

# To the Public of The Republic of Turkey

3 July 2020

## Our Association's opinions on the amendments planned to be made to the Legal Profession Act...

The Amendment Proposal for the Legal Profession Act submitted to the Grand National Assembly of Turkey by the Justice and Development Party proposes to **establish “multiple bars” of 2,000 lawyers in Ankara, Istanbul and Izmir, to reduce the representation rate of 23 provincial bars – which represent 88.8% of the lawyers across Turkey – from 67.1% to 31.5% in the General Assembly of the Union of Turkish Bar Associations, and to increase the representation rate of 57 city bars –which represent 12.2% of lawyers – from 32.9% to 68.5%.**

In addition to the fact that the entirety of this Proposal is in contradiction with the Constitution, the statement **“A bar can be established with two thousand lawyers in provinces where there are over five thousand lawyers”**, which is proposed to be added to Article 77 of the Legal Profession Act, may harm the unitary state system (unitary in the elements and organs of the state) of the country, which is stated with the provision **“The State of Turkey, with its territory and nation, is an indivisible entity”** in Article 3 of the Constitution, and it may lead to threats to the existence of our country.

**The Ankara, Istanbul and Izmir Bars represent 58.8% of the lawyers in Turkey – 73,262 of 124,555 lawyers in total (2019 year-end data).** Considering the

fact that this Proposal has the aim of reducing the number of delegates of bars in the Union of Turkish Bar Associations from 221 to 25, and **reducing the representation rate to 07.5% from 41.5%** by using multiple bars, **it is worth noting that said Proposal is presented as “democratizing the management of bar associations and the Union of Turkish Bar Associations”** in statements given to the press, although there is no valid rationale for this in the “Justification” section of the Proposal. Meanwhile, the Proposal will ensure that the city bars, which represent 51,293 lawyers, corresponding to 41.2% of the total number, will have a representation rate of 92.5% in the General Assembly of the Union of Turkish Bar Associations, which means that the minority will dominate the majority.

If this Proposal is passed into law, the duty to “**defend the rule of law and fundamental human rights**” will inevitably fail to be fulfilled, said **duty belonging to bars**, which are legal profession institutions regarded as public bodies in Turkey.

More importantly, if the Proposal is passed into law it will harm the administrative integrity and independence of the bars, which represent defense, one of the main elements of an independent and impartial judiciary, and will also damage the independent functioning of the judicial power as regulated in Section III of the Constitution.

**As detailed below, the anti-democratic amendments that are planned to be made to the Legal Profession Act with this Proposal conflict with the Constitution; they do not comply with the requirement for the “integrity of administration” or for an independent and impartial judiciary, of which lawyers are one of the main elements.** The amendment draft has the potential to cause a hard-to-fix hole in the **unitary state principle of Turkey** and to lead to occasions that will harm this principle. **It would be appropriate to revoke the Proposal, hold common-mind meetings with all the shareholders involved, and determine the problems and find solutions for the bars and other professional organizations.**

## OUR REMARKS:

1. **The Proposal that aims to establish multiple bars in certain cities (currently Ankara, Istanbul and İzmir) is in contradiction with the unitary single-state principle set out in Article 3 of the Constitution, and with Article 123ff. and in particular with Article 126, which are administrative reflections of said principle.**

Adding the statement **“A bar can be established with two thousand lawyers in provinces where there are over five thousand lawyers”** to Article 77 of the Law to create “multiple bars in provinces” is against the provisions of Articles 3, 123ff. and 126 of the Constitution, which are related to the integrity of administration, which is obligatory for a unitary state.

**(a) Given that the “multiple bars” Proposal could jeopardize the unitary single-state principle set out in Article 3 of the Constitution, if said Proposal is passed into law it could pose serious threats to the existence of our country.**

Article 3 of the Constitution adopts the unitary single-state principle with the statement: **“The State of Turkey, with its territory and nation, is an indivisible entity.”** The unitary state principle was adopted by the Republic of Turkey as a principle the amendment of which cannot be proposed, as this land is a melting pot of tens of different cultures that have gone through major losses, deep sorrows and thousands of bad experiences over hundreds of years.

If the law, once revised, allows the establishment of six additional bars in Ankara, two in İzmir and 20 in Istanbul (2019 figures), which will make up to 31 bars in total in these three provinces; if 28 additional administrative bodies, i.e. bars, are founded in these provincial structures, which are the smallest administrative units, this will obviously cause a hard-to-fix hole in the unitary state principle, leading to other occasions that will harm said principle.

