy"[3]. The war for example moved even the staunch foes of the idea of united Europe, like that Britain. After the war, Prime Minister Winston Churchill called for "a federation of European states to promote harmonious relations between nations, economic cooperation, and a sense of European identity"[4]. In post-war period, the agreement for the need of united Europe was widespread: "never since the breakdown of the universal church and the universal empire has the six hundred years old ideal of a united Europe been pushed closer to realization that in the last twelve months."[5]

1.1 Neofunctionalism and Integration Through Spillover

As policy makers and activists rally around the idea of a united Europe, scholars began to think on mechanisms of unification and integration. That is to say, scholars increasingly pay attention whether these pro-unification movements will

[1] Ernst B. Haas, "The United States of Europe," *Political Science Quarterly* Vol. 63, No. 4 (1948):528.
[2] Haas 528.
[3] Ben Rosamond, *Theories of European Integration*. (New York: Palgrave Macmillan, 2000) 22.
[4] http://web.archive.org/web/20061217175506/http://www.winstonchurchill.org/i4a/pages/index.cfm?pageid=61
[5] Haas 528.

weaken the pillars of state sovereignty in Europe though their demands of transferring more authority to international bodies. While some scholars envisioned that the unification will be achieved at the expense of state sovereignty, some others scholars argued the unification would in fact bolster rather than undermine state sovereignty. For example Haas offered a zero-sum understanding of sovereignty, predicting decreasing state sovereignty as transnational European bodies acquire more authority. This theory is called "neofunctionalism." Against neofuncationalism, other scholars, like Stanley Hoffman, developed another theory, what is known as "intergovernmentalism." Before detailing those theories, one should keep in mind that those theories are affected by international theories namely functionalism and realism. Functionalists believe "rational, peaceful progress is possible; conflict and disharmony is not endemic to the human condition"[6]. The key figure of this movement is David Mitrany (1888 – 1975). The starting point for Mitrany was not "ideal form of international society"[7]. Rather he focused on what are the essential functions of this society. Functionalists focus on common interest and needs for states through which international agencies will take over the governance eventually. What they prioritize is human needs not the self interest of a nation state. They believe nation states will weaken and international agencies will deal with governance and human need through knowledge and expertise. As opposed to functionalism, realists believe nation states will be primary factor, and given the self-help and survival logic of anarchical international system, states will continue keep significant authority to themselves, rather than transferring such authority to international agencies.

Institutionally, The European Union has a surprising origin, The European Coal and Steel Community (ECSC), established through a German and French initiative after Second World War. France Foreign Minister Robert Schuman proposed ECSC on 9 May 1950 to prevent another war between France and Germany. When The Treaty of Paris established ECSC in 1951 Italy, Belgium, Luxembourg and Netherlands joined to France and West Germany. The treaty took

[6] Rosamond 31.
[7] Rosamond 32.

force on 10 August 1952 with the opening of its headquarters in Luxembourg. The mandate of ECSC was limited, common market for coal and steel governed by "High Authority." This authority was the predecessor of The European Commission. New treaties were signed with similar spirits: in 1958 the Treaties of Rome had established two new communities alongside the ECSC, which are the European Economic Community (EEC) and the European Atomic Energy Community (Euratom).

The growth of common governing bodies in Europe triggered scholars to re-think about the process of integration. American scholar Haas put forward theory so called "neofunctionalism". This theory dominated the debate on European integration "from the very beginning in the 1950's until early 1990's". Haas's main theoretical contribution was the concept of 'spill over'. The early efforts to understand regional integration depended on the experience on the ECSC not about "The European Union" that we have today. Haas in *The Uniting of Europe* defined integration as "the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and demand jurisdiction over the pre-existing national states. The end result is a new political community, superimposed over the pre-existing ones."[8] Haas believed that when integration in one area is successful that will create a need for further integration, which he named as 'spillover effect'. According to Haas, 'spillover' happens in two steps. One is functional spillover; the other is political spillover. In that process, they are the "interest groups and supranational actors as the key actors in the process of European integration"[9]. This means that domestic groups see that they could create policies much more affectively by performing them at the supranational level. When one area transferred to the supranational level, the other areas will follow, which is functional spillover. What follows this is political spillover. In this process, domestic actors assume that policies would be conducted at the supranational level and transfer their loyalties to supranational level, which is political spillover.

[8] Ernst B. Haas, *The Uniting of Europe: Political, Social, and Economic Forces 1950-1957*, (Stanford: Stanford University Pres, 1958) 16.
[9] Amy Verdun, *The Euro: European Integration Theory and Economic and Monetary Union*, (London: Rowman & Littlefield, 2002) 10.

To support his theory of neofuncationalist integration in Europe, Haas argued that the logic of spillover explains the transformation of the ECSC into the EEC. While this was largely an economic integration, he envisioned that the political integration would follow and European policy makers, working within the demands of technical efficiency, would transfer political authority to the European high authority.

1.2. Turkey's Relation with Europe and Neofunctionalism

However, this logic does not adequately explain the relation between Turkey and the EU. Some scholars divide Turkey – EU relation in two phases: from 1950s to 1980s and 1980s to present. The first phase began when Turkey has signed the Ankara Agreement. The second phase began when Turkey has gone through the structural change as a result of the late Prime Minister Turgut Özal's policy. In the first phase, taking into consideration that Turkey was economically weak, political concerns were much more important. Turkey has applied the European Economic Community in 1959 as a result of "the Soviet threat and Greece factor"[10]. After the Second World War, the Cold War has begun between the communist and liberal bloc. This forced Turkey to apply all kind of European and West oriented organization to feel secure. Already a member of the OECD, Council of Europe and NATO, Turkey also applied the European Economic Community. That community also looked Turkey under the framework of the Cold War and started to talk with Ankara. Those talks lead the EEC to sign Ankara Agreement with Turkey. Another factor for Turkey to apply the EEC was Greece factor. Greece has applied for an association agreement on 15 May 1959 and Turkey has applied on 31 July 1959. Because there were problems between Turkey and Greece, Ankara did not want Greece to have an allies in Europe, who could looks problems with Greek's interpretation. These factors forced Turkey to apply EEC.

[10] Çınar Özen, "Neo-functıonalism and the Change in the Dynamics of Turkey-EU Relations," *Perceptions Journal of International Affairs*. September – November. 1998: 3.

One can see that political concerns were much more important in the first phase. In the second phase, because the Cold War era has ended, Turkey lost its strategic importance for the West. That is why political concerns have subsided. Nevertheless, Turkey wanted to become a member and applied in 1987. The European Commission has declined that Turkey request. Instead, the Commission has offered a talk on economic matters. Thus, the European Union has signed the Custom Union with Turkey. The agreement entered in force in 1996. A year after, The European Union did not give Turkey a candidacy status in the Luxembourg Summit. Instead, the EU has begun to talk with the former Communist countries. As a response to that, Turkey has suspended the political relations with the EU. When one compares Turkey's economic power, she can see that in the second phase, Turkey was better. However, this does not turn into political partnership as neo-functionalism has predicted.

One can also see that neofunctionalist idea on integration cannot explain Turkish judiciary's stance against the European Union. The new sovereignty of the European Union is compatible with that neofunctionalist theories envisioned. The European Union's growing supranational legal authority demands members states to transfer legal authority by accepting supremacy of European judicial bodies like the European Court of Justice and the European Court of Human Rights. Turkish judiciary finds these demands unacceptable. However, Turkish judiciary is not reluctant to share sovereignty and is not cooperating with EU.

1.3. The Problem of Neofuncationalism

Empty chair crisis also showed that governments are still active and the demand for and power of supranational structure should not be exaggerated. The source of the conflict is about common agricultural policy. The Then European Commission President Walter Hallstein put forward a proposal to finance the CAP. That proposal would allow the Community to develop its own financial resources, so that it would not depend on the states for financial needs and also give more budgetary powers to the Parliament. In addition to this, it applied the majority voting

into the Council, which the French government said it could not say ‘yes’. Although Hallstein knew his proposal would create a controversy, he believed that it was necessary that there would be new arrangements for the CAP. Hallstein’s proposal increases the European Commission's and the European Parliament's power so that it can build a supranational formation to shun away member states’ veto. The Parliament also supported Hallstein’s proposal.

Hallstein put forwad his proposal to the Parliament on 24 March 1965, before he presented it to the European Council for debates. However, Hallstein’s moves backfired. When he presented his proposal, the European Council was in a trouble. The Then French President Charles de Gaulle was questioning the supranational power of the Commission. He even accused Hallstein of acting as if he were a head of state. In additional to this objection, France did not want to change the CAP. Also, if the majority-voting system started to work, the position of France in the CAP might be questioned by the other members. The disagreement between France and the European Commission was worsened with France’s take of the Council Presidency in 1965. On the 30th of June, 1965, Paris recalled its representative from Brussels in order to force other member states and the European Commission to agree with France on the CAP. This "empty chair crisis" showed that the European Commission’s position against a powerful member state. If the Commission’s agenda did not get along with a powerful member state, it could not proceed as it wants.

“The Empty Chair Crisis” showed to scholars that states still active and if they want they can block high ambitioned integration in the name of national interest. After this incident many scholar questioned Haas' early theory had been "too automatic"[11] leaving very little understanding to state interest and disregarding “the range of motives, constraints and opportunities that face decision makers”[12]. Even Haas admitted the problem when he conceded that he had not foreseen "a rebirth of

[11] Finn Laursen, “Theory and Practice of Regional Integration". *Jean Monnet/Robert Schuman Paper Series*, Vol. 8 No. 3 February. 2008: 5.
[12] Michael G. Huelshoff, “Domestic Politics and Dynamic Issue Linkage: A Reformulation of Integration Theory.” *International Studies Quarterly* Vol. 38, No. 2. 1994: 258

nationalism and anti-functional high politics"[13].

