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TURKEY'S MIDDLE-DEMOCRACY ISSUES and HOW TO SOLVE THEM: Judiciary, Accountability and Fair Representation

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And https://gun.av.tr/people/mehmet-gun

This book is dedicated both to my almighty nation,
which has brought me to this point in my life by generously
and wholeheartedly sharing its scarce resources,
and to the memory of Atatürk and his fellow fighters,
who saved our country, laying the foundations of democracy
during the Turkish War of Independence, so we might freely
flourish and grow, and re-founded our state on its ashes,
entrusting and bequeathing it to us.

ON THE OCCASION OF PUBLISHING MY BOOK IN ENGLISH

This book was first published in May 2018, and this, the second edition, a relatively short time afterwards. Of a total of 11,000 copies, more than 9,000 of that first edition reached opinion leaders all over Turkey, as well as business-world figures in every corner of Anatolia. Thereafter, the executive summary of the book was adopted as a policy document and published in the form of a report by TÜRKONFED. Through a series of conferences on structural reforms that was jointly organised by TÜRKONFED and the Better Justice Association, of which I am proud of being President, I then had the chance to present my book to more than two thousand businesspeople at 12 important centres. The degree of interest shown by those businesspeople to issues that might have been considered boring and complex for non-lawyers was demonstrated by their engaging with my presentations for up to an hour, on occasions. I have been very pleased to have witnessed the positive response the book has garnered, and to receive messages such as this from opinion leaders and members of supreme courts with a deep grasp of the troubles of our country: "We are also well aware of the problems mentioned in your book. You are right. All

these points need to be discussed and we are glad that you have given voice to them!"

The intention underlying my decision to have my book translated into English was to reveal and demonstrate fairly and squarely certain truths about Turkey, and, thereby, to help generate unbiased ideas about how those truths might be reconciled. Prejudices and biases are generally the result of having been shackled to a certain point of view or having been disabled by a shallow conception of history, and we need to go deeper to give ourselves a more realistic line of vision. The tendency toward mediocrity that dominates a great majority of the public in the rapidly digitalising Western world is even further increasing the shallowness of historical and philosophical depth. Populist and autocratic views are gaining strength on one side, while prejudices, rather than truths, are starting to dominate the approach on the other. This, in turn, creates a vicious circle that draws international relations away from the ideal of humanity and, instead, pulls humanity down for perceived maximum benefit. While the free movement of mankind across the world is being restricted more and more every day, un-boundaried communications are challenging everything. The power of countries and their governments may be eroded, even erased, through the effect of those communications on basic human values. I believe that my own country has been negatively affected by the prejudices about it. That is why, in this book, I wished to ameliorate that, challenging the biases I have frequently observed in the Western world about Turkey and building a sound basis for solutions, thereby making a contribution from our own culture to the genuine fostering of ideas across the globe.

Turkey is a country with a contemporary civilisation and the depth and capacity for further development. Its problems are almost identical to the problems of any other country that is trying to grow independently. But the difference between Turkey and some of those other countries is that it also has the capacity to find solutions to those problems that will carry its populace to the

next level, thereby contributing to the growth of humanity as a whole. The people of Anatolia, who are the foundation of our nation, have a great wealth on which to draw, being a melting pot of very deep-rooted ancient civilisations. Because Turkey is not only a geographical bridge, but, more importantly, a bridge across cultures. I am making a call for the use of this wealth in the interests of humanity, both nationally and in the international arena.

This book therefore offers suggestions for the solving of our country's problems by contemporary methods inspired by our age-old Turkish-Islamic culture. As the occasion arises, I explore in it the similarities between the West's constitutional theory and the Turks' customs and moral laws, between the West's theory of separation of powers and the separation of the judiciary from the khan, sultan or sovereign throughout Turkish history, and between the West's theory of the rule of law and the universal equality adopted in the Turkish-Islamic culture. In doing so, I try to point out that we Turks may even be able to offer theories that could further improve on the idea of democracy that was created in the Western world.

I would not wish the publishing of my book in English in London to be perceived as a call for help, because Turkey is mature enough to identify and analyse its own problems and implement its own solutions. The people of Anatolia have always backed and will surely continue to back their children, who understand them and sincerely wish to contribute to the solution of their problems. However, if the international community were to try to understand the root causes of our nation's problems, rather than merely focusing on the problems themselves, and to establish equal, respectful, collaborative relations with those willing to help solve them, with an eye on the interests of humanity as a whole, it would surely deliver more successful results.

The difficulty of finding the exact meaning of the terms used in this book, and the long and complex sentences formed by me for the sake of explaining certain concepts, have made the translation

of this book into English a tough job. Therefore, I owe a debt of gratitude for their great effort and sacrifice to Turgut Ağar, a doyen of interpretation in Turkey, for translation, to Luke Finley for the first editing, and to Gill Wing for the final editing hereof.

Av. Mehmet Gün

FOREWORD

Atatürk and his fellow fighters have bequeathed to us a state that will surely endure forever, a country in which we can freely flourish, and a self-governing popular administration that was ahead of its time. That is why, to repay our debt of gratitude to them, we must fulfil our duty to protect and defend Turkish independence and the Turkish republic we inherited by raising our nation above the level of contemporary civilisation.

In spite of coming from behind and starting almost from scratch, Turkey has already gone a long way down this road, succeeding in taking its place among the world's leading countries and economies. Despite inevitable failures and interruptions, it has learnt many useful lessons and made great strides in establishing a democratic government and all of the organisational requirements of democracy. After losing almost all of its adults, as well as its elite and its well-versed intellectuals, except for a small group, in the First World War and War of Independence, Turkish society made tremendous progress, both economically and culturally, under the republican administration, adopting and now pressing the government for democratic governance. However, in many aspects, democracy remains inconsistent in Turkey.

International conventions are superior to the constitution, and the constitution is superior to internal law. However, Turkey's constitutional audit remains limited and inadequate, and, therefore,

laws and regulations found unconstitutional and nullified by the Constitutional Court somewhere may be held in force and valid somewhere else. According to our constitution, judicial power is independent, but, in practice, the highest judicial postholder is appointed by the executive and legislative powers-that-be, and this critical post's functionality is tightly linked to and dependent on the relevant minister and his or her undersecretary, who are answerable, in turn to the executive power. Turkey is a republic and a state of law, and according to our constitution, everyone is equal under the law. However, as a result of legislative provisions clearly proven to be against these basic characteristics in a judgment of the Constitutional Court passed in 1977, members of the Council of Judges and Prosecutors, Supreme Electoral Council, Supreme Court of Appeals, State Council and Supreme Court of Public Accounts have become a privileged clan exempted from all responsibilities as a result of the closure of all legal remedies to decisions about them.

The executive power is under obligation to comply with laws, but the functionality of the judiciary to proceed against criminal acts by public officials and civil servants is made subject to the prior permission of that executive power. Although the highest tier of the executive power and all politicians will naturally be called to account by the electorate from one election to the next, they are never required to give an account of themselves except in very special and exceptional circumstances. According to our constitution, Turkey is a democratic state of law, but political parties determine the state government, and local authorities and public bodies are dominated by an anti-democratic delegate system and centralised administration.

Thus it is that those who are in charge of ensuring the continuance of a developed democracy and of enacting the will of the people are, in fact, restricting and limiting the people's right of representation. They have become skilled in going against the popular grain and of submitting to the domination of the ruling clan.

Though it is generally accepted that leaders and administrators may be changed by democratic means, in Turkey, political parties and election systems are, in practice, used instead to further reinforce the domination of leaders and central administrations, while the people are left to seek a change of management in alternative ways. The regime of the state may be republican, but the people cannot elect the government itself, only make a choice between the candidates chosen by the clans that dominate the management of political parties.

Political parties with leaders who are never elected by their grassroots supporters do not identify existing problems and generate solutions for them. Instead, they are like the lion's den that the populace may not enter, comprised of unapproachable individuals who come together to share the positions, powers and opportunities of the state. Rather than sharing their ideas, winning new members and increasing their funds through member subscriptions, those parties restrict the participation of the people and limit any domination by their grassroots supporters, preferring to have access to Treasury grants and the official or unofficial contributions of candidates wishing to buy a share of governmental power. Rather than electing qualified candidates from among those listed for primary elections, grassroots members are therefore forced to vote for candidates named in the lists created by and imposed on them by their leaders and central management that are the outcome of bargains and intrigues. Such lists created behind closed doors are used to determine not only the party management, but also the candidates for Parliament and municipal elections, which are then presented to the people not in the form of a decision about suitability but, instead, as an opportunity to select a preference. In other words, the people do not elect the government itself, but are forced to make a choice from the predetermined lists imposed on them. As a result, the Turkish economy experiences ups and downs depending on the personality, foresightedness and personal integrity of public administrators, and it is by no means easy to make a long-term plan and

to enhance the nation's overall welfare sustainably.

In essence then, Turkey's basic problem is not the protection of democracy, but the protection of the rule of law and accountability in the judiciary, and of justice in representation. Indeed, the problems related to the rule of law – that is, Turkey's middle-democracy issue – are the root cause of all of the country's other problems. When the rule-of-law problem is solved, the country's democracy problems will be automatically resolved, too.

The sole way for Turkey to solve its middle-democracy problems is to ensure the supremacy of the law in public administration. The non-accountability of the judiciary and civil servants is one of the greatest challenges we are facing in the rule-of-law field, and the cause of the many paradoxes afflicting our country. It is wrong to restrict the independence of the judiciary, of course, but it is now believed to be justifiable because the judiciary is not accountable. Making civil servants accountable to the judiciary for their criminal acts only with the prior permission of their superiors is also wrong, but the judiciary's non-accountability offers easy justification. To put it in another way, the view that the judiciary is not accountable compromises not only its own independence, but also the accountability of the executive power and of public officers, and, as a result, deviations from the rule and supremacy of law are believed to be justified.

This contradictory situation in Turkey of political self-advancement turning out, instead, to be national self-abasement is the most pressing problem to be solved, and the sole solution is to assure the rule of law across the board in public administration. In turn, this will be possible only if and to the extent public administrations and civil servants are made accountable for their acts.

The purpose of this book is to identify Turkey's fundamental problems, to demonstrate the root causes of those problems via the interspersion throughout of references to many legal texts, and to propose suggestions for their solution, thereby plotting a simple,

practical road map to greater democracy. However, it also aims to be the most comprehensive of all the works created to date on the democratisation of our nation.

In discourse about political parties and election law in this book, it has been necessary to use terms such as "leader's authoritarianism", "oligarchic group", "minority", "landlords of members and delegates" and "fake member registrations", which may be considered rather heavy-handed and offensive, because of the frequent references made to them in the references herein. It is my perception that these terms are often used in academic resources too, because of the lack of alternative terms that adequately reflect the underlying concepts in a way that is comprehensible to ordinary people. For this reason, those who are in the groups covered by these terms should not be offended by them, and should not prejudge my book by their usage.

Almost all the problems identified and all the solutions suggested in this book, except for those relating to the judiciary, have already been debated by Turkey's wealth of academics. Yet, there were only a small collection of resources relating to the judicial system on which I could draw. Unfortunately, though it has been the subject of serious discussion, scientific works on the subject are scarce, and those that do exist are either non-integrated or do not discuss the issues from a neutral point of view. Thus, the majority of the determinations made here and all of the suggestions as to how to solve Turkey's judiciary problems are those of the author, in the formulating, development and maturation of which I have drawn on the valuable contributions of members of the Better Justice Association.

I have, with great pleasure, spent every spare moment since June 2017, including weekends and holidays, researching, writing and developing this book. I owe a debt of gratitude to Arda Batu, its originator and mastermind; to Bekir Ağırdır for his significant contributions to the development of ideas herein through his research, comments and restructuring proposals; to Emre Tamer for

the great support he offered through his source and data research, and his valuable views; to Tarkan Kadooğlu, President, and the Board of Directors of TÜRKONFED, who allowed me to present to its members in Ankara the conclusions of this work; to the Board of Directors of the Better Justice Association, and particularly to Nuri Çolakoğlu, who first proposed this book in the General Assembly of the Association, prompting me to begin the section on the judiciary; to Ali Göreç, who is like a brother to me, and his wife, Tülay, for their tolerance of my neglecting the requirements of friendship, and their thoughtful discussions and valuable contributions focused on ensuring the name of the book conveyed a positive message to the public; to my blood brother Mustafa and dear Emir Kaya for their contributions on the humanitarianism of democracy; to my trainee, Havva Yıldız, for her careful correction of my grammar; to Haluk Tükel for his valuable comments and proposals; to my law-office colleagues, who allowed me to spend time on this book by taking over my duties; and to everyone not specifically named and mentioned here.

This book is presented to the Turkish nation that took me, a person born in poverty in an earth-covered hut on the Dikilitaş Plateau in the Taurus Mountains, and brought me to this juncture, and also to Atatürk and his fellow fighters, who founded the Turkish republic that has risen from the ashes of their struggle for democracy.

Av. Mehmet Gün

The most important problem of Turkey is Justice and the rule of law, and the Judicature which is primarily responsible for making them real. In Turkey, the fundamental problem of democracy is indeed the need for a Judicature system independent, efficient and accountable in its functions, and for the rule of law and the accountability to be provided thereby. Even all other important problems such as accountability in the public administration, and democratic governance in political parties and public vocational and professional organizations are directly related thereto. All of these fundamental problems may be resolved in a short time by resolving the Judicature system problem, thereby assuring the rule and supremacy of law.

As members of the Better Justice Association, we hereby declare and undertake that:

1. We shall work to improve our judicial system, which is one of the essential pillars of democracy and the keystone of a better future for our country, as well as being fundamental to its functioning.
2. During our activities to that effect, we shall make every effort to embrace all stakeholders in the judicial system. These stakeholders include official and private bodies, non-governmental organisations, judges, prosecutors, advocates, other judicial officers, academicians and representatives of the business world. We shall invite them to meet on common ground to generate innovative, progressive and reformative solutions, through multi-voice thinking and the harmonisation of different ideas, and to put these theoretical solutions into practice.
3. We shall contribute to the Turkish constitution and Turkey's law-making activities by bringing forward proposals aimed at reforming its judicial system.

Within the scope of our activities:

1. We shall abide by the fundamental and universal judicial principles.
2. We shall safeguard our country's greatest interests.
3. The rule of law, honesty, transparency and accountability are our highest-priority values.
4. We shall take a stand against misconduct in judicial pro-

ceedings, and make every effort towards honesty, as well as engaging in full and frank disclosure of all facts in relation to disputes and evidence.

5. We shall take a conciliatory position in every kind of public dispute.
6. We shall make concerted efforts to ensure that our Association embraces all sectors of society.
7. We shall be impartial and treat equally all public and private institutions and organisations, non-governmental organisations and political parties.
8. We fully support the ten fundamental principles, addressing matters of human rights, environment, the fight against corruption, and labour law, that constitute the basis for the United Nations Global Compact initiative.

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ABBREVIATIONS

A.	Article
Av.	Attorney at Law
A/RES	Code used by the General Assembly of the United Nations for Agenda Topics on Which Solution Proposals are Made and Decisions are Taken
b.c.	Before Christ
BRSA	Banking Regulation and Supervision Authority
CEPEJ	Council of Europe European Commission for the Efficiency of Justice
CHP	Republican People's Party
CIECA	Court of Inquiry and Evidence Collection and Accusation
CoA	Court of Appeals
CMB	Capital Markets Board
CoC	Chamber of Commerce
CoJ	Council of Judges
CoJP	Council of Judges and Prosecutors
CoP	Council of Prosecutors
CPL	Criminal Procedures Law
DISK	Confederation of Progressive Trade Unions of Turkey
DL	Decree-Law
E.	Case File Number

EAJ	European Association of Judges
ECHR	European Court of Human Rights
ENM	École Nationale de la Magistrature, France
etc.	Etcetera
EU	European Union
fn	Footnote
FETÖ	Fettullah Terrorist Organization
GDP	Gross Domestic Product
HAK-İŞ	HAK Confederation of Trade Unions
HCJ	Higher Council of Judges
HCJP	Higher Council of Judges and Prosecutors
HCP	Higher Council of Prosecutors
HIJ	Higher Institution of Justice
IBA	International Bar Association
ICC	International Chamber of Commerce
IFC	International Finance Corporation
IMCD	Investment Monitoring and Coordination Department
IMF	International Monetary Fund
ITCA	Information Technologies and Communication Authority
IWSA	Istanbul Water and Sewerage Administration
J.	Judgment Number
MEDEL	Magistrats Européens pour la Démocratie et les Libertés
MDP	Nationalistic Democracy Party
MHP	Nationalistic Movement Party
MMC	Metropolitan Municipal Council
NGO	Non-Governmental Organizations
no.	Numbered
OG	Official Gazette

OSCE	Organization For Security and Co-Operation in Europe
p.	Paragraph
PIS	With Public Institution Status
Polity IV	Political Regime Characteristics and Transitions (Project)
Prof. Dr.	Professor Doctor
SEC	Supreme Electoral Council
SDIF	Saving Deposits Insurance Fund
SETA	Foundation of Political, Economic and Social Researches
SoE	State of Emergency
SoE DL	State of Emergency Decree-Law
SSC	State Supervisory Council
Supreme CoJP	Supreme Council of Judges and Prosecutors
Supreme CoJ	Supreme Council of Judges
Supreme CoP	Supreme Council of Prosecutors
TBB	Union of Turkish Bar Associations
TGNA	Turkish Grand National Assembly
TCC	Turkish Criminal Code
TPA	Turkish Pharmacists' Association
TESEV	Turkish Economic and Social Studies Foundation
TMMOB	Union of Chambers of Turkish Architects and Engineers
TOBB	Union of Chambers and Commodity Exchanges of Turkey
TRT	Turkish Radio and Television
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TTB	Turkish Medical Association
TÜRK-İŞ	Turkish Confederation of Trade Unions
TÜRKONFED	Turkish Enterprise and Business Confederation
TÜSİAD	Turkish Industry and Business Association

TV	Television
US$	United States Dollar
USA	United States of America
UN	United Nations
V-DEM	The Varieties of Democracy (Project)
WTO	World Trade Organization

EXECUTIVE SUMMARY

As modern economists have proven, Turkey's avoidance of the middle-income trap through economic growth and sustainable increases in GDP is dependent upon the country freeing itself from the middle-democracy trap.

In order to avoid the middle-democracy trap, it is necessary and sufficient to (i) ensure that the rule of law and accountability prevails in the public sector by (ii) improving the judiciary to be fully independent, efficient and accountable, and (iii) ensure fair representation in all types of elections, including elections in political parties and public professional organisations.

Standards of Democracy and Judicial Independence

Along with 172 other member states, Turkey agreed, in United Nations General Assembly Resolution no A-RES-59-201, that the basic principles of democracy are: (i) separation and balance of powers, (ii) independence of the judiciary, (iii) pluralistic system, (iv) respect for the rule of law, (v) accountability and transparency, (vi) free, independent, pluralistic media, and (vii) respect for human rights and political rights.

UN General Assembly Resolutions 40/32 of November 29, 1985, and 40/146 of December 13, 1985 set out the basic principles of judicial independence as follows: *"(i) the judiciary as a whole must be independent from the executive branch and other powers; (ii) the*

independence of the judiciary must be respected and observed, and (iii) the judiciary must be free to decide without any restrictions, influences, inducements, pressures, threats or interferences."

An independent, efficient and accountable judiciary is the most important element of a democracy because it is the only means to preserve the separation of powers and balance between the branches of the state on the one hand, and on the other hand to protect civil and political rights, including the right to vote and be elected, and freedom of expression, and to ensure the rule of law throughout.

Rule of Law, Accountability and the Judiciary

Turkey's two fundamental problems of the judiciary and rule of law have become an intertwined Gordian knot. The lack of accountability of members of the judiciary and other public officials is one of large black holes that have ripped into the rule of law.

The Need for Judicial Reform

It is urgently necessary for Turkey to comprehensively reform its "hands -and feet- tied" judiciary, to transform it from an item of expense that restricts the country's own motions into an institution contributing to the general welfare by generating justice, conciliation, harmony and peace.

It is wrong to make judicial reform a topic for international political negotiations and to index it to the EU's willingness to open Chapters 23 and 24 for negotiations.

The Problem of the Separation and Independence of the Judicial Branch

The judicial branch is dependent on the one hand on politicians as if it were an extension of the legislative and executive branches, because they appoint the members of the Council of

Judges and Prosecutors (CoJP), and on the other hand upon the executive branch, through the minister of justice and his undersecretary, simply in order to perform its regular functions.

The Lack of Judicial Accountability for the Judiciary and Its Members

The judiciary has become unaccountable, as the CoJP's non-transparent decisions concerning the appointment, tenure and discipline of judges and prosecutors, including members of the highest judicial authorities, were taken outside judicial review with the inclusion of such provisions in the 1982 Constitution that had been found to be contrary to the "republican" nature of the state, as well as violating the constitutional principles of equality before the law, rule of law and human rights, by the Constitutional Court's ruling of January 27, 1977.

Even though all should be equal before the law, the members of the judiciary have gained immunity from the law and accountability. The legal framework that leaves judicial accountability to members' own institutions, even with regard to personal crimes, has granted high court judges a lifetime of invulnerability and de facto immunity. This has spread from the Court of Cassation, to the Council of State, the Court of Accounts, the Banking Regulation and Supervision Agency and the Information and Communication Technologies Authority, and lack of accountability has spread throughout the state's higher administrative echelons like a cancer.

The judiciary's lack of accountability has led to substantial complaints concerning violations of the public nature of trials, and of the right to appropriate reasons for judicial decisions on the adjudication of even the most ordinary disputes.

The Judiciary's Capacity to Perform Its Duties

As lying to the court, concealing evidence relevant to ad-

judication and acts to obstruct justice are considered part of the right of defence, the judicial process has virtually turned into a race of trickery and Turkey's courts have become unable to resolve complex disputes.

The shortcuts being taken in procedural rules purporting to facilitate the workload of judges have reduced the courts to a state in which they are unable to fulfil their function as well as generating a heavy cost to the public. A simple case that could be effectively resolved in a maximum of 100 days can only be resolved by our commercial courts, which are presided over by our most competent judges, in an average of 1,500 days.

Having become dependent upon the executive in a number of ways, the Turkish judiciary has long been delegating its judicial powers to persons who are mostly not judges so regularly that this practice has become virtually institutionalised.

(i) In civil and administrative proceedings: Judges are being required to obtain expert reports for nearly all of their cases which in turn has led to the de facto transfer of the power of adjudication to experts. The disputing parties' right to obtain expert opinions has been usurped by the judiciary. Adjudication has become a process for collecting the documents and petitions to be sent to the experts, whose identities are not known to the parties, virtually turning the process into an exchange of letters between the parties and ex parte persons.

The coterie of court-appointed experts has been allowed virtually free rein to plunder those cases in which the "no ex parte communications" rule has been severely violated, particularly during expert examinations.

(ii) In criminal proceedings: A significant portion of judicial powers have been given to prosecutors, who in turn have delegated some of their powers to the police to temporarily restrict the freedoms of persons; and who have become dispensers of justice through decisions not to indict suspects and/or to issue bills of

indictment on the basis of files prepared by the police.

Almost half of the persons officially charged by the prosecutors who have been granted privileged judicial powers through the use of "the Republic" in their titles having the power to restrict the freedom of individuals are innocent. This means that half of the people the prosecutors decide not to prosecute must be guilty. Also, prosecutors routinely delegate their responsibilities to the police, causing the investigation process to become unnecessarily rigid, and as a result suspects are being harassed in their daily lives by means of traumatic events such as being taken from one's hotel room at dawn, dawn raids, being held at police stations until the very last minute of the legal holding period, and general maltreatment.

The elimination of interrogation courts and transfer of their powers to prosecutors in the 1980s was a step backward in criminal justice. These courts should be reinstituted in the form of Courts of Investigation, Evidence Gathering and Arraignment combining the powers of the public prosecutors and of the judges of criminal peace courts.

Better Judicial Organisational Structure – Supreme Council of Justice

The judicial branch must be saved from being at the centre of the political tug-of-war for control over state power.

The judicial branch must be separated from the other branches of the state, in terms of both its power and its functions, and in particular its independence from the legislative and executive branches must be established so as to leave no room for doubt.

The reasons for complaints that have led to the restriction of the judiciary's independence since the 1961 Constitution are as much strongly justified as the reasons justifying its full independence. As such, that judiciary, with its own flaws, has caused the restriction of its own independence. Addressing these complaints leading to restrictions is possible if the judiciary is made institu-

tionally accountable, allowing a judicial review of all decisions and actions made and taken by the judiciary.

Similarly to in France and Germany, judicial remedies must be made available against any and all decisions of the CoJP, which were made immune from judicial review by the enactment of an unconstitutional law in 1981 during the coup era.

Resolving all of the known problems of the judiciary requires the establishment of a sophisticated organisational structure composed of the representatives of all stakeholders, clearly separating its political, policy and preference functions from the professional operations and allowing for judicial remedies against any and all decisions and acts of the judiciary and all its organs.

Under such an organisational structure, which could be named the "Supreme Council of Justice" the professionall associations of the three components of the judicial branch – namely judges, prosecutors and lawyers – should be separated into autonomous professional entities that would ensure the equality of all these professions and pave the way to improving their efficiency and accountability.

The Accountability of the Executive Branch and General Administrative Law

The foremost obstruction in Turkey's democratisation is the weakness in ensuring that the rule of law prevails in the public domain and over public officials. One of the fundamental reasons for this weakness is the fact that the rules determining the behaviour of public institutions, and in particular high-level public officials, have not been clearly set out, and as a result the accountability in the public domain and the release or discharge from liability of public officials has faltered. Another fundamental reason is the fact that the prosecution of public officials for their offences – both professional and personal felonies – is subject to the preconditional permission of the executive branch.

For these reasons, consequently, it is necessary to first enact a general code of administrative procedure indicating how administrative powers are to be exercised in line with the provisions of Articles 1, 2, 10, 66, and 125 of the Constitution, and in particular Article 8, which states that *"executive powers […] must be exercised and implemented in accordance with the Constitution and the laws"* to ensure competence, rationality, transparency and accountability in government.

A general code of administrative procedures has become absolutely necessary to balance out the executive branch in the presidential system that has been adopted in Turkey.

Competence and Accountability in Appointments to Public Office

Every stage and result of the process of the appointment of public officials must be transparent, objective and open to judicial review to ensure that the public and all parties concerned are able to participate in the process and agree with such appointments. During the process, all information on the candidates' qualifications should be revealed to the public and the candidates should be required to make full, accurate and honest disclosure about themselves concerning the public duty so as to ensure that only the most qualified persons are appointed.

Judicial Accountability of Public Officials

Preliminary authorisation conditions and procedures required for the criminal prosecution of public officials put in place in purporting to safeguard them in light of the sensitivities of their public duties have been stretched so far out of bounds with regard to the personal and work-related offences and negligence of the members of High Courts and high-level officers that a privileged class of immune persons has emerged who cannot be held accountable or penalised while they are free to arbitrarily exercise public authority.

The preliminary authorisation conditions and procedures for the prosecution of public officials must be abolished. The judiciary must be able to commence investigations and prosecutions on any matter within its purview without having to obtain permission, regardless of the identity, position or title of the suspect; public officials also must be investigated for any unlawful actions; and no circumstances of immunity and impunity should be allowed to occur. Only an independent judicial authority should decide on a public official's innocence, not the suspect's administrative superior.

The sensitivities of public duties should be justification for establishing competent and specialised judicial bodies for public officials only.

Participation in Governance and Fair Representation

Elections (for Political Parties, General Elections and Professional Associations)

The use of the delegate system, which violates the Constitution's democratic governance and fair representation principles, in elections for the central management and organs of political parties and public professional organisations prepares the ground for a small number of persons to dominate these institutions through abuse of central polling, fixed lists and closed lists. The lack of a healthy membership registration and record system in political parties creates an environment suitable for "feudal masters of delegates," "nylon delegates lists" and similar abuses.

The unconstitutional delegate system should be completely eradicated from elections for the organs and administrators of political parties, municipalities and professional associations. The practice of fixed lists should be prohibited.

All intra-political-party elections should be conducted under the observation and supervision of a judicial authority.

Political party candidates for elections to single-person po-

sitions, such as presidencies, chairpersons and other similar positions, should be nominated through two-round elections under judicial supervision similar to the presidential election.

All political factions exceeding 3% of the votes nationwide should be allowed the opportunity to be represented in parliament in some manner. Accordingly, electoral districts should be of a size that provides opportunity for all political factions to express themselves and be elected, with each electoral district electing a minimum of seven, and preferably nine or eleven, members to parliament.

Political Parties

Academic works express a broad array of justified criticisms that the Political Parties Act prevents intra-party competition; membership registration systems are unhealthy; the administration of parties has been taken over by a political elite through various unlawful methods and authoritarian leadership has become the norm; government resources and facilities are being used to sustain the rule of political elites, to strengthen and enrich their supporters; illegal funding has become a part of politics; the party base is unable to control or direct the administration and, to the contrary, the central administration is placing restrictions on the choices of the party base; and, in conclusion, politics has become a means to rule and exercise the power of government rather than a means of reflecting the nation's will onto parliament.

(a) Political Party Organization and Intra-Party Democracy

It is necessary to grant exclusive jurisdiction to regional Courts of Justice where the party's headquarters are located to resolve disputes relating to any bylaws, memberships, organs or members of political parties, and dealing with such cases should be given priority and ruled on speedily.

Member admission, rejection, registration and recording transactions in parties should be carried out by judicial authorities and complaints about unlawful practices such as "feudal masters of delegates" and "nylon delegates list" should be terminated indefinitely.

The Political Parties Act should no longer restrict parties to a single type of organisational structure; instead it should only indicate which models are prohibited.

The political party candidates in elections for single-person positions, such as party leaders, provincial heads, and county heads, as well as the president, mayor and similar positions, should be determined through two-round elections under the supervision of judicial authorities similarly to the presidential elections, where the two candidates who gained the most votes in the first round compete in the second round.

Party candidates for positions where multiple persons will be elected should be determined through proportionate majority in preliminary elections held under judicial supervision.

The power of central management of political parties to nominate candidates and their turn in candidate lists should be limited to a small number and declared prior to preliminary inter-party elections.

(b) Funding Politics and Political Parties

Subsidies from the treasury should be distributed fairly and equally to ensure a fair race between competing views. Accordingly, mainstream political views should be considered in one band while non-marginal political views are considered in a secondary band. Treasury subsidies within the same band should be distributed equally.

(c) Election Bribes and Off-the-Record Funding

A system should be established that is able to identify and audit all unlawful and off-the-record donations and donors to po-

litical parties for an expectation in return; and donations in kind should be recorded as much as cash donations.

All political party activities that could be a source of income or expenditure should be recorded and audited.

The activities of all candidates for any public office open to election, including candidates for any office in political parties, their assistants and any persons to whom they assign any responsibilities, should be logged and open to public review and audit.

Aside from the Constitutional Court's auditing, political parties should be required to obtain independent internal audits, and the results should be disclosed to the public.

Local Governance

Representation unfairness in metropolitan municipal councils should be remedied. For this purpose county heads may be stripped of their natural membership, and direct election of metropolitan municipal councils or allocation of membership in the metropolitan municipal council pro rata according to the votes throughout the metropolitan area may be considered.

The structure of the Iller Bank Inc. should be reformed in order for it to function more democratically and more independently from the central government; and complaints that it cannot make decisions autonomously, is open to political influence and acts as an extension of the central administration must be addressed.

The central government's administrative control over municipalities should be limited, and the authority to apply heavy sanctions such as removal from office should be subject to a judicial decision.

Managements of the Investment Monitoring Coordination Presidencies and Iller Bank Inc. should be made more democratic and more representative of the voters, similarly to the special provincial administrations.

Professional Associations Characterised as Public Institutions

Of the means and practices employed in elections of the organs of the provincial and central management of public professional entities, the delegate system should be eliminated and the practices of fixed and closed lists should be prohibited. If the delegate system is maintained, then the differentiation in the representative powers of delegates that the Constitutional Court found to be unconstitutional in 1991 and 2002 should be remedied.

Thus a wide segment of members who are required to become members and pay membership dues in order to be permitted to carry out their professions should be included in the administration of their own professional associations.

Faith-Based Organisations and Societies

Turkey must take stock of the last 40 years that culminated in the attempted coup on July 15, 2016, and learn the important lessons therein.

The fact that freedom of religion and faith are protected under the Constitution in Turkey provides a suitable environment for faith-based societies to emerge, to flourish and grow rapidly.

Turkey, while still protecting the freedom of faith, needs to find a way to prevent faith-based societies from becoming a threat by burrowing deep under society's skin and to avoid the harm they may cause, taking into consideration that their activities are often off the record, outside of the monitoring, control or even knowledge of the government, and that they are prone to infiltration and control for malicious intent as they can easily turn their members, who are generally innocent persons of faith, into threats to the very survival of our nation.

To ensure that faith-based societies operate within the boundaries of the law, they must be closely observed and audited

by the state. Ensuring that the leaders, members, activities, and administrative and financial structures of such societies are made transparent and accountable will be sufficient to achieve this objective while still respecting the purpose and function of these kinds of societies.

The Need for an Effective Civil Constitution

Drafting and Methodology of a Civil Constitution

Turkey is in desperate need of agreeing – and not just on the basics but in comprehensive detail – on a new Civil Constitution that solidifies social consensus, addresses polarisation and adopts principles of compromise, understanding, reconciliation, persuasion and tolerance.

In order for efforts to draft a new Constitution to succeed, it is necessary to pass a framework law for this purpose establishing the organisational structure, secretariat and method to be followed; outlining a basic framework and plan for the work that will be carried out; ensuring that the full diversity of society participates in deliberations; and specifying how the concerns of those with different and opposing views will be addressed.

Effective Protection of the Constitution and the Constitution Protection Institution

Turkey's Constitution protection system is limited, simple and inadequate. This weak and ineffective protection exposes the constitutional order to external powers and influences and invites tutelage for its protection. Serious gaps occur in compliance with the Constitution, as unconstitutional laws and decree-laws remain in force for years. While it is not possible to prevent unconstitutional laws before they come into force, the Constitutional Court also lacks the authority to redress the consequences of such unconstitutional laws.

The duty to protect the Constitution and constitutional order should be entrusted to an efficient functioning organisation – the Constitutional Protection Institution – transforming the Chief Public Prosecutor's Office.

Within this framework, filing for annulment actions against the enactment of laws and decrees on the grounds of unconstitutionality should be facilitated by also allowing individuals to file such actions. The Constitutional Court should review allegations of unconstitutionality regarding rules, regulations, circulars and general regulatory administrative acts issued by the executive.

Constitutional and Legal Checks on Presidential and State of Emergency Decrees

a) Classification of Presidential Decrees

There is ambiguity as to whether presidential decrees are administrative or legislative in force of law and as such whether they fall under the jurisdiction and purview of the Council of State and administrative courts or of the Constitutional Court. This ambiguity must be clarified by indicating that presidential decrees are administrative and as such fall under the jurisdiction of the Council of State and the administrative courts.

b) Judicial Review of State of Emergency (SOE) Decrees

Article 148(1) of the Constitution does not grant the Constitutional Court any power to review SOE decree-laws. The Constitutional Court ruled on January 10, 1991, that it had the authority to determine whether the SOE decree-laws were in the SOE nature, and in the event that they were not in the SOE nature then the Court had the authority to review decree-laws even if they were issued during a state of emergency; however on October 12, 2016, the Constitutional Court revoked its earlier jurisprudence and ruled that it had no such authority.

There might be circumstances requiring the nation to be governed under a state of emergency. However, even under a state of emergency, the Constitution must remain in effect, the rule of law must be maintained, the powers of the executive must be limited to the necessities of the state of emergency and the constitutionality of SOE decree-laws must be reviewed. Therefore Article 148 of the Constitution and the law on the duties and powers of the Constitutional Court must be amended to clarify this issue.

Laws for Harmonisation with the Referendum Results

The term "harmonisation laws" should not be understood as a reference solely to verbal amendments that are required in relation to the referendum.[1] Circumstances requiring the harmonisation of the acquis of legislation with new provisions of the Constitution should also be considered within the scope of harmonisation laws; and the regulatory framework necessary for a healthy and easy transformation to the presidential system while strengthening the rule of law should be adopted.

Law on the Principles and Procedures for Presidential Elections

Pursuant to Article 101 (last paragraph) of the Constitution stating that, "the other principles and procedures concerning presidential elections will be regulated under the law" it is first necessary to enact a law that anticipates that many candidates will come forward, while requiring political parties to determine their

1 A constitutional referendum was held throughout Turkey on April 16, 2017, on whether to approve 18 proposed amendments to the Turkish Constitution that were brought forward by the governing Justice and Development Party (AKP) and the MHP. Turkey adopted a presidential system of governance after the referendum

nominations through intra-party preliminary elections.

Political parties should be required to nominate their presidential candidates through two rounds of preliminary elections by the party members.

The requirement of the amended Article 101(3) of the Constitution allowing 100,000 voters to nominate a candidate should be regulated to facilitate, at no cost, the emergence of independent and competent leaders who have remained outside of politics but are willing to resolve the country's issues.

Election Law

In the case of the election of a single person, such as presidential elections and elections for the heads of municipal governments or professional associations or muhtars (local headmen), it should be mandatory for the nominees for candidates to be elected through two rounds of preliminary elections.

The electoral districts should be of a size that provides an opportunity for all political factions to express themselves, preferably so that each electoral district can elect seven, nine or eleven members to parliament, and the size of electoral districts throughout the country should be roughly the same.

Law on the Establishment and Organisation of the Supreme Electoral Council

Article 5(2) of Law No. 7062 adopted on November 20, 2017, stating that "no applications can be made to judicial or other authorities for judicial review against the decisions of the Council" and consequently removing Supreme Electoral Council decisions from judicial review, should be repealed and replaced with regulations allowing appeals against these decisions before the Constitutional Court.

Political Parties Act

The Political Parties Act should be amended to address current criticisms, ensure conciliation between different views and create a parliamentary structure in which legislative activities can balance presidential decrees. Consensus or compromise between political parties should be sought with regard to this issue but if no consensus or compromise can be found, the concerns of the opposing factions should be alleviated.

General Code of Administrative Procedure

In order to prevent any confusion under the new and unprecedented presidential system, with no customary practices, as well as taking into consideration the need to ensure the lawfulness, accountability and predictability of the executive, a general code of administrative procedure should be enacted pursuant to provision of Article 8 of the Constitution, **"executive powers […] must be exercised and implemented in accordance with the Constitution and the laws"** prior to the presidential elections.

Constitutional Review of Decree-Laws Issued during the State of Emergency

SOE decree-laws that have been issued since July 15, 2016, but not yet been submitted to parliament's will, pursuant to Article 119(7) of the Constitution automatically become void and cease to have effect if not approved by the Turkish parliament within a period of three months following the presidential elections. If these SOE decree-laws are not submitted to the parliament earlier than the presidential elections it may not be possible for the parliament to approve them within the three-month period following the presidential elections. In such cases, those SOE decree-laws becoming automatically void may lead to a legal confusion.

To be cautious against this consideration and in order to prevent such a possibility, it is necessary for these SOE decree-laws to be submitted to the parliament and approved prior to the presidential elections.

PART I.
INTRODUCTION

The Humanitarian Vision of the Turks

It is a sine qua non prerequisite or, rather, an essential condition or thing that is absolutely necessary, for a study aiming to define Turkey's middle-democracy problems and to offer solutions for such issues to start with questions such as "Why does a state exist?" "For what purpose and to what extent should democracy be improved?" or, to put it in other words, "What is the ultimate aim of a democratic government, or what should it be?" Of course, the ruling leaders should also ask these questions of themselves.

Philosophers who have generated and developed ideas about the concept of the state down through the ages have also searched for answers to the aforesaid questions. Those finding answers to these questions have gone further, and have become conquerors. While states have struggled to conquer each other, ideologies from ancient times have influenced Eastern thought, and Eastern thought has, in turn, affected Western thought. In the meantime, many civilisations have, one after the other, passed through periods of rise, stagnation and collapse. Thanks to these different ideals affecting each other as the background of the rise and collapse of civilisations, humankind has succeeded in generating and adopting a great many governance principles and standards, some of which are internationally accepted in the present day. Western thought, as a whole, has developed with greater momentum in recent times, drastically and keenly affecting Eastern thought. What is more,

the technical means and potential of the modern era is further increasing the speed and intensity of this interaction.

As commented by Nevzat Kösoğlu,[1] Lao-Tse, the first great philosopher of Taoism, says that: *"for happiness, one must lead a life of virtue, and that is why a community's happiness is also dependent upon domination of it by virtuousness."* Confucius defines political science as a branch of the science of morality, and expresses love as the highest ideal. Mao-Tse, from the school of Confucius teachings, attributes the establishment of the state to the social contract arising out of the necessity of the coexistence of humankind. Meng-Tse (also known as Mencius), who lived in the 4th century B.C., accepts the necessity of the state but, nevertheless, argues that people should not be slaves; on the contrary, people should hold exclusive and distinguished positions. According to Mencius, good political governance should rely upon the concepts of goodness (kindness) and justice. Another Chinese philosopher, Siyun-Tse, accepts and defines justice as the essence of moral principles.

As summarised by Kösoğlu in the same work, according to Farabi (870–950) the state should be virtuous. A virtuous state relies upon knowledge, qualifications, merit, virtue and justice, and aims to assure the mental development, welfare and happiness of the people.[2] According to Ibn Khaldun (1332–1406), humankind lives together as a community in co-operation with a view to forging a living, and coexistence in the form of a community is a must for humankind. The feelings of lending a hand to and behaving compassionately towards one's kith and kin are inherent and natural amongst people. Protection and claiming one's rights within a community are possible and feasible only as a result of group feelings (co-operation and solidarity). Such co-operation and solidarity gradually morphs into power, with the ultimate aim of transforming into a state.

1 See his work titled "Hukuka Bağlılık Açısından Eski Türkler'de – İslam'da ve Osmanlı'da Devlet," pp. 2–4.

2 Kösoğlu, p. 124

The underlying essence of group feelings that results in the formation of a state is the love felt for the existence of all others. This means that the essence of the state should also be based on love. Continuing this line of thought, on the basis of the recommendations of Sheikh Edebali, developed and propagated throughout the whole of Anatolia by Ahmed Yesevi and followed by Mevlana, Yunus Emre, Ahi Evran and Edebali and many of their followers emerging in the Islamic age of enlightenment, philanthropy, refusing all kinds of discrimination and accepting each human being as is constituted the foundation of the Ottoman Empire, and have always underpinned the Turkish-Islamic state governance culture.

According to the philanthropic-humanitarian vision developed by Turkish-Islamic philosophers and virtually imprinted into the genes of the community down through the ages and centuries:

(i) in spite of having many different names, bodies, colours and languages in appearance, no separation, favouritism or discrimination must be shown or practiced amongst the people; (ii) everyone is interconnected, and together they constitute a whole; (iii) all human beings should surpass any individualistic, communal or racial thoughts, and meet each other only in peace and brotherhood, although maintaining all differences of their own selfness; (iv) one must be full of compassionate and kind feelings towards all human beings, and show respect to and give credence to the thoughts of others; and (v) only love is beneficial to humankind: love, understanding and tolerance are a definite need of everyone, first of all for oneself, because those without love first do harm to themselves. For these reasons, it should be humankind's desire to be at peace, at all times.

The humanitarian vision has also become an effective factor in the West's state governance culture over time, probably due to the effects of the Turkish-Islamic state culture thereupon. John Locke, the theoretician of natural rights, shaped his philosophy (in Western thought) within the frame of the humanism and political movements of the 17th century, also known as the Age of

Enlightenment. Locke thinks of the human as a part of nature. In this state of nature, all people, whether men or women, are free, i.e. to make decisions and take actions themselves, and are equal. This means that no one is subject to, or dominated by, the will or authority of another person. However, so as to protect them- selves against certain threats and dangers of the state of human nature, people will form a political union mutually by entering into a "social contract". Thus, a political authority is constituted and set up but, nevertheless, the people reserve and retain their natural rights, such as the right to life and personal freedom and the right of property. The state is under an obligation to protect and maintain such natural rights of its citizens, and if it fails to perform its obligations, it loses its legitimacy and authority. According to the Marxist ideology that emerged in the 20th century, the essence of an individual is their potential and capability to use their personal skills to the fullest extent, and to meet their own needs fully.

As expressed by Jerome J. Shestack[3], "Within a religious framework, each human is considered and treated as blessed and sacred. It brings together a universally common understanding and hence, some universally common rights. The rights emerging from divine sources cannot be overridden by a mortal potentia or power. This approach is adopted also in the Jewish, Christian, Islamic and other religions based upon a divine foundation. Hence, the religious doctrine hosts the probability of foundation of a broad intercultural area of reconciliation in adoption of such principles as equality and justice constituting the foundation of human rights in international arena. […] amongst the approaches in the human rights field, religion may be the most attractive one." For this reason, even though it is a fact that the clarification and discussion of the teachings of Turkish and Islamic philosophers relating to religion and state are designed to explain and teach the Islamic

3 "The Philosophic Foundations of Human Rights, Liberal Thought," Volume II, 2006, p. 87–119.

religion on the one hand, on the other hand the humanism and humanitarian values resulting therefrom should by no means be seen or treated as an act of proselytism, nor should they be denied and overlooked solely for this reason.

Although in a democratic governance system the state draws its strength from the people, and its basic duty is to provide welfare and happiness to large groups of people, it is generally accepted that in this day and age, even in the most developed countries, democracy has so far failed to fulfil its basic duty, and is even in need of further development over a fairly wide geography. Democracies are, inter alia, criticised for (i) the alleged non-reflection of the will of individuals in state governance and (ii) the alleged failure in fair distribution and sharing of the common social production and wealth. Both of these points of criticism are directly related to human beings, and they represent two different manifestations of the fact that democracy has thus far neglected the human and has become an arena of struggle for rule and command over social forces and wealth. Thus, these two fundamental problems may both be radically resolved by improving democracy with humanism, and in making humanism dominant over state governance, both as a principle and as an objective. Democratic state governance offers a fairly robust starting point and a further mechanism capable of being developed towards the achievement of this objective.

Today, in many international conventions and treatments accepted worldwide, although the protection and further development of peace and human rights, as well as the propagation of democracy amongst countries, are intended, albeit partially approached, humanism has never been identified as an objective and goal thereof.

In Chapter I, Article 1, of the Charter of the United Nations, the purposes of the UN are listed (in paragraph 1) as *"to maintain international peace and security and, to that end, to prevent the disturbance of peace, and to resolve and settle international disputes by peaceful means," (in paragraph 2) "to develop friendly relations*

amongst nations and to strengthen universal peace" and (in paragraph 3) "to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights, and for fundamental freedoms for all without distinction as to race, sex, language or religion."

Article 55 of the Charter states that *"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations amongst nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: (a) Higher standards of living, full employment, and conditions of economic and social progress and development; (b) Solutions of international economic, social, health and related problems, and international cultural and educational co-operation; and (c) Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."*

The purposes of the UN as listed in the Charter of the United Nations – *"to maintain international peace and, to that end, to provide welfare of the nations in economic and social fields, and to promote and encourage respect for human rights for all without distinction*" – are not the same thing as the humanism mentioned above. Even though to show respect for human rights for all without distinction is indispensable and a prerequisite for humanism, it does not contain the elements of philanthropy, tolerance, solidarity and co-operation necessitated by humanism. Likewise, most UN member states have already inserted in their own domestic rule of law the obligation to show respect for human rights, nevertheless, they do not meet the requirements of humanism. Only in rare instances have some countries begun to exhibit some of the other elements of humanism. For instance, the states endowing a certain minimum amount of income to their citizens, and providing broader social rights in situations of duress, such as death, birth and natural disasters, may be said to have evolved towards humanism. However, the fact remains that even though a philosophical consensus

has already been built thereon, and humanitarian values such as honour, dignity and integrity have thus far been uttered, operational humanism has not yet been clearly accepted and undertaken in international treaties or conventions, nor have these values been addressed in national laws as an ultimate aim. As a matter of fact, the attitudes exhibited by states against the migration tragedies in recent years, clearly caused by civil wars and poverty, can by no means be said to be humanistic. It is an unequivocal fact that nations are racing to increase the welfare and happiness of only the people living in their own countries, not in other countries, and, to this end, to seize and take possession of the rich resources of other countries – without engaging in brutal wars. The sole difference from historical times is that military forces and wars, today, are not used as a means of pursuing that intention as they were in the past.

Similarly, the Charter of the United Nations does not clarify what benefits will be derived from reaching an excellent level of democracy by satisfying the minimum standards of democracy, as stated in the aforementioned decision of the UN. To put it in other words, the aforesaid UN decision apparently falls short of clarifying what is the final common purpose underlying the ownership of a democracy tool and the efforts aimed at bringing it to such an advanced level of perfection, and to what extent this is expected to carry the member states and humanity, in general, or for what reason all of these steps are required to be taken.

What may be the ultimate aim of the member states in ratifying the aforementioned UN decision with regard to the minimum standards of democracy, and in coming to a mutual agreement as to the international norms and standards relating to respect for civil and political rights and the supremacy of law, as well as other issues pertaining thereto, and in assuming the obligation to implement said international norms and standards, other than the intention to provide welfare and happiness to humankind – i.e. other than humanism?

Considering that humanism is not clearly referred to in the

"purposes" section of the aforesaid UN decision, it may naturally be asked whether the independent states that have signed that UN decision are racing against each other with the intention to establish superiority over others, or whether they are expressing and declaring the minimum conditions sought in others so as to establish and build relations with each other. Even though it is not clearly stated in the decision, humanism, being a common purpose for the whole of humanity, is indeed the cause and reason underlying all of the relevant covenants. Of course, the states ratifying the document have signed this Charter, on the one hand, as a precondition of recognising the existence and the sovereignty of other countries, and on the other hand, in order to ensure that their own country is also recognised likewise, to ensure that their own citizens have the chance to develop themselves in welfare and happiness, and to take the lead in the race in the international arena. Even though the signatory states have committed to these standards for their own citizens, the total sum of their covenants is, indeed, an engagement towards the whole of humanity. Therefore, if the scope of the commitments and engagements of separate states is further developed by the addition of humanism as an ultimate aim thereof, then an initial step may have been taken forward towards the progress of human civilisation into the next and more advanced stages.

A desire among the human community for more advanced democracy should also be assessed from this point of view, and the goal of the democratisation of Turkey should in no case be limited by what the West has thus far realised to that end. Even though it may be seen as a utopic aim for the time being, states should take the mantle of philanthropy, human happiness and perfection, i.e. humanism. In any event, recent developments in the international arena and technology reveal that humanity will face an utterly different civilisation and global order after another 50 or 100 years. Though it is indeed feasible today, and even though it is believed that it will not be easy, it should be taken into consideration that all people will meet this ideal one day. It is this goal that can indeed

be achieved by humankind within a few decades, which should be determined and identified as the vision and purpose of Turkey, and the Turkish nation should immediately commence work in order to extend this vision to include all peoples and all nations.

Turkey should activate its already available deep humanitarian cultural heritage in order to ensure that this purpose is clearly adopted in the international arena, and should focus its efforts on this goal to ensure that the UN is no longer an arena of the race to power between states and nations, and that the states combine their forces on universal values aimed at the welfare, happiness and perfection of all peoples. Accordingly, Turkey should adopt an understanding of humanism removing individual, personal, racial, national and ethnic borders, see living plants, animals and humanity as parts of the same whole global kingdom, and should aim to further develop the mutual agreement of democracy in the UN by the addition of this goal to the principles listed above.

On the other hand, thanks to the vast humanistic culture it already owns, it will not be difficult for Turkey to assume and maintain a pioneering role at this point. In order to achieve this goal, it will merely be a matter for Turkey to act by synthesising the teachings of Mevlana, Yunus Emre and Sheikh Edebali within the frame of the understanding of humanism associated with diversity and tolerance, and removing national and ethnic borders, as already achieved by Mevlana.

By keeping this in mind, it would be worthwhile to present a proposal aimed at achieving the addition of the purpose formulated below to UN documents and treaties:

"Common Purpose and Final Destination of Humanity: Humanism"

"To ensure that all peoples meet at the common points of love, tranquillity, trust, peace and brotherhood already existing in their essence, without showing or practicing any separation, favouritism or discrimination amongst themselves, in spite of having many different names, bodies, colours and languages, and by surpassing any individualistic, communal or racial thoughts, and by keeping and maintaining all differences of their own selfness, and that they act towards each other in respect, tolerance, compassion and kindness, and are full of love towards all of their human fellows and the nature they are living in, and that all kinds of disputes, disagreements and conflicts are amicably resolved within the frame of these values, and that peace and tranquillity dominate the whole world; and, thus, to further improve and upgrade human civilisation to higher levels …"

If this common purpose that has been accepted as the final level of maturation of humanity since the early ages is also adopted by the state, it may provide us with broad long-sightedness (vision), where our road is illuminated by our ancient cultural assets and the values deriving from the ages past, and it may ensure that our country gains the acceptance and respect of everyone under all circumstances in the ongoing international race, and stays at the forefront at all times, and is accepted as a pioneer country in the international arena.

To this end, the principle of humanism we have tried to briefly describe in the preceding paragraphs should be adopted as a fundamental governance principle, and should be added to the "purposes" section of our Constitutional Law, thereby bringing with it a basic accessible task and spirit to the state governance system.

PART II.
THE DEMOCRATIC ORIENTATION OF TURKEY

The Desire for Better and More Stabilised State Governance

The Republic of Turkey was founded by descendants of a nation that had already established many states throughout history, and which had made great and significant contributions to the progress of humanity, by synthesising its state governance traditions with different government systems it came into contact with, enriching the same with humanitarianism.

After finding and attaining a homeland that freely grew and developed apace through its glorious War of Independence, upon the dissolution of the Ottoman Empire as a result of the First World War, the Republic of Turkey, at the time of its foundation, adopted the most advanced state governance system and regime then available; and it has, thereafter, always tended towards, and insuperably endeavoured to achieve, its goal of democratisation, in spite of certain interruptions along the way and despite losing and then regaining ground from time to time.

The dream of the Turkish community to have a democratic government can be easily understood from its election of the Motherland Party in 1980, rather than the MDP that was appointed by the coup plotters, although it was the same community that approved the 1982 Constitutional Law imposed upon it with a high number of "Yea" votes. All subsequent revisions and amendments to the 1982 Constitutional Law, initiatives towards making

a Civil Constitution (although they went away empty-handed), and the resistance of the people against the treacherous coup attempt of July 15, 2016, clearly demonstrate and prove that the Turkish community believes in, gives critical importance to and stakes a firm claim on democracy.

As was demonstrated on July 15, 2016, though the Constitution may need to be amended and improved, society desires constitutional order and the Constitution itself is protected and safeguarded, and can be altered only in response to civil matters and with the will of the nation. No other interventions in the constitutional regime can be permitted.

The fact that the percentage of the "Yea" votes was so close to that of the "Nay" votes in the referendum of April 16, 2017, by which the executive organ is entirely separate from the legislative organ through the presidential regime, is a demonstration of the will of the people for better state governance through better democracy.

To the criticism regarding the Western-style democratisation that has continued since the period of the collapse of the Ottoman Empire, Turkey gave its reply by adopting a presidential-type state governance system in its referendum, and this is a deep political fact that must be taken into serious consideration. The opposing ideas coming into focus in the referendum process, with a difference of a hair's breadth between the levels of support for them, demonstrate that the community desires a more evident separation of powers, and a freer but more effective and accountable executive organ. The reason underlying this desire must, according to the author, be the secular and accountable state governance culture developed by the Turks since the time they governed in Middle Asia, and which has been engraved in its subconscious since that time. A positive perspective on the Western world's criticism of Turkey's form of democracy is to see it as a means of speeding up the awakening of our vast state culture, adapting it to the present day and differentiating our democracy with features that are unique to us.

Readers are recommended to read the book titled İslam Düşüncesi'nin Batı Düşüncesi'ne Etkileri by Prof. Dr. Bekir Karlığa, especially pages 171 to 179 therein. Quoted from page 176: *"Upon these two separate worlds coming face to face, one more advanced and the winner (the Muslim East) and the other more underdeveloped and the loser (the Christian West), the Western world laid the foundations of renaissance emerging in the distant future. On the other hand, the Eastern world was contented with spending its heritage and, just as it was on the brink of total collapse, it found ways to survive for another six hundred years thanks to the Ottomans."*

Indeed, just as Western civilisation, after its regression following the collapse of the Western Roman Empire, awakened from its centuries of slumber and entered into a path of development under the influence of Turkish-Islamic civilisation, it is now Turkey that is influenced by Western civilisation. This fast and challenging interaction speeds up the awakening of our egalitarian, humanistic and vast state governance culture based on the supremacy of law. This awakening, if not managed well, may cause differentiation and a conflict of the internal dynamics of community with external expectations, and it is therefore unequivocally critical for Turkey to transform this awakening into a path of development through a synthesis with the values of our day, and this will surely carry Turkey to a very special place in comparison with other countries.

People seek greater standards of welfare not only by producing more and better and creating higher added value, but also by attaining contemporary civilisation levels, to be competitive in the international arena, to universalise by reviving and developing their already-existing vast culture and deeply rooted values, and

to adopt, synthesise and further enhance universal values. They also dream of becoming one of the leading countries of the world in both the economic and social arenas, and of reviving their old powerful and healthy days.

As democracy is seen as a path that leads to the realisation of their dreams, people desire to have better and more effective administration through better democracy, and prefer state governance not to be affected by coalitions, to be capable of making decisions proactively and quickly, but at the same time to have a corporate, foreseeable, transparent and accountable structure.

Thus, the community desires clearer separation of the state organs from each other, but further strengthening of harmony and collaboration amongst them, better opportunities of representation in public administration, and the unconditional protection of justice and supremacy of law. To that end, the judiciary power needs to be independent, free from all kinds of tutelage and indoctrination, neutral, effective, efficient, and accountable, and, finally, it needs to realise the further development and civilisation of the Constitutional Law.

The most important lesson that must be derived from discussions held and concerns expressed prior to the referendum of April 16, 2017, is that the community strongly argues against the disintegration of the homeland, sooner or later, the loss of even the smallest part thereof, and any compromise on a unitary state or the formation of even the slightest indication thereof. It is a fact that the terrorism problem in southeastern Anatolia, and organisations in the northern parts of Iraq and Syria, and other national and international issues having their origins in pre-First World War and pre-Independence War periods, have emerged to be matters of national security and survival concerns, drawing the highest degrees of sensitivity in public opinion. This matter, considered as a survival issue of the state, is absolutely required to be taken into consideration, sensitively, and in the course of satisfying the desire of the community as to reconciliation of the central government and local (decentralised) administrations.

One of the most important desires of the people is "stability in administration" as defined by the principle of justice in representation, as referred to in Article 66(6) of the Constitutional Law.

Given that a Constitutional Law amendment has been adopted which not only emphasises the principle of supremacy of law in the executive organ but also tends to protect and maintain the immunity of political government executives, it may easily be concluded that the community desires a stabilised, prudential, fast and correct decision-making process in public administration, and better developed and more effective accountability and acquittal systems therein.

Debates on referendum-related decisions of the YSK (Supreme Electoral Council) demonstrate the extent to which it is important for our country to secure the independence of the judiciary and the dependability of court judgments, and to establish a remedy for decisions of the YSK, which is the highest of judicial institutions. However, on the other hand, both supporters and opponents of the presidential regime represent a population of not less than 49% in the community, and this is a fact that all of us must accept. Under these circumstances, we are of the opinion that a settlement must be reached responding to the concerns of opponents of the presidential regime and their reasons for opposition, and that we must focus on methods of improvement towards a better democracy, and on protecting the spirit and integrity of our country.

Other expectations of the people with respect to better state governance are the supremacy of law and justice. Almost all segments of the community are pining for the good old days when

even the sultans were accountable to the courts, and the law was valued above everything else. Turkish legends such as the Justice of Caliph Omar, His Holiness, and the Muslim judge hearing Mehmet, the Conqueror, who ordered the cutting of his hand as per "lex talionis" are indeed illustrations of the dream of justice of the community. The community, on the one hand, demands social-justice-embracing concepts, such as income distribution, equal opportunity and merit, and, on the other hand, desires equal treatment for everyone, whether public officials and civil servants or ordinary citizens, in appearances before judges, regardless of their identities, professions, duties and status.

Since the termination of the coup administration upon the adoption of the 1982 Constitutional Law, Turkey has been moving towards democratisation and, from time to time, various non-gov- ernmental organisations have declared packages of democratisa- tion. The most comprehensive and much-debated package is un- doubtedly the one published by TÜSİAD in 1997. As also stated in that report, and as is generally known, one of the fundamental areas of development towards democratisation for Turkey is the issue of protection of basic rights and freedoms, especially the freedom of expression. The community is widely concerned about the efficien- cy of juridical power, playing a key role and function in the protec- tion of fundamental rights, inter alia. These concerns have grown stronger since the precautions taken following the prevention of the December 17–25, 2013 attempt to overthrow the government, with the assistance of the judiciary, and following the prevention of the July 15, 2016, armed military coup d'état attempts. They have been uttered loudly in the external world, which cannot correctly perceive the degree of penetration of FETÖ into the state and its institutions, and have also become rather widespread within our country, though in a biased and prejudiced way from time to time, even though the local community has greater information about such a threat. The community feels proud of having demonstrated its faithfulness to democracy by suppressing

the coup d'état attempts but, on the other hand, feels anxious about being associated or correlated with coup plotters, and being victims of rough justice and judicial errors. This is because the judiciary is unable to adequately reassure the community, in general and, particularly, because in cases of the perpetration and completion of a crime, arrest warrants are issued disproportionately according to the generally accepted opinion of the community, and may be said to pave the way for the community to self-censor, thus undermining freedom of expression, especially in the environment of concern fed by widespread criticism of this practice.

The community is unsure whether their individual rights and freedoms will be protected, and is of the opinion that the judiciary and its members omit or fail to perform their duties to maintain the supremacy of law, including against the executive organ and public officials and civil servants, and that their motive of protecting the privileges granted to them solely due to their duties of ruling and judging the community has already obviated and averted their first duty to establish justice. The public perception is that members of the judiciary fail to perform their duties thoroughly, cannot act neutrally, independently and free from bias, do not tend to fulfil their duties towards those who are not in a position to call them to account; and, that they on the contrary, make use of and can, from time to time, abuse the powers and privileges granted to them due to their duties. For all these reasons, public opinion is hostile towards the judiciary, in general. Judges and public prosecutors (attorneys general) are no longer professionals who command respect from the community but are fearful of coming to harm due to their vocational powers, while legal advisors and attorneys are seen as professionals who are untrustworthy and not straightforward on the one hand, but who are also essential and indispensable on the other hand, thus leading to a confusion of minds and feelings.

Under these circumstances, public opinion is cognisant of the fact that the judiciary has become the highest-priority concern of our country, and desires to have an independent, neutral, unbiased,

effectively operating but, at the same time, accountable judiciary.

Accordingly, the two fundamental problems for Turkey, the judiciary and accountability, are at the forefront of community concerns in the form of an interwoven, tangled web. An independent and neutral judiciary is imperative for accountability, and accountability is a precondition for an independent and neutral judiciary.

In an environment where the judiciary is believed to have failed, the lack of any legal remedy against the decisions of the YSK, which made the referendum results controversial and equivocal, as well as the complaints thereof which overlapped with statements made by international supervisory agencies and institutions, is a demonstration of the betrayal and abuse of trust in the supremacy of law in relation to elections.

> Making amendments in the legislative instruments of the YSK that are agreeable also to the segments of the population who voted "Nay" in the referendum is imperative to regain trust. Otherwise, the legitimacy of all subsequent elections will inevitably be questionable and contentious. This danger could, in turn, lead to serious and deep disintegrations in the community, and absolutely must be prevented.

Another factor strengthening the concerns and preconceptions of public opinion regarding the judiciary is the judicial chaos emerging in the legal proceedings with respect to the MHP (Nationalist Movement Party).

The referendum process started with this ongoing judicial chaos regarding the party administration of the MHP. At the first stage, the opposition group emerging in the MHP established a congress through a legal proceeding, and amended the bylaws of the party.

Thereafter, the bylaw amendments were suspended by an interlocutory injunction issued in a second legal proceeding, but the constitutional amendment and referendum process had already begun prior to the completion of this legal proceeding.

In the referendum, the MHP administration developed an "Aye" vote stance while opposition groups decided to use the "Nay" vote and, therefore, the party's grassroots were divided on which path to follow in the referendum. Failure to complete the pending legal proceeding quickly and efficiently also played a key role in this division.

It is a very natural right and duty of the MHP, as a significant political party of the country, to develop a stance as it deems fit, and in the interests of our country. Therefore, it is also important for our country to ensure that the will of the party as a whole is clearly determined, without any separation or confusion of minds at its grassroots level. However, the delay in completing the legal proceeding affected the politics surrounding this issue.

The Relationship between Democracy and Economy (National Income and Welfare)

A report entitled "Towards the New Constitution" published by TÜRKONFED in 2015, aside from referring to the relationship between the level of democracy and national income, clearly states that in order to be able to break away from the middle-income group trap through sustainable economic success and by enhancing welfare, a country should develop its democratic governance by reinforcing its institutions.

On page 29 of the aforesaid report, we are reminded of the significance of democracy for economic development and income increase through the following words:

Indeed almost everyone is like-minded as to what is needed in order to avoid or get out of the trap: productivity growth, improvement of human capital, more research and development and innovation. […] In these [middle-income] countries where institutions are not built well and/or operated well, first of all, it is imperative to take significant steps forward with regard to corporate and organisational structure. The literature contains many studies dealing with relations between institutions and economic performance, where democratic institutions assuring and guaranteeing freedoms besides elections are argued to be very important in terms of their contribution to economic performance. In the coming years, it seems that the largest challenge of these emerging countries, also including Turkey, will be to get out of the

deadlock of mediocre education, mediocre growth and mediocre democracy. […] The common view for the medium income group countries is that the strengthening of institutions plays a key role in their climbing the ladder towards the high income group. Accordingly, particularly besides the fundamental economic institutions such as protection of property rights and contracting rights, emphasis is placed also on consolidation and deepening of financial structure, and development of administrative capacity and public services. […] Studies conducted in the recent years indicate that political organisations also play a central role for economic development. [….] In countries with less developed institutions, with augmenting uncertainties, it becomes more and more difficult to make a long-term plan. The business world refrains from making investment for further improvement of their human capital and renewal of their technology.

Page 38 of the aforesaid report contains determinations and statements that may be summarised as follows:

Most of the emerging countries have fallen into the clutches of not only the medium income trap, but also some other traps. It has already been understood […] that market economy may survive also in absence of liberal democracy. Dimitrov (2008) puts forth this unexpected togetherness and coalescence between authoritarian regime and capitalism, giving Russian and Chinese examples as a proof thereof. As for the Chinese example, Gallagher (2002) emphasises that the modus operandi of market reforms [ensures] sustainability of the existing regime, rather than encouraging demands for democracy, thanks to considerable incentives supplied to a large mass, especially to the elite of the ancient regime. Growth performance achieved and maintained for a long time in many emerging markets, notably China and Russia, has played a significant role in the continuity and sustainability of authoritarian regimes in these countries. We may mention a similar dynamic also in the example of Turkey.

And page 39 continues to say:

Stating that since the 1990s, many regimes have been democ-

ratized without creating any realms or areas of freedom, i.e. have developed a unique and limited democracy based upon only elections, Zakaria underlines the fact that these regimes may bring about many hitches and problems such as ever-increasing centralisation and breakage from the principle of separation of powers (checks and balances), narrowing of the realms of freedom, pressures on media, ethnic conflicts and/or wars.

The fact that authoritarian regimes may also be successful in assuring economic growth and increasing national income can be seen not only in the Russian and Chinese examples of the present day, but also in many other states that have quickly risen (and which have quickly fallen and collapsed) throughout history. It is also amongst the experiences of more recent history that the rapid development of authoritarian countries has not continued permanently and, in the absence of democratisation, has led to a quick collapse, bringing with it catastrophic results for both their own population and humanity in general. Also, the fact is that some East Asian monarchies showing feudal and oligarchic features have later been democratised by sharing their public power over time, and stand as strong and mounting evidence proving that authoritarian regimes, as well as the enrichment that accompanies them, cannot be sustained, and that their permanence is dependent upon their democratisation in any event.

In authoritarian regimes, economic growth may be realised mostly against compromises in social justice. Not only do the granting of privileges to minority groups of small population by authoritarian regimes through various methods that thrive at the expense of the poverty of large masses of people, and wage and income gaps between the haves and the have-nots, become a cliff in people's trust in justice; the ability of the community to make healthy decisions is lost as well, thereby causing social catastrophes.

The "Chamber of Justice" i.e. judiciary power, as depicted by the maxim, "Justice is the Foundation of the State" being one of the cornerstones of the Turkish-Islamic state governance tradition,

demonstrates the extent to which social injustices that are perpetrated by authoritarian regimes might be dangerous to the strength and survival of the state.

"Justice is the Foundation of the State!"

In ancient Indian-Persian fundamental political theory, the Chamber of Justice is formulated as follows: *"the power of the emperor (sovereign) is dependent upon military force, military force upon the treasury, treasury upon taxes paid by rayah [the lower economic level of taxpayers], increase of taxes upon justice."* This is why a wise emperor wishing to protect his sovereignty and increase his power is required to treat his rayah with justice, and refrain from tyrannizing them.

Mr. Tarkan Kadooğlu, president of TÜRKONFED, a non-governmental organisation representing tens of thousands of businesspersons all of whom are from the business world and scattered to the four winds of Turkey, writes in the foreword of the 2017/18 edition of the TÜRKONFED/Biz journal:

We, as the business world, sincerely believe that for the sake of avoidance of repetition of July 15th in the future, restructuring of our state governance system within the frame of some certain universal principles such as merit, institutionalisation and reinstating the normal flow of life, as well as democracy, supremacy of law and independence of the judiciary is a must. […] We, as the business world, deem it useful to underline the requirement of reforms for sustainability and continuity of growth.

Easily understood from these words of Kadooğlu is the extent to which the further development of democracy is imperative

and significant for the business world, and therefore for the economy and the enhancement of welfare. This conclusion, derived by the business world from its own past experiences, is also asserted by globally known economists in their scientific studies.

In their article titled "Democracy Does Cause Growth", Daron Acemoğlu et al. suggest that investments and reforms may also be made in non-democratic countries, but that even countries having average degrees of democracy will surely be more successful, that democratisation leads to a GDP increase and that democracy, at the same time, makes contributions to a GDP increase in the future as well. In the same article, Acemoğlu et al. put forth the view that through a number of important mechanisms and channels and, in particular, by encouraging economic reforms, increasing investment in human capital, and improving the state's capacity and some aspects of public services, as well as reducing social unrest, democracy prevents the fall of GDP and ensures its rise, thus demonstrating that there are a great many close links between economic growth on the one hand and democratic institutions on the other.[4]

In their article "Democracy Causes Economic Development?" published in 2014, where the authors say "no" to the question as to whether or not democracy is useful only for developed economies, Acemoğlu et al. clearly state that democratisation paves the way for greater GDP increases, and that civil rights and freedoms stand as the most important democratic factor underlying this fact.[5]

In "Democratisation and Growth" published in 2008, Papaioannou and Siourounis argue that even in "averagely" democratised countries, growth per capita increases by 1% per annum,

4 Democracy Does Cause Growth, Daron Acemoglu, MIT; Suresh Naidu, Columbia; Pascual Restrepo, MIT; James A. Robinson, Harvard; May 1, 2015.

