daha iyi yargı

To the Public of

The Republic of Turkey

10 June 2020

Consolidating Legislative Immunity and Eliminating Unlawful Actual Immunities

Our Request and Suggestions

The legislative immunity right given to members of the parliament with the first sentence of the second paragraph of Article 83 of the Constitution was removed retroactively with a special law, i.e. Provisional Article 20, which was added to the Constitution on 7 June 2016 and states: “This provision does not apply to the members of the parliament who have files […] submitted to the Presidency of the Joint Commission.” With this amendment that was contrary to the Constitution it modified, members of the parliament continued to be judged, as the **legislative immunity for this particular class was removed from the Constitution for a while and then readopted**. As the presidential resolutions that reported the final court decisions to the Presidency of the TGNA (Turkish Grand National Assembly) were read at the General Assembly, Enis Berberoğlu, Leyla Güven and Musa Farisoğulları were stripped of their MP status as of 4 June 2020. These three members of the parliament were at the TGNA the day before they were arrested and sent to jail the next day.

To sum up with an example: Fuat Oktay, vice-president of the Republic of Turkey, signed the resolution dated 26 November 2018 that reported to the TGNA that Berberoğlu was sentenced to imprisonment for 5 years and 10 months and that the

Kore Şehitleri Cad. 17 Zincirlikuyu 34394 İstanbul, Türkiye +90 (212) 354 00 00
info@dahaiyiyargi.org dahaiyiyargi.org

sentence was upheld on 20.09.2018 by the 16th Criminal Chamber of the Supreme Court of Appeals. The resolution was based on the informative letter received from the Ministry of Justice as per Articles 83 and 84 of the Constitution.

The first point that draws attention is that a final judicial decision was reported to the Presidency of the TGNA by an executive organ and not by the Chief Public Prosecutor's Office, which is the responsible authority for executing such a decision – i.e., that the executive organ interfered in the duties and authority of the judicial organ in terms of the formalities of reporting a judicial decision.

Osman Can, a professor of constitutional law, shared a post titled "Failure of the TGNA – The Case of Berberoğlu" on his personal blog, where he stated: "The judicial process continued although it should have been stopped; the sentence for Berberoğlu was upheld with the decision dated 20 September 2018 and reported to the TGNA. During this process, Berberoğlu made an individual application to the Constitutional Court as well as requesting an interim measure […] They could have waited for the result of the application made to the Constitutional Court, and the elections were not to be held in another three years. Although it is not a legal obligation, this method could have been used considering previous practices." With these statements, Can is criticizing the fact that the regulation for legislative immunity is frail and is inefficient at fulfilling the purpose, and he is offering a practical solution. (See http://osmancan.com/tbmmnin-tukenisi-berberoglu-vakasi, accessed 5 June 2020.)

Protecting state secrets and ensuring the accountability of the executive organs where they cannot protect such secrets are among the extensive range of duties of members of the parliament. It is of paramount importance for the benefit of our country that members of the parliament fulfil such duties independently and freely, without the least hesitation, and that the legislative immunity recognized in the Constitution is protected to ensure that said duties can be fulfilled.

In this regard, Mr. Can criticized the aforementioned judgment process, which resulted in the revoking of the MP status of the aforementioned persons, with the following statement: "**The judgment process was problematic as a whole, as it was carried out under political discussions and interactions.** [The same goes for the judgment processes carried out for Güven and Farisoğulları.] **It is known that the court panel was unusually modified during the judgment process."** It is quite saddening to have to allow that such criticism is justified. It damages the reputation of

Kore Şehitleri Cad. 17 Zincirlikuyu 34394 İstanbul, Türkiye +90 (212) 354 00 00
info@dahaiyiyargi.org dahaiyiyargi.org

democracy, politicians, and legislative and judicial organs in our country because it gives the impression that even legislative immunity cannot be protected, that the judicial bodies are influenced by political factors and prevented from seeing the imperfections of the executive organ, and that the judiciary is used as a political means to suppress political opponents.

Leaving the Execution of Judicial Decisions to the Discretion of the Executive Organ or Politicians is Against the Rule of Law and the Principle of the State Law

As per Article 84(2) of the Constitution, a person shall no longer be a member of the parliament once the final conviction decision of the court is reported to the General Assembly of the TGNA. What revokes such membership is the final decision of the court regarding conviction. The authority responsible for reporting the court decision to the TGNA is the Chief Public Prosecutor's Office. Article 5 of Law No. 5275 on the Execution of Sentences and Security Measures states that the court sends the final criminal sentence that has been upheld to the Chief Public Prosecutor's Office. Execution of the sentence is monitored and supervised by the public prosecutor.

For the execution of the final decision of the court, i.e. to revoke the membership of the parliament of the relevant person, it is a legal obligation for the Chief Prosecutor's Office to report it to the TGNA and for the TGNA to report it to the General Assembly within the shortest time possible, because the last paragraph of Article 138 of the Constitution states: "Legislative and executive organs of the administration […] cannot delay the execution of court decisions."

In this case, the final decision of the court was reported to the TGNA by the vice-president, an executive element, and not by the Chief Public Prosecutor's Office as the body authorized to do so. The Presidency of the TGNA thus reported to the General Assembly of the TGNA a notification by an executive organ, which is not authorized or liable to execute the decision.

Indeed, the following statement is found in the minutes of the General Assembly of the TGNA dated 4 June 2020: "Resolutions of the Presidency regarding the revoking of membership of the parliament […] have been submitted to the General Assembly. It was announced that the memberships of the parliament of [the three individuals concerned] have been cancelled in accordance with the final decisions of the court, submitted as per Articles 83(3) and 84(2)] of Constitution." This statement

Kore Şehitleri Cad. 17 Zincirlikuyu 34394 İstanbul, Türkiye +90 (212) 354 00 00
info@dahaiyiyargi.org dahaiyiyargi.org

too proves that the resolution of the executive organ was submitted to the General Assembly of the TGNA by an organ other than the Chief Public Prosecutor's Office, which is the authorized body to do so.

As per Article 5 of the aforementioned Law No. 5275, the authority responsible for executing the final decision is not the Ministry of Justice or the Presidency. In addition to the fact that the final court decision of the Presidency of the TGNA was reported to the TGNA by the vice-president of the Republic, who was not the authorized party to execute such a decision, the fact that the notification of an executive organ replaced that of a judicial authority is in contradiction to the rule of law, to the principle that the executive organ is not superior to others in a democratic state and to the separation of powers. This leads to the impression that the aforementioned elements of the executive organ are superior to the authorities of jurisdiction.

