

## NEW TURKISH CONSTITUTIONAL LAW SYSTEM (\*)

by Dr. Can TUNCAY

### A. Historical Background of the Turkish Constitution (1) I. Period of Ottoman Empire

The history of Turkish constitutional life goes back to the Ottoman Empire. The Ottoman Empire was a classical type of monarchy. The entire power and authority was collected in the hand of one man, the Sultan. The sultans ruled the empire from its foundation until its destruction, between 1291-1920, in whatever way they desired. They had absolute authority of possession and disposition over the land, state, goods and even the lives of the people. The sultan was not only the absolute ruler of the country but also the highest religious leader of the whole Islamic world. As is to be expected of such a State, it had no constitution.

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(\*) This article is based on the lecture delivered by Dr. A. Can Tuncay (Associate Professor of the University of Istanbul, Faculty of Law) at the University of Kentucky, College of Law, on March 28, 1983.

1) For further information see, O. Aldıkaçtı, *Anayasa Hukukumuzun Gelişmesi ve 1961 Anayasası* (Development of the Turkish Constitutional Law and 1961 Constitution, 4th edition), Istanbul 1982, pp. 35-93.

The year 1808 is considered the beginning of the constitutional movement. By that year the Sultan was persuaded by the Grand Vizier and some army commanders to declare a charter for the sake of restoring the ailing state authority and to diminish general unrest. Similar to 1215's Magna Charta, the Sultan unilaterally declared that he would no longer arbitrarily govern the lives and goods of any individual. Although this was not a document in the constitutional sense, it was the first document which restricted the Sultan's unbridled authority. Of course, that promise did not last long and the charter was later revoked by the Sultan. The second attempt at establishing a constitution was in 1839. In that year the Sultan, who had been influenced by the French Revolution, unilaterally declared a charter and promised to obey the laws which he issued. This charter secured the right to live and the right of possession. It also guaranteed that there would be no religious discrimination among the people. But, as with the previous charter, this one did not last long. The third constitutional movement was in 1876. The ailing state authority, failure in wars, unrest among the ethnic groups and classes within the empire and, most important, the vigorous activities of Young Turks against the Sultans' absolute ruling regime and the desire to westernize the country resulted in the declaration of the Constitution of 1876. This document established a representative assembly for the first time although its authority was very restricted. The name of this new regime was the Constitutional Monarchy. It did not even last a year. As always happened before, the new was suspended by the Sultan and his absolute monarchical regime returned. Upon this **fait a complis** the Young Turks Movement against Sultan's despotism resumed, this time with the support of some army units. The Sultan had no choice but to put the previously suspended Constitution, with certain significant amendments, into effect again in 1909. The amendments of 1909 expanded the legislative authority of the assembly to a considerable extent and for the first time a parliamentary government was established which exercised executive power in the western sense. In contrast to the previous constitutions, this document survived until World War I. Upon losing the War,

Turkey was invaded and divided by the winning nations. But the Turkish nation, which is not familiar with living under captivity, under the leadership of Kemal Atatürk revolted in 1919 against the invaders and the Sultan. Thus, the Independence War, which lasted for three years, had begun.

## II. Period of the New Turkish State

On April 23, 1920 the Grand National Assembly of Turkey was established. It began immediately to prepare the first Constitution of the new Turkish State during the course of the Independence War. This Constitution was declared on January 20, 1921 which is considered the beginning of the new Turkish State. The core of this Constitution was the principle of «national sovereignty». As a reaction to the Sultans' absolute rule it was declared that the nation is sovereign and it alone can rule the land. As a natural consequence of this principle and in light of the war time conditions, all state powers had been gathered by the Grand National Assembly and for the sake of the principle of national sovereignty and for the sake of the maintenance of the nation's unity, the principle of separation of power was ignored. The legislative branch played the role of executive branch and high courts at the same time. This was the so called «assembly-government system». The political structure worked quite successfully under the wartime conditions and the nation gained its independence and unity. After peace returned, the Republic was declared on October 29, 1923 and the necessity of adopting a new Constitution was recognized.

The first Republic Constitution was passed on April 20, 1924. It remained in effect until 1960. This constitution was widely inspired by the French and Polish constitutions. Besides abolishing the religious based state system, this constitution stayed generally loyal to the concepts of national sovereignty (democracy in its pure meaning) and central administration and consequently adopted the approval of concentrated powers found in the former constitution. Nonetheless, this constitution

accepted some rules of separation of powers. Legislative power was to be exercised by the Grand National Assembly, the representative of the national sovereignty, while executive power was delegated to the government which was chosen from among the deputies. Although this constitution delegated the judicial authority to independent judges, it did not accept judicial review of constitutionality. Moreover, it guaranteed some fundamental rights and freedoms but did not indicate the sanctions in case of their breach. As can be seen, this Constitution was very susceptible to dictatorship. Indeed, this happened in the late 1950's. Until 1946 the Republic of Turkey was a one party state. The Republican Peoples' Party (RPP) established by Atatürk as the instrument of social reform dominated the scene until 1950 when it was defeated and deposed by the newly established Democratic Party, which represented the liberal economic views. The Democratic Party remained in power during the years, 1950-1960. But toward the end of the decade due to political failure, the party's popularity diminished. During those years, the electoral system was based upon the principle of absolute majority representation. This enabled the DP to maintain total power even though by the late 1950's its margin of popularity had considerably declined. Fear of losing the elections instigated the officials of the DP to try to get rid of the opposition party by suspending some fundamental rights of the people. The vague provisions of the 1924 Constitution about separation of power encouraged the ruling DP to attempt to form a sort of party dictatorship for the sake of remaining in power. Consequently, the army was compelled to intervene in May 27, 1960. However, it made a commitment to the nation that it would withdraw from political life after the adoption of a new Constitution.

