THE MAIN FEATURES OF 1982 TURKISH CONSTITUTION AND RECENT CONSTITUTIONAL CHANGES IN TURKEY

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I. A Short Look at the Constitutional Developments in Turkey

The first constitutional movements in Turkey took place by the Deed of Alliance (Sened-i Ittifak, 1808), Decree of Reforms (Tanzimat Fermani, 1839) and the Decree of Improvements (Islahat Fermani, 1856). After these movements the first constitution was written and declared in 1876 titled Kanuni Esasi[1]

The Deed of Alliance was accepted as a result of negotiations between the representatives of the central government and the notable (âyan) senators. By this Deed it was decided that none should interfere with governmental affairs except the government officials, that the chief president (sadrazam) should participate in the exercise of power and share responsibility, and that in case of a revolt against the state by a government official they should work together to repress him. However, no mechanism was proposed for applying these rules. In 1839, with the declaration of the Deed of Reforms by the Sultan, the state undertook the providence of security of life, property and honor for all subjects of the government, and the regulation of all taxation and military affairs. The Decree of Improvements has, in a sense, renewed promises which were initially suggested by the Decree of Reforms assuring equal treatment of all subjects without regard to their religious differences.

The Constitution of 1876 founded a parliament consisting of two assemblies: first was the "Heyet-i Mebusan" whose members were elected through a two-stage electoral system; and the Assembly of Senators (Heyet-i Ayan) whose members were appointed by the Sultan. According to the Constitution, the power of the Parliament were quiet limited and the law or deed proposition of the

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1 For the details of the constitutional developments in Turkey see: Tanör, Bülent: *Osmanlı-Türk Anayasal Gelişmeleri (1789-1980)*, Istanbul 1995, pp.33-183; Erdogan, Mustafa: *Türkiye'de Anayasal Gelişmeler ve Siyaset*, Ankara 1997.

deputies depended on the consent of the Sultan. Moreover, the laws that had been accepted by both assemblies had to be approved by the Sultan. The responsibility of the government before the parliament was not clearly defined. The Sultan was authorized to dissolve the parliament. In 1909 some amendments were made to the Constitution of 1876 to construct a constitutional monarchy, thereby limiting the powers of the Sultan and transforming the Constitution into a genuine constitutional monarchic constitution.

By 1921, the Turkish Grand National Assembly (TGNA), in the midst of the National Salvation War accepted a new constitution. The Constitution of 1921 is a short but politically important document. The most important rule of this constitution is the principle of national sovereignty (Art.1). Moreover, the constitution declared that the legislative and executive powers were combined within the TGNA. Generally, it is accepted that the Constitution of 1921 founded a "government of an assembly". After the modifications in 1923, a new model for founding government in accordance with the development of a parliamentary governmental system was adopted. On the other hand, important parts of the Constitution of 1921 were about the provincial government. In this context, the Constitution has adopted the principles of administrative decentralization and local democracy. By the constitutional modifications of 23rd October 1923, it was declared that "The governmental system of Turkish State is the Republic". It was also accepted that the President of the Republic would be elected among the members of the TGNA for one term. One interesting aspect of this period is that the Constitution of 1876, having not yet been abolished, was in force. That is probably why some principles of fundamental rights and freedoms, as well as judicial power were not addressed in the new constitution.

In 1924 a new Constitution was adopted because it was agreed that the constitution of 1921 insufficiently addressed the foundation of the state and the regulations of rights and freedoms. The Constitution of 1924 founded a mixed governmental system combining the assembly government and the parliamentary system of government. According to the Constitution, only the TGNA could represent the Turkish Nation and only it could use the right of sovereignty on the name of the Nation (Art. 4). Legislative and executive powers were vested in the Assembly (Art. 5). The Assembly could always control the government, but the government had not been authorized to dissolve the Assembly. Nonetheless, some other elements of a parliamentary system took place in the Constitution. In periods when the Constitution of 1924 was in force it appeared that the governmental system was increasingly being transformed into a parliamentary system. Being a rigid Constitution, while accepting the principle of the rule of the Constitution, it had not reserved any place for the judicial control over the correspondence of the laws to the Constitution. The Constitution generally regulated the rights and freedoms of the individual except some social rights that had not

even appeared in contemporary Western constitutions, but it had not clarified the extent of the limitations that could be made by the Assembly. This was making possible an extreme constraining of rights for the majority of the Assembly. In 1928, the provisions that "The religion of Turkish Sate is Islam" and the "application of the Shariah laws" were taken out. The principle of secularism was added to the Constitution in 1937.

A primary factor in the development of the Constitution of 1961 was the fact that, the Constitution of 1924, which was mainly exercised in the period of single party ruling, was adopting a majoritarian democracy and was deprived of the insurance that could be taking place in a multiparty system. In that system, the institutions and balances allows the minorities in opposition to become majority were insufficient. The Constitution provided for majority-based democracy rather than a pluralist and participatory democracy. For example, it did not apply any constraints to the majority of the parliament; the legislative possibilities of controlling the government were insufficient; the opposition was not endowed with democratic and egalitarian functioning; and basic rights and freedoms were not sufficiently assured.[2] While the judicial control of the Constitution and accordance of the issued laws was not being recognized, thereby ignoring one of the most significant institutional conditions in terms of the rule of law and the protection of rights and freedoms, some anti-democratic decrees issued by the majority of the Assembly destroyed the relationships of the government and the opposition. This in turn brought about the strengthening of outside opposition and the emergence of student demonstrations, preparing the way for the May 27th military intervention.[3] Another reason for the May 27th Revolution was that during the ruling of Democratic Party the military-civil officials and intellectuals had lost some of their social and political power. Then, in the realization of the May 27th military coup, the contribution of those strata was very important.

