TÜSİAD

TURKISH INDUSTRIALISTS' AND BUSINESSMEN'S ASSOCIATION

PERSPECTIVES ON DEMOCRATISATION IN TURKEY

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PREFACE

TÜSİAD (Turkish Industrialists' and Businessmen's Association), which was founded in 1971, according to rules laid down by the Constitution and in the Associations Act, is a non-governmental organisation working for the public interest. Committed to the universal principles 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 principles 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 an 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 for a permanent increase in productivity and quality, thus enhancing competitiveness.

TÜSİAD declares its objectives, activities, and views to the public and supports them with scientific research and reports.

This study, "Perspectives on Democratisation in Turkey" commissioned by the Parliamentary Commission of TÜSİAD, has been written by Prof.Dr. Bülent Tanör, member of the Law Faculty at İstanbul University. The coordination of the study has been carried out by the chairperson of the commission, Can Paker.

January 20, 1997

FOREWORD

A call for democracy

TÜSİAD was founded in 1971, to play an active role in the establishment and development of a sounder economic and social infrastructure, to help Turkey take its place amongst the developed Western countries. TÜSİAD fulfilled this mission mainly in the economic area until the second half of the 1980s. As a non-governmental organisation dedicated to serving the public interest, TÜSİAD played a leading role in Turkey's adoption of the free market economy.

The second half of the 1980s showed that the establishment of a free market economy in all its dimensions was dependent on the legal and institutional structure of the country. In the same period political instability emerged as one of the main obstacles to economic and social development.

Moreover, it was widely agreed that a stable free market economy was only possible within a participatory, pluralistic democratic system. Thus, attention was focused on the factors slowing down the economic and social development of the country and those factors which were rooted in Turkish history, in its institutions and political culture.

Within this framework, TÜSİAD, while formulating necessary economic strategies for the Turkey of the next millenium, also tried strenuously to point out to the deficiencies of the existing political structure. Three studies, firstly, "Our Laws and Rights", secondly, a document about the Constitution prepared by 9 professors in 1991-92, submitted to the presidency of the Assembly and published by the latter, and thirdly, a document on the restructuring of public administration and the electoral system (1993-96) were the products of these efforts.

Is TÜSİAD alone in believing that the only possible solution for Turkey's economic and social problems and the opportunity for accelerated development lie only in an economically and socially democratic society?

No. The fact that Turkey had to sign the Customs Union Agreemen in 1995 showed that integration with Europe is, for Turkey, a state policy. During this period the support the public gave to such efforts showed that a large proportion of the society shared the same attitude. It is generally accepted now that to become

fully-integrated in Europe, a broader application of democracy in economics and politics is required, and this is a pre-condition. Furthermore, whenever any problem is discussed, the two words which appear most frequently are consensus and dialogue. The fact that they do occur so often suggests that there is a real longing for a democratic society where the meaning of these words may become realised.

During such a period it was inevitable that some political and social resistance to the developments that paved the way to a more open, participatory, and more transparent system should have appeared. As a matter of fact, the economic and social conjunctures strengthened these points of resistance. Consequently, democracy could not broaden its sphere of influence; on the contrary, it started to undergo a retrogression.

What was clearly understood was that institutionalisation of economic and social democracy was not an inevitable process that the country would go through sooner or later, but could only be the outcome of the continuous efforts of the people who believed in democracy as the only solution.

In this context, TÜSİAD, while trying to find ways of strengthening and stabilizing the economy, also emphasised the need to eliminate the deficiencies of Turkish democracy so that political instability was no longer an obstacle in the path of economic development. Whereas this subject was considered to be of primary importance with regard to TÜSİAD's mission, it became in 1996 a top priority to be studied in depth. The events that coincided with the publication of this report, convinced us once again that this study was a timely response to Turkey's needs.

While the last corrections were being made, we read in the papers that the Susurluk investigation had been closed and 35 people had been convicted; that a young woman's religious convictions were exploited and she was later abused by the leader of her religious sect. It was a period in which, a year after Özdemir Sabancı's assasination, one of the perpetrators of this barbaric act was captured and pleaded quilty, it was the first anniversary of journalist Metin Göktepe's death in police custody, and it was the moment when the graverobbers who had stolen the corpse of Turkey's beloved and distinguished Vehbi Koç were arrested. All these events form an embarrassing picture of democracy, human rights, clean politics/clean society and humanity in Turkey. A profound lack of confidence in the system is starting to permeate all sectors of society. While internal tension increases in the country, some circles seek to consolidate national unity by playing on the theme of "external enemies".

This report "Perspectives on Democratisation in Turkey", written by Prof.Dr.Bülent Tanör, member of the Law Faculty of Istanbul University, under the auspices of TÜSİAD's Parliamentary Commission and under the coordination of Can Paker , chairperson of the commission, has been conceived in such a context.

Do we really need such a report?

Yes. Because this report takes Western democracies as a model. Since the people who have prepared this report have no desire to acquire political power and have no short-term political expectations, this study has been accomplished by maintaining an impartiality towards all the actors in the political arena. The legal system as a whole is examined, and no significant question has been excluded for conjunctural or political reasons. This report is comprehensive and consistent; it is constructive rather than destructive, and, while criticizing the system, it makes positive proposals. The report calls for very important changes to improve democracy in Turkey, but these changes should be made as a gradual transition within the system.

Is this the right timing for the publication of such a report?

TÜSİAD aims to define the democratic infrastructure necessary for Turkey both for attaining the level of developed Western countries and for achieving economic and political stability. Since it is not a political institution involved in the race for power, TÜSİAD's starting premises are not determined by political convenience. Democracy for TÜSİAD as well as for Turkey is not a matter of conjuncture, but rather one of principle. Moreover, in a period when people are regularly confronted with new examples of corruption, they lose confidence, either partially or completely, in the institutions of the system. Consequently, a strong desire for self-criticism and a search for solutions develop.

It is not sufficient to deal with the Susurluk scandal by putting the guilty parties in prison for a few years. What is expected, rather, is that the deficiencies in the system should be eliminated. The solution is a broader-based democracy, and the Turkish people is ready to listen, discuss and work towards this end.

Are all these TÜSİAD's duties?

Our concern with this subject necessarily follows from TÜSİAD's purpose. In our statutes this mission is defined thus: "TÜSİAD, which is committed to the universal principles of democracy and human rights, together with the freedoms of enterprise, belief and opinion, tries to foster the development of a social structure which conforms to Atatürk's principles and reforms, and strives to fortify the concepts of a democratic civil society and a secular state of law in Turkey". The association, believing that industrialists and businessmen represent the leaders and entrepreneurs of Turkish society, monitors the steps taken in this direction. Not only TÜSİAD but all Turkish citizens and all institutions representing the civil society are obliged to strive towards the improvement and internalization of democracy in this country. Our future depends on it.

Turkey's future does not lie in isolating itself from the world; on the contrary, it should keep up with global developments. The world is removing one by one all the barriers against democracy. Henceforward, economic and political relations cannot evolve independently of democracy and human rights. It is not by increased co-operation with countries less-developed than itself, but by increased co-operation with developed countries that Turkey can accelerate its economic growth, thereby gaining the competitive impetus required for the 21st century. We must organise our strategies not according to where we find ourselves now, but according to the target we wish to reach. We need to take the developed Western democracies as our model. We should see that, by adopting a more broadly based democracy in Turkey, political and economic stability will be strengthened. Rather than becoming desparate and resorting to superficial remedies, if we aimed at fundamental solutions, confidence in state and democracy would grow. In addition, this would improve Turkey's image abroad.

A broader-based democracy will certainly not result from this study, nor will it be realised by TÜSİAD alone. This can only be achieved by those who adopt the perspectives put forward in this document and who are willing to come together to reach an agreement on the details. Thus it would be possible only by the concerted efforts of groups such as: non-governmental organisations, trade unions, professional bodies, industrialists and businessmen's associations, whose struggle would be reflected in the Parliament by political parties.

After all, if we decide that "now is not the right time, or it is not our job" then we, as the true sovereigns of this land, who authorize politicians to represent us in the Parliament, we as members of civil society organisations should ask ourselves this question: If not us - who?, If not now - when?

TÜSİAD Board of Directors
20 January 1997

BÜLENT TANÖR

Born in 1940 in Beylerbeyi, Istanbul, Bülent Tanör completed his secondary education at the Galatasaray Lycée (1951-1959) and his higher education at the Faculty of Law, the University of Istanbul (1959-1963). In 1964, he was appointed research assistant in the Department of Constitutional Law of the same Faculty. In 1969, he obtained a PhD in Law with his thesis "The Freedom of Political Expression and the Turkish Constitution of 1961". In 1978, he became associate professor with his thesis "Social Rights in Constitutional Law".

From 1983 to 1986, as a "fellow professor" at the Faculties of Law of Paris (Nanterre), Dijon, and Geneva, he gave lectures at undergraduate and postgraduate level on "Democracy in the Third World". In 1992, he was promoted to full professorship at the University of Istanbul.

At present, Professor Tanör teaches in the Department of Constitutional Law, Faculty of Law, University of Istanbul. He also lectures on the "Turkish Revolution."

His works include: *Two Constitutions (1961 and 1982); Local Congressional Powers in Turkey (1918 to 1920); Turkey's Human Rights Issue; Ten Conferences on the War of Liberation (1918 to 1922); Ten Conferences on the Foundation of Turkey (1922 and after), Ottoman-Turkish Constitutional Developments.* (All in Turkish.)

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The World

Our old planet is witnessing a new democratisation drive which started in the 1970s when Portugal, Spain and Greece made a transition or return to democracy. The 1980s were the years when many military - bureaucratic regimes, particularly in countries of Latin America, collapsed. After 1990, following the break-up of the socialist authoritarian systems, new democratic regimes began to enter the world stage in Europe and Asia.

Parallel to these transformations, a perceptible change is taking place in the content of the concepts of development/underdevelopment. In the world of the 1950s, these were categories conceived particularly and primarily in socio-economic terms. Today, however, certain political values have begun to come to the forefront in addition to the social and economic criteria of development /underdevelopment. "Development" is now a concept that also involves the political model. From this point of view, whether the regime of a country is democratic or not is closely related also to the level of development of that country.

Let us look at certain European countries which have recently undergone system changes. It is obvious that these countries such as the Baltic countries, Poland, Hungary, the Czech Republic, Slovakia, Slovenia, Croatia, etc. are faced with serious economic problems. However, although they do not have any considerable past experience of democracy, they have made significant achievements on the road to democracy over the last five to six years.

These countries which are not much better than Turkey in terms of economic conditions are now ahead of Turkey on the path of pluralistic-liberal democracy based on human rights and on the supremacy of law. The same observation applies even for certain countries of Latin America which have in the past constantly alternated between democracy and military regimes. Most of these countries, too, have now speeded up their march towards political modernisation or democratisation.

This is clearly born out by comparative analyses made on a global scale. In some of these studies which take human rights and freedoms as their starting point, Turkey's performance in these areas seems to be behind even that of certain Latin American and even Asian and African countries (see for example the report "Freedom in the World" by Freedom House). The quantitative data and the

methods used in those studies may be defective in certain aspects. However, it should be admitted that these defects are not such as to invalidate the essence of the overall picture above. Things that happen in Turkey and people who live through them are evidence enough and witnesses of this fact.

Turkey

Today, there is indeed a problem of democratisation or, rather, lack of democratisation in Turkey. In the area of political-legal regime, this problem has deep roots in history. The interludes of military rule in the recent past imposed practices that strengthened the state excessively against the individual, confined human rights to narrow frameworks, impaired the supremacy of law and the independence of the judiciary, and even weakened laicism.

However, recognition and constant reiteration of these facts is not and has not been sufficient to overcome the problems. The main point to note is that elected governments do not seem to make a serious move forward to change this structure and to achieve democratisation. The major obstacle in the way of democratisation is not the legacy of history but a lack of political will to overcome it.

It will be argued that separatist terrorism is what prevents democratisation. However, this view is riddled with two (meaning "hostile foreign sources") basic weaknesses. The first is the insistence on "external centres" to explain terrorism and the refusal to see that lack of democracy and freedom has a part in it. The second is the fact that, in spite of authoritarian practices, the state of emergency, and even certain practices that do not conform to the idea of a state governed by the rule of law, terrorism still continues.

In recent years, the triangle of politics-mafia-bureaucracy, which feeds also on the existence of terrorism, has been threatening to push the existing democracy even behind the positions it has been able to reach. The fact that transparency has all but disappeared on the level of state and administration and the fact that channels of political and judicial control have become clogged up, are both cause and consequence of this corruption.

Dissolution on the level of the state finds echoes on the level of civil society and people, and this is what is really dangerous. Political parties are unable to produce alternatives. The biggest ones can hardly obtain one fifth of the votes in general elections. Dispersion and fragmentation in political life is the main trend. Parties of the centre are losing strength while those of the extreme right are on the rise.

According to some opinion polls, the army is the institution that is trusted most by the people. Parliament, parties and politicians have the lowest ranking. Lack of trust in civilian political institutions is becoming more widespread.

These developments should be sufficient to think that "the alarm bells are ringing for democracy in a country".

What is to be done?

Of the problems that the western countries solved gradually within the span of at least three centuries, the main ones may be listed as follows: transition from feudal fragmentation to nation-building and to the nation-state, from medieval economies to primitive capital accumulation and capitalism, from centralist absolute monarchies to constitutional monarchies or republics, from theocratic or semi-theocratic systems to laic or secular systems, from democracy based on limited suffrage to democracy based on universal suffrage, from classical-liberal democracy to social democracy and to the system of social rights, from the idea of classical justice to the idea of social justice, from rural to urban life, etc.

Turkey has faced all of the above-mentioned problems simultaneously in the last 70 years. The juxtaposed, multi-layered character of the basic problems is one of the historical causes that have complicated democratisation in Turkey.

Located as it is in a sensitive part of the Middle East and the Islamic world, Turkey is faced with these two burning problems: making an effort to reconcile laicism and Islam with one another, on one hand, and the nation-state and the different ethnic identities with one another, on the other hand.

The foregoing is an overall description and is presented not as a pretext for problems or failures but for the purpose of providing some understanding of their sources.

Then, what should be done? What can be done? It would be more appropriate to seek the answer to these questions in past and present conditions.

It would be rather pleasant to be able to argue that the past and present conditions dictate democracy to Turkey, that Turkey does not have an alternative to democracy. Unfortunately, however, we are far from having such a right to be complacent. Turkey's history and especially recent history are not unfamiliar with interruptions of democracy. It should be noted that the corruption of the state and political institutions today feeds or may feed searches for an authoritarian regime. There is the possibility that extremist parties and alliances may push the country in even more anti-democratic directions compared with the present situation.

However, the picture may be interpreted in a different way as well. The last 150-year history of the country is also the history of modernisation in law and in state administration. The Kemalist Revolution in particular has made significant contributions to nation-building, secularisation and democratisation. This is sufficiently borne out by a comparison of Turkey with other countries of the political and cultural geography to which she belongs. In addition, today's Turkey displays a picture that is differentiated, diversified and opened up to the world in economic, social, cultural, ideological and political terms. An authoritarian alternative with a military or civilian appearance would not have the capability of running such a complex country. The international state of affairs, too, is favourable; the winds in the world are blowing in the direction of democracy. Turkey's failure to carry out the programme of democratisation would mean her break with and exclusion from major centres of the international community.

In brief, it may be argued on these grounds that, objectively, Turkey's chances of democratisation are strong.

Having made this determination, a subjective factor comes in: do the pro-democracy forces have the sufficient will for this? It seems that democracy will develop not because it is an inevitable process but to the extent that it is fought for.

This is the first meaning of the word *"perspectives"* that occurs in the main heading of the present Report. In other words, will Turkey choose to be a modern world state or a *"parochial"* state? The former of these two choices corresponds in this Report to *"democratisation"*.

What is democratisation?

Democracy entered the stage of history first as a political concept and institution. What was to be the form of organisation of the state? Democratic theory and practice has answered that question briefly as follows: Political power must conform to the will of citizens. This means either the rule of the people by the people itself (i.e. direct democracy) or its consent to be ruled by those whom it elects (i.e. representative democracy). The latter is the main model of democracy in our age and manifests itself in free elections. Consequently, to draw an inference from what has been said above, one may say: Democracy is a historical product concerned with the source of power (the sovereignty of the people or nation) rather than with the problem of how to limit power. This much is also called very briefly *"political democracy"*.

However, this much of democracy is not sufficient to describe the rich content that the concept and the institution, has come to acquire today. Although "election" is one of the foundations of democracy, the latter cannot be reduced to the ballot box. For, if democracy is the sovereignty of the people or nation, this may sometimes be oppressing and anti-democractic. "Majoritarian democracies" that are based on popular elections but that ignore minority rights and block the ways for the minority to become the majority have not failed to exist.

For these reasons, it became necessary to complement the concept of political democracy or the political aspect of democracy (elected governments) with new concepts and adjectives. This necessity is concerned now with the limitation of power, not with its source. The phrases "liberal democracy" or "pluralistic democracy" are an expression of these searches for and gains of limited power. A government, even if elected by the people, can be regarded as a democratic one only if it respects a pluralistic and liberal social structure. To express it in legal language, the relevant concept here is the whole body of *human rights.* Therefore, democracy is not simply a regime where the source of political power is the people's will, but also a system where this power is limited by human rights.

Another element introduced by democratic theory and practice with regard to the limitation of the state and of political power is the concept of *State of Law/Rule of Law,* which means that the state and political power will deserve to be called "democratic" only if it accepts the supremacy of law, which in turn involves the obligation to abide by the national constitution as well as the general and universal principles of law. Needless to say, this last condition assumes that the national constitution itself conforms to the universal principles of law and democracy.

So, democracy or democratisation (or lack of it) is a wide-ranging and complex process which has *political dimensions* and which necessarily involves such issues as *human rights* and *state governed by the rule of law.*

Are democracy and democratisation an ideal? If we mean by the word "ideal" the political systems developed by mankind which is "the closest to the best" or "the least bad", we must answer the above question in the affirmative. This answer applies for Turkey as well.

If, however, what is meant or understood by "ideal" is "a future goal" or "a nice thing whose achievement can be postponed", then we must answer the question in

the negative. A pessimistic and superficial approach tends to view democracy as a luxury or prize that will be enjoyed after all the complicated and piled-up problems are solved. However, democracy is not an "ideal" in that sense but a practical key to solutions, and solutions agreed upon by all can be produced only in democracy. Such solutions should have a higher chance of success than solutions imposed from above. The political history of the world and Turkey is quite rich in examples that prove it.

If this analysis is correct, we may state that democracy and democratisation are not only lofty human values but also a more efficient investment and method in the long term. Democracy is the most reliable support of economic and political stability and development.

Scope and Outline

Democratisation or lack of it in a country has various political, legal, social, cultural, economic and other dimensions and reasons. This is the case in Turkey, too.

This Report focuses on those which are of a political and, in particular, legal character. However, we do not claim to cover all the problems observed in these areas in our country.

The present work of research makes an attempt at identifying the main legal obstacles to democratisation in Turkey and at proposing solutions.

Therefore, the basic concern is a survey of legislation. The purpose is to help weed out the fundamental legal rules that obstruct democratisation.

In the survey, the problems of democratisation and the proposed solutions have been collected around three main axes, each of which corresponds to a Part and follows the "concept of democracy" given above.

The first axis may be said to be the *political dimensions* of democratisation, which means determination of the national will and the structuring of political power. Issues concerning elections, parties and power are dealt with here *(Part One)*.

The second axis is the issue of *human rights,* one of the indispensable elements of democracy and democratisation. A selective approach has been taken to this issue also, covering not all the components of human rights but only those which most closely and directly concern political democracy *(Part Two)*.

The third axis is formed by the *State of Law,* and the *judicial review* that it requires. It is obvious that the efficient functioning of a democracy depends to a great extent on the strength of judicial review and sanctions *(Part Three)*.

As a matter of fact, the triad of *political dimensions, human rights and State of Law* also conforms to the formulation employed in the Turkish Constitutions of 1961 and 1982: a democratic state based on human rights and governed by the rule of law (Art. 2).

The principle of a *"laic state"* that occurs in those formulations, closely interconnected as it is with each of the main parts of the Report, has been treated separately wherever it is relevant.

Concerning the issues treated in each Part and in their sub-divisions, essentially the following order of sequence has been followed:

a) Description of the relevant legislation;

b) A critique of it; and

c) Proposals for amendments.

The description of legislation covers mainly those pieces of legislation which are considered harmful from the point of democracy. Nevertheless, certain aspects which we believe should be retained but which currently are a subject of debate have also been covered even if partly (such as the system of government).

In criticisms and proposals, an effort has been made at thinking as much independently of the current conditions of the country as possible, at concentrating on *principles* rather than on current conditions.

PART I

POLITICAL DIMENSIONS

POLITICAL DIMENSIONS

What is meant by the political dimensions of democratisation is the determination of the national will and the structuring of political power. Here, issues concerning political parties, which play a very important role in the functioning of democracy, will be discussed first (I). This is followed by "elections" (II) which means the manifestation of the national will, by the Grand National Assembly of Turkey (III), by the System of Government (IV), by the Issue of Civilianisation (V) and, finally, by Public Administration (VI).

I) POLITICAL PARTIES

Political parties have a central role in the functioning of representative democracy. Today, democracy is inconceivable without political parties. The Constitutions of 1961 and 1982 emphasize that parties are among the "indispensable" elements of democracy. The provisions concerning political parties appear in the Constitution and, particularly, in the Law on Political Parties (LPP) no. 2820 of 22 April 1983. The following survey and evaluation of legislation on this issue is based on the articles of the LPP.

1) Scope of the Law (LPP, Art. 2)

By the law no. 4121 of 23 July 1995, Article 69 of the Constitution was amended and the following provision was inserted in the third paragraph: "The auditing... of the conformity to law of the acquisition of assets by political parties, ... the methods of such auditing, and the sanctions to be applied in the event of unconformity, shall be regulated by law." This addition provides a further guarantee for political parties and also means a command to the legislature to rearrange this area by law.

Article 2 of the LPP, however, has the phrase "revenues and expenditures" in defining the scope of the law, but makes no mention of "acquisition of assets". This is normal because, at the time of making the law, the text of the Constitution did not include such a phrase. Now, "acquisition of assets" has been included in the Constitution, and it has become necessary to remove this gap in the law so as to make it conform to the Constitution. Therefore, the law should include also the concept of "acquisition of assets" which is a separate legal category from the concept of "revenues and expenditures" and which pro-

vides political parties with an additional guarantee. As a matter of fact, an amendment to that effect was proposed by Deniz Baykal and twenty-nine other MPs.

Proposal:

Therefore, the relevant provision would read as follows:

"Article 2 - This Law contains provisions for the formation, organization, activities, functions, powers and responsibilities of, *the acquisition of assets by,* and the auditing, cessation of activities and dissolution of political parties."

2) Definition of a political party (LPP, Art. 3)

The law currently defines a political party as follows:

"Article 3 - Political parties are organisations whose goal for the nation is to reach the level of contemporary civilisation within a democratic order of state and society by ensuring the formation of the national will..."

Of the two criteria included in the above wording, one is too narrow and the other completely unnecessary. The expression "ensuring the formation of the national will" is correct and appropriate but not sufficient. The former Law on Political Parties attributed a more effective role to political parties:

"Article 1/1: ... to direct, control and influence the social and State order and public affairs..."

The Constitutional Commission of the Consultative Assembly which was charged with drafting the 1982 Constitution adopted this wording in the former law. However, it was met with the reaction and disapproval of the General Assembly and did not find its way into the text of the law. In fact, from the viewpoint of the constitutional provision (Art. 68/2) which regards political parties among the indispensable elements of a democratic political system, it would have been more appropriate to retain the wording used in the former law.

Proposal:

The following words should be added to Article 3 of the LPP: "to direct, control and influence the social and State order and public affairs".

Article 3 of the LPP contains a totally unnecessary provision: ".... goal for the nation is to reach the level of contemporary civilisation..."

First of all, this is not a property or condition of being a political party. In no other country of the world is there such a provision, and its translation and reading in a foreign language could only cause amazement.

Moreover, it is not a legal concept or category; it does not have any positive content from the point of law. The said expression does not mean anything other than an ideological-political choice or wish. It is not appropriate to overload legal texts with such highly charged phrases.

Besides, defining political parties in the country as "aiming for the nation at reaching the level of contemporary civilisation" is against the principle of political and party pluralism. In the world of politics and political parties, the principle of pluralism exists so that different political world views may freely organise and compete for power. Parties may be in favour of modernisation and progress or may have conservative values and seek to make such values influential in the administration of the country within the limits of secular democracy. This is what party competition is, and this is what the "multi-party" system exists for. It is not right to force political parties to be hypocritical.

Proposal:

The words ".... goal for the nation is to reach the level of contemporary civilisation..." should be removed from the text of Article 3 of the LPP.

3) Indispensability and nature of political parties (LPP, Art. 4)

The relevant provision is as follows:

"Article 4: Political parties are the indispensable elements of democratic political life. They operate in loyalty to the principles and reforms of Atatürk."

The first sentence of the paragraph above is appropriate. It is simply a reiteration of the provision contained in the Constitution. The second sentence, however, is completely unnecessary and even dangerous. "To operate in loyalty to the principles and reforms of Atatürk" is related neither to the property of being a political party nor to the "indispensable" character of political parties; it is even alien to these.

Moreover, "the principles and reforms of Atatürk" are something whose legal content is difficult and even impossible to define. Let alone defining it in the legal sphere, there is no consensus even among historians on what those "principles" are, and it is very natural that there should not be. In order to see the diversity of opinion on this issue, it is enough to look at the textbooks on this subject.

The dangerous nature of this last point may be conceived as follows. If political parties are required "to operate in loyalty to the principles and reforms of Atatürk" and if, as many books or textbooks state, those principles include, say, "etatism" and "reformism", then will "liberal" or "conservative" parties not be violating the law?

In addition, "operating in loyalty to the principles and reforms of Atatürk" is a matter of ideological and political choice, and imposing it on all parties is once again contrary to the principles of ideological, political and party pluralism. For example, in its decision dissolving the "Huzur" Party, the Constitutional Court put forward as one of the reasons "the fact that the party has opposed Atatürk's ideas and the Turkish Revolution" (file no. 1983/2, decision no. 1983/2, dated 25 October 1983). A similar reason for dissolving a political party is impossible to be found in modern democracies. However, the Constitutional Court may argue that it was based on the law (LPP) in the said case. At least, the expression above gives the court this right.

There is another, more serious danger. This provision of the law goes much beyond forbidding political parties from engaging in activities against the principles and reforms of Atatürk (this prohibition is elsewhere; see Art. 84 and 85), but it actually imposes on them the obligation of "operating in loyalty" to those principles and reforms. We have to say that this represents an unacceptable, excessively oppresive mentality and arrangement.

Moreover, certain activities against the principles and reforms of Atatürk are already prohibited by the law, which contains detailed provisions protecting the principle of laicism, the essence of these principles and reforms. The expression we criticize serves no other purpose than forcing political parties and their members to act in a hypocritical way. Since it is far from having any legal value, it also goes counter to the principle that rights and freedoms may only be restricted by law.

Proposal:

The words "they operate in loyalty to the principles and reforms of Atatürk" should be removed from the text of the law.

4) Right to become a member and to resign from membership (LPP, Art. 6)

The second paragraph of Article 6 of the LPP reads as follows: "No one may be a member of more than one political party at a time. Otherwise, his/her membership of all the political parties shall be deemed to have terminated."

It is appropriate to disallow membership of more than one party at the same time. However, the sanction that is envisaged is too heavy, ignores the will and choice of the individual, and reflects a "penalising" mentality.

It is possible to take an approach that is more constructive and one that takes care of the individual. As a matter of fact, a bill of amendment drafted jointly by the True Path Party and the Social Democratic Party (26 May 1992) does contain a correct arrangement in that direction.

Proposal:

The last part of the paragraph should be amended to read: "Otherwise, the membership records prior to the most recent membership shall be considered null and void." Such a formulation would also agree with the provisions contained in the last paragraph of the same article.

5) Organisation of political parties (LPP, Art. 7)

"The organisation of a political party consists of its central organs, of its branch organisations in provinces, districts and sub-districts, of its group in the Grand National Assembly of Turkey, and of its groups in provincial general assemblies and in municipal assemblies."

This provision conformed to the Constitution before it was amended. Paragraph 6 of Article 68 of the Constitution before the amendment was as follows: "Political parties shall not..... organise and function abroad, shall not form discriminative auxiliary bodies such as women's or youth branches, nor shall they establish foundations." This restriction was abolished while the Constitution was amended in 1995. The law, however, dominated as it is by the old restrictive mentality, enumerates one by one and restricts the organs that a party may have. The organs enumerated do not include women's and youth branches and such units as village and ward organisations. The contrariness of the law to the new constitutional situation is obvious, and the law should therefore be made to conform to the Constitution as amended.

This could be achieved in two ways:

(a) In enumerating the organisations that a political party may have, "women's and youth branches", which have been made possible by the constitutional amendment, could be added, and this would make the article read as follows:

"The organisation of a political party includes its central organs, its branch organisations in provinces, districts and sub-districts, the women's branch, the youth branch and any other auxiliary bodies provided for in its statute, its group in the Grand National Assembly of Turkey, and its groups in provincial general assemblies and in municipal assemblies."

The amendment proposed by Deniz Baykal and other MPs are in that direction, except that the verb they use is *"consist of"* as is the case with the article of the law that is currently in force. However, after using an open-ended expression like "any other auxiliary bodies", the appropriate verb would be *"include"*.

(b) As an alternative provision, concrete forms might be cited instead of the general expression of *"any other auxiliary bodies"*. This was done in the proposal submitted by the True Path Party and the Social Democratic Party (on 26 May 1992) in these words: *"Ward and village representations"*. However, such an elucidation or concretisation would obviously mean also a restriction and limitation. Therefore, it would be more appropriate to choose the phrase *"any other auxiliary bodies"* for the sake of not forcing party organisations to be uniform.

The last provision of Article 7 of the LPP is as follows: "Political parties shall not establish any organisations in any place and under any designation other than those mentioned in the preceding paragraph."

What should become of this paragraph? Should it be abolished?

In the text entitled "The laws that must be regulated in compliance with constitutional amendments" prepared by the Research and Study Office of the Laws and Decisions Directorate of the GNAT, it is stated that, as Article 68/6 of the Constitution has been abolished, the last provision of Article 7 of the LPP must also be abolished. The same view is adopted in the Motherland Party's "bills for securing harmonisation with constitutional amendments".

Since the relevant article of the Constitution as amended does not contain any restriction or command in this area, the opinions mentioned above are correct. From the perspective of democratisation, too, political parties should in principle be free to decide their own organisations themselves.

Proposal:

The last provision of Article 7 of the LPP should be abolished.

6) Formation of political parties (LPP, Art. 8)

According to this provision of the law, to be a founder of a political party, one is required to be eligible for membership of the parliament (Art. 8/1). Article 11 of the Law on the Election of Members of Parliament (LEMP) enumerates those who are not eligible for membership of the parliament as follows:

"f) Even if they have been pardoned, persons convicted of:

1. (....)

2. Any of the crimes stated in the first part of the Second Chapter of the Turkish Penal Code or the crime of publicly inciting the commission of any of those crimes;

3. The crime of openly inciting the people to hatred and animosity on grounds of class, race, religion, sect or region, which is provided for in Article 312 of the Turkish Criminal Code;

4. Committing for political and ideological purposes the acts stated in the first, second and third paragraphs of Article 536 of the Turkish Penal Code or the acts stated in the first to fifth paragraphs of Article 537 thereof."

The first part of the Second Chapter of the TCC is entitled Offenses Against the Personality of the State (Art. 125 to 173) and includes disclosure of news the publication of which has been prohibited (Art. 137), establishing or joining international organisations without permission (Art. 143), receiving decorations or salaries from hostile states (Art. 144), failure to report sedition to official authorities (Art. 151), engaging in publications that would endanger the security of the country (Art. 155), insulting and cursing the President (Art. 158), deriding the constitutional agencies and public personalities (Art. 159), political and economic sedition (Art. 161), transportation of criminal publications (Art. 162), and crimes committed against foreign states and their presidents and diplomatic envoys (Art. 164 to 167). As for Articles 536 and 537 of the TCC, they concern such crimes as posting placards, bills, posters, etc. without permission, writing on the walls, and destroying public notices.

People who have committed any of these crimes shall neither be eligible for membership of the parliament nor can become founders of a political party, regardless of whether they have been pardoned later on. In addition to these prohibitions, Provisional Article 4 of the 1982 Constitution imposed a ban on certain politicians to establish political parties.

What has been the practice? What can be proposed to improve the situation?

The wording of this prohibitive legislation raised the possibility that the pre-1983 period might also be affected. Based on the letter of the arrangements in question, it was argued that those who had been convicted of the above-mentioned crimes before 1983 could not become founders of political parties even if they have been pardoned. This was prevented by the Constitutional Court through an appropriate interpretation (File no: 1989/5-Political party warning, Decision no: 1990/1, dated 22.1.1990, The Official Gazette, 4 April 1990, no. 20482). This is the first favourable development.

The second step of democratisation in this area was taken through the referandum held on 6 September 1987 which abolished Provisional Article 4 of the Constitution which imposed certain prohibitions. In this way, the political bans on certain politicians, and in particular the ban on them to form political parties, were lifted.

The third change which led to further democratisation took place with the abolition, through the Anti-Terrorism Act of 12 April 1991, of certain crimes in the Turkish Criminal Code, namely those in Articles 140, 141, 142 and 163.

In spite of these improvements, the remaining body of bans continues to exist. Of these bans, those which concern freedom of expression (TCC Articles 155, 158, 159, 311 and 312) and non-violent actions such as posting placards and bills particularly disturb the public conscience.

Moreover, the expression "even if pardoned" shakes the feelings of law and justice, because a "pardon" is, as a rule, an act that nullifies the punishment with all its consequences.

However, the problem here does not arise from laws only. The 1982 Constitution itself is the origin of these anti-democratic arrangements. According to the Constitution, "persons who have been convicted of disclosing state secrets, of involvement in ideological or anarchistic activities or of incitement and encouragement of such activities shall not be elected as deputies, even if they have been pardoned" (Art. 76/2). Therefore, they may not be founders of political parties, either (LPP, Art. 8/1).

Proposal:

The words *"disclosure of state secrets, involvement in ideological or anarchistic activities or incitement and encouragement of such activities"* in the Constitution (Art. 76/2), and the paragraphs 2,3 and 4 of Art. 11/f of the LEMP, should be

deleted. If the LEMP is amended in this way, there will be no harm in retaining the provision of Article 8/1 of the LPP.

7) Supervision of the formation of political parties by the Chief Public Prosecutor (LPP Art. 8/final p. and Art. 9)

The law requires that the notification of formation of a political party, and the document of receipt, should be sent also to the Office of Chief Public Prosecutor (Art. 8/final p.). The Office of Chief Public Prosecutor is authorized to examine and supervise the formation of a political party (Art. 9). These provisions were based on paragraph 5 of Article 69 of the Constitution before it was amended and were therefore in conformity with the Constitution. The said paragraph was as follows:

"Article 69 - (.....)

The Office of Chief Public Prosecutor shall examine, with priority, the conformity of the statutes and programmes of new parties and the status of their founders to the the Constitution and law; and it shall also follow their activities" (Paragraph 5).

The constitutional amendments of 1995 have removed these provisions and deprived the Office of Chief Public Prosecutor of the power to supervise. This is a progressive and democratic novelty. However, it has made the provisions of the LPP contrary to the Constitution. This power to examine belongs to the Constitutional Court alone, within the framework set out in the Constitution and law. Nevertheless, to bring an action for the dissolution of a political party, the Office of Chief Public Prosecutor may always request the necessary information and documents from the said court or directly from the party concerned.

Proposal:

To ensure conformity with the constitutional amendments, it is essential to remove the words *"the Office of Chief Public Prosecutor and"* from the last paragraph of Article 8 of the LPP and to abolish the provisions of Article 9.

This is also pointed out in the proposal submitted by Deniz Baykal and the other MPs.

8) Register of political parties (LPP, Art. 10)

The former LPP (Art. 7) provided as follows: "At the Constitutional Court, a register shall be kept of political parties. The documents and information to be

included in the register of political parties and how this register is to be kept shall be set out in the rules of procedure of the Constitutional Court. This register shall be open to all." The supplementary article 1 of the said Rules of Procedure enumerated the information to be included in the register as follows: the name of the party, its address, its central organs, its provincial organisations and its statute, programme and internal regulations. There was no obligation to furnish and request any other information. These provisions did not damage the right and principle of "freely carrying out activities" as provided for in the 1961 Constitution.

On the other hand, the LPP of 1983 which is currently in force has taken the duty of keeping the register from the independent judiciary and given it over to the Office of Chief Public Prosecutor. In addition, it provides (Art. 10) that "all kinds of regulations and other publications that regulate the activities of the party", the full identities of all its members and of the officials who are on the central and peripheral organs, and "other information and documents" which the Office of Chief Public Prosecutor may demand, shall also be recorded in the register.

These provisions, which require that the state be notified of almost everything and all sorts of publications, from the "full identities" of all the party members to intraparty communications and resolutions, including the party documents concerning political tactics and objectives (which should be secret), are dangerous for all parties, but particularly so for those which are in opposition or which represent political minorities.

The fact that the state knows everything about political parties with no privacy left implies that political parties are regarded as part of the state, not of civil society. Thus, the state demands, with no right at all, from organisations of civil society the openness and transparency that is expected from itself, but one which it often does not display.

The constitutional amendments of 1995 have changed this picture, putting an end to the duty and power of the Office of Chief Public Prosecutor to examine and monitor political parties. Now, the authority of examination is none other than the Constitutional Court. However, the law itself continues unchanged and creates an unconstitutional situation.

Proposal:

It is essential to change the provisions that concern the register of parties (LPP, Art. 10), to remove the words related to the Office of Chief Public

Prosecutor from the text, and to replace them with references to the Constitutional Court. It would also be appropriate to limit the range of information and documents that may be demanded for the register of parties and to narrow it down to the stipulations of the former legislation.

9) Becoming a member of a political party (LPP, Art. 11)

The first problem in this area concerns the minimum age of membership.

Through the amendment of the first paragraph of Article 68 of the Constitution by the law no. 4121 of 23 July 1995, the minimum age of membership of a political party has been reduced from 21 to 18. However, the necessary harmonisation has not been carried out; the age-limit in the LPP remains 21.

Proposal:

The words "who has completed the age of *twenty-one*" in Article 11/1 of the LPP should be replaced with the words "who has completed the age of *eighteen*".

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The second and really wide-ranging problem in the area of membership of political parties concerns the prohibitions on membership.

The primary issue here is again that of harmonisation. The constitutional amendments of 1995 enable members of the teaching staff and students in institutions of higher education to join political parties, but these amendments are yet to be incorporated into the law.

Moreover, the LPP imposes broader bans on membership than the Constitution does. Although the Constitution clearly enumerates and limits the bans on membership, the LPP goes further and denies the right to join a political party also to the managers, auditors and officers of banks and organisations established by a special law, those who are on the central boards of associations working for the public interest, those who have been convicted of the crimes set out in the first part of the Second Chapter of the Turkish Criminal Code or for publicly inciting the commission of such crimes, those who have been convicted for the offence of incitement in Article 312 of the TCC and those who have been convicted for committing for political and ideological reasons the offences of posting placards, bills, posters, etc. which are set out in Articles 536 and 537 of the TCC.

While the provisions in the LEMP that limit eligibility for membership of the parliament do have a basis, even if abstract, in the Constitution (Art. 76/2), the

restrictions imposed by the LPP on becoming founders or members of a political party are not grounded in the Constitution. At any rate, it is not possible to make such an inference from the relevant articles. However, Provisional Article 15 of the Constitution does not allow this unconstitutionality to be considered by the judiciary, and/or the Constitutional Court has avoided considering this question, in effect regarding the said Article as "permanent" rather than provisional.

The fact that the said provisions of the LPP may not be regarded as unconstitutional does not mean that they may not be amended. The Constitution does not have any obstacles to the adoption of the amendments proposed below.

Proposal:

Article 11 of the LPP should be rearranged as follows:

"Article 11 - Every Turkish citizen who has completed the age of eighteen and who has the capacity of excercising civil and political rights may become a member of a political party.

However:

(a) Judges and public prosecutors, members of higher judicial organs including those of the Audit Court, civil servants in public institutions and organisations, other public servants who are not considered to be labourers by virtue of the services they perform, members of the Armed Forces, and students who are not yet in higher education institutions, shall not become members of political parties.