Indeed, if the Proposal is passed into law and 2,000 lawyers get together to establish multiple additional bars in their provinces, where there are already administrative organizations;

- If 2,000 lawyers establish a bar **to support the government**;
- If 2,000 lawyers who are sect members establish a bar **for religious purposes**;
- If 2,000 lawyers establish a bar **to support atheism**;
- If 2,000 lawyers establish a **separatist bar based on ethnicity**;
- If 2,000 lawyers establish a bar that is **intended for race-based discrimination**;
- If 2,000 opportunist lawyers establish a bar **for corruption purposes**;
- If 2,000 lawyers establish a bar **for anarchy**;

this will cause damage to the unitary state principle that this country adopted after much turmoil and many hardships. Similar demands will emerge in different areas after a short while, and people will find the courage to request second or third municipalities, neighborhood administration bodies, governor's offices and district offices. All of these developments have the potential to jeopardize the unitary state principle.

**(b) The “multiple bars” Proposal is in contradiction with the principle of uniqueness of administration, which is a result of the unitary state principle; with Turkey’s administrative structure; and with Article 123ff. and especially Article 126 of the Constitution, as well as having the potential to harm the administrative integrity of the country.**

In his book *Anayasa Hukukuna Giriş*, (Bursa Ekin Kitabevi Yayınları, 2004, pp. 67–79), Prof. Kemal Gözler, a unique constitutional lawyer in our country, defines the term “unitary state” and its elements as follows: “A ‘unitary state’ is also known as a ‘single state’ or ‘simple state’. The unitary state is a system where there is uniqueness in terms of country, nation and sovereignty, as well as legislation, execution and judiciary. Then, we can **define the unitary state as uniqueness in the elements and organs of the state.**” He defines “uniqueness in elements” as follows: “**In unitary states, elements constituting the state are unitary and indivisible**” (emphasis added.) He defines “uniqueness in organs” as follows: “In unitary states, country, nation and sovereignty are unitary; so are the legislative, executive and judiciary organs of the state.”

The principles to which the bodies that we can call “Constitutional State Institutions” that are set out in Chapter II of the Constitution (although they are not directly institutions of execution themselves) and whose names are listed below; and the institutions of execution are subject are jointly set out in Article 126, following from the unitary state principle adopted as per Article 3 of the Constitution. In other words, in the administrative structure of Turkey, other administrative bodies that are not elements of the executive power or its execution are subject to the principle of the integrity of administration defined in Article 126 of the Constitution.

Constitutional State Institutions that are included in the administrative structure of Turkey, although they are not part of the executive, are regulated in items (“A”) to (“J”) between Articles 123 and 137 in the section titled “IV. Administration” in Chapter II of the Constitution. These include: (E) institutions of higher education and their higher bodies; (F) the Radio and Television Supreme Council, institutions of radio and television, and public affiliated news agencies; (G) the Atatürk High Institution of Culture, Language and History; (H) professional organizations having the characteristics of public institutions; and (I) the Presidency of Religious Affairs.

Bar associations are quite different from Chambers of Commerce and Industry, the Union of Chambers and Commodity Exchanges of Turkey (TOBB), and other professional organizations that have the characteristics of public institutions and that are established as per Article 135 of the Constitution. Bar associations are professional organizations that are part of the judicial organ, which is distinct from execution and administration, as is the Council of Judges and Prosecutors. To put it differently, aside from being professional organizations, bar associations represent defense, one of the main elements of the independent judicial power and functioning regulated in Chapter III of the Constitution. That there is no regulation relating to lawyers in Chapter III and that the existing provisions apply only to courts, judges, prosecutors and adjudicatory procedures is due to the fact that the writing process of the 1982 coup Constitution was flawed. The Judiciary is comprised of defense, lawyers representing defense and the professional organizations of these lawyers. Therefore, although lawyers and their professional organizations, i.e. bars, are regulated among the professional organizations under the section titled “Administration,” it is obligatory to consider them an element of the Judiciary in Chapter III and to take this into account when making regulations that apply to them.

It must be underlined that bar associations are also subject to the principle of the integrity of administration, which is a reflection of the unitary state principle.

