



# QUALITY IN THE JUDICIAL SYSTEM

Executive Summary



**TURKISH INDUSTRIALISTS' AND BUSINESSMEN'S ASSOCIATION**

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Lebib Yalkın Yayınları ve Basım İşleri A.Ş.

# FOREWORD

*TÜSİAD (Turkish Industrialists' and Businessmen's Association), which was founded in 1971, according to the rules laid by the Constitution and in the Associations Act, is a non-governmental organisation working for the public interest. Committed to the universal principals of democracy and human rights, together with the freedoms of enterprise, belief and opinion, TÜSİAD tries to foster the development of a social structure which conforms to Atatürk's principals and reforms, and strives to fortify the concept of a democratic civil society and a secular state of law in Turkey, where the government primarily attends to its main functional duties.*

*TÜSİAD aims at establishing the legal and institutional framework of the market economy and ensuring the application of internationally accepted business ethics. TÜSİAD believes in and works for the idea of integration within the international economic system, by increasing the competitiveness of the Turkish industrial and services sectors, thereby assuring itself of a well-defined and permanent place in the economic arena.*

*TÜSİAD supports all the policies aimed at the establishment of a liberal economic system which uses human and natural resources more efficiently by means of latest technological innovations and which tries to create the proper conditions of for a permanent increase in productivity and quality, thus enhancing competitiveness.*

*TÜSİAD, in accordance with its mission and in the context of its activities, initiates public debate by communicating its position supported by scientific research on current issues.*

*The following is the Executive Summary of the report entitled "Quality in the Judicial System" prepared by Prof. Erdoğan Teziç, Prof. Yıldızhan Yayla, Prof. Köksal Bayraktar, Prof. Erdener Yurtcan, Prof. Selçuk Öztekin, Prof. Süheyl Batum and Prof. Necmi Yüzbaşıoğlu that was published by TÜSİAD in 1998. The report complements the 7th National Quality Congress entitled "Quality in the Legal System".*

### **Prof. Erdoğan Teziç**

Prof. Erdoğan Teziç was born in 1936 in İstanbul and graduated from Faculty of Law, University of İstanbul in 1959. He became a Professor of Constitutional Law in 1980. He is still working at İstanbul University as a Professor of Constitutional Law while at the same time he is the Deputy Rector of Galatasaray University, the Manager of Lycee de Galatasaray and a legal adviser to the Turkish Grand National Assembly.

His articles concerning the Constitutional Law have been published in various journals. Some of them are: Election Systems, The Concept of Law according to the Constitution of 1961, The Legal Status of Political Parties and Political Parties in Turkey, The Sources of the Turkish Parliamentary Law, Constitutional Law.

### **Prof. Yıldızhan Yayla**

Prof. Yıldızhan Yayla was born in 1937 and graduated from Faculty of Law, University of İstanbul. He made his Ph.D. in Public Law in 1968 and became an Associate Professor in Administrative Law in 1974. He became a Professor of Administrative Law in 1982 and started working as the Deputy of the Dean of the Faculty of Administrative Sciences. He worked as the professor of Administrative Law and the Deputy of the Dean of the Faculty of Faculty of Law, Marmara University in 1984. He became the Deputy of the Rector of the same university in 1986 and he continued his studies as the Professor of Administrative Law and Constitutional Law in 1987. Since 1992 he is working as the Rector of the Galatasaray University and some of his publications are as follows: the Organisation of Service to the Village (1968), The Major Legal Problems of City Planning and the Example of İstanbul (1975), Administrative Law (1990), The Essence of the Republic according to the Constitutional Court. Furthermore, Prof. Dr. Yıldızhan Yayla's many articles, chronicles and papers published in university journals, encyclopedias, the Journal of the Council of State and some other daily newspapers.

### **Prof. Dr.Köksal Bayraktar**

Prof. Köksal Bayraktar was born in Bandırma in 1941. Up on graduating from Galatasaray High School, he received his Bachelors Degree from the Faculty of Law, İstanbul University. He became an assistant of Criminal Law at the Faculty of Law, İstanbul University in 1966 and he completed his Ph.D. thesis titled "The Criminal Responsibility of the Doctor due to Treatment" in 1970. He became an Associate Professor with his study named 'Provocation to Committing Crime' in 1975 and a full Professor with his book 'Political Crime' in 1982. He conducted some studies at the Faculty of Law at Strasbourg and Paris. He has participated in many national and international conferences and prepared papers. He is still working at the Department of Criminal and Criminal Procedure Law at the Faculty of Law, İstanbul University.

### **Prof. Erdener Yurtcan**

Prof. Erdener Yurtcan was born in 1942 and graduated from the Faculty of Law, University of Istanbul in 1966. He worked as an assistant at the same faculty in Criminal Law in 1967, where he also made his Ph.D. in 1972. He became an Associate Professor in 1976 and Professor in 1983. He was retired in 1998.

Prof. Erdener Yutcan worked as The High Counsellor at the Ministry of Justice between 1991-1995. Between the years 1988-1995 he was also the Chief Legal Advisor to the Turkish Football Federation and he attended cases at UEFA and FIFA on behalf of Turkey. He prepared important draft laws such as the Criminal Procedure Code. He works as a registered lawyer at the İstanbul Bar Association and he is a practicing lawyer and an adviser. Prof. Yurtcan is the author of 42 books and many articles published in Turkish and German. Furthermore, he is also the author of 4 books "Memories of a University Member"(1995), "Stories of a Society" (1996), "From Past to Today with a Criminal Lawyer"(1996) and "Lines of Poetry for the Lover"(poetry-1998).