Although it was not announced with an official letter by the Chief Public Prosecutor's Office, everyone, including the organs of the TGNA, learned that the guilty verdict against the aforementioned persons was final, on the day it was made final. This was because an extensive public discussion was held as soon as the decision was made public. What leads us to question the Presidency of the TGNA's respect for the rule of law is that the final sentencing decision and the cancellation of the membership of the parliament were not immediately reported to the General Assembly of the TGNA by the relevant authority; however, notification by someone who represents the executive organ was processed.

It is understood that the notification of the final decision of the court to the General Assembly of the TGNA had been delayed for 19 months, since the letter signed by Fuat Oktay was dated 26 November 2018. It is obvious that this situation is in contradiction to the relevant provision of Article 138 of the Constitution, such contradiction being in violation of the rule of law.

It is also against the law that the final decision of the court was not reported to the General Assembly on time, allowing the aforementioned persons to use their powers as members of the parliament for a long time and to benefit from their rights and privileges. Relevant persons should be held accountable.

Even though the justifications of those who defend the delay in the implementation of court decisions about said deputies until the end of the election

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info@dahaiyiyargi.org dahaiyiyargi.org

period are justified in saying that this has become the current practice and that delays have taken place before in similar situations, and even though the verdict of conviction was rendered in contradiction to the law, those who defend the delay in the cancellation of the parliament due to the malpractice of the Presidency of the TGNA are not aware that they desire a result that contradicts the explicit provision of Article 138 of the Constitution, that they want the delay to be routine practice in the legislative and executive organs in executing judicial decisions, and that this will lead to much more severe cases of unlawful procedure.

It is against the requirements of the duties of the Presidency of the TGNA, especially the principles of independence and impartiality, that the TGNA waited for the letter of another element of the executive organ before enacting its own duty to cancel the MP status of the relevant persons, that it relied on such a letter and that said letter was processed only after a very long delay.

While Legislative Immunities are Being Weakened and Eliminated, Unlawful Actual Immunities and Impunity are Spreading Like a Cancer among the Judicial and Public Servants of Our State

(a) The protection for legal legislative immunity is weak and subject to political influence and decisions

The independence of members of the parliament, and the legislative immunity that ensures such independence, are closely related to the sovereignty and independence of the nation. As we have seen in this last incident, legislative immunity, which is a legal assurance provided to members of the parliament, can be revoked retroactively for specific people by means of a political decision. This situation contradicts the fundamental principles of law and the logic of immunity. The aim of legislative immunity is to ensure that each member elected by the public can freely and independently fulfil their duty to represent the public. As part of this assurance, a member of the parliament should be able to stand against the majority and the leaders when necessary.

The fact that a legal protection provided to members of the parliament by the Constitution can be revoked not by the decision of a judicial organ but by that of a political element prevents members of the parliament from doing their jobs freely and independently, which also restricts the public's right to political representation, because the revoking of immunity via a political decision restricts members of the

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info@dahaiyiyargi.org dahaiyiyargi.org

parliament and forces them to side with the majority or the leaders. This, in turn, further consolidates the anti-democratic powers of the central administration and the leaders of political parties.

Legislative immunity is a legal right enshrined in the Constitution. It should be up to a judicial process and a judicial organ to decide whether this legal protection, which is the assurance of independence of the public, will be revoked or not. However, this decision is taken by politicians. It is against the logic of law that a decision made with political motives can lead to legal results even though it is of no legal value. Decisions leading to legal results should be made by judicial authorities comprising experts, following a systematic judicial process. This is also a requirement for the rule of law, for equality before law for members of the parliaments or for an ordinary citizen, and for the judicial organ to be able to act independently in every incident in its field.

It is against science and logic that legislative immunity, as a strong legal protection enshrined in the Constitution, can be revoked with a political decision. Such an approach to constitutional regulations, which thus becomes a means for the protection of criminals against the law and for manipulating independent members of the parliament, is against the nature and purpose of the institution of the judiciary; it serves the purpose of making the judiciary a tool in political competition.

(b) Public servants receive unlawful actual immunities and impunity, and this has been spreading through the state governance like a kind of cancer

A class comprised mainly of members of the supreme courts and senior public administrators and servants, who have absolutely no legal immunity and must be equal to everyone else before the law, have become a privileged community that cannot be hold accountable, investigated, prosecuted or punished even if they commit a crime. This is caused by the fact that the prior consent and permission required with regard to the investigation of their personal and duty-related crimes have made it unusually difficult to undertake such investigation.

Benefiting from unlawful actual immunity and impunity, said privileged class can only be held accountable by the specific strong authorities in power. In cases where the authorities have no such power, public servants are strengthening their position as a separate and privileged class, as they use the state power and the politicians need them; sometimes they can even use their power over the single party

Kore Şehitleri Cad. 17 Zincirlikuyu 34394 İstanbul, Türkiye +90 (212) 354 00 00
info@dahaiyiyargi.org dahaiyiyargi.org

in power. It will be recalled that the Justice and Development Party complained about this situation during the first years after it was elected as the ruling party.

This is used to justify the situation in which all powers of the state are used by the executive power, which the public has the chance to change only in elections. This causes the public to support anti-democratic governance, which in turn creates a serious threat to the independence of the judiciary and the rule of law.

In particular, the adoption of prior permission to investigate members of the executive organ causes significant disruptions in the rule of law and the principle of equality before the law.

The condition of prior permission to investigate the personal and duty-related crimes of members of the judicial organ, and the fact that the final decision to grant such permission is made by their colleagues, in particular members of the courts of appeal, creates an environment in which it is quite possible to form unofficial schisms, coalitions and groupings, as well as informal bonds and dependencies between the elements of the judiciary.

Leaving the investigation permissions to the discretion of their own institutions and colleagues and aggravating the conditions for permission allows the elements of the judiciary to receive actual immunity and impunity against crimes they have committed, although they are not entitled to such a right in legal terms.

This has started to be observed in the top management of important state agencies.

Due to the fact that the investigation of their crimes is subject to aggravated permissions and conditions, a class of people in the top management of the state has become a privileged community that cannot be held accountable. For instance, regarding the train wrecks in Pamukova, Çorlu and Ankara, as well as the disaster that happened in Soma, among those for whom investigation permissions were received and who were called to the court, there were no top-echelon managers of the relevant public institutions, who may have been responsible of negligence or violation.