In the Republic of Turkey, which is a unitary state, the administrative integrity principle that applies to the executive and other public institutions is regulated based on the central administration principle with the following statement in Article 126 of the Constitution: **“In terms of central administrative structure, Turkey is divided into provinces on the basis of geographical situation, economic conditions, and public service requirements; provinces are further divided into lower levels of administrative districts. [...] Central administrative organizations comprising several provinces may be established to ensure efficiency and coordination of public services.”**

It is obligatory that regulations regarding bar associations are made in a way that will protect and enhance the provisions of Article 126 of the Constitution and the judicial independence regulated in Chapter III of the Constitution, i.e. “administrative integrity and independence”. This obligation prevents the establishment of multiple bars in provinces. While it is not possible to establish more than one bar in a province, it is possible to found a regional bar that encompasses several provinces. Indeed, there is a single regional bar for the provinces of Bayburt and Gümüşhane. It is called “The Regional Bar Association of Bayburt and Gümüşhane” and it is currently active.

**2. The fact that the number of lawyers required to send an additional delegate to the General Assembly of the Union of Turkish Bar Associations has been increased from 300 to 5,000 for provincial bar associations that have a lot of members is clearly against the main Constitutional principles that the state is a democratic state of law and a republic, as well as the provisions of Articles 2, 5, 6 and 135 of the Constitution, and the precedents dated 1991 and 2001 of the Constitutional Court.**

The amendment planned to be made to Article 114 of the Legal Profession Act **would change the structure of the Union of Turkish Bar Associations (“TBB”) clearly in favor of the small city bars with a small number of members.** The Proposal would increase the number of delegates from two to three for small city bars, while severely restricting the right of bars with over 100 members to select delegates by reducing their representation from one additional delegate for each additional 300

lawyers to one for each additional 5,000 lawyers.

When we make a calculation according to the Proposal based on the number of current members of provincial bars, it is clear that lawyers' right of representation in the General Assembly of the TBB will deteriorate severely if the Proposal is implemented. The power of representation of lawyers in bars in 23 provinces where the smallest number of members is 878 (in particular in Ankara, Istanbul and İzmir, where the number of members is especially high) will be reduced extraordinarily, **from 67.1% to 31.5%**, said lawyers **constituting 88.88% of all lawyers**. Meanwhile, the power of representation of 57 provincial bars in which the number of members is between 42 and 810, **representing 12.2% of all lawyers**, will be increased tremendously, **from 32.9% to 68.5%**.

Indeed, according to the draft, in the Bar of **Istanbul**, which has 46,052 members, **3,542 lawyers** will be able to elect one delegate; in the Bar of **Ankara** (with 17,598 members), **2,514 lawyers** will be able to elect one delegate; and in the Bar of **Izmir** (with 9,612 members), **1,922 lawyers** will be able to elect one delegate. Meanwhile, in the bars of four small cities with a total of 270 members (Ardahan 48, Gümüşhane Bayburt 89, Kilis 91 and Tunceli 42), **15 lawyers** on average will be able to elect one delegate: **10 lawyers** in the Bar of **Tunceli**, **12** in the Bar of **Ardahan**, and **22 lawyers** each in the **Bars of Gümüşhane Bayburt and Kilis**.

According to 2019 year-end data, the total number of delegates in 57 provincial bars representing 16,986 lawyers, which corresponds to 11.2% of the 124,555 lawyers in Turkey, has increased by 45, from 183 to 228, while the total number of delegates in 23 bars representing 110,705 lawyers, 88.8% of the 124,555 lawyers in Turkey, where the smallest number of members is 878, has dropped by 269, from 374 to 105. In this way, **for 88.8% of lawyers in Turkey, the proportion of delegates in the General Assembly of the TBB has dropped to 31.5%, while for 11.2% the proportion has increased to 68.5%**.

What is worse is that the draft amendment aims to restrict the representation of the Bars of Ankara, Istanbul and İzmir, which together represent 58.8% of lawyers, or 73,262 lawyers in total. The number of delegates of these three

bars in the General Assembly of the TBB is 221, respectively 53, 138 and 30, and now this is being dropped to 25, respectively 7, 13 and 5. This means that the vast majority of lawyers are clearly being turned into a minority in the General Assembly of the Union of Turkish Bar Associations.