### **Prof. Dr. Selçuk Öztekin**

Prof. Öztekin was born in İzmit, in 1951 and was graduated from Saint Joseph High School. He was graduated from Faculty of Law of İstanbul University in 1974 and Faculty of Law of Lausanne in 1977. He has made his PhD. in Law at University

of Lausanne in 1982 and became an Associated Professor in Civil Procedure and Law of Bankruptcy and Bailiff at University of Marmara. He is a Professor at the Faculty of Law of University of Marmara since 1994.

**Prof. Dr. Süheyl Batum**

Prof. Süheyl Batum was born in İstanbul in 1955. He completed his secondary education at Lycee de Galatasaray, a highly reputed francophone high school in İstanbul. He received his Bachelors degree from the Faculty of Law, University of Paris (Panthéone Sorbonne).

He began working as a research assistant for the Department of Constitutional Law of the Faculty of Law, University of İstanbul in 1980. There he successfully completed his Ph.D thesis, titled, 'Referendum as a means of Political Participation' in 1985. Having completed a research on 'European Human Rights Convention and its Influence on the Turkish Constitutional System' he became Associate Professor in 1990. He was awarded his professorship in 1996 at the Galatasaray University. Profesör Süheyl Batum is currently the Dean at the Communications Faculty of Galatasaray University.

**Prof. Dr. Necmi Yüzbaşıoğlu**

Prof. Yüzbaşıoğlu was born in 1956 and graduated from Faculty of Law, İstanbul University. He became an assistant at the Chair of Constitutional Law, İstanbul University in 1981 and he started his Ph.D in the same year. He became a Doctor of Law with his Ph.D thesis named "Executive Power in the Parliamentary Systems and Turkey" in 1986. He became an assistant Professor at the Department of Constitutional Law in 1987 and an Associate Professor with his thesis titled 'Constitutionality Blockade in Turkish Constitutional Litigation'. He became full Professor in 1996 with his thesis titled as 'The Regime of Decrees in Force of Law in Turkey according to the Constitution of 1982 and the decisions of the Constitutional Court. He works as the Deputy of the Dean of the Faculty of Law, İstanbul University. He has articles and monographs published in the field of Constitutional Law.





## **QUALITY IN THE JUDICIAL SYSTEM**

In its 75th year as a Republic, Turkey needs to make a self-criticism and assessment, which is essential not only for holding on to and protecting what the Republic has already achieved but also for attaining those modern republican values that are not yet in place.

"The State of Turkey is a Republic" says the first article of the Constitution; and its second article sets out the characteristics of that Republic, most of which are universal characteristics of any democratic system, though some may be specifically attributed to Turkey. Among these, its characteristic of being a 'state of law' bears special significance since it also serves the function of safeguarding the other characteristics of the Republic.

In 1998, which marked the 75th year of the Republic, an intense debate on the institutions of law, justice and judiciary took place in Turkey. To contribute to these efforts as a non-governmental organisation, TÜSIAD launched an inquiry into and a debate on "the Quality in the Judicial System" as the major issue of 1998; and it commissioned a report to seven academicians for this purpose.

In a "state of law", all acts and actions of the government and of the administrative bodies are subject to judicial review. Court decisions are binding upon the legislative and executive organs of the state and upon the administrative bodies. This is the only way of assuring the citizens of a life within legal security.

## **IMPLICATIONS OF THE QUALITY IN THE JUDICIAL SYSTEM**

Adjudication is a very important function of any "state of law", and well-equipped and reliable adjudication is an indispensable public service. The government and its legitimacy are cast in doubt when the adjudication service ceases to be functional. This is the reason why the courts have a very important role to play in securing a smooth public life and in maintaining civil peace. This, in turn, depends on the proper functioning of the adjudication service.

Adjudication is a public service, of which the organisation of the judiciary is the legal and material instrument. The quality of adjudication involves the satisfaction

of certain quality requirements in the performance of that service; and the control of quality means that the presence and adequacy of these qualities are verified. Efficiency and respectability are the essence of the quality in the judicial system. These can be secured by public trials heard by independent judges on the basis of impartiality and the equality of prosecution and the defence, which should result in correct judgements and fair outcomes.

## **IS THE ADJUDICATION SERVICE FUNCTIONING WELL?**

It is widely believed in Turkey that the adjudication service is not functioning properly. It may further be stated that this is the expression of a common observation rather than a belief. A survey presented as an annex to a report commissioned by TÜSIAD makes it clear that the adjudication service is not efficient and it emphasises that the adjudication system suffers from major drawbacks.

The issue of the quality of the adjudication service is being debated in its various aspects not only in Turkey but also in developed countries. As a matter of fact, an intense debate on this issue has been launched upon an invitation made by some of the European judges in Geneva in 1996 and a call made by the French judges for the independence of the judiciary in 1997.

The foregoing and similar discussions that take place in Europe show that a mere improvement of the judicial organisation or its staff, instruments and procedures will not be sufficient to enhance the quality in the judicial system. This will be the product of a social and integrated improvement, education and practice.

Opinion polls conducted and observations made in Turkey show that these universal and contemporary problems are being experienced in this country as well. Naturally, other problems that are peculiar to Turkey, such as those emanating from inflation, economic measures, general and specialised training, social habits, and tradition are to be mentioned in addition to the foregoing.

These problems can be summarised as follows:

Political influence, pressure and debate are challenging the work of judges and prosecutors and are impairing their independence.

Adjudication remains a very very slow process while the number of disputes is increasing, resulting in the progressive increase of the number of pending cases, carried over by courts from one year to the next.

Deficiencies in the technical infrastructure have not been remedied. Inadequate buildings and equipment constitute obstacles to the efficient performance of the adjudication function and to the rendition of fair, respectable, rapid and correct judgements.

In terms of recruiting highly skilled people, staff problems have not been solved either. The education, salaries and working conditions of the staff are not adequate for the conduct of qualified public service.