The fact that the decision as to whether a trial will take place, if they ever commit a crime, is at the discretion of their colleagues or superiors has led to public

Kore Şehitleri Cad. 17 Zincirlikuyu 34394 İstanbul, Türkiye +90 (212) 354 00 00
info@dahaiyiyargi.org dahaiyiyargi.org

servants doing whatever their superiors ask them without even questioning it, instead of being sensitive to the law and forcing their superiors to also be sensitive to the law when necessary.

All of these conditions have led to the formation of a privileged class that has gained actual immunity and impunity, although such a right is not given by law in our country and, on the contrary, they are equal to the ordinary citizen before the law.

We provide detailed explanations regarding this matter on pages 13 to 31.

The circumstances summarized above:

- Damage the rule of law and the principle of being a democratic state of law;
- Make the investigation of persons who are subject to law and equal to the ordinary citizen before law, and thus the independent functioning of the judiciary, dependent on a political decision and the permission of politicians;
- Make public servants, especially members of the courts of appeals and top-echelon public servants, an immune class that has impunity;
- Cause the legal protection of legislative immunity to fail to serve its nature or purpose, causing it to be weakened and capable of being revoked by a political decision;
- Cause the immunity regulations to fail to work, thus meaning that the legislative immunity of members of the parliament cannot be fully protected in practice;

Those courts that handle cases involving members of the parliament do not have the required expertise, knowledge or experience regarding legislative immunity or other judicial matters, although their decisions lead to the cancellation of membership of the parliament. For example, the court panel can be changed during the proceedings, violating the principle of the natural judge and judge assurance.

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info@dahaiyiyargi.org dahaiyiyargi.org

Our opinions and recommendations

1. Any and all kinds of actual and legal immunities that prevent and render meaningless accountability in public administration should be prohibited; no community or no individual should be entitled to legal or actual immunity.

In this regard, the inclusion of the following statement in Article 10 of the Constitution (which is about equality before the law) should be considered: "**No legal immunities can be granted to any individual or community and no regulations can be adopted to provide any actual immunity.**"

2. Except for the president, ministers and members of the parliament, no person or community should be granted any immunity apart from the current legislative immunity or the separate regulation for "next-generation qualified liability" recommended by our association; the privileges provided should be limited and proportional to the requirements of the functions of the relevant class.

3. The parliament's authority to remove immunities should be rescinded. If a suit is filed to the Supreme Court regarding this section of people granted privileges, if it is determined by the court that the relevant party should be prevented from proceeding with their duty, the authority of the parliament should be limited to deciding whether the relevant party will continue with their duty or not. Aggravated meeting and decision quorums may be stipulated for such decisions.

4. The provisions on legislative immunity in the current regulations should be rescinded; however, the assurance aimed to be provided by such immunity should be re-regulated from a new perspective. The assurance aimed to be provided by immunity should be offered without preventing the judicial organs from acting independently and without subjecting it to a political (revoking of immunities) or administrative (permission for investigation) decision.

Starting an investigation against those who are granted immunity by the current regulations (the president, ministers and members of the parliament)

Kore Şehitleri Cad. 17 Zincirlikuyu 34394 İstanbul, Türkiye +90 (212) 354 00 00
info@dahaiyiyargi.org dahaiyiyargi.org

should be subject to the permission of a special expert and experienced court, whose members cannot be assigned easily and whose expertise and independence cannot be questioned. To put it differently, it should be stipulated that the decision to rescind immunities be made by an expert and independent special court instead of politicians at the TGNA.

The decision to start an investigation relating to members of the parliament should be made by this competent and expert court; the possibility to use political influence or authority in opening an investigation should be eliminated permanently. To this end, a new court (the Supreme Court of Justice) should be established that is similar to the Constitutional Court and whose appeal is supervised by the Constitutional Court.

The bringing of a charge against those who have been permitted to be investigated and the filing of an indictment should be subject to approval by this court.

The filing of a lawsuit against a member of the parliament (i.e. the decision to accept the indictment) should be subject to the decision of an expert court.

5. All current and potential lawsuits filed against said people should be handled by the Constitutional Court only, as the Supreme Court.

Trials of members of the parliament (and other relevant parties) should be conducted in a manner that will not restrict their activities as deputies. The courts should determine if there is anything that prevents them from fulfilling their duties; however, they should still be unable to prevent their activities. If such a thing is detected, the final decision should be made by the TGNA. In terms of the nature of the duty, it is better and more logical for the court to make the decision and report the situation to the TGNA so that it can render the final decision, since being a member of the parliament is a political duty but determining if there is anything that prevents the relevant person from fulfilling such duty is a legal process. In this way, the process for revoking immunities should be subject to a complete judicial review, while the final decision on whether or not restrict the representation authority granted by the public should be made by the political authority based on the judicial findings and recommendations.

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info@dahaiyiyargi.org dahaiyiyargi.org

6. Permissions and the permission process and conditions for the investigation and prosecution of public servants should be revoked; public servants should definitely be investigated and prosecuted for their unlawful acts; there should be no non-liability for crime or impunity; their innocence should be decided not by their administrative superiors but by an independent judicial authority.

The specific qualities required of public officials – and in particular the degree of sensitiveness of their role, should only be determined by competent and expert judicial authorities. In cases where particular discretion is required of public officials, qualified investigation and prosecution processes may be stipulated. For instance, investigations regarding members of the executive organ and members of the parliament can be handled by the chief public prosecutor of the Supreme Court of Appeals, those regarding other public officials can be handled by provincial chief prosecutors, indictments can be approved by an expert court and the prosecution can be handled at an expert court.

7. In the regulations to be made, it should be ensured that the judicial organ can fulfil its duty independently; however, judicial authorities should be established that are expert, competent, reliable and cause no doubt to ensure that the best decisions are made on sensitive matters to be subject to trial; sensitive trial procedures should be adopted.

In conclusion

It is possible to develop and consolidate the assurances aimed to be provided by immunities, without compromising on the rule of law or the formal and functional independence of the judiciary.

For every matter within its area of authority, the judiciary should be able to start an investigation and prosecution without the need to obtain permission,

Kore Şehitleri Cad. 17 Zincirlikuyu 34394 İstanbul, Türkiye +90 (212) 354 00 00
info@dahaiyiyargi.org dahaiyiyargi.org

regardless of the personality, position or authority of the suspect. In this regard, it would be enough for the chief public prosecutor of the Supreme Court of Appeals to start an investigation either directly or upon getting permission from a control mechanism, to be accepted, in cases against members of the parliament, the president, the prime minister and ministers. The best way to find a balance between legislative immunity and the rule of law would be to make it obligatory that the authorized expert court accept and approve the indictment for a charge to be pressed. A lack of organization of legal regulations is the only explanation for why this reassuring regulation, which is valid for the investigation of duty-related crimes of attorneys at law, has not been accepted in relation to legislative immunities.

