

# Legal and Institutional Framework for Privatisation\*

## A Legislative History

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This seminar began with "law" and now it is necessary to complete its "legal framework."

After the first session, one of the esteemed participants addressed an important question but in my opinion it was not answered properly. The question was: "How is it that, a process which began in 1984 is put within a legal frame with a law that is passed ten years later?"

The answer that not was given then is very simple:

Because at the beginning the "law" was neglected, or to speak frankly it was pretended as though it did not exist. Although "privatization" is primarily an "economic choice" and once you make this choice the practice must take place within "legal means and methods."

Later, it became obvious that even experts at the head of privatization had "confused concepts." In fact, within the given examples on the first day, a decision of the Council of State concerning the electricity distribution company of the asian side of Istanbul. The incident that resulted the decision has very little to do with "privatization." This decision is about concession of public service.

The first mistake in the "legislative history" was made with the Statutory decree number 233. The Motherland Party (ANAP) which had a great majority in the Parliament creating a new Public Economic Enterprises (KIT) regime and a new category, made a mess of everything that was already quite confusing and created an advantage for the opposing parties. Especially in the case of Public Economic Entities (KİK) where the element of public service is more prevalent, the Constitutional Court and the Council of State were also involved.

The problem must be solved as it was done in Italy; all the KIT's must be transformed into joint stock companies and whatever the ratio of the shares are, they must all be considered public partnerships. Later the necessary amount of shares can be sold, in other words privatized.

The most interesting thing is that the first privatization in Turkey was made this way. The shares of TELETAS which is a "partnership," were sold this way.

After this, the whole thing was organized with statutory decrees and nearly every time the act of authorisation for the statutory decrees was found unconstitutional or the decree itself was overruled.

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There was a rumour that, finally the Government, or to be more precise, the Prime Minister had asked the President of the Constitutional Court his opinion on the legality of a new act of authorisation. But this rumour has not been verified.

If the rumours are true, this method is extremely wrong, because according to the Constitution, the Council of State is competent in such cases. The 155 th article which has the heading "Council of State" mentions that "the Council of State gives its opinions on draft legislation submitted by the Prime Minister and the Council of Ministers."

At the Administrative Law classes that I teach, an interesting case is given as an example at the lectures:

Two boys went to the same hospital, one for appendectomy the other for circumcision. The nurse who was in charge of arranging the surgery row, because she is too busy, and mixes up the order of patients in a hurry and in the end the boy to be circumcised had appendectomy operation and vice versa. So the privatization that I drew the legal framework has started just like this.

The "privatization" process in Turkey may be deemed as started with Law 2983, Concerning the Encouragement of Savings and Acceleration of Public Investments, issued in March 1984. However, I have had the chance of referring to the matter the first time with an address under the heading of "Studies on Privatization of the Public Economic Enterprises from the Standpoint of Administrative Law" which I delivered during a symposium<sup>1</sup> convened with participants from politicians, unionists, business environment and scientists to discuss the Statutory Decree No 233 dated June 8, 1984 for the Public Economic Enterprises, certain provisions of which were later overruled by the Constitutional Court.<sup>2</sup>

Until so far, I participated in numerous meetings at which I mentioned in each case, the mistakes made in the subject matter and entered scientific polemics with the deceased Adnan Kahveci, which at the end I got sick and tired and gave up privatization.

A considerably long period of my silence in writing was not even broken with my appraisal paper<sup>3</sup> dealing with the "build-operate-

1 The papers delivered to the symposium held in 1986 were published the same year in the ORHİM Seminars: "Opinions," pp. 181-202.

2 Articles No. 42, 45 and 49 of Statutory Decree No. 233 and certain provisions of the Provisional Article No. 1 of the Statutory Decree No. 308 were cancelled by the Decision of the Constitutional Court, No E. 1988/5 - K. 1988/55, dated December 22, 1988 and it was published in the Official Gazette No. 20232, dated July 25, 1989. The said Articles were later abrogated with Statutory Decree No. 399, dated January 22, 1990.