Indeed in July 9, 1961 the 2nd Republic Constitution, prepared by a Constitution Assembly, was put into effect after acceptance by popular referendum and the soldiers withdrew from the power.

Although the military intervention of May 27, 1960 introduced certain modern institutional changes in terms of a cons-

tution which had effects upon political, economic and social life, it was a «reaction constitution», a reaction against the past experiences. As a reaction to that experience the new Constitution gave particular weight both to ensuring human rights and to the separation of state powers.

In that manner the Constitution listed and guaranteed fundamental rights and freedoms in the broadest sense and recognized also the right to collective bargaining and strike. The legislative branch was split in two: House of Representatives and Senate. Executive power was exercised by a cabinet in the traditional parliamentary sense. Most importantly, the Court of Constitution was established which had the authority to review the constitutionality of the laws passed by Grand National Assembly. However, the broad liberal concept of Constitution did not enable the political process to survive.

## **B. OUTLINES OF THE CONSTITUTION OF 3rd REPUBLIC**

### **I. Reasons making it necessary to adopt a new constitution**

The years between 1961-1980 saw an increasing tempo of economic and political failures. Since the late 1960's Turkey was ruled mostly by coalition governments. Due to the extreme differences in political orientations, no party could achieve majority in the general elections.

Also 1968's violent student movements in Europe were reflected in Turkey. Demands starting from reforms within the universities expanded to broad demands for change in social, economic and political life. Some factions of workers and trade unionists and even civil servants participated in these demands and movements. Consequently these movements turned into a right-left fight. Beside the two largest political parties DP and RPP, the National Salvation Party was seeking a return to an Islamic order while the Nationalist Movement Party was working toward the formation of a fascist state order. The

failure of the Turkish Labor Party led the Turkish left to divide into rival factions with extremist urban guerilla groups instigating a series of murders, bombing and kidnappings. Parallel to this disorder, Turkey was dragged into economic and social chaos. The inflation rate had soared to 100 percent while the production rate had fallen and the unemployment rate rose to 14 %. In this disorder the bullet was preferred to the ballot box. On September 12, 1980 the army under the leadership of Chief of the Staff Gen. K. Evren, was forced to intervene as it had in 1960 and in 1971 (2). Political violence by the extremist partisans of both left and right which might lead to civil war and an eventual breakdown of the regime and of the unity of the country was the major reason given for this military intervention. After abolishing the Parliament, General Evren declared himself as the Head of State and his five-member National Security Council as the law-making power. He then appointed a new cabinet consisting of civilian experts and technocrats. The military intervention of September 12, 1980 has generally been accepted by most segments of the public as inevitable due to the mounting economic and social difficulties and the upsurge of anarchy and terrorism in the country. The National Security Council proclaimed its determination to return Turkey to multi-party civilian rule under a revised Constitution and reformed institutions. A 'Consultative Assembly' was formed by October 1981 which, along with the National Security Council, would carry out the task of implementing certain constitutional and legislative amendments. The new Constitution draft prepared by the Consultative Assembly, after revision by the National Security Council, was submitted to popular referendum on Nov. 9, 1982. The draft was accepted by the nation with an unprecedented majority of 91%. By acceptance of the new Constitution, Gen. Evren automatically became the seventh President of the Turkish Republic. Look-

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2) In 1971 the Turkish Armed Forces presented a memorandum to the government that resulted its withdrawal, some changes in the 1961 Constitution and holding of new elections.

ing back at recent history and at the deep-rooted tradition of the military to withdraw back to barracks after restoring parliamentary democracy, there is no reason to believe that the present provisional government will entrench itself in power for a period too long to be acceptable.

Presently the election acts are being revised by the Consultative Assembly and it is expected that the general elections will be held toward the end of this year and will provide for the return to Civilian government. The previously described events demonstrated that the 1960 Constitution was inadequate to protect democracy and the republic from its enemies. In the words of one of the former Prime Ministers who was victimized by the terrorists: «The 1961 Constitution was too luxurious for the Turkish nation.»

## **II. Basic characteristics of the new Constitution**

The 1982 Constitution preserved the basic structural character and basic institutions of the previous Constitution. However, the new Constitution imposes considerable restrictions upon the exercise of fundamental rights. The powers of the Executive branch, particularly the authority of the state president, has been expanded to a significant extent. Emergency powers were broadened but the Constitution specifically prohibits the establishment of any kind of dictatorship. Like the previous document, it is a reaction to recent events and is an uncommonly long and detailed written Constitution consisting of 177 Articles. It starts with a preamble, affirming that this Constitution is deemed to be made directly by the Turkish nation inasmuch as it was prepared by the Turkish nation's legal representative Consultative Assembly and after revision by the National Security Council was accepted by a national referendum. It states too, that this Constitution is based on Ataturk's nationalism concept and his principles and that the sovereignty belongs only to the Turkish nation. In addition, it states that there is no hierarchical ordering among the bran-

ches of government but rather that they should exercise their separate authority in harmony and cooperation.