1.4. The Rise of Intergovernmentalism

In the 1960s a new group scholars offered new criticism to neofunctionalism. Called "integovernmentalist" because of their emphasis on the primacy of state interest and sovereignty, these scholars argued that neofuncationlism theory underestimates the role of national governments. Stanley Hoffmann, a prominent scholar who offered an early theory of intergovernmentalism, claimed that European integration would only happen if it were in the best interest of national governments. Moreover, he made a distinction between high and low politics. In the low politics, integration would happen because it does not threaten the role of the elite in a country. However, when it comes to high politics, Hoffman argued "nations prefer the certainty, or the self controlled uncertainty, of national self reliance, to the uncontrolled uncertainty of the untested blender."[14] High politics has immunity against integration. Moreover, Hoffman argued even if there would be an economic interest by integration, this does not bring political integration as Haas predicted. That is, economics and politics are different realms for Hoffman. In general Hoffmann argued that to understand whether integration is in the best interest of states, scholars should pay more attention to "the diversity of domestic determinants"[15] in each state and "geo-historical situations"[16] and "external power struggles"[17] states are facing. However, the Common Foreign and Security Policy (CFSP) and the Economic and Monetary Union (EMU) shows that nation states "willingly surrendered control over issues of central importance to national sovereignty"[18].

[13] Laursen 5.
[14] Stanley Hoffmann, "Obstinate or obsolete: The fate of the nation state and the case of Western Europe." *Daedalus: Proceedings of the American Academy of Arts and Sciences* 1966: 882.
[15] Hoffman 864.
[16] Hoffman 864.
[17] Hoffman 864.
[18] Rosamond 79.

The debate between neofunctionalist and intergovernmentalist subsided in the 1970s and 1980s as the European integration slowed. After the Cold War, the debate on integration re-emerged as European integration gained speed. Andrew Moravcsik's theory of integration became one of the most influential. He integrated the logic of intergovernmentalism with liberalism, as opposed to realism which earlier intergovernmentalist followed. In Moravcsik's theory "the role of the state and the national interest of national governments stood at the core"[19]—he even suggests that European integration strengthened the state. His theory of integration includes three phases: national preference formation, interstate bargaining, and institutional choice. According to Moravcsik, for a possible issue area for integration, in the first phase one should examine whether economic or geopolitical interests is dominant when national preferences of member states are formed. For a successful integration, he believes that economic interest should be the dominant factor in determining the national interest. In the second phase, there should be some level of asymmetrical interdependence among states or an active supranational entrepreneurship pushing for the integration. Moravcsik believes that it is asymmetrical interdependence is important because "some member states have more at stake than others. They will work harder to influence outcomes and may have to give more concessions"[20] Three factors determine the outcome of interstate bargaining: "i) unilateral policy alternatives each states might have, ii) the value of alternative coalitions and compromise, and iii) possibility of issue linkage that states may use in the bargaining."[21]

In the third phase integration, states are expected to transfer sovereignty to a supranational authority. Moravcsik gives three possible explanations why a state may give up some of its sovereignty. The first of these explanations is about ideology (he calls it 'Federalist ideology'). The second one is institutional, through the efficiency of a centralized technocratic management. The third one is more political which Moravcsik call credible commitment. He prefers the political explanation over

[19] Verdun 11.
[20] Laursen 7.
[21] Andrew Moravcsik, "The Choice for Europe," New York: Ithaca: Cornell University Press 1998: 63.

ideational and institutional explanations. This is because he argues that states delegate sovereignty because it is a rational choice. The rationality of commitment is that states' pre-commitment bind governments to future decisions, thereby encouraging future cooperation and improving the chances of implementation of the agreement.

1.5. Turkey- Europe and Liberal Intergovernmentalism

When one applies liberal intergovernmentalism to Turkey - EU relation, she can see that although it falls short of explaining the first phase, it has more explanatory power over the second phase. As I mentioned earlier in the first phase political concerns were much more important on the relation. However, in the second phase as a result of Turkey's economic transformation, economic concerns are much more important. Because the then Prime Minister Turgut Özal has transformed economic policies and Turkey has adopted an open market policies. Thus, Turkey has become a valuable country to make an investment. When one looks at the claims of liberal intergovernmentalism, it can explain the relation between Turkey and the EU. Economic concerns are relevant; some members of EU want Turkey to become an EU member as a result of their policy. For example, UK wants Turkey to become EU member because it wants the EU to be like an economic union and does not want the Union to turn into a political center. That goes against UK's traditional policy against Europe.

Intergovernmentalism also has more explanatory power the stance Turkish judiciary has against European Union. Turkish judiciary is not inclined to share sovereignty with the European Union. Rather it has an understanding of traditional sovereignty as intergovernmentalism has advocated.

So far I discussed European integration theories of neofunctionalism and intergovernmentalism. Following table summarizes the distinction between them.

TABLO 1: Integration Theories in General

Neofunctionalist Family	**Intergovernmentalist Family**
• Neofunctionalism • Fusion Thesis • Multilevel Governance	• Domestic Politics • Two – Level Games • Liberal Intergovernmentalism • Intergovernmentalism
Actors: A variety of non-state are crucial actors.	Actors: The nationa state
Mechanism: There is some automaticity	Mechanism: There is no automaticity in the process

1.6. Enlargement versus Integration: A False Dichotomy

After looking at the theories, I want to present their view on enlargement. The European Union's enlargement was as impressive, if not more, as its integration. Although six members founded ECSC, there are now 27 members in the European Union. England, Denmark, Ireland were the first that joined the European Communities (EC). Greece, Spain and Portugal joined the Community in 1980s. On 1 January 1995 Austria, Finland and Sweden acceded to the EU. The biggest enlargement happened when Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia, Malta and Cyprus joined on 1 May 2004. On 1 January 2007 Romania and Bulgaria joined the Union. Croatia and Turkey is still negotiating to be member of the EU. Can intergovernmentalism and neofunctionalism be applied to the enlargement of the European Union by granting membership to new members in addition? How do these theories balance the

concerns of enlargement of the European Union with its expansion into new issues and its further integration?

Some neofunctionalist scholars believe that enlargement will slow the pace of integration in the community. When new members added to the community, "spillover effect will be slowed and political integration will be delayed"[22]. On the other hand, liberal intergovernmentalist looks enlargement with an opportunity of bargaining for further integration.

How does a country join a member of European Union? It is on Rome Treaty that members decided that any European country would join their union. When members decided to take a new country among them, that country should harmonize its law with the EU law, acquis communautaire. It can be said it is basically a reception of law. Nevertheless, implementation is also vital to join the EU. Turkey has received laws from European countries after it is founded. The Civil Code of Turkey was received in 1926, based on Swiss Civil Code. The Penal Code was accepted by Parliament in 1926, based on the Italian Penal Code. Many other laws were also based on the Western countries' laws.

There are two main different views on the reception of law. German jurist Anton Friedrich Justus Thibaut advocated that law is a product of human nature. Thus, it can be received by other countries. On the other hand, Friedrich Karl von Savigny took the opposite view on the reception of law. He argued that laws reflect the culture of a given society. That is why Savigny did not believe in the reception of law.

After talking about theories and theories application to Turkey – EU relations, in the next section, I will talk about the history between Turkey and the EU, Copenhagen Criteria and Turkey's amendments.

[22] Hüseyin K. Aytuğ, "Bütünleşme Kuramlarının Avrupa Birliği Genişlemesine Bakışı," *Yönetim ve Ekonomi* Cilt 15 Sayı 1 2008: 152.

CHAPTER II:

2. TURKEY – EUROPEAN UNION

2.1. Historical Background

Turkey has applied for membership for the European Economic Community in 1959 as a result of the Soviet threat and Greek factor. After the Second World War, the Cold War has begun between the communist and liberal bloc. This forced Turkey to apply all kind of European and West oriented organization to feel secure. Already a member of the OECD, Council of Europe and NATO, Turkey also applied the European Economic Community. That community looked Turkey under the framework of the Cold War and started to talk with Ankara. Those talk lead the EEC to sign Ankara Agreement with Turkey. Another factor for Turkey to apply EEC was Greece factor. Greece has applied for an association agreement on 15 May 1959 and Turkey has applied on 31 July 1959. Because there were problems between Turkey and Greece, Ankara did not want Greece to have an allies in Europe, who could looks problems with Greek's interpretation.

After military intervention in 1960, the relationship between Ankara and Brussels came to a halt. Establish civil administration, Turkey and the EEC signed the "Agreement Creating an Association between The Republic of Turkey and the European Economic Community", also known as the Ankara Agreement. That agreement came into force in 12 December 1964. Through the beginning of 70's until 80's the relationship between Ankara and Brussels was shaky. As a result of 1980's military intervention the relationship was suspended though the multiparty elections in 1983 resulted in restoration of Turkish-EEC relations. Based on this restoration, Turkey has applied for membership to the European Community in 1987. Meanwhile, Turkey lost its strategic importance for the West at the damn of the collapsing Communist bloc. That is why the EEC stopped to look Turkey as a strategic asset. Nevertheless, Turkey wanted to become a member and applied in 1987. The European Commission has declined that Turkey request. Instead, the

commission has offered a talk on economic matters.

After that answer, European leaders in 1991 agreed on the Maastricht Treaty and that treaty entered in force in 1993. With this treaty, the EC turned into the European Union and enabled the introduction of Euro, the EU's currency. Moreover, as a result of the collapse of the Communist bloc, European leaders gathered at Copenhagen in 1993 to determine criteria for membership in order to former communist countries to join the EU. Copenhagen criteria could be considered as a new page in the relationship between the EU and Turkey. Some scholar argues that with those criteria, the Ankara Agreement is no longer meaningful and can be considered as "trash"[23].

Those criteria have caused uneasiness between the elites in Turkey and the EU. For example, considering itself 'a guardian of the republic' the Turkish army did not want to lose its privilege in Turkey. Meanwhile, the army considered itself a motor for modernization in Turkey. However, 'a civilian control over army' should be in place if Turkey wanted to become a member of the EU. Nevertheless, the army could not openly objected Turkey of becoming EU member because it may contradict the traditional stance of the army. As Zeki Sarıgil has pointed out, "even though the military was highly concerned about the consequences of reforms for its own political powers, it could not block them due to the likely damage such an action would cause to its legitimacy and credibility."[24] Facing with this dilemma, the army has objected some of things it perceived a vital for its status. Also, the judiciary was biased against the EU because of its problematic stance against the Union. The judiciary still drags its feet against the EU. I will detail this stance at the last section of my thesis.

