



## SIGMA

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## TURKEY

### ADMINISTRATIVE LAW FRAMEWORK

#### ASSESSMENT MAY 2008

#### Preamble

This report should be read in conjunction with Sigma's assessment report on the general legal administrative framework in Turkey of September 2006. No changes in this framework were observed during the assessment period (September 2006 – May 2008), although some projects are envisaged.

We use the notion of general administrative law to denote those parts of administrative law that are applicable – fully or partially, primarily or supplementarily – to all administrative settings, public bodies, administrative activities and administrative relationships. In other words, general administrative law would be the part of administrative law that is not only applicable across the whole administration, but also contains principles and norms that give rise to special regulations or specific organisational functioning.

Administrative law is the refined product of the pursuit in the course of history of the liberal goal to submit public powers to the law by ensuring that any action of the state is subject to the law or ruled by law. Modern democratic states derive their administrative law from their constitutions. The study of administrative law in a country cannot be dissociated from that of constitutional law.

The general legal framework for the administration is nevertheless comprised, first and foremost, of administrative law. A first approximation of the definition of administrative law is that it is a part of national public law (in EU Member States it is also now a part of the supranational legal order of the EU) that regulates the powers, competences (responsibilities), organisation and functioning of public authorities or of the public administration as a whole. This regulation includes relations established internally between administrative bodies and externally with other administrative bodies and with the general public.

Civil service legislation forms a part of administrative law, which is the instrument used by civil servants to ensure that the administration operates under the rule of law. There are other pieces of legislation composing this legal framework, such as budget laws, internal financial control, external audit and public procurement, which are assessed elsewhere. Reforming the civil service without reforming the general administrative law would be an incomplete reform. For that reason this assessment attempts to answer the following question:

***Do Turkish administrative practices and the legal administrative framework guarantee the principle of legality in administrative decision-making, and are they sufficient and appropriate to guide civil servants and public officials and to make them accountable for their performance?***

#### Introduction

The Turkish Grand National Assembly (TGNA) adopted the 9<sup>th</sup> Development Plan 2007-2013 by its Decision of 28 June 2006. The Plan identified “increasing quality and effectiveness of public services” as one of the five development axes: “With the aim of increasing quality and effectiveness in public services; duties, powers and functions of public institutions and organizations will be revised and conflicts in this area will be eliminated, policy formation, cost accounting and implementation capacities of institutions and organizations will be increased, human resources will be improved, information and communication

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technologies will be efficiently utilized in the provision of public services to citizens and effective provision of justice and security systems will be ensured.”<sup>1</sup>

The Plan (paragraph 687) continues by stating that “the public administration system will be restructured in the framework of good governance approach. Laws on the establishment of public institutions and organizations will be revised in a way to prevent duty and authority conflicts. In order for all public institutions and organizations to be able to perform their principal duties, consistency of their duties and responsibilities with organization structures will be ensured.”

### **Political Priorities: a New Constitution is missing**

The political atmosphere that has been created in recent years clearly speaks for the real priorities in the country, which are political in nature. Turkey needs to look for solutions and consensus in the political arena first if the public administration and civil service are to be soundly reformed and if a convincing democratic accountability framework for the state bureaucracy is to be put in place.

The Turkish Government, although its action was late in coming, seems to realise that the first priority is to reshape the rules of the political game. It has commissioned the drafting of a “civilian” constitution to replace the current Constitution, promulgated in 1982 after the military coup of 1980, which is unfit to serve the modernisation and democratisation of the country’s bureaucracy.

However, the new draft constitution, presented in September 2007, which was prepared under the leadership of an outstanding constitutionalist from Bilkent University in Ankara, has been shelved for the time being.

The new draft constitution seems to have some shortcomings, such as the missed opportunity to lay down the constitutional grounds for a more democratic system of public bureaucracy, the vagueness of legislative control over the government, and the sacrifice of the environment in order to favour unrestricted free-market economics. By shelving the constitutional project, the ruling party seems to have opted for a piecemeal approach to constitutional reform, as in February 2008 it amended articles 10 (equality) and 42 (right to education).

