Report of the TESEV Commission on Constitution

Towards Turkey's New Constitution

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Commission members (in alphabetical order)

Between December 2010 and April 2011, TESEV Commission on Constitution carried out 12 meetings at which headings of this report were discussed. The discussions realized at these meetings and the suggestions agreed upon by the members were compiled **Yaprak Gürsoy**, the rapporteur of the Commission. On behalf of the Commission and based on the text compiled by the rapporteur, Commission members **Mustafa Erdoğan** and **Serap Yazıcı** have penned this report, which bears the agreement of the TESEV Commission on Constitution.

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Contents

The sections Turkey Needs A New Constitution, The Fundamental Principles of the Constitution, Preamble and Preliminary Articles, The Source and Character of Power, Fundamental Aims and Duties of the State, Citizenship, Fundamental and Cultural Rights, A State Governed by the Rule of Law, Freedom of Conscience and Religion and Laicism, and Decentralization and Local Governments were written by **Mustafa Erdoğan**, and the sections on Separation of Powers, Political Parties, and Civilian-Military Relations were written by **Serap Yazıcı**. The section on The Process of Making the Constitution was penned jointly by the members of the Commission and presented to the public opinion in a press release in January 2011 and included in the second edition of the report.

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Foreword

Turkish Economic and Social Studies Foundation (TESEV)

In the globalization process, having started with the last quarter of the 20th century and is still ongoing, the world is changing its skin, not only socially or politically, but also in terms of mentalities. The observation that the modern state/society relationship falls short in solving –even more magnifying- today's problems is becoming more common. There is a search for a new ground of legitimacy based on participation, transparency, persuasion processes and decentralization.

This global transformation not only offers a new approach to addressing the structural issues that remain unsolved, but also serves as an invitation to make social contracts that allow for the unpredictable new demands and preferences of societies. This means that under no circumstances can a society's need to redefine fundamental concepts, set the norms for living together, and hence determine its own fate be ignored.

Exactly 30 years after the coup constitution made in 1982, Turkey is now trying to develop a new constitution. The need for a new social contract is more evident and urgent in Turkey's case... This is mainly because the political inheritance taken over stands for a 'republic' concept that has failed to become a democracy, has never actually liked the concept, and even hindered it. Under the tutelary system that protects this structure, the official ideology was religionized, while a state in fear of its society was created along with a citizenship dependent on the state.

The current state of affairs is an adaptation crisis that ossifies deadlock and paralyzes politics. Deeds towards protecting the regime and creating a nation appear today to have resulted in the continuation of the communitarian structure, a failure to become a society, and an inveterate mutual alienation between the state and the individual.

Recreating the dream of societal peace and integrity, peace and trust and a common future requires shedding this artificial ideological and legal guise that has come from the top. By making a constitution that leaves open the area of freedom for future generations, it is in our hands to be citizens by making it through civilian politics, and to be a society by making it together...

As TESEV, we believe that the society is ready to carry this mission and can earn the self-respect it deserves by becoming the real owner of the state. This report, penned by a commission established for this purpose, along with being a TESEV recommendation, reflects the common belief of the commission members. We think that this belief is present in the society and that this report can play a constructive role in the debates that will no doubt take place in the coming days.

Turkey Needs a New Constitution

Turkey's need for a new constitution is accepted by almost everyone today. In fact, this was a need that has been in existence since the day the 1982 Constitution was made, for the 1982 Constitution was not only anti-democratic in terms of the method it was made, it also did not fit the ideal of a democratic and pluralist-liberalist society in terms of its content. Indeed, with characteristics such as its official ideology, its hierarchical model that renders the society subject to the state, its unionist-uniformist structure that sees differences and diversity illegitimate and its sacrificing freedom for authority, the 1982 Constitution is far from the standards of today's democracies, and goes against the structure and needs of the society in Turkey.

Since the day it came into effect, various amendments have been made in the 1982 Constitution, essentially as a result of this need. Yet, although these amendments, particularly those made in 2001 and 2010, made considerable contributions to the liberalization and democratization of our society, this situation has not removed Turkey's need to make a completely new constitution. Moreover, these amendments have also disturbed the current constitution's integrity within itself. On the other hand, in the face of the will of voters revealed in the 2010 referendum on the constitutional amendments, making a new constitution has now become an urgent task that can no longer be ignored.

During the last few years in Turkey, the method that should be pursued in making the new constitution has been broadly debated in the public. **Foreseeing that political parties would open to public debate their own views and suggestions on the new constitution during their election campaigns, our working group had already announced to the public that the parliament formed at the end of this election would have the power to make the new constitution.** Since then, various civil initiatives and formations have carried out activities to collect the demands of the people on the matter of the constitution, or opened their own suggestions to public debate. Meanwhile, news that some major political parties were also in similar preparations appeared in the media. As a result, in line with our own expectations and foresights, it is understood that this election campaign will also become a constitution campaign and that the new parliament formed after the June 2011 elections will embark on the task of making a new constitution. Accordingly, this situation has made it urgent for TESEV, a non-governmental organization, to share with the public its main views and suggestions regarding the new constitution.

The Process of Making the Constitution

In the discussions finding voice in the public opinion, three methods are being pronounced on how and by whom the new constitution is going to be made. The first method suggests setting up a **"founding assembly"** to draft the constitution. However, this suggestion does not seem acceptable either in principle or in terms of implementation. **Above all, this method is antidemocratic, to the extent that it attempts to exclude the existing parties and politics.** Besides, it seems very likely that a **founding assembly** brought together with the assumption that its members are elites and have better knowledge of the subject might just lead to the **continuation of the tutelary tradition, the authoritarian structure and the status quo.** On the other hand, in case a draft constitution prepared with this method is offered for referendum, it seems highly unlikely that it can get a strong support from the public. This would in turn leave the new constitution face to face with legitimacy debates in the initial days following its coming into effect. Moreover, establishing a founding assembly to draft the new constitution can only be possible through the adoption of a special law that determines the number of the members of this assembly, the quorum and the applicable methodology for selecting the members. As this special law must be prepared by the Turkish Grand National Assembly (TGNA), the political majority dominating the TGNA will also have a decisive effect on the composition of the founding assembly. This fact shows that even if the founding assembly method is pursued, this will not eliminate the effect of today's parliamentary majority on the process of making the new constitution. Finally, if a draft constitution prepared by the founding assembly is not approved by the TGNA, this would be a return to the starting point without completing the process. For a constitution that can get the approval of the elected parliament, there is already no need for a founding assembly, as the parliament is certainly capable of making the constitution it will approve.

The second methodology discussed in the public opinion suggests having the public directly shape the process of making the constitution. The fact that the real owner of the principal founding power, which stands for making the constitution belongs to the people, makes this method attractive. However, there is no possibility that this suggestion will be followed.