3 Özay İl Han, "Serendipity" in, Görüş, September 1993, Issue No 11, Page 50-51. In my brief appraisal paper, my starting point was as follows:

"Although it is the subject of economics whether the operation called privatization is required or not, since the "public economic enterprises and public participations are deemed as included in the "administration" in our system, it is involved particularly in my scope. Therefore it is inevitable for Administrative jurists to be interested in the matter. However, since it is a matter of political pref-

transfer" model appeared in the TÜSIAD's publication "GÖRÜŞ."

Though however, I tried to follow, as far as I could, this complicated problem which to a certain extent became insolvable, as the Committee member of the Faculty of Law submitting the "Opinions" requested from the Faculty by the President of Republic.

Now I shall leave aside all the figures and numbers which I think completely useless except for complicating the subject and start to outline the "Institutional and Legal Framework of Privatization" only by referring to certain arrangements and legal decisions in this regard and I shall simplify the topic as far as possible. While making this I shall direct some questions to myself and reply them.

The first question will be as such: Whether the privatization may meet with a restriction from the constitutional standpoint, in other words, if there is any provision in the Constitution which makes it impracticable.

The same question is also asked by the Joint committee of the Faculty of law which was entrusted with the task of preparing the "Opinion requested by the President of the Republic and is replied as follows:<sup>4</sup>

"While the constitution does not include any provision or rule directly associated with "Privatization," the Constitutional Court as well, which operates and institutes the order of rights by way of interpretation, has explicitly stated that there is not any constitutional restriction for the pursuance of any economic policy, the determination of economic preferences or the tendency of governments to follow an interventionist or liberal policy"<sup>5</sup>

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erence and the Governments of the last decade, the majority of the Parliament and the present partner of the political power deemed it necessary and adopted the idea, I think, such studies should be treated with interest and also highly esteemed as the consequence of democracy. In this regard, there is a responsibility for the ones dealing with public law: to prepare and deliver to the political power which exercised its preference in favor of the case, the instruments of the law technique which will enable them to perform and complete the operation with minimum loss and at optimum level if possible. Being conscious of my responsibility, I am in the opinion that involvement in such operation without consulting to the jurists is an attitude which should be criticised adversely."

Taking into consideration this conclusion, I want to congratulate and express my best regards to the ones who did not neglect the legal framework of privatization while discussing the matter and requested me to present a paper to the symposium in this regard.

<sup>4</sup> The report prepared by the Committee has not been published but I have a draft copy which I acquired the said information.

Since I was requested to deliver my paper after somebody else's who was assigned to give a speech under the topic of "Technical Assistance to the Central Asian Republics" and since the former heading of my paper was the "Legal and Institutional Framework of the Consultancy for Privatization," it was anticipated that I should have to mention something else and the questions I ask myself should have been related to the constitutions of such countries. But I know non of their laws or their order of rights, therefore I'm telling our own so that it may be a precedent. The comparison may be made at the end of the discussions.

<sup>5</sup> The information is based on the Decision of the Constitutional Court No E. 1984/9-K 1985/4, dated February 18, 1985 rendered as a result of the lawsuit opened for the annulment of certain articles of Law No 2983 Concerning the Encourage-

The second question that may come to our minds is that which "body" (organ of the State) is authoritative in the field of "privatization" according to our constitutional system and which legislative instruments can be used for such an operation; in other words, how can it be accomplished." The response to be given to the second aspect of the question will in fact enlighten the subject of "authorized body."

The Constitution has determined the authoritative bodies (authorized organs of the State) in the exercise of sovereignty. Just as, it has been stipulated in Article 47 of the Constitution that the nationalization which may be deemed as the reversal of the privatization, shall be realized in accordance with the laws in effect. It is why Law No 3082 was issued in 1984, Concerning the Rules and Principles for the Possibility of Nationalization of the Private Enterprises having the Public Service Quality, in cases it is mandatory in respect of Public Interests.