2 Tanör, *Osmanlı-Türk Anayasal Gelişmeleri,* p. 300.

3 For some debates on this issue see: Tanör, *Osmanlı-Türk Anayasal Gelişmeleri,* pp.303-304; also for the factors preparing the May 27th, 1960 coup see: Hale, William: *Türkiye'de Ordu ve Siyaset: 1989'dan Günümüze*, (Translated by: Ahmet Fethi), İstanbul 1996, pp.100-108.

After the military coup, a Constituent Assembly was organized to draft a new constitution. The constitution made by this assembly was accepted by people in a referendum held on July 9th, 1961.

In the chapter on the general principles of the 1961 Constitution, a rigid code, it was emphasized that Turkish Republic is a national, democratic, secular and social Law State devoted to the principles pointed out at the beginning. The 1961 Constitution has clearly accepted the supremacy and binding force of the Constitution (Art. 8), and in the context of applying it, has founded the Constitutional Court to control the compatibility of the issued laws with the Constitution. On the other side, as a requirement of being a law state the Constitution, which has subjected all administrative deeds and affairs to judicial review, also founded the Supreme Council of Judges in order to assure judicial independence. The Constitution has also given place to "the principle of natural judgement" as well as principles concerning crime and punishment in this context. According to the Constitution, “Sovereignty is vested in the Turkish Nation without reservation or condition. The Nation shall exercise its sovereignty through the authorized organs as prescribed by the principles laid down in the Constitution” (Art. 4). The Constitution has adopted the separation of powers in terms of the relationships of legislation and execution, and the parliamentary governmental system in terms of the system of checks and balances. In this framework, a bicameral system has been constituted composed of the National Assembly and the Republic Senate. Furthermore the Constitution, in terms of the division of power, has adopted the principle of local government before the central government as well as some autonomous public institutions such as universities and the administration of radios and televisions. In order to develop the pluralist structure of society, the Constitution has regulated the political parties that were regarded as "indispensable elements of the democratic political life", by legally guaranteeing them. It also gave place democratically to union activities, the freedom of founding associations and public professional foundations, protecting them by certain legal guarantees. In addition to its strengthening and extending classical individual rights and freedoms as well as political rights, one of the most progressive aspects of the 1961 Constitution was its early regulation of social rights. It also brought some criteria such as "being appropriate to the spirit of Constitution" and "not conflicting with the essence of freedom", and charged some tasks upon the state in order to realize the social rights in practice. Moreover, it gave place to other regulations required by a social state. Given the principles and rules it issued, it can be said that the main aim of the 1961 Constitution was to construct a plural democracy.

On March 12th, 1971 a military memorandum was issued to the government for its inability to assure public order and cope with the increasing terrorism, to demand a solution with an “above-party” perspective. In the interim pe-

riod[4], lasted until 1973, the Constitution was modified twice. Through these revisions, which radically contrasted the underlying philosophy of the 1961 Constitution, the provision of general protection concerning constitutional fundamental rights and freedoms was transformed into an item of general constraining and the reasons to constrain were duplicated. Additionally, the executive power was strengthened, the autonomy of university was narrowed down, the constitutional and executive judicial reviews were restricted, and the natural way of judgment was replaced by the way of legal judgment law. The Courts of the State Security and the Military Supreme Executive Courts were founded, and the right of the state officials to found unions was abolished. In this constitution the regulations strengthening the executive power were intended to adjust an important weakness of the 1961 Constitution, which, in contrast to the contemporary developments, had left the executive authority powerless. Nevertheless, the constraints placed upon the independence of the courts and basic rights and freedoms represented backwardness from what the 1961 Constitution had provided the Turkish constitutional system. As a matter of fact, the 1982 Constitution has maintained this tendency with more limitations on independence of courts, judicial review of the executive organ and the fundamental rights and freedoms.

II. The Main Features of 1982 Constitution

The 1982 Constitution[5] was made by a Constituent Assembly composed of an Advising Assembly, which was constituted by the way of appointment, and the National Security Council, after the military coup realized by the Turkish Military Forces on September 12th, 1980 through a chain of command and imperative. The apparent reasons for the military coup were anarchy, terrorism, separatist activities, increasingly bad economic conditions, and the incapability of the government to cope with all these problems.[6] The Constitution was pre-

4 For more on the discussions about the reasons preparing this period, which began on March 12th, 1972, the features of the interim period and constitution see: Hale, *Türkiye'de Ordu ve Siyaset,* pp. 160-184; Tanör, *Osmanlı-Türk Anayasal Gelişmeleri,* pp. 344-351.

5 For more on debates about the regulations of the 1982 Constitution, see: Özbudun, Ergun: *Türk Anayasa Hukuku*, Ankara 1993; Atar, Yavuz: *Türk Anayasa Hukuku*, Konya 2000.