### **III. State System**

#### **1) Basic Principles**

The Constitution defines the Turkish State as the Turkish Republic (Art. 1). According to the basic principles the Turkish Republic is a democratic, secular and social state based on law and bound to the principles mentioned in the preamble and Ataturk's concept of nationalism. It respects human rights within the concept of social welfare, national solidarity and justice (Art. 2). Further, the State of Turkey is an indivisible whole with its land and nation. Its language is Turkish, the flag is a white crescent and star on a red ground, the national anthem is the Liberty March and its capitol is Ankara (Art. 3). These first 3 provisions are not subject to any method of Constitutional Amendment (Art. 4). Sovereignty belongs only to the nation. However, the nation shall exercise it by the authorized organs within the constitutional limits. Its exercise cannot be delegated to any group or class of people or any individual (Art. 6).

The enunciated fundamental tasks and targets of the state are to protect the republic, democracy and the independence of the nation and the land, to remove political, economic and social obstructions restricting fundamental rights and freedoms, and to promote an environment for the development of individual material and spiritual well being (Art. 5).

Legislative power is exercised by the Grand National Assembly of Turkey (GNAT) in the name of the nation. Executive power is carried out by the State President and the Government according to the constitution and law. Judicial power is exercised by the independent judiciary in the name of Turkish nation (Art. 7, 8, 9).



After the French Revolution, the principle of equality before the law became one of the basic principles of democratic constitutions. The principle was placed in all Turkish constitutions. According to Art. nr. 10 everybody is equal before the law, without distinction of language, race, color, sex, political opinion, philosophical belief, religion, conviction or the like. No one, no family, no group or class may be privileged.

The principle of binding effect and priority of the Constitution is one of the most important and unique provisions. According to the principle, constitutional provisions are the binding fundamental rules not only for legislative, executive and judicial organs and administrative bodies, but also for legal personalities and individuals. Laws shall not contravene the Constitution. The provision explicitly provides that the Constitution governs civil law relations among individuals, so called «Drittwirkung» (3). It should be noted that this point has generated considerable debate among scholars in many European legal systems which do not have a specific constitutional provision of this sort.

## **2) Powers of State**

Modern political analysis divides the powers of state into three parts: Legislative, executive and judicial. If a modern sovereign state is to be ruled democratically then these powers must be separated and exercised by different organs in order to avoid dictatorship. As we have mentioned above, the Turkish state system is based on separation of powers.

### **a) Legislative Power**

This power is exercised by the Grand National Assembly of Turkey (GNAT) in the name of the nation that was founded

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3) In German this means third effect of the Constitution or the effect of the constitution upon private law relations.

by Ataturk in 1920 during the Independence War. This was the first step in founding a new Turkish state on the wreck of the Ottoman Empire. It was the first time that the Turks rejected the absolute power and the rein of the Sultan who surrendered and delivered the Fatherland to the winning side of World War I.

The GNAT is composed of 400 deputies elected by the nation. In the previous system the GNAT was composed of two chambers, the National Assembly and the Senate. The new Constitution has abolished the Senate. Unless the GNAT or the President of the Republic (in certain cases) decides to hold elections before its normal term expires, the deputies shall be elected for a term of 5 years. Election terms may be extended for one year in case of war. For each election term the GNAT shall twice elect a President (Speaker) and a Presidency Council among its members.

Any deputy who switches to another party or accepts an office in the ruling party's government upon withdrawal from his party, or who does not attend five sessions in a month of the GNAT without a good cause, forfeits his membership (Art. 84). However a this forfeiture is not automatic but upon the decision of the majority of the assembly's members. This is a new provision. During the previous decade parliamentary life suffered greatly from deputy transfers between parties, defections, resignations, secret engagements with another party and frustrating the functioning of the assembly by purposely not attending its sessions. It is expected that the new provisions will no longer permit these sort of unfair practices.

The deputies enjoy legislative inviolability. No member of GNAT may be blamed, sought by the police, arrested or detained because of opinions expressed or votes cast by him in the exercise of his office whether in parliament or outside parliament unless the GNAT has previously adopted the restriction. No deputy may, without authorization of GNAT, be prosecuted,

arrested or questioned for a criminal offense during his term of office. (Art. 83).

A member of GNAT represents the entire nation, not only the region from which he was elected or those who voted for him (Art. 80). As a matter of fact Deputy (Milletvekili) means «representative of the nation».

Duties and authorities of GNAT consist of adopting, amending or repealing laws; supervising the government and ministers; authorizing the council of ministers to issue executive orders having the force of law, accepting the budget, deciding upon the issuance of money, granting general or private amnesty, giving consent for the execution of death sentences imposed by courts, declaration of war and ratification of international treaties. (Art. 87).

Only the Government and deputies are authorized to propose legislation. Laws accepted by the GNAT shall be published by the President within 15 days in the Official Gazette. In the Turkish constitutional system the State President has no right of veto in its general sense. The only thing he can do is to send the bill back to the GNAT within 15 days stating his reasons for requiring reconsideration. If the GNAT passes it again without making any changes the bill must be promulgated by the President of the Republic.

International treaties ratified and put into effect duly by the GNAT in terms of law are deemed to be domestic laws. However there is no need to ratify treaties with a term of one year or less which pertain to economic, commercial and technical relations. These cannot be challenged before the Constitutional Court. (Art. 90). The GNAT also can, to a limited degree, authorize the government to issue orders having the force of law. (Art. 91). The GNAT controls its own authority and the executive power by raising questions to the Council of Ministers or Ministers personally or by instigating a parliamentary investigation or questioning or general discussion and

by proposing a vote of confidence. The most important method among these is, of course, the request for a vote of confidence. If the majority of the GNAT members vote for no confidence the government or the targeted minister topple. (Art. 98-99).