5 "Democracy causes economic development?" Daron Acemoglu, Suresh Naidu, James Robinson, Pascual Restrepo, 19 May 2014.

and though the growth rate slows down during transition periods, it becomes permanent at higher rates in the midto long term. This finding is in favour of democratic government, and it further verifies the theory of Friedrich Hayek, propounded in the 1960s, that the benefits of democracy rise to the surface in the long run.[6]

In their study conducted on South Korea as an example in order to ascertain whether democracy and human capital, amongst the factors bearing importance for a country willing to rid itself of the middle-income trap, are amongst the conditions precedent for a high rate of economic growth, Zakariassen and Eriksen come to the conclusion that economic growth rates will be higher in democracies than in authoritarian regimes, and that the factor preventing the fall of South Korea into the middle-income trap is that democracy provides for higher economic growth.[7]

Though these studies have failed to expose tangible data demonstrating that democracy provides higher levels of and more sustainable economic growth, it is not too difficult to envisage that better protection of the supremacy of law and basic rights and freedoms will not only induce the entrepreneurial spirit of the people, but will also strengthen the trust in country and system. In addition, thanks to accountability, the sense of responsibility of decision-making authorities acting for and on behalf of the public will further increase, giving them the authority to make timely and healthy decisions suited to the present requirements of the economy to use their job-related powers as intended, and to refrain from fraud. Politicians and public administrators using their executive powers may be prone to making unhealthy decisions, characterised specifically as "election bribes" as a result of their

6 Papaioannou, Elias and Gregorios Siourounis (2008) "Democratisation and Growth," Economic Journal, 118(532), 1520–1521.

7 "The Middle-Income Trap, Democracy and Human Capital: A Study of Korea," NTNU publications.

desire to win in the next round of elections. However, a democratic regime featuring supremacy of law and accountability compels the executive organ to make correct decisions even at the risk of losing elections. Just as happened with Greece during its economic crisis, it is this mechanism that ensures that governments that fail to make healthy economic decisions quit the scene of politics, and are replaced by new rulers emerging from amongst the people.

Government is entrusted with the task of protecting and further developing economic activities so as to enhance the welfare of its citizens and, to this end, it is entitled and empowered to make and implement rules and take actions and measures as required by the economy. As the sole regulator of economic activities in the country, besides and in addition to its economic activities, such as production, consumption, purchasing, selling, and borrowing and lending, the government is also a player in the marketplace from time to time and, thus, has direct impacts on economic activities in the country.

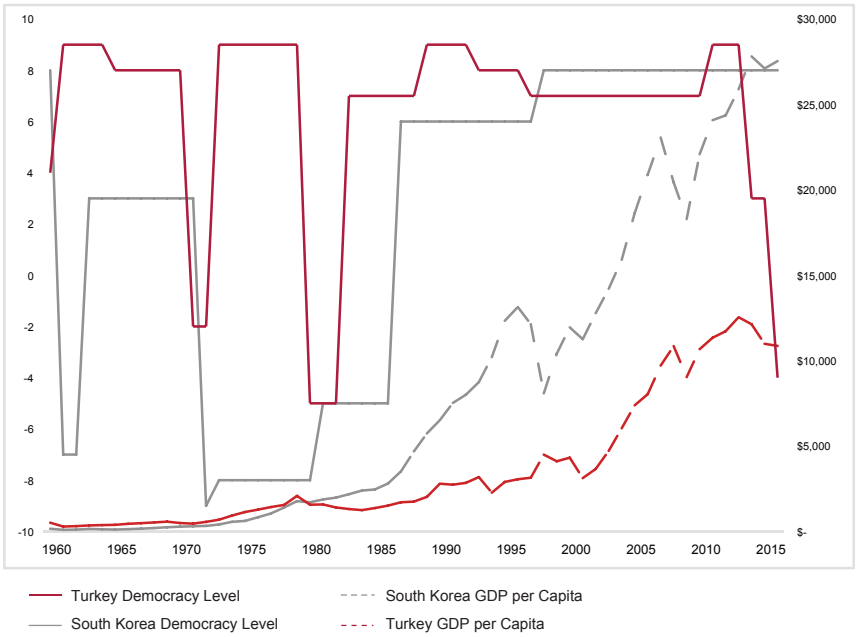
Timely, correct and healthy decisions made by rulers and governments have direct effects on welfare, social order and peace in the country. As a matter of fact, it is easily seen that throughout the course of Turkey's economic performance from the 1970s to the 2010s, rises in economic levels were a result of an atmosphere that allowed for healthy decision-making processes, while falls in the economy were a result of an atmosphere where no, or only bad, decisions were made. Inflation increasing for years, and the social security system retiring people while still of working age, bringing it to the point of bankruptcy, are examples of the bad results of bad decisions. On the other hand, we know from the recent history of Turkey that thanks to the fiscal discipline of the public administration and the public sector under the pressures of the IMF and other crediting institutions after its 2001 economic crisis, Turkey suffered rather less, comparatively, from the 2008 crisis, and that steps taken towards further democratisation cleared the way for economic improvement.

Experiences of Turkey's recent history reveal and demonstrate that if and when the principles of the supremacy of law and accountability of public administrators do not work, personal interests, incompatibilities, lack of harmony and the fight for power obstruct and suffocate the system, and prevent the timely making of healthy decisions in the name of the government; the economy starts to fall, and unresolvable disagreements and problems leave the country wide open to coup attempts. Even mandatory decisions can be made only by way of a coup, but the coup plotters will, inevitably, fail to make the right decisions and, what is more, the unaccountability of their decisions will pave the way for the further expansion and propagation of errors, thus making their leadership inherently unsustainable over time, causing new problems deeper than the issues they sought to resolve in the first place. As a matter of fact, 20 years after the 1980 coup, Turkey was led into a deep crisis, which clearly demonstrated the failure of the coup plotters in building healthy and viable fundamental economic institutions; this could have been overcome and corrected only by pressures from international crediting institutions. After 2001, the acceleration of democratisation, thereby raising the international reputation of our country through its reflection in economic development, is one of the concrete and tangible examples of this fact.

In conclusion, the economic success of democratic governments and regimes characterised by the supremacy of law and the accountability of government executives is indeed a product of the ability of rulers to make healthy decisions in a timely fashion, and the continuity of this ability. The use of democratic methods and the presence of workers and even other stakeholders in corporate management as a requirement of codetermination for the sake of being able to make healthier decisions in micro-enterprises at the smallest level, and even in gigantic enterprises employing tens of thousands of workers, prove the ability of democratic management to make healthy decisions and to keep it sustainable because, ei-

ther alone or when they come together as a group, executives and managers, by themselves, cannot grasp the needs of an enormous country and make healthy decisions that are fit for it. Through the participation of people in administration, democracies enable the government to collect far healthier information and to make correct decisions.

Graph 1: Turkey–South Korea Comparison



Consequently, it is not surprising to note that since Turkey is at the midrange in terms of democratic government, its economy is also amongst midsized economies, and its income per capita is also at the medium income level. This means to say, intuitively, that the medium income level in Turkey is a result of its state governance being at the midrange in terms of democracy. As a matter of fact, Mahfi Eğilmez[8] looks at this from another point of view, writing: *"One of the ways for Turkey to get away from the fragile five category is to reduce its outstanding external debt stock and to directly attract foreign capital investments rather than debt-financing its current account deficit. And this in turn requires our country to strengthen supremacy of law, raise democracy standards, refrain from creating new risks, and achieve social consensus and reunification."*

Accordingly, Turkey may progress further from the medium income level only, and naturally, if it furthers democracy.

For this purpose, the initial step required to be taken is to assure the domination of the supremacy of law and accountability in public administration, and the second step is to make the judiciary powers entrusted with this task fully independent and accountable and capable of offering effective and efficient judicial services responding to the needs and demands of the community. The third step is to ensure justice in elections, and in representation in political parties and professional organisations.

8 Mahfi Eğilmez, "One of the ways of Turkey to get away from the fragile five category is…"T24, February 19, 2018.

Democratic Standards and Democracy in Turkey

There exists a consensus that democracy is a type of state governance wherein the country is controlled and governed by its own people through rulers elected by the people and, at a minimum, the legislative, executive and judiciary powers of government are separate from each other, wherein basic rights and freedoms and basic human rights are safeguarded, and the rule and supremacy of law is assured. The ideal of "a government of the people, by the people, for the people" that is usually used as a (normative) rule defining democracy can by no means and at no time be achieved in the strictest sense. Whether a regime is democratic or not can be understood through assessment of results provided by that state's governance or regime.[9]

Resolution No. A/RES/59/201, adopted by the General

9 Kemal Gözler, "Cumhuriyet ve Monarşi,"Türkiye Günlüğü, Edition 53, November – December, 1998, p. 27–34. Democracy has two different theories, namely, "normative" and "empirical". According to normative theory, democracy is defined as a government of the people, by the people, for the people. This is an ideal. This ideal can by no means, and at no time, be achieved in the strictest sense. On the other hand, according to empirical theory the existence of democracy is determined on the basis of certain criteria. For instance, a regime that satisfies the following conditions may be accepted as a democracy: (i) effective political authorities should be assigned and commissioned only through elections; (ii) elections should be repeated at regular intervals; (iii) elections should be free and fair, and based on the universal suffrage principle; (iv) multiple political parties should be allowed to participate in elections; (v) opposition should have the chance to come to power; and (6) basic public rights should be secured in the country. Only if a government satisfies all six of these conditions, collectively, may it be empirically said that the government is more or less democratic.

Assembly of the United Nations in 2004, identifies the essential elements of democracy in terms of governing structure and the consequences expected from it, as follows:

(i) The separation and balance of powers;
(ii) The independence of the judiciary;
(iii) A pluralistic system;
(iv) Respect for the rule and supremacy of law;
(v) Transparency and accountability;
(vi) Free, independent and pluralistic media; and
(vii) Respect for human rights and political rights.

One of the international conventions and treaties relied upon by the UN Resolution, cited herein, is the International Covenant on Civil and Political Rights, a multilateral treaty adopted by the United Nations General Assembly on December 19, 1966, which was signed by Turkey on August 15, 2000, and thereafter ratified through Law No. 4868, dated June 4, 2003. The certificate of Turkey's ratification of this International Covenant was delivered on September 15, 2003, and, thus, it has been effective in Turkey since December 15, 2003.[10]

The aforesaid UN Resolution was adopted through the af- firmative votes of 172 states, fifteen countries being absent in that meeting, and no state used a negative vote therein. In this respect, this UN Resolution represents the consensus of the international community as to the fundamental elements of a democratic government.

10 For the full text and a broad assessment of this International Covenant, please see pp. 95 to 146 of Mehmet Semih Gemalmaz's book Ulusalüstü İnsan Hukuku Belgeleri – II. Volume / Uluslararası Sistemler (Istanbul: Legal, 2010).

The EU demands and expects democracy from full membership candidate countries but, nevertheless, does not have a comprehensive definition of democracy. In the 1993 Copenhagen Criteria, the "Political Criterion" was formulated as follows: "Countries wishing to join need to have stable institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities." The "rule and supremacy of law" and "respect for human rights" elements enumerated amongst the fundamental elements of democracy in the UN Resolution cited above are stated separately, as if they are separate elements required to be added to democracy.

There is no union of concepts and terms regarding the rule and supremacy of law amongst the EU member states, However, the Venice Commission has declared a consensus on fundamental elements covered by the "rule of law" concept used in English, and the "respect de la loi" concept used in French, translated as "Hukukun Üstünlüğü" (supremacy of law) in Turkish. These elements are: (i) legality, including a transparent, accountable and democratic process for enacting law; (ii) legal certainty; (iii) prohibition of arbitrariness; (iv) access to justice before independent and impartial courts (including judicial review of administrative acts); and (v) non-discrimination and equality before the law. Thus, a practical checklist to be used in the assessment of the rule of law is created on the basis of the criteria listed above.

Accordingly, in the present day, a universally accepted democratic state governance may be defined as a pluralistic polity (form of government) respectful of the rule of law and human rights, being transparent and accountable; where all people have access to information and ideas through free, independent and pluralistic media; and the legislative, executive and judiciary powers of government are separated from each other but act, collectively, in balance, yet the judiciary power is absolutely independent; and the regime operates via political parties and or-

ganisations through which the people are freely organised and express their opinions and views.

Turkey has already entered into the class of democracies which have separated the legislative, executive and judiciary powers of government, has established the imperative institutions of democracy through pluralistic elections and competition amongst political parties, and has brought comprehensive protections to civil and political rights in constitutional and legal platforms, and it has, thus, completed the development process.

Hence, as shown in the report "Towards the New Constitution" published by TÜRKONFED in 2015 (see p. 22: figure 3, "Democracy and World"), Turkey has drawn apart from the countries that are in the process of transitioning to democracy (some Middle and South American, Asian and Middle Eastern countries, and the majority of African countries), and is centred at a place close to established democratic countries (Southern European and developed Latin American countries). Now, therefore, it is concluded that Turkey is located inside the middle-democratic band.

As the aforesaid report states (p. 12): *"As of today, Turkey already has an institutional structure needed for reinforcement of democracy. What is needed are not new institutions, but reforms to the existing institutions through an effective checks and balances system. […] Restructuring our existing institutions and organisations in light of principles of efficiency and fair representation will ensure the institutionalisation and reinforcement of democracy. Turkey, with a further strengthened democracy in terms of institutionalisation and mindset, will also have a system capable of a stabilised, effective and efficient management." It continues (p. 13): "institutional reform is the most important condition of reinforcement of democracy, and it also requires proliferation of a democratic culture and overall trust for coexistence and living together in the community. Institutionalisation is, of course, important, but institutionalisation capable of reinforcing democracy can be successful and sustainable only by development of a*

democratic culture in peoples' minds, on the basis of living together and feeling trust for the other."

Table 1: Table of Countries according to National Income and Democracy Level

Countries	Nominal GDP Per Capita (USD)	Polity IV	Freedom House	The Economist	Polity State Fragility Index
USA	$ 57.436,00	8	Free	7,98	3
Australia	$ 51.850,00	10	Free	9,01	2
The Netherlands	$ 45.283,00	10	Free	8,8	0
Germany	$ 41.902,00	10	Free	8,63	0
Belgium	$ 41.283,00	8	Free	7,77	2
United Kingdom	$ 40.096,00	10	Free	8,36	0
Japan	$ 38.917,00	10	Free	7,99	0
France	$ 38.128,00	9	Free	7,92	0
Italy	$ 30.507,00	10	Free	7,98	0
Republic of Korea	$ 27.539,00	8	Free	7,92	0
Spain	$ 26.609,00	10	Free	8,3	0
Portugal	$ 19.832,00	10	Free	7,86	0
Czech Republic	$ 18.286,00	9	Free	7,82	0
Greece	$ 17.901,00	10	Free	7,23	2
Chile	$ 13.576,00	10	Free	7,78	2
Poland	$ 12.316,00	10	Free	6,83	0
Turkey	$ 10.743,00	-4	Partially Free	5,04	9
Romania	$ 9.465,00	9	Free	6,62	4
China	$ 8.113,00	-7	Not Free	3,14	6
Dominic Republic	$ 7.159,00	7	Partially Free	6,67	4
Peru	$ 6.199,00	9	Free	6,65	6
Thailand	$ 5.899,00	-3	Not Free	4,92	5
South Africa	$ 5.261,00	9	Free	7,41	8
Sri Lanka	$ 3.887,00	6	Partially Free	6,48	11
Indonesia	$ 3.604,00	9	Partially Free	6,97	8
Morocco	$ 3.063,00	-4	Partially Free	4,77	6
The Philippines	$ 2.924,00	8	Partially Free	6,94	12
Ukraine	$ 2.194,00	4	Partially Free	5,7	9
Uzbekistan	$ 2.122,00	-9	Not Free	1,95	11
India	$ 1.723,00	9	Free	7,81	11
Bangladesh	$ 1.602,00	1	Partially Free	5,73	12
Ghana	$ 1.569,00	8	Free	6,75	11
Kenya	$ 1.516,00	9	Partially Free	5,33	10
Pakistan	$ 1.468,00	7	Partially Free	4,33	16
Ivory Coast	$ 1.459,00	4	Partially Free	3,81	17
Zambia	$ 1.275,00	6	Partially Free	5,99	12
Myanmar	$ 1.269,00	8	Partially Free	4,2	19
Cambodia	$ 1.230,00	2	Not Free	4,27	11

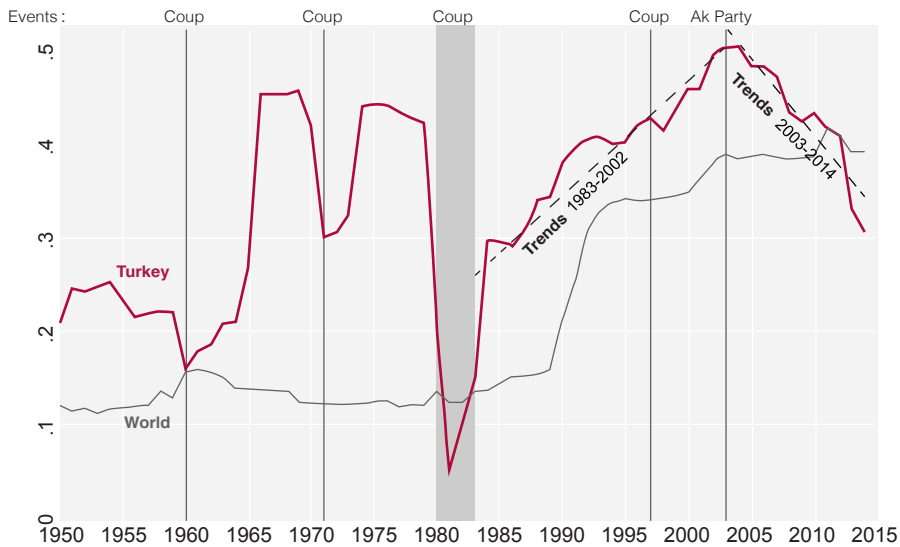
Wealth Level	High	Medium	Low
Democracy Level	High	Medium	Low

Notes: Countries shown in the table are those with a population of more than 10 million and an income per capita of more than USD1,000, and that are not a net petroleum exporter. Countries with a population of less than 10 million are excluded from the table as they are not fit for comparison, and petroleum exporter countries are excluded as their high national income arises out of petroleum.

A review of Table 1 and a comparison of national data clearly reveals that there is a parallel between the democracy levels of countries and their income levels, and that a breaking point exists between the democracy levels of countries at an income level of approximately US$11,000, which includes Turkey, and democracy levels of countries at higher income levels. Below that breaking point are both democratic and autocratic countries, but above that breaking point are only countries with high democracy levels. In our opinion, this table is adequate to demonstrate and prove the direct link and relationship between the standard of democracy and national income, and also supports the thesis that one may get out of the trap of the middle-income group only through escaping the middle-democracy trap.

Graph 2 shows that Turkey is above the global average in the V-Dem ranking. Also, in Polity IV and other democra- tisation ratings contained in "Towards the New Constitution" report of TÜRKONFED, Turkey is at a level similar to the mid- dle group amongst the democratic governance systems roughly categorised into three levels, namely, "developing", "established" and "developed".

Graph 2: Turkey and Global Democracy Index Trend Comparison, 1950–2015

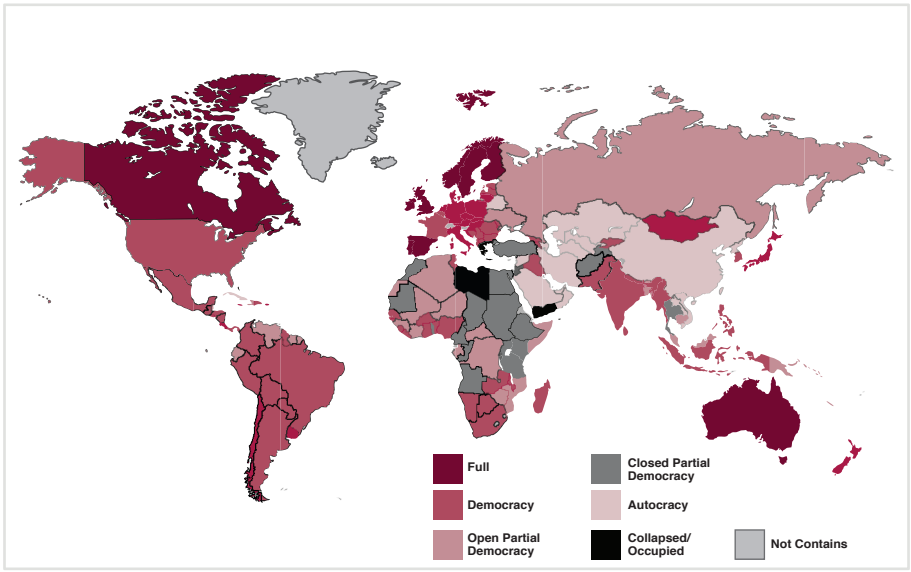


This national income and democracy level may be defined as the middle-income and middle-democracy trap. Table 1 clearly conveys the message that in order to exceed and surpass a middling level of income, Turkey should raise its democracy level as well.

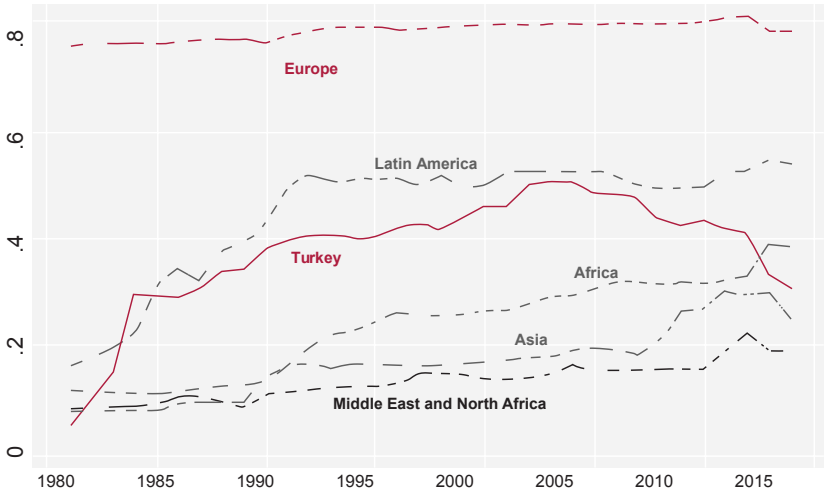
In developing democracies, reforms are still being made, to institutions that are partially formed already but still at the stage of creation and formation. On the other hand, in established democracies that are also referred to as "middle democracies," institutions have already been formed and established, rulers come to power by elections and, at least, the senior staff of the government have been determined by fair, virtuous and periodic elections, wherein candidates freely compete, and all those entitled to do so can use their votes; the system supervises and protects the fundamental civil and political rights of the people, such as rights of expression, publication, meeting and organisation, and the right to elect and be elected. Also added to these are the protection of minority rights, the existence of areas of power beyond the access of those elected through democratic and horizontal accountability, guarantees of political pluralism, and the rule of law.[11]

11 Borne, Angela K. (2011) "Democratisation and the Illegalisation of Political Parties in Europe," Paper Series on the Legal Regulation of Political Parties, No. 7.

Graph 3: Polity IV Democracy Index, Turkey–World Comparisons



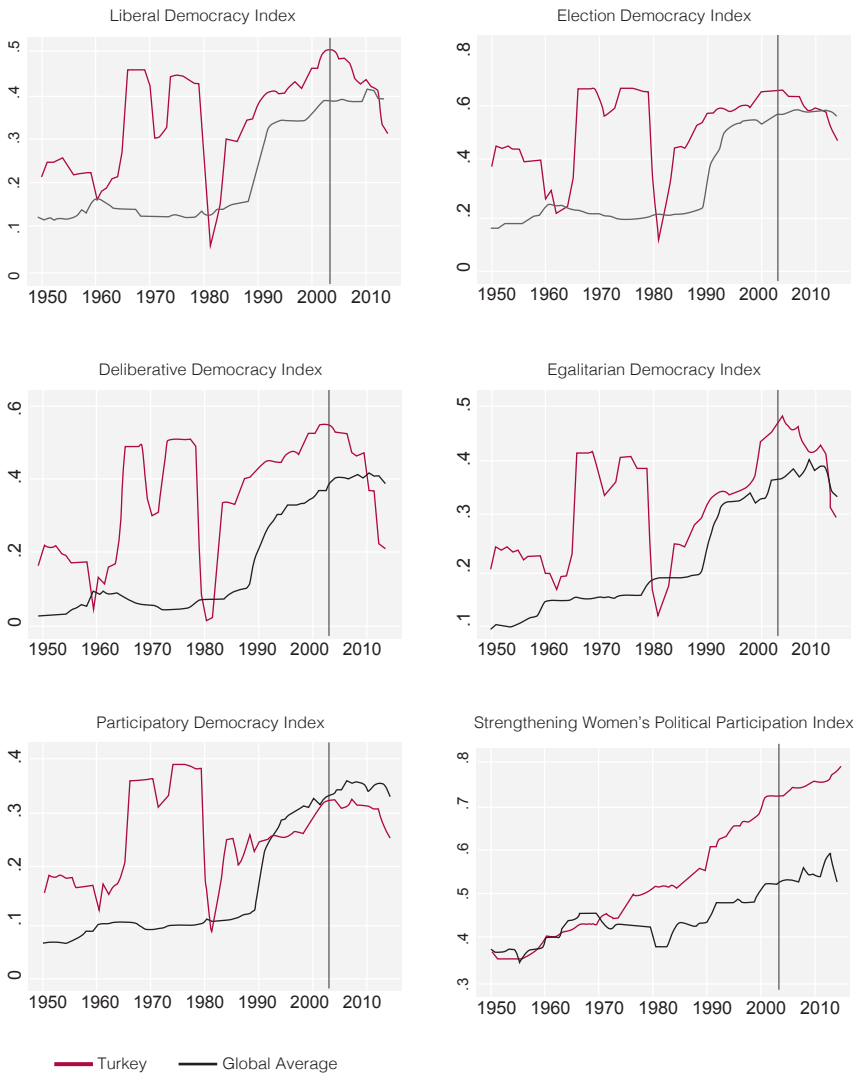
Graph 4: Turkey and Global Democracy Index Trend Comparison, 1980–2014



Notes: As seen in the V-Dem diagram given above, democracy in Turkey is differentiated from that of developing democracies because of its fundamental democratic institutions, but still needs some qualitative improvements and developments in order for Turkey to find a place amongst developed democracies; for this reason, Turkey is included in the middle-democracy band.

The difference between countries defined as developed democracies and those at the middle level is determined by the qualitative differences recorded in the functioning of the institutions summarised herein. To put it in other words, middle democracies and developed democracies are not differentiated in terms of institutions that exist therein, but there are great qualitative differences in the modus operandi of these institutions.

Figure 1: Polity IV Democracy Index, Turkey–World Comparisons



In Turkey, democracy is in need of significant qualitative improvements and developments in the fields of justice and rule (supremacy) of law, political parties, elections, separation of powers (checks and balances), independent judiciary, and protection of the constitutional order. These fields may be briefly summarised as detailed below.

It is generally accepted and known that the Political Parties Law No. 2820 prevents intra-party political competition, and political party management is taken over by the political elite, thereby paving the way for oligarchic party management and authoritarian leadership; thus, the parties' grassroots fail to audit, supervise or direct management but, on the contrary, central party management restricts the probable choices and preferences of the people. State resources and means are used only to maintain and sustain the power of the political elite, and to reinforce and enrich advocates and proponents thereof, thus contaminating the political parties through illegal financing. As a result, the political parties are seen as a means of both gaining and being able to use public power, rather than as reflecting the national will in parliament. Although almost all political factions accept that these problems exist, no desire is formed to remedy and correct them. In addition, it is also observed and noted that the desire to come into power, and indeed to seize the entire public power, causes the integration of the legislative and executive powers and organs of the state and, in majority governments, the legislative organ becomes an extension of the executive organ and an approving authority, only approving the rules prepared by the executive organ, while in minority and coalition governments the function of decision-making in the name of the nation is used with a view to restricting the executive power.

Legislative and executive powers combining and integrating with each other may further seize judiciary power, thereby eliminating the separation of powers (checks and balances) and leading, in the end, to the entire public power being collected in one single hand, i.e. that of the political party in power. Under such

circumstances, the judiciary power, having lost its independence from other state powers, can no longer remain neutral and impartial. Indeed, under circumstances where the legislative power only legalises and enacts the directives of the executive organ dominating it, the judiciary power, which is arranged and organised by the legislative power in word but by the executive organ in deed, also enters into the hegemony of the executive organ over time. Where the judiciary power cannot effectively be protected by Constitutional Law, these problems lead to very serious results. It is this situation that allows the survival and retention in force of the transactions that are reliant upon unconstitutional provisions. Under these circumstances, the executive organ may decide, from time to time, not to enforce court judgements and verdicts. As a result of the domination of the resources of the judiciary power, the executive and legislative organs may also paralyse the judiciary power by refusing to provide the financial resources and funds needed by the latter. In the 1990s, Turkey was witness to this, and legal procedures and trials were interrupted due to the lack of service process stamps. Many examples may easily be found in legislative activities of the restriction of the independence of the judiciary, some decisions of which have been cancelled and nullified on the grounds of unconstitutionality.

Although a fairly comprehensive and detailed constitutional order has been founded by establishing unchangeable provisions, Turkey's inadequate constitutional protection system that inclines itself towards the power and personal choices of the sovereigns does not comply with the requirements of democracy. The dependence of the constitutionality audit upon a suit to be brought forward by political party groups or, exceptionally, upon a contention of unconstitutionality by the courts, has led to the emergence of a rather wide scope of inconsistencies in terms of the constitutionality of laws. Not only are there a great many laws that are, indeed, unconstitutional but that have nevertheless remained in force for many years and are even still actively pursued, as no

annulment actions have thus far been commenced against them. Also, there are many decree-laws in place, all of which are, in fact, unconstitutional, and only some of which have been nullified and cancelled through contention of unconstitutionality. The root and primary cause of this fairly comedic picture is, of course, the failure to show respect to constitutionality during the course of the drafting of laws and decree-laws, and indeed it is the inadequacy of the constitutional protection system that causes its failure to eliminate and remove these unconstitutionalities. This means to say that the constitutional protection system in Turkey is left behind in comparison with systems (for instance, the constitutional protection system of France) that permit persons to individually trigger a constitutionality audit.

Another issue is that, as also indicated through Decision No. 2016/159 of the Constitutional Court dated October 12, 2016, though they may lead to very serious consequences, such as suspension of the Constitutional Law, the decree-laws relating to the announcement of a state of emergency, and which are issued and enacted during the period of a declared state of emergency, cannot be (and are not) subject to a constitutionality audit. Under such circumstances, it must be accepted that the rule (supremacy) of law and the state of legal principles cannot be protected even at the constitutional level. However, indeed, the rule (supremacy) of Constitution and law can in no case ever be compromised in a democracy.

The determination of candidates competing in elections not directly by the people but by leaders and central management organs of political parties, and the utilisation of unhealthy anti-democratic methods during the course of the determination of candidates in such a manner as to bring the oligarchic political elite into power, have become a disease on democracy, have metastasised over all organisations like a cancer, and have penetrated into almost all organisational units, from political parties to semi-official autonomous occupational organisations. For example, the proce-

dures to determine the number of delegates and the election of delegates to central organisational units of the TTB, TBB, TEB and TOBB have been designed and arranged in such manner as to sustain authoritarian leadership and oligarchic central management, and to entirely exclude opponents from being elected. Hence, the form of determination of management of these organizations is by no means democratic and representative of the membership base. Thus, large groups of professionals who are forced to become members and to pay subscriptions as a requirement of their professional activities are excluded from management in their occupational organisations. When those who are excluded from management constitute a majority in the organisation, they then exclude those who are in management – in power – and this process is found to be very natural.

This discriminatory electoral system that keeps opponents away from organisational management causes polarisation to reach a peak and excludes others in the community, and turns even the occupational organisations that are definitely required to stay away from politics into arenas of political struggle. On the other hand, according to the results of the last referendum, a broad mass of almost half of the community is now excluded from and not represented at all stages of the civilian community. This panoramic view, which can by no means correlate to the principle of justice in representation, shows Turkey's representation system to be far behind those employed in developed democracies.

Another feature of a developed democracy is the lack of effort to grasp power through unusual means, because the power of democracy comes from the assurance it provides of the effective and efficient representation of the people in government, thus making social differences a tool and means of further development and conversion into dynamism; this prevents polarisation and ensures that the community excludes non-democratic methods. For example, Turkey's neighbour, Greece, even throughout its harsh conditions in recent years, quickly changed the ruling parties in

government. In developed democracies, the lack of efforts to grasp power through illegal methods is fundamentally proof of the fact that opponents are not excluded but, on the contrary, are able to be represented in management.

It is an unequivocal fact that those who are not allowed to be represented in and participate in management will shift towards non-democratic formations and organisations; in the end, pressure and power groups which officially appear to be political movements but are, indeed, not organised as political parties and not officially recognised, will emerge in the country, and these groups will be exposed and prone to be oriented from the inside and outside for illegal purposes. Non-democratic struggles that fuel tension in the community and may, over time, cause major social events and losses sap the community's energy. Looking at the example of the coup attempt of July 15, 2016, the losses incurred during such an incident are composed not only of damages suffered on that day and subsequently, but also of the damage caused to the community and the state to a depth and in a quantity that is unimaginable, through abuse and fraud, as well as discrimination and favouritism in public administration that has continued for more than 40 years.

Another characteristic feature of middle democracies is that politicians who use public power for the protection and survival of their government try to avoid accountability. The desire to avoid accountability is the main cause underlying the need to prevent discussion of budgets in depth; to narrow the limits of fiscal auditing and reporting of public institutions and organisations; to preclude governmental bodies from becoming automatically accountable by producing reports; to not allow the efficient operation and use of the right to information; and to hold under their control even such organisations and institutions as ombudsmen responsible for oversight. The political elite who refuse to be accountable even in legal issues, and who propel themselves to a privileged, preferential and inaccessible position through exemption and immunity regu-lations, are developing a new discourse

that they are accountable only towards their voters, and they are, thus, abusing their public powers and authorisations in a widely arbitrary manner to such an extent as to assure their re-election. Amongst various accountability methods, such as legal audits, internal audits and external independent audits, the unhealthiest one is political accountability that is confined to elections. The confining of political accountability to elections mostly serves as an inducement to rulers to misuse and exploit their power, desiring not to be accountable but only to appear so, and the only sanction that the people can enact against such rulers is to not elect them. The political elite are in no event worried about this unhealthiness of political accountability, or about the fact that if accountability is confined only to this method, it will become null and void ab initio, or that the government may not be overthrown or changed without major social reactions and commotion that may in turn cause great losses.

The political elite and leaders make healthy economic decisions only if and to the extent that they are helpful for the survival of their government, or to put it another way, they do not refrain from making decisions that cause the deterioration of the economy. As a matter of fact, with respect to party governments that are based on competition amongst political parties starting from the year 1950, in Turkey, the economy has repeatedly and consistently experienced a downward trend, the government could only be changed through military coups, and finally, the decisions required to ensure economic recovery could be taken and implemented only under the pressure of the IMF, representing international economic forces; this cycle is surely a result of non-democratic governments and management styles.

In conclusion, though it has the fundamental institutions and election system required for a democratic government, Turkey is under the hegemony of a group that has grasped power by making use of the weaknesses of political parties and electoral systems, is polarising the nation for the sake of the protection and

survival of its government, and is excluding its opponents and others from management.

Turkey must get rid of this majoritarian (not pluralistic) antidemocratic government hegemony, and must take its well-deserved place amongst developed democracies by ensuring and developing the separation of powers, independence of the judiciary, rule (supremacy) of law and justice, intra-party democracy in political parties, justice in representation, participation of different opinions and views in state governance, and accountability of public administration, as required.

Rule (Supremacy) of Law

Amongst the state forces and institutions, in all kinds of public activities carried out in the name of state and using state forces, especially in all relations between state institutions on the one hand and individuals on the other, the rule (supremacy) of law is the sole precondition and pathway for the achievement of democracy in state governance.[12] It is a requirement of the rule (supremacy) of law that individuals be allowed to be fairly represented in public administration through the right to vote and to stand for election, ensuring the participation of individuals in state governance (justice in representation). Likewise, another requirement of the rule of law is to ensure that state forces and institutions strictly comply with the Constitution, i.e. the most basic social contract, in all of their operations, and that civil servants and public officers act wholly in compliance with the laws, thereby making accountability a dominant principle in public administration. Accountability is a reflection of the rule of law in public administration. This means

12 Kemal Gözler, "Cumhuriyet ve Monarşi," Türkiye Günlüğü, Edition 53, November – December, 1998, pp. 27–34. "Out of 21 countries considered and listed as democratic by Arend Lijphart, 10 are republican, and 11 are monarchy regimes. Such states as Australia, Belgium, United Kingdom, Denmark, The Netherlands, Japan, Canada, Luxembourg, Norway, Sweden and New Zealand are democratic beyond a shadow of a doubt. What is more, democratic governance has not ever been interrupted in a very long time, and these nations are administered by a monarchy, not republican regimes."

to say that democracy is, at its basic level, a regime that assures the rule of law, as well as accountability in public administration. On the other hand, administrations that fail to achieve this objective, even if they are republic-based regimes, end up as a type of oligarchy where the people, only on the face of it, elect government executives..

(a) Rule of Law – Separation and Balance of Powers

In a democratic government, the rule of law is expected to assure much-needed harmony amongst the legislative, executive and judiciary powers and branches of the state. That is why constitutions, as the basic social contract, contain fundamental provisions and arrangements to which all of these three powers are to be subjected. To make certain that all of these three powers remain within the borders delineated for them in the Constitution is amongst the functions and duties of the Constitution and constitutional order protection systems.

One can conveniently utter the rule of law in a country only if and to the extent that compliance with the law is definitely secured in every area of social life and, particularly, in the political field, state governance and through the use of powers and authorisations vested in the government. Also, contrary to the basic forces of the state, the rule of law is the most important condition, i.e. the sine qua non, of democratic government. As a matter of fact, only state governance where the law predominates can be said to be democratic. After all, a state failing to assure the rule of law, even if it pretends or declares itself to be a democracy can, by no means, be considered and treated as democratic.

The fundamental justification for holding the judiciary power separate and independent from the legislative and executive powers in a democracy is the need to establish and protect the rule of law through the instrumentality of the judiciary power. Indeed, in the Turkish state both before and after the Turks were introduced to and accepted Islam, the reason for according a superior place

to the judicial authorities, which assured governance according to traditional laws and the accountability of the rulers, was the desire to ensure justice and the rule of law. The division of legislative and executive powers and the separation of the bodies overseeing those powers in a democracy is intended to ensure that healthier decisions are made in the name of community, and that such decisions are implemented and enforced more effectively. At the same time, these two powers counterbalance each other. However, due to its aim of assuring the rule of law, the separation and independence of the judiciary power is much more important, indeed critical, because the compliance with the law of the legislative and executive powers of the state, and the co-operation and harmony between their independent functions, can be secured only by a separate and independent judiciary power.

In connection therewith, page 46 of the report entitled "Towards the New Constitution" published by TÜRKONFED in 2015, provides that:

The institutionalist theory becoming increasingly prevalent in recent times argues that, historically, the most important determining factors of the income difference between developed and developing countries are the institutions, and that institutions bringing into action good governance principles, such as the state of law and the range of rights secured by it, as well as transparency and accountability, are settled and established better, both legally and actually, in the developed countries. This approach further continues to emphasise the contributions made to economic development and sustainability of growth by the institutions ensuring co-ordination and co-operation between state and community, and especially between the state and business world.

And, as stated on page 96 of the same report:

Turkish economist Daron Acemoğlu, in his scientific study performed jointly with his two colleagues, has made a breakthrough in economic literature by setting down that the direction of statistical effect is from the rule of law to economic development and growth in coun-

tries on individual bases. Subsequent studies have demonstrated that this relationship is valid on a micro level as well. For instance, it has been confirmed that the projects funded and financed by the World Bank are more successful in countries, or even in regions in the same country, where the rule of law is better established. […] In the rule of law criterion, Turkey is in the mid-ranks when compared with other countries [according to the comparative indices issued by the World Bank], behind the Western European countries, and at a similar level with the new member states of the EU.

The rule of law is secured and protected against the legislative power by the Constitution and the constitutional jurisdiction, and against the executive power, basically, by the administrative jurisdiction and, partially, by the constitutional jurisdiction. The degree of functionality of juridical power, separately and independently from other powers of the state, determines the degree of the rule (supremacy) of law over the legislative and executive powers. However, no institution exists that assures the rule (supremacy) of law over judiciary powers. That is why the judiciary power's own internal processes and decision-making mechanisms should be designed with an adequately comprehensive scope in such a manner as to assure judicial review. However, in practice, the trust that the judiciary power will automatically supervise and take care of the rule of law, by itself, has resulted in the omission of auditing and supervision measures to ensure the compliance of the judiciary power with laws and, in most cases, in the waiver thereof.

This omission paves the way for the upsetting of the balance between the legislative and executive powers. The suppression of the judiciary power by these two other powers that integrate with each other from time to time upsets the balance between them and, in turn, inclines the pluralistic system towards the domination of both the legislative and the executive organs by a single political party. It is this spiral that ends up with a presidential regime where, inevitably, a candidate takes the simple majority of votes in the first or second election cycle, with a political party that fails to

constitute the majority of votes on a nationwide basis, taking only 35% of all votes, and succeeds in constituting a quorum ending up with 60% of the total number of deputies in parliament, in consequence of the electoral system.

In a parliamentary regime where the nation elects a legislative body and the latter appoints the executive body, the executive body gets its legitimacy from the nation, indirectly, while the legislative body relies on it directly on the nation for its legitimacy. However, if and when the balance amongst the legislative, executive and judiciary powers is upset, the representation legitimacy of both the legislative body and the executive organ appointed by it breaks down, leading to the emergence of a situation in which the top-rated political party, albeit inadequate in essence, is enabled and permitted to constitute a majority in the legislative body of up to twice its voting rate, thus predominating, alone and singly, the entire system composed of legislative, executive and judiciary powers. Although stability is provided in the executive organ in the event of a single political party holding a majority in parliament, the role of parliament in holding control and supervision of the executive organ fades, and the majority party and government replace it in this role. A single political party holds not only the executive body but also the parliament under its control and, as a result, both of these organs lose their independent functioning capability under the umbrella of a one-party system, and become like two systems that are almost conjoined and dependent sub-elements of the ruling party, i.e. the executive organ.

Where the legislative and executive bodies that are under the domination of the ruling party integrate with each other, in a middle democracy – a culture wherein the democracy and justice levels are not adequately developed – the judiciary organ comes under more pressure from the ruling party, thus quickly losing its independence. In recent times, the amendments to the law regarding the judiciary system which have been passed by the parliament in Poland, but could not be put into effect due to heavy criticism

by the EU, are a good example of this fact.

It may spring to mind immediately at this point that the election of the executive body and parliament, separately, by the people will naturally guarantee the complete separation of these two powers from each other and prevent their integration. Another reasonable and valid ground relied upon by the defenders of a presidential regime is that in such a system, the executive body is prevented from being affected by fragmented representation in parliament, thus leading to stability and continuity in government, as well as the avoidance of coalitions, and even that parliament may over time be composed of only a few political parties, representing a unity of mainstream views.

A presidential system may clearly guarantee the separation of powers much desired in a parliamentary system. However, on the other hand, certain concerns are raised against the presidential system. The interest shown in the legislative body, which evidently loses its chance to come to power, or at least to supervise the ruling party in government, will diminish; vesting the entire public forces in the hands of a single person may induce the ruler to act arbitrarily, and, therefore, personal and erroneous decisions may be made. That is why, looking at the example of other countries, it can be seen that the President is balanced by means of both the legislative organ and a strongly independent judiciary power. However, in the system adopted in Turkey, the parliament is not vested with the power to check or balance the President.

As a conclusion, following the adoption of the system of presidential government through the constitutional amendments of 2017, while on the one hand the risk of the combination and integration of executive and legislative powers is avoided and eliminated, on the other hand, as the President is permitted to be a party member, these two powers may, again, be reshaped as sub-elements of the ruling party, depending on the person elected as the President and on their preferences. To put it in other words, the separation of powers won by the change of system may eventually

be lost, depending on the person elected as the President.

In the event that the leader or candidate of a political party that has the majority in parliament as a result of elections is, at the same time, elected as the President, the danger of integration of the executive and legislative bodies will re-emerge while, on the other hand, if the majority is won by the other political party in parliament, a hard separation, and even conflict, may arise between the executive and legislative powers. In this event, the law-making speed of parliament will increase but, nevertheless, on his part, the President will try to slow down and delay the legislative organ by returning and recommitting the laws to parliament, or ordering a referendum thereon, or even retarding his approval of the law and, on the other hand, will try to administer the country solely by means of presidential decree-laws. However, parliament will refuse to approve these laws, thereby nullifying the presidential decree-laws, ab initio, and a race might start in which the President and the parliament pass decree-laws and laws respectively, thereby nullifying or disabling those enacted by the other. Under these circumstances, the President may try to form a new parliament by renewing and repeating elections and, in the meantime, to mobilise their executive powers so as to ensure that the party under their leadership wins the elections. This will, in turn, naturally lead to continuous referenda, repeated elections and a struggle over the rules. In such a situation, the most desirable alternative will be the creation of mutual harmony, a type of moratorium or a coalition, between the executive and legislative powers and organs. However, it is unequivocally vague and dubious in Turkey as to whether or not the established political culture is fit and convenient for the creation of such harmony or a co-operation or coalition between the legislative and executive bodies.

Under these conditions, it becomes absolutely necessary to take action in order to preclude a probable struggle between the legislative and executive bodies from allowing the country to drift into a state of chaos and, to this end, to check and balance the

executive organ through effective and efficient accountability. Accordingly, Turkey should proactively and long-sightedly forecast the likelihood of problems and troubles resulting from the recently adopted presidential government system, and it should develop solutions therefore by reconciling opposite ideas through rationalist discussions, and make quick, even if limited, corrections in its system. The regression trends in democracy as recently detected by some internationally accepted organisations[13] should be taken seriously, and the probability of the retrogression of our democracy, even from the middle-democracy band, should be eliminated.

13 In the Economist Intelligence Unit's Democracy Index released after this book was edited, Turkey has regressed from 88th in rank in 2003 to 100th in rank in 2017, and this regression is understood to have been caused by its fall from 7.92 to 5.33 out of 10 points in the 'Electoral Process and Pluralism' category; from

6.79 to 6.07 out of 10 points in the 'Functioning of Government' category; and from 5.59 to 2.35 out of 10 points in the 'Civil Liberties' category. It is noted that this regression has been largely caused by the declared state of emergency. It may be easily estimated that the regression in these three categories is closely related to judiciary power, accountability, and justice in representation issues, which precisely constitute the subject matter of this book.

In the CTRS public opinion research and poll from Kadir Has University published at http://ctrs.khas.edu.tr/sources/TSSEA-2017_vfinal.pdf in 2017, the proportion of those believing that Turkey is a democratic country is only 27.3%, while the total proportion of those believing that Turkey is by no means democratic, or its democracy is weakening, or it is still democratising, reaches 72.7%, in aggregate.

Graph 5: Polity IV Index Trend, Turkey

b) Supremacy of Law over the Executive Power

In the short run, certain measures may be taken in order to alleviate concerns and prevent probable dangers regarding the supremacy of law over the executive power in the presidential government system adopted in the referendum. One of them is to increase certainty and predictability in the executive power by enacting a general administrative procedures act as agreed upon in the legal doctrine and jurisprudence.

(i) General Administrative Procedures Act

In the recently amended Constitutional Law, the second sentence of paragraph 1 of Article 104 provides that *"Executive power belongs to the President"*; the first sentence of paragraph 16 states that the *"President may issue presidential decree-laws on issues regarding executive power"*; and, likewise, paragraph 18 states that *"For implementation purposes of laws, the President may issue regulations, providing that they are not contrary to the laws,"*. Paragraphs 7 and 8 of the same article vest in the President certain executive powers with regard to "*appointment and dismissal of ministers and senior executives"* while paragraphs 5 and 10 thereof grant powers with regard to the *"publishing of laws and international treaties and conventions."*

Considering the provisions that *"The State of Turkey is a Republic"* in Article 1 of the Constitutional Law; that *"The Republic of Turkey is a democratic, laic-secular and social state of law based upon the fundamental principles listed in the introduction hereof, and respectful of human rights within the frame of the sense of justice"* in Article 2; that the *"Executive power is used and performed by the President and Council of Ministers in strict compliance with the Constitutional Law and Acts"* in Article 8; that *"Everyone is equal before the law"* in Article 10(1); that *"State organs and administrative authorities are under the obligation to act in compliance with the principle of equality before the law in all of ttheir operations"* in Article 10(5);

that *"Judicial remedies can be taken against all and any actions and transactions of public administration"* in the first sentence of Article 125(1); and that *"A stay of execution may be ordered in the case of an administrative transaction clearly contrary to laws"* in Article 125(5), and as also agreed upon in the legal doctrine and jurisprudence, it is required to pass an act setting down the procedures and principles for the use of administrative powers by the executive organ. This is further supported by the principle of *"stability in administration"* as referred to in Article 66(6) of the Constitutional Law. There seems to exist a consensus amongst administration and constitutional lawyers about this requirement and need that existed, indeed, also before the constitutional amendments.

Also, from the provision that *"**Executive power is used and performed** by the President and Council of Ministers in strict compliance with the **Constitutional Law and Acts**"* in Article 8 of the Constitutional Law, it may be derived and concluded that an act that regulates the method of use of executive powers is needed.

The transparency and foreseeability principles require the enactment of a Right to Information Act, in addition to the right to information on the predictability of administrative preferences and decisions of the public administration and, to this end, the enactment of an Administrative Procedures Act.

Fundamentally, and as a matter of fact, considering the scope and variety of the constitutional rules cited above, which are absolutely required to be pursued and complied with in the course of the use of administrative powers, a General Administrative Procedures Act is definitely needed in order to facilitate both the making of lawful and legal decisions by public administrators, and the assessment of the compliance of the public administration with laws pertaining thereto.

While such an act exists and is enforced in the USA, as well as in various European countries, Turkey lacks a General administrative Procedures Act regulating the formal and procedural rules

applicable to all administrative transactions and decisions. There is a consensus in the legal doctrine and jurisprudence on the need for such an act, and though we have heard of ongoing work for the preparation of a draft act in the Ministry of Justice, no draft act has yet been made public in connection therewith.

Administrative procedures, the right to information and ombudsman laws are required to be coherent and compatible. Administrative decisions may be made predictable by way of processing the information acquired about administrative issues and matters in the light of such rules as to transactions regulated by the Administrative Procedures Act, the addressees of administrative transactions, and the format of justification therefor. An ombudsman system would also assure the conformity of administrative decisions in the same spirit. Furthermore, through the assurance of the right to participation and expression of opinions by individuals, the probable difficulties of unilateral administrative acts may be prevented, and it may become possible to put such administrative acts into practice more efficiently.[14]

The General Administrative Procedures Act should set down how all public administrations and civil servants, from top to bottom, are expected to use their administrative powers so as to guarantee merit, rationality, transparency and accountability in public administration. This act must determine the causes and procedures of appointment and dismissal of ministers and senior public executives, and ensure that candidates are determined through a transparent process and are eligible persons who are the best-fit and optimal candidates for the performance of their job duties. The appointment processes stipulated therein must ensure that all public executives are reviewed and evaluated in terms of competence and fitness for the performance of their duties and that, at the end, the most efficient and capable people are appointed, and that all of

14 Oğuzkan Güzeliş, Bağımsız İdari Otoritelerde İdari Usul ve Yargısal Denetim, Ankara, 2007, p. 105 et seq.

them are accountable.

In circumstances requiring the use of extraordinary powers, the quickest and most efficient statutory auditing and review opportunities must be recognised and granted, and in all transactions performed by those having these powers, transparency and accountability standards must be raised (for instance, in confiscations by the Saving Deposits Insurance Fund, in the appointment of a Receiver, and in other similar transactions and decisions).

Legal remedies recognised against decisions and actions taken by the President must be made public, and the legal definition of and statutory auditing and legal supervision means applicable to presidential decree-laws must be clarified.

Another step required to be taken is to remove certain exemptions and immunities vested in, and the preliminary permission requirement for the commencement of investigations against, civil servants and public officers, thereby ensuring that these servants and officers make quick and correct decisions in the name of the state, and in strict compliance with the laws.

In making this step definite and foreseeable through a law, in addition, the level of compliance by civil servants and public officers with laws may be elevated. Such a legislative instrument may, at the same time, ensure the exoneration of civil servants and public officers, thus helping them in the efficient and safe use of their powers. The strengthening of this act by means of an effective accountability system may smooth the way for effective, efficient and lawful use of the executive powers of the state.

Freedom of Expression and Free, Independent and Pluralistic Media

Freedom of expression is the most important of the human rights that have been declared, agreed, committed to and secured by a great many international treaties and conventions, and in particular the Universal Declaration of Human Rights.

When a human being speaks, it is never intended to fall on deaf ears. Save for those cases of one-to-one and direct contact, individuals have indirect access to data and information that affect their decisions by way of getting word from other people through means of communication. Not only to acquire information and build opinions but also to confirm and further strengthen their own opinions, individuals ask for information and advice from others, or occasionally may wish to influence others in keeping with their own ideas and opinions. All of these processes occur through conveying or making conveyable information, ideas and opinions to others through individual or collective means of communication.

Freedom of expression, i.e. the freedom of individuals to express and transmit their opinions and ideas to others, can take place through media. Freedom of expression requires the existence of channels, i.e. media, that allow others to access ideas and opinions expressed by individuals, and the need to prevent the restriction of this freedom requires a pluralistic media. For the same reasons, the media, if and when it cannot be pluralistic, should at

least be independent and neutral.

That is why freedom of expression, on one hand, and media, on the other hand, are intertwined and conjoined.

The International Covenant on Civil and Political Rights of the UN, relied upon in the UN Universal Declaration referred to herein, lists freedom of expression under the heading of respect for human rights and political rights, and enumerates free, independent and pluralistic media amongst the primary elements of democratic state governance.

Freedom of expression is formulated in Article 26(1) of the Constitution of Turkey, precisely as follows: *"Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing, or in pictures, or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities."* The Constitution has introduced detailed rules and provisions on the protection of freedom of expression, and on the media and communication. In this context, we must particularly refer to paragraph 1 of Article 22 of the Constitution: *"Everyone has the freedom of communication."* Privacy of communication is fundamental, and paragraph 1 of Article 28 states: *"The press is free, and shall not be censored"*, while Article 31 states: *"Individuals and political parties have the right to use mass media and the means of communication other than the press that is owned by public corporations. […] The law shall not impose restrictions preventing the public from receiving information or accessing ideas and opinions through the media, or preventing public opinion from being freely formed"*, and paragraph 3 of Article 133 states: *"The unique radio and television institution established by the State as a public corporate body and the news agencies that receive aid from public corporate bodies shall be autonomous, and their broadcasts shall be impartial."*

If and to the extent that media is not free, independent and neutral, there is no freedom of expression. The proposition *"free*

and independent media should also be pluralistic," refers to the required availability of a variety of sources and channels in order to ensure that different ideas, opinions and thoughts have the opportunity to be expressed freely. Nowadays, assuming that the media channels and sources of our day have reached the diversity needed for pluralism, the state monopolies, historically, are abolished and concessions are made through the application of the principle of "neutrality" as a legal necessity, as tightly as was the case in the past. However, where media is not pluralistic, it is required to secure and assure its neutrality by taking the appropriate legal and other actions or measures.

The media is of a particular and essential concern to freedom of communication and information, expression and dissemination of thoughts, science and arts and press, the right to legal remedies, and the right of the community to call its administrators to account, all of which are amongst the basic rights and freedoms of individuals. The media enables the public to be and stay informed of both the events and developments directly concerning it, and the activities performed in the name of the state, and ensures dissemination of information, ideas and thoughts, thus shaping opinions, thoughts and decisions of the public vote, thereby giving the public a voice and say in the modus operandi of the state. Being able to acquire accurate information in a timely fashion, and to transfer or disseminate one's thoughts, makes individuals capable of forming healthy and sound opinions and taking correct decisions with respect to their own interests and the affairs of state. The public, in general, may call civil servants and public officers to account only if and to the extent that it is adequately informed.

That is why the media is a separate power assuring the healthy functioning of all other powers of the state and, in democracies, is seen as a power separate from, and equivalent to, all of the legislative, executive and judiciary powers, and is therefore referred to as the fourth power.

On a nationwide basis in Turkey, media channels may be cat-

egorized basically into two separate groups: those under the control of the public sector, and those under the control of the private sector. In Turkey, media channels established by separate laws, as per Article 133(3) of the Constitution, are the TRT and the Anatolian Agency, which are under state control. Media channels may further be grouped into those owned by residents and those owned by non-residents, depending on the place of residence of their controllers (owners or management). According to coverage areas, media channels may further be categorised as domestic or cross-border, and foreign media channels targeting or covering only Turkey from abroad may also be considered and treated as a separate group.

In the present day, communication methods are rather diverse, channels are abundant and access to media is influential across borders. Recent developments and advancements in internet, satellite and information technologies have already enabled media access for millions of people in seconds, for every segment and level of society. In the end, in the course of international competition, countries are now capable of influencing the public opinion of other countries in favour of their own policies. This, in turn, makes it a necessity for each country to keep its own public well informed more quickly, efficiently and effectively than other countries. Therefore, in this race that requires huge investment, public funds are channelled into the media. Even in very developed countries, such as the USA, the public sector is also amongst the media players. The public sector takes its place in media channels, in general, with the intention of keeping its own public opinion well informed, thus fighting against disinformation on one hand, and of influencing public opinions of other countries in favour of its own interests, on the other hand.

Furthermore, the concern that the private sector may not be adequate and willing to keep public opinion well informed completely, healthily and neutrally also requires the involvement of the public sector in media channels. However, control of the public sector over the media, i.e. the public sector acting as the "boss",

also raises problems and concerns, such as those relating to independence, neutrality and accountability. For example, complaints are often heard that broadcasts by the state-owned TRT represent only a certain segment of society and do not ever, or adequately, reflect the variety of political opinions and thoughts other than those of the ruling party, e.g. as a result of the different durations of the broadcasts dedicated to different political parties.

On the other hand, material criticisms of media under the control of the private sector are also heard throughout society. In this respect, the following fundamental determinations quoted from a report entitled "Communicative Democracy – Democratic Communication – Media in Turkey: Legislation, Policies, Actors" published by TESEV in 2011[15], are still valid:

- *"In Turkey, the media is dominated by a partial journalism tradition. Structurally, the media sector is divided into parochial communities; owners of large media groups are involved as investors or shareholders in different market sectors, such as healthcare, education, construction, telecommunication and distribution, and use the power they hold in the media sector in order to maximize their economic profits from other sectors.*

- *"Even though they represent different ideological and political standpoints and conflicting economic interests, owners of large media groups generally share a common 'mindset' in valuing the 'state's interests and benefits' and 'national security' above democracy, human rights and media freedom. This is why the apparent media diversity arising out of the numerous media companies is misleading.*

15 İletişimsel Demokrasi – Demokratik İletişim – Türkiye'de Medya: Mevzuat, Politikalar, Aktörler (Communicative Democracy – Democratic Communication – Media in Turkey: Legislation, Policies, Actors) Esra Elmas, Dilek Kurban; TESEV; 2011; http://tesev.org.tr/wp-content/uploads/2015/11/Iletisimsel_Demokrasi_ Demokratik_ Iletisim_Turkiyede_Medya_Mevzuat_Politikalar_Aktorler.pdf.

- *"It is not possible to say that there is an autonomous journalism tradition that is not affected by pressures exerted by politicians, interest groups, governmental bodies and authorities, military forces, and judiciary power."*

Thus, indeed, traditional media, including newspapers, radio and TV channels that require profit-oriented economic investment, have naturally become an arm of big capital owners. In the 1990s, when private radio and TV broadcasts were liberated, some of the large capital groups became media owners. Public opinion believes that media power influences the economic decisions of the government, and the environment giving birth to the 2001 economic crisis was further fuelled by these influences, inter alia. It is a common belief in Turkey that the media fails to perform its function of informing society accurately and healthily, assuring the free transfer and dissemination of ideas and thoughts, and to achieve the desired level of success in transmitting accurate data and information, independently and neutrally.

The sentences quoted below, from the beginning of a study named "Media – Government Relations in Turkey: Problems and Suggestions"[16]published by the Istanbul Institute, demonstrate the picture drawn in the preceding paragraph: *"In Turkey, for a long time, the media has operated under the effects of a self-censored climate arising out of government pressure and close and intimate relations between media owners and politicians. A non-profit-making structure of the media sector, current market conditions, and the economic size and magnitude of the state are the reasons underlying the effectiveness of tools that may be used by the state against media moguls. The tendency of the media moguls to align themselves closely with the government, and to waive critical publishing and even newscasting due to their investments in other fields of business, are amongst the most important reasons*

16 http://platform24.org/Content/Uploads/Editor/T%C3%BCrkiye%E2%80%99de %20Medya-%C4%B0ktidar%20%C4%B0li%C5%9Fkileri-BASKI.pdf

to self-censor in the media."

It is imperative, in order that public opinion can be built on healthy ideas and thoughts, to ensure that the media is independent and impartial, and that information and news coverage is complete, balanced and objective. The legal framework governing the media seems, in theory, as if it is capable of resolving all of these problems and, at the very least, ensuring that the community can obtain accurate and correct information. However, in reality, ongoing problems of judiciary power and the non-enforcement of laws effectively leave the media to develop and operate as it sees fit.

Public opinion can easily be seen to coincide with the views cited below from the publication entitled *"Press Freedom in Turkey: Myths and Realities," published in 2016 by SETA: "Periods of deepening political crisis and intensifying social tensions in the history of the Republic of Turkey have witnessed media manipulations and news and headlines containing disinformation, and in these periods, the law, democracy and human rights have received heavy blows"; "the media has adopted a publication policy pushing its legitimate limits"; "Traditional media has shared made-up false news within a political agenda"; and "media organs that do not act in an adequately sensitive manner against terrorism and violence […] have pursued a publication policy pointing to individuals as targets."*

As stated in a news publication at the beginning of 2018,[17] according to research on the media and trust conducted by Xsights Research for Marketing Turkey, trust in the Turkish media is continuing to decline. Social media seems to have become a more reliable source of news. The global public opinion research conducted by the Pew Research Centre also indicates that the public does not trust in the impartial journalism of the media,[18] and determi-

17 http://www.marketingturkiye.com.tr/haberler/medyada-guven-erozyonu-devam-ediyor.

18 http://www.pewglobal.org/2018/01/11/publics-globally-want-unbiased-news-coverage-but-are-divided-on-whether-their-news-media-deliver.

nations in the Turkish annex of the 2017 Digital News Report of Reuters Institute[19] likewise indicate that, save for a few exceptions, the public does not trust the media, preferring social media for information purposes; however, in 2017 a decline was recorded in the tendency to seek news from social media while, on the other hand, resort to reliable and safe online communication channels increased.

On the other hand, social media, which is born out of the communication revolution and which enables access for millions of people to all kinds of real (or not) information in only seconds, has rooted out and torn up the traditional media, and has raced to the top in communications by allowing almost everyone to broadcast from any point, and enabling access for almost everyone at any time or place. Thus, social media platforms allowing individuals to easily communicate and share their news, ideas and thoughts with thousands of people in only seconds have outdistanced traditional media and compelled the latter to change and digitalise.

Countries where digital technologies and social media have burgeoned have developed a new type of global political and economic domination in this field. Communication companies that have turned the corner and have been recipients of billions of dollars on a worldwide basis in a very short time have started to have a significant impact on the development of other countries and their legal systems. Taking safety precautions is not sufficient to rescue these countries from their fate of being overrun by this new type of tsunami.

In the social media competition, which does not require any sources other than human resources and communication technologies, important lessons may be derived from the struggle between Russia and the USA, as well as the effects of social media during the Arab Spring. As a matter of fact, in some developed countries,

19 http://reuterinstitute.politics.ox.ac.uk/sites/default/files/2017-11/Turkey%20Digital% 20 News%20Report.pdf.

notably in the USA and Germany, it is a commonly expressed view that social media platforms such as Facebook are used to influence the political atmosphere and even the outcome of elections in countries and that, therefore, they are required to be regulated just like traditional media. Also in Turkey, it is well known that social media is very influential in elections, referenda and other important social events, and some columnists and opinion leaders often complain about social media trawls. As to the extent to which healthy and reliable information may be provided in our country and other countries of the world by social media platforms, most of which are based in and originate from the USA, the legal atmosphere and co-operation with the USA will, in any case, be a determinant factor.

In Turkey, there are fairly deep complaints and comprehensive discussions with respect to freedom of the press. At this point, it is not possible to overlook the concerns of Turkish society about the freedom of the media and press as an indicator of a strong desire for a more healthily operating media sector.

As examples of these concerns, we can underline the following statements in the report entitled "Press Freedom in Turkey: Myths and Realities" published in 2016 by SETA: *"Since the beginning of the 2000s, in Turkey, a very serious struggle has continued between entities defending the status quo and forces demanding change. Tensions encountered in the media sector, and attempts to restrict and supervise press activities, are directly related to disturbances felt from the aforesaid transformation process. This process may evolve into a healthy channel only if and when a new Constitution prepared in the interests of relevant social stakeholders, and agreed upon by all segments of the community, is made effective and put into force."* The following statements were published in a press bulletin released on June 15, 2017, by TÜSİAD, accepted to be the most effective non-governmental organisation of the Turkish business world: *"Besides the investigations started against, and the arrests of, a gradually increasing number of academicians, politicians, media managers, authors and*

journalists in recent times, the prohibition of many international websites creates a perception of regression from our feature of being a society of freedoms. […] We should not retreat from our democratic achievements and gains in all areas of freedom and, in particular, freedom of expression and press, and in the supremacy of the state of law. While continuing our rightful and legitimate struggle against terrorism and taking actions and measures for the security of the people, we have to protect the freedoms of thought, press and expression, and the freedom of doing politics that are believed to articulate the feelings and the general concerns and desires of our society.

We deem it necessary to reiterate that history is full of examples demonstrating the importance of healthy information in order to ensure that the state powers are used legitimately, lawfully and in accordance with the established desire of society. It is a well-known fact that governments in power have a tendency to deviate from facilitating access to accurate and healthy information by society so as not to lose and give away public strength.

To identify all of these problems, and to bring suggested solutions, even in outline form, exceeds the original intention of this study. Our sole purpose is to propose limited, timely improvements aimed at ensuring that the media, termed and considered as a fourth power in a democratic regime, is able to inform society in a healthy manner and to contribute to strengthening democracy in our country. Thus:

(i) Freedom of media should be strengthened financially and functionally by providing monetary and operational support, as well as the required supportive physical and virtual environment, and new entries to the market should be encouraged.

(ii) The financial and administrative transparency and accountability of media should be maximised in order to ensure that the media informs society, healthily and accurately.

(iii) Diversity should be assured also in ownership and control in the media sector, and the media should be enabled to perform

its function of transmitting independent, neutral and fair information and opinions, and to cover different ideas and thoughts on social issues.

(iv) Media institutions owned or controlled by the public sector should absolutely and objectively be neutral and impartial against political parties and positions, should stand at the same distance from all thoughts and beliefs, and should serve as a channel for the transmission of all political views to society. Equal coverage should be provided to the government in power and the main opposition party as the parties representing mainstream political thought; less but in any case equal coverage should be provided to smaller parties; and still less but again equal coverage should be provided to others. In this respect, coverage should be allotted to different political parties proportionally, in the same that state aid or subsidies are.

(v) Issues concerning the media, and the right to demand information and news, as well as freedom of expression, should be identified as priority and urgent issues for the improvement of judiciary power, and juridical processes, transactions and decisions should be developed in such a manner as to prevent the emergence of an impression of concessions being made regarding, or restrictions imposed upon, these rights.

(vi) The media should be forbidden from directly or indirectly establishing relations with, or publicising or advertising, a political party or formation. The media should by no means be converted into a tool of propaganda, and should by all means strive for healthy information to inform and reflect public opinion.

PART III.
JUSTICE AND JUDICIARY POWER

As is generally known, the Turkish states are communities that speak the Turkish language as the primary language, accepted to have been born and initially developed in Central Asia, in AltaiSayan and in the Tian Shan Mountains; they comprise a social organisation made up of "üruğ", meaning a nucleus family and a union of close relatives; tribes, bringing various "üruğ"units together; clans that are composed of tribes; and provinces founded on the basis of tribe-clan combinations. A state that is founded on the basis of tribes is termed a province. A province, i.e. a state, is an organisation of the dominating power amongst tribes and clans. Councils (kurultais) that bring the rulers of tribes together are convened in provinces three times a year. In the Turkish administrative mentality, sovereign right is not absolute but is limited by customs and morals.

As mentioned by Ekrem Buğra Ekinci in Osmanlı Hukuku (Ottoman Law), page 65: *"Turkish customs have not been formulated in the form of written laws in today's context, but in the form of customs and usage. Turkish customs were composed of rules filtered through the life experience of the nation over hundreds of years. Customs and usage rules were applied, both in superior courts presided over by the khan, and in ordinary courts, headed by other judges (adjudicators). Even the khan could not stand against customs and usage rules. Khans that opposed customs and usage could lose their throne, and even their life."*

As commented by Nevzat Kösoğlu in his book Hukuka Bağlılık Açısından Eski Türkler'de – İslam'da ve Osmanlı'da Devlet (State of Old Turks – Islam and Ottoman in Terms of Loyalty to Law), according to Kelile and Dimne, believed to have been authored in India in the 3rd century B.C., order in hometowns and the security of the people can be provided only through justice. Kösoğlu explains (ibid, p.41) that justice is a grace in the Eastern tradition, while it is a right for citizens (national subjects) and a base of the legitimacy of the khans in the Turkish administrative mentality. In Turkish culture, the powers of sovereignty () are limited by loyalty to customs and usage, or to put it in other words, the legitimacy of sovereignty is dependent upon justice. For the Turks, justice means the enforcement of laws, correctly and impartially. Kösoğlu (ibid, pp. 114–115) quotes from the Kutadgu Bilig of Yûsuf Has Hâcib, saying: "If justice is in place, a wolf and a lamb can live together"; *"You should enforce the law well and correctly"; and "Neither sahib and slave, nor son and foreigner, should be treated differently by the law."*

In conclusion, the respect shown by state governance to the law and its enforcement authorities – which in present-day circumstances entails the judiciary power being separate from the executive power, the judiciary power's supremacy over the executive power in the enforcement of the law, and a government and administration culture in which the judiciary power is represented at the upper tier of state – has already penetrated deeply into the genes of Turkish society. The aspect of Turkish culture that requires the administration of the state according to customs and usage (Constitution) is comparable to the democratic mentality in ancient Hellenic culture.

The Relationship between Supremacy (Rule) of Law, Justice and the Judiciary Power

The fundamental philosophical view that justice is the impartial enforcement and execution of stable and invariant customs or law predominates in the Turkish-Islamic governance tradition, which developed in the free environment of the Central Asian steppes, in which state governance is equal to the subjects electing or adopting it and is committed to administering justice to subjects in strict compliance with customs and usage and the law. It requires that state governance be accountable to the law, and places the judiciary power assigned and authorised to enforce and execute the law in a separate, special and reputable place in relation to state governance.

This practical state theory that places Muslim judges against the absolutist power, the sultan, and adopts the fundamental principle that justice is the foundation of state was reflected in symbolic structures called the Dâru'l-'Adl (Tower of Justice) and the Cihân-nümâ (Pinnacle), these being the most prominent and striking parts of the palace. In Edirne and Istanbul, these symbolic structures dominated the entirety of the palaces, and they are said to have supervised the entire country.