## **EFFORTS FOR A SOLUTION**

The improvement of the judiciary is a widely discussed issue in Turkey as it is in many other countries. Government programmes and development plans offer a description of the present condition of the judiciary in Turkey and put forward the need for revising the organisational structure, for reconsidering law education, for filling vacancies in the positions of judges, public prosecutors and support personnel, and for modernising the infrastructure. In the meantime, there is an ongoing debate about the re-organisation of the Supreme Council of Judges and Public Prosecutors in order to achieve a fully independent judiciary and about the creation of intermediate appellate courts to deliver fair, rapid, effective and efficient results. There are further plans to modify the codes of civil and criminal procedure, and to introduce new arrangements that will not only speed up execution proceedings but also result in a better sharing of the workload of administrative adjudication. New codes are being drafted to separate the judicial and administrative police, to restructure the organisation and administration of penal institutions and detention facilities, to reinforce the judiciary with modern equipment and instruments and induce more widespread use of computers, to increase the respectability of and the confidence placed in the security forces, and to ensure transparency.

These initiatives, which have been included in the official documents in Turkey and have reached the Chairmanship of the Turkish Grand National Assembly, demonstrate that the problem is a very widely perceived one. To sum it up, what underlies the failure to improve the judicial system is the lack of determination

necessary to put these solution proposals into effect rather than unfamiliarity with the problems.

As adjudication is a public service, there should be principles and rules for the functioning of this service and of personnel and property that are the agents or means through which these rules and principles are applied. This report will firstly discuss the basic principles of adjudication which will be followed by the organisation of various offices of the judiciary, the measures and means of control for alleviating their workload and shortening the length of trials, and problems related to execution and bankruptcy will be addressed; and, finally, other material instruments constituting personnel and infrastructure will be dealt with.

## **BASIC PRINCIPLES OF ADJUDICATION**

### **Independence of Courts and Security of Tenure of Judges**

Among the indispensable requirements of the principle of the rule of law, the foremost is the independence of courts. In terms of the independence of courts and the security of tenure of judges, Turkey has to observe the principles set out in the European Convention on Human Rights (ECHR) and in its implementation, and create such institutional structure that will ensure fair trials. As a matter of fact, the European Commission on Human Rights has concluded that the State Security Courts cannot be classified as independent courts because their military members are appointed by and, for their career records, rely on, army officers, and also because there is a relationship of responsibility between the former and their commanders.

Subjective independence and impartiality, that is, freedom from personal choices and prejudices of judges as a result of their tenure, is as important for fair trial as for objective independence and impartiality of courts at the institutional level.

The most important problem, which the judiciary branch is faced with in terms of objective independence and impartiality, is the protection of its independence from the interference of the executive. The Turkish practice suffers from significant deficiencies in this regard. In fact, according to the second paragraph of article 138 of the Constitution, no branch of the government - including the executive- may give orders or instructions to judges, nor send circulars or make recommendations

or suggestions to them relating to the exercise of the judicial power. However, in practice, governments have been observed to interfere with the Judiciary in various ways.

The independence of the judiciary of the executive implies that the latter will have to comply with court decisions, and may not modify or delay the enforcement of them. This is, in fact, covered by an explicit constitutional provision. However, Turkish practice suffers from significant deficiencies in this regard as well.

Judges should bear in mind that they are independent not only of the government but also of various ideologies, socio-political forces and pressures that prevail in society. They shall, on the one hand, take into consideration the needs, beliefs and parameters of the society in which they live so as not to dissociate themselves from concrete and current facts, and, on the other hand, shall not forget that they do exercise the law, shall always act cautiously whatever the said needs, beliefs, parameters and pressures are, and shall uphold the independence of the judiciary.

Objective independence of judges need to be protected against both the "courtroom" and "out-of-courtroom" effects in the sense that the judge should be objective and should be able to remain impartial towards the parties involved. One of the most effective measures to achieve this is to involve several judges in the rendition of judgement so as to reach a "combined" judgement (the system of courts with a panel of judges and grades). Therefore, we should state that we are not in favour of the tendency observed in recent drafts towards the conversion of multi-judge courts into one-judge courts. On the contrary, there will be great benefits to be derived from the conversion of one-judge civil and criminal courts of first instance into multi-judge courts.

Subjective independence, also known as the security of tenure of judges, can only be achieved if the judges are provided with a genuine security. The institution which is most criticised in this respect is the Supreme Council of Judges and Prosecutors. This organ, which is authorised for career matters of judges, should be made independent of the legislative and executive, and even, of the judiciary. However, the existing constitutional situation does not allow this. The presence of the Minister of Justice and his Undersecretary in the Council is problematic in this respect. Also, the fact that the Council relies upon the Ministry of Justice for its

finances, office space and secretarial services is very harmful in practice. In this respect, a reorganisation on constitutional basis and a new constitutional body is needed.

In the first place, the independence of the public prosecutor, who is a party to adjudication, unlike the judge, should not be confused with the career security the latter should enjoy. Due to the specific nature of the profession of prosecution, it should be ensured that prosecutors are provided with professional guarantees.

To this end, the Supreme Council of Judges should be separated from the Supreme Council of Prosecutors, as was the case under the Constitution of 1961. The Supreme Council of Judges should have such a composition not to undermine the independence of judges. The Council should have an independent budget, office space, and secretariat. It should be ensured that the judge members of the Council retain their membership until the age of mandatory retirement and are not employed in any other business. Also, decisions of the Council should be made appealable.

In terms of security of tenure of judges, it would be useful to restore the geographical tenure system, even if in a more flexible version.