**b) Executive Power**

This power is exercised by the President of the Republic and Council of Ministers within the Constitution and laws. (Art. 8). Compared to the previous constitution the authority of the State President is considerably extended.

**aa) The President of the Republic:** The President of the Republic is the head of state and represents the Turkish Republic and national unity. He is elected for a term of 7 years by the GNAT either from its members or from among those Turkish citizens who are over 40 years of age and have completed their university education. The same person can not be elected twice as president. (Art. 101). The election of the President of the Republic takes place by secret ballot and requires a two-third majority of the assembly. After the third ballot an absolute majority is sufficient. But exceptionally and automatically and for one time only the President of the National Security Council has been elected as President of the Republic with the adoption of the new Constitution by the popular referendum (Trans. Art. 1).

Duties and authority of the President: (Art. 104). He promulgates and returns the bills back to the GNAT for reconsideration and submits constitutional amendments to popular referendum if he considers it necessary. He may submit a law or executive order having the force of law to the Constitutional Court for judicial review. He may order the holding of general elections in circumstances indicated by the Constitution. The latter authority is a novelty for Turkish constitutional life. Thanks to this remedy, it is believed that political deadlocks (i.e. if a government becomes impossible because the Assembly arith-

metics prevents its formation) can easily be overcome by resorting to elections with no need for GNAT's decision.

He appoints the Prime Minister and the Ministers. The President accredits and sends diplomatic representatives and receives foreign diplomatic representatives and ratifies and promulgates international treaties. He convenes and presides over the National Security Board, when it is needed. He convenes and presides over the Council of Ministers and he declares a State of Emergency and issues orders having the power of law. He may grant pardon and amnesty and mitigate penalties and appoints the Chief of Staff and presidents of the universities. The President is the Commander in Chief of armed forces in the name of nation and announces a state of war if approved by the GNAT.

The President names the members of the Constitutional Court, 1/4 of the Council of State, the military Court of Cassation, the Military High Court of Administration and the Chief Prosecutor of the Court of Cassation (4).

The President has immunity for all acts performed while exercising his functions except high treason. In such case he is impeached by GNAT by a 3/4 majority of its members.

The functions of the President of the Republic are exercised by the President of the GNAT (Speaker) in cases in which he cannot perform them temporarily such as being abroad or being incapacitated.

**bb) Council of Ministers (Cabinet):** It is composed of the Prime Minister and ministers. As a parliamentary tradition the head of the political party that has received the majority of the votes during the general election shall be appointed as Prime Minister by the President of the Republic. The Ministers also

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4) The highest appellate court.

shall be appointed by the President upon their designation by the Prime Minister. (Art. 109). As a parliamentary tradition again and also as a constitutional requirement, the Prime Minister shall request a vote of confidence after presenting his government's program and the policies he intends to carry out before the assembly (Art. 110). Refusal of the majority of GNAT's members to give such a vote automatically results in the collective resignation of the cabinet. The Council of Ministers rules the country by ensuring the enforcement of the laws. The Ministers and Prime Minister are collectively responsible for the general policy of the Cabinet. Moreover the ministers are responsible for the actions of those who are under their command. (Art. 112).

#### **cc) Administrative Organization**

Since the administrative organization is a part of the executive power it is appropriate to examine it as a dimension of executive authority.

The centralization embodied in the constitutional structure of the country ever since the foundation of the republic characterizes its administrative structure even today. Modern Turkey has called upon centralism as a means of preserving and developing a sense of nationhood among its people. For administrative purposes Turkey is divided into 67 provinces, provinces into districts and districts into subdistricts. These divisions reflect geographic, economic and public service groupings. Provinces are ruled by governors appointed by the central government's Ministry of Domestic Affairs. The administrators of other subdivisions are similarly appointed.

However, there are also local administrative entities in Turkey. The most important form is the municipality. Municipalities are autonomous public units that deal with the local population's collective living needs (such as transportation, cleaning the streets, food, water, gas, etc.) of a certain region. Every municipality has a President (Mayor) and an assembly

that come to the office by regional elections. Municipalities also have the authority to levy taxes.

All public services that are performed by the state or other public authorities are carried out by civil servants and public employees.

**c) Judicial Power**

Judicial power is exercised by the independent courts in the name of the nation. Judges in Turkey are professional (5) and exercise their tasks independently of any other power or effect, but in accordance with the constitution, law and their own conscience. They have tenure in office and may not be removed, excluded or suspended from office or assigned to another court or function against their will, except as a result of a decision by the High Council of Judges and Public Prosecutors. They may not be deprived of their salaries and other financial benefits even if their court or offices are abolished. Unless they request, they may not be retired before age 65. Public prosecutors enjoy the same rights as judges (Art. 138 - 140). The judiciary has always been separate and independent from the other powers.

There is no jury system in Turkey. Also judge made law is almost nonexistent. As in all continental law systems (including Turkey) which are bound to Roman law, judicial precedent has no priority value.

**aa) Judicial organization and types of jurisdiction**

Generally the Turkish judicial system is based on a network of lower courts and national level high courts. In the Turkish system jurisdiction can be divided into four categories, with a different court system for each category.

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5) That is, they have a university degree in law.