In the course of the relationship between Turkey and the EU, the Customs Union was completed on 1 January 1996. At that time, the Agenda 2000 Report

[23] Murat Erdoğan, "Türkiye - AB İlişkilerinde Ortak Payda: Vizyonsuzluk," *Liberal Düşünce* Cilt 11 No 43 Yaz 2006: 11.
[24] Zeki Sarigil, "Europeanization as Institutional Change: The Case of the Turkish Military," *Mediterranean Politics* Vol. 12 No. 1 March 2007: 2.

which evaluates the EU enlargement process was written. It has been stated at the report that due to its political and economic problems, Turkey cannot be included in the enlargement process. In pursuit of that report on 12 and 13 December 1997 in the Luxembourg Summit, Turkey hasn't been recognized as a candidate country. Reacting against this decision Turkey has stated that it is going to suspend the political debate between EU and Turkey. With this reaction of Ankara, in the Helsinki Summit on 10 and 11 December 1999, The European Council recognized Turkey as a candidate country. It has been stated clearly in the final declaration of the summit that Turkey is a candidate country. In the final declaration it has been said that: "The European Council welcomes recent positive developments in Turkey as noted in the Commission's progress report, as well as its intention to continue its reforms towards complying with the Copenhagen criteria. Turkey is a candidate State destined to join the Union on the basis of the same criteria as applied to the other candidate States."[25] In the 4th item of the final declaration, it has been pointed that compliance of the candidate states with the political criteria laid down by the European Council in Copenhagen has been a prerequisite for the opening of accession negotiations: "The European Council recalls that compliance with the political criteria laid down at the Copenhagen European Council is a prerequisite for the opening of accession negotiations and that compliance with all the Copenhagen criteria is the basis for accession to the Union."[26] The political criteria adopted in Copenhagen on 21 and 22 June 1993, has been acknowledged in the founding treaty, and compliance with all the criteria has been a stipulated condition for the member and candidate states. According to the decisions has been taken in the Helsinki Summit, it has been agreed on to include Turkey in the pre-accession strategy that the EU has developed for full membership candidate states.

After the EU parliament's approval, The European Council has adopted "The Accession Partnership for Turkey" that has been prepared by the EU Commission, on 8 March 2001. On the other hand "Turkey's National Programme for the Adoption of

[25] The European Parliament, *Helsinki European Council 10 and 11 December 1999 Presidency Conclusions*, 1 July 2009 <http://www.europarl.europa.eu/summits/hel1_en.htm>.
[26] The European Parliament

the Acquis" has been adopted by the cabinet on 19 March 2001. As Turkey has carried out the reforms; in the Copenhagen Summit on 12 and 13 December 2002 it has been concerted to Revise Turkey's National Programme for the Adoption of the Acquis and prepare another "Adoption of the Acquis programme" by the European Council. Accordingly, "Turkey's National Programme for the Adoption of the Acquis" that has been prepared by the European Commission has been acknowledged by The European Council on 14 April 2003. In parallel with the new Adoption of the Acquis programme Turkey has revised the National Programme and adopted by the cabinet on 23 June 2003. Also in this summit the leaders have decided to open accession negotiations with Turkey according to the report of the European Commission in December 2004. Leaders have said that: "The Union encourages Turkey to pursue energetically its reform process. If the European Council in December 2004, on the basis of a report and a recommendation from the Commission, decides that Turkey fulfils the Copenhagen political criteria, the European Union will open accession negotiations with Turkey without delay."[27]

After the rapid constitutional and legislative reforms between 2002 and 2004, the European Commission has given a favorable report and has proposed to open accession negotiations with Turkey. The Commission has made a proposal that: "In view of the overall progress of reforms, and provided that Turkey brings into force the outstanding legislation mentioned above, the Commission considers that Turkey sufficiently fulfils the political criteria and recommends that accession negotiations be opened."[28] In the light of this report, leaders have come together on 16 and 17 December in Brussels. In the final declaration of the Summit Leaders have recognized and pleased about the progress made by Turkey towards fulfilling the reforms and stated their belief about it. As a result of the 2002 dated decision and the Commission report, leaders have accepted a decision says: "It requested the Council

[27] The European Comission, *2004 Regular Report on Turkey's progress towards accession,* 06.10.1999, 01.07.2009 < http://ec.europa.eu/enlargement/archives/pdf/key_documents/2004/rr_tr_2004_en.pdf>.
[28] The European Comission, *Communication from the Commission to the Council and the European Parliament*. 2004, 1 July 2009 <http://eur-lex.europa.eu/smartapi/cgi/ sga_doc?smartapi!celexplus!prod!celexnumdoc&lg=en&numdoc=504dc0656>.

to agree on that framework with a view to opening negotiations on 3 October 2005." Upon this decision, Turkey entered into negotiation process.

2.2. Accession

In the second section of my thesis, I discussed the integration theories. Here I want to talk the accession process. Before that I will mention the difference between the previous enlargement and Turkey's case.

Turkey's accession to EU has been different in many ways when comparing the previous enlargement. That is why some Turks felt 'double standard' in becoming a member of the EU. For example, in the previous enlargement, it was enough to transplant laws in accordance with Copenhagen Criteria. Thus when a candidate country legalizes those requirements it can be a member of the EU. Moreover, the EU allowed Bulgaria and Romania to become a member although they did not sufficiently apply those criteria. However, in Turkey's case, the EU insisted that those criteria should be applied. Every year, the European Commission published its report to track how Turkey is doing in applying those criteria.

This 'double standard' also can be seen at the negotiating framework. First difference has been caused as a result of the Cyprus problem. Turkey wanted to solve the problem before Cyprus became a European member. To do that, Greek and Turk sides voted Annan Plan, which is a plan to solve the Cyprus problem. Although Turks voted in favor of the plan, Greeks did not. Nevertheless, Greek Cyprus, which EU considers the legal representative of the island, did become an EU member. This result has caused many problems for Turkey. For example, the EU wanted Turkey to solve this problem before being an EU member. Also, this problem showed itself in the negotiating framework. In *the sixth article*, EU mention directly or indirectly about this problem.

- Turkey's unequivocal commitment to good neighbourly relations and its undertaking to resolve any outstanding border disputes in conformity with the

principle of peaceful settlement of disputes in accordance with the United Nations Charter, including if necessary jurisdiction of the International Court of Justice;

- Turkey's continued support for efforts to achieve a comprehensive settlement of the Cyprus problem within the UN framework and in line with the principles on which the Union is founded, including steps to contribute to a favourable climate for a comprehensive settlement, and progress in the normalisation of bilateral relations between Turkey and all EU Member States, including the Republic of Cyprus.

- The fulfilment of Turkey's obligations under the Association Agreement and its Additional Protocol extending the Association Agreement to all new EU Member States, in particular those pertaining to the EU-Turkey customs union, as well as the implementation of the Accession Partnership, as regularly revised.

In the last clause of sixth article, the EU wanted Turkey to extend the Association Agreement to all new EU Member States. Although Turkey extended in the paper, it did not implement this agreement. As a result of this, the EU suspended the talks in 8 chapters with Turkey.

Another difference is that the European Union specially talked about "the open ended process"[29]. Although some officials from EU insisted that this is the case for previous enlargement, it is the first time that European states talked about the character of the talks. In the second article of the negotiating framework, EU members pointed out that, “The shared objective of the negotiations is accession. These negotiations are an open-ended process, the outcome of which cannot be guaranteed beforehand.”[30] Last difference is that EU mentioned "the absorption

[29] The European Council, *Negotiating Framework*. 3 Oct. 2005, 1 July 2009 <http://ec.europa.eu/enlargement/pdf/st20002_05_tr_framedoc_en.pdf>.
[30] The European Council

capacity".[31] As a result of 2004 enlargement, some EU countries insisted that Turkey is too huge for the EU. That is why they incorporated the absorption capacity in the negotiating framework.

When one looks at the negotiating framework with Crotia, she cannot see the term 'open – ended process' and 'the absorption capacity'. These are specific terms that are used for Turkey's negotiating process.

After talking about the difference between the previous enlargement and Turkey, I want to talk about the accession process. Integration basically is to adopt the laws of the candidate country to the standards of the European Unions' acceptance. The candidate country is then under the responsibility of integrating its national laws with the EU's Acquis. One can perceive that the scope of the acquis is from the founding treaties to the secondary law applications, from the case laws of the court of justice to the politics that have occurred for many years. While working on integrating its national laws, it is compulsory for the candidate country to work on the primary fields that has been signed and issued in the association agreement and concentrate on the important subject within the negotiation process. This process has already begun long before the treaty of accession and the primary fields of integrating the national laws of a country have been chained by the European Union through the Adoption of the Acquis programme and by the candidate country through the National Programme. Integration is to adapt the national cases towards the EU laws. If the national cases aren't in accordance with the EU laws, a new draft is needed to carry the laws to the expected integration level.

After the treaty of accession has gone in effect, the concerned country has to directly apply the articles of founding agreement. The treaties at issue have been applied to both candidate states and its citizens and who resides in that country. There is no extra operation for texts that has the characteristics of the founding treaty to be applied. However while integrating some of the founding treaty provisions,

[31] The European Council

integration rules of bylaws, circulars and decisions have been applied.

The most important study that the national institution has to do in integrating the by laws and decisions, is to ascertain the level of the legislation that correspond the at issue community cases. For that reason with beginning of the negotiation process the candidate state is gone through a screening process. In those screening processes the differences between the candidate state and the Union's legislations are discussed. If the acquis are in accordance with any negotiation field, this article is then omissible. But if there are any differences, the candidate country is asked how it would accomplish the integration and is given time. With the innovations made within this time, legislation of the candidate country becomes compatible with the Union's acquis. Another important point must be noted that the process is completely a technical process. The Commission that is in the state of the Union's "cabinet" is responsible for making the legislations compatible.

Accession negotiations that determine the accession conditions of the candidate country to the EU are focused especially on the acceptance, application and conduction conditions of the candidate country's community acquis. While it is possible for adjustment of certain situations of the transition period, those adjustment needs to be limited in terms of time and scope. The actual negotiations are made as bilateral conferences between each candidate state and EU member states. After detailed evaluation (screening) of various parts of the community acquis, as free movement of goods, agriculture, environment…etc, negotiations are opened to the candidate countries section by section. Negotiation process is made at a level of permanent representative of member states and candidate countries' ambassadors or at a level of senior negotiation officials. Negotiation results are tuned into adhesion act draft and submitted for European Parliament's review to receive convenient opinion. Afterwards it is sent to the committee of ministers of the council of Europe for the approval. After signing the adhesion act it is presented to the member and candidate states for approval. Candidate states can want to hold a referendum for initiation of the new country. When the agreement goes in effect the candidate country becomes a member.