On the other hand, it is obligatory to revoke the actual immunities and impunities that have resulted from the regulations and practices related to investigation permissions despite the fact that they are against the law. Ensuring that public servants are accountable to the judicial authorities for their duty-related and personal crimes is essential, both to make sure that they act in accordance with the law and can be dismissed and to ensure equality before law.

Ensuring these two points will make the rule of law and democracy in Turkey stronger than ever before, as well as boosting our national income.

Respectfully announced to the public.

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info@dahaiyiyargi.org dahaiyiyargi.org

The Legal Accountability of Civil Servants and Members of the Judiciary

Article 10 of the Constitution provides that: “Everyone is equal before and under the law.” However, Article 129(5) of the Constitution stipulates that: “Prosecution of public servants and other public employees for alleged offences shall be subject, except in cases prescribed by the law, to the permission of the administrative authority designated by the law.” This second provision clearly contradicts the fundamental principle cited in Article 10. The laws enacted in reliance upon this contradictory special provision have thus far restricted and made arbitrary the legal accountability and rendering of accounts of civil servants and public officers.

By the laws enacted in accordance with the above-cited special provisions of Article 129(5), but in contradiction with the fundamental principles of the Constitution, members of the supreme courts, such as the Supreme Court of Appeals, the State Council and the Supreme Court of Public Accounts, have been made exempt from responsibility for the decisions of these courts in their refusal to give permission for prosecution against them, and some top-echelon civil servants and public officers have been made exempt from responsibility through the decisions of their superiors to refuse to give permission for prosecution against them. As a result, public servants have become privileged or exempt from being held accountable for crimes committed, and from punishments related thereto.

In consequence of this situation, which is in clear violation of the state of law and the fundamental principles of the rule (supremacy) of law and equality before the law, public servants have become a privileged and irresponsible clan that obeys only those who seize and hold public power and, in the absence of such power, uses domination and authority at its own will. Some public servants are totally untouchable and immune from discipline and prosecution, while others are touchable and not immune, but only if and to the extent permitted by the ruling politicians. If and when public power passes into other hands, the former may be touchable but the latter remain untouched. The laws applied and enforced against ordinary citizens are either not implemented at all or implemented very late against these public servants, thereby causing public opinion to boil over into rage. For example, while a citizen opposing corrupt and unlawful practices is immediately charged with resisting and obstructing an officer, a public servant who mistreats citizens is either not prosecuted at all or prosecuted with many obstacles in place.

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info@dahaiyiyargi.org dahaiyiyargi.org

The rendering of accounts by public servants is made subject to the prior consent and permission of their administrative superiors and this, in turn, precludes the courts from action, and from performing their functions and duties independently, and leaves their functioning to the discretion and option of the executive organ. Rather than the judicature, it is the president and the ministers appointed by the president who remain at the top of the administrative hierarchy, who are in a position to determine and render final decisions as to the legal accountability of public servants. If they do not give permission, even if the plea of nullity is successful in the end, due to prolonged and delayed processes legal accountability becomes meaningless. In the end, in the absence of permission from the executive organ, it is impossible for the courts to ensure the legal accountability of public servants.

Given the fact that whether a public servant will be prosecuted or not is theoretically, and finally, decided by a juridical authority, to make this prosecution subject to the prior consent or permission of a superior administrative authority is by all means illogical and unreasonable. This discretion of consent granted by a superior administrative authority either saves public servants from judicial review, or prolongs and makes the process difficult in favor of public servants, thus rendering it meaningless. In the example of the resistance of a citizen against a public servant due to alleged mistreatment, while the ordinary citizen is immediately taken to trial, the public servant who is the subject of the complaint of mistreatment is allowed to go free, and this is an example of the lack of accountability in the process.

Legal accountability and judicial review before juridical authorities is a method of accountability that is minimally ambiguous and will surely render the most proper consequences, as it is subject to extremely detailed legal standards and processes. On the other hand, as also declared in the settled judgment of the Constitutional Court issued in 1977, legal accountability is a requirement of the principles of republic, state of law and equality before the law, and of human rights protections.

Making legal accountability subject to the right of discretion of superiors has led to the formation of many different types of cooperation, schisms and parallel organizations beyond those stipulated in the law among public servants and, thus, in state governance, and also has made public servants accountable towards persons (politicians, community leaders and other similar figures) outside of state governance.

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info@dahaiyiyargi.org dahaiyiyargi.org

Given that politicians are influential as to the legal accountability of public servants, those politicians who constitute the top echelons of the executive organ have gained final dominion over public servants. This fact especially precludes public servants in key positions from resisting unlawful demands of the government in power. Public servants and officers who wish to use more public domination and power by acquiring and holding a place inside the public administration can maintain the positions they have seized, as above, by merely doing just that, and this in turn leads to the formation of autonomous institutions and fields, and a type of “liberated rebel zone” inside state organizations. This may be considered a well-functioning win–win negotiation between top-echelon public administrators on the one hand and the politicians in government on the other hand, in the interests of both sides, as they each allow the other to refrain from rendering accounts. Politicians may request that public servants obey their desires and will, even if contrary to the law, and, for their part, public servants may expect to make use of this protection against accountability. This relationship is one of the basic reasons underlying the fact that most top-echelon public servants and administrators are nominated as candidates in elections from within the party in power.

Top-echelon public servants and administrators, in particular, have become skilled professionals in the acquisition of extraordinary protective armor by bringing themselves to a separate and untouchable place within full society and even among other public servants. There are many factors justifying this claim, which is not specific to Turkey but is valid for all countries of the world. First of all, under circumstances where representatives of a nation do not dare to make decisions due to coalitions or political risks, or for other reasons, public servants who take the initiative assume serious risks indeed, and this fact may legitimize and justify their protection. However, such separate, discriminatory and personal methods of treatment can by no means be acceptable in terms of the principles of the rule (supremacy) of law and democratic state governance.