6 On the debates about the reasons for the September 12th, 1980 military coup see: Hale, *Türkiye'de Ordu ve Siyaset,* pp. 205-208; Karatepe, Şükrü: *Darbeler, Anayasalar ve Modernleşme*, İstanbul 1993, pp. 246-251; Yazıcı, Serap: *Türkiye'de Askeri Müdahalelerin Anayasal Etkileri*, Ankara 1997, pp.144-154.

pared[7] and accepted within the Assembly, and was accepted by the people by a referendum on December 7th, 1982.

Several factors contributed to the need for a new constitution. For the military, the transformation of the separation of powers created a conflict of power, public institutions misused their autonomous positions, political parties acted irresponsibly and encouraged separatist and destroying activities, partisanship was in force in administration; and the legislative organ was obstructed. The governmental system that was constructed by the 1961 Constitution did not function, so the ability of political decision-making and producing new policies was weakened so that it made the regime crisis more and more heavy. The freedoms brought by the 1961 Constitution were more than were necessary, and the state authority was shaken while being left defenseless.[8] Thus, the 1961 Constitution was blamed as the source of various social, political and economic problems. While the criticisms of the functioning of the governmental mechanism were generally correct, it wouldn't be an accurate evaluation to regard Constitution as solely responsible for the weakening of state authority. The effective functioning of a government system as outlined in a constitution also depends on corresponding political factors. In the mid-seventies, however, the Turkish two-party system began to transform into a multi-party system, and this consequently resulted in coalition governments. In this context, the premature culture of "consensus" among the political parties brought about unfavorable conditions for the functioning of the system and brought about serious obstructions both in legislative and executive spheres.

In anticipation of the criticisms made to the 1961 Constitution, the 1982 Constitution was composed of a Preamble and seven parts. These parts are titled as follows: first, "General Principles", second, "Basic Rights and Duties", third,

7 During the codification of the 1982 Constitution, opinions and proposals of universities, high judicial organs, and public institutions about the constitution were taken and presented to the Constitutional Committee of Advising Assembly. These propositions were proliferated among themselves ranging from adopting the pluralist democratic approach of the 1961 Constitution, to even going beyond the tendency of the existing 1982 Constitution in restricting freedoms and strengthening the state authority. For the opinions and proposals of the institutions in question, see: Gürbüz, Yaşar: *Anayasa-Görüşler-Taslak*, İstanbul 1982, pp. 27-312.

8 On this issue, see: Yayla, Yıldızhan: *Anayasa Hukuku Ders Notları*, İstanbul 1985, pp.81-82; Tanör, Bülent: *İki Anayasa (1961-1982)*, İstanbul 1986, pp.97-99; Özbudun, *Türk Anayasa Hukuku*, pp. 24-25,27; Soysal, Mümtaz: *100 Soruda Anayasanın Anlamı,* İstanbul 1986, pp.129-132; Özçelik, Selçuk: *Anayasa Hukuku Dersleri*, İstanbul 1983, pp. 313-318; Kuzu, Burhan: *1982 Anayasasının Temel Nitelikleri ve Getirdiği Yenilikler*, İstanbul 1990, pp. 1-19.

"Fundamental Organs of the Republic", fourth, "Financial and Economic Provisions" and the reminder, "Miscellaneous Provisions". The Constitution is rigid compared to the 1961 Constitution. It is a long and casuistic constitution composed of 177 articles (apart from 16 provisional articles some of that are no longer in force) some of which suggested a transitional period. The major reason for the relative length of the Constitution is the attempt to give long explanations to the articles restricting freedoms, and to put almost a constitutional article for each problem. Regarding the freedom-authority balance, the 1982 Constitution has increased the weight of authority, and tried to protect state against individual. The Constitution also issued some provisions to overcome the obstructions to the functioning of the parliament, which is usually considered a positive aspect. But, while the Constitution strengthened the executive organ, it favored some units of executive power excessively and increased the authorities of the President on a way incompatible with a parliamentary regime. On the other hand, given its initial regulation of the political parties, associations, foundations, unions, and the provisions it brought about political participation, the Constitution has suggested a less participatory democratic model compared to the 1961 Constitution. Through constitutional changes made in 1995, regulations were made regarding these issues that might be considered more democratic.

The 1982 Constitution, after stating the provision "The Turkish State is a Republic" (Art. 1), enumerates the characteristics of the Republic as follows: "The Republic of Turkey is a democratic, secular and social State governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble" (Art. 2). Moreover, the Constitution has given place to the principle of equality before the law (Art. 10) in the part on the general principles.

The task of the state of fulfilling the three fundamental legal functions, legislative, executive and judicial functions were given by the Constitution to three corresponding state organs: Legislation to the TGNA; execution to the President of the Republic and the Council of Ministers; and judicial power to independent courts. The Constitution has adopted a moderate separation of powers between the legislative and executive organs based upon their cooperation, and the principle of independence of the courts.