### **Organisation of the Administration**

With regard to the structure of the public administration, an analysis of the duties and competencies of the diverse bodies is foreseen in order to assess whether any overlapping exists, whether each body’s mission is clearly established, and even whether the body’s existence is justified. On the basis of this analysis, the dissolution, internal reorganisation within a service or merger between services will take place. The rationalisation of public administration structures constitutes a way of reducing operational costs and increasing their efficiency. A draft law on organisational structures will be submitted to the Council of Ministers and subsequently to parliament.

Within the scope of this draft law, the government foresees to reduce the gap between the top administrative level and the citizens and economic actors, with a view to increasing efficiency. In this sense, the law provides for the reduction of the number of hierarchical levels from seven to five. It is intended to create bodies with a more horizontal structure in order to facilitate decision-making and consequently provide more rapid public services.

Currently, there is excessive centralisation. The government aims to deconcentrate so as to provide public services at local level that meet the same standards as those of the central administration. One way of mitigating this situation is to partially deconcentrate the services of the central administration to the local level; this is the solution that the government intends to implement. The Constitution does not allow the decentralisation of power, and the draft law on organisational structures is considered by some observers to be unconstitutional since it contemplates the rationalisation of public administration structures through decentralisation. Concerned that the draft law would result in a “political federalism”, the Presidency vetoed it.

The Strategic Development Units (SDUs) created in 2006 in line ministries and public agencies play a significant role in the arrangements for implementing the Public Finance Management and Control (PFMC) reform, which is one of the most powerful existing instruments for modernizing the organisation of the

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<sup>1</sup> 9<sup>th</sup> Development Plan, paragraph 686.

administration. The mobilisation of the emerging SDU network to help rationalise administrative operations and structures and to improve the quality of public services should also be considered as an existing horizontal tool at the disposal of public sector managers.

## **Ombudsman**

The Ombudsman institution was created by a law passed by parliament in June 2006, which was rejected by the President, reapproved by parliament and sent to the Constitutional Court by the President. As a consequence, there is still no ombudsman in Turkey. The creation of the ombudsman was included as a short-term priority in the annex of the Decision of the Council of the European Union of 13 February 2008 on the principles, priorities and conditions contained in the Accession Partnership.

## **Administrative Procedures**

Apparently the adoption of a general law on administrative procedures is on the list of urgent legislation on the legislative agenda of the government. According to the calendar of the National Programme, it is foreseen to submit the draft law to parliament by September 2009. The quality of the draft law is unknown to Sigma, as we have had no access to the draft text.

## **Data Protection and Access to Information**

Law 4982 on the Right to Information of 24 October 2003 was amended in 2006 by Law 5432 so as to enable citizens to dispute all decisions of state agencies to deny requests for information. These laws are complemented by Law 4778 on the Use of the Right to Petition. According to the 2006 Accession Partnership with the European Union, Turkey is obliged to adopt a law on the protection of personal data and to establish an independent supervisory authority. No law on the matter has been passed yet. For the time being, the protection of personal data is regulated by article 24 of the Civil Code, according to which an individual whose personal rights have been violated unjustly has the right of take civil action. The 2005 Penal Code regulates crimes against the private life and the private sphere, which may be pursued *ex officio* whenever these offences concern the storage, illegal transfer or retention of data.

The right of access to information is part of the measures intended to promote transparency and openness in the public service and to reduce corruption. In spite of the fact that the right of access to information has been legally stipulated in Turkey since 2003, the implementation of this legislation is not homogeneous throughout the state bodies. The legislation includes a broad category of exemptions, and along with a lack of clarity prevents the information from being effectively disclosed. A “list of frequently requested information to be regularly updated and provided *ex officio* would help to ease implementation for both the state bodies and for those requesting information”<sup>2</sup>.