Judges should be free from financial difficulties and should have attained a certain level of welfare if they are to administer justice in tranquil faith. Being financially secure is one of the most important factors that make the judge independent of everyone - especially of the parties to the dispute. The profession of being a judge should cease to be one that demands sacrifices only. Therefore, salaries of judges should be sufficient to meet their needs in the best manner. In this connection, restrictive upper limit comparison should not be made between the salaries of judges and members of other professions.

## **Equality of Parties**

The principle of the equality of parties, which is known as "equality of arms" in the ECHR practice, suggests that parties to adjudication are granted equal opportunities and chances with regarding to their claims and defences (such as the presentation of evidence, the hearing of witnesses, the access to hearings and decisions) and that neither party should have an advantageous position over the other. This basic principle is one of the indispensable requirements for a fair trial - one that should always be implemented. In this connection, the institution of mutual legal aid should be seriously reconsidered and reorganised.

## **Public Trial**

The aim of the principle of public trial is to enable the judicial authorities to conduct adjudication and to reach judicial decisions independently, impartially and free from all doubts and worries, with a view of safeguarding the interests of the parties to adjudication and strengthening confidence in justice in general, and thereby securing public interest.

However, as a result of the rapid development of and tough competition in visual media, the principle of public trial has come to serve the purposes far beyond its original intent. The principle of public trial does not imply the publication or recording of hearings by means of instruments such as tape recorders, TV equipment, cameras or video recorders. As a matter of fact, under French law, the use of such instruments during hearings is prohibited; the judge is even authorised to prohibit the press from revealing the contents of hearings. In this connection, the principle of public trials should be kept within the limits of its original intent, without impairing the essence of the freedom to give and receive information.

## **Reasoned Court Judgements**

The individuals having the rights relating to the case may be put at a disadvantage by the failure to include satisfactorily detailed and reasoned opinions in court rulings. This may undermine, in the first place, the confidence placed in the judiciary, and may result in inconsistent judgements because a reasoned opinion will demonstrate the reason why a judgement is similar to, or deviates from, others in similar cases. Therefore, a reasoned judgement also constitutes a guarantee that the court does not render judgements arbitrarily. This is one of the requirements for efficiency and respectability, those conditions for high-quality adjudication, which have been emphasised from the outset.

## **Speed and Economy**

Speed should be a basic principle applicable to all areas of adjudication. In criminal proceedings in particular, punishments, if they are to be effective, should be applied in a short time after a crime is committed. The greatest benefit to be obtained from speed in criminal litigation is that it ensures the acquittal of an innocent defendant quickly by enabling the gathering of evidence promptly. In our



country, as elsewhere, judicial reform means, first of all, the achievement of speed in proceedings. Naturally, the easiest way to do this is to simplify criminal procedural rules so as to facilitate implementation and to expedite proceedings. However, this cannot be achieved by legislative steps alone. The judge, the prosecutor, the defence counsel, and the parties, who are all involved in the process of adjudication, have important responsibilities to fulfil. It should be possible to impose fines on those parties or their counsels who obstruct proceedings. These sorts of factors have an important role to play in swift, low-cost and high-quality adjudication.

The common purpose of the procedural rules of adjudication is to reconcile swiftness with the search for legal truth. The real aim is not to conduct a speedy adjudication process, but to conclude it swiftly in terms of the search for legal truth.

On the other hand, adjudication, as a public service, should be as economical as possible since it is the most indispensable and reliable remedy in law. However, just like speed, economy too should be interpreted in such a manner to avoid the obstruction of the search for legal truth. An effective way to achieve this could be to avoid extra-high costs of adjudication and to facilitate the provision of legal aid to those whose means are very limited.

## **ORGANISATION AND RULES**

### **Constitutional Litigation**

The hierarchy of rules within the legal system, and, in that connection, the principles of supremacy and binding force of the Constitution and the rule of law necessitate the review of constitutionality of laws.

This is the reason why the 20th century has been a century of Constitutional Courts while the 19th century was that of parliaments. On the eve of the 21st century, the humanity has come to understand that democracy is a liberal, pluralist and participatory rather than a majoritarian regime. Parallel to this, a law acquires its constitutional meaning only when the will of the reviewers, alongside the elected ones, is recognised. Through this work, the organs of constitutional review play a role that does contribute to, rather than preventing, the formation of general will.

The practice of constitutional review was introduced to Turkey under the Constitution of 1961, based on a central system following the example of the Continental model which is generally accepted in today's world. The Constitution of 1982 also follow such a preference.

In addition to its main function of reviewing the constitutionality of laws, which represents a very specialised area of adjudication, the Constitutional Court performs some other functions specifically accorded to it, including criminal litigation in impeachment cases brought before it in its capacity of Supreme Tribunal and deciding on the banning of political parties for unconstitutional activities. In order to serve these functions in the best way, all members of the Court must be jurists. As a matter of fact, members of the Constitutional Courts in most of the European countries are required to "possess legal qualifications expected from judges" and even to be "experienced jurists". Therefore, there are benefits to be derived from the appointment of its members by the President of the Republic, from among three candidates to be nominated for each vacancy by specialised legal institutions, such as the Court of Cassation, the Council of State, the Supreme Military Administrative Court, the Military Court of Cassation, the Bar Associations and Law Schools of Universities.

All adversities caused by delayed justice in Turkey are visible in constitutional adjudication as well. Considering that the workload of the Constitutional Court will dramatically increase when "constitutional complaint" is included in its area of competence, it will be inevitably necessary to change the present structure and adjudication procedure of the Court.

In order to increase the efficiency and effectiveness of constitutional litigation, one could envisage, as a first suggestion, a structure based on the two-chamber German model, which is known for its successful performance to date. Thus, the Constitutional Court should consist of two chambers, each with nine principal and three alternate members. The competence of each of the chambers, and of the joint chambers, should be set forth in the Constitution.