Members of the teaching staff at institutions of higher education shall be exempt from the prohibitions to which civil servants are subject. However, they shall not assume responsibilities outside the central organs of the political parties."

(b) 1. The current provision regarding *"those who are banned from public service"* should be retained.

2. The current provision regarding *"those who have been convicted for dishonourable offences such as embezzlement, corruption, bribery, theft, fraud, forgery, breach of trust and fraudulent bankruptcy, and persons convicted of smuggling, of conspiracy in official bids or purchases, or of disclosure of state secrets"* may be retained.

3. The current provision regarding *"those who have been sentenced to a prison term of three years or more excluding involuntary offences, or to a heavy imprisonment for any offence"* may be retained.

4. The sub-paragraph *"those who have been convicted of any of the offences set out in the first part of the Second Chapter of the Turkish Criminal Code or for publicly inciting the commission of those offences"* should be removed from the law.

5. The sub-paragraph *"those who have been convicted for committing for political and ideological reasons the acts stated in the first, second and third paragraphs of Article 536 of the Turkish Criminal Code or the acts stated in the first to fifth paragraphs of Article 537 of the same"* should be removed from the law.

10) Central, provincial and district organisations (LPP, Art. 13 to 21)

In political parties in Turkey, there is a "problem of intraparty democracy". Leadership dominance or leadership oligarchy is a phenomenon observed in many parties. The number of active members is small, and people who are members on paper are indifferent. The difficulty and even the impossibility of changing the leader and the leadership, coupled with weak intraparty democracy, leave opponents usually with no choice other than resigning from the party. The only serious alternative is expulsion. These conditions cause a steady rise in the number of parties and contribute to the political fragmentation and instability prevailing in the country.

Here, the question that should be asked with regard to our subject-matter is this: Does the LPP play a part in the lack of democracy inside the party? When the relevant provisions of the LPP are reviewed, one cannot easily say "yes" to this question. The situation may be better examined by considering a critical problem related to intraparty democracy.

One of the most troublesome areas with respect to democracy within the parties is the fact that party organisations are from time to time dissolved, or their officials removed, by the central office. As a requirement of party discipline and even of the concept of political party, it is normal that such a power should be available. The question is simply this: Are the arrangements that are provided in the LPP such as to corrupt democracy?

Articles 19/5 and 20/9 of the LPP recognise that members of provincial and district committees may be removed by the central office and leave the question of how this will be done to the statutes of political parties. However, both the said articles of the law and the ninth paragraph of Article 20 thereof which concerns district party committees provide that the decision of such removal must be taken by the authorized party organ by secret vote and by at least two thirds of the full number

of members on that organ. Likewise, the law stipulates the period within which the provincial or district congress must convene and elect the new committee.

These arrangements cannot be considered anti-democratic. To the contrary, they provide some measure of democratic guarantee. Therefore, it seems more appropriate to look for the causes of the problem of intraparty democracy within political life in general rather than in any adverse consequences of the law or in any failure of it to provide guarantees.

The existence, the absence, or the insufficiency of intraparty democracy appears to be not a legal issue but one which is related to political culture and maturity. Many factors beyond the province of law such as the level of political maturity, the ideological and political tendency of the party, the social composition of its members, etc. have a part in the emergence of this problem. Therefore, it is not correct to consider law to be the main cause of the absence of intraparty democracy, just as it would be wrong to think that law can provide magic solutions.

For this reason, we believe that the current provisions concerning the central and provincial organisations of political parties do not contain any aspect that have directly adverse effects on intraparty democracy. However, a proposal on another issue concerning intraparty democracy, namely on the "determination of candidates".

11) Designation of party candidates (LPP, Art. 37)

With respect to the designation of party candidates for elections, the law stipulates various methods such as central nomination and selection by local party organizations. It should be noted that the law requires the selection procedure to be open to all local party members. However, the law does not make it compulsory to carry out local nomination. So, a political party may determine its candidates using one or several of the methods available.

In our opinion, it would be useful with respect to the designation of party candidates to require that a certain proportion of the candidates be determined by the method of selection. In fact, the first paragraph of Article 69 (as amended) of the Constitution states: "The activities, internal regulations and operations of political parties shall be in accordance with democratic principles. The implementation of these principles shall be regulated by law." This shows that the Constitution imposes on the legislature an active duty to ensure and achieve

intraparty democracy. A legal requirement to the effect that local nomination must be used in the determination of a certain proportion of candidates would be in accordance with the Constitution.

Proposal: Article 37/3 of the LPP should be supplemented as follows:

"Parties shall carry out selections by local party organizations in at least ..... percent of the electoral constituencies in which they take part in elections."

12) Prohibitions (LPP, Art. 78 to 97)

Part Four of the LPP which is entitled "Prohibitions Concerning Political Parties" gives a frightening list. In no democratic country can there be anything similar. Most of the prohibitions are of the nature of duplications. Since 1971, the Constitutional Court has made more than ten decisions of dissolution based on the ideological framework to which political parties must conform, excluding issues of procedure and form. It is again impossible to see anything similar in pluralist democracies.

The constitutional amendments made in 1995 provide certain relaxations. However, these are yet to be reflected in the LPP. The criticisms and proposals made below contain issues concerning the adjustment of the law so as to have it conform to the Constitution as amended.

The arrangements of pluralistic-liberal democracies that concern political parties must keep ideological prohibitions at a minimum.

What are the provisions of the LPP which most blatantly go counter to the idea of democratic society and to the new provisions of the Constitution?

Those concerning protection of the democratic state order

"Article 78 - Political parties may not:

a) (...) pursue the goal of changing (...) the principles laid down in the Preamble to the Constitution (...)"

***

Almost all of the principles laid down in the Preamble to the Constitution are contained in the text of the Constitution itself, and there are also provisions concerning the principles to which political parties must conform. In addition, the LPP restates them excessively anyway.

Given this situation, what is the meaning and function of the statement in Article 78/a of the LPP that "political parties may not pursue the goal of changing the principles laid down in the Preamble to the Constitution"? This question

becomes a serious problem in the face of the statement contained in the Preamble. The amended fifth paragraph of the Preamble reads as follows: "No protection shall be afforded to thoughts or opinions contrary to Turkish national interests, (...), Turkish historical and moral values (...)"

These words in the Preamble are extremely vague in legal content. The statement that even thoughts may not enjoy protection against national interests and historical-moral values is a formulation of a kind that can only be seen in totalitarian systems. A mentality that does not consider even some thoughts to be worthy of protection will not tolerate in the least the establishment of parties on the basis of such thoughts. It is on the basis of this formulation that the Constitutional Court decided to dissolve a relatively unknown party, namely the "Huzur" Party.

What should be done is, of course, to remove these words from the Constitution. However, it is easy to insert new provisions in a Constitution made under anti-democratic conditions, but it is more difficult to remove existing provisions from it. If the nature of those provisions is suitable for demagogy, the difficulty becomes even greater. The political parties currently represented in the GNAT do not have any inclination in that direction anyway. During the constitutional amendments made in 1995, certain changes were made in the Preamble but the said paragraph was not touched. Therefore, there is not much of a chance to rid the Constitution of this dangerous provision. What can be proposed in these circumstances consists simply of a very modest amendment.

Proposal:

The words *"may not pursue the goal of changing the principles laid down in the Preamble to the Constitution"* in Article 78/a of the LPP should be removed from the text.

On the same grounds, the words *"in contravention of the basic principles laid down in the Preamble to the Constitution"* which occur in Article 5/3 of the LPP should also be removed.

Protection of independence

"Article 79 - Political parties shall not:

a) (...)

b) organise and carry out activities abroad."

***

This provision was grounded in the sixth paragraph of Article 68 of the Constitution before it was amended. However, it no longer exists. The new Article 68 does not stipulate any such ban. The intention of those who amended the Constitution was to make it possible for political parties to organise abroad.

Proposal:

The words *"may not organise and carry out activities abroad"* in Article 79/b of the LPP should be removed.

Prevention of creation of minorities

"Article 81 - Political parties shall not:

a) argue that there exist in the territory of the Republic of Turkey any minorities based on differences of national or religious culture or differences of sect, race or language;

b) pursue the goal of disturbing, or seek to disturb, the integrity of the nation by creating minorities in the territory of the Republic of Turkey through protection, development, or promotion and dissemination of languages and cultures other than Turkish language and culture;

c) use any language other than Turkish in the drafting and publication of their statutes and programmes, and in their outdoor or indoor meetings, rallies and propaganda activities, use or distribute placards, posters, records, audio and video tapes, brochures and declarations written in a language other than Turkish, or remain indifferent to the commission of such acts and actions by others, save that they may translate their statutes and programmes to a foreign language other than one which is prohibited by law."

***

The provisions of this article are dramatic from the point of respect for logic and culture. The expression *"prevention of creation of minorities"* in the marginal heading implies that minorities are created at will. While the heading is *"prevention of creation of minorities"*, the text of the article admits the existence of groups with a different language and culture. The opposite is not possible anyway, and the purpose of the article is to prevent them from being called by their names.

Let us briefly note a few things about the foregoing paragraphs of the article. The first paragraph implies that a political party cannot claim the existence in Turkey of any Alawis, Kurds, Armenians, Jews and Greeks. The second paragraph

even punishes pursuit of the goal of protecting other cultures, and it smacks of cultural genocide. According to the third paragraph, the Republic of Turkey may by law prohibit a language. (This language prohibition was imposed in 1983 and lifted in 1991.)

The decision to dissolve the Turkish Workers' Party in 1971 was based on the ground that this party had violated the said provision (Art. 89 of the former LPP). The grounds for the dissolution of about ten political parties since then have included the violation of this provision.

Every state, every constitutional system, has a right to protect national unity. The 1982 Constitution and the LPP are not lacking in such provisions. Indeed, as the above example shows, they contain more than enough of such provisions. It is these excesses that make the legal system anti-democratic and give it a chauvinistic and authoritarian nature. The democratic and rational approach requires that political parties seeking to represent different ethnic and religious idendities, on condition that they are not separatist, should not be excluded from the system but included in it.

Proposal:

Since the Constitution and the LPP have a sufficient number of provisions protecting national integrity, the provisions of Article 81 of the LPP, which are of the nature of an anti-democratic intervention in the domain of language and culture, should be completely abolished.

Protection of the status of the Department of Religious Affairs

"Article 89 - Political parties shall not pursue any goals contrary to the provisions of Article 136 of the Constitution which stipulate the status, as an entity within the general administration, of the General Directorate of Religious Affairs which is to perform the duties set out in its special law, aiming to ensure national solidarity and integration, remaining above all political opinions and ideas, and in accordance with the principle of laicism."

This article is a work of the military regime of 12 September 1980. Such a provision is dangerous and anti-democratic in many respects.

First of all, the only institutional model of laicism is not an organization in the form of the General Directorate of Religious Affairs. Indeed, frankly speaking, in a laic country the state should not presume to conduct religious affairs.

The particular conditions of Turkish laicism may have made the establishment of such an agency necessary or useful. However, it is wrong to think that this is the only form of laicism; it is not only wrong but also unjust to impose this idea.

In a democracy, political parties and party pluralism exist to produce and implement different solutions. This is what parties compete for. The said provision, like many others, casts all parties in the same mould. However, to debate whether the Religious Affairs Department should remain within the general administration and to propose different solutions are among the most natural functions of democratic political life.

Since this provision leaves no room for thought and action available for political parties, Article 136 of the Constitution which concerns the Department of Religious Affairs effectively takes on a character of provisions that cannot change and that cannot be changed. If political parties, which are among the indispensable elements of democracy, are not allowed to consider different alternatives, then it is inevitable that members of parliament who are their members cannot take any action in this area. Consequently, Article 136 of the Constitution effectively becomes an unchanging provision. However, the constitution enumerates those of its provisions that cannot change and that cannot be changed, and Article 136 is not among them.

As Article 89 of the LPP does not take any account of whether a political party seeks to change Article 136 of the Constitution in pursuit of a goal contrary to laicism or in order to develop laicism further, it is quite possible for political parties that actually advocate laicism to be dissolved for this reason.

As a matter of fact, the grounds for the dissolution of the Party of Freedom and Democracy, which had no tendency at all against laicism, included the violation of this article (File no: 1993/1, Decision no: 1993/2. dated 23.12.1993, the Official Gazette of 14 February 1994, no. 21849). An application filed with the European Commission of Human Rights following the dissolution of this party was found "acceptable" (Petition No. 23885/94 of 2 September 1996). Again, an action has been brought for the dissolution of the Democratic Peace Movement, which is a laic party, for the same reason and purely on grounds of violation of Article 89 of the LPP.

A system closing itself to proposals for a rearrangement of the relations between state and religion will only exacerbate its own crises.

Proposal:

Article 89 of the LPP is contrary to both democracy and laicism and should be abolished immediately and completely.

Restrictions on statutes and programmes and on party activities

"Article 90 - (...)

Political parties shall not carry out any activities outside their statutes and programmes, nor shall they decide to support another party in elections." (Paragraph 2)

As it will be noted, Article 90/2 brings two different prohibitions: the prohibition on carrying out activities outside the statute and programme and the prohibition on supporting another party. Both go counter to reason and to facts of political life.

Whether a political party acts or does not act in accordance with its statute and programme concerns not the public authority, the state, but only that party, its members, supporters and voters. The prohibition of disobedience to the party statute and programme, and the prescription of sanctions for such disobedience, are the business of politics, not of the State. It is the citizen that calls or does not call it into question.

If it is feared that activities contrary to the party statute and programme may cause harm to the public, this is sufficiently taken care of by the large number of provisions concerning prohibitions on political parties. Every activity of a party that is contrary to its statute and programme is not necessarily harmful to the country and society.

In fact, political parties fail at times to act in accordance with their programmes. The nature of politics and political struggle sometimes makes this inevitable. In addition, the diversity and constant flow of political life makes it impossible to foresee and programme everything in advance.

Finally and most importantly, the prohibition on "activities outside statutes and programmes", which is prescribed in the previous Article 69/1 of the Constitution, was lifted by the 1995 amendments. Therefore, keeping the same prohibition in the law is against the Constitution.

Prohibiting political parties from supporting another political party is wrong and anti-democratic, too. Such a prohibition cannot have any logical reason. Moreover, in countries where electoral systems with a high national treshold are in force, such a prohibition also results in great injustices. In addition, there

always exist ways to get around this prohibition as we witnessed in the general elections of 1987 and 1991. Such artificial ways should not be necessary; political parties should be able to have more open and honest relations with each other. Unjust and arbitrary prohibitions work at the end to the detriment of the feeling of "respect for the law". Moreover, this prohibition is not grounded in the Constitution and is clearly unconstitutional.

Proposal:

Article 90/2 of the LPP should be abrogated.

Ban on auxiliary bodies

"Article 91 - Political parties shall not form women's branches, youth branches and similar discriminative auxiliary bodies, nor shall they establish associations and foundations."

This ban was grounded in the sixth paragraph of the previous Article 68 of the Constitution. Following the amendments made in 1995, the Constitution does not have any basis for such a ban. Article 91 of the LPP which keeps this ban in force has thus become contrary to the Constitution.

Proposal:

Article 91 of the LPP should be abrogated.

Ban on political relations and cooperation with associations, trade unions, foundations, cooperatives and professional bodies

"Article 92 - Political parties shall not, for the purpose of furthering their political aims, be in political relations or cooperation with associations, trade unions, foundations, cooperatives, and public professional organizations, or with their higher organs, or receive financial assistance from them, or extend financial assistance to them, or give them support, or act jointly with them for these purposes."

Article 92 of the LPP has become unconstitutional as the provisions of Article 33/4 of the Constitution on which it was based were abrogated by the 1995 amendments.

Proposal:

Article 92 of the LPP should be entirely abrogated.

Status of the members of political parties dissolved permanently

"Article 95 - (...) Of these persons, those who, through their acts, have caused the political party to be dissolved cannot join another political party, or take part as a candidate in elections to the GNAT, for a period of ten years." (paragraph 1)

"Neither shall a new political party be founded the majority of whose members are former members of a political party previously dissolved." (paragraph 2)

The limitation of "ten years" envisaged in the last sentence of the first paragraph of the Article above was reduced to "five" years by the constitutional amendments of 1995 (Art. 69/8). Therefore, the law has to be made to conform to the Constitution as amended.

The second paragraph of the Article is of the nature of an unjust penalty against those members who had no responsibility for the dissolution of their political party and also deprives them of the possibility to exercise their political rights in a party and in a manner they choose. It is as if members are punished for acts for which others were responsible. In addition, this provision which brings a very heavy burden of bureaucratic control is not quite enforcable.

The wording of the paragraph is also full of problems. The foundation of a political party takes place upon notification. The group necessary for this is the founders, not "members" as the law says. At the time when the founders declare their intention to found a political party and fulfil the necessary conditions, there is not, as a rule, a separate group of people called "party members". Therefore, the law is wrong in using the concept of "member" to disallow the foundation of political parties of the kind that it intends to disallow.

Finally, what is really important is this: the ban imposed by the law was originally imposed by the Constitution (Art. 69/7 before it was amended). As the ban in question was lifted by the amendments made in the Constitution in 1995, the current provision of the law has become unconstitutional.

Proposal:

The words *"ten years"* in the last sentence of Article 95/1 of the LPP should be replaced with *"five years"* to make the Article conform to the Constitution.

The second paragraph of the Article should be abrogated.

Party names and insignia that cannot be used

"Article 96 - Political parties shall not use the names, emblems, symbols,

badges and similar insignia of the political parties dissolved under the Law for the Dissolution of Political Parties (no. 2533 dated 16 October 1981) or of any political parties dissolved prior to that date for whatsoever reason; nor shall they use such flags, emblems and banners of previously founded Turkish States.

A political party shall not declare or claim to be the successor of a dissolved political party.

Neither shall a political party be founded with the name "communist", "anarchist", "fascist", "theocratic" or "national socialist" or a similar name or with names denoting religion, language, race, sect or region; nor shall such words be used within the name of a political party."

As the law no. 2533 referred to in the first paragraph has not been in force since 1992 when it was abolished, the paragraph has become largely ineffective. Its remaining provisions impose certain unnecessary and meaningless prohibitions.

The prohibition in the second paragraph has been overcome and become almost unworkable as a result of the liberal interpretation made by the Constitutional Court in its decisions regarding the True Path Party and the United Communist Party of Turkey. This is how it should be, because for a political party to say that it is the successor of a dissolved political party is not necessarily unlawful or a crime. Moreover, dissolved political parties have always had political successors and this cannot be prevented by artificial ways.

The bans on the words "communist" and "anarchist" which are imposed in the third and last paragraph have no place in democratic societies. In its decision dissolving the United Communist Party of Turkey, the Constitutional Court referred also to this ban on names and was unable to overlook this absolute, formal ban. In reality, however, the said party, like many others which carry the same name in other countries, had adopted an idea of organisation which was peaceful and not revolutionary and which was respectful of democratic rules. As a matter of fact, the public prosecutor in this case failed to produce any evidence to the contrary. The word "communist" does not necessarily mean "revolutionary" just as anarchism which is a serious current of thought is not synonymous with "subversion".

The same cannot be said of the words "fascist", "national socialist" or "theocratic". By nature, these are incompatible with democracy and laicism. Therefore, the objection above cannot be raised against the ban on the use of these words for party names. However, even if the clear provision concerning these three words did not exist, the remaining part of the sentence would be sufficient to dis-

allow the foundation of a party with a name containing any of those three words: "... or with names denoting religion, language, race, sect or region, nor may such words be used within the name of a political party." Therefore, the separate mention of those three words is unnecessary. At any rate, now there is a world in which assuming explicitly the words "fascist" or "national socialist" would in political practice be harmful rather than advantageous.

Proposal:

Article 96/1 and 96/2 of the LPP should be abrogated.

There is no use in retaining the words "communist, anarchist, fascist, theocratic or national socialist" that occur in the third paragraph, and they, too, should be removed from the text.

Ban on statements and actions against the military takeover of 12 September 1980

"Article 97 - Political parties may not engage in any attitude, statement or action against the Operation of 12 September 1980 which the Turkish Armed Forces, upon the call of the nation, carried out for the reasons stated in the Preamble to the Constitution, or against the decisions, communiqués and acts of the National Security Council." (The central organ of the military regime of 1980-1983).

This provision which prohibits political parties from criticising the intervention of 12 September and the government of the time has not found a serious area of application so far, but it seems that it is still legally in force.

As the words included in the Preamble and aiming at justifying the operation of 12 September 1980 were removed by the constitutional amendments made in 1995, the situation of Article 97 of the LPP has become even more awkward.

Proposal:

Article 97 of the LPP should be abrogated.

What should be the system of bans? What is the ideal solution?

It is time that the system of bans on political parties in Turkey is freed from the excessive restrictions imposed by the LPP. The grounds for bans that are envisaged in the constitutional amendments of 1995 are less wide-ranging and more logical than those in the law. Therefore, the LPP could incorporate the pro-

visions of the Constitution as amended and bring them all under a single article.

Such an arrangement which would involve a systematic statement of the relevant provisions of the Constitution would be fed by interpretations to be made by the Constitutional Court.

Proposal:

It would be sufficient to bring the party bans to be included in the LPP together in a single article as follows:

"Article - The statutes and programmes and the actions of political parties shall not be in conflict with the independence of the state, with its indivisible integrity with its territory and nation, with human rights, with the principles of equality and state governed by the rule of law, with national sovereignty, or with the principles of the democratic and laic republic; neither shall they aim at establishing any form of dictatorship." (Abridged from Article 68/4 of the Constitution as amended.)

"Political parties shall not use for the purpose of propaganda religious feelings or things held sacred by religion". (Inspired by Art. 24/final paragraph of the Constitution.)

"Political parties shall not receive financial assistance from foreign States, from international organisations or from real or legal persons that are not of Turkish nationality." (Verbatim from Art. 69/9 of the Constitution as amended.)

"The permanent dissolution of a political party shall be decided when it is established that the statute and programme of the political party violate the provisions of the foregoing paragraphs." (Verbatim from Art. 69/5 of the Constitution as amended.)

"The decision to dissolve a political party permanently owing to activities violating the provisions of the foregoing paragraphs may be rendered only when the Constitutional Court determines that the party in question has become a centre for the execution of such activities". (Art. 69/6 as amended of the Constitution.)

"A political party dissolved permanently can not be founded under another name." (Art. 69/7 of the Constitution as amended.)

13) Dissolution of political parties (LPP, Art. 98 to 108)

This Part Five of the LPP is closely related to Part Four which is entitled "Prohibitions Concerning Political Parties". Therefore, to ensure conformity with the system of bans which consists of a single article as proposed immediately above, the provisions of Articles 98 to 108 of the LPP should be changed accordingly.

II) ELECTIONS

By the political dimensions of democracy, we meant the determination of the national will and the structuring of political power. Now, we take up the issue of elections which are the most important channel through which the national will is manifested.

There are certain universal criteria of whether the electoral legislation in force in a country is democratic or not. We will dwell first on these criteria and then on the electoral system which is presently a contested issue.

1) Principles of democratic elections

Contemporary standards as to whether an election practice can be considered democratic or not are quite unambigious. These standards are contained also in the Constitutions of 1961 and 1982 (Articles 67, 77 and 127 of the Constitution of 1982.)

What are these basic principles and what is the situation in Turkey with regard to them?

a)Universal suffrage means that everyone has the right to vote, except for customary and normal restrictions regarding age and mental capacity. In Turkey, with the recognition of women's right to vote and to be elected (in 1934), this principle is basically established. The four amendments made in the Constitution of 1982 have further extended the scope of this right. These are the possibility to vote at customs borders, the possibility to vote abroad, the possibility for those under arrest to vote and the reduction of the voting age to 18. The last three are the result of the 1995 amendments. What is missing now is the legal arrangements needed to enable Turkish citizens living abroad to effectively use this right. In brief, there are no problems in Turkey with regard to the principle of universal suffrage.

b)The principle of equal vote also is recognised in the Constitution and means that everyone's vote is equal to everyone else's. As the practice in Turkey has always been such, there has not been any problem of democracy in this regard, either.

c)The principle of direct voting means that voters elect their representatives directly, that second-degree electors do not come in between. Although it may be argued that some democratic societies have electoral systems that involve two stages and that such systems also are democratic, the system of direct voting is generally more democratic. Turkish constitutional law has adopted this system

since 1945, and the Turkish Constitutions have raised the system of direct voting to the level of a constitutional principle. Therefore, there is no problem concerning democracy on this point, either.

d)The principle that elections are held at pre-determined intervals (i.e. periodicity) also is a democratic guarantee. After transition to the multi-party system in Turkey, this principle, too, has become firmly established, and there has been no habit of "avoiding elections". The only question that can be brought up with regard to the principle of the periodicity of elections is the preference of the 1982 Constitution for holding elections to the legislature and local government councils every five years rather than every four years. Underlying this preference was the intention to keep the country outside the electoral atmosphere for a longer period of time and to enable governments to operate more comfortably. However, the realities of political life have not permitted legislative terms to extend into the fifth year and have caused general elections to be held in the fourth year since the 1982 Constitution.

Without doubt, this has been influenced by the fact that political and social changes in the world and in Turkey have particularly accelerated. It is obvious that the political fragmentation and the parallel political instability in the country also are factors for early elections.

Therefore, to make the legal situation conform to political and practical realities, it seems more appropriate to hold both national elections and local elections every four years.

Proposal:

The periods in Articles 77 and 127 of the Constitution should be reduced from "five" to "four" years, and the provisions of the relevant laws should be changed accordingly.

e)The principle of secret vote (and of public counting of the votes) too, has been basically guaranteed in our country since 1950. Problems with the registers of voters, and irregularities observed in certain regions in the last local elections, are not relevant here. However, it has to be emphasized that it is an urgent necessity to update the registers of voters in parallel with movements and displacements of population and to extend the computer system. Circumstances that partially threaten the will of voters and citizens are manifested in terms of this last point, rather than the principle of secret vote and public counting.

f) With regard to the principle of free and equal competition, it is obvious that certain problems exist. We have already mentioned the provisions of the LPP that confine political parties to narrow limits and that make them almost uniformly identical, including in particular the prohibitions on political parties and the grounds for dissolution. It has to be admitted that, in a political arena surrounded by so many prohibitions, it is not quite possible for political parties and candidates to compete freely and equally. Abolishing those provisions and replacing them with more democratic ones are necessary not only for the freedom of political parties but also for free and equal elections.

There is inequality also in TV and radio speeches because the party or parties in government are favoured (Article 52, as amended by the Law no. 4125, of the Law no. 298). As for treasury assistance to political parties, it would be more appropriate to base it on the percentage of the votes cast for a political party in elections rather than on the proportion of the seats in parliament held by that party as is the case now. This is required by the word *"equitable"* inserted in Article 68 of the Constitution in 1995.

The fact that the cost of election and propaganda activities has excessively grown creates adverse consequences with regard to free and equal elections. Low- and even middle-income candidates suffer an injustice, and the electoral competition becomes a costly investment. Therefore, legal arrangements are needed to make politics cease to be costly, to limit electoral spending and to ensure the transparency of such spending.

The bans on cooperation imposed by the Law on the Election of Members of Parliament also impair freedom. Their removal would enable voters to make better use of their votes. In addition, this might also provide some of the advantages expected from two-round elections.

Regarding the bans on the publication of opinion polls, such research and publications may have certain risks such as corrupting the will of electors and preventing this will from being freely formed. Opinion polls may also be used deliberately for certain commercial and political purposes.

However, looking at the other side of the coin, opinion polls do serve the voters' most natural right to inform themselves. The voter may determine his/her choice also taking into consideration forecasts of likely distributions of the vote, and this is related and contributes to the free exercise of the right to vote.

Therefore, it may be necessary to find a balance between those two drawbacks or to reconcile those two benefits. This means that it is wrong to oppose opinion polls in principle just as it is wrong to argue that they cannot be restricted.

Looking from this point, the ban on publishing opinion polls as from the beginning of the election period, which is imposed by the supplementary paragraph added by the Law no. 4125 (27 October 1995) to Article 61 of the Law no. 298, is an excessive restriction and should be made more reasonable. The deadline for publishing opinion polls might start "two days prior to the day of voting".

Proposal:

The first paragraph of Article 52/c (as amended) of the Law no. 298, which provides the party in government with additional propaganda time, and the provision of Article 16 of the Law on the Election of Members of Parliament, which prohibits cooperation in elections, should be abolished, and the deadline for publishing opinion polls should start *two days prior to the day of voting.* It would be more appropriate to determine the amount of treasury assistance to political parties according to their shares of the vote, which more properly reflect their strength, rather than the number of seats they hold in parliament.

g)The principle of judicial administration and supervision of elections has also become basically established in our country since the Constitution of 1961. The Supreme Election Council is authorized to conduct and supervise elections. With respect to the principle of fair elections, the Turkish practice no longer has any serious problems. Dubious elections are now a thing of the distant past. There is a general consensus on the legitimacy of elections and elected governments. The Supreme Election Councils of the 1961 and 1982 Constitutions have played a major part in achieving this result.

2) Electoral system

There has been no stability with regard to electoral systems in Turkey, with a different system used in every election. None of the political parties can be said to be pleased with this situation and with the existing system(s). However, neither do they seek to agree on a lasting system.

Searches by experts for a new electoral system originate from the need for and the lack of a lasting system. A few examples of these searches are cited below.

A committee of experts which operated during the term of office of Seyfi Oktay as the Minister of Justice and which had Hikmet Sami Türk as its rapporteur produced a draft with two options: multiplication by a decreasing arithmetic series of integers and division by an aritmetic series starting with 1.5. This draft was not communicated to the government or parliament.

Another example is the "majoritarian consensus system" proposed by Murat Sertel and Ersin Kalaycıoğlu where voters rank political parties by an order of preference (the first, second, and even third preference). The system is based on smaller constituencies and serves to reveal the least desired political party as well as the most desired one (*Towards a new electoral system for Turkey* [in Turkish], The Association of Turkish Industrialists and Businessmen, May 1995).

Yet another proposal has been made by Seyfettin Gürsel, and this envisages a two-round system with narrow constituencies and with a proportional representative element whereby 500 deputies are elected through the two-round and narrow-constituency method and the remaining 50 through the proportional system. This proposal aims in particular at overcoming the divisions within the centre-right and within the centre-left (*The debate on the electoral system, and the two-round system* [in Turkish], The TÜSİAD, April 1996).

Coşkun Kırca advocates the two-round system of proportional representation. Here, at the first stage, the number of seats in a constituency is distributed among the parties according to the d'Hondt system. If a party has won more than half of the seats in that constituency, then the election there will be considered to have ended. If this has not happened, then a second round of elections will be held involving the three largest parties, and the seats will be distributed among them again according to the d'Hondt system ("A new electoral system" [in Turkish], *Yeni Yüzyıl*, 24 and 25 October 1996).

Although the searches for a new system are praiseworthy, they do not seem practicable for the time being. For a completely new system, for a radical change, there is not yet any adequate accumulation of political force, as the authors themselves largely admit.

In these circumstances, would it not be possible to make in the existing system certain amendments which are not radical and which can elicit easier agreement? This question necessitates certain remarks on what the existing system is.

The electoral system that is currently in force is provided in laws and has become what it is now partly as a result of the decisions of the Constitutional

Court. Following the annulment by the Court of the constituency-threshold(local threshold) on grounds that they were contrary to the Constitution (see File no: 1995/54, Decision no: 1995/59, dated 18 November 1995, the Official Gazette no. 22470 of 21 November 1995 and File no: 1995/56, Decision no: 1995/60, dated 1 December 1995, the Official Gazette no.22486 of 7 December 1995), the current system is the d'Hondt system with a national (quotient) threshold of 10% and with no local threshold.

Apart from the electoral law and from decisions of the Constitutional Court, the third piece of legislation that concerns our current electoral system is the provision of the last paragraph of Article 67 (amended) of the Constitution. This paragraph, which was added by the 1995 amendments, states: "Electoral laws shall be drawn up so as to reconcile the principles of fair representation and stability in governance."

This shows that the Constitution does not have a clear preference for any electoral system, simply pointing out the extremes, stating that neither injustice nor instability is desired and calling upon the legislature to strike a balance between these two poles.

The latest general elections for deputies were held under these principles. The present electoral system implemented is a proportional system with only a national threshold (10%). One must admit that the result of those elections was satisfactory with respect to neither "stability" nor "justice". None of the parties was able to obtain a majority in parliament, and parties like the Nationalist Movement Party and the People's Democracy Party which received a considerable share of the votes were left outside. The Republican People's Party just managed to enter into parliament.

From the point of the principles of "fair representation and consistency in governance", it is possible to question the existing system with regard to the principle of "fair representation" because of the 10% national threshold alone. Without doubt, it is not easy to reconcile the principles of "fair representation" and "consistency in governance" with one another. In this context, the objective in searching for an electoral system ought to be to find "the least bad" rather than "the best".

In addition, it is a fact that achieving stability is not simply a matter of electoral systems. An excessive number of political parties, their further proliferation, and the ensuing instability may stem from much deeper causes, from social and political divisions. The situation in the 1990s is a case in point. Moreover, an electoral system that permits minority votes to have effect does not necessarily mean

that stable majorities cannot arise. Regardless of the electoral system in force in a country, strong social and political winds blowing in favour of a particular political party can carry that party to power on its own. As a matter of fact, the strict PR system in force at the time did not prevent the Justice Party from winning a very strong majority in the legislature following the 1965 elections.

Returning to the issue of what amendments should be made within the existing system, it may be useful to start discussing it with regard to the national threshold of 10%. In western democracies that have a national threshold in their respective electoral systems, it is around 5% on the average. Although the higher threshold in Turkey is advocated on grounds of "consistency in governance", it should not be overlooked that the failure of some of the parties to enter parliament could result in graver political instabilities.

To go back to concrete examples from the 1995 elections, there is no doubt that if the Nationalist Movement Party and the People's Democracy Party had succeeded in entering the parliament this would have made the distribution of seats even more scattered. However, considering the weakness of representation created by the fact that these forces which together obtained about 15% of the votes across the country and which nevertheless failed to win any seats, it is possible to find a strong reason for lowering the national threshold.

We see once again the "unifying" and "cohesive" role played by the proportional system and fair representation in new democracies and in deeply divided societies. It is only through this way that minority preferences can be protected and reconciled with the system. Since it is more representative, a system focusing on just representation may, particularly in such societies, enable more effective governments to arise (A.Lijphart, *The Global Rise of Democracy* [in Turkish], pp. 185-196).

Another argument for lowering the national threshold is related to the world of coalitions. Many western countries have been and are being run by coalition governments. Turkey, too, is familiar with it and even getting used to it. Joint governments formed by two or three parties that have won more than 50% of the vote (1991 and later) are more representative than a single party holding a two-thirds majority in parliament with only one third of the national vote (1987 to 1991). Crises of legitimacy are more likely in the latter than in the former case. Therefore, coalition governments need not be feared. They are also useful as they draw into the system such political parties as tend to move away from the system.

Proposal:

On these grounds, our proposal is to reduce the national threshold to around 5%. In addition, it would be useful to adopt the "preferential voting" system which allows a voter to choose not only a political party but also a particular candidate. Another proposal which would feed this is, as mentioned earlier, the abolition of the ban on cooperation in elections. These proposals concern general elections for members of parliament. With regard to part of the elections for local government, it seems more logical to adopt a different system. It is natural that the election of *persons* such as mayors and village and ward headmen should be different from the election of *assemblies*. The drawbacks of electing a mayor or headman on a vote of around twenty percent are obvious. The root-cause of these drawbacks is the single-round election method.

With respect to the election of *persons* to fill local government offices (such as mayors and headmen), it is necessary to introduce the two-round system.

III) THE GRAND NATIONAL ASSEMBLY OF TURKEY

Under this heading, we will follow the sequence in the section "Legislative Power" of the Constitution (Part Three, Chapter One).

1) Composition (Cons., Art. 75)

The GNAT is composed of elected members only. There are no longer any non-elected representations such as the National Unity Committee, senators appointed by the President, or ex officio members, in the Senate of the Republic provided for in the Constitution of 1961. There is no anti-democratic aspect to the way in which the legislature is formed. The pre-1980 arguments over "representation by the non-elected" or "life-long senatorship" have now come to an end.

One aspect that is partly debated and critisized is the fact that the GNAT is unicameral unlike that under the Constitution of 1961. It is proposed that a second chamber be established along the lines of the Senate of the Republic. The main argument for this proposal is that laws passed by a unicameral legislature are not sufficiently debated and may therefore sometimes contain unconstitutional aspects.

It is difficult to agree with these criticisms and proposals. First of all, Turkey does not have a federal, aristocratic or corporatist structure. Most of the bicameral systems in the world have arisen from the requirements of such a structure.

The reasons that led to the creation of a second chamber in Turkey in 1961 centered on the points of "balance", "moderation" and "playing the role of a filter". However, the practice of two decades did not meet these expectations. The bicameral system is remembered more for its adverse aspects and particularly for the fact that it slowed down the legislative process.

Furthermore, the criticism that can be directed at the legislature today is not only or essentially its "hastiness"; to the contrary, its "slowness" and its obvious "neglect" in passing certain laws. As a matter of fact, as stated in a report prepared by the Laws and Decisions Department of the GNAT upon the directives of Mustafa Kalemli, President of the GNAT, there are eleven areas of legal vacuum which have arisen as a result of annulment decisions of the Constitutional Court and which it has not been possible to fill for years. Therefore, the basic need of the country today is to speed up the legislative process, and the bicameral system is not an advantage but an obstacle in this respect.

As for the review of laws that are contrary to the Constitution, there is already an organ that performs this function, namely the Constitutional Court. Before this judicial review, the relevant commission of the GNAT carries out its own review of laws with regard to conformity with the Constitution. Therefore, a bicameral legislature would not bring any additional benefit in terms of ensuring the conformity of laws with the Constitution, either.

For these reasons, we are of the opinion that the model of the unicameral legislature introduced by the Constitution of 1982 is appropriate and should be retained.

The constitutional amendments made in 1995 increased the number of seats in the GNAT from 450 to 550. This is a matter of political choice. Indeed, comparing it with the numbers of seats in the legislatures of other countries which have a comparable population (650 in Great Britain, 630 in Italy and 656 in Germany), there should be no harm in increasing reasonably further the number of seats in the GNAT. As will be remembered, under the Constitution of 1961, the National Assembly consisted of 450 members and the Senate of the Republic of 150 elected members, with the latter chamber containing also the non-elected members referred to above.

2) Conditions of eligibility (Cons., Art. 76)

The minimum age to be elected a deputy is set by the Constitution at "thirty". Following the reduction of the minimum voting age to 18 by the constitutional

amendments of 1995,it would be correct to reduce the minimum age of election to 25. This would be justified by the fact that a considerable part of the country's population consists of young people. In western democracies, the minimum age of election is in that range (25 for the House of Representatives in the USA, 25 in Italy, 23 in France and 18 in Germany).

The words *"totalling one year"* in the expression "who have been sentenced to a prison term totalling one year or more" which occurs in the second paragraph where the offences that bar election to the GNAT are enumerated restrict the right to be elected excessively and unjustly. This restriction should be made more reasonable.

It would be appropriate to remove the word "totalling" from the text and replace "one year" with "two years."

The second part of Article 76/2 of the Constitution is as follows: "those who have been convicted for dishonourable offences such as embezzlement, corruption, bribery, theft, fraud, forgery, breach of trust, fraudulent bankruptcy, and persons convicted of smuggling, conspiracy in official bids or purchases, of offences related to the disclosure of State secrets, of involvement in ideological and anarchistic activities, or incitement and encouragement of such activities, shall not be elected deputies, even if they have been pardoned."

It is not difficult to understand and accept the permanent ineligibility of persons convicted of ordinary and dishonourable offences. However, the same cannot be said of "persons convicted of .... offences related to the disclosure of State secrets, of involvement in ideological and anarchistic activities, or incitement and encouragement of such activities..." First of all, these are not ordinary offences, but "political offences". Secondly, the expression "ideological and anarchistic activities" does not have a clear definition in criminal law. What these activities are is uncertain. Therefore, the prohibition of persons so convicted from being elected "even if they have been pardoned" is extremely heavy and anti-democratic. These unjust provisions are made even more unjust by the possibility that persons convicted under Article 311 or 312 of the Turkish Criminal Code may fall within their scope.

Proposal:

The words *"the age of 30"* in the first paragraph should be changed into *"the age of 25"*.