*"Expropriation" which is the most ordinary way of acquiring ownership by the public can be made according to the rules and principles as specified by law, in accordance with Article 46 of the Constitution.*

*The fundamental principle that may be derived from the provisions concerning such institutions is that the Constitution deems the proprietorship (ownership) as the subject of Law.*

At this point, it is met with the issue of whether the privatization can be performed pursuant to a "Statutory Decree" based on any law of authorization.

The last Decision of principle rendered by the Court concerning the matter which prescribes the constitutional limits of the "privatization" clarifies the issue as such:

*"The authorization laws which cover all subjects related to privatization, all aspects so as to solve the problems that may arise in connection with the public institutions and establishments during the operation of privatization, all kinds of authorizations in public acquisitions and all details relevant to the personnel reform and organizational structure, shall mean the "delegation of legislative authority" and are therefore against the constitution.*

The Court also points out that the aspects which concern the personnel and the staff lists allowing for employment should be unconditionally arranged by laws as the expenditure items of the budget. According to the jurisdiction of the Court, the public expenditures relevant to personnel and allocation of staff lists can not be executed by the Statutory Decrees to be issued pursuant to authorization laws and the Executive Organ shall not be allowed to be authorized in these issues.<sup>6</sup>

ment of Savings and Acceleration of the Public Investments. The decision of the Court was published in the Official Gazette No 18793, dated June 26, 1985.

<sup>6</sup> In accordance with the Decision of the Court, No. E 1994/49-K 1994/45-2, dated July 7, 1994, the "Law for Authorizing the Government to issue Statutory Decrees regarding the Arrangement of Privatization Implementations and the Solution of the Employment Problems that may arise as a result of Privatization," is overruled. The Decision is published in the Official Gazette No 23047, dated September 10, 1994 on pages 7 to 62. In subsequent pages I shall briefly mention such issues which are solved to a certain extent by the said last Decision which also covers many principles in this regard.

Within this context, in line with the relevant articles of the Constitution of 1982 and according to the interpretation of the Constitutional Court, *it is mandatory to make all the necessary arrangements by exercising the laws in respect of the fundamental issues concerning privatization such as, public institutions and establishments and public immovable to be privatized and the personnel, employment, personnel reform and organizational structure.*

If we return to our initial question, *the Constitution has not set forth any precondition (inhibition) for the privatization, on the contrary, it includes principles related to similar "institutions" although it is contrary to the idea which foresees and arranges nationalization.*

However, instead of discussing whether the "privatization phenomenon" can be accorded with the Constitution, in an abstract manner, the evaluation of a concrete law or legislative arrangements related to privatization, that is, the evaluation of laws and regulations "case by case" and "in concreto" in each case, will be more proper and appropriate. This is what the high jurisdiction authorities such as, the Constitutional Court, Council of State and Court of Cassation, do in cases brought before them.

The next most important question and the issue is that whether there is an area or economic activity closed to privatization by the Constitution.

The question is important due to views whether certain sectors such as "telecommunication" which carry a fundamental importance for the country, may be included in the scope of privatization or not.

In this context on the other hand, it is met with the issue related to the privatization of public economic enterprises having a state of "monopoly" which was also referred to in the Last Decision of the Constitutional Court.

I think it will be useful to remember and to remind you of the teoretical knowledge and solutions in performing and carrying out the public services before dealing with matters whether any area exists closed to privatization and the Public Economic Enterprises in the state of "monopoly" such as "telecommunication" which is substantially important for the country.

As it is a fact, the public services, may be carried out, either in a manner of monopoly or not, by the "administration" directly with its own personel and equipment, which in technical terms named as, "trust method;" or may be organized as a jointly shared establishment (joint trust) together with a private legal entity. On the other hand, the public services may be transferred as a "concession" to a private legal entity with a status of joint stock corporation, where in such case a "monopoly" exists in general.

The Legislation Will which builded up the public services, has the absolute "power of appreciation" in the preference of the method of such execution. Certain writers even claim that the public economic enterprises (PEEs) established in accordance with the law, are carrying out such services they assumed in a manner of "concession" granted to them by law.