### **aaa) General Jurisdiction**

This is not too different from the meaning it is given in the USA. In this field the courts are two leveled; lower courts and high court. Lower courts are basically divided into two parts: civil law and criminal law courts. These courts also have subdivisions based upon the subject of the dispute. There are also labor law, trade, and press law tribunal divisions under the civil law courts. The Court of Cassation has appellate authority over the lower courts. It is the High Court and divided into 15 chambers based on the type of dispute. The chambers consist of 5 judges and other members who are chosen by the High Council of Judges and Public Prosecutors from among the first class (most outstanding) judges. As a rule appeals are submitted in writing without oral argument.

### **bbb) Constitutional Jurisdiction (Constitutional Court)**

Judicial review of the constitutionality of Acts and of orders having the force of law is performed by the Constitutional Court. Moreover, it decides on impeachments of the President and of members of Council of Ministers and other Superior Courts (Art. 148). The Constitutional Court is also authorized to review the constitutional amendments but only with regard to the adoption procedure.

The Constitutional Court is composed of 15 judges who are named by the President of the Republic and are chosen from the magistrates of the Superior Courts. One member is chosen from University professors, four members are chosen from lawyers and high level administrators. The court elects its president from its members for a term of 4 years. Members of the constitutional court serve until age 65.

There are two procedures for providing judicial review of the laws of GNAT.

1) **Case of Repeal:** This is a direct method of bringing a suit to the Constitutional Court. Only the President of the



Republic, the ruling party and the largest opposition party and at least 1/5 of the members of the GNAT may initiate such a case. The right to litigate expires 60 days after the promulgation date of a law or executive order (Art. 150-151). The Constitutional Court examines the cases concerning unconstitutionality upon written submission and with respect to both substance and procedure.

2) **Claiming unconstitutionality in the other courts:** This is the indirect way of claiming unconstitutionality. If a judge determines on his own initiative or upon the assertion of a party during a trial that there is a serious question of the constitutionality of a rule or rules of an act or an executive order, he may put the trial off pending the final decision of the Constitutional Court. If the Constitutional Court cannot award its decision within 5 months, the trial court is to settle the case according to the present laws in force (Art. 152).

A law, order or rule held to be unconstitutional, is treated as a nullity from the day following the publication of the decision. The Constitutional Court may however postpone the effects of the decision for up to one year. By doing so the legislative organ is given enough time to fill the gap caused by the repeal. Decisions of repeal are not retroactive (Art. 153).

**ccc) Administrative jurisdiction (Administrative Courts):** This jurisdiction refers to the disputes between individuals and the State or state organs in the area of public law (such as expropriation, confiscation, tax disputes, removing or firing of civil servants, etc.).

Before the new Constitution only the Council of State considered such matters. It functioned not only as a high court but also as the trial court for cases pertaining to administrative conflicts. The new Constitution provides for lower level administrative courts where needed.

Three fourths of the members of the Council of State are elected by the High Council of Judges and Public Prosecutors,

1/4 by the State President. This court is empowered not only to resolve administrative conflicts between individuals and the State organs but also to function as a consultative organ of executive power. Upon request it can advise the Government respecting the legality and constitutionality of laws proposed by it.

At the end of an administrative lawsuit if the Council of State reaches the the decision that the individual has been injured by illegal administrative action that action is revoked. If the illegal action or decision caused any damage, the administration is liable to provide compensation. This duty of the Council of State is called judicial supervision of the administration or judicial review of the administrative actions or decision. Judicial review of the administrative conduct helps to avoid arbitrary actions. The constitution states that «every king of administrative decision or action is subject to the judicial review.» (Art. 125). However, a repeal suit must be initiated within 60 days from the date of written notice issued by the administrative agency.

**ddd) Military Jurisdiction (Military courts):** The military courts and discipline courts handle cases involving military personnel. The Military Court of Cassation and Military High Administrative Court are the two constitutionally formed high courts in this area (Art. 156, 157). The former deals generally with military crimes while the latter handles administrative type of conflicts pertaining to military service, promotions, assignment, and the like.

**eee) Financial Jurisdiction**

The Council of State also serves as the appellate court for tax conflicts between the individuals and the state or Public Organs. The highest Court of Accounts, however, is the audit department of the state. It investigates and studies the public revenues and expenditures of all state organs and audits all kinds of accounts concerning the treasury and awards the final

decision in the name of the GNAT. Whether or not it is a judicial organ is a debatable matter.

fff) **Others**

It is not unusual to encounter legal conflict respecting whether a case is to be handled by a general jurisdiction court or administrative or military court. In order to settle such conflicts a special type of high court, the Court of Conflicts, has been established in the Turkish Court System.

Another special type of court established by the Turkish Constitution is the State Security Court. Such courts are empowered to try actions against the unity of the State and nation, the free democratic system and constitutional order. In other words, crimes concerning internal and external security of the State. However, their decisions are appealable to the Court of Cassation. It was argued that the State Security Courts as specialized courts will be more efficient in fighting the enemies of free democratic order and the constitution.

Additionally, the High Council of Judges and Public Attorneys is constituted to ensure the independence of courts and the professional tenure of judges and public attorneys. This council is composed of the members of the Court of Cassation and Council of State who are named by the President of the Republic. The minister of justice presides over this council. It is responsible for appointments, promotions, assignments or termination of employment of judges and public prosecutors.