The expression *"totalling one year"* in the second paragraph should be changed into *"two years"* and the word *"totalling"* removed.

That part of the second paragraph which reads *"... of offences related to the disclosure of State secrets, of involvement in ideological and anarchistic activities, and incitement and encouragement of such activities..."* should be abrogated.

3) Election term of the GNAT (Cons., Art. 77)

As mentioned earlier under the heading of "Elections" (II,1), the electoral interval of five years is too long. Considering the extent of political dynamism, the political instability that prevails, the lack of contact that occurs between the electorate and the GNAT, the fact that general elections are held in reality every four years and, finally, the legislative terms in other countries, it would be appropriate to reduce the election term to a reasonable extent.

Proposal

The provision of Article 77 (paragraph 1) that *"elections for the Grand National Assembly of Turkey shall be held every five years"* should be changed so as to read *"every four years"*.

4) Deferment of elections to the GNAT and by-elections (Cons., Art. 78)

The first paragraph of Article 78 reads: "If the holding of new elections is found impossible because of war, the Grand National Assembly of Turkey may decide to defer elections for a year."

From the wording of the paragraph, it appears that the deferment of elections will require "a decision of the Assembly". Unlike holding elections at an earlier date, the deferment of elections is a restrictive act with regard to electors and political rights. It is a constitutional rule (Art. 13/1) that fundamental rights and freedoms, and political rights and freedoms in this particular case, may be restricted only by law. As a matter of fact, the Constitution of 1961 explicitly provided in its relevant article that such deferment might be made by law.

The Constitution of 1982 should have adopted the same principle. Therefore, the first paragraph needs to be changed.

Proposal

As proposed also in the joint-report entitled *"For A New Constitution"* [in Turkish] (The TÜSİAD, 1992), Article 78/1 of the Constitution should be amended as follows: "If the holding of elections is found impossible because of war, the elections may be deferred by law for a year."

If the legislative term is reduced from five to four years in the previous article, it will be necessary also to make a reasonable reduction in the period of *"thirty months"* in the third paragraph of Article 78.

5) Oath-taking (Cons., Art. 81)

The text of the oath in this article is as follows: "I swear upon my honour and integrity, before the great Turkish Nation, to safeguard the existence and independence of the State, the indivisible integrity of the country and the Nation, and the absolute sovereignty of the Nation; to remain loyal to the supremacy of law, to the democratic and laic Republic, and to Atatürk's principles and reforms; and not to deviate from the ideal according to which everyone is entitled to enjoy human rights and fundamental freedoms under peace and prosperity in society, national solidarity and justice, and from loyalty to the Constitution."

The text of the oath is excessively charged and, in places, is full of concepts which have no legal value or which should not be imposed upon the representatives of the nation. Partly for this reason, it has been the subject of certain arguments and disputes.

What is meant by the text being overcharged and being full of unnecessary repetitions is "the existence and independence of the State, the indivisible integrity of the country and the Nation, the absolute sovereignty of the Nation, the supremacy of law, the democratic and laic Republic, human rights and fundamental freedoms, and loyalty to the Constitution." In fact, all these concepts are summed up in these five points: independence, integrity, democracy, laicism and the republic.

Concepts that do not have much legal and even political significance in an oath-taking text drafted for deputies include "peace and prosperity in society, national solidarity and justice."

Finally, what is meant by the "imposition" of an ideological, political or philosophical character is the promise "to remain loyal to Atatürk's principles and reforms". The most concrete expression, on the level of constitutional law and

text, of the Kemalist Revolution (or of Atatürk's Reforms), which is the greatest move forward in the history of Turkish modernisation, would be the above-mentioned principles of "independence, integrity, democracy, laicism and the republic". A formulation going beyond this is both vague in legal content and infringes upon individual choice in the area of political and philosophical values. Besides, the promise "to remain loyal to Atatürk's principles and reforms" has not had in political life the force of credibility expected from it. On the contrary, this formulation, coercing as it does all deputies, makes some of them swear upon values in which they do not believe. Let alone providing any guarantee, it is obvious that this situation erodes the value of oath-taking and of Atatürk's Reforms. For the sake of pluralism and democracy as well, this formulation should be abandoned.

In order also to avoid rows such as those which took place during the oath-taking ceremony at the opening of the legislative term in the past, there would be benefits in amending the text of the oath. In short, the text should be worded in the minimum common denominators of democracy and be shortened, freeing it from concepts that have no legal significance. Such a change would consolidate the legal and moral value of the oath in terms of democracy.

Also, in view of the problems that were experienced in the past at the opening of the legislative term, an addition should be made to the article to the effect that a deputy who fails to take the oath may not assume office.

Proposal:

"Members of the Grand National Assembly of Turkey shall, before assuming office, take the following oath: *'I swear upon my honour and integrity to remain loyal to the independence and integrity of the state and the nation and to the principles of the laic republic and the democratic state based on human rights and governed by the rule of law.'* A member who is considered not to have taken the oath duly may not assume office as a deputy."

6) Activities incompatible with membership (Cons., Art. 82)

This subject is referred to as "incompatibilities" in legal language. Regulation against "incompatibilities" may play a useful role in preventing corruption and political degeneration. The growing political degeneration of our times is one of the most important enemies of democracy; the importance of the subject and the necessity of ensuring the restoration of the prestige of parliament should be better understood.

In Article 82, which is reserved by the Constitution for this matter, a list is given of duties which members of parliament may not undertake and jobs they may not take. In this list, there are both excesses, and some deficiencies.

The prohibition which we consider excessive and find inappropriate from the viewpoint of democracy is the provision (Paragraph 1) which states that members of the Grand National Assembly "may not hold office in the executive and supervisory organs of trade unions and their higher bodies or of enterprises and corporations " The characteristic shared by other provisions in the same paragraph which cannot be considered improper is the relationship of these duties and jobs to establishments and organisations either directly or indirectly supported by the state, whereas trade unions do not have this quality. From this angle, there is a basic and qualitative difference between these and the others. Furthermore, this harmful prohibition, because it requires trade unionists who are elected as members of parliament to resign from their duties, is contrary to the 1995 constitutional amendments which demolished the walls of prohibition between politics and trade unions. This provision which impedes pluralism and the participation of organised society in political life is antidemocratic.

This limitation is also disquieting from the viewpoints of equality before the law and equal competition in politics. This stipulation of the article does not bring any obstacle against the directors and lawyers of companies and holding companies but subjects the administrators and inspectors of trade unions to differential treatment. If they are elected as members of parliament, these people are obliged to resign from their former duties.

For this reason, the provision in question needs to be considered harmful from the viewpoint of democracy and principle of equality.

As for the deficiencies of the constitutional provisions in this area, these have been especially pointed out by circles that are in a position to be more cognisant of the causes of political degeneration and of their solutions.

The sentence which the True Path Party wishes to add to the second paragraph of Article 82 of the Constitution is as follows: "In any type of undertaking, contract award or sales and purchase in public establishments and organisations or their affiliates and subsidiaries, they may not, by means of using their influence as members of parliament, in any way make propositions to offices and persons in authority." The proposed provision, even if not very successful from the viewpoint of legal drafting, strongly indicates a course of action arising from a need. From this

point of view it may be considered that it would be appropriate to make use of it.

The Republican People's Party's recommended addition contains a prohibition on members of parliament from assuming office on the executive and supervisory boards of private banks. From the standpoint of the logic we applied above to professional chambers and trade unions, we do not find this proposal correct and regard it as harmful.

Proposal :

In the list of "activities incompatible with membership" contained in Article 83/1 of the Constitution, this section needs to be removed from the text: "they may not hold office in the executive and supervisory organs of trade unions and public professional organisations or their higher organs or of the enterprises and corporations in which they have a share, nor may they be appointed as representatives of these bodies ..."

We are of the opinion that the addition proposed by the True Path Party will be useful. However, it is more appropriate for this addition to be appended to the end of the first sentence of the second paragraph, not to the end of the paragraph. In this case, the provision of Article 82/2 would be: "Members of the Grand National Assembly of Turkey may not be entrusted with any official or private duties involving recommendation, appointment or approval by the executive organ, *nor may they by means of using their influence as members of parliament in any way make propositions to offices and persons in authority in any type of undertaking, contract award or sales and purchase in public establishments and organisations or their affiliates and subsidiaries.* The acceptance by a member of a temporary assignment given by the Council of Ministers on a specific matter, and not exceeding a period of six months, is subject to the approval of the Assembly." (The addition is printed in italics.)

7) Parliamentary immunities (Cons., Art. 83)

Privileges ensuring the ability of parliamentarians to carry out their duties independently are called "parliamentary immunities". These can be divided into two. "Parliamentary irresponsibility" means that members of parliament may not be held responsible for their words, statements and votes in the course of parliamentary activities. This is also called absolute immunity, platform immunity, and perpetual immunity. "Parliamentary inviolability" means that a parliamentarian

may not be interrogated, arrested or tried without a decision of the assembly because of an alleged crime committed either before or after his election. This is also given such alternative names as partial or temporary immunity.

Article 83 of the 1982 Constitution, since it regulates both parliamentary irresponsibility and inviolability, bears an incorrect heading: "Parliamentary involiability" (Dokunulmazlık). This should have been, "Parliamentary immunities" (Bağışıklıklar). If it is suggested that this term is not very customary, then it would be appropriate to change the heading in this way: "Parliamentary irresponsibility and inviolability".

By considering these two concepts and institutions separately and by taking problems observed in their application into consideration, we will now attempt to develop criticisms and recommendations.

a) Parliamentary irresponsibility

The provision of Article 83/1 of the Constitution reads: "Members of the Grand National Assembly of Turkey shall not be held responsible for their votes and statements concerning parliamentary functions, for the views they express before the Assembly or, unless the Assembly decides otherwise on the proposal of the Presidential Council for that sitting, for repeating or revealing these outside the Assembly."

As can be seen, this paragraph establishes a principle on the one hand and introduces an exemption on the other. What is the position from the viewpoint of principle? This question needs to be tackled with priority.

The members of parliament of the former Democrat Party had been found guilty of violating the Constitution either directly or as accessories because of their votes and statements in the Assembly by the High Court of Justice, known as the "Yassıada Court". Since then no serious problem has emerged from the point of view of this principle. There have been certain developments in breach of this principle, but these have been prevented by the appropriate attitude of the President of the Assembly.

For example, the words in a speech at a group meeting of his party used by the Welfare Party Leader Necmettin Erbakan to the effect that his party would become the government, but that whether in a bloody fashion or in another way only time would tell, opened the way to the preparation of a summary of investigation by the public prosecutors' office of the Ankara State Security Court. In his

written statement rejecting the summary, Grand National Assembly President Hüsamettin Cindoruk declared that those words fell within the scope of absolute parliamentary immunity.

The problem of the provision of this paragraph concerns limitation of the principle. On the proposal of the Presidential Council, the Assembly may bring an exception to the principle of not holding a member of parliament responsible for repeating or revealing outside the Assembly his/her views expressed before the Assembly. In fact, there has been one application (Member of Parliament M. Ali Eren) of this provision (Cumhuriyet, 28.1.1988).

The limitation introduced by the 1982 Constitution is opposed to the concept of parliamentary irresponsibility and is antidemocratic. For one thing, it is a logical contradiction to hold a member representing the nation responsible for repeating to the nation itself words and statements he is able to make in the parliament. Secondly, other members and representatives should not be entitled to interfere with the transmission to the nation of words and statements of a member who is considered to represent the nation, because this type of guarantee is laid down for the protection of minorities or individual members of parliament against majority pressure. Finally, absolute parliamentary immunity exists just as much to take under protection the outside repetition of words and statements as to protect them inside the assembly because, in general, assembly proceedings are not observed by very many people; the effectiveness of a member of parliament is apparent in the way he is able to pass his words in the assembly on to the citizens and voters.

For these reasons, the limiting provision in question needs to be lifted. Otherwise the concept of parliamentary irresponsibility and the representative nature of democracy will continue to be eroded and damaged.

Proposal :

The heading of Article 83 of the Constitution should be changed either to *"Parliamentary immunities"* or to *"Parliamentary irresponsibility and inviolability"*.

The words "unless the Assembly decides otherwise on the proposal of the Bureau for that sitting" should be removed from the text.

b) Parliamentary inviolability

The institution of relative immunity or simply "immunity", designed in order for members of the legislative assembly to be able to carry out their functions

without being under any pressure or threat, has in recent years been the subject of a number of alterations. There are meaningful differences in the direction of these alterations in Turkey compared to other countries.

In the case of the motherland of parliamentary inviolability, i.e. Britain, the "armour" has been reduced to a function protecting MPs against civil suits and no longer against criminal prosecutions. In France, too, the scope of immunity was limited by a constitutional amendment dated 4 August 1995 (Article 26). The condition of seeking the assembly's "lifting of inviolability" for judicial enquiries and hearings was discontinued. From now on, the decision of the assembly is only necessary for the arrest or deprivation of an individual's freedom. Moreover, conditions of flagrant crime requiring heavy punishment and their final verdicts are outside this provision (Süheyl Batum, "The new dimension of the protection of parliamentary immunity" (in Turkish), Görüş; the TÜSİAD, April-May 1996).

Developments in Turkey are in the opposite direction. Criminal files concerning members of parliament and in particular files containing allegations of ordinary crimes (embezzlement, fraud, the passing of bad cheques etc.) have greatly multiplied. Protections provided for members of parliament because of their function have come to cover them as individuals. The transformation of the institution of immunity into a mechanism protecting against crime and suspicion of crime means that this institution has suffered functional damage. What can be done to prevent the institution from being abused further?

This search brings along with it four questions: What should be the scope of inviolability? Against what type of actions should immunity protect? Should additional judicial guarantees be considered for members of parliament? How should a final sentence be executed?

Exemption from immunity in the Constitution consists of two items: "The condition of flagrant crime requiring aggravated punishment" and "situations under Article 14 of the Constitution, provided that investigation be initiated before election" (Article 83, paragraph 2). There is no need for the lifting of immunity in these two circumstances.

Here a deficiency attracts attention. The Constitution does not regard the offences that bar election to the parliament (Article 76/2) as outside the area of immunity, whereas offences that are an obstacle to the election of a member of parliament not being an obstacle to his continuation in office is a contradictory

situation. It is necessary to remove files on offences coming into this category from the area of immunity as well. Such a provision should be added to the article.

In view of this, the reference made to Article 14 of the Constitution is inconvenient. For one thing, it is difficult to understand it within the meaning of criminal law; there is almost no chance of knowing its exact equivalents in the Turkish Criminal Code. Furthermore, it may be said that it is covered by the crimes requiring aggravated imprisonment, in Article 76/2 of the Constitution. For these reasons, the section of the paragraph referring to Article 14 of the Constitution should be removed.

After the expression "offences that bar election to parliament" has been inserted into the article, there remains no room for the words "conditions of flagrant crime requiring aggravated punishment"; these should be removed.

Proposal :

The second sentence in Article 83/2 of the Constitution should be amended as follows: "Offences that bar election as a deputy do not fall within the scope of this provision."

What types of action should immunity protect parliamentarians against? This is the second question. In our opinion, the armour of inviolability should not be an obstacle to judicial enquiry or trial. This protection should only be capable of use only against actions such as arrest, detention and detention on remand which remove freedom, because the function and aim of parliamentary inviolability consists of protecting a member of parliament or a minister so that he may carry on his duties unhindered. Beyond this, judicial enquiry and trial cannot be considered as disrupting the duties of a member of parliament or a minister.

For these reasons, the removal of the words "may not be interrogated" and "may not be tried" in the 2nd paragraph of Article 83 would be appropriate. The sentence may be changed as follows:

Proposal :

"A deputy who is alleged to have committed an offence before or after election may not be arrested or detained unless the Assembly lifts his/her inviolability." (Article 83/2, first sentence).

After the limiting of immunity in this way, a member of parliament may need additional judicial guarantees. On this subject, inspired by the proposals of the True Path Party, the Motherland Party and the Republican People's Party, the following new items may be introduced: the preliminary investigation of offences outside immunity should be made by the Chief Prosecutor of the Republic; the Grand National Assembly should be immediately notified; and, as the place of trial for this type of offences, a penal chamber of the Supreme Court of Appeal should be empowered. An alteration of this type should be made in the provision of Article 83/2.

Proposal:

"In such situations, the Chief Public Prosecutor at the Supreme Court of Cassation shall carry out a preliminary investigation and immediately notify the Grand National Assembly of Turkey; the place of trial shall be the Penal Chamber of the Court of Cassation."

The final point relates to the execution of a sentence and the effect of this on membership. The punishment of a member of parliament receiving final sentence for a crime which is an obstacle to election is immediately carried out, and his membership is also lost. This is already provided for by the 2nd paragraph of amended Article 84 of the Constitution. A subject of debate which may be considered as relating to detail is that of when shall the "loss" is to be considered to have taken place. Article 84/2 of the Constitution accepts "the notification of the court's final judgment to the Plenary" as the yardstick and the "moment of loss."

Proposals have been made based on the date of the judgment's finalisation in the Motherland Party's proposal and the date of the notification of the court's judgment to the Presidency of the Grand National Assembly in the Republican People's Party's proposal. In our opinion, the arrangement in Article 84/2 of the Constitution is sounder. Regarding the loss of membership to have taken place on the date of notification to the Plenary Session of the Grand National Assembly is more congenial to democratic parliamentary traditions.

As for other offences that do not prevent the election of a member of parliament, the arrangement in Article 83/3 of the Constitution is as follows and it is correct and adequate: "The execution of a criminal sentence imposed on a member of the GNAT either before or after his election shall be suspended until he ceases to be a member; the injunction is suspended during the term of membership."

We have now reached the point of combining the results arrived at and writing the new provision of the article in full.

Proposal :

Parliamentary irresponsibility and inviolability

Article 83- Members of the Grand National Assembly of Turkey shall not in any way be held responsible for their votes or statements concerning parliamentary functions, for the views they express before the Assemby and for repeating these outside the Assembly.

A deputy who is alleged to have committed an offence before or after election may not be arrested, detained or remanded unless the Assembly lifts his immunity. Offences that bar election as a deputy are not covered by this provision. In such situations, the Chief Public Prosecutor at the Court of Cassation shall carry out a preliminary investigation and immediately notify the Grand National Assembly of Turkey; the place of trial shall be the penal chamber of the Court of Cassation.

The execution of a criminal sentence passed on a member of GNAT either before or after his election shall be suspended until he ceases to be a member; the injunction is suspended during the term of membership. The punishment of a member for a crime which is an obstacle to election shall be carried out immediately.

Political party groups in the Grand National Assembly of Turkey, or other organs of a party, may not hold discussions or take decisions regarding parliamentary immunity."

8) Loss of membership (Cons., Art. 84)

The amendment of this article by Law No. 4121 dated 23.7.1995 was positive from the point of view of preventing "pseudo-parties"* and of normalisation in political life. However, a number of inconvenient provisions remain in the article. It is possible to regard these as concerning on three points.

The 1st paragraph of the article as amended continues to subject the loss of a resigning deputy's membership to a decision of the Grand National Assembly, although resignation is a unilateral action. Moreover, to submit the resignation of a person who has become a representative of the nation to the approval of other

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** The term refers to the now unnecessary practice of extablishing a political party by a deputy or a group of deputies wishing to join another political party in parliament, for the mere purpose of obviating the ban, abolished in 1995, on switching from an existing political party in parliament to another such political party, and dissolving that party once the purpose is attained.*

representatives of the nation is contrary to his capacity as being such a representative and to his freedom of decision. One should not exaggerate the inconvenient consequences which may arise because resignation is a unilateral action (as might be the case with an undated resignation letter). From this viewpoint, the lifting of only the first paragraph on acceptance of resignations would be appropriate.

Paragraph 2 of the article says, "Loss of membership due to conviction for an offence or to deprivation from legal capacity shall take effect upon receipt by the Plenary of the notification of final court decision." It appears that "conviction" will not be conviction for any offence at all, because the 3rd paragraph of Article 83 states, "the execution of a criminal sentence shall be suspended until the deputy ceases to be a deputy." For this reason, the expression "conviction" should be understood as "conviction because of a crime which impedes election of a member of parliament," and the article should be clarified accordingly.

The last paragraph of Article 84 states, "The membership of a deputy whose acts and statements are cited in a final judgement of the Constitutional Court as having caused the permanent dissolution of his political party shall terminate on the date when the said judgement, accompanied by the statement of reasons, is published in the Official Gazette. The Presidency of the Grand National Assembly of Turkey shall immediately carry out this judgement and inform the Plenary."

This provision and the sanction are superfluous and even harmful in several respects. For one thing, a member of parliament is as much the representative of the nation as he is a member of a party, and even more so. "Members of the Grand National Assembly of Turkey represent not merely their own constituencies or electors, but the Nation as a whole." (Constitution, Article 80). Party membership and membership of parliament are statuses that are separate and separable from one another. Secondly, "statements" of a member of parliament are most probably the expressions of opinion within his/her parliamentary irresponsibility. As for a deputy's "acts", if these constitute a crime barring election as a member of parliament and there exists a final judgment establishing this, membership will lapse anyway and the sentence be carried out (Article 84/2). As difficult as it is to understand how a person with the mere status of a member of parliament who has no duty in the party administration could make "statements and acts" binding upon his party and leading to its closure, it is a very heavy penalty also to terminate the membership of that deputy because he is assumed to have caused the dissolution of his party. For this reason, it would be appropriate to remove the final paragraph of the article.

Proposal :

The provisions of Article 84 of the Constitution that subject the resignation of a deputy to the approval of the GNAT (Paragraph 1) and that provide for the termination of membership of a deputy who has caused the dissolution of his party (Paragraph 5) should be removed.

9) Duties and powers of the Grand National Assembly of Turkey (Cons., Art. 87)

While the functions and powers of the Grand National Assembly are outlined in general in this Article of the Constitution, an exception has been introduced concerning the Assembly's authority to grant amnesty. The power of the TGNA to proclaim amnesty with regard to those convicted because of offences in Article 14 of the Constitution is contradicted. This is an infringement of the legislative assembly's natural rights and powers and was inserted into the article at the insistence of the extraordinary regime in Turkey between the years 1980 and 1983. It needs to removed.

Proposal :

The phrase in Article 87 of the Constitution, "excluding those convicted for acts set forth in Article 14 of the Constitution" should be removed from the text.

10) Authorisation to enact decrees having force of law (Cons., Art. 91)

In the first place, there is a mistake related to the scope of the regulation in this article. The first paragraph of the article contains the statement, "the fundamental rights, the individual rights and duties included in the First and Second Chapters of the Second Part of the Constitution, and the political rights and duties listed in the Fourth Chapter cannot be regulated by decrees having force of law." The outcome of this drafting is that it may become possible to regulate by decrees having force of law the social and economic rights and duties in the Third Chapter. This Chapter includes such rights and freedoms as ownership of land, freedom to work and to conclude contract, the right to found trade unions, and such rights and freedoms as collective bargaining, strikes and lockouts. If the wording of the paragraph is examined, it seems these may be regulated by decrees having force of law.

However, this is not the aim, and the wording is erroneous. For one thing, the provision regarding the general principles of the Constitution states that funda-

mental rights and freedoms may be restricted *by law* (Article 13/1). The interpretation of the Constitutional Court is in the same direction. In fact, even the founders of the Constitution do not accept and intend that provisions relating to social and economic rights as a whole should be capable of regulation by decrees having force of law. This is an incorrect phrasing which exceeds the aim. What is meant and intended are the areas of activity (social insurance, housing, health etc.) which are contained in the third chapter relating to social and economic rights and duties and which are solely the duties of the state. From this viewpoint, the necessary correction should be made in the paragraph.

There are two basic problems regarding the principle concerning decrees having force of law. The first of these is that decrees having force of law presented to the Grand National Assembly on the day of publication are not being examined by the Assembly and are being delayed. Today the number of decrees having force of law awaiting examination by the Assembly is excessive. This is a serious failure of parliamentary review. The way to overcome this is to add a provision to Article 91 of the Constitution to the effect that decrees having force of law that are not examined in the Assembly and ratified within a certain period shall cease to have effect automatically. In the same way, the operative period of empowering acts should also be indicated in the Constitution (Necmi Yüzbaşıoğlu, *The Regime of Decrees Having Force of Law in Turkey*, in Turkish, Beta Publications, 1996).

It has been observed that the framework drawn by the Constitutional Court, which has introduced important limits by the decisions it has made from 1990 to date on the subject of enabling acts and decrees having force of law is either unknown to or not heeded by the legislative organ. Frequent annulment decisions make this clear. Therefore, it would be beneficial to give the principles emerging from Constitutional Court decisions, the status of a Constitutional provision in view of the exceptional character of these regulations and of the necessity of recourse to them only in important, urgent, and mandatory circumstances.

Proposal:

The first paragraph of the article should be rearranged in this way:

"However, excepting periods of martial law and states of emergency, the Fundamental Rights and Duties contained in the Second Part, except for those provisions concerning duties of the State defined in the third section of this part, cannot be regulated by decrees having force law."

A provision should be added to the last paragraph of this Article to the effect that decrees having force of law not examined and approved by the Grand National Assembly of Turkey within a certain period, should automatically cease to have effect . This period may be between 3 and 6 months.

The operative period of decrees having force of law specified in the enabling acts could also be limited by the Constitution. The period could be fixed at 6 to 8 months.

It may be beneficial to transfer to the Constitution the criterion emerging from the case-law of the Constitutional Court setting "important, urgent, and mandatory circumstances" as the limits of the scope of this "exceptional regulation".

11) Presidential Council of the Assembly (Cons., Art. 94)

The third paragraph of the article states: "Two elections shall be held to the Bureau of the Grand National Assembly of Turkey in one legislative period. The term of office of those elected in the first round is two years and the term of office of those elected in the second round is three years."

Electing the Presidential Council and the President of the Assembly twice in one legislative period is preference that calls to mind a suspicion of mistrust. At the same time, this is a great waste of time. The truth is that the Bureau and the President of the Assembly should be elected for one legislative period. Since 1961 no serious worry has clouded on the subject of the activities and operations of the Bureau and the President of the Assembly. At this point we may remind that our personal preference, as explained above, is the reduction of the legislative term to four years.

Paragraph 4 of the article sets a period of ten days for the declaration of candidates for the Presidency of the Assembly and a further ten days for the completion of the election. Thus, actually 20 days have to pass with these elections. As elections are held twice in one legislative term, a total of 40 days is occupied with these elections. Just as during this period the Assembly cannot carry on its activities, there is a possibility that the Bureau will not be capable of being established during the course of the first-period elections. It should be accepted that it is necessity to reduce these periods.

Proposal :

The provision of Paragraph 3 should be changed in this way: "The Bureau of the Grand National Assembly of Turkey is elected for one legislative period." The

first of the "within ten days" provisions contained in Paragraph 4 should be changed to "two days", the second to "seven days".

12) Rules of Procedure (Cons., Art. 95)

This article of the Constitution relates to "Rules of Procedure, political party groups and security affairs." Rules of Procedure have undergone important changes in recent times, and conformity to the new Constitution has to a great extent been achieved. However, there still remains a need for certain recommendations for improvement.

(a) A provision that a member of parliament who is considered not to have duly taken the oath will be unable to take part in Assembly activities should be added to Article 3 of the Rules of Procedure. (This proposal is parallel to that which we have made for Article 81 of the Constitution).

(b) It should be stated that the periods set forth in the Constitution, the law and the Rules of Procedure shall not be operative during holidays and breaks (Rules of Procedure, Article 6).

(c) A provision should be added that the President of the Grand National Assembly may not use his the powers of the President while he is acting as proxy for the President of the Republic of Turkey (Rules of Procedure, Article 14).

(d) The role of "abstentions" in the counting of votes should be clarified (Rules of Procedure, Article 65).

(e) Measures should be introduced against those who verbally or physically attack a speaker on the platform (Rules of Procedure, Article 65).

(f) Precautions and sanctions should be introduced for the debating of decrees having force of law and for the Assembly to decide upon them with urgency (Fourth Part). (This proposal is related to that which we have made in connection with Article 91 of the Constitution.)

(g) The opportunity and right to obtain information from parliamentary investigation commissions should be widened and the obstacle of "state secrets" (Rules of Procedure, Article 105, final) should either be removed or brought into line with the principle of "State governed by the rule of law".

13) Quorum required for sessions and decisions (Const., Art. 96)

The quorums for sessions and decisions are respectively regulated as "at least one third" and "at least one quarter". By this method, the opportunity for the

Assembly to meet and produce decisions is increased as against that of former times, and the benefits of this have been seen in practice. However, it remains a fact that the Assembly still does not work productively enough. With the aim of overcoming this situation, certain proposals have been put forward from the viewpoint of still further reductions in the quorums. For example, there are those who, pointing to the situation in certain other countries, have proposed that the session quorum be reduced to the range of 50-60 people.

Since the number of members of parliament has been increased and an even greater increase may come on to the agenda, it would be contradictory to reduce the quorum for sessions. If this quorum is reduced, then the question will inevitably arise of why a greater number of deputies is necessary. In our opinion, the solution to the problem of lack of attendance lies in nowhere other than enforcing the legal sanctions against failure to attend (Cons., Art. 84/4) and exposing to the public those deputies who do not attend to their duties properly. Turkey could not afford arguments over the legitimacy of laws passed with very low quorums for sessions and decisions.

From this viewpoint, the quorums provided in the Constitution should be maintained, and the road towards reducing these should not be embarked upon.

14) Parliamentary inquiries (Cons. Art. 98/3; Rules of Procedure, Art. 105)

Parliamentary inquiry commissions have the power to obtain information from individuals and experts as deemed necessary and defined in the Rules of Procedure. Because the Rules of Procedure is a text which in principle governs the work of the Assembly, it is more appropriate for the activities outside the Assembly referred to above to be regulated by law.

Again, as has been pointed out above, the provision contained in the conclusion of Article 105 of the Rules of Procedure that "State secrets and trade secrets remain outside the scope of parliamentary inquiries" is harmful. It is difficult to relate the concept of "state secrets" which "the representatives of the nation" may not know to the meaning of democratic-parliamentary control and the principle of the accountability of the administration. From this viewpoint, the phrase "state secrets" contained in the paragraph should either be removed or be limited so as to relate it to the requirements of a democratic State of Law. Furthermore, the operations of a Parliamentary Inquiry Commission already conform to secrecy.

15) Parliamentary investigations (Cons., Art. 100; Rules of Procedure, Art. 111)

In the Constitution there is no clarity as regards the maximum length of time for a final Plenary decision to be given on a parliamentary investigation. From the point of view of ensuring efficiency of parliamentary control, there is benefit in inserting into the text of the Constitution or the Rules of Procedure a reasonable time limit in this area.

Proposal:

A provision stipulating that the Assembly's decision on this subject be made within a reasonable period (say three months) should be added either to Article 3 of the Constitution or to the 1st paragraph of Article 112 of the Rules of Procedure.

Likewise, taking into account the important powers possessed by a Parliamentary Investigation Commission also operative outside the Assembly, it is more appropriate to these by a law.

IV) THE SYSTEM OF GOVERNMENT

This subject has two dimensions: the debate on the presidential system, and corrections to the existing parliamentary system.

1) Debate on the presidential system

In Turkey, from the time of Turgut Özal's Prime Ministry to the present, recommendations for the adoption of a presidental (or semi-presidential) system have proliferated. The presidential system of government involves the election of the president by the people, his irresponsibility in principle, administration with a single head, organic and functional separation between the legislative and the executive, and the absence of weapons such as dissolution and dismissal. This system, born out of the preferences of the founding fathers of the USA, also arose from the need to secure a central union within a federation. In the USA, the loose discipline in and the very limited ideological character of the parties are features that deserve attention.

In fact, the US model of the presidential system is an expression of the synthesis of democracy and personal rule. Here the "personal rule" element crystallises the English monarchy in the person of the President as its North American equiva-

lent. To put it another way, "the President elected in place of the monarch" is the characteristic of the system. Theodore Roosevelt expressed it as follows: "A king and a prime minister united in one person."

It is obvious that the presidential system contains a built-in danger of producing results contrary to democracy. As a matter of fact, the USA is the only place where the system has produced democratic results. It is even said that American democracy is not a democracy because of the system but in spite of it.

The proposal and recommendation for a presidential system in Turkey has been put forward not to develop democratisation but to ensure efficiency and continuity in administration. Without doubt, continuity and efficiency in administration are also elements in support of democracy. However, it is also necessary to point out the dangers presented by the recommended model.

These are: legitimacy crises arising between the elected president and the parliament, the near impossibility of changing the president before his term of office ends, meeting the need which may be felt for an impartial arbiter, and finally, serious possibilities of arbitrary individual administration. These dangers are even more valid for countries whose accumulation of democratic experience is limited. The adventures of Latin American countries after adoption of the presidential model, which suffered presidentialist "deviations" and made a linear transition to military-bureaucratic regimes, are full of lessons that show that these dangers should in no way be underrated.

Moreover, because Turkey does not have a federally structured system, a need has not been felt for a presidential system strengthening the centre. Indeed, what the country needs is the development of powers of local administration, not of the centre. The structures of parties in the country being very tightly disciplined, under leadership control and dependent on the leader, are also elements which could sway the presidential model away from democracy.

When the president and parliament are from the same political majority, personal rule and its dictatorial inclinations are encouraged. If these are from different political wings, additional difficulties of a confrontational political structure are experienced.

Moreover, because the executive in this system does not have the authority to prepare and propose laws, important problems may arise in the functioning of legislative rules. None of the possibilities which may come to the fore is attractive. So much so that either legislative and legal gaps may occur because of inactivity

of the parliament or the executive organ may embark upon the path of killing these by forcing its own powers, resulting in usurpation of legislative power.

Amongst the advantages of a presidential system, the unifying role of a single person, and the special benefits of this in a community of mixed population, have been referred to. While the fact that Turkey does not have a large and mixed population to the same extent as the USA and other similar countries do, it is not very healthy to expect a unifying role from a single person. This type of monopolisation has been observed to promote conflict more often than unity. Reducing the number of centres of power and minimising it will bring about not consensus but ruthless conflict between these vital organs, because the target has been very much narrowed down; the winner wins a lot but the loser loses a lot.

From another point of view, the presidential system requires a very different and very strong politico-cultural infrastructure. For the system not to degenerate, this is a precondition. While the balances of the parliamentary regime are sufficient guarantees for it to renew and reproduce itself, the same is not true for the presidential model. And Turkey's political past and experience is marked with searches for a better parliamentary regime. The culture for a presidential system, if we do not make such a mistake as to cite the period of monarchy as an example, is extremely weak.

In fact, those who advocate this system have demonstrated their limited knowledge of the subject and its cultural prerequisites. For example, to speak of the ability of the president to dissolve parliament or remove the prime minister is tantamount to complete ignorance of this system, because there simply is no prime minister in the presidential system, and therefore no authority of the president to dissolve the parliament. The system's two basic supports are primarily built on these "two impossibilities". In the same way, the view that "a system of a president elected by the people should be introduced to remove frictions between the President and the prime minister" is also equivalent to ignorance of the essence of this regime.

In advocating the presidential regime, actual examples from recent history have been produced and it has been put forward that Turkey has always lived under "de facto presidency" (Atatürk, İnönü, Bayar, Evren, Özal). The single-party regimes of the Atatürk and İnönü periods cannot be considered as an example on this subject for pluralistic democracy. As for the Democrat Party period, just as it is debatable whether the "de facto President" was Bayar or the prime minister

Menderes, this period witnessed dictatorship of the majority. The Evren period (1980-83) was the interval of a military regime and cannot be compared to a presidential system on the democratic side. Finally, the Özal period, being a period of prime ministerial leadership, is not relevant to the presidential system.

Thus, these objective drawbacks and actual weaknesses would make it extremely dangerous to experiment with such an entirely different model as the presidential system. What is appropriate to recommended for Turkey are not completely new and untried models but attempts at giving credit to a parliamentary regime which has started to mature internally.

In passing, and stating that we will return to it a little later, we can say that the semi-presidential system, which is a hybrid model between the presidential and parliamentary regimes, is a more difficult formula to apply, like all hybrid models. It is clear that when this was brought to life in France, despite that country's existing maturity in the political and cultural terms, complex problems were encountered. The "cohabitation" question in itself is sufficient for an understanding of the dimensions of these problems.

So, what are the conditions necessary at the level of legislative-executive relations to bring the present system to a more functional state ?

2) Revising the system

It appears that the difficulties experienced in this area have arisen from political life and extra-legal effects rather than from the Constitution and legal regulations. Simply by looking at the Constitution, it is not easy to find a great many factors which impede the operation of the parliamentary regime. Recommendations for improvement have also been partly implemented by the 1982 Constitution (rationalised parliamentarianism). Measures to ensure the operation of today's parliamentary regime better can be grouped together on one axis: the status of the President of the Republic. We can proceed with this issue as our starting point.

The debate and searches concerning the status of the President can be grouped in two items; the election of the President and his powers. In order for today's system to function more effectively, the proposal that the President be elected by popular vote is on the agenda. Amongst the principal reasons for this, views have been put forward that election by the people will be a step forward to democratisation, that it will not be incompatible with the parliamentary regime and that it will make the country more resistant to possible coups d'Etat.

It may be said that the election of the President by the people is more democratic than the present procedure. There are indeed presidents elected by the people in European parliamentary regimes. As for the thesis that it will make democracy more resistant to coups d'Etat, this is not based on very solid ground. If election by the people were enough to secure this guarantee, there should have been no coup d'Etat against elected parliaments made up of people's principal representatives. Moreover, political history is not lacking in coups d'etat carried out against elected presidents and heads of state.

The main risk of election of the President by the people is the high probability of bringing the administration to a "two-headed" state in a negative meaning of the term. The 1982 Constitution has already transformed the presidency from being a symbolic office into one equipped with important powers. In exercising these powers, Presidents are not observed to have been in a state of "weakness" by reason of not having been elected by the people. The equipment of an office with these powers as well as its election by the people gives for the presidency a legitimacy within the constitution but outside the parliament. This carries within it a tendency for conflicts between the government which derives its confidence and security from parliament and a president who puts forward his legitimacy and prestige based on popular vote, paralysing in a basic way first the executive organ, then later with the passage of time the machinery of the state. Small-scale examples of this were experienced during the course of Özal's Presidency in the period of the True Path Party-Social People's Party coalition governments under the Prime Ministry of Demirel.

Because of this, this measure, which is for strengthening the system and the executive, is prone to completely contrary results. This is the reason for pointing above to the "cohabitation" difficulties experienced even in a country like France. The birth of this type of crisis does not mean that the crisis will stay at that point and not be deepen further. Conflicts and imbalances arising out of the election of the President by the people bring on to the agendum searches for a new balance. Within a democratic system, the first and the nearest stop of these new searches will clearly be the presidential or semi-presidential systems.

What is meant by this is that an "election by popular vote" system which does not run contrary to the parliamentary regime can only exhibit the character of a transitional period from the viewpoint that it accommodates within it systemic crises and searches for a new system. However, there is no guarantee that this

transition will be limited solely to democratic models. The Latin American experiments are instructive in this respect.

If these observations and concerns are correct, the continuation of the present election procedure, in other words the model of election by the Grand National Assembly, will be sounder. In case it is necessary to emphasize this again, this election procedure has up to now not been an obstacle to the President's use of the important powers vested in him.

In our opinion, the ideal for the future in the structure of its provisions is a return to the status of the presidency on the axis of the 1961 constitutional model. It is possible to call this a "classical parliamentary regime" or "the classical model of parliamentary regimes".

An amendment whose enactment may be appropriate on the subject of the presidential election relates to the period laid down for this election. The Constitution sets 10 days for the declaration of candidacy and periods of at least 3 days in each vote. The presidential election is a process which can be completed in 30 days according to the rules in force (Constitution, Article 102/2). This period has been unnecessarily prolonged. Loss of time and energy caused by this are of serious proportions. There would be benefit in shortening the period.

Proposal :

The period prescribed by the Constitution for the completion of the presidential election should be redefined by reducing it from 30 to 15 days.

At this point, the text of the President's oath should be simplified and unloaded as we have advised for the members of parliament, but, in contrast to the text of the oath for members of parliament, the retention of the concepts of "loyalty to the principles of Atatürk" and "impartiality" is appropriate.

On the subject of the President's powers, the sensitive point of the discords that have arisen up to the present is that these may be executed alone (Article 105). Even if the Constitutional Court has brought valuable clarifications to this subject, the establishment of clarity on this matter at the constitutional level may also be beneficial. For example, the actions that the President may undertake alone could be defined as follows: summoning the Grand National Assembly of Turkey to meet during holidays and breaks, returning laws to the Grand National Assembly of Turkey for reconsideration, appointing the prime minister, taking constitutional amendments to a referendum, deciding repetition of elections, selecting members for the high courts etc.