Therefore, **the most realistic option is to have the real holders of the power of making the constitution, i.e. the people, use this power through their democratically elected representatives.** On the other hand, the people should be able to participate through various means in the ongoing efforts of their representatives to make a constitution; the draft constitution should come into effect only after it is approved in a referendum, and hence the people should have the chance to influence the whole of the process. Turkey is in a situation where it has to make its new constitution **through the hand of the parliament that will be formed in the coming elections**. There is no

doubt that the TGNA has the authority to do it. However, at this point, the following issues should be taken into consideration:

1. It is very important in this process that the parliament does not turn in on itself but cooperates with non-governmental organizations, pressure groups and academics. At the stage of making the constitution, the parliament should hear the suggestions of the organized groups representing the people and should be open to the demands and contributions of these groups.
2. After its completion, the constitution must be presented to the public's vote through a referendum, regardless of the parliamentary majority voting in favor of it.
3. Lowering the 10% election threshold is an important reformatory condition to strengthening the representative capability of the parliament. If the threshold is not lowered, the method employed in Germany, Denmark and Sweden may be considered. In these countries, although there is a national threshold rule, the parties getting the highest amount of votes in a given constituency area are exempt from this threshold when they fail to get enough votes to pass the national threshold, and become able to gain representative power in the parliament. Such a method may create a chance of earning parliamentary seats for those ethnicity-based parties that are able to get the majority of the votes especially in the South East but cannot be represented in the parliament since they fail to pass the election threshold. Thus, there would be no need to participate in the elections with independent candidates, a complicated and essentially unfair method which was used by the Democratic Society Party (DTP) in the general elections of 2007 and by the Peace and Democracy Party (BDP) in the 2011 elections to avert the negative impact of the 10% national election threshold. In case this model is also not preferred, then the Turkey MP status, adopted in 1995 and cancelled by the Constitutional Court, could be reintroduced. In the event that this method is adopted, the 10% national threshold will apply to only 450 seats of the 550-seat parliament, and the remaining 100 (or another number agreed upon) seats will be allocated to political parties prorata the votes they have received at the national level and without taking into consideration the threshold.

The Fundamental Principles of the Constitution

The main ideas and principles upon which the new constitution should be based can be determined to a large extent by looking at the constitution that is currently in force. The perspective that should guide us in this matter should be to reverse the main preferences of the 1982 Constitution or at least move away from them. One of the characteristics of this constitution is that it is state and authority focused, placing the state at the center or even at the top of the social-political existence. The 1982 Constitution is one that foresees a state that regulates the society from top to bottom, considered as a monolith and homogenous whole or entity, that designates or even imposes aims and rights for that society, and it foresees a society that does not/cannot go out of this restrictive framework set by the state. This situation, inevitably, has led to the consequent reinforcement and fortification of the state authority against the individual and the society.

Yet, by definition, a constitution is a system of norms by which the society regulates the state and not the other way around, and by which the society determines materially and procedurally the limits of the powers and duties of the state. In other words, a constitution is not a type of licence for arbitrariness that reinforces the state's authority, but on the contrary a document of limitation that closes all doors on arbitrariness. The constitution is a framework determined for the state by the people, and a document of limited authorization given to the state by the people. Furthermore, the function of a true constitution cannot be to legitimize the state's imposition of an ideological project on the society; on the contrary, a true constitution aims to provide the foundation that will enable the society to freely develop itself and express its views.

The new constitution should define the state-society relation according to this understanding. What is expected of the constitution is that it draws the framework of the powers of the state in an exact manner. In this context, the new constitution should attend to determine what the state should not do, rather than what it should do. The new constitution should thus limit the state while liberating the society. This can be achieved first of all by reversing the model of state-individual relation foreseen in the 1982 Constitution, i.e. by giving special importance to protecting the individuals against the authority of the state. This would require rearranging the fundamental rights with a liberal mentality. It is also paramount that this arrangement does not include any expressions or phrases that may provide a basis for arbitrary discrimination between the citizens, and that it enables an implementation that respects the diversity and plurality of the society.

In line with this understanding, the principal requirements of the democratization of the state in Turkey can be categorized under five main headings:

1. THE STATE SHOULD NOT HAVE ANY OFFICIAL IDEOLOGIES:

Most of the freedom and democracy-related problems regarding the 1982 Constitution stem from the fact that it grants a privileged, official status to a specific ideology. Hence, it is necessary that the new constitution does not determine any official ideologies for the state and stands away from a language that may imply or connote that the state renders this or that ideology as privileged. In this framework, other than showing the main principles that are essential for the existence of a liberal and pluralistic-democratic society, the new constitution should not make references to any ideology that seeks to regulate the society and prescribe what and how it should be. The state should be impartial towards the different world views, ideologies and lifestyles in the society, should treat the members thereof equally, and should neither favor nor stand against any of them.

2. THE STATE SHOULD BE IMPARTIAL TOWARDS RELIGIONS:

Impartiality of the state towards religions and sects is a requirement of not only a liberal-pluralistic society notion but also of laicism. A democratic state should be equally impartial towards irreligiousness or "faithlessness", as it is towards religions and beliefs. This impartiality notion is incompatible with "religiosity" or "official religion" as much as it is incompatible with turning anti-religiousness into an official policy. In this framework, the new constitution should keep away from a mentality that sees laicism as a project aiming at secularizing the society in a way that may provide a legal basis for an imposing implementation; on the contrary, it should institutionalize an understanding of laicism as guarantee of freedom, pluralism and social peace.

3. THE STATE SHOULD NOT BE DEFINED WITH AN ETHNIC OR CULTURAL IDENTITY:

The new constitution should distance itself from the long established mentality that defines the state in cultural and ethnic terms. It does not conform to a liberalist-pluralist mentality for the state to identify itself with an ethnic-cultural community even if that community constitutes the majority of the country's population, and as shown by experience, it is a wrong constitutional-legal choice that also threatens societal peace in Turkey. This "impartiality in identity" is particularly important in terms of the definition of citizenship. The new constitution should stay away from concepts with ethnic connotations in its definition of citizenship, and should employ a totally egalitarian citizenship definition that does not distinguish between religion, sect or ethnicity and that does not make references to concepts and terms related to such.

4. THE STATE SHOULD BE CIVILIANIZED IN TERMS OF ORGANIZATION AND FUNCTIONING:

The new constitution should fully institute the principle of "civilian oversight of armed forces", which is one of the tenets of contemporary democracy. The armed forces in Turkey, with the power they get from their self-created role as "the guardians of the official ideology", have become the partner of the state rule and a direct actor of the political system. There is an urgent need to remove the constitutional bases of the autonomy this situation creates for the armed forces and moreover the means

of tutelage over the representative-democratic institutions and to rearrange the military-civilian relation in accordance with a "civilian government" mentality.

5. STATE ORGANIZATION SHOULD BE DECENTRALIZED:

In Turkey, the current political-administrative organization of the state is an extremely centralist one with no other examples remaining in the democratic world. This structure not only reduces effectiveness and efficiency in the delivery of public services and in meeting the local needs, it also causes a weakening in local initiatives. The centralized system also does not allow cultural diversity to express itself at the local level or the local governments to become "democracy schools". To overcome these obstacles, the state system should be restructured in line with decentralization principles while the local government units should be rearranged so that they are able to meet the common demands of their constituency through democratic procedures.

Preamble and Preliminary Articles

Although it is not necessary for constitutions to have a "preamble", for two main reasons it would be appropriate for the new constitution to include a "preamble". Firstly, it should be clearly stated that the statist-authoritarian philosophy, expressed in the Preamble of the 1982 Constitution, is rejected. Secondly, it would be useful to include a short explanation of the main ideas and reasons that have led Turkey to make a new constitution. For these reasons, **it would be appropriate for the new constitution to include a brief and to the point "Preamble" reflecting the will of the people of Turkey to be committed to the ideal of a pluralist-democratic and civilian regime, and stating that the preamble is not a part of the text of the constitution. Undoubtedly, the Preamble text, which should express the constituent will with the words "We, the people of the Republic of Turkey …", must also be free from any ideological, religious, ethnic or nationalist references.**

The Preamble text, which should specifically emphasize the notion of pluralist democracy and the assurance of individual freedoms, should make special references to the following concepts, values and principles:

- Human dignity
- Human rights
- People's sovereignty
- Rule of law
- Respect to minority rights
- Recognition of and respect to cultural differences
- Societal peace
- Laicism as the guarantee of the freedom of conscience and religion
- Equality before the law and everyone's right to equal access to public services
- Dedication of the state to its commitments arising from the international law

Moreover, the constitutional provision determining the form of the state should state that "Turkey is a democratic republic state" and also express in the same article that this is the only irrevocable provision of the constitution.