The Court should retain its competence under the Constitution of 1982, and should be donated by wider powers in its function of controlling the Parliament. In line with this, restrictions in the review of the constitutionality of amendments in the Constitution and on the review of forms of laws should be removed. The

monitoring bodies in the ECHR review the cases of promulgation of state of emergency or martial law and emergency decree-laws. The exclusion of these cases from judicial review in Turkey is not compatible with the rule of law, and, moreover, it creates significant handicap for Turkey on institutional basis. Therefore, the resolutions of the Parliament such as the promulgation of martial law and state of emergency and emergency decree-laws should be included in the scope of constitutional review.

Interim Article 15 of the Constitution of 1982, which still exists though it was designated as interim, is in no way compatible with the supremacy and binding force of the Constitution nor with the rule of law. The law of the 12 September 1980 period, which comprises of almost the entire body of legal arrangements constituting the basis of our legal system, including organic laws, is currently outside the scope of constitutional review. In order to eliminate this constitutional obstacle, it is necessary to repeal at least paragraph 3 of the Interim Article 15 of the 1982 Constitution.

For an effective constitutional Judiciary, the procedure of annulment actions should be rearranged so as to include preventive review, which will precede the taking effect of a law, in addition to a remedial review, which is conducted after a law takes effect.

It is the time to introduce the remedy of constitutional complaint to Turkey in addition to the conventional annulment and appeal remedies. This practice, which is most effectively applied in the Federal Republic of Germany and is receiving greater attention in other countries of Europe and the rest of the world, enables individuals to appeal, as a last resort, to the Constitutional Court of which the basic function is to safeguard the rights and freedoms, on the allegation that their fundamental rights and freedoms have been violated.

Turkey has experienced important legal problems because of the delays in the publication of the reasoned resolutions of the Constitutional Court in the Official Gazette. A rule should be introduced to the effect that the annulled rule(s) will cease to be effective on the date the decision of annulment is made public by the Court. However, the requirement of reasoned resolution should not be removed, and a mandatory time limit should be imposed on the Court.

## **Civil Litigation**

Some of the defects attributed to the Civil Procedure Code for the failure to provide high quality adjudication stem from the fact that courts fail to operate some of the provisions of the said Code because of their heavily-loaded case agenda. For example, after the completion of the submission of the petition and reply by the parties, the judge should read the file thoroughly and fix a hearing date accordingly, should get prepared for the case properly, and should determine the points on which the parties agree or disagree before the first hearing since the investigation will be confined to the points of dispute among the parties. Unfortunately, these requirements are not complied with in practice. Due to the heavy case load, judges have to schedule hearings more than they can handle for a working day. Hearings usually take a few minutes and the principle of uninterrupted trial is violated.

Some provisions of the Civil Procedure Codes are needed to be improved. For example, the contents of the conditions for action should be clarified, and, if the conditions for action are disputed, it should be ensured that the judge resolves this beforehand. The presence of a pending case should no more be regarded as a condition for initial objection and should be seen as a condition for action. Since adjudication takes a long time in civil courts of peace, it also should be ensured that simplified adjudication procedure be fully applied in these courts. On the other hand, the prolongation of proceedings can, due to decision of lack of competence, to some extent, be avoided by clarifying the provisions concerning competence of courts. Furthermore, an explicit provision should be included in the Code to allow suits with several demands and the changing, by way of amendment, of the amount in controversy or the adverse party should be allowed.

The conciliatory function of the judge should be strengthened and, for certain matters, it should be made mandatory to attempt a compromise before a suit is filed. A special adjudication procedure should be created for non-contentious cases.

The practice of referral of certain matters to court experts is increasingly creating problems. If many judges find it necessary to resort to court experts even in matters of law, despite the contrary provisions of the Civil Procedure Code, and if it is impossible to prevent this practice, this fact should no more be ignored. This

duty should be taken away from certain professionals who do not see anything wrong in behaving irresponsibly and be given to qualified people working in teams, and thus delays should be prevented.

In Turkish practice, the specialisation of judges of general courts is understood as specialisation in civil or criminal law. It is too difficult for a judge to be familiar with many branches of law. Therefore, the types of specialised courts should be increased. There should be at least one civil law and one criminal law judge in every district and at least courts of first instance should be provided with a panel of judges so that responsibility can be shared.

The Court of Appeals has a very heavy caseload. In Turkish practice, this highest court of final appeal also serves the function of an intermediate appellate court since the latter does not exist. Now, it is time to create intermediate courts of appeal.

The Court of Appeal has almost 300 members. Supreme courts in developed countries are not so over-staffed. There should be no more than 60 judges in the ideal organisation of the Court of Appeal.

Unfortunately, the practice of arbitration is not benefited sufficiently. In fact, this institution can play a significant role in alleviating the workload of general courts.

In suits involving a sum of money, statutory interest and charges should be arranged by taking market values into consideration, in such manner so as not to induce the plaintiff or the defendant to act in bad faith.

Chambers of commerce, chambers of small tradesmen, consumers' associations and the like should be collaborated in matters such as rent assessment cases or non-contentious judicial matters.

It is necessary to pay far more attention to enforcement courts and to increase the number of matters, which can be settled by way of execution without a writ.

### **Administrative Litigation**

Originally, the *raison d'être* of administrative adjudication was to protect and safeguard the public interest and the operation of public services. However, in the course of time, emphasis has shifted to the protection, in a balanced manner, of

rights and freedoms of individuals against the public power and the public interest. Turkey is experiencing some difficulties associated with this evolution. In some of their decisions, judges of administrative courts fail to observe the balance between the protection of the public interest and of the rights and freedoms.

One peculiar aspect of the administrative litigation is its control over the acts and actions of the authorities that exercise public power. For this reason it is not very easy for the individuals to put forward claims against the administration, which exercises the public power; and their access to remedies is problematic in itself even if they make such claims.