Although in periods of stagnation and regression the judiciary branch and function of the Ottoman Empire gradually became corrupted and retrogressed, the supremacy (rule) of law and the

law enforcers' perceived role as independent of (and even superior to) the other powers of the state are almost imprinted on the state governance culture of the Turks. The fact that the public more and more strongly expresses that the sole way to improve the state is through true justice emanates from this healthy and strongrooted cultural code.

Figure 2: Tower of Justice in
Istanbul Topkapı Palac

Justice does not mean the supremacy of the rules of law. Flawless and perfect enforcement of laws does not alone suffice to secure justice. Justice is a sense of feeling and perception occurring in individuals or, to put it in other words, it is atrust . In order for a trust in the justice of a society to be formed and reinforced, first of all, the welfare and troubles, duties and obligations endured must be shared fairly, i.e. the rules of sharing must first be fair. However, coming to a mutual agreement on the rules of fairness also does not suffice to secure justice. The trust in justice can be established only through strict application of the already agreed-upon fair rules in the course of sharing, and can be further reinforced and strengthened through the creation of trust in the application of these rules at all times.

Exactly for these basic reasons, the legislative, executive and judiciary powers cannot alone secure justice. Justice can be secured only if and to the extent that each of these powers performs its own functions and obligations, because, as briefly mentioned above, the trust that people have in justice is fed from many different sources. Failure in any one of these sources results in disruption or impairment in the trust that justice exists.

In order to secure justice in society, first and foremost, the laws and other regulatory rules must be formulated fairly, on the basis of mutual consensus and agreement, and should be adopted as such by the whole of society.

Constitutions determine and set down the fundamental standards requiring compliance when making rules, as well as the procedures and conditions for the achievement of social consensus and mutual agreement. For this basic reason, constitutions should be written and, if necessary, amended, not by simple majority or on the basis of small differences between different political factions, but by a qualified majority; and if and when the proposals of a certain faction are chosen, this should be by way of consensus aiming to address the common concerns of opponents and minorities. Otherwise, the Constitution is merely a piece of paper that

supports a type of structure that generates injustice under the skin, and is complied with solely due to statutory obligations and as a result of legal assertiveness, but is by no means owned or protected by the people.

A gradually growing problem exists in the drafting and creation, in a fair manner, of all regulatory rules, such as laws, bylaws and regulations, including the Constitution. Social consensus is by no means sought in amending and rearranging, suddenly and without adequate debate and contestation, hundreds of rules and the provisions of tens of laws by means of omnibus bills, and most of the time society is not even made aware of such amendments or rearrangements. Usually, in the balance of the burden of such rules, as noted above, the odds are stacked against ordinary citizens, in favor of public administrations and civil servants, who are indeed expected and required to perform services for society.

However, fairness in the Constitution and other rules of law is, alone, inadequate for the establishment of justice. Fair rules should be definitely applied in each case and event related thereto, and trust should be built in society as to the application of fair rules at all times, and with no exception. This trust can be created and exerted only by a judicial system operating independently, impartially and effectively, and that is trusted to do so. This means to say that that judicial system may, indeed, make a significant contribution to the establishment of justice by ensuring that fair rules are at all times applied in a good and fair manner. However, if the rules are not fair, the application of the rules produces injustice, not justice.

The judiciary power entrusted with the task of the application and enforcement of rules may produce either justice or injustice, depending on how it performs its basic function, because

unfair application of fair rules also leads to injustice, not justice – just like strict and word-for-word application of unfair rules. Thus, though it is by no means capable of establishing justice alone, the judiciary power plays a very important and determining role in the establishment of justice as the enforcer of rules.

Even negligence, want of care, or misinterpretation in the formulation of rules may induce great injustices. Jurisprudence, or, in other words, case law, exists for the purpose of preventing this. Accordingly, , good judicial precedents can prevent a generation of injustice resulting from unfair, misconceived or misinterpreted rules. For this reason, the authorisation of the courts is needed to create laws through judicial precedents. In such choices as limitation or expansion of the coverage and impact of judicial precedents, or whether to make compliance with judicial precedents voluntary or non-voluntary, certain keystones, such as the strength of rules, the competences of judiciary power, and the need of and trust in justice, should be taken into consideration. It is clear that, in Turkey, judicial precedents fail to secure justice, because it is legally mandatory to comply with only a few judicial precedents while the great majority of judicial precedents are only recommendatory.

Society believes that the judiciary power is unsuccessful in the performance of its responsibility and the use of its powers with respect to establishment of justice and, therefore, desires comprehensive rehabilitation and reform in the judicial system. Hence, the judicial system is considered to play a key role and to be fully authorised in the establishment of justice. For this reason, it is held by society to be individually and solely liable for applying and enforcing the rules well, in order to eliminate injustices.

The public does not fully perceive or accept that the judicial system is permitted to use its powers and perform its functions only in certain circumstances and subject to certain conditions, and that the judges are tied hand and foot. For example, consi-

dering incidents that involve both a police officer and a citizen, paving the way for the offences of "resisting and obstructing an officer" on the part of the citizen and "cruel treatment of citizens" on the part of the police officer, though the citizen is immediately taken to court and jail, legal proceedings are not easily initiated against the police officer, and hence it is very natural and reasonable for the public to take the view that the judicial system is protecting the police officer and that the law is enforced only against the citizen. In this example, the police officer, standing in the legally stronger position, takes the citizen to the police station, deprives the citizen of freedom, even if for only a short while, gives testimony in the name of the public prosecutor, and detains the citizen in jail until the end of the legal period of detention; and this, in turn, leads to the emergence of a perception that the judicial system and security forces act in harmony and co-operation in terms of creating injustice.

The judiciary power is written off in the establishment of justice and held liable for society's trust in justice falling through the floor, and justice is required to be rebuilt and re-established by applying fair rules well, and by avoiding and eliminating unfair rules by means of good judicial precedents. To this end, a fairly comprehensive judicial reform package is needed. It is absolutely necessary to ensure the participation of all stakeholders in such a reform package within the frame of scientific methodology. In the course of such a judicial reform package, the following points, at least, should be taken into consideration, and solutions should be found for them.

In the Great Seljuq Empire, the khan was under obligation to hear complaints two days a week. In the Anatolian Seljuq Empire, the sultan attended the ecclesiastical court once a year, where he was required to appear before the Muslim judge, and then any sentence given by the Muslim judge against the sultan was enforced and executed.

In the Ottoman Empire, the Imperial Council (Divân'I Hümâyûn) chaired by the padishah, was considered to be a supreme court of justice, wherein even an ordinary citizen was allowed to personally express his complaints against representatives of the state.

In Turkish-Islamic state traditions, the judiciary has had an independent, separate and superior place in comparison with that of the sultan or khan.

It is now generally believed that the principle of separation of powers developed and defended by British philosopher John Locke and French philosopher Montesquieu, made the greatest contribution to the concept of the of independence of the judiciary, comprising the basis for a great many national constitutions, particularly those of the USA and Canada. *(Justice F.B. William Kelly, An Independent Judiciary: The Core of the Rule of Law, footnote 6; The Hon. Ken Mark, Judicial Independence (1994) 68 Australian Law Journal 173)]*

The Issue of the Separation and Independence of Judiciary Power

As mentioned in the previous chapter, judicial power has a special and respected place in the Turkish-Islamic state tradition which is superior even to the that of the Sultan.

In periods of stagnation and regression, the judiciary aspect and functions of the Ottoman Empire also gradually deteriorated and dropped behind those of its concurrent Western counterparts. But, nevertheless, both the rule of law and the belief in the requirement to hold the judiciary power independent and separate from (and even superior to) other powers of the state are almost engraved on the governmental culture of the Turks. Society's strong belief that the sole way to further improve the state is through justice emanates from this sound and robust cultural code.

The motto of the independence of the judiciary and the concept of the separation of powers were developed by great contributions by British philosopher John Locke and French philosopher Montesquieu, in the process of the modernisation of political systems in the Western world in the 17th century.

In the present day, the independence of the judiciary is accepted and committed to by all world states under the umbrella of the United Nations as one of the fundamental conditions of

democratic state governance. The fundamental principles of the independence of the judiciary are formulated in an international document entitled "Basic Principles of the Independence of the Judiciary" approved by the General Assembly of the United Nations through its Decision No. 40/32, dated November 29, 1985, and Decision No. 40/146, dated December 13, 1985 (UN Decision). The UN Decision lists the fundamental principles of the independence of the judiciary power required for the protection of basic rights and freedoms of individuals, secured by international treaties and conventions, such as the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations.

For this reason, at least the basic principles set forth in the UN Decision are required to be strictly complied with for the sake of the independence of the judiciary power, and in order to demonstrate and prove it.

According to Article 1 of the UN Decision, the judiciary shall, as a whole, be independent from the executive and other powers, the executive and all other powers shall respect and observe the independence of the judiciary, and judges shall independently decide on matters before them, impartially.

According to Article 2 of the UN Decision, the judiciary shall decide, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter, or for any reason.

According to Article 3, the judiciary shall have jurisdiction over all issues of a judicial nature, and shall have the exclusive authority to decide whether or not an issue that is submitted for its decision is within its competence. Whether the "independence of the judiciary" purpose set down in Article 1 is achieved or not is confirmed and checked by this Article 3. Through its granting of exclusive authority to the judiciary to decide whether an issue

submitted for its decision is within its competence or not. As per Article 3, if the judiciary fails to decide on whether an issue submitted for its decision is within its competence or not, the independence of the judiciary envisaged in Article 1 cannot be achieved.

The UN Decision in question also stipulates certain other measures and actions in order to assure the independence of the judiciary and to ensure that judges make their decisions free from any influence or pressure. It imposes rules and provisions as to the freedom of expression and association of judges, particularly in Articles 8 and 9; as to safeguarding against judicial appointments for improper motives, in Article 10; and as to the appointment, term of office, security, adequate remuneration, conditions of service, pensions and rights of retirement of judges that are required to be secured by law, as to the assignment and distribution of cases, and as to the principle that the actions for damages caused by the fault of judges shall be brought forward against the government, in Articles 11 and 12.

The IBA (International Bar Association), has adopted the basic substantive principles regarding judicial independence, as listed in its document entitled "Minimum Standards of Judicial Independence" published in 1982, and attaches special importance to the independence of the judiciary from the executive power.

The IBA's document of minimum standards states in Article 1 that individual judges should enjoy personal independence and assurances precluding them from being subject to executive control, and that in the discharge of their judicial functions, judges should be subject to nothing but the law and to the commands of their minds and conscience; and, in Article 2, that the judiciary body as a whole should enjoy autonomy and collective independence vis-à-vis the executive power.

The same document states in Article 3 that appointments

and promotions of judges should be vested in a judicial body in which members of the judiciary and legal profession form a majority, free from any participation, involvement or influence of the executive or legislature bodies therein – but that, nevertheless, exceptions to this rule may be acceptable in countries where judicial appointments and promotions operate satisfactorily due to long historic and democratic traditions thereof; and, in Article 4, that the executive may participate in the disciplining of judges only in referring complaints against judges, but not in the initiation of disciplinary proceedings and the adjudication of such matters, and that the power to discipline or remove a judge must be vested in an institution or judicial commission which is independent of the executive body.

Article 5 provides that the executive shall not have control over judicial functions. Article 6 states that rules of procedure and practice shall be made through legislation or by the judiciary in co-operation with the legal profession, subject to parliamentary approval. Article 7 states that the state shall have a duty to provide for the execution of judgements of the courts, and the judiciary shall exercise supervision over the execution process thereof. Article 8 states that all judicial matters are required to be exclusively within the responsibility of the judiciary. Article 9 states that the central responsibility for judicial administration, preferably, shall be vested in the judiciary, or jointly, in the judiciary and executive bodies. Article 10 states that it is the duty of the state to provide adequate financial resources to allow for the due administration of justice. Article 11 states that division of work amongst judges should be at the discretion of the judges themselves. Article 12 states that the power to transfer a judge from one court to another shall be vested in judicial authority and shall, preferably, be subject to the judge's consent.

According to these two important international documents, the judiciary should be separate and independent from both the executive power and other powers of the state. In addition, judg-

es should be allowed to decide upon and judge, independently, all matters submitted to them, free from any influence or pressure. To put it differently, for the sake of the independence of the judiciary, first and foremost, the judiciary should be separated and independent from both the executive power and other powers of the state, and judges should be allowed to decide and judge, independently, and free from any influences or pressures.

For the sake of the institutional independence of the judiciary, the judicial organs and elements should be capable of performing their duties and functions free from any direct or indirect pressures from other elected or appointed organs and authorities, and without the requirement for any permission or consent from them. The second vital requirement of the independence of the judiciary is that the courts should make their decisions and verdicts in reliance upon material facts, by enforcing the laws, impartially, and free from all external effects and influences, and that court judgements should not be held subject to any control or supervision, save for internal objections and appeal processes.

At this point, we deem it necessary to add that ensuring judges do not feel any influence or pressure on them is a must in order to sustain the independence of the judiciary and, particularly, domination by the executive organ over legislative power, the enactment of legislative instruments making concessions from the independence of the judiciary, and the restriction of resources allocated to the judiciary should be absolutely prevented (preferably by means of a strong constitutional protection).

A parallelism exists between the West's development of its state governance (political) systems by adopting the principles of separation of powers and the independence of the judiciary, on the one hand, and its economic and social growth and development, on the other hand. In the Islamic and Ottoman world, there exists an opposite parallelism – between its political regres-

sion, on one the one hand, and economic and social stagnation and regression, on the other hand. In recent times, some economists, including Daron Acemoğlu, have verified that the rise and fall of countries and civilisations is closely linked to the law, and that welfare is also enhanced in countries with a developed democracy. Departing from this fact, it may be concluded that the real cause underlying the regression of the Ottoman and Islamic world is its failure to develop its state governance systems, as has been done by the West. While some authors think that the cause of regression is the West's finding new trade routes, thereby leading to a decline in economic resources, it will be more realistic to accept that the primary and real cause of regression is the failure of the state governance to assure the development of society, because the Ottoman Empire, holding all of the major trade routes under its control at one time, could easily have been expected to organise greater geographical expeditions and to achieve greater successes than the West, thanks to the relatively rich resources it owned. It may thus be concluded that for the sake of being successful in international competition, it is of vital importance to establish the separation of powers and the independence of the judiciary.

The Capacity of the Judiciary Power to Perform Its Function

(a) The Problem of the Restriction of the Independent Functioning of the Judiciary Power

The first conclusion required to be derived from the concept of the independence of the judiciary power is that this important power should at all times have the capacity to perform its functions independently. However, in practice, the capacity of the judiciary power to perform its functions independently is neglected and, hence, the concept of judicial independence is oversimplified and reduced to the principle of independence of the courts and judges, meaning that no one can give orders or instructions to them. This mode of thought that disregards the main function of the judiciary power remains silent about restrictions imposed on and obstacles to the functional independence of the judiciary, and sees the immunities from (or preconditions for) prosecution of public officials as just cause for restricting the independence of the judiciary power. It also overlooks the fact that the failure of the judiciary power to perform its functions in relation to a certain segment of subjects who are indeed equal before the law means the immunisation and exemption of that segment from the law, and this may in no event be allowed or go unnoticed in a regime governed by the rule (supremacy) of law. This insufficient perception, which finds support even within the judiciary community itself, has laid the ground-

work for the creation of artificial exemptions in practice under the guise of immunity, and gives way to the production of insulated islands of immunity not accessible to the judiciary power.

Because of this mentality, the judiciary power is thought to be composed of only judges and public prosecutors, forgetting that attorneys are also a constituent element of the judiciary power and ignoring all other judicial professionals. This thinking has, in turn, resulted in judges and public prosecutors being given weight and brought into focus in the structuring of the judiciary and the interrelations amongst its elements, and in the provision of judicial services. This is why public debates on the independence of the judiciary power have focused on judges and public prosecutors, and their professional organisation. Reform initiatives have also been carried out under the domination of the Ministry of Justice bureaucrats and judges and public prosecutors, seeing not only attorneys, the other element of judicial services, but also the direct addressees and objects of judicial services as external stakeholders therein.

In order to assure the rule (supremacy) of law and to perform its expected function of establishing and securing justice, the judiciary power should (i) be independent, or, in other words, not dependent on other state powers or units or on external power groups for the performance of its functions; (ii) be capable of fulfilling its functions impartially; (iii) be free from all types of tutelage and wardship, and from pressure and influence from all and any power groups for the sake of earning trust for its independence and impartiality; (iv) be able to perform its duties and responsibilities effectively and efficiently – i.e. it should by no means be the cause of injustice; and (v) be accountable as to whether it uses its powers and authorisations for the intended purposes thereof, and whether it carries out its duties and responsibilities, as well as dealing with other issues or points pertaining thereto.

However, as separately discussed in detail in Chapter 8, in Turkey the judiciary power cannot perform its functions separately

and independently from other state powers or forces; to the contrary, it is dependent on legislative and executive organs in order to be able to perform many aspects of its functions. The impunity to politicians and a wide array of public officials, and the prior authorisation and preliminary permission system for investigations aimed at ensuring the judicial accountability of other civil servants and public officers – also even those concerning personal offences of some officers – have indeed made the capacity of the judiciary power to perform its functions dependent upon, and subject to, other powers.

(b) The Merit of Constituent Elements of Judiciary Power, and the Issue of Objectivity in Appointments

Rules and practices regarding the appointment, career advancement and promotion of judges are of particular interest in relation to the independence, impartiality and accountability of the judiciary power. For instance, if judges are appointed by the executive organ, the court members appointed as such are thought to be deeply bound to the appointer in loyalty or in other forms; this view may only be an impression contrary to facts, or it may, conversely, reflect the true situation, but the impression is, in any case, perceived as reality, even if it is contrary to the facts. This is why all appointment and career advancement decisions and processes from the lowest stages to the top levels in the hierarchy of the judiciary system should absolutely be designed and operated in such manner as to secure impartiality and assure the application of the principle of merit.

In appointments to the highest levels of the judiciary system, the influence of the power groups that are established and exist in the judiciary system should be minimised, and all appointments should be made independently and impartially as a result of a transparent process conducted within the knowledge and with the approval of society. To this end, all appointing persons and entities should be transparent and accountable, and all of their de-

cisions and actions should be reinforced and strengthened through transparency and, if needed, judicial accountability, thereby building public trust towards the judiciary system.

Judges should be appointed definitely on the principle of merit, but also taking into consideration the profession's fundamental need for life experience, and the factors of age and past professional experience – i.e. seniority should be a factor in making decisions on appointments, alongside merit. The appointment of judges according to their professional merit and seniority is an obvious requirement not only for building public trust in the judiciary but also for developing trust within the judiciary system itself and amongst its professionals.

On the other hand, the accountability of the judiciary power also requires the principle of transparency. To this end, besides merit, in all appointments within the judiciary system, also including appointments to the supreme boards and councils thereof, the appointment processes should certainly be transparent, thereby demonstrating and proving that only capable candidates are appointed according to objective criteria, and that objectivity is assured and sustained in appointments. In doing so, it would also be assured that the appointers are transparent and accountable.

In all types of appointments to judicial positions and functions, notably in the appointment of members of higher judicial bodies, disclosure to the public of the data used for objective assessment and to prove the merit of appointees, as well as their personal data and information setting forth that they are eligible and fit for such important positions and functions, and that they will use all powers vested in them in compliance with their job definition, and that society respects and esteems them, and will continue to do so, is imperatively necessary for the operation of a process for public participation therein, for the enhancement of trust in judicial system professionals, and to earn and sustain the reputation of and esteem for judiciary power. Sharing with the public, clearly and objectively, the criteria that are the basis for which

judges are appointed to which positions, and ensuring that the public accept such appointments as justifiable and legitimate, are amongst the conditions precedent to the building of trust in the system. Actions required to be taken to this end are: to ensure that all decisions and transactions in the process of the determination, nomination, election and appointment of candidates are handled transparently and are held open to judicial review and supervision that may, at any time, be initiated by anyone having an interest therein; and especially, to permit anyone related thereto, also including relevant non-governmental organisations, to take part in debates in the course of assessment and, if need be, to participate in the processes of judicial review and supervision, and to induce others to do so, even if they are not willing. Hence, contestations, pleas and remedies against appointment decisions in the judicial system should be open, and all persons having an interest therein should be permitted and empowered to participate in that process.

At present, the lack of remedies and supervisions against decisions with respect to the appointment, career advancement and promotion of the members of the CoJP), and of judges and prosecutors by the CoJP, is a capital error, and it is certainly a requirement to open these actions to remedies and judicial reviews and, to this end, to organise an independent court entrusted with tasks relating thereto.

(c) The Issues of Transparency, Publicity and Justification in Trials and Proceedings

The first arena of transparency in the course of the use of jurisdiction in the name of the nation is the court hall, and for this reason, all trials and hearings should be overt and public, i.e. should be open to everyone. However, it is also a great mistake to restrict this concept to only those individuals who are able to enter the court halls and directly observe court hearings. To the contrary, the term "public" should be interpreted broadly, and the

final conclusion should be that individuals have the right to ease of access to all stages of trials and proceedings, and to form opinions about trials and procedures of adjudication. Public judgement may be greatly enhanced if, and to the extent that, information on trials and proceedings is disclosed to willing individuals without the need for them to physically attend the court halls, and without any interruption or delay in their daily routine activities, through the use of all kinds of means and opportunities created by the technologies of our day. Given the prevalence of internet-based video conferencing, electronic mail, and information distribution systems that allow instant information distribution and circulation to millions of people at the same time, transparency in trials and proceedings may be developed to contemporary levels. For instance, court hearings may be broadcast live via the internet.

To this end, the practice of dictation of the record of a trial by the judge should be discontinued, and the prohibition and offence of taking records in court hearings, which enables judiciary professionals to whitewash their faults and leads to non-detection of some acts and behaviours causing complaints among the public, should be eliminated.

On the other hand, the inability of the public to acquire adequate data and information on a great number of events that it is closely interested in gives cause for the dissemination of prejudiced speculations about judicial activities, institutions and elements, and the members thereof – particularly at the stage of measures taken, such as detention and arrest – which in turn paves the way for an impairment of trust in the judiciary system. For the sake of raising the level of trust therein, notably in the case of incidents requiring restriction of personal freedoms, the public should be kept closely informed thereof through the disclosure of adequate and required information, in a timely fashion. Minimum standards that deal with the contents and methods of such acts of information-sharing should be formulated and made public via the media through press bulletins or statements, or through other similar methods.

Although all decisions rendered in public trials and hearings should be accessible to the public, some restrictions are in place which create problems in accessing court judgements and rulings. All decisions taken by juridical authorities and the courts should absolutely be published and be made accessible, freely, via electronic media. No difference in applications should be allowed amongst civil, administrative and criminal courts in connection therewith. Broadcasting and publishing organisations that provide the opportunity to electronically publish, and that provide easy access to court judgements and rulings, should be strengthened so as to both facilitate access to decisions and increase the coverage and scope of judicial services. By strengthening the processes for making court judgements and rulings public, the confidence that the courts are strictly applying the law in the cases referred to them, irrespective of the sides thereof, and thus that the rule (supremacy) of law is adopted therein, should be instilled and corroborated in public opinion.

Another important aspect of transparency is justification. Justification determines the content quality of court judgements and rulings and the health of the prosecution and judgement process, and of the conclusion derived at the end of the process. Accordingly, justification provides deep transparency supporting the determination of compliance with the law in the course of the use of jurisdiction. For this reason, a reasonable and valid justification for court judgements and rulings requires the court to provide reasonable and proper explanations justifying the court decision in terms of the acceptance or refusal of claims and defences asserted therein, to ensure that the reader may come to the same conclusion.

Nonetheless, even though progress has been made in terms of the justification of court judgements and rulings in recent years, both the courts of first instance and courts of appeal may, from time to time, make decisions and give rulings using frivolous statements that cannot be accepted as serious justification, such as "[the case] be dismissed because of lack of propriety and legitimacy", "[the case] be accepted as it is found proper and justified in terms of procedural

law and the merits of the case" or "the case is not found acceptable in terms of the evidence," and they may occasionally allege as a pretext or excuse for the non-performance of their job duties such reasons as work burden and lack of adequate time, which never has any bearing on ordinary citizens.

(d) The Issue of De Facto Delegation of Jurisdiction

As also stated in the decision of the United Nations in the preceding sections, in the cases referred to them, the courts should issue their judgements and rulings according to the facts and in strict compliance with the laws, and should by no means be under any influence. The jurisdictional powers should be used only by courts that are independent and impartial juridical authorities, and by judges duly appointed and assigned according to the principle of natural judgeship, and these powers should not be delegated nor left to any person or entity other than the trial court judge. However, Turkish juridical bodies may occasionally delegate their jurisdictional powers to persons or entities outside of the judicial system. Many just and unjust excuses are generated for this, and almost-institutionalised methods have been developed, for such delegation of jurisdictional powers, in breach of the law.

(i) In Criminal Prosecutions

Firstly, it must be expressed that as a manifestation of the trust and importance attributed to them beyond the normal limits of their natural functions contrary to the nature and requirements (dialectics) of the fair trial principle, public prosecutors share and use the same bench, case files and building as the judges in the courts. The public prosecutor, despite being counsel for the prosecution, sits at a higher bench than the defence side in court trials and proceedings rather than at an equal level, and works hand in hand with the judge, and this has been rightly criticised for many years.

It is also required to underline the fact that public prosecutors, although not being a court or a judge, have almost come to dispense justice to citizens through their verdicts of non-prosecution (nolle prosequi), given or not given, or by means of their bills of indictment, resulting in conviction or acquittal, thus making a contribution to the impairment of society's trust in justice.

More importantly, public prosecutors occasionally use extraordinary powers as if they are judges, have suspects detained and summoned before them, and interrogate them or, from time to time, do not personally use their interrogation powers but have the suspects interrogated by security forces. Although the law did not actually authorise them to do so until the decree-laws enacted and issued after the July 15 coup attempt, as a result of and in reliance upon traditionalised de facto applications by public prosecutors, security forces question and take the testimony of suspects by substituting for the office of public prosecutor, as if they were authorised by the law to engage in these activities.

Suspects who are indeed required to be brought before a judge as soon as possible after the moment of deprivation of their freedom are first detained and kept in custody in police stations. Under the pressure of having been seized, and considering the environment of police stations, individuals are questioned by police officers. Suspects not yet known to be guilty or innocent are detained, or subject to similar other treatments, until the end of the longest period of detention, at the sole choice and discretion of the security forces. Thus, suspects are in some ways disciplined or acquitted in police stations, again, in the opinion of the security forces. Then, having already been detained and interrogated in police stations, the suspects are questioned once more by the prosecutor before whom "they are summoned and ordered to appear." It is unequivocally true the repetition of these interrogations is unnecessary and punitive or retributive, on the part of the interrogator.

Recognition of the right of suspects to defence counsel at the time of detention and interrogation, the presence of defence

counsel during the interrogation, and the granting of rights to objection by the defence counsel may, by no means, be adequate to enforce all constitutional and legal protections vested in detainees, unless and until defence counsel is allowed to efficiently control and supervise all of the steps taken by the security forces throughout the course of that process, and to recover and resolve non-conformities.

Public prosecutors are also entrusted with the task of administering the courthouses that contain the courts and, in addition, work in offices that are adjacent to those of the judges in courthouses, but are more grandiose and spectacular than those of the judges and indeed than the courtrooms themselves. Hence, the appearance of the public prosecutors' offices is damaging to the reputation required for the independence of the courts.

Likewise, the use of some of the powers vested in public prosecutors by, in particular, inspection boards of public administrators, inspectors and other administrative authorities, or by security forces authorised to manage and handle investigations in the name of the public prosecutor, impairs the trust of citizens in justice and may, from time to time, pave the way for acts of injustice.

(ii) In Administrative and Civil Trials and Proceedings

In almost all civil proceedings, although it is explicitly forbidden by the law, judges appoint panels of legal experts; they are then required to comply with the experts' recommendations, causing them to act unlawfully through de facto delegation of judicial powers to court-appointed experts.

The principle of party publicity, being the fundamental principle of the law of trial procedures that requires court hearings to be open to the parties at all times, and requires the parties to attend the court hearings held during the course of trials, is seriously and commonly breached, particularly during expert review. Notwithstanding the above, a systematic breach of the principle of

party publicity during expert review is not a problem encountered only in civil law procedures, as the same problem also surfaces in criminal law procedures.

> A flawed opinion has argued that the judiciary's workload is heavy and judges do not have enough time, that the meeting of the parties with experts is unnecessary and that loss of time dominates initiatives aimed at developing trial processes. However, this flawed opinion does not even address the fact that as a result of concessions made from the requirements of the trial process, trials and legal proceedings are becoming a de facto inquisition by judges and experts. It is critical to ensure that disputes are resolved through the right decision-making and that justice is established and secured, and also to ensure that the case files brought forward to the courts are concluded at the highest rate, and as quickly as possible.

The court practice of concluding a case only after taking an expert opinion in the course of trial procedures was initiated in good faith and for practical reasons, so as to enable judges to take more pointed and unerring decisions prior to the 1980s when something approaching a privileged caste system had emerged in the judiciary system. However, this same practice has now become almost a non-voluntary, obligatory rule as a result of judicial precedents over time, has entwined with the judiciary system like poison ivy, has deviated from its genuine fine purpose expressed at the beginning, and has reached a level that systematically breaches the principle of party publicity. Judicial precedents defending the idea that judges should make their decisions in reliance upon expert opinions that confirm each other or, otherwise, the judge should refute the expert opinions with justification, have forced judges to make their decisions and judgements according to consistent and

non-contradictory expert opinions. As a matter of fact, it is unequivocally obvious that a judge in need of an expert to conclude a case does not have the scientific competence to refute expert opinions and, thus, will feel himself obliged to make his decisions and judgements according to expert opinions alone. In the end, the tendency to look to expertise surveys for the resolution of problems of the judiciary has further restricted the movement of parties and judges, and has resulted in the courts being confined to a clan of experts created for that purpose.

On the other hand, excuses have been made that the rush of business and the backlog of work of the judges have paved the way for concessions made in favour of judges, even from trial procedures and rules and the fundamental principles of legal pro- ceedings. The solution to the reality of the failure of the judiciary to perform its duties and responsibilities effectively and efficiently, and to conclude the cases and disputes referred to it in a reasonable period of time, has been to soften trial rules and principles such that they bend in favour of the judges, and even fundamental principles have become open to being sacrificed and open to compromises. Trials have ceased to be civilised platforms of debate wherein claims, defences and evidence are discussed before the judge and, at the end, the judge formulates his judgement to reflect the consequences of such discussion, and have come to be a process of collecting documents and petitions wherein experts, unknown by and unidentified to the parties, are assigned to prepare flimsy and lightweight reports that advise a method of conclusion for the resolution of the matters disputed between the parties.

Even the summoning to a court hearing of experts issuing incomplete, faulty and even sham (contrary to the facts) reports in response to the claims and defences of the parties, and even the right of parties to ask questions to the experts, have been left to the discretion of the judges, who are snowed under with their caseloads and have no time. Hence, the platform for debate required of trials is not created in most cases. The parties are not granted the

right to cross-examine the individuals appointed as experts who will occasionally be relied upon, or will have an essential effect on, their pending cases.

For the correction of even the simplest mistakes, the parties are forced to write and submit fatiguing petitions causing delays and, on top of it all, are never answered in a satisfactory manner. The right of defence is censored by judges, and questions are transmitted to experts in the form of letters that, most of the time, are not answered thoroughly or as they should be. **Trials have almost become an exchange of letters inter absentes.** Save for certain exceptions, during this procedural process that is fairly effective as to the consequence of trials, the parties are not allowed to bring into the open any deficiencies, conflicts and contradictions by coming together with, asking questions of and receiving answers from the experts. In consideration of this, the nature of trials that require face-to-face discussion is denied in the name of the judiciary. Experts are summoned to and are interrogated in court hearings only in exceptional cases and if deemed necessary by the judge. In other cases, in order for the judge to give credence to the experts, the content of the expert reports is deemed to be adequate. Trials have almost transformed into a generator of case files aiming to feed and maintain the monster-log of experts. Under these circumstances, rather than using the courts for these trials, would it not be more rational and reasonable to appoint experts as judges, and to hold the hearings in their offices outside of the court halls?

These widespread practices that go far beyond their original purposes have ended up with the de facto delegation of jurisdiction to experts, and have transformed judges almost into officers who only collect the required documents and evidence for submission to experts in the course of legal proceedings.

The judiciary is offloading the blame of its own inefficiency onto the citizens seeking justice and, as a result, for very simple conflicts that should easily be resolved in a few hours had a trial been organised as it should have been, the parties are forced to

work day after day, and to write and present numerous reiterating petitions and bills. To put it in other words, the judiciary is trying to conceal its own inefficiency by imposing labour, time and monetary costs and burdens on citizens, and, even so, it still fails to adjudicate fair decisions and judgements in an efficient manner.

All of the disadvantages and inconveniences of the expert system, which is already rotten to the core, have their reflections in the trial system, and "court justice" is harmed and tarnished by use of the expert system. For these reasons, the expert system, which prevents the professional development of judges as well as reducing and eliminating satisfaction in court judgements made as a result of trials, and which seriously precludes the provision of quality trial services, should urgently be corrected and reformed in conformity with the nature of trials. The expert system has become so putrid that the intention underlying Expertise System Law No. 6754, enacted in 2016, was to try to discipline and take the system under control. Even though the intentions underlying this law are sincere and good, it is already obvious that it will lead to far worse results that are the exact opposite of these intentions – such as the institutionalisation of such rottenness.

An "expert" is required to be far ahead of, to be more knowledgeable than, others in any specific profession or craft. However, this law has artificially created a strange profession under the name of "Court Expert". Thus, an odd professional group has emerged composed of members whose usual trading duties or jobs are mostly non-existent, and who are therefore willing to earn the fairly low expert fees payable by the courts, as well as various "other"revenues that may be obtained thanks to their expert activities and job titles. These "Court Experts" who are entrusted with the task of examining and opining on the evidence that is indeed required to be discussed by the parties and the judge throughout the course of a court hearing, and who may thus have influence over the decisions of the judges through their opinions, are, in this respect, emulating the vice chancellor (assistant judge) system applied in Germany.

These individuals who function just like a judge, and who have significant effects on the performance of the duties of a judge, are chosen, determined and listed by methods of administrative law, and judges are required to make their choice from amongst these listed individuals. At present, experts issue their reports mostly without conducting adequate examination and with unnecessary delays of months, and, most of the time, they express deficient, unfair and erroneous opinions and, even though this does great harm to legal proceedings and trials, they are not held liable by any means because, even though to express opinions contrary to the facts has been defined and categorised as an offence, such acts cannot be prosecuted unless and until the court judgement or verdict that has relied upon such opinions becomes final. In order to have an court judgement that has relied on an expert report containing opinions contrary to the facts dismissed or reversed, the injured party is obliged and forced to deal with appeal processes for years, and this in turn makes it effectively impossible for anyone to prosecute and pursue such acts. Another problematic point is that these individuals, who are considered to be so very important to the judiciary, are not even summoned to appear before the courts, and cannot be questioned during the course of the trials, save for certain exceptions.

In a manner of speaking, this problem, which may do far greater harm to the judiciary than those done thus far by creating a marshland that will inevitably be institutionalised, and the existing rancidness and rottenness to the core may swallow up the entire judiciary system, must be resolved in a rational and reasonable manner, and as soon as possible. Whether the subject matter of the dispute is tangible or intangible, that dispute belongs directly to the parties to it. Even if the state is also a party to a dispute, the state's act of creating an expert system that alone will determine the progress and consequence of legal proceedings is contrary both to the fair trial principle and to the principle of impartiality.

All actions and steps taken in legal proceedings are of par-

ticular concern to the parties and the court, and the state is expected only to equip the courts with adequate human and other resources. If, solely in order to obtain support in trials without prejudice to judicial independence and impartiality, the state wishes to register the individuals to be assigned as experts in the courts, and to monitor and record how they perform and fulfil their functions, this, although it is still a sensitive issue, may perhaps be acceptable due to the good faith and good intentions behind it. However, if the state intends to determine and choose individuals to be assigned as experts in the courts, and to force the courts to appoint these individuals, then such an act constitutes an open and severe intervention in an independent and impartial judiciary.

For these reasons, all provisions of the aforementioned Expert System Law, but for its provisions pertaining to a registry to be maintained of experts, should be repealed as soon as possible, and the use of the expert system as a method of delegation of the jurisdictional powers and duties of courts should be absolutely prevented. Only the parties who deem it necessary for proof of their claims and defences, as the case may be, must, if they so wish, be permitted to obtain expert opinions within the discipline rules of judicature and to submit the same to the court; and, within this process, the courts must be held liable to take only actions and measures that aim to ensure that the expert opinions collected, as above, are healthy, reliable and sound. In connection therewith, any probable loss should be recouped as soon as possible through urgent legislative arrangements, in keeping with the comments expressed by the Better Judiciary Association prior to the enactment of the draft law.

On the other hand, the archaic procedure of submission and disclosure of evidence as "proof of arguments," employed particularly in civil law procedures, has ended up in the disclosure or concealment of only certain facts, to the extent that they are provable. Leaving it to the discretion of parties to submit and disclose the evidence required for the resolution of disputes has brought civil

law procedures (and courts) to a position where they may efficiently resolve lawsuits and disputes on common expenses of apartment buildings, for instance, but are incapable of resolving more complicated and comprehensive lawsuits. This is why even in commercial courts presided over by the most competent judges, it takes tens of years to resolve complicated and comprehensive lawsuits, and even though a long time is spent therein, quality and satisfactory judgements are still not reached.

Our courts are by no means capable of resolving such disputes as company law cases that may arise between investors and intermediary institutions in capital markets or in companies that are not controlled by a certain capital group, alone, most notably in publicly held corporations; disputes regarding investments that are subject to complex and complicated relations bringing together innovators, financiers and incentive organisations; and legal cases arising out of consortium and joint venture agreements; and disputes with respect to large infrastructural investments, insurance and, particularly, reassurance, in an efficient and effective manner as required by the economy, within reasonable periods of time, and by protecting and maintaining the ongoing economic relations amongst the parties affected therefrom.

For the reasons cited above, the business world is endeavouring to exclude from the state judicial system, and even from the country, such types of disputes that may indeed be great income sources for the legal system as a whole, and for law professionals. Though the added value to be brought to the legal services market by a dispute having an average value of US$5 million in terms of the object of litigation may easily exceed $1 million if resolved in Turkey, deservedly, such types of dispute are presently referred and escalated to the International Court of Arbitration of the International Chamber of Commerce in Paris, to other arbitration courts, or even to British courts or courts of other developed countries. Hence, while on the one hand our lawyers complain about the scarcity of jobs and revenues, on the other hand, such legal services

offering a great opportunity of income are excluded from the system and from our country. To reverse this trend may be possible only through comprehensive judicial reform, taking the skills of contemporaries into consideration and aiming to do better.

The Issue of the Non-accountability of Elements of the Judicial System

Society's defending the independence of the judiciary depends upon whether the judiciary power is giving, or can give, an account of the use of the powers and authorisations vested in it for the original intended purposes thereof, and the non-use of said powers and authorisations arbitrarily or for malicious purposes. For this reason, in Article 33 of "Minimum Standards of Judicial Independence" adopted and published by the IBA in 1982, it is stated that judges are by no means immune from the principle of accountability.

To begin with, the top-level judicial bodies, senior management and their members within the judicial system should be efficiently and practically accountable. However, regulations leaving even essential accountability for their own judgements to their own or their institutions' discretion protect the members of higher judicial bodies and senior executives of the state with lifelong immunity and exemption and, as a result, fail to provide a remedy for the neglect of duty, as they cannot be called to account for breach of duty, even for personal offences.

While the most fundamental duty of the higher judicial bodies is to assure accountability in state governance, in practice they have gone against this duty and legal and de facto exemptions and immunities that make the members of higher judicial bodies

non-accountable even in breach of duty or for personal offences have penetrated into the senior managing bodies of the government. As a result, non-accountability has metastasised into the senior management of the government just like a cancer. Thus, indeed, has the approach of seeking a decision by the Supreme Court of Appeals itself on the investigation of breaches of duty and personal offences of its own members, as depicted in Article 46 of the Supreme Court of Appeals Law, has spread into the State Council (Article 76(3) and (4) and Article 82), the Supreme Court of Public Accounts (Article 66(1), (3) and (6)), the BRSA (Banking Regulation and Supervision Authority; Article 104(2)) and the BTIK (Information Technologies and Communication Authority; Article 5(10)) (see Table 2). This has, on the one hand, resulted in a restriction of the powers of the judicial bodies and, on the other hand, ended up in the legal restriction or de facto elimination of accountability to the public, particularly in the top managing bodies of the government. It has paved the way for arbitrariness in public administration, thus leading to injustice and, gradually, to the disengagement of and polarisation between the state and civil servants on the one side and citizens on the other.

It is unequivocally obvious that society will acutely avoid giving account to a judiciary that is itself not accountable and that, as a result, the judiciary will not be capable of thoroughly performing its function of serving as a system of checks and balances. The judiciary is required to be effectively and efficiently accountable itself, given that it is responsible for assuring accountability in all segments of the society, especially in public administration. To ensure this, the judiciary and all of its organisational units, bodies and elements should be at the ready to share all of their information, transparently, to answer any questions asked of them, and to be subject to judicial review by an external authority of their compliance with the law and whether they are performing their functions independently, impartially, efficiently, effectively and in conformity with universal legal values and principles.

Table 2: Provisions of the Supreme Court of Appeals, State Council, Supreme Court of Public Accounts, BRSA and BTIK pertaining to the Investigation of Offences

Supreme Court of Appeals	State Council	Supreme Court of Public Accounts	BRSA	BTIK
Examination, Investigation and Prosecution of Offences: Personal and Job-related Offences: Article 46. Beginning an investigation into job-related or personal offences of the first president, first vice-presidents, department heads and members of the Supreme Court of Appeals is dependent upon a decision of the First Presidency Board. […] The First Presidency Board will, if it deems it necessary, assign one of the criminal department heads to a preliminary investigation or, otherwise, it decides to cancel the case file. This decision is final. Then, the department head assigned to the investigation will, after completion of the investigation, refer the case file to the First Presidency Board. […] The First Presidency Board […] will, if final investigation is deemed unnecessary, decide to cancel the case file […]. Decisions as to cancellation of case files are final.	Criminal Prosecution and Investigation: Article 76(1). For the offences arising out of job duties of or committed during, performance of job duties by the president, attorney general, vice-presidents, department heads and members of the State Council, a first investigation is conducted by a committee composed of one department head and two members to be chosen by the State Council president. (3). […] The case file is sent by the State Council president or vice president to the Council of State for Administrative Cases for decision-making purposes. Decisions made by said Council are notified to the suspect and, if any, to the complainant. (4). A ban on trial decisions is examined, automatically and ex officio, while decisions as to the start of a final investigation are examined upon an objection in the State Council General Assembly in absence of the chairperson and members of the Council of State for Administrative Cases. Procedures of Prosecution for Personal Offences: Article 82(1). In the prosecution of personal offences committed by the president of the State Council, vice-presidents, members and chairpersons of chambers, provisions of the law pertaining to prosecution of personal offences committed by the president, chief prosecutor of the Republic, and members of the Supreme Court of Appeals.	Criminal Prosecution against the president, department heads and members of the Supreme Court of Public Accounts: Article 66(1). For job-related offences alleged to have been committed by the president, department heads and members of the Supreme Court of Public Accounts, a preliminary examination will be conducted by a committee composed of 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 documents will be submitted to the Board of Chambers for a decision as to whether investigation permission will be granted, or not. […] Decisions of the General Assembly as to refusal to give permission for investigation are final. Decisions as to granting investigation permissions are taken by affirmative vote of a two-thirds majority of members present in the meeting. (3). If any one of the persons listed in the preceding paragraph commits a personal offence not linked or related to his job duties but committed during performance of his job duties, the decision-making process as to giving or not giving investigation permission will be carried out according to the procedures set down in this article. (6). In prosecutions to be carried out for personal offences committed by them and not linked or related to their job duties, the law provisions pertaining to prosecution of personal offences of members of the Supreme Court of Appeals will be enforced.	Criminal and Civil Liabilities of Board Members and Personnel of the Authority: Article 104. Investigations regarding offences alleged to have been committed by the board chairperson and members and personnel of the Authority are conducted according to general law provisions only through the prior consent of the relevant minister for the board chairperson and members, and with the prior consent of the president for personnel of the Authority. In investigations regarding offences alleged to have been committed collectively by board members and personnel of the Authority, investigation permission for the personnel of the Authority may only be given by the relevant minister. […] For investigation permission relating to […] crimes and offences, there should be adequate evidence proving that these individuals have, in fact, acted deliberately with the intention of deriving benefits for themselves or third parties, or causing harm to the Authority or third parties, and have, in actual fact, obtained benefits for themselves or third parties.	Law No. 2813, Article 5(10). Board members and personnel (of the Information Technologies and Communication Authority) shall be considered and treated as civil servants as well as public officers in terms of offences committed by them due to, or during, performance of their job duties or offences committed against them. Investigation permission is given by the relevant minister for the president and members, and by the president for personnel of the Authority. With respect to criminal and civil liabilities of board members and personnel of the Authority, the provisions of Article 104 of Banking Law No. 5411 dated October 19, 2005, are applied and executed.

Contrary to the requirements of accountability, the CoJPare entrusted with excessively broad essential duties, functions and powers, such as electing members to the Supreme Court of Appeals and the State Council, which stand at the most critical point of the judicature; opening and closing courts; and acceptance into the profession, appointment, transfer, promotion, discipline, dismissal or removal from public office of judges and public prosecutors. Ensuring their accountability should be the responsibility of a higher judicial body not accountable pursuant to Constitutional Law.

In spite of the above, apart from decisions as to the penalty of removal from public office, decisions and actions taken by the CoJPwithin such a broad range, each having constitutional and vitally important features and consequences, are final, without any manner of or right to appeal or objection against them. An internal right of appeal is in place that is submitted directly to the CoJP-only against decisions as to the penalty of removal from public office. This remedy is, indeed, not even an appeal or objection but only an application for review and reassessment of the underlying decision – but nevertheless, it is termed an objection. This right of application that can in no respect be described as a judicial review or remedy cannot be said to be sufficient in order to efficiently protect the rights of affected individuals, or to fulfil the requirements of the right to legal recourse.

Prior to the 2016 referendum, out of 22 members of the HSK, seven were elected by the executive organ, five by the members of higher judicial bodies and 10 by members of the courts of first instance. Following the referendum, out of 13 members of the HSK, seven are elected by the majority of the TGNA and six by the executive organ, and investigation or prosecution of disciplinary and juridical offences or crimes of HSK members now requires the prior consent of other members of the Council in the General Assembly thereof. Refusal to give consent leads to non-liability, immunity and non-accountability, in perpetuity.

On the other hand, both the CoJPand, particularly, the supreme courts have the sole and final discretion and option, even in the investigation and prosecution of non-job-related offences of their members, and no legal or judicial reviews or remedies are available against their decisions pertaining thereto. Judicial bodies and elements are non-accountable even for personal offences, and – leaving aside the imposition of any sanctions – an investigation cannot even be opened against them if it is not deemed necessary by their own institution, not only for simple misdemeanours such as, for instance, breach of parking bans but also for extremely serious crimes or acts that typically constitute a crime, such as bribery or corruption. All of these facts damage and tarnish the reliability of the judicature, thereby leading to loss of social support for the institution and its members.

In the event covered by the acquittal sentence rendered in Case File No. 2011/1, Decree No. 2012/1, dated December 19, 2012, given by the Constitutional Court as and in the capacity of the Supreme Criminal Tribunal, members of higher judicial bodies who were indeed required to be condemned according to public opinion were, in fact, acquitted – through interpretation of certain

judicatory principles in their favour. As seen in coverage of the event in Der Spiegel magazine and as also reflected in the Turkish media, a foreign bank may have bribed the Turkish judiciary, but the Board of Presidents of the Supreme Court of Appeals rendered a final decision of non-investigation. All such findings surely serve to impair, if not destroy, trust in higher judicial bodies and their members.

The decision in Decree Case File No. 1976/43, Decree No. 1977/4, dated January 27, 1977, given by the Constitutional Court, holds that denying judicial remedies in relation to such types of powers and decisions is contrary to the fundamental principles of the Constitution and that the reasons put forward to support doing so are not correct and sound, because *"the composition of an institution of administrative type of members of higher judicial bodies does not justify or necessitate the exemption of its decisions from judicial review. As a matter of fact, administrative decisions and actions taken by the highest and most senior officers of the State are also subject to judicial review, because judicial review has some unique and sui generis rules of its own. Review is required to be conducted and concluded in strict compliance with these rules. Furthermore, the argument is not consistent or acceptable that as the president and members of the related board have been elected from members of the Supreme Court of Appeals, it is neither necessary, nor useful, to hold the decisions of this board subject to any other audit or supervision."*

What is more, leaving members' accountability to the discretion and decision of their own institutions and colleagues leads to the formation of a type of negative solidarity and the establishment of coalitions, thus causing deteriorating standards that allow non-accountability to permeate such institutions.

As a result of these developments, and as is also clear from the falling trust in the judicature demonstrated by opinion polls, a great part of the society feels a lack of confidence in judicial bodies, courts and their members, as they are perceived to be untouchable, immune and exempt from any kind of responsibility. Although so-

ciety lodges complaints to the effect that they are neglecting and breaching their job duties, and that some of the judiciary have been involved in crimes, only a few individual cases have been referred to the Supreme Criminal Tribunal over the past decades and this, in turn, emphasises the fact that accountability is seriously hindered in the judicature.

Members of the CoJPand other supreme courts are non-accountable and the performance of their functions has almost been left to the conscience and perceived good faith of their members, and these facts are reasonable and valid grounds for the desire to take the board under control and to exert pressure on its independence at all times.

For the reasons outlined in the preceding paragraphs, judicial reviews and remedies should be provided against all decisions and actions of bodies and other elements of the judicial system, and any personal offences they are suspected of, either related or unrelated to their job duties, should be investigated and prosecuted without the need for prior consent and, in any event, by authorities and utilising methods appropriate to the sensitivity required by their job positions. Thereby, all bodies, organs and elements of the judicature should be ensured to be effectively and efficiently accountable. Just and valid concerns, such as the need to protect the independence and impartiality of the CoJPand the Supreme Courts of Appeal, as required by their job duties and functions, cannot constitute just cause for making concessions from their accountability or for holding them legally or de facto exempt immune or not responsible for any act they commit that constitutes a crime.

Stare Decisis and Single Jurisdiction Issues

The rule (supremacy) of law and the equality of every person before the law may be achieved only by ensuring that the interpretation and enforcement of laws, even if they are indistinct and contradictory, does not vary from one court to another, according to judges, persons or entities involved, or from public to private –

i.e. through the stare decisis principle, meaning "let the decision stand". The uniform application of the law and, thus, legal certainty, clarity and predictability can also be guaranteed through the stare decisis principle. Furthermore, this principle is closely linked to the institutional accountability of the judicature, as well as the individual accountability of each of its members. The judicature, failing to abide by the stare decisis principle, cannot be said to be accountable in any respect. Hence, in the absence of stare decisis, the judicature fails in accountability.

The stare decisis principle also requires a single jurisdiction. However, on the other hand, it is also known that courts need to be specialised on certain issues and disputes in order to be able to give effective, efficient and correct decisions. Even though the courts may be subdivided due to the need for specialisation, the rule of law must be applicable to them by definite, clear and invariable lines, and must not be separated or subdivided. At the end, what we have at hand is the enforcement of the same rules of law by different courts, leading to an inevitable difference amongst

court rulings and opinions. At times, we may even face differences between rulings and opinions of courts of the same discipline. In Turkey, as in many other nations, differences and conflicts may arise amongst court rulings and opinions in many fields of law.

The need for specialization in the judicature is based upon the need to enhance the quality of judicial services in their rulings and judgments, as well as similar other just causes and reasons. However, building different courts according to different groups in the same field of law is not a requirement of specialization. For instance, it is plausible and makes sense to build tax courts or administrative courts specialized in issues or problems concerning the relations between administration and citizens, but it does not make sense to separate the administrative courts into military and non-military courts. Similarly, even though it is rational to establish criminal courts specialized in criminal law issues, it does not make sense to subdivide the courts trying criminal cases and suits of civilians from those that try criminal cases and suits of soldiers.

The formation or organization of different, separate juridical authorities, and different, separate courts of appeal inside each of them, damages the belief in justice, not only by leading to the application of different jurisdictional standards in the same or similar cases but also by causing differences amongst court rulings and opinions.

As a result of the referendum, with the exception of such disciplinary authorities or courts as are needed to achieve the discipline required of those with the status of being a soldier, military courts trying the cases and suits only of soldiers have been repealed and removed due to being in non-compliance with the basic principle of equality before the law as depicted in the Constitution, and this step has represented positive progress towards the achievement of stare decisis and single jurisdiction.

On the other hand, the subjects dealt with in legal cases and the legal relations that administrative and tax courts are involved in – even though they are dealing only with administrative and tax-related disputes – are closely related to, and most of the time are exactly the same as, private law relations that the Supreme Court of Appeals and civil courts are involved in. Nevertheless, the same rule of law may be interpreted and implemented in administrative jurisdictions in a manner different from in civil jurisdictions, thereby causing differences amongst court rulings and opinions. For instance, in damages incurred and suffered due to the poor construction of buildings, while civil courts base their decisions and judgements on the principle of the strict and absolute liability of the building owner, administrative courts trying the same types of cases have thus far come to the conclusion that if the building owner is the public administration, its liability is dependent upon its neglect of duty, i.e. service failure, thereby paving the way for different legal precedents on the same issue, and dispute between the Supreme Court of Appeals on one side and the State Council on the other. However, in the legal order, if the building owner's strict and absolute liability is accepted, this basic rule should not vary depending on who owns the building.

Administrative jurisdiction courts wherein the State Council stands as a court of appeal or, in exceptional cases, as a court of first instance are indeed courts specialised in their own fields. Specialisation in jurisdiction is amongst the requirements of our age. However, in practice, the separation of routes of jurisdiction into different fields of specialisation for the sake of specialisation may cause differences amongst court rulings and opinions, as shown in the example given above. It is unacceptable to interpret a certain event or rule of law differently, and to apply different rules in relation to it within the jurisdictional order. Such acts tarnish the trust in justice by causing legal uncertainties and discredit (lack of confidence).

A single and final court of legal precedents and appeals is

needed in order to achieve the stare decisis principle, to close the differences amongst judgements and rulings of courts in different disciplines, and to prevent differentiation and separation of legal precedents according to fields of specialisation of courts. To this end, a method should be found and developed that definitively eliminates the differences amongst court rulings and opinions that may emerge between different jurisdictional routes; at first glance, (i) the merger of the State Council and the Supreme Court of Appeals under the roof of a single court of appeal, or (ii) the formation of a final-appeal authority entrusted with the task of closing the gaps between the legal precedents and rulings of the State Council and the Supreme Court of Appeals, should be considered and assessed as different probable means of solution.

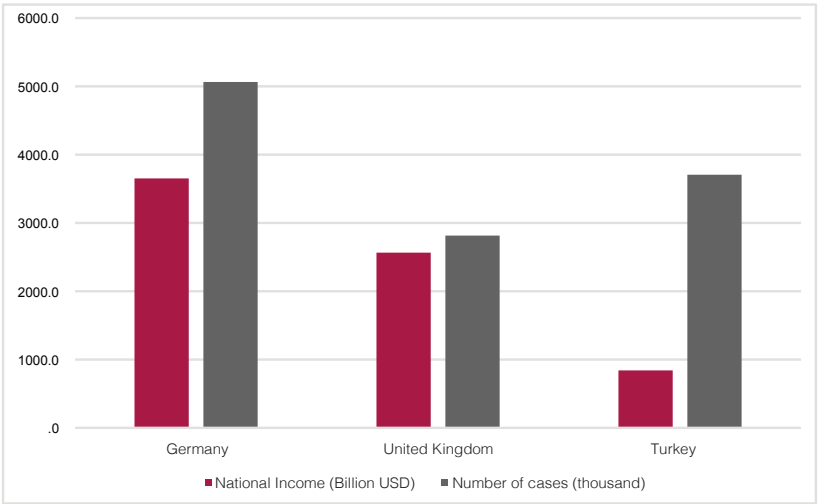
The Issue of the Inefficiency of Judicial Processes and Their Non-compliance with Principles

The judiciary, which is both required and expected to ensure the development and improvement of society through the justice assurance process and to perform a rehabilitative and corrective function in society, is in practice and unfortunately, leading to the decline of society, and individuals who are trained as honest people acting in good faith in an elementary nuclear family environment. There are important indicators of the importance of this sociological reality. For instance, the snowballing number of consumer law disputes arising out of the trade of goods and services stands as an indicator of the lack of adequate trust between suppliers of goods and service providers, on the one hand, and consumers on the other; likewise, the interest and trust shown in foreign-origin goods, and even in goods bearing foreign brands but manufactured in Turkey, is an indicator of the lack of confidence in the domestic legal regime and order applied to local goods. A comparison of the annual national income of Turkey with those of developed countries reveals that Turkey takes the lead in the engagement of disputes, while more developed countries are at the forefront in the production of goods and services. These examples may be easily added to. So many disputes, and so much distrust and lack of confidence, would by no means exist in a country characterised by a judicial system that is further developing society. On the other

hand, the rate of extrajudicial reconciliation of disputes at the pre-court stage, and during litigation, is almost nil, and the basic cause underlying this is that the judiciary is not trusted; on the contrary, judicial processes are open to abuse and are, in fact, abused.

According to official statistics of the Council of Europe European Commission for the Efficiency of Justice (CEPEJ; see Graph 6), of which Turkey is a member, while the British judicial system manages to reach reconciliation in 98% of its civil disputes in courts with 3.5 judges per 100,000 population, the German judicial system, with a budget equal to twice that of Great Britain's system, reaches reconciliation in only 38% of civil disputes in its courts, with 24.5 judges per 100,000 population. In Turkey, whose approach has traditionally followed that of Germany, the rate of reconciliation is below 1%, and this reality is the greatest factor underlying various legal compulsions, such as non-voluntary mediation, in the country in recent years.

Graph 6: Comparison of Number of Lawsuits and National Income between Germany, Great Britain and Turkey



The British judicial system enjoys a worldwide reputation and success in reaching reconciliation in disputes, and records a level of achievement equal to three times the level in Germany, with half the budget and with human resources equal to one-eighth of those of the German judicial system. The secret underlying this achievement is that the principles of honesty and good faith are used efficiently in civil procedures law, and the parties are held strictly liable to disclose and present the events in dispute, together with their evidence and proof thereof, fully, completely and accurately. However, on the other hand, in Germany, as in Turkey, the principles of having "to prove what is pleaded," and "to prove only one's own claims and defences", are valid and applied.

Turkey has truncated the rules and principles of civil procedures law imported in a basic form from Germany, and to a lesser extent from Switzerland, with the excuse of facilitating the business of the judiciary elements, and in civil procedures has cut out vital parts of the system, thereby both precluding the judicial system and its processes from performing their jobs and making them less capable of producing added value for society, thus turning the judicial system into a heavy burden and cost item for society. This is why a very simple legal case, which could be resolved efficiently in a maximum of 100 days through the calculation of an amount of compensation by applying a simple rule of law, in actuality takes on average 1,500 days to resolve in the commercial courts to which the most competent judges of our country are assigned and appointed.

In the end, Turkey produces a greater number and rate of civil disputes and cases than Germany, even though Turkey's GDP is only a quarter the size of that of Germany.

In criminal procedures, wherein personal rights and freedoms are of a more particular concern, the situation is even more pronounced. Turkey has a first-instance criminal procedures system, which may be considered to be composed of three layers, said to be designed so as to ensure that the impact of judicial processes

on the rights and freedoms of citizens are minimised, thereby enabling the judicial system to run and be operated better. Accordingly, in order for an offender to be sanctioned by the system, in the first instance these three layers are required to be passed, followed then by intermediate appeal and final appeal stages.

The first layer of the first-instance stage is handled by public prosecutors, the second layer by criminal courts of peace and the third layer by criminal courts of first instance or assize courts, depending on the type and nature of the crime committed. If and when a crime is alleged to have been committed, the relevant public prosecutor is required to be persuaded, and the relevant criminal court of peace is involved in the process, whether the suspect should be requested to be arrested or to be subject to similar other security measures. When a bill of indictment is issued, the competent court initiates the criminal procedure.

In prosecutions, public prosecutors delegate a material part of their duties and tasks to the security forces; a suspect who is deprived of their freedom is interrogated and questioned firstly by the security forces and then by the relevant public prosecutor. Thereafter, if the public prosecutor decides to formally charge the suspect by issuing a bill of indictment, the criminal procedure is initiated in the competent court having jurisdiction ratione materiae (subject-matter jurisdiction) therein. Thus, until the process is completed by a decision of a public prosecutor or criminal court judge, the accused's freedom is restricted and his/her daily life involves harassment. Included amongst the examples of such harassment are traumatic events such as being led away in handcuffs from a hotel room at dawn, police raids on the home, being kept in the police station until the end of the legal detention period, and maltreatment and assault.

We should also add that when a public prosecutor issues a bill of indictment, the accused is besmirched and dishonoured as if he/she is condemned in part, and as it is commonly believed in society that the justice system is not at all secure in our country

due to the problems of the judiciary, even if the accused is finally acquitted, he/she becomes the object of the never-ending prejudgement of society: "He is surely guilty, but must have washed his hands of the charges one way or the other!"

Another problematic issue is that public prosecutors are entrusted with the task of collecting all evidence in the interest of, or in favour of, both the prosecution and the defence sides, thereby being obliged to serve as a judge, in contradiction of the nature of their one-sided position. This task is, indeed, not easily performed, cannot be fulfilled in daily life practices most of the time and, in fact, goes against the grain. Public prosecutors naturally take their place on the side for or against the event referred or reported to them, and act accordingly. It is unequivocally natural for public prosecutors to handle their case files according to their initial feelings and tendencies; if they reach the conclusion that a crime truly has been committed, they take action in that direction, but if they believe that a crime has by no means been committed, they take that side accordingly. The current practice leads to many injustices, as may be easily understood from the fact that half of criminal cases are completed by a sentence of acquittal. Acting and serving as a judge is a behaviour common to and expected from the one assigned as a judge, not the one assigned for the prosecution or defence in a criminal procedure.

Every complainant standing upon his rights and demanding justice is entitled to expect the collection of all of the relevant evidence, to be tried in a competent court having jurisdiction in his/her case, and to receive a reasoned ruling or verdict of the court. Based on this very simple dialectical logic, these powers vested in public prosecutors should be withdrawn, and should be delegated to the courts of inquiry and evidence that were repealed and abolished – inconsiderately and injudiciously – in the 1980s.

On the other hand, no one should be accused and indicted by a unilateral act of one side of the criminal procedure, i.e. by a bill of indictment issued by public prosecutors. An accusation against an

individual should be absolutely dependent upon a ruling by a competent court, and should be permissible only upon the assessment and evaluation of fully collected evidence by a judge of inquiry, and through evidence collected during the course of the criminal procedure. This procedure has many examples in developed judicial systems. The courts of inquiry, standing as fully impartial and independent from both the prosecution and the defence, should refer criminal case files, with all of the evidence collected and all preliminary interrogations completed, to the competent courts having jurisdiction ratione materiae for final trials and sentencing. This is a prerequisite for a healthy and effective criminal system, and even for implementation of the single-trial principle.

Only if and to the extent that the courts of inquiry and evidence are formed and designated to function as described in the preceding paragraphs, and many judicial duties and powers presently vested in public prosecutors that go against the grain of the judiciary system are delegated to these courts, may the freedoms of individuals be secured and protected more effectively. The right against self-incrimination will be assured and safeguarded if individuals are charged and indicted not at the personal discretion or decision of public prosecutors but only through the ruling of the court that is issued at the end of the criminal procedure.

Measures taken for the good functioning of the criminal justice system are, unfortunately, yielding adverse outcomes and leading to many complaints. According to official statistics, as stated above, half of the individuals who are officially charged and indicted by public prosecutors are cleared of wrongdoing in the end. This may roughly be interpreted as a failure of the public prosecutors in half of their case files. On the other side of this issue, it may also be concluded that half of the individuals who are not charged by the public prosecutors through a judgement of nolle prosequi are in fact guilty, and so half of complainants fail to pursue redress for half of the crimes affecting and harming them. To put it in other words, public prosecutors, who stand in a special position representing the

state in the judiciary system, not only do harm to innocent citizens through their unfair and groundless charges on the one hand but, vicariously, allow criminals to beat charges through judgements of nolle prosequi on the other hand, thereby building a barrier between society and justice, and precluding victims from clearing the hurdles and getting a fair chance of seeing justice served.

Public prosecutors have access to, and take advantage of, a great many legal and actual privileges, despite the principle of equality of arms and the explicit proviso that "everyone is equal before the law" as stated in Article 10 of the Constitution. They are working on the same case files that are used by the judges; they are in the same courthouse as the judges, working together with them; and they have access to the same job security and the same fringe benefits as the judges within the organisation and scope of the Council of Judges and Prosecutors. They also share the same bench as judges, as if they are judges, and, more importantly, they have the authorisation to make use of the public power to which the defence does not have access. Defence counsel may utilise their collection of evidence and other rights only through the public prosecutors' offices. In terms of access and entrance to, and exit from, the courthouses, public prosecutors enjoy many advantages that are by no means comparable to the rights and advantages granted to defence counsel. These problems hinder the performance of defence counsel in their duties in large courthouses, such as the Mehmet Selim Kiraz Campus in Çağlayan and the Anatolian Courthouse of Istanbul.

Furthermore, the use of the word "republic" at the beginning of the job title only of public prosecutors, although they are no more important than defence counsel and judges, also elevates them to a separate and more prestigious position in the eyes of the public. Granting such a privilege only to public prosecutors is in conflict with the independence and impartiality of the judiciary principle. This title, which was added to the name of this component of the judiciary due to certain considerations at the founding

stage of the Republic of Turkey, is no longer necessary in the present day.

In conclusion, Turkey is a society that produces disputes, rather than goods and services; and harasses its people, who would prefer to focus on production in a free environment, through its civil servants, who are expected to protect their rights as cited above, and exerts pressure on their productive activities. To put this in other words, Turkey struggles with the problems it has generated, and the number one factor responsible for this picture is the judiciary and the problems with its processes.

The judiciary problem has become a marshland created by Turkey itself, that gets in the country's own way and restricts its movements. The judiciary system should be reformed and rehabilitated as soon as possible in order to transform it into a system that produces justice, conciliation, peace and welfare for the country. Reforms must be undertaken in order to achieve this objective, and are required to bring sustainable resolutions at least for the following purposes:

(i) The judiciary should be made independent from the executive and legislative organs, and this should be secured and guaranteed by the Constitution.

(ii) All judicial organs and components, particularly the Council of Judges and Prosecutors and the courts of appeal, should be made to be accountable, and this should also be secured and guaranteed by the Constitution; and the accountability of any person or entity should by no means be left to the discretion or decision of the person's own institution or its members or to the entity itself, and, to this end, the following provisions should be included in the Constitution: *"The accountability of public administrations, entities and components, also including the judiciary, may by no means be left to their own decision or discretion, and they may be acquitted and absolved from job-related or*

personal offences only through trial, and whether they should continue in their positions until the end of investigation and prosecution or not is to be decided by the judicial authority handling the prosecution."

(iii) All decisions of judicial bodies and other judiciary-related entities and institutions should be ensured to be made transparently, as a requirement of accountability, and with public participation and consultation; and all appointments to judiciary-related job positions must be based on transparency, merit, objectivity and judicial review principles.

(iv) All investigation permission conditions and other similar restrictions that prevent the independent functioning of the judiciary must be removed and prohibited by the Constitution; and the immunity of civil servants and public officials should be rearranged so as to be limited only through decisions as to whether the investigated officials will be allowed to continue their job or not, and these decisions must not be made by their own institution but by an impartial and independent institution.

(v) The tenure of judges must be strengthened by geographical tenure and, accordingly, judges should be appointable only if they wish to be so, the court they are assigned to must not be changeable, and the non-voluntary rotation of jobs should be clarified by decisions made in advance as to where the judges will take office, for what amount of time, and this rotation of jobs must not be left to the decision of the Council of Judges and Prosecutors at the time of appointment. Judgement and prosecution processes must be developed, and the duration of lawsuits must be shortened so as to ensure that a judge may complete the process and render a decision by the end of his term of office and that if this is not possible or in the case of a change of judge, the judgement process should be reinitiated.

(vi) Considering that granting only a right of application against the decisions of dismissal to the State Council the members of which are appointed by the Council of Judges and Prosecutors is far from establishing adequate job security for judges and prosecutors and that this is entirely inadequate for the assurance of legality, all of the discipline, dismissal and suspension processes concerning judges and prosecutors must be carried out in accordance with the established judgement standards, and all such decisions made and all transactions performed must be subject to judicial review.

(vii) Semi-judicial powers vested in public prosecutors, and shown as the reasoning for their sharing of the same bench, case files and building with judges, must be withdrawn and removed.

(viii) The sharing of the same bench, case files, lodging, building, etc. by judges and public prosecutors, which gives the impression that judges make their decisions and rulings by coming to mutual agreement and in co-operation with public prosecutors, impairs the belief that court rulings and verdicts are issued free of all effects and influences, and must be terminated as soon as possible. In addition, public prosecutors must be reorganised under a board, separate from the Council of Judges and Prosecutors.

(ix) Courts of inquiry, which were abolished in Turkey in the 1980s, must be reinstituted as "Courts of Inquiry, Evidence Collection and Charges" and the criminal courts of peace must be transformed into these courts. The semi-judicial powers presently vested in public prosecutors must be delegated to these courts, and decisions with respect to collection of evidence, security measures, etc., in the course of investigation and prosecution must be guaranteed to be made, bilaterally, by a judiciary body; and against the actions and measures that may be ordered

by these courts that may result in the restriction of freedoms, swift and effective appeal and objection remedies and mechanisms must be made available through the courts staffed by more senior judges, preferably functioning in the form of a panel of judges.

The Courts of Inquiry, Evidence Collection and Charges should serve and function as a filter to decide whether a criminal suit is to be commenced or not, after the collection of all of the evidence and the completion of all preparatory stages, and ensuring delivery to the court of the case files deemed worthy of trial, with all preparations for trial duly completed. Within this framework, the "demurrer to the indictment" mechanism, as stipulated in Article 75 of the Criminal Procedures Act, should be cancelled.

Save for flagrant cases, individuals should be arrested only by a warrant issued by the Court of Inquiry, Evidence Collection and Charges, and except for in flagrant cases, prosecutors or security forces must not be permitted to restrict the freedom of individuals in any manner whatsoever. The courts should be able to issue a warrant only in flagrant cases, crimes of terrorism, and upon the failure of the suspect to respond to a subpoena.

Individuals should be interrogated and questioned only in the Courts of Inquiry, Evidence Collection and Charges competent within the relevant jurisdiction, and security forces or public prosecutors should be allowed to ask questions of suspects only in court. However, public prosecutors should also be obliged to collect evidence identified by the suspect without waiting for interrogations to be made.

The right to remain silent of all individuals must be respected to the maximum extent, but if those who do not

use their right to remain silent, make misstatements, or develop an attitude so as to prevent or complicate trials, knowingly and with malicious intent, such acts should be defined and categorised as offences. Authorising judges to use discretional increase of penalty in response to such misstatements or acts of prevention or complication of trials, rather than using discretional extenuation, should be considered.