#### **IV. Emergency Powers**

The term «emergency powers» in the Turkish constitutional order refers to the exercise of extraordinary powers by the State in case of extraordinary situations. In other words, it means the expansion of the authority of the executive organ not arbitrarily but constitutionally due to some extraordinary situation arising in or out of the land. At times, it might be too

late to deal with such emergency situations (such as natural disasters, dangerous epidemics, severe economic crisis, violence, rebellion, war, etc.) within the usual norms of the constitutional mechanism. Equipping the state with extraordinary ruling process is a widely used constitutional device for dealing with emergency situations more effectively and more rapidly.

The Turkish Constitution has adopted two sorts of extraordinary administrative processes for dealing with emergencies. In case of natural disaster, severe economic crisis, dangerous epidemic, serious signs of impending disorder threatening the constitutional system or fundamental rights, or violent disruption of public order, the Council of Ministers, with the President of the Republic presiding, may declare a state of emergency in the entire nation or in some parts of the land for not longer than 6 months. The decision pertaining to the declaration of a state of emergency shall be published in the official Gazette and submitted for Ratification by the GNAT as soon as it is held. The GNAT is entitled to revoke or to alter the duration of a State of Emergency. The extension of the duration shall not be longer than 4 months for each request. During a State of Emergency, fundamental rights or freedoms can be restricted or repealed, payment, employment or delivery of goods can be compelled and the powers of public service officials or security forces can be expanded. (Art. 119-121).

The other process of extraordinary administration is a declaration of martial law. In that case the executive power is delegated partly to the military. The conditions for resorting to martial law involve the expansion of the violent actions which warrant declaring a State of Emergency but to a degree of bordering on civil war (Art. 122). Martial law may also be imposed in the event of military mobilization and a state of war. The procedure for declaring martial law is not too different from declaring a state of emergency. It again must be emphasized that in the former case the military is not involved.

## **V. Fundamental rights and freedoms**

### **1) Generally**

In the western type of free democratic orders (as contrasted with the Marxist democracies) the main duty of the State is to ensure the fundamental rights and freedoms of individuals. In its traditional sense and historical development the main reason for the existence of the constitution is to define the area of individual liberties which must be free from state interference. In the Turkish constitutional system the amount and the meaning of these rights and freedoms are not different from those of other European constitutions. It is to be pointed out here that the major focal points of most European post World War II constitutions which distinguish them from their predecessors are the reaffirmation of human rights, but restricting them in such a way as to make them unavailable to the enemies of constitutional democracy and to prevent the reemergence of totalitarian methods and dictatorship and finally the stressing of social goals and their implementation to provide social justice (6).

It should be stressed here again that the new Turkish constitution adopts many restrictions pertaining to the exercise of fundamental rights due to the past bad experiences. This was one of the hotly debated points during the preparation of the constitutional draft. It was powerfully asserted that those restrictions and forfeiture provisions cast a shadow on the democratic structure of the constitution.

### **2) General essentials pertaining to fundamental rights and duties.**

The constitution mentions the duties of individuals as the counterpart of the fundamental rights. By doing so, it seeks

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6) See, A. J. Zurcher, *Constitutions and Constitutional Trends Since World War II*. 2nd. Ed. New York University Press Washington Square, New York 1955, pp. 17-18.

to emphasize that the State not only provides the individual freedoms but also requires that the individual bear such responsibilities as payment of taxes, performance of military service, participation in elections and respect for the freedoms of the others.

The Constitution declares that everyone has inviolable, inalienable and unrelinquishable fundamental rights and freedoms. However, it makes provision for these rights and freedoms to be restricted by law, consistent with the constitution, in order to protect the unity of state with its land and nation, national sovereignty, republic, national security, public order, public interest, public ethic and moral, public health and for some other specified reasons (Art. 13). Even further, the exercise of these rights can be restrained partly or entirely in case of war, mobilization, martial law or state of emergency (Art. 15). Abuse of the fundamental rights and freedoms is also prohibited. No one is allowed to exercise these rights in such a way as to make it possible to destroy the unity of the state and republic, to remove the fundamental rights and freedoms, to jeopardize the existence of the Turkish State and Republic, to form any kind of personal or class dictatorship or any kind of state order that is either based on discrimination or language, race or religion or based on these factors only (Art. 14). In summary, it can be said that there is no freedom to destroy freedom.

The great German law scholar Jhering, who lived in the last century, classified fundamental rights into three categories; (1) Status positivus, (2) Status negativus and (3) Status politicus. The term status positivus refers to the rights and freedoms of individuals in the positive meaning to do such things as communicate, work, travel, or engage in trade. Status negativus refers to a person's freedom from state interference such as secrecy of private life, inviolability of domicile, freedom of belief and conscience, right of property, and the like. Status politicus means the participating rights of individuals in the political life such as the right to elect political representatives,

the right to be elected, and the right to access to public services. Although it often is difficult to distinguish negative statute rights from positive statute rights, nevertheless Jhering's classification is still a generally accepted method of classification used in many law systems. The New Turkish Constitution remains loyal to this classification to a certain extent.

In this manner the constitution has divided the fundamental rights and duties into three. Classical fundamental rights and duties, social and economic rights and duties and political rights and duties.