If the candidate states which enters in the process makes sufficient development, bringing forward their membership process is anticipated. Hereby each candidate state is judged by according to its own development in terms of EU integration criteria. For that reason, foreseeing the length of each negotiation is impossible. After talking about the process, I want to talk about Copenhagen Criteria, which is essential for any European country to join EU.

2.3. Copenhagen Criteria

Saying that it would deepen within itself, The European Union which rejected the membership application of Turkey in 1987 had found itself in a new world order post cold war. When the Union wanted to embody the Eastern European countries which have survived from the communist block, it was actually looking for a safe harbor. Under these circumstances, member states have come together in the capital of Denmark in Copenhagen and determined the criteria for those countries that want to be members. With this period the Union has determined the standards for the countries that want to be members according to Copenhagen criteria.

2.3.1. Copenhagen Summit

In the Copenhagen Summit on 22 June 1993 the European Council has acknowledged that the EU expansion would include the Central Eastern European countries and at the same time it has determined the criteria that countries had to meet before the acceptance to the membership. Those that named as the Copenhagen Criteria, has been gathered into three groups; adoption of the political, economic and community legislation. According to the Copenhagen criteria requirements: “Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership

including adherence to the aims of political, economic and monetary union." The most important features of Copenhagen Political Criteria that it does not comprise the full membership negotiation process subject independently from the economic, judicial and administrative criteria; on the contrary it is a precondition for beginning the full membership process.

2.3.2. Political Criteria

2.3.2.1 Democracy and Rule of Law

It is determinative for candidate countries not only to put legislations about democracy and rule of law but also it is necessary to ensure that they are actually applied. We understand from the notions that; having political pluralism, constitutional guarantee comprising freedom of expression and freedom of religion choosing; carrying out liberal and fair elections; existence of democratic institutions, independent judiciary and constitutional institutions that enable various government agencies to work properly. Candidate countries that have made membership application have to solve their minority problems before full membership. They also have to guarantee for the official authorities as judiciary, police and local administrations to work actively and guarantee the stability of the various institutions that enable establishment of democracy.

One of the main reference points is that to be a party to The Council of Europe, Convention for Protection of Human Rights and Fundamental Freedoms and an acceptance of individual communication to The Council of Europe, Court of Human Rights. On the subject of minority rights and protection; The Council of Europe Framework Convention for the Protection of National Minorities and the Council of Europe Parliamentary Assembly Recommendation 1201 are the reference point. What is asked from the countries that want to be a member of the EU is not only adoption but also practical implementation of the political criteria stated above.

2.3.3. Economic Criteria

According to the conclusions of the Copenhagen Summit, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union is also requested.

2.3.3.1. Functioning Market Economy

The existence of a functioning market economy requires that; Establishing supply and demand equilibrium by the liberal mutual interaction of the market forces; prices, as well as trade, are liberalised, the absence of any significant barriers to market entry and exit, enforceable legal system, including property rights, is in place, economic stabilization including price maintenance and sustainable external economic balance, a consensus about necessities of economic policies, a developed financial sector that is able to direct savings to the real economy.

2.3.3.2. The capacity to cope with competitive pressure and market forces within the Union

Providing the capacity to cope with competitive pressure and market forces within the Union requires that; Macroeconomic stability of economic operators that can make decisions in a foreseeable and consistent climate, as well as existence of a functioning market economy, infrastructure, possessing sufficient real and human capital including education and research, having the capacity for the companies to comply with the technology.

Until now, I discussed the integration theories and the accession process. Now I will mention what Turkey did in order to begin membership talk with EU and to become a member of EU.

CHAPTER III:

3. AMENDMENTS

3.1. STRUCTURAL REFORMS

3.1.1. Abolition of State Security Court

As it was expectancy in the 2003 Adoption of the Acquis and in the 2003 Progress Report to customize authorization, responsibility and working of the State Security Court (SSC) for the European Union criteria; it has been foreseen to abolish the 143rd article that is about the establishment of these courts. At the legislative intention of the 143rd article that enactor the authorization, responsibility and working of the SSC, establishment aim of the related courts is stated as; "There are some acts towards Existence and continuity of the state that special expertise needed to bring in the quick and right decision. In such cases it is necessary to keep SSC available. According to the provisions of constitution no private court can be established after a certain action took place. For that reason SSCs have been approved by the constitution to rule afore-mentioned criminal cases. As the special provisions of their establishment had appointed before the action (crime) took place, it is not possible to consider them established after certain actions (crime) took place."

However, with the 18 May 1999 dated and by constitutional amendment performed with the law no. 4388, the 143rd article of the constitution has been changed as to provide to appoint civil judges and prosecuting officers instead of military judges and prosecuting officers of SSC. The ECHR's decisions and the negative criticism of EU on all occasions have the great contribution in that. Despite the performed amendment, criticism towards SSC couldn't be ended off. In this sense, as it was expectancy in the 2003 Adoption of the Acquis and in the 2003 Progress Report to customize authorization, responsibility and working of the State

Security Court for the European Union criteria; it has been foreseen to abolish the 143rd article and with constitutional amendments performed on 07 May 2004 the SSCs have been abolished completely.

3.1.2. Family Courts

It is foreseen to establish Family Courts that incorporate a psychologist, pedagogue and social worker, to rule cases resultant from law of domestic relations. When necessary by the help of experts, Family Courts also encourages amicable settlement of the problems that wives and their children confront as a result of the harmed love, respect and tolerance between parents. Thereby, beside jurisdiction, Family Courts will fulfill an important function as taking protective, educational and social precautions towards the protection of the family that is a cornerstone of the community.

3.1.3. Justice Academy Law

The law arranges rules about the foundation and duties of the Justice Academy. The primary objective of the Justice Academy is to educate judges, prosecuting officers, other judicial personnel, lawyers and notaries to increase the justice efficiency.

3.1.4. Regional Courts Of Justice

The law arranges rules about the foundation and procedures of Regional Courts of Justice. The law virtually foresees the establishment of the secondary divisional courts. While the Turkish judicial system has a second level court system before this law, after application of this law the Turkish Judicial system will proceed to the third court system.

3.1.5. Government Audit Office Law

This law aims the constitution of Government Audit Office and regulations about the government chief audit that expected to be active through the country and the duties, features, elections, working principles, independence of the government auditor, applications made to the institution and institution personnel and related subjects.

3.2. Harmonization Packages

The first three harmonization packages were passed in the parliament during the DSP-ANAP-MHP coalition government. The third one is the most striking one among the three packages with positive reactions abroad and debates at home. The capital punishment was abolished from the Constitution at a time when Abdullah Ocalan, head of the outlawed Kurdistan Workers Party (PKK), was sentenced to death, which shows the importance attached to the package.

In the first package, the government made some amendments in the Articles 159 and 312 of the TCK, which were seen as obstacles before the freedom of expression, as well as Article 7 and 8 of TMY. With these amendments, the maximum penalty was reduced from six to three years imprisonment and definition of crimes committed against the state was revised and the duration of sentences were decreased. The maximum penalty for publicly insulting and degrading the state was reduced from six to three years imprisonment with minimum sentence remaining one year sentence and a fine was lifted. Some other amendments were also made in Article 312. Another amendment to Articles 7 and 8 of the Anti-Terror Law was stipulated by “encouraging to resort to terror” so that propaganda could be defined as a crime. Printed media outlets would be fined up to 3,000 Turkish Liras and, if the crime is committed by means of mass communication, would face up to 2 years of sentence.

The second harmonization package was discussed in the parliament on March

26, 2002. Founding associations were eased thanks to this package. Also, languages other than Turkish were allowed to be used thanks to an amendment to the Article 5 of Law of Associations.

The third package was adopted amid harsh debates in the parliament on Aug. 3, 2002 and some wide-range amendments were made with this package. Death penalty was abolished at a time PKK head Ocalan was sentenced to death. Articles within the limits of criticism were made more difficult to be sued by civilian and military prosecutors. Instead of death penalty, Turkey has introduced "life imprisonment". Nevertheless, it is allowed to give a death penalty in war times. However, later death penalty is abolished all together. With the third packages, minority foundations are allowed to have properties. Non-Muslim (congregational) foundations may have properties on their needs in the fields of religion, charity, social, education, health and culture. Turkish citizens of (non-Muslim) minorities already have a right to obtain property anywhere they like. Foreigners are also allowed to purchase property in Turkey under reciprocal agreements. Also with the third reform package, If any objection to a national court decision made before the ECHR is accepted, the defendant will be given the right for a retrial provided that his/her grievance continues although he/she receives compensation by the ECHR. For example, a person who is convicted and jailed due to proofs "obtained illegally" like wiretapping without a court order might both apply to the ECHR and demand compensation and at the same time ask for a retrial after appealing to the Court of Appeals. If his/her request is accepted, he will be retried and released from jail. Thus, national courts will think more meticulously while taking decisions, considering the possibility of rejection by the ECHR.

The third reform package also opened a way Kurdish people to broadcast in their language and learn it. Radio and television broadcasts will available in different languages and dialects that citizens of Turkey use traditionally in their daily lives. In fact, broadcasts will be allowed not only in Kurdish but also in other local languages such as Lazca and Zazaca, which are regarded as traditional languages. These broadcasts will be inspected by RTÜK. Besides to this, private courses will be

opened to learn different languages and dialects that citizens of Turkey use traditionally in their daily lives. These courses to be available in Kurdish, Lazca and Zazaca will be subject to inspection of the Ministry of Education. With the third reform package, no sentences will be applied to written and verbal statements or video footages against Turkishness, the state, the parliament, the government, ministers, army, police and courts if only they were criticisms.

This package was welcomed in Europe. "Turkey is now on our side,"[32] said Günter Verheugen, former European Commissioner for Enlargement. Statements from the Turkish government implied that now it was Europe's turn. The European Commission praised these amendments in its report published in 2002. "The adoption of these reforms demonstrates the determination of the majority of Turkey's political leaders to move towards further alignment with the values and standards of the European Union. These reforms were adopted under difficult political and economic circumstances, and represent a major shift in the Turkish context," [33] it said.