On the other hand, the conditions and procedures of prior consent and permission for investigation and prosecution of certain public servants, introduced legitimately as a requirement arising out of the sensitivities of their specific job duties and functions, have gone too far in relation to personal and job-related offences and negligent acts of the top echelons, composed mainly of members of the supreme courts and senior public administrators and servants, to such an extent that a privileged class, which can by no means be called to account, investigated,

Kore Şehitleri Cad. 17 Zincirlikuyu 34394 İstanbul, Türkiye +90 (212) 354 00 00
info@dahaiyiyargi.org dahaiyiyargi.org

prosecuted or punished, has begun to emerge in Turkey.

It may be said that the most important gain brought by the amendments made to the Constitution as a part of the move to the presidential system was that they created an opportunity to clearly separate the legislative and executive organs from each other, thereby preventing their occasional integration. Because otherwise the executive organ, the party in government, and the legislative organ might integrate with the party member president, and this might create a danger of retrogression from the clear separation expected as cited above. This may have good and connective or bad and polarizing results, depending on whether the president is a party member or not. Given that they are actually not accountable due to aggravated quorums, democratic institutions may function properly only depending on the personality of the president. This may negatively affect the behavior of the president seeking to be re-elected or to nominate a successor, particularly at the time of subsequent elections. However, in this case, there is no accountability mechanism in place that could force the president to comply with the law.

a) Permission for Investigation is Contrary to Fundamental Principles of the Constitution

In Article 129 (last paragraph) of the Constitution, stipulating that "Prosecution of public servants and other public employees for alleged offences shall be subject, except in cases prescribed by the law, to the permission of the administrative authority designated by the law," the term "prosecution for alleged offences" refers to the "final investigation" as it was called in the past, or "criminal prosecution" as it is called in the new Criminal Procedures Act, which may be commenced by the authorized and competent public prosecutor.

The terms "investigation" and "prosecution" are definite terms not open to interpretation, which define the different phases of a criminal prosecution, with their meanings having been determined and outlined with fairly clear borders between them under criminal procedures laws since 1985. In order for a criminal suit or case to be commenced with the claim of imposition of a criminal sanction

Concerning offences that may have been committed by officers and other public servants in respect of their job duties and functions, even the starting of a criminal investigation is now made subject to prior consent and permission through enacted laws. In addition, although the phrase “for alleged offences” in Article 129 (last paragraph) is used to refer only to the job duties and job-related offences in other laws, this phrase is expanded so as to cover both personal offences and job-related offences in the law dealing with presidents and members of the Supreme Court of Appeals, the State Council and the Supreme Court of Public Accounts.

Assessment of the phrase “for alleged offences” in Article 129 of the Constitution with a rather wide scope so as to cover personal offences that are not related to job duties grants the privilege to members of supreme courts of enabling them to be rid of their responsibility, even if their offences are not related to their job duties, and for this reason it is contrary to the fundamental principles that “Everyone is equal before and under the law,” and “No privilege shall be granted to any individual, family, group or class,” as declared in Article 10 of the Constitution.

Legal provisions that subject a group to a situation that is different from that of others or that grant different rights to them are, by nature, a “privilege.” The word “privilege” is defined in the dictionary of the Turkish Language Association as “special and personal rights or conditions or preferential treatment not granted to others.” Basically, all types of provisions that contradict the equality rule constitute a privilege, in essence.

In its Judgment No. 2007/33, dated March 22, 2007, the Constitutional Court upheld the view that the provisions of Article 127 (6) of the Banking Law (Law No.

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5411, Article 15 (7)(a)) – stating that although the directors not appointed by the Fund are liable and responsible for their personal faulty and detrimental acts and transactions, the directors appointed by the Savings Deposits Insurance Fund are not liable and responsible even if they are at fault – is contrary to the "equality principle." In this judgment, the Constitutional Court clarified this rule with the following words: "The rule of law is based on the [supremacy of law] in all aspects, and equality before the law is an essential component of this rule. Such a concept refutes all kinds of privileges. This fundamental principle has been expressed in the third paragraph of Article 10 of the Constitution, as follows: No privilege shall be granted to any individual, family, group or class. Equality means equal treatment for everyone with the same legal status, and at all points. It is unequivocal that the directors appointed by the Fund and other directors hold the same legal status as and in the capacity of 'members of the board of directors.' For this reason, the rule requested to be annulled contradicts Article 10 of the Constitution".

The justification of the Constitutional Court, as cited in the preceding paragraph, is based on the idea that if an institution is authorized to make decisions itself as to whether or not an investigation will be opened against its own members, this will undoubtedly constitute a privilege granted only to that institution and its members, and will be contrary to the fundamental principle that "Everyone is equal before and under the law."

Indeed, whether or not an act by an individual constitutes a crime requires a court decision and judgment. Whether a person will be charged or not, i.e. prosecuted or not for an act they have committed, is decided only at the end of a judicial proceeding, and as a result of a process subject to judicial review to the core. Being equal before the law requires everyone to be equal, and to be subject to the same rules as for a person who has committed acts constituting a crime, in essence. This must be decided not by that person or their institution, but by a judicial authority that is independent from them, and is in a position to judge and try them. If the offender is a judge or an officer in the judicature, this does not mean that he can make decisions concerning himself. As a matter of fact, in a decision in 1977 the Constitutional Court declared that the decisions of the Supreme Council of Judges being taken by judges cannot be just excuse for elimination of judicial review on those decisions in any case.

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b) Problems in the Legal Accountability of Members of Supreme Courts

In the course of investigation of both personal (for instance, bribery or fraud) and job-related offences of members of the Supreme Court of Appeals, the State Council and the Supreme Court of Public Accounts, decisions of non-prosecution (nolle prosequi) or trial restraining orders have been left to the right of discretion of their own institutions. These decisions are final and are not subject to appeal. To put it differently, whether or not members of the supreme courts will be brought to justice for their crimes or offences is decided by those courts themselves or, looking at this from a different viewpoint, by colleagues of the suspects. Another point is that the phrase "for alleged offences" in Article 129 of the Constitution has been drafted in such a manner as to also cover the personal offences of presidents and members of the Supreme Court of Appeals, the State Council and the Supreme Court of Public Accounts. Thus, the accountability of members of these supreme courts even for personal offences unrelated to their duties is entirely dependent on a decision by their own institutions and colleagues.

As a result, this privileged situation created by the provisions of laws regarding the Supreme Court of Appeals, the State Council and the Supreme Court of Public Accounts – stipulating that investigations of even personal offences committed by presidents and members of these courts is dependent upon decisions of their own institutions and that decisions of non-prosecution (nolle prosequi) will be deemed final and not subject to appeal – is obviously against the fundamental principles of the Constitution that the state is a republic and subject to the rule of law and, particularly, to Article 10(1) of the Constitution, which provides that "Everyone is equal before and under the law." Article 10(3) also provides that "No privilege shall be granted to any individual, family, group or class," as further specified in the precedent case law judgment of the Constitutional Court of 1977.