(x) As a matter of principle, only in cases of direct interest to the public should public prosecutors be permitted to act for and on behalf of the public; in cases of the personal interests of individuals, their requests for the commencement of criminal suits should be decided not by public prosecutors, but by Courts of Inquiry, Evidence Collection and Charges, at the end of a judicial proceeding. Public prosecutors should be able to intervene as interpleaders to the criminal suits brought forward by individuals if, and to the extent that, participation in the proceedings is deemed useful in the name of the public. To put it in other words, in the prosecution of crimes affecting the personal interests of individuals, public prosecutors should prefer to participate only in those proceedings and trials relating to crimes affecting the public interest, rather than acting as the decision-making authority in bringing a criminal suit in the name of the public on the grounds that each and every crime affects the public interest. In acting thus, public prosecutors should no longer stand as a barrier between citizens and justice, and should no longer be seen as such.

To this end, firstly, in cases of offences that are prosecuted in response to a complaint, the complainant should be empowered to directly commence and bring an action, and public prosecutors, if the case is considered to be in the public interest, should be entitled to participate in

the legal proceeding on the side of whichever party they deem fit.

(xi) In offences and crimes wherein the public is entrusted with the task of ex officio prosecution, prevention and investigation in the name of the public, the denunciation in the name of the public should be made by the authorities in charge, but they should be represented by "public prosecutors" before the courts.

(xii) Inspectors and similar other administrative officers should be prevented from using judicial powers, for legal or other reasons; judicial powers must be utilised only by independent and impartial judicial bodies and components.

Public inspectors and administrative authorities should conduct investigations and interrogations only if, and to the extent that, they are necessitated by their own internal disciplinary rules. Reports by administrative authorities and inspectors should at no time be relied upon in a criminal or civil investigation. If the auditing institutions are of the opinion that an indictment needs to be made, they should be required to apply to the Courts of Inquiry, Evidence Collection and Charges, suggested above to be re-established, through prosecutors employed in their own organisation or assigned for this specific purpose, such as treasury solicitors.

(xiii) All of the Law on Experts but for the provisions pertaining to the registry of experts, which is institutionalising the degenerated expertise surveying system and impairing the independence and impartiality of the judiciary, should be repealed; and, as is commonly the case in contemporary judiciary systems, in the course of judicial proceedings, specialists who are experts in their fields and are agreed upon by both sides of the dispute should be

assigned within the work discipline of the judiciary.

The comprehensive judicial reform that is required to achieve at least the objectives listed in the preceding paragraphs is possible only if, and to the extent that, it is intended to transform the judiciary into an effectively and efficiently operating body, aiming to offer the highest-quality services to people. To this end, the target should be to protect fundamental rights and freedoms at the highest degree, and to make the judiciary capable of producing the highest added value in the interests of society. For this purpose, the approach adopted thus of seeing as first-degree stakeholders only the judges and prosecutors who are on the side of service providers, and focusing only on them, must be relinquished. A reform approach seeing each segment of society as a first-degree stakeholder and service providers as second-degree stakeholders, and rehabilitating the organisations and individuals in charge of providing said services, should be exhibited.

Our unpleasant and bitter experiences in the past few years have revealed that the judiciary body that is said to have been freed from tutelage may have since fallen under tutelage again, and even under the control of other civilians, but uncontrolled pressure and power groups like FETÖ, and others who have taken possession and charge of the judiciary body, may be abusing it with malice aforethought, with the intention to take possession and charge of other organs of the government as well, and with the end result of causing qualified patriots of our country to languish in prisons for years through fabricated or tainted evidence, and even of staging a judicatory coup d'état.

The Need for Judiciary Reform, and Thoughts on Methodology

In Turkey, due to society's trust in the justice system having hit rock bottom, almost everyone is of the same mind as to the need for comprehensive reform in the judicial services. However, there is no one single well-founded idea as to the right method of reform, and everyone – every government and justice minister – is, as the phrase goes, marching to the beat of a different drummer. As a result, though comprehensive reform of the judiciary has an important place in governmental programmes, this reform has not yet been realised.

Some limited advancements, such as the abolishing of the death penalty and special courts and the establishment of specialised Courts of Intellectual and Industrial Rights, have been realised only as a result of international pressure, as a part of the requirements of membership of the Customs Union and the negotiations on full membership of the European Union, to bring Turkey in line with the interests of foreign powers. The right to individual application to the Constitutional Court has, likewise, been granted and recognised with a view to reducing the number of applications originating from Turkey to the European Court of Human Rights. Some limited changes in the form of the separation of the Council of Judges and Prosecutors from the Ministry of Justice, and the restructuring of this Council, have also been

adopted as a result of criticism by the EU regarding the need for further democratisation in Turkey, but have been left half-finished due to the continuing involvement in the Council of the justice minister and his undersecretary.

By establishing specialised courts – other than patent suits – Turkey has swiftly approached international standards in the field of intellectual and industrial property rights, and some specific judgements of the Constitutional Court in the arena of fundamental rights and freedoms have, to some extent, contributed to an increase in trust in justice. These positive developments also stand as strong indicators of the great advancements that may be realised through comprehensive judiciary reform.

Though it is the most critical need, expected to make the greatest contributions to the country, justice and judiciary reform has been put on the table with respect to international negotiations originating from outside of Turkey, and is used as a political tool in the course of the struggle to seize public power from within. It is very interesting – and disappointing – to witness that certain politicians, non-governmental organisations and intelligentsia who, indeed, are expected to come together and combine their forces to achieve comprehensive judiciary reform are, in practice, indexing this reform through taking only minuscule steps towards full membership of the EU, and are criticising the EU for its refusal to open Sections 23 and 24 in the areas of judiciary and law. This approach – expecting the EU to exert pressure on Turkey, albeit in its own interests towards improvement or progress in justice and judiciary reform – leads us to think that those entrusted with this task have almost thrown in the towel.

At this point in time, although it has become a necessity for society that is almost as important as bread, water and air, there is a common and rather strong belief that justice and judiciary reform can be realised in Turkey only if foreign powers wish it to be so, with the imposition of international pressure and only as per international directives.

(a) A Reform Vision and Long-Sighted Leadership

It has become inevitable and essential for Turkey to put judiciary reform on the agenda, unconditionally, as the most critical and the highest-priority problem. To this end, all existing political factions and non-governmental organisations and the whole of society need to come to a mutual understanding on, and come together around, a common vision that enjoys full consensus. This may be achieved only through long-sighted, impartial leadership that is respected by everyone, and which stands at equal distance from all political factions and views. To achieve this goal, it is a must for us to establish a platform independent from all official bodies, governmental authorities and public administrations, entrusted with the tasks of developing and formulating policies as needed, identifying the existing problems of society and suggesting solutions, thus establishing a platform where views and proposals are freely expressed and considered through reason, and with vision.

A reform vision is not something that can automatically and spontaneously form when members of the judiciary and justice bureaucracy, other professionals, or indeed any specific segment of society are gathered together. In order to form such a vision, a neutral, impartial and respectful leadership is necessary that is knowledgeable about the world and familiar with different judicial systems and recent advancements in the field of law, and that is established and accepted by the whole of society. This, in turn, requires us to choose the leadership of the judiciary through natural selection processes, as a result of which the competences and opinions of candidates nominated by society can be considered, to ensure that the leadership thus selected performs its functions and duties within a framework of effective and efficient accountability and through a platform where all different political factions and segments of society are duly represented.

In this respect, if it is preferred to maintain the influence of the justice minister and his undersecretary, as a part of the exec-

utive organ, over the judiciary power, then an approach should be considered in which both are elected directly by the people from amongst impartial candidates, and are provided with a special position within the executive organ. Thus, given that separate elections would be organised for both the legislative and the executive offices, we must discuss and elaborate on the organising of a separate election also for the judiciary office, in strict compliance with the characteristics of this office. As the system of the direct election by the people of the President, representing the executive body, has already been adopted and accepted, the direct election by the people of the person who will be the head of the judiciary power – another and a more important component of democracy – is also a requirement of the direct and accurate representation of the people in state governance.

(b) A Suggestion for a Scientific Reform Methodology

The judicial organisation is a large service organisation that brings together tens of thousands of judges, prosecutors and other justice professionals throughout the country. As a requirement of the high sensitivity of its functions, this organ should render its services absolutely to the highest of ethical standards, and the quality of its service should be audited by intermediate and final-appeal remedies. However, this is not a requirement that is specific to Turkey. Just as is seen in almost every country in the world, in Turkey too there are many private corporations and non-governmental organisations of sizes competitive with, or even larger than, the corresponding state organisations that produce and offer services to all corners of the world.

Nor is the subject of improvement and reform of such large organisations that produce and offer public services an untouched subject. In almost every country in the world, judicial organisations are, from time to time, rehabilitated and reformed. The "Total Quality" concept that was created and initiated by Japan in the

1950s, and employed as a very useful tool in that country reaching the level of welfare that it enjoys today; the judicial reform initiatives of Great Britain in the 1990s and again in the 2000s; and many other organisations, such as the IFCE (International Framework for Court Excellence), founded within the framework of the judicial (court) excellence initiative, kicked off by the CEPEJ in the EU and, separately, by the Singapore courts, have seen very comprehensive and extensive achievements thus far.

It is a logical requirement to use a particular methodology in everything we do. The subject of methodology in judicial reform is also not an unknown concept. The International Framework for Court Excellence paper that was published by the IFCE in 2013 states that for reform to be effective, it is first necessary to determine the purposes and the framework of development. To this end, values such as equality before the law, fairness, impartiality, independence of decision-making, competence, integrity, transparency, accessibility, timeliness and certainty should be complied with; the court resources and fields intended to be developed and the development process to be followed should be identified; the criteria to be used to measure the level of success achieved should be assessed; and, finally, the actual development should be transparently measured, reported and communicated.

The joint key point of all of these components is the realisation by the judicial system of high-quality judicial services that satisfy the needs of its counterparts and customers, i.e. service recipients. Offering high-quality services to customers should be done on the basis of guidance which, like a compass, always points them in the right direction. Accordingly, TÜSİAD has published a memorandum entitled "Judicial Services of Top Quality" describing the elements that represent quality in judicial services. Even by relying only upon that memorandum, the expectations that all of society has of judicial services can be determined, thus enabling the final objective of reform initiatives to be identified and specified. Once the final objective is identified, it is also easy to identify

the road map to be used, the actions to be taken, the criteria to be employed to measure progress and the reporting principles in connection therewith.

While the jurisprudence contains fairly broad literature as to reform methodology, it is disappointing for Turkey to note that, concerning the Strategy Paper issued by the Ministry of Justice that was adopted in April 2015, the EU, in its 2015 Progress Report, made the following comment: *"However, the Strategy Paper is only a very general planning document."*

We are of the opinion that the following basic methodology may be followed in the formulation of an internationally acceptable reform strategy in Turkey:

a) Why is reform needed? Determination of existing problems;

b) Identification and participation of complainants and dependents (stakeholders);

c) Mutual agreement of stakeholders on the final goal to be achieved (judicial services of the highest quality, consensus, trust in justice, etc.);

d) Mutual understanding on standards and principles;

e) Determination of root causes of the problems;

f) What should be done to achieve the desired objectives? (structural/entities/individuals, procedures, consequences);

g) Prioritisation, timing and scheduling, and who is responsible for what;

h) Measurement, assessment (indicators) and feedback; and

i) Review and rehabilitation.

Better Judiciary Superstructures

a) The Separation and Independence of Judiciary Power

The objectives of Article 138 of the Constitution, which states that *"Judges shall be independent in the discharge of their duties; they shall give judgement in accordance with the Constitution, law, and their personal conviction conforming with the law. No organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, or send them circulars, or make recommendations, or indoctrinate them,"* may be achieved only if, and to the extent that, the necessary conditions are created to enable judges to rule on their cases according to their personal convictions yet in strict compliance with the applicable laws and regulations. For this purpose, firstly, the separation and independence of the judiciary organ from the other organs, both as a power and in terms of its functions, must be assured beyond any doubt, and at the same time, the independence of individual judges must also be guaranteed in such manner that their personal convictions cannot be prejudiced or biased.

To achieve this purpose, it is an absolute requirement that fundamental principles stipulated in the UN resolutions and in other international conventions that Turkey acceded to, as well as those determined by jurisprudence need to be complied with. Throughout this process, both the vast state experience and justice culture of society and the well-known ideas and thoughts that

stand as the common heritage of humanity must be taken into consideration and synthesised .

The basic international documents that are focused on these issues have been referred to in Chapter 8 above. The basic principles of independence of the judiciary are described in the international document "Basic Principles on the Independence of the Judiciary," approved by the UN General Assembly in its Decision No. 40/32, dated November 29, 1985, and No. 40/146, dated December 13, 1985. Therefore, so as to ensure and demonstrate the independence of the judiciary power, compliance with the basic principles enumerated in the aforesaid document must be guaranteed.

According to said document, the judiciary should, as a whole, be totally independent from other powers. The executive and all other organs and institutions must respect the independence of the judiciary; the judiciary should be allowed to adjudicate entirely free from any direct or indirect restriction, influence, guidance, inducement, pressure, threat or intervention by any authority; and the judiciary should be fully authorised on all judicial matters and be able to decide on matters within its jurisdiction. For the sake of the corporate and functional independence of the judiciary, the judicial institutions and their elements should be capable of performing their duties and functions without any prior consent, permission or approval, and free from any direct or indirect pressure or influence by other elected or appointed organs, bodies or authorities.

b) The Independence of the Judiciary Can Be Protected by Accountability

Since the enactment of the 1961 Constitution, certain complaints that have resulted in the restriction of the independence of the judiciary are right and legitimate, just as are the reasons and justifications given for the full independence of the judiciary. The delicate balance needed between these two positions can be built

and protected only through the accountability of the judiciary.

As a matter of fact, the judiciary can protect its independence only if, and to the extent that, it receives support from the public, and adopts and protects its independence by resisting amendments that are proposed to be made to the Constitution or the laws that would restrict its independence. This support of the public may be won by the judiciary only by rendering judicial services that respond to the needs of and conform to the policies, preferences, principles and priorities of the people with regard to the carrying out of justice and the hearing of trials. To this end, the judiciary should be entirely accountable about to what extent it is capable of performing its duties and functions, and to what extent it uses its powers and privileges for the intended purposes thereof. In order to be accountable and to comply with its raison d'être, the judiciary should function independently, its activities and operations should be entirely free from any kind of influence, and it should perform its job duties neutrally and impartially; otherwise, the accountable party should be not the judiciary itself but those influencing it.

Judicial review methods and channels are needed that assure the compliance of all judicial transactions and decisions with these basic principles. Judicial review should not be seen as a mechanism that is composed only of auditing the decrees or sentences of judges by means such as intermediate and final appeals. The judiciary organisation, its corporate functions, and the decisions and transactions of all judiciary elements are absolutely required to be subject to and compliant with judicial review. To this end, the elements of the judiciary that provide services should have a say in the system of which they are a part, and problems identified in this way must be resolved.

Finally, like other institutions the judiciary exists not for itself but for the society it is a part of, and to serve the society is its raison d'être, and it is therefore a sine qua non requirement for the whole judicial organisation and its bodies and elements to be fully coordinated so as to be able to offer high-quality services to

society.

Each country has developed unique procedures and methods within its own historical development to achieve the goals mentioned above. Although no uniform judicial structure and organisational model exists that can be taken as a model, some studies and work conducted by the UN, EU and international non-governmental organisations does exist with regard to the criteria required to be satisfied by judicial systems, in countries that are constituted as democracies.

Amongst the internationally accepted basic documents issued thus far in connection therewith, we may refer to the aforementioned UN "Basic Principles on the Independence of the Judiciary," the "Minimum Standards of Judicial Independence" adopted by the IBA in 1982, and the "European Charter on the Statute for Judges" of the European Council, issued July 8–10,1998.

On the other hand, it is a natural requirement and, at the same time, a social obligation, for each sovereign country to do its best with regard to judiciary powers and functions, being the most important element of its sovereignty, and to form an organisational structure resolving any problems and complaints reported or foreseeable. This is to say that in designing a structural mechanism for Turkey, it is required not only that the standards imposed by the aforesaid basic documents are complied with but also that any problems reported or foreseeable are dealt with, and that a solution is sought that is fit and responsive to the characteristics, needs and requirements of the country.

c) Complaints, Requests and Suggestions Regarding the Judiciary in Turkey

The criticisms and complaints voiced by the national and international public regarding the judiciary power and functions in Turkey may be summarised as follows:

- Given that the elements (judges, prosecutors and law-

yers) of the judiciary are different in nature, and that lawyers are organised in a separate professional organisation composed of bar associations and the Unions of Bar Associations, it is incorrect for judges and prosecutors to have only one single professional organisation. The professional boards and organisations of judges and prosecutors should be separated.

- In relation to the same point, it should be noted that making a separation between lawyers and prosecutors is entirely artificial. These two professional groups serve the same function of representing one side before the court; vesting a different status and range of powers in those who deal with the prosecution of crimes, ex officio, those who deal with complaints in the defence of the public is by no means fit and appropriate to the requirements of their functions, and it would be more appropriate and rational to group these professions according to their functions in the judiciary, not according to whether or not they represent the state.
- The judiciary power is not fully independent (in structural, functional or personal terms), but has always been dependent upon the executive and legislative organs, and has even come under the tutelage of different (military or civilian) powers in the past.
- The judiciary power is exposed to the influence of the executive organ. Through the roles and actions of the minister of justice and his undersecretary in the Council of Judges and Prosecutors ("CoJP"), the executive organ interferes with the activities of the judiciary power.
- The Ministry of Justice has influence, and even tutelage, over lawyers and their bar associations, which indeed should represent the fully independent element of the judiciary.

- The judicial bodies; CoJP, the Court of Appeals ("CoA"), the Council of State and their elements (judges and prosecutors) are not accountable for their functions, decisions and actions, and the prosecution and investigation powers and permissions granted to them, and the processes thereof, may cause them to morph into a privileged clan – or, at the very least, leads to a perception of them as such. This is why the powers vested in judicial bodies may, from time to time, be used arbitrarily, job duties may occasionally be performed arbitrarily or not as expected, and decisions and rulings may lack adequate justification.
- The prosecution and defence sides are not at a balanced level, and prosecutors are granted more powers than lawyers. The functions of lawyers (particularly in the collection of evidence and free presentation of their defence to the court in civil and criminal cases) are restricted in favour of the judges and prosecutors and, in criminal cases and proceedings, prosecutors have a position superior to that of lawyers; they are close to the judges, and are even interwoven with them. For all these reasons, the principle of equality of arms has been imbalanced in favour of the prosecution side the expense of the defence side.
- The judiciary organ is failing to render high-quality judicial services, and has become a burden and a cost, not producing any added value for society but having a detrimental effect on it.
- The supreme courts are failing to perform their duties. A high workload is alleged as a pretext and excuse for this failure, and for their making a compromise in what the services expected from them require due to their significance. They tend to find palliative and personal solutions, even where these are not in compliance with the law (as they are by no means accountable). This approach also

prevents the creation of public awareness about the size, degree and significance of these judicial problems, and the finding of solutions to them in a timely manner.

- The judiciary organ grinds slowly, it falls short in keeping itself up-to-date with the latest developments, and its decisions and rulings are not predictable and foreseeable but may vary according to persons and situations; it therefore lags behind the current changes in the country and in society, prevents the swift and effective conduct of governmental affairs and activities, and is in some ways encumbers and impedes development.
- It is believed that in disputes between citizens and the state, the judiciary organ acts with an instinct to protect the state and public interests and, thus, when the counterparty is the public, the equality of arms is imbalanced, with the judiciary organ tending to protect the government in preference to the public.

The information summarised in the preceding paragraphs is by nature not a determination as to whether these criticisms and complaints concerning the judiciary are correct or not, but only a determination as to the existence of such complaints. At this point, it should be remembered that some of these types of complaints, and others too, are expressed about the judiciary organs of other developed nations as well.

The broad range of criticisms concerning the judiciary as summarised above may probably be further increased or varied, but we believe that the points listed here are adequate for the formulation of a reasonable idea about the overall dissatisfaction level of society towards the judiciary organ.

However, on the other hand, the suggested solutions that have actually been put into words for the correction or remedy of such a wide range of criticisms and complaints about the judiciary organ are rather limited, and are far from being integrated in na-

ture. These suggestions can be summarised, briefly, as follows:

- Justice and judiciary policy should be determined and formulated by social consensus and agreement and using an "arm's length" approach, and the executive organ should not have a say alone. All differing and conflicting views and suggestions should be evaluated, and the financial means and human resources of the judiciary should be developed, so as to smooth the way for high-quality production of service.
- The stage of formulation of justice and judiciary policy should be separated from the stage of formulation of executive decisions in keeping with said policy. In addition, these two stages should further be clearly separated from the judiciary organ's service production activities – i.e. from its operational aspects. As to regulations and activities regarding service production, the professional actors and their institutions and organisations should have a say and be responsible, but at the same time should be effectively accountable for the compliance of their activities and services with policies, principles and priorities.
- So long as they are not entirely independent, the minister of justice and his undersecretary, appointed by the executive organ, should not enter into CoJP and, particularly, should in no event be involved in or interfere with the appointment, assignment, disciplinary issues or promotion of judges. They should not have a say in or any effect on the council, and their roles and functions should be limited by making contributions and providing appropriate and adequate budgeting and ancillary services for the formulation of judicial policies.
- The professional organisation of prosecutors should be separated from that of the judges, and a separate professional organisation should be established under the

name of the "Supreme Council of Prosecutors."

- All transactions and decisions of the Council of Judges and Prosecutors ("CoJP") should be justified, and all of them should be open to appeal, or other resorts to the jurisdiction. This appeal or resort should be directed towards a special and specialised place of jurisdiction assigned in strict conformity to the characteristics of the CoJP and its functions, and should by no means be the administrative or civil courts managed or run by judges appointed directly by CoJP.
- The tenure of judges (in terms of job security, place of assignment and revenues) should further be strengthened and, accordingly, judges should not be appointed to a place other than their existing place or court of assignment without their consent.
- The members of professional organisations of judges and prosecutors, the judges and prosecutors themselves, and the members of supreme courts should be selected on the principle of merit and as a result of a public debate; politicians should in no event have any say or influence thereon. All elements of the judicial organ, including judges, prosecutors, lawyers and ancillary service providers, should be subject to performance management and should be effectively accountable for their acts.
- Supreme courts should not be entrusted with responsibility for judicial accountability and the investigation of their own members in relation to it, and decisions or rulings thereon should not be final but should be open to appeal. This appeal or resort should also be directed towards a special and specialised place of jurisdiction, assigned in strict conformity to the characteristics and significance of these organs and their members, and, accordingly, judges on the bench and those prosecuted

should not be colleagues in the same organ.

- Civil and criminal trial processes should be revised, and laws dealing with civil, criminal and administrative trial procedures should be compared with those of contemporary and advanced systems, so as to be able to offer the best and the most cost-effective services to system users, and should then be developed in such a manner as to reach said levels of services provision.

It is, however, unequivocally obvious that such wishes and suggestions are not adequate to respond to and resolve all criticisms and complaints as a whole; they are incidental, and tend not to be focused on resolving the root causes and underlying problems but rather on diminishing the complaints resulting therefrom. It is invariably gleaned from social experiences that some of these solutions that are put into practice fail to fully correct and remedy the related complaints and that, what is more, they pave the way for other and even more serious complaints. For example, the 1961 Constitution that provides for election of one-third of eighteen members of the Supreme Council of Judges ("Supreme CoJ") by judges, onethird by the legislative body and one-third by the CoA was amended in 1971 to create a system of election of all of the members of the Supreme CoJ by the CoA, and during the 1971–1981 period, the Supreme CoJ elected members of the CoA. This structure, in turn, led to domination of the whole judiciary by the CoA, thereby creating a privileged judicial caste in the judiciary. Thereafter, in 1981, with the intention to limit the domination of the CoA, CoS was authorised to appoint members to the Supreme CoJ, thereby sharing the domination between these supreme courts. But then, so as to create balance therein, the minister of justice and his undersecretary were also made natural members thereof, thus allowing the direct involvement of the executive organ in the judiciary. However, the real root cause of the problems and complaints faced in those days was the fact that the

independence of the judiciary led to arbitrariness and deterioration in judicial services, solely due to negligence of the accountability of the judicial organs. The solutions brought in after 1981 in the name of judicial reform have also remained only incidental and, thus, have been rendered ineffective. The intention to make the judiciary accountable that lies behind these inadequate and unsuccessful amendments has, in actual fact, resulted in an increase of weight of the executive organ in the judiciary. All of these experiences that have accumulated since 1961 clearly reveal that we have to approach the problems of the judiciary with a holistic view, and must produce solutions accordingly.

d) The Need for a Structure Fit to Produce High-Quality Services

Another criterion required to be taken into consideration and to be underlined in the course of the development of suggested solutions is that the suggested organisational structure should by all means support the positive co-operation and solidarity needed for high-quality service production.

The existing superstructure of the judicial bodies and organisational units does not support solidarity, positive cooperation or efficient service production amongst professionals but, on the contrary, encourages them to disregard and exclude each other, to act alone, and to refrain from corporate and individual accountability, thereby causing a paralysed, contradictory and incompliant relationship between them. For instance, even though lawyers are said to be an entirely independent constituent element of the judiciary, the Union of Turkish Bar Associations is under the tutelage of the Ministry of Justice in terms of personnel affairs. This means to say that the Ministry of Justice renders decisions on the personal affairs of lawyers. The Ministry of Justice, which is an administrative organ that is part of the executive power, manages and represents CoJP, and further has the authority to and the final say in the

appointment of judges to the administrative courts having jurisdiction in the judicial review of the Ministry of Justice. Judges of administrative courts, who are theoretically at an equal level with lawyers in the three pillars of the justice system, are entrusted with the task of supervising and reviewing the administrative decisions taken by the Ministry of Justice concerning lawyers. Furthermore, lawyers have the right to resort to the courts against decisions or actions concerning their personal affairs, while judges and prosecutors do not have any such right.

Accordingly, legal channels and remedies are available against decisions of the Ministry of Justice and the Union of Turkish Bar Associations with respect to the lawyer element of the judiciary but, on the other hand, no such legal channels and remedies are available against decisions taken by CoJP concerning judges and prosecutors, and the decisions of CoJP are final.

One of the problems that is generally contentious amongst legal professionals, that creates doubts about the system, judges and prosecutors on the part of both the professionals and citizens, that wears away confidence in the judiciary, and that is encountered and criticised in almost each incident and almost every day, is that in court trials, prosecutors who represent the public share the same bench as judges, and they are at a separate, superior position in comparison with the lawyers representing the defence side. This, in turn, causes further contests and conflicts amongst professionals and judicial organs and units from time to time.

It is this type of organisation, and the complex, unprincipled and contradictory order of interrelations caused by such organisation, that inhibits the positive cooperation and atmosphere of solidarity required for efficient service production amongst legal professionals. In such an environment, which is by no means fit for high-quality service production, it is in no case surprising to hear complaints about failures of the judiciary in the production of good services, or that it produces injustice itself, rather than advocating and administering justice.

Another important problem is that the Union of Turkish Bar Associations, the professional organisation of the lawyer element of the judiciary, and CoJP are disconnected from each other to such an extent as to prevent the cooperation, solidarity and even the basic communication needed for the performance of their functions. Hence, co-operation and interrelations between these two organisations, in the absence of the corporate link required for at least coordination between them, are fully dependent upon the personal initiative of their management.

The Ministry of Justice, being in direct and close relations with CoJP, although having an administrative tutelage and custody role over the Union of Turkish Bar Associations, is not entrusted with the task or role of creating synergy and coordination between these two fundamental organs of the judiciary towards the achievement of a joint objective. A tangible example of the inefficiencies caused by this problem is the judicial reform initiatives. The Ministry of Justice seeing itself as the owner of the judicial reform strategy works but considering the Union of Turkish Bar Associations as one of the affected stakeholders, has given weight to its ministerial bureaucrats and judges and prosecutors and has excluded the lawyers (and others) from reform preparations. Leaving aside the fact that service providers can by no means take any reform steps in services alone, without even understanding the needs, choices and demands of service recipients, it may easily be concluded that to exclude from the judicial reform initiative one of the segments in charge of providing legal services is in no event a healthy choice, and will surely lead to further worsening in the very areas that are under contemplation for reformation and rehabilitation

Such a mechanism can under no circumstances be expected to realise judicial reform that is capable of resolving complaints, fulfilling the demands and wishes of society, and being adopted and respected both locally and in the international arena. This unhealthy structuring is directly responsible for the limited conclu-

sions derived out of the reform initiatives taken to date, and for their failure to make the desired improvements and rehabilitations in the judicial system. Due to this structure, the social segments seeking justice have been left out of the reform process and, as a result, the solutions suggested – for problems that are perceived only partially and erroneously, in reliance upon only the complaints of the judges and prosecutors – cannot be successful. In the end, regulations have been issued and enacted that only strengthen the status of segments failing in judicial services, and enhance and upgrade their personal affairs, while on the other hand reducing their duties and responsibilities and eliminating their accountability to a great extent.

The lack of a corporate structure or an environment of cooperation and solidarity that could bring service-producing professionals together, even in the production of such an extremely important document as part of a reform strategy on this most urgent and vital need of society is a critical and extremely upsetting and worrisome picture for Turkey.

Amendments adopted as a result of the 2017 referendum are in no manner adequate or appropriate for the improvement of this picture. The increase of the weight and influence of the executive organ in CoJP and the reauthorising of the legislative organ to appoint members thereto, although this system was repealed in 1971, demonstrate that attempts to solve the existing problems will be made through individuals elected to CoJP. However, it may easily be contemplated that these compromises made from the principle of the separation and independence of the judiciary from the executive and legislative organs will further increase the existing problems, rather than rehabilitating and curing the diseases, just like all of the previous amendments. The reduction of the number of chambers in the CoJP from three to two, the removal of the word "Supreme" from its name and the re-emphasizing of its "impartiality" principle, which is already an imperative requirement thereof, cannot be considered as reformative steps. What is more,

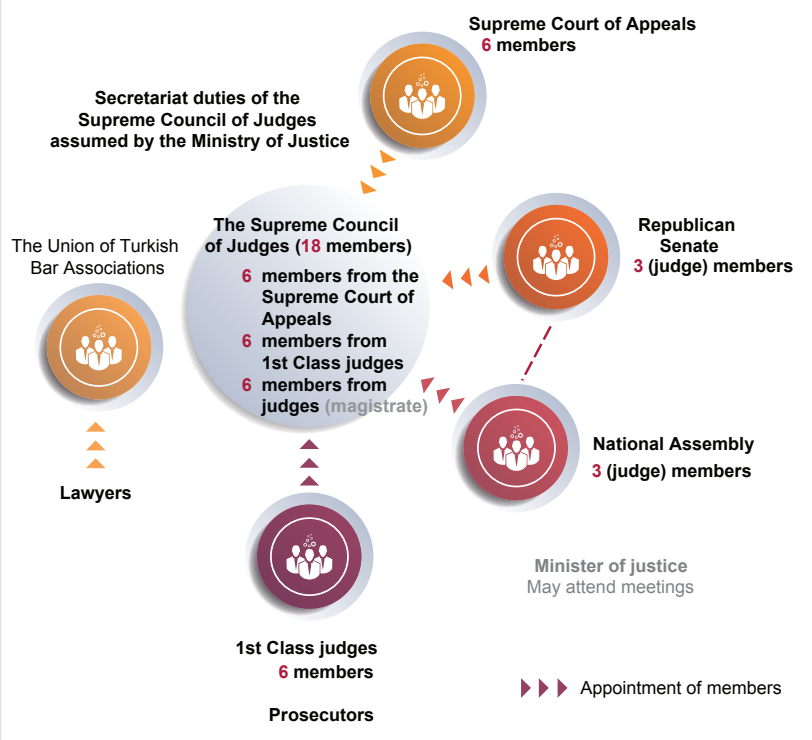
the election of members of the CoJP by the legislative and executive organs is rather a worsening, which is contradictory to the basic principles of the independence of the judiciary adopted by the United Nations.

e) A Brief History of the Judiciary Superstructure in Turkey

Turkey has been of two minds for a long time concerning the judiciary and its superstructure, and has still not been able to establish an ideal, robust and sustainable superstructure. The judiciary, which must absolutely remain out of politics, and must even supervise and oversee politics, has thus far remained at the very epicenter of the struggle between the political parties and sides seeking to dominate and gain control of governmental power. Political power struggles not focused on high-quality service production have resulted in an increase of the influence of the executive organ over the judiciary. This can easily be seen from the constitutional amendments in the recent history of the country.

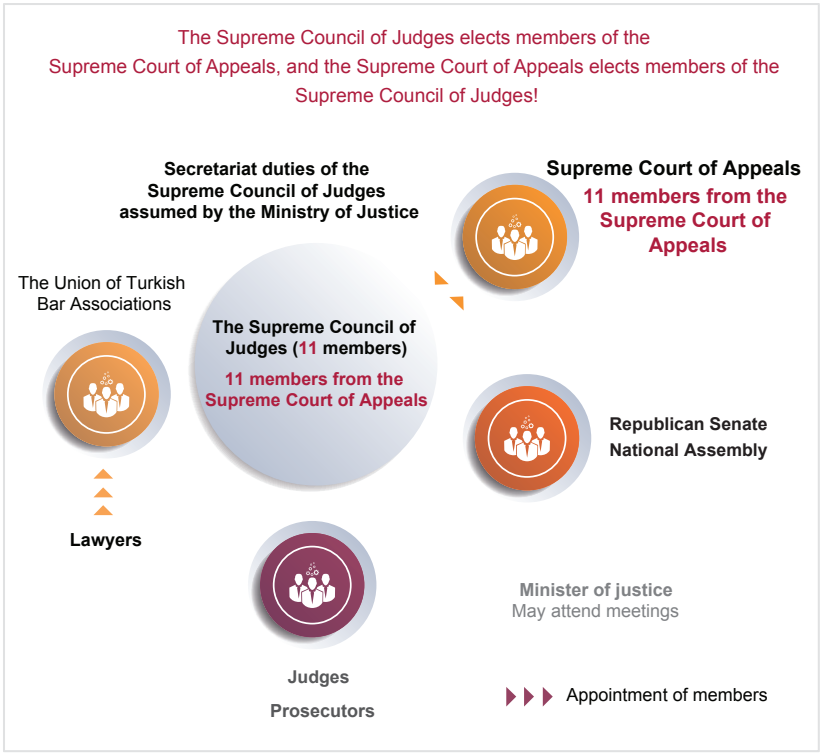
According to the 1961 Constitution, and Law No. 45 dated April 22, 1962, enacted thereunder, the Supreme Council of Judges ("Supreme CoJ") was composed of 18 members, six of whom were elected by the CoA from amongst its own members, six members by the 1st Class judges from amongst themselves, three members by the National Assembly, and three members by the Republican Senate from amongst candidates who had served as a judge or magistrate. The Supreme CoJ elected its own chairman, and its decisions were open to appeal and other remedies. The minister of justice could, if he so wished, attend the meetings of, but could not vote in, the Supreme CoJ (see Figure 3).

Figure 3: Formation and Election of the Supreme CoJ according to 1961 Constitution



By the constitutional amendments adopted in 1971, the number of members of the Supreme CoJ was reduced to 11, and it was decided that all of its members would be elected by the CoA from amongst its own members (see Figure 4).

Figure 4: Formation and Election of the Supreme CoJ after 1971 Amendments



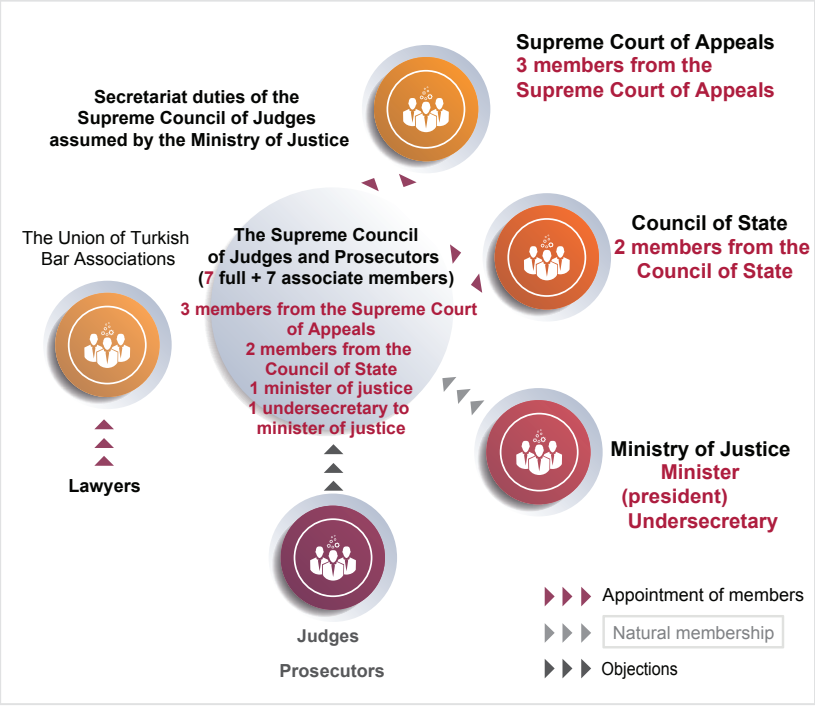
Under the conditions wherein the Supreme CoJ elects members of the CoA and the CoA elects members of the Supreme CoJ, a cooptation status emerged. As of that time the Supreme CoJ has not had its own secretariat, and this service has been performed by personnel of the Ministry of Justice. This picture has been criticised due to the Supreme CoJ falling under the influence of the Ministry of Justice.

Through the amendments made in 1971, a Supreme Council of Prosecutors ("Supreme CoP") was also formed and defined as a constitutional institution in Article 137. Just as in relation to the personal affairs of judges of courts prior to the 1961 Constitution, certain boards belonging to the Ministry of Justice made decisions about the personal affairs of prosecutors also prior to the 1971 amendments. The Supreme CoP was formed by seven full and two associate members, comprising the minister of justice and his undersecretary, personal affairs general director and chief public prosecutor, as well as three full and two associate members elected by the CoA.

Then, through Law No. 2461 enacted in 1981 during the September 12 coup administration, the Supreme CoP merged with the Supreme CoJ to form the Supreme Council of Judges and Prosecutors ("Supreme CoJP"). The minister of justice and his undersecretary were made natural members of the Supreme CoJP and its decisions were closed to any appeals or other remedies. Three full and three associate members of the Supreme CoJP were appointed by the president from amongst candidates nominated by the CoA from amongst its own members, and two full and two associate members thereof were appointed, again by the president, from amongst candidates nominated by the Council of State from amongst its own members. The minister of justice was the chairperson of this council, while its vice Chairman was elected by the council's members. This structure was then fully reflected in the 1982 Constitution (see Figure 5).

Given the absence of separate premises and operating in the same offices of the Ministry of Justice, the fact that the secretariat has already made it actually dependent on the ministry and the fact that it was unable even to hold a meeting in the absence of the minister of justice or his undersecretary, the Supreme CoJP has become dependent upon the attendance of the minister of justice at its meetings and, thus, upon the heavy tutelage of the executive organ in terms of its functionality. No right of action or remedy is granted against decisions of the Supreme CoJP, but a right of objection to a board of objections formed by both the full and associate members, and rendering its decisions with the participation of at least eight members under the chair of the minister of justice, was available. The decisions made by such board, upon objection, were final.

Figure 5: Formation and Election of the Supreme CoJ after 1981 Amendments



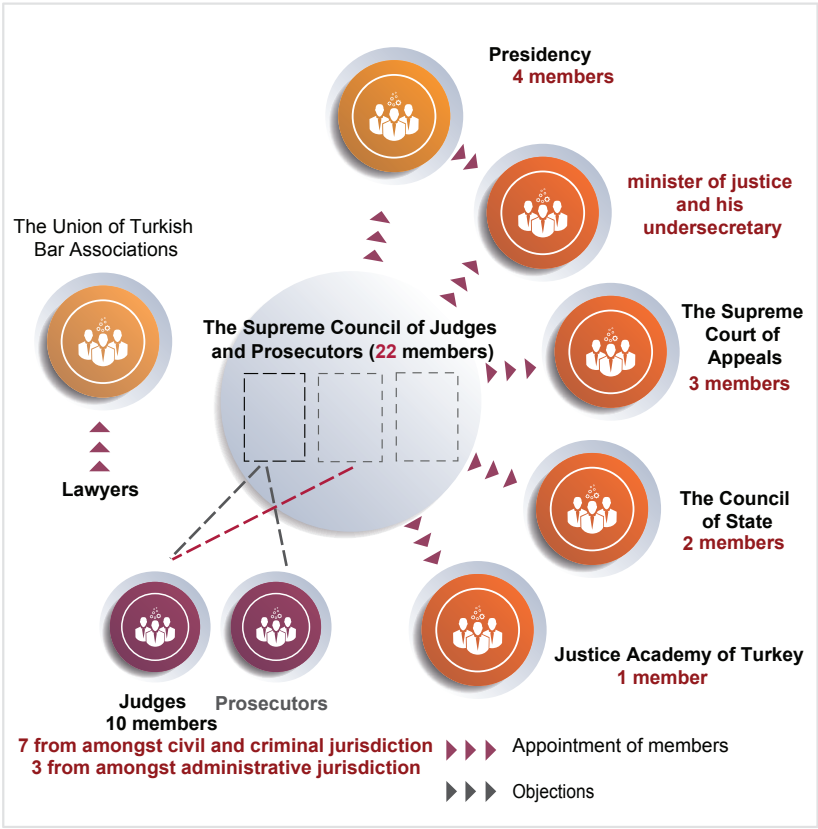
Until 1981, legal resorts and remedies were available against decisions of the Supreme CoJ and the Supreme CoP. An attempt was made to amend the first paragraph of Article 144 of the 1961 Constitution with a view to repealing this right, but this was nullified by the Constitutional Court on the grounds that it was contrary to the Republic and its fundamental principles and human rights and, therefore, it could not even be proposed. In its decision of January 27, 1977, the Constitutional Court states that the Supreme CoJ decisions being closed to judicial review did not accord with republican principles, and was in disharmony with human rights, the state of law and the equality of legal principles. The Constitutional Court further clearly stated that such a rule could be proposed, nor could it be brought even by amendment to the Constitution. Accordingly, the 1961 Constitution provisions and principles relied upon in the aforesaid decision of the Constitutional Court were fully transferred to the 1982 Constitution as well, with only changes to article numbers.

However, the provision stating that "Decisions of this council cannot be appealed by any other authority," which was found by the Constitutional Court in its decision of January 27, 1977, to be contrary to both fundamental republican principles and human rights, the state of law and the equality of legal principles was, unfortunately, added thereafter as a special clause to Law No. 2461 and to the 1982 Constitution. Thus, this provision, which is contrary to the fundamental principles of the Constitution, was imposed upon the nation by the coup plotters. Therefore, the decisions of the Supreme CoJP have been closed to any appeals or other resort since 1981.

As per the amendments made in 2010, the number of members of the Supreme CoJP was increased to 22, and in addition to the minister of justice and his undersecretary, out of 20 elected members thereof, four were elected by the president, three by the CoA, two by Concil of State, one by the Justice Academy of Turkey, seven by civil and criminal jurisdiction judg-

es and prosecutors from amongst themselves, and three by administrative jurisdiction judges and prosecutors from amongst themselves. The Council operated in three chambers, and its chairperson and representative was the minister of justice, as in the past (see Figure 6).

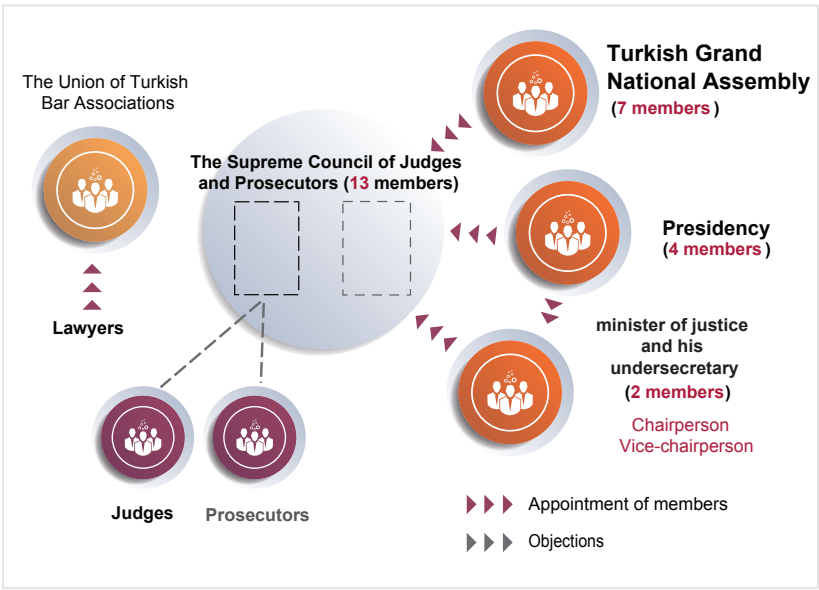
Figure 6: Formation and Election of the Supreme CoJP after 2010 Amendments



Ten out of 22 members of the Supreme CoJP, not being supreme court members, and its vice-chairperson and department heads being elected by its elected members, and the remedy of appeal to the Council of State against the Supreme CoJP's decisions as to the penalty of termination of the office of a judge, were positive developments recorded in the 2101 amendments. However, as the decisions as to judge and prosecutor investigation permissions were made by the minister of justice, as and in the capacity of chairperson of the Supreme CoJP, such decisions were not subject to appeal.

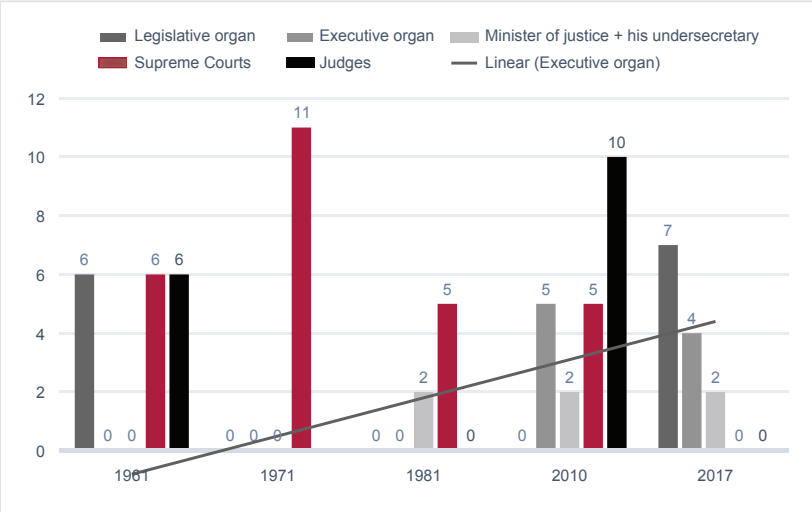
As per Article 159 of the Constitution, amended by the recent referendum, CoJP is now composed of 13 members and operates in two chambers. Four members of the Council are elected by the president from amongst 1st Class judges and prosecutors, three members by the CoA from amongst its own members, one member by the CoS from amongst its own members, and three members by the Turkish Grand National Assembly ("TGNA") from amongst academicians and lawyers. The chairperson of the CoJP is the minister of justice, and the undersecretary of the Ministry of Justice is also a natural member of the council (see Figure 7).

Figure 7: Formation and Election of the CoJP after 2017 Amendments



Graph 7 shows that the influence of the executive organ on the judiciary organ has had a tendency to increase since 1981. While the members of the council were elected from lists drawn up by their own colleagues prior to the referendum, since the referendum the members of the Supreme CoJP appointed by the TGNA have, in fact, been elected by the votes of the AK Party and the MHP. This alone indicates that the structure of the judiciary is prone to being captured and invaded by politics.

Graph 7: Influence on the Management of the Judiciary, Trend 1961–2017



As the above graphics show, a comparison of the situations prior to and after the referendum clearly reveals that at present, the superstructure of the judiciary is not appropriate and fit for the production of high-quality services or for the establishment of justice and can easily be taken hostage. In fact, a political party that may elect the president and that is entitled to appoint even one member to CoJP in the TGNA will have the opportunity to seize control of CoJP and, thus, to identify, appoint and choose prosecutors and judges who are authorised to accuse, to try and to rule on criminals in the name of the Turkish nation.

Its functioning being dependent upon the approval and participation of the minister of justice and his undersecretary, members of the executive organ are vying the second time for domination and control over CoJP.

f) The lack of Accountability of the Council of Judges and Prosecutors

The Council of Judges and Prosecutors, constituting the superstructure of the judiciary, has not been subject to any judicial review or any accountability before the courts since 1981.

The judicial review mechanism that existed prior to 1981 was repealed by a law enacted during the coup d'état period in 1981. Throughout the period starting with Law No. 2461, which was passed in 1981 and fully reflected in the 1982 Constitution, the Council of Judges and Prosecutors has not been accountable to the courts. This was the situation prior to the referendum, and it has remained the case after the referendum too. For this reason, no judicial review or remedy is available against the great majority of the decisions of the Council of Judges and Prosecutors, other than its exceptional decisions as to the penalty of termination of the office of a judge, not including termination of office due to membership of FETÖ.

As a result, the decisions of the Council of Judges and Pros-

ecutors are devoid of the transparency and justification required in order to demonstrate their correctness to other relevant parties and to the public. For instance, in summer season appointment decrees, only the name and surname of the appointed judge or prosecutor, and the place to which they are appointed, are stated, and no justification is given as to whether the appointment has been made upon demand or upon being deemed necessary or as a requirement of a planned rotation; or as to the compatibility of the competence and experience of the appointed judge or prosecutor with the needs of the place to which he is appointed. Likewise, some judges are appointed directly to a court with permanent authorisation, while others are appointed only to provinces, whereupon the provincial justice commission is authorised to determine and decide their places of assignment, but this differential treatment is never justified or clarified. As a sanction inflicted as a result of disciplinary investigations, some judges or prosecutors are appointed to other courts attributed with less importance, but as the grounds and reasons for this are not clarified, such appointments lead to speculation and gossip. However, neither the parties affected therefrom nor the public are equipped with any judicial remedy against such decisions that deeply affect the members of the judiciary and their professional duties and activities.

This problem, which could easily be prevented entirely through the establishment of a judicial review and remedy mechanism, is one of the most critical causes of erosion of confidence in the judiciary.

As is also stated in Ruling No. 1977/4, in Case File No. 1976/43, dated January 27, 1977, of the Constitutional Court, the lack of a judicial remedy against the decisions of the Council of Judges and Prosecutors is in conflict with the "republican" regime of the state, and breaches the principles of the Republic, equality before the law and the state of law, as well as those of human rights in general.

Relevant sections of the aforesaid ruling of the Constitu-

tional Court issued in 1977 are quoted in the box below.

Quoted from the ruling of January 27, 1977, of the Constitutional Court

The first paragraph of Article 144 of the 1961 Constitution was revised to state that *"The Supreme Council of Judges makes the final decisions about the personal affairs of judges of the courts of justice.* ***No appeal is permitted against these decisions with other juridical authorities.*** *However, the minister of justice, or the judge affected therefrom, may request review of the decisions as to disciplinary matters and termination of office a single time."*

On the question of whether the sentence ***"No appeal is permitted against these decisions with other juridical authorities"*** **is in compliance with the fundamental characteristics of the Republic of Turkey or not:**

- The fundamental characteristics of the Republic of Turkey, forbidden through Article 9 of the Constitution to be changed or revised, are clearly described in Article 2 of the Constitution, and also in the Introduction section referred to in Article 2. For this reason, the prohibition set forth in Article 9 covers and extends not only to the change of the word "republic", but also to the aspects and characteristics clearly described in Article 2 of the Constitution, as well as in the Introduction section referred to in Article 2.

- Article 2 of the Constitution defines the Republic of Turkey as a national, democratic, laic-secular and social state of law that relies upon human rights and the fundamental principles set forth in the Introduction thereof. Therefore, a state alienated from and devoid of these principles can by no means be accepted or classified as a "republic" defined in the Constitution.

That the Supreme Council of Judges is an administrative organ and its decisions are, therefore, administrative decisions has clearly been stated, freely of any doubt, in both the legislative instruments and the statutory documents pertaining to the foundation of the Supreme Council of Judges, in the jurisprudence, in court sentences and judgements, and, particularly, in Ruling No. 1963/113, in Case File No. 1963/169, dated May 15, 1963, of the Constitutional Court. **Prior to the revision made to Article 144 of the Constitution, lawsuits brought against decisions of the Supreme Council of Judges were tried and decided by the Council of State.** This amendment to the Constitution has not changed the administrative character of the Council or its decisions and, in addition, Article 143 of the Constitution amended by Law No. 1488 has made the administrative character of the Council and its decisions even more obvious. Indeed, while the minister of justice was only entitled to participate in the meetings of the Council prior to the revision brought by Law No. 1488, he was authorised by the amendments made to Article 143 of the Constitution to chair and head the Council if and when deemed necessary. Given that an executive officer cannot be chair and preside over the Court, it is impossible to accept the Supreme Council of Judges as a judicial board, or to accept its decisions as judicial rulings or verdicts.

(a) In Terms of Human Rights

Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides that: "In the determination of his civil rights and obligations, or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time, by an independent and impartial tribunal established by law."

Article 2 of the Constitution clearly declares that the

Republic of Turkey has relied upon human rights and has, accordingly, imposed these rules in its Articles 31 and 114.

For these reasons, **the rule in dispute preventing the judicial review of decisions of the Supreme Council of Judges is in conflict with the principles of human rights.**

(b) In Terms of State of Law

One of the fundamental characteristics of our Republic is that it is a "state of law". This characteristic is not only explicitly stated in Article 2 of the Constitution but also is transformed from an abstract concept into a solidified rule by provisions of other articles thereof.

As also described in other decisions of the Constitutional Court, a state of law means a state that shows respect to and protects human rights; establishes a legal order fit to and appropriate for justice and equality in social life; deems itself obliged to maintain this order; complies with the general legal rules and the Constitution in all of its acts and attitudes; and opens all of its transactions and actions to judicial review. In fact, judicial review is the fundamental element that stands as an assurance of compliance with all other elements of the state-of-law principle, because it is the judicial review itself that is considered as the power which dissuades a public administration that does not show respect for human rights, which does not comply with the law and the Constitution in its actions and decisions, from such choices, and which forces the public administration to remain within the limits of legitimacy and legality.

The rule contested in our case abolishes all kinds of reviews and audits and, particularly, judicial review, and deprives judges of any legal assurance. In a state where judges are deprived of the right to resort to judgement, no one can say that individuals have legal assurance. A judge

against whom a complaint is filed, or into whom an investigation is commenced upon an audit, may easily be dismissed through a decision of the Supreme Council of Judges, but he cannot resort to any legal remedy against such a decision. This rule is in all aspects unlawful and contra legem. **The lack of the right to resort to legal remedies against decisions of the Supreme Council of Judges runs counter to the state-of-law principle of the Republic.**

(c) In Terms of Equality

One of the fundamental principles of the state of law is equality.

In its Ruling No. 1/21 dated April 19, 1966, the Constitutional Court states that: ***"The state of law is based upon the rule (supremacy) of law principle. Equality before the law, i.e. equal protection of the law, is an essential element of this fundamental principle. Such a concept refutes all kinds of privileges."*** It is unequivocally clear that the rule contested in our case falls contrary to the equality principle.

In sum, the sentence **"No appeal is permitted against these decisions in other juridical authorities,"** preventing any legal remedies against the decisions of the Supreme Council of Judges, as contested in our case, acts contrary to human rights and state-of-law principles, which are listed amongst the fundamental principles of the Republic of Turkey; therefore, it is covered by the prohibition cited in Article 9 of the Constitution, which states that the Constitution **"cannot be amended or revised and cannot even be proposed to be amended or revised,"** and, for these reasons, it is unconstitutional in all respects.

The provision "No appeal is permitted against these decisions by other juridical authorities", which was previously nullified by the Constitutional Court with its aforesaid ruling of April 21, 1977, on the grounds of being in contradiction with the fundamental principles of the Republic and the Constitution, i.e. against the principles of state of law and equality before the law and against human rights, was, thereafter, imposed upon the nation by the 1982 Constitution in the atmosphere of September 12.

The formation of a grey zone beyond the reach of judicial review in a state adopting the principle of equality before the law can in no case be accommodated by the state-of-law principle of the country. Furthermore, as also stated by the Constitutional Court, the Supreme Council of Judges, being a judicial organ and all or the majority of its members being lawyers, cannot ever justify the exclusion of its actions and decisions from the scope of the judicial review principle.

g) The Council of Judges and Prosecutors is Dependent upon the Executive Organ in Practice

During the referendum process, a broad segment of the population gave voice to very serious concerns as to independence with regard to the amendment made in Article 159 of the Constitution.

In his article published in the magazine Güncel Hukuk under the heading "Judiciary in the Clamp of Politics", Prof. Dr. Köksal Bayraktar writes: *"To adopt a new system to be entirely dominated by the political power by protecting and maintaining the chairmanship of the minister of justice and the deputisation of the minister by his undersecretary in meetings when the minister of justice is absent, which has thus far always been criticised, can, I should say, not ever be described by any words other than entering into a grip."* Similarly, concerning the amendments made in the aforesaid Article 159, the TBB says in its "Motion on Constitutional Amendments" (Ankara, 2016, page 37) *"according to the […] approach put on the agenda by*

the motion on constitutional amendments, the judiciary is pushed away from being a 'Power' operating in accordance with the 'Separation of Powers' principle and, particularly, standing as an assurance mechanism for citizens against the overwhelming strength of the executive organ, and is redesigned almost as a subject of the bureaucratic organ, and reporting to the executive organ."

Likewise, lawyer Berra Besler has also expressed her concerns in "[…] Assessment of Motion on Constitutional Amendments […]"(Ankara, 2016, page 12) as follows: *"the council […] whose number of members is reduced to twelve […] is chaired and headed by the minister of justice. The remaining eleven members are contemplated to be selected and appointed by the president and the Turkish Grand National Assembly. Considering the equation and relationship between the president and the majority in the National Assembly, the Supreme Council of Judges and Prosecutors will also enter under the tutelage and custody of the executive organ. Considering the powers vested in the Supreme Council of Judges and Prosecutors, it is unequivocally clear that the whole judiciary system, also including the Supreme Court of Appeals and the Council of State, will enter under the tutelage and custody of the executive organ."*

However, the aforesaid Article 159 about which these serious concerns have been expressed has been fully adopted and put into force in its criticised version and form and, thus, all of the members of the Council of Judges and Prosecutors are now selected and appointed by the legislative and executive organs.

This opinion is further confirmed and verified by Mr. Taha Akyol, with the thoughts offered in his article titled "Independent and Impartial" published in the Hürriyet newspaper on January 18, 2018, as follows: *"Such organisations as the Council of Judges and Prosecutors entrusted with the tasks of appointment and inspection of judges and prosecutors must absolutely be kept away from all political influences. However, in our country, in 2014, the law was amended and, thereafter, it is no longer an offence to give orders and instructions to judges and prosecutors at the interrogation stage. All members*

of the Council of Judges and Prosecutors are now being appointed by politicians. Under these circumstances, even if judges and prosecutors act independently and impartially according to their own personal conscience, the confidence in the judiciary is heavily damaged in the eyes of public opinion. President […] and member […] of the […] court, finding the verdict of conviction unjust in […] case, are dismissed from this case, and are assigned to […]. When? Only two days prior to […] when the court was supposed to take a decision on the objection against […]. Why did the Council of Judges and Prosecutors dismiss these two judges from the case only two, even only one and a half days before the critical hearing? What is more […] and […] who ruled […] have also been dismissed from the case […]. It is then understood only months afterward that the decisions of those judges were just and fair […] and […] trying and ruling […] cases since the very beginning has also been dismissed from these cases only at the judgement stage, although they were the only judges with good knowledge of these cases in Turkey. The Council of Judges and Prosecutors must explain and clarify the justification for these abnormal appointments to the public."

Given that the Council of Judges and Prosecutors cannot make any decisions without the participation and approval of the minister of justice, or his undersecretary, being a natural member and the chairperson of the Council, and that it is stated in the amended form of paragraph 7 of Article 159 of the Constitution that the Council of Judges and Prosecutors is to be managed and represented by its chairperson, i.e. the minister of justice, it is clear that the Council of Judges and Prosecutors is, in fact, dependent upon the executive organ. Pursuant to paragraph 4 of Article 3 of the Law on the Supreme Council of Judges and Prosecutors No. 6087, the deputy chairperson to be elected by its General Assembly is entrusted with the tasks of chairing the meetings not attended by the minister, and using the powers delegated to him by the minister. Although the Council of Judges and Prosecutors has a sound grasp of the professions of judge and prosecutor, through its making of decisions regarding their recruitment, appointment,

promotion and exchange of offices, and of the establishment and closing of courts, as well as determination of the scope of their duties and supervision of them, its members are still chosen and appointed by the legislative and executive organs; therefore the Council stands with arms folded, and it can by no means make its decisions or take any action without the participation and approval of the executive organ.

Taking into account the fact that the Council of Judges and Prosecutors is clearly dependent upon the minister of justice and his undersecretary in performing its functions, it cannot even be argued that the members of the Council of Judges and Prosecutors may, or can, act independently after being elected by the legislative and executive organs, and are not legally an extension of the executive organ. Hence, as also pointed out by Berra Besler, due to the influence of the executive organ on the elections held in the Turkish Grand National Assembly, it cannot be denied or ignored that the Council of Judges and Prosecutors has become an extension of the executive organ.

Under these circumstances, we have to accept that the formation, composition and functioning of the Council of Judges and Prosecutors do not comply with the standards and criteria that *"at least half of its members should be elected by judges,"* and *"it should not be dependent upon the legislative and executive organs,"* as adopted in the aforementioned documents of the UN and the IBA and as also referred to in the EU Charter.

b) The Lack of Judicial Review of the Council of Judges and Prosecutors Injures the Independence of Judges

Included amongst the factors strengthening the individual independence of the members of the judiciary are the transparency of decisions of the judicial organs and the existence of an effective internal auditing mechanism against these decisions, as well as the possible application of legal remedies against them. However, the

provision that *""No judicial review or remedy is available against the decisions of the Council of Judges and Prosecutors, other than its decisions as to the penalty of termination of office"* contained in Article 159 of the Constitution has closed all decisions of the Council of Judges and Prosecutors, but for its decisions as to termination of office, to judicial review mechanisms.

Firstly, restriction of judges' and prosecutors' means to object against decisions made and actions taken concerning them results in the weakening, and even the elimination, of the tenure and employment assurance of judges.

Article 138 of the Constitution provides that *"Judges shall be independent in the discharge of their duties; […] No organ, authority, office nor individual may give orders or instructions to the courts or judges relating to the exercise of judicial power, send them circulars, nor make recommendations or suggestions,"* while Article 140 states that "Judges shall discharge their duties in accordance with the principles of the independence of the courts and the security of the tenure of judges." But these provisions are not adequate to assure the independent and impartial discharge of duties by judges who do not have the right of judicial review and remedy against appointment, career, personal affairs, assignment, and disciplinary decisions that may be made concerning them.

While a judge may easily be appointed to another place against his wishes, and the scope of his duties and powers may be changed, or the cases tried by him may be delegated to another judge through the closing of his court, a provision that no one may give orders or instructions to courts or judges cannot give any assurance of the independence and impartiality of judges. Another judge willing to substitute for him and to try and rule on his cases will always be available. Such a judge may even not deem it necessary to ask in which direction he is expected to rule and judge. And given that the new judge is in a position to know or estimate how he can protect his job position and title by ruling and judging in a particular direction, or in favour of particular interests, he will

by no means be able to rule independently and impartially because, in this scenario, he will perform his duties as a judge not independently and impartially but under political influences and bias, in line with the basis of ruling that will least affect him, or will help him most in progressing in his career. Under such circumstances, it should be admitted that the new judge will also be obliged to surrender to the probable wishes and expectations of the authorities having the power to make decisions about him and his career.

At this point, it should also be taken into consideration that a great majority of our valuable Turkish judges are sons of Anatolia who are not financially strong enough to resist political intent and pressures directed towards them, and are economically dependent upon their position and wages paid therefor; they dare not lose their position, and are unable to stand against even a small change of place of assignment.

For these reasons, even if it is assumed that it will make the most correct and fairest decisions, the fact that the decisions of the Council of Judges and Prosecutors are immunised against and exempted from judicial review and remedy is alone enough to restrict the independence of judges.

Now, therefore, it is a reality required to be accepted that judges by no means feel themselves to be independent against the fairly broad powers and authorities of the Council of Judges and Prosecutors, which is immunised against and exempted from judicial review and remedy, and even if no one attempts to give orders and instructions to them, the rule set down in Article 138 of the Constitution stating that *"Judges shall be independent […] and no organ, authority, office, or individual may give orders or instructions to the courts or judges"* will, in any event, remain unfulfilled.

i) International Treaties and Documents Require Judicial Review of the Council of Judges and Prosecutors

The "European Charter on the Statute of Judges" dated July

8–10, 1998, which was drafted with the participation of delegates from thirteen European member states and representatives of the EAJ, ENM and MEDEL and was adopted by the European Council in 1998, sets down and regulates the commonly accepted standards as to the legal status of judges. The minimum standards adopted by this Charter in connection therewith may be briefly summarised as follows:

a) In paragraph 1.3 of Article 1 regarding "General Principles" it is stipulated that in respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority, independent of the executive and legislative powers, within which at least half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.

As is seen therein, the members to be elected thereto are not only required to be from the profession of the judiciary but are also required to be elected by their peers, following methods guaranteeing the widest representation of the judiciary. Another important criterion is that the authority making these decisions must be totally independent of the executive and legislative powers.

In Turkey, the Council of Judges and Prosecutors perform this function. Prior to the referendum, the majority of the members of the Council of Judges and Prosecutors were elected by their peers, and the system was more compatible with the European Charter on the Statute for Judges. After the referendum, half of the thirteen members of the Council of Judges and Prosecutors were determined by the legislative power and the other half by the executive power; thus, this compatibility has been entirely eliminated. This is to say that the method of formation of the Council of Judges and Prosecutors is not in compliance with Article 1.3 of the aforesaid Charter. On the other hand, given that the roles of the minister of justice and his undersecretary, as well as those of various other members of the Council of Judges and Prosecutors,

are determined by the executive power, and the roles of certain others by the legislative power, the system is incompatible with the criterion of "being independent of the executive and legislative powers" also set down by the Charter.

b) According to Article 1.4 of the European Charter on the Statute for Judges, the statute gives to every judge who considers that his or her rights under the statute are threatened or ignored in any way whatsoever or, more generally, his or her independence, or that of the legal process, the possibility of referring to an independent authority with effective means available to it of remedying or proposing a remedy.

Given that such a threat may emerge through the decisions of the Council of Judges and Prosecutors against judges, in order to respond to or overcome this threat, a juridical authority entrusted and authorised to undertake a judicial review of the actions and decisions of the Council of Judges and Prosecutors is an absolute requirement.

However, the provision *"No judicial review or remedy is available against the decisions of the Council of Judges and Prosecutors, other than its decisions as to penalty of termination of office"* of Article 159(10) of the Constitution, allows judges to make reference to remedies only against decisions as to their termination of office, and this is clearly contrary to the proviso of Article 1.4 of the European Charter.

c) According to Article 5.2 of the European Charter on the Statute for Judges: *"The dereliction by a judge of one of the duties expressly defined by the statute may only give rise to a sanction upon a decision, following the proposal, the recommendation or the agreement of a tribunal or authority, composed at least of one-half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation. […] The decision of an executive authority, of a tribunal or of an authority pronouncing a sanction, as envisaged*

herein, is open to appeal to a higher judicial authority." The reference to a *"higher judicial authority"* in the second sentence of the article clearly proves that the authority mentioned in its first sentence is also a judicial authority.

In the legal cases to be brought against the decisions of the Council of Judges and Prosecutors for termination of the office of a judge, the Council of State has jurisdiction in the subject matter as a court of first instance. Decisions of the relevant chamber of the Council of State may be appealed in the General Assembly composed of the chambers of the Council of State. However, appointment of the members of the Council of State by the Council of Judges and Prosecutors may easily pave the way for concerns as to independence and impartiality. Even if only at a perception level, these concerns must be removed. Furthermore, there is no right to file a petition of appeal against the decisions of the Council of State to a higher judicial authority. The General Assembly of chambers, standing as a different grouping inside the Council of State itself, performs this function. In order to remove these concerns, a separate judicial authority for appeals against decisions of the Council of Judges and Prosecutors must be created, and another court must be appointed as the appellate court for appeals against decisions of said separate judicial authority.

d) According to Article 5.3 of the European Charter on the Statute for Judges: *"Each individual must have the possibility of submitting, without specific formality, a complaint relating to the miscarriage of justice in a given case to an independent body. This body has the power, if a careful and close examination makes dereliction on the part of a judge indisputably appear, […] to refer the matter to the disciplinary authority, or at the very least to recommend such referral to an authority normally competent in accordance with the statute, to make such a reference."*

The European Council's Committee of Ministers recommends in Article VI(2 and 3) of its Recommendation No. R(94)12 that a special organ be established, entrusted with the task of giv-

ing disciplinary punishments and taking disciplinary measures, with its decisions to be checked by and appealed in a supreme court of last resort, or with itself acting as, and in the capacity of, a supreme judicial authority.

Article 17 of the United Nations decision titled *"Basic Principles on the Independence of the Judiciary" made in 1985 provides that: "A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure, and the judge shall have the right to a fair hearing, and such decisions shall be open to judicial review mechanisms."*

According to these three documents, all complaints against judges must be examined and reviewed by an independent organ; the results thereof must be reported to another authority authorised to impose sanctions; this authority, itself being a judicial organ or its decisions being subject to review and appeal by a judicial organ, must decide to impose such sanctions after a hearing thereon; and the judge must have the right to defend himor herself in this process. The decisions made by this authority must be open to judicial review mechanisms.

At present, complaints concerning judges are reviewed, examined and decided upon by the Council of Judges and Prosecutors, and judges have the right to seek legal remedies (in the Council of State) only against decisions of termination of office. However, according to the documents cited above, the authority examining the complaints and the authority implementing the sanction must be judicial organs independent from the Council of Judges and Prosecutors, and must render their decisions as a result of a hearing.

All of these facts demonstrate the requirement to form a judicial organ to supervise and monitor the decisions of the Council of Judges and Prosecutors.

Pursuant to the provisions of Article 159(10) of the Constitution, amended by the referendum, and of Article 33(5) of Law

No. 6087, no judicial review or remedy is available against the decisions of the Council of Judges and Prosecutors, other than its decisions as to the penalty of termination of office. The Council of State is assigned as the court of first instance having jurisdiction on decisions of the Council of Judges and Prosecutors as to the penalty of termination of office. If it is accepted and viewed as an element of the executive organ, it seems rational for the Council of State to be appointed as the authority for appeals against decisions of the Council of Judges and Prosecutors because, as per Article 155 of the Constitution, the Council of State is basically the last instance for reviewing decisions and judgements rendered by the administrative courts, is entrusted with the task of expressing its opinions about the general regulatory transactions of the executive organ, i.e. of ensuring the compliance of the executive organ with the law, and is founded for the supervision and auditing of administrative actions and decisions.

However, though the Council of Judges and Prosecutors is described as an administrative board in the 1977 ruling of the Constitutional Court, and it actually performs an administrative duty, it is indeed not a part of the executive organ but is itself an executive organ, specifically working for the judiciary power. To put it in other words, it is an organ that runs the judiciary power, and a component of the judiciary power. For this reason, it is not legally fair to use the Council of State, originally founded for the supervision of the compliance of the government with the law, for the reviewing and auditing of decisions of the Council of Judges and Prosecutors as to the penalty of termination of office.