According to the Constitution, which suggested a single-assembly system, legislative power is vested in the Turkish Grand National Assembly on behalf of the Turkish Nation. This power cannot be delegated (Art. 7). The primary tasks of the TGNA are to make law, to review the executive organ,

to give to the Council of Ministers the authority to issue decisions having the force of law, to evaluate the convenience of the confirming of international contracts, and to elect the President (Art. 87, 101). "The TGNA shall be composed of five hundred fifty deputies elected by universal suffrage" (Art. 75). Members of the Parliament shall not be liable for their votes and statements concerning parliamentary functions, for the views they express before the Assembly, and they shall have parliamentary immunity (Art. 83). Elections for the Turkish Grand National Assembly shall be held every five years. The Assembly may decide to hold a new election before the termination of this period, and new elections may also be decided upon according to a decision, taken in accordance with the conditions set forth in the Constitution, by the President of the Republic (Art. 77). The principles of democratic elections have been accepted by the Constitution. According to the Constitution, "elections and referenda shall be held under the direction and supervision of the judiciary, in accordance with the principles of free, equal, secret, and direct, universal suffrage, and public counting of the votes" (Art. 67). The determination of electoral system was left to the law. According to the Constitution however, "The electoral laws shall be drawn up in such a way as to reconcile the principles of fair representation and consistency in administration" (Art. 67). As for the Electoral Law of Representative, while by initial regulation it has been decided to be a mixed electoral system, in the amendments made to this Law in 1995, the d'Hondt version of proportional representation with a national quotient was accepted.[9]

According to the Constitution, "Executive power and function shall be exercised and carried out by the President of the Republic and the Council of Ministers in conformity with the Constitution and the law" (Art. 8). The executive organ within the parliamentary governmental system[10] as accepted

9 The Mixed electoral system, which was accepted in 1983 and remained in force until 1995 with some modifications, was amended in 1995. Thus instead of narrow constituencies which gave a mixed nature to the electoral system, each province was principally regarded a constituency (large constituency system), the barrages in constituencies which were quite high were completely abolished, and an end was put to the practice of quota candidateship. The Turkish electoral system in force is the d'Hondt version of proportional representation with a national quotient. The general nation-wide barrage, however, has not been abolished. Therefore, in spite of the fact that the 10 percent barrage is quite high, it is more proper to regard the d'Hondt version of national quotient as proportional representation, instead of a mixed system.

10 The 1982 Constitution has accepted the elements of a parliamentary governmental system which required the responsibility of the government before the parliament; the election of the President by the Assembly, his political irresponsibility and the

by the Constitution has a dualistic body composed of the President of the Republic and the Council of Ministers. For the Constitution, the Assembly elects the president for seven years and he acts neutrally in his task. His main duties are to publish the issued laws and in some cases return them, to call new elections for the Turkish Grand National Assembly, to appoint the Prime Minister and the ministers, to accredit representatives of the Turkish State to foreign states and to receive the representatives of foreign states to the Republic of Turkey, to select members of the high judicial organs, to appoint the members of the Higher Education Council, to appoint rectors of universities, and to appeal to the Constitutional Court for the annulment of laws (Art. 104). The President is politically irresponsible and the treatments acted are subject to the rule of counter-signature, except those that were acted by him alone. The Council of the Ministers is composed of the Prime Minister and the ministers. The Ministers are appointed and dismissed by the President on the proposal of the Prime Minister (Art. 109). The Council of Ministers is established by the appointment of the President and takes the office. Having taken a vote of confidence the government goes on working. The Council of the Ministers is responsible altogether for the execution of the general policies of the government, and each minister is also individually responsible for the affairs within the limit of his authority and the deeds and procedures of those who work under his authority. The Council of Ministers has the authority to issue decrees having the force of law.

According to the Constitution, "Judicial power shall be exercised by independent courts on behalf of the Turkish Nation" (Art. 9). Judges shall be independent in the discharge of their duties, having the security of tenure. The Supreme Council of Judges and Public Prosecutors has been suggested to ensure judicial independence and guarantees for the judge. However it is criticized for being incompatible with the rule of law and the independence of the judiciary because there are somebody who are not judges in the Council and its decisions are immune from judicial review. The Constitution has suggested, as court of appeal, Council of State in the administrative sphere; High Court of Appeals in the sphere of judicial law, the Military High Court of Appeals and the High military Administrative Court of Appeals in the military judicial sphere, Jurisdictional Conflict Court in order to solve the disputes between courts of justice and administrative and military courts

obedience of his affairs to a counter-signature; and the authority of the President to renewal the elections in the constitutional conditions.

concerning their jurisdiction and decisions, the Audit Court for the financial review of the administration, and finally the Constitutional Court for reviewing the compatibility of the laws to the Constitution.

The Constitutional Court was first established by the 1961 Constitution and adopted by the 1982 Constitution. It was recommended to be a special court composed of eleven regular members and four substitute members. The members are appointed by the President from amongst the proposed candidates. Its fundamental task is to review the compatibility of the norms with the Constitution.[11] The Constitution has defined the norms which are subject to review as laws, the Rules of Procedure of the Turkish Grand National Assembly, and constitutional amendments only in respect of their form.[12] As a method of appealing to the Constitutional Court, both principal proceedings and incidental proceedings have been accepted. The norms, except the constitutional amendments, which are reviewed only in respect of form, are reviewed in respect to both form and substance. Alongside the provisions of the Constitution, international conventions on human rights and the general principles of law are the criteria norms to be taken as substance. The decisions of the Constitutional Court are final and binding.

In the sphere of constitutional review, the 1961 and 1982 Constitutions have adopted, the methods of a centralized review system in terms of the courts authorized to review, and "corrective system" in terms of the consequences of the review. In the Turkish Constitutional judiciary, however, the way of "constitutional complaint" has not been opened to those whose rights are violated by public institutions.