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info@dahaiyiyargi.org dahaiyiyargi.org

Supreme Court of Appeals	State of Council	Supreme Court of Public Accounts
Law on Supreme Court of Appeals No. 2797 (Article 46): Investigations of job-related or personal offences of the first president, first president deputies, department heads, members, chief public prosecutor, and deputy chief public prosecutor deputy of the Supreme Court of Appeal **are dependent on a decision of the First Board of Presidency**. However, preparatory and preliminary investigations for flagrant offences requiring heavy sentences are subject to general law provisions. The First Board of Presidency will, if the subject event is deemed to require the opening of an investigation, assign one of the criminal department heads to lead a preliminary investigation or, otherwise, **will decide to cancel the case file. This decision is final**. The criminal department head assigned to investigate will, after completion of the investigation, send the documents to the First Board of Presidency. Then, the First Board of Presidency will, if it does not deem it necessary to open a final investigation, decide to cancel the case file, or, otherwise, decide to open a final	**Law on State Council No. 2575 (Article 76):** Pursuant to Article 76 of the Law of State Council No. 2575: For offences arising out of job duties, or committed during performance of job duties of the president, chief prosecutor and his deputies, department heads and members of the State Council, a preliminary investigation will be conducted **by a committee comprising a department head** and two members will be appointed by the relevant department head. The summary of proceedings issued at the end of the investigation is submitted to the president of the Administrative Affairs Board, and the decision of this Board is notified to the relevant persons. Trial restraining orders are examined by the General Assembly of the State Council automatically, while decisions to open a final investigation are examined by the General Assembly of the State Council only upon objection. After the decision to open a final investigation is rendered, the case file is referred to the chief public prosecutor.	**Law on Supreme Court of Public Accounts No. 832 (Article 66):** Pursuant to Article 66(1) of Law No. 832, an offence alleged to have been committed by any one of the president, department heads and members of the Supreme Court of Public Accounts arising out of their job duties is subject to a preliminary examination by a committee comprising three department heads and two members to be elected by the General Assembly of the Supreme Court of Public Accounts; and the resulting report and other relevant documents are submitted to the Board of Departments for use in deciding **whether or not permission for an investigation will be given**, and this board may decide to give permission for an investigation through a decision of a **two-thirds majority of its members present in the meeting**. This decision is further examined by the General Assembly upon an objection. **Decisions of the General Assembly as to refusal to give permission for an investigation request are final. Decisions of the General Assembly as to granting**

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investigation, and send the case file to the chief public prosecutor of the Supreme Court of Appeals for submission to the Constitutional Court for job-related offences, or to the relevant criminal department of the Supreme Court of Appeals for personal offences. **Decisions to cancel the case file are final.**	**Personal offences are prosecuted according to the law provisions pertaining to prosecution of personal offences of the president, chief public prosecutor and members of the Supreme Court of Appeals.**	**permission for an investigation are taken by a two-thirds majority of the members present in the meeting.** Pursuant to Articles 66(3) and 66(6), if and when any one of the president, department heads and members of the Supreme Court of Public Accounts commits a personal offence during performance of their job duties, but not related to their job duties, in the prosecution to be initiated thereon, **the law provisions regarding prosecution of personal offences of members of the Supreme Court of Appeals are applied**. This means that whether or not an investigation will be opened is decided by the First Board of Presidency, and this decision is final. (5) Upon a final decision granting permission for an investigation, the case file is referred and moved to the Constitutional Court.

Just like the saying that one rotten apple will cause the entire barrel to spoil, this picture paves the way for the formation of various types of cooperation and coalition among institutions and their members, resulting in an evasion of the law by the criminal if any one of them commits a crime, misprision of other similar subsequent offences as well and, finally, abatement. It is evident that this will make individuals at first insensitive towards similar unlawful and illegal acts of others, later on willing to commit crimes and, finally, willing to commit serious and violent offences, thereby leading to total corruption, wherein even the institutions act in collusion in a crime, and are able to evade justice and the courts.

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c) Accountability Issues in Certain Critical Institutions

Some critical institutions and organizations the independent and impartial administration of which is extremely important for our country, economy and citizens are also exposed to situations similar to those of the supreme courts and juridical authorities. The sole differences between these institutions and organizations, as exemplified below, and the supreme courts is that the legal accountability of their top executive, i.e. the president, is subject to the prior permission of the relevant minister, and the legal accountability of their other employees is subject to the prior permission of the president. Accordingly, while the supreme courts render decisions concerning their own members, the decisions of other institutions and organizations are made by the Supreme Council of Judges, represented by the minister of justice and his undersecretary.

Pursuant to Article 104 of Law No. 5411, offences committed by members of the Banking Regulation and Supervision Agency (BRSA) may be investigated only if permitted by the relevant minister. However, in order to obtain this permission, the commission of the subject offence is almost required to have been proven. According to said Article 104, in order to obtain permission for an investigation, clear and adequate evidence is required to be produced demonstrating that the relevant person has acted willfully and maliciously with the intention to derive benefits for himself or for third parties, or to cause harm to the relevant institution or to third parties and has, thus, derived benefits as such. Although the “malicious intention of causing harm” and “intention of deriving benefits or actually having derived benefits” conditions required for permission to investigate are indeed factors that can be identified and determined only as a result of court trials, they are herein accepted and listed as conditions precedent to court trials. As obviously seen in our recent history with the laconic words, “Does a briber ever give a document in proof?,” it is thus rendered impossible for the courts to try and prosecute job-related offences of such public servants by satisfying all of the conditions precedent as cited above. Hence, it may easily be observed that a type of immunity is granted to the executives of this agency. Another problem is that breach or omission of public duties and functions by these executives is not subject to any sanction whatsoever. However, according to the general criminal law theory, both omission and abuse of public duties and functions are penal offences. Yet Article 104 grants actual immunity to said public servants by preventing even the permission to investigate for negligence offences of these public servants.