Bars in these three important provinces – where the dynamics that will improve the legal profession are found – have 221 delegates, 41.6% of the total number, which corresponds to one-third of the number of the lawyers they represent in the General Assembly of the TBB. The Proposal would make things even worse: it would unreasonably reduce the representation of these three bars in the General Assembly, dropping it to 25 delegates, which corresponds to only 07.5%. This will cause lawyers representing a small proportion of all lawyers to dominate the majority, which will lead to a quite anti-democratic situation.

**3. This Proposal is in contradiction with the republican identity and democratic management principle of the state and with the precedents dated 1991 and 2001 of the Constitutional Court.**

Regarding the structure of the General Assembly of the Union of Turkish Bar Associations as stipulated in the Proposal, the **management and operation of professional organizations that have the characteristics of public institutions cannot be against democratic rules**, as per Article 1 of the Constitution – **“The State of Turkey is a Republic”** – and the provisions of Article 2 of the Constitution, which states the qualities of the republic: **“The Republic of Turkey is a democratic, secular and social state governed by rule of law [...].”** It is obligatory to ensure that the management of these institutions is democratic.

With the precedents dated 1991 and 2002, the Constitutional Court found it to be against the law that there were differences in the number of members represented by the delegates elected from various provinces to the general assemblies of other professional organizations that have the characteristics of public institutions.

With Decision No. 1991/45, dated 3 December 1991, the Constitutional Court cancelled the provision **“Those with members up to 200 shall select 5 representatives [to the Grand Congress], those with over 200 members shall**



**select 7 representatives and the same number of substitutes,”** found in Paragraph 2 of Article 51 of the Turkish Pharmacists’ Association Law No. 6643, as it found it to be in contradiction with the Constitution.

The court stated that the management and operation of professional organizations that have the characteristics of public institutions could not be against democratic rules; that democratic election requires fair participation and free, equal and general suffrage; that restricting the chambers of pharmacists with over 200 members, regardless of how large the number was, to seven representatives in the Grand Congress would hinder fair participation in the most important organ of the association; and that this was in contradiction with democracy. Therefore, the court rendered a decision that said regulation was against the preliminary provisions and Articles 2, 5 and 135 of the Constitution, and cancelled it.

With Decision No. 2002/31, dated 19 February 2002, the Constitutional Court rendered a decision to cancel the provision “Those with members up to 200, up to 3,500, and above 500 shall elect seven representatives and the same number of substitutes,” found in the second sentence of Paragraph 1 (replaced by Law No. 3224) in Article 60 of the Turkish Medical Association Law No. 6023, as it caused inequality **because the Istanbul Medical Chamber, which had around 14,000 members, would be represented by seven delegates, while a chamber with 500 members would be represented by seven delegates as well.** The court stated that this situation would not be in compliance with Article 135 of the Constitution, which aims to ensure that the structure and operation of professional organizations that have the characteristics of public institutions is in compliance with democratic principles.

**4. The management of the Union of Turkish Bar Associations is left to a minority in cities with a small number of members, i.e. those other than the three metropolises of Ankara, Istanbul and İzmir; the fact that bars with less than 2,000 members are closed down but new bars are established and existing ones are maintained in cities where the number of members is well below 2,000, corresponding to 2–3% of this number, is not in compliance with the principle of equality before the law, or with Article 10 of the Constitution, which states that no groups shall be granted privileges.**

As explained above, if the Proposal is passed into law it will leave the management of the TBB to a minority in cities with a small number of members, i.e. those other than the three metropolises of Ankara, Istanbul and İzmir. Statements such as “We are going to raise the voice of Anatolian Bar Associations” made by members of the Justice and Development Party confirm this purpose. Furthermore, for the provinces of Ankara, Istanbul and İzmir, where multiple bars are planned to be established, the Proposal stipulates the **“End [of] the legal entity of the bars if the number of lawyers drops below two thousand”**; however, **it maintains the existence of bars established in cities where the number of lawyers as few as 30, way below two thousand.**

Lawyers in small cities (non-metropolitan areas) will thus be given privileges considering the fact that in some regions of the country it will be obligatory to have 2,000 lawyers to establish a bar while only 30 lawyers are enough to do so in other regions; and that in some regions, bars where the number of lawyers has dropped below 2,000 will be closed down while in other regions bars where the number of lawyers corresponds to 2–3% of this number (40, 80, 90) can still remain open.