On the other hand, the Council of Judges and Prosecutors selects and appoints three-quarters of the members of the Council of State, while one-quarter of its members are appointed by the president. Therefore, taking into account that the Council of State is a hierarchically supreme board over the Council of Judges and Prosecutors – as it determines and appoints its members – it goes against the grain to use the members of the Council of

State appointed directly by the Council of Judges and Prosecutors as an authority of supervision and auditing over the decisions of the Council of Judges and Prosecutors. Of course, judges of the Council of State will rule and judge independently, and according to their personal convictions, but the natural essence should not conflict with this high ethical duty imposed on the judges. On the contrary, the natural dynamics arising from the natural essence should be to support and strengthen this ethical duty imposed upon them.

This, in turn, requires the formation of a separate judicial organ positioned specifically and independently, and entrusted with the task of ensuring judiciary accountability and supervision of the Council of Judges and Prosecutors, as well as compliance with the law in all of its decisions, particularly concerning its decisions as they relate to termination of office.

Another distortion created by the existing structuring of the judiciary may be seen in the example of legal cases brought forward against the state due to liability of the members of the Supreme Court of Appeals. In the past, liability claims and cases concerning and affecting its own members were tried and ruled on by the General Assembly of the Supreme Court of Appeals and, thus, a hierarchy existed between chambers and the General Assembly. Then, this judicial power and task was delegated to the 4th Civil Law Chamber of the Supreme Court of Appeals. As a result, members of the 4th Civil Law Chamber of the Supreme Court of Appeals were equipped with jurisdiction over members of other chambers who are, indeed, their peers in the hierarchy. Even when a legal case is tried by the General Assembly, the concerns arising out of the judges trying the case at the same time as being members of the same authority are felt even more sharply with this new arrangement. However, such types of legal cases concerning the members of the Supreme Court of Appeals should not be handled and tried by its other members, but by a special court organised outside of the Supreme Court of Appeals, with the seniority, com-

petence and adequate qualifications to oversee trials of judges at that level, but being undoubtedly independent and impartial, or specifically structured in such a manner as to not raise any question of impropriety. This requires the formation of a separate court that is specifically assigned to and authorised for these types of cases.

On the other hand, given that criminal cases against members of the Supreme Court of Appeals are tried and ruled upon by the Constitutional Court acting as the Supreme Criminal Tribunal, it is entirely contradictory to accept a different standard of referral of civil claims and cases concerning the same members to a different court. Even this very simple need points to the requirement for the further development of the judiciary superstructure by founding a separate court assigned and authorised to hear these cases.

As mentioned by Canadian judge Justice F.B. William Kelly in his article "An Independent Judiciary: The Core of the Rule of Law", in France judges are tried by the Supreme Court of the Judiciary, composed of seven members who are appointed by the president from amongst judges and two members who are appointed from amongst non-judges. As a result of hearings, one of the disciplinary measures, extending from warning to dismissal, is imposed. In Germany, the German Federal Constitutional Court decides whether a judge has breached basic German law or not, and may ultimately decide to terminate his office, to retire him or to appoint him to other duties. Germany also has a disciplinary court authorised to impose disciplinary measures on or terminate the office of judges, in the event of their accepting bribes or delay or failure in the performance of their judicial duties.

These two examples also demonstrate that it is necessary to establish a separate judicial authority for the trial of judges for disciplinary or other matters, and supports our proposal to establish a separate judicial organ for the judicial review of decisions concerning the judiciary itself and its elements within the frame of formation of the Supreme Authority of Justice.

On the other hand, it should be not only the decisions of the Council of Judges and Prosecutors as to termination of office but all of its decisions that are subject to and covered by judicial review, because judicial review of the decisions as to termination of office will determine only whether the subject can be accepted into the judicial community or not, and therefore this judicial review does not have the capacity or the opportunity to ensure the compliance of the existing members of the judicial community with fundamental universal principles. In addition, an uncontrolled authority of supervision over existing members of the judicial community will surely have negative effects, both on their ability to make independent and impartial rulings and judgements and on the effective performance of their duties. Even if it does not have any such consequences it will leave them with the lingering fear and pressure of the possibility of such effects and will, therefore, negatively affect their being free to act independently.

Furthermore, to provide an assurance to judges alone, as described above, is not adequate or right either. All professionals employed in the judiciary organ should likewise be covered by this job assurance. Particularly due to the vital role played, especially in ensuring the compliance of the public administration with the law and, generally, in securing justice in the country, both the lawyers and counsel, accepted as being amongst the founding elements of the judiciary, and their professional organisations, i.e. bar associations, as well as the Union of Turkish Bar Associations, should be relieved of the control, custody and tutelage of executive powers.

Indeed, we are facing a disorganised, patchwork and fragmented picture due to the availability of judicial review in some of the supreme organs of the judiciary and the unavailability thereof in others. Administrative remedies are available and open against decisions of the Union of the Turkish Bar Associations and of the Ministry of Justice. However, this does not conform to the hierarchy of professions and professional organisations. Administrative law judges who are appointed by the Council of Judges and Pros-

ecutors have a say in the decisions of lawyers and their professional organisations that are, indeed, at their equivalent level in the hierarchy. Likewise, administrative court judges are authorised to supervise and audit the administrative decisions made by the minister of justice, standing as the chairperson of the Council of Judges and Prosecutors that appointed them, and by his undersecretary, both acting in the name of the Ministry of Justice. As is noted, also when judicial remedies are available against the decisions of the Council of Judges and Prosecutors, various problems and conflicts exist that may affect independence, hierarchically, and may lead to discrepancies amongst professionals.

Another deep-rooted contradiction is that although lawyers have this right, judges and prosecutors are not allowed to apply for judicial review of decisions of their own superior professional organisations.

In examples from the Supreme Court of Appeals, civil liability claims and cases against members of the courts of appeal are tried by their own peers and colleagues who are at the same hierarchical level, and are in close collaboration with them as a requirement of their job functions, and this also cannot be accepted in light of the principle of impartiality. Such types of legal cases are also required to be referred to, and tried in, a separate court.

In conclusion, all elements of the judiciary must have the right to resort to legal remedies against decisions and actions of their superior organisations, and these legal remedies should be arranged as required, without causing any internal contradictions or conflicts.

(j) The Relationship between the Restriction of the Independence of the Judiciary and Non-accountability

There is no legislative arrangement (other than for decisions as to termination of office) requiring the Council of Judges and Prosecutors to be accountable to society ex officio, or to a judicial organ or authority upon demand or application of the relevant

persons or entities on all matters concerning their rights pertaining thereto.

There are many reasons lying behind the intent of politicians to keep the decision-making organs and elements under their control. However, the reason lying behind the willingness of the public, and even its almost encouraging the politicians towards it rather than raising an objection against it, is the common belief that the judiciary and, particularly, the supreme judicial organs and their members are not accountable, cannot even be held accountable for personal offences that are not job-related and have turned into a privileged clan enjoying preferential treatment, even though they fail to perform their duties.

As a matter of fact, the basic reason and rationale underlying the legislative arrangement made in 1981, and upheld in the 1981 Constitution, to directly include the minister of justice and his undersecretary in the Supreme Council of Judges was the severe reaction of the public to the system wherein since 1971 members of the Supreme Court of Appeals had elected members of the Supreme Council of Judges and, vice versa, members of the Supreme Council of Judges had elected members of the Supreme Court of Appeals, thereby paving the way for the Supreme Court of Appeals to dominate and control the entire system, and for its members to become a privileged and non-accountable society.

Behind the support given by the public to the constitutional amendments made in the recent past, i.e. in 2010, in a fairly democratic environment in comparison with that of 1982, lie some important reasons and facts, such as the failure of the judiciary to keep in step with the rapid development of the country, its struggle against change, its failure to offer judicial services to meet the demands or to give clear account, and its push against custody and tutelage in regard to certain important milestones. The public complains of the judiciary in the belief that it does not perform its duties, and cannot accept its members' making use of the privileges and preferential treatment granted to them solely as a result

of their positions. Thus, the people resent the judiciary due to its failure to perform its duties and, therefore, exhibit a reactionary response by giving control to the executive organ – which can, at the very least, be replaced in elections.

Briefly, included amongst many reasons lying behind the trend for politicians to make efforts to be included in and to take control of the judiciary power through certain elements of the executive organ, as a result of which the weight of the executive organ has gradually increased therein, is one extremely just and right reason, which is the fact that the judiciary and its elements are by no means accountable.

Under these circumstances, the way to make the judiciary accountable is viewed as the surrendering of control by the Council of Judges and Prosecutors, sitting at the peak of the judiciary organisation, to the executive organ, which can call the judiciary to account (and may also be called to account itself in elections). Historically, the preferred course for it has been to make the functioning of the Council of Judges and Prosecutors dependent upon the participation and approval of the minister of justice and his undersecretary. Thus, in fact, the non-accountability of the judiciary power makes it the subject of efforts aimed at taking it under control, and in cases of integration of the legislative and executive organs makes it subject to, and required to surrender to, the executive organ. In other words, this consequence was, in any event, inevitable.

This, in turn, demonstrates that the independence of the judiciary power is dependent upon its being accountable. Therefore, the judiciary power can assure respect for and protection of its independence only upon agreeing to be accountable, and providing that it does, indeed, make itself accountable. A judiciary that is not independent, or whose independence is not trusted, can by no means give confidence as to its impartiality, and cannot be expected to provide assurance that it secures, or will secure, justice either in reality or in the perception of its applicants.

(k) The Independence and Effective, Productive Functioning of the Judiciary Can Be Secured Only by an Organisation Making It Accountable in All Aspects

In fact, in both the public and the private sectors, the healthy functioning and sustainability of institutions and organisations is dependent upon their being accountable. The judiciary should also shore up confidence as to its will to perform its functions in a healthy manner and to secure justice, to fulfil the fair and just requests of the people and to be accountable in all aspects. To this end, it must demonstrate to the public that it is performing its job functions properly or, otherwise, is precluded from performing its job functions due to certain just causes.

The judiciary must become capable of developing co-operation and solidarity amongst its members, developing and implementing strategies that respond fully to the needs and requirements of society, and establishing trust, both inside and outside, through functioning in a healthy manner. Finally, it must produce the highest-quality services and compete with its contemporaries.

For this purpose, the following goals should be achieved in the judicial organisation:

- Representation of different political views and interest groups;
- Dampening political influence at the stage of determination of policies and priorities, by taking actions and measures assuring the expression of political preferences of different interest groups but, nevertheless, preventing their interference in the operational level of the judiciary;
- Assuring the corporate and individual accountability of the judiciary and its elements – without compromising established principles;
- Ensuring that all actions and decisions of the judicial organs are fully transparent and justified, and are open to legal resorts and remedies;

- Ensuring that legal professionals providing services are held liable for, and have a say in, all arrangements and organisations regarding provision of these services; and
- Ensuring that services are rendered in conformity with the demands, needs and priorities of service recipients, who are made aware of, and have a say in, all stages of services.

Firstly, it is a commonly accepted rule that in the production of all kinds of goods and services, it is required to establish a consensus between service producer and provider on the one hand, and service recipient on the other hand, with respect to the qualities and standards of services, the modus operandi of the entire production process, and the rights and obligations of the service provider and recipient in the course of the production process. It does not make any difference, and is by no means important, whether the subject service is a public service or not, is chargeable or free of charge, or is given or received voluntarily or non-voluntarily. Speaking of judicial services, in order to satisfy public concern, many mandatory legislative instruments are required to be issued with respect to services, service providers, service processes, and the rights and obligations of service recipients. For example, a fair trial standard determines and puts forth the minimum quality level of judicial services following international and national regulations. Trial procedures and rules describe the service production process to the fullest extent, and intermediate appeal and appeal regulations constitute the quality control stages that provide assurance of the accuracy and fairness of the judgements and rulings resulting therefrom.

Likewise, the exclusion of judicial processes and operations from political influence requires clean and pure services. However, the reflection of the political preferences of society with respect to judicial services is comparable to the fulfilment of requests of service recipients as to how service providers must organise themselves and function. The rules allowing customers to express their requests and demands regarding service providers, but which preclude them from

interfering in the activities of the service provider, are exactly the same as for judicial activities. In fact, society must be permitted to express its political preferences regarding judicial issues and choices, but must never be allowed to intervene in judicial operations, other than through expectations of accountability, objections, pleas, and appeal processes and methods. This can be secured by assuring the independence and accountability of the judiciary. To put it in other words, independence and accountability must act in harmony in the judiciary.

It is already demonstrated through our experiences that the independence of the judiciary should be secured and guaranteed by both the Constitution and a strong Constitutional Protection Organisation. To say that judges are independent is in no event, and by no means, adequate to ensure that the judiciary functions independently. The judiciary may function independently without being subject to or requiring any custody or tutelage only if and to the extent that this is secured and guaranteed by sound constitutional support and protections.

Both the independence and the accountability of the judiciary can be safely assured by a two-phase superstructure and through the separation of service operations from policies. To this end:

(i) Firstly, the stage of formulating policies and preferences with respect to justice and the judiciary, and the organ in charge thereof, should be clearly separated from the stage of providing judicial services and the organ in charge thereof. The organ determining policies and preferences should have the right and opportunity to affect and influence the organ determining judicial operations.

(ii) Secondly, in the organ in charge of policies and preferences, a membership composition and an appointment system not affected by any political thought or any politicians should be adopted and applied. Through such methods as providing the mainstream and secondary-level political parties with the right to nominate candidates, and the appointment of a higher number of members

by certain organisations (for example, election or appointment by organisations secured by the Constitution and non-governmental organisations meeting certain criteria) than those appointed by politicians, the elimination and neutralisation may be achieved of the determinant weight of the powers of appointment presently vested in politicians in both the legislative and executive organs in the appointment of the members of the Council of Judges and Prosecutors.

To assure the independence and accountability of the judiciary; to make sure that the judiciary reflects of the politics of society regarding justice and the judiciary; to dampen the intention of politicians to influence the judiciary at an early stage, before it can reach judicial activities and elements and, thus, ensure the elimination of just criticisms, complaints, problems and concerns of society in connection therewith; and, at the same time, to make the judiciary capable of producing healthy, effective and productive judicial services at the same level as its contemporaries, may be possible only with the judiciary superstructure outlined and described below. This superstructure can be easily established by the foundation of a superior umbrella organisation, which could be named the "Supreme Authority of Justice" by rearranging the relations between the judicial organs, and by allowing legal resorts and remedies against all kinds of decisions and actions of the judicial organs relating to the judiciary.

The Supreme Authority of Justice

The Supreme Authority of Justice should be entrusted with the task of determining and formulating the justice and judiciary policies of the state in line with the needs of the country and the preferences of society, entirely independent from political powers and governments but, on the contrary, by ensuring the representation and participation of all political viewpoints and even all constitutional organisations and parts of the state. Accordingly, all duties and powers vested in the Ministry of Justice in relation therewith should be delegated to the Supreme Authority of Justice. The duties and powers of the Ministry of Justice should be limited to developing policy proposals and presenting the same to the Supreme Authority of Justice, providing the resources that may be required throughout the course of policy formation, and providing certain ancillary services of the judiciary.

The Supreme Authority of Justice should be managed and represented by a board, the members of which may be contemplated to be elected as a result of a process that allows for public debate and for the expression of all opinions in relation therewith from amongst candidates who meet certain minimum qualifications, as nominated by the organisations regulated by the Constitution, in particular, the Turkish Grand National Assembly, the Presidency and the bar associations, by the professional organisations with public institution status, and by judges and prosecutors, in such

a manner as to reflect the preferences of all segments of society. Such an election procedure will ensure that all segments of society have a say and are represented in the formation of the Supreme Authority of Justice, thereby electing only capable and efficient candidates thereto. So as to further strengthen the impartiality of the Supreme Authority of Justice, the election of candidates to be nominated by certain non-governmental organisations classified according to certain criteria to be determined – such as working in the public interest, having a certain organisational structure and a certain number of members, or being equipped with certain powers – may also be considered.

The Supreme Authority of Justice may further be insulated from political influences by keeping the term of office of its members longer than the term of office of the president and the deputies and, likewise, by electing its members not collectively but separately, at different times. Furthermore, it may also be contemplated that some activities of the board be held under the supervision of the National Assembly, or that the board be held responsible by the National Assembly in some instances.

The Supreme Authority of Justice must include a "Policies, Preferences and Principles Department" to hold negotiations on justiceand judiciary-related issues, and to formulate policies to be pursued thereon and determining principles and priorities in connection therewith, as well as a "Decisions and Enforcement Department" to make and implement decisions for the enforcement of the policies formulated by the former, and to follow up the implementation thereof. The first department should be manned by representatives of political parties, while the latter should be manned by experts on the judiciary and its services; thus, reflections and influences of politics on the judiciary should be terminated in the first department, and the politics should somehow be detained at that phase.

The basic objectives of the Supreme Authority of Justice should at least be as follows:

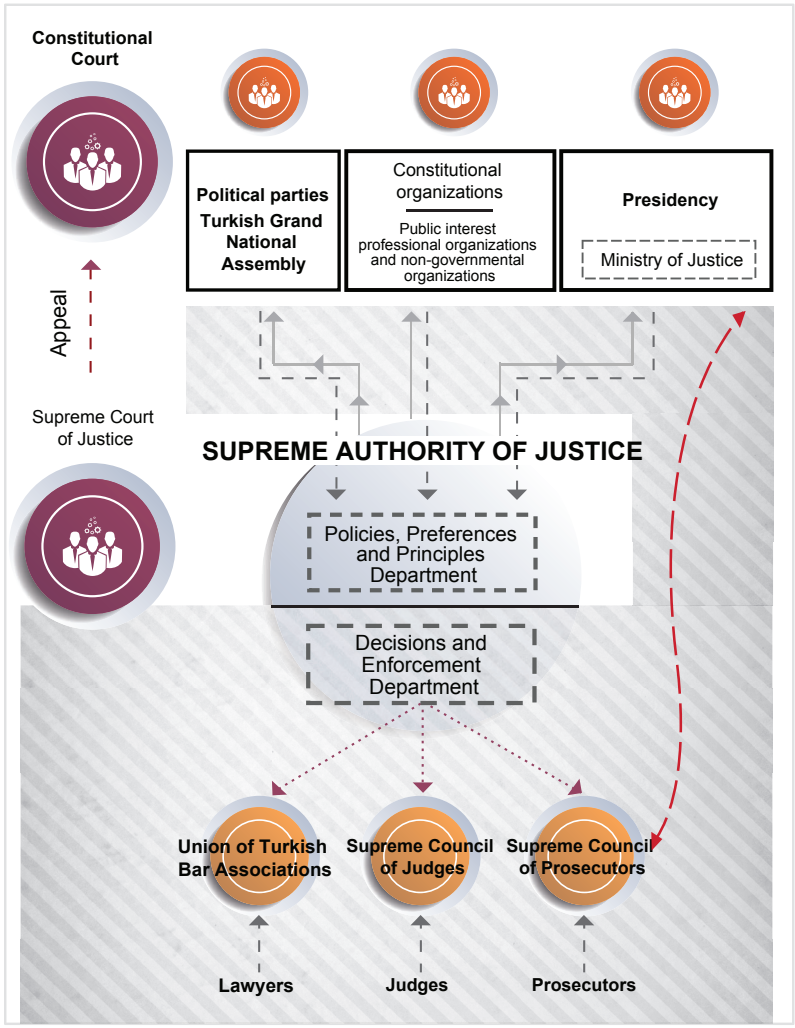
(i) Judges, prosecutors, lawyers and counsel, and other paralegal personnel should be required to comply to the maximum extent with universal judicial principles, in particular including, but not limited to, independence, impartiality, transparency and accountability, integrity, honesty, foreseeability, precision and certainty, accessibility, equalitarianism and non-discrimination, capacity, professional capability, prudence, effective and efficient working, and professional attitude.

(ii) The Supreme Authority of Justice must determine the policies and priorities of Turkey regarding justice services and resources, as well as the budget therefor required, and must give priority to allowing the judiciary budget to be drawn from the state budget.

(iii) The Supreme Authority of Justice must ensure both short -and longterm planning for lawyers and other human resources and must announce these plans to the public in a transparent manner, and especially to judges and prosecutors. The planning must show – even if roughly – how they may progress in their careers, providing that they maintain their qualifications and competence throughout their full professional life, and must, at the beginning of their career path, indicate at what dates they will be subject to appointments, compulsory eastern service and similar other obligatory assignments.

(iv) The Supreme Authority of Justice must ensure that all judiciary professionals (judges, prosecutors, lawyers and counsel, and other paralegal personnel) are subject to the same ethical and disciplinary rules, and to the same prior consent, investigation and prosecution rules in connection with any task-related and personal crimes and

Figure 8: The Proposed Supreme Authority of Justice and the Composition, Elections and Accountability of the Judiciary



misdemeanours committed, and that these rules are uniformly implemented over all of them.

(v) The Supreme Authority of Justice must observe the activities of the judiciary elements in pursuit of predetermined goals and the results obtained therefrom, and must ensure accountability for this work in all aspects.

(vi) All types of actions and decisions of the Supreme Authority of Justice, other than its policy-related decisions, should be subject to judicial review.

(vii) The Supreme Authority of Justice must be accountable directly to the public through the issuing of comprehensive yearly reports indicating to what extent its predetermined objectives for securing justice have been accomplished, and through providing all forms of information to the press, other media and citizens upon demand. It may also be contemplated that it should also be accountable towards the Turkish Grand National Assembly. The Turkish Grand National Assembly should observe and supervise the effective functioning of the accountability of the Supreme Authority of Justice through a special commission designated solely for this purpose.

(viii) Cases requiring cancellation of membership or dismissal of members of the Supreme Authority of Justice should be regulated as exceptions, and the Constitutional Court should be authorised in connection therewith. The power to initiate this process may be vested in a limited number of constitutional organisations and the National Assembly, and, in addition, it may be considered to give special authorisation to entities such as the Constitutional Protection Authority and the Chief Public Prosecutor's Office which are contemplated to be established.

a) Policies, Preferences and Principles Department

This department that is preferably to comprise members appointed or determined by political sources should be entrusted with the task of determining the policies and preferences of the country, as to justice and the judiciary, and should make decisions and recommendations as the basis for the decisions of other departments. As politicians will not be allowed to intervene beyond this point, this department will, on the one hand, identify the political choices and policies of society and, on the other hand, limit and attenuate political influences on the judiciary to this department and its functions – precluding politicians from being involved on the enforcement side. This department may have executive powers only in exceptional cases – for instance, such cases as the exceptional dismissal of members of the Decisions and Enforcement Department – or alternatively may have no executive power in any circumstances.

b) Decisions and Enforcement Department

This department may make decisions enforceable by other judicial organs, and may present these decisions to them in line with the policies and preferences that are determined by the Policies, Preferences and Principles Department. For instance, it may make and advise on decisions for the Board of Judges on such issues as in which legal fields the number of judges needs to be increased, and what types of solutions should be prioritised in connection therewith. The effects of this department on other judicial organs may also be terminated at the point of presentation of these decisions. This department may also be given certain executive powers, such as the appointment of certain members of the operational judicial organs, e.g. the Council of Judges and Prosecutors, as well as their dismissal in exceptional cases. If judicial organisations such as the Council of Judges and Prosecutors are operationally and functionally autonomous from the Supreme Authority of Justice

and its Decisions and Enforcement Department, but are accountable in terms of policies and preferences, then this enforcement department may also be precluded from exerting any influence on judicial service providers.

c) Supreme Court of Justice

Through an Objection and Trial Chamber (court) that is a part of the judicial organisation but, nevertheless, autonomous from the Supreme Authority of Justice, a full judicial review mechanism can be provided against decisions of both the Supreme Authority of Justice and the Supreme Council of Judges, Supreme Council of Prosecutors and Supreme Council of Lawyers. This court may be granted jurisdiction over objections and appeals against decisions of the Supreme Authority of Justice and its departments, and over all of the professional organisations of judges, prosecutors and lawyers. Thus, all judicial professionals will have legal recourse and remedies of the same standards, and their conflicts with the system can be resolved by judicial organs in accordance with general trial procedures. Of course, decisions of this court should also be subject to appeal.

This judicial authority (court) required to be formed in order to try objections and legal cases brought against decisions of the Supreme Authority of Justice, Council of Judges and Prosecutors and Union of Turkish Bar Associations should be a part of this system, but should function independently from the Supreme Authority of Justice, and if it is included in the organisation of the Supreme Authority of Justice, then it should be independent from and impartial in relation to other departments and members of the Supreme Authority of Justice.

To achieve all these objectives requires the establishment of a Supreme Court of Justice with jurisdiction over objections and legal cases against decisions of the aforementioned judicial organs, as detailed in the preceding paragraphs. Though this function may also be contemplated to be assigned to the Constitutional Court, as

the decisions of the Supreme Court of Justice are also required to be subject to appeal, it would be more appropriate to consider the Constitutional Court as the authority of appeal against the decisions of the Supreme Court of Justice. Of course, another judicial authority may also be considered to be established for appeals against the decisions of the Supreme Court of Justice, but as the issues covered by the duties of this court will be closely related to constitutional rights and assurances, it would be more rational to use the Constitutional Court as an authority of appeal.

The Supreme Court of Justice may also be contemplated to be a special and temporary court formed and functioning according to certain procedures with the participation of representatives of other supreme courts; but, in practice, the assignment of such duties to individuals in addition to their normal duties and tasks indeed limits their contributions to both their own institution and their temporary place of assignment, also narrowing their accountability and their efficiency, and this approach must, therefore, not be preferred.

Such an organisation may be preferred as it creates a judicial remedy, authority and methodology, fit and appropriate to the judicial elements and their professions. However, and more importantly, almost all of the decisions and actions in connection therewith, and all of the probable conflicts arising therefrom, are of particular concern to the judicial elements secured and guaranteed by the Constitution. For this reason, each subject of all cases referred to this Supreme Court of Justice will basically contain an element of constitutionality review. Therefore, each subject of any case to be referred to this chamber (court) will directly concern the functions of the Constitutional Court. It would thus be logical to involve the Constitutional Court in the process, at least at the stage of appeal against the decisions of this Supreme Court of Justice. Such a function would, at the same time, serve to reinforce the function of the Constitutional Court regarding the protection and supervision of the Constitution.

d) YProfessional Organisations of Judicial Elements: Council of Judges, Council of Prosecutors, Union of Turkish Bar Associations

The Council of Judges and Prosecutors should be divided into two councils, as the Council of Judges and the Council of Prosecutors, and further, into professional organisations with three judicial elements, i.e. judges, prosecutors and lawyers or counsel. These should be segregated and rearranged as the Council of Judges, Council of Prosecutors and Council of Lawyers at the same level, and all of them should be held accountable to render their services in harmony, according to choices to be determined by the Supreme Court of Justice. However, these three professional groups should be autonomous from the Supreme Court of Justice and independent per se, and must have a say in their own professional organisations through fair representation. If it is contemplated that the Supreme Court of Justice is to be represented in these councils, such representation should be limited to such an extent as to render it impossible for the Supreme Court of Justice to control and dominate the will of these professionals.

In such an organisation, the Union of Turkish Bar Associations, Supreme Council of Judges and Supreme Council of Prosecutors can all be independent, and can also perform their functions without compromising their independence, only if they are made to be independent (autonomous) from the Supreme Court of Justice in terms of function. The Supreme Court of Justice, in the interest of the public may, therefore, guarantee their effective accountability and efficient functioning through the monitoring of their activities.

Therefore, the professional organisations of judges, prosecutors and lawyers (Supreme Council of Judges, Supreme Council of Prosecutors and Union of Turkish Bar Associations) must be independent and autonomous in their functions, but must also be accountable to the Supreme Court of Justice. The Supreme Court of Prosecutors must be independent and autonomous in its func-

tions, and accountable to the Supreme Court of Justice in its activities, but must also be affiliated with the Ministry of Justice in terms of resources.

In conclusion, the structuring of the supreme organs of the judiciary as proposed above will, on the one hand, attenuate and dampen the influence of the executive organ and politicians over the judiciary at the level of the Supreme Authority of Justice while, on the other hand, making it possible to formulate judicial policies in line with the preferences of society and to guarantee the accountability of the judiciary without compromising its independence and impartiality, in addition to creating positive platform for co-operation and solidarity amongst the professionals. This, in turn, will rapidly increase and enhance the quality of judicial services.

On the other hand, autonomous professional organisations will further develop vocational efforts and competition and, through the professional management support provided, professionals will be able to use their own power more effectively.

In addition, the Supreme Court of Justice will provide opportunites to institutions representing a broad segment of society to see their preferences and wishes with regard to the judiciary and justice reflected in judiciary and judicial policies, without precluding the judiciary from functioning independently and impartially, through members to be appointed by them thereto.

PART IV.
RENDERING OF ACCOUNTS IN JUDICIARY AND EXECUTIVE POWERS

To be "accountable" means that one is "ready to be accountable" to render an account, but it does not necessarily mean that one has rendered or is going to render an account of one's actions. While "rendering of an account" per se and in itself covers the status of being "accountable," it further suggests that an account will definitely be rendered, and that the account to be rendered has been made ready. While the word "accountability" contains a subjectivity and uncertainty that depends upon the personal acts of the person rendering an account or the person calling someone to account, the term "rendering of an account" implies a certainty, and does not contain any subjectivity or uncertainty; it presupposes that the mechanisms and processes needed for this purpose have already been put into place and are functional, and the rendering of account has already commenced and will, in the future, be completed. The word "accountability," derived from the combination of the word "account" and the word "ability," meaning "talent, skill or proficiency to do something,"is generally translated into Turkish in its exact essence, word for word, as "hesap verebilirlik," but the same Turkish words are also used to express the concept of "rendering of an account." Thus, although this Turkish translation of the word "accountability" seems correct in a literal sense, we believe that the Turkish phrase misrepresents the concept that the English word expresses and will, inevitably, convey to the reader a meaning that is different from the actual underlying concept. For this reason, we prefer to use the words "Rendering of an account."

Ensuring that civil servants and public officers properly perform their job duties and use the powers vested in them fully and in line with the requirements of their job, and proactively preventing probable fraudulent actions, are vitally important for social peace and order. The rendering of accounts in public administration is the most important method of achieving this objective, and maintaining peace and order.

In the post-referendum government system established in Turkey, wherein the president renders an account only to electors, and during the election process, while ministers render an account only to the president, it has become ever more important to assure the rendering of accounts in public administration.

Rendering of Accounts in General, and Its Importance for Democracy

The rendering of accounts is a means to assure the rule (supremacy) of law in the public field and, at the same time, to be seen to preserve it. The rendering of accounts, either to hierarchical superiors in an administrative meaning of the term or to juridical authorities in a legal meaning, represents a legal process of auditing and checking whether or not civil servants and public officers are performing their job duties and using their job-related powers in strict compliance with certain predetermined legal rules. This process assures the rule (supremacy) of law in the public field. The rule (supremacy) of law requires the rendering of accounts and, in turn, the rendering of accounts paves the way for the rule (supremacy) of law. This is why whenever the rendering of accounts is not maintained, the rule (supremacy) of law also fails.

The rendering of accounts literally means that a person demonstrates and proves to another person by physical facts that he or she is conducting business activities in accordance with the rules applicable thereto. To put it in other words, the rendering of accounts is carried out according to a specific rule. In order for one to be eligible to state the existence of a rule (a law), it is not adequate to formulate and put forth the rule; that rule must also be enforced, or be enforceable. In yet other words, a rule that is not enforced, or that cannot be enforced, is indeed null and void ab initio. Accordingly, a law that is not, or cannot be, enforced is, in fact, not a law in real terms. Enforcement

of a rule means that those who breach it are, in practice, sanctioned by another person. To this end, the person assigned for the enforcement of a rule must be equipped with the power to impose sanctions on violators and must also have adequate physical power and means to exert such power.

If one breaches a rule enacted and imposed by oneself, that rule is, ipso facto, deemed to be nullified per se, and therefore a breach of rule no longer exists. For this reason, one never holds oneself liable and responsible for, and never imposes, any sanction on oneself due to a breach of one's own rule. A person is only obligated to comply with the rules of a breach that may lead to liability towards third parties. The enforcer of a rule is, by all means, required to be a person other than the person required and expected to comply with that rule because, as is accepted today as one of the fundamental principles of the law of obligations, one may not become indebted to oneself. If and when a debtor and creditor are one and the same person in a relationship, the underlying debt is per se removed automatically and with immediate effect. Naturally, also, when one breaches a rule one is obliged to comply with, one considers oneself to be inherently authorized to remove or modify the relevant rule, permanently or temporarily, and retrospectively. Thus, if one breaches a rule one is obliged to comply with, one does not accuse and penalize oneself, unless one does so for the demonstrative effects on third parties, because human nature is based on advancement at all times, not on self-accusation and penalization.

For these reasons, for the sake of the rule (supremacy) of law, whether or not laws are complied with should be checked and audited by a person other than those who are required to comply with them, and if and when any of these laws is breached, the violator should absolutely be punished by the sanction predetermined therefor. It is imperative, both logically and on moral grounds, to ensure that the rules of law, at all times, are enforceable and stand superior, and that those who call someone to account are, at all times, different from those who render an account, i.e. who are under the obligation

to abide by the rules. As a natural result, persons or entities cannot render to themselves an account for their action. Rendering an account to oneself is also contrary to human nature. For this reason, in order for one to be able to render an account, one must definitely be put in a position to render one's account to another person.

This means to say that the rendering of an account cannot be considered unless the person rendering the account is different from the person who calls him or her to account. A scenario wherein a person or an entity is rendering an account and is, at the same time, the party calling the first party to account cannot be an example of rendering an account. Such a scenario will inevitably result in arbitrariness.

The process of rendering an account is naturally composed of three stages: (i) the party rendering an account keeps the other side informed of its activities; (ii) the questions of the party calling the first party to account are answered, and the underlying activities are explained with reasons therefor; and (iii) feedback (approval, criticism, accusation, release and other similar acts) is given, or a decision is made, about the party rendering an account and its activities.

No one can refer to the rule (supremacy) of law and the democratic government in the absence of the rendering of accounts by public administrations and entities. Unless and until the civil servants and public officers entrusted with the task of state governance and those who are vested with the power to possess and use public power, render accounts for their policies, decisions, actions, omissions, breaches and expenditures, democracy remains merely on paper. For this reason, in public administration the rule (supremacy) of law, or, to put it in other words, the public rendering of accounts, is a sine qua non for a democratic government.

The fundamental purpose of rendering of accounts by public administrations is to ensure that the powers vested in civil servants and public officers are, at all times, used accurately, in a timely fashion, in such a manner as to accomplish the best result, and in strict compliance with the original intention of assignment, thereby assuring

the performance of all public duties in the most effective manner possible. The first function of the rendering of accounts is democratic control, i.e. enabling the public to check and audit whether the civil servants and public officers assigned by them are performing their duties and using their powers in strict compliance with their original purposes of use, thus providing voters with healthy data as needed for political supervision and audit. Its second function is to provide assurances through judicial review against social deterioration and corruption, favoritism, fraud, and other improper actions and behaviors, thereby preventing misuse and abuse of public powers. Its third function is to ensure that the required lessons are derived and taken from good and bad events, thus paving the way for public learning. The rendering of accounts is required not to make civil servants and public officers into scapegoats or to keep them under eternal suspicion, but to ensure their release and discharge, and to encourage them to fulfill their functions in the best manner possible and to render accounts for their actions.

Another consequence of the rendering of accounts is that it strengthens the merit and qualifications of the servants in public administration. While merit requires the selection and appointment of the best candidates from amongst the nominees with adequate job qualifications for civil service posts, the rendering of accounts ensures that the civil servants and public officers thus selected and appointed perform their job duties in the best manner possible. As a result, merit and the rendering of accounts function hand in hand. In the absence of merit in public governance, the civil service deteriorates into struggles for position, public power and income channels in consideration of unconditional adherence to the orders of the appointer, rather than serving the public, which in turn leads to social deterioration and, over time, to the politicization of state organizations and government bodies. For this reason – for the sake of healthy public governance – the utilization of a merit system and the rendering of accounts is needed and, as one of the basic elements thereof, it is essential to assure the rendering of accounts in public administration. As a matter

of fact, the rendering of accounts is a requirement and a condition precedent to institutionalization. The system of rendering of accounts and merit should be the fundamental and foremost principle required to be accomplished in institutionalized public governance.

In general, the methods of rendering of accounts may be grouped into many categories depending upon to whom the account is rendered, the issues and subjects covered, for what purposes and by what methods. The methods of rendering of accounts to prevent misuse and abuse of public powers may be classified as follows: (i) hierarchical responsibility towards superiors; (ii) compliance with professional ethics and discipline rules towards colleagues and peers; (iii) financial and accounting compliance towards fiscal auditors; (iv) compliance with laws and legal rules before judicial authorities; and (v) political accountability in elections by the public, or so as to be eligible for election by the members of the relevant organizations.

In addition, the methods of rendering of accounts may also be grouped as either vertical or horizontal depending upon the nature of the relationship between the party rendering an account and the party calling the first party to account. In vertical rendering of accounts, the party calling the other to account generally controls the party rendering an account, and is in a position where he or she may also be affected by the consequences of the rendering of the account. In vertical rendering of accounts, the party calling the other to account is, hierarchically, the immediate superior of the party rendering an account and is closely related to the subject on which the account is rendered. On the other hand, in horizontal rendering of accounts, as there is no such relationship between the party calling the other to account and the party rendering an account, the party calling the other to account is not affected by the consequences of the rendering of account and is able to act more neutrally and impartially. Despite this positive aspect, in horizontal rendering of accounts, the party calling the other to account is less involved in the subject upon which an account is rendered than is the case in vertical renderings of account.

A combination of the methods of vertical and horizontal ren-

dering of accounts may assure greater transparency in the rendering of accounts, thus making it more effective. For instance, in a vertical, hierarchical rendering of an account, where an officer renders an account to their superior, the superior to their manager, the manager to a general manager, the general manager to the regional manager, the regional manager to the undersecretary and the undersecretary to the minister, the public may even not be aware of such a sequence, and nor may the public have a say in the decisions required to be given, or even formulate or express any opinions thereon. Under such circumstances, as in the saying "Don't let it out of this room," even breaches, fraud and corruption committed by civil servants may not reach the ear of the public and, thus, the right of the public to call the relevant civil servants to account may be restricted.

The right to information granted to individuals cannot be expected to close this gap: How can an individual be expected to file an application for information on a specific event that has not even come to light, or that has no bearing on that individual's personal interests? Even if such an application for information is filed, the information acquired as such will not be adequate for the rendering of accounts, in principle. For this reason, in public administration, each stage of the hierarchical rendering of accounts should be reported so as to be freely accessible to the public. Adoption of the Integrated Reporting principles in this reporting process will surely increase the depth and effectiveness of the rendering of accounts.

As is done in publicly held corporations, there is a need to ensure the integrity of reports issued by public administrations, and to build and develop trust in the public in relation therewith. Compliance with the Integrated Reporting principles will ensure a significant improvement in this direction. However, even this is not entirely adequate, and a professional and independent external audit should also be used for public activities in order to prove and demonstrate that these principles are complied with and that the reports are full and complete. At this point, what is important is not necessarily whether the auditing firm is a private sector or public sector corpora-

tion but that it has no direct or indirect relation with, and is entirely independent from, the entity rendering an account of its actions. In some incidents that have taken place in the U.S. in recent years, even in the presence of an independent external audit, it has become manifest that various methods may, over time, be developed in order to avoid the rendering of accounts. The lesson required to be derived out of events such as the Enron scandal in the U.S. is that external audits and external auditors must be wholly independent from the persons and entities being audited.

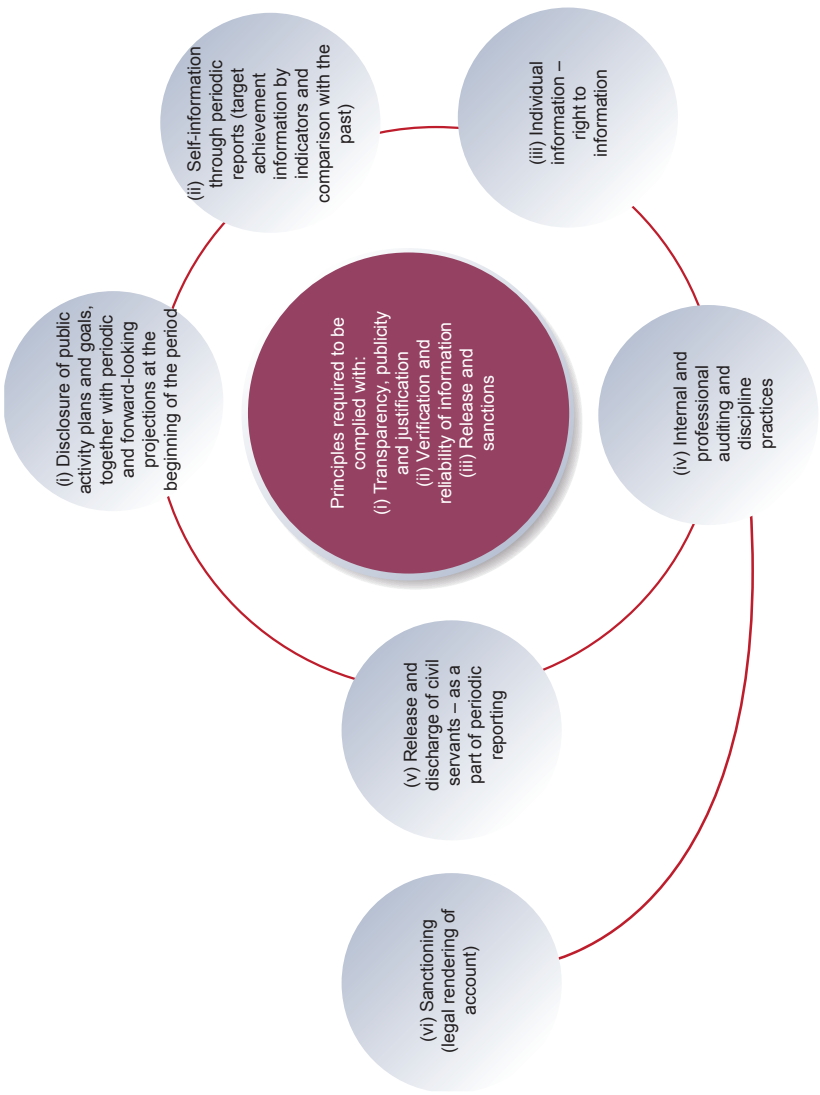


Figure 9: Cycle of Rendering of Accounts

Another requirement is to ensure the public rendering of accounts by private individuals in privatized public services. According to the regulatory rules, private enterprises that are responsible to the boards and committees that are entrusted with the task of implementing these rules, and are under obligation to render an account on administrative aspects, should also be made subject to the obligations relating to public rendering of accounts. Effective participation of the public and related entities in these processes will further develop the public rendering of accounts of both private enterprises and the public organizations and entities auditing their activities.

On the other hand, as will be stated in more detail in Chapter 16 regarding transparency, ensuring the rendering of accounts through the reporting of full and accurate information will surely obligate the public officers and administrations rendering accounts to give their best performance and be accountable at all times while, at the same time, keeping the public informed, in a timely manner, about public administrations' activities and the related processes of rendering of accounts in connection therewith. This will surely pave the way for the participation of related and interested actors in the process, and for the healthier functioning of the process. Disclosure of the results of inspection, auditing and other internal and external renderings of accounts to both the related persons and the public will assure information-sharing and participation, which will in turn enable the relevant public institutions and organizations to build and maintain trust, and to function with greater consistency and in a healthier manner.

The Relationship between Rendering of Accounts and Transparency

The first condition of the rendering of accounts is transparency concerning public activities and their justified reasons. Transparency, either to obtain information concerning public activities or to ensure the rendering of accounts, is critical in any event. The information needed for the rendering of accounts covers both the details of and the justification for public acts and transactions, and other information that may at any time be needed during the process thereof. The Right to Information Act is by no means adequate for the acquisition of information regarding all acts and transactions of civil servants and, thus, for the assurance of the rendering of accounts.

Civil servants should not be able to make a choice about which of their acts or transactions are to be covered by the rendering of accounts but, on the contrary, should be held liable to render accounts on all and any issues within the scope of their job duties. Civil servants should disclose to the public all of their acts and activities during the course of their work as civil servants, and should explain the decisions made, the acts they have performed and their justified reasons. Public administrators and officers should, per se, be obligated to provide such information automatically, to disclose any other information that may be requested in addition and to respond to any queries made in connection therewith. With respect

to information such as state secrets and personal data that would be considered to be of a sensitive nature, these subjects cannot be accepted as valid reasons to restrict transparency in the rendering of accounts, in principle. Such information should be disclosed to authorities with auditing powers by taking adequate measures of protection.

The information that may be requested in order to be able to call someone to account should be required to be disclosed, and mechanisms and processes should be established and made available for that purpose. As a result, the public should have easy and ready access to all information required to be disclosed for the rendering of accounts. To this end, civil servants and public officers should disclose their public activities as a matter of course and regularly, and in addition, methods such as disseminating information through web sites and the media should be developed and diversified.

The information disclosed as referred to above should not comprise only partial or selected pieces of information, should meet the requirements of the rendering of accounts, should not be internal or confidential, and should be accessible to the public at all times.

Effective sanctions should be imposed so as to discourage and dissuade the related persons from failing to render accounts, or to disclose the information required for the rendering of accounts. These sanctions, and the procedures of application thereof, should ensure that anyone expected to render an account gives the information of their own accord and in a timely fashion.

The Financial Accountability and Transparency of Public Administration

In modern representative democracies, the rendering of accounts ensures that the powers delegated by citizens to their representatives, i.e. deputies, are used only for the intended purposes and in strict compliance with the law. The rendering of accounts not only assures the rule (supremacy) of law in public administration, but also ensures that the public administration complies with the law in financial matters. The financial accountability of the public administration is of particular concern to the economy for two basic reasons: firstly, to ensure the expenditure of large amounts of public funds for the intended purposes thereof, efficiently, frugally, economically and sparingly; and secondly, because given that the government, aside from being a regulatory body, is the largest market player and actor, precluding the economic activities of the government (as and in the capacity of a buyer or seller of certain goods or services, or a borrower or a lender) could cause harm to other market players and to the economy as a whole.

It is a well-known fact that for some time non-accountable government executives have used public funds in their own favor or interests with a view to remaining in power and strengthening and reinforcing their power. On the other hand, they may have also prevented the healthy functioning of markets through questionable market operations and interventions. The use of public

funds and resources through legal or illegal means or, for instance, by way of affording advantages or benefits for political intentions through pre-election bribery-type investments and expenditures, through favoritism and corruption in public works and projects, or for the financing of politics by other similar methods is, basically, a medium-democracy problem. This issue has some aspects that are of particular concern with respect to politics, such as justice in representation, and in the guidance of the political will of the society. However, and more importantly, as the largest player and actor in the marketplace, the government may worsen the economy and exert ill effects on the healthy functioning of the markets by making unlawful and unhealthy decisions. On the other hand, bad decisions that may be made under the effect of being overwhelmed by the government's ambition to remain in power negatively and unfavorably affect society's belief in justice and democratic competition and their faith in the economy, in general.

As stated in the decision of the Constitutional Court in Case File No. 2012/207, dated December 27, 2012:

It is already proven through experience that the election period investments and populist acts constituting a widespread election sickness in Turkey, and even an unhealthy game played by society and the politicians during election periods, render destructive effects on the state budget and the economy in general. It is also well known that such acts create advantages for the government in power in the course of election races, weaken its opponents and turn elections into an unfair race.

On the other hand, the financial accountability of the public administration is, indeed, the sole healthy source of information for the opposition and for the public concerning the accuracy of decisions and acts of the government, and whether the government is using its administrative power properly or not. Without such information, the people cannot make informed decisions in the election of administrators, nor can the opposition criticize the government.

Accordingly, in this decision the Constitutional Court em-

phasizes that as the Republic of Turkey is a democratic constitutional state, and pursuant to Article 160 of the Constitution, the Supreme Court of Public Accounts should, acting for and on behalf of the Turkish Grand National Assembly, conduct financial audits of public entities and administrations and social security organizations that are covered by the central government budget, in accordance with the principles of transparency and publicity that are amongst the fundamental requirements of democracy and in conformity with the principle of the obligation of the executive organ to render accounts to the legislative organ and to the people. In this decision, the Constitutional Court states:

Both the "financial accuracy" audit wherein all financial reports and statements of public administrations and all kinds of other documents underlying said reports and statements and which are needed for auditing purposes are examined and assessed and an opinion is expressed as to the reliability and accuracy of them, and the "compliance" audit wherein it is intended to determine whether the income, expenses and properties of public administrations and their accounts and transactions pertaining thereto are in compliance with the law and other legislative instruments or not, are required by the traditional responsibility principle and are, at the same time, a sine qua non condition of the budgeting right of the legislative organ.

However, in the present day, due to the great increase in financial transactions of the government, both qualitatively and quantitatively, it is no longer possible for the Supreme Court of Public Accounts to audit and check all of these financial transactions through external auditing. Instead, the processes accepted and adopted are the formation of in-house auditing systems and the performance of the auditing of the Supreme Court of Public Accounts only through assessment of whether the internal auditing systems of public administrations are functioning effectively and efficiently or not.

Thus, it is ensured that the financial management and internal control systems of the audited organization are reviewed, that

potential risks embedded therein, if any, are diagnosed and that the legislative organ is made aware of the defective aspects of the financial functioning of public administrations.

The budgeting right granted to the legislative organ covers not only the preparation of budgets but also the auditing of the implementation of these budgets. As a matter of fact, in its Decision No. 2010/21, in Case File No. 2008/84 dated December 30, 2010, the Constitutional Court defined the budgeting right as "the legislative organ's delegating an authorization within certain predetermined limits to the executive organ on the collection of public revenues in the name of the people, and on the spending of such public revenues, again, in the name of the people, and checking and supervising the results thereof." Healthy auditing of the budget requires the audit to be conducted in conformity with the technical characteristics of the budget, in general. Upon transition from traditional budgeting systems to more contemporary systems, the scope of auditing of the public sector has been expanded and, in addition, the legality and substantive test on expenditures and the degree and level of effective, frugal, cost-efficient and economic functioning of the public sector have also been included in the scope of audits.

As also stated in the aforementioned decision of the Constitutional Court:

For the functionality of transparency and accountability responsibilities of the public administration, being amongst the indispensable requirements and sine qua non conditions of a democratic constitutional state, the performance audit is absolutely required to cover not only the measurement of consequences of activities and operations in light of targets and indicators, as determined by the public administrations themselves, but also the assessment of whether the public resources are used effectively, frugally, economically and sparingly, or not. The reporting by the Supreme Court of Public Accounts to the Turkish Grand National Assembly as a requirement of the international auditing standards as to whether public resources are used effectively, frugally, economically

and sparingly, or not, cannot be deemed a review of expediency.

For this reason, in the auditing of the income, expenses and properties of public administrations, and their financial accounts and transactions pertaining thereto, making an assessment as to the administrative or managerial effectiveness, cost-efficiency, frugality and productivity of decisions duly taken and actions and transactions duly performed by the relevant official authorities and organs is a requirement of Articles 2 and 160 of the Constitution. Elimination of this review would, in any event, be contrary to the aforesaid provisions of the Constitution.

Transparency and Accountability as to Merit

As for those individuals who are competent and qualified for the performance of a duty, "merit" is in fact a matter of right, and thus it is a matter of the discipline of law as to who is most deserving to be appointed and assigned to the subject position and, in the end, this demonstrates itself to be a problem of the supremacy of law within the area of responsibility of the juridical organ. Rights of individuals may be respected only through the determination and selection of the person who is the most competent and capable to perform the duties and tasks of the subject job position. The selection process requires collection and verification of personal and professional data of candidates nominated for that position, and assessment of such data, to make the most correct and fairest selection, and this should be auditable in all of its aspects. This is why the selection process is naturally required to be transparent and the selection decisions should naturally be accountable and auditable.

> "In Turkey, generally, and particularly in public administration, the term "merit" tends to be heard as just another fancy word."

As for organizations expected to select and appoint one of the candidates, merit requires the determination of a candidate

who is most appropriate for the subject job position. Hence, it is required to select and determine the most competent and qualified person from amongst the candidates who are nominated for the role, by following a transparent and accountable process. Even if this process is not clearly and explicitly described in the relevant laws, it is a legal necessity in all selections and appointments to public job positions in light of a great many legal principles, such as the equal protection of law, equality of opportunity, the state (rule) of law, the republican character of the state, and the compliance of the public administration with the laws.

Even though it may be thought that persons outside the public sector may make decisions as they so wish about their own interests and, thus, that merit is optional and discretionary in the private sector, the modern and more advanced interpretations of the rules of law governing society, in general, require the application of the law in this field as well. Although certain steps forward have already been taken, especially concerning job security and non-discrimination principles applied in the field of labor law in Turkey, as well as in other developed countries, in selections to be made in reliance upon classified job advertisements, and even in the case of the sale of private properties in some events, selecting the most worthy candidates and informing the other applicants of the appointment have almost become legal obligations.

In Turkey, selections and appointments to public job positions are very far from the principle of merit. The principle of merit is by no means dominant in appointments to public job positions, nor is the appointment process uniform in general. Selections and appointments are made not from amongst the most qualified and most competent candidates, but from amongst those having the minimum required competencies and qualifications, and the appointers are generally granted a right of discretion which is, by all means, very broad and even arbitrary. Only a very small part of the selection and appointment process is transparent. Nor are appointment processes and decisions effectively or healthily auditable.

While all citizens are allowed to participate in the process of election of a mukhtar (the head of a municipal district) for a neighborhood, a member of the Supreme Court of Appeals, who is in fact authorized to judge thousands of appeal files, a commander of a large army, a governor of the Central Bank entrusted with the task of protecting the value of every penny in everyone's pockets, and many other very important civil servants and public officers are appointed either by a single person or by committees the reasons for the decisions of which are by no means disclosed to public, and the decisions of which are by no means subject to appeal by the public or by other candidates. The general public opinion supports the common belief that discrimination is rampant amongst the candidates, and in favor not of the most competent and qualified candidates but of the most loyal supporters and followers who commit themselves to unconditionally obey the appointer, rather than acting in compliance with the law; these candidates are appointed, and decisions and appointments are made as a result of various negotiations held beyond closed doors, and by taking into consideration various political balances and relations that are entirely contrary to the merit principle. It is also common opinion amongst the public that in the appointments of judges and prosecutors, or to municipalities and other public administrations, the verbal interviews arranged for selection from amongst the candidates who pass the written exams are misused and abused by the politicians, with the intention of disqualifying candidates who do not support or follow them, and, also, that the rules and applications on appointments to public positions are clearly and heavily unfair, unjust and unlawful, but that nothing can be done against this picture.

For the sake of merit in selections and appointments to public job positions: (i) the system of appointments should be improved and developed so as to encourage the most competent and most qualified candidates to trust in the system, and to file an application thereto; (ii) objective criteria employed in listing and

ranking the candidates should be clearly disclosed to the public; (iii) the justification for the listing and ranking of the candidates should be clearly demonstrated according to these criteria; (iv) the right to objection and similar other rights should be granted to the excluded candidates; (v) the listed candidates should also be made public, other required data and information should be collected about them, and they should be reassessed accordingly; (vi) interviews with the candidates found to be eligible for inclusion on the list as a result of such an assessment process should be made public and should be open to participation by anyone, and in the subsequent interviews, questions directly related to the subject job position should be asked, rather than arbitrary and irrelevant questions. In the case of confidentiality concerns, an alternative approach to participation should be encouraged for the sake of public participation and objectivity; (vii) selection and appointment decisions should be reasoned; and (vii) both the affected persons and the public should be entitled to take legal action and apply for judicial review against these decisions.

Through the accountability of the civil servants and public officers selected and appointed as above, it should be assured that they are undertaking their duties properly and free from any feelings of loyalty to the appointer throughout the performance of their job.

Predictability of Administration and Review of Expediency

In a decision concerning expediency, the Constitutional Court has ruled:

Public administrations are required to be equipped with a right of discretion so as to be able to generate and produce the most appropriate solution in the different circumstances they encounter. The aim underlying this right of discretion is to provide the public administration with the freedom to select the appropriate and expedient option from amongst the available different methods of solution. Whether the solution found by the public administration is appropriate or not is not a legal matter but a matter of expediency. Therefore, neither the judicial organs nor the external auditing organs taking actions leading to legal results and consequences may be deemed to be authorized to audit and check whether the solution found (the decision taken) by the public administration is expedient or not.

Auditing of the results arising out of use of the right of discretion or the use of discretionary power by the public administration (i.e. the expediency of its choice and decision) may not be found to be acceptable. This is a matter of opinion of the legislator. However, even in this case, it is a legal necessity to audit whether the public administration has complied with the law in the course of the use of its right of discretion or its discretionary powers. This should in no case be considered or treated as a review of expediency, because in this review and audit, whether the public

administration has complied with the law in making this choice will indeed be audited and checked, not the appropriateness of the result chosen by the public administration. This type of audit is not a review of expediency.

Viewing and describing the rendering of accounts only within the frame of the objective of prevention of abuse takes a stand against the review of "expediency" in the legal rendering of accounts. However, this idea could pave the way to arbitrariness in the public administration. The review of expediency is only related to the consequences of a choice made, or an administrative step taken, by the civil servant. No compromises should be made under the pretext of expediency in terms of the auditing of whether or not the civil servant has complied with the law and whether or not they act arbitrarily in making a decision or using their rights of discretion. It should be desired and intended to audit not whether the consequences arising out of the use of the right of discretion or the discretionary power by the public administration are adopted and accepted by the auditor, but whether the public administration has complied with the established legal rules or has acted arbitrarily in the course of the exercise of its right of discretion or its discretionary power.

This is the thesis that is defended by those who oppose the review of expediency because, according to this view, if the civil servant has complied with the established rules in exercising their rights of discretion, then the chosen consequences should be accepted exactly as they are, whatever they are. To put this in other words, the auditing authority should not give voice to criticism such as *"If I were you, I would do or prefer this option, not the one you have chosen,"* but should only check and audit whether the civil servant who has used their rights of discretion or discretionary power in a certain direction has strictly abided by the then-current rules (such as by conducting the required preliminary study, the determination of choices and preferences and the mutual and comparative assessment of them, and, if this is not possible, mak-

ing an urgent decision as to the reasons and grounds therefor).

The justification underlying the right to information that allows individuals to be apprised of the businesses and transactions performed, the decisions taken, and the plans prepared by the public administration is to enable individuals to predict the decisions most likely to be taken by the public administration, and to make wiser decisions about their interests. This will, at the same time, make the activities and acts of administrators more predictable and clear. However, in order for the decisions and transactions of the public administration to be truly predictable, public administrators should be at the ready to render an account of their actions. Public administrators could act arbitrarily unless they are strictly bound by rules – in other words, in a situation in which either no rule exists, or certain rules are formulated but are not enforced in practice. Indeed, they may make arbitrary decisions and choices solely with the aim of improving their chances of being re-elected, or in order to show favor to an individual, rather than to do that which is required to be done. Arbitrary decisions and actions may in no event be predictable.

Although a sound and robust legal infrastructure that is capable of preventing arbitrariness in the public administration does not exist, and is not proposed either, strong opposition to the review of expediency could result in the opening of the door of the arbitrary administration to the fullest extent. However, being economical, frugal, productive, efficient and compliant with the law, and ready to render an account of its actions, per se, requires all activities and operations of the public administration to be predictable.

An effective information mechanism making the principles of predictability and foreseeability dominant in activities of the public administration, and maximizing transparency in the public administration, will render a debate over expediency totally unnecessary. In other words, making it possible to discuss the contents of the process through information and accountability mechanisms,

rather than a review of expediency which is, in fact, focused on the consequences thereof, will terminate the debate on expediency, and thus the public administration will be auditable and will work more efficiently. Discussion of the word "expediency," when the decisions and acts of the administration should be dealt with in terms of "predictability" and "foreseeability," changes and strays from the subject.

To this end, a legal framework should be drawn up that indicates how the administrative powers will be used. In any case, predictability of administration and, at the same time, the accountability of civil servants require the enactment of a General Administrative Procedures Act that creates a framework as to how public services will be carried out. Through such an act, governing all civil servants and public officers, the procedures and principles of performance of public functions and duties, and procedures of rendering of accounts and of release and discharge, may be regulated in such manner as to facilitate the use of public powers and functions. Thus, not only can predictability be assured within the public administration but also civil servants will be made accountable according to their performance goals.

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 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 crimes committed, and 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.

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 amongst 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.

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 the public servants to obey their own desires and will, even if contrary to the law, and, for their part, the 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 of the 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 amongst 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 mem-

bers 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, prosecuted or punished, has begun to emerge in Turkey.

Under circumstances where the executive organ is not as strong as it is under a single-party government, knowing that they are actually using public force and that the politicians are truly in need of them, public servants can reinforce and strengthen themselves as if they are a separate and privileged ruling class, and can even impose their power on single-party governments from time to time. The Justice and Development Party complained about just such a situation in the first years of its government.

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 give 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 was used in the past, or "criminal prosecution" as is used 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 on a certain individual on charges of committing a crime, first of all, an authorized and competent public prosecutor must carry out an investigation (preliminary investigation) into that individual as a "suspect." If, at the end of this investigation, the prosecutor comes to the conclusion that there is adequate evidence to charge the individual with a certain crime, the prosecutor must file an indictment and request the court to punish the suspect. The stage of trial starting upon acceptance by the court of the prosecutor's indictment is named the "criminal prosecution" phase. Prior to 1985, the phase of investigation and preparations made by the prosecutor was called the "preliminary investigation," and the stage of trial in court after the criminal case had begun was called the "final investigation." At present, the terms are better clarified, with the prosecutor phase referred to as the "investigation" and the court phase as the "prosecution."

Concerning offences that may have been committed by officers and other public servants in respect of their job duties and functions, even to start 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 a privilege to members of supreme courts 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 as *"special and personal rights or conditions or preferential treatment not granted to others"* in the dictionary of the Turkish Language Association. 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. 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 faulty, is contrary to the "equality principle." In this judgment, the Consti-

tutional 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. 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, it will undoubtedly constitute a privilege granted only to that institution and its members, and will be contrary, basically, 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.

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 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.

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 amongst institutions and their members, resulting in an evasion of law by the criminal if any one of them commits a crime, misprision of other similar subsequent offences as well, and, finally, abetment. 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.

Table 3: Provisions leading to the High Court Judges

Supreme Court of Appeals	State 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 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.	**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. 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.	**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 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 to say 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.

c) Accountability Issues in Certain Critical Institutions

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 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 the said Article 104 grants actual immunity to the said public servants by preventing even the permission to investigate for negligence offences of these public servants.

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, and even if they are not guilty, may they be taken to court. Thus, their legal accountability has indeed been formulated not in such manner as to encourage them to perform their public duties and functions in the best manner 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 fulfill their demands. Public servants, under these conditions and circumstances, cannot reasonably be expected to resist the politicians in government, or oppose any of their unlawful or illegal orders, or even to 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

BTK through Article 5 of Law No. 2813, to the 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.

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, flagrante offences, personal offences not related to job duties, torture, use of force exceeding of authorization limits (Article 256 of the Turkish Criminal Code), delinquency and misfeasance in public office in affairs regarding courthouses, and 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 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.

Table 44: Provisions concerning the Judicial Accountability of Selected Governmental Bodies

BRSA (and 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 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. Against the decision to, or not to, grant permission for investigation, an objection 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 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 the said persons becomes final.	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 October 19, 2005.	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 provisions of Article 104 of Banking Law No. 5411, dated October 19, 2005.	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.

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, impairment in 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 com-

mencement 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 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 the 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 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 the 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, as mentioned above, to set down how public servants and the executive organ will perform and fulfill 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 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 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 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 fulfill 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.

All kinds of actual and legal immunities that prevent and render accountability in public administration meaningless should be forbidden by the Constitution, and no group, clan or individual should be granted any legal or actual immunity or exemption in any form. To this end, it may be considered to add the phrase **"No person or group can be granted any legal immunity, nor may legislative arrangements granting actual immunities be issued"** to Article 10 of the Constitution setting down the principle of equality before the law.

Permissions for investigation and prosecution and permission processes and conditions envisaged for public servants should be removed, and public servants should also be fully investigated and prosecuted for any unlawful and illegal acts they may have committed; non-liability for crimes, or immunity from punishment, should not be allowed, and the innocence of public servants should be determined and decided not by their administrative superiors but by an independent judicial organ.

In each of the incidents within its jurisdiction, the judicial organ should be able to initiate investigations and prosecutions without prior consent or permission, irrespective of who the suspect is and what their job position or level is. Within this framework, the chief public prosecutor of the Supreme Court of Appeals

should be able to directly initiate an investigation against deputies, the president, the prime minister and ministers, and should be able to commence a lawsuit directly with the Constitutional Court, providing that it is made subject to an audit and supervision mechanism to be agreed upon, and it should not be required to obtain a decision of the National Assembly or to get authorization from it for the initiation of an investigation or prosecution in relation thereto.

No person or group, other than the president, ministers and deputies, should be granted any immunity, and the immunities to be provided to the president, ministers and deputies should be proportionate and limited by the requirements of their job functions. The power of the National Assembly to remove immunities should only comprised the power to decide whether the relevant person will be entitled to immunity or not, if and when a suit is brought forward against that person in the Constitutional Court. For such decisions, it may be considered to employ quorums similar to the aggravated quorums stipulated for removal of the legislative immunity of deputies and for dismissal of the president and ministers.

The sensitivities and features of public job positions should be the only cause for determination and assignment of competent and specialized judicial authorities. Qualified investigation and prosecution processes may be considered to be applied in cases required by sensitive public positions and functions – for example, such measures as investigations against executive organ members and deputies by the chief public prosecutor of the Supreme Court of Appeals, investigations against other public servants by provincial chief public prosecutors, approval of indictments by a specialized court and assignment of a specialized court for prosecution.

PART V.
PARTICIPATION IN ADMINISTRATION AND JUSTICE IN REPRESENTATION

As mentioned in the Preface, the purpose of this book is to determine and identify the problematic areas of democracy, and to offer easily understandable, and applicable and feasible suggestions for solutions to them, and it does not make any pretension to being an academic work. Regarding elections and the election system, explanations far more comprehensive than the short summaries below may, of course, be given. However, in keeping with the aforesaid purpose of the book, we have specifically avoided such extensive analysis here, and have confined ourselves to giving only such summary information as is considered adequate to allow an understanding of the proposals made herein. Readers, if they so wish, may avail themselves of the more detailed information on this subject that can be found in Yasin Aydoğdu's book Seçim Sistemleri ve Türkiye (Election Systems and Turkey) (Adalet Publishing House, 2015) and Aslan Delice's book Anglo-Sakson Örnekler Işığında Siyasal Parti ve Seçim Yasaları (Political Party and Election Laws in the Light of Anglo-Saxon Examples) (On-ikilevha, 2016), as well as other books written and published on the same subjects.

Elections

a) Election of Representatives: An Overview

In a representative democracy, the people, as and in the capacity of the sole real owner of sovereignty, exercise their sov-

ereignty powers through representatives and delegates they have elected. Then, the representative administrators designated by the people, through elections from amongst groups competing for power, assigned and authorized for the use of sovereignty in the name of people, administer the state and government for and on behalf of the people. This means to say that the nation, as a moral asset, declares and proclaims its will through its elected representatives. It is generally accepted that the will of these representatives is, in essence, a manifestation of the will of the nation, because the functions and duties of the representatives consist solely of manifesting the will of the people they represent. However, one of the more important questions of democracy is whether the representatives reflect the will of the nation which has elected them, or whether they are, indeed, elected in order to reflect their own will. At this point, the concept of participatory democracy has been developed so as to ensure that the representatives, having been elected by the people, reflect not their own will but the will of the people.

It is well known that the powers of legal representatives are tightly determined and enumerated for the sake of ensuring that they take actions in strict compliance with the will of their clients, and if ever they exceed the breadth of their powers, all actions taken by the representatives beyond this border are rendered invalid. However, political representatives are granted rather wide-ranging freedoms and, thus, their actions and decisions may be different from those that would reflect the will of the people they represent, yet in this case these actions and decisions remain valid. Although the authority of a legal representative may at any time be immediately terminated, in the case of political representation even representatives who are not favored, and whose acts are not approved or sanctioned, remain in power and continue to carry out their duties until the next election. This means to say that political representatives, even if and when they do not comply with the will of the population they represent, may continue to

use their powers of representation according to their own personal preferences. This is why in the case of political representation, the relationship of representation between principal and representative is fairly weak.

In such a weak political representation relationship, as the opportunities for the represented subjects to intervene in decisions and preferences of their representative that they disagree with are rather limited, representatives can make decisions solely at their own discretion and in reliance upon their own ideals. In a representative democracy, in the process of elections, it is not the candidates who summarize and reflect the people's common ideas and preferences but the candidates whose ideas and promises are most welcomed who are elected as representatives. The people are obliged to endure the consequences of the decisions and choices of their representatives until the next election period. This, in turn, reveals the importance of the right of the people to elect their own representatives in representative democracies. The people should have the opportunity to elect as their representatives only the candidates who will decide and act in line with the will and wishes of the people. For this reason, the people should not be obliged to elect candidates dictated to or imposed upon them, but should be able to elect the most appropriate and preferred candidates who are eligible to represent the people.

However, at this point we face a constitutional dilemma. According to Article 80 of the 1982 Constitution, TGNA members, who are elected from a certain electoral district, represent not only the voters of their district but also the entire nation. As stipulated by the Constitutional Court in its Judgment No. 1995/59, in Case File No. 1995/54, the *"District and voter criteria sought for in elections are thereafter turned into a national dimension. This is indeed a formation in conformity with the principle of 'representation' therein."*

b) Election Law

The democratic right to elect may be assured and secured by at least realizing the principles of: (i) equality: everyone has an equal degree of right to vote (one vote by one person); (ii) generality: everyone has the right to vote free from any discrimination based on wealth, tax, education status, race and gender; (iii) individuality: individuals use their votes not as members of their professional, economic or social groups but as members of the community they are incorporated into by citizenship links; (iv) confidentiality: how individual electors cast their votes should by no means be known by anyone; and (v) freedom: electors should be able to use their votes of their free and own will and volition and free from any kinds of pressure.

There are two important and effective tools used in the participation and representation of the people in administration, namely political parties and election laws.

However, in practice, the fair representation of the people in administration is sometimes intervened in under the guise of ensuring stability in administration, and the will of the people is diverted by election laws so as to ensure the so-called stability of the resulting executive power. Thus, the fundamental requirement of democracy is compromised. This is indeed a dilemma in democracy, wherein problems of fair representation and stability in administration are inextricably linked. When the people are better represented, problems arise of stability in administration, and when stability is assured in administration, problems arise of unfairness and injustice in representation. To put it in other words, the principle of fair representation is compromised for the sake of a stabilized administration, and the principle of stability in administration is compromised for the sake of fair representation.

As a matter of fact, the majority of systems pay regard to the principle of stability in administration, while proportional representation systems favor and place due regard on fair representa-

tion, i.e. the principle of justice in representation. In proportional representation systems where the opportunity is high for small political parties to be represented in parliament, electoral thresholds restricting representation are introduced in order to prevent the probable instability in administration. In fact, high electoral thresholds and small and non-uniform electoral districts causing "residual voting" problems eliminate the benefits of justice in representation provided by proportional representation systems.

It is generally accepted that justice in representation is best realized by proportional representation systems, provided that electoral districts put up enough representatives to give the opportunity for the representation of different political viewpoints therein. In this system, political parties are represented according to the rate of votes they win in elections. However, representation is determined not in proportion to the rate of votes received by political parties but according to a method that takes into account rates of voting, but which separates and distorts the rate of voting and the rate of representation. For example, a political party that has taken a vote share of 35% may be represented by 60% of representatives in parliament, while another party with a share of 9% of the vote may not be represented in parliament at all. A proportional representation system may by nature be applied only using the list election system, in which the number of deputies to be elected is more than one, and the positions are distributed among different political parties according to their votes. Thus, differentiation of the rate of representation from the rate of voting under the guise of stability in administration distorts the proportional representation system in such a manner as to cause injustice in representation. Experiences in Turkey since 1982 clearly validate this thesis.