Some of the problems of administrative litigation stem not from the adjudication itself but from the wrongly conditioned psychology of executives who exercise public powers; from their lack of commitment to the rule of law; from the fact that the means of substantiation, evidence and documents are often in the possession of the administration; from the reluctance of potential plaintiffs, those who would like to claim their rights, to come into conflict with the administration; and from the absence of associations, trade unions and similar organisations that will protect those who would claim their rights in such situations.

An important part of the problem stems from the traditional passive stance of the judiciary before the administration. In order to refrain from obstructing the administration and its activities or to avoid a position in which they would seem to have substituted themselves for the administration, administrative judges do not issue judicial orders to the administration or to the executive branch and do not monitor and enforce the implementation of their decisions.

If the problems of the administrative court system are to be mitigated and its case load alleviated, it is necessary, in the first place, to develop those administrative procedures that will help settle disputes through legal methods besides litigation. The "Act of Administrative Procedure and Right to Obtain Information", of which a preliminary draft has already been prepared, may help correct certain deficiencies in this area. Furthermore, the protection of individuals by strong organisations such as professional associations or non-governmental organisations against administrative staff and authorities may be effective in reducing the administrative disputes.

Adjudication methods and procedures to expedite administrative litigation are also needed.

Especially in administrative acts, written notices sent to those concerned or related public notices should explicitly state the time limit for any appeals that may be filed against that act, the litigation authority which has competence and jurisdiction, the designation of the adverse party, the reasons for the act, and the reports or opinions on which the act is based. In the event of adjudication, this procedure will facilitate the progress of a case when the trial stage is reached.

Latest means of communication should be used more widely in the serving of notices.

Accelerated litigation procedure should be applied to the discovery of evidence, on-site inspections, and the implementation of interlocutory orders; if examination by court experts exceeds certain time limits, new court experts should be appointed at the initiative of courts; and, for the purpose of discovery of factual evidence, delegated judges in multi-judge courts should be empowered to give judicial orders and, if necessary, to apply sanctions to all those concerned, and not only to the parties.

The number and the type of proceedings heard by a single judge in the administrative adjudication should be increased while, in appellate examination, chambers with three judges should be authorised to render judgement as a general principle.

The creation of intermediate appellate courts in administrative litigation is a long-standing proposition in Turkey. In the present administrative adjudication model, the scope of the competence of existing Regional Administrative Courts can be expanded so that they can serve as intermediate appellate courts. However, at least, part of the decisions of the Regional Administrative Courts should be subject to appellate review by the Council of State.

In Turkey, the Supreme Courts of the general, administrative and military court systems are independent of one another, and, between them arise positive and negative conflicts of jurisdiction claims and even conflicts of judgement, which result in prolongation of cases. Therefore, the procedure of jurisdictional disputes should be simplified as regards to both time limits and the emergence of disputes.

The quality of adjudication depends on its efficiency and the latter on the existence of actual remedies for the rights claimed. The enforcement of court decisions becomes problematic especially in the administrative litigation because the administration, which exercises the public authority, is a party to such disputes. Therefore, the court decision should be explicit and should state the manner in which it will be enforced. The procedure, form and contents of the practice may be indicated by the court, where necessary, by a delegated member of the court or directly through the judgement. This can also be in the form of a court order. The court may not substitute itself for the administration but may well state what the latter is required to do.

For this purpose, the administrative judge shall, immediately after the rendition of judgement, issue a written notice describing the steps to be taken by the administrative authority that took the annulled action, or in other words, by the civil servant who made the related decision. Furthermore, the court may set a time limit for the enforcement of the decision in order to expedite it.

## **Criminal Litigation**

Criminal law has also been the subject of an intense debate due to the political and social changes, great transformations, and revolutionary industrial innovations that have taken place in Turkey and in the rest of the world since 1960s and under the impact of information and computers age, which affect every aspect of economic and social life.

Thus, crime has undergone qualitative and quantitative changes and the interpretation of types of crime set forth in criminal laws is changing. The number of cases which constitutes the subject of criminal litigation is increasing due to the acceleration of the process of urbanisation, increasing economic hardships which preoccupy people in the rural and urban areas, and drastic increase in crime rates.

On the other hand, it is observed that Turkish criminal legislation contains confused, complicated, unsystematic, and many inconsistent provisions and that some pieces of criminal legislation enacted during the period of Ottoman Empire are still in force.

An examination of the Turkish Criminal Code in its broad outlines reveals the existence of articles incompatible with the modern life and the general provisions



of criminal law. There are inconsistencies between the Law concerning the Execution of Sentences and the Law concerning the Organisation and Trial Procedure of Juvenile Courts, which together complement the general criminal code, and that many provisions of the Criminal Code fail to meet modern needs of the society.

It is now strongly argued in the doctrine and practice that the distinction between "felonies and misdemeanours", which is made both in the Turkish Criminal Code and special criminal laws, is not correct or appropriate; that definitions and prerequisites included in law texts are unsystematic; that the absence of active repentance in the criminal law system is a deficiency; that some of the punishments prescribed by laws are not proportionate; that doubts and practical difficulties arise when matters governed by special laws are also included in the Criminal Code; and that the sanctions for non-compliance with the "revolutionary laws" are very weak and these laws are needed to be revised.

In the light of these observations, the need to revise all sources of criminal law in Turkey seems to be a prerequisite for solving the problems and improving the quality of criminal litigation.

The modern criminal law is under the influence of the tendencies of decriminalisation and diversion from the penal system. Therefore, it is necessary to eliminate those offences, which can no more be called so. It must be known that there are limits to punishment. The conviction of a person should not trigger a ruthless process of stigmatisation.