V. THE ISSUE OF CIVILIANISATION

The question devolves upon the relations between military and civilian authorities on the level of the state and political power. At the outset, we should acknowledge that democracy in Turkey has a "problem of civilianisation." This accounts for the reason why we have chosen straightforward language for the section heading.

We propose to treat the pertinent issues and the keys to their solution in terms of *principles*, rather than the current situation (conjuncture). We have selected, in particular, the two following fundamental principles of democracy as our guide: 1) Military authority is subject to civilian authority in a democratic system; and 2) The functions of defence and internal security are separate (hence, military authority is to be concerned solely with national defence, and the responsibility for domestic security is to be undertaken by the civilian authority and relevant ministries).

Two prominent components in the multifarious issue of civilianisation are the statuses of the Chief of the General Staff and the National Security Council.

1) Office of the Chief of the General Staff (Article 117 of the Constitution)

The second sentence of Paragraph 4 of Article 117 of the Constitution titled "Offices of Commander-in-Chief and Chief of the General Staff" reads as follows: "The Chief of the General Staff shall be responsible to the Prime Minister in the exercise of his duties and powers." The status of the Chief of the General Staff and the key point of the debate concerning this Article find their origin here.

When we consider the nature of the parliamentary regime, the requirements of administrative hierarchy and the character of defence services, it is essential that the Chief of the General Staff be placed not under the prime ministry but under a ministry. This is the case in established democracies, most prominently in those of NATO member countries.

As a matter of fact, Turkey is already familiar with such an arrangement. The Chief of the General Staff was subordinate to the Ministry of National Defence between the years 1949 and 1960. The Office of the General Staff, which had answered to the prime ministry under Law no. 4580, dated June 5, 1944, was incorporated into the Ministry of National Defence under the terms of the Law no. 5398, dated May 30, 1949. This revision was considered as part of the launching of the democratization process in Turkey fifty years ago.

Against the fact that, since the 1960's, the Chief of the General Staff has been under the responsibility of and accountable to the prime ministry, proposals for a return to the 1949-60 model have been put forward by the main political parties of the country during the 1990's. The records of the joint government of the True Path and Social Democratic People's parties (DYP-SHP), the recommendations by the Motherland Party (ANAP) (*see Yeniden Yapılanma Elkitabı* [A handbook for restructuring] (1995), p.15) and, finally, the preference of the Welfare Party (RP) have all been solidly in favour of such a return. The weight borne by these civilian political powers at the national and parliamentary level should make possible the reintroduction of the democratic civilian formula for consideration.

Proposal:

Article 117 of the Constitution should be amended to read:

"The Chief of the General Staff is appointed by the President upon the recommendation of the Minister of National Defence: his position and authority are defined by law. The Chief of the General Staff is subordinate to the Minister of National Defence" (Paragraph 4). (Paragraph 5 to be repealed).

2) National Security Council (Article 118 of the Constitution)

At the time the Chief of the General Staff was made subordinate to the Ministry of National Defence, a Supreme Council of National Defence was established by the Law no. 5399. This council was intended to act as an auxiliary in "home defence affairs" and furnish "advice". Three aspects of the Supreme Council of National Defence deserve recognition from a democratic standpoint: Its creation was by statute rather than the Constitution; its function was restricted to "National Defence" rather than the much broader sphere of "National Security"; and its membership in peacetime was open to one single member from the military services (the Chief of the General Staff). Though the organization chart created in 1961 may appear to have derived from this earlier model, it was, essentially, quite different.

For one thing, the new council was now elevated to the constitutional level, to the level of a constitutional organ. In the second place, the name of the council underwent a meaningful alteration. Replacing the concept of "National Defence", it now subsumed the much larger category of "National Security". Thirdly, though the members of the council from the military services do not compose the majori-

ty, they nevertheless possess significant weight. Legislation for the founding of this council is contained in the Law no. 129.

On the other hand, the National Security Council (NSC), as provided by the Constitution of 1982, has more extensive powers, and military officers constitutes the majority. The founding and functioning of the Secretariat General of the NSC demonstrate that it no longer represents either an advisory or a consultative organ. Transcending the concept of national security, Article 118 of the 1982 Constitution authorises the NSC to take all decisions "imperative to safeguard the peace and security of society". Furthermore, these decisions are to be given "priority consideration" by the Council of Ministers.

Let us briefly examine the Law on the National Security Council and the Secretariat General of the National Security Council (no. 2945, dated November 9, 1983). The law supplements the concept of national security with the "protection and safeguarding" of the state "against any foreign or domestic threats to its interests in the international sphere, including political, social, cultural and economic, and its contractual rights". The national security policy of the state is to be "determined by the Council of Ministers in conformity with the views expressed by the NSC" (Article 2). By constant observation of the "nation's political, social, economic, cultural and technological situation and developments", the Council will "make evaluations" and "identify the fundamental principles" to ensure the furtherance of "national objectives" (Article 4).

The Secretary General, who must be of the rank of general or admiral (Article 15), plays an organizing, observing and controlling role in all these deliberations and decisions (Article 13); for their execution, he is authorized to act in the name of the President, the Prime Minister and the National Security Council (Article 14). We should point out here that the Secretariat General of the NSC is provided for by the 1982 Constitution (Article 118) and enjoys constitutional protection.

In practice, for over some thirty-five years, the NSC has taken "advisory decisions" not only on routine subjects pertaining to domestic security, like martial law and state of emergency, or external security, like the "Operation Provide Comfort". Issues on which the "recommendations" submitted by the NSC to the Council of Ministers have, without exception, obtained approval including the economy, foreign policy, education, human rights, university administration and academic studies. The NSC gathers information on these subjects, makes recommendations to a variety of public institutions and autonomous organisations, takes the initiative in

the formation of committees of specialists in these areas and is even capable of interventions that exert an effective influence on the public. The regulation on the Prime Ministry Crisis Management Centre that has recently come into effect constitutes an arrangement consolidating such interventions (see the Official Gazette of January 9, 1997, no. 22872).

The exercise of the existing authority of the NSC in conjunction with this broad field of interest and activity would result in the elevation of its position to one nearly equal to that of the Council of Ministers. One of the most important factors in opening the way to such a possibility is the serious power vacuum created on occasion by the civilian administration.

What should be done now? To be more capable of processing and evaluating the information submitted above regarding Turkey, it might be appropriate to briefly survey the systems in other countries.

The constitutions of France and Italy refer not to "national security" councils but to "national defence" councils or committees (Articles 15 and 87, respectively). The U.S. National Security Council is not sanctioned by its constitution; it is a board composed of technical experts (consultants) subordinate to the president. Besides Turkey, only the constitutions of South Korea (1972) and Algeria (1976) present a national security council as a constitutional organ (see Tayfun Akgüner, *1961 Anayasası'na Göre Milli Güvenlik Kavramı ve Milli Güvenlik Kurulu* [The concept of national security and the National Security Council under the Constitution of 1961]. It should not escape our notice that neither of these countries possesses a democratic regime.

Under the circumstances, what needs to be done is evident. If Turkey wishes to move in the direction of a modern democracy, the issues of domestic and foreign security and national defence must be differentiated, and The Turkish Armed Forces' sphere of interest must be restricted to national defence. From this perspective, the model of the Supreme Council of National Defence of pre-1960 may be reconsidered as a familiar, national model. For, it is undeniable that a need does exist for cooperation and sharing of information between the civilian and military flanks regarding military and defence issues.

The very appropriate formulation of Paragraph 2, Article 117 of the constitution is as follows: "The Council of Ministers shall be responsible to the Grand National Assembly of Turkey for national security and for the readiness of the Armed Forces for the defence of the country."

Two basic inferences may be derived from this with regard to our subject: Responsibility and authority for the maintenance of national security belongs to the Council of Ministers; and the duty of the armed forces is restricted to the defence of the country.

Accordingly, all matters related to national security must belong to the Council of Ministers and related ministries and only to them. The powers and duties of the President in this area are reserved.

Proposal:

The NSC should be eliminated as a constitutional agency and Article 118 of the Constitution should be repealed. Parallel to this, the Law no. 2945 on the National Security Council and the Secretariat General of the National Security Council should also be repealed. The duties of the Turkish Armed Forces in the area of defence and cooperation with the government may be secured, just as it was prior to 1960, by a Supreme Council of National Defence or a similar organisation that would be created on the statutory level.

The Prime Ministry Crisis Management Centre, which has no legal or constitutional basis and which has a high probability of lending itself to a quasimilitary regime, should be abolished.

VI) PUBLIC ADMINISTRATION

Changes necessary for the democratisation of public administration are very wide in scope and require a separate study. Later under the heading "State of Law" (Part Three) we will indicate various specific research carried out on this subject.

The questions and proposed solutions to be considered here are in broad outline and have been deliniated as follows: Election, participation, transparency and state of emergency.

The first three of these are general concepts useful for the measurement of democratisation. As for the state of emergency regime, this is a subject which needs to dealt with separately because of its specific problems.

Without doubt, there are two more subjects whose discussion under the heading of "Public Administration" will be expected: Administrative authorities and the review of administrative acts. Defects encountered in these fields are set out in later sections. In Part Two on Human Rights, certain authorities of the administration and the security forces in relation to human rights will be considered. As for

the subject of review, this has been treated in Part Three under the heading of "The State of Law".

1) Election

Election in public administration applies in particular to local administrative organs. In Turkey where municipal mayors have been elected by the people from 1965 to the present, this question has basically been solved from the viewpoint of local administrations. The first paragraph of Article 127 of the 1982 Constitution also provides a guarantee for this.

Although proposals are also made that provincials governors be brought to office by election, this may be left out of the subject, because it requires basic systemic change.

There are, however, certain problems awaiting solution in relation to election of local administrative organs. The first of these relates to the periodic nature of elections. We declared above our preference in the direction of carrying out general elections "once every four years" instead of "once every five years". It is fundamental that local elections be tied to the same timing as general elections. From this viewpoint, it is appropriate for local elections too, to be carried out once every four years.

The second point is that, in certain circumstances defined in the Constitution, elected local administrative organs or their members may, as a temporary measure and until a final judgment is made, be removed from office by the Ministry of the Interior (Constitution, Article 127/4). The removal from office in this way of elected organs is contrary to the principle of democracy. The granting of this authority to the Interior Ministry, a political office, even if temporarily, is problematic. Administrative judicial authorities should exercise this temporary authority upon the request of the Minister.

Initiatives by political majorities in the Grand National Assembly changing the dates of local elections are also antidemocratic interferences in elections and with elected organs. There is also benefit in the prevention of this via the Constitution.

Proposal:

The provision "held once every five years" contained in Article 127/3 of the Constitution should be changed to "held once every four years".

The second sentence of Article 127/4 of the Constitution should be amended thus: *"Those organs of local administration against which or their members against whom investigation or prosecution has been initiated on grounds of offences related to their duties may be temporarily removed from office by the administrative judicial authorities upon the request of the Minister of the Interior."*

To the same article should be added the provision that the determined date of elections for local administrations may not be changed to an earlier date and may not be postponed except in case of war.

On the subject of election, an important question is that universities which are defined as possessing academic autonomy have been left bereft of administrative autonomy and the right of election resulting from this (Constitution, Article 130/1 and 6). According to the Constitution, "rectors are chosen by the President of the Republic and deans by the Higher Education Council." (Paragraph 6). Thus university and faculty organs which had been formed by election since 1946, in other words since the years when the first steps towards multi-party democracy were taken, have been deprived of this democratic structure by the 1982 Constitution and the Higher Education Council Law which came into force even before the former.

Although certain relaxations softening this antidemocratic regulation have occurred in law and in practice, it has not been possible to make much progress in the face of this rigid provision of the Constitution. From this viewpoint, the administrative autonomy of universities should be recognised, and as a minimum condition of this, the "election" procedure should be reinstituted, and faculties should be given back their status of legal entities by a Constitutional amendment.

Proposal:

The 6th paragraph of Article 130 of the Constitution should be amended and the following provision be put in its place: "Rectors and deans are elected by the teaching staff of the relevant institutions."

In parallel with this, if there is indeed any advantage in its being established as a higher coordination council, the majority of members of the Higher Education Council should be elected by the teaching personnel or by higher education institutions, and the 2nd paragraph of Article 131 of the Constitution should be clarified so as to ensure and guarantee this.

Another troublesome point in the context of removal of elected officers relates to public professional bodies (Constitution, Article 135). According to the first version of the Constitution, elected organs of these bodies could be temporarly removed from duty by the highest authority of the district in certain circumstances defined in the Constitution and where delay is deemed prejudicial(former Article, paragraph 7). This antidemocratic provision was reviewed in 1995; the scope of the authority to intervene was limited, and in place of removal from office "suspension from activity" was prescribed. It is now provided that the decision be submitted for approval to a judge within 24 hours, that the judge's decision should be given within 48 hours and that otherwise the administrative decision will automatically become ineffective (Article 135/7). While these were basically alterations in a democratic direction, in view of the fact that "suspension from activity" included within it "removal from office", this was an even heavier sanction. From the point of view of preventing elective organs being removed from office by the administration, it is more appropriate to leave it to judical authorities to make a decision upon the administration's request. What we had proposed for local administrative organs was along the same lines.

2) Participation

The right of participation is a concept which includes "election" and at the same time exceeds it. The most sensitive point here is participation in the functioning of local administrations and decision-making therein. In Turkey, positive steps have been taken in this area, too. The Villages Law dated 1924, even if it has not found many areas of application, contains an extremely democratic organ in which all villagers participate: the Village Association. Law No. 1580 also provides for a plebiscite to be carried out to bring a village to municipality status.

Leaving these aside, the Turkish public administration is at bottom excessively centralised. It is almost closed to participation of the people at the local level, whereas local administrations are basic institutions of democracy. That their organs are elected is not enough to secure this functionality and local democracy.

Although the establishment of "provincial and sub-provincial assemblies" was sought by a circular (16.1.1992) issued by the Prime Ministry in order to ensure participation of fellow citizens at provincial and sub-provincial levels, it cannot be said that these councils, which have a "consultative" character, have found a serious function; nor could it have been expected that they would.

There are also proposals that local assemblies, even parliaments, should be founded on the level of provinces and sub-provinces. However, in political systems with singular sovereignty, without having explicit provisions in the Constitution, the establishment of assemblies of this type and with definite decision-making powers would create constitutional problems.

On the same subject, if an arrangement of the "regional" type within the unitary state model is proposed, it is clear that this will also require a constitutional amendment.

However, there is no absence of possibilities for ensuring or developing local participation even within the existing constitutional framework. Two points may be made in relation to this, one having the character of a general perspective, the other being a concrete proposal.

The general perspective is that local participation can be achieved through the development of local administrations (decentralisation) instead of a "widening of authority" (deconcentration). For example, the "strong authority" model aimed at by the amendments to the Provincial Administration Act is not a beneficial but a harmful option from the viewpoint of democratisation and local participation. (On this subject, a more detailed report has been prepared by Dr.Selçuk Yalçındağ).

The idea which could be a concrete and specific formula is the removal from the laws of existing provisions prohibiting political activities at local level.

Proposal:

It is necessary to remove the prohibitions on political debates and political demands in Article 124 of the Provincial Special Administration Act No. 3360 and Article 53/1, 4 of the Municipalities Law No. 1580.

3) Transparency

The principle of administrative transparency or administration in sunshine is one of the main subjects on the agenda of contemporary democracies. In the last twenty-five years, giant steps have been taken on this front by western countries (USA, France, Denmark, Holland, Britain, Luxembourg, Sweden, Norway, Greece etc.). Transparency or openness is a principle which fulfills the rights by which the individual may demand that he be given information about himself which is in the hands of the administration or current information which is not considered

a state secret, that he be kept informed of the administration's decision-making process and that he have an influence on it. Therefore, the "participation" referred to above is also related to the degree of transparency; excluding state secrets, the administration's openness to individuals and the society also promotes participation.

As for Turkey, the administration has usuallly been a "closed box" for a long time. In the 1980s, the concept of a highly repressive "state of national security" and practices resulting from this brought the administration to an even more opaque condition; security enquiries, classifications, concealing information relating to individuals, even from the administrative courts.

This secrecy is nourished partly by the Constitution but more by the laws. The most important example which can be given from the Constitution is a provision related to by-laws which are one of the principal acts of the administration. According to this, "The law shall designate which by-laws are to be published in the Official Gazette" (Article 124/2). Leaving notification to the public one of the basic acts of the administration, which closely concerns people, to the discretion of the legislature and the administration is an example of the rejection of openness in public administration. Practices have been observed resulting from this. A security investigation regulation issued in November 1986 referred to things like "the degree of relationship to foreigners, indiscretion and tattling" (*Cumhuriyet*, 11.11.1986) and was secret. By reason of its not having been published in the Official Gazette, this regulation was annulled by the Council of State, but it managed to remain in force for three years. As has been seen, one of the situations damaging openness in administration results directly from the Constitution.

There are also a lot of provisions in the laws impeding openness in administration. For example, Article 15 of the Civil Servants Law, amended by Law No. 2670 dated 12.5.1982, brings a prohibition on civil servants giving "information and statements". Law on The Organization and Procedure of Constitutional Court(Article 43) has recognised the right of the administration to avoid sending certain secret information and documents to the Constitutional Court. An amendment made to a similar provision of the Law on Administrative Judicial Procedure (Art. 20) aims at preventing the administration from abusing the pretext of "state secrets" to the detriment of the plaintiff (Law no. 4001, published in the Official Gazette of 18 June 1994).

Proposal:

The provision of the Constitution (Article 124/2) that "The law shall designate which by-laws are to be published in the Official Gazette", should be amended in this way: "By-laws are published in the Official Gazette."

The provision of the amended Article 15 of the State Civil Servants Law prohibiting civil servants from giving "information and statements" should be put out of effect.

The provision contained in the Law on the Organization and Procedure of Constitutional Court (Article 43/2) that "The relevant office may avoid giving information and sending papers and documents whose disclosure is expected to damage the high interest of the state and which are required to be kept secret," should be put out of effect.

4) State of emergency

Because a martial law regime is not much on the agenda at the moment, it is more useful in principle to concentrate on the state of emergency regime from the practical point of view. It is natural that here the problems and the recommendations for their solution will also to a great extent be valid for a martial law regime.

Questions relating to the judicial review of state of emergency and similar regimes will be studied later under the heading of The State of Law. Here state of emergency has been considered only as a method of administration, and some proposals have been brought together.

The martial law and state of emergency legislation in force today is basically the product of military or semi-military regimes (12 March and 12 September). Nor is this legislation consistent. In the state of emergency legislation, changes have been made very frequently and usually by means of decrees having force of law.

The direction of these changes is striking. The legislation, which shows no consistency because it has frequently been changed, is consistent on one point: the common characteristic of the alterations is their being directed towards a less democratic and more oppressive regime.

As the state of emergency legislation has intensified with the passage of time, so, in a way, has the legislation of ordinary periods come to resemble that of a state of emergency. Most recently law No. 4178 dated 29.8.1996 relating to the amendment of the Provincial Administration Law, the Anti- Terrorism Law and certain other laws is a typical example of the way in which the procedures of ordinary administration

have been made extraordinary from the viewpoint of the new powers bestowed on civil authorities. The "By-law on Prime Ministerial Crisis Management Center" (Official Gazette, 9.1.1997-22872) is at the moment the latest link in this.

The basic tendency can be summed up like this: first, martial law legislation has come to resemble the state of emergency legislation, and now the state of emergency legislation has begun to encroach upon an ordinary period.

After pointing out that the source of inconveniences created for the democratic State of Law by the state of emergency practices is to be found in the Constitution and in particular in the non-dependence of state of emergency decrees having force of law on any empowering statute,we can put together some proposals. (Necmi Yüzbaşıoğlu, in *The Problem of Turkey's Democratisation*, in Turkish, Istanbul University Law Faculty Publications, 1996).

Proposal:

(a) Article 15 of the Constitution which regulates the subject should be amended.

For one thing, to the article's heading "The suspension of the excersise of fundamental rights and freedoms", the word "partial" should be added and the heading should be this: "The partial suspension of the excersise of fundamental rights and freedoms," because the present heading has come to mean the ability to suspend all fundamental rights and freedoms completely, and this again cannot be reconciled with another fundamental principle which is "proportionality".

Secondly, the phrase contained in the text, (may be suspended) "completely" should be removed from the text for the reason indicated above.

Thirdly, the phrase contained in the conclusion of the first paragraph of the article, "or measures may be taken which derogate the guarantees embodied in the Constitution" should be put out of effect because this provision has a meaning which excludes judicial review.

Paragraph 2 of Article 15 lists the inviolable rights even in states of emergency. Also taking into account international documents relating to human rights, it is correct to revise this list of rights and extend it. Our comments in this respect are explained by giving examples in the section entitled Human Rights (Article 15).

(b) Amongst the reasons for state of emergency listed in Article 119 of the Constitution, "the reason of serious economic crisis" is counted. In one sense,

Turkey is continually a country of severe economic crisis. In that case, it may be necessary for the country to live continually under a state of emergency regime. This provision was placed in the 1961 Constitution (Article 23) in order to preserve of some laws existing prior to 1960. Today's Article 119 has its source in this. There is benefit in deleting this provision from the Constitution and amending the article's sub-heading accordingly.

(c) The proclamation of state of emergency or martial law is "not to exceed six months" and any extension thereof is "not to exceed four months" (Articles 120, 121, 123). These periods are both too long and have reduced the Grand National Assembly of Turkey's supervisory opportunities. There is benefit in shortening. Moreover, the right of the Grand National Assembly of Turkey to "reduce the period" laid down for martial law (Article 122/1) should also be openly declared for a state of emergency (Article 121/1) as well.

(d) We have recommended deranking of the National Security Council from the status of a constitutional institution. As a result of this, the phrase; "after consultation with the National Security Council" contained in Articles 121 and 122 should be removed from these articles.

(e) The principle that state of emergency and martial law periods should be regulated by a frame-law ought to be fundamental, and the decrees having force of law promulgated during these periods should be clearly pointed out in Articles 121 and 122 to be within the limits drawn by the law and having the character of measures directed towards implementation.

It is obvious that these recommended amendments to the constitution need to be reflected in legislation in general, and in related laws in particular.

The problems of review in connection with state of emergency and martial law and decrees having force of law promulgated during these periods (parliamentary review and judicial review) will be considered later in the section headed The State of Law.

PART 2

HUMAN RIGHTS

HUMAN RIGHTS

Democracy's political dimension was considered in Part One. Now we are moving to the subject of human rights, one of the essentials of democracy. (Main source: Bülent Tanör, *Turkey's Human Rights Issue,* in Turkish BDS Publications, 1994). Here we have to be selective and shall give priority to those human rights which are most closely related to democracy.

The heading's being "Human Rights" carries a special meaning. In fact, the phrase which occurs more frequently in the language of Turkish public law is "fundamental rights and freedoms." This expression defines "those which exist" in the constitution and the laws. The term "human rights" establishes a context which goes beyond this and expresses "those which need to exist". From this is understood the common gains and ideals of humanity and contemporary civilisation which transcends the legislation of any certain country.

For this reason "human rights" is also the term the use of which is appropriate in a research which tries to produce criticism and recommendations.

The section begins with an examination and critique of general principles of Turkish Law related to the subject (I). This is followed by personal inviolability, liberty and security (II), Intellectual Freedom (III), and collective rights and freedoms (IV). The "Kurdish question", which is a special area, is included under a separate heading (V).

I) GENERAL PRINCIPLES

In Turkey, the general principles of law on human rights are defined by the Constitution. These are contained in the Preamble and in the section entitled "General Provisions" in Part Two.

1) The Preamble

The 5th paragraph of the Preamble of the Constitution contains the following provision embracing the entire Constitution and in particular the regime of fundamental rights and freedoms:

"No protection shall be afforded to thoughts or opinions contrary to Turkish national interests, the principle of the indivisibility of the existence of Turkey as an indivisible entity with its state and territory, Turkish historical and moral values, or the nationalism, principles, reforms and civilisationism of Atatürk; and as

required by the principle of secularism, there shall be no interference whatsoever of sacred religious feelings in state affairs and politics(...)"

Most of the values whose protection is sought in this paragraph have already been put under special guarantee in relevant articles of the Constitution: indivisibility, Atatürk nationalism, its principles and reforms, secularism, separation of religion and state, separation of religion and politics, and the impossibility of religion being a subject for exploitation.

Some terms are not clear from the viewpoint of legal value and scope: Turkish national interests, Turkish existence, Turkish historical and moral values, Atatürk civilisationism.

Furthermore, apart from the last, these terms with their excessively nationalist, statist and spiritualist characteristics, are also very suitable for abusing fundamental rights and freedoms.

The statement that, "No protection shall be afforded to thoughts or opinions(...)" with its character of transgressing even the world of ideas and beliefs, is a totalitarian dictum the equal of which is not to be found in any democratic constitution.

In the light of this information, the paragraph in question is unnecessary because provisions protecting certain legal values is already contained in the text of the Constitution, and it is also dangerous because its provisions have the potential for abuse.

It is necessary that this antidemocratic provision, which threatens in a serious way all fundamental human rights and freedoms and in particular freedom of thought, should be removed from the Constitution.

Proposal:

The 5th paragraph of the preamble to the Constitution should be put out of effect in its entirety.

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The preamble has other dubious aspects, such as "... liberal democracy, as set forth in the Constitution and the rule of law instituted according to its requirements" (paragraph 3) and "of the fundamental rights and freedoms set forth in this Constitution.." (paragraph 6). These reduce institutions and principles such as democracy, freedom and the state of law, which are universal standards, to "those indicated in this Constitution." The constituent power that made

the 1982 Constitution did not want universality. As the harbinger of the narrow limits imposed, it was already announced in the Preamble that democracy, freedom and the state of law may be possible and valid only to the extent of "those indicated in this Constitution." Thus the universal values in question have been "nationalised."

While announcing its acceptance of individual right of application to the Council of Europe, Turkey has stated that the right of application and complaint has been subsumed under the framework of the rights indicated in the 1982 Constitution. However, very correctly, this reservation has not received acceptance, and the comprehension of "democracy peculiar to Turkey, human rights peculiar to Turkey, state of law peculiar to Turkey" has suffered rejection in international legal circles.

We will return to the doubtful elements of these provisions in the Preamble a little later and emphasize these from another standpoint. However, coming to the point, we must state that these provisions of the Preamble inherently have the character of constitutional dicta limiting human rights. Because of this it is necessary not to overlook these basic provisions in the struggle for democracy.

Proposal:

The words "set forth in this Constitution" (paragraph 3) and "in this Constitution" (paragraph 6) should be removed from the text.

2) Restriction of fundamental rights and freedoms (Cons., Art. 13)

The general provision of the Constitution relating to the restriction of fundamental rights and freedoms is Article 13. According to the provisions here, fundamental rights and freedoms may be restricted both on special grounds indicated in the relevant articles and on general grounds indicated in this article. These general reasons are listed as follows: the indivisible integrity of the State with its territory and nation, national sovereignty, the Republic, national security, public order, general peace, public interest, public morals and public health.

As can be seen, not much has been left out or forgotten. Putting rights and freedoms under double jeopardy is a peculiarity of the 1982 Constitution; there is nothing similar to this in democratic constitutions.

Two practical results emerge from this double restriction. The first is that even rights and freedoms for the special restriction of which a reason is not given in the

relevant articles, such as the freedom to claim rights (Article 36) or the right of petition (Article 74) may be restricted by reason of the nine general restrictions above. The second is that those for the restriction of which a reason or reasons are indicated in the relevant articles may also be further limited by relying on the 9 concepts above or on some of them.

The Constitutional Court, too, has accepted this double restriction and has ruled that even freedom of thought may be restricted both for general and for specific reasons.

Let us give a concrete form to this regulation of the Constitution, and the judgements of the Constitutional Court which recognises it.

According to the provision of the Constitution, the freedom to express and disseminate ideas may be limited for the following reasons and aims: "The prevention of crimes, the punishment of offenders, the witholding of information duly classified as a State secret, the protection of the reputation and rights and the private and family lives of others, or the protection of professional secrets as prescribed by law, or the proper functioning judiciary". (Article 26/2). The Constitution has perhaps once more restricts freedom of science and art, perhaps once more as the sole example in the democratic world: "The right to disseminate shall not be exercised for the purpose of changing the provisions of Articles 1, 2 and 3 of the Constitution" (Article 27/2)". "The provisions of this article shall not preclude regulation by law of the entry into the country of foreign publications and their distribution." (Paragraph 3).

These two examples make clear the systematic limitations contained in the Constitution. According to this, freedom of thought and of arts and science, which are the most basic values of democracy and, in turn, of civilisation, may be doubly limited by the reasons and aims above, and in addition by the 9 general reasons, or some of them, in the first paragraph of Article 13.

Such a logic has no place in democracies. An arrangement in which every freedom may be limited by almost every concept which comes to mind cannot be considered to have produced a "system", because if the Constitution had not produced any "system" in these matters, or indeed if the Constitution itself had not existed, the result arrived at would not have been very different from the picture above.

How should a general article be arranged in relation to fundamental rights and freedoms? This is the question which requires to be answered.

A general article should not be a "general limitation provision" as in the existing text, but a "general protection provision". The general provision should indicate not what the legislature may do but what it may not do.

The question will be asked of how, in this case, fundamental rights and freedoms can be limited. The answer to this is simple, and it is this: "a right and freedom should be limited only by the special reason(s) and purpose indicated in the article in question. The content of and values inherent in certain rights and freedoms do not permit limitation. Into the relevant articles, limitations relating to these should not be inserted. Categories such as science and art, thought and its dissemination, religious belief, the search for judicial redress, the right of defence and the right to petition are examples of these. The content of these rights and freedoms is unlimited. These may only be regulated from certain standpoints related to procedure.

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Article 13 of the Constitution has also established a provision for the drawing of boundaries for the restriction of fundamental rights and freedoms. According to this, "General and specific grounds for restricting fundamental rights and freedoms shall not be in conflict with the requirements of the democratic order of society and shall not be imposed for any purpose other than those for which they are prescribed." (Paragraph 2).

The final principle of this limitation, that is, the principle of limitation by purpose, is correct. As for the phrase, "the requirements of the democractic order of society," this is not adequate because the amended 3rd paragraph of the Preamble to the Constitution speaks of "liberal democracy as set forth in this Constitution." This means that "liberal democracy", which is a universal concept, has been "nationalised" and reduced to "that indicated in this Constitution". Because of this the concept of "the requirements of the democratic order of society" will be interpreted in this light. Likewise, in its decisions up to 1987, the Constitutional Court leaned towards understanding "the requirements of democratic order of society" to the extent "indicated in this Constitution" and accepted by it. In this situation, if the adoption of democracy's universal criteria is required, an addition conforming to the formulation in Article 13/2 should be made, and the phrase referred to in the Preamble should be deleted, as has been stated previously.

There is also an important gap concerning the limits of limitation. In its first version, the 1961 Constitution provided this safeguard: "The law cannot encroach

upon the essence of a right or freedom even for reasons such as public interest, general morality, public order, social justice and national security." (Article 11/2). The 1982 Constitution does not contain this provision. Along with the revisions and additions indicated above, there is great benefit in including in the Constitution the principle of "not encroaching upon the essence." Besides, the Constitutional Court has demonstrated a tendency to include this concept in its latest rulings although it is not included in the Constitution.

On these grounds, it is necessary to make fundamental amendments to the 13th Article and the Preamble of the Constitution.

Proposal:

The 13th Article of the Constitution should be rearranged as follows:

Article 13 - Fundamental rights and freedoms may only be restricted by law and to the extent that the reasons and aims in relevant articles justify it.

These restrictions may not be contrary to the requirements of the meaning of a contemporary democratic society and the essence of a right or freedom may not be encroached upon.

3) Prohibition of abuse of fundamental rights and freedoms (Cons., Art. 14)

This provision of the Constitution prohibits the abuse of rights and freedoms. This Article is a third safety brace over fundamental rights and freedoms after the Preamble and Article 13. Not abusing rights and freedoms is already amongst the general principles of law. The 14th Article not only makes positive a principle which has no need of inclusion in the text, but it also gives another instruction to the legislature and encourages and authorises it once more to adopt restrictive measures.

The Constitutional Court has understood this in the same way. The High Court's decision in finding "the punishment of crimes committed by way of art" in compliance with the Constitution rested on Article 14 (E. 1985/8). In this situation there is nothing to do but to accept that just like the provision of Article 13, the provision of Article 14 operates as an additional general restricting provision.

For this reason, even if the above-recommended amendment in Article 13 is carried out, that the amendment will have no meaning if Article 14 remains intact, whereby Article 13 will have been replaced by Article 14.

The first and a simpler version of the provision of Article 14 of the Constitution was added to Article 11 of the 1961 Constitution which was amended in 1971. There was no such provision in the first version of the 1961 Constitution. No need was felt for it. The absence of such a provision created no problem between 1961 and 1971. Even while the Constitutional Court ruled that certain "offences of thought" were in compliance with the Constitution, the lack of such a provision was not felt.

From this viewpoint, if the transition to a democracy based on human rights and freedoms is desired, a return to 35 years ago, to the first provision of the 1961 Constitution, will be sufficient.

Proposal:

Article 14 of the Constitution should be abrogated.

4) Suspension of the exercise of fundamental rights and freedoms(Cons.,Art. 15)

This article of the Constitution relates to the restrictions to be imposed on the fundamental rights and freedoms regime under the procedures extraordinary administration. These administrative procedures are those of regimes of a state of war, mobilisation, martial law and state of emergency.

Questions relating to this matter have been previously dealt with under the heading Public Administration (Part One, VI). We may reexamine these consideration with certain additions.

First, the word "partially" should be added to the heading of the article, and the phrase "(may be suspended) entirely" should be removed because the existing form of the article and the heading have imply the ability to suspend fundamental rights and freedoms in their entirety, and this is obviously irreconcilable with the principle of "proportionality".

Second, the phrase "or for these, measures may be taken which supersede the guarantees embodied in the Constitution" contained in the same article should be taken out of effect because this provision is full of associations of ideas that exclude judicial review. To close the door to such a possibility, it is correct to make an addition to the article, explaining that judicial review exists.

Finally, the list of rights and freedoms which cannot be encroached upon even under extraordinary administrations should be extended. In our opinion,

freedoms and rights such as expression of thought, art and science, seeking judicial redress, and the rights of defence and petition should be included in this framework.

Proposal:

Article 15 should be re-edited from the beginning as follows:

Article 15- In times of war, mobilisation, martial law and in states of emergency, the exercise of fundamental rights and freedoms may be partially suspended within the limits of obligations arising from international law and to the extent required by the exigencies of the situation.

Recourse to judicial review shall be open against these acts and actions..

Even under the circumstances indicated in the first paragraph, an individual's right to life, the integrity of his material and spiritual being and his rights and freedoms with respect to religion, conscience, thought and its expression, art and science, seeking legal redress and making defences and petitions are inviolable; crime and punishment may not be made retroactive; presumption of innocence is mandatory.

II) PERSONAL INVIOLABILITY, LIBERTY AND SECURITY

Personal inviolability includes the individual's right to life and the right to protect and develop his physical and moral being. Questions such as the right to life and the death penalty, excesses of the security forces, torture, and security investigations are related to personal inviolability.

The concepts of personal liberty and security taken together express the individual's right to freedom of movement and the right not to be deprived his/her liberty save in limited situations prescribed by law. The two basic subjects in this area are arrest and detention.

Matters which will be considered here are as follows: the death penalty, excesses of the security forces, torture, security enquiry, arrest and detention.

1) The right to life and the capital panishment

Apart from Turkey, in European countries the death penalty has either been abolished entirely (Austria, Denmark, Federal Germany, Iceland, Luxemburg, Norway, Portugal, Sweden, France, Great Britain, the Netherlands, Romania etc.) or reduced to situations limited to military crimes committed in wartime and to

treason (Italy, Spain, Switzerland etc.). 39 States of the USA, and New Zealand and Australia have put an end to this punishment and in for Canada and Israil it has been maintained only for military crimes. The situation in Latin America is striking. Most of these are Third World countries, and they have either completely abolished death sentences (Venezuela, Colombia, the Dominic, Ecuador, Nicaragua, Honduras, Costa Rica, Panama, Uruguay etc.) or have restricted them to wartime (Argentina, Brazil, Mexico).

Amongst member countries of the Council of Europe, Turkey is the only country who has not signed Additional Protocol No. 6 concerning the abolition of the death penalty in peacetime. In the laws, this punishment is in force for as many as 40 crimes. The Constitution refers to the death penalty as well (Articles 15/2, 17/4 and 87).

However, certain developments, even if partially, can be considered as beginning to brighten this picture. First, the death penalty for 13 crimes has been changed to life imprisonment by an amendment made to the Turkish Penal Code (3679-21.11.1990). The second development is the provision that death sentences passed up to 8.4.1991 under the Anti-Terrorism Law dated 12.4.1991 not be carried out, and the annulment of the High Treason Law. The third and fundamentally interesting one is the unwilling behaviour of the Grand National Assembly of Turkey on the subject of carrying out finalised death sentences from 1984 to the present, and the fact that since that date no enforcement law has been adopted.

These developments, and in particular the last item, are signs that in our country, too, the death penalty has not found great support in the public conscience and at the state level. Now what is required by this may be carried out in the legal realm. The fact that the Constitution speaks of death penalties is not an obstacle to the removal of these from the laws. The stipulations of the Constitution do not make these penalties compulsory; they are there to ensure that they cannot be considered contrary to the Constitution. Technically, if the death penalty is not contrary to the Constitution, its removal cannot be unconstitutional either. Indeed, it fulfils the requirement of the "right to life" in Article 17/1.

Proposal:

Additional Protocol No. 6 should be accepted. Provisions in the laws relating to death penalties (at least the ones to be applied except in case of a state of war) should be taken out of effect.

2) Excesses of the security forces

By this phrase is meant excessively violent or arbitrary behaviour displayed by the security forces in the execution of their duties. The powers of the security forces to resort to violence, even to use their weapons, under certain circumstances and within certains limits are natural. The question here is whether or not erroneous aspects are to be found in the regulation of these powers. We wonder whether they have been regulated in such a way as to damage personal inviolability and whether there are provisions open to arbitrariness.

The subject has been dealt with in various laws and regulations (Mobile Forces Regulation, Article 25). The existence of differences in regulations from the standpoint of ordinary and emergency periods is also natural.

The general provision related to ordinary times is contained in Article 16 of the Law on the Duties and Powers of the Police. Promulgated in the single-party period (2559- 4.7.1934), this law recognises in a very generous way the power of the police to use weapons. In spite of this, it frequently emphasises that the use of weapons is a "last resort". The second law is the Law on Meetings and Demonstration Marches (2911-6.10.1983). Article 24 of this law allows under certain circumstances for a meeting or demonstration march to be dispersed and for force to be used in the process.

The main reason for people's being harmed, even losing their lives, as a result of excesses by the police and security forces is the provision added to the Law on the Duties and Powers of Police in 1985 with Law No. 3233.

Additional Article 6 - In cases of resistance by persons whose arrest is necessary or by groups whose dispersal is necessary or of their threatening to attack or carrying out attack, the police may use violence to subdue these actions.

Use of violence refers to the use of bodily force, physical force and all types of weapons specified in the law and it gradually increases according to the nature and level of resistance and attack in such a way as to bring about pacification.

In cases of intervention by group forces, the extent of the use of force and the equipment and instruments to be used are determined by the commander of the intervening force.

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Whether or not the existence of this provision is a necessary is a subject for debate, because it has been indicated above that Article 16 of the Law on the Duties and Powers of Police already contains authorisation for the use of

weapons. The use of force has also been regulated in other articles of the law (Article 11, 13, 17). From this point of view, Additional Article 6 has been seen as a redundant provision. Although it can be said that the reason for its introduction is related to the intensification of organised crime and outbreaks of mass violence, it should be accepted that in fact there is no need for such an excessive regulation (Zeki Hafızoğulları, *"The Duty and Authority of the Police to Use Force"*, Human Rights Centre Review, Ankara University, Faculty of Political Sciences, 1995).