Turkey changed its government in an early parliamentary election held late in 2002. The coalition government of DSP-MHP-ANAP was replaced by a single-party government AK Party. The fourth harmonization package was passed on January 2, 2003 in the new parliament after the election. This package paved the way for those who were sentenced to prison terms to be elected Member of Parliament. Also, punishments given on charges of torture and ill treatment would be no longer commuted to fines nor postponed under the new law. Interrogation periods of those detained or arrested were reduced to four days in cities where state of emergency was implemented. Moreover, some other amendments were made on political parties. Conditions of membership into political parties were revised. In the Article 312 that was amended in the first harmonization package, 'inciting people to hatred on the basis of differences of social class, race, religion, sect or region' would no more

[32] Sabah Gazetesi. *04.08*.2002. 1 July 2009 < http://arsiv.sabah.com.tr/2002/08/04/>.
[33] The European Comission, *2002 Regular Report on Turkey's progress towards accession,* 09.10.2002, 01.07.2009 < http://ekutup.dpt.gov.tr/ab/uyelik/progre02.pdf>.

amount to a terrorist crime. Those who were convicted of this terrorist crime were not allowed to become members of political parties. Following the amendment to this article, those who were charged with offenses under Article 312 would now have the right to be members of a political party. Closing down parties, which was previously made difficult, was made much more difficult with this harmonization package. Accordingly, a three-fifth majority will be required in closure cases of political parties and the Constitutional Court might decide to deprive a political party of treasury funds, instead of closing down. With the new law, non-Muslim (congregational) foundations were entitled to enjoy property rights. Besides, associations will be able to release statements without prior notice and legal persons will be able to become members of associations in addition to real persons.

Following this package, the first harmonization package was adopted in the parliament on January 23. Amendments about the law on associations were in the foreground. Offenses punishable by three months to six months like establishing relations with international organizations without permission, releasing declaration without a board of directors decision, not having permission to release a declaration, not helping legal inspection and not submitting declaration of property were commuted to fines by 1,000 Turkish liras up to 3,000 liras.

Some important amendments were made with the sixth harmonization package so as to start negotiations with the European Union. The Article 8 of the Anti-Terror Law was abolished with the package that was adopted in the parliament on June 19, 2003. Besides, some changes were made about SSC, which were criticized in European Commission reports. Methods of interrogation and trial of DGMs were changed and the presence of a lawyer was made compulsory. In addition, broadcasting in Kurdish language was allowed on TV stations and in different languages and dialects that citizens of Turkey use traditionally in their daily lives following amendments in relevant laws. Also, synagogues and churches were allowed to be recognized as places of worship in housing laws. Some other amendments were also made regarding the decisions of the European Court of Human Rights. For example, some additions were made in articles related to retrial.

Accordingly, a retrial will be provided for the persons whose convictions have been found by the European Court of Human Rights to be in violation of the European Convention on Human Rights and Fundamental Freedoms.

With the seventh harmonization package, several changes were made on NSC, increasing the control of civilians over the military. Implying that the Turkish politics were dominated by the military, the EU first wanted the number of military in the MGK to be reduced and then to be completely removed from the council. Accordingly, MGK meetings were decided to be held on every two months, instead of every month, and council decisions were made recommendatory. Investigation on torturers was included in the scope of emergency affairs. The Article 169 (on support for illegal armed organizations) of TCK was amended and the scope of the crime was narrowed.

With the eighth harmonization package, the death penalty or capital punishment was abolished. The phrase of "…the execution of the death penalty" was removed from the Article 15 on "the exercise of fundamental rights and freedoms" as additional protocol no 13 envisaged completely lifting of the capital punishment. Therefore, Article 17 on "immunity of persons" and Article 38 on "general principles on crime and punishments" was amended accordingly. State Security Courts were also abolished with this package after the Article 143 on the foundation of SSC's was revoked.

CHAPTER IV:

4. WHY HAS TURKISH JUDICIARY SLOWED TURKISH EU MEMBERSHIP?

Harmonizing of laws with the European Union is the essence of a candidate's membership process. Candidates are expected to bring its laws with conformity with European standards. For candidate like Turkey, it seems that European Union is not satisfied with the mere adoptation of laws, but their implementation. In its membership process, although Turkey progressed towards democratization and liberalization, widespread suspicion exist whether these remain mostly on paper. After years of reforms, the deficiencies of "implementation"[34] of formally-legislated reforms remain the most serious problem. For example, Turkmen notes: "Although legislation has so far been the most important component of Turkey's democratization efforts, the judiciary remains—structurally and doctrinally—one of the most problematic areas of the democratization process itself"[35]. Judiciary, the key in this process, retains considerably autonomy. A powerful civil society organization TESEV notices this autonomy when it reports acknowledges that judges can apply laws, including legislatures EU-harmonization laws, "in accordance with the will of producer of laws or they have a power to prevent, decelerate and fail down this democratization process."[36] Turkish judges' expansive discretion makes it an important player in democratization process. Judges rarely use their discretion for more democratization. Yavuz Atar notes "Turkish judges usually interpret those existing rights and freedoms in a strict manner instead of enlarging their scope"[37]. Essentially Turkish judiciary has become a liability and hindrance on Turkish membership to European Union rather than an asset and facilitator. Three reasons are behind Turkish judiciary's de facto anti-European Union position: the politization of

[34] Füsun Türkmen, "The European Union and Democratization in Turkey: The Role of the Elites," *Human Rights Quarterly* 30, 2008: 148
[35] Türkmen 55.
[36] Ümit Sancar, Türkiye Ekonomik ve Sosyal Edütler Vakfı, 01 Nov 2007, Yargıda Algı ve Zihniyet Kalıpları, 1 July 2009 <http://www.tesev.org.tr/UD_OBJS/PDF/DEMP/YargidaAlgiveZihniyetKaliplariRaporu.pdf> : 3-4
[37] Yavuz Atar, "Türkiye'nin Hukuk Devleti Sorunu: Hukukun Evrensel Üstünlüğüne Karşı Devletin Anayasal Üstünlüğü," *Liberal Düşünce* Sayı 24 2001: 182.

Turkish judiciary, its state-centrism, and the legacy of military-imposed 1982 Constitution.

4.1. The Contested stance of Turkish Judiciary

While always to a varying degree politicized, the Turkish judiciary showed a resistance against in applying EU norms. Leading the opposition to AK party, Turkish judiciary often took a position against AK Party's EU reforms especially "since 2007"[38]. Countless examples of AK Party-Judiciary attest the polarization between these two and politicization of the latter.

One such clear case was the acrimonious debates of the election of 11th President of Turkey. The process was filled with military issued-e-manifesto, and large scale judiciary and military supported protests. Turkish judiciary played a critical anti-government role in the process, most significantly with its controversial 367 decision, declaring AK Party does not have quorum to elect the president with its parliamentary majority. Initially the argument is made by some retired jurists with political and judicial clout. They argued that there must be 367 deputies present as a quorum for the head of state election. This opinion was unusual because it was never raised in previous elections. Among these debates, AK Party acted alone on 27 April 2007 to select a new president with its 357-strong majority, 10 less than the alleged quorum. After this vote, the opposition party Republican Peoples Party (CHP) applied to the Constitutional Court and argued that the AK Party's election is void because it failed to have 367 members in the parliament. Further polarization and making things more uncertain was on the same day, Turkish army issued what is called e - memorandum due to its appearance on army's website and showed army's opposition to Abdullah Gül's nomination on ideological grounds about Gul's ambivalence in agreeing the army's authoritarian interpretation of secularism.

[38]Emrullah Uslu, "Turkish Judiciary Opposing the AKP Government." *Eurasia Daily Monitor* Volume: 6 Issue: 97 (2009): The Jamestown Foundation. 1 July 2009 <http://www.jamestown.org/ single/ ?no_cache=1&tx_ttnews[tt_news]=35016&tx_ttnews[backpid]=7&chash=ec353e079a>.

The Constitutional Court has decided on 1 May 2007 and supported the 367-quorum interpretation. This decision made AK Party's election void. In following attempt on 6 May 2007 AK Party failed again with only 358 deputies present at the parliament due to opposition's boycott of the election.

The Constitutional Court's decision on 367-member quorum has been one of the most highly debated decisions in court's recent history. Some claimed that the court has no jurisdiction on the presidential election. Among these, constitutional law professor Mustafa Şentop claimed that the Constitutional Court has no power over presidential election because the constitution puts the election beyond constitutional review: "Due to the fact that the presidential elections are elections that take place within the parliament, they are technically a parliamentary decision. They are not one of the functions of parliament listed in Article 148. From this angle, then, it is not possible for the Constitutional Court to have authority over the Parliament's decision with regards to the presidential election, as parliamentary decisions lie outside the court's authority."[39] Another constitutional law scholar, Zühtü Arslan agrees with Şentop's interpretation. Arslan claims that the Constitutional Court cannot check Turkish parliament about presidential election because "the parliament does not make any amendment"[40]. He further suggests that the constitution does not talk about a quorum about presidential elections at all. Arslan brings empirical support to substantiate his claims by arguing that the 367-criteria were never brought into the presidential elections before.

Some scholars also criticize the court's reasoning based on the notion of 'qualified consensus' in its 367 decision. The Court claimed that for presidential elections, "It is obvious that the Constitution aims to provide for the largest possible qualified consensus in Parliament"[41]. Using this interpretation, the Court then finds

[39] Mustafa Şentop, *A Cabal Power of Judges*. 4 May 2007. 1 July 2009 <http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=110205>.
[40] Zühtü Arslan, *Gerekçeli '367 kararı'nın düşündürdükleri*. 28 June 2007. 1 July 2009 <http://www.zaman.com.tr/haber.do?haberno=556988>.
[41] Ali A. Kılıç, *Court justification on '367 decision' angers experts*. 29 May 2007. 1 July 2009 <http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=115350>.

the stringent quorum in the Constitution, which is 2/3 of the number of deputies, or 367. While the Court rationale accepts the promotion of widest possible consensus for presidential election, Arslan disagrees with such activist interpretation and points to a literal reading in which 'consensus' is not a precondition for the presidential election. To elaborate his position, Arslan points to the articles of the constitution in which in the third and fourth round of president elections a simple majority is enough to elect a president, making qualified consensus rationale in clear contradiction with constitutional stipulation about majority's power to elect the president. Constitutional law professor Mustafa Kamalak points to this inconsistency: "If a qualified consensus is required for the first round, then why doesn't the same requirement hold for the second and third rounds?"[42] Ahmet İyimaya, the former chairman of the parliamentary Constitutional Commission, argues that the court adopted what he classes an interventionist approach: "The Constitutional Court has failed to produce a persuasive constitutional reasoning for its decision, which has fueled crises in the system, democracy and politics. The dissident opinion makes reference to the effects of the environment in which the decision was given and of certain people and organizations on the court. But the court should have attempted to eliminate the distrust created by the environment emphasized in the reasoned decision."[43] Another constitutional law professor, Zafer Üskül, claims what the constitutions requires is not the 'qualified consensus' but a majority consensus: "The Constitution has set the rules of how to obtain a consensus in electing a president. Consensus is sought in the necessary number of supportive votes. Article 102 says you need to obtain a majority of 367 in the first two rounds. This is consensus. And if you cannot find that, the Constitution says that consensus is sought in the simple majority"[44].