The constitutional provision determining the characteristics of the Republic should, parallel to the Preamble content, include the abovementioned principles and values. The article may be formulated as follows: "The Republic of Turkey is a laic and pluralist democracy that respects human dignity, dedicated to human rights, based on the rule of law and is peaceful at home and in the world."

The Source and Character of Power

The new constitution should absolutely reject the mentality that associates the source and exercise of the state's power to an official ideology and that therefore places democratic institutions, firstly military institutions, under the tutelage of the bureaucratic power. To this end, **the new constitution should state with a clear and final wording that the source of the power emanates from the people.** Moreover, it should also be noted that there is no technical requirement to include in the constitution the term "sovereignty", which evokes the idea of an unlimited power. On the contrary, in the constitution it should be stated that the power of the state shall be used in concordance with the rule of law and human rights, in adherence to the international and supranational laws and Turkey's international commitments.

Fundamental Aims and Duties of the State

The constitutional definition of the fundamental aims and duties of the state is directly related to what kind of a state we want. When making this definition or designation, the following two points should be highlighted:

1. One of the foremost fundamental aims and duties of the state is to eliminate any and all tangible and intangible factors that prevent individuals from leading a life of freedom and human dignity, from free self expression and self-development, and that cause discrimination and constitute a barrier to the equality of women and men.
2. The state also has the obligation to recognize the pluralist structure of the society that includes political, social, cultural and identity-related differences, to respect this pluralism and support it when necessary.

Citizenship, Fundamental and Cultural Rights

One of the most significant mistakes of the 1982 Constitution is its definition of citizenship that has ethnic-cultural implications. Therefore, **the new constitution should suffice with stating that the citizenship of the Republic of Turkey is a fundamental right, without defining citizenship.** However, to hinder any possibility of discrimination that may arise in implementation, the same article should emphasize that **citizenship is a right that can be gained or lost in accordance with the procedures provided for by laws regardless of differences in ethnicity, language and faith.**

When it comes to fundamental rights in general, the **new constitution should, above all, define the fundamental rights with a liberalist view and in accordance with the understanding of "natural rights".** For such a definition, unlike in the 1982 Constitution, there is no need to state that the fundamental rights and freedoms also include the individual's duties and responsibilities, and any such statement should in fact be avoided. For even if such a statement originates from a well-intentioned idea of bringing assurance against the "extreme individualist" stance that is far from the feeling of duty and responsibility, it can conveniently be used as a ground for introducing excessive and unreasonable limitations to the fundamental rights and freedoms in practice.

Furthermore, the new constitution should not include **a general limitation provision covering all rights and freedoms**, a provision which was abolished even in the 1982 Constitution with the 2001 amendment**. Instead, the specific reasons of limitation in accordance with the characteristics of a right should be described under each relevant article, as in the European Convention on Human Rights.** The prohibition of abuse of fundamental rights and freedoms should have a new definition, distanced from the repressive logic of the 1982 Constitution (art. 14) that associates it with the aim and worldview of the right holder independent of the actual harm arising or not from using the right. It may be appropriate to take as a basis in this new definition the provision of Article 17 of the European Convention on Human Rights (according to which: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.")

Conscientious objection (of military service) should be included as a fundamental right in the new constitution.

The religion and "widow" categories in identification cards, which cause discrimination, and the arrangements that make it obligatory for married women to take the surnames of their husbands, in violation of the equality of women and men, should also be abolished.

Furthermore, considering that currently ethnic-cultural identity problems are among the issues that hurt Turkey's domestic peace and bring its democracy to a deadlock, it is of course inconceivable that the new constitution could ignore the issue of "cultural rights". The main approach that should provide guidance as to how cultural rights should be regulated in the new constitution can be summarized as follows: **First of all, the constitution should in no way make any references to any ethnic identities, yet should identify it as a fundamental principle to respect all cultural differences and lifestyles.** As a matter of fact, we have already mentioned above that the Preamble of the new constitution and its provision determining the fundamental aims and duties of the state should be based on an understanding that regards differences and the pluralist structure as richness. This requires, as a minimum, prevention of any discriminatory treatment based on culture, identity and gender. The "European Charter for Regional or Minority Languages" can also be used as a reference with regard to how the cultural rights should be arranged in the new constitution. Meanwhile, if necessary, subunits under the ombudsman can be created, which will observe-oversee the practices against discrimination based on ethnicity, culture, religion-sect, gender, sexual orientation or lifestyle.

However, taking the concern for respect for pluralism and differences to a length that makes protection of different cultures a general duty of the state may, despite its seeming attractiveness, have an effect that restricts the options of individuals who are members of ethnic-cultural groups or that freezes existing cultures. Hence, **it is our opinion that when it comes to cultural diversity and differences, it would be more appropriate to adopt "recognition and respect" as a general principle rather than protection and support.** However, the fact that we do not recommend protection of cultures as a general policy does not mean that we categorically refuse the possibility of exceptional situations requiring the state to support some disadvantaged cultures.

Another issue regarding cultural rights is the situation of the citizens with mother tongues different than the official language. **We think it would be appropriate to maintain Turkish as the official language, not because it is the mother tongue of Turks, the dominant ethnic-cultural community, but because it is the most widely spoken language and the main language of general communication in the country.** However, **we also underline that it is necessary to state in the constitution that appropriate facilities shall be provided to ensure that the citizens of the Republic of Turkey whose mother tongue is not Turkish benefit from public services.** In this framework, Turkish as the language of education in primary and secondary education should remain the norm. However, for languages other than the official language, there should be optional courses that will also enable development of said languages. Moreover, it should be free within the framework of constitutional principles to establish private education institutions providing education in the mother tongues of citizens of the Republic of Turkey whose mother tongues are not Turkish. Meanwhile, we also feel the necessity to mention the need to make some legal arrangements to facilitate the adaptation to the official language for students whose mother tongues are not Turkish in their first years in primary school and to compensate for their disadvantaged position vis-à-vis students whose mother tongues are Turkish.

A State Governed by the Rule of Law

There should be no doubt that the rule of law should be one of the guiding principles of the new constitution. In brief, the rule of law foresees taking all state activities within the framework of the law, and a state that never goes beyond the boundaries of law in any way whatsoever. Basically, the rule of law serves to protect the rights of individuals through prevention of arbitrariness and use of unnecessary and disproportional force in the state administration. This principle is also indispensible in that it ensures legal security for individuals through guaranteeing to a certain extent stability and foreseeability in law.

One of the main requirements of being a state governed by the rule of law is the independence and impartiality of the judiciary. In essence, the main purpose of independence is to ensure impartiality. It is clear that, only if the judiciary function is performed by independent courts and through judges who have security of tenure can law be implemented impartially and hence serve justice. In this framework, **rearrangements towards pluralism and democratization in the High Council of Judges and Prosecutors (HCJP), brought about by the latest constitutional amendment, has been on the mark. The new constitution should maintain the same mentality albeit with some corrections.** Ensuring impartiality also requires the judges to have a universal understanding of law, to not act based on political considerations and to never be under the pressure of an official ideology. This means that the previously mentioned ideological impartiality of the state, in relation to the philosophy and main principles of the constitution, is of critical importance also in terms of the impartial functioning of the judiciary.

The rule of law requires that all public transactions are open to the review of the impartial and independent judiciary. However, the indispensability of judicial review in terms of rule of law does not legitimize the politicization of judiciary and its rulings that put the judiciary in the place of political-administrative authorities. On the contrary, **the oversight by judicial organs should remain within the framework of the law and should never transform into a scrutiny of expediency. Hence, the judiciary-related provisions of the new constitution should be arranged in accordance with these requirements. In this framework, there is also a need to state clearly in the new constitution that the Constitutional Court does not have the jurisdiction to examine in respect of substance the constitutional amendments adopted by the TGNA.**

In addition, **an ombudsman institution that will serve under a legislative organ is important in terms of the external oversight of the public administration and should be included in the new constitution**. An ombudsman would, in addition to serving the purpose of ensuring effective and consistent functioning of the public administration, would primarily contribute to the protection of fundamental rights and the conformity of the administration to law. **Furthermore, it should**

also be noted that making the ombudsman a constitutional institution will eliminate the need for the State Inspection Board. In essence, this situation would also be in harmony with the need to reduce the powers of the president of the republic, as explained below.