This Proposal is contrary to the prohibition of privileges in Article 10 of the Constitution, as it grants privileges to a minority in management – because, as per Paragraph 4 of Article 10 of the Constitution, which regulates the **principle of equality before the law, “No privilege shall be granted to any individual, family, group or class.”**

## OUR SUGGESTIONS:

Given that bars are among those professional organizations considered to be public institutions, our Association supports the idea of making them among the advanced and exemplary democratic organizations in our country by enhancing their structure and their organ elections, as well as lawyers' representation in management and participation in the decision-making process as members. To this end, we would like to suggest the following. Simply following these suggestions will ensure that bars themselves and the Union of Turkish Bar Associations become highly democratic institutions, and the dynamics that will emerge will pave the way for many other improvements.

**1. Instead of establishing multiple bars in metropolises, other solutions should be used, such as increasing the number of organs or members as needed in bars that meet certain criteria; assigning deputy chairs responsible for commissions, districts or courthouses; and making management duties into full-time paid jobs.**

**2. The General Assembly of the TBB and the delegation system should be revoked from the Legal Profession Act and all the other laws.**

The General Assembly and the delegation system should be revoked from all laws, as its main function is to elect the chair and organs of the union and it does not provide any solid benefit for the profession, but rather causes waste of resources and a disintegration of democratic management.

**3. Instead of delegates, all lawyers should elect the chair and organ members of the Union of Turkish Bar Association, as is the case in provincial bar elections.**

**4. The chair of the Union of Turkish Bar Associations and chairs of provincial bar associations should be elected using the two-round system, as is the case in presidential elections.**

**5. Closed lists and similar methods and applications that harm or direct the voter's will in elections should be banned.**

**CONCLUSION:**

Bars themselves and the Union of Turkish Bar Associations are professional organizations that are considered to be public bodies established as per Article 135 of the Constitution and **whose organs are elected in democratic ways by their own members**. Aside from being professional organizations, bars represent defense, one of the main elements of an independent and impartial judiciary; therefore, they are directly related to the judicial power and function set out in the Constitution. Rule of law can only be ensured through an independent and impartial judiciary. The independence and impartiality of the judiciary is only possible with the independence of lawyers and bar associations.

The independence of bar associations is one of the main requirements to ensure that the judicial power of the state is truly independent and impartial. Entrusting bar associations with the duty to defend the rule of law and fundamental human rights is a result of this Constitutional situation. Due to the fact that bars are an independent element of the independent judiciary entrusted with the duty of defending the rule of law and fundamental human rights, they have a quite different and important function compared with chambers of industry and other professional organizations considered public bodies established as per Article 135. For this reason, strict attention must be paid to avoid negatively affecting the functions of the judiciary when making regulations regarding bar associations.

It is obvious that if the regulation allowing “**multiple bars in three metropolises**” suggested in the Proposal is passed into law, **the bars will no longer be independent professional organizations**; such an action will **turn the bars into interest groups that defend the interests of their members instead of the rule of law and that compete with each other** to get more members in pursuit of these interests; there will be a toxic environment that promotes misconduct in a manner that will disunite the members of the legal profession.

Therefore, in addition to harming the independence and unity of lawyers in an anti-democratic manner, the Proposal is intended to **bring about a management order that may jeopardize the independence and impartiality of the judiciary; a disintegrated structure where explicit and implicit benefits may come to the fore; a management style where the minority will dominate the majority.**

Article 83 of the Constitution, which offers immunity to members of the parliament for their votes and statements in parliamentary works as well as their thoughts, does not give them the right to act arbitrarily. Members of the parliament must use their authorities and privileges as stated in Article 5 of the Constitution, especially “to protect the Republic and democracy”.

We would like to invite the parliamentary members of the Justice and Development Party to revoke this draft from the Grand National Assembly of Turkey, all relevant parties to act responsibly on this matter, all parties involved to get together without any preconditions or prejudices to detect the problems in common and use common mind to come up with a solution.

As a politically impartial institution with many esteemed lawyers and management science experts, **our Association, with all of its members and management staff, is ready to facilitate such a common-mind gathering** in a politically unbiased manner **at an equal distance from all parties** as required by the independence and impartiality of judiciary, to help detect the problems, **come up with solutions and reach an agreement.**

**Respectfully announced to the public,**

**Better Justice Association**