While the 1982 Constitution's regulations concerning rights and resembles that of the 1961 Constitution in respect of content and system, it differs in respect to the content of the freedoms and their restrictions. Having considered respect for human rights as one of the main characteristics of the state, the 1982 Constitution has regulated the rights of the individual, social and economic rights, and political rights in parallel with the international human right contracts. It has adopted a positivist approach in the regulation of freedoms (Preamble, par. 8), and in respect to limiting the fundamental rights and

11 The Constitutional Court also has some other tasks such as the legal and financial review of political parties, and review of some decisions of the parliament.

12 On the other hand, the substantial review of the constitutional amendment is not accepted, and the decrees having force of law which are issued at states of emergencies, the laws of the National Security Committee period, and the Laws of Revolutions have been kept completely immune from judicial review.

freedoms by law, it did not suffice with explaining the "special reasons for limiting" each article concerning the rights and freedoms, but it also gave place to general reasons for limitations available for all freedoms (Art. 13). This did not take place in the 1961 Constitution. Moreover, there are some other limitations made directly by the Constitution. Because of this regulation, the 1982 Constitution has been criticized for favoring the state over individual, and destroying the individual-authority balance in favor of authority. The rules to be pursued in restricting the freedoms, in other words, the limits of restrictions are stated in the Constitution as follows: "Fundamental rights and freedoms may be restricted by law, in conformity with the letter and spirit of the Constitution... General and specific grounds for restrictions of fundamental rights and freedoms shall not conflict with the requirements of the democratic order of society and shall not be imposed for any purpose other than those for which they are prescribed."

III. The Criticisms of the 1982 Constitution

Since its inception, the 1982 Constitution has been criticized by lawyers, political scientists and politicians, in fact, by almost all segments of society. These criticisms are that:

1) The making of the Constitution was not democratic.
2) The state was protected against individual.
3) It adopted a less pluralist and participatory democratic model than the 1961 Constitution.
4) It involved official ideology.
5) It is a casuistic and extremely rigid constitution.
6) It is poorly worded.
7) It severely restricts the fundamental rights and freedoms, and the insurances it brings are insufficient.
8) There are many limitations on political parties, associations and labor unions.
9) The Presidency is strengthened in a way that is incompatible with a parliamentary system;

10) The situations under which may be declared a state of emergency or martial law are extended and the decrees having force of law during periods of martial law and states of emergency have been kept immune from judicial review.

11) The acts of the President of the Republic in his own competence and the decisions of the Supreme Military Council and the High Council of Judges and Prosecutors are outside the scope of judicial review.

12) Centralism has been increased and the principle of local administration weakened.

13) The autonomy of the universities has been abolished.

14) The structure and constitution of the High Council of Judges and Prosecutors negatively influences the independence of courts.

15) The principle of natural judgement has been transformed into a legal judgement insurance, and allows the founding of the State Security Courts and martial courts in a way incompatible with the principle of natural judgement.

IV. Amendments in the 1982 Constitution

As it appears, although the criticism made about the 1982 Constitution are numerous, and almost all political parties agree on the necessity of changing it,[13] only limited changes have been made, and some attempts have failed because of the lack of consensus in political parties and other reasons external to the parliament.[14] The constitutional amendments made in various dates since it

13 According to a study (see: *TBMM Aylık Bülteni,* March, 1993, Number 22, pp. 18-22) made on the proposals that the political parties represented in the TGNA presented about which articles of the 1982 Constitution they wanted to be modified, most political parties wanted to change more than an half of the articles of the Constitution.

14 Apart from the constitutional amendments mentioned above, in 1992 an attempt to change the Constitution was made but failed. After the general elections of October 29th, 1991, True Path Party (DYP) and Social Democratic-Populist Party (SHP) set a coalition. In the contract of this coalition they assigned they declared that "1982 Constitution fell behind the requirements of the society; "a full democratic, pluralist and contemporary constitution based on the rule of law should be prepared with the

has been put in force (in the years 1987, 1993, 1995, and 1999) have been generally positive, and aim at more democratization. However, the necessary fundamental amendments concerning the rights and freedoms have not been yet made. Some of the most important changes that have been made are as follows:[15]

The Amendment of the Preamble of the Constitution: By the amendment in the Preamble of the Constitution, the phrase "sacred Turkish State" in the first paragraph has been replaced by "great Turkish State" and the sentences praising the 1980 military coup were deleted[16] from the text in effort to make the Constitution more democratic.[17]

reconciliation of political parties, other related institutions, and the people." Thus, the coalition parties, DYP and SHP, in May-June 1992 prepared a proposal of decree, and introduced it to the discussion of the political parties and public opinion, but the constitutional amendment could not be achieved in this date because the required consensus could not be assured. Some amendments taking place in this outline could be made only in 1995. On the other hand, the temporary 15th article of the 1982 Constitution, which had been tried to be amended by the attempt in 1995, and which provided judicial immunity for the military administrators of the 12 September period, again, could not be achieved because sufficient voting majority could not be gathered. At the beginning of 2001, the parties composing the coalition government, i.e., Democratic Leftist Party, Nationalist Action Party and Motherland Party were in agreement with the opponent Virtue Party in a limited amendment of the constitution, which consequently resulted in failure. According to this failed agreement, closing political parties would be harder, the period of Presidency would be longed and his authorities revised, and the judicial review of the laws issued at the 1980 military administration would be possible.

15 See: 17.51987 dated and 3361 numbered Law (*R.G.* [Official Gazette] 18.5.1987, Number 19464 repeated)

8.7.1993 dated and 3913 numbered Law (*R. G.* 10. 7. 1993, Number 21633).