Another issue that should be mentioned in this regard is the consequences of the rule of law with respect to the international domain. Today, it is generally accepted that the rule of law also has an international dimension in addition to being a principle of domestic law. Therefore, **it should be ensured that our domestic law is in conformity with not only the human rights regime but also the international and supranational law as a whole.** As a consequence of this, it should be accepted that the international and supranational rules of law, the international treaties and also the European Convention on Human Rights (ECHR) and the case-laws of the European Court of Human Rights (ECtHR) are among the foundations of our law. In this framework, in the new constitution it should be laid down as a general rule that the provisions of international treaties have supremacy over national laws. In consequence, this would clear the way for the cancellation by the Constitutional Court of any laws that are in violation of the international and supranational law, the ECHR or the decisions of the ECtHR.

Freedom of Conscience and Religion, and Laicism

One of the most problematic aspects of the constitutional tradition of the Republican era of Turkey is the adoption of a laicism concept that is not congruous with the generally accepted understanding adopted in contemporary democracies, and its negative impacts on the freedom of religion. This mentality, which does not fall into line with the liberalist-pluralist mentality, has not only harmed societal peace, but also formed a barrier to the full democratization of Turkey.

For this reason, the laicism concept on which the new constitution should be based must be in accordance with the general understanding of impartiality and should be able to serve freedom and societal peace. **The fundamental purpose of laicism is to guarantee freedom of conscience and religion and ensure that the society lives together in peace. And this requires the state to be impartial towards the lifestyles of all religions, sects, faith groups, faithless groups and all other possible groups.**

However, the 1982 Constitution, remaining loyal to the example set by the 1961 Constitution, has included a provision in the last paragraph of its Article 24 that completely contrasts with this understanding. This provision, which, in addition to the prohibition of abuse applicable for all fundamental rights, introduces a second prohibition of abuse and "exploitation of religion" only for the freedom of religion, is interesting in that it demonstrates the prejudiced attitude of the currently effective constitution with regard to freedom of religion. This provision does not only introduce more restrictions on the civil freedoms of religious individuals compared to other individuals, but it also constitutes the legal basis for the serious restriction of the participation of these individuals in public debates and politics. The practical consequence of this provision in terms of Turkey's political regime is a lowering of the "citizenship" statuses of religious individuals, virtually leaving them only the domain of private life. In short, this provision is both anti-freedom and anti-democratic. Thus, a similar provision should not be included in the new constitution.

On the other hand, it is unacceptable to force people to declare their religions where "freedom of conscience" is a constitutional principle. Such an obligation is contrary to the universal understanding of the freedom of religious faith and opinion. Hence, the **"religion" (and "sect") sections in identification cards and passports should definitely be lifted.**

In order for the freedom of conscience and religion to conform to the universal understanding and the impartiality of the state, it is also necessary to make a reform in primary and secondary education. In this framework, first of all the compulsory religion lessons should be abandoned. As a matter of fact, the decision of the European Court of Human Rights convicting Turkey on this matter has already made it a legal obligation. **Neverthe-**

less, again as emphasized by the European Court, there are no objections to having en elective course of "Culture of Religions" with"objective, critical and pluralist" content in the curriculum of public schools. The course content should address all religions equally and instruct objectively and critically on various religions and sects from a sociological and philosophical perspective. The main purpose of this course should be to inform students about various religions and enable them to get acquainted with the pluralist structure of the country in terms of religions and faiths in a peaceful environment. However, this course should still not be made available until grade 8 of the primary education and should be offered to the students within a meaningful package of choices.

On the other hand, it is clear that a general course on the culture of religions will not be considered sufficient by parents who wish a more in-depth religious instruction for their children in line with their own faiths. Therefore, **opening private courses and institutions providing religious instruction should also be taken under guarantee subject to inspections in line with the fundamental principles of the constitution.** Moreover, the Ministry of Education should inspect these private religion education institutions to ensure that they are not of a character that instills hatred and animosity towards different religion and faith groups or faithless groups, or that may lead students to anti-democratic attitudes.

Another issue related to both the freedom of religion and laicism is the issue of determining the place of the **Presidency of Religious Affairs (Diyanet)** within our constitutional system. In its current structure, the Presidency of Religious Affairs is a public agency included under the general administration with a duty to serve basically to Sunni Muslims in line with a certain understanding of Islam. **Although it "may seem ideal" to lift the Presidency,** with its other functions –mainly public services- in meeting the needs of the dominant faith groups, **it does not seem possible to disband this institution in today's conditions. However, in the long run, the Presidency of Religious Affairs may be evolved in line with the demands and wishes of the groups it represents, or may even be disbanded.**

The prevailing opinion in our working group was that for now, it would be more appropriate to remove the constitutional status of the Presidency of Religious Affairs and restructure it in a manner respectful of the freedom of religion and conscience. **The structure and duties of this institution should be rearranged in line with the principle of impartiality of the state towards all religions and its equidistant stance towards all religions, sects, faiths and faithlessness.** With this rearrangement, priority should be given to associating the Presidency with the Prime Ministry, while making it an autonomous structure, downsizing it and narrowing its budget. Additionally, to allow for future internal transformations, the Presidency of Religious Affairs must be equipped with mechanisms that increase participation, must be made transparent and open to demands coming from the society.

On the other hand, **in the event of organization of various faith groups or communities of religions and sects that do not benefit from the religious services provided by the Presidency of Religious Affairs, the state should recognize them as public legal entities.** Furthermore, in case of demands arise, the facilities offered to mosques and masjids due to their status as places of worship should also be offered to cemevis (house of worship of Alewites). **Privileges, such as**

facilities in taxes, opening bank accounts, holding title deeds or payment of public utilities, offered to places of worship operating under the Presidency should also be offered to Muslim and non-Muslim groups other than the dominant faith groups. Finally, **the communities should be provided with the necessary means and facilities to raise their own clergy, and any legal or de facto obstacles thereto should be removed.**

Separation of Powers

One of the main objectives of making a constitution is to limit the state authority with rules of law and hence create a system that guarantees the rule of law for individuals. One of the critical means of achieving this objective is to designate the three main functions of the state, namely legislature, executive and judiciary functions, to different organs. This principle, called separation of powers or separation of functions, prevents the state authority from concentrating under one single organ and from creating a pressure on individuals. On the other hand, the separation of functions also enables each organ to create a kind of balance or constraint mechanism over the other organs. However, only if this constraining or balancing role is performed within the boundaries of law can one talk about a real separation of functions and a state authority bounded to this principle. To put it more clearly, the separation of powers is not a system that legitimizes conflict between the powers, or in which the organs of the state immobilize the constitutional functions of each other to the extent of rendering them unable to perform.

Likewise, even the 1982 Constitution, which has been the target of justified criticisms due to many reasons, states in its Preamble that the principle of separation of powers "does not imply an order of precedence among the organs of the state, but refers solely to the exercising of certain state powers and duties and is civil cooperation and division of functions limited to this exercise. Despite this, there took place many instances during the effective period of the Constitution and particularly in the recent years, where the high judiciary institutions controlled by the elites of the state, and sometimes the presidents falling in a conflict of opinions with the majority of the parliament, have abused their constitutional powers in a way rendering void the choices of the representatives of the people. Hence, contrary to the will of the constitution-maker, a system based on conflict between powers, rather than on the principle of separation of powers, was created and portrayed to the public opinion as legitimate.