This provision added in 1985 does not only consist of an "excess". From the point of view of its formulation, this provision opens the door to extremely dangerous practices. Gradually increasing violence against "resistance" to necessary arrest or dispersal goes as far as "the use of all types of weapon". Raids on illegal cells, "capture dead" operations, executions without trial, and mass killings by opening fire on crowds (Gazi district etc.) are examples of what this provision makes possible. It should be noted that against persistence of refusal to surrender by those whose arrest is necessary or of a crowd's failure to disperse, even if this is not armed resistance, "the power to use all types of weapon" would escalate gradually. The most tragic application of this is the mass killings with heavy weapons in houses and dwellings of those who do not obey a call to surrender.

For the protection of the right to life and physical inviolability, an amendment should definitely be made to this article.

Proposal:

The correct course is the annulment of Additional Article 6 of the Law on the Duties and Powers of the Police in its entirety. The power to use weapons and force has already been thoroughly regulated in other articles of the law and in other laws.

If annulment of the whole of the article is not desired, the alteration which should definitely be made is the deletion from the text of the word "resistance" in the first paragraph.

The provisions regulating the power of the security forces to use weapons under state of emergency administration procedures are contained in the Martial Law Act (Article 4) and the State of Emergency Law (Article 23). It is natural that the security forces should be equipped with additional powers under state of

emergency administration. But common points contained in both laws are of such a type as to create concern in that: "If the order to surrender is not obeyed, (...) members of the security forces on duty may fire upon the target directly and without hesitation."

In open spaces where persons or groups who are armed and seeking to use their weapons are in question, this regulation obviously falls within the logic of the operation. As for enclosed areas and situations where there is no possibility of knowing the identity of those inside or the real nature of their equipment, "the power to open fire directly and without hesitation" against persons who do not immediately obey the call to surrender but who do not attempt to resist with arms, this is another matter. The "target" here is people; exactly as in the previous examples, this power destroys the principle of "proportionality".

In times and regions of martial law and states of emergency, incidents of mass killing as a result of raids on enclosed spaces receive legal support from these provisions. The right of life and physical inviolability are not just "luxuries" to be protected under ordinary regimes. State of emergency regimes, too, owe them respect.

The fact that authorization provided in the law for killing people, whose being armed is not certain and who do not attempt to resist by using weapons, solely because they do not obey a call to surrender is contrary to the specific provision of the Constitution on this subject, because the right of life and physical inviolability are considered amongst the core of rights which are also inviolable in places and periods where state of emergency administrative procedures are in force.

The relevant provision of the Constitution reads as follows: "Even under the circumstances indicated in the first paragraph, the individual's right of life and the integrity of his physical and moral being shall be inviolable except where death occurs through lawful acts of warfare and execution of death setences ..." (Article 15/3). This provision is very clear; that the legal provisions above are contrary to it is also equally clear.

However, the State of Emergency Law of 1983 has been placed beyond judicial review (Constitution, Provisional Article 15), and the Constitutional Court has consolidated this position with rulings which regard this "provisional" article as permanent. In this situation, it is not possible to eliminate the dubious provision in the State of Emergency Law by judicial rulings.

Similar provisions in the Martial Law Act are not excluded from judicial review, but no annulment suit has been initiated on this subject. Time has long passed for this annulment action. The route to bringing this provision before the Constitutional Court by means of appeal is also blocked, because at the moment there is no martial law in the country.

It is obvious that, apart from going all the way of amending the law, once again no solution may be found.

Proposal:

Provisions in Article 4/2 of the Martial Law Act and Article 23/2 of the State of Emergency Law referring to "failure to obey an order to surrender or resorting to armed resistance" should be changed in this way: "failure to obey an order to surrender *and* resorting to armed resistance."

3) Torture

Revisions in the Criminal Procedure Law (3842, dated November 18, 1992) effected alterations in the earlier provisions, which had proved inadequate in preventing torture, and secured significant safeguards, such as: The clear recognition of the "right to remain silent" by the accused (Article 135/1, b, 4); the ascertainment of a statement or interrogation by a detailed record (Article 135/1, b, 7); an enumeration of prohibited methods of interrogation (Article 135/a); the explicit provision that statements obtained by such means may not be used as evidence (Article 135/a, final clause); the furnishing of legal assistance by the bar; examination by the attorney of records included in the preliminary investigation; the granting of an interview with the detained or accused party; permission to be accompanied by the attorney during the giving of a statement and questioning; waiver of the need for the power of attorney prior to defence; interviews in a setting ensuring that others are not privy to conversation; correspondence conducted without inspection (Articles 136/1, 138, 143, 136/final paragraph and 144); and evidence obtained in a manner contrary to law not to be used as a basis for judicial decisions (Article 254).

Despite such amendments and safeguards, the continuing practices of torture or claims to that effect is not surprising, because torture is not a disorder that can be eliminated simply by legislation. Moreover, even at the level of legislation, certain significant deficiencies may be observed. The following represent a few examples.

First of all, the Law no. 3842 which has introduced the favourable revisions above deny most of these rights to suspects and accused persons who come under the jurisdiction of the State Security Courts. Article 31 of the Law states that those provisions in force prior to the revisions in the Criminal Procedure Law will be implemented with respect to such suspects and accused persons. Only those revisions regarding the "prohibited methods of interrogation" (Article 135) and "exclusion from consideration as evidence" (Article 254) are in effect for those suspected and accused of offences under the jurisdiction of the State Security Courts. It should be recalled, however, that the original determination of which status is applicable for any suspect or accused is made by the police.

As we have seen, most of the former provisions that fail to provide protection for those suspected or accused of offences under the jurisdiction of the State Security Courts remain in force; whereas these are the very people who are most vulnerable to the threats facing suspects and the accused. This double standard in the law, therefore, is one of the main reasons for the continuation of torture practices or claims.

Second, the detention period is still lengthy, such that it practically facilitates or covers up ill-treatment. We will deal further with this issue shortly under the heading of detention.

Third, legislation, particularly that which is related to the trial of civil servants, clearly poses an obstacle to the trying of a civil servant accused of torture. This issue will be also dealt with in the part devoted to the State of Law.

Fourth, the penal and administrative sanctions are inadequate. The penalties for torture frequently come not under the provision pertaining to torture (Turkish Criminal Code, Article 243), but under provisions pertaining to less serious acts of "maltreatment" (Turkish Criminal Code, Article 245). One reason is the reference to "accused" in the article pertaining to torture, so that when the person under arrest who is not yet the "accused" becomes a victim of torture, only the article regarding "maltreatment" can be applied. It is obvious that the persons who have been arrested but not yet detained are the main targets of torture.

The citing of only these four points clearly demonstrates the existence of a need for fundamental changes in the legislation.

Proposal:

The duality that has been created by the revisions in the Criminal Procedure Law must be abolished and the safeguards provided therein should be rendered

effective in all judicial venues and be applied to all offenses. Specifically, Paragraph 1, Article 31, of the Law no. 3842 must be abrogated.

In addition, the detention period must be reduced and an end be put to the privileges that hinder the prosecution of public officials; the provision for a penalty in cases of torture of suspects in the Turkish Criminal Code (Article 243) should also embrace those who are under detention; and, finally, the penalties provided in Articles 243 and 245 of the Turkish Criminal Code must be increased.

4) Personal inviolability and security inquiry

Personal inviolability also includes the protection and development of the individual's physical and moral being. (Constitution, Article 17/1). Against this, what meaning does the security investigation have, which is so widespread in Turkey?

Security enquiry is a pressure on and a threat to several individual rights and freedoms. The freedoms of thought, opinion, speech and work are damaged by this. Equality, presumption of innocence, privacy of private life and the principle of not seeking qualifications other than those required by the job on entering public service are all affected by security investigation and suffer depreciation. But above all else, the individual's dignity and physical-moral entity are impaired by this. From this viewpoint, it is necessary as a priority to relate the subject of security enquiry to the concept of personal inviolability.

It is useful to remind ourselves briefly of the principal features of the application of security enquiry. First, this application is striking from the viewpoint of the subjects it comprises. The subject of security enquiry is matters which do not constitute any offence. Criminal actions and behaviour already invite punitive sanction. Here, though, a kind of punishment of the individual for actions and behaviour which are not considered offences is in question.

The scope of security enquiry from the viewpoint of the individual is very wide. The application in Turkey is valid not only for duties with a degree of secrecy but for all fields of public service. The Security Enquiry By-law No. 245 dated 8.3.1990 (Official Gazette, 13.4.1990 - 20491) which is in force today decrees the resort to "archive search" in all appointments and transfers of public sector personnel. This expression is used in place of the expression "having a criminal record" which had been in use up to that time. In fact, the alteration mainly consists of this. It has not been possible to secure a serious reduction in the scope of personnel subject to security enquiry.

Another striking point from the legal point of view is that security enquiry has no constitutional or legal basis. Up to now the subject has been regulated by decisions of the council of ministers, circulars and by-laws. In fact, in the Security Enquiry Regulation currently in force referred to above, the space reserved for legal basis has been left blank because there is no such law. Therefore, such an application violates the principle of imposing restrictions on rights and freedoms solely by law. (Constitution, Article 13/1). Thus as many as 10 constitutional rights and freedoms or principles listed above are restricted by acts of the executive which have no legal basis. This is a complete violation of the Constitution.

In this situation, what should be done? It is obvious that certain sections of public service within a state need special care. It may be accepted that there is a need for security enquiry in employing personnel for civil service. But it is necessary to keep this application within reasonable bounds. And this is the subject of a legal regulation. In the light of this, security enquiry should be reorganised by a regulation within a limited framework. Finally, there is the necessity of carrying out a diminishing of the powers that are granted by some provisions to the administration to take decisions to the detriment of an individual based on secret enquiry.

In regulating the security enquiry by law, it should be listed and indicated as an exception in employing personnel in the public services. It would not be too difficult to determine these exceptions. Certainly the provision by law of such an application in areas such as the military, security and intelligence services is appropriate. For personnel to be employed in prisons and institutions executing punishment, the same enquiry may be considered proper. Except for these exceptional items, security enquiry on entry to the remaining services should be ended. Already in Grand National Assembly commissions the above categories have been specified in draft laws and the limitation of security enquiry to these has been suggested.

We have stated that certain laws equip the administration with the power to make decisions to the detriment of individuals with the methods of secret enquiry. The most definite and most disquieting examples of this are contained in the Passport Law and the Martial Law Statute. Article 22 of the Passport Law states that permission to travel abroad may not be given to "those whose departure from the country has been determined by the Interior Ministry" to be a danger to public security.

The last paragraph of the amended second article of the Martial Law Statute No. 1402 (2766 - 28.12.1982, Official Gazette 30.12.1982 - 17914) reads as follows: "Requests by martial law commanders for appointment, according to their status, or dismissal of public personnel whose employment is deemed doubtful from the viewpoint of general security, general peace, and public order in the region or whose services are not beneficial, and for the removal from duty or dismissal of those working in local administration shall be carried out immediately by the relevant agencies and organs. In relation to these, the provisions of Retirement Fund Law No. 5434 or of law on other social security institutions shall be applied. In this way, civil servants, other public officials, and public service workers who are so dismissed will no more be employed in public services. Concerning requests related to those who fall within the scope of Article 21 of this law, provisions in their own special laws shall be applied."

It is seen that both these provisions violate the individual person's right to protect and develop his/her material and moral being. These provisions have found a wide area of application. As will be recalled, certain artists and lawyers could not obtain Security permission in cases where they needed to travel abroad for medical treatment, and moreover a large number of citizens have been deprived of their right to travel abroad. As for Amended Article 2 of Law No. 1402, this has provided the opportunity for approximately 5 thousand public personnel, among them university teaching staff, to be removed from their duties without any cause being shown and with legal redress being prohibited.

Proposal:

Security enquiry should be regulated by law and should be defined as being applicable only to personnel who will be employed in units which are rated as confidental, the Turkish Armed Forces, the General Directorate of Security, intelligence organisations, and in institutions executing sentences, and prisons.

The provisions of Article 22 of the Passport Law and the final clause of Amended Article 2 of the Martial Law Statute should be put out of effect.

5) Arrest and detention

Of the two important restrictions relating to personal liberty and security, the first is the situation of arrest and detention, the second detention on remand.

The principle questions of the detention regime are: conditions of arrest, notification of the arrested person's relatives, the rights of the person arrested, and periods of detention.

The conditions for arrest and detention are regulated by Article 127 of Criminal Procedure Law (CPL). These conditions are reasonable; they are also in conformity with the standards laid down in the European Convention on Human Rights. (Article 5/1, c).

With the amendments made to the CPL in 1992 (Law No. 3842), the role of the judge in arrest and detention is also recognised. According to this, the arrested person's lawyer, legal representative, next of kin of the first or second degree or spouse may apply to a justice of the peace to procure immediate release. (Amended Article 128). However, pursuant to Article 31 of the amendment law, this provision is not applied to offences falling within the Jurisdiction of State Security Courts. Here once again doubts about discriminatory legislation arise.

Proposal:

Article 31 of Law No. 3842 should be amended so as to remove the exception relating to State Security Courts.

* * *

It has been stated that the second problem of the detention regime relates to the "notification of relatives". This duty has on many occasions not been carried out. This situation arises from deficiencies in the type of training given to security personnel and from lack of supervision. However, the legal arrangements are not flawless either. First and foremost, the Constitution has provided an exceptional provision leaving the door open to arbitrary behaviour. According to this, "Notification of the situation of the person arrested or detained shall be made promptly to the next of kin except in cases of definite necessities pertaining to the risk of revealing the scope and subject of the investigation compelling otherwise". (Article 19/6). The 1961 Constitution did not contain such an exceptional provision. It is also impossible to understand from the exception provision in the 1982 Constitution whether what may not be notified is the event of arrest or the reasons for it. Law on the Duties and Powers of Police does not provide greater certainty: The next of kin of the person arrested need not be notified of the situation "if this shall pose a definite risk of revealing the subject of investigation" (Article 13).

Both in the Constitution and in the Law on the Duties and Powers of Police, these exceptional restrictions are extremely harmful. The role of these evasions is great in jeopardising the suspected or accused person's rights and in dismaying his relatives. These provisions require to be deleted from the Constitution and the law.

Proposal:

The phrase "except in cases of definite necessities pertaining to the risk of revealing the scope and subject of the investigation" contained in the 6th Paragraph of Article 19 of the Constitution should be deleted, and the provision of the paragraph should be rearranged as follows, as in the 1961 Constitution: "The situation of the person arrested or detained shall promptly be notified to his/her next of kin".

Likewise, the expression "if this shall pose a definite risk of revealing the subject of investigation" in Article 13 of the Law on the Duties and Powers of Police should be deleted from the text, and the paragraph should read as follows: "The arrest of a person shall promptly be notified to his/her next of kin".

* * *

From the viewpoint of an arrested person's rights, the 1992 CPL (CMUK) amendments have provided important guarantees: the right of silence, the possibility of being able to present evidence in his favour in a more reliable manner, the ensuring of a written record of a statement or interrogation, prohibited interrogation methods and the non acceptance as evidence of statements obtained in this way (Articles 135, 135/a, 254/2), and having the legal assistance of a lawyer and being able to see and contact him/her at all times. (Articles 136, final clause and 144). However, these guarantees, apart from "prohibited interrogation methods" and "non-acceptance as evidence" are not applied in offences falling within the jurisdiction of the State Security Courts. At the stage of arrest, those who determine what is within the jurisdiction of the State Security Courts and what is outside it are the police officers.

Proposal:

Discriminatory provisions concerning offences falling within the jurisdiction of State Security Courts need to be removed.

A critical point relating to detention regime is the subject of periods. After the

1992 CPL (CMUK) amendments, the first period has been kept as 24 hours, and it has been laid down that in collective offences committed by three or more persons, the prosecutor may extend this to 4 days by written order; and if the investigation still cannot be completed, it may be prolonged to 8 days by the decision of a justice of the peace upon the prosecutor's request. Thus, in collective offences, the maximum 15-day period effective up to that date has been reduced to 8 days. (Article 128). However, as expected, this, too, has exceptions. These periods are 48 hours and 15 days in offences falling within the jurisdiction of State Security Courts and twice this, i.e. 96 hours and 30 days, in offences falling within the jurisdiction of State Security Courts in state of emergency regions (Law No. 3842, Article 30).

These periods are very long and greatly exceed European standards. In the system of the European Convention on Human Rights, the maximum period of 96 hours, in other words 4 days, may be extended a little by judicial decision. The lengthy detention periods in Turkey has also been observed by the European Human Rights Commission, and circumstances that necessitate payment of compensation by Turkey have emerged.

A draft amendment of law signed by Necmettin Erbakan, the Prime Minister, and prepared by the Ministry of Justice, that also takes account of this has been presented to the Presidency of the Grand National Assembly. In the draft, in case of simple offences, the maximum period of detention in collective offences is reduced from 8 days to 7 subject to judicial decision; fundamentally important, the same principle is adopted for offences that are under the jurisdiction of State Security Courts. In state of emergency regions there is the possibility of extending the 7-day period by a further 3 days, in other words to 10 days, by judicial decision. Moreover, the draft amendment further narrows down the jurisdiction of State Security Courts.

Proposal:

The periods laid down in the draft law are reasonable, and these need to be put into effect.

* * *

While concluding the subject of detention, it must be mentioned that in certain areas closely related to the subject there is also a need for additional regulations.

Proposal:

(a) From the moment of arrest all information should be collected in one centre and the person arrested and his/her condition should be continually monitored (The killing of Metin Göktepe has once more made clear how necessary such a measure is).

(b) Interrogation must be carried out by the prosecutor and a lawyer must be present. This item also reduces the probability of rejection of a statement.

(c) The Draft Judicial Police Force Statute should be passed into law and a judicial police force be founded. Without this, the realisation of a trustworthy detention regime is almost impossible.

(d) The technical facilities offered to government doctors and the Judicial Medical Institution must be improved and, more importantly, these must acquire an active and protected legal status.

6) Detention on remand

Judges in Turkey have tended towards simply passing judgements for detention in certain types of cases. So much so that detention on remand seems like a rule. Because trials have also dragged on for a long time, detention, which is basically a preventive measure, has been transformed into a punishment suffered in advance. Some aspects of the criminal procedure law which simplify and fail to restrict detention have also played a role in this.

The 1992 CPL (CMUK) amendments have brought about important innovations in this field, too. Detention conditions and circumstances have been narrowed and clarified, and the principle of proportionality has been adopted which did not exist before. (Article 104, last paragraph). Moreover, some sort of "detention trial" has been introduced in which both prosecution and defence take part.

Doubtful and deficient arrangements also exist. In offences including punishments restricting personal liberties for up to 6 months, recognising the crime's having awakened "indignation" in the community as one of the reasons for detention (Article 104/3) is one of these. With this provision, it is as though the accused has been left not to the judiciary but to the community and its conscience. Another negative factor is that the new detention regime is not applied to offences falling within the jurisdiction of the State Security Courts.

The length or brevity of the period passed in custody is also important from the viewpoint of the accused's rights and the right to fair trial. There are no universal and definite rules on the length of reasonable detention periods. However, by examining every individual case within its own context, the European Court of Human Rights has produced certain yardsticks.

The Court has established in two decisions that periods in custody of 26 and 24 months are not to be considered "reasonable" and violate the provision of Article 5/3 of the European Convention on Human Rights (Neumeister and Stögmüller). In recent years, influenced by these decisions, several European countries have limited periods in custody still further. For example, in Federal Germany these periods are 6 months for simple offences and 1 year for terrorist crimes.

The 1992 CPL (CMUK) amendments established the detention periods by excluding the State Security Courts once more. In the preliminary investigation the upper limit is 6 months. In the initiation of a public prosecution, it is 2 years. However, in sentences of 7 years or over the judge has the right to exercise discretion (Article 110). As is seen, the question in this field is not the length or the brevity of the periods, but that once again the State Security Courts have been left out.

If the custody is unjust and the trial ends up in acquittal, then what happens? For those who know the taste of freedom, it is hard to determine the price to compensate for the loss. However, in these situations there is a law whose application is possible: the Law Concerning Payment of Compensation to Illegally Arrested or Detained Persons (466 - 7.5.1964, Official Gazette 15.5.1964-11704). But the compensation payable under this law is ridiculous and, leaving aside compensating for the damage, injures human dignity. It is necessary to reconsider this subject.

Proposal:

On the subject of the custody regime, exceptions concerning the State Security Courts should be lifted, or more reasonable limits should be placed on these. The provision, "the awakening of public indignation by the offence or..." in Article 104 of the CMUK should be deleted.

The legal regulation relating to compensation for unlawful arrest should be reviewed and compensation payments brought to a state of compatibility with human dignity.

III) INTELLECTUAL FREEDOMS

Another variable which closely concerns the functioning or non-functioning of democracy is the state of intellectual freedoms. To this group, freedom of religion must be added. Freedom of belief and religion ultimately have an "intellectual" nature, they belong to a person's spiritual world.

Under this heading, after freedom of religion, freedom of thought and "offences of thought", freedom of science and art, and freedom of mass communication will be considered.

1) Freedoms of religion

At the forefront of freedoms of religion comes freedom of belief. This is followed by the freedoms of worship and education.

a) Freedom of belief

Freedom of belief includes and protects being able to believe in any religion and also to have no religious-theist belief. The first and third paragraphs of Article 24 of the Constitution read as follows: "Everyone has the right to freedom of conscience, religious belief and conviction(...). No one shall be compelled to worship, or to participate in religious ceremonies and rites, to reveal religious beliefs and convictions, or be blamed or accused because of his/her religious beliefs and convictions".

In a decision, the Constitutional Court also stated as follows: "In a secular State everybody is free to choose his/her religion and to be able to divulge it within the limits of freedom of religion and conscience. The same is true for those who hold no religious belief" (E.1986/11)

At first glance, there seem to be no legal problems in our country from the viewpoint of the freedom of belief. At least, this is the situation for the majority religion and creeds. It may also be said that certain interventions against minority beliefs or non-believers have not arisen from the law but from the unlawful actions of certain administrators, or that they derive from communal pressures.

The judicial authorities have been careful on the subject of beliefs and have taken protective decisions. The decision of the Constitutional Court considering such provisions of the Turkish Criminal Code that discriminate between celestial and non-celestial religions and that punish attacks only on the first group as being contrary to freedom of belief and annulling them, is an example of this (E.1986/11). This deficiency has been overcome by an amendment of law made

later, and in this sense all religions and beliefs have been put under protection (3369-20.5.1987, Official Gazette 26.5.1987 - 19471). The Court of Cassation also behaved in the same way with its decision considering the freedoms of belief and worship of Jehovah's Witnesses as being under the protection of the Constitution (9. Penal Chamber E.1985/2623).

However, it is necessary to deepen these preliminary observations. There are at least two significant examples of unjust interventions in freedom of belief by law and legislation. The first, compulsory religious education, will be returned to a little later under the heading "religious education". The second example is the provision in the 1st paragraph of Article 43 of the Civil Status Law No. 1587 dated 5.5.1972 that a person's "religion" be indicated in his birth registration. Here obvious contravention of the provision of the Constitution that "no one (...) shall be compelled to reveal his/her religious beliefs and convictions" is in question. However, in two judgements the Constitutional Court reached the conclusion that this provision was not contrary to the Constitution (E.1979/9 and E.1995/17). Henceforth, this provision may only be rendered ineffective by means of legislative enactment.

b) Freedom of worship

Regarding freedom of worship, the framework laid out by the Constitution is that religious worship, rituals and ceremonies are free so long as they do not violate Article 14 of the Constitution (Article 24/2). Similar provisions exist in all legal systems. The context for religious practice in Turkey has been made flexible and, in a sense, "liberalized." An end has been put to the use of certain houses of worship for other purposes (2845-November 15, 1935); pilgrimage has been facilitated; the original language (i.e. Arabic) of the Muslim call to prayer has been restored; tombs (türbe) have been reopened to visitors; religious orders have been considered to enjoy constitutional protection by the Court of Cassation on the condition that they do not go beyond the dimension of belief (9. Penal Chamber, 1985/2623), and have been let to return to social and even political life. Article 163 of the Turkish Criminal Code and the Law no. 6187 on the Protection of the Freedom of Conscience and Freedom of Meeting, which had served as the pretext for raids on "Secret Rituals", were abrogated (April 12, 1991). Permission for attendance at Muslim Friday prayers on condition that it creates no interference with public service has led to a de facto situation of limited freedom.

Issues arising in association with the freedom of worship involve violations by certain administrators of the principle that worship shall not be subject to compulsion. These kinds of incidents do not originate from the law, however, and on the contrary, constitute a violation of the law. For this reason, this study the main subject of which is the "scanning of existing legislation" should not be expected to address these issues.

c) Religious education

In the field of religious education, one can speak of both a liberalization, on one hand, and practices that infringe on laicism and the freedom of belief, on the other.

The liberalization in question is a fact that is observed at the level of civil society. Indications such as the existence of classes for *Quran* instruction-regardless of whether permission has been granted or whether it takes place under official supervision-activities by religious foundations and associations; and the rapid proliferation of religious publications, films and videos and television broadcasts, are evidence of this fact. Complaints that religious training and publishing activities are a monopoly of the State no longer have any foundation.

The problem lies elsewhere. It is at the State level and concerns laicism. The "laic" State which ought to remain neutral regarding Islam and other religions has itself come to occupy the position of being a religious propagator. Here, we are not concerned with the degree of authenticity of the particular version of Islam that is being disseminated.

The State possesses three main channels for religious propagation and instruction: The Department of Religious Affairs; Highschools for the Training of Religious Functionaries; and compulsory religious classes in primary and secondary education. The last two are the first to come to mind when one addresses the subject of religious training.

The constant increase in numbers of Highschools for the Training of Religious Functionaries has been criticized chiefly from the point of view of laicism and the degeneration of the unity of laic education (the Law for the Unification of Education). These criticisms are entirely justified. Secondary education today has indeed a dual character, with some pupils educated in one way and the others in a different way.

Another dimension of the issue, however, is one which pertains to democracy. The foundations on which democratic systems have arisen consist not merely

of the freedom of enterprise alone but also the premise of "liberation of the intellect" and "free man". The phrase "The Age of Enlightenment" is one expression of this. The democratization of a society and political system is possible only to the extent that man and his thought are free, which in turn depends on the development of his capabilities to conceive rationally of, and change, nature, the universe and society. That is why it is requisite that individuals and, in this connection, young people be raised in a "culture of questioning".

In the religious conception of the world, however, a principle of obedience and submission take the place of values like freedom, intellect, debate and questioning. As the number of people increases who do not consider themselves "authorized to make a decision" concerning almost any aspect of life, such as law, politics, economy, morals and even daily life and who believe that the rules of behaviour in these areas have "already been decreed", our chances diminish for a democratic regime based on freedom and human rights.

Problems related to the human rights dimension of democratization in Turkey are first and foremost related to the "Human". As for the solution to these, to a large extent it depends on how youth is brought up. From this point of view, secondary education is a crucial sector. Those who have had the opportunity to get to know young people in higher education closely have observed at first hand how an increasingly large section of the nation's youth is trapped and spinning in the whirlpools of a dogmatic and totalitarian world view.

In order to raise generations attached to human freedom and rights and democracy, it is necessary to make fundemental changes in secondary education.

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"Compulsory religious education" in primary and secondary education is a serious problem in this connection. It would be useful to know how this point was reached.

In 1948-1949 religion courses were reinstituted in the 4th and 5th grades of primary schools. These were offered on the conditions that students attended only at their parents' request, that they were taught by the school's own teachers, and that the hours of other courses were not reduced. They had no influence on passing classes. However, Republican People's Party's Education Minister Prof. Tahsin Banguoğlu, by using, as he himself called it, an "artifice" and introducing the procedure of the provision of a letter from parents not in order for a student to attend religious education but in order to avoid it, brought this to an effectively compul-

sory state. Religion courses, which were voluntary on paper but compulsory in fact until 1982, from that date onwards attained their true identity and were brought to a compulsory state not only for primary schools but for the primary and secondary education as a whole.

The 4th paragraph of Article 24 of the 1982 Constitution which related to this subject reads as follows: "Education and instruction in religion and ethics shall be conducted under State supervision and control. Instruction in religious culture and moral education shall be compulsory in the curricula of primary and secondary education. Other religious education and instruction shall be subject to the individual's own desire and, in the case of minors, to the request of their guardians".

The wording of the articles gives the impression that the aim of compulsory instruction does not encourage adoption of a certain religion but to give general knowledge and culture on religions, but the facts of the case are otherwise.

In the form in which it emerged from the Consultative Assembly, this provision referred to "religious and moral education and teaching" and "lessons in religion". That its aim was not to give general information on religions but to provide direct religious initiation is clear from the fact that it was deemed necessary to add the provision, "Attendance at religious lessons for persons who are not members of the Islamic faith is dependent on their wish."

This sentence was deleted from the text by the National Security Council, organ of the military regime of 1980-1983, and "religious culture and moral teaching" was decided upon as an "objective" formula. However, it is clearly understood from the minutes of the National Security Council that its basic aim was to make use of "religion as an element uniting the community" and of religious teaching.

The application developed according to these intentions, unfolding in a grave manner. From then on, that the "religious culture and moral teaching" lessons have been directed towards indoctrination and practice is clearly understood from the 3 November 1986 decision of the High Council on Education and Teaching of the Ministry of National Education. The text states that Christian and Jewish students of Turkish nationality receiving education in schools other then minority schools may not be made to learn by heart professions of (Islamic) faith, professions of monotheism, the Muslim formula "in God's name", chapters and passages of the Koran or prayers; they may not be taught knowledge directed towards application of prayers, fasting, religious ablutions or the pilgrimage to Mecca, and those students are not to be held responsible for these (Cumhuriyet, 19.11.1986).

This decision displays clearly what kind of indoctrinatory and influential nature this has for "Muslim students". Creating a distinction such as "Muslim and non-muslim" in primary and secondary education among children and young people, illustrates how far education today has deviated from secularism and principles of contemporary civilisation.

Because our subject is democracy, human rights, universal freedoms and in particular religious education, it is necessary also to address the issue from these standpoints.

Compulsory religious lessons are contrary to freedom of belief and religion. In a democratic, secular order based on human rights, the State has no right or authority to teach religion by force. Thinking in the opposite way, is probably contrary to the religion's own system of values. However, this is outside the scope of our subject.

Compulsory religion lessons mean that the State has forcibly entered an area reserved for the individual and conscious choice of people (students, parents). Freedom of belief and non-belief exists also to protect an individual from all types of external pressure and at this point definitely against State pressure.

From the viewpoint of international standards, it is obvious that compulsory religion lessons upon parental rights and contradict the freedoms of teaching and education. The United Nations' Declaration of the Removal of All Types of Intolerance and Discrimination Based on Religion or Belief dated 1981 forbids all types of religious education against the wishes of parents in Article 5/5: "A child... may not be forced to receive instruction of religion and belief against the wishes of its parents or legal guardian." The Declaration of Children's Rights, an earlier document dated 20 November 1959, also makes concrete the rights of parents to raise their children "in accordance with their own religious and philosophical beliefs."

In its *Campbell and Cosans* decision of 25 February 1982, the European Court of Human Rights states as follows: "Child education in all communities is a collection of methods applied by adults to instil in young people their beliefs, customs and other values. Instruction (enseignement) aims in particular at transferring information and the formation of intellectual perfection." From this angle, as it is emphasized in the *Kjeldsen et al* decision dated 7 December 1976, instruction needs not to put forward a certain doctrine but to "take care in disseminating the knowledge and findings in the curriculum in an objective, critical and pluralist

manner." Again in this decision, according to the Court's view the principle of "educational pluralism" in question prohibits "the pursuing of the aim of indoctrination which can be considered as disrespect to the religious and philosophical beliefs of a child's parents."

All this data should have made it clear that compulsory religious education is contrary to secularism, secular education, freedom of religion and conscience and the rights and freedoms of children and parents. In fact, the Constitutional Court, in making decisions to close the National Order Party and the "Huzur" Party on the grounds of their contravening secularism considered the desires of these parties to bring religious education to a compulsory and widespread state and, finding these wishes contrary to the Constitution and secularism, indicated them as being amongst the reasons for "closure" (K.1971/1 and 1983/2).

Proposal:

a) The words "of his/her faith" should be deleted from the text of Article 43, Paragraph 1 of the Civil Registration Law no. 1587 dated May 5, 1972.

b) The Highschools for the Training of Religious Functionaries should be provided with a structure that conforms to the status of vocational highschools; those which are in excess of the real need for such schools should be converted to general or technical highschools. Female students should, under no condition, be admitted to Highschools for the Training of Religious Functionaries.

c) All students should be subject to compulsory attendance for eight years of elementary education, and the first three years of Highschools for the Training of Religious Functionaries should be eliminated.

d) Classes for *Quran* instruction should be under the supervision of the Ministry of Education, and no admission should be granted to those who fail to complete elementary education.

e) The provision pertaining to religious classes in public schools should be abolished by an amendment of the Constitution and a return be made to the wording contained in Paragraph 4, Article 19 of the 1961 Constitution: "Participation in religious education and training is at the option of the individual and the legal guardians of minors".

f) Apart from examinations for the hiring of staff for institutions providing religious education and religious functionaries, no questions are to be asked to determine one's religious knowledge.

2) Freedom of thought and "crimes of thought"

In pluralistic-liberal democracies, the phrase "freedom of thought" signifies the freedom of expression (and this is its essence). This freedom occupies a privileged position. The doors are open to the expression of thought and its defence and closed to "Crimes of Thought".

The bitter experience of the period prior to and during the Second World War led to a reconsideration of certain aspects of freedom of thought. In some countries, propaganda in support of fascism, discrimination, anti-semitism and incitement to war came under prohibition. Legislation to combat terrorism also forbids praise of terrorist organisations.

But, "crimes of thought" in Turkey have existed in a real sense and on even broader grounds. The Anti-Terrorism Act has carried out a sweeping clean-up in this sphere. A significant proportion of the provisions regarding certain "crimes of thought", which were pronounced to be in conformity with the Constitution by the Constitutional Court and which were implemented at times in a very rigid manner by the Court of Cassation and the Military Court of Cassation, has been preempted by the political will.

The Anti-Terrorism Act has abrogated Articles 140, 141, 142 (excluding Paragraph 3) and Article 163 on "crimes of thought" in the Turkish Criminal Code (Article 23). In this context, propaganda and praise no longer constitute offences. In reference to these articles, the statement of reasons of the Anti-Terrorism Act states that they were being abrogated because their implementation had resulted in restrictions in the freedom of expression of thought and the freedom to organize on the basis of ideas; and in their place, an arrangement was being made that would safeguard the freedom of the expression of thought, so long as it did not advocate violence, and the freedom of association in support of ideas. Undoubtedly, the intent of the law-makers in this case was to allow the expression of ideas that do not advocate violence and to permit association on the basis of ideas. Article 8 of the Anti-Terrorism Act, which will be dealt with shortly, represents a serious and unacceptable exception to this.

Another important phase of reform has occurred in the area of "language freedom". The repeal of the Law on Publication in Languages Other than Turkish (by Article 23 of the Anti-Terrorism Act) means that freedom of press and publication (books, magazines, videos, tapes, etc.) in every language (or, more to the point, in Kurdish which was the actually targeted language) has been restored. But the pro-

visions in the Constitution that impose restrictions on "languages prohibited by law" still remain in force (Article 26/3 and 28/2).

The Anti-Terrorism Act has also abrogated Article 163 of the Turkish Criminal Code and, parallel to this, a special law, no. 6187, the Law for the Protection of the Freedom of Conscience and Freedom of Meeting. The provisions abrogated were principally aimed at penalizing these three offences: Anti-laic propaganda, anti-laic organization and the exploitation and abuse of religious sentiments or of things regarded as sacred by religion for the purpose of securing personal or political gains. The first two offences pertained to the expression of thought and to organization on the basis of ideas. Their abrogation should be regarded as a positive step towards liberal democracy. Besides, these two offences had no basis in the constitutions of 1961 and 1982. The third offence which might be shortly called "abuse" has no place in the context of the freedom of thought; besides, it is provided for in the 1982 Constitution. The final paragraph of Article 24 reads as follows: "No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of securing personal or political gain or influence..." What constitutes the expression of thought or the "exploitation and abuse" remains the task of the courts. What interests us here is that no penal sanction exists in the legislation against actions that "exploit and abuse". Current events clearly show the drawbacks of this lacuna.

The Anti-Terrorism Act contains provisions that restrict the freedom of expression of thought. The first of these pertains to the punishment of those who print and publish announcements and statements of terrorist organizations (Article 6/2). However, this situation concerns freedom of press and publication more closely and will therefore be treated under the appropriate heading shortly. The second curtailment is the prohibition of and penalties for propaganda relating to terrorist organisations (Article 7/2). Similar provisions exist in other countries possessing legislation to fight terrorism and cannot be said to violate the freedom of thought.

These are not the typical "crimes of thought" spelled out in the Anti-Terrorism Act; rather, they reside in Article 8 entitled "Propaganda against the Indivisibility of the State". The original text of the article was as follows: "Regardless of method or objective or idea, no written or verbal propaganda and meetings, demonstrations and marches may be held that aim at impairing the indivisibility of the Republic of Turkey. Those who do so shall be subject to heavy imprisonment of 2 to 5 years

and a heavy fine of 50 to 100 million Turkish Liras." The second paragraph of the article applies to members of the press.

As we have seen, the arrangement that takes as its starting point "regardless of whichever method, objective or idea" results in the punishment of even such statements having nothing to do with terrorism. By this provision, the offences of the earlier Article 142/3 of the Turkish Criminal Code have become even more undefined and a reduction has been made only in the penalty. This provision, which imposes penalties even on thoughts that do not involve advocating violence, is a typical "crime of thought" and violates the freedom of thought.

As a matter of fact, the practice has vindicated these worries. Application of this article has led to the interrogation of a number of writers and publishers, and some of them have received final sentences. In situations where the provisions of this article cannot be implemented, Article 312 of the Turkish Criminal Code is implemented and decisions for final verdicts are obtained. In applications of Article 8 of the Turkish Criminal Code, the Court of Cassation has not sought the condition of a special intention of committing an offence, and a general intention has been considered sufficient for finding a suspect guilty (9. Penal Chamber, 1993/190).

The latest amendment of the Anti-Terrorism Act has eliminated from the text the phrase "regardless of method, purpose and thought" (Law 4126, October 27, 1995). This deletion represents a positive action from the perspective of preventing punishment of a suspect without the necessity of seeking fault in the action; however, it is still unclear as to which kind of verbal and written propaganda is of the nature to impair "the indivisibility of the State with its territory and nation." There is still the possibility that expressions of thought and comment may be subject to punishment. The revised form of the Article also puts at risk the principle that "offences must be laid down in the law" and the right to be informed. (Çetin Özek, In: *The Problem of Democratization in Turkey,* in Turkish, edited by Istanbul University, Faculty of Law, 1996, p.35, footnote 32).

As will be noted, the article in its revised form also fails to seek the condition that propaganda be of such a character as to impair the indivisibility of the state with its territory and nation. To be subject to punishment for the act of propaganda, it is unnecessary to consider whether or not the propaganda would lead to this outcome. To punish the perpetrator, it is sufficient that he has acted, or is assumed to have acted, with that purpose in mind. It is clearly evident that the

aim, rather than the act, is punished, and that it is contrary to the philosophy of democracy. For this reason, the only thing that must be done is to abrogate Article 8 of the Turkish Criminal Code (see Sahir Erman, In: *The Problem of Democratization in Turkey*, p. 50).

There are other provisions in force in the Turkish Criminal Code, in addition to the Anti-Terrorism Act, that restrict freedom of thought or that are interpreted and implemented as such. Such provisions punish those who obtain information, publication or dissemination of which is prohibited by the competent authorities (Article 132/3); those who gain access to information related to State secrets (Article 136/4); those who disseminate news that has been prohibited (Article 137); and those who publish articles which serve to cause the public to disobey the law and which endanger the security of the country or those who discourage the public from military duty by publication or persuasion (Article 155). In recent years, it has been observed that the application of the provisions of Article 155 is being sought in the prosecution of anti-war ideas.

Article 158 of the Turkish Criminal Code imposes penalties for "insults and cursing" directed at the person of the President of the Republic. The broad interpretation by courts of insults and cursing has led to the designation of strong criticism as an offence. Article 159 of the Turkish Criminal Code describes the offense of "openly insulting and deriding the Turkish nation, the Republic, the Grand National Assembly of Turkey, the Government, the Ministers, the armed and security forces of the State or the moral personality of the Judiciary". Numerous writers have been tried on grounds of this article.