Simple faults and behaviours involving breach of law, which, in organic and real terms, do not have "criminal" attributes, or do not contain scientific elements of a crime according to the sciences of law and criminology, should no longer be made subject to criminal prosecution and administrative measures, but administrative fines should be applied instead. For this purpose, all laws containing penal provisions should be reviewed. This elimination will help alleviate workload of the judiciary to a certain extent.

While the option of commutation into fines under Law No:647 concerning the Execution of Sentences has been exercised frequently, little use has been made of the other options and of special execution measures. However, our legal circles seek higher quality and have to find new types of punishment which would help

reintegrate offenders to society and establish and maintain civil peace.

We observe a relatively weak tendency in this area, namely that of administrative fines. However, it is observed that administrative fines can amount to very high figures, which are not proportionate to the nature of unlawful action or personal circumstances of the offender. This situation negatively affects Turkish criminal justice.

The practice of prepayment, which has become a means of rescue, is becoming widespread. However, a great void, which enlarges the scope of prepayment beyond intention, is created by the absence of other practices such as objection to indictment, refusal of indictment, option of not commencing action upon indictment, option of postponing a criminal action before judgement and postponement of criminal action at the stage of judgement. The manner in which suspension and recidivism are organised seems to be a factor that slows down the litigation.

The concepts of infamous crime and record of convictions, as applied in Turkey, are not compatible with the current conception of human rights. Keeping these records with almost no control and excessive reliance on them constitute one of the important legal grounds for human rights violations in Turkey.

The reform of criminal legislation is an issue that has long remained on the agenda of Turkey. The amendments introduced in the Criminal Procedure Code in 1992 were a milestone on the path towards a modern criminal litigation respectful of human rights. The guarantees which safeguard the rights of the defendant, such as the rearrangement of the norms of arrest and detention, the time limit imposed on detention, the presence of counsel in making interrogations and taking statements, the inadmissibility of unlawful evidence in litigation and the prohibition of reliance upon such evidence in judgements, have the nature of a reform in the area of criminal litigation. This reform should be completed by making the new norms also applicable to trials held before the State Security Courts and by restricting the scope of exceptions and by introducing security of tenure of judges.

Principles governing the work of prosecutors should be rearranged; they should cease to be a mechanism commencing action automatically and it should be ensured that they could conduct preparatory investigations more freely.

In the organisation of the police, and of the security institutions in general, new arrangements should be introduced to strengthen the function of the police in

preventing crime and to enable them to have a more effective and modern role in the struggle against crime and offenders.

It has become obvious that the present security institution in Turkey lacks an effective position against crime. Therefore, a judicial police organisation, directly under public prosecutors, should be set up as soon as possible. Within such a system, judicial police provided with specialised staff and equipped with modern technical instruments will greatly contribute to criminal justice.

The present three-level general criminal court system (criminal courts, first instance and central criminal courts) should be maintained, but the competence of courts should be redefined so as to alleviate the case load of central criminal courts and to strike a balance between the criminal courts of peace and first instance. Such a rearrangement will help reduce the number of cases to be heard in legal proceedings, including especially the case load of the Court of Appeals, and improve the quality of adjudication.

In criminal litigation, special judicial institutions such as those for trying juvenile offenders or a supreme tribunal handling impeachment cases are acceptable. However, the State Security Courts (SSCs) should be abolished. Because there is no reason why the central criminal courts cannot serve the function of the State Security Courts. The current system should be maintained as regards the structure of remedies. However, it should be possible to hold examinations with oral hearings before the Joint Criminal Chambers of the Court of Appeals. Furthermore, the Ministry of Justice should not have the power to direct the public prosecutor to appeal to the Court of Cassation for reversal of judgements.

There should be an intermediate investigation between the preliminary investigation and the final investigation in criminal litigation. The main purpose of this investigation should be to inform defendants of the charges before they are held for trial and to strengthen the defence through the mediation of a judge. This system also offers the advantage of remedying deficiencies of the preliminary investigation.

The position of defence in the adjudication process should be strengthened. In this regard, the defence counsel's right to collect evidence should be recognised and the possibility of introducing cross-examination should be considered.

Certain new concepts applied in the Anglo-Saxon countries can be incorporated into our judicial system. In this connection, studies should be conducted on "summary trial" procedures, in circumstances where evidence is obvious and is accepted by defendants and their counsels, which involve the waiver of action and the reduction of punishment, that lead to swift settlements.

The Law on the Trial of Public Officers, which is very much criticised in Turkey and which is like a two-edged sword, should be repealed together with the laws based on this system. In crimes in which public officers are implicated, preparatory investigation should be conducted by the public prosecutor and when a criminal action is initiated, investigations should be carried out by general courts. It is not possible to ensure criminal justice through a preliminary trial, which is conducted by the administrative authorities to which the civil servant is subject.

On the other hand, as the issue of trying, or as the failure to try, political figures is very much annoying the public conscience, it is absolutely necessary to launch a reform towards "clean society". In this connection, the practices of legislative immunity and parliamentary investigation, which are part of the trial procedure of political figures (MPs and ministers) should be rearranged in such a manner to enable them to retain their functions in accordance with the original intent, but without obstructing adjudication. Such an arrangement, similar to that of the French or Italian Constitution, is not difficult to introduce. However, this requires a constitutional amendment.

The issue of execution of sentences is also directly associated with the quality of the judicial system. Under the Republic, Turkey has made many rearrangements in its criminal code and its legislation covering the execution of sentences in connection with the situation of prisons. Yet, the present picture is far from being satisfactory. Prisons are insufficient in terms of their number and are incompatible with the contemporary understanding of human rights; they are in an unacceptable situation, both in terms of law and the understanding of respect for human beings.