Indeed, as is clearly seen in the example of Turkey, a political party taking approximately one-third of all of the votes on a nationwide basis in parliamentary elections may acquire a superior majority of seats in parliament, while large masses of people having a higher rate of vote in total than the party in power may not be

represented in either legislative or executive organs in proportion to the weight of their votes.

This paradox, which is fairly difficult to permanently resolve, is expressed in Article 66 (6) of the Constitutional Law as the "principle of justice in representation and stability in administration." Thus, in laws pertaining to elections, political parties, local governments and professional organizations with public institution status, the principle of stability in administration is given weight, and the principle of justice in representation is compromised.

As a result of a referendum, the executive organ has been sharply and entirely separated from legislative power. Thus, the justification for the compromising of the fair representation of the people in the legislative body has been eliminated. Although if and when the president is not independent or does not have the support of the majority in parliament, a conflict may arise between the president and the TGNA leading to a disruption or failure in legislative function, or to legislative efforts aimed at clipping the wings of the president, such possibilities are not problems of stability in administration within the classical meaning given to this term. Turkey should rid itself of the desire to restrict justice in representation and of the resultant greater focus on stability in administration.

Therefore, electoral thresholds that are fairly high, and which have in the past caused the exclusion from parliament of the political parties pursuing mainly policies focused on the southeastern region, should be reduced, and the electors should be ensured to be represented at a higher rate in the TGNA. Through reduction of these electoral thresholds, which have thus far not been found to be unlawful or unconstitutional but have found to be fairly high in the pertinent verdicts of the Constitutional Court and the European Court of Human Rights, the political movements or viewpoints having secondary and tertiary degrees of effect on society, and the political factions pursuing mainly policies focused on the southeastern region, may be ensured to be represented at a higher rate in parliament and in other democratic organizations.

There is no doubt that such an opportunity for fairer representation may further pave the way for dialogue and consensus amongst those factions or parties who acquire the opportunity to be represented, in spite of the difficulties therein. The reduction of electoral thresholds and the representation of a greater number of political viewpoints in parliament may further create an atmosphere that would enable the president to build and arrive at a social consensus. The president may expertly and ingeniously use, in order to build a consensus amongst different political thoughts, the capability of parliament to pass and enact laws so as to render presidential decrees ineffective. Through issuing decrees with a finger firmly on the pulse of the people, and responding well to the needs, demands and preferences of the people, the president may force parliament to come to a consensus and, thus, become a leader of society who can be acknowledged by everyone. In such a projection, the existence of many political parties failing to constitute a majority in parliament, rather than a single political party constituting a majority therein, may in fact be preferable, as it requires the political parties to reach a consensus in parliament against the president.

In the presidential system, although stability in administration is strengthened, the representation of the people in the executive organ is made more difficult, because the opportunity to participate, and be represented, in the executive organ through representation in parliament has been almost entirely eliminated. For this reason, if presidential candidates are determined and nominated through a high rate of participation of the people and through political parties' grassroots, the lack of representation in the executive organ may be partially recovered.

c) Election Methods in Political Elections and in Elections for Professional Organizations

The methods employed in Turkey in elections by the people of their administrators are rather different and various, both election methods and electoral districts are subject to wide diversity, and some inconsistencies that are not based on any just cause or grounds are observed in numerous cases. Methods may vary depending on whether a single person or several people are to be elected, and they may also vary according to the dates of imposition of the rules regarding elections. Qualitatively, election methods may vary depending on whether the electoral process is completed in a single round of voting or as a result of several successive rounds. The latter case includes both elections in which, in the second round, electors re-elect from among those elected in the first round, and those in which those elected in the first round choose between candidates in the second round. Another distinction concerns whether elections comprise only a single electoral district covering the entire country or several subdivided electoral districts.

The general president and central managerial bodies of political parties are elected through a general congress at the third stage by the delegates elected firstly in townships, and then in provincial congresses. Likewise, the president and central managerial bodies of professional organizations with public institution status are also elected by a General Assembly, comprising delegates from elections organized on a provincial basis. The rights of representation in the General Assembly of those who win in elections that are composed only of a choice from a list of candidates are limited by delegate quotas.

According to the results of a referendum, in presidential elections if one of the candidates fails to take the majority of votes in the first round, the candidate who rates the highest in the second round will be deemed elected. On the other hand, in municipal elections and mukhtar elections, where a single person is elected, elections are held in a single round and the highest-rated

candidate wins the election. Members of the TGNA and municipal councils are elected on the basis of a majority in the distribution of votes, but the ranking of candidates in lists is determined by political party leaders and central managerial bodies.

This means to say that in Turkey, generally, different election methods are employed in elections organized in similar and even same situations, and the right to speak (the right to vote and elect) of the people in the determination and election of their administrators, and likewise, the right to stand for election (right to be elected) by the people so as to take part in the government, are restricted to a significant and material extent. Two basic tools used in this restriction are lists of candidates and the delegation system.

In presidential elections, qualification for the second round will allow the electors to re-choose from amongst the candidates who competed in the first round, and will provide the candidates with wider popular support. However, the opportunity to make a choice from amongst candidates who competed in the first or second rounds may result in less representation of the people in the executive organ, not in direct representation of the people therein. For this reason, in presidential elections during the process of nominating the candidates who will compete in the election (presumptive nominees), if a great many candidates were offered and introduced to the people and were then elected as in the presidential election itself, the people would be more strongly represented in the government. Otherwise, the presidential elections may over time appear to have become an election of a king for a certain period of time from amongst candidates nominated by political party management.

This two-round election system of one single person should be applied in the elections of mayors, mukhtars and general presidents of professional organizations, as well as in elections of candidates to be nominated by political parties for these posts. However, on the other hand, in the TGNA, Municipal Council and Provincial Council elections, (i) in the process of designation of can-

didates at the first stage, by the majority-vote system, candidates and their ranking should be determined in political parties, and fixed lists should be made up of candidates determined as such; and (ii) at the second stage of the election of representatives, elections should be held according to the principle of proportional representation and, in these elections, citizens should be allowed to make choices from amongst the candidates listed.

> Presidential candidates should be elected by political parties on a nationwide (national territory) basis, either in two rounds from amongst multiple candidates or, in the case of a single candidate, by the referendum principle and method.

However, even if organized in two or more rounds, in a system leading to the election of one person from amongst several candidates, unless a similar method is pursued at the stage of determination of the candidates who will compete in the election, power and pressure groups may impose upon society only certain candidates to choose from, rather than allowing them to make an entirely free choice. Therefore, as will be dealt with in more detail in Chapter 19, both for intra-party democracy and, particularly, for single-person/single-member district elections, the methods for nominating candidates should be developed similarly.

In cases of election of several persons, the people are forced to make a choice from amongst only the names included in the lists already determined and prepared by a small group, rather than choosing from amongst all of the candidates. Just like the formation of electoral districts, the basic purpose underlying list-based elections is to facilitate the election process. It is an unequivocal fact that in an election where hundreds of candidates compete for tens of memberships, it may be fairly difficult, if not almost impossible, for electors and voters to make a healthy choice from amongst candidates. Therefore, the formation of lists by different

political factions, and a choice made by electors from amongst these lists, may be an easier method. However, in this option, for the sake of the principle of justice in representation, it is obligatory to ensure that lists are formed with a high level of representation, i.e. to assure justice in representation in the formation of the lists.

Such practices as fixed or mixed lists, precluding the determination of representative candidates to be elected in an electoral district and the ranking of these candidates in the list in conformity with the will of electors, and preferential lists wherein electors can hardly make a choice and are even guided by various methods to cast their vote in a certain direction, are unsound and untrustworthy in terms of democratic representation.

> "In the TGNA, Municipal Council and Provincial Council elections, the candidates of political parties and their ranks should be determined by the majority-vote system, but the elections themselves should be organized and held using the proportional representation system."

In primary elections to be held in the course of the formation of lists, if the candidates are listed and ranked from the top-rated nominee downwards, this will ensure that the candidates of political parties are, from the outset, determined and nominated so as to assure justice in representation, and that the general elections also have the same result.

While the use of a split ticket developed for easy choice by electors ensures the safety and practicality of elections, the method of formation of the chosen lists would pave the way for justice in representation. Thus, political parties would be encouraged to determine and nominate their candidates prior to election from amongst individuals favored by the people, and democratic lists would assist in the elections.

An easy and practical proposal for Turkey that would maximize the benefit of a democratic proportional representation system may be formulated as follows: (i) political parties may determine and nominate their candidates by a single-round primary election wherein candidates are ranked and listed from the top-rated nominee downwards; (ii) central managerial bodies of political parties may determine and announce only a small number (for instance 10%) of candidates and their rankings in the list; (iii) elections may be held by use of split tickets over fixed lists formed as above through primary elections; (iv) electors may make a choice from amongst the political parties and, according to the existing majority-vote system, the candidates of the political parties who will be deputies may be determined through lists and according to their rankings therein; and (v) electors may be allowed to choose from amongst candidates on ballot papers.

This type of election system should be applied not only in parliamentary elections but also in elections for public administrations, such as in the Municipal Council and Provincial Council, for professional organizations with public institution status that seek democratic management, and for business organizations with broad participation.

d) Electoral Districts

Electoral districts are designated and organized for purposes such as enabling electors to know their candidates better, ensuring the representation of each segment of the population from every part of the country, and assuring the organization of elections in a healthy and trustworthy manner at the time of election of several hundreds of deputies as representatives of the people. Besides its benefits, the electoral district system may also have some disadvan-

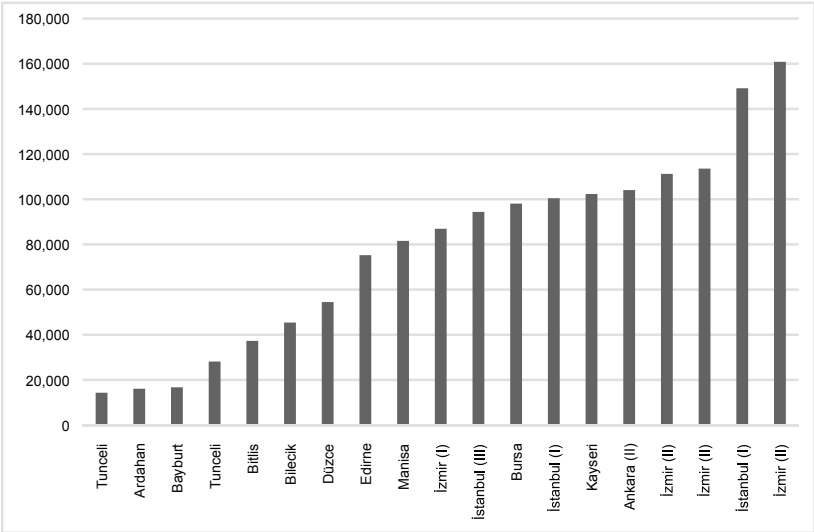
tages, such as representation restrictions and residual votes. Perhaps the most critical disadvantage is the difference in size of the electoral districts. In small electoral districts that are represented by a small number of deputies, the people may know the candidates and representatives better than they do in electoral districts represented by a great number of deputies, such as Istanbul, where the opportunity for the people to know their deputies is reduced. The distribution of parliamentary seats amongst electoral districts may lead to the election of deputies with different numbers of votes from all electoral districts.

In parliamentary elections, electoral districts are organized on a provincial basis according to an administrative structure and, accordingly, each province is determined as a separate electoral district. A number of deputies from each electoral district are elected from the population of the relevant province. There are very large differences between province populations in Turkey. Besides provinces with a population that is adequate for only two deputies, there are also provinces represented by approximately 100 deputies in parliament. According to the Parliamentary Election Law, provinces represented by up to 18 deputies are considered as one electoral district, those represented by 19 to 35 deputies are divided into two electoral districts, and those represented by more than 36 deputies are composed of three electoral districts.

Another issue relates to the distribution of the total number of deputies amongst electoral districts organized on a provincial basis. The allocation of at least one deputy to each of the provinces, each designated as a separate electoral district, is a practice that increases the voting power of electors living in underpopulated provinces while decreasing the voting power of electors living in densely populated provinces, thereby causing injustice therebetween.

This may be easily seen in Graph 8, comparing small and large cities on an electoral district basis in terms of the number of electors represented by deputies.

Graph 8: Differences in Numbers of Electors represented by Deputies



As is also seen in Graph 8, the voting power of electors living in underpopulated provinces, such as Tunceli, Ardahan and Bayburt, is almost 12 times greater than the voting power of electors living in more densely populated provinces, such as Istanbul, Ankara and İzmir.

The number of deputies representing electoral districts should be determined in such a manner as to reveal the diversity of political ideas and factions in society, marginal populace excluded, and to give all basic political movements and viewpoints of society the opportunity to be represented in parliament. A reduction in size of the electoral districts that are below the existing threshold of 18 deputies may enable the representatives to be closer to the people, and may allow different methods to be revealed, aimed at strengthening intra-party democracy. Electoral districts should be determined by the number of deputies that is adequate to ensure pluralism in representation in each electoral district; for instance, political factions receiving more than 3% of votes in an electoral district should have the chance to be represented in parliament, which figure should be accepted and treated as a nationwide electoral threshold. To this end, electoral districts should be determined as districts represented by not less than seven and preferably by nine or eleven deputies. Another rule should be the requirement to give the opportunity to be represented in parliament to political factions that take more than 3% of the votes on a nationwide basis. Given that this percentage is accepted as legitimate, it should be considered as the measure of marginality on a nationwide basis and, accordingly, all different political factions reaching this threshold should be given the chance to be represented in parliament. Only using such an approach may it be deemed legitimate to disregard the political factions remaining under this threshold. Another important factor required to be taken into consideration here is that marginal factions generally bear different, innovative and even revolutionary characteristics, and stand as trailblazers for progress and development in society, as a catalyst of interaction therein.

Diminishing the size of electoral districts in such a manner as to eliminate the differences amongst electoral districts, and to enable electors to personally meet and know the candidate deputies, will surely assure justice in representation in a healthier manner, thus facilitating the deputies to understand the needs, demands and preferences of their electoral body.

On the other hand, in the determination of electoral districts, if we accept each of the provinces as an administrative unit, at least as one such unit has practically restricted the representation of different political factions within that district. This inconvenience may be overcome by determining several provinces that together have an adequate population to be represented by an optimum number of deputies as a single electoral district. So as to ensure that the sizes of electoral districts are determined uniformly and on a nationwide basis taking into account the optimum number of deputies, electoral districts in large provinces should be divided into population zones corresponding to that optimum number. Thus, each electoral district may be ensured to be represented by an equal, or almost equal, number of deputies in parliament.

e) Restriction of Representation via the Delegacy System

In Turkey, by restricting the representation of the people and failing to reflect the real will of electors, the democratic government system has indeed become a deception, and the greatest factor that can be identified therein is the delegacy system. Groups controlling the delegates by various methods are thus determining the leaders and central managerial and decision-making bodies of political parties and professional organizations. The central managerial and decision-making bodies of political parties, local governments and professional organizations with public institution status are effective and influential in the determination of delegates. Then, the delegates who are filtered and chosen from amongst political party members as such elect the leaders and cen-

tral managerial bodies in general assemblies and congresses. To put it in other words, leaders and central managerial bodies may further strengthen their own domination via delegates in the election and the filtering of those who are under their own control. This vicious circle, in turn, restricts the participation and representation of the people in public administration, thus continuously pulling democracy downwards.

Placing the candidates of political parties or candidates competing in professional organizations in the form of a list is legally legitimate, but is an unfair election method which, in the end, ensures control of delegates and shapes the votes of the electoral body in a certain direction. When only one list is put out to be voted upon, this method, although named an election, turns into a plebiscite wherein only that list is approved or not, rather than a free election from amongst the candidates. When several lists are put forth to be voted upon in the election, the election is won by a list as a whole and, thus, by all of the candidates included in that list, and on the other side of the coin the losing list, and all of the candidates named on that list, lose entirely. Even if particular candidates named on the losing list take far more votes than candidates included in the winning list, they are deemed to have lost the election as they are included in the "losing list." Even though it is theoretically possible for candidates to run as independent candidates in elections, in practice not many independent candidates compete, and for those that do, the high costs incurred and efforts required cause great grievance and unfairness.

Professionals are not fairly represented in the professional organizations with public institution status which they are required to be members of and to pay subscriptions to as conditions precedent to practicing their professions. The sole reason therefor is the abuse of a delegacy system wherein elections are conducted via lists. It has, in fact, already been verified by jurisprudence of the Constitutional Court that the delegacy system commonly used in elections for professional organizations with public insti-

tution status is contrary to the Constitution, in essence. The State Supervisory Council (SSC) has also determined this fact comprehensively in a report issued in 2009, declaring that this problem causes participation in management and elections in professional organizations to bottom out. Raising the participation of society in the process of the elections of its administrators and executives in each area, and in particular increasing the participation of excluded segments, will be possible only by resolution of these two fundamental issues.

It is an unequivocal fact that forcing electing members to choose between lists dictated to them severely limits their right to elect. Either in political parties or in professional organizations, the right of members to elect and be elected should be assured and guaranteed, so as to ensure the highest degree of representation.

The delegacy system, which is still in force and implemented in spite of being unconstitutional, should be removed, and elections from amongst lists should be forbidden. In the case of election of several persons, it should be obligatory to conduct elections through the proportional representation method. Once it is capable of the completion of trouble-free elections with around 50 million electors, Turkey will certainly be more easily able to realize elections in which a relatively small number of electors participate.

Political Parties

In a democracy, administrators are representatives of individual citizens of a state, and their function is to reflect the will of individuals into state governance.

Political parties, besides paving the way for the election or appointment of public administrators on the one hand, ensure, on the other hand, that individuals are encouraged and directed to generate ideas, and that ideas are brought into the open, further developed, consolidated and amalgamated, based upon a social consensus, before being transferred into state governance. In this respect, political parties function as a bridge between individuals and the state.

On the other hand, it is unequivocally obvious that individuals' rights to freedom of expression and of assembly, particularly with respect to state governance, are required to find their real meanings in political parties. It is absolutely necessary for social peace to ensure that all political ideas and viewpoints exist, and can continue to exist, and that the opportunity exists for them to be expressed in legal and legitimate environments, because views for which there is no opportunity for expression through legal channels will eventually, and sooner rather than later, be expressed by any means possible, no matter the cost and even at the cost of illegal engagements.

Both the public servants assigned to administer the state and the way in which they do so are, ultimately, determined by political parties. Ensuring that the political choices of parties are generated and formed healthily is directly related to the good governance of the state. In almost all of the great number of academic papers and books published in connection therewith, it is found, in Turkey, that the decision-making and management mechanisms of political parties are mostly dominated by oligarchic political groups and leaders who see the party as part and parcel of their personal patrimony; that parties' grassroots do not have any right to determine party policies and decisions and are expected and requested only to support the choices and decisions of their leader and central managerial bodies; and that businesspeople, parochial communities, those who act like feudal lords in controlling the votes of particular groups of voters and delegates, and other similar groups are very influential on political party management through non-transparent methods.

> In academic works, "political oligarchy" is defined as a power structure in which power rests with a small group of individuals, who have the potential to use public resources for their own material, monetary and political gain, or for that of persons or groups within their sphere of influence, if and when their political party comes into power.

At the present time, especially in parliamentary systems, political parties, when they constitute a majority in parliament and come into power, tend to remove the legislative/executive organ dualism and separation and to become influential or dominant over the judicial body or organ, using the advantages of dominating both of them. This in turn causes deterioration and corruption of the democratic system. Furthermore, when leaders and a small group of their supporters take control of a political party, this leads

to the party becoming a private enterprise, like a toy, of a professional politician class, and results in party members being blindly attached to party policies and ideology rather than being wedded to them as a result of free thought, defending the innocent against wrong and winnowing truth from falsehood.[20]

It has been put into words many times that in Turkey, not only democracy overall but also intra-party democracy lags behind that of the country's contemporaries. One of the reasons underlying this truth is the law on political parties. The largest obstacle precluding Turkey from becoming an advanced democracy at the same level as its contemporaries is the array of political parties that have by no means sincerely and fully adopted democracy within their own functioning.[21]

On the other hand, the fact that the senior executives of state governance dominating the entire state bureaucracy are only politically accountable in elections, and that the only sanction they are subject to is that of winning or losing an election, smooths the way for election bribes and for vote-hunting populist decisions, rather than the decisions necessary for the economy.

It is also stated in academic writings that everyone is happy as a king; this is demonstrated by the fact that Political Parties Law No. 2820 has not been amended, despite the fact that it has been shown to be the cause of the problems described above and in spite of complaints by almost all groups affected by it.

20 M. Yanık, p. 100, footnote 79

21 M. Yanık, p. 149

a) Political Party Organization and Intra-Party Democracy

In Turkey, political parties, and indeed democracy itself, are seen as tools by which to coming into and keep hold of political power. Politicians deal with and assume almost all kinds of functions, such as finding jobs, appointments, promotions, bid tenders, and trading influence for business or credit, and this in turn leads them away from their main duties, thereby causing all kinds of relations to be based upon mutual interests at all stages and thus leading to the degeneration and corruption of democracy.

Should politics be seen merely as a fight for specific interests and politicians be perceived as actors in this fight, democracy will surely not have much chance to develop, and will be largely dependent upon coincidences and tied to individuals.

The uniform party organization model imposed by Political Parties Law No. 2820 is, firstly, not consistent with the freedom of organization of individuals and society as a whole. The form of organization imposed by this law prevents the social will from being influential in political parties' policies and thus in politics more broadly. For the sake of overturning this situation, it would indeed be adequate for the Political Parties Law to refer only to those types and methods of organization that are forbidden to political parties.

In Turkey, political parties usually engage in activities such as public surveys and opinion polls or consultation meetings with party members under the domination of managerial approaches imposed by the senior management of the party. The conclusions reached in such activities are used in the determination or formulation of the decisions of party executives. However, the results of such activities affect party policies and decisions only to the extent that they are also adopted and accepted by the party executives. Otherwise, the lower echelons and grassroots members of political parties are almost always left out of their party's organization and decision-making mechanisms. In fact, the most

important input for the democratization of political party organizations should be the contributions and political participation of party members. But in practice it is mostly certain leading families, high-ranking bureaucrats and officers, rich business circles and, to a lesser extent, elite military and civilian groups of the population that are influential and effective in the foundation of political parties, while party members are requested only to vote for the party rather than expressing and defending their ideas. Rather than permitting party members to influence and control the party management, party executives control and guide the members. Under these circumstances, it is rather natural and expected that a small group, established in the central management of a party, will grasp hold of the party and thus constitute a party oligarchy therein.[22]

All social groups and political parties have a leader and a nucleus group around the leader[23], and this is natural. However, it is also a fact that all human communities and political parties include a great many individuals who have the characteristics required of a leader. Parties should elect their leaders through a competition amongst willing candidates who exhibit these qualifications. Intra-party democracy should create an environment conducive to this competition. However, in Turkey, even those who truly believe in democracy and start the journey with the most democratic of intentions tend to forget intra-party democracy after some time, under the effects of the people around them or for other reasons. In many academic works, the system is criticized for being characterized by political party leaders acting as if they are commissioned for life unless they are removed by non-political interventions; for the fact that political institutionalization cannot materialize due to individual leaders' domination and authoritarianism; and because rather than being the intellec-

22 M. Yanık, pp. 158–166

23 Uyanık, p. 186, footnote 130

tual movements of specific cadres, political parties are gradually becoming the personal property of their founders.

As also mentioned by Yanık[24], oligarchic powers, acting with the motive of safeguarding and sustaining their domination in parties, cause the degeneration of the system by preventing the formation of a transparent party membership system. Limitations on who can be accepted as a member and certain key points in the registration system also create an environment that contributes to the degeneration of the system. Due to the lack of a regular, systematic registration and enrollment system, most of the time it is not even possible to understand who is a member and who is not. Even if a system or order is formulated, either it is not implemented at all or it is run incorrectly or perfunctorily. Individuals who act like feudal lords in controlling the votes of members are able to gain in influence, and false collective member registrations referred to as artificial enrollments are created, thereby paving the way for politics to be monopolized by professional politicians rather than being an activity participated in by large masses of people, thus obstructing healthy channels of political participation.

Hence, Article 68(1) of the Constitution provides citizens with the right to establish political parties, and to subscribe to and unsubscribe from political parties in accordance with the procedural rules, but this has failed in enabling individuals adopting the ideology and opinions of political parties to become and remain as members of their party.

Although the principle of intra-party democracy has already been laid down as a constitutional obligation, in Turkey, as in Germany and Spain and as also mentioned by Dr. Fazıl Sağlam, the multi-level intra-party election system impedes participation in party democracy, and leads to oligarchy and authoritarian lead-

24 M. Yanık, pp. 167–198

ership. Thus, political party headquarters may dismiss the elected local party organizations, and elected managerial bodies may be dismissed using undemocratic methods. As mentioned by Yanık[25], this power, required to be permitted only in exceptional cases, is in practice paving the way for central management to disregard the will of grassroots party members.

An amendment made in 1986 to Article 37 of Political Parties Law No. 2820, leaving the nomination method to the discretion and choice of political parties, has made it possible for a marginal leader and central group to get hold of the power to nominate. Candidates are designated by a decision of the party leadership rather than by primary election in keeping with the principles of free, equal and secret ballot and open counting, which is more democratic and more in compliance with justice in representation. Nomination power is thus under the domination of the groups in control of political party headquarters.[26]

Congresses of political parties can become a mere formality, prearranged and undertaken perfunctorily, rather than events enabling party members to participate in the formulation of party policies and in decision-making processes. In elections of party leaders and executives, the principles of the secret ballot and open counting are breached by fixed-list applications, competition amongst candidates for managerial posts is prevented, and paying homage to the central headquarters and being content with what is proposed by the party's senior executives are made almost obligatory. The application of such methods in all of the political parties leads to the election not of moderate and reconciliatory members prepared to reach compromises, but of immoderate fanatics and militants. This, in turn, causes an increase of polarization in both politics and society.

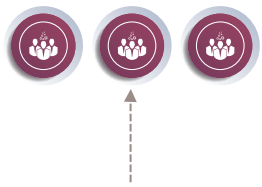
25 M. Yanık, p. 69

26 Uyanık, p. 174

The most serious factors underlying these problems are the delegacy system, which undermines intra-party democracy and breaches the principle of equal and fair representation of members; the multi-level delegate election system;, and the irregular and non-transparent party membership and registration system that allows the leadership to hold party members and delegates under control at all times.

Central Congress

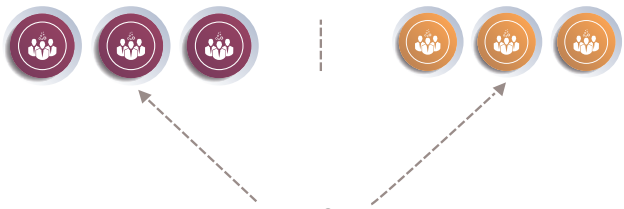
In the central congress, comprised predominantly of Group A and of a minority of marginal supporters closer to Group A than to Group B, the leader sitting at the head of the entire system and leading the party as an authoritative father figure, and a leading nucleus group around him, are elected to the management.



Provincial Congresses

Assuming that there are 300 delegates, composed of 30 delegates from each of ten townships, 150 delegates will be core Group A supporters and 150 will be marginal supporters (75 closer to Group A and 75 closer to Group B).

Let us assume that 30 delegates are to be elected from a specific province to the central management. If these 30 delegates are elected using a list, not on a representational basis, all 30 will be elected from amongst Group A and, thus, at the second congress stage, after core supporters of Group B, the marginal supporters who are closer to Group B will also be eliminated. The central congress of the party will thus be composed predominately of core Group A supporters and a minority of marginal supporters who are closer to Group A than Group B.



Township Congresses

Let us assume that we have 100 supporters of Group B, 100 marginal supporters (50 closer to A and 50 closer to B) and 100 supporters of Group A, and that these latter members will elect 30 delegates. Due to Group A's control of membership records and the registration system and, at the same time, the failure to apply a representation-based election method, all of these 30 delegates will be elected from amongst Group A (15 from their core support and 15 from marginal support). All of Group B will be eliminated. On the other hand, had a representation-based election system been applied, each group (core Group A, marginals and core Group B) would have been able to elect ten delegates, and thus, justice in representation would have been achieved in the delegate structure.

As is shown in the boxed text above, a leader elected not by the votes of all of the members of the party but by the votes of delegates representing only some of the members, the election of whom is kept under tight control from the very beginning, can appoint anyone they wish as a deputy and anyone they wish as a minister, and can take and implement any decision they wish without even consulting with any party organ.[27]

The boxed text below, quoted exactly (deleting the names of political parties and individuals) from an article by Örsan K. Öymen published on the ODATV web site on January 29, 2018, supports our conclusions and exemplifies how and to what extent the block list and delegacy systems are abused and kept out of judicial review, and how and to what extent this problem restricts the right of representation of factions of the party in the formation and election of party executives. This picture can by no means be accepted in Turkey, purporting to be a state of law and a republican regime, wherein the people manage themselves through electing their executives directly, where the right of citizens to elect and be elected is assured by Constitutional Law, and where a democratic style of administration is adopted and implemented. Nor can this picture in any way be accepted either morally or as a cultural norm. The failure to take legal and other measures to prevent these weak aspects of Turkey's democratic system should indeed make us red in the face with embarrassment.

Domino Effect or Chain Reaction

In […], delegates having the right to vote in township congresses are elected in neighborhood congresses wherein all members participate and vote. These township delegates go to a township congress and elect the township president, township

27 Uyanık, p. 179, footnote 104

board of directors and provincial delegates having the right to vote in provincial congress. Then, these provincial delegates go to a provincial congress and elect the provincial president, provincial board of directors and [Great Congress – General Assembly] delegates. At the third step, the [Great Congress – General Assembly] delegates in all provinces go to a [Great Congress – General Assembly] and elect the [party]'s general president and party council members. Thereafter, central steering committee members are appointed from amongst the party council members.

However, this process, operating under the domino effect or chain reaction, has been determined and manipulated in the neighborhood congresses from the very beginning. Township management, which can easily and instantly communicate with all members by sending an SMS by mobile phone giving details of a funeral ceremony if and when a member of the township organization or one of his family members dies, acts reluctantly in communicating the date, time and place of neighborhood congresses to its members, and generally, gives notice thereof of only 1–2 days, does not give any information thereof at all or gives the news only to its own followers. If you attempt to ask the reason for this, the township management says "We have already announced the congress on our web site."

The scandals in neighborhood congresses never end. In general, township management, with the prior consent and approval of the provincial management and party headquarters, prepares a list of delegates to be elected in the neighborhood congresses in advance, and then, in order to make sure that names on this list are elected therein, exerts pressure on the township organization, and does its best to prevent preparation of other lists therein. In any case, in the neighborhood congresses, usually only those whose names are included on the lists prepared by the township management in advance are elected as delegates. A situation to the contrary is seen only very rarely.

From time to time, even more desperate situations are observed. For example, a neighborhood congress is not organized at all, or is not held in a healthy manner, or many undue steps are taken in the neighborhood congress, but nevertheless the congress's chairmanship council keeps a memorandum as if all procedural rules have been abided by. And due to lack of a judicial review, no sanction is applied against such undue acts and breaches of procedural rules.

This system is valid for all political parties. This thing called the [Great Congress – General Assembly] process is generally run on such an unhealthy and anti-democratic foundation in Turkey.

It Is Ridiculous Even to Mention Intra-Party Democracy…

However, the pressures do not stop even at this stage.

Both the headquarters and the municipality of that township or province (if from that party) intervene in the township and provincial congresses, and exert all kinds of pressures in order to have their own candidates elected therein. From time to time the party's provincial organization and its provincial municipality, and/or its township organization and township municipality, come into conflict with each other. However, in the end, whether it is a provincial or township management or a provincial or township municipality, it is not a bottom-up but a top-down organization model that is employed.

Another reason for embarrassment regarding township and provincial congresses is as follows: […] delegates determined and appointed starting with the neighborhood congress process take a decision to enter the elections with a "block" list prepared by candidates in many township and provincial congresses. In such a delegacy system, which does not recognize the democratic right that should be vested in delegates, it is absolute nonsense to mention intra-party democracy.

Another cunning method used by the headquarters in order to have any person it likes elected as the general president (leader) is as follows: by a decision of the central steering committee, organizing a tight [Great Congress – General Assembly] calendar that leaves only a short time between provincial congresses where [Great Congress – General Assembly] delegates are determined and the [Great Congress – General Assembly] where general president and party council members are elected. Thus, it is made almost impossible for the probable general president candidates to contact and convince the [thousands of] [Great Congress – General Assembly] delegates recently elected from 81 provinces.

For example, the [Great Congress – General Assembly] delegates having the right to vote in [Great Congress – General Assembly] to be held on […] have recently been elected [two weeks] ago in the provincial congresses as per the [Great Congress – General Assembly] calendar. Thus, it is made almost impossible for a probable general president candidate other than […] to visit 81 provinces and convince [thousands of] delegates and explain and make propaganda for their policies, strategies and principles within only 15 days.

[…]

In conclusion, the re-election of [the party leader] as general president in the [Great Congress – General Assembly] does not have any relation to his influence or power in the party grassroots or with public opinion. [The party leader] and the politicians around him have already designed the [Great Congress – General Assembly] process in such a manner as ensure that [the leader] is re-elected each time.

Örsan K. Öymen

Proposals

(i) Political Party Organization

The uniform and single organization model imposed by the Political Parties Law should be repealed and cancelled, and political parties should also be freely organized without geographical basis; for instance, any political party should be permitted to prefer central organization entirely and solely, without establishing any provincial, township or field organization.[28]

Conditions of participation and parliamentary elections should not be based on geographical organization; instead, the conditions of promotion could, for instance, be linked to such criteria as distribution of party members amongst provinces and townships, and representation could thus be increased while bureaucracy is reduced.

The powers of central organization bodies over field organization bodies should be limited, while the power to suspend or recall decisions should be usable only through judicial intervention, and only in some limited and exceptional cases.

28 Özbudun, Demokrasi (Democracy), page 5

(ii) Political Party Membership

Arbitrary registration (subscription), cancellation and preventions in political parties should be prevented, registry of party members should be the responsibility of a judicial organ and elections should be based on member lists to be issued by that judicial organ in reliance upon such registry.

The cancellation of membership in a political party should also be based upon a judicial decision, and unless a competent court imposes an interim injunction, party members should be able to use their membership rights until the date of cancellation.

Decisions as to refusal of an application for membership should also be appealable to the courts.

Party members should be entitled and authorized to get information from party management, to request the party management to take actions necessary according to the party bylaws and, if such actions are not taken, to apply to the competent courts to enforce such actions.

(iii) Delegacy System

The delegacy system should be entirely repealed not only in political parties but also in all public organizations that utilize this system. The use of lists and the delegacy system should be forbidden in all areas and fields where democratic management is mandatory or obligatory.

If not repealed, the delegacy system should at least be comprehensively rehabilitated for use only in very exceptional cases, and only if and when party management and bodies cannot otherwise be elected. Delegate elections should be regulated in all respects and in such a manner as to assure the fair representation of all party members.

Delegates should be elected by principles of pluralism and/or proportional representation, and honesty, equality, and free will

and own volition should be established, thereby terminating the domination and tyranny of party management over members.

The township delegacy system should be repealed, and provincial delegates should be elected through the political participation of all party members in such a manner as to ensure the fair representation of members.

Political party congresses should not be composed of multiple stages. The limit of 1,100 imposed on the number of delegates eligible for participation in (great) congress should be removed.

All party members should be allowed to vote in the Great Congress elections of the parties.

Proposal quorums of 20% or one-third as stipulated for bringing forward proposals in party congresses should either be completely removed or be reduced to a lower limit, adequate to ensure that even the proposals of different factions representing minority views in the party can be brought forward to the party congress.

(iv) Intra-Party Democracy

Intra-party elections should be organized at all stages in accordance with democratic principles, and material and important decisions and choices should be ensured to be decided by the participation of all party members. To this end, methods such as offering a referendum should be developed and employed.

In intra-party elections at each level and grade, legal judicial processes should be assured and a proportional representation system should be employed as in general elections, and the rights of intra-party opposition factions should be protected and should be allowed to be represented in the management of the party.

All party candidates, including presidential candidates, should be determined and designated by a primary election, participated in by all party members under the supervision and con-

trol of judicial organs and on the basis of the party registries and records kept and issued under the management and supervision of the judiciary.

Single-person elections for party general president, provincial and township chairperson, and presidential candidates should be organized and held by absolute majority vote in the first round, and by two-round elections between the two highest-rated candidates of the first round in the second round, just like the system applied in presidential elections.

In all cases and elections where parties designate several candidates and nominees, party headquarters should be forbidden from issuing and imposing a block list, and breaking this ban should be prevented. The lists and ranking of candidates to be nominated on the basis of electoral districts should be determined by an intra-party primary election using the proportional representation system. Parties should prepare their candidate lists using this system, ranking candidates according to the number of votes received, and should enter the elections with these lists.

The power of the party headquarters to determine and designate candidate deputies should be exceptional, and should be limited by a rate and an upper limit (cap) that is mandatory, not dependent on political considerations or unjustifiable motives. Parties should declare, in advance, the number, electoral districts and ranks of candidates to be nominated by them.

The party headquarters should show respect to candidates elected by primary elections and to their ranks, and should not be authorized to change the ranks of candidates.

(v) Resolution of Intra-Party Conflicts

A chamber of the Supreme Court of Appeals having jurisdiction in the subject matter should be solely and exclusively authorized to resolve conflicts with regard to township, provincial and great congresses of political parties, and with regard to

amendments to their bylaws.

A fast-track appeal route and authority should be designated in relation to decrees of that chamber of the Supreme Court of Appeals, and the representation of the national will in political parties should be secured by effective judicial assurance.

Disputes amongst the party legal personality and its members and organs should be in the sole and exclusive jurisdiction of the courts having several chambers in a single city in Turkey, but the distribution of cases amongst these chambers should be secured.

These legal cases should be given priority.

b) Financing of Politics and Political Parties

It is the overall verdict and opinion of the public in Turkey that political parties and movements are largely financed by illegal and forbidden means, including from abroad; that neither the government nor the judicial organs can detect and prevent this problem, which is believed to be immense and extensive and, further, constitutes a crime under ordinary conditions; and that politicians, either in government or in opposition, are reluctant to find a solution to this problem, and their actions and words are insincere in connection therewith.

Parliamentary and political parties are presently the leading actors in the functioning of representation in democracies, though they may not fulfill their functions at an ideal level. In democratic governments, pluralism may be realized only if the political parties can fulfill their representation functions to the best extent possible. This requires the political parties standing for the realization of political representation to be able to participate in political and election competitions under fair and equal conditions. This, in turn, naturally brings into question the financial powers of political parties and the monetary balance of power amongst them. There are great financial inequalities amongst Turkish political parties. Political parties are incapable of financing their decision-making processes solely by member subscriptions, considered to be the most important factor of democratization. The basic problems and debates on this point are directly or indirectly related to state and treasury subsidies and grants.[29]

As per Article 68(8) of the Constitutional Law: *"The State shall provide the political parties with adequate financial means in an equitable manner. The principles regarding aid to political parties, as well as collection of dues and donations are regulated by law." As per*

29 Rengül Ekizceleroğlu, Türkiye'de Siyasi Partilerin Finansmanı ve Siyasi Rekabette Eşitlik (Financing of Political Parties and Equality in Political Competition in Turkey), p. 239

Additional Article 1 added to Political Parties Law No. 2820: "To the political parties having exceeded the overall nationwide threshold (10%) in the Parliamentary Election is paid an allowance equal to 2/5000th of total sum of budget revenues (schedule B) of that year out of the national treasury every year. This allowance is shared amongst the political parties having exceeded the threshold in proportion to the numbers of their valid votes." "State aid is granted to political parties having exceeded 3% of the total number of valid votes in the parliamentary elections. The amount of this aid is calculated in proportion to the rate of votes and the amount of aid paid to the lowest-rated political party amongst those above the threshold, and cannot be less than 1 million TL."

Accordingly, the group of political parties exceeding the nationwide threshold receive a higher amount of state aid while those exceeding only 3% receive a lower amount of state aid, but in both groups the aid and subsidies vary proportionately to the number of votes received by the parties. However, though the existence of two different ranges for treasury aid and subsidies (and even the existence of secondary sub-ranges inside each range) is generally acceptable, making the amount of aid and subsidies to be paid to political parties in the same group proportionate to the number of votes they receive is neither in compliance with the "adequate financial means in an equitable manner" criterion referred to in Article 68 of the Constitutional Law, nor is it fair and right.

As also clarified in Judgment No. 2007/75 in Case File No. 2007/59 of the Constitutional Court dated July 30, 2007, the word "adequate" is directly related to a monetary amount sufficient to finance the political activities required to be performed in order to obtain social approval in the elections. Where political parties cannot secure adequate monetary resources through member subscriptions and donations to assure the formation of the national will, access to state aid and grants will preclude them from coming under influence, pressure and control of wealthy people. This is the main purpose underlying state aid and grants.

> Given that the Constitutional Court accepts that a political party taking a high rate of votes and a high amount of state aid can have access to social approval free from any influence and pressure, a contrario, it should also be accepted that another political party from mainstream politics taking a lower rate of votes and a lower amount of state aid will be more exposed to political influences and pressures, and its probable contribution to the formation of the national will thus have been restricted.

In the same judgment, the Constitutional Court defines the words "in an equitable manner" as the "measure determining to which political parties state aid will be distributed at what rates," thereby clearly stating that state aid should be shared amongst political parties according to a fair and equitable criterion. The Court interprets the "equitable manner" measure as based on the level of success achieved in elections by political parties that have been organized to a certain extent, and have received particular social approval in elections.[30]

The Constitutional Court does not have a sound and clear opinion about the *"equitable manner"* criterion. On the one hand, it argues that the phrase "equitable manner" is a measure and, on the other hand, it states that the "measure"should be *"fair and just."* However, the words *"equitable manner"* have the same meaning as *"fair and just."* Nor does the Constitutional Court make a clear choice amongst the *"organized to a certain extent," "received particular social approval in elections,"* and *"level of success achieved in elec-*

30 Abdülkadir Saka, Siyasi Partiler Hukuku Açısından Siyasi Partilerin Finansmanı (Financing of Political Parties in Terms of Political Parties Law," p. 149–150; footnotes 16 – 18

tions" measures, which are indeed separate and independent from each other but from time to time interpenetrate in each other. In fact, the question required to be asked is as follows: According to what measures is "*equitable," "fair,"* or "just" to be determined and measured? Should it be determined according to the ideas of members, or the number of votes received in elections, or entirely in a different way, according to *"what society has the right to expect from different political factions,"* i.e. according to *"the right of the society"*? Of course, the starting point should be that state subsidies and aid are indeed the joint savings of society, and that these savings should be spent so as to respond to social needs and demands in the best manner possible. To this end, the fundamental idea underlying the granting of state aid to political parties should be checked. This fundamental idea is to ensure that political parties are capable of better reaching society. To put it differently, society funds and helps political parties in the introduction of different political ideas and opinions to society so as to allow society to be able to elect the best from amongst them. That is why the words "equitable manner" should be understood and taken to mean "in such manner as to ensure that the opinions competing with each other are financially capable of entering into fair competition." At this point, we can see the "fair and just" grounds for grouping parties representative of mainstream political opinions in one range and those representative of more marginal political opinions in a second range.

As a matter of fact, two members opposing the aforesaid judgment of the Constitutional Court have stated that all political parties are in need of financial resources, and small parties are in need of more protection than large parties in terms of the strengthening of their opinions and increasing their followers, and, therefore, failure to allow access to state aid for a significant number of political parties that do not reach the threshold dictated by the law is indeed contrary to the rule stipulating that state aid should be adequate and be distributed in an equitable manner. In the absence

of extraordinary and unusual circumstances, political parties that have a strong financial power base have a higher chance of being successful in elections. However, in fact, it should be not those with more effective and extensive propaganda but those whose political ideas are healthier and more useful for society that should be more successful and should come to power. As a matter of fact, political parties with a relatively low financial power base may, from time to time, also win a significant rate of votes and may even come to power. On the other hand, success in electoral competition is also related to the political atmosphere of the day, and various other factors, such as events occupying the nationwide agenda and the attitudes adopted by the parties and their leaders in response to such events, as well as the charisma of the party leader, may also be even more influential than financial power.[31] Therefore, granting more state aid and subsidies to a political party taking a higher rate of votes in elections, and less state aid and subsidies to another political party taking a lower rate of votes, is neither fair treatment amongst political factions nor in the interests of the country. It is in the interests of the country to encourage the development of competing political ideas and groups in order to resolve the problems of the country. For this reason, it is not logical or reasonable to distribute a higher amount of aid and subsidies to a political party solely due to its previous success in elections, given that it may indeed develop worsening ideas in subsequent elections.

What is more, although the electors give different numbers of votes to different political parties, none of the political opinions is better or worse than the others. The country can by no means be left in the hands of one political faction alone. The best, most correct and most comprehensive syntheses needed by the country can only arise from debate, through the clashing of differing and opposing ideas and opinions. Decisions concerning the whole country may rely upon a joint assessment of all opinions and ideas,

31 Ekizceleroğlu, ibid, p. 243

whether they are held by those in power or not, and even if those propounding them have not ever come to power. The most recent and simplest example of this fact is the adoption by the AKP of the promise of the CHP in the 2015 elections to increase the minimum wage.

From this point of view, the state should not exclude any one of the political opinions put forth in the country but, to the contrary, should support the expression of all political ideas and opinions that have the capability to enter into the political sphere. Considering the number of electors represented and the rates of representation shaped in parliament, it may be justifiable and reasonable to support mainstream political opinions with higher levels of aid and to support other political opinions, except for extremist and marginal ideas, with a lower rate of state aid.

A low level of member subscriptions and other revenues amongst political parties justifies state and treasury aid and subsidies but, nevertheless, the fact that the amount of financial aid and subsidies is higher than the parties' own revenues restricts and limits the representation of party grassroots at the headquarters level, and makes ordinary members subject to and dependent on the leader and the headquarters.[32] State subsidies and aid that doubles or triples the contributions of provincial organizations makes the political parties rich, and makes them reluctant to pursue member subscriptions and other revenues. Parties become centralized, and headquarters become detached from field organization and members, and, in some cases, party activities can even be carried out only with the financial support of the headquarters. Under an authoritarian leader and with the headquarters growing fat and getting rich, as noted above, the subscriptions and ideas of members are no longer seen to be necessary.

32 Ekizceleroğlu, ibid, p. 239

Proposals

In terms of state subsidies and aid, political opinions and parties should be divided into three groups. The first group should cover the mainstream rightist and leftist political parties taking a vote share of 25% or more; the second group should be those political parties taking 10% or more of the votes; and the third group should be those taking between 2.5% and 10% of the votes. Considering the scientific theses defending the notion that approximately 2.5% of all people in a society are innovators, state aid and subsidies should be provided also to political parties whose views may include innovative ideas for the further development of the society.

Between the member subscriptions and other revenues of political parties on the one hand and state subsidies and aid on the other hand, a balance should be established so as to encourage parties to reach a wider social base, to earn more member subscriptions, to identify other revenues, to create and sustain more democratic balances within the party; and to discourage them from financial centralization – or, at least, avoid encouraging them to centralize. State aid and subsidies should be adjusted and arranged in such a manner as to ensure that the political parties included in the same range encourage the democratization of the others, as well. For example, state subsidies and aid could, on the one hand, be limited by the amount of member subscriptions and other revenues of the parties and, on the other hand, be adjusted and categorized depending on whether the total number of members

of parties included in the same range reaches or remains below or above certain thresholds to be determined. For example, if the threshold of the total number of members were exceeded by 10%, the amount of state aid could be increased by 10%, and if the party remained below or above the threshold by 10% the total amount of state aid could be paid; and for parties remaining below the threshold by more than 10%, the amount of state aid to political parties could be reduced by 20% to 25%.

As an alternative method, treasury and state aid may be distributed amongst political parties in two separate ranges, the first being relatively and pro rata higher and including the political parties representing mainstream political opinions, and the second being proportionately lower, including the political parties representing more marginal political opinions. Out of the mainstream political parties, those that take higher rates of votes and representing the center and left and right of center of electors (for instance, a range of parties with a vote share of more than 20%) may be eligible to receive a higher amount of state aid, while those having a lower rate of votes may be eligible to receive a proportionately lesser amount of state aid. The treasury and state aid and subsidies may further be adjusted at an appropriate rate depending on the results of comparison between the numbers of members of political parties. For instance, a political party with a number of members being a certain percentage (to be determined) more than the total number of members of other parties in the same range (or the average number of members of those parties) may be paid state aid of a correspondingly higher amount. At the opposite end, a proportional reduction may be made to state aid for political parties with a smaller number of members.

In addition, the spending of state aid and subsidies must be in strict compliance with principles of intra-party democracy and should be regulated in detail, and all expenditures should be recorded and efficiently audited; thus, the party headquarters should not be allowed to dominate and control the party and its members

through control of spending and use of state aid. For instance, in order to ensure that candidates who do not have adequate financial power do not become dependent on the party headquarters, heavy expenses of electoral campaigns could be guaranteed to be financed by the party headquarters.

c) Election Bribes and Unrecorded Financing

It is generally believed by the public that political parties have access to unrecorded and informal revenues and make some expenditures of a size that cannot be exactly determined, and also that the party in government uses public resources and funds as a form of political bribe irrespective of the requirements and priorities of the public interests.

The bribing of electors with expenditures made out of public funds through populist approaches before elections is widespread. In order to prevent this, some actions and measures should be taken against the use of public funds and resources for political party propaganda or in a manner that may be construed as an election bribe given to electors, and, at least, the public administration should be subject to financial auditing in relation thereto. In this respect, it is easily possible to integrate public administration auditing with the fiscal auditing of political parties.

It is very difficult, even in countries equipped with very developed systems for the purpose, to detect, prove, punish, penalize and prevent by legal means acts of bribery where the bribe-giver cooperates and collaborates with the taker and the two sides have joint interests. Therefore, it is impossible to detect and audit those who grant illegal or unrecorded donations to a political party in exchange for an expectation, or donations granted as such. It is widely held that all political leaders who originated as civilians save for a few exceptions, and who served as metropolitan city mayors in the past, may have advanced their political career as a result of the unrecorded and informal financing of politics, inter alia. The well-known İSKİ scandal, the attempt of a mayor to found a new political party, and the case of another mayor who founded and then dissolved a new political party may all be considered signs demonstrating that, although the truth is not easily brought to light or proven, such speculation may indeed be accurate.

Although there are laws limiting the sources and amounts

of donations that can be made to political parties, it cannot be said that these rules are fully complied with or that compliance with them is effectively audited. For example, a person wishing to make a donation in an amount above the personal donation limit may easily donate through kith and kin or, especially during election periods, may bear the cost of party propaganda and other aspects of fighting the election, and may make unrecorded and informal contributions in cash, in kind or in other forms, and there is no system under which to audit such acts. A fairly developed and effective operating system is required to be established in order to prevent such donations, which may reach substantial amounts and which may even result in the candidates of a political party being determined according to monetary and fiscal power, in non-democratic ways.

Only if such auditing is applied can the financing of politics by unrecorded, unethical and even criminal methods be prevented, or if it cannot be entirely prevented, at least minimized. To this end, both all kinds of activities of political parties that may constitute sources of income and expense for them, and all and any activities of politicians serving in public offices and posts, should be required to be fully recorded and registered.

Proposals

Firstly, all kinds of expense-creating activities of political parties should be recorded and kept under control through registration by an independent judicial organ, including all data regarding the cost of such activities of political parties according to location, timing and market conditions, and how such cost is or will be met or funded (providing that such registration can by no means be construed as a control, permission, approval or consent mechanism on the aforesaid activities). The registration of such data by judicial organs will entirely remove the concerns that it may lead to, or be construed as, the control of activities of political parties.

Activities of political parties should be effectively and efficiently registered and recorded, with deterrent sanctions for failure to comply. For example, the registration system should be ensured to be effective by defining failure to register and fraudulent registration as severe and weighty offences, and not permitting the realization of unrecorded and unregistered activities.

All kinds of donations and contributions made to political parties, whether in cash or non-cash form (in the latter case, at the current market value), should be recorded and registered in the name of donators, and during auditing it should also be checked and audited whether the donators are financially strong enough to make such donations.

> In particular, non-cash donations and free uses should be effectively registered, their current financial value should be determined and an audit should be made as to compliance with any prohibitions relating to donations.

Political parties should declare and make public all of their activities and all kinds of (cash and non-cash) donations and other contributions made to them, and the total amount of income obtained as such, as well as all and any expenditures made by them, in reports to be prepared and issued in accordance with the Integrated Reporting principles, with clear reference to the resulting activities and the associated income sources, in such a manner as to permit auditing of the activities causing such expenditures so as to ascertain whether the actual expenses incurred are current and reasonable or not. Political parties should, firstly, audit this process through their own self-auditing methods and means.

Activity reports and reports of auditing should be visible and open to being questioned by any interested party, particularly party members, and such questions should be answered.

All political-origin public servants, the president and ministers and deputy ministers, and all senior and top-echelon public servants fulfilling their orders and instructions at the first instance and reporting to them should, during all of their activities and services, keep auditable and accessible daily records. These records should contain details of all activities of relevant persons, such as the persons involved, location and venue, tools, subject matter, expenses incurred and donations received, and these records should be published by internet or other means so as to be easily accessible to the public. The classification of certain activities as secret or proprietary activities should not be used as an excuse for failure to keep or publish these records, and such records should be kept secret from the public only if there are just causes and reasons, but

should absolutely be accessible in audits conducted by the Constitutional Court and at the time of vertical and judicial accountability of relevant public servants.

Fiscal auditing of political parties by the Constitutional Court should not comprise only the checking of compliance of records with the rules and assessment of complaints and notices, and should not be limited to accounting compliance and reasonableness auditing. It should cover all of the items referred to hereinabove.

The Constitutional Court should, by taking into consideration all records kept by judicial organs and authorities, audit the activities and financial power of political parties, including in their scope all of their local organization units and activities.

Prior to auditing by the Constitutional Court, political parties should be required to undertake self-audits and to prevent probable fraud by using such means and methods as horizontal and vertical auditing, through financial accountability, and through self-auditing and external auditing using Integrated Reporting, followed by independent external auditing through private or semi-official specialized institutions.

The Constitutional Court audit should be activated before or, at the latest, as soon as they prohibited activities are carried out.

Local Government

It is argued that the present-day representative democracy model, which allows the people to indirectly participate in government and public administration, does not satisfy and respond to the wishes of the people to participate more in government and that, therefore, it is in a crisis of legitimacy, that democracy should, in essence, be participatory, and that local governments should create more opportunities for the participation of the peo- ple in government. This is why the realization and reinforcement of participatory democracy are indeed dependent on the strengthening of local governments.[33] After stating in their article "Yerel Demokrasinin İlkeleri" ("Principles of Local Democracy") that democracy arises first in local governments, Yaylı and Pustu add: *"The basic components of the concept of democracy, namely, the participation of citizens, the majority principle, the importance attributed by leaders to consultation, and the need for them to be accountable to electors, will surely find a chance more easily in local governments."*

It is fairly difficult for the state to accurately determine and describe local needs and requirements, varying as they do on the basis of geographical, cultural and other factors, and to resolve dif-

33 Bedir Sala, Yeni Demokrasi Arayışları ve Türkiye'de Yerel Yönetim Politikaları (New Democracy Searches and Local Government Policies in Turkey), İnsan ve Toplum Bilimleri Araştırmaları Journal, 2016, V. 5, Edition 6, p. 1716–1728

ferences in strict compliance with local characteristics. The resolution of this problem, which is not only specific to Turkey but is a topic on the agenda also in other countries with regional or local governments, requires local government structures in addition to the central government. This dual level of government brings with it the need to establish how central and local governments should interrelate and how they should be coordinated.

In terms of central–local government relations, though this varies depending on the political structures and administrative traditions of particular countries, in general, local governments may be given weight in federal states while the central government stands at the heart in unitary states, and a superior–subordinate hierarchical relationship may be established between them. In the international arena, two fundamental principles have been adopted: (i) locality and (ii) autonomy.

The term "locality," used with the meaning of the English word "subsidiarity" and the French word "subsidiarité" in Article 4 of the European Charter of Local Self-Government, refers to the principle of authorization at low levels by the local government unit that is closest to the public needs and requirements. According to this principle, the upper echelon or (central) government authority shall in no case assume or use the powers of the bottom level (or local) government authority unless absolutely required. The underlying purpose is to ensure that decisions relating to local needs and requirements are taken by local government authorities at the level of governmental unit that is closest to its citizens.

The "autonomy" principle is a part of a larger sphere, and means the free use by a local governmental unit of more limited powers and authorities recognized within its own frame, in spite of being subject to and governed by a larger and centralized power. In respect to local governments, autonomy includes responsibility for administrative and financial matters but does not extend to the right of sovereignty. In partial political autonomy that also covers the right of sovereignty to a degree, local governments are rather

independent from central governments in administrative and financial terms, but the right of sovereignty of the local government is limited in favor of the central government.

The fairly sensitive question for Turkey is the risk of the conversion or transformation of administrative and financial autonomy of local governments, over time, into demands for political autonomy, independence and separation, leading to concerns for the perpetuity and survival of a unitary state.

Under the effects of these concerns, Turkey has expressed reservations on Articles 9, 11, 15, 18, 22, 24, 25, 28, 29 and 30 of the European Charter of Local Self-Government ratified in 1988, legalized in 1991 and made effective in 1993. As summarized by Yusuf Karakılçık: *"The reservations were focused on giving permission for tutelage auditing only if limited by the interests that need to be protected; the need to take into account as far as possible the increases in service costs in the provision of resources to local governments; the need for pre-consultation with local governments and authorities as to methods of allocation to local authorities of financial resources to be redistributed; and the need to ensure, as far as possible, that financial aid does not repeal and abolish the fundamental freedom of local governments to implement their own policies."*

Turkey has arranged the distribution of duties and powers and the coordination and other relations between central and local governments according to principles of centralization and decentralization, but under the legal and financial tutelage and weight of the central government. Bedir Sala defines this system as follows: "Though local mayors and council members are appointed through elections, provincial and district governors appointed by the central government have more powers and authority in the administration of provinces or districts. This, in turn, causes the emergence of a double-headed administration."

Article 123 (paragraphs 1 and 2) of the Constitution provides that: *"The administration is a whole in its formation and func-*

tions, and shall be regulated by law. The organization and functions of the administration are based on the principles of centralization and decentralization." Article 126 (paragraph 1) defines the hierarchical and geographical organization of the central administration with the following words: *"In terms of the central administrative structure, Turkey is divided into provinces based on geographical situation, economic conditions, and public service requirements; provinces are further divided into lower levels of administrative districts."* Paragraph 3 thereof states that: *"Central administrative organizations comprising several provinces may be established to ensure the efficiency and coordination of public services. The functions and powers of these organizations shall be regulated by law."*

Article 127, paragraph 1, of the Constitution, states: "Local administrations are public corporate bodies established to meet the common local needs of the inhabitants of provinces, municipal districts and villages, whose principles of Constitution and decision-making organs, elected by the electorate, are determined by law." Paragraph 3 thereof adds: "Special administrative arrangements may be introduced by law for larger urban centers." Paragraph 2 defines local administrations as follows: "The formation, duties and powers of the local administrations shall be regulated by law in accordance with the principle of local administration." And paragraph 5 of the same Article asserts that "ensuring the functioning of local services in conformity with the principle of the integrity of the administration, securing uniform public service, safeguarding the public interest and meeting local needs properly" is required. As for the objectives set forth in paragraph 5, the central administration has the power of administrative tutelage over the local administrations, and pursuant to paragraph 4 thereof, as a provisional measure until the final court judgment, the minister of internal affairs may remove from office those organs of local administrations or their members against whom an investigation or prosecution has been initiated on the grounds of offences related to their duties.

In conclusion, in order to meet the common local needs of the inhabitants of provinces, municipal districts and villages, in strict compliance with the principle of the integrity of the administration and according to the principles of free, equal, secret, direct, universal suffrage and public counting of votes set out in Article 67 of the Constitution, the local administrations elected once every five years under the management and supervision of the judiciary are further subject to the heavy tutelage of the central government.

According to Municipality Law No. 5393, the organs of a municipality are the municipal council, the municipal committee and the mayor. According to Article 4 of said law, it is obligatory to establish a municipality in provincial and district centers, and a municipality may be established in residential areas with a population of 5,000 and greater.

Pursuant to the Law on Elections for Local Administrations No. 2972, the total number of members of a municipal council is nine in residential areas with a population of up to 10,000. The total number of members of a municipal council is 11, 15, 25, 31, 37, 45 and 75 original members, with the same number of associate members, for residential areas with a population of 20,000, 50,000, 100,000, 250,000, 500,000, up to 1 million and more than 1 million, respectively. Metropolitan city mayors are elected directly, but metropolitan municipal councils are composed of one-fifth of the municipal council members in a district, together with the district mayor and metropolitan city mayor, and are not constituted by a separate election. In municipal committees composed of five or seven members (depending on the population being greater or less than 100,000), the mayor and service unit heads constitute one more than the number of members elected by municipal councils. Municipal committees are a mixed organ by nature, where executive bureaucrats constitute the majority.

The directly elected mayor has the actual command of the municipal council through their administrative and representational powers. Municipal councils are authorized to make deci-

sions on matters of principle and important issues such as the adoption of budget and final account, borrowing, franchises and concessions, privatization, and staffing pattern formation and cancellation. Mayors may reject decisions of the municipal council or may sue for the cancellation of its decisions.

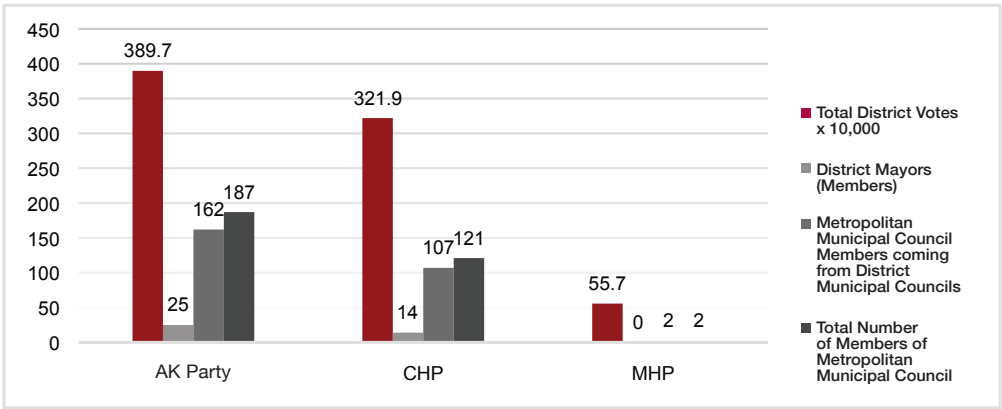
Municipal councils are organized and formed through elections under the proportional representation method. In metropolitan municipal councils composed of one-fifth of the district municipal councils and the district mayor, the natural member status of district mayors may cause an imbalance in representation. For instance, in district municipal council elections in Istanbul, the AKP took 50.7% of all votes except for the votes remaining under the electoral threshold but won 60.3% of all seats in the metropolitan municipal council, while the CHP won 41.9% of the votes and 39% of seats in the metropolitan municipal council, and the MHP won 7.2% of the votes and 0.6% of seats. The AKP thus won 8% more seats in the metropolitan municipal council, solely due to district mayors standing as natural members therein.

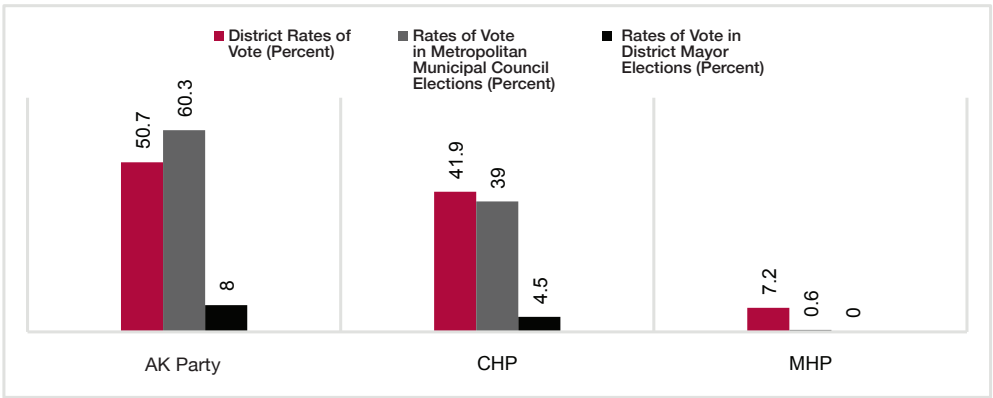
There are two basic reasons for the differentiation between the rates of voting and rates of representation. The first is that district mayors are natural members of the metropolitan municipal council and, thus, a party winning the mayorship in more districts acquires more seats in the metropolitan municipal council. Secondly, the remainder of votes determining district municipal council members are not taken into account in the determination of members of the metropolitan municipal council.

Special provincial administrations regulated by Law No. 5302 of 2005, repealing Law No. 3360 of 1987, were established to offer a large part of public services, such as sports, healthcare, agriculture, industry and commerce, environmental planning, public works and settlement, culture, arts, tourism, micro-credits, and supply of lands and construction and repair of buildings for nursery schools and orphanages, as well as elementary and secondary education institutions in areas that remain within the provincial

administrative borders but are outside of the service area of municipalities. Members of the provincial general councils, being the decision-making organs of special provincial administrations, are constituted by elections but report to the governors.

Graph 9: Rates of Voting in Istanbul Metropolitan Municipal Council





Law No. 6360 has repealed and abolished the special provincial administrations in metropolitan cities, and has delegated some duties and powers to the Investment Monitoring and Coordination Department (YİKB), presided over by the provincial governor. A criticism of this system is that the YİKB is considered a type of local administration ministry, and that through powers vested in it, the weight of tutelage powers of governors over local services is further aggravated, almost to the point of creating a local centralization institution.[34]

Turkey has, through the direct election of members of municipal councils and provincial general councils, adopted the autonomous organization of local administrations separately from the central government. However, this autonomy has been partially withdrawn by the abolishment of special provincial administrations and provincial general councils constituted by elections in metropolitan cities, and by delegation of their functions to the YİKB under the control of the central government.

Another field where the central government gives direct support to local administrations, and at the same time interferes with them, is in the İller Bank (Provincial Bank, known as İlbank). The Provincial Bank is a financial institution extending credit facilities to borrowers, on the one hand, and on the other hand is a treasury that collects and distributes a significant part of the finances of local administrations. In addition, it is an organization providing technical assistance to local administrations, and it builds, or causes others to build, local plants and structures. The Provincial Bank has played a role and made contributions in almost all of the drinking water and sewage operations in Turkey. As well as having a nationwide network and highly qualified and experienced expert staff, İlbank is, at the same time, an indispensable know-how resource for local administrations, because of its vast local administration traditions and knowledge. For these reasons, local adminis-

34 Yusuf Karakılçık, Yerel Yönetimler (Local Administrations), p. 203 et seq.

trations are in many respects dependent upon the Provincial Bank, which thus has an enormous influence over them.

The decision-making organ of this bank is its board of directors, composed of seven members, including its general manager. Six members of the board of directors, other than general manager, are elected by the bank's General Assembly of shareholders, four from amongst candidates nominated by the Ministry of Public Works and two from amongst candidates nominated by the Interior Ministry, by mayors and special provincial administration representatives participating in General Assembly meetings. The bank's general manager is appointed by the prime minister upon a proposal of the minister of public works. This means that five out of seven members of its decision-making organ are determined and nominated by the central government. On the other hand, the General Assembly, having a symbolic and advisory function, is composed of representatives of local administrations and relevant, and its duties are to examine the annual reports and accounts, and to make decisions of release, and to decide on write-offs of irrecoverable receivables.

Given that their financial resources thus far been developed only partially, local administrations are still in need of, and dependent upon, the financial support of the central government for substantial investments. The central government still has vast influence and decision-making power in relation to the satisfaction of local needs and demands – financially, as the owner of know-how through the Provincial Bank, and as an administrative tutelage-owner and regulatory body. In the context of such power and authority of the central government, local administrations take the role of a representative of a local government against the central government and of an official fulfilling the instructions of the central government if and to the extent that their own financial resources are inadequate for their needs. This may be further developed by raising the competence in democratic administration of local administrations, and also by making local administration

areas appropriate for the establishment and advancement of democratic culture.

To this end, the first steps may be to restrict administrative tutelage, to require a court judgment for weighty sanctions such as dismissals, and to make the management of the YİKB and the Provincial Bank more democratic. Rational regulation of relations between the YİKB and the Provincial Bank may play an active role in the resolution of many problems requiring the close intervention of the central government in local administrations, without compromising any principles of democratic government and, at the same time, in compliance with the principles of central government. For instance, the duty to fulfill local services currently vested in the YİKB could be delegated to the Provincial Bank. Likewise, local investments could be coordinated, and large-scale local administration investments could be realized, in the name of local administrations by İlbank, or under the planning, supervision and control of İlbank. Thus, with its deep know-how and competent human resources, İlbank could assume rather effective roles and functions for the sake of provision of services by local administrations without any discrimination; the auditing of compliance with laws on administrative and legal issues; and, generally, the accountability of local administrations.

Proposals

In metropolitan municipal councils, the injustice in representation should be abolished. To this end, abolishing the natural membership of district mayors in metropolitan municipal councils, and establishing direct election of members of metropolitan municipal councils, or distribution of membership in metropolitan municipal councils on the basis of the vote shares of political parties in the provinces, may be considered as options.

Furthermore, the following steps should be taken for the sake of strengthening of democracy in local administrations:

(i) The determination of candidates of political parties;

(ii) The right to make personal choices amongst candidates in elections;

(iii) The election of members of metropolitan municipal councils, or the repeal or elimination of injustice in representation (abolishing the natural membership in metropolitan municipal councils of district mayors, and their default position as the first member therein);

(iv) The use of the administrative tutelage of central government (on issues such as dismissals) through court intervention, not through direct administrative decisions;

(v) In connection with proposal (vi) below, the development

of the tutelage powers of central government in such a manner as to focus on the accountability of local administrations;

(vi) Corporate improvements aimed at abolishing political influences on the intervention tools referred to in proposal (v) by delegating the central government's powers regarding distribution of financial support and actual provision of services to a professional and independent organization that is autonomous from the central government and makes its own decisions by democratic means (for example, delegation to İlbank of the functions and powers of special provincial administrations, municipal committees and the Investment Monitoring and Coordination Department, except with respect to the formulation of policies and assurance of accountability, and making İlbank a fully autonomous organization, independent and free from political influence).

To this end, complaints about the Provincial Bank, such as about the inadequacy of its financial resources, non-autonomous decisions, openness to political influences and effects, and operating as an extension of the central government, should in all respects be addressed.

Administrative tutelage on local administrations should be limited, and heavy sanctions, such as dismissal, should be made subject to court judgments.

The management of the YİKB and the Provincial Bank should be made more democratic and better representative of electors.

Furthermore, when the coordination and financing of central governments are needed, relations between the YİKB and the Provincial Bank should be regulated rationally so as to ensure efficiency and effectiveness.