The following phrases, abstracted from judgements of the Court of Cassation rendered according to Article 159 of the Turkish Criminal Code, have been defined as "insulting and deriding": "The Armed Forces or the Council in power is a junta; the junta is against the people; let us unite against the junta"; the claim that the courts have acted in a prejudicial manner in the release of the murderers; and concerning the government in power, "This is not the first incident under the Irmak government which rules the country by the jungle law. This incident is a link in the chain of raids and murders that continue the systematic beating of the teachers" and "darkening the silhouette of the homeland with shadowy clouds of cruelty smelling of death" (Tarık Senkeri, *Offenses of Insult and Derision in Constitutional Institutions* , in Turkish, Kazancı Publishers, 1996]).

Two other articles that are open to interpretation as punishing "crimes of thought" and, in fact, have been so applied in part are Articles 311, and 312 of the Turkish Criminal Code. These are provisions that impose penalties for the "incitement of the public to commit an offence (Article 311), and the frank praising of an action that is considered an offence by law or the statement that it appears good, or the encouragement of disobedience against the laws, or the incitement of the people to resentment and enmity on the basis of class, race, religion, sect or regional difference (Article 312). Certain "crimes of thought" that have been abolished (Article 163 of the Turkish Criminal Code) and certain statements that cannot be placed in the scope of the Anti-Terrorism Act have recently been punished under Article 312 of the Turkish Criminal Code.

It should also be noted that critical approaches in the spheres of faith and divinity have led to investigations on the basis of Article 175 of the Turkish Criminal Code. After the exclucion as an offense of anti-laic propaganda and even of exploitation for personal or political gain of religious feelings and of things held sacred by religion, the response in the form of a criminal investigation to criticisms of religion is one of the new contradictions of the national human rights regime.

"Legislation on crimes of thought" in the country comprises principally these items. When the balance sheet is drawn up for the year 1996, we see in this year alone a total of 140 years in prison and billions of lira in fines were imposed as penalty for intellectual offences (*Cumhuriyet* newspaper [October 25, 1996] p.3).

This is the picture, and it is thought-provoking from the standpoints of a democratic state governed by the rule of law and of human rights. What can be done in this situation?

Although some jurists who have demonstrated in their professional lives their devotion to human rights, democracy and freedom are of the opinion that "if the judge is good, there is no bad law" (Yılmaz Aliefendioğlu), the reality is there for all to see, with old and new court decisions. Unfortunately, the courts have been unable to provide a positive and lasting contribution to overcome the persistence of "crimes of thought".

It should be made clear, so as not to lead to unfair and one-sided accusations, that the present Constitution and laws also make it difficult to form a liberal case-law. Even when looked at from the perspective of the Constitution alone, the Preamble of the Constitution, and Articles 13, 14 and 26 thereof, are sufficient to reveal the situation.

For this reason, the solution lies not with the judge and the case-law, but with the legislature which should amend the laws. Once again,what is needed is "political will".

Proposal:

a) The reasons for special restrictions as are found in the phrases "the prevention of crime and the punishment of offenders" in Paragraph 2, Article 26 of the Constitution should be removed from the text since they serve to impose or maintain "crimes of thought". Paragraph 2 pertaining to language prohibitions should be abrogated in its entirety.

b) Article 8 of the Anti-Terrorism Act and Articles 132/3, 136/4 and 155 of the Turkish Criminal Code must be abolished.

c) Articles 158, 159, 311 and 312 must be revised so as not to permit the possibility of punishing ideas, and Paragraph 1 of Article 312 must be abrogated.

3) Freedom of science and arts

The Constitutions of 1961 and 1982 acknowledged freedom of science and arts in addition to freedom of thought. Although these two freedoms are intertwined, they differ in terms of their legal status.

The special place of science and arts throughout the history of human kind made it imperative that a free environment be provided for the creative work in these fields. For example, although some acts of propaganda (such as fascism, racism, discrimination, war propaganda, etc.), indecency and instigation to crime are not under the protection of law, it is inconceivable to have committed such offences with scientific and artistic creation. In this sense, freedom of science and arts is absolute, and is subject only to its own rules and criticism.

In Turkey, the courts valued these two freedoms differently. Under the 1961 Constitution, the Constitutional Court accepted the restricted nature of the freedom of thought, and ruled that 'offences of thought' were allowed in the Constitution. The same court, however, held the opinion that freedom of science and arts was to be unrestricted. Yet the distinction between restricted freedom of thought and unrestricted freedom of science and arts has not helped the latter.

Many authors, translators and publishers of local and foreign works were prosecuted under article 142 of the Turkish Criminal Code, and some of them received sentences. The annulment of this article in 1991 seemed to bring a relaxation, but it was soon understood that it was replaced by article 8 of the Anti-

Terrorism Act under which many studies and research have been considered to be "propaganda against the indivisibility of the State".

In the meantime, the 1961 Constitution which recognised the absolute freedom of science and arts was replaced with this provision of the Constitution of 1982: "The right to disseminate scientific and artistic works cannot be exercised for the purpose of changing articles 1, 2 and 3 of the Constitution" (art. 27/2). In no other democracy there exists a Constitution which restricts science and works of art with provisions that relate to the form of the State (art.1), the characteristics of the Republic (art. 2), and the integrity of the State, its official language, flag, national anthem and capital (art. 3).

The specific problem for scientific work is the 'crimes of thought'. The main problem for works of art on the other hand, is with the Administration. Artistic works such as films, musical pieces, videos, and plays are frequently faced with such acts of the administration as censorship, control, banning, and even outright destruction (of films).

The censorship of films is comprised of very strict controls carried out in at least three stages starting with the examination of the script, and continue throughout the shooting process and take their final form at the completion of shooting. The relatively tolerant attitute of the Council of State has not been very helpful in eliminating such strict controls.

The Governors of the provinces are also authorised to ban the showing of films. One film which succeeded in passing all stages of the censor was banned in the city of Gaziantep by the Office of the Governor on grounds that it "included scenes that were aimed at imposing ideas with the intention of defaming the Turkish police and destroying the integrity of the State". It is quite difficult to comprehend why the same film did not exactly pose the same 'threat' in other provinces of the country. The above mentioned Governorship banned the showing of 38 films in a period of 9 months.

There are also cases where the Governors ban films in order to protect moral values. But this raises the question that if a film (e.g. Betty Blue) can be shown in, for example, Istanbul then why is it considered to have adverse effects on the moral values in Kocaeli, a neighbouring province with a similar a social and cultural structure?

Musical performances, concerts and other audio-visual performances have also been subjected to strict controls. Concerts and video and music cassette tapes can

be banned. In such administrative measures it is again the governorships that play the major role, but the influence of the ministry at the background is discernable. In other words, a political structure obstructs scientific and artistic production.

The situation with theatre plays is not different. Plays face police inquiry, administrative injunction, or censorship from within the institution. Administrative decisions are usually based on the Law on the Duties and Powers of the Police, Add. Art. 1 (1985) and on article 11 of the Law of Provincial Administration.

All the pressures exerted on artistic work and the arbitrariness of implementation are due, to a large extent, to legislation. First and foremost comes the Constitution which justifies these pressures, and especially the censorship on films (Preamble; art. 13, 26 and 27). Law on Duties and Powers of the Police (art. 6) and a Regulation dated 1983 have also been the grounds on which such censorship is based. These two sources were repealed with the promulgation in 1986 of the Law for the Works of Cinema, Video and Music (SVMEK). The present pratice of censorship is based on SVMEK and on the regulations enacted on the basis of that law.

SVMEK has described its objective as: "to bring order and standard to the cinema and music life for our national unity, integrity and continuity" (art. 1). It is obvious that this represents an approach which restricts the universality and creativity of art. The law, on the other hand, brings two more control criteria in addition to the 9 already inscribed in the Constitution (art. 13/1), and thus even exceeds the Constitution in this respect. As if this were not enough, the by-law enacted on the basis of this Law has introduced two more criteria, bringing the number of clauses aimed at restricting the performance or practicing of art to 13. These last two criteria are the "hurting of national sentiments" and the "policies [of the State]" and especially its "foreign policies" (arts. 1 and 9).

The constraints in this area are not limited to preventive or preliminary control mechanisms. The Administration reserves the right to interfere and ban, at any time, any work of art that has already passed the censors. Article 9 of the Law for the Works of Cinema, Video and Music authorizes the Administration to make arbitrary interventions:

"Administrative officials may outlaw the distribution and performance of works of art which have the potential of causing a social incident because of the characteristics of the region within the scope of their authority and duty by indicating the reasons thereof. As a result of any inquiry that is held by the Ministry or

administrative officials, if the work of art in question is found to be contrary to the indivisible entity of the State with its territory and nation, national sovereignty, the Republic, national security, public order, general security, public good, general ethics, health, and customs and traditions, then such work shall be banned and judicial prosecution shall be carried out."

The above provision of the law, with such ambiguous terms as "the potential of causing a social incident" and "as a result of any inquiry", is the main source of the arbitrariness witnessed in practice. Although it is nominally possible to appeal against such administrative orders, the requirement to appeal separately in every province in which the work has been banned, and the economic and physical difficulties that this gives rise to, renders this right ineffectual. In essence, behind many of the prohibitions is the Ministry itself and its instructions, but when it comes to judicial action process, the Ministry absolves itself from any responsibility, and the owner of the banned work is compelled to file lawsuits against a number of administrative units in different administrative districts.

The banning of plays, on the other hand, is based on the following provision of Add. Article 1/2 of the Law on Duties and Powers of Police.

"Those that are found to be against the public morals, to the indivisible integrity of the State with its territory and nation or to the constitutional order shall be banned by the police under the instructions of the highest administrative official of the locality, and the relevant persons shall be referred to the judicial authorities."

Proposal:

(a) Provision of Article 27/2 of the Constitution which restricts the freedom to promote science and arts and which has no other example in the world must be abrogated.

(b) Another provision in the same article which reads, "Provisions of this Article shall not preclude regulation by law of entry and distribution of foreign publications into the country" (paragraph 3) was incorporated in the said Article as a constitutional basis for the provision of Article 31 of the Law on Press. These provisions are in contradiction with the principle of free flow of news and information without any boundaries. Furthermore, the phenomon of globalization has been recognised worldwide. Treating sources of information and news in a manner similar to drugs and arms is wrong. This article must be abrogated.

(c) Paragraph (D) of Article 8 of the Law on Duties and Powers of Police (3233 - 1985) (PVSK) which provides that "If the police has conclusive evidence and upon an order to be issued by the highest civil authority of the locality: (...) D) Places wherein games or plays or films or video bands which could be detrimental to the undivisible unity of the State with its territory and nation, constitutional order, general security and public moral are played, performed or shown .... shall be closed down and/or prohibited by the police from carrying on business " should be deleted from the text.

(d) As for Paragraph A) and C) of Article 11 of (PVSK) which read:

"Police shall prohibit, ban and prevent from further performance persons who:

A) behave in a manner or display an attitude which is shameful, not acceptable in terms of public order and in contradiction with principles of public morals and who expresses an opinion, sings a song, performs music or shows of similar nature;

B) (....)

C) produce or sell films, records, video and sound recordings which are not congruent with public morals even if no complaint has been lodged in connection therewith",

Paragraph A) should be entirely abrogated while the following phrase in paragraph C) should be deleted from the text: "..... produce or sell films, records, video and sound recordings which are not congruent with public morals....".

(d) The following provision of paragraph 2 of additional Article of PVSK (3233-1985) must be abrogated: "Those which are determined to be in contradiction with public morals, undivisible unity of the State with its territory and nation or the constitutional order shall be prohibited by the police upon an order of the highest local civil authority, and those concerned shall be promptly referred to judicial authorities".

The power and duty of the police to refer the suspects of a crime to the judicial authorities already exists in the legislation. Consequently, the annulment of this provision in its entirety will not cause any problems with respect to this last point either.

e) The expression in article 1 of the Law for the Works of Cinema, Video and Music (SVMEK), setting out the objective: "to bring order and standard to the cinema and music life for our national unity, integrity and continuity" should be replaced with a democratic and liberal arrangement.

f) Article 9 of the SVMEK given above should be abrogated.

g) The expressions, included in the by-laws issued after the SVMEK, such as "the policies [of the State]", "foreign policy" and "hurting of national sentiments" should be put out of effect.

4) Freedoms of mass media

The relatively new concept of the freedoms of mass media has both a conventional and a relatively new aspect. The conventional aspect is the freedom of press and publication, whereas the relatively new aspect concerns the audio-visual communications (radio, television, video, etc.). The following sub-headings correspond to this distinction.

a) Freedom of press and publication

This freedom is composed of components such as the freedom to receive and impart news, and the freedom of expression through press and publication. What are the main problems in this area in Turkey?

The most striking is the high number of *prosecutions*. This is followed by the high number of *preventive measures*. Special attention should also be paid to *seizure, destruction* and *closure*. And finally, the role of *legislation* should not be forgotten. The main problem lies therein.

Prosecutions have come in different and consecutive waves, but they have acquired a certain permanency. Some figures will give a sufficient idea.

In the period between 1980 and 1984, a total of 181 prosecutions were held for the owners, editors, writers, correspondents, translators and authors of several newspapers, journals and books, resulting in a total imprisonment sentence issued by the court of first instance for 82 persons of 316 years 4 months and 20 days.

After the restoration of normal political life following the elections in 1983, the situation got worse rather than better. During the first five and a half years of the civil regime, a total of 458 publications were seized, for 368 publications the courts decided seizure and destruction, 39 tons of newspapers, journals and books were burnt, a total of 2127 persons were tried in 1426 lawsuits, total prison sentences given reached 2000 years in addition to billions of TL of fines, and the distribution of some newspapers and journals were obstructed.

Following a legislative change in 1986 (3266-6.3.1986, Official Gazette 12.3.1986-19045) a new trend started: the suits about 'harmful publications'. The penalty fines ruled in these suits reached astronomical and impossible levels.

Some theatre plays, films, literature and scientific works were categorised as "obscene" and took their fair share from the inquiries. In such suits the judge does not have the freedom to appoint an expert. According to Law no. 3266, a commission has been set up within the prime ministry, the majority members of which are selected by the high ranking State bureaucrats, and it has been entrusted with "the duty of acting as official experts to the judicial authorities" in cases involving articles 426, 427, and 428 of the Turkish Criminal Code.

Following the lifting of martial law, such cases were decided and sentences were given in the civil courts. Although the Anti-Terrorism Act (TMK) has abrogated some "crimes of thought" (12.4.1991), the number of lawsuits after this date increased rather than declined. The reason for this is the new offences brought about by the Anti-Terrorism Act, especially with article 8 thereof. For example in 1992, journalists and writers were given a total of 25 years and 11 months of prison sentences and a total fine of TL 5,976 million. In 1993, however, the amount of total prison sentences rose to 165 years, with fines reaching TL 38,267 million, as a result of which 18 persons were imprisoned.

The account for the year 1996 shows a total term of imprisonment for 140 years with billions more of fines. According to the October 1996 figures of the Human Rights Association, the total number of arrested and sentenced journalists and writers reached 102.

The second important issue is *preventive measures.*

In addition to legal prosecutions, another threat to the freedom of press is the precautionary measures and decisions involving prevention of distribution, suspension of publication, seizure, banning of the entry to the country and distribution of publications. The first two of these measures are preliminary controls, in other words they represent censorship. Because, like printing, distribution and publication are inseparable parts of the freedom of press. For those bodies that are going to exercise the power of prevention of distribution and suspension of publication to learn beforehand and prevent what is to be published, is nothing but censorship.

In 1990, the distribution of some issues of the newspapers Milliyet, Bugün, Güneş, Günaydın and Sabah, and the journal 2000'e Dogru was prevented. The newspaper Sabah also experienced suspension of its publication.

With the Law On the Addition of Two Articles to the Press Law (4202-6.11.1996, Official Gazette 12.11.1996-22815) some obligations regarding distribu-

tion and the penalty of closing down of business premises of those who do not comply with this obligation were introduced. It can be argued that this new arrangement will create problems not with respect to freedom of press but in relation to prevention of forced labour and freedom of contract (Constitution, arts. 18 and 48).

There are also many examples of seizure. Although the authority to rule on this issue is given to the courts, a selection of publications seized would show that this has not brought any safeguards.

Before 1991, socialist classics were on top of the list of books for which seizure decisions were issued under the propaganda ban in article 142/1 of the Turkish Criminal Code. Some of these were: Anti-Duhring, The State and Revolution, A Contribution to the Critique of Political Economy, Imperialism: The Highest Stage of Capitalism, Political Economy, The Poverty of Philosophy, Critique of the Gotha and Erfurt Programmes, The Communist Manifesto, The Joint Government Programme of the French Left, Essays on Revolution (Babeuf).

In the same period some of the best examples of world literature were seized; 'Boyalı Kuş' (Kosinski), 'Çimento' (Gladkov), 'Aslan Asker Svayk' (Brecht), 'Bir Şeftali Bin Şeftali' (Samet Behrengi), 'Dipten Gelen Dalga' (Ehrenburg), etc.*.

Some other books that have nothing to do with socialism were also seized relying on the same provision. One example is W. Reich's 'Sexual Maturity'.

The ban on propaganda aimed at "weakening national sentiments" provided in article 142/3 of the Turkish Criminal Code has also served as a ground for the seizure of encyclopedias: Larousse Atlas de Poche and Ana Britannica, fascicule 2.

In the same period the practice of the seizure of socialist journals with the decision of a single judge of the State Security Court has become a rule and has been institutionalized.

After 1984 and especially after 1986 when the law was changed, it was time for 'obscene' publications to feel the brunt of seizures. Some scientific publications as well as literature was considered within this category and seized: 'Oğlak Dönencesi', 'Bitmeyen Aşk', 'Sudaki İz', 'Burgu', 'Cinsel Yaşam', 'Asılacak Kadın', etc.

The Anti-Terrorism Act of 1991 abrogated some "crimes of thought". But after this law the practice of seizure increased rather than decreased. This time the grounds were the provisions of this law, especially of article 8. The total number

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** (translator's note: the titles of the Turkish translations have been kept since the titles in English may be different.)*

of seizure orders in 1991 were 121 newspapers and journals, and 29 books; in 1992, 189 newspapers and journals, and 20 books; in 1993; 425 newspapers and journals, and 29 books.

In fact, the seizure order is a provisional measure, and in case of acquittal it is uplifted, the seized issues or books are returned, with the knowledge, however, that the returned publications are by then useless. If the publication is a periodical, it has become outdated, returning does not make sense, it does not cover the loss incurred. But the loss or fear of loss on the part of the publisher weakens the freedom of the press and publication. Moreover, the ease with which the owners of such work are tried, and the fact that their work are continuously under threat of seizure may deter the use of such freedoms.

In this sense, the practice of seizure, considered to be a provisional measure, is in fact nothing but a sanction used without the necessity to issue a final judicial sentence.

The prohibition of the entry and distribution of publications published outside the country is another practice which is not only against the freedom of press and publication but also detrimental to the freedom of thought and access to thought, and the freedom of learning science and arts. Such measures can be taken by the Council of Ministers and in certain cases by the Interior Ministry. Let us again resort to figures.

In the 35-year period between 1949 and 1984, the number of publications that were banned in this way was 1303. These publications included: maps and atlases; some Quran and Bible interpretations; dictionaries and alphabets in Kurdish and Circassian, 'L'Espoir' of Andre Malraux, Manifeste du Parti Comuniste, Dialectical Materialism, etc.

At times, there were blanket applications. With a decision dated 1953 of the Council of Ministers: "The entry into Turkey and distribution of all publications published in the USSR, Poland, Czechoslovakia, Hungary, Rumania, Bulgaria, the People's Republic of China, East Germany and North Korea, or published by the official or unofficial organs or agents of these countries abroad has been banned." (29 June 1953, no. 4-1044).

This practice, which now seems to have lost its thrust except in the case of publications in Kurdish, and the legislation that forms the basis of such restriction, is obviously contrary to the standards of international texts that quarantee the free flow of all information and news irrespective of state borders. Three of the most important

of these international texts are: UN International Convention on Civil and Political Rights (art. 19/2); The Council of Europe, Declaration of Freedom of Expression and Freedom to Receive and to Impart News; and finally, the Helsinki Final Act.

Sanctions in the form of seizure, destruction, and closure are supplementary measures to a sentence.

Seizure is of two kinds. The first concerns the one applied to the publication that involves an offence following the passing of the final sentence. For example, books such as the Communist Manifesto, The State and Revolution, and Karl Marx: His Life and Work (H. Lefebre) were subjected to seizure after the passing of the final sentence.

Seizure does not only concern the publication. A second dimension involves the seizure of machinery and other equipment used in the actual process of printing. The fear of works of thought thus extends to machines.

The method of destruction is implemented by sending the publication in question to be converted into pulp in the factories of the state's paper manufacturing enterprise, SEKA. In the period between 1980 and 1986, the amount of publications thus destroyed only by the seizure decisions taken in Istanbul courts reached 39,000 tons. Under martial law or in the provinces a simpler method of destruction is applied; burning or shredding.

The third sanction for periodicals is closure. This sanction was used primarily for socialist newspapers and journals after 1993.

What is the position of *legislation*? It is here that we can grasp the essence of the problem. The grounds of almost all of the above practices are laid out in the laws, and in the provisions of the Constitution. In short, most of the practices that destroy the freedom of press and publication are paradoxically legal, and most of the laws related thereto are constitutional.

Therefore the real problem lies in legislation, which consists of the entirety of laws and the Constitution. That is also where the difficulty lies. Now we have to prove this argument in the order given above.

The high number of prosecutions stems from the restrictions and large number of offences defined in the laws. These can be categorised under two headings. The provisions of law that restrict freedom of thought in general, and that restrict freedom of the press and publication in particular.

We have touched upon laws that restrict freedom of thought in general in the section 'freedom of thought' above. Although some of these were abrogated in

1991 with the Anti-Terrorism Act, the situation has not become better, on the contrary it has deteriorated. Because, while on the one hand certain "crimes of thought" have not been abrogated, or provisions that could be interpreted as sanctioning "crimes of thought" have not been revised, the Anti-Terrorism Act has introduced certain new "crimes of thought" on the other hand.

In this respect it is important to note the following provisions included in the Turkish Criminal Code and the Military Penal Law: Obtaining and disclosing of certain official information (arts. 132, 136 and 137), publishing of articles that would jeopardise the security of the country (art. 155), instigation to crime (art. 311), praising acts which are considered on offence, provoking social classes to feel hatred against each other (arts 311 and 312), insulting the President of the Republic (art. 158), Turkishness, the Republic, the Grand National Assembly, the moral personality of the government, of the ministries, of the armed forces and the security forces, of the courts (art. 159), crimes against religious freedom (arts. 175 and 176), discouraging the public from military service (art. 155 of the Turkish Penal Code and art. 58 of the Military Penal Law). A typical "crime of thought" brought about by the Anti-Terrorism Law is "propaganda against the unity of the State" (art. 8).

The second category is the legislation regarding, either directly or indirectly, the press. These arrangements which cover a wide area primarily restrict the right to receive and disseminate information, and weaken the right to reach the truth. Other additional offences and arrangements specified in articles 358 and 401 of the Turkish Penal Code (TCK), article 15 of the Civil Servants Law, article 88 of Criminal Procedure Law (CMUK), articles 6 (putting up posters for terrorist organisations) and 8 of the Anti-Terrorism Law, and the provisions in the Law on State of Emergency and Martial Law leave no room for the freedom of receiving and disseminating information.

Legal prosecutions regarding 'obscene' publications have gained momentum with the taking effect of the Law no. 3266 on 6.3.1986.

As for preventive measures, the prevention of distribution is both specified in Additional Article 1 of the Press Law (2950-10.11.1983) and in article 28/5 of the Constitution. Moreover, the law has adopted a wider definition of cases whereby the distribution can be stopped as a preventive measure. In this sense, has gone beyond the Constitution. But again according to provisional article 15 of the Constitution, this law is not subject to constitutional review.

The power to prevent the distribution of a publication is given, in principle, to the judge, and in cases where delay is deemed prejudicial, to the public prosecutors, who are accountable to the executive. Although it is specified that the order of the prosecutor would be presented to the approval of the judge at the latest within 24 hours, and in case the judge does not approve the order then it becomes null and void, it is obvious that this means nothing for periodicals, and especially daily newspapers.

Moreover, in case an offence is found in the publication, the distribution of which has been prevented, it would mean that the sentenced person is penalised for a publication that has not been distributed and therefore not been 'published' at all.

The practice of the *suspension of publication* is based on an amendment made in article 24 of the Civil Code (3444-4.5.1988). According to this provision: "A person whose reputation is damaged or who faces the threat of such a damage may request ... that such damage should be brought to a halt." (art. 24/A, 1). The decision for the suspension of publication for libel is given in accordance with this provision.

The legal grounds for the *seizure* of publications are included both in the laws (art. 86 of CMUK, add. art. 1/2 of the Press Law) and in the Constitution (art. 28/7). The Constitution and the Press Law also granted the authority to give seizure orders to public prosecutors in cases where delays would be prejudicial. In such cases the prosecutor nevertheless has to submit its order to the judge within 24 hours, and the judge decides within 48 hours. If the judge does not approve of the order then it becomes null and void. However, the guarantee which comes with a delay of 72 hours does not present any practical use. This is especially the case with the daily newspapers. Furthermore it has also been proven in practice that the use of this right by the judge fails to provide any guarantee. Below the decisions about seizure of publications, examples of which are given above, are the signatures of the judges.

In seizure decisions given after 1991, the primary reasons were based on the provisions of articles 6 and 8 of the Anti-Terrorism Law.

The authorisation to ban the entry and distribution of published material from abroad is provided by Article 31 of the Press Law. During the 1961 Constitutional period, the Constitutional Court did not find any breach of the Constitution in that matter. The constituent power of the 1982 Constitution was more careful and did

not forget to add the following expression to the article regarding scientific and artistic freedoms: "Provisions of this article shall not preclude the regulation by law of entry and distribution of foreign publications into the country." (art. 27, para. 3).

The *confiscation* of published material and the printing machinery and equipment is specified in additional articles 1 and 3 of the Press Law. In the article titled "the protection of printing instruments", the Constitution of 1961 stipulated that: "Printing houses and their annexes and printing equipment cannot be confiscated or seized or barred from operation even for the reason of their being instruments of crime" (art. 25). The Constitution of 1982 repealed this provision (art. 28/8) and stipulated that: in the case of a "sentence given for a crime against the indivisible unity of the State with its territory and nation, the fundamental principles of the Republic, and against national security", then such printing houses and their annexes "shall be confiscated and seized as instruments of crime" (art. 30).

It is now time to take stock and conclude. First of all it must be accepted that the "fourth power" has suffered irreparable damages. The sad thing is that such damages were inflicted in the name of law and legislation. Unless the legislation regarding press, starting from the Constitution, is not fundamentally re-edited and amended, the problems will drag on.

Consequently, it is imperative that a universalist approach be adopted and courageous and fundamental action be taken. Proposals to this end partly concern amendments to the legislation and are partly in the form of general proposals.

Proposal:

a) In relation to the *Constitution* and limiting the case only to the key articles, the principles laid out in the study titled "For a New Constitution" can be reiterated with a few changes.

Freedom of Press

Proposed amendment for Article 28:

Press is free; it cannot be censored. The establishment of publishing houses cannot be subjected to prior permission and depositing of a financial guarantee.

The State shall take the necessary measures to ensure the freedoms of press and information in accordance with the needs of a pluralistic society.

Freedom of the press and freedom to obtain information may be limited for the purposes of protecting the secrecy required by national defence, or public

morality, of preventing attacks on individuals' honour, dignity or rights, or prevention of crime, or of ensuring the proper functioning of the judiciary.

No prohibition may be placed on the publication of events unless this is ordered by a judge, within the limits to be defined by law, for the proper functioning of the judiciary.

Periodical and non-periodical publications may be seized only in case of incitement to commit crimes clearly indicated by law and with the decision of a judge."

The right to publish periodicals and non-periodicals

Proposed amendment to Article 29:

"The right to publish periodicals or non-periodicals shall not be subject to prior permission or depositing of a financial guarantee.

To publish a periodical it is sufficient to submit the information and documents prescribed by law to the competent authority.

The law shall not impose any political, economic, financial or technical conditions which obstruct or make difficult the publication of news, ideas or opinions.

Newspapers and magazines shall have equal access to the means and facilities of the State and other public corporate bodies or their affilated agencies according to the principle of equality."

Protection of printing equipment

Proposed amendment to Article 30:

"Printing houses and their annexes and printing equipment shall not be seized or confiscated or barred from operation even if it be by reason of their being instruments of crime."

(b) With a weeding out to be carried out at the level of *the laws*, the following provisions should be put out of effect as top priority:

- All antidemocratic provisions in legislation, including those having the character of *"crime of thought"* considered both in the section on freedom of thought and under the present heading,
- Additional Article 1 of the Press Law relating to "prevention of distribution" and Amended Article 24/A of the Civil Code which pertains to halting publication,
- Additional Article 1/2 of the Press Law which recognises the confiscation authority of the public prosecutor to confiscate,
- Article 31 of the Press Law which gives authority to prohibit the entry into the country and distribution of works printed abroad,

- Additional Article 1/3 of the Press Law which provides for the seizure and confiscation of machinery and equipment used in printing,

(c) These items should be added to the law as additional provisions:

- The right of the people to be informed and the responsibility of public officials to give information, subject to some limitations,
- The right of journalists to refuse giving evidence and their right not to divulge their news sources,
- As a principle in press offences, avoiding of custodial sentences,
- The adoption of measures to protect the secrecy of private life, etc.

b) Freedom of audio-visual communication

In Turkey there was a monopoly of state radio and TV broadcasting until 1993. Despite this, at the beginning of the 1990s there took place a rapid proliferation of private radio and television stations.

The first step towards correcting the legal position and harmonising it with the de facto situation was taken with the amendment of Article 133 of the Constitution:

"F) Radio and television administration, and news agencies for the public

Article 133 - It shall be free to establish and manage radio and television stations in accordance with the conditions regulated by law.

The sole radio and television institution established by the State as a public corporate body, and news agencies receiving assistance from public corporate bodies, shall be autonomous and be impartial in their broadcasts."

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The new provision is important from two viewpoints. The first of these is the abolition of the State monopoly in radio and TV broadcasting (Paragraph 1). The second is the renewed acceptance of the principle of "autonomy" in State radio and TV broadcasting.

The important step after the Constitutional amendment was the signing by Turkey of the European Convention on Cross-Frontier Broadcasting (7 September 1992) and the passing of the ratification law relating to this (3915 - 4.11.1993, Official Gazette 7.11.1993 - 21751).

The law on the Foundation and Broadcasts of Radio and Television Stations (3984 - 13.4.1994, Official Gazette 20.4.1994 - 21911) passed by reason of Amended Article 133 of the Constitution was the third and last stage to the pre-

sent. The law regulates all public and private radio and TV broadcasts (Article 1 and 2) and, with this aim, establishes the "Radio and Television High Council (RTHC) having the character of an autonomous and impartial public corporate body." (Article 5). This council is made up of nine members, five selected by the Grand National Assembly of Turkey from candidates submitted by the governing party or parties and four from candidates submitted by the opposition parties (Article 6).

This election has been carried out in a controversial manner. Having the members of this council, who are meant to be "autonomous and impartial", elected by political parties is a fundamental and (possibly) permanent drawback. Similarly, the fact that those closer to the government wing (naturally) make up the majority is another drawback. It is probable that members will feel obliged to get on well with the parties that have elected them, since their positions are open to re-election. Moreover, the Turkish Radio and Television Corporate Body whose "autonomity" and "impartiality" is provided for by the Constitution, is subjected to the supervision of a council (RTHC) not provided by the Constitution, and whose autonomity and impartiality is doubtful from the start.

Law No. 3984 regulates the freedom of private enterprise in the field of audio-visual communication and of private radio and television stations. This law, which lays down their foundation as joint stock corporations, also prevents the monopolisation of the forces of domestic and foreign capital in this area in a way which would damage pluralism (Article 29). However, the same article which openes this sector in a limited way to private capital closes it to a section of democratic mass organisations and other groups in the following way: "Political parties, associations, trade unions, professional organisations, cooperatives, charitable foundations, local administrations etc.... shall not establish radio and television stations and shall not be partners in these."

From the viewpoint of freedom of visual and oral communication the fundamental question is how the system of supervision and sanction is to be established. A section of the "broadcasting principles" laid down by the law is made up of general and constitutional provisions (indivisibilty of the State, public morality, non-propagation of hatred and discrimination etc.); another section contains special and positive novelties such as freedom of expression, communication and broadcasting freedom and pluralism, justice and impartiality, equal opportunities

for democratic groups and parties, not holding any person guilty unless this has been established by a judicial verdict etc. However, amongst these principles laid down in Article 4, there are also those whose necessity is debatable, such as "the national and spiritual values of the community", "the Turkish family structure" and "the general aims and basic principles of Turkish national education". The expectation that the educational moulds such as these designed for school children and young people would also work well for the adults through radio and TV broadcasting apparently sounds very convenient to a mentality which considers the people as immature.

In the law, a three-stage sanction system is provided under the heading "Sanctions": "Warning, suspension and cancellation." (Article 33). The High Council warns private radio and TV establishments that do not fulfil their responsibilities, do not conform to licence conditions or act contrary to the principles of broadcasting. If the offence is repeated, according to its seriousness, the use of the licence may be suspended for up to a year, or the broadcasting licence may be cancelled. The warning sanction is also valid for the Turkish Radio and Television Corporation (Articles 35 and 36). In case it is established that cause for suspension of the Turkish Radio and Television is contained in broadcasts, the offices of the General Director and Board of Directors of the Corporation terminate (Article 36).

In fact, the sanctions are not limited to these. Another concerns the "banning of broadcasts", which has the character of censorship. "On condition that judicial decisions are reserved, broadcasts may not be controlled or halted in advance. However, in cases where it is clearly necessary for national security or it contains a strong probability of damaging public order to a serious extent, the Prime Minister, or a Minister he may designate, may halt the broadcast." Against these actions, an annulment suit may be brought before the Council of State. This suit will be heard and decided with priority. Requests to suspend execution are decided upon within 48 hours (Article 25).

The principles and the institution (the High Council) produced by the law in question have the quality of providing a ground for antidemocratic practices to some extent. However, the ending of the State monopoly in this field and the search for autonomy are both important steps. Another characteristic of this opening up in the field of freedom of audio-visual communication is that it has mustered mass mobilisation and support.

Proposal:

(a) The "broadcasting principles" in Law No. 3984 should be brought to a state of simplicity and clarity, and its conservative dictates should be removed.

(b) By reorganising the composition of the RTHC, it should be provided with a structure in keeping with the principles of impartiality and autonomy, and representatives of the media and of universities should be appointed to it.

(c) The authorization granted to the Prime Minister or the minister he appoints in the "suspension of broadcasts" should be taken out of effect.

IV) COLLECTIVE FREEDOMS

This term applies to those human rights and freedoms which are used collectively. Three of these will be discussed here, in the same sequence with the Constitution: freedom of association, freedom of meeting and demonstration marches, and trade union freedom.

1) Freedom of association

In Turkish law, this subject is basically regulated by the Constitution (Article 33) and the Associations Law (2908 - 4.10.1983).

In the 1995 amendments to the 1982 Constitution, under the heading "Freedom of association", important improvements were made. At the forefront of these are the removal of the reference made to Article 13 of the Constitution, the ending of prohibitions on political activity and cooperation (paragraph 4), the comparative democratisation of suspension from activity and the provision securing the role of the judiciary in this (new paragraph 4), and the move to enhance the rights of public servants (new paragraph 5).

The harmonisation efforts required by these amendments have to date not borne fruit. Draft proposals in this area have also been limited solely to the requirements of the constitutional amendments.

Whereas, the Associations Law is one of the most antidemocratic of laws in Turkish legislation. The mere reflection in law of the amendments, whose value cannot be belittled, made to the Constitution would in no way make the Associations Law to acquire a pluralist and freedom-oriented structure.

It is not enough here to carry out partial amendments such as those we have proposed in previous sections in relation to political parties or election laws or press legislation. The question of freedom of association can be solved not by

changes in the law but only, and only, by radical changes of law, that is, by the production of a new law.

Here it is necessary to point out once again that because the Associations Law, like a number of other laws, has been left outside the scope of judicial review of the Constitutional Court (see Interim Article 15 of the Constitution), the method of improvement by means of judicial decisions is completely blocked.

The search for a radical solution opened the way to a special report directly related to this subject amongst TÜSİAD studies. With a democratic and liberal approach, the report under the title "Draft Associations Law" has been prepared by the Study Sub-Group of the TÜSİAD's Parliamentary Affairs Commission.

This study in its basic outline has adopted the legal association principles of contemporary democracies, has considered the balance between freedom and public order and has set forth long-term principles. Here we simply state that we identify with the principles of that report.

2) Freedom of meeting and demonstration marches

At first sight, the provisions of the 1961 and 1982 Turkish Constitutions, and the laws based on them, that "Everybody has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission" (1982 Constitution, Article 34), present a positive appearance. However, the 1982 Constitution and the legislation and practices under it do not leave much chance for being optimistic on this subject.

In the first place, there is an important limitation regarding those who may use this right whose recognition for "everybody" is declared. According to the Meeting and Demonstration Marches Law (2911 - 6.10.1983), "Associations, foundations, trade unions and public professional organisations may not organise meetings and demonstration marches outside their own subjects and purposes." (Article 21). It is clear that this limitation placed on organisations which are the pressure groups of contemporary society is open to unjust and arbitrary practices. However, this prohibition arises from the Constitution (Article 34/final paragraph).

Moreover, it is easily possible for a meeting or demonstration march to be deemed illegal. For example, meetings that go beyond the above-listed limitations or fall outside the purpose declared in the notification or where "posters, placards, banners, pictures signboards, apparatus and equipment having a character consid-

ered criminal by the laws are used, or where slogans having this character are uttered or broadcast by sound equipment" (Article 23), are all considered contrary to the law.

More important are the powers possessed by the Administration in this area for intervention and prohibition. In the original version of the 1963 Law on Meeting and Demonstration Marches, which was previously in force, the Administration's right of prohibition or postponement was not recognised, there was only the authorisation for government commissioners to disperse meetings in case of a situation damaging to public order (Article 9) or for police authorities to disperse demonstration marches in situations indicated by law (Article 14). The authorisation to postpone was first introduced by a legal amendment dated 1973. This law was later annulled by the Constitutional Court from the procedural standpoint. By another legal amendment made in 1976, postponement authorisation of up to ten days for meetings and demonstration marches was recognised for local and civil authorities and in certain circumstances for the Ministry of the Interior (Amended Article 10). However, this time the Constitutional Court found these contrary to the Constitution in principle and annulled them. According to the Court, these provisions for meetings and demonstration marches "cause the exercise of these freedoms not at the time those who make use of them wish, but at the time required by the administration and furthermore bring them to the state of being incapable of being exercised, in a concealed fashion, at the end of the period of postponement.... have the quality of making difficult the achievement of the aims of and removing the effect of meetings and demonstration marches because they prevent their being carried out on time... are open to subjective interpretations according to the individual views and comprehension of public administrators, may be the cause of practices which could result in arbitrary action, and do not have the character of legislation that conforms to the design and aim of the maker of the Constitution" and, for these reasons, the "essence" of the freedom in question is "interfered with". The authorisation given to government commissioners to "disperse meetings" by reason of "verbal" attacks endangering the continuation of the meeting and public order was also annulled.

While the 10-day postponement period was considered "excessive" and "interfering with the essence" of the right and "open to arbitrary interpretation" under the conditions of the 1961 Constitution, under the 1982 Constitution and laws introduced in the period of this Constitution which are still in force today, according to

various circumstances, such periods are respetively 48 hours, 30 days and 2 months (Articles 14,15,16,17) and even unlimited because Article 17 speaks not only of postponement but of prohibition. Furthermore, the Regional Governor, or if no Regional Governorship has been established the Provincial Governor and the Minister of the Interior, has the authority to "forbid all meetings for a period of up to 3 months." (Article 19 and Provisional Article 2). Here the points which should attract attention are that the authority to postpone or ban in the first group relates to *a particular meeting* or demonstration march, that in the second group to *all future assemblies,* and that neither group is related even to states of emergency but to *normal* times.

Because, following the introduction of this law, from 1983 onwards for a long period several provinces and regions of Turkey were under martial law or state of emergency administration, it could not have been expected that the provisions referred to above would find a wide area of application. Administrative interventions and prohibitions of this type were already in effect based on decisions taken in accordance with the statutes regulating martial law and states of emergency.