Therefore, one of the urgent tasks to be addressed by the government in Turkey is to reconsider the penal institutions, to identify the steps that can be taken towards a system of criminal justice which is compatible with contemporary practices and conceptions, and to put this into practice.

Parole has now become a practice eliminating almost the whole effectiveness

of punishment under Turkish law. Therefore, this practice should be reviewed and necessary personnel and equipment to reinforce this practice should be provided.

## **QUALITY OF THE ELEMENTS OF THE JUDICIARY**

### **Staff**

#### **Judges and Prosecutors**

Without any doubt, a well-trained staff is the primary requirement of a high-quality adjudication. This, in the first place, is associated with pre-career and in-career training. As judges are recruited among law school graduates, law education needs to be carefully addressed first. Only a well trained, knowledgeable and highly skilled judge can make fair judgements. The dilemmas between the thought and action, reactions to political and ideological currents that affect our times and impartiality, and respect for authorities and an independent conscience are not irreconcilable for a well-trained and morally and intellectually competent judge.

Judges should be capable of distinguishing the main lines shaping the society and our times from daily and temporary uneasiness. Equipped with the inaccessible powers of having the last say and pointing to legal truth in a "state of law", they should have the talent, consciousness and maturity that will enable them to determine the limits of their own duty.

If the judges are to possess all of these qualities, this can be made possible primarily through education and by taking those measures that will attract young lawyers to the career. For this purpose, the length of study at law schools should be increased and programmes should be reinforced with courses in philosophy, psychology, ethics, logic, mathematics, sociology, economics and history, art courses such as literature, essay writing, drama and cinema, and applied courses to make students familiar with working in electronic media. This need is obvious as evidenced by the current practice of admitting students to law schools on the basis of their equally weighted average scores in verbal and mathematical tests and by the emphasis placed by certain law schools in fields such as philosophy, sociology, literature and history.

It is necessary to include the above-mentioned fields of science and art, which remain outside the traditional law courses, in the examinations of admission to the career of judges, and the candidates should be expected to have attained such cultural refinement level so as to enable them to write essays in certain subjects. The- thus-heightened level of quality will contribute to the quality of the service. The same education and conditions for admission to the career should apply to prosecutors as well.

The period of apprenticeship for judges and prosecutors should be one in which both practical and theoretical knowledge are dealt with, not only in the apprenticeship centre of judges but also in a large city offering an adequate environment of university, culture and arts.

Since the judge faces new problems almost every day, in-service training should be dealt with sufficient attention, and there should be frequent panel discussions, seminars and symposia, participation in which should be mandatory for judges. It should also be ensured that judges follow the scholarly works and case law regularly.

The first measure that will increase the appeal of the career is to raise the salaries of judges and prosecutors considerably and to convince people that this will be a permanent raise. The appeal of the career should be increased not in comparison to other jobs in the civil service but in comparison to the other areas in which the most successful young graduates of law schools can elect to practice. It can also be envisaged to increase the income of judges and prosecutors by paying premiums on the basis of the number of cases, which will be reviewed annually.

The provision of better conditions to judges in terms of relocation, safer living conditions and availability of accommodation is also important for the appeal of the career.

## **Support Personnel**

The human element of the judicial service does not consist of judges (or prosecutors) alone. Most of the needs of the service, such as registration, record keeping, archives work, secretarial services, printing and publication duties and arrangement of meetings are provided by support personnel who do not take part

in judicial decisions. Judges would not be able to perform their duties properly if these members of personnel are not well trained or are not sufficient in numbers.

The training of support personnel has been solved to some extent by the opening of Vocational Justice Colleges. However, it cannot yet be claimed that this is a satisfactory solution. The provision of vocational training to those who provide auxiliary judicial services and the increase of their prestige in terms of material and moral aspects bear importance for the quality of service.

Also, it would be useful to strengthen the defence, the third element of the judicial system and to rearrange apprenticeship period for lawyers upon a very serious reconsideration in order to raise the quality and to establish apprenticeship academies in certain provinces, where experienced lawyers will be in charge of training.

### **Physical Infrastructure of the Judicial System**

In the cities of civilised countries, "Le Palais de Justice" (the courthouse) is the most magnificent building which is aptly called so. It is one of the symbols of the power of the state. This is why these buildings are called "Palaces of Justice". In our country, court buildings are inadequate save a few exceptions. This is not compatible with the seriousness attributed to justice.

In the court buildings, while carrying out their duties, judges benefit from very limited amenities. The bureaux are almost ancient and in a mess. They need to be modernised by being equipped with adequate technical and electronic instruments.

The Law on the Service of Notices should be revised, simplified and rendered more intelligible, and a special organisation should be set up for the service of judicial notices.

Security in criminal cases has become a problem with ever growing dimensions. Tensions between the litigating parties in the corridors or at the entrance of the court buildings sometimes result in another type of extra-judicial execution, that of execution on the very site of justice. The incidents that have taken place in the State Security Courts have acquired such dimensions so as to intimidate judges, prosecutors, defence counsels and defendants.

The principle of public trials - an essential principle of adjudication - should

not be interpreted in such a manner to result in the failure to provide adequate security. Courthouses should be provided with a new physical structure in which security can be assured thoroughly. In very critical cases, the possibility of rescue or of vengeance operations during the transportation of defendants and trying them in the places where they are kept should be considered.

Finally, the society needs to be informed and thereby educated regarding the function of adjudication. The public at large should be educated to such extent it could have adequate knowledge about the function and operation of the judiciary, and what it is capable and incapable of. To lay the foundation of this education, it would be appropriate to include in the elementary and secondary school programmes subjects of law, the rule of law, limitations on the exercise of powers, self-questioning and self-limitation and recognition of accountability, which should be studied in practical cases and with examples.