

SOME THOUGHTS ON NATIONAL SECURITY CONCEPT

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To Versan :

**Thank you for the fellowship we have shared
and the good will and friendship you have
always taught us.**

I. National security has become a topic of debate and of interest lately. There are many reasons in Turkey for this:

a. Turkey underwent internal chaos coupled with terrorism in the not-so-distant past. Therefore, the concept of internal security, as well as that of external security, is very important for Turkey.

b. International terrorism, intricate international relations, and political, economical and social conditions make the National Security concept very important.

c. Since National Security is such that it allows the executive and legislative branches to apply it in directions that can result in restricting and blocking almost all of the basic rights and freedoms, it also becomes a constitutional concept. It should be considered a very important concept, therefore.

National security concept and administrative bodies such as the National Security Council in the United States of America have first appeared in the executive branch of government since

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the Second World War. The United States of America first gave impetus to new interpretations of the National Security concept. It is well known that the National Security Adviser is one of the President's most important counsellors. The U.S. has had several different applications of the national security concept. The Fourth, Fifth and Fourteenth Amendments of the U.S. Constitution are involved here. The U.S. Supreme Court has rendered many important decisions on this matter. One of the most important of these was that concerning the New York Times and the Pentagon Papers. In addition, the Executive Organ has taken different stances on such matters. Besides, there is a very important organization in the U.S., the National Security Council. The legislative branch has passed several laws that bear on the subject. For example, 1920 Immigration Act proposed deporting persons who did not fit a certain definition. The Supreme Court in 1939 gave an interpretation which narrowed the scope of the concept. Later, in 1940, Smith Act sought to override the Supreme Court decision.

In 1947, the National Security Act established the National Security Council. There were the extremely interesting, and perhaps, exemplary for Turkey, execution and judicial decisions concerning subversive activities and loyalty oaths. There are many detailed and enlightening decisions concerning the rule of law and judicial review and the law of Criminal Procedures. Freedom to travel, freedom of the press, freedom to work and using evidence secured through illegal means with national security overtones, all have been subject to executive practices and judicial decisions. Even recently, matters such as the freedom to work whether civilians working on military installations should be subject to interventions by military personnel and whether wire-tapping and eavesdropping should be permitted for the purpose of collecting State evidence have been heatedly debated. Moreover, committees in the Senate and in the House of Representatives have held sessions on these matters. Studying the minutes of these meetings will be beneficial in formulating a definition of national security.

II. National Security is a slippery and obscure term, difficult to define. On the surface, it may seem to be only a military matter, but the term is, in fact, has political, economic and, more particularly, legal, ramifications. Proof of this is its appearance on International documents, in constitutions, laws and other legal documents. These legal passages, however, do not attempt to define the «national security» concept. In truth, it would be difficult for these written documents to

define the term. There is a Turkish attempt, if not a too successful one, to define it in Article Three of the Regulations For the Secretariat of the National Security Board (Millî Güvenlik Kurulu Genel Sekreterliği Yönetmeliği). According to this, national security is «the full use of all the national strength, efforts and acts to determinedly oppose all forms of aggression from within and without, subversive activities, natural disasters and large fires; to defend and extend the authority of the state; and to ensure victory in case of war». The Turkish Council of State in a 1970 decision defined the term thus : «The security and defense of the corporate identity of the State against internal and external dangers that present themselves in the country».

Because of National Security concept's nature, when it appears in Constitutions and laws, there is no attempt to define it.

III. In the international field, there is a general recognition that certain freedoms can be restricted for the purposes of national security. For example; in various protocols and agreements ratified by member nations of the European Council and in the International Covenant on Civil and Political Rights accepted by the United Nations, such provisions are evident.

In Turkey, National Security is mentioned in the Constitution of 1961 and 1982, in certain laws and administrative regulatory acts (such as regulations).

Article 11 of the 1961 Constitution and article 13 of the 1982 Constitution state in identical words : «The basic rights and freedoms... may be restricted ... to protect the national security.». In other articles of both Constitutions, almost the same wording about National Security's limiting basic rights and freedoms appear.

Certain Turkish laws too, contain references to national security. Among the several instances could be cited: Sometimes, the Council of Ministers is given authority to postpone a strike or lock-out on the grounds of national security; the Passport Act and the TRT Act.

Turkish judicial organs have issued rulings concerning national security. The Constitutional Court has given decisions based on different interpretations of national security. The Council of State, in its various

decisions, has established the following conditions on which acts can be taken on the basis of national security:

«— Particularly on matters touching on the Constitutional rights and freedoms, measures may be taken if acts, not based on probability comprise a clear infringement on National Security.

— If steps concerning national security should not be taken, there should be clear indication that the acts would become wider and more violent.»

IV. When considering to applications based on national security, one thinks of matters such as the defense of the state's internal and external national security from threats arising from foreign states at war or at peace, and internally of the defense of the state corporate identity from armed rebellion and destructive acts. The national security concept should not be confused with that of «public order.» Public order is the extension, not of economic chaos, but, on the contrary, of a certain peace and order and the defense of security, tranquility and health in a society, whereas national security should not entail matters to be prevented by intervention of the normal police forces. In other words, the national security principle should not be broadened in a manner contrary to the goals and will of the Constitution - framers and law-makers.

The foremost problem that has to be first solved in any legal study of national security is the determination of **how a balance can be achieved between the basic rights and freedoms and national security.** An extreme concern for national security could pave the way for destroying the basic rights and freedoms. An opposite stance could mean the rejection of the national security concept, presently accepted as a reality. It is very difficult to balance the demands of national security and those of the basic rights and freedoms of the citizens. This balance has never been established. The non-realization of this balance could create a new system of preventive law applicable to the field of ideas and essentially different from traditional democratic procedures.