It was obvious that with the growth in the number of provinces where martial law was lifted and the state of emergency terminated, the antidemocratic regulations of Law No. 2911 would be increasingly applied. In fact, before long, examples of this began to be seen one after another. These few examples of meetings and demonstration marches banned or postponed just in the years 1989 - 1990 will give sufficient information concerning the state of this freedom: the April 23 Children's Festival march, the meetings to be held in Karaman on account of the language festival, the "*Görüş* June Festival" (24 June 1989), the "Great White March" and the "March in Uniforms" arranged by the health personnel (Ankara and Istanbul, June 1989), the "joint press conference" to have been attended by socialist and independent mayoral candidates for the March 1989 local elections, all May 1 meetings and marches, intercity protest marches, the "No to War" meetings and peace festival, the trade union rights for public sector workers meeting, the panel "The Reality in Turkey in the 42nd Year of the Universal Declaration of Human Rights" organised by the Human Rights Association's Istanbul Branch, the "Status and Problems of Women" meeting in Ankara, etc.

This indicates what the recognition of the need for banning and postponement decisions and the power of administrative authorities and the Administration to intervene in this freedom has come to mean. For example, the "*Görüş* June Festival" to take place in Kartal was postponed from 24 June to 16 July because it

coincided with the "State Meeting" in Taksim Square which was decided on at a later date. The Language Festival was cancelled because, according to an unofficial explanation made by the Karaman Sub-Provincial Governor, "Festivals are gatherings in friendship, not debates and public meetings" and probably to prevent participation in it of certain writers regarded as "dangerous". As for the press conference by socialist and independent local administration candidates, this was prevented by citing Article 23 of the Meeting and Demonstration Marches Law as the reason. Even more arbitrary behaviour is that in most cases of decisions to postpone or ban, no need is even felt to indicate a reason.

Moreover, after the transfer into the hands of opposition parties of a majority of municipalities with the March 1989 local elections, provincial governors took an attitude of opposition to mass activities organised by municipalities. The provincial governor's office in the capital insisted on the condition of obtaining prior permission for all activities and adopted a negative attitude by setting forth various reasons when permission was requested. Permission was not granted for such activities as a chess tournament organised for children because it would "damage law and order", for sporting activities such as a volleyball tournament and a bicycle race because these would "endanger public order and security", for an exhibition of sculpture whose opening was requested in Güven Park, for the 23 April festival, for a kindergarten competition and a "meet the teachers" evening in connection with Teachers' Day.

It is clear that the character of these prohibitions is not legal but openly political. In fact, by a circular of the Ministry of the Interior whose aim was an even stricter implementation of this supervision, the powers which were held in law by sub-provincial governors were also transferred to provincial governors. The circular reads:

"It has been learned that recently young people and especially university youth have been educated in the direction of Marxist ideology at certain meetings held under the name of cultural and artistic events. It is also known that certain of our sub-provincial governors have given permission for this type of meeting. From the date of this circular onwards, permission for all types of outdoor and indoor meetings will be given as a result of investigation carried out by provincial governorships and provincial security directorates."

Furthermore, meetings of opposition parties could be forbidden by provincial governors.

These obstacles persisted in the following years. The Istanbul Provincial Governorship banned the "First Student Youth Congress", the Tekirdağ Provincial Governorship a Grup Yorum concert on the grounds that it would "harm general security and public order", the Malatya Provincial Governorship the 17 April "Festival of Respect for Democracy", the Ankara Provincial Governorship the "Kurdish Problem Congress", the Istanbul Provincial Governorship the Homosexuals' Congress and the meeting for the 73rd Anniversary of the Foundation of the Turkish Communist Party, and the Ankara and Şanlıurfa Provincial Governorships the "Peace Meeting" organised by the The Party of Democracy, and the Şarkışla, Sivrialan and Sorgun Sub-Provincial Governorships either banned or postponed Alawite cultural festivals.

As can be seen, in reality there is no freedom in the field of meeting and demonstration marches but a "system of permission". Although judicial recourse is available against decisions of postponement or prohibition, this mechanism has not been able to operate easily and quickly. Already in certain circumstances civil authorities have prevented an easy and rapid solution by judicial recourse by announcing prohibition or suspension of execution decisions at the last moment. For example, the prohibition decision on the "March in Uniform" planned by the Turkish Nurses' Association to take place in Istanbul's Çağlayan Square on 18 June 1989 was notified to interested parties on Friday 16 June after the end of working hours (18.00), and thus no opportunity was left to them to secure a "suspension of execution" decision by means of judicial recourse.

Certain prohibition decisions taken by reason of "protection of public order and security" have produced completely tragic results, and public order and security have fallen into danger precisely because of these. The results produced by prohibitions relating to May 1 demonstrations are a typical example of this. In the events of 1989, one person died and a large number of people were injured. The May 1 1990 balance-sheet showed around 40 people injured, one of them seriously (in a paralysed condition). According to official figures, 3304 people were arrested in Istanbul alone, the detained on remand in Turkey as a whole exceeded 90, and, after trials were concluded, 35 people were sentenced to imprisonment. This is the view which has been taken in Turkey of a special day celebrated in almost all the countries of the world. Permission for May 1 celebrations was given only from 1992 onwards.

People taking part in symbolic protests have also been arrested, detained, and put on trial for violating the Meeting and Demonstration Marches law. For exam-

ple, those alleged to have taken part in the "sitdown" action at Sultanahmet to protest the practices in prisons and the "Black-Clothed Women" action at Tünel, the Social Democratic People's Party members who laid a black wreath at the Iranian Consulate, the doctors who demonstrated by taking their gowns off in the park and the women who protested with whistles, all met this type of action.

There are, moreover, a number of methods that are used to destroy the effectiveness of meetings and demonstration marches for which "permission has been given", for changing the minds of those who want to take part in these by frightening them, and intimidating the participants. To a great extent these also arise from the Constitution, laws and by-law (Official Gazette, 8.8.1985 - 18836).

For example, civil authorities have the power to determine in advance the places where meetings and demonstration marches will take place in their own regions (Constitution, Article 34/2). Places like this are usually selected from neighbourhoods and roads far from the city centre, whereas meetings and demonstrations can be basically effective only in frequented places. One function of the city's central spaces (roads, squares) is to provide a place for the freedom of expression. The selection by the administration of out-of-the-way places, just as it destroys the meaning of speeches and actions intended to influence, it also removes this function of public areas. In this situation, central streets and squares are left to those who create a de facto situation and to "leaders of the State." The political meetings of the chairmen of government parties and "State meetings" are examples of this. What we see is that Turkish public administration is very far from understanding that "roads are not worn away by being trodded."

Banners to be used at meetings or marches may also be controlled by the provincial governorship, and some of these may be prohibited. Video-recording of legal meetings and demonstration marches by the police has also played a psychological role in intimidating those who participate in them. Now, it has become almost habitual for the security forces to record and video-tape even scientific seminars and memorial ceremonies.

Until 1992, the authorised court for crimes committed in connection with meetings and demonstration marches was, under certain conditions, the State Security Court. According to Article 9 of the State Security Courts Law, "in cases of these being carried out against the indivisible unity of State with its territory and nation, the free democratic order and the characteristics of the Republic defined in the Constitution, and directly relating to the State's internal and external security,"

crimes under the Meeting and Demonstration Marches Law were tried in the State Security Courts. There was a return to normalcy by the removal of this provision by the 1992 Criminal Procedures Law amendments (Law no. 3482, Article 29).

Apart from this, no significant alteration has been experienced in relation to the regime of meeting and demonstration marches. This item was left untouched during the course of the 1995 constitutional amendments. Therefore, it is necessary to begin with the Constitution, because most of the fundamental rules and an important part of the prohibitions arise from it. Without changing it, there is not much chance of moving forward just by corrections carried out at the level of laws.

The inconvenient aspects of Article 34 of the Constitution reserved for this matter are the 2nd, 4th and 5th paragraphs, where power on the subject of routes is given to the civil authorities (paragraph 2), powers of postponement and prohibition for very vague reasons are given to the civil authorities (paragraph 4) and an antidemocratic prohibition open to arbitrary action is introduced in form that prohibits the organisation of meetings and demonstration marches by certain organisations outside their subjects and aims (paragraph 5).

These are the provisions which require to be purged right away. This necessity can only be met by rewriting this article from beginning to end. In that case, how can relevant basic principles be determined?

It is obvious that there is benefit in defining routes from the viewpoint of the protection of urban life. However, this should not have the quality of obstructing the fulfilment of the aim of the freedom in question.

Secondly, reasons for the limitation of this freedom should be clustered around one single point, as in the 1961 Constitution: public order and its protection.

Thirdly, again as in the 1961 Constitution, it is more correct not to give power to the public authorities to suspend or prohibit the use of this freedom. Of course, powers on the subject of illegal meetings and their prevention will be reserved.

Finally, the prohibition on associations, trade unions and public professional organisations to hold meetings outside their own purposes and aims should be lifted. Already the 1995 constitutional amendments have rendered this prohibition meaningless and unnecessary in an indirect way.

In the light of these principles, Article 34 of the Constitution should be rearranged. This modification may be carried out according to the text titled "For A New Constitution".

Proposal:

Article 34 of the Constitution should be amended as follows:

"Everybody has the freedom to hold and to take part in unarmed and peaceful meetings and demonstration marches without obtaining prior permission.

This freedom may only be limited with the aim of protecting of public order.

The law may recognise the authority of administrative offices to determine the places and routes where meetings and demonstration marches will be carried out with the aim of preventing disruption of order in urban life. However, this authority may not be used in such a way as to give rise to a result rendering this freedom ineffective."

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In the light of this rewritten article of the Constitution, basic alterations in the Meeting and Demonstration Marches Law would be inescapable. The most important of these may be defined as follows:

Proposal:

(a) The subject of determination of place and route in Article 6 should be modified in the light of the above principle.

(b) The powers of postponement and prohibition in Articles 15, 16, 17, 18 and 19 and Provisory Article 2 should be removed. If this is not regarded as possible, these should be limited to periods such as 24 hours or 48 hours.

(c) The provision (Article 21) which determines that associations, foundations, trade unions and public professional organisations may not organise meetings and demonstration marches outside their own subjects and aims should be removed.

(d) The phrase contained in clause (b) of Article 23, "posters, banners, placards, pictures, signboards, tools and equipment of a character deemed criminal by the law being carried or slogans of this character being uttered or broadcast with sound equipment" and the phrase in clause (k), "in conflict with the provision of Article 21" should be taken out of effect.

3) Trade union freedoms

In the year 1995, two important modifications on the road to democratisation in the field of trade union freedoms were made. The first of these comprised the

amendments to the Trade Unions Law (4101 - 4.4.1995), the second the concerned sections related to this subject of the Constitutional amendments (4121 - 23.7.1995), made in the same year.

Taking these amendments into account, we are in the position of pointing out to new improvements that are needed in present legislation. Here, too, the system in the law is examined in its main outlines. Finally, brief reference is made to the trade union rights of public servants.

In defining *the function and aim of trade unions*, a framework is drawn as follows: "To protect and develop the economic and social rights and interests of their members, in their labour relations." (Constitution, Article 51/1, Trade Unions Law, Article 1). This may be the basic function of and reason for existence of trade unions; however, this by itself is a limiting definition. Unions, whether of employees or employers, are organisations of civil society with very wide functions. They have their place amongst the pressure groups of the democratic system. Because this report relates not to social rights but to democratisation and classical rights, a need has been felt for these determinations.

During the 1995 constitutional amendments with the lifting of the ban on trade unions to engage in political activity and cooperation (Constitution, former Article 52), the wide framework drawn above has already been adopted. Therefore, the definitions of aim and function in Article 51/1 of the Constitution and Article 1 of the Trade Unions Law need to be brought to a state appropriate to this understanding.

Proposal:

Definitions relating to the function of trade unions in Article 51/1 of the Constitution and Article 1 of the Trade Unions Law should either be removed or brought under a wider framework by removing their being limited solely to labour relations.

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A problem exists also from the viewpoint of the *subjects* of trade union rights and freedom. Both in the Constitution (Article 51/1) and the Trade Unions Law (Article 1), the holders of these rights are defined as "workers (işçiler) and employers". There is no problem from the angle of the "employer" concept. However, with the 1995 constitutional amendments, public employees have also been granted these rights (amended Article 53/3). In this situation, from the point

of view of the concept of a holder of rights, the term "worker" is too narrow. The need for brining it to an appropriate state in the Constitution has become clear. The appropriate term is the word "employees" as in the original version of the 1961 Constitution (Article 46). There is no need to alter the word "workers" in the Trade Unions Law because this law relates to the "worker and employer" sectors of working life. The trade union rights of public servants are to be regulated by a separate law (Constitution, amended Article 53/3).

Proposal:

The word "employees" should be inserted into Article 51/1 of the Constitution in place of "workers".

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In connection with the *principles of foundation*, the condition of "the aim of being active throughout Turkey", even though it strengthens the trade unions, is a provision which makes the use of the freedom to organize trade unions difficult. (Trade Unions Law, Article 3). We merely point this out.

From the point of view of the qualifications required from founders, the list provided is very long and antidemocratic (Trade Unions Law, Article 5). In fact, with the amendment to the law (4101-4.4.1995), this section has been deleted: "... moreover it is a condition not to have been convicted under Articles 68, 70, 71, 72, 73, 74, 75, 76, 77 and 79 of the Collective Agreement, Strike and Lock-out Law."

However, the list of convictions preventing one from being a trade union founder is still very bloated. This list is the list of crimes preventing election as a member of parliament or founding a political party. For this kind of unjust, antidemocratic and excessively burdensome group of obstacles we have made proposals both in the pages concerning political parties (Part One, I, 6) and those concerning the Grand National Assembly of Turkey (Part One, III, 2). These criticisms are valid a fortiori for founders of trade unions as for election to parliament or founding a political party.

Proposal:

The phrase "with the aim of being active throughout Turkey" (Trade Unions Law Article 3/1) should be reconsidered and the provision relating to obstacles to being a founder (Trade Unions Law Article 5/1) beginning "The second volume of the Turkish Criminal Code..." should be lifted.

A point relating to *branch general councils* is also relevant to democracy within the trade union organisation. In the original version of the law (Article 10/2) it was stipulated that the election of delegates to attend branch general council meetings would be subject to judicial supervision. This guarantee was removed as part of the amendment made by Law No. 2882, and Law No. 4101 made no move to replace it. Reviving this guarantee in relation to internal trade union democracy would be correct (Fevzi Şahlanan, "Amendments Made to the Trade Union Law" (in Turkish), in *To the Memory ofH.K. Elbir*, Istanbul University, Faculty of Law, 1996).

Proposal:

The principle of judicial supervision should be added to Article 10/2 of the Trade Unions Law.

***

One of the conditions for being a union executive is really incomprehensible:"For an employee to be an executive of a trade union and its higher organs, it is required that he has actually worked as a worker for at least ten years." (Constitution, Article 51/7; Trade Unions Law, Article 14/14).

Such "care" for trade unions is an expression of uncertainty and lack of trust. This limitation also prevents those who will become professional trade union executives from gaining experience at an early age. The right of free election of trade union executives is also damaged by this (International Labour Organisation Convention No. 87, Article 3). Moreover, because such a condition cannot be considered for executives of employers' associations, there exists a situation contrary to equality. Finally it is entirely odd that such a provision should be contained in the Constitution.

Proposal:

Provisions in the Constitution (Article 51/7) and the Trade Unions Law (Article 14/14) relating to the condition that in order to be an executive it is necessary to have actually worked for at least ten years as a worker should be taken out of effect.

***

Prohibitions on membership have been greatly narrowed down by Laws No. 3449 and 4101 and have been limited to "military persons" in the Trade Union Law (Article 21). The similar prohibition existing for "teachers working in schools

belonging to Private Educational Foundations" has been removed from the Trade Unions Law but is still maintained in the Private Education Institution Law No. 625 (Article 32).

Proposal:

The provision that teachers referred to in the Private Education Institutions Law and governed by it may not be trade union members (Article 32) should be taken out of effect.

***

Turning to *reasons for limitation and prohibited activities,* the subject is governed by Article 51 of the Constitution as "the right to found trade unions" and in greater detail in the Trade Unions Law (2821-5.5.1983, O.G. 7.5.1983-18046). Article 52 of the Constitution under the heading "Trade union activities" was abrogated by Law No. 4121 dated 23.7.1995. First we need to consider the importance and meaning of this last point.

There were several restrictions and prohibitions in Article 52. These all had an antidemocratic character. For this reason, their removal is a positive step on the road to democratisation.

Article 52 also contained the provision, "Just as trade unions shall not act contrary to the restrictions set forth in Article 13..." This article of the Constitution listed nine general reasons for limitation: indivisible unity, national sovereignty, the Republic, national security, public order, general peace, public interest, public morality and public health.

Although the fact that the removal of this provision which disposes of the mass of general reasons for limitation lumped together in Article 52 is an act in the direction of democracy, the practical effect of this is not so clear. For one thing, the reference to Article 13 was wholly superfluous, since "General grounds for limitation contained in this article shall apply to rights and freedoms as a whole" (Article 13/3) and this provision is still in force today. Moreover, Article 37 of the Trade Unions Law, in stating the principles "against which" trade unions "cannot act", refers not to Article 13 of the Constitution but to Article 14. The limitations indicated in the Law do not fall far short of the general grounds for limitation in Article 13. This being the case, the practical effect of the removal of Article 52 of the Constitution and of the reference made to the provisions of Article 13 of the Constitution is dubious.

In this case, it cannot be considered that the limitations on trade union activity have been drawn up in conformity with democratic criteria. Therefore, today it remains necessary to limit the constraints to which trade unions are to be subject and to harmonise the law accordingly.

In the limitation of trade union freedom, reasonable criteria are already indicated in the provisions of the Constitution. "The rules, administration and functioning of trade unions and their related superior organisations should not be inconsistent with the characteristics of the Republic defined in the Constitution, or with democratic principles" (Constitution Article 51, final paragraph).

In that case, what needs to be carried out is the harmonisation of the provision of Article 37 of the Trade Union Law with the above Constitutional provision.

Proposal:

From the provision contained in Article 37/1 of the Trade Unions Law stating: "Just as they shall not act contrary to Article 14 of the Constitution of the Turkish Republic, so their administration and functioning shall not be contrary to the characteristics of the Republic defined in the Constitution", the part reading, "Just as they shall not act contrary to Article 14 of the Constitution of the Republic..." should be removed. If it is wished to ensure conformity of this paragraph to the Constitution, this provision of Article 51 of the Constitution should be repeated: "The rules, administration and functioning of trade unions and their related superior organizations should not be inconsistent with the characteristics of the Republic defined in the Constitution, or with democratic principles."

Following the lifting of Article 52 of the Constitution, the 2nd, 3rd and 4th paragraphs of Articles 37 of the Trade Unions Law will no longer have any basis. So much so that in these circumstances they are contrary to the Constitution or, by means of the Constitutional amendment, have been abrogated implicitly.

From this viewpoint, the 2nd, 3rd and 4th paragraphs of Article 37 of the Trade Unions Law should be taken out of effect.

***

The situation is the same for the subject of the *State's administrative and financial supervision.* Former Article 52 (Pargraph 3) of the Constitution said, "The administrative and financial supervision of trade unions by the State, their income

and expenditure and the method of paying membership fees to a trade union shall be regulated by law." After this was lifted, there remains no constitutional basis for the provision in Article 47/1 of the Trade Unions Law that, "The State is authorised to carry out administrative and financial supervision of trade unions and confederations." From now on, the State cannot carry out such inspection. In the same way, the method of payment of membership fees cannot be regulated by law because, "No person or organ shall exercise any State authority which does not emanate from the Constitution" (Constitution Article 6/3). The regulation of the subjects of supervision and fees thus belongs from now on to the unions and their internal rules.

Proposal:

The provisions relating to administrative and financial supervision by the State (Trade Union Law Article 47 etc.) and fees (Trade Union Law, Article 61) should be taken out of effect, and these matters should be regulated by unions' own rules.

***

As stated at the beginning, the situation of trade union rights and freedoms from the viewpoint of civil servants is the last item in this discussion.

With the 1995 constitutional amendment, the right of civil servants to form unions was granted (amended Article 53/3). Relevant laws are yet to be amended accordingly.

The problem here is whether it is possible to recognise by law the right of civil servants to strike and make collective agreements.

In the context of democratisation, this crucial point has far greater relevance to social rights, which do not enter the scope of this report, than to human rights.

Nevertheless, this determination may be made: while the strike and collective bargaining rights of civil servants are not secured under a constitutional guarantee, the principle that civil servants (certain sections excepted) have these rights is accepted in European and ILO Conventions, to which Turkey is a party, as well as in the interpretation and application of the same.

For this reason, in the drafting of the law relating to the trade union rights of civil servants, these international standards and commitments should be taken into consideration.

V) THE KURDISH QUESTION

As in a number of fields, the Turkish Revolution achieved significant successes in the creation of the nation state. However, in parallel with the opposition seen in other areas (for example the anti-secularist development), in this area, too, we have encountered a problem.

It is obvious that this bottleneck which is referred to as "the Kurdish question" also has social and economic causes. For this reason, the term "Southeastern question" is at once legitimately used with the connotation of a question of underdevelopment.

However, the subject of this study does not cover social and economic fields. Moreover, it should be accepted that the problem has dimensions related to Kurdish identity.

In this framework, and remaining within the legal field, it is possible to formulate the problem like this: In the laws of the Turkish republic, on condition it rest on the concept of a unitary State with singular sovereignity and indivisibility, are there provisions which deny Kurdish identity and which therefore need to be revised. If so, what are they?

It is correct to point out immediately that it is not very easy to encounter direct discriminatory and rejectionist provisions in the country's constitution and laws on this subject. However, even if indirectly stated, provisions and provisions whose outcome is discrimination and rejection may be found.

In any event, Turkey is not faced with this dilemma: if cultural and democratic rights are recognised, it would lead to division; if this is not done, separatist terror would not stop.

Turkey's accumulated experience should be able to overcome this dilemma. Hence under this heading, an attempt will be made to study, criticise and produce proposals for these issues. The intention and aim is limited to presenting a peaceful and democratic "commencement of a draft of legal solutions" to the problem.

First let us recall the international legal documents relating to this subject: the Universal Declaration of Human Rights (Articles 2, 7, 22), the Convention on Removal of All Types of Racial Discrimination (Article 2), The United Nations International Convention on Cultural and Political rights (Article 27), the Convention on Children's Rights, the Paris Charter, the Copenhagen Document etc.

All these documents contain principles and rights such as the non-subjection of different ethnic groups to discrimination, their benefiting from equality, their ability to develop their own languages and cultures, the protection of their identi-

ty, their ability to express their identity freely, and their ability to use their own languages freely in every field.

In the context of these principles, what deficiencies and defects are observed in Turkey? We are in the position of providing criticism and recommendations, based on studies and reports produced by certain legal circles.

1) Personal names

The Civil Registration Law (Article 16) and the Institutions Related to Population Services, Duties and Operations Regulation numbered 7/13269 and dated 8.3.19777 (Article 77) require that the name given to a baby by its parents must be in conformity with "our national culture". The Surnames Regulation of 24.12.1934 No. 2/1759 also stated that, "Newly-adopted surnames are taken from the Turkish language, names of foreign races and nations may not be used as surnames" (Article 5 and 7). These texts also stipulated measures and sanctions in this regard.

As can be seen, here an indirect prohibition of Kurdish names and surnames appears. Until recently, application, too, was this direction, including judicial sanctions.

However, an Interior Ministry circular of 1993 States that the name desired to be given should be entered into the civil register, and if any contradiction with law is detected, a denunciation should be made to the public prosecutor's office after obtaining the opinion of the Interior Ministry. It is clear that this approach is inadequate in terms of a substantive democratic and humanitarian solution.

We do not see much possibility of a similar situation existing in democratic countries. A "name" is amongst personal rights. The interference of the State in this, except within certain limits (public morality, protection of the child etc.) is groundless.

Proposal:

By making the necessary modifications in the Civil Registration Law and related regulations, the "freedom to name" should be ensured and the *"national culture"* condition should be terminated.

2) Names of places of settlements

The Provincial Administration Law No. 5442 dated 10.6.1949 introduced the provision that, "....village names.... which are not Turkish shall be changed as soon as possible by the Interior Ministry after receiving the opinion of the Provincial

Permanent Committee" (Amended Article 2, D/2). From that date to the present, continual changes of the names of villages, towns and hamlets have been observed. The names of mountains, peaks, and rivers have also had their share of this.

The names of settlements express the cultural wealth and legacy of any country. These names were given hundreds of years ago by the local population and were accepted. Changing these by central decisions is also disrespectful of the patrimony of the national culture.

Proposal:

From the provision of amended Article 2D of the Provincial Administration Law, the phrase "....*which are not Turkish.*,," should be removed, and an attempt should be made to return to the names that had been given by the people.

3) Language prohibitions

With a euphemistic Statement, the 1983 Law on Broadcasting and Publications to Be Made in Languages Other Than Turkish effectively banned Kurdish. This law was removed from effect by Article 23 of the Anti-Terrorism Law (12.4.1991).

However, the bases of this prohibition still exist in the Constitution: "No language prohibited by law shall be used in the expression and dissemination of thought" (Article 26/3), and "Publication shall not be made in any language prohibited by law" (Article 28/2). Any printed documents, magnetic or video tapes are to be seized by the competent authority where delay is deemed prejudicial (Constitution Article 26/3).

Despite the annulment of the law relating to language prohibition, these constitutional regulations still remain in effect. Based on these and on laws reliant on them, seizure decisions are continually being taken. The reason given is that the meaning of Kurdish words cannot be immediately understood, giving rise to doubts as to whether or not they contain criminal intent. The application has been largely based on the provisions of the PVSK (Law on Duties and Powers of the Police).

It is necessary to put an end to this situation. Up to now we have referred to necessary amendments to laws as corollary to constitutional amendments. In this case, we are in the position of waiting for the equivalent Constitutional amendement to be made as corollary to the amendment of law in 1991. This time the demand is for the amendment of the Constitution along the lines of a law amend-

ment (12.04.1991) which removed an antidemocratic provision, and for making the Constition comply with a law.

Proposal:

Provisions of Articles 26 and 28 of the Constitution relating to *"prohibited languages"* should be taken out of effect.

4) Citizenship

The Constitution defines citizenship as: "Everybody bound to the Turkish State through the bond of citizenship is a Turk" (Article 66/1).

This Statement cannot be taken to mean "Everybody in Turkey is Turkish," or "There are no Kurds in Turkey." It is not possible to share interpretations and criticisms along these lines. The above formula relates solely to the definition of citizenship and is a legal formulation. It is not correct to extrapolate a cultural or social (ethnic) meaning from this. Furthermore, this formulation first emerged in the years of the national independence war and entered the 1924 Constitution in the same form.

Given these facts, we do not agree with criticisms made of the related provision of the Constitution. Indeed, we regard this formulation of being a "Turk" as related to a legal bond, that is, "citizenship", and believe that keeping it within these limits is a democratic attitude.

Opinion:

The provision of Article 66/1 of the Constitution should be maintained.

5) What is "mother tongue"?

The Constitution says that: "No language other than Turkish shall be thought as mother tongue to Turkish citizens at any institution of training or education" (Article 42, conclusion, 1st sentence).

The expression of the Foreign Language Education and Teaching Law is as follows and it is very strange: "The mother tongue of the Turkish citizens cannot be taught in any language other than Turkish" (2923 - 14.10.1983 Article 2/a). The element of strangeness is this: according to the meaning of the sentence, it is possible for Turkish citizens to have a mother tongue other than Turkish, but that mother tongue can be taught only in Turkish.

Returning to the provision of the Constitution, it is necessary to point out to a fact: As it is obvious from its name, the term "mother tongue" means the language a child learns from its mother and father (langue maternelle). This is a social phenomenon. As for official language, it is a different thing. This is determined by law and it has already been determined. Under the heading *"Official language"*, the relevant part of Article 3 of the Constitution is as follows: "The Turkish State, with its territory and nation, is an indivisible entity. Its language is Turkish." (Article 3/1). We need to read and understand the sentence "Its language is Turkish," as meaning, "The Turkish State('s) language is Turkish or, by following the sub-heading which explains the subject of the text, as, "The Turkish State's official language is Turkish."

The statement in the last paragraph of Article 42 of the Constitution which rejects a natural and social phenomenon such as "mother tongue" and treats it as "official language" is disturbing, even offensive. There is absolutely no need for this. The State, the Constitution, and the laws have the right to decree that the official language be taught as the primary and mandatory language in all schools. But the expression of this should in no way be like the one in the stated provisions.

It is also useful to mention the provisions relevant to this subject of the Convention on Children's Rights, which Turkey has ratified with reservations. They state that: States (Parties), "encourage the mass media to have particular regard to linguistic needs of the child who belongs to a minority group or who is indigenous" (Article 17/d); "States (Parties) agree that the education of the child shall be directed to ... the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, from which he or she may originate, and for civilizations different from his or her own ..." (Article 29/c); "In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exists, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language." (Article 30).

Certainly Turkey should not deny these rights, which it has recognised for the children of the world, from the children of its own country who are members of a different linguistic group.

Proposal:

Statements contrary to logic and scientific knowledge in the last paragraph of article 42 of the Constitution and Law No. 2923 should be amended; moreover the right of everybody to learn and enrich their own mother tongue at school and/or in establishments outside school to the highest extent possible, should be recognised.

6) Freedom of expression

Article 8 of the Anti-Terrorism Law punishes "propaganda against the indivisibility of the State". We have dwelt sufficiently on this in the relevant section and given examples which show how this is a producer of "crime of thoughts".

If what is meant by this vague crime is clearly a prohibition on "separatist propaganda", even this has no place in liberal democracies, because "to desire separation" is also a thought. It is clear that in a country and a period stalked by separatist terrorism, the prohibition of the expression of its "thought" has no meaning. It may even be said that such a prohibition is reminiscent of "Nasrettin Hoca's tomb."

In democratic countries, led by France, Spain and Britain, which have taken precautions against separatist terror by resorting to extraordinary measures and which have this right, we know of no single example concerning the prohibition of "separatist thought".

Furthermore, in examining the trial files containing the speeches and writings of persons punished under Article 8 of the Anti- Terrorism Law, it can easily be seen that they have not even put forth "separatist ideas".

Proposal:

As stated in the previous relevant section, Article 8 of the Anti-Terrorism Law must definitely be abrogated. The other provisions of the Anti-Terrorism Law (propaganda of terrorist organisations) are more than enough to prevent matters which cause concern.

7) Press, broadcasting and artistic products

The prohibition of bringing works printed abroad into the country and their distribution, the liability of printing houses and their annexes to seizure, the seizure of video and musical works, and the closing of performance halls are in *general* antidemocratic provisions. These were also considered in the sections

above, and certain recommendations have been made. It may be said that in practice, these oppressive precautions mostly target Kurdish publications, but there is no need to discuss it again here under this heading.

Proposal:

Analysis and recommendations regarding these types of prohibition and oppressive measures have been given in the relevant sections above. These general determinations and the proposed changes are also valid for the specific problem considered here, and have the potential to produce positive results.

8) Activities of associations

Article 5, Clause 6 of the Associations Law States that: (it is forbidden to form associations) "To claim the existence of minorities based on differences of race, religion, sect, culture, language within the nation of the Turkish Republic or to create minorities by enriching and disseminating languages and cultures other than the Turkish Language and culture."

The provision of this clause, as we have already seen in Article 81 of the Political Parties Law, has an extremely oppressive character.

According to Clause 4 of Article 6 of the same law, the use of "placards, signboards, records, sound and video tapes, brochures, fliers, statements or similar items in languages forbidden by the law" at meetings in open or enclosed places arranged by the association or attended by the association is forbidden. We reitarate our above mentioned stand in relation to this prohibition as well.

Proposal:

The provisions of Article 5/6 and Article 6/4 of the Associations Law should definitely be abrogated. Turkey should not be made vulnerable to accusations of as being "cultural genocide".

9) Radio and TV broadcasts

It is obvious that securing the necessary freedom in this respect, too, will be beneficial. In the public circles it is already possible to observe some initiatives or efforts towards this end. Furthermore, in an age when the world is turning into a global village (globalisation), this type of monopolisation and prohibition is becoming meaningless.

Proposal:

The Turkish Radio and Television Law should be amended so that, broadcasting in languages other than Turkish can be possible.

10) Political parties

The provision of Article 81 of the Political Parties Law is as follows:

"Political parties:

a) Shall not claim the existance of minorities based on differences of national or religious culture, race, sect or language within the nation of Turkish Republic.

b) Shall not have the objective of destroying the integrity of the nation by creating minorities through the protection, enrichment and dissemination of languages and cultures other than the Turkish language and culture and they shall not carry out activities towards this end.

c) Shall not use languages other than Turkish in the writing and publication of their statutes and programmes, at their congresses, at meetings in open or enclosed spaces, at rallies or in propaganda; shall not use and distribute placards, signboards, records, sound and video tapes, brochures and Statements in a language other than Turkish; and shall not remain indifferent to the carrying out of these actions and operations by others. However, it is possible for their rules and programmes to be translated into a foreign language other than those forbidden by law."

This was one of the provisions we had in mind in stating that Turkey does not deserve to be branded with "cultural genocide." Furthermore, such a set of prohibitions is also in contradiction with the "Modernism of Atatürk" (Preamble, paragraph 5).

Proposal:

In accordance with the reasons given under the heading *"Political Parties"* (Section One), this provision must be removed in its entirety.

PART 3

STATE OF LAW

STATE OF LAW

In Turkey, the third dimension of the democratisation problematic focuses on the concept of the State of Law, following the previous political (Part One) and human rights (Part Two) dimensions.

The concept of the State of Law means that all acts and actions of the State are in conformity with Law and a democratic-liberal constitution. The concept is also expressed in phrases such as "the sovereignty of Law" or "the supremacy of Law".

The basic means of ensuring the State's conformity to Law, is judicial review. Hence, the State of Law requires that recourse to judicial review shall be open against all actions and acts of the administration. This section is structured around this axis.

From the viewpoint of the State of Law and judicial review three topics are at the forefront: freedom to claim rights (I), problems of judicial review (II) and independence and impartiality of the judiciary and its guarantees (III).

The proposals in this part have been appended as "General proposals" (IV) at the end of the section because the issues are intertwined with one another in a way reminiscent of a ball of wool (Main Sources: Bülent Tanör, *Turkey's Human Rights Issue* , in Turkish, and *For a New Constitution*, in Turkish, Work Group).

I) FREEDOM TO CLAIM RIGHTS

The freedom to claim rights is the dimension of the of the State of Law which concernes the individual or the governed; in a sense it is the "starting kick".

Freedom to claim rights includes rights to apply to the administration, to the legislature (the right of petition) or to judicial authorities. These are known respectively as the *administrative (or hierarchic), political* and *judicial* means of recourse.

The post- 1980 legislation brought important and significant limitations to the administrative and political means of recourse. In particular, obstacles placed against collective applications come at the head of these. The prevention of civil servants and students from presenting collective applications to the Administration and the fact that, while in the former Constitution and legal provisions which regulated the right of petition, provision was made for the right of "collective" application, this is absent in the new Constitution and legislation, might be an indication of the fear of "united right-claiming" actions and exercise of collective freedoms.

Moreover, it is necessary to refer to a further backward step in connection with the right of petition. The new law which regulates this subject, is content with far fewer provisions than the former Law No. 140 of 1962 despite the fact that it also covers administrative applications. In particular, the right of application to the Grand National Assembly of Turkey is considered an internal matter of the legislature and is left to in-house regulation.

This section will dwell not on administrative and political applications but on means of judicial application and their possibilities. These will be set forth in terms of application rights to the administrative jurisdiction, the constitutional jurisdiction and the judicial jurisdiction. These means and the rights relating to them are regulated by various articles of the Constitution, but Article 36 is specifically related to freedom to claim rights.

"Everybone has the right of litigation either as plaintiff or defendant before the courts through lawful means and procedure.

No court shall refuse to hear a case within its jurisdiction."

The equivalent of this Statement in the 1961 Constitution referred to "all legitimate means and methods" (Article 31). In a decision given during this period, the Constitutional Court, depending on this provision and the definite nature of the word *"all"*, ruled that the right in question could not be subjugated to any condition and that this principle would be valid even in "a State of mobilisation" (K. 1963/167). Those who drafted the 1982 Constitution acted with suspicion on this subject, and by deeming the emphasis of the 1961 text on *"legitimacy"* inadequate, ("all legitimate means and methods"), avoided including the word *"all"* in their own text.

1) Recourse to administrative jurisdiction

The administrative jurisdiction route and the right to apply to it is also specifically protected beyond the provision of "freedom to claim rights" (Article 36), which is of a general character: "Recourse to judicial review shall be open against all actions and acts of the Administration" (Article 125/1). This formulation indicates a weaker guarantee system compared to the provision in the 1961 Constitution (Article 114/1), which States that "*No* action or acts of the administration may under *any* circumstance can be left outside the review of the judicial authorities". While the 1961 system declared that no exceptions to judicial review could exist either in ordinary or extraordinary periods, the 1982 Constitution has intentionally

arrived at the understanding that this certainty has been abandoned, using as its precedent the formula contained in the 1971 Constitutional amendment. In fact, not only the 1982 Constitution but also certain laws passed in the new period have included important exceptions in this regard. In this sense, there is significant difference between the 1961 provision and the formulae of 1971 and 1982.

Some of the amendments made in the Administrative Procedure Law (IYUK) during the 1990s have the quality of limiting the freedom to claim rights (3622-5.4.1990). For example, in the initial examination of applications made to the administrative courts, in other words before the petition is forwarded to the other party and the dispute is argued, a new condition opening the way to rejection of the suit has been added. According to this, "the subject of an administrative suit is examined as to whether or not it is a definite operation requiring execution." (IYUK 14/3). Thus if the action which is the subject of the suit is deemed not to have this characteristic, the suit is rejected right away. Furthermore, amendments made in the law making a suspension of execution decision difficult and providing methods of contesting it, are also damaging to the freedom to claim rights (IYUK 27/2 and 12). New provisions opening the way to delays which will be to the disadvantage of private persons involved in suits and making it difficult for them to obtain concrete benefits also have the quality of rendering the freedom to claim rights ineffective.

The provision of the 3rd Additional Article put into effect by this law which amended IYUK has been cancelled by the Constitutional Court. The High Court found that the creation of a method named "contest" besides the annulment suits, with weaker protections than such suits enjoyed within the realm of administrative jurisdistion .... was contrary to the rules of the Constitution relating to State of Law (Article 2), freedom to claim rights (Article 36) and recourse to administrative judicial review. (Article 125).

In the same way, the provision of the Provisional Law Concerning the Trial of Civil Servants prohibiting judicial recourse against the decisions of the Provincial Administrative Council (Article 6) was found to be contrary to the freedom to claim rights (Article 36) and the principle that judicial recourse is open against all types of acts and actions of the administration (Article 125) and was annulled.

These decisions are important contributions from the point of view of the freedom to claim rights in the administrative jurisdiction. Moreover, it can be said that the Council of State takes a watchful jurisprudential attitude on the question of the freedom to claim rights.

However, there are other factors which impede or make difficult the seeking of rights in the administrative jurisdiction. The category of "contracted personnel", has limited the opportunity of those with this status to make such applications. With the amendments to the State Civil Servants Law (Article 13), persons may not file a suit against the responsible personnel because of damage they have suffered, but may only file a suit against the government department. (2670-12.5.1982). There are also limitations which have arisen from judicial decisions. For example, the Council of the State, in suits filed against the decisions on the prohibition of importation and distribution of certain works taken by the Council of Ministers, has interpreted the "interest condition" in accordance with Article 31 of the Press Law very narrowly. The suit filed against the decision to prohibit Salman Rushdie's book the The Satanic Verses was rejected on this ground. The meaning of this is that, by depending on the law in question, nobody has the freedom to claim rights in the administrative jurisdiction against decisions of the Council of Ministers and that these decisions are regarded as a kind of "governmental disposition" which is outside the administrative jurisdiction.

Another negative factor to be added to these is the recognition by a new IYUK amendment (Article 2) of the right to open a annulment suit for "persons whose individual rights are infringed" instead of "persons whose interests are infringed" (4001-10.6.1994). This wording was found by the Constitutional Court to be contrary to the principle of the State of Law and the freedom to claim rights, and it was annulled.

2) Recourse to constitutional jurisdiction

The recourse to administrative jurisdiction route discussed above cannot by itself be an adequate protection. In the review of administrative acts, if the law which is taken as the reference is not in compliance with the Constitution, administrative judicial review and the freedom to claim rights by this means cannot provide the benefit expected from them. Hence, constitutional jurisdiction has great importance not only in ensuring the supremacy of the Constitution but also in terms of the freedom to claim rights.