Undoubtedly, an important matter that should be stressed here is that according to the universal meaning of the principle of separation of powers, the organs of the state have the obligation to diligently refrain from acts and actions entering the jurisdiction of the other powers of state, or in short, from attitudes that mean usurpation of powers. In a constitutional order limited with the rule of law, it is clear that state organs and authorities can only use the powers given them through constitutional provisions. Therefore, in such a system, no state organ or authority can engage in acts or actions falling under the jurisdiction of another for any reason whatsoever, and no rationale can legitimize any such act or action. This ultimate point shows that the principles of separation of powers and the rule of law have a common goal in which they complement each other in limiting the authority of the state. Likewise, both principles have taken shape concomitantly

during the 18th century when constitutionalism was only just emerging, and have hitherto maintained their existence and importance.

STRUCTURE OF STATE ORGANS AND RELATIONS BETWEEN THEM

a) Legislature

The first question that should be answered with regard to the legislature is the matter of how this organ's structure will be. At this point, there are two alternatives: one or two houses. A parliament structure with two houses is a consequence made necessary by the nature of federalism. On the other hand, for unitary state orders, a bicameral parliament structure is something determined by the choice of the constitution-maker. In unitary state systems, the factor that encourages a bicameral parliament is the desire to protect the supremacy of the constitution through a second house. Yet, experiences have shown that the political oversight via a second examination of the laws by a second house is not an effective method for protecting the rule of supremacy of the constitution. Moreover, the existence of a second house also causes a slow operation of the legislature process. **Our working group has not found it appropriate to further slow down the legislature, which already operates slower than the executive, by a bicameral system. Furthermore, the extensiveness and diversity of the liberalization, democratization and civilianization reforms that Turkey needs require avoiding any initiatives that may slow down the legislative process and, on the contrary, turning towards measures that will add effectiveness and speed to this process.**

b) Executive

The structure of the executive organ and its relations with the judiciary is a matter directly related to the preferred government system. **Our working group agrees that the new constitution should adopt provisions and mechanisms conforming to the requirements of parliamentary democracy.** Therefore, **our group thinks that classical parliamentarism, where executive powers are shared between the president and the cabinet, where actual powers of the executive are conferred on the cabinet while the powers of the president are limited to symbolic matters, is the best choice for Turkey.**

The fact that the 1982 Constitution adopted a hybrid government system in which the main elements of parliamentarism exist together with a presidency equipped with strong powers has created serious problems in practice. The most significant of these problems is the way some presidents, with strong powers, used their constitutional powers in a manner that locked the legislative and executive processes when faced with a parliamentary majority of different inclinations. This in turn rendered governments unable to pursue the policies they had promised to their voters, leading to the consequence of a serious dilapidation of representative democracy. Moreover, this picture also does not conform to the rule of parallelism between power and responsibility, a fundamental principle of public law. This rule means that those with power are responsible, and those without responsibility have no powers. As a matter of fact, the classical parliamentarian system requires that the president has no powers and no responsibilities, and that the real power in fulfilling the executive function lies with the council of ministers, which should be accountable to the parliament and the society due to these powers.

In the system created by the 1982 Constitution, the non-responsibility of the president is

included with the effect of the parliamentarian tradition; however, the president is given strong powers that do not conform to the essence of parliamentarism. Hence, a hybrid government system was created where the organ without responsibility has the power, while the organ with responsibility cannot use its powers, an example not to be found anywhere else in the world. This hybrid structure was further strengthened by the referendum of 21 October 2007, by which the procedure of election of the president by the people was adopted. Henceforth, whenever a conflict of opinions arises between the president, the government and the parliamentary majority, the president will not hesitate to use his/her constitutional powers to the full, with the added effect of the meaningful role of having been elected by the people, and hence the problem of deadlocked state life, as encountered before, may reach dramatic dimensions.

Therefore, our working group is of the opinion that a presidency structure without power and without responsibility should be adopted in accordance with the principle of parallelism between power and responsibility and the nature of classic parliamentarism. Yet, **our group also agrees that this president, without responsibility and without power, should be elected by the people, as adopted in the Constitutional Amendment of 2007.**

There are several factors that justify this opinion. One is that the presidential elections have up until now brought the elites of the state and the parliamentary majority face to face, due to the tutelary role attributed to the presidential seat. Likewise, the election of the president has led to political crises both during the effective period of the 1961 Constitution and the 1982 Constitution. The crisis-making potential of the presidential elections was relatively weakened during the effective period of the 1961 Constitution with the election of military personages to this office. Yet, this method created an anti-democratic model where the presidential office, which should belong to the representatives of the people, was placed under the control of military authority. However, this model did not work in the last period of the Constitution, as the position was filled by proxies standing in for the president since the TGNA failed to elect a new president from April 1980 to 12 September 1980.

For this reason, the State Security Council (SSC) evaluated the TGNA's failure to reach an agreement even only in electing a president as one of the factors encouraging intervention. Hence, Article 102 of the 1982 Constitution regulating the election of the president was penned in a way that would facilitate the election of a president and force the parliament to come to an agreement on the candidates. As a matter of fact, the elections of the 8th, 9th and 10th Presidents took place without any deadlocks in the parliamentary process. However, the election of the 11th President brought the state's elites against the parliamentary majority. This picture resulted not only in a constitutional crisis but also with a deadlock on the democratic process with an e-memorandum published by the Turkish Armed Forces (TAF).

As a result of these experiences, in May 2007 the TGNA adopted a constitutional amendment that granted the public the power to elect the president. With this amendment, the crisis-making potential of the presidential election process was completely eliminated. **Our working group has agreed on the necessity of maintaining this procedure, considering that taking back a power conferred on the people is likely to create a negative effect on the**

electorate. Furthermore, it should also be mentioned that the method of public election of the president does not contradict in any way with the powerless presidency model adopted by our working group. Indeed, although the classical parliamentary system where presidents are given only symbolic rights is adopted in Austria, Finland, Ireland and Iceland, the power to elect the president is vested in the people. Hence, there is no inconsistency, as claimed by some circles, in having the people elect a president who has symbolic powers.

One of the important issues of the new constitutional process will be the choice of the government system. In view of recent discussions, there is an impression that a proposal for transition to a presidential system may come on the agenda during this process. **As mentioned above, with regard to the type of government system, our working group is in favor of maintaining the parliamentary system. Therefore, our group has not seen it necessary to make detailed assessments on the advantages and disadvantages of the presidential system. In the process of making the new constitution, if transition to a presidential system is brought forward as a proposal to the parliament, our group will share its views with the public through an independent study on the matter.**

c) Judiciary

Regardless of the powers granted to the organs of the state and hence regardless of the type of the government system, the main principle that is indispensible for a democratic constitutional order is the impartiality and independence of the judiciary. Indeed, judiciary as an impartial and independent power is the most important guarantee ensuring that political organs, such as the legislature and the executive, and administrative authorities exercise their powers in concordance with the rule of law. It also prevents limitation of constitutional rights and freedoms arbitrarily by the acts and actions of elected and appointed authorities. Yet, a judiciary performing a function that limits the state's authority with the rule of law is possible only through a guarantee of impartiality and independence of this organ.

In a state governed by the rule of law, the norm is to have a judiciary that settles the disputes referred to it within the boundaries of law, without being affected from any - economic, political, social, cultural etc - influences. And one of the most important tools in ensuring this is the principle of independence. The independence of the judiciary has two dimensions: institutional independence and individual independence.