Many constitutional law scholars and liberal thinkers, and of course AK Party and its supporters perceived the Court's decision its prejudice against AK Party and followed a cumbersome, controversial reasoning to fit the law to the cover the

[42] Kılıç, *Court justification on '367 decision' angers experts*. 29 May 2007. 1 July 2009 <http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=115350>.
[43] Kılıç.
[44] Kılıç.

Court's biases and its desire to block a president from the AK Party. This view also shared by the Turkish public. According to TESEV's research on the politization of judiciary, ordinary people show a strong distrust to the Court's reasoning. These are some excerpts from interviews: "There was no problem while choosing 10 presidents. While electing last one, they can direct things."[45] Another interviewer said, "They can change things in favor or against when they want."[46]

Ultimately, the 367 decision forced AK Party to declare an early parliamentary election. However, to the disappointment of judiciary, the early election brought AK Party to the government with higher percentage of popular votes compared to its first victory in 2004, yet with fewer number of parliamentarians (mostly due to entrance of of third party, Nationalist Action Party's success to qualify to send its candidates to the parliament). Even more to the disappointment of the judiciary, Prime Minister Recep Tayyip Erdogan resisted those calls of nominating an outsider to the presidency, AK Party nominated Erdogan's right-hand man, Abdullah Gul, whose wife wears a headscarf, for the presidency. This nomination drew criticisms from large spectrum of so-called secularists, most ardently from judiciary.

Disappointed but undeterred, the judiciary took an even more controversial step against the AK Party, initiating a legal case for the party's closure upon AK Party's constitutional amendment to allow women with headscarf to go attend universities. This was an issue, a symbolic war between AK Party and its secularist opposition, AK Party did not take up in its first term. After its election success, protecting its majority at the Parliament and sending one of its members to presidency, AK Party moved to establish education and religious equality by removing the headscarf ban in Turkish universities. The change of strategy was signaled when Turkish PM Erdogan challenged the secularist rationale of headscarf ban (it is a political symbol) that "What if the headscarf is a symbol? Even if it were

[45] Mithat Sancar and Suavi Aydın, *"Biraz Adil, Biraz Değil" Demokratikleşme Sürecinde Toplumun Yargı Algısı*. 12 May 2009. 1 July 2009 <http://www.tesev.org.tr/ud_objs/pdf/demp/yargi2_son_web07_05_09.pdf>.72

[46] Sancar, Aydın 72

a political symbol, does that give right to ban it? Could you bring prohibitions to symbols?"[47] Subsequently, AK Party acted with the minor opposition party, MHP, to lift the ban. Changes to Article 10 and 42 to indicate none would be denied from education for religious and political reasons were endorsed by 411 deputies. Nevertheless, the main opposition party, CHP, took the amendment to the Constitutional Court. After lengthy discussions, the Court ruled against the amendment, siding with strict secularist interpretation of the foundational principle of secularism. Like the Court's ruling on 367 case, some commentators view the annulment of AK Party initiated constitutional amendment to remove headscarf ban a political one, and accused the court to overstep its authority by annulling a constitutional change.

The headscarf amendment produced more than mere constitutional problem for AK Party but even put its survival at stake. After CHP took the headscarf amendment to the Court, the Chief Public Prosecutor of the Supreme Court of Appeals, Abdurrahman Yalçınkaya, brought a case to the Constitutional Court to close down AK Party, accusing it for being what he called "hotbed of anti-secular activities"[48]. A process of highly acrimonious debates in public and media followed when the Court accepted the case for deliberation. At the Court, AK Party defended its policies in terms of democratization, public opinion, and its electoral mandate, and accused the prosecutor conducting a political case with distortation and biased selections, and out-of-context quotes from the political speeches of some AK Party's members. In a balanced and what perceived a calculated move, the Court agreed with the prosecutor for AK Party being hotbed of anti-secular activities and fell short in terms of the party's closure. Nevertheless, the court halved the party's public funding as a penalty. This case had however broader implications. It surfaced a tension that when a party made a move against secular convictions, it can be closed down by courts, which is supposed to act within the law. In other words, judiciary become a de facto Damocles' sword over AK Party in the name of being a guardian of the

[47] *Justice and Development Party - 2008 closure case*. 2008. 1 July 2009 <http://en.wikipedia.org/wiki/ak_party#2008_closure_case>.
[48] Justice and Development Party - 2008 closure case

republic, a post the judiciary seemed to take over from the Turkish military.

This stand is clearly stated by by senior judicial figures who do not hesitate to divulge their political opinions even in cases they decide. For example, Turkish parliament tried to ease the ban on headscarf. The First President of the Supreme Court [Yargitay] Hasan Gerçeker link judiciary position preemptive: "it is not a simple headscarf issue. We should not permit the efforts to turn back the system, which is full of superstition"[49]. Gerçeker perceives this effort against the founding principle of Turkey, which only judiciary has constitutional right to interpret. Retired high-level judiciary are also vocal against AK Party for what they alleged the party's 'hidden agenda' of Islamizing Turkey. For example Former President of Supreme Courts Erarslan Özkaya, on the opening of judicial year in 2003, framed the demands of freedom of speech and religion as a slippery slope towards Islamization. To the disappointment of human rights groups for being put in the same category of Islamists, Ozkaya claimed "Those who want limitless religion and conscience freedom have the same aim with those who want to have an Islamic state."[50] Gerçeker also said that judiciary is a partisan to secularism. Gerçeker told Akşam daily news that, "Yes we are a party to secularism, republican acquisitions, the first three article in the constitution..."[51] Similar attitude also can be seen from The Presidential Board of Supreme Courts. Board commented the changes on article 10 and 42 made with "unpreventable speed"[52]. Also the Board accused the government of "abusing common acceptance to change constitution"[53]. Besides, the board blamed the government "to use this acceptance to prepare a draft directed and wished by one political thinking."[54] Those statements show that not only the judicial figures but also the Supreme Courts itself are making political comments.

[49] "Yargıtay Başkanı'ndan İlk Türban Sözleri," 1 Jul 2009 < http://www.haberx.com/haberler/subat-2008/yarg%C4%B1tay-baskan%C4%B1ndan-%C4%B1lk-turban-sozler%C4%B1-394473.aspx >.
[50] "AK Parti hakkındaki iddianameden (3)," 1 Jul 2009 < http://www.haberx.com/haberler/mart-2008/ak-partı-hakkındakı-ıddıanameden--403165.aspx >.
[51] "Yargıtay Başkanı: Biz laiklikte tarafız," 1 Jul 2009 < http://www.aksam.com.tr/2009/05/13/yazar/6186/aksam/yazi.html >
[52] "Yargıtay Başkanlar Kurulu Bildirisi," 1 Jul 2009 <http://www.yargitay.gov.tr/content/view/232/63/>
[53] Yargıtay Başkanlar Kurulu Bildirisi
[54] Yargıtay Başkanlar Kurulu Bildirisi.

The closure case was highly contested in public as well. For example, some of the interviewees of TESEV's research said that they lost their trust to judiciary because of the case. They stated their distrust in following terms: "Because of this case we lost our trust. They can turn off state and citizens whenever they want."[55] Another participant reacted by saying, "We do not believe in the independence of judiciary"[56].

The judiciary's politicized position, defined by being against to AK Party and thereby finding an anti-secularist motive in every amendment and reform of AK Party puts the judiciary in a position of rejecting EU reforms. For example, the Constitutional Court annulled the EU-demanded ombudsman law to the disappointment of EU Enlargement Commissioner Olli Rehn who said the law "was important to keep public authorities accountable and enhance citizens' rights"[57]. After having the bill vetoed by former President Ahmet Necdet Sezer, AK Party Government return the bill to president, effectively by-passing the presidential veto. Sezer also signed the bill into law. However, the president with the support of the main opposition party, CHP, took the law to the Constitutional Court for its annulment. The Court ruled against the AK Party, and supports of European Union by annulling the ombudsman law. The Court argued that the law lacked a clear basis in the constitution and it could damage the 'administrative unity' of the state. Both AK Party and liberal elites, the staunch EU supporters, criticized this decision. Constitutional law professor and a leading liberal thinker in Turkey, Mustafa Erdoğan said the constitutional clearly allows the Turkish parliament can "supervise and control and governmental agencies"[58]. By ignoring such clear constitutional right, the Court engaged, what he calls, subverting the constitution. Similarly another constitutional law professor with strong liberal and pro-EU orientation, Ergun

[55] Sancar and Aydın 72.
[56] Sancar and Aydın 72.
[57] *Top court annuls ombudsman law in EU setback*. 28 Dec. 2008. 1 July 2009 <http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=162448>.
[58] Mustafa Erdoğan, *Anayasa Mahkemesi şaşırtmaya devam ediyor,*. 11 May 2009. 1 July 2009 <http://www.stargazete.com/gazete/yazar/mustafa-erdogan/ anayasa-mahkemesi-sasirtmaya-devam-ediyor-haber-181161.htm>.

Ozbudun, agreed with constitutionality of ombudsman law by arguing that "Turkish parliament have right to make arrangements to supervise government agencies"[59].

4.2. The State-Centrism of Turkish Judiciary

Turkish judiciary has shown a tendency to side with state as opposed to selected government. For example, on one side during the time of military intervention to civilian governments, judiciaries sided with military as representative of the states, such as delivering verdicts to favoring military over the overthrown government. Judges often act as willing executer of state and military establishment. This tendency is evident in judiciary's ease with closing down political parties that the state and military officials call separatist, anti-secular, dangerous, anti-state, and anti-military (a tendency which is hihgly questioned at EU level, ECHR opposed all but only one of thess closure (Refah Case)). The judiciary is also quick to punish political speech if this speech is critical of state and military (ECHR usually overturn these decisions). The judiciary closed down many internet sites that insulted Turkishness and Mustafa Kemal Atatürk, the founder of Turkey. On the other, the judiciary was slow to prosecute state security forces, including police and military. Though Turkish legislature reformed and amended the Constitution, and also statues like Turkish Penalty Code expanding basic freedoms, providing more protection to individuals against the state, the judiciary preferences to act as an agent of state, protecting it against individuals persist. These problems "point at a deeper spirit of state authoritarianism"[60]. Increasingly, judiciary appoints itself to be the guardian of the state.