On the basis of this theory, it seems possible that the public services carried out by a public economic enterprise to be privatized, even though

it is a "monopoly," may be transferred to a joint stock company again in a similar way as "concession" in accordance with the law.<sup>7</sup>

On the other hand, the angle of vision of the Constitutional Court in these matters and issues is different. The Court, with its Decision issued in 1994 on the date referred to has set out the following views:

"Beyond their acquisition, the sovereignty of foreigners over the areas such as telecommunication, electricity generation, transmission and distribution which are strategically important, may have dangers from the standpoint of security, dependency and economical aspects, since such type of public services are closely associated with the security and safety of the country.<sup>8</sup>

*The Constitutional Court does not foresee an absolute "conservatism" with such justification but thinks that the privatization may be realized, by taking into consideration the native-foreign differentiation, with methods not leading to a foreign sovereignty.*

The Court has also considered the issue from the standpoint of "monopolization" and explained its views in the Decision as such:

"The effectiveness of the market economy depends on the existence of competitive conditions. In an environment which allows for "monopolization" or "cartel formation," the market economy loses its effectiveness. Therefore the legal arrangements relevant to privatization should have to contain principles and rules to prevent the monopolization and cartel formation and to protect the consumers.

If the enterprise to be privatized is a monopoly, the public monopoly will inevitably be replaced by private monopoly. In case of public monopoly while there is the possibility of direct involvement of the State in the production of goods and services, such situation shall not exist in private monopoly and while the cost of goods and services will be determined much higher than that of the public monopoly,<sup>9</sup> the quality will be affected adversely."

If no measure is taken, the privatization of the public economic enterprises which produce the basic public services such as electricity, water and telecommunication and have the state of real monopoly and which are important from the strategical point of view, means to secure possibility for private monopolization; if we express it in other words, it means the transfer of public functions to the private sector. In such case, it is a must to specify the conditions which the real and legal entities should fulfill and the sanctions to be executed as a result of the controls and supervision to be assumed by the State in accordance with the principles

7 As an opposition to the idea, the members of the Committee of Faculty of Law, particularly the Commerce Law Experts set forth the risks of monopolization and opposed to the idea of continuity in "monopoly" during the process of privatization. As can be seen below, the Constitutional Court also rendered a decision sharing the same view.

8 The wording of the statement of motive reveals that the Court has made a judgement marked by "properness" rather than "legality."

9 In my opinion this is not correct, because in the services performed in a manner of "concession," while the price is determined by the administration, rules may be imposed as well, to control the production.

and rules.

As was proven by the foregoing justifications, *the Constitutional Court deems it mandatory to keep certain strategic areas out of the scope of privatization from the standpoint of "properness" yet points out that the laws and regulations of privatization should foresee put forward rules in conformity with certain principles to control the markets and to coordinate the foreign trade as well as to protect the consumers.*<sup>10</sup>

As I previously mentioned, the Committee of the Faculty, of Law, as well, by taking into consideration the theoretical principles, arrived at the idea that there is not any restriction in the Constitution which limits the boundaries of privatization excluding the justice, inland-outland security, in other words, the public security and national defence services.

Nevertheless, *there is no doubt that the provisions of the Constitution stipulating that the coasts and natural richness and resources are under the domination and acquisition of the Government and the proprietorship of the State forests can not be transferred, constitute the limits in respect of the goods.*

In the jurisdictional decision we are discussing, this matter and issue are dealt with and these justifications are included:

"It is prescribed by the Constitution that the natural wealth and resources are under the domination and acquisition of the State and the transfer of their proprietorship is prohibited and further it is foreseen that the State which has the right of exploration and operation of these resources may transfer this right to persons or legal entities with a certain period of time by the approval of the law.