In systems, such as Turkey, where the right of the individuals to file annulment suits with the Constitutional Court directly is not recognised there is still a means to set such a review into motion: plea or contest. The right to apply to

constitutional jurisdiction, which is the other means, is also connected to an individual's freedom to claim rights. The right of a certain number of parliamentarians who represent the nation or of political parties which reflect the wishes of their voters to institute an action must be considered in this connection. Suits filed or which might have been filed by the High Council of Judges, the Council of State, the Military Court of Cassation and the universities, whose right to institute annulment actions "in areas concerning their own existence and duties" recognised by the 1961 Constitution, closely concerned their members or their freedom to claim rights. In fact, a significant proportion of the provisions whose annulment was requested in annulment actions initiated by these institutions in the period of the 1961 Constitution, concerned rights of their members.

What points today can be criticised from the viewpoint of the freedom to claim rights in constitutional jurisdiction? It is possible to approach the question via contest and annulation suits.

The ability of the parties to contest the constitutionality of provisions of a law or of decrees having force of law to be applied during a trial in the courts and the referral of this claim by the court to the Constitutional Court as a "dilatory question" if the former finds it "serious" is a concrete guarantee in terms of the freedom to claim rights, because in the event that the Constitutional Court takes an annulment decision, both the plaintiff and the defendant benefit directly. The 1961 Constitution also recognised the authority of the Constitutional Court to give an annulment decision "limited to facts and binding only the parties concerned" (Article 152/4).

The 1982 Constitution brought a number of limitations to the freedom to claim rights through a plea of unconstitutionality. For one thing, there is no longer any chance of ensuring the review of laws as to form through the contest route (Constitution Article 148/2). Moreover, "No allegation of unconsitutionality shall be made with regard to the same legal provision until ten years elapse after the publication in the Official Gazette of the decision of the Constitutional Court dismissing the application on its merits (Article 152/4). Even if in principle the setting of such a time limit in this matter is logical, the specified length of period may not be suitable in view of the dynamism of the society and changes in its value judgements. Indeed, as seen in the treasury aid to political parties, the Constitutional Court gave two completely contradictory decisions within two years (decisions dated 18-19 February and 2 February 1971). Thirdly, the

removal of the possibility of making a judgment limited to the occasion and binding only on the parties is another point creating difficulty for the protection of individual rights in concrete situations. Finally, whereas under the former system the trial court had the option in a case where the Constitutional Court's decision was delayed to solve the question in hand "according to its own opinion", or in other words to solve it by leaving aside the possibility of unconstitutionality (Article 151, conclusion), the 1982 Constitution has specified that if the Constitutional Court does not give a decision within 5 months after receiving the contention, the trial court "shall conclude the case under existing legal provisions" (Article 152/3).

The annulment suit route, in other words the route by which organisations, institutions, parties etc. seek rights, has suffered even more significant limitations. In the first version of the 1961 Constitution, even parties "represented" in the Grand National Assembly of Turkey could file suits. This opportunity enabled the Turkish Workers Party to set the constitutional judicial mechanism in motion; a considerable number of legal provisions were passed through the filter of the Constitutional Court and some of these were annulled. This opportunity, which was removed by the 1971 Constitutional amendment, has not been included in the 1982 Constitution either. While in the period of the 1961 Constitution parties obtaining 10 % of the vote in the preceding general election had the right to institute an annulment action, the new Constitution has withdrawn this. Again, in the period of the former Constitution, at least one sixth of the total membership of either houses of the parliament had the right to file suits. In the new system, one fifth of the total membership of the Grand National Assembly of Turkey has this right. On the subject of filing a suit, the right recognised for political parties by the Constitution includes only the parliamentary groups of the party in power and main opposition party. It is highly unlikely that the party in power will approach the Constitutional Court for legislation it has passed using its majority position in the parliament. The main opposition also, with expectations of future power may refrain from appealing to the court for certain legislation if it considers them to be to its advantage later. Moreover, since the right to initiate a suit recognised by the 1961 Constitution for the organs and institutions listed above "in areas affecting their own existence and duties" has been withdrawn, the indirect freedom of the personnel of these institutions to claim their rights has also become ineffective.

3) Appeal to judicial jurisdiction

The obstacles that impede claiming rights through the judicial jurisdiction route have legal and de facto characteristics: "civil servants' guarantees", impairment by the administration and the police forces, lack of education and knowledge, financial questions, the absence of a judicial police organisation etc.

The immunity from trial of public officials and certain behaviour of the police forces have affected the freedom to claim rights in an adverse manner. For one thing, when they infringe rights and freedoms, it is highly difficult to try public officials. The Constitution's considering the permission of the administrative authority mandatory for prosecution (Article 129), and in particular the provision of the Provisional Law Concerning the Trial of Civil Servants dated 1913 which gives the responsibility of pre-investigation in cases of duty abuses by civil servants to administrative bodies and the inability of the public prosecutors to directly file suits against civil servants, are positive elements in terms of civil servants' guarantees but negative ones in terms of the freedom to claim rights on part of the persons oppressed. With these characteristics, the Provisional Law Concerning the Trial of Civil Servants creates discrimination and violates the principles of equality, the rule of law, and the unity of justice, and freedom to claim rights. It is necessary to remove the provisions of this "provisory" law dated 1913 and of the last paragraph of Article 129 of the Constitution (Sami Selçuk, *Concerning Trial of Civil Servants,* 1996-Report in Turkish).

Filling of certain penal suits involve even graver problems. Appeals related to claims of torture are a typical example of this. To be able to initiate such an action, it has been necessary to go through a period of struggle of as much as 7 years in the process, and sometimes even this has not been enough to start a case. Difficulties of determining evidence and witnesses are the main reasons for this situation.

It is also possible to encounter behaviour by the administration and police forces that directly impede the freedom to claim rights. To refuse entry to certain political refugees for whom legal proceedings files exist and who, knowing this, have come to Turkey to be given a hearing is a typical example of this. Whereas, not only citizens but "everyone has the right of litigation either as plaintiff or *defendant* before the courts" (Constitution Article 36/1), and not only citizens but "everyone" may be tried in the courts.

Another factor creating difficulty for the ability to use the freedom to claim rights is the fact that a large proportion of the citizenry do not have the financial resources to bring cases before the courts and to have themselves defended. The position of those tried for crimes deserving heavy punishment is the most sensitive aspect of the subject. While "legal aid" is referred to in the laws, in practice no means has been created for this other than the voluntary participation without fees of the Bars and lawyers. Hence, while "legal aid" remains inadequate, it also turns into a "forced labour" for the lawyers. The responsibility of Provinces and Municipalities under the Attorneys Law No. 1136 of 7 July 1969 to provide financial aid to the Bars has so far not been implemented.

Finally, the fact that a judicial police system has not been introduced leads to tension and distance between prosecutors and the police and results in the ineffectiveness of legal appeals and investigations.

II) ISSUES OF JUDICIAL REVIEW

Here weaknesses in judicial review will be presented which make the realisation of a State of Law difficult.

These appear as problems related to administrative jurisdiction and constitutional jurisdiction.

In Turkey, electoral jurisdiction, defined in *Part One*, is not an area of review burdened with significant problems. Hence, it has not been considered here.

1) Administrative jurisdiction

Even if it operates slowly and with difficulty, judicial review is the most important guarantee and sanction against contraventions which may arise in administration. In countries, headed by France, where an administrative regime and administrative justice system have been adopted, the administrative judges' meticulousness and independence in reviewing administrative operations has become the main guarantee of the protection of freedoms. In Turkey during the period of the 1961 Constitution, administrative judicial review was on the way to achieving this maturity. The Constitution's provision for all actions of the administration to be reviewed in *all circumstances*, the absence of provisions contrary to this in the laws and, despite certain judgments open to criticism, the meticulousness shown by the Council of State in judicial review were laying the foundation stones of this positive development.

Administrative judicial review has produced important results in our time. In particular, the negative behaviour of certain provincial governorships towards associations and labour unions (the Language Society, the Human Rights Association, Association of Physicians Against Nuclear War, student associations etc.) could to a great extent been overcome only by judicial judgments even though it took considerable time. Council of State, with a reconciliatory judgment, has decreed that Provisional Article 15 of the Constitution cannot be considered an obstacle to judicial review (OG. 18.6.1991-20905). Here, however, our basic subject is the dimensions of an apparent regression in administrative judicial review.

The restrictions brought to administrative judicial review by the 1982 Constitutional system were first stipulated for certain categories of acts. The acts carried out by the President of the Republic on his own competence (Articles 105/2, 125/2), the decisions of the Supreme Military Council (Article 125/2), of the Supreme Council of Judges and Public Prosecutors (Article 159/4), of the Audit Court (Articles 160/1), and the disciplinary decisions of warnings and reprimand (Article 129/3), are outside the scope of judicial review.

In the practice and theory of a parliamentary regime, the probability that the administrative acts and actions that the President of the Republic can undertake on his own initiative will affect the field of human rights is not high. The draft approved by the Consultative Assembly (Article 113) which lists these acts one by one confirms this. Theoretical and judicial measures have been adequately taken, to overcome problems which may arise its exclusion from rejection of this provision by the National Security Council, and its non-inclusion in the Constitution. At all events, it is not possible for the President to make administrative decisions and carry out acts in fields relating to human rights and freedoms only on his own initiative. However, in other areas this prohibition on review may produce results contrary to the principle of State of Law.

Turning to the Supreme Military Council (YAŞ), the rules of military hierarchy cannot justify the exclusion of YAŞ decisions from review. If it were possible to think differently, the reason for the existence of the High Military Administrative Court would also be inexplicable. The exclusion from judicial review of administrative acts and actions concerning military personnel and military services with decisions of the Supreme Military Council is the result of reaction to annulment decisions made by the Council of State and the High Military Administrative Court

taken in the past, and it is contrary to the principle of State of Law. In fact, it is possible to claim that YAŞ decisions are only of a "notification of opinion" nature, that the main executive decisions are taken by tripartite decree and that judicial recourse is possible against these, the High Military Administrative Court has not accepted this view and has considered the YAŞ decision as a "preliminary decision" and the tripartite decrees as a "procedural transaction" and considered the door to review as closed (Abbas Gökçe, "The duty of notification of opinion", *Radikal*, 19.12.1996).

The exclusion from review of decisions of the High Council of Judges and Public Prosecutors (HSYK) has the same character. Indeed previously, a provision which damages "the freedom of judges to seek justice" was inserted for the High Council of Judges foreseen by the 1961 Constitution (Article 144/1), but it was found to be in contradiction with the basic characteristics of the Republic and was annulled by the Constitutional Court. That the judgment was based on Article 6 of the European Convention on Human Rights is proof that the provision of the 1982 Constitution introducing the same prohibition is in breach of international standards in this field.

The basis for excluding punishments of warning and reprimand from review must be the idea of "not strangling justice with minor disciplinary sanctions." However, all types of disciplinary punishment are sanctions which both affect the individual's records and are related to his personal honour. In the face of these superior values, no reason can be found to justify the exclusion of certain sanctions from judicial review.

Coming to the case of the Audit Court, this body, "shall (also) be charged with auditing, on behalf of the Grand National Assembly of Turkey, all the accounts relating to the revenue, expenditure and property of government departments financed by the general and subsidiary budgets, with taking final decisions on the acts and accounts of the responsible officials" (Constitution, Article 160). The provision of "No application for judicial review of such decisions shall be filed in administrative courts" which is contained in the Article, is a prohibition which limits freedom to seek legal rights. The fact that the Audit Court has a judicial duty and is included in the 1982 Constitution under the heading "High Courts" is not sufficient to dissolve the adverse effects which may arise from this situation. The change in the law which in effect makes the governing party the sole voice in appointing members of the Audit Court has made these drawbacks even more tangible.

In certain other situations, too, the application of judicial action against administrative acts has been made difficult if not impossible. The altered form of the Law on the Protection of Minors from Harmful Publications places an obligation to protest to the General Assembly of the Council of State within one month before resorting to legal recourse against decisions of the supervising council (Article 9), can be cited as an example.

There are also amendments which limit the *content* of administrative judicial review directly or indirectly. There is a prohibition on "review of soundness" which was introduced with the 1971 constitutional amendment (Article 114/2) and whose weight and vagueness were further increased with the Administrative Procedure Law (Article 2/2) and the 1982 Constitution (Article 125/4). Proceeding from the fact that every action or acts has, more or less, a discretionary character, in a case where this prohibition is interpreted against judicial review, it means that judicial review of the administration is made far more difficult. Moreover, the possibility to give suspension of execution decisions in general and for periods of State of emergency in particular, has been or may be limited (Article 125/5 and 6). In fact, while the limitation of the prohibition on suspension of execution decisions only during States of emergency was related to public servants with an organic and functional relationship to this regime (IYUK, 27/10), the interpretation of the necessity of applying this prohibition in all cases relating to civil servants in certain rulings of administrative courts is another negative factor. The new arrangement which provides exemptions to the personal fiscal responsibility of public sector employees (and at the same time widens and strengthens the administrative guarantee on the subject of criminal prosecutions of these people) is also an element opposed to the principles of State of Law and judicial review. Factors such as wide powers of the administration and the administration's not being transparent and democratic also work against administrative judicial review. Certain amendments made to the Administrative Procedure Law which are mentioned under the heading "Freedom to Claim Rights" have brought even wider restrictions on judicial reviews.

Coming to the question of enforcement of judgments of administrative jurisdiction, this responsibility is a natural result and requirement of judicial review. This is why the subject is connected to clear legal regulations in other countries. In Turkey during the period of the 1961 Constitution it will be recalled that decisions of the Council of State which nullified a number of appointment acts related in particular to the upper bureaucracy was not implemented. The 1982

Constitution (138/last paragraph) repeats the "responsibility for compliance" provision of the 1961 Constitution (Article 132/2), but, it in practice it is seen that particularly the suspension of execution decisions are ignored. Sometimes the administration, with a logic not contained in IYUK or in administrative law, appropriates to itself the right of non-application within the 60-day period to contest decisions suspending execution.

This type of weakness emerging in the judicial review of administration has given rise to the question, "is the absence of special inspectors outside the administration such as an *ombudsman or mediateur* a deficiency in Turkey?"

The essence of this control is the investigation and answering of complaints related to the administration by an impartial official. The inspector is appointed by the parliament, government or the Chief of the State or by cooperation among them. As in France, the impossibility of his dismissal and of his ineligibility for re-selection at the end of a 6-year period ensures independence in his duties. Already in early 1980s, 67 countries had one or more *Ombudsman.* These are either generally authorised to oversee the operation of public services or have a special duty (on an issue-basis such as barracks, universities, prisons, women or foreign workers). This diffusion and multiplication has given rise to the birth of the word *"Ombudsmanie".* Certain countries (for example France) have preferred the mediator, which is an official or institution with narrower powers, or an increasing number of voluntary advisors (Japan).

This institution has an original *supervising mechanism.* The *Ombudsman,* who has wide investigatory powers, investigates complaints and issues without transgressing the area of authority of other organs and proposes to the administration an objective solution according to the merits of the matter in hand. These recommendations improve the relationship between the administrators and the administered. The publication of the annual reports of the inspector has also a constructive and remedial influence. Another important point is the structural character of the office. The *Ombudsman* is completely outside the other administrative units it is going to inspect and is independent of them. The structure is autonomous. This ensures the possibility of ready contact with the citizens. The *Ombudsman* is neither an unapproachable inspector nor a colourless civil servant of an anonymous bureaucracy. His investigations, if they do not have the effect of judicial reviews, are considered extremely useful by the people for their simplicity and economical nature.

As the examples given in this section have shown, in Turkey there is a gap between the administration and its review. Judicial paths of review exist, but it is difficult to use these and obtain a result in a short time. Moreover, in sections of society with lower cultural levels, there are other influences that make the use of these opportunities difficult. Applying to judicial organs, obtaining the advice of a legal expert or visiting a lawyer's office and carrying out a great number of resulting formalities are factors which deter many people right from the start. For some, opportunities of this type are already too limited or not known well enough. "Putting the State on trial" is not a habit which can be easily formed. Despite important contributions made by local administrative courts with regard to judicial review, today it is still not a satisfactory guarantee. The absence of other, simple methods producing rapid results is strongly felt. An *ombudsman* or *mediateur* is an option which comes to mind to fill this gap. The advantage of these is that they have the opportunity of taking action even on simple verbal complaints and that in general they carry out their investigations in the name of the same legislative body which appointed them. Taking these characteristics into account, it can be easily accepted that the State Supervisiory Council appointed and operated by the President of the Republic contained in the 1982 Constitution does not have the opportunity to fulfill such a function, because, far more than the protection of human rights and freedom, the organisation's aims, functions and powers are focused on the inspection of the administration and civil society institutions subject to private law.

Viewed from these angles, it can be said that there is a need in Turkey for ombudsman-type arrangements. In fact, amongst the recommendations made in the name of the True Path Party during the efforts towards a new constitution, the idea of introducing the institution of Ombudsman (Chief Secretariat for Citizens' Petitions) into our legal system was also proposed.

A more recent study report has been prepared on this subject (Oğuz Babüroğlu-Nevra Hatiboğlu, *Study of the Ombudsman Institution,* in Turkish, 1996).

2) Constitutional jurisdiction

Review problems in the area of constitutional jurisdiction are of two types: limitation of the review function and prohibitions of review.

The first series of obstacles concerns the limitations placed upon the *review function* of the Constitutional Court. That is to say, laws which could be reviewed

and which are sent to the high court are sometimes could not be subjected to a full review. For example, verification of conformity of laws to Constitution as to form, is restrited to "consideration of whether the requisite majority was obtained in the last ballot" (Article 148/2). Thus the opportunity has been granted for the majority in parliament to pass "surprise laws", and the procedural deficiencies which prevailed before are de facto overcome.

Furthermore, laws which change the Constitution may not be reviewed in terms of substance. Their verification in terms of form is also limited to requisite majorities for the proposal and ballot and to compliance with the prohibition on debates under procedures of urgency (Article 148/2).

Another factor which effectively narrows the review function of the Constitutional Court is that the Constitution itself has limited human rights and/or generously authorised the legislative power to enact such limitations.

The same limitation is valid for decrees having force of law. Because of recognition of greater freedom and discretion to the executive organ compared to the former level concerning decrees having force of law, their review has become even more difficult. There is already no need for the "enabling act" for the decrees having force of law relating to extraordinary administrative proceedings. As a rule, these are not subject to constitutional jurisdiction either.

Another new regulation which narrows the Constitutional Court's review function is the rule that the Court, in the course of annulling a provision, "shall not act in the capacity of a law-maker and pass judgement leading to new implementation" (Article 153/2). This arrangement, which reflects the reaction felt by certain circles to certain annulement decisions given by the high court in the period before 1980 (nationalisation, the election system, treasury aid to political parties, allocations and travelling expenses of members of parliament, the application of amnesty to death sentences, the State Security Courts, the continuation of martial law courts after the lifting of martial law etc.), which at first glance appears meaningless, has been regarded as a "warning" condition, incapable of functioning so as to impede review. Indeed, the implementation has also confirmed this.

Turning to prohobitions of review or *"non-reviewable norms"*, this subject is the weakest point of Turkish constitutional jurisdiction.

The most important package of non-reviewable norms is the National Security Council laws. 626 laws passed between 12 September 1980 and 7 December 1983 are still not subject to review by constitutional jurisdiction. This situation arises

from the last paragraph of the Provisional Article 15 of the Constitution: "No allegation of unconstitutionality shall be made in respect of laws and decrees having force of law enacted, or decisions and measures taken under Act No. 2324 on the Constitutional Order during this period".

Up to now the provision in question has been understood and applied as a definite and permanent prohibition of review both by the Constitutional Court and by the courts of justice. Moreover, the removal from effect of this article by the Grand National Assembly of Turkey has not been possible either.

Thus the laws of the military regime of 1980-1983 are in the position of a kind of *"second constitution"* alongside the Constitution. These laws, whose contradiction the Constitution cannot be contended, are in a sense stronger than the provisions of the Constitution, because while laws changing the Constitution can, if nothing else, be claimed to be contrary to the Constitution in terms of form, the laws of the military regime are impossible to review judicially either as to form or to substance.

Furthermore, this collection of laws which cannot be reviewed shows that the military regime still continues within the normal constitutional system.

The second important package of "non-reviewable norms" is the provision that, "no action shall be brought before the Constitutional Court alleging the unconstitutionality, as to form or substance, of decrees having force of law, issued during a State of emergency, martial law or in time of war" (Article 148/1). In such periods and under these regimes, the Council of Ministers convening under the Chairmanship of the President of the Republic can, "on subjects created by necessity", take any measures and can bring about prohibitions and limitations on human rights (Articles 121, 122) but these measures are not subject to judicial review. The meaning of this is that during such periods, constitutional government and the principle of the supremacy of law are suspended.

But, states of emergency are also constitutional administrations, and the principle of the supremacy of law is valid for such periods as well. The difference between these periods, is that the powers of the State, led by the executive organ, enjoy a certain expansion, which is natural. However, unless these regimes are to be regarded as "arbitrary" regimes, it is not possible to accept the exclusions of these from constitutional judicial review. There is an even greater need for judicial and constitutional review precisely during the periods. The adverse effects of an expansive administration on human rights can only be controlled through this

mechanism. Furthermore, this anomaly has created a contradictory situation within the Constitution itself. As a positive novelty, the Constitution has specified an unassailable area even in this type of situation and has decreed that measures be taken "to the extent that the situation requires." (Article 15). But whether or not this area has been tresspassed and whether or not the measures taken conform to the principle of the extent of the requirements of the situation, still cannot be brought to the review of the Constitutional Court. This contradicts the principle that State of emergency regimes are also "legal regimes". Moreover, a road has been embarked upon whereby provisions having nothing to do with a region under State of emergency are established in decrees of State of emergency (Decrees Nos. 424, 425 and 430). The Constitutional Court very justly has overridden the prohibition of review in relation to these and has agreed to approve them in terms of substance and has annulled this type of provisions.

In conclusion, the 1982 constitutional jurisdiction, in terms both of form and substance, is not in a position to fulfill the function of supervising a democratic State of Law based on human rights.

III. INDEPENDENCE, IMPARTIALITY AND GUARANTEES

The judicial organ in Turkey made important gains in terms of independence and its juridical guarantees with the 1961 Constitution. If changes in the Constitution between 1971 and 1973 produced certain backward steps in this area, aside from two such important areas such as the martial law courts and the State Security Court which contradicted the principles of "natural judge" and "independence of the courts", at least the independence of general and ordinary justice and its guarantees were protected.

Today the question of independence is on the agenda in a way reminiscent of the pre-1960 period. The statements of high court presidents and the complaints and criticisms raised in the news and articles in the press bear witness to this. How have we come full circle?

1) In general

The first problem which attracts attention from the viewpoint of judicial independence and impartiality is the selection and appointment of those who serve in the higher institutions of this organ by the President of the Republic. The President personally selects and appoints members of the Constitutional Court (Article

146/2), the Military Court of Cassation (Article 156/2), the High Military Administrative Court (Article 157/2), and the High Council of Judges and Public Prosecutors from lists submitted to him, as well as one fourth of the members of the Council of State and the Chief Public Prosecutor of the Republic. That the President is the head of State and considered to be impartial does not obscure the fact that he is also the head of the executive. The powers listed are the first steps on the road to making dependent the high institutions of justice to the administration. In fact, in countries such as the USA and France, too, the heads of State are not without similar powers. However, in these countries judicial independence together with democracy and human rights have taken root for at least two hundred years, and various rules and mechanisms ensuring the independence of the judiciary and its guarantees have been working in an effective manner. In Turkey, the bringing of the President of the Republic by the 1982 Constitution to the position of "sole selector" in the appointment of certain high judges has to a great degree been regarded as resting on the assumption that "above-party individuals" would reach these positions, whereas in a situation where the President comes from a political party (this being a normal preference in the democratic order) it is certain that the doubts expressed above will increase and grow. In fact, certain appointments made to the Constitutional Court have confirmed that these are not groundless suspicions. It may also be pointed out at this stage that the cumulation of these powers in the President's hands has given rise to such a paradox as the possibility of this individual's being tried by judges he himself has appointed (by the Constitutional Court acting as the High Court).

Another problem is the subject of unification or separation of jurisdiction. In Turkey, as in many countries of the world, there is not complete consolidation of jurisdiction and the principle of judicial separation has been adopted. The basis for this is the separation of judicial and administrative jurisdictions. In addition to this separation, which has come about for certain correct reasons, new divisions and separations created within judicial and administrative jurisdictions, leaving aside the argument whether or not they are properly justified, create problems in view of the independence of the judiciary. The destruction of the internal unity of judicial and administrative jurisdictions has led to their weakening because of division, has caused each part to be more susceptible to external interventions. So much so that each, part falling away from the whole has emerged with an identity which was more receptive to executive orders and more distant to the general

judicial principles. The existence of a separate section called "military jurisdiction" within the judicial jurisdiction and its ability to try civilians is the most dangerous development which comes to mind on this subject. The State Security Courts in the judicial jurisdiction and the Supreme Military Administrative Court in the administrative jurisdiction must be considered in the same context.

2) Supreme Council of Judges and Public Prosecutors

After these general reminders, it is necessary to dwell on the Supreme Council of Judges and Prosecutors (HSYK) which holds a critical position within the subject of judicial independence and security for judges. Originally established by a law of the National Security Council and later defined by the Constitution (Article 159), the HSYK is in the position of being the key organ in the professional lives of the judges and prosecutors who serve in the judicial and administrative jurisdictions. This council is empowered and entrusted with such matters as admission to the profession, appointments, transfers, promotion, disciplinary action, dismissal from the profession, and removal of personnel and alterations in the jurisdictional boundaries of the courts. Moreover, the Council carries out other duties under the Constitution and laws. The most important of these is the selection of members of the Court of Cassation, the Jurisdictional Conflict Court and the Council of State.

It is interesting to compare the HSYK's position with regulations under the former Constitution. In the period of the 1961 Constitution, the High Council of Judges, with 11 members and 3 alternates, was empowered to supervise essential operations regarding only the judges in the judicial jurisdiction. The High Council of Prosecutors, with 7 members and 2 alternates, had similar powers in relation to public prosecutors. In the 1982 system, the HSYK, made up of just 7 full members, is the sole institution of authority on matters relating not only to law court judges but also to court prosecutors and administrative judges and prosecutors. In a field where in the former period two separate councils with a total of 18 full members were empowered to act solely in relation to judges and prosecutors within the judicial jurisdiction, a single council with just 7 full members is in charge of a wider area covering also the administrative jurisdiction.

In the new system, bringing essential matters relating to judges and prosecutors under the authority of the same council is striking. It is obvious that this approach, which eliminates the functional difference between the two groups has moved the judges to the less secure position of the public prosecutors instead of

bringing the public prosecuters to the more secure position judges held or were supposed to hold. This will be further elaborated.

The coverage of those connected to the administrative jurisdiction under the authority of the HSYK has also brought about doubts from the viewpoint of administrative jurisdiction. In this way, the characteristic of the administrative jurisdiction organisation as a separate entity from the courts of justice has been partially destroyed. Furthermore, as can now be seen, persons authorized to pass judgement on the executive power and the administration are now being placed under the authority and supervision of a council carrying the stamp of the executive power and have lost lost much of their independence vis-a-vis the executive.

The HSYK is made up of the Minister of Justice (Chairman), the ministry undersecretary (ex officio member) and 5 judges. The members who are judges are selected and appointed by the President of the Republic from candidates presented to him by the Court of Cassation and the Council of State. The authority to select members of the Council vested in the Court of Cassation in the 1961 system has been reduced to submission of candidates, implying a distrust of high court judges. The doubts raised from the viewpoint of judicial independence created by the designation of the head of the executive as the final authority in the appointment process are obvious. In the case of the President of the Republic coming from a political party (as is normal), these doubts are multiplied. Furthermore, making the Minister of Justice Chairman of the Council and the ministry undersecretary an ex officio member has increased the initiative and effectiveness of the executive within the Council.

The mode of operation of the Council has added to the adverse effects arising from its structure. The Council, which has no separate organisation, independent budget, building or even a secretariat and whose operations are overseen by ministry officials, is not noticeably different from any of the units of the ministry's central organisation. Neither is there any public openness or transparency in the working of the Council. Whereas, for example, the High Council of Judges in Italy (Constitution, Articles 104-110) carries out its work openly in accordance with the principle of "democracy in sunshine", the HSYK in Turkey has performed its activities behind a curtain of secrecy.

Furthermore, judges who serve as HSYK members as "an additional duty" have neither the time nor the opportunity to examine the council's files or seriously participate in its decision-making. Draft decisions and information on which

they are based are prepared by ministry officials, and nothing is left to the judge members besides functioning as a "ratification authority". It has been realised that this ratification has been transformed into a "carrying out of formalities", especially from the summary signature of decisions that relocate hundreds of judicial personnel.

Even more serious is the closure to judicial review of the decisions of this council which is completely open to political and executive influences from the viewpoint of its structure and operations, having its own influence on justice notwithstanding. In the period of the 1961 Constitution, there was no doubt about the status of similar institutions (the Supreme Council of Judges and the Supreme Council of Public Prosecutors) or on the subject of their decisions being administrative decisions, either in legislative documents or in legal doctrine or in court decisions (in particular those of the Constitutional Court). It is also obvious that today's HSYK is an administrative organ, and that its decisions have administrative status, and it is equally obvious that keeping administrative decisions outside judicial review contradicts the principle of State of Law. In fact, the Constitutional Court found an amendment to the Constitition which prohibited appeals against the former Supreme Council of Judges to be in contradiction with the principle of "human rights" and the judicial appeal contained in the European Agreement on Human Rights (Article 6) and the 1961 Constitution (Article 2) as well as the principle of the "State of Law", and annulled it. Even a constitutional amendment prohibiting judicial recourse against the Supreme Council of Prosecutors was countered by this sanction and was cancelled. When the High Court finds the laws and even constitutional amendments which blocks the way to judicial appeal against the decision of these councils and annulles them, there is no point in dwelling further upon the illegitimacy of the current "prohibition of appeal through judicial courts".

All the negative effects of the system stemming from the HSYK have been sufficiently exposed. The flow of resignations following the passing of Law No. 2461 and the continual discontent experienced from that day on have deeply wounded judicial personnel and the world of justice. In his Year of Justice opening address on 7.9.1987, the President of the Court of Cassation said, "Some of the undertakings of the Supreme Council of Judges and Prosecutors have shown that there is a crisis of trust as we have been underlining and that this crisis of trust will become more widespread as time goes on." In retrospect, the mass transfer operations carried out show that those worries were not groundless.

3) Some other administrative and organisational issues

There are other elements which damage judicial independence and security of judges. The absence of regional security and bench security are at the head of such a list. Frequent alteration of the judge and prosecutors in an ongoing trial is a situation not encountered seldom in the application of Turkish law. Considering judges and public prosecutors as "attached to the Ministry of Justice in so far as their administrative functions are concerned" (Constitution Article 140/6) is an important element of pressure because, particularly in the case of the judges, the distinction between judicial and administrative duties is a very fine one and is enough to keep them in perpetual discontent. Moreover, supervision of judges is carried out by judiciary inspectors attached to the Ministry of Justice (Constitution Article 144). That with the passage of time this supervision has taken on an increasing political quality can be understood from the testimony of high court judges. Additionally, in the appointment of judges and public prosecutors to positions at the central ministry establishment, not even the HSYK has a role (Constitution Article 159). Here, the acquiescence of the interested party is necessary, but it is possible that this guarantee works in reverse as "partiality", thus damaging the judiciary's independence. The powers possessed by the HSYK to transfer judges to the status of prosecutors and the authority of the Ministry of Justice to confer temporary powers on judges or public prosecutors (Constitution Article 159/7) are also elements which damage independence and security. Despite the fact that a change in the law enabling judges and prosecutors working under the judicial jurisdiction to be appointed to the administrative jurisdiction is found by the Constitutional Court to be against judicial independence and annulled, there is no possibility of claiming that provisions far more contrary to judicial independence and security in the judiciary are unconstitutional (Constitution Provisional Article 15); and these are already directly included in the text of the Constitution.

Factors endangering the principle of judicial independence and security in the judiciary are not only related to those related to the structuring of the State's judicial organisation. Questions of the professional organisation of judges and lawyers, which are elements of judiciary and the legal process, also affect this area strongly. From the viewpoint of judges, the situation is simple. There are no organisations which ensure the protection and defense of themselves and of their professional values, whereas what ensures the independence of justice and the

judiciary and its professional guarantees is not only regulations within the State but also their ability to organise freely. The fact that the basic force which secures independence of justice and the judiciary and its guarantees in France is the "Judges Union" (Syndicat de la Magistrature), is an indication of this.

Turning to the subject of the *bars*, which are the professional organisations of lawyers, their independence is also a definite necessity for an independent and impartial justice. From this viewpoint the situation in Turkey provides no relief. The bars are subject to the ministry's "administrative and financial control", and their membership and disciplinary operations are dependent on the ministry's approval. Participation of the bars in international meetings depends on authorisation. Restrictive provisions concerning associations are applied to bars as well.

4) Military jurisdiction

The failings of military courts from the point of independence can be classified in several groups.

Military courts are made up of members which are directly appointed by the executive organ. In a system where the trio of the President of the Republic, Prime Minister and Minister of National Defence have the power to make appointments, it is impossible to claim that these courts are independent. This conclusion is confirmed by the decisions of the Constitutional Court.

On the other hand, martial law military courts are formed after events and defendants have become apparent; their board is appointed and these can be changed at any moment. This gives the political regime and the executive power the opportunity of making appointments according to the events and defendants, depending on political options. The situation is extremely dubious from the viewpoint of the principle of natural judge as well as the principles of independence and impartiality.

Moreover, the presence of military officers who are not from the class of judges on martial law courts and the greater lack of security and independence of these members compared to military judges are further negative factors. The trial of civilians for non-military crimes by tribunals in which military officers participate is a denial of the terms "court" and "fair trial". In addition, it is possible for an established martial law military court to be dissolved and its case files transferred to another selected court. Here once again we are faced not only with an occurrence of trampling of the principle of natural judge but also with a question relat-

ed to the independence and impartiality of the judiciary. On top of its ability to change court judges as it wishes, the executive's power to dissolve courts directly and send case files to the court it wishes is an open indication of its power to direct and influence the operations of military courts.

The true nature of military justice and martial law courts has thus been determined. That is to say, the power which declares martial law, establishes courts, appoints judges and, in turn, has the power to abolish these courts or to change their judges easily is the same organ; the executive power or the government. In this way, martial law military courts are under executive supervision from the beginning to the end of their period of existence.

On the subject of the professional status of those who serve on military courts, the powers of the executive organ and the military authorities are of a nature that drawing of this picture of dependence in even clearer lines.

Promotion of judges who serve on military courts is, as with other officers, made according to the grades in their occupational and rank registration documents. Hence they have no guarantee of their rights to promotion and advancement in their profession. In this type of application, the executive organ and the military hierarchy have an extremely wide range of prerogatives. Without obtaining a positive report from the unit commanders to whom they are attached, military judges cannot be promoted.

This administrative registration procedure has been found contrary to judicial independence and cancelled by the Constitutional Court in the case of the Military Court of Cassation, but it has been found to be in accordance with the Constitution in the case of other judges.

Similarly, there is no guarantee of occupational security. The administration has a wide range of prerogatives also in the matter of removing judges and prosecutors from duty by any method and retiring them.

5) Mission sought to be imposed on judges

These data have brought to the fore the fact that Turkey is once more living with a justice problem which previously was solved to a considerable extent. This has been emphasized by the statements of Presidents of the Court of Cassation who live with this problem and are at the highest peak of the judicial structure, emphasing that "in our country there is no genuine judicial independence", and that "a crisis of trust" is being experienced.

In this connection, it is impossible not to observe the traces of the definite and literal application to justice of the authoritarian law imposed by the September 12 regime. The serious erosion suffered by the independence and impartiality of justice and security of judges is a consequence of the realisation of this project. The institutionalisation of mistrust was seen as a deterrent and a punitive weapon against opposition which might come from the judiciary in the application of authoritarian laws.

It is possible to grasp this reference to the margin of interpretation available to judges. The 1961 Constitution (Article 132) said, "Judges are independent in their duties. They give judgement according to the Constitution, the statutes, the law and their conscientious convictions." The amendment in the 1982 Constitution (Article 138/1) is: "Judges shall be independent in the discharge of their duties; they shall give judgement in accordance with the Constitution, the statutes, the law, and their personal conviction in conformity with the law." With this condition, which is especially important from the viewpoint of criminal law and also valid for military justice, conscientious conviction has ceased to be an independent element which a judge takes into consideration on his own initiative and has been brought to the status of an element which may be used in accordance with the Constitution, the statutes, and the law. It is necessary to add that, here, the Constitution is the 1982 Constitution whose interpretation and application through "absolute loyalty" are required; the statutes, very probably the military regime's statutes, and the law is "the law (...) defined in this Constitution." (Constitution, The Preamble).

The judiciary is expected to function within this circle of siege. This choice, which is part of the determination to have the judiciary enforce authoritian laws in the most rigid manner, is damaging despite the partial independence which should be available to it through "interpretation" and "creation of law".

IV) GENERAL PROPOSALS

To restore the State of Law and judicial review, it is necessary to make radical changes. The issues which need to be given top priority and the principles and recommendations relating to them may be listed as follows:

1) With regard to administrative jurisdiction

The sentence, "Recourse to judical review shall be open against all actions and acts of the administration," in Article 125/1 of the Constitution should be

amended as, *"No action and act of the administration shall under any circumstance remain above judicial review."*

Administrative operations left outside review by the Constitution must be opened to judicial action, and relevant articles must be changed concerning: operations carried out by the President of the Republic alone (Articles 105/2, 125/2), the High Military Council (Article 125/2), the High Council of Judges and Prosecutors (Article 159/4), decisions of the Audit Court (Article 160/1), and punishments of warning and reprimand (Article 129/3).

There is also benefit in abolishing of the High Military Administrative Court and returning to the unity of administrative jurisdiction.

The provision of the Administrative Procedural Law (Article 14/3) which calls for "examination of whether there exists an action that is subject to administrative litigation and that requires final execution and the provision (Article 27/2 and 12) which makes the giving of decisions to suspend execution difficult should be revised.

The Provisory Law on Trial of Civil Servants should definitely be abrogated.

The provision of Article 125/6 of the Constitution which limits the authority of administrative jurisdiction under State of emergency procedures should be abrogated.

2) With regard to constitutional jurisdiction

With regard to the establishment of the Constitutional Court, its duties and powers, annullment suits, and method of contestation, there should be a return to the principles of the 1961 Constitution.

Provisory Article 15 of the Constitution must definitely be abrogated.

Judicial review should be opened against decrees having force of law promulgated in periods of State of emergency (Constitution Article 148/1).

3) With regard to the independence and guarantees of the judiciary

The basic role in the selection of high court judges should belong to the judiciary. Limited quota rights should be recognised for the President of the Republic.

The legal status of State Security Courts should be reconsidered from the viewpoint of judicial independence. Military judges should not be assigned to these.

Selection of members of the High Council of Judges and Prosecutors should be left to the judicial organs (the Court of Cassation and the Council of State), the

Council should choose its own Chairman, the Minister of Justice should be able to attend meetings if it is deemed necessary without the right to vote, the ex officio membership of the ministry undersecretary should be ended, and decisions of the Council should be opened to judicial review.

The provisions that judges and prosecutors are considered as *"attached to the Ministry of Justice from the viewpoint of their administrative duties"* (Constitution Article 140/6), that they are made subject to the supervision of *"Ministry of Justice... inspectors"* (Article 144), and that permission is given to the Ministry of Justice to appoint judges and prosecutors to temporary duty (Constitution Article 159/7), should be abrogated.

An end must definitely be put to the power of the military jurisdiction to try civilians, it must be ensured that all court members are from the class of judges, the preponderance of the military hierarchy over these courts must be removed, and, in the event of martial law, the taking over of duty by the existing State Security Courts must be clearly tied to a prohibition against establishing Martial Law Military Courts, via necessary changes in the constitution and laws.

A judicial police force should be established and moreover, the Bars should be freed from tutelage.

Changes should be made in the hearing procedures, and a cross-examination system should be adopted whereby parties are given the opportunity to directly question each other, the witnesses, and the experts.