Institutional independence: Institutional independence means the ability of judicial organizations to fulfill their duties without any pressure from other elected or appointed organs or authorities. To this end, our Constitution has the following provision in its Article 138: "Judges shall be independent in the discharge of their duties; they shall give judgment in accordance with the Constitution, law, and their personal conviction conforming to the law. No organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, or make recommendations or suggestions. No questions shall be asked, debates held, or statements made in the Legislative Assembly relating to the exercise of judicial power concerning a case under trial".

However, in practice, it is seen that not only the political actors but also the military-civilian bureaucrats can display attitudes threatening the independence of the judiciary. **Therefore, our working group thinks that in order to**

guarantee the institutional independence of the judiciary in the new constitution, a provision parallel to Article 138 should be included, though such an arrangement will not be sufficient on its own in achieving the goal.

Individual independence: In order for the judicial power to perform the function expected of it, an assurance of individual independence should be provided to judges and prosecutors. Individual independence implies the measures that prevent judges and prosecutors from having to worry about being deprived of their personnel rights for exercising their duties originating from the constitution and the laws. The most important such measure is to have autonomous councils vested with the power to decide on the personnel rights of the members of the judiciary. And the autonomy of these councils is dependent on the member composition, the method employed in selection of the members, the transparency of the council decisions and the availability of effective appeal and judiciary review against these decisions.

Examples seen in the democratic world and the reports published by some institutions of the Council of Europe, to which Turkey is also a member, give some data on the structural characteristics that the high judiciary councils should have. According to these data, when high judiciary councils are composed only of members from the judge profession, there occurs the possibility of professional cooptation. Therefore, it is suggested that the judiciary councils have a mixed model composed of members from the judge profession along with members such as lawyers or law professors and so on. The members from the judge profession should be elected by their equals in a way that will ensure representation of the whole judiciary – including the first instance, appellate and high judges and prosecutors. It is suggested that non-judiciary members be elected by the parliaments based on the rule of qualified majority. In this way, the member composition of the high judiciary council will allow representation of the entire judiciary while also ensuring that the council is founded on the basis of democratic legitimacy, which is an important factor that will consolidate the legitimacy of the judiciary system. On the other hand, the transparency of the decisions of high judiciary councils, the availability of effective internal supervision mechanisms and judicial remedy against these decisions are among the factors that strengthen the individual independence of the members of the judiciary.

The Constitutional Amendment adopted on 12 September 2010 gave the HCJP a new structure that matches up with these data to a large extent. Our working group is of the opinion that this amendment restructuring the HCJP is a positive one. However, it is the opinion of our group that the president should not be given the power to designate members to the HCJP in the new constitution. This opinion is in harmony with our group's preference of a parliamentary democracy with a president holding limited powers. Our working group has agreed that the provision regulating the HCJP in the new constitution should take into consideration the following:

- **At least one third of the members of the HCJP should be elected by the TGNA through qualified majority vote, and methods that will enable informing the public about the members should be adopted in order to ensure transparency of the election process,**
- **Decisions of the HCJP should be published on the website of the Council, thereby ensuring transparency of the decisions,**

- **Judicial review should be made available against all decisions of the Council that involve disciplinary punishments.**

CONSTITUTIONAL JUDICIARY

The duty of the Constitutional Court is to oversee the conformity of the laws to the constitution. Within the framework of this duty, the Court cancels the laws that are in violation of the constitution, ending the legal existence of these laws. This is a sort of negative law-making power. Therefore, as with the parliaments, the constitutional courts should also be based on the principle of democratic legitimacy. As a matter of fact, the western democracies have adopted models in which the will of the people is effective in determining the members of the constitutional court. In Germany, Poland and Hungary, all members of the Constitutional Court are elected by the parliaments. In France, the Constitutional Council has nine members, three of whom are elected by the publicly elected President and six of whom by the Speakers of both Houses. The Italian Constitutional Court has 15 members, five of whom are elected by the government, five by the judiciary organ and five by the general assembly of the parliament. The Spanish Constitutional Court has 12 members, four of whom are elected by the House of Representatives, four by the Senate, two by the judiciary and two by the government. In the USA, which does not have a centralized constitutional judiciary system and where therefore the constitutional conformity of the laws is reviewed by the Supreme Court, the power to designate all the members of the Supreme Court belongs to the President, who is elected by the people. However, the President's choices are subject to the approval of the Senate. Therefore, the democratic legitimacy of the US Supreme Court is fed from two different sources.

According to the original text of the 1982 Constitution, the president has the power to designate 11 regular and 4 substitute members to the Constitutional Court. The president designates a portion of these members directly, and the remaining indirectly from among the candidates proposed by various institutions. The Constitutional Amendment adopted on 12 September 2010 gives the TGNA the power to elect only three of the 17 members of the Constitutional Court. **Our working group thinks that this amendment concerning the member composition of the Constitutional Court is significant yet suboptimal. Our group agrees that the provisions regulating the Constitutional Court in the new constitution should be based on the following principles.**

- **It is acceptable to have a Constitutional Court with 17 members, as is the case today. However, the right of individual application introduced with the Amendment of 12 September 2010 will significantly increase the workload of the Court. Taking this into consideration, it may be considered to increase the number of the members of the Supreme Court.**
- **Regardless of the number of the members of the Constitutional Court, a portion or half of the members should be elected by the general assemblies of the high judiciary institutions. As will be seen below, our working group agrees on the abolition of the Military High Administrative Court and the Military Court of Cassation; hence, the high judiciary entities electing the members of the Constitutional Court will be the Court of Cassation (Yargıtay) and the Council of State (Danıştay).**
- **At least half of the members of the Constitutional Court should be elected by**

the TGNA. Thus the democratic legitimacy of the Supreme Court should be strengthened. However, considering the significance of the post of Constitutional Court membership, the rule of qualified majority should be adopted in these elections.

- In addition to all these, it should be ensured that the candidates for Court membership are subject to a sort of public interview, corresponding to the "public hearing" process, at the joint meeting of the Constitution and Human Rights Commissions. This would lay the groundwork for the candidates to become sufficiently known by the public opinion, thereby ensuring a stronger legitimacy basis for the elections done by the TGNA. Since the public's assessments on the candidates will take place before the election process, any debates that would harm the legitimacy of the membership status will have been prevented after the membership status is gained.
- The term of office of the members should be limited to 12 years, as is the case today, and re-election should not be possible.
- The procedure in which the Constitutional Court works through chambers and a general assembly, as is the case today, should be adopted. However, examination of the constitutionality of the laws, party closure cases and the Grand Chamber trials should be included under the jurisdiction of the general assembly.
- Considering the growing tendency of the Constitutional Court to exceed its constitutional powers since the 1961 Constitution, various measures that will ensure the Supreme Court to exercise its powers within the limits foreseen in the Constitution should be considered. In this context, it may be considered to include as a provision in the new constitution that the Constitutional Court cannot examine the constitutional amendments in respect of substance. For decisions to close political parties or deprive them of treasury aid, the rule of 2/3 of the total member number should be sought, as is the case today.
- In order to ensure the conformity of the constitutional order to the universal standards of democracy and human rights, the Supreme Court should be given the power to review, upon application, the conformity of laws to international treaties on fundamental rights and freedoms. Such a power would encourage the parliament to exercise its law-making power in conformity with the international criteria of democracy and human rights. On the other hand, it may also prevent judicial bodies from violating the mandatory regulation included in Article 90 of our Constitution, as they do today.
- Finally, in the light of the experiences gained to date, it should be regulated as a clear rule that the Constitutional Court must exercise all its powers limited to the examination of lawfulness, that it cannot perform expediency reviews, and that it cannot institute provisions like a constitution-maker or law-maker.

Political Parties

One of the most important factors preventing democratization in Turkey is the restriction of political rights in general and, more specifically, the political party freedom, through the hand of official ideology of the state. This makes it considerably difficult to institute an order based on the principles of pluralism and representation.