### **3) Classical fundamental rights and the duties.**

There is no need to explain all these freedoms comprehensively within the narrow frame of this study. It should suffice to list the fundamental rights and freedoms in their constitutional order. According to the constitution everyone has the right to the protection and free development of his personality. Nobody can be treated inconsistently with human dignity. Everyone has the right to life and to physical inviolability. No one may be compelled to perform a particular kind of work. Forced labor is prohibited, (Art. 18). These rights may be interfered with only on the basis of the constitution or the law. Personal liberty is inviolable. No form of arrest, inspection or personal search is admitted except by warrant of judicial authority and only in cases and modes provided by law. However in exceptional cases of necessity and urgency, indicated by the law, a person can be arrested or captured without a warrant of judicial authority. But at all events he must be presented to the judicial authority within 48 hours (Art. 19).

The home and secrecy of family and private life is inviolable. Inspections or searches may be ordered only by a judge or in the event of danger in delay by other authorities provided by law but only on the basis of law. (Art. 20-21). Liberty and secrecy of correspondence and other forms of communication is inviolable. Its limitations are the same as mentioned

above (Art. 22). Everyone enjoys freedom of movement and travel and has the rights freely to choose their place of living, Art. 23), has freedom of religion and conscience (Art. 26), and to freely express and disseminate his thoughts or opinions through speech, writing and pictures (Art. 25-26). All these freedoms can be limited only by law. Freedom of science and art (Art. 27) and freedom of the press are also recognized (Art. 28). Censorship is prohibited. The Foundation of a publishing house is not subjected to a prior permission. But whoever writes or publishes or allows publication of writings having a character of threatening the unity of external or domestic security of the state, or inciting a tumult or rebellion against the state, or news relating to the secret documents of the state, will be responsible according to the relevant provisions of law. Distribution of these kinds of publications may be prevented by the order of a judge or in case of danger in delay by the order of executive authority. In the latter case this order is to be submitted to the authorized judge's review within 48 hours.

Everyone has the right to form associations and societies with no need for prior permission (Art. 33). No one may be compelled to be a member nor stay as a member of an association. Associations can only be dissolved by the order of the judges on the basis of law. Associations may not engage in political activities and they may not cooperate with political parties, trade unions or other professional corporations for political purposes. Everyone has the right to assemble and march peaceably without arms with no need for prior permission. But due to certain reasons (such as serious threats to public order) these may be prohibited or postponed for not more than 2 months by the authorized agency (Art. 34). Property and the right of inheritance are safeguarded, but their scope and limitations are to be determined by the law. (Art. 36).

Everyone has the right to sue or defend his interests before the courts. No one may be removed from the previously established and designated jurisdiction of a court (this is known as



the «natural judge principle»). (Art. 35-37). No one may be punished except by virtue of a law in force before the act was committed. The accused is not considered guilty until final decision. Penal responsibility is personal (Art. 38).

#### **4) Social and economic rights and duties.**

The state recognizes the family as the basis of Turkish society. For that reason it will take every precaution in order to provide for its welfare and especially protect mothers and children (Art. 41). No one can be deprived of the right to education. Elementary instruction is obligatory for all citizens male or female and is gratuitous at the State schools (Art. 42). State and public agencies are authorized to expropriate private property only if the public interest is greater and on condition that the owners are compensated in advance and in cash. (Art. 46). Everyone has the right to contract and to work in any field he wishes. Private economic enterprise is also free (Art. 48). Everyone has the right to live in a healthy clean environment. It is the duty of both the state and the citizens to protect the environmental health and to avoid environmental pollution (Art. 56).

The right to social security is also guaranteed. Everyone has the right to social security. The State shall take every measure in order to provide this security. War and public service disableds, the family of martyrs, handicappeds, aged people and orphans shall particularly be protected. (Art. 60, 61).

Of special significance in the Turkish constitution are the provisions relating to labor relations. During the drafting of these provisions these were hotly debated in labor and employer circles. Many unnecessary provisions imposed by the Consultative Assembly that might be harmful for the free collective bargaining system against workers were eliminated by the National Security Council in the last revision. However it still can be said that the new constitution adopted more

restrictive provisions relating to the collective bargaining system than those found in the previous constitution because the nation has suffered a lot from the abuse of trade union and strike freedoms during the past years.

Labor is everyone's right and duty. The State will take every measure in order to promote the standard of living of the workers, to protect the workers, to encourage work and to eliminate unemployment. (Art. 49). No one may be compelled to do work that is inconsistent with his age, sex and strength. In that sense, minors, women and handicapped shall particularly be protected. Workers have the right to a weekly paid rest, annual paid leave and paid holidays. (Art. 50).

It is the duty of the State to take every necessary precaution in order to provide social benefits for workers and to assure a fair wage adequate to the quality of work. However, workers shall not be paid below the minimum wages. (Art. 55).

In the Constitution freedoms of trade unionism, collective agreement and industrial disputes are regulated unnecessarily in an overly detailed way.

Employers and employees have the right to establish trade unions associations and higher labor organizations without need for prior permission for the purpose of protection and development of their members' economic and social interests. (Art. 51). In Turkish legal usage the word «trade union» is also used by employer associations. Persons and entities are free to join and to withdraw from membership.

But, a worker cannot belong to more than one union at any given time. Also, the union security clause is prohibited and trade unions are prohibited from engaging in all kinds of political activities (Art. 52).

Employers and employees have the right to enter into collective agreements in order to arrange their mutual econo-

mic and social lives and working conditions. More than one collective agreement may not be in force for the same place and same term. (Art. 53).

The constitution recognizes not only the strike but also the right to lockout. (The lockout was not recognized as a constitutional right in the previous constitution) However, the new constitution forbids the abuse of these freedoms. Political, sympathy, general strikes and lockouts, and actions like factory occupation, slow downs, and reduction of production are prohibited.