3.7.1995 dated and 4121 numbered Law (*R.G.* 26.7.1995, Number 22355).

13.8.1999 dated and 4446 numbered Law (*R.G.* 14.8.1999, Number 23786).

18.6.1999 dated and 4388 numbered Law (*R.G.* 18.6.1999, Number 23729 repeated).

16 23.7.1995 dated and 4121 numbered Law (*R.G.* 26.7.1995, Number 22355)

17 For the reason, see: *TBMM Tutanak Dergisi,* D: 19, Year of Legislation: 4, p.: 861

Freedom of Association: By the amendment made in the 33rd article of the Constitution concerning the freedom of association,[18] the third paragraph "banning the associations to participate in political activities and to cooperate with labor unions, public professional organizations and foundations" was abolished. And relatively more democratic regulations concerning the procedures of dissolving associations and retaining them from activities were made by increasing the judicial insurances. This amendment was also important softening the restrictions upon civil society institutions, which are the most important elements of the contemporary democracy.

Privatization: Privatization was added as paragraphs to the 47th article of the Constitution regulating "Nationalization", and thus gaining a constitutional status.[19] Thus, the privatization of the companies and properties present at hands of the state, public economic enterprise, and other corporate personalities, and the adjudication or transferring of the enterprises and services made by those personalities to real and corporate personalities on the base of private legal contracts would be possible by principles and procedures determined by law. Since there was not any impeding provision in the Constitution some public business had been privatized before this constitutional regulation was made, but the debates over their compatibility with the Constitution has never ceased. By this regulation, privatization has gained a clear constitutional base.

Recognizing the rights of public officials to establish unions and hold collective bargaining meetings with the administration: By the paragraph added to the 53rd article of the Constitution, the right of the officials "to form unions and hold collective bargaining meetings with the administration in accordance with their aims" has been accepted.[20] This right, however, did not include the right of strike, and collective negotiations held between the public officials and the administration have no binding character, rather, the reports of the negotiations are presented to the Council of Ministers for making appropriate legal and administrative regulations. As it is seen, this possibility that has been granted recognition has nothing to do with the collective contract.

18 23.7.1995 dated and 4121 numbered Law (*R.G.* 26.7.1995, Number 22355.

19 13.8.1999 dated and 4446 numbered Law (*R.G.* 14.8.1999, Number 23786).

20 23.7.1995 dated and 4121 numbered Law (*R.G.* 26.7.1995, Number 22355).

The Reduction of the Voting Age: With an amendment made in 1995 the voting age w was addressed According to article 67/3, "all Turkish citizens over 18 years of age shall have the right to vote in elections and to take part in referenda." Thus the voter age has been amended to eighteen in parallel with practices of other democracies.[21]

The Voting of Turkish Citizens Living in Foreign Countries: In order to make Turkish citizens living outside Turkey vote in the elections in Turkey, this statement has been added to the second paragraph of the 67th article:[22] "However, the conditions under which the Turkish citizens who are abroad shall be able to exercise their right to vote, are regulated by law." While the Constitution allowed such voting methods as via attorneyship, letters, voting in the Turkish embassies and some other possible methods of voting by default, there has not been made any regulation since the Constitution was amended in 1995. Before that times, millions of Turkish citizens living outside the country, were deprived of the possibility of voting in elections.

The Voting of the Prisoners: The following statement was added to the fifth paragraph of the 67th article of the Constitution:[23] "The Supreme Election Council shall determine the measures to be taken to ensure the safety of the counting of votes when detainees in penal execution institutions or prisons exercise their right to vote; such voting is done under the on-site direction and supervision of an authorized judge."

Adopting the "Principles of Fair Representation and Stabilitiy in Administration" for the Laws of Elections: The provision "The electoral laws shall be drawn up in such a way as to reconcile the principles of fair representation and consistency in administration" was added to the 67th article of the Constitution,[24] thereby regulating the electoral system and other elec-

21 23.7.1995 dated and 4121 numbered Law (*R.G.* 26.7.1995, Number 22355).

22 23.7.1995 dated and 4121 numbered Law (*R.G.* 26.7.1995, Number 22355).

23 23.7.1995 dated and 4121 numbered Law (*R.G.* 26.7.1995, Number 22355).

24 23.7.1995 dated and 4121 numbered Law (*R.G.* 26.7.1995, Number 22355).

toral rules. This provision was added in an attempt to balance the principles of "equality" and "utility".

Amendments Concerning Political Parties: By the amendments made on the 68th and 69th articles of the Constitution, which had imposed extreme restrictions on political activities and parties, the constitutional framework of the political parties was re-worked in effort to make it more democratic.[25]

The important amendments and additions in the 68th article regulating "Forming Parties, Membership and Withdrawal from Membership in a Party" are those: 1) The age of membership in the parties was reduced from 21 to 18. 2) The "deeds" of the political parties, as well as their regulations and programs, should not be contrary to the principles declared in the Constitution. 3) The members of higher education were allowed to be members to the political parties and to take tasks within the central organs of the parties. 4) The students of the higher education were allowed to join the political parties. 5) The State shall provide the political parties with adequate financial means in an equitable manner. 6) The provision that prohibited political parties to found sub-institutions was abolished.