The government published drafts of bills on “State Secrets” in February 2004 aimed at placing limits on the existing practice of allowing officials to classify documents with little oversight or restrictions. The draft was rejected and the government put forward another draft in 2005, which was also rejected by the opposition parties in parliament. Finally, a new draft law on state secrets was passed by the relevant parliamentary committee in January and April 2008; it is waiting to be adopted in the plenum.

The Criminal Code prohibits the unauthorised disclosure, acquisition or publication of state secrets, including those of another country. Penalties include a prison sentence of one to four years (article 258 of the Penal Code). Obtaining or publishing “banned documents” (non-public official documents) is also prohibited, and this restriction is regarded to be against democratic standards, according to the OSCE: “In democracies, it is the public authorities and their staff who bear sole responsibility for protecting the confidentiality of legitimately secret information. Other individuals, including journalists and civil society representatives, should never be subject to liability for publishing or further disseminating this information, regardless of whether or not it has been leaked to them, unless they committed fraud or another crime to obtain the information.”<sup>3</sup>

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<sup>2</sup> See *Turkey: Country Economic Memorandum*, Volume II, April 2008.

<sup>3</sup> OSCE: “[Review of the Draft Turkish Penal Code: Freedom of Media Concerns](http://www.sissco.it/fileadmin/user_upload/Dossiers/negazionismo/documenti/turchia_osce_2005.pdf)”. Vienna, May 2005. Available at [http://www.sissco.it/fileadmin/user\\_upload/Dossiers/negazionismo/documenti/turchia\\_osce\\_2005.pdf](http://www.sissco.it/fileadmin/user_upload/Dossiers/negazionismo/documenti/turchia_osce_2005.pdf).

Another draft law recently sent to parliament seeks to better protect the right to privacy. The draft establishes parameters for the legal classification of information as personal. The 41-article draft also defines circumstances in which the state may collect personal data and strictly regulates the conditions for relaying such information to third parties.

### **Administrative Justice**

No particular changes have been observed.

### **Quality of Legislation**

The passage of specific legal provisions is often limited by the Constitution, which is highly detailed. Hence, there are those who consider that it is necessary to elaborate a new Constitution adapted to contemporary society rather than introduce successive piecemeal amendments that could jeopardise its internal coherence. The excessive amount of legislation and the low systematisation of the stock of legislation are also problems.

To improve the efficiency and transparency of law-making, the Council of Ministers issued a decree requiring that agencies undertake regulatory impact assessment (RIA), setting out in detail the expected costs and benefits of proposed legislation. According to the By-law on Procedures and Principles for Drafting Legislation, it was foreseen that RIA had to be applied as from 17 February 2007 for draft laws with an estimated budget impact exceeding YTL 10 million, which so far has had little influence on improving the quality of legislation.

The monitoring of compliance of new laws with existing ones is the responsibility of the Directorate of Law under the Ministry of Justice and of the Cabinet of the Prime Minister. The Ministry of Justice has the attribution of preparing draft laws, and the Prime Ministry has a co-ordinating function on legislative matters. The simplification of administrative procedures is the responsibility of the Prime Minister, but not at legislative level.

The rule of law is rather well guaranteed in Turkey. The problem with public law legislation is not mainly a formal quality problem, but rather a problem of legislative content, which still needs to be better aligned with EU values for the public administration, as defined in EU treaties and reiterated by the Helsinki Council in 1999 as a condition for EU membership.

### **Conclusions**

- The situation of the general legal administrative framework for the administration in Turkey remains as it was described in Sigma's preceding assessments of 2005 and 2006. Many key issues will not change, however, until a comprehensive constitutional reform is carried out first, as these issues touch upon the political rules of the game (e.g. decentralisation/de-concentration of public services, organisation of the administration, and improvement of local service delivery).
- There is a need for a general law on administrative procedures abrogating almost all special procedures that currently exist, for the sake of transparency and legal certainty.
- Legislation on the access to information should be homogeneously applied throughout all administrative settings. A sound balance between confidentiality and secrecy is needed. The new legislation under preparation on state secrets and the protection of privacy should help strike that balance.
- The law on the national ombudsman should be passed and the ombudsman institution set up.