The state-centrism of Turkish judiciary has surfaced in TESEV report about Turkish judiciary and judges' worldviews. According the results of survey, disproportionate numbers of the members of judiciary, judges and prosecutors, believe that state interest comes first before anything else. Judges and prosecutors

[59] Ergun Özbudun, *Kamu denetçiliği ve Anayasa Mahkemesi*. 28 May 2009. 1 July 2009 <http://www.zaman.com.tr/ haber.do?haberno=842299&title=yorum-prof-dr-ergun-ozbudun-kamu-denetciligi-ve-anayasa-mahkemesi>.
[60] Türkmen 156.

seem often ignore state-officials wrong-doings, even at the expense of the concerns of justice and fairness. For example, to the interview question whether state interest or justice comes first, some judges and prosecutors answered:

"I am a state centric jurist"

"The State comes first"

"We are following state school tradition."

"Without a state, there would be no law or judges and prosecutors"

"Of course we love our state. We should give maximum care and attention for the security of the state."

"Let's say that in order to protect the state we may not just or deviate from justice. You could harm the state in the name of justice or vice versa. Those could happen."

"There would be no democracy without a state...As a public prosecutor; I should protect the state and regime. I am a public prosecutor of this regime. In case something is against this regime, I would disregard democracy. You cannot attack my state and people."

"I would not care law when my state is in question"

"Without a state my personal freedom is not worthy anything."

When interviewers were asked which value has priority, human rights or state security, one stated his/her skepticism about human rights: "Human rights are exaggerate a bit."

These judges and prosecutors often see themselves as part, representative of the state, even if that means to act against society:

"I am a public prosecutor. My constitutional duty is to protect and watch the republic."

"I am a prosecutor of this regime."

"If we perform our duty, the state will not weaken."

There have been, however small, voiced views upholding human rights and interests of society as a whole:

"I am a prosecutor of this public"
"My only priority is justice and I am a judge of justice. I am a judge of this republic, state, Europe or world. I am a judge of justice. This is my priority. There are many mechanism and way that the state could protect itself."

TESEV findings also point that judges and prosecutors differentiate crimes against state and “wrong-doings” done in the name of state. For example, a 45 % of respondents acknowledged the presence of differentiation [for state and against state] in Turkish judiciary even if they fully comfortable with it: "Unfortunately there is such inclination." one said. A significant 24 % respondent embraced this differentiation: "There must be such inclination". In the survey, one respondent explain the underlying rationale of this differentiation of wrong-doings for or against state: "[On one hand] laws are product of the state. On the other hand, earlier generations fought for this country. We do read those and internalize them. When one commits crime against state, people get anxious whether our state is tearing apart."

The public seems to be aware judiciary’s state-centric bias. When TESEV researchers interviewed public, A respondents from Kars [a city located in Eastern Turkey with substantial Kurdish population] says, "The more you take side of the state, the more courts will protect you. There is nothing to say". Another interviewee from Kars believes courts protect the regime: "Biased they are. They clearly protect those are in favor the regime". Another interviewer from Diyarbakir [a city located in South-Eastern Turkey with the most active Kurdish population, center for Kurdish identity] believes that it is expected that the courts will favor state interest and offer a historical justification for this bias: "Jurisprudence protects state. This is the case throughout history. From Hittite and Assyria's time to our modern time, jurisprudence protects state. Even it seems that they protect citizens, it is not the case. When a person commits a crime in Hittite, you are punished. However, when you commit a crime against the state, your whole family would be killed." All these three excerpts, coming from interviewees from a region with substantial Kurdish population suggest that these people perceive courts as agents of state rather than

perceiving the courts there to protect people.

Not surprisingly, the emphasis on the needs and security of state in Turkish judiciary makes judicial corps quite skeptical about EU reforms. In general the judges are wary about governments who concede to its international treaties when they are in conflict with domestic laws. This skepticism and wariness are evident in TESEV's research. Some interviewees considered government's willingness to follow its treaty obligations as actions of foreign law "interfering domestic affairs" and "limiting [Turkish] sovereignty". To a question whether judges and prosecutors take international human rights treaties which Turkey accepted in judicial decisions a majority %53 of respondents answer negatively. A half of respondents %49 think unfavorably about re-trails imposed as a result European Court of Human Rights decisions[61]. A bigger portion, %63, of respondents was against government's signing additional European charters and human rights treaties.

Combined together, these results point to what TESEV's researchers a "mentality problem" in Turkish judiciary. As a staunch defender of the state, putting its security above human rights and putting its sovereignty above Turkish treaty obligations on human rights issues, a significant portion of Turkish judiciary hostile to EU reforms and possibly use their judicial powers and discretion to slow it.

4.3. The Legacy of Military-Imposed 1982 Constitution

Since its becoming a Republic, Turkish democratic experience has been punctuated by several military interventions. The first of this intervention came on May 27, 1960, followed by a second one in 1971, and a third one in 1980. Military was able to extend its influence more with its 1960 and 1980 coup d'état because military appointed and controlled groups wrote new constitutions to satisfy military demands. Despite the military influence, scholars tend to perceive 1960 constitution

[61] Sancar 22.

more democratic compared to its predecessor and follow up. In 1970s, amendments diluted some of the democratic rights secured in 1960 constitution. These amendments, Prof. Dr. Zühtü Arslan notes, aimed at "cutting its freedom centric structure". For example 1971 and 1973 amendments expanded the power of National Security Council, where military had substantial representational and power. This change in NCS, normalizes and legalized the military's power over governments. Military started to "suggest" policy priorities to the governments, suggestions which had de facto mandate.

Despite its enormous powers brought by 1970s constitutional amendments to the military, military carried another coup d'état in 1980, writing a new constitution that gave more power and authority to the state and its agencies. Yavuz Atar captures this state centrism when he writes that 1982's constitution "bless"[62] the state and subordinate "individuals and civil society to state"[63]. Similarly, Zühtü Arslan notes the same trend through ordering within 1982 constitution: "Our constitution began to mention general restriction for freedoms before mentioning freedoms."[64] Some commentators notice three layers of restrictions in Turkish constitution: general restrictions for freedoms, particular restrictions for a particular freedom, and the prevention of abuse of freedoms. That is why 1982 constitution violated liberal democratic rules that 'freedoms are policy; restrictions are exception' and "emptied and made it impossible to use those freedoms"[65]. In general, 1982 constitutions sets a frame in which the state and society as a "rival"[66]. Society's gaining power is seen wakening the state. This framework diffuses in Turkish judiciary in which most judges and prosecutors perceive the rights and freedoms as dangerous, destabilizing the state institutions.

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[62] Yavuz Atar, "Türkiye'nin Hukuk Devleti Sorunu: Hukukun Evrensel Üstünlüğüne Karşı Devletin Anayasal Üstünlüğü," *Liberal Düşünce* Sayı 24 2001: 173.
[63] Atar 173.
[64] Zühtü Arslan, "İfade Özgürlüğünün Sınırlarını Yeniden Düşünmek: "Açık ve Mevcut Tehlike"nin Tehlikeleri." *Liberal Düşünce* Sayı 24 Güz 2001: 14.
[65] Mithat Sancar, "Devlet Aklı Kıskacında Hukuk Devleti," Birinci Baskı, İstanbul: İletişim Yayınlan, 2000: 145
[66] Tuna Polat, "Avrupa Birliği Uyum Sürecinde 1982 Anayasası'nda Yapılan Değişiklikler," *Cumhuriyeti Üniversitesi Sosyal Bilimler Enstitüsü*, Sivas, Mayıs 2005: 42.

This emphasis on rights and needs of the state puts the 1982 Turkish Constitution apart from European constitutions. Most European constitutions upholds and elevates "personal honor and human rights, democracy and rule of law"[67] over the concerns about state security. Some European constitutions even enumerate the basic rights and freedoms as foundation of the state. For example, the German constitution declares in its first article that 'immunity of personal honor' and 'immune and untransferable human rights' are the basis of state[68]. Portugese constitution mentions human being's honor as an element of the basis of state.

4.4. Military Courts

One of the issues between Turkey and EU is military courts. Turkey has give a right to military courts to try civilians as some other European countries does. However Turkey's allowance has caused critics from EU. For example, EU Commission criticized National Security Courts for its having a military judge. After EU's criticisms, Turkey abolished NSC courts.

One can see military courts in Europe dating back to 15th Century. Nevertheless in the last years there is an inclination to abolish those courts. For instance, although EU member France founded Military Supreme Courts in 1962 it allowed judicial courts to prosecute military personal in the peace time. Another EU member Italy closed down Military Supreme Courts in 1981. Belgium abolished all military courts in 2004.

After the collapse of Ottoman Empire, new republic found military courts in 1930 according to French and German's law. With 1961's constitution, military courts have gained constitutional status. Moreover, discipline and Military Supreme Courts have founded. Turkey allowed those courts to try civilians in some cases as some other European courts did. However, ECHR's decisions changed that. For

[67] Mustafa Erdoğan, "Avrupa Birliği Anayasalarında Devletin Temel Nitelikleri." *Liberal Düşünce* Sayı 23 2001: 30
[68] Erdoğan 31.

instance Greece abolished this right all together. ECHR's decision also affected Turkey. Turkey changed the article to restrict military courts' right to prosecute civilians. However, Turkey gave a right to military courts to try civilians in case they humiliate the army. However, the Constitutional Court annulled this article because it goes against the constitution.

In addition to this, Turkish parliament voted in favor of a change that abolishes the military courts' right to prosecute civilians. According to this change, the military courts will not be able to prosecute civilians. Moreover, if a soldier commits a crime that falls within the scope of civilian courts, those courts will prosecute that soldier in peace time. In war and martial law times, military courts will prosecute that soldier. However, this change is not ratified yet.