In connection with the abovestated theoretical principle, *the Constitutional Court foresees that, as is the case with public services, the exploration and operation may be subject to a "privilege" provided that the main proprietorship will be retained by the State and the Administration.*<sup>11</sup>

*The Court which points out that it is mandatory to take into regard the prin-*

10 The Vice Chairman of the Committee who wrote a "different statement of motive" asserts in his paper that the privatization of a public economic enterprise (PEE) performing a public service can not be made according to the same rules that of State Economic Enterprises (SEE). The privatization of a State Economic Enterprise may be made within the framework of monotype rules. The privatization of a public economic enterprise performing a public service requires individual laws and regulations according to the principles and specifications of the service.

Here I wish ANAP (The Motherland Part) to hear us. Because I had made a warning in my paper which I referred to previously on page 1, stating that; the creation of the PEE category in an already complicated environment of SEEs by the enactment of Statutory Decree No 233, has considerably flattered the oppositions and prepared a grounds for the involvement of the Constitutional Court and Council of State in the matter.

11 In the "Different Statement of the motive for overruling" referred to in the previous page, it is stated that the transfer of services to private entities, which have the quality of real monopoly in respect of natural and economic structures or causing these services produced by the private persons shall mean the granting of privilege, and it is explained that the transfer of a public service to private persons by privileged agreements will necessitate the fulfillment of all constitutional and legal conditions of the privilege institution. Accordingly the

*principles foreseen in Article 168 of the constitution, in the privatization of the Public Economic Enterprises which produce public services by utilizing or exploiting the natural wealth and resources on the site, deems it impossible to transfer the proprietorship of such natural wealth and resources utilized by SEEs, to the persons and legal entities.*

The Constitutional Court which also stated in its Decision, the impossibility of considering the Public Economic Enterprises producing public services apart from the natural wealth and resources utilized by them in the production of such services, arrived at the following conclusion in connection with the matter and issue:

"In the privatization of the public economic enterprises and the assets of other public entities related to the natural wealth and resources, it is mandatory to transfer the rights regarding the operation of these resources with a specified period of time. The privatization by means of transferring the right to sell and operate the natural wealth and resources utilized by the Public Economic Enterprises, with an unlimited period of time, is against Article 168 of the Constitution.

If we summarize the theoretical principles which have been tried to be explained since the beginning of my address and in line with the interpretation and the principles specified by the Constitutional Court relevant to the matter and the issue, we may arrive at the following conclusion:

1- The limit and in a way the restriction imposed by the Constitution in respect of privatization are the coasts, natural wealth and the resources which are deemed by the State under its domination and acquisition. However, *their operation may be transferred to private legal entities with a specified period of time as "concession" on condition that their proprietorship will be retained by the public.*

2- The acquisition by the foreigners, of the public enterprises and services which have strategic importance is dangerous from the standpoint of "properness." In such situation, the privatization may directly affect the right of sovereignty and may create adverse conditions.

3- There are also certain services such as justice and national defence<sup>12</sup> and since they have been regarded under the monopoly of the State from everlasting, it may be said that there is a metajudicial limit for the privatization in this field even though it is not constitutional or legal.

examination of the agreement by the Council of State is a rule which is impossible to surpass by the laws. Though I wholly agree with the general wording of the Statement of the motive, I have doubts whether the bill is allowed to be examined by the Council of State or not, in case the privilege is granted by law. In accordance with Article No 155, the Constitution stipulates that the Council of State shall examine the contracts and agreements regarding the "concession," in other words, the administrative acts. In this case the Council of State will not examine the privatization law relevant to the subject but will examine the draft contracts and agreements to be prepared in accordance with the privatization law.

<sup>12</sup> In certain places, for example in France, some news appeared in the mass media related to implementations such as the "privatization of prisons."

The former heading of this address was the "Institutional and legal framework of the consultation for privatization." I myself wished to remove the word "Consultation" and it was deleted. The text would be the same even though it was not deleted. Whether it is at our own will or not, it is this "framework" which dominates the positive Law and constitutional order of Turkey and which is outlined by the principles and rules supported with the decisions of the Supreme Court. Yet unfortunately there is a sociopolitical and unchangable "reality" in Turkey that nobody takes notice of "consultation." To explain such mentality and deep "belief" there is not any need to write long tales. The formula has only three words: I did it, it became.