Political party bans and closures

The idea of banning political parties due to their activities that undermine democracy was first expressed in the 1949 Bonn Constitution. However, in Germany, party bans were adopted as a means of protecting the pluralist democracy from anti-democratic parties. Hence, to date, only two political parties have ever been closed down in Germany with the decision of the Constitutional Court.

Whereas in Turkey, party bans have been adopted as a means of protecting the official ideology of the state and limiting the legitimate domain of politics with this ideology, rather than protecting the pluralist democracy. For this reason, during the period of the 1982 Constitution, a total of 19 political parties have been closed down with the decision of the Constitutional Court. These decisions have been examined by the ECtHR since 1987, the year Turkey has adopted the right of individual communication, and barring one, all party closure decisions have been ruled as violating the ECHR.

On the other hand, these decisions also do not conform to the criteria set in the "Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures" published in 1999 by the Venice Commission. According to this report, "Prohibition or enforced dissolution of political parties may only be justifiable in the case of parties which advocate the use of violence or use violence as a political means to overthrow the democratic constitutional order, thereby undermining the rights and freedoms guaranteed by the constitution. The fact alone that a party advocates the changing of the Constitution in a peaceful way should not be sufficient for its prohibition or dissolution".

The practice of party bans to the extent of eliminating the freedom of a political party in Turkey, and particularly the initiation of a case against Justice and Development Party (AKP) for its dissolution on 14 March 2008, have urged the Council of Europe to examine the party dissolution regime in Turkey. As a result, the Venice Commission released a report examining the party bans in Turkey in March 2009. According to this report, there are two reasons behind the extreme practice of party bans in Turkey. One reason is the long list of grounds for closure, which consist of vague and ambiguous concepts. And the other reason is the procedural rules applied in opening closure cases.

In view of the provisions of the ECHR, the case-laws of the ECtHR, the provisions of the UN Covenant on Civil and Political Rights and the 1999 and 2009 reports of the Venice Commission, our working group has agreed on the following:

- The new constitution should transform the party closure sanction into a rule applied only in exceptional cases, in a way that will ensure free establishment and operation of political parties. This would require limiting the grounds for closure of political parties to resorting to violence, calling for violence and encouraging hate and animosity.
- The expressions included in the by-laws and program of a political party can only be the subject of a court case if they contain hate speech in a way conflicting with the provision of Article 20 of the UN Covenant on Civil and Political Rights. Moreover, inclusion of such expressions in the by-laws or program of a political party should not constitute grounds for direct initiation of a closure case, but should lead to opening of a closure case only if said expressions are not changed despite the warnings by authorized bodies – may be the Chief Public Prosecutor of the Court of Cassation- or if similar expressions are repeated in the discourses of the party.
- The procedural rules on which party closure cases are based are also as important as the limitation of the closure grounds. Therefore, the power to initiate a closure case should be given to organs that are accountable to the public, as in Germany and Spain. Our group thinks that with the new constitution, this power should be conferred on a special commission composed of the members of the TGNA Constitution Commission and Human Rights Commission. This special commission may decide that a party closure case can be initiated, only with the votes of two thirds majority of the total member number. The Chief Public Prosecutor of the Court of Cassation can use his/her authority to initiate a case only following such a decision by the commission. In other words, the Chief Public Prosecutor of the Court of Cassation should not be able to initiate a closure case ex officio.
- Following the relevant commission decision, the Chief Public Prosecutor of the Court of Cassation may also decide not to open a case after examining the matter.
- Chief Public Prosecutor of the Court of Cassation must add to the file all evidence against and for the political party that is the subject of the closure case, in conformity with the principles of criminal procedure. Preparing the indictment based only on the evidence against the party is a practice that turns the office of the prosecutor into a sort of judgment authority and which therefore hinders the right to fair trial.
- The new constitution should give the General Assembly of the Court of Cassation the power to designate the Chief Public Prosecutor of the Court of Cassation who is authorized to initiate the closure case. The General Assembly should be able to use this power only with two thirds of the total member number. The term of office of the Chief Public Prosecutor of the Court of Cassation should be limited parallel to the term of office of the members of the Constitutional Court. Re-election should not be possible.
- The power to decide on closing a political party or depriving it fully or partially from treasury aid belongs to the General Assembly of the Constitutional Court. The Assembly may exercise this power with two thirds of the total member number.

- **The new constitution should not include bans from politics as a secondary consequence of the closure decision, as included in the 1982 Constitution. It should be kept in mind that these bans, included under Articles 8 and 69 of the 1982 Constitution, are in violation of the Protocol No.1 of the ECHR and that Turkey has been convicted to pay compensation by the ECtHR due to this violation.**

Treasury aid to political parties

Freedom to establish and organize political parties and participate in election runs are among the main conditions of representative democracy. Ensuring these conditions require providing financial support to political parties from the state treasury. However, this aid must be offered on the basis of equality and equity. The number of political parties in our country prevents providing treasury aid to all of the parties. Moreover, a system where every political party can get treasury aid may result in abuse of party freedom for the sole purpose of material gain. Conversely, the provision regulating the state aid provided for political parties in the Law on Political Parties does not appear to be in conformity with equity. This provision seeks the condition of having won at least 7% of the valid votes in the most recent general elections. Therefore, **our group thinks that political parties should be able to get state aid proportional to their votes earned in the most recent general elections.**

HIGH ELECTORAL BOARD

The High Electoral Board (HEB) regulated under Article 79 of our Constitution is the organ reviewing the lawfulness of all actions related to the election process. On the other hand, the Board also casts decisions that are administrative in nature. Nevertheless, the Board decisions are final. There is no possibility of applying to a judicial organ against these decisions. Yet the decisions taken by the Board has a restrictive role on political rights. Moreover, the conformity of some of these decisions to law is also dubious.

Whether the new constitution regulates the HEB as a unique organ, as it is today, or under the heading of judiciary, these decisions taken by the HEB should also be subject to review by the Constitutional Court through the individual communication mechanism, so as to encourage lawfulness of the Board decisions.

Civilian - Military Relations

In Turkey, one of the most important factors preventing the institution of a democratic constitutional order is the civilian-military relations. The democratic model of the civilian-military relations requires the military authorities to be subject to the decisions of elected organs, such as the parliament and the government. Whereas in Turkey, contrary to this model, elected organs such as the parliament and the government need ratification by military authorities with regard to the policies they intend to pursue. Therefore, it is possible to define the system prevailing in Turkey as a military tutelage or a tutelary democracy. In the foundation of such a system, the most important factor is, inter alia, the various powers and privileges granted to military authorities in the constitutional provisions adopted following military interventions. These powers and privileges, adopted initially in the 1961 Constitution, were further expanded following the military interventions of March 12 and September 12. Some of these powers and privileges have been abolished with the Constitutional Amendments of 1999, 2001 and 2004, though it is still not possible to assert that the military-civilian relations in Turkey demonstrate an appearance conforming to the democratic model. Accordingly, **our working group has reached a consensus that the following should be taken into consideration in the new constitution in order to normalize military-civilian relations:**

- **Constitutional status of the Turkish Armed Forces (TAF):** When the 1982 Constitution is examined in general, one gets the impression that this Constitution regulates the TAF almost as a fourth power right alongside the judiciary, the executive and the legislative organs. Considering the powers and privileges granted to the TAF in laws and regulations and in view of the isolated events taking place in the decision-making process, the perception that the TAF is a powerful actor of the political order gets deeper. **Establishing a democratic constitutional order requires, above all, putting an end to this abnormal picture and regulating the TAF with a status equivalent to other institutions included within the administrative structure of the state. The General Staff, which still reports to the Prime Ministry, should report to the Ministry of National Defense, and the powers of this institution, which do not comply with a normal democracy, should be ended.**
- **Our working group is in agreement that the Chief of General Staff should be appointed by the Council of Ministers, and that a system should be adopted in which the final authority in the promotion of high-ranking officers belongs to the Council of Ministers and which is based on cooperation with the TAF.**
- **As is the case today, the General Command of the gendarmerie should be maintained as an entity under the Ministry of Interior, however the appointments and promotions within this Command should be subject to the decisions of the civilian authorities.**
- **Security and national defense: One of the important factors in the militarization of**

the political institutions and politicization of the military authorities in Turkey is the intertwining between the concepts of security and defense. Therefore, the concepts of security and defense should be distinguished from each other in the new constitution. Agencies operating under the Ministry of Interior should be given the responsibility to perform the internal security services, and the Armed Forces should not interfere in the execution of these services. However, the Armed Forces should be able to help when requested by civilian authorities in cases of emergencies. Elimination of external threats should be regarded within the framework of defense services, for which the Turkish Armed Forces should be responsible.