In which kind of workshops and cases strike and lockout rights will be prohibited or postponed will be regulated by the law. In such cases labor disputes shall be settled by the High Arbitration Board. Thanks to this constitution the High Arbitration Board has become a constitutional institution. The decisions of the High Arbitration Board are final and have the force of a collective agreement. (Art. 54).

Additional details of exercising these rights shall be regulated by law. But it is to be pointed out that the civil servants and the public employees have been excluded from the freedoms of trade union membership, collective agreement and strike.

The Constitution imposes a general reservation respecting all of the listed social and economic rights. It is that the State shall realize its economic and social duties protecting the economic stability within the capacity of its financial resources (Art. 65). It is a realistic, but on the other hand a potentially millifying provision for realization of the social and economic rights.

#### **5) Political rights and duties**

Even, Turkish citizen has the right and duty to participate in the political life of the Turkish Republic unless he is deprived of these rights for certain reasons. Basically everyone whose father or mother is Turkish is a Turkish citizen. (Art. 66).

Citizens have the right to elect or to be elected and to take part in referenda or engage in political activity. Whoever has reached age 21 may vote except those who have been arrested or sentenced and noncommissioned noncareer soldiers.

The elections and referenda are held on the basis of secret, free, direct, equal, universal voting and open counting under supervision of judicial authorities.

In Turkey the political parties are considered as unrelinquishable factors of democratic political life. The parties participate in forming the political will of the people. They can be freely established without prior permission. One must be at least 21 to be a member of a political party. The statutes and programs of the parties must conform to the unity of the State with its land and nation, human rights, national sovereignty, and democratic and secular republican principles. Neither can their internal activities be contrary to these principles. Parties that promote any kind of class or personal dictatorship may not be formed. The political parties may not engage in political relation or cooperation with the associations, trade unions, foundations, cooperative societies or professional societies. Nor may they receive any kind of financial aid from them. Parties endorsing contrary purposes or not conforming with the above mentioned principles shall be dissolved by the decision of the Constitutional Court. (Art. 68, 69).

Other political rights are the right to receive public services and the right to petition the GNAT or authorized agencies. The duties, however, are military service and tax payment. Military service is not only the sacred duty of the Turks but also their right. All are bound to contribute to public expenses in proportion to their taxable capacity. Taxation shall only be based on law (Art. 70-74).

#### **VI. Amendment of the Constitution**

The new constitution establishes the procedure for constitutional amendment. Amending the constitution can be propo-

sed by at least 1/3 of the members of the GNAT. Adoption of the amendment must be approved by 2/3 of the members of the GNAT. The procedure of the passing of the constitutional amendment is the same as the passing of bills with the exception of those above mentioned proportions (Art. 175). In that manner the President of the Republic may submit the amendment bill to referendum if the GNAT approved the amendment a second time even after he sent it back for a new decision. In any case the very first three provisions of the Constitution relating to the form of the State, characters of the Republic, unity of the State, its official language, flag, national anthem and capitol may not be amended and such amendments may not even be proposed. (Art. 4).

Constitutional amendments are subject to the judicial review by the Court of Constitution. The Court may, however, handle the review only with respect to the amendment procedure (Art. 148).

### **Conclusion**

As we can see, Turkey's constitutional order did not experience wholly stable development after the introduction of multi-party democratic life in 1946. Due to the unnecessarily severe rivalry between the political parties, many politicians had such a passionate dedication to reelection that it seems to have outweighed their commitment to the nation's needs. Too seldom did they use the tools of political compromise and accomodation. Similarly, many of the electorate were fanatical in their dedication to their selected party. Thus, the relatively young Turkish democracy was dragged to the brink of crisis from decade to decade. This situation was made worse by the increasing social and economic distances among the segments of people and by the continued influence of religious fundamentalism within the society.

The concept of national sovereignty of the 1924 Constitution gave all powers to the GNAT. This facilitated the creation of a party dictatorship by the party possessing the majority in

the parliament. This, indeed, happened. The 1961 Constitution, prepared after the first military intervention, contrary to the previous one, was too liberal with the result that it could easily be exploited. For the sake of guaranteeing the human rights it separated the state powers to such a degree that the state authorities could not work harmoniously.

The political and social chaos of the 1970's was halted by the military again in 1980. The new 1982 Constitution tried to balance the concepts of powerful government and the protection of human rights, though it gives more weight to the powerful government than to the protection of human rights.

Compared to the western type of democratic constitution. Turkey's new constitution seems to be overly restrictive of individual freedoms. But Turkey's new constitution must be evaluated in light of the nation's circumstances. Its political, cultural, historical, social and economic conditions are not the same as those found in the West. If one remembers the past 10 years' experience well, he will have a better appreciation of the choice made to give greater weight to assuring a strong system of government. Moreover, as a NATO member, Turkey's critical geographic location - Soviet Russia in the North, Khomeini's Iran in the East, Syria, Iraq and the overall unrest in the Middle Eastern countries in the South, Greece and Bulgaria in the West - pose immediate threats that would make a more westernized type of a democratic constitution unsuitable. Therefore, it would be better to talk about a Turkish type of democratic constitution, instead of a western type of a democratic constitution for a durable, stable Turkish democracy. It should be emphasized that astonishingly in contrast to the armies of the other developing industrial countries, the well trained and disciplined Turkish army has always been the number one protector of the democratic institutions that are the foundation stones of Republic of Turkey which was founded and entrusted by K. Atatürk.