There have been many incidents in Turkey pertaining to national security. In Turkey, the national security concept can not be argued about, can not be touched. The close relationship between national

security and national policy has not been understood. Foreign ideologies have infiltrated the country. Besides classical infringement on basic rights and freedoms by the State are the perhaps even stronger intervention of third parties. Terror had reached terrible level. These activities caused panic, which in turn provoked a military takeover of November 12, 1980 which, while armed at the suppression of subversive activities, had a negative effect on the constitutional guarantees of the right to think and speak freely, and equally important, the right to criticize freely.

Like all other nations, Turkey faces internal as well as external dangers. It can be agreed that a nation must protect itself against these dangers by some kind of security measures, i.e. program. Up to now, no direct attempt was made by officials to prevent wrongful acts before they were committed; they punished the persons responsible only after they had committed the acts. All measures were centered around wrongdoers. A security program, or measures and applications of government activity for the sake of national security, instead of promoting a sense of security among the citizenry, has often had the opposite effect of spreading doubt, suspicion and mistrust even among public officials who have no connection with terrorist activities. In addition, in Turkey a pessimism prevailed, making it impossible to assess the nature of Turkey's real problems. Political parties and ideologues exploited security matters for their own purposes. It was forgotten that the economy was a national security matter and that today countries are using their developed economies to promote their national security aims. So much has it been forgotten that there is pretense of not knowing that the national security of one country is closely related to that of another. In addition, The Turkish Republic's unique philosophy derived from the principles of Mustafa Kemal Atatürk (Kemalism) have for various reasons been ignored. All of the above situations helped to bring about the military action of September 12, 1980.

V. The 1961 Constitution with its amendments in 1971 in Article 111, established a **National Security Board** to advise the Council of Ministers on basic views necessary to decide on matters involving national security and related matters. This Board used to consist of the Prime Minister, The Joint Chief of Staffs, the ministers specified in the National Security Board Act, number 128 and the heads of the Armed Forces.

Article 111 of the 1961 Constitution is as follows: «**The National**

Security Board shall consist of the Prime Minister, the Chief of the General Staff, the ministers specified by statute, the Force Commanders.

The President shall preside over the National Security Board; in his absence, the Prime Minister shall assume this function.

The National Security Board shall present to the Council of Ministers its essential basic recommendation to assist in making decisions concerning national defense and in ensuring coordination.»

1982 Constitution too, in Article 118, has retained the National Security Board. In addition, a new act called «Act on National Security Board and General Secretary of the National Security Board», numbered 2945 has been accepted by the Legislature.

The text of Article 118 of the 1982 Constitution, concerning National Security Board is as follows : «The National Security Board shall be composed of the Prime Minister, the Chief of the General Staff, the Ministers of National Defence, Internal Affairs, and Foreign Affairs, the Commanders of the Army, Navy and the Air Force and the General Commander of the Gendarmerie, under the chairmanship of the President of the Republic.

Depending on the items of the Agenda, Ministers and other persons concerned may be invited to meetings of the Board and their views be heard.

The National Security Board shall submit to the Council of Ministers its views on resolutions and ways of ensure necessary coordination with regard to the formulation, establishment, and implementation of the National Security policy of the State. The Council of Ministers shall give priority to the decisions of the National Security Board concerning the measures that it deems necessary for the preservation of the existence and independence of the State, the integrity and indivisibility of the country, and the peace and security of society.

The Agenda of the National Security Board shall be drawn up by the President of the Republic taking into account the proposals of the Prime Minister and the Chief of the General Staff.

In the absence of the President of the Republic, the National Security Board shall meet under the chairmanship of the Prime Minister.

The organization and duties of the General Secretariat of the National Security Board shall be regulated by law.»

It is obvious there are some differences between Article 111 of the 1961 Constitution and Article 118 of the 1982 Constitution:

a. The members who will participate in the meetings of the National Security Board are limited in Article 118 of the 1982 Constitution by specifying them in the Constitutional text.

b. The power and duties of the Board have been specified in detail in Article 118.

c. Article 118, imposes a duty on the Council of Ministers to give priority consideration to the decisions of the National Security Board.

d. Another innovation of Article 118 is that the General Commander of the Gendarmerie become a member of the Board.

VI. The National Security Board and its functions have been the subject of debate in Turkey. The National Security concept should not be broadened in a way inconsistent with the Constitution and law drafters' purpose and will. It is essential to prevent such a broad interpretation. It is equally important that a balance be established and preserved between the basic rights and freedoms and national security. This is a legal matter. The final say in resolving this legal matter and in determining the limits and principles of the national security concept belong to the judicial organ. The importance of the decisions to be reached by the judicial organ is clear.

VII. Clearly, research on a National Security concept has important implications. A legal formulation of a definition of the commonly used concept of National Security based on studying the rule of law, judicial review, its constitutional aspects and possible limits on its discretionary nature is of the utmost importance for Turkey and its legal and political circles.

This importance was enhanced by the period of the September 12, 1980 military action in Turkey and the preparation of the 1982 Constitu-

tion of the Turkish Republic. The ruling group itself indicated this by calling themselves the National Security Council.

We, in the profession of teaching government administration, know that once a bureau or institution is established, it is all but impossible to ignore it or to abolish it. The 1961 Constitution contained references to the National Security concept and a National Security Board. This is most certainly true of the 1982 Constitution as well.

Research on the National Security should help to build this concept in the Constitution on strong foundations, to ensure that the execution is set up in line with the concept, that any National Security Board remain an advisory organ only, and that it be entrusted with preparing a National Security program for the Council of Ministers instead of merely relaying its response to events that have taken place. It should help to delineate the boundaries between National Security and martial law, which are closely related and to elicit sounder judicial decisions concerning national security.