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info@dahaiyiyargi.org dahaiyiyargi.org

Such top-echelon executives may, if they commit an offence, be prosecuted and tried in front of the courts only if the relevant minister grants permission therefor. Only if the minister permits it, and even if they are not guilty, may they be taken to court. Thus, their legal accountability has indeed not been formulated in such a manner as to encourage them to perform their public duties and functions in the best way possible and to resist the unlawful demands of politicians as a requirement of their independence, but instead ensures that they must get along with politicians, keep them sweet and fulfil their demands. Public servants, under these conditions and circumstances, cannot reasonably be expected to resist the politicians in government, oppose any of their unlawful or illegal orders, or even perform their own job duties as required.

It is unequivocal that this law provision making public institutions, which indeed should function independently and impartially, accountable not to the law but to the politicians, is at its base contrary to the principles of republic, state of law and rule (supremacy) of law, and thus it is contrary to the Constitution as well. However, as the methods and remedies for constitutional review are also restricted, this non-constitutional law provision is still in force.

This protection as provided to the BRSA through Law No. 5411 has been extended also to the president and members of the Information and Communication Technologies Authority (BTK) through Article 5 of Law No. 2813, to the Capital Markets Board (SPK) through Article 25/1/b of Law No. 2499 and to the Public Procurement Authority through Article 53/e of Law No. 4734, and thus the unconstitutional immunity for the BRSA is exactly valid also in relation to the top-echelon executives of these other institutions.

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BRSA (and Savings Deposit Insurance Fund/SDIF)	**BTK**	**SPK**	**Public Procurement Authority**
Pursuant to Article 104 of Banking Law No. 5411, investigations into job-related offences alleged to have been committed by the **BRSA board chairperson and members and agency personnel** are conducted **according to general law provisions only if permitted by the related minister for the board chairperson and members**, or by the president for agency personnel. In order for permission to be given for an investigation into the board chairperson and members and agency personnel, **clear and adequate evidence is required to be found**	According to Article 5 of the Law on Foundation of Information and Communication Technologies Authority No. 2813, board members and authority personnel are deemed and treated as public servants as regards offences committed by them during and due to performance of their job duties or committed against them. Permission for investigation is granted by the related minister for the chairperson and members, and by the president for personnel. Criminal and civil liabilities of board members and authority personnel are subject to and governed by the provisions of Article 104 of Banking Law No. 5411, dated	According to Article 25/1/b of Law No. 2499, the board chairperson and members and other personnel are, in terms of liability, deemed and treated as public servants, concerning offences they committed during and due to performance of their job duties, or committed against them for the purposes of the Turkish Criminal Code. Permission to investigate is granted by the related minister for the board chairperson and members, and by the president for personnel. Criminal and civil liabilities of the board chairperson and members and personnel are subject to and governed by the	Pursuant to Article 53/e of Law No. 4734, board members and authority personnel are deemed and treated as public servants for offences committed during and due to performance of their job duties, or committed against them. Criminal and civil liabilities of the board members and authority personnel are subject to and governed by the provisions of Article 104 of Banking Law No. 5411, dated October 19, 2005.

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demonstrating that the relevant person has acted willfully and maliciously with the intention to derive benefits for themselves or for third parties, or to cause harm to the relevant institution or to third parties and has, thus, derived benefits as such. An objection against the decision to, or not to, grant permission for investigation, may be filed with the State Council. Investigations and prosecutions initiated as above will, if so demanded by the relevant member or personnel, be pursued by an attorney to be assigned by an attorney agreement. Court expenses for said legal proceedings, and an attorney fee of up to 15 times the corresponding attorney fee set forth in the minimum	October 19, 2005.	provisions of Article 104 of Banking Law No. 5411, dated October 19, 2005.	

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attorney fee tariff published by the Turkish Union of Bar Association, will be paid out of the agency budget. All actions of debt and actions for damages commenced, or to be commenced, against the board chairperson and members or agency personnel will be deemed to have been opened against the agency. The agency may claim recompense for its costs from the relevant persons only if and when a court judgment upholding the fault of said persons becomes final.			

The Legal Accountability of Civil Servants and Other Public Officers:

Law No. 4483 sets down the authorities authorized to give permission for the prosecution and trial of civil servants and other public officers in relation to job-related offences, as well as the procedures to be followed therein. Those who are subject to different procedures due to their job duties and capacities are to be prosecuted according to the procedures stipulated in their special laws. However, flagrant offences, personal offences not related to job duties, torture, use of force exceeding authorization limits (Article 256 of the Turkish Criminal Code), delinquency and misfeasance in public office in affairs regarding courthouses, and

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failure to disclose information requested by judges, prosecutors or courts, at all or in a timely manner, as described in Article 65 and Article 332 of the Criminal Procedures Code, are not included within the scope of Law No. 4483.

According to Article 4 of Law No. 4483, if and when a job-related offence alleged to have been committed by a public servant is reported, firstly, it is decided whether denunciation will be put in process or not, and only if it is decided to be put in process will a preliminary examination be initiated as per Article 5 of the law. At the end of the preliminary examination, it is decided whether permission for an investigation will be given (or not). Pursuant to Article 9, the affected persons may raise an objection to such decision in the competent administrative tribunal. If the administrative tribunal accepts and honors the objection, the relevant public servant may be tried.

Upon the granting of permission to investigate or, if permission is not granted, upon the cancellation of the relevant decision by the competent administrative tribunal, the relevant chief public prosecutor conducts a preliminary investigation of the incident reported to him in accordance with the pertinent provisions of the Criminal Procedures Code. Arising from the investigation, if a law suit is filed, specially authorized courts are determined and designated according to the job position of the relevant public servant. For instance, the court having jurisdiction over and specially authorized for the secretary-general of the Presidency, the secretary-general of the TGNA, undersecretaries and governors is the relevant criminal chamber of the Supreme Court of Appeals, and the court having jurisdiction over and specially authorized for district governors is the relevant provincial high criminal court.

However, with respect to the preliminary examination, the granting of the investigation or, if not granted, the objection to and cancellation order of the administrative tribunal, these steps cannot be completed easily, and in the short time that might appear sufficient on paper; it is a rather long and troublesome process.

Before deciding whether an investigation will be permitted or not, it must be determined as a condition precedent whether the alleged act of the public servant is related to their job duties or not, or is included within the scope of such permission or not. If the administration errantly sees the act within the scope of offences subject to investigation permission, this erroneous decision is also required to be cancelled by administrative tribunal. Although the juridical authorities are not bound by

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administrative decisions, due to the culture of showing respect to decisions of other units or institutions in state organizations, the administration's erroneous decisions may prevent or delay normal juridical processes.