Professional Organizations with Public Institution Status

In Turkey, there are many professional organizations with public institution status founded by statute in reliance upon Article 135 of the Constitution. All relevant professionals are under an obligation to enroll in, and pay a subscription to, these organizations. What is more, one is required to obtain a license from these organizations in order to be eligible to practice certain professions, such as attorneyship. In addition, all business-world persons and entities intending to engage in commercial activities not requiring a license are also under an obligation to enroll or register in, and pay a subscription to, the relevant chamber of commerce or exchange

> Article 135 (1) of the Constitution: **Professional organizations with public institution status and their higher bodies are public corporate bodies** *that are established by law, with the objectives of meeting the common needs of the members of a given profession, to facilitate their professional activities, to ensure the development of the profession in keeping with common interests, and to safeguard professional discipline and ethics in order to ensure integrity and trust in relations amongst its members and with the public;* **and the organs of which are elected by secret ballot by their members in accordance with the procedure set forth in the law, and under judicial supervision.**

Because of their public institution status, such professional organizations are required to be governed by democratic management principles. Their organs are constituted through elections among their own members. Their central organization and the election of their organs are similar to those of political parties and to the elections of the TGNA and municipalities. Like political parties, they have central and field organization units, and their central organs are elected by a General Assembly or congress composed of delegates elected by field organizations. Field organization delegates are elected similarly to delegates in political parties, and a delegate determination, nomination and election system is applied that allows control of delegates but does not assure fair representation of members. The number of members represented by delegates elected from different provinces to represent their provinces at the central organization varies according to the number of members of the provincial organization they are elected from and, thus, provinces with a low number of members are represented by a relatively high number of delegates, while provinces with a high number of members are represented by a fairly low number of delegates. To put it in other words, the representation power of members in small provinces is light-years ahead that of members in large provinces.

Arguments defending the view that the determination of central managements of professional organizations with public institution status by provinces with a high number of members is incorrect are not acceptable and legitimate in democratic terms, because such an argument seeks to restrict the representation rights of members from provinces with a high number of members and, on the other hand, to augment the representation power of smaller numbers of members from small provinces, thereby leading to tyranny of the minority over the majority. On the other hand, complaints arguing that large provinces with a high number of members are represented unfairly by a disproportionately low number of delegates are right and legitimate in terms of democracy.

The laws governing professional organizations currently restrict the representation of large provinces and increase the representation power of a lesser number of members from small provinces, thus leading to tyranny of the minority to the majority. The Constitutional Court has also found the complaints of injustice in representation right and justifiable and has, therefore, nullified the subject regulation for any single professional organization, due to its unconstitutionality.

Both in political parties and in professional organizations with public institution status, the delegacy system intensively used in the determination of central decision-making and managerial organs, and the collective list procedures and practices whereby the central management and various other focal points determine who will be elected as delegates, are, firstly, contrary to the constitutional principles of pluralism and justice in representation. Central congresses composed of delegates determined by methods contrary to the Constitution, as well as the list-based election processes applied in those congresses, are not compliant with said principles either. To put it in other words, the delegacy system employed in political parties and in professional organizations with public institution status is not democratic, and is in contradiction to the basic principles of the Constitution.

Just like the will of the volunteer members of political parties, the will of the mandatory members of professional organizations with public institution status is restricted through lists and delegates, and they are forced to choose one of the lists dictated to them rather than making a choice of their own free will and at their sole discretion. As a result, a significant segment of members who cannot be added to the lists, who are prevented from being placed on the lists, or who take a higher number of votes but who, nevertheless, lose the elections due to being included in the losing list, are excluded and marginalized from the management of their own professional organizations. This not only limits the representation of members in management, but also paves the way

for the creation of an authoritarian leader and central management structure, similar to that in political parties, and for use of the resources and funds of members not for the intended purposes but based on other motives or according to political choices and discretion.

Having assessed and discussed – three times, in 1991, 1995 and 2002 – the delegacy rules contained in the laws and regulations on the foundation of professional organizations with public institution status, the Constitutional Court, in its judicial rulings and opinions of 1991 and 2002, found the differences between the numbers of members represented by delegates elected from different provinces to be in conflict with the Constitution. However, the same provisions conflicting with the Constitution are also contained in the laws governing other professional organizations, and have remained in force and implemented for many years, solely because an action for nullity has not yet been brought forward against other such laws on the grounds of unconstitutionality.

On December 3, 1991, the Constitutional Court, in its Judgment No. 1991/45, nullified the second paragraph of Article 51 of the Law on the Turkish Pharmacists' Association No. 6643, which set out a criterion on delegates elected by the chambers to the Great Congress, quoted as ***"Chambers having a number of members up to 200 elect five original delegates and substitutes of the same number, and chambers having a number of members greater than 200 elect seven delegates and substitutes of the same number,"*** thereby providing that the number of delegates of chambers with more than 200 members, regardless of the exact number thereof, remains fixed, due to unconstitutionality.

In summary, the Constitutional Court judged that the subject provision is in conflict with the Introduction and Articles 2, 5 and 135 of the Constitution and, therefore, nullified it on the grounds that in professional organizations with public institution status, founded by statute and in reliance upon Article 135 of the Constitution, and equipped by organs formed and constituted by

"elections,"as the fundamental rule of democracy, the management and operational processes cannot be in conflict with democratic rules; that the principles set forth in the Introduction and Articles 2 and 5 of the Constitution, which are required to be protected with great care by the state, are also relevant and important in connection therewith; that democratic election rules cover fair participation and free, equal and general ballot principles; and that participation in the Great Congress by chambers of pharmacists with more than 200 members, regardless of the total number, by seven representatives indeed prevents the fair participation of chambers in the most important organ of the Association and is, therefore, in contradiction with democracy.

The reasoning expressed by the dissenting members of the Constitutional Court that "*representation of chambers in the congresses by very different numbers of delegates will lead to injustice in representation amongst chambers, each being a separate legal personality*" demonstrates that these members of the Constitutional Court wish to focus on representation of provincial chambers as separate legal personalities, not on representation of members of the Association, disregarding the fact that the subject required to be represented fairly in the congress is not the legal personality but the members of the Association. This archaic way of thinking, ignoring the fact that the representation relationship is between individuals and organs representing them, is by no means acceptable in our day. The concern uttered by the dissenting members of the Constitutional Court that *"representation of chambers with a great number of members in the Great Congress according to their number of members will lead to domination of the congress by the large chambers,"* and their reasoning that *"this is in conflict with democratic management principles,"* require us to question what type of a democracy is dreamed of by these dissenting members of the Constitutional Court. Indeed, how in the world can the principle of fair representation of members and the right conclusion created by such representation be seen as the reasoning of a dream in the

opposite direction, i.e. seeking a conclusion where a great number of people would be dominated by a few people? Likewise, the reasoning of the dissenting members of the Constitutional Court that *"conformity of the management and operational processes of professional organizations with democratic principles can be assured through the representation of chambers in congress by delegates of certain numbers"* is also a deduction that does not comply with logical rules, and that is caused by that erroneous approach. Furthermore, in a legal case focused on the right of representation of members, assessment of the subject rule by the dissenting members as "holding the chambers of pharmacists with more than 200 members to be a separate legal personality obliged to send seven representatives to the Great Congress" is so baseless that nothing more need be said.

On February 15, 1995, the Constitutional Court, in its Judgment No. 1995/9, dismissed an action based on a claim of nullification of the last paragraph of Article 7 of the Law on the Turkish Dentists'Association No. 3224, quoted as ***"Chambers with a number of members up to 200 elect five original delegates and substitutes of the same number, chambers with a number of members up to 500 elect seven delegates and substitutes of the same number, and chambers with a number of members more than 500 elect ten delegates and substitutes of the same number,"*** on the grounds that representation in the congress of a chamber with more than 2,000 members and a chamber with only 501 members by the same number of delegates (10) contradicts democratic principles and equality and is, therefore, in conflict with Articles 2, 5 and 135 of the Constitution.

In reasoning its judgment of dismissal of action, the Constitutional Court relied upon, and reiterated, the grounds referred to by the dissenting members in its judgment of nullification of 1991, and stated, in summary:

The important criterion is to ensure that each chamber is represented in the Great Congress by a particular number of delegates. Chambers will participate in the Association's General Assembly (Con-

gress) through delegates of a number appraised by the legislative organ to represent the number of dentists registered therein. Chambers become a component of the General Assembly in this way. Representation in the congress by very different numbers of delegates creates an inequality amongst chambers with separate legal personalities [… and] is in conflict with the initial objectives of the Dentists' Association and, in general, of the associations of professional chambers, based on the principle of representation of chambers, not individual dentists. Such a type of composition cannot be said to be in conformity with democratic management principles.

As we have also stated in our comments on the dissenting opinion attached to the judgment of 1991, this reasoning ignores the fact that it is the individuals who are represented therein, i.e. dentists themselves, and sees the chamber legal personalities as a separate right owner in representation, and for these reasons it is entirely voidable. What is more, the reference to alleged "conflict with the initial objectives" of the chambers indicates the error that lies in relying not upon the Constitution itself, which grants jurisdiction to the Constitutional Court, but upon the law alleged to be in conflict with the Constitution. As an excuse for its judgment in the opposite direction to its previous judgment of 1991, the Constitutional Court states: "Each judgment is specific to and dependent on its own case file and material facts," but this excuse is composed of a cliché. It may be used by juridical courts of first instance, but can under no circumstances be used by the Constitutional Court, because the Constitutional Court is under an obligation to apply the fundamental principle set down in the Constitution to every case, and the rules are by no means different by nature between this legal case and the case in 1991.

As a matter of fact, the dissenting members of the Constitutional Court, by not approving this erroneous judgment of 1995, have defended the view:

That the most equitable and least complained-of delegate election method is based on the number of delegates closest to the representation

principles, in conformity with the number of delegates, even if a full mathematical number cannot be found and, thus, members registered in the chambers may be represented fairly and realistically; that although the subject represented in the Association's General Assembly is the "chamber" formalistically and theoretically, the chamber, in turn, also represents its members; that a fair election is one that assures and reflects the participation in it in the most realistic manner; that representation of all chambers with more than five hundred members by the same number of delegates, regardless of the difference between the numbers of members thereof, is indeed in conflict with democracy; and that the right of discretion of the legislator is also limited by the constitutional and universal law rules; that determination of an appropriate number of delegates cannot be considered as a matter of "expediency"; that their comments are also verified by Judgment No. 1991/45 of December 3, 1991, of the Constitutional Court; that "democratic principles" are required to be complied with also by professional organizations with public institution status in their own internal regulations by nature that it is impossible to separate the management and operational principles from elections and to exclude democratic principles from the determination of the number of delegates; and also that an "election," as the sine qua non requirement and condition of democracy, will be valid and fair only with fair participation.

On February 19, 2002, the Constitutional Court, in its Judgment No. 2002/31, nullified the second sentence of the first paragraph of Article 60 (as amended by Law No. 3224) of the Law on the Turkish Medical Association No. 6023, quoted as *"Chambers with a number of members of up to 200 elect three original delegates and the same number of substitutes, chambers with a number of members of up to 500 elect five delegates and the same number of substitutes, and chambers with a number of members of more than 500 elect seven delegates and the same number of substitutes,"* by accepting and honoring by a majority of votes the claim of nullification due to unconstitutionality based on the grounds that in the Great Congress of the Turkish Medical Association, the Istanbul Chamber

of Medical Doctors, with around 14,000 members, is represented by the same number of delegates (seven) as a chamber having only 500 members and this, in turn, causes inequality.

In its reasoning, the Constitutional Court declared, in summary, that as per Article 2 of the Constitution, the Republic of Turkey is a democratic, secular and social state of law; that the most evident characteristic feature of democracy is elections aimed at ensuring fair participation, based on free, equal and general ballot principles and relying upon justice in representation; that according to Article 135 of the Constitution, the aim is to assure compliance with democratic principles in the foundation and operation of professional organizations with public institution status and of their higher bodies; that by the contested rule, participation in the Great Congress by chambers of medical doctors with more than 500 members, regardless of the exact number thereof, is limited to seven delegates, thereby precluding the chambers from being represented in the Association's General Assembly by a number of delegates fit for the establishment of a fair balance amongst them; and that this rule is in conflict with Article 135 of the Constitution, which seeks compliance with democratic principles in the formation of professional organizations with public institution status.

The dissenting members of the Constitutional Court, in summary, put forward arguments parallel to the reasoning of the dissenting opinion of the judgment of 1991, and defended the importance of ensuring that each chamber is represented in the Great Congress as required; that though each of chambers has equal rights with the others, if they are allowed to send delegates to the Great Congress in proportion to the number of their members, then the chambers of a few provinces that have a large number of members and, thus, send higher numbers of delegates to the Congress will dominate and control the Congress, and will guide it in line with their own requests and interests; and that this will, in turn, lead to many anti-democratic consequences for

those chambers with a low number of members. Such arguments ignore the fact that the congress is represented by natural-person individuals and substitute them with legal-entity chambers, and by doing so they pave the way for tyranny of the minority over the majority, which is by no means acceptable in light of the precepts of democracy.

In its judgments of nullification made in 1991 and 2002, in essence, the Constitutional Court states that in a democratic, secular and social state of law, a delegacy system, not allowing equal representation of members in elections of organs of professional organizations with public institution status founded by statute, as per Article 135 of the Constitution, is by no means democratic and is, therefore, in conflict with the Constitution. In fact, the delegacy system that was said to be created so as to overcome the problem of gathering thousands of members in a certain location at the same time is, in practice, used with the intention of seizing power in, or keeping under control, the management of professional organizations in such a manner as to not conform with the will of their members. To this end certain members are granted a higher rate of representation in the Congress, while a larger segment of members is precluded from being represented therein, and this method of use of the delegacy system is nothing more than ill-favored abuse. Nor may it be defended in terms of principles of justice in representation and democratic management.

Although the aforesaid regulations escalated to the Constitutional Court have already been nullified, other regulations containing similar or even weightier conflicts with the Constitution are still in force, and continue to be enforced, solely because they have not been specifically referred to the Constitutional Court. This is a bizarre discrepancy and contradiction created by the inadequate and problematic constitutional protection system.

The review of the laws and regulations of the professional organizations in the following pages, in light of said judgments

of 1991 and 2002 of the Constitutional Court, clearly reveals that the provisions and rules applied by all of them with respect to the number of delegates are unequivocally contrary to the democratic state-of-law principles of the Constitution. To put it differently, the central managerial bodies of these professional organizations are formed through anti-democratic means, and the right of all members to be fairly represented in the central management is impaired and distorted through the delegacy system.

a) Union of Turkish Bar Association

Pursuant to Article 114 of the Attorneys' Act, the General Assembly, as the highest organ of the TBB, is composed of two delegates to be elected by each of the bar associations. Bar association chairpersons on duty, and attorneys who have in the past served or are currently serving, as the chairperson of the Union of Turkish Bar Associations are also natural members of the Union's General Assembly and have the right to vote and elect, and to be elected, therein. According to this scheme, the TBB General Assembly is like a committee of the provincial bar associations, not a committee of members of those bar associations. Supposedly to relieve the unfairness caused by this scheme, bar associations that have more than 100 attorney members are further granted the right to one more delegate for every 300 additional members.

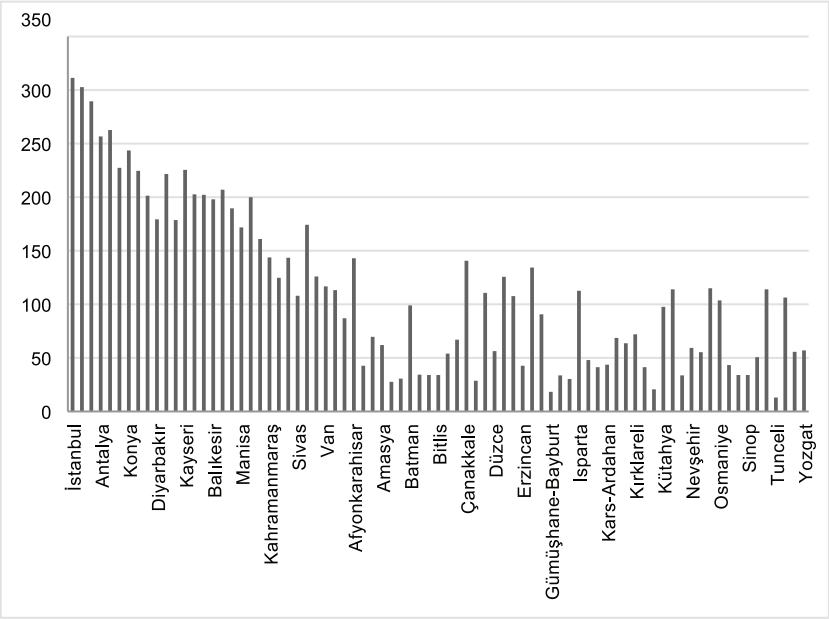
This scheme results in the bar associations with a large number of attorneys registered as members therein being represented in the General Assembly by a low number of delegates compared with their number of members, and the bar associations with a small number of attorneys registered as members therein being represented in the General Assembly by a high number of delegates compared with their number of members. To put it in other words, the representation power of members registered in small bar associations is proportionally greater than that of members registered in large bar associations.

In 2017, the TBB General Assembly was composed of 504 participants, 421 being elected delegates, 79 being bar association chairpersons and four being present or former union chairpersons. Thus, 500 participants were elected delegates representing provincial bar associations and chairpersons of the same provincial bar associations. For this General Assembly, in the autumn of 2016, approximately 100,461 attorneys elected their delegates and chairpersons. According to a comparison between the total number of attorneys and the number of delegates representing them in the General Assembly, for the sake of the full and fair representation of attorneys, in

the General Assembly each delegate should represent a total of 201 attorneys, or in other words every 201 attorneys should have elected one delegate.

As will be seen in Graph 10, there is a very heavy injustice, as is clear from comparison of the numbers of registered attorneys per delegate of the bar association having the highest number of members with the numbers of the bar association having the lowest number of members. Even between the bar associations sending a minimum number of delegates to the General Assembly, there are great differences in terms of the number of attorneys represented therein, and as for the attorneys registered in those bar associations, there is a very clear injustice in representation. Considering the 18 bar associations with the greatest number of members, on average one delegate represents 265 members, and considering the Istanbul Bar Association, which has the highest number of members, 314 attorneys are represented by one delegate.

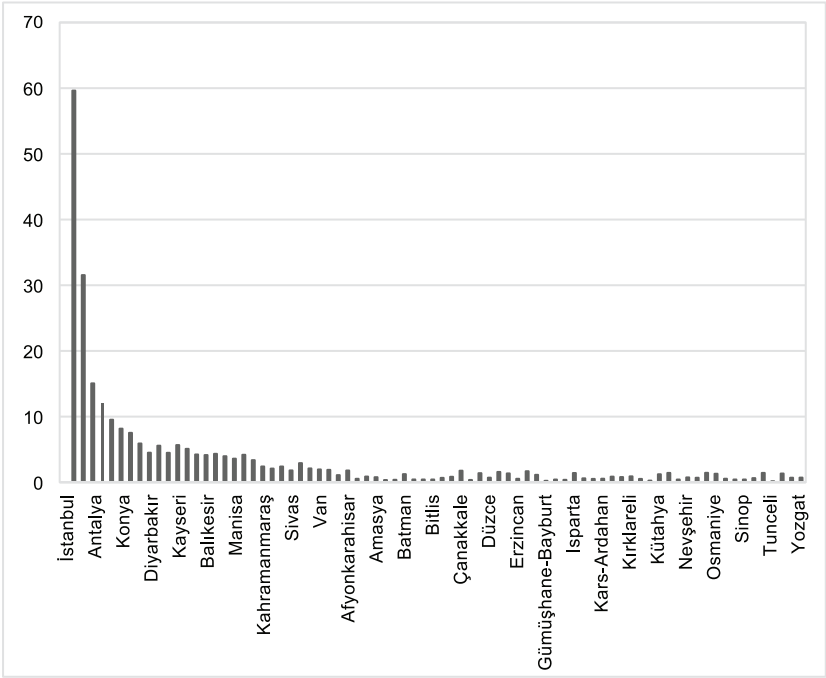
Graph 10: Differences in Number of Attorneys per Delegate amongst Selected Bar Associations



Thirty-nine provincial bar associations with a total number of members below 201 are represented in the General Assembly by at least three delegates, one of them being the bar association chairperson. The Tunceli Bar Association, with only 40 members, is represented by three delegates and, in Tunceli, one delegate represents approximately 13 attorneys.

If the numbers of delegates in the General Assembly were determined according to numbers of members, 201 attorneys should be able to elect one delegate. If the number of delegates corresponding to bar associations with a total number of members below 201 were 0.5 or more, rounded up to one, each of the Batman, Kütahya, Giresun, Adıyaman, Kırklareli, Aksaray, Kastamonu, Burdur, Kırıkkale, Amasya, Nevşehir, Yozgat, Düzce, Yalova, Niğde, Bolu, Şırnak, Karabük, Kars-Ardahan, Rize, Ağrı, Erzincan, Karaman, Kırşehir, Bilecik, Bingöl, Bitlis, Siirt, Sinop, Hakkâri and Muş bar associations would be represented by one delegate, and the Istanbul Bar Association, with 37,985 members, would be represented by 189 members in the General Assembly (see Graph 11).

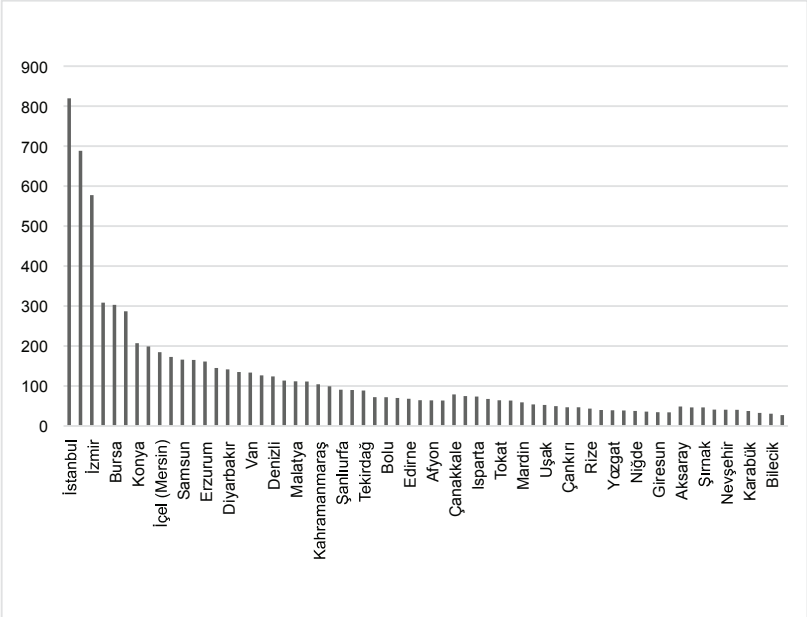
Graph 11: Numbers of Delegates that Bar Associations Should Have in the TBB General Assembly



b) TTB – Turkish Medical Association

The TTB Great Congress, electing the members of the Turkish Medical Association's Central Council and board of auditors, is composed of delegates elected by general assemblies of provincial chambers of medical doctors. Chambers with up to 200 members elect three delegates, chambers with 200 to 500 members elect five delegates, and chambers with 500 to 1,000 members elect seven delegates plus one additional delegate for every subsequent 1,000 members. As in the TBB, the chairpersons of provincial chambers of medical doctors are also natural members of the TTB Great Congress. As a result, the number of delegates of chambers with more than 1,000 members is half of the number of delegates of chambers with fewer than 1,000 members. For instance, while a chamber with 2,000 members is represented by eight delegates, another chamber with 1,000 members is represented by seven delegates. It is unequivocal that this is not compliant with representative democracy. This is easily seen in Graph 12.

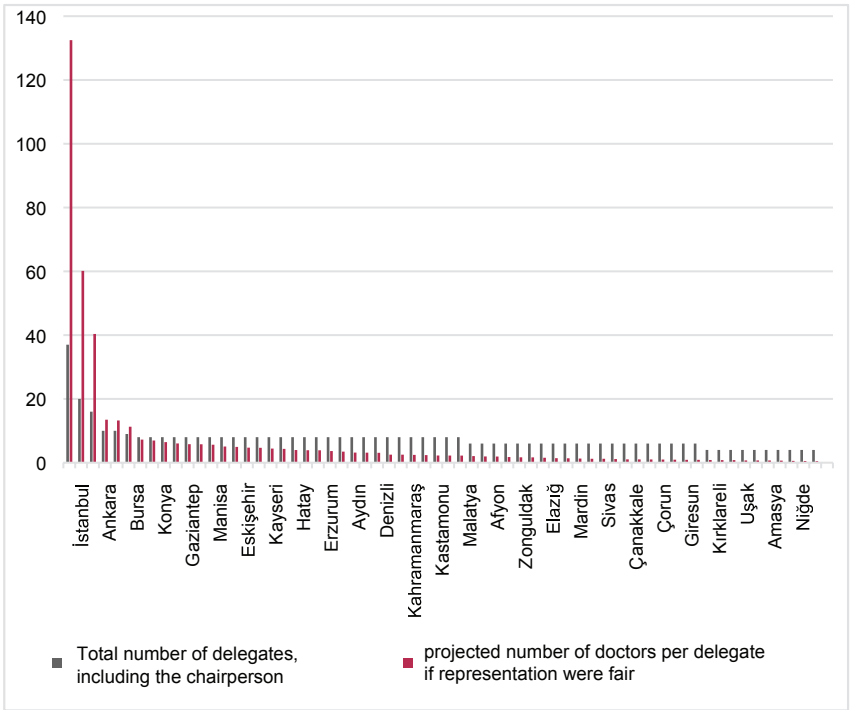
Graph 12: Differences in Numbers of Doctors represented by Delegates in the TTB



As the member and delegate numbers for subsequent years could not be obtained, Graph 13 is created from data for 2008 as contained in the report published in 2009 by the SSC.

As will be seen in this Graph, members are represented in a rather unfair manner in the TTB too. Medical doctors working in Istanbul, where the chamber has more than thirty thousand members and should therefore have 132 delegates to be fairly represented, are represented by only 37 delegates; medical doctors working in Ankara, where the chamber should be represented by 60 delegates, are represented by only 20 delegates; and medical doctors working in İzmir, where the chamber should be represented by 40 delegates, are represented by only 16 delegates. On the other side of the coin, medical doctors working in the other 47 provinces, each of which should be represented by two delegates, are represented by six delegates on average. Thus, there is an undemocratic injustice in representation which is in favor of the chambers of provinces with a very low number of members, and against the chambers of provinces with high numbers of members.

Graph 13: Numbers of Delegates in the TTB as They Should Be

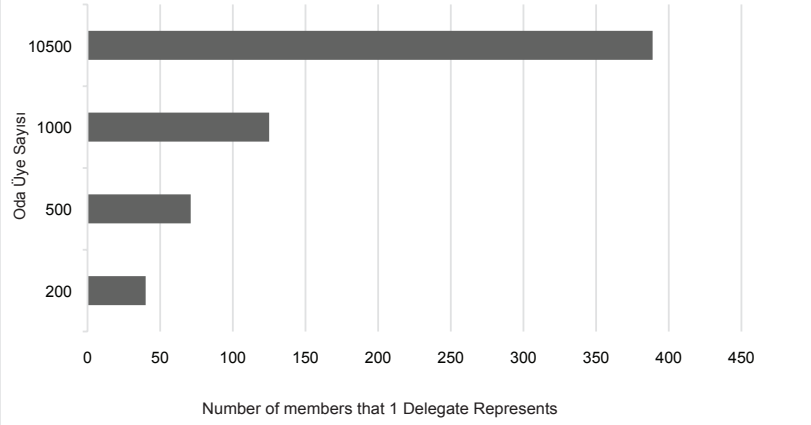


c) TEB – Turkish Pharmacists' Association

Pursuant to Article 51 of Law No. 6643, the TEB Great Congress is composed of representatives elected by secret ballot in the general assemblies of provincial chambers of pharmacists. Chambers with up to 200 members elect five representatives, chambers with 200 to 500 members elect five representatives plus one more representative for every additional 150 members, and chambers with than 500 members elect seven representatives plus one more representative for every additional 500 members.

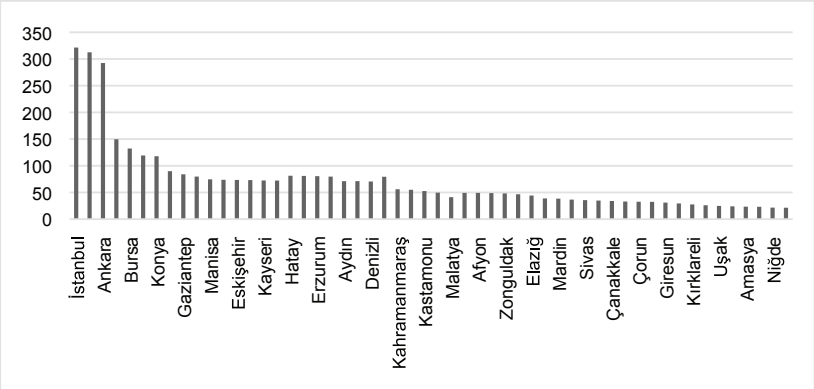
If a chamber has 200 members it is represented in the General Assembly by one delegate per 40 members (= 200/5), if a chamber has 500 members it is represented in the General Assembly by one delegate per approximately 71 members (= 500/7), and if a chamber has 1,000 members it is represented in the General Assembly by one delegate per 125 members (= 1,000/8). In other words, a chamber with 1,000 members equal to five times that of another chamber having only 200 members is represented by a number of delegates that is only 1.6 times that of a chamber with only 200 members. The number of delegates of a chamber with 1,000 members is only one more than the number of delegates of a chamber with 500 members, i.e. 500 members are represented by seven delegates, but 1,000 members are represented by only eight delegates (see Graph 14).

Graph 14: Differences in Numbers of Members represented by Chamber Delegates in the TEB



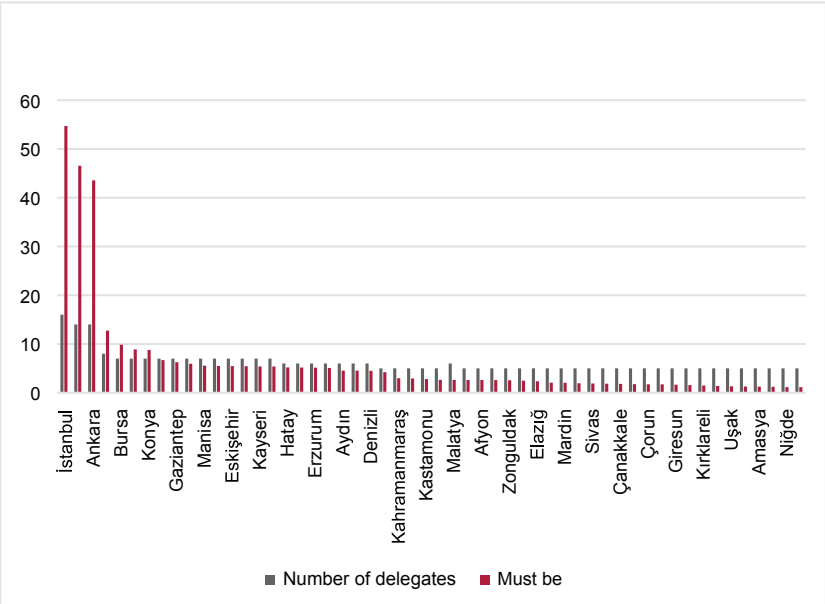
As is clearly seen in Graph 14, the composition of the TEB Great Congress is structured in contradiction to the fair representation principles of democratic management, resulting in chambers with fewer members having a greater proportional weight than those with a higher number of members, and leading to the control of the majority by the minority. Furthermore, as will be seen in Graph 15, the numbers of pharmacists represented by delegates vary greatly between provinces. Graph 15 is created by using data from 2013 made public in the course of a legal case.

Graph 15: Differences in Numbers of Pharmacists represented by Delegates in the TEB



In the numbers of delegates representing the provincial chambers of pharmacists, we observe an injustice in representation that disfavors pharmacists working in large cities and favors those working in small cities, in comparison with the representation levels that would exist if they were to be represented according to their numbers of members. This is further evidenced in Graph 16.

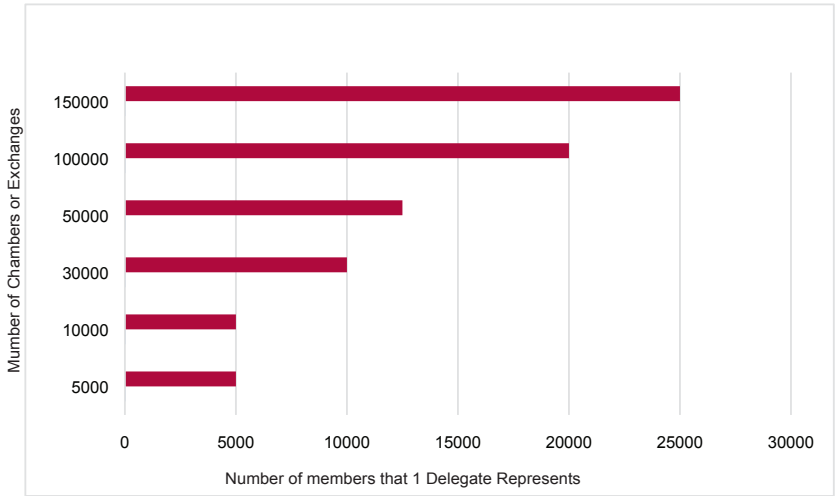
Graph 16: Numbers of Delegates in the TEB as They Should Be



d) TOBB – Turkish Union of Chambers and Commodity Exchanges

The TOBB General Assembly, which elects the councils, the TOBB chairperson and members of the Higher Disciplinary Board, is composed of delegates elected by assemblies of chambers and commodity exchanges (for a term of four years). Chambers are represented therein by at least one delegate, in addition to the chairpersons of their boards of directors. Chambers and commodity exchanges with between 2,000 and 5,000 members elect one delegate, those with between 5,000 and 10,000 members elect two delegates, those with between 10,000 and 30,000 members elect three delegates, those with between 30,000 and 50,000 members elect four delegates, and those with more than 50,000 members elect five delegates plus one more delegate for every 50,000 additional members. In addition, chambers for which the average subscriptions paid by members during the last four years exceeds the minimum wage amount are entitled to elect one additional delegate for each minimum wage amount, up to a maximum of 20 additional delegates (see Graph 17).

Graph 17: Differences in Numbers of Members represented by Chamber and Commodity Exchange Delegates in the TOBB



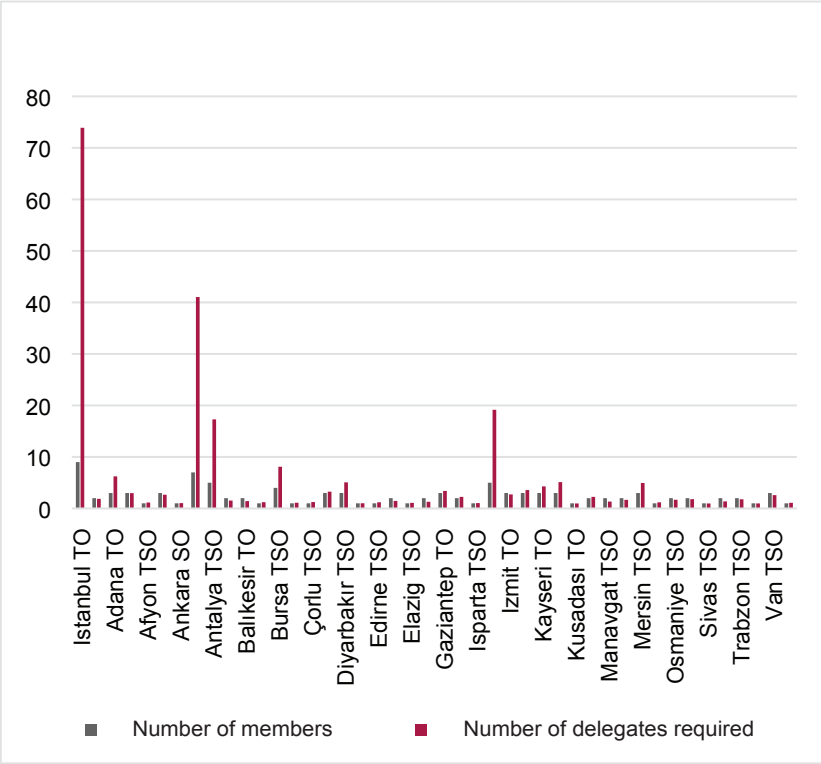
There is a grave injustice in the representation of members in the TOBB. Depending on the total numbers of members, and if calculated according to the numbers of delegates and the data for 2008 given in the report published in 2009 by the SSC, 163 chambers with a total number of members of 148,442 are represented by 163 delegates in total in the TOBB General Assembly, while on the other hand 44 chambers with a total number of members of 943,601 are represented by 106 delegates in total therein.

The number of delegates by which each chamber is represented in the TOBB General Assembly could not be ascertained from publicly accessible sources, including the TOBB's web site. The sole reliable data set identified was the data for 2008 given in the report of the SSC. Delegate elections may vary according to whether the chamber and its members have paid their subscriptions or not, and according to the amounts paid. However, we were unable to find data relating thereto. For this reason,

our findings regarding justice in representation in the TOBB are based on the numbers of representatives in relation to the numbers of members as summarized above. In any event, the existing data is adequate to demonstrate the disastrous injustice in representation therein.

Another important point worthy of discussion is that elections to, and numbers of representatives eligible to attend, the TOBB General Assembly are not transparent and auditable, and this in turn leaves the processes open to influences and may cause unhealthy elections. Judicial review is absolutely required for the healthy determination of delegates (see Graph 18).

Graph 18: Numbers of Delegates in the TOBB as They Should Be

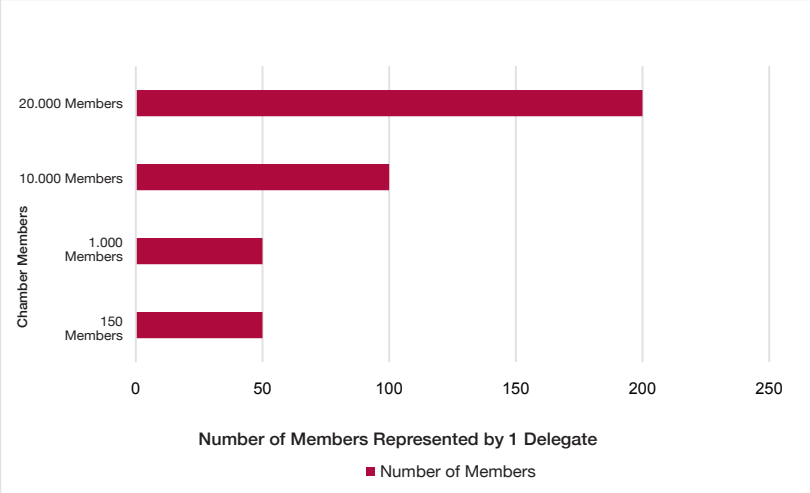


e) TMMOB – Union of Chambers of Turkish Engineers and Architects

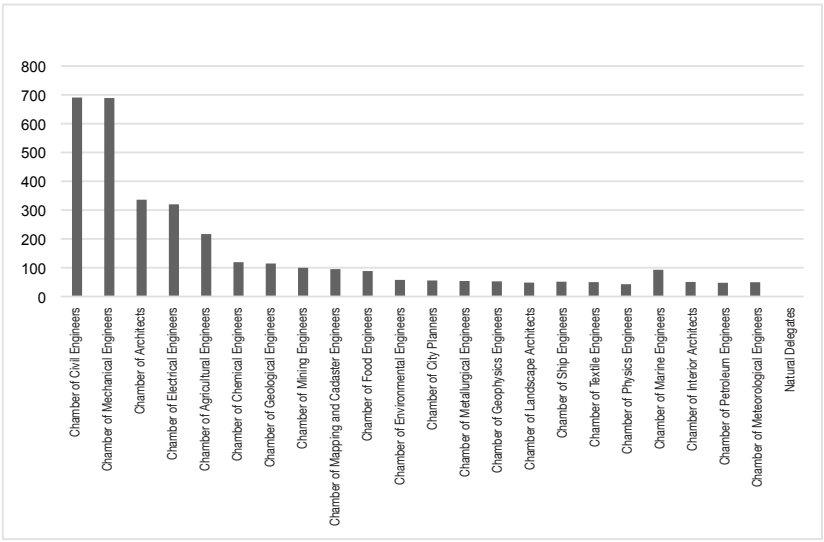
The General Assembly of the Union of Chambers of Turkish Engineers and Architects is composed of delegates elected by chambers in a number equal to 2% of their numbers of members, with a minimum of two and a maximum of 100 delegates per chamber. Thus, if a chamber has three delegates, it should have 150 members, if a chamber has 20 delegates, it should have 1,000 members, and if a chamber has 100 delegates, it should have 5,000 members.

Here, it is observed that the percentage applied in the representation of chambers with to 100 members has fair consequences, but restriction of delegates to a maximum of 100 causes an injustice in terms of the representation of members of large chambers with more than 1,000 members (see Graph 19).

Graph 19: Differences in Numbers of Members represented by Chamber Delegates in the TMMOB

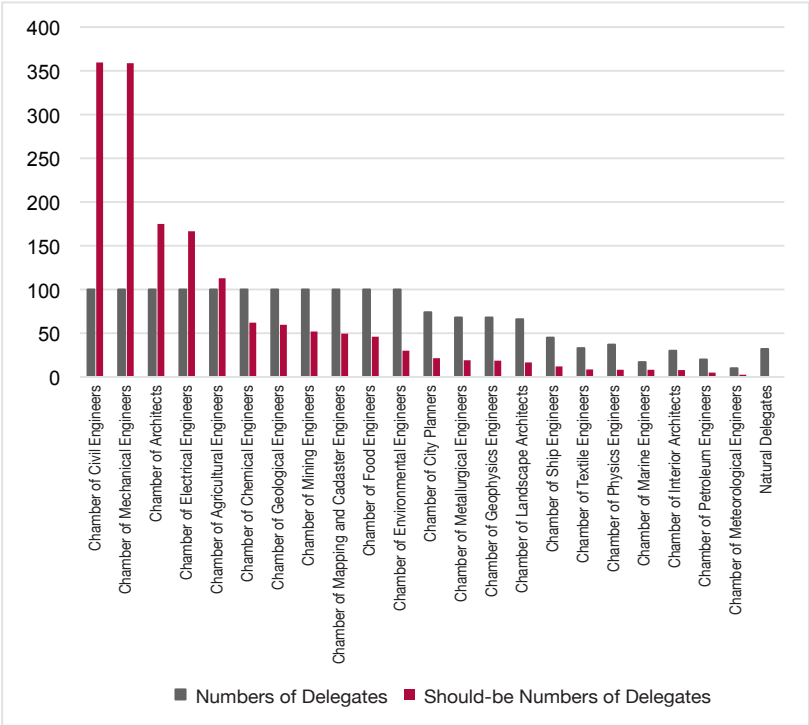


Graph 20: Number of Members per Delegate in Selected Chambers of Engineers and Architects



Graph 20 indicates an injustice in representation that disfavors chambers with large numbers of members and favors those with small numbers of members in terms of representation in the TMMOB. As will be seen in Graph 21, chambers that should be represented by higher numbers of delegates are, in practice, represented by one-fourth as many delegates as would be a fair number, while chambers that should be represented by lower numbers of delegates are, in practice, represented by three or four times as many delegates as would be a fair number.

Graph 21: Numbers of Delegates of Selected Chambers of Engineers and Architects



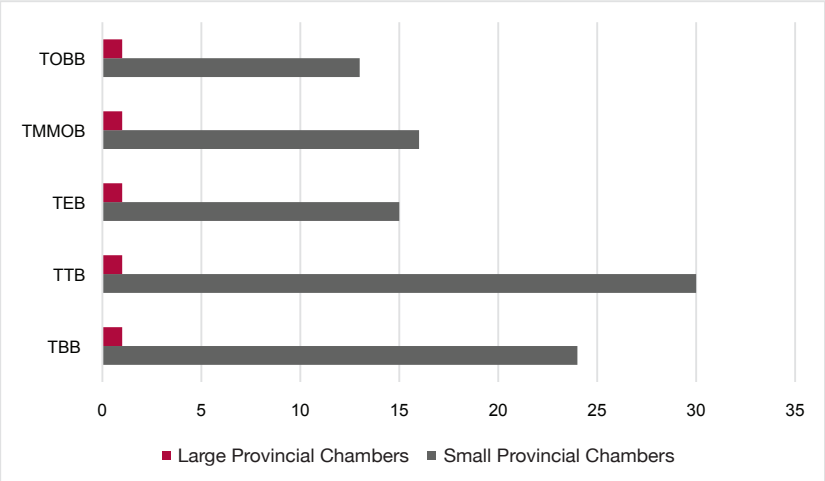
Another important point is that in professional organizations founded by statute, where professionals are legally obliged to be members of and pay a subscription thereto, both the representation of members and their right to participate in management are restricted by various different methods. This causes members to avoid seeking to participate, and over time to become completely excluded. This in turn leads these professional organizations to become institutions that legally collect subscriptions from, but do not render any services to, citizens, like Dumrul the Mad. Professionals have even begun to prefer to move away from these non-governmental organizations founded by statute. This is by no means useful or helpful for the objective of developing democracy in society but, on the contrary, may cause great loss

of confidence.

In the preceding paragraphs, we have demonstrated through figures and graphs the injustice in representation in professional organizations with public institution status, which is well known by the public and is of particular concern to society.

In these organizations, in general, the power of representation in management and the influential power and easily controllable nature of the votes of members in provinces with lower numbers of members has over time set such members apart to a great extent from members in large provinces. The greatest gap in representation power is seen in the TOBB, wherein in the Babadağ Chamber of Commerce, the chamber with the fewest members, one member's voting influence is 335 times that of members of other chambers, assuming that each member has at least one vote. Thus, according to an assessment based on the fairness of representation, it is noted that certain groups of members that are lesser in number are given a very high rate of representation power and, hence, in these professional organizations, the minority generally has tyranny over the majority. This problem exists also in other professional organizations (see Graph 22).

Graph 22: Differences of Representation Power in Professional Organizations between Members in Large Provinces and Members in Small Provinces



We have referred above to the comprehensive report on professional organizations with public institution status published in 2009 by the SSC. The findings and proposals of the SCC regarding democratic management, which we agree with and accept, are summarized in the following paragraphs:

The rate of participation of members in elections of professional organizations should be raised, and different opinions should be given the opportunity to be represented in the organs of these organizations. Elections should be organized impartially and under conditions of equality. To resolve the existing problems of representation, rather than elections based on lists taking the majority of votes as a whole, a proportional representation system similar to that of parliamentary elections, together with choice and preference systems, should be employed, allowing groups to be represented in organs in proportion to their vote shares. The election of the same persons for many years and the formation of hierarchical, autocratic and monopolistic structures should be prevented, and the regulations and charters of professional organ-

izations that are similar to each other by nature should be made uniform on the basis of certain minimum standards.

To achieve these objectives, the laws pertaining to professional organizations with public institution status and, especially, the rules regarding elections therein should be reissued, the fair representation of chambers with low numbers of members should be secured and terms of office should be limited. Elections should be organized under judicial review, all candidates should be placed on a single list and choices/preferences should be allowed in elections. The election system should be rearranged to ensure that the candidates winning the most votes are elected, as in the proportional representation system employed in parliamentary elections. Methods aimed at increasing participation in elections, e.g. voting by mail or via internet, should be employed, and actions should be taken to keep ballot boxes open for a longer period of time.

However, the proposals of the SSC as to the imposition of a "ceiling" so as to prevent the absolute control and domination of several large chambers in central general assemblies of professional organizations, and as to the redetermination of the numbers of members and delegates eligible to attend General Assembly meetings in such a manner as to keep the existing insecure system, cannot be accepted. This is because justice in representation can be achieved in a better and more comprehensive manner only by making sure that even the chamber with the fewest members is also represented in management, and also by respecting the right to proportional representation in management of chambers with high numbers of members – not by excluding some members from the right to representation.

Conclusions

In our country, for the sake of permanently establishing democracy not only in political parties and the state itself, but also in all kinds of official and private social organizations where people come together optionally, mandatorily or necessarily and where

the self-government of individuals is required, democratic methods should dominate and should be established as the basis of the management culture therein. It is a sociological reality that in the absence of such a management culture, democracy cannot be successfully employed in political parties or legislative and executive organs, and that in such circumstances, even the most democratic political and governmental bodies and institutions will quickly descend to the democratic level of the wider society, whatsoever that may be.

This sociological reality directly affects not only politics and state governance but also daily relations amongst individuals and economic activities even in the smallest unit of society. In an undemocratic and authoritarian family, the head of the family, holding the power in his hands, acts arbitrarily in his decisions, and such an arbitrary and authoritarian leader deprives himself of the valuable knowledge and different points of view of others since he does not grant others the right to speak and participate in decisions. Such a head of a family feels suffocated due to his attempting to resolve problems alone, and after some time starts to resort to the use of violence or force against his loved ones. This is the reason underlying events such as certain successful family-owned businesses composed of owners tightly connected to each other falling into dispute and conflict over time and going bankrupt, thus causing the loss of significant assets in the broader economy. For instance, a Turkish company that was an important exporter and held a significant share in the global tractor market some time ago went bankrupt solely as a result of family disputes and disagreements, and this event stands as a recent example from which important lessons can be learned. On the other hand, whatever their size, businesses that are not managed in a democratic way, that do not treat their employees equally in spite of differences in wages paid and in the positions held by them, and that do not take into consideration the employees' knowledge, wishes and suggestions fail to resolve even very simple problems and cannot

ever reach their potential production capacity. Such examples as employees sabotaging production or deliberately contaminating the products of the business in response to unfair treatment or being disregarded are the result of these problems. Furthermore, given that even in small businesses run by a only few individuals, the participation and contribution of those in charge of different aspects of the business activities are considered to be essential for success, it is unequivocally clear that democratic management is very important to the success of hundreds of thousands of business enterprises.

To put it in other words, although economists and management scientists have not yet demonstrated by experimental data the extent to which democracy is effective in business enterprises, given that the economy and welfare is most advanced in countries with an advanced democratic culture, there is no doubt that a democracy culture is an important factor in the economic success of societies.

In order to establish and promote democracy in state governance, the principle of democratic management principle must be applied in all social platforms, and must be turned into a fundamental part of society's culture.

Also, in professional organizations which people are legally obliged to be enrolled in and pay subscriptions to, as dictated by the Constitution, democratic management should be established as soon as possible. The government, which has thus far intervened in democratic management through restrictions, and in conflict with the Constitution, should, as soon as possible, enforce its obligation thereto, and should quickly amend or repeal restrictive provisions in the law in connection therewith.

Proposals

In professional organizations with public institution status, central General Assembly or delegate congresses should be abolished and replaced by councils making decisions on all important matters. Council members should be determined in elections where all members vote in single-round elections organized according to principles of proportional representation.

Central management heads should be elected in two-round elections where the two candidates taking the highest number of votes in the first round compete in a second round if an absolute majority cannot be reached in the first round, as in the presidential elections.

In professional organizations, local management units with too great a number of members should be divided into several local management regions, and areas with too few members that can be integrated with one another economically should be merged. Again, their chairperson should be elected in two-round elections, and boards of directors in single-round elections according to principles of proportional representation.

Selected Labor Unions

TÜRK İŞ

According to Article 7 of Türk-İş's Charter, member unions are represented in the General Assembly by numbers of delegates in inverse proportion to their number of members. Unions with 1,000 members are represented by one delegate, unions with 15,000 members by nine delegates, unions with 30,000 members by 14 delegates, unions with 50,000 members by 19 delegates, and unions with 100,000 members by 29 delegates. As this demonstrates, in small unions one delegate represents 1,000 members, while in large unions one delegate represents 3,000 members. The total number of delegates is limited to 500. This reveals that in the Türk-İş General Assembly, members of member unions are not represented democratically and proportionately, and smaller unions may be disproportionately influential in the General Assembly and in management.

DİSK

According to Article 10 of the DİSK Charter, the DİSK General Assembly is composed of 400 delegates, including natural delegates and delegates duly elected in union General Assembly meetings. Original members of boards of directors, boards of auditors and disciplinary boards, other than the General Assembly of the confederation, are treated as natural delegates so long as they

remain on said boards.

Each union is represented by at least two delegates, determined according to the number of subscription-paying members of the unions. The numbers of delegates remaining after subtracting the numbers of natural members and the two members for each of the member unions from the total number of 400 delegates is divided by the total number of subscription-paying members, and the resulting figure is divided by the total number of members to give the number of delegates in the confederation General Assembly. Although it seems as though the unions are represented fairly proportionately in the General Assembly, if there are differences amongst numbers of subscription-paying members of unions, a result may emerge which favors small unions represented by at least two delegates in the General Assembly.

HAK İŞ

According to Article 10 of the HAK-İŞ Charter, the HAK-İŞ General Assembly is composed of at least 300 delegates. The numbers of delegates are determined on the basis of statistics (on numbers of members) of the Ministry of Labor and Social Security. Three delegates are assigned for the first 1,000 union members, an additional delegate is assigned for the second 1,000 members and a further additional delegate is assigned for the third 1,000 members. Then, the total numbers of members not included in the calculation of delegates above is divided by the numbers of unspecified delegate seats, and the resulting figure is used to determine the remaining delegacies. The total numbers of delegates in excess of, or below, 300 are also accepted.

The HAK-İŞ Charter also causes disproportion in representation, with some unions with low numbers of members being represented by relatively higher numbers of delegates and, therefore, some members of other unions with more members not represented.

Belief-Based Organizations and Groups

Article 24, paragraph 1, of the Turkish Constitution secures the freedom of "conscience, religious beliefs and convictions" of individuals, and paragraphs 2 and 3 of the same article secure the acts of worship, religious rites and ceremonies – so long as they do not violate the provisions of Article 14 pertaining to the limitation of abuse. Article 24, paragraph 4, forbids (i) acts even partially basing the fundamental social, economic, political and legal order of the state on religious tenets or (ii) acts of exploitation or abuse of religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political interest or influence.

The scope of the "prohibition of abuse of fundamental rights and freedoms" constituting the protection of the freedom of conscience, religious belief and conviction of individuals secured by Article 24, paragraph 2, as cited above is described in Article 14. Fundamental rights and freedoms and, accordingly, the freedom of conscience, religious beliefs and convictions of individuals can by no means be interpreted in such a manner as to (i) *"violate the indivisible integrity of the state with its territory and nation, or eliminate the democratic and secular order of the Republic,"* as stipulated in Article 14, paragraph 1, or (ii) destroy the fundamental rights and freedoms or restrict them more extensively than as stated in the Constitution, and as stipulated in Article 14 paragraph 2.

In Article 174 of the Constitution, titled "Preservation of Reform Laws," one of the laws and acts forbidden to be argued to be unconstitutional is Act No 677 of November 30, 1341 (1925), on the closure of Dervish monasteries and tombs, the abolition of the office of keeper of tombs, and the abolition and prohibition of certain titles, and although it is forbidden by said act, it is known that some belief-based organizations and solidarity groups, some of which carry out their activities under the name of an association or a foundation, have emerged around individuals named hodja or master or given similar other titles who act as a leader of a particular religious thought group, or have certain personal approaches or ideas on issues concerning the beliefs of humans.

Pursuant to the first sentence of paragraph 3 of Article 24 of the Constitution, titled *"Freedom of Religion and Conscience"*, *"Religious and moral education and instruction shall be conducted under state supervision and control."* This provision authorizes the state to prevent "religious and moral education and instruction" from taking place beyond the supervision and control of the state. As a matter of fact, in Act No. 430 on the Unification of the Educational System, being one of the other "Reform Laws" safeguarded by Article 174 of the Constitution, Article 4, providing that *"The Ministry of Education will establish and open a faculty of theology to educate specialized theologians,"* is fully in conformity with the assignment and limitation set down in the first sentence of paragraph 3 of Article 24 of the Constitution.

However, religious and moral education and instruction are being given by some sects, religious congregations or other organizations created by certain sheikhs, hodjas and masters unregistered anywhere, together with the believers gathered around them, totally beyond the supervision or control of the state. We worry that young minds will thus be conditioned, as their will may be easily restricted and they may be precluded from freely using their fundamental rights and freedoms, and thus the wish of society to learn its religion may be abused.

It has been widely discussed in recent years that a spiritual and pastoral group has emerged that almost acts like an intermediary between believers and beliefs, that communicates and conveys beliefs and controls and guides believers, and that certain spiritual leaders named sheikh, hodja or master, or given similar other titles, believed to possess superhuman and heavenly qualities, are preaching and imposing on their followers or acolytes certain rhetoric discourses or statements that are in no manner relevant to religious beliefs, and may even occasionally be in conflict with the requirements of religious beliefs.

It is a common observation and concern of the people that these followers or acolytes, who have unreasoned obedience to and implicit faith in their leader under the heavy effects of unquestionable discourses or statements and contentious information, disputable in terms of their conformity with religious beliefs, may over time be easily turned into militants, and abused and used for illegal purposes or motives. These organizations generally target and recruit intelligent, talented and innocent children determined to extricate themselves from poverty by offering free education, accommodation, meals and job placement services and, over time, transform them into acolytes and militants. These innocent children, even if they can keep clear of becoming militants, may be easily abused and used on the basis of the unconditional obedience, faithfulness and debt of gratitude that have been instilled in them.

Of course, it is amongst the leading rights of believers to better learn their religion and its philosophy and requirements. It is the function of the state to protect freedom of belief and to help people in reaching healthy and reliable information about their religion. For this reason, both the Constitution and the Act on the Unification of the Educational System entrust the state with this task. The assumption of this function by the state is also required for the purposes of monitoring incidents that may endanger public security if not prevented, and for their prevention at an early stage. Experiences in the Seljukian and Ottoman Empires demonstrate

that such belief-based organizations may even reach a level at which they endanger public security and the survival and perpetuity of the state. However, in the present day, in spite of the explicit provisions of Article 24, paragraph 3, of the Constitution, certain particular religious and moral educational and instructional activities, performed beyond the supervision and control of the state, are indeed in breach of the freedom of religion and conscience secured by the Constitution.

At the same time, these belief-based organizations function as economic solidarity groups, and are acquiring considerable economic resources of through various methods. Their capital, accumulated also by collecting donations such as the hides of sacrificed animals and alms (zakat) granted by the people in a spirit of solidarity, is then introduced into trading activities, and the economic power that grows in this way is employed in order to expand the network of members and areas of influence, and to condition the recruited children in line with the organization's religious teachings. Thus, loyalty to such belief-based organizations is further strengthened through economic methods, leading to a mass of members tightly linked and connected to each other within the organization and gradually expanding outward.

It is an unequivocal fact that these types of organizations and their members will be exposed to some malevolent and evil-minded approaches, and that members can easily be abused under the guise of religious beliefs. This reality points to a very great danger for the perpetuity and survival of Turkey, just like that faced by the Seljukian and Ottoman Empires.

It is known that it is not difficult to penetrate into and take control of such belief-based organizations that maintain their activities unrecorded and beyond the supervision, control and knowledge of the state. It is also very well known that all underground organizations intend to seize public power and to establish empery and command, and, to this end, they may tend to use clandestine and hidden methods and even to stage a coup. If and when such

types of organizations enter into the control of foreign powers, the survival and perpetuity of the state will also be threatened. Therefore, this great potential problem should be foreseen, and actions should be taken before it emerges. This is, at the same time, a duty required to be performed in order to prevent the transformation over time of innocent people joining such organizations, seen as a requirement of their beliefs, into militant acolytes. At this point, Turkey should learn from the important lessons of the transformation of the service congregation that arose around 40 years ago, Fettullah Gülen, into a terrorist organization, which gained enough strength in those 40 years to stage the painful July 15, 2016, coup d'état attempt.

In Turkey, belief-based organizations are not under an obligation to be transparent towards their members or the general public. Individuals do not know, nor do they need to know, the activities, operations, financial situation, assets, revenues and expenses of their organization, and how its resources are used. Even the leaders of somewhat larger organizations of this type may not have adequate information about all of the activities undertaken in the name of their organization, because these organizations are not organized as legal institutions or corporations that keep corporate records and report to official authorities. Fiscal data is transparently maintained in some organizations that are legally constituted in the form of associations or foundations, but not in organizations not organized as such.

The management of these organizations are not accountable towards their members or any other authority. In organizations that are formed as associations or foundations, which keep full records of their properties and income sources, we see financial accountability exhibited to some degree, but we do not particularly see any financial accountability in others. Funds collected in the name of belief-based organizations are by no means accounted for, and whether the properties and assets owned by the organization, but registered in the names of its executives or trustees, are used

for the intended purposes thereof and are accounted for or not is left entirely to the discretion and integrity of individuals. It may be legally impossible to retrieve these properties and assets from legal heirs upon the deaths of the individuals in whose name they are registered. Although there are some other factors as well, leadership in these types of organizations is inherited by way of succession within the family, not established through democratic means.

Article 24, paragraph 4, of the Constitution forbids the use or abuse of religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for political interest or influence. In spite of this Constitutional rule, such types of organizations can be fairly effective in politics by using their significant influence on and control of their members and by channeling their financial assets and resources into politics.

It is one of the most critical issues required to be addressed and resolved by Turkey to bring these types of organizations under the tight supervision and control of the state in order to prevent their intervention in politics and their transformation into groups of treachery, which may even threaten the survival and perpetuity of the state, and to ensure that they carry out their activities within the bounds of the law.

This problem cannot be said to have been resolved by "Reform Laws," such as Act No. 677 on the closure of Dervish monasteries and tombs, the abolition of the office of keeper of tombs, and the abolition and prohibition of certain titles, or Act No. 430 on the unification of the educational system. The country's past painful experiences are living proof of the fact that these laws were by no means adequate thereon.

In Turkey, with a population the large majority of which is composed of Muslims, people wish to understand the Islamic religion and to learn its practices. The freedom of conscience, religious belief and conviction of individuals secured by the Constitution provides them with the right to freely believe, learn and practice

their religion. These circumstances constitute an appropriate platform upon which belief-based organizations can emerge, spread and develop.

It is, of course, not possible to fully prevent all dangerous situations and organizations that may emerge from this appropriate background. However, rather than ignoring and disregarding them, their existence should be admitted and this danger should be managed in a better, more rational manner. If and when the reality is admitted, it will also be easier to develop ideas and methods for managing the situation. To this end, it is necessary, firstly, to know these organizations better, and to understand their functions; secondly, to identify the problems that exist already and may be created in the future by them; and thirdly, to establish a system to develop positive functions but proactively prevent the problems. New opportunities should be generated out of the new system that will arise when these steps are fully taken.

There are three basic functions of belief-based organizations:

(i) The spiritual leadership and guidance of believers in order to enable them to understand the requirements of their beliefs at the highest level and to fulfill such requirements to the greatest extent possible;

(ii) Assistance and solidarity amongst fellow believers, and even with members of the community outside the religious group, depending on the interpretation and preferences of the religion;

(iii) Beyond its main functions, to ensure that the religious group becomes influential in public administration and politics over time, to seize the state over time, and to transform the state in line with its own teachings.

The need to learn in order to understand the requirements of beliefs and to fulfill and satisfy such requirements – the first of these functions – is an area where dangers may be encountered, and the state should proactively seek to detect erroneous teachings

given to members of religious groups, intervene at an early stage and take action to ensure accurate healthy information.

The second function is the easiest and most useful one. This function may be easily developed and turned into an opportunity by taking these types of organizations under registry and control and by assuring their accountability. On the one hand, the abuse of philanthropic feelings of the Turkish nation may be prevented, and on the other hand, the culture of social cooperation and solidarity may be better institutionalized and made more efficient.

The third function, relating to the effort to become influential in public administration and in politics, may be withdrawn to inside the bounds of the Constitution, and its probable dangers may be eliminated through transparency and accountability in state governance and in politics, because being a member of a belief-based organization cannot be an excuse for exclusion from public duties and functions but, of course, the abuse of public duties and functions in the interests of that organization can by no means be accepted and should be prevented. Indeed, had such actions and measures been taken in time, the penetration of members of FETÖ into the higher ranks of public servants, and their subsequent influence on state governance, could easily have been prevented.

Accordingly, it is very promising that after the July 15, 2016, coup d'état attempt Mehmet Görmez, ex-president of the Department of Religious Affairs, warned all religious congregations and sects "to become transparent," and that according to the news, the relevant units of the state were taking certain actions in that direction. An article published on karar.com by Erol Metin in 2016[35] states: "Warning the civilian religious organizations against the danger of abuse of Islam, Mehmet Görmez, President of the Department of Religious Affairs, says: *"The remedy is transparency.*

35 Gündem/cemaatlere-uyelik-formulu-tartisiliyor?p=2

Each religious organization should declare to the society under what framework it is offering its services, and should by no means step out of line." Statements contained in the text of this article are that, for the sake of transparency, the required legal infrastructure is required to be established; that the recording of religious sects and congregations will be ensured; that their followers will be brought to light by the application of a membership system in associations, and membership in them may be encouraged through state subsidies and fund-raising permissions; that they will be prevented from engaging in activities beyond their original missions; that the operation of unregistered student hostels and dormitories will not be permitted; that they will be forced to become transparent, including in financial issues; and that their informality may be prevented through audit and supervision. Some religious sects and congregations leaning towards transparency may constitute the trailblazers for these actions and regulations.

As also mentioned in the article, while it is necessary to ensure compliance with, and respect for, the freedom of faith and belief of individuals, it is also necessary to proactively preclude belief-based organizations from becoming a threat to the security of the state and to the rights and freedoms of individuals. Turkey should derive important lessons from the July 15, 2016, coup d'état attempt, and find a way to save its country and state from threats, dangers and damage that may be caused by such organizations.

Proposals

Aside from the requirement to conducting a wide-scale study in order to take the necessary actions and measures in connection with the issues discussed above, at the first stage, some additions should be made to Law No. 677 with regard to the following proposals, so as to quickly ensure that all belief-based organizations become visible and accountable, and perform their activities solely within the framework of beliefs and solidarity:

(i) Belief-based organizations should be classified under the name of "Belief-Based Organizations and Groupings," and should be encouraged to be organized and managed in accordance with democratic rules and principles. Several measures may be taken as to the leadership doctrine and leaders of these organizations, and to ensure the change of leaders by means other than kinship relations, through the recording and registration of all members, activities, resources, earnings and expenses; the reporting of the same regularly to members, the public and relevant official authorities; and the requirement to obtain prior approval for education and training activities.

(ii) Belief-based organizations and groups should be required to keep records of and officially report all of the funds and donations collected and distributed by them in such a manner as to make it possible to check whether these funds and donations are distributed in compliance with the original intention of solidarity, and rules indicating how the properties and assets held by these organizations and groups are to be managed and employed should be formulated in detail. It should be made easier to collect such religious and traditional grants and donations, such as sacrificed animals, hides and other materials of sacrificed animals, and alms (zakat) donated to such organizations, that are not currently recorded and

taxed, so that their receipt and use becomes transparent and auditable.

(iii) Actions and measures should be taken so as to preclude belief-based organizations and groups from engaging in political activities and from supporting any political viewpoint or movement by undertaking work in support of them, or through cash or non-cash aid, contributions and grants; and, particularly, to prevent the use of funds and resources collected for social cooperation and solidarity in the interests of political parties or candidates in any manner whatsoever.

Candidates for public positions and duties may be obliged to declare clearly and in detail their relations, if any, with belief-based organizations and groups (as members, executives or leaders, recipients of scholarship or student hostel services, etc.); and individuals having relations with such organizations and groups may be forbidden to serve in strategically important units and administrations, such as the judiciary, national education, internal security and the armed forces.

PART VI.
THE NEED FOR A CIVIL AND EFFECTIVE CONSTITUTION

Quoted from the Orkhon Inscriptions:

The founder of the Kök Turks states, Bumin Khan, upon ascending the throne, "founded the country, and created the customs and laws, and put everything in order, for the Turkish nation," and then established his sovereignty and founded his empire all around. (H.N. Orkun, Eski Türk Yazıtları I [Ancient Turkish Inscriptions I], Ankara, 1936, D.I., D.II.) Thereafter, the state collapsed over time, and when it re-entered into a war of independence, Elteriş Khan, "seeing the collapse of social order and law, recreated and reactivated the Turkish nation as per the customs and laws of their ancestors." (Budunıg türk törüsün içgımış, budunıg eçüm apam törüsinçe yaratmış, başgurmuş," I D 13, II D 12, I D 14). (Halil İnalcık, p. 25)

Having founded a global empire in reliance upon the Middle Asian Mongolian and Turkish tribes, just like the Mete and Bumin Khans, Temuçin (Çinggis Khan), i.e. the global emperor, bequeathed to his grandchildren the global empire, suggesting that if they wished to hold global sovereignty in their hands, they should, at all times, adhere to the Law. […] Even the sons of Çinggis Khan, after becoming Muslim, particularly in state governance, remained rigorously loyal and faithful to the principles of the Law. (Halil İnalcık, p. 37)

Orkhon Inscriptions

Making a Civil Constitution and the Methodology of Constitution Making

There is a consensus in public opinion that the 1982 Constitution, although amended in some provisions thus far, is not adequate or appropriate for the effective administration of Turkey, and that the formation of a new Civil Constitution is required. Turkey needs to either amend and further develop its existing Constitution or establish a new one. However, although broad segments of society have thus far contributed to the efforts to create a new Constitution, and have come to mutual agreement on various provisions thereof, these efforts have, in the end, failed, and only when the circumstances have been adequately compelling has it been possible to make partial revisions and amendments to the existing Constitution.

Our past experiences demonstrate that Turkey is in need not of a brief or concise Constitution developed over time through court precedents, as is done in the USA, but a detailed Constitution, mutually agreed upon as to the details in addition to the fundamental principles. The historical, social and cultural dynamics of Turkey also require mutual agreement on the details of its Constitution, as the basic document of social consensus. However, on the other hand, as the details have begun to be discussed and as the number of points requiring a social consensus increases it becomes difficult, even impossible, to create a Civil Constitution

through the mutual agreement of all the actors.

Nor does the level of legal culture of Turkey, together with the well-known problems of the judiciary, allow for further development over time, through court precedents, of a brief and concise Constitution containing only fundamental principles. Creating a detailed Constitution through mutual agreement is an option that is both easier and more appropriate, taking into consideration the realities and conditions of Turkey. However, it is also possible to proceed with the 1982 Constitution by making partial amendments and revisions therein in order to eliminate the deviations from and conflicts with the fundamental constitutional rules and principles, as has been done thus far. In any event, it is necessary to ensure that the Constitution is consistent and fully compliant with fundamental principles.

Our past experiences show that a failure to resolve the administrative problems of Turkey that require constitutional regulation through civil consensus may pave the way for coups d'état, impositions and even faits accomplis. As a matter of fact, the 1961 and 1982 Constitutions of Turkey, made through and upon coups d'état and imposed on the society, are tangible proofs of this statement.

The public, in witnessing the failure of politicians to establish a new Constitution, has abandoned itself to despair. But even if and though the politicians fail to come to a consensus, society is willing and eager to reconcile. In terms of establishing a new Constitution, rather than being obstinate with each other as to their own preferences, politicians should, by taking into consideration the concerns of their opponents and of minorities, strive to reach a social mutual agreement through mutual compromises and give-and-take and, if needed, should force their own grassroots and other supporters to reconcile.

As the most fundamental social consensus document, the Constitution should be prepared through the effective participa-

tion of all segments of society, and by way of negotiations, mutual agreement, persuasion and reconciliation, to such an extent as to eliminate the concerns of minorities and opponents, and in such a manner as to reach the highest level of social acceptance. Firstly, mutual agreement should be reached not on the Constitution itself but on a healthy and sustainable methodology for developing it. The Constitution is not the law of a particular person or political party; on the contrary, it is a social consensus document that is owned by all segments and layers of society, all of which should have had a voice in the creation process.