- **TAF should be made responsible only for the national defense services, meaning elimination of external threats. This will be one of the important steps that will ensure normalization of the military-civilian relations. Within the framework of this purpose, the State Security Council, which has been existing as a constitutional institution since the 1961 Constitution, should be restructured under the name Supreme Council of National Defense, as was before. Regulation of the Supreme Council of National Defense by laws will be an effective factor in normalizing the military-civilian relations. The law should include provisions that will ensure that the Council convenes only when needed, upon the request of the Council of Ministers, instead of convening periodically. The Council should include only the Chief of General Staff to represent the military authority, and the ministers who will attend the Council should be regulated by law. Finally, parallel to the suggestion of our working group to create a presidential office that has limited powers, the prime minister should chair the meetings of the Supreme Council of National Defense.**
- **The National Security Policy Document, which even today does not have a constitutional basis, should be renamed as the National Defense Policy Document. Preparation of this document should be among the duties of the Council of Ministers, and the document should be presented to the TGNA by the Council of Ministers and adopted after its discussion by all political parties. In a normal democracy, the main rule is to have all parliamentary work take place open to the public. However, the National Defense Policy Document will also require adherence to the principle of confidentiality due to its various aspects in terms of protecting the interests of the country. Based on this fact, the parliamentary discussions on the document should be open to the public only barring the elements thereof that require confidentiality.**
- **Auditing of TAF spending:** A democratic constitutional order requires transparency in the expenditures of all public entities and their judicial review with regard to conformity with the law. Whereas in Turkey, with the Constitutional Amendment of 1971, TAF's expenditures have been left out of the audits of the Court of Accounts (Sayıştay). This privilege granted to the TAF was also maintained with Article 160 of the 1982 Constitution. Said article was later repealed with the Constitutional Amendment of 2004, in a significant step towards making TAF's spending transparent and auditable. The legal arrangements that will render this constitutional reform implementable have been adopted only recently. **The new constitution should include provisions that will ensure the transparency and auditing of the expenditures of the TAF. It**

should be kept in mind that review by the Court of Accounts is limited to review of conformity with the law, and that this review cannot include a review of expediency. Yet, the expediency of the spending made for defense services is as important as its conformity with the law. The nature of the defense spending plays a critical role in due performance of the defense services and protection of the safety of the lives of military and civilian personnel. Therefore, it is clear that there is a need for some sort of an expediency review by experts in order to determine whether the spending strategies take into account the technological developments. To this end, spending strategies should be open to review by subcommittees composed of experts from the National Defense, Internal Affairs, Planning and Budgeting Commissions of the TGNA.

- **Unity of the judiciary:** One of the privileges granted to the military authority in Turkey stems from the existence of the Military High Administrative Court (MHAC) in the domain of administrative justice, and the Military Court of Cassation in the domain of criminal justice. The existence of these entities alongside the Council of State and the Court of Cassation creates consequences that undermine the unity of the judiciary and the principle of equality before the law and hence the principle of rule of law, which is one of the conditions sine quo non of democracy. Therefore, **our working group suggests dissolving the MHAC and including the administrative disputes falling under its jurisdiction among the powers and duties of the Council of State as was before. Similarly, our group suggests dissolving the Military Court of Cassation and transferring its powers to a specifically designated special chamber of the Court of Cassation.**

- **National service:** Article 72 of our Constitution states that "National service is the right and duty of every Turk. The way in which this service shall be performed, or considered as performed, either in the Armed Forces or in public service shall be regulated by law." This provision allows the compulsory national service to be performed not only through military service but also through various public services that count for national service. Hence, the constitutional article gives the law-maker a kind of discretionary power to introduce compulsory public services that will replace the compulsory military service. On the other hand, the legislature has not yet adopted any arrangements to concretize this discretionary power offered by Article 72. **The new constitution should maintain this provision of Article 72 and give the legislature the discretionary power concerning compulsory public services corresponding to military service. These public services should be performable by all citizens of the Republic of Turkey, be they men or women. In addition, the new constitution should recognize the right to conscientious objection as a fundamental right.**

- Whereas our working group believes in the importance of constitutional reform in normalizing the military-civilian relations, it is also of the opinion that these reforms will not be sufficient in ending the military tutelary system. Hence, **our group suggests that all legislative provisions adopted since the military intervention of May 27 be systematically reviewed and the abnormal powers granted to military authorities be ended.** It is also among the suggestions of our group **to remove from the secondary education curriculum the national security course,** which is intended as a means to militarize the society.

Decentralization and Local Governments

The restructuring of the state organization in line with the principles of decentralization, an extremely important norm in terms of democratization in Turkey, is another issue that should be considered when making the new constitution. It surely does not conform to the concept of democratic government to take decisions concerning the whole of such a large population embracing many differences without involving local authorities but only through central decision-making organs. Therefore, "local democracy" is an inevitable part of today's democracy understanding and practice.

Besides, it is not possible for such a centralized system to assess the different needs in all parts of the country and find the most suitable way to meet these needs. Under Turkey's current conditions, it is clear that trying to govern the "periphery" from the "center" is not only undemocratic, but also not an appropriate way in terms of effective and efficient delivery of public services and the "good governance" concept. Therefore, the current administrative system that locks the whole of Turkey to the "center" in Ankara, even for the solution of the smallest local problems, must be transformed in line with the principles of decentralization.

On the other hand, decentralization of the administrative structure will also contribute to solution of the ethnic-cultural identity problems that have become quite visible in the recent years in Turkey. If the representation of such differences at the local level and their participation in decision-making mechanisms can be ensured, this may strengthen the democratic pluralism in Turkey while also reinforcing the democratic legitimacy of the system by putting an end to the feeling of exclusion among ethnic-cultural communities. This is also vital in terms of reinstituting societal peace in Turkey.

All these requirements cannot be met only by transferring a little more authority to local government units within the currently existing structure. Therefore, the matter is not merely the "delegation of power" from the center to the periphery; it is a matter of ensuring the participation of local governments in the democratic decision-making mechanisms of Turkey as routine elements of these mechanisms. And this requires restructuring the local government units and transforming them into main government units at the local level. **Transforming local government authorities into the main government units at the local level require decreasing the powers of the authorities representing the central administration –mainly the provincial and district governors- and at the same time lifting their "tutelary" powers over the local government units.**

The local government units that should be formed fully through democratic representation should have decision-making powers with regard to determination of local needs and the ways of meeting those needs, and should also be able to impose taxes to some extent in

order to cover their expenditures – in addition to the fairer share they will get from the central budget. **The decision-making powers of the local democratic government units should also cover public works, agriculture, health and, to an extent, law enforcement and education services.** To express in the reverse order, delivery of justice and defense services and national law enforcement services should remain under the authority of the central administration, and education should be given a flexible structure that will not replace the national education system but observe the requirements posed by regional needs.

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