Another subject is the existence of non-juicial personel in discipline and military courts. Those personels caused a question of courts's independence. That is to say beacuse those figures are liable to the army it caused a concern whether they could be impartial. Also, their and judicial figures' depended on the report from army personal. That is also anohter subject for concern. Their dependence on the army caused a question mark whether they can be impartial, which ECHR gave a huge importance.

The government did allow non-judicial figures to appear in military courts. However, the Constitutional Courts decided this allowance to be unconstitutional and annulled this right. Some commentator found this decision very important on the EU road.

V. REPORTS ON TURKISH JUDICIARY

5.1. EU's report on Turkish Judiciary

With the Helsinki Summit, after the approval of Turkey's candidate statue by the leaders, EU Commission has begun to prepare yearly progress report for Ankara. In these reports, a general photo of the country is taken and various subjects as the harmonization to the Copenhagen criteria provided and suggestions whether to open candidate negotiations or not are stated. In the light of these progress reports, Leaders can make decisions about that country. In this respect the progress report becomes more of an issue. Considering the last decade there are various criticism towards the judiciary. The common ground of these criticisms is the problem of judiciary independence and neutrality. In the progress reports, the incoherence of the courts about freedom of expression, judges making statements in political subjects, the 367th decision of constitutional court, have been under the lash of criticism.
In 1998 and 2001 dated reports the commission that has made technical knowledge-based analyses about judiciary, with 2002 it has potentiated the criticism. The Judiciary neutrality and the incoherence of the courts about freedom of expression have been also under the lash of criticism. In 2007 dated report while the decision of 367 of the constitution court that discussed a lot has been under the lash of criticism, in the 2008 dated report, judges making statements in political subjects have caused criticism.

In the 2002 dated progress report it has been pointed out that prosecuting officers have made "incontinent use"[69] about freedom of expression. In the report the case is summarized as Articles 159 (insulting the State institutions), 169 (support for an illegal armed organisation) and 312 (incitement to class, ethnical, religious or racial hatred) of the Penal Code and Article 8 of the Antiterrorist law (separatist propaganda) are among the provisions most commonly used to restrict freedom of

[69] The European Comission. *2002 Regular Report on Turkey's progress towards accession.* 09.10.2002. 01.07.2009 < http://ekutup.dpt.gov.tr/ab/uyelik/progre02.pdf>.

expression. These provisions are particularly applied to individuals expressing opinions on Kurdish related matters, and the role of religion, which might be portrayed as violating the principles of indivisibility of the territory and the secular nature of the state as provided under Article 13 and 14 of the Constitution. In the report, despite the amendments of these laws, it is emphasized that prosecuting officers make use of the laws like those and restrict the freedom of expression. It is said in the report that, "there has been a certain tendency by prosecutors to use other provisions of the Penal Code, which were left unchanged by the harmonization packages, to limit freedom of expression."[70] Besides, in the same dated report, stating that different judges have judged by the same law but come to different conclusions; it has been said that, "This in turn raises the question of the predictability of interpretation of the law."[71] Examples are also given in the report and it is displayed that judiciary resists to take a step despite the laws. It is said in the report that, "the Supreme Court overruled a decision of the State Security Court in Diyarbakir which appeared to be based on the newly introduced provisions, in particular on the new version of Article 312 of the Penal Code. In this case, the Diyarbakir State Security Court decided to delete the criminal records of Tayyip Erdoğan, the leader of the AKP party, convicted under the old Article 312. The State Security Court ruled that the act for which he was convicted was no longer considered as a criminal offence under the new version of Article 312. This would have allowed Mr Erdoğan to participate in the elections of 3 November, but the Supreme Court ruling, followed by the subsequent decision of the High Electoral Board effectively prevented this. As it seen in that report and in the last example, the judiciary acting with the instinct of protection of the state, it hinders the fundamental rights and freedom wherever it wants. It has been discerned well in the situation Erdoğan and freedom of expression concerning the Kurds.

Criticism towards the freedom of expression has gone on in the 2003 dated report. It is pointed out in the progress report that, it has been made use of the proper articles of the Penal Code from the point of freedom of expression. With regard to

[70] The European Comission
[71] The European Comission

this, it is pointed out that, despite the amendments of the articles used for previous accusations that lead to much more freedom of expression, the prosecuting officers have opened cases by expanding the meaning of the Articles 312 and 169 of the Penal Code and article 7 of the law to fight terrorism. Besides, it has been stated that judiciary doesn't always behave in an impartial and consistent manner in all cases.

Criticism about judiciary has continued in the 2004 dated report that the EU Commission has approved the membership negotiation with Turkey. The Commission pointed out that within the frame of amended article 8 of anti-terror law, confiscated publication has been enlarged by other articles. When the negotiations started between Turkey and European Union on 3 October 2005, in the published report, criticism about freedom of expression has continued. In the report that the Şemdinli Case involved, it has been called attention to the impartial of YARSAV because of dismissing the Public Prosecutor of Van, Faruk Sarıkaya who had prepared the indictment on the Şemdinli Case. In the indictment that he had prepared about the Şemdinli explosion, Sarıkaya had also mentioned about the Former Commander of the Turkish Land Forces Yaşar Büyükanıt. After the army criticised the indictment, YARSAV had convened and dismissed Sarıkaya. It is forseen that, the nature of the explosion in Şemdinli has been taken into account and judiciary's protection reflex of the state still exists. However, while the amendment of the Turkish Penal Code praised in the progress reports, because of the perception of article 301, in the 2005 dated report this article has also been criticised. With its continued protection reflex of the state, judiciary has used this article in order to punish –from the state stand point– the impermissible comments or at least to oppress who makes those comments. In the report, the punishment of the Armenian journalist Hrant Dink who has been assassinated is mentioned. In the 2006 dated report, it has been pointed out that, while criticism towards the Turkish Penal Code's interpretation of the article 301 continues, some judges have interpreted the articles in an inconsistent manner.

The 367 decision of the Constitution Court has been criticised in the report published in 2007 that has witnessed the Turkish Election of the President of the

Republic that developed into a political crisis. The Court ruled that a quorum of two thirds (367 deputies) is necessary for presidential elections in Parliament. However, concerns remain as regards the independence and the impartiality of the judiciary, as the number 367 condition hadn't been set for any election and has now been set for AKP's candidate Abdullah Gül. By drawing attention towards these interpretations, the Commission said that; "This decision led to strong political reactions and allegations that the Constitutional Court had not been impartial when reaching this decision."[72] It has been also pointed out in the 2008 report that concerns remain as regards the independence and the impartiality of the judiciary. In addition, the Commission has stated that senior members of the judiciary made public political comments. The Commission has also said; "senior members of the judiciary made public political comments which may compromise their impartiality in future cases."[73] EU Commission progress reports have made evaluation to the point. The judiciary system presents a statist character in hot cases like those above. It makes no odds whether in freedom of expression, presidential authority or woman's right to choose to wear the Islamic headscarf. Besides those criticisms, the commission has criticized similar independent institutions of thoughts.

5.2. Other critics against Turkish Judiciary

The Brussels-based International Crisis Group, in it its "Turkey and Europe: The Decisive Year Ahead" report, has criticized the 367 decision. The Group says that, "…367 deputies was needed to make that majority effective, and the Constitutional Court concurred. Liberal jurists contended that its decision was political, intended to block a perceived threat to secularism."[74] Also, group says that even Constitutional Court's members criticize the rulings. However the Group pointed out that members who have been elected for the Constitutional Court also have come from the bureaucracy itself. The Group summarizes the subject by saying

[72] The European Comission, *Turkey 2007 Progress Report*, 06.11.2007. 01.07.2009 <http://ec.europa.eu/enlargement/pdf/key_documents/2007/nov/turkey_progress_reports_en.pdf>.
[73] The European Comission, *Turkey 2008 Progress Report*, 05.11.2008. 01.07.2009 < http://ec.europa.eu/enlargement/pdf/press_corner/key-documents/reports_nov_2008/turkey_progress_report_en.pdf>
[74]Crisis Group. *Turkey and Europe: The Decisive Year Ahead*. 15 Dec. 2008. 1 July 2009 <http://www.tepav.org.tr/eng/admin/dosyabul/upload/ turkey_and_europe_the_decisive_year_ahead.pdf> : 6.

that, “This means that candidates are intrinsically linked to the country’s often conservative bureaucracy.”[75] This shows that the court thinks about the state rather than the fundamental rights and freedoms

[75] Crisis Group 12.

CONCLUSION

To conclude I want to highlight two key findings my study and three possible future research project. First finding is that the like functionalist scholars argued the European Union integration seems a transformative process when it comes to issues of sovereignty. European Union demands member states to share important aspect of their sovereignty. These demands, I have argued, put Turkish judiciary and its commitment to traditional sovereignty in a difficult position.

Second finding is that legal change is a key for Turkish membership to European Union. So far Turkish judiciary proved to be a liability and obstacle for the Turkish membership to the EU rather than asset and facilitator. In addition to the concerns of Turkish sovereignty, there have been three main reasons: its increasing politicization with during AK Party Government, its state-centric culture and perspective, and its privileges and autonomy embedded in 1982 constitution.

There can be three further studies can be conducted following the argument of my thesis. First, EU is also a transformative process not only for Turkish society but also Turkish state institutions. My findings can be generalizable to other Turkish domestic institutions as well such as Education Ministry, Directorate of Religious Affairs, and Military. A comparison with Turkish military and judiciary may be particularly important. Turkish military in many ways reflect parallel tendencies with that of Turkish judiciary: commitment to traditional notion of sovereignty, desire to protect its institutional privilege and autonomy, its politicization, and its state-centric culture. A further study would be useful to compare Turkish domestic institutions to assess which ones and why have been more successful to achieve institutional transformation the European Union demands.

Second, one may also compare Turkish judiciary's reluctance with the European Union demands with its large-scale and radical transformation with in early years of the republic in the 1920s. Were there similar problems at that time? What explains differences? How did early Republican leaders get the commitment

from Turkish judiciary to carry out large-scale modernization and reform movements?

Third, a further study can be also made to compare Turkish judiciary with others recent members. For example, did Polish judiciary show similar difficulties in achieving its institutional transformation? If there Polish judiciary also showed similar problems, one might speculate that the problem of Turkish judiciary is not because of its "Turkish"ness but because, maybe, conservative nature of judicial institutions and their privileged positions within traditional notion of sovereignty.

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