If permission to investigate is not granted in spite of the existence of a job-related offence, the competent administrative tribunal is expected to cancel the decision of refusal of permission to investigate. However, this entire process may run with a fairly extensive delay. A lot of debates may arise on such issues as how long the preliminary examination to be conducted by the administration should take – for instance, how long the inspection to be performed in the organization should continue, and how effectively the crime-related evidence and proof can be collected, impartially, within the organization during the said inspection. Although the time spent on these steps may be seen and treated as a reasonable period on the part of the administration, it is indeed too long a period of time on the part of the public, and of the victims affected by the offence. Further delays cause loss of evidence and a cooling down of the desire to repair the harmful effects of the offence and, most importantly, impair the belief in justice. Only from the point of view of the health and efficiency of trials and proceedings will this extension over time, and the resulting delay, surely eliminate or significantly reduce the benefits of a timely trial process.

Permission for a preliminary examination and investigation process at the same time means that the offences, which are indeed required to be tried by independent and impartial courts, are reviewed by the relevant public entities and authorities and in their own organization before the competent court. In that process, inspectors play the role of a judge, while hierarchical superiors – although they may be personally liable for the alleged offence – assume the role of either the prosecution or the defense, as the case may be. More importantly, some offences and crimes that are of direct and particular concern to the public may occasionally be covered up by the public servants who have indeed committed the offence, or are personally liable therefor, during the aforesaid administrative processes. The related parties and the public must then bear the additional burden of legal proceedings before commencement of a lawsuit so as to be able to take an actionable event to the courts. While such types of event causing public indignation are referred to the courts, others may, over time, come to be seen as tolerable and commensurable events. In the end, the public is, over time, alienated from the public administration and public servants as a whole. The fact is that in land registries, execution offices and municipalities, public servants request and receive "tips" from citizens in consideration for

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performance of their normal job duties – part of a culture that has continued for many years, which has been revealed in recent years and has even been proven by hidden camera records in a few places. These events have almost been taken for granted and become unwritten procedures and well-functioning rules of daily life and are, indeed, a result of this mechanism, i.e. the legal accountability of public servants for their job-related offences committed during the performance of their job duties having been made subject to preliminary examination and permission for investigation by the relevant public administration.

This picture is one of a terrible condition for the Republic and the state of law. Thus, public servants have become unaccountable, privileged and almost superior to the nation and people they are in fact a part of, and over those persons who pay their wages and salaries through taxes. However, as stated in the maxim of Atatürk: “Public servants are servants of the nation.”

In conclusion

As stated in Article 10 of the Constitution, in a state of law everyone is equal before and under the law, and no one is superior to the law. However, as is clearly seen in the examples given above, the restrictions and conditions imposed on the proper functioning of the law are so heavy and so bound by certain personal decisions and discretion that the law is rendered incapable of functioning unencumbered, and the top echelons of public administrations are protected by actual immunities and exemptions. Unless effective accountability is established in public administrations, it is entirely in vain to expect the judicial and other state forces and organs to be used democratically and in full compliance with the law. Accountability for the public administration through the supremacy of law is the primary step required to be taken so as to become an advanced democracy.

It is obvious that to make the investigation of personal or job-related offences and crimes of public servants subject to the prior consent or permission of their own institutions or hierarchical superiors is contrary to the fundamental provisions of the Constitution, the Republic, the principles of state of law, the rule (supremacy) of law and equality, and human rights. Article 129(5) of the Constitution is only one of the special provisions contradictory to said fundamental provisions of the Constitution. In the simplest terms, this provision contradicts Article 9 and Article 138 of the Constitution, relating to the independence of the courts. Thus, laws issued in reliance

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info@dahaiyiyargi.org dahaiyiyargi.org

upon this contradictory special provision, and which even partially exceed the scope of the provision, also contain certain contradictions with fundamental principles of the Constitution. Both these contradictory provisions should be separated, special provisions should be made compliant with the fundamental principles of the Constitution and the contradictions of certain laws with said fundamental principles should be eliminated.

A legal measure that first comes to mind in order to solve this problem is to issue and enact a General Administrative Procedures Code to set down how public servants and the executive organ will perform and fulfil their managerial duties and, thus, strengthen the decision-making and accountability of public servants and officers. Through such a law, not only will public servants be facilitated to make decisions compliant with the law but the instructions of the executive organ may also be assured to be in compliance with laws. If bureaucrats are strong in terms of compliance with the law they will also hold strong against political executives, and this may in turn further develop compliance with the law in state governance as a whole.

The amendments made in the Constitution have not specified auditing of the executive organ, the power of which is concentrated in the president, by the legislative organ. Due to the rise of proposal and decision quorums for judicial review of personal and job-related offences, the executive organ is only subject to political accountability in elections. In these circumstances, the accountability of the top echelon of public servants who are only one level below the executive organ becomes even more critical. Therefore, public servants in this situation should be strengthened and reinforced in terms of their non-performance of illegal and unlawful orders through an increase in their legal accountability, and their hierarchical accountability towards ministers should be limited only to the good performance of their job duties. The executive organ should be entitled to decide on, or give permission to, trials of public servants. Furthermore, the concerns arising out of the influence of the executive organ on the judges and prosecutors who try and prosecute public servants, due to the role the minister of justice plays in the Council of Judges and Prosecutors, should also be removed. For the sake of the rule (supremacy) of law, it will be possible to ensure that politicians are balanced and limited by bureaucracy only if all the above-listed actions have been taken.

Within the framework of the General Administrative Procedures Code, the

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info@dahaiyiyargi.org dahaiyiyargi.org

processes of performance of public services, each stage of the process, and the duties and obligations assigned to the related parties and public servants at each of these stages, should be clearly and fully set forth, and public servants should be accountable for the performance of their job duties and functions, as required.

For instance, in what time frame and how a public servant will perform and complete their job duties should be determined, and the public servant should be accountable for the performance of these duties and functions to both their institution and the related parties affected thereby. At present, the law provision stipulating that if an application by a related person is not answered within 60 days the demand will be deemed to have been refused does not fulfil the needs of our day. As for public servants, these periods of time should be limited to a reasonable time as needed for the relevant work, while the term of litigation concerning the related person should be kept as long as possible. For instance, a petition to fill in a pothole in a street should be satisfied and fulfilled within three days, and the complainant should be entitled to exercise his legal rights and remedies after three days.

Kore Şehitleri Cad. 17 Zincirlikuyu 34394 İstanbul, Türkiye +90 (212) 354 00 00
info@dahaiyiyargi.org dahaiyiyargi.org