The important amendments and additions in the 69th article regulating "Principles to be observed by Political Parties" are as follows: 1) The activities, internal regulations and operations of political parties shall be in line with democratic principles. 2) The prohibition upon the political parties of founding, or cooperating with associations, labor unions, foundations, co-operatives, and professional institutions was abolished. 3) The principles concerning the financial review of the political parties were regulated in more detailed form. 4) A new regulation about dissolving political parties was made, and it made dissolution possible in the event that "the statute and program of a political party should violate the provisions of the Constitution" or "the party in question has become a center for the execution of unconstitutional activities". 5) A party, which has been dissolved permanently, cannot be founded under another name. The members, including the founders, of a political party whose acts or statements have caused the party to be dissolved permanently cannot be founders, members, directors or supervisors in any other party for a period of five years from the date of publication in the official gazette of the Constitutional Court's final decision and its justification for permanently dissolving the party. 6) The principles concerning the electoral expenditures of the political parties and candidates were suggested to be regulated by law.

25 23.7.1995 dated and 4121 numbered Law (*R.G.* 26.7.1995, Number 22355).

Increasing the Number of Deputies: The Constitutional provision of Art. 75 regulating the establishment of the TGNA was amended two times in 1987 and 1995[26], and the number of the deputies was first increased to 450, then to 550. However, it is unlikely that this increase will bring about the changes, which are the rationale for this amendment.[27]

New Regulations About the Loss of Membership of the Parliament: The 84th article of the Constitution entitled "Loss of Membership" was regulated again and amended.[28] Important provisions of these amendments are: 1) The loss of membership, through a final judicial sentence or deprivation of legal capacity, no longer be voting in TGNA, shall take effect after the final court decision in the matter has been communicated to the plenary of the Turkish Grand National Assembly. 2) The provision inhibiting a deputy, who resigned from his party from participating in a new party, taking task in the Council of Ministers, or being made candidate, was abolished from the text of the article. The former text was aimed at securing the political ethic by way of constitutional regulation, which was contrary to democracy. This meaningless provision which, indeed, was not working, and was being made ineffective by tricks, was rightly abolished from the Constitution. 3) The provision suggesting the dropping of memberships of all deputies of a permanently dissolved political party was amended and replaced by the provision suggesting the dropping of memberships of only those who caused the permanent closing of a party through their declarations and activities.

Local Governmental Elections: A statement about the election period of local administration was added to the third paragraph of 127th article of the Constitution.[29] According to the new regulation, "the elections for local administrations shall be held every five years... However, general or by-elections for local administrative bodies or for members thereof, which are

26 17.5.1987 dated and 3361 numbered Law (*R.G.* 18.5.1987, Number 19464 repeated); 23.7.1995 dated and 4121 numbered Law (*R.G.* 26.7.1995, Number 22355).

27 Political parties have always felt difficulties in electoral periods while preparing their lists of candidates. Obviously this problem seems to have played important role in overcoming the difficulty through increasing the number of the deputies.

28 23.7.1995 dated and 4121 numbered Law (*R.G.* 26.7.1995, Number 22355).

29 23.7.1995 dated and 4121 numbered Law (*R.G.* 26.7.1995, Number 22355).

to be held within a year before or after the general or by-elections for deputies, shall be held simultaneously with the general or by-elections for deputies." But while this regulation was intended for the reasons[30] of not introducing the country frequently into an electoral atmosphere, decreasing the costs of the elections, and precluding the governmental crisis which may arise out of possible defeat of the power parties in the local elections made before the general deputy elections, such an ambiguous regulation would, in practice, bear a risk of destroying the power-opposition relationship and leading to more instability.

In order to facilitate arbitration to settle the disagreements that arise from conditions and contracts, under which concessions are granted concerning public services, a statement has been added to the 125th article of the Constitution, which regulates the "recourse to judicial review".[31] According to this article: "Recourse to judicial review shall be available against all actions and acts of the administration. National or international arbitration may be suggested to settle the disagreements that arise from conditions and contracts under which concessions are granted concerning public services. International arbitration can only be applied in the case of the disagreements which involve foreign components." Moreover, by the amendment made on the second paragraph of the 155th article[32] regulating "The Council of State", the task of the Council of State "to examine the conditions and contracts under which concessions are granted" has been limited "to give its opinions on the conditions and contracts under which concessions are granted within two months."

Breaking the Monopoly of the State to construct and operate Radio and Television Stations: The 133rd article of the Constitution concerning "Radio and Television Administration and News Agencies" was amended[33] and the State monopoly over these institutions was abolished. According to the new regulation "Radio and television stations shall be established and administered freely in conformity with rules to be regulated by law" (Art. 133/1). The amendment of this provision of the Constitution was realized af-

30 For the reasons see: *TBMM Tutanak Dergisi,* D.19, Legislation Year: 4, P. Number: 861.

31 13.8.1999 dated and 4446 numbered Law (*R.G.* 14.8.1999, Number 23786).

32 13.8.1999 dated and 4446 numbered Law (*R.G.* 14.8.1999, Number 23786).

33 8.7.1993 dated and 3913 numbered Law (*R. G.* 10. 7. 1993, Number 21633).

ter certain radio and television programming began to be broadcast despite the Constitutional prohibition. As technological developments emerged in this area (broadcasting from outside Turkey via satellites and other new technologies) and social change occurred due to the public interest in these broadcasts) this constitutional amendment became inevitable.