For these reasons, the efforts to establish a Constitution should, rather than being the good-faith attempt of a certain individual, party or group, be set within an institutional framework, assuring the participation of all segments and groups of society. To this end, a law should be issued and passed on the methodology to be used to create (or revise) the Constitution and, therein, the institutional framework, secretariat and methodology should be adopted and legalized.

The teams to be assigned to establish a Constitution, their roles and functions, and the processes and formats of communication and negotiation amongst them and for consultation with society should be planned in detail. At the first stage, the points to be put on the agenda for consensus and reconciliation should be determined and listed in such a manner as to constitute integrity, and to facilitate an effective and productive negotiation process. Furthermore, how the Constitution will be revised and amended, how its general framework will be structured, how public opinions and comments will be collected and evaluated, how the people will be encouraged to participate in negotiations, and how the preferences of society will be determined on fundamental issues and topics should be decided, and an open and transparent road map traceable by everyone should be created. This law should also contain rules and provisions on the method of consultation with society to be used in order to overcome any unforeseeable deadlocks

and conflicts in negotiations or in the basic choices and preferences of the public that are required to be determined by referenda.

Only after the basic framework and road map are drawn up, and it is established which, if any, of the choices and preferences of the public will be determined by referenda, should the talks and negotiations commence, and all of the stages of these talks and negotiations should be transparent.

At the first stage of efforts to establish a Constitution, all publications issued concerning the Constitution should be scanned, and the resulting findings should be compiled, together with suggestions either formulated upon social consensus or sub- ject to debate, and a scientific breakdown of them should be pre- pared on the basis of mainstream, secondary and extremist opin- ions and thoughts.

These findings, and the different and innovative ideas and suggestions mutually agreed upon or continuing to be discussed, should be reassessed, and a mutual agreement should be reached on the future vision of the country desired to be created through the new constitutional order. A vision of the country covering, for instance, 10, 50 and 100 years into the future should be drawn up. The Constitution should be the document setting forth how that vision will be realized over time. To this end, objectives and targets that are in conformity with the vision should first be determined, and the Constitution should shed light on the method of achievement of these objectives and targets. To put it in other words, first the destination point should be determined. Then, the alternative roads that will take us to the destination should be put forth, and the caravan should be prepared according to the road chosen, as above. It is unequivocal that a caravan that is not fit for the destination and the road will fail to reach its target, and will perish along the way. The Constitution should be the fundamental document determining the destination, road and caravan mechanism.

At the final stage, upon a failure to reach consensus on cer-

tain points during negotiations on the Constitution, the different options that may be put on the agenda should be left to the discretion of the people. For example, on issues requiring social consensus, such as how the election system should be organized or upon what principles citizenship or nationality should be determined, the options should be put to the public.

Throughout its time as a part of the Middle East and, particularly, during the Ottoman Empire era, Turkish society has been accustomed to the legalization of generally accepted customs and usage. Unless and until new and different rules and regulations are explained and taught to society, society prefers to continue to comply with customs and usage as they are known and have been applied since the old times. For this practical sociological reason, in the absence of a serious necessity, in the course of making a new Constitution both the achievements to date and the points of consensus agreed upon during previous Constitution negotiations processes should be preserved and safeguarded. Accordingly, principles of the unitary state, democracy, rule (superiority) of law, secularism, separation of duties, the independence of the judiciary, fundamental rights and freedoms, and the superiority of international treaties and agreements to domestic law should be preserved, and this preservation should be further improved and developed institutionally, and in principle.

It should be emphasized that democratic state governance relies upon the separation of duties, and democracy, as the contemporary form of state governance and culture, developed to its current level and state with the contributions of experiences of centuries of humanity beyond and within Turkey. The principles of democracy, the separation of duties and their harmonious operation should be further strengthened and developed, and the participation of society in public administration should be increased.

The corporate governance of state organs should be further developed, and transparency and accountability should be made basic principles of state governance. These principles should be

dominant in all public institutions and among all civil servants, especially on the judiciary, and in society as a whole, and the accountability of no person or entity should be left to its own discretion or option.

The compassion of the state should be reflected onto each segment and group of society, and any person who is afraid of the state and harbors ill will against it, or who believes that the state government is harboring ill will against him or her, should be enabled to gain trust in the state. To this end, the expression of all ideas should be permitted, and all ideas should be heard by everyone. Accordingly, conservatives, extreme right-wingers, nationalists, religious congregation members, social democrats, liberals, socialists, neo-nationalists, political Islamists, communists, Sunnis, Alevis and Kurds (including religionists, democrats or those defending armed struggle), regardless of whether they are to the right or to the left of the political spectrum, should be able to express themselves, and should be responded to by the others involved in the process.

Constitutional Review of the Decree-Laws of the Presidency and the State of Emergency

a) Decree-Laws of the Presidency

The first sentence of paragraph 1 of Article 125 of the Constitution provides that: *"Recourse to judicial review shall be available against all actions and acts of the administration." Paragraph 5 of Article 125 is as follows: "A justified decision regarding the suspension of execution of an administrative act may be issued, should its implementation result in damages that are difficult or impossible to compensate for and, at the same time, the act would be clearly unlawful."*

As amended by the referendum, with effect from November 1, 2019, the second sentence of paragraph 1 of Article 104 of the Constitution states: *"The executive power shall be vested in the President of the Republic."* The first sentence of paragraph 16 states: *"The President of the Republic may issue presidential decrees on matters regarding executive power."* Paragraph 17 states: *"The President of the Republic may issue bylaws in order to ensure the implementation of laws, provided that they are not contrary thereto."* Paragraphs 7 and 8 refer to the powers of the president, regarding execution, to: *"Appoint and dismiss ministers and high-ranking executives, and regulate the procedure and principles governing the appointment thereof by presidential decree,"* and paragraphs 5 and 10 refer to the president's power to: *"Ratify and promulgate laws and international treaties."*

According to Article 2(1) of the Code of Administrative Procedures No. 2577, "Actions for nullity of administrative acts due to their being unlawful acts in terms of authorization, format, cause, subject and purpose thereof, and full remedy actions commenced by individuals whose personal rights are directly infringed (breached) by administrative acts or transactions, and actions regarding conflicts and disputes that may arise between sides out of all kinds of administrative agreements signed for provision of public services, are, as per Article 3 of the same Code, brought forward by petitions addressed to the chairs of the State Council, administrative courts and tax courts." To put it in other words, the State Council, administrative courts and tax courts have jurisdiction in matters relating to all kinds of legal actions and cases that may be commenced due to acts and transactions of the executive power.

On the other hand, with respect to the second and third sentences of revised paragraph 16 of Article 104 of the Constitution, there is some doubt as to whether the decree-laws of the Presidency are administrative acts and regulations within the jurisdiction in the subject matter of the State Council and administrative courts, or are in force of laws and are, therefore, within the jurisdiction in the subject matter of the Constitutional Court. Indeed, considering the provisions of the paragraph – *"The fundamental rights, individual rights and duties […] and the political rights and duties […] shall not be regulated by a presidential decree. No presidential decree shall be issued on the matters which are stipulated in the Constitution to be regulated exclusively by law. […] A presidential decree shall become null and void if the Grand National Assembly of Turkey enacts a law on the same matter"* – the nature of a presidential decree-law that is issued by the Presidency, but will become null and void if the Grand National Assembly of Turkey enacts a law on the same matter, or to put it in other words, whether that presidential decree-law will be considered and treated as a decree in force of law or only as a regulatory act, such as administrative bylaws or regulations, is not clear. This uncertainty may cause doubts and suspicions about legal and

constitutional reviews. If they are accepted and treated as decrees in force of law, then they will be included within the jurisdiction in the subject matter of the Constitutional Court, and only political party groups will be authorized to bring forward an action for nullity against them. Hence, the legal rights of application of citizens whose rights have been infringed by such legislative instruments will have been restricted. On the other hand, if they are accepted and treated as general administrative acts, then they will remain outside of the jurisdiction in the subject matter of the Constitutional Court, and actions for nullity against them will have to be commenced in the State Council and administrative courts.

The jurisdiction in subject matter against decisions and acts of the executive power belongs to the administrative courts. This is the way in which the customs and law have settled in our society. In the post-referendum order, executive power is represented by the president. Considering all of these facts, it is necessary to clearly state that presidential decrees are administrative acts and, therefore, actions for nullity of them are within the jurisdiction in the subject matter of the State Council and administrative courts. This statement may be clarified in the administrative procedures law that has become rather necessary in the new legal regime. The draft bill amending the law on duties and powers of the Constitutional Court stipulates that the actions for nullity of presidential decrees within the jurisdiction in the subject matter of the Constitutional Court must be included. Due to the simple reasoning explained above, such an amendment will be non-compliant with both the methodology of the legal system and Article 125, providing that the executive power will be reviewed and audited by the administrative courts.

b) Decree-Laws of the State of Emergency

Paragraph 1 of Article 148 of the Constitution provides: "*The Constitutional Court shall examine the constitutionality, in respect of*

both form and substance, of laws, presidential decrees and the Rules of Procedure of the Grand National Assembly of Turkey, and decide on individual applications. Constitutional amendments shall be examined and verified only with regard to their form. However, presidential decrees issued during a state of emergency, or in time of war, shall not be brought before the Constitutional Court alleging their unconstitutionality as to form or substance."

As clearly stated in the text of this Article, the Constitutional Court is not authorized to examine the constitutionality of decree-laws during states of emergency, because it is totally forbidden to bring forward any legal action in relation thereto. As also stated by the well-known constitutional lawyer Prof. Dr. Kemal Gözler, the fact that it has been criticized by many authors does not prevent the existence and validity of this prohibition. Through its Judgment No. 1991/1 in Case File No. 1990/25, dated January 10, 1991, the Constitutional Court judged that it is, in fact, authorized to examine the constitutionality of the state of emergency decree-laws – i.e. to check whether they are really state of emergency decree-laws, or not – and to examine the constitutionality of those not found to be a state of emergency decree-law in nature, but not to examine the constitutionality of the decree-laws found to be state of emergency decree-laws in nature. The reasoning of the aforesaid judgment of the Constitutional Court may be understood from the quotations in the box below.

Review and Audit of State of Emergency Decree-Laws

The third paragraph of Article 121 of the Constitution provides: *"These decree-laws are published in the Official Gazette and are presented for the approval of the Grand National Assembly of Turkey on the same day; the period and procedural rules regarding approval of them by the National Assembly will be determined by the Internal Regulations."* The Grand National Assembly of Turkey may accept or reject, as a whole,

or may accept with amendments and revisions the state of emergency decree-laws presented for its approval. However, although Article 121 says that *"the period and procedural rules regarding approval of them by the National Assembly will be determined by the Internal Regulations,"* no such rules have thus far been incorporated into the Internal Regulations. Under these circumstances, it is uncertain when the state of emergency decree-laws will be discussed in, and handled by, the Grand National Assembly of Turkey.

According to the first paragraph of Article 148 of the Constitution: *"However, presidential decrees issued during a state of emergency or in time of war shall not be brought before the Constitutional Court alleging their unconstitutionality as to form or substance."*

However, the Constitutional Court is under an obligation to make a legal definition of the regulatory acts put into force by the legislative or executive organ and presented to it for review of constitutionality, because the Constitutional Court cannot agree to be bound by the name given to the text requested to be reviewed. For this reason, the Constitutional Court is under an obligation to examine whether the acts issued under the name of "state of emergency decree-laws" are really in the nature of a "state of emergency decree-law," as referred to in the Constitution, and exempted from the review of constitutionality, or not, and to make an examination and review of constitutionality of the acts not found to be in the nature of a "state of emergency decree-law." Article 148 of the Constitution only prevents executive acts that are really in the nature a state of emergency decree-law from being subject to a review or examination of constitutionality.

Prof. Dr. Kemal Gözler argues that although supported by many doctrinarians, the aforementioned judgment of the Constitutional Court is incorrect, and he adds: "It may be useful to allow judicial review of the state of emergency decree-laws, but usefulness of judicial review of state of emergency decree-laws does not automatically authorize the Constitutional Court to review and examine them. The Constitutional Court may review and examine these decree-laws only if and when this authorization is clearly and specifically vested by the Constitution in it. Our Constitution, however, does not contain any clause vesting such an authorization in the Constitutional Court. What is more, to the contrary, our Constitution has clearly and specifically provided that these decree-laws cannot be reviewed by the Constitutional Court."Gözler believes that through its judgments of 1991, the Constitutional Court has greatly surpassed the prohibition imposed as above.

Thereafter, by its Judgment No. 2016/159 in Case File No. 2016/166, dated October 12, 2016, the Constitutional Court changed the approach adopted in its judgments of January 10, 1991, and July 3, 1991, and judged that it is not authorized to examine the constitutionality of decisions on the proclamation of a state of emergency. In the 2016 judgment, the Constitutional Court declared that Article 148 of the Constitution does not authorize the Constitutional Court to review and examine the decree-laws issued in a state of emergency, and although it is authorized to determine the nature and character of said state of emergency decree-laws, this does not grant any power of review and examination thereof, even if the unconstitutionality of decree-laws is not adequate for their review, examination and nullification by the Constitutional Court. The relevant press statement of the Constitutional Court is partially quoted in the box below.

"Considering the clear provisions of Article 148 of the Constitution regulating the functions and powers of the Constitutional Court stating that the decrees issued during a state of emergency may by no means be brought before the Constitutional Court alleging unconstitutionality as to the form or substance thereof, it is unequivocally evident that the Constitution has not vested any power in the Constitutional Court for judicial review of said decree-laws under any name whatsoever.

There is no doubt that the Constitutional Court has a right and power of discretion as to the determination of the nature or character of a rule presented to it. Accordingly, characterization may be made according to a material criterion on the basis of the contents or substance of a transaction, or according to an organic criterion of the organ making the transaction and of the procedures applied therein.

Regardless of the criterion relied upon therein, the characterization should in no event cause the Constitutional Court to step out of the line drawn by the Constitution or, to put it in other words, result in a review and examination of the constitutionality of state of emergency decree-laws as to the form and substance thereof.

The argument that a state of emergency decree-law contains unconstitutional provisions is not adequate for a review and examination of the constitutionality of it. State of emergency decree-laws can be reviewed and examined by the Constitutional Court only if and when a constitutional power is clearly vested in the Constitutional Court in relation thereto. Considering the wording of Article 148 of the Constitution, the purposes of the Constitution maker, and the related and associated legislative organ documentation, it is obvious that the state of emergency decree-laws can, in

no case, be subject to judicial review under any name, or for any reason, whatsoever.

A judicial review to be made in spite of said provisions will contradict Article 11 of the Constitution, dealing with the binding effect and superiority of the Constitution, and Article 6 of the Constitution, stipulating that no person or organ shall exercise any state authority that does not emanate from the Constitution.

After proclamation of a state of emergency, and after approval of this decision by the Grand National Assembly of Turkey, the Council of Ministers convened under the chair of the president issued and enacted the decree-laws Nos. 668 and 669 on July 25, 2016, for application on a nationwide basis, and these decree-laws were promulgated in the Official Gazette edition no. 29783 (second edition) on July 27, 2016, and edition no. 29787 on July 31, 2016, respectively, and were presented to the Grand National Assembly of Turkey for approval on the date of publication. Thus, the subject decree-laws also containing the rules in dispute are the state of emergency decree-laws issued and enacted during the validity term of a state of emergency in reliance upon Article 121 of the Constitution.

The provisions of the decree-laws in dispute issued and enacted pursuant to Article 121 of the Constitution cannot be subjected to a judicial review on the merits and substance thereof, due to the provisions of the third sentence of the first paragraph of Article 148 of the Constitution: *"However, presidential decrees issued during a state of emergency or in time of war shall not be brought before the Constitutional Court alleging their unconstitutionality as to form or substance."*

The judgments of 1991 and 2016 of the Constitutional Court are in agreement as to the absence of the power of the Constitutional Court to review and examine the state of emergency decree-laws. The disagreement is focused on whether the Constitutional Court is authorized to examine and review the nature and character of decree-laws termed state of emergency decree-laws, or not. According to its judgment of 1991, the Constitutional Court is authorized and entitled to determine the nature and character of the decree-law presented to it, while according to its judgment of 2016, it is by no means authorized to determine the nature thereof, because determination of the nature thereof would pave the way for nullification of the state of emergency decree-laws. This approach adopted by the Constitutional Court in its judgment of 2016 is logically faulty and unacceptable.

It is possible to demonstrate this unreasonableness by an exaggerated example: Even if a decree-law as to the divorce of Ahmet and Ayşe is issued and is termed a *"state of emergency decree-law,"* the Constitutional Court will not characterize the contents and nature of the document, and will not see itself as authorized to nullify the same. This is an obviously illogical, unreasonable and faulty approach. Like all other courts, the Constitutional Court is entitled and obliged to characterize and describe the document presented to it, and to take its decision by applying thereon the legal rules granting authorization thereto. This characterization made by the court is of further importance, as it paves the way for the use of other remedies, because the court should, first of all, clarify whether the matter referred to it requires constitutional review, or is within the jurisdiction area of the administrative courts as a decision or act of the execution.

As stated by Gözler:

many provisions of state of emergency decree-law nos. 667 and 668 issued after July 15, 2016, are very clearly against our Constitution. […] most of these provisions have no connection whatsoever to the cause underlying the state of emergency. In our opinion, far more than

half of the provisions of the state of emergency decree-laws issued after the July 15 coup d'état attempt are obviously contrary to our Constitution. […] There are a lot of legal objections to exemption of the state of emergency decree-laws from judicial review. […] the Council of Ministers convened under the chair of the president, seeing and noting that its decree-laws are not subject to any judicial review, sees no harm in issuing state of emergency decree-laws covering even some ridiculous clauses, as is seen in the example of winter tires for cars, which can by no means be regulated by a state of emergency decree-law. […] Due to this experience, it may be said that in a future amendment to the Constitution, it may be useful to authorize the Constitutional Court to also review and examine the constitutionality of state of emergency decree-laws."

In Turkey, certain events or cases may of course take place that require the proclamation of a state of emergency, with appropriate measures taken therefor, leading to the establishment of a state of emergency administration. However, the proclamation of a state of emergency cannot be construed as the emergence of cases and causes requiring or justifying the same. To put it in other words, the Constitution cannot be suspended without just cause. The Constitution must remain valid and in force, in any event, and even in states of emergency, and the state of emergency should be composed of, and be limited only by, those provisions required to enable the public administration to take and manage actions and measures in compliance with the details of the state of emergency. This, in turn, necessitates the constitutional review of the proclamation of state of emergency and decree-laws, general and specific legislative instruments enacted by the legislative, and executive organs during states of emergency proclaimed as such.

However, under the existing circumstances, it is true that Article 148 of the Constitution does not authorize the Constitutional Court to review and examine the state of emergency decree-laws, and that there are differences between judgments of the Constitutional Court as to whether the court is authorized to characterize and describe the state of emergency decree-laws or not. There is no

remedy for the unification of decisions available for the elimination of differences amongst judgments of the Constitutional Court. For this reason, the gap in Article 148 of the Constitution, and the gap of constitutional review in relation thereto, are required to be closed by clearly referring to this authorization in the Constitution, and by also reflecting the same in the law dealing with functions and powers of the Constitutional Court. For these reasons, Article 148 of the Constitution is required to be revised in such a manner as to allow constitutional review of the state of emergency decree-laws, and also to prevent the incorporation of any clauses that are obviously against the fundamental provisions and principles of the Constitution, even by the inclusion of special provisions therein.

Proposal

Article 148, paragraph 1, of the Constitution is hereby proposed to be amended to read as follows.

Red = addition; ~~strike-through = deletion~~

Constitution, Article 148, paragraph 1: The Constitutional Court shall examine the constitutionality, in respect of both form and substance, of laws, presidential decrees, and the Rules of Procedure of the Grand National Assembly of Turkey and decide on individual applications. Constitutional amendments shall be examined and verified in substance in terms of their compliance with the fundamental provisions set down in Part 1, composed of Articles 1 to 11 of the Constitution and, as for the others, only with regard to their form and as to the presence of any contradiction with other provisions. ~~However, presidential decrees issued during a state of emergency or in time of war shall be reviewed and examined as to constitutionality on the basis of the decree-law regarding the proclamation of a state of emergency shall not be brought before the Constitutional Court alleging their unconstitutionality as to form or substance.~~

Effective Constitutional Protection and the Constitutional Protection Organization

Effective protection of the Constitution and the constitutional order is as important as establishing a Constitution. The constitutional order should absolutely be protected by a comprehensive and well-operating system. If and to the extent that its provisions are not enforced, and its breaches are excused or pardoned, a Constitution is not even worth the paper it is printed on. Should it not be enforced and should it be easily violated, neither a Constitution nor its amendment according to changing requirements and conditions would be needed. For this reason, social problems that may arise if and to the extent that it is not effectively protected invite solutions beyond and outside of the law. As a matter of fact, one of the fundamental causes underlying the many coups d'état experienced by Turkey is the fact that there is no possibility for such problems to be solved within the borders of the law on a constitutional basis.

The sensitivities of fairly detailed arrangements made and clauses incorporated into the 1982 Constitution require effective protection of the constitutional order in Turkey. However, Turkey's existing system of constitutional order is inadequate. The effectiveness of protection may vary according to conditions, the holder and effects of political powers and influences, or the attitudes and choices of people. The protection system may be operated and run

rather difficultly and according to currently prevailing choices. Such inadequate protection exposes the protection of the constitutional order to external forces and influences, and invites oppression by way of tutelage and guardianship.

At present, the scope of the constitutional protection system is limited to the shutting down of political parties, invariable and non-amendable provisions, and revolutionary laws, and thus it is simplistic and narrow. The foreseen constitutionality supervision is inefficient. The powers of the Constitutional Court are restricted by the fact that very few persons and entities may bring forward legal actions, and also through formal control in constitutional amendments. Hence, the constitutionality supervision is limited by the overall attitudes and choices of political parties under existing circumstances. Some politicians say that formal control powers should be repealed, and that the constitutional clauses which cannot now be proposed to be amended could then be amended. On the other hand, according to the new jurisprudence of the Constitutional Court that leaves it with a lack of jurisdiction in supervising the constitutionality of presidential decrees enacted and issued under states of emergency, the Constitution may actually be suspended during states of emergency. The unconstitutional laws that render a suit of nullity not to be commenced continue to be enforced, and even if a suit of nullity is commenced, and such laws are cancelled and nullified, the consequences of such unconstitutionality cannot be removed; therefore, annulment decisions are not executed retroactively, and the transactions that are unconstitutionally effected are not withdrawn or cancelled but remain in force although their unconstitutionality is determined by a final court judgment and they are, thus, nullified.

The direct right of action for the shutdown of political parties or imposition of sanctions thereon due to unconstitutionality is granted to the chief public prosecutor, not to those who are entitled to file such a legal action. However, although entrusted with the task of bringing forward the action for the shutting down of

a political party, the power of the chief public prosecutor to commence this legal action has been restricted and has been made subject to an application to be filed with the chief public prosecutor. Therefore, the operation of a constitutional protection system varies according to circumstances, conditions and personal influence. If and when the chief public prosecutor does not bring such legal action forward in spite of public demands, the procedure that is required to be pursued in order to force the chief public prosecutor to commence an action is inefficient. Even if it were accepted to be efficient, it is doubtful to what extent the chief public prosecutor would efficiently and effectively pursue legal action that he is forced to commence under such circumstances. Conditions imposed on the right of political parties with a presence in the Turkish Grand National Assembly to demand the commencement of such actions are very restrictive. The power of the minister of justice to demand the commencement of this action upon a decree of the Council of Ministers does not allow legal action to be brought against the party in power, because it is illogical to expect a Council of Ministers composed of members of a political party to demand a legal action for the shutdown of its own political party.

The process of appointment of the chief public prosecutor is not adequate to give confidence to the public that the chief public prosecutor will ex officio commence this legal action whenever deemed necessary for the protection of constitutional order. The process of appointment of the chief public prosecutor, to whom such an important task is entrusted, is required to be developed in reliance upon merit, competence and transparency. Confidence should be created in the public that the candidates designated for this post are competent and qualified to perform this very important duty and will, in any event, fulfill their job duties in a timely fashion, independently and neutrally, to ensure that they have the support of the public whenever they use their powers as cited above. Otherwise, in order to use their powers they will inevitably be required to wait for the opportunity for, or to seek, tutelage, custody and support.

It cannot be said that the chief public prosecutor currently in office has gained such confidence, trust or support from the public.

Pursuant to Article 154(4) of the Constitution, the chief public prosecutor is appointed by the president, representing the executive force, alone, from amongst five candidates to be nominated by the General Assembly of the Supreme Court of Appeals. The members of the Supreme Court of Appeals who nominate the five candidates are determined and designated by the Council of Judges and Prosecutors, composed of 13 members, six of whom are the minister of justice and his undersecretary and other members appointed by the president and seven of whom are elected by the political party in power in the Turkish Grand National Assembly, the activities and decisions of which are clearly dominated by the minister of justice and his undersecretary. In this process, during the determination of candidates and the appointment of one of the candidates, the public has no rights of participation, or access thereto, or any say therein, nor is it ever disclosed to the public which persons are appointed to these job positions and for what reasons. Therefore, the public believes that such appointments are made entirely based on political considerations. What is more, although elected for a term of office of four years, neither the members of the Council of Judges and Prosecutors nor the chief public prosecutor have any assurance of completing their terms of office. Under these circumstances, it is clear that the chief public prosecutor cannot be disposed to file legal action for the shutdown of a political party – save for parties with only limited public support and which are engaged in unconstitutional activities, which will be weakened as a result.

In addition, it is necessary to accept that the Constitution, its general provisions constituting the foundation of constitutional order and its initial clauses that are classified as invariable and non-amendable provisions cannot always be protected by law in the Constitutional Court.

As is also stated in Judgment No. 1977/4 of the Constitu-

tional Court, in Case File No. 1976/43, dated January 27, 1977, provisions contrary to the fundamental principles of the Constitution cannot be enacted even through their addition to the Constitution. Accordingly, special provisions of the Constitution are fully required to be compliant with, and not to be against, its fundamental principles and clauses. However, there are many special provisions against the fundamental principles in the 1982 Constitution. This fact is one of the basic and deep-rooted problems requiring amendment of the 1982 Constitution. For this reason, as is clearly specified in the justification, quoted below, for the judgment of the Constitutional Court of April 21, 1977, for the sake of better and more effective constitutional protection, the incorporation into the Constitution of clauses and provisions that are contrary to the fundamental principles of the Constitution or other laws is required to be prevented.

> Article […] of the Constitution formulates the rule that *"The constitutional provision that the form of the state is that of a republic is invariable and non-amendable and cannot even be proposed to be amended."* The phrase *"the form of the state is that of a republic"* used in the text of that article cannot be thought to be making reference to Article 1 of the Constitution and to the word *"republic"* used in that article, because if the *"invariability"* principle is linked only to and limited only by a single *"republic"* concept that has varying characteristics and contents according to different social and political opinions, then the political regime may be easily corrupted and may degenerate radically without even touching Article 1 of the Constitution, and by making some revisions to the *"Introduction"* section and Article 2 thereof. If we look at all of the countries of the world, we can see many states that, although they are named a *"republic,"* are diametrically opposed to the system as defined in our Constitution, through their political regime.
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> However, the form of state founded and intended to be

> protected by our Constitution is that of a republic, as defined and described in the Introduction section and Article 2 thereof, and the *"invariability"* principle introduced by Article […] refers to the word "republic" with the main intention of protecting its characteristics as cited above, and preventing any revision or amendment therein. This issue has already been widely discussed and clarified in Judgment No. 1975/87, in Case File No. 1973/19, dated April 15, 1975, issued by the Constitutional Court in another legal case (Official Gazette: February 26, 1976, Edition: 15511, pp. 7–8).
>
> The conclusion derived out of these explanations is as follows: Proposals for amendments to the Constitution, firstly, cannot in any way deviate from or make the smallest change in the principles referred to in the Introduction section and in Articles 1 and 2. It does not matter whether an amendment targets all or any of the aforesaid principles. Whatever the scope is, all amendments and revisions relating thereto are covered by this prohibition. Accordingly, a constitutional amendment leading to a deviation from the fundamental principles of a republic can neither be proposed in, nor be accepted by, legislative assemblies or organs. If, nevertheless, such an amendment is proposed or accepted, it is contrary to the formal conditions as described in Article […] of the Constitution.

Even if they are wished to be brought through an amendment in the Constitution, the use of entirely legal remedies to prevent any regulations or amendments containing such breaches of fundamental rules and principles is a requirement also for the prevention of application of extra legem solutions.

If and when a legal action for the shutdown of a political party, or an action of objection or a suit of nullity, is brought forward, the constitutional protection system that is composed of only the cancellation and nullification of unconstitutional laws and

decree-laws and the prosecution of crimes against the state in the light of the Turkish Criminal Code is neither adequate nor effective. These provisions are insufficient to protect the constitutional order against dangers it faces. In the case of states of emergency, a considerable legal gap exists that actually suspends the Constitution and precludes the Constitutional Court from performing its functions in terms of the constitutional supervision and control of the presidential decrees enacted and issued in states of emergency.

Powers and authorizations of the Constitutional Court are inadequate to allow the Constitutional Court to perform its functions as expected of it in a healthy and effective manner. For instance, the Constitutional Court is not allowed to protect itself against laws that limit or restrict its functions in an unconstitutional manner. To this end, it is dependent on a political party in terms of commencing a legal action thereagainst. However, being a constitutional organization entrusted with the task of protecting the constitutional order, the Constitutional Court should be capable of protecting itself against illegal restriction or limitation of its powers. This basic rule that finds its origin in the Constitution and must be accepted to be inherently contained within the area of authorization of the Constitutional Court must be clarified and clearly set down in the Constitution.

Effective constitutionality supervision and prevention of unconstitutionality may be possible only by preventing the incorporation of unconstitutional rules and provisions into the legal regime, and by precluding them from being effective therein. However, the supervisory powers of the Constitutional Court are not adequate to proactively prevent any unconstitutional rules or regulations be- fore they are made effective and put into force, or to repeal or with- draw transactions already effected in reliance upon them: in more plain wording, to overcome the effects of unconstitutionality. In order to prevent such consequences, constitutionality supervision is required to be launchable before any such unconstitutional rules or provisions are published in the Official Gazette or are made effective.

Through Law No. 6524 dated February 15, 2014, certain amendments were made to the Law on High Council of Judges and Prosecutors No. 6087, and said amendments became effective and were implemented, but, thereafter, some of the implemented amendments were found to be unconstitutional, and these were nullified and cancelled by Judgment No. 2014/81 of the Constitutional Court in Case File No. 2014/57, dated April, 10, 2014. However, as the orders of cancellation of the Constitutional Court are not retroactive, and as there is no other legal way of removing them in spite of their being unconstitutional, said unconstitutional transactions have remained in effect. Indeed, in the case of an unconstitutionality that should have been nullified ab initio, any transactions that rely upon it should also be considered null and void and should be automatically invalid and obsolete from the very beginning. This is a good example of the fact that the Constitution can easily be breached, and the agents of unconstitutional acts or transactions can easily get away with them.

Under the existing system, the power of the Constitutional Court to supervise and check the constitutionality of laws and presidential decrees can be activated only if and when political parties, the Presidency or a certain number of deputies bring forward a legal action, or an objection is raised in a pending case in connection therewith. Other than these remedies, no one has a right of action pertaining thereto. This, in turn, leads to gaps in terms of constitutionality, and even to the survival of unconstitutional acts or transactions; thus, unconstitutional laws and presidential decrees are issued, put into force and enforced for years as no objection is raised thereto, or no suit of cancellation is opened against them.

Laws relating to professional organizations with public institution status are a good example of this problem.

There is no justifiable reason or logic for depriving individuals, non-governmental organizations and other entities or organizations regulated by the Constitution of the right to supervise and check the constitutionality of the laws or other legislative instruments enacted by the National Assembly. While the principle of the rule (supremacy) of law requires all individuals and entities to have legal rights of action or remedy on all issues concerning or affecting their rights, it is entirely unfair and unjust to restrict the rights of individuals to commence legal actions of nullity or cancellation in relation to constitutionality matters that deeply affect their rights and interests. Furthermore, such restriction paves the way for unconstitutionalities to emerge and to be perpetuated.

On the other hand, while some organs and institutions of the state are regulated by the Constitution and are thus taken under protection, it is self-contradictory to leave them unprotected in practice against such unconstitutionalities as they may be exposed to. Each subject of law, including all entities and individuals deemed important enough to be regulated in and thus protected by the Constitution, should be equipped with a right of action for the commencement of suits of nullity and cancellation directly in the Constitutional Court, not only on all issues concerning themselves but also on the laws and presidential decrees affecting them; this is a requirement of the principle of the rule (supremacy) of law. In addition, creating this legal remedy may further prevent the delinquencies or breaches of a limited number of subjects who are already appointed and authorized thereon.

In this proposed scenario, concerns about the resulting density of lawsuits and legal cases in the Constitutional Court are meritless, because to express such an argument is naturally equivalent to offering an excuse with the intention to avoid finding a solution to the problem identified above. For the collective management and handling of hundreds, or even thousands, of legal cases com-

menced in relation to the same subject matter, there are very developed practices internationally, such as "class actions," and there are also some established practices in the field of law of expropriation in Turkey itself. In fact, it is possible to ensure that individual suits of nullity or cancellation are opened and heard easily, and at the lowest cost possible. Such suits of nullity or cancellation opened by individuals may be assigned to the responsibility of the proposed Constitutional Protection Organization, and such measures as the limitation of the use of this right of action within a certain time period may be considered so as to ensure that they are completed as soon as possible.

Pleading excuses in order to prevent the rights of action of individuals to bring forward suits of nullity or cancellation should cease; on the contrary, the methods by which individuals may protect their rights at the constitutional level should be thoughtfully considered.

Against bylaws, regulations, circulars, and other general regulatory and administrative transactions other than laws and presidential decrees, intensive unconstitutionality pleas are raised and filed in the State Council, administrative courts and ordinary courts. Administrative regulations and acts are nullified by the State Council due to unconstitutionality, and ordinary courts refer to the Constitutional Court by way of objection to the allegations and claims of unconstitutionality of laws and presidential decrees if and to the extent deemed justified. The assessment and resolution of unconstitutionality pleas by courts of different disciplines does not suffice to assure constitutionality. Furthermore, this leads to the emergence of as many constitutional commentaries as there are courts involved therein. However, whenever an unconstitutionality plea is deemed worthy of consideration, the sole court that may examine and discuss the constitutionality of such administrative transactions or regulations, and of the laws or presidential decrees underlying them most effectively and accurately, is the Constitutional Court. The supervision of

the constitutionality of administrative transactions or regulations by the Constitutional Court is the primary way to ensure that the public administration fully complies with the Constitution, both in wording and in spirit. The Constitutional Court is the sole juridical authority assigned and authorized to perform the function of assurance of constitutionality in Turkey.

Another important point is that constitutionality supervision has almost been limited to the shutdown of political parties. However, in Turkey, besides political parties there are many powerful political organisms that, although as strong as a political party, have never been organized as such or as a non-governmental organization, that have remained underground most of the time throughout history and have only risen to the surface occasionally. These organisms may occasionally even come into power, or change the political party in power. There is fairly broad consensus in the disciplines of sociology and history in connection therewith. The clearest example of this is the belief-based organism that became a terrorist organization over time, that gave our country a "run for its money" through the July 15 coup d'état attempt. Prior to that incident, other movements have arisen throughout the country or on a regional basis, and have transformed into revolts or insurrections endangering national sovereignty and interests. There are many organisms in Turkish society that are not currently engaged in any illegal activities but are, nevertheless, perceived by everyone as a threat for the future due to their economic wealth and size, the human resources under their control, and the methods applied by them to control wealth and resources. Tighter and more effective prosecution of certain crimes and offences, such as terroristic crimes in the Crimes Against Judiciary, Crimes Against Security of State and Crimes Against Constitutional Order and Operation of This Order sections in the Turkish Criminal Code and in the Anti-Terror Law No. 3713, is not sufficient to allow the state to fight against such organisms and organizations, or for the effective and efficient protection of the Constitution and the constitutional

order. Hence, better-coordinated and centrally managed systems and mechanisms are needed in connection therewith.

The constitutional protection duty may be performed without the need to seek the tutelage, custody or support of any forces only if and to the extent that the Constitutional Protection Organization is established on a sound and robust legal and corporate structure. Otherwise, certain events may be encountered that are by nature incompatible with the rationale of protection, such as an inclination towards the power of tutelage or custody, rather than protection through legal means or remedies, in the case of a need for protection, or remaining silent against constitutional breaches in the case of the absence of strong tutelage or custody. By proactively preventing such events, it is possible to put an end to coups d'état or attempts to bring down democracy, and to reinforce the legal regime and environment for the changeover of government only through normal constitutional means.

For many reasons, particularly the factors mentioned in the preceding paragraphs, to further develop the constitutional protection system and make it more effective and efficient is as important as the demilitarization of the Constitution. A developed constitutional protection system should be carefully designed, taking into consideration at least the following requirements: (i) it should include a constitutional protection mechanism and an institutionalized means by which that mechanism can operate; (ii) it should assure the efficiency of constitutionality supervision; (iii) it should detect and prevent unconstitutional organisms; and (iv) the duties and powers of the Constitutional Court and the organization assigned to be responsible for the protection system should be determined so as to allow the effective and efficient functioning thereof. These purposes may be better achieved by converting the Office of chief public prosecutor into a Constitutional Protection Organization, and by further formulating its duties and powers in line with above requirements.

The proposed Constitutional Protection Organization should function independently and efficiently; should be entitled to automatically mobilize per se upon notices sent by the entities specifically named in the Constitution or by political parties or citizens; and should, at the same time, be obliged to take the required protection measures upon the demand of any of the entities named in the Constitution, political parties and their groups in the National Assembly, or a certain number of citizens. This organization should further monitor unconstitutionality events and discussions in society, and should be entitled to take appropriate and adequate steps to prevent incidents that may endanger the Constitution and the constitutional order in the executive organ, authorized juridical authorities and the Constitutional Court. For instance, it should be able to implement measures such as the dissolution of organisms posing such threats and the seizure and confiscation of their properties and assets.

Proposals

Constitutionality supervision, and the supervision and protection system, should be further developed and strengthened in such a manner as to ensure that the executive and legislative organs fully comply with the Constitution, both in wording and in spirit, to detect and prevent probable breaches at an early stage and to be easily operable, even automatically, per se. Within this framework:

(i) It should be made easier for political parties and deputies to commence suits of nullity or cancellation in the Constitutional Court;

(ii) Individual deputies or groups of a small number of deputies (for instance, 10) should also be allowed to commence said suits so as to pave the way for alliances amongst deputies from different political parties;

(iii) In addition to the Presidency, political parties and their groups that already have a right of action for nullification of unconstitutionalities, the entities and organizations which rely upon the Constitution, or, in other words, that are constitutional by nature, should also be entitled to directly commence suits of nullity on issues concerning or affecting them;

(iv) Natural persons and legal entities, non-governmental organizations, and unincorporated organizations that do not have a separate legal personality but are formed according to a certain number and certain eligibility criteria should also be entitled to directly commence suits of nullity in the Constitutional Court;

(v) Suits of nullity should not be subject to any conditions precedent, other than regarding their commencement within a certain reasonable period of time, and suits of nullity commenced on the samesubject matter should

be permitted to be handled as class actions.

(vi) All pleas, objections and disputes on the unconstitutionality of laws, presidential decrees, bylaws, regulations and other general administrative acts and transactions, in the State Council, administrative courts or ordinary courts, should be escalated to and resolved solely by the Constitutional Court. To this end, the legal manner in which to escalate unconstitutionality pleas, objections and exceptions to the Constitutional Court should be facilitated. For this purpose:

- Constitutionality supervision by way of objections or exceptions should be made easier; unconstitutionality pleas or objections should, as a rule, be escalated to the Constitutional Court; and these claims should be dismissible in exceptional cases. In such claims, the role of courts should be limited to deciding whether the objection or plea is worthy of being escalated to the Constitutional Court or not.
- All pleas or objections as to the unconstitutionality of all kinds of administrative acts, decisions and transactions raised or filed in the legal cases heard in the State Council and administrative courts should be allowed to be escalated to, and resolved by, the Constitutional Court, and the State Council and administrative courts should only decide whether the objection or plea is worthy of being escalated to the Constitutional Court or not.

(vii) The Constitutional Court should have the power to nullify and cancel laws, presidential decrees and other regulations that may restrict or limit the performance of its own functions, including the formal supervision

and control of its abolition (except for constitutional amendments that may terminate its own existence), and the proposed Constitutional Protection Organization should be entrusted with the tasks of monitoring these activities, opening legal cases and taking other actions deemed necessary.

(viii) The proposed Constitutional Protection Organization should be responsible for pursuing suits of nullity commenced upon unconstitutionality pleas, and should be liable to give the required legal, financial and human resource support to claimants.

(ix) The legislative instruments that are subject to constitutionality supervision should be cancellable at any time from the moment of approval and publishing, without waiting for their promulgation in the Official Gazette or for their effective date, and thus they should be stoppable, thereby preventing any probable legal effects of unconstitutional legislative and state of emergency instruments or regulations.

(x) The Constitutional Court should be authorized to effectively prevent any probable legal effects of unconstitutional statutory instruments, and if, nevertheless, these instruments are nullified only after becoming effective, the probable effects of unconstitutionality should be removed retroactively.

(xi) A Constitutional Protection Organization aimed at ensure the effective operation of the constitutional protection system should be formed. This should be done by transforming the Office of the Chief Public Prosecutor the Constitutional Protection Organization. The Constitutional Protection Organization should effectively and transparently monitor threats to the constitutional order and constitutional breaches, and should

be able to prosecute and investigate the same in the relevant juridical authorities and in the Constitutional Court without any prior consent or permission.

(xii) The Constitutional Court should function as both a first-instance court and a court of appeal until a separate and specific High Court of Justice is established, and only as a court of appeal if and after the High Court of Justice is founded, on all functions of the Supreme Court of Appeals, State Council, Supreme Court of Public Accounts and Higher Election Council, which are closely related to the constitutional order by nature but are currently not covered by any rights of action or objection to other authorities.

PART VII.
LAWS FOR HARMONIZATION WITH THE REFERENDUM RESULTS

The constitutional amendments adopted in the referendum of April 16, 2017, became effective and entered into force at the elections that were held on November 1, 2019.

On the one hand, amendments stipulated to the provisions of the Constitution with immediate effect are required to be enacted; on the other hand, old terms and expressions used in the existing laws are required to be harmonized with and adapted to the constitutional amendments. Furthermore, pursuant to the proviso of the last paragraph of Article 101 of the Constitution, which states that *"Other principles and procedures concerning presidential elections will be regulated under the law,"* the enactment of a law is an obligation as per the constitutional amendments. In order to determine the remedies that may be applied for "general regulations" or "individual acts and decisions" out of the decrees to be issued by the president "in force of law," and to avoid any probable legal chaos, it must be clarified against which of them an application may be filed with the Constitutional Court, and against which of them an application may be filed with the State Council and the administrative courts, and to determine the presidential acts and decisions that are not subject to judicial review.

Although it is not specifically mentioned in the Constitution, similar other statutory instruments within the new provisions should also be considered in the scope of the harmonization laws. However, the term "harmonization laws" as used by politicians should be taken to mean not only the mandatory amendments and

revisions, but also the amendments required so as to ensure that the presidential system leads to a better democracy, as promised prior to the referendum.

Given that the constitutional amendment proposals were supported by promises of better administration and better democracy, and were accepted and approved only by a small margin and only under a contentious but official and final decision of the Supreme Electoral Council, for the sake of broader social consensus the statutory instruments formulated so as to remove concerns and satisfy the wishes and demands of the remaining part of society that opposed the constitutional amendment proposals should also be accepted and enacted as harmonization laws. For example, in order to assure the more democratic representation of the people in the National Assembly, either new laws should be enacted or the existing laws should be comprehensibly amended with the intention of improving intra-party democracy, financing and election systems in political parties; increasing democratic representation and management in professional organizations with public institution status; making judicial authority independent from legislative and executive forces; outlining how the executive organ will use its public administration powers; and assuring transparency and accountability in state governance. All of these requirements should be considered as a part of the harmonization laws.

In the meantime, certain forward steps have been taken for the enactment of the harmonization laws. For instance, the National Assembly bylaws have already been amended so as to improve intra-assembly discipline and negotiations, and various laws and draft bills about the duties and functions of the Constitutional Court have already been made public.

After the proclamation of the state of emergency, due to the new jurisprudence of the Constitutional Court of 2016 that it does not have the jurisdiction to supervise and control the presidential decrees enacted during the state of emergency, the gap that

has occurred in the Constitution must be filled by a constitutional amendment.

Within this framework, in the post-referendum period, at the first stage, the steps described below should be required taken for harmonization of existing wording with the new constitutional picture.

Law on the Principles and Procedures for Presidential Elections

Paragraph 3 of Article 101, as amended, of the Constitution provides that: *"The President of the Republic may be nominated by political party groups, by political parties that have received at least 25% of valid votes on their own, or collectively, in the latest parliamentary elections, or by at least one hundred thousand voters,"* and the last paragraph of the same article is quoted as follows: *"Other principles and procedures concerning presidential elections will be regulated under the law."* Paragraph 1 of Article 104, as amended, of the Constitution, stated that: "The executive power shall be vested in the President of the Republic," and in the remaining paragraphs, executive powers are described comprehensibly, in detail, and executive power is separated from legislative power with rather clearly outlined borders.

In this separation, it should be accepted that the direct election of the executive organ by the people without the mediation of their representatives in the National Assembly will assure more direct representation in the formation of the executive organ. Likewise, the need to receive one vote more than half in order to be elected will pave the way for a higher level of representation in the elections.

However, the apparently high level of representation and legitimacy in the election of the president directly by the people will assure better representation and legitimacy only providing that the

candidates amongst whom a choice will be made by voters are also determined and nominated likewise. This is why the law to be enacted should clearly stipulate that the political party candidates will also be determined in this way. In the absence of such a provision, the political parties' central management and the leaders dominating them, having the power to nominate and designate candidates, will, of course, use their tyrannical powers to determine their candidate for the Presidency as well. If the candidate nomination process is not made democratic, the people will be forced to directly elect one of the existing candidates, and this will, in fact, not ensure direct representation, but rather the elections will become a process of coercion and constraint.

The direct election of the executive organ by the people will be democratic only if and to the extent that the candidate nomination methods of political party groups and political parties are rearranged so as to provide the broadest democratic representation therein. If such a regulation is not issued, and the people do not have a say in the determination of presidential candidates, as the executive organ will have been chosen by political figures accepted not to represent the people in a fully democratic way, the existing anti-democratic practices will only have been carried forward to future periods. If the candidate determination process is not further developed so as to increase democratic representation, and people are forced to make an election from amongst the candidates determined and nominated by the central management of political parties, it will be necessary to accept that the parliamentary government system is indeed more democratic and better represents the people than the newly established presidential system.

Furthermore, the provision enabling at least 100,000 voters to come together and nominate a candidate should be formulated in a cost-free and facilitating manner so as to allow new, independent and competent leaders to come forth who have remained out of politics, but are willing to resolve the problems of the country. Such a formulation will further prevent this provision from being

seen by the people as a method of eyewash. Those who wish to become candidates should be protected against possible attacks and inappropriate attempts. Such a group of at least 100,000 voters should be enabled to easily nominate their candidate, in such manner as to require the least time and labor, at the lowest cost or even cost-free – with any costs thereof to be borne by the state. The Supreme Electoral Council should be entrusted with this task. Given that the 100,000 people nominating a candidate are required to be voters, and that this is further required to be checked by the Supreme Electoral Council, the Supreme Electoral Council should provide a secure candidate portal and create ways to facilitate the nomination of candidates via e-government, internet, e-mail or similar other electronic and written forms.

All of these points should be regulated in detail in the Law on the Principles and Procedures for Presidential Elections required to be enacted as per the last paragraph of Article 101 of the Constitution.

Election Law

In Turkey, there is an profusion of electoral rules, some of which are more or less similar to each other and some of which are more different, for political elections such as parliamentary elections and elections for local administrations regulating the competition between different political opinions and movements; for elections regulating the competition between different factions and opinions in political parties; or for professional organizations with public institution status that need to have democratic and civilian management.

It is well known that these electoral rules do not ensure democratic representation in Turkey but that, on the contrary, they pave the way for leader and oligarchic management tyranny. It is an unequivocal fact that the choices of the grassroots are not reflected in central management, but that leadership and central management impose their own choices onto the grassroots. Compliance with democratic principles is contentious in public administrations, and even the mandatory legal rules may easily be breached.

As a result, the requirements of democratic governance are not satisfied in either political parties or autonomous professional organizations with public institution status. This, in turn, leads to controversial legal dynamics in which accountability in public administration is restricted, and in the end reduced solely to political

accountability through elections. It is a commonly accepted fact in the country that election methods applied in the election of leaders and in the central decision-making and management bodies of parties and organizations are not democratic and do not ensure the representation of the grassroots. As a result, even political accountability through elections cannot be ensured and so society is doomed to suffer unsuccessful leadership.

The most important factor underlying the failure of elections to be democratic and thus to assure full representation and full legitimacy, and the method most commonly used for the restriction of democracy, is the delegacy system adopted and applied by all parties and organizations. The delegacy system was originally implemented due to the impossibility of gathering all members in general assemblies or congress-type meetings for organizations with a large number of members in the past, when communication, transportation and technology had not yet been developed as it is today. It not only restricts the right of representation of a great majority of members but is also used as a means to diminish the organization to the size of a delegacy system, wherein the leader and central management can dominate and manipulate the delegates. This malformed method that acts contrary to principles of equality and proportionality, by restricting the democratic representation of members of metropolitan cities that have a higher number of members and are relatively stronger and more independent in economic terms, and on the other hand by giving disproportionate weight to delegates in smaller and more controllable residential places and cities, seems to have spread and influenced all organizations.

A similar problem is partially observed also in terms of electoral districts under the existing election law. In its decision relating to Electoral Districts, No. 759, dated July 18, 2017, published pursuant to the provisions of Parliamentary Election Law No. 2839, the Supreme Electoral Council states that: "Provinces with up to 18 deputies comprise a single electoral district, provinces

with between 19 and 35 deputies are divided into two electoral districts, and provinces with 36 or more deputies are divided into three electoral districts." The court finds, as a result of its determinations made as per Article 5 of that law, that out of the provinces represented by more than 18 deputies, Ankara (36 deputies), Bursa (20) and İzmir (28) are divided into two electoral districts, while Istanbul (97 deputies) is divided into three electoral districts. Each of the remaining 77 provinces is composed of only one electoral district, and included amongst them are 13 provinces each represented by two deputies, 20 provinces each represented by three deputies, 10 provinces each represented by four deputies, and seven provinces each represented by five deputies. In total this constitutes 50 electoral districts. When these 50 provinces divided into 50 electoral districts and represented by 161 deputies in total, are compared with the combined Ankara, Bursa, Istanbul and İzmir, divided into nine electoral districts and represented by 181 deputies, it can be seen that the number of electoral districts in provinces with smaller populations is 5.5 times the number of electoral districts in metropolitan cities.

Firstly, this breaks the links and relations between voters and candidates in large cities, and voters are forced to vote for candidates whom they do not know and do not have the chance to express their opinions and choices. It also prevents political parties from nominating their own candidates. What is more, it prevents the use of a system wherein voters may choose from amongst candidates.

Electoral districts should, rather than being determined by provinces, be formed by combining them into a single electoral district of several provinces or townships with the least number of interlinked geographies, wherein all political factions and movements should have the opportunity to be represented. In this alternative, deputies would be more strongly associated with and better known in the districts for which they are elected.

Election law should require the organization of elections for

a single person, such as elections for president, mayor or chairperson of professional organizations, from amongst candidates running for these offices by runoff election and on the basis of the majority of votes; and the organization of elections for multiple people, such as elections for parliament and municipal councils, from amongst all candidates running for these offices through lists and on a majority basis, and according to the ranking of votes they receive. If voters can choose from amongst candidates also in the process of the preparation of lists of candidates, the representation of voters will be even more strengthened.

Law on the Foundation and Organization of the Supreme Electoral Council

The Supreme Electoral Council has lost the confidence of a broad segment of the population due to acts and decisions taken by it in the April 2017 referendum process. On the international platform, the accuracy of the decisions of the Supreme Electoral Council and their compliance with the law have been criticized by the EU, which has close economic and political relations with Turkey, and by the OSCE, of which the Supreme Electoral Council is a member. The council has been exposed to very serious criticisms that its members are voting under pressure, and under the influence of their personal concerns, not according to the laws, and that, as a result, the council is making unlawful decisions and sees itself as above the law, and fails to accurately determine the will of the nation, even making untrue and misleading disclosures to the public. Therefore, both the decisions of the Supreme Electoral Council and the officially finalized referendum results have been the subject of some applications filed with the State Council, the Constitutional Court and the European Court of Human Rights. News has been published as to complaints filed by various persons and entities concerning members of the Supreme Electoral Council.

The Supreme Electoral Council and its members make decisions determining and shaping the future of our country but are by no means accountable, either institutionally or individually, if and

when they breach their job duties for personal reasons. Their legal backgrounds allow them to act arbitrarily, at their own discretion. The prosecution of members of the Supreme Electoral Council elected from amongst members of the Supreme Court of Appeals and the State Council is dependent upon a final decision to be made by their own colleagues within the organization they are working. Even if said persons have committed a crime, due to such decisions that may at times be unlawful and wrong but are in any case final, they will in no event be held accountable.

This creates an environment that may allow or cause all members of supreme courts and all executives of the Supreme Electoral Council to act arbitrarily under the effects of their personal concerns, or in their own personal interests. Indeed, this environment is created for members of the Supreme Electoral Council, since there is no other remedy or method of objection by another authority against their decisions, and even if their decisions constitute a breach of duty or a personal offence they can easily be made immune from any investigation, prosecution or sanction by their own organizations and colleagues.

On the other hand, it is a fact that there is no remedy or legal means of application against either administrative decisions of the Supreme Electoral Council or its judicial decisions and verdicts. This means to say that even if the Supreme Electoral Council makes a decision that is clearly contrary to the laws, that decision is required to be accepted by the voters. Under such circumstances, it is possible for members of the Supreme Electoral Council to make decisions that ignore the will of the nation, but declaring this will cause certain pressures and threats by coercive forces. No one can guarantee that such members, who can by no means be held liable or accountable for the consequences of making such unlawful decisions, will not act arbitrarily by giving priority to their own lawful or unlawful interests rather than the will or interests of the nation; on the contrary, it may even be said that this system will provoke them to act arbitrarily.

> The Supreme Electoral Council is an organ that supervises and audits all transactions and acts relating to the election system in terms of compliance with the laws. Furthermore, the Council also makes administrative decisions. However, in any event, the Council's decisions are final, and cannot be objected or appealed to any juridical organ or authority. Therefore, in order to encourage the compliance of decisions of the Supreme Electoral Council with the law, these decisions should be open to supervision and control by the Constitutional Court through individual applications.
>
> TESEV Constitution Commission Report, Türkiye'nin Yeni Anayasası'na Doğru (Towards A New Constitution of Turkey), pp. 21 and 22.

Discussions and debates after the April 2017 referendum caused a broad segment of the population to approach with doubt and not to recognize the decisions of the Supreme Electoral Council in the subsequent elections. International debates and discussions on the validity of elections, though held in a civilized manner, leave democracy in Turkey be under suspicion in many respects.

Ongoing international debates as to the legitimacy of the powers vested in political leaders governing the country may have very serious results. For instance, if they are not accepted as legitimate representatives of the people, it may become difficult for our presidents to defend and protect the interests of Turkey abroad. In addition, the failure of the country to adopt and maintain the democratic style of governance adopted throughout the world by UN Conventions, and concerns about undemocratic elections and similar other suspicions, may pull the country far below the level it deserves in the international arena, thereby causing great and lasting harm to us.

Applications filed against the referendum process and results remain inconclusive without the merits being open to being examined for such reasons as the impossibility and illicitness of this manner of application. To put it in other words, the merits of the disputes between the Supreme Electoral Council on the one hand, and a significant segment of people on the other, have not been examined by an independent and neutral juridical authority or body, and have not been terminated by a judicial decision shedding light on the subject matter of these disputes. The Supreme Electoral Council itself decided on the subjects of severe criticism addressed by a broad segment of the population to the Supreme Electoral Council, and itself finalized its own decision. Thus, the decision of the Supreme Electoral Council was legally finalized, but the criticism of critics of the Supreme Electoral Council have not been dealt with and disputes have not been resolved. As a result, since the criticism has not been dealt with through a judicial process by an authority other than the Supreme Electoral Council, as itself the subject of objections and criticism, distrust has arisen in a significant segment of the population with regard to the Supreme Electoral Council. Therefore, it has become necessary to issue a regulation that can eliminate this distrust and regain trust in the name of the Council.

All of these concerns could be easily removed by opening a judicial remedy against decisions of the Supreme Electoral Council, and this would make the decisions of the Supreme Electoral Council, and thus the results of elections, reliable beyond any doubt on national and international levels.

Another point is that the lack of any judicial remedy against decisions of the Supreme Electoral Council does not comply with the principles of republic and the state of law, as also stated in the Judgment of 1977 of the Constitutional Court, or with the principle of the rule (supremacy) of law, and that the fact that members of the Supreme Electoral Council are lawyers does not justify the immunization of its decisions from judicial review.

In Article 5(2) of Law No. 7062 passed on November 30, 2017, the provision, *"No application may be filed for any judicial remedy or with any authority against the decisions of the Council,"* has further ossified the problem, disrupting and eliminating the trust in the council. Due to the conditions and criticisms summarized above, a judicial remedy should have been opened against the decisions of the council, and it should have been clarified which authority is vested with the power to finally decide thereon, and thus the public trust should have been re-established.

For the reasons cited and explained in the preceding paragraphs, Article 5(2) of Law No. 7062, immunizing the decisions of the Supreme Electoral Council from judicial review, should be repealed, and it should be decided which judicial authority is authorized to hear applications filed against such decisions. As elections are closely related to the constitutional order, this power should be vested in the Constitutional Court.

Law on Political Parties

In the new regime wherein the legislator's power to determine and change the executive power through votes of confidence or no-confidence has been removed, the functions of the legislative body are limited only to issues such as making laws, and to the approval or non-approval of presidential decrees. The removal of the contest for positions in the government may facilitate intra-party democracy, and deputies and political parties may better understand the needs of their grassroots and may tend to pursue more democratic and reconciliatory policies in the legislation process. The removal of the influence and pressure of the legislative body on the executive power leads to the opportunity to create a consensus amongst different political factions, and thus in society as a whole, at least during the rule-making process. The occurrence of healthy competition arising out of the independent tendencies and actions of the Presidency and the National Assembly may pave the way for the formulation of good governance and good rules, and for the effective and efficient operation of both sides.

However, it should also be kept in mind that the practice of the preparation of draft bills by the executive organs may remain in effect, and that the legislative body, not ever pushed by the executive organ, may remain idle in performing its functions. Another probability is that political parties may see and use the Turkish Grand National Assembly as a bridge to government in order to

determine their candidate for the Presidency in the next elections, and may make regulations and laws only on issues proposed by the president elected as such, and may circumvent other issues and problems.

For these reasons, the Law on Political Parties should be amended so as to address the existing criticisms, to create consensus amongst different opinions and to form a National Assembly structure capable of balancing presidential decrees with legislative instruments of the National Assembly. On these points, agreement or consensus should be reached amongst political parties, and if this does not work, the concerns of dissenters and opponents should definitely be addressed.

General Administrative Procedures Law

As explained in detail at the beginning, through constitutional amendments the president has alone been vested with broad executive powers and powers to enact and issue decrees. The fundamental principles of the Constitution require the executive organ to strictly comply with the Constitution and the laws, and to act in accordance with the principle of equality under the law in all of its actions. Article 8 of the Constitution provides that: ***"Executive power and function shall be exercised and carried out by the President of the Republic and the Council of Ministers in conformity with the Constitution and the laws."*** These mandatory provisions and the principles of legality and predictability, and other principles as discussed above, require the procedures and principles of use of the executive power to be regulated by law.

In addition, it may naturally be expected that the presidential system, which is rather new for Turkey and does not have any customs and usage, will pave the way for many legal problems. These new conditions arising in the post-referendum period also make it a necessity to enact such a law.

For this reason, a general administrative procedure law should be enacted and passed. The law should require executive and other public administrations and civil servants to use their administrative powers and authorizations in accordance with prin-

ciples of merit and qualification, rationality, transparency, and accountability.

Furthermore, the ambiguity as to whether the presidential decrees are administrative acts or in force of the law should be removed, and judicial remedies and means of objection against presidential decrees and other acts and decisions of the president should be clarified.

Constitutional Review of Presidential Decrees Issued in States of Emergency

As discussed in detail in the preceding chapters, the Consti- tutional Court has decided that the Constitution does not vest any power in the Constitutional Court with respect to judicial review of the constitutionality of decree-laws regarding the proclamation of, or issued in, a state of emergency, and that even to discuss the nature of these decree-laws will indeed be a form of abuse of powers; thus it has regressed from its much-debated jurisprudence of 1991.

With regard to said jurisprudence of the Constitutional Court, there has been no judicial review or remedy against various presidential decrees that have, indeed, been issued in contradiction to the clear provisions of the Constitution, and should not be kept active or in force for even one more day. Under these circumstances, it should be accepted that the proclamation of a state of emergency leads to a state of suspension of the Constitution. However, the proclamation of a state of emergency is indeed a power required to be granted by the Constitution, and thus suspending the Constitution by using such a power is not possible, either legally or rationally.

Pursuant to Article 121 of the Constitution, the Council of Ministers chaired by the president may issue decree-laws throughout the period of a state of emergency on issues necessitated by

the state of emergency. Again, as per the same article, these decree-laws are required to be promulgated in the Official Gazette, and to be presented for the approval of the Turkish Grand National Assembly on the same day. Timing and procedure as to approval of these decree-laws by the Turkish Grand National Assembly are regulated by the bylaws.

According to Article 128 of the bylaws of the Turkish Grand National Assembly, presidential decrees issued pursuant to Articles 121 and 128 of the Constitution, and presented for the approval of the Turkish Grand National Assembly, are dealt with and decided according to the rules specified by the Constitution and the bylaws for negotiation of draft bills and proposals, but before other decree-laws, draft bills and proposals, urgently and within 30 days, at most. Decree-laws the negotiation of which cannot be completed in commissions within 20 days, at most, are directly included in the agenda of the General Assembly of the Turkish Grand National Assembly.

The purpose of this provision is to ensure that the decree-laws issued during a state of emergency, of which constitutionality review upon enactment has been restricted by the provisions of Article 148 of the Constitution, are transformed into a legislative instrument of the TGNA as soon as possible, and that if not adopted by the TGNA they are repealed and abrogated, but if adopted by the TGNA they are opened to constitutional review at the soonest time possible. To put it in other words, the Constitution attempts to eliminate the effects of prohibition on supervision arising out of Article 148 by an approval law of the TGNA to be passed within 30 days thereafter. However, in practice, the decree-laws issued throughout the period of the state of emergency following July 15, 2016, were immediately promulgated in the Official Gazette and put into force and implemented, but were never presented to the TGNA for approval, and the period of 30 days set down in Article 128 of the bylaws was not adhered to. Another fact is that no sanction has been imposed against non-compliance with the

period of 30 days after presentation to the TGNA. As a matter of fact, in the past, the TGNA has from time to time not complied with its own bylaws.

Under these circumstances, as also mentioned below, it is generally accepted that the decree-laws issued throughout the period of the state of emergency following July 15, 2016, contain clearly unconstitutional provisions, and many legislative instruments do not have any relation to the causes underlying the proclamation during the state of emergency. To put it differently, as these decree-laws were not actually presented to the TGNA, the decree-laws issued throughout the period of the state of emergency, the constitutionality of which cannot even be reviewed or checked due to Article 138 of the Constitution, have led to an unconstitutional state. Thus, the Council of Ministers chaired by the president may issue decree-laws throughout the period of any state of emergency which, in fact, contain unconstitutional provisions, and they remain in force until the date they are presented by the government to the TGNA. This means that the Constitution is in actual fact repealed and suspended by the executive power itself, until the date at which the government decides to present these decree-laws to the TGNA.

However, in fact, both the president and the Council of Ministers are bound by the provisions of the Constitution also during states of emergency, pursuant to Article 11 of the Constitution: *"The provisions of the Constitution are fundamental legal rules, binding upon legislative, executive and judicial organs, and administrative authorities, and other institutions and individuals."* The president takes an oath to be bound *"By supremacy and rule of the Constitution and the law,"* as per Article 103, and the prime minister and the ministers take an oath *"to remain loyal to the supremacy and rule of law and of the Constitution,"* as per Articles 81 and 112 and, likewise, as per Article 121, prohibiting any statutory instruments beyond *"The issues necessitated by the state of emergency,"* and as per other relevant provisions of the Constitution pertaining thereto.

Putting the Constitution out of commission or suspending its enforcement in any manner whatsoever – for any reason or motive – and acts of the highest-echelon public servants of the state in breach of the rules and provisions of the Constitution, are legally unacceptable. Therefore, this situation should immediately be removed by presenting the subject decree-laws of the state of emergency to the TGNA as soon as possible, and ensuring that the TGNA makes a decision to accept or refuse them, and turns them into a law urgently, and in any case within 30 days as stipulated in the Constitution, thus opening these decree-laws to judicial review as to their constitutionality.

This problem has another technical aspect that requires it to be considered and handled under harmonization laws, as it may cause a chaotic legal situation for the country if not resolved. That is to say:

(i) Decree-laws of states of emergency are valid only throughout the term of that state of emergency and will become invalid as soon as the state of emergency is terminated.

(ii) Through decree-laws of the state of emergency, many laws either related or unrelated to the state of emergency have been amended, and new law provisions have been adopted. When the state of emergency is terminated, the previous law provisions will again become valid, and the new law provisions will become null and void.

(iii) Although in the existing version of the Constitution the validity of decree-laws issued during the state of emergency was not limited by any term, after the amendment made in the referendum, as per Article 119(7) of the Constitution, if not approved by the TGNA within a term of three months, decree-laws of the state of emergency become null and void automatically; i.e. in this

case, the amendments will be reinstated, and the new law provisions will lose their validity.

(iv) Said provision amended in the referendum became effective as of the date the president was elected.

(v) It may not be possible for the TGNA to commence working and negotiating on the decree-laws of the state of emergency and make decisions thereon by the end of the term set down in the amended Article 119(7); in the meantime, upon lapse of the term, decree-laws of the state of emergency will automatically become null and void, thereby leading to the chaotic situation referred to above.

In order to prevent such an eventuality, therefore, it is critical to ensure that decree-laws of the state of emergency are presented to the TGNA, and that a law be passed and enacted. If this is not done, the need to prevent such a chaotic situation may alone result in an extension of the undesired state of emergency.

CONCLUSION

Turkey is not a police state at the westernmost edge of the East and the easternmost edge of the West, but a flagship entrusted with the task of carrying the Turkish and Islamic worlds to the contemporary level of civilization, thereby taking the reputable and honorable place it so deserves on the world scene.

This flagship, which has thus far been reborn from its ashes in spite of many crises and difficulties, shall absolutely perform its historical duty, and shall be the driving force behind the advancement of the entire humanity up to a new level of civilization by opening wide the doors of peace, richness, wealth and fertility in a geography spanning from the coast of the Atlantic Ocean to the west, to Kamchatka in the easternmost part of Asia.

This grand objective will be achieved sooner or later unless all hell breaks loose and demolishes the Turkish nation.

This is why, in the governance of its state, in the determination of its objectives and goals, in all of its communications at home or abroad and in its international relations, Turkey is under an obligation to exhibit the exemplary attitude and behavior that befit its extraordinary historical duty, and to be a real flagship.

This grand objective will become real and be achieved only if and when the state makes peace and integrates with its nation; the community starts to see all differences as an indication of

richness; separations and polarizations become brotherhood; all people start to embrace each other without any discrimination; and the state, community and individuals come together around paramount humanitarian values.

The final objective of democracy coincides precisely with our councils (kurultai) and customary/constitutional traditions that have enjoyed continuity from Middle Asia; with the philanthropy and humanitarianism tightly embedded by Mevlana (Rumi), Yunus Emre and Ahi Evran, as well as other ancestors, in the very blood of our community; with our state governance tradition blended with love, tolerance and humanitarianism with no discrimination against any person; and with our rule (supremacy) of law and justice, acknowledging that everyone is equal and that even the sultans are accountable before the law.

There is no need for us to fear the fact that the people of today have been polarized, or that this could, in turn, create a lightning effect, because the great Turkish nation has the know-how and capacity to transform tensions into very favorable conditions for the advancement of the whole of humanity with the support of its state traditions and rich culture and the acumen of thousands of years. **The developed democratic wish of the Turkish people is also a product of this vast state culture.** The Turkish nation had already acquired the maturity and competence needed to overcome its present problems and difficulties centuries ago, and in further developing traditional concepts of law, justice and democracy, which have recently been frozen into inertia in contemporary countries, adding new and social dimensions thereto and renewing the synthesized Western and Eastern cultures and the system of values of humanity, it can combine not only the Islamic geography but the whole of humanity under and within the framework of such values.

With her sociological and cultural know-how and her well-educated, success-oriented, intellectual workforce with their fairly high entrepreneurial spirit, Turkey is the sole country that

has the potential to resolve the disputes and causes of conflicts spread over a wide geography, particularly in the Middle East and African countries, most of them being within the reach of a few hours of flight, and to convert existing difficulties into new opportunities. However, this potential may be activated only if and to the extent that Turkey becomes an exemplary country, competing with more developed countries in terms of its government on the basis of democratic law, libertarian ideals and fair social order.

The purpose of this book is to determine and describe the existing problems of Turkey, which may also be described as "middle-democracy" problems, and to develop proposals for the resolution thereof. I have thus far tried to identify the problems and to propose solutions as if I were the lawyer acting for and on behalf of the Turkish nation to which I owe my existence. My criticisms solely aim to put forth the reasons and justifications for the proposals that believe can resolve the existing problems. I have never intended, nor can I ever have, evil intentions, to injure or offend any individuals or entities. My desire is to pave the way for a social consensus, or at least to start a debate towards that end, so as to be able to proceed and progress for the better as a nation.

My opinions on certain issues, which may be considered as political, are expressed not with a political motive but from the point of view of the legal aspects of the issue, solely with the wish to further advance the country and to ensure that people embrace each other tightly and without any legal concerns. If, nevertheless, my opinions injure or give offence to anyone, I kindly ask them to read these notes once more, and if they accept my proposals, to leave aside the probable effects thereof on themselves and think once more about where our national interests lie. If anyone prefers to label me as having ulterior motives, I ask them to keep in mind that even the most secret of motives has a witness, and the truth will come out sooner or later.

In the contemporary world with its axis shifting from the West to the East, Turkey is the sole country that can reconcile and bring together different cultures along the paths of trade and economy, and that can carry the whole of humanity together to a different plane through development.

Beyond the great difficulties lie great opportunities and wealth for humanity.

The only thing we have to do is to make the law and legal accountability superior in all fields and areas of our social life, particularly in the public sector. The rule and supremacy of law and accountability will, in the public sector, ensure that the state is a state of law and is administered well, and will, in political parties and elections, ensure justice in representation. To this end, it is essential to ensure that the judiciary is independent from both the legisla tive and the executive organs, is operating efficiently and effectively, and is made accountable. If these conditions precedent are satisfied, Turkey will free itself from the middle-democracy trap, enter onto a fast-growth track, and take its deserved place as a reputable leader amongst the developed countries of the world.

In the wish that my book will make a contribution to some extent on this path …

Mehmet Gün

Zincirlikuyu

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