Abolishment of the Political Prohibitions upon the Labor Unions and the Public Professional Organizations: The 52nd article of the Constitution entitled "Activities of Labor Unions" (but whose content regulated the prohibitions on the labor unions) was abolished. The 135th and 171st articles were amended;[34] thereby the lifting the prohibition upon labor unions and public professional organizations "to cooperate with political parties and associations".

Discharging Military Members from the Courts for Security of the State: In some decisions against Turkey taken by the European Human Rights Court, whose judicial authority is recognized by Turkey, the Courts for Security of the State were not recognized as "independent courts" because they included military members. This fact played a significant role of amending the 143rd article. The 143rd article of the Constitution was amended, discharging the military members of the Courts for Security of the State and the principle of appointing all judges by the civil judiciary has been accepted.[35]

Amendment of the Constitution: Another Constitutional amendment made by the Law numbered 3361 was concerned with "Amendment of the Constitution". Through this new regulation, the procedure for changing the Constitution was highly amended. In the new regulation the subtitle of the 175th article of the Constitution has been transformed into the phrase "Amendment of the Constitution, Participation in Elections and Referenda", and it is difficult to explain systematically why in this article "participating elections" is mentioned. The last paragraph of this article (Art. 175) stating "Every measure including fines shall be taken to secure participation in referenda, general, by-elections and local elections", should not be located here,

34 23.7.1995 dated and 4121 numbered Law (*R.G.* 26.7.1995, Number 22355).

35 18.6.1999 dated and 4388 numbered Law (*R.G.* 18.6.1999, Number 23729 repeated).

but in the 67th article regulating "the right to vote".[36] After the amendment in the 175th article of the Constitution there has not been a change in terms of proposing Constitutional amendment. By the amendment, "the quorums required for decisions" which had been requiring 2/3 of full members of the Assembly, has been suggested in two different forms as 3/5 and 2/3 of the membership. Moreover, the voting was required to be secret. By the amendment, the authority to confirm the constitutional changes is shared between the President and the people. Thus, if a proposal for constitutional change admitted by 3/5 of the Assembly, the President could return it to the Assembly or present it for popular vote. If the change is accepted by 2/3 or more majority of the Assembly, the President can return it, can present it to the people, or can confirm and put it into force. In case of a return, the Assembly has to secure a 2/3 majority. Laws related to Constitutional amendment, which are submitted to referendum, shall require the approval of more than half of the valid votes cast.

Abolishing the Political Prohibitions: The provisional 4th article of the Constitution, which had placed certain political prohibitions upon some politicians of the period before September 12th, 1980, has been abolished by the Constitutional amendment made by the Law numbered 3361, dated 1987, but in order to be confirmed and put into force, this law was required to pass a popular vote.[37] As a matter of fact, according to the provisions of the "The Law of Submitting Constitutional Amendments to Referendum" dated 1987 and numbered 3376, abolishing the provisional 4th article of the Constitution has been accepted by people.[38]

V. CONCLUSION

The 1982 Constitution has made the exercise of the most fundamental democratic freedoms, freedoms of expression and association, almost impossible. It precluded the development of a pluralist democracy and civil society, tried to constitute a single-type social and political structure, and destroyed the authority-freedom balance against individual by extremely restricting fundamen-

36 On the other hand, it is obvious that this regulation also contradicts the Constitutional decree which states that: "Elections and referenda shall be held... in accordance with the principles of free, equal, secret, and direct, universal suffrage" (Art.67/2). See: Onar, Erdal: *1982 Anayasasında Anayasayı Değiştirme Sorunu*, Ankara 1993, p.183.

37 *R. G.* 18.5.1987, Number 19464 repeated.

38 *R. G.* 12. 9. 1987, Number 19572.

tal rights and freedoms. Additionally, it did not acknowledge the autonomy of the universities, and put extreme prohibitions upon political parties in contrast to the practices in the contemporary democracies and the criteria brought by the international covenants. It kept the regulations made during the 1980 military coup, outside the scope of judicial review, as well as the acts of the President of the Republic in his own competence, and the decisions of the Supreme Military Council and the High Council of Judges and Prosecutors. Furthermore, it weakened the independence of the courts and brought restrictions upon the judiciary.

The Constitution of 1982 increased centralism and weakened the power of local government and could not ensure openness in public administration. Having also allowed the establishment of the courts for security of the State and martial courts in a manner incompatible with the principle of natural judgement, the Constitution has actually weakened the civil administration. Therefore, in spite of its suggestion of "a limited and controlled democracy", the 1982 Constitution has proved that it cannot fulfill the requirements of a contemporary society, and cannot respond to social change.

There has been a focus on democratization in Turkey by internal and external groups.[39] However, in spite of reports addressing "the political dimensions of democratization, human rights and the rule of law" that also offer important proposals and advise in this direction, only limited steps have been taken towards democratization.

Turkey has entered into the process of candidateship to the European Union, and now must attain the standards of Western democracies including democratic constitutions, internal contracts, and the democratic criteria set up by the Council of Europe and the Organization for Security and Cooperation in Europe. Decisions of the European Court of Human Rights and the civil constitutional attempts made by democratic circles within Turkish society should be evaluated and appreciated. It is time for Turkey to create "a new democratic constitution based on human rights and the rule of law" through consensus of the parties, and broader social participation.

39 On these researches and reports, see: *TüSİAD "Türkiye'de Demokratik Standartların Yükseltilmesi- Tartışmalar ve Son Gelişmeler"*, Bülent Tanör (ed.), İstanbul 1999, pp.19-24.