

Turkish Constitutional Law and the European Union from a European Point of View

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I. Introduction²

Turkey's attempts to incorporate the "acquis" of Europe reach back to the middle of the 19th century. In the course of the "Tanzimat" period, the Ottoman Empire started a process of legal reform, of codification and restructuring the administrative and legal system.³ Like in other European countries, such as Spain or Italy, this process was effected by the adoption of foreign codes, e.g. the French penal and commercial codes. The structure of the Constitution of 1876 recalled other European constitutions, e.g. the ones of Prussia or Belgium, even some similarities with the Imperial Constitution of Germany 1871 may be stated. In 1924, the new Republic of Turkey shaped her constitutional system very close to the developments which have occurred in other European countries after World War I.

After World War II, Turkey again staid close to the international developments. Turkey was one of the first members of the United Nations as well as of the Council of Europe. Turkey ratified the European Convention on the Protection of Human Rights and entered the NATO early in the Fifties and thus inclined herself to the adoption of the main principles of law, acknowledged by the western European countries. When Turkey ratified the Agreement of Association with the EEC in 1961, a new constitution was adopted, which – until our days – is said to be the most modern constitution Turkey ever has had. Later, Turkey also ratified the UN and European Conventions for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and most of the other international human rights instruments.⁴

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Note: As far as internet sources are used as references, they may change from time to time. The sources used in this contribution have been active by 25 November 2001.

² See also Christian Rumpf, The Turkish Legal Order and Europe - Contribution delivered to a Project of the University of Milan/Italy (L'Europa di Domani verso l'Allargamento dell'Unione, 15 – 17 February 2001, Milano) (http://www.tuerkei-recht.de/Turkey_Europe.pdf).

³ See Christian Rumpf, Zur Entwicklung der türkischen Rechtsordnung seit der Reformperiode im Osmanischen Reich, Zeitschrift für Türkeistudien 12 (2) (Journal of Turkish Studies), pp. 199-223.

⁴ See also Christian Rumpf, The protection of human rights in Turkey and the significance of international human rights instruments, in: Human Rights Law Journal (Kehl), 1993, 14 (11-12), pp. 394-408.

Despite such positive steps, administrative and political practice remained behind the constitutional developments. It was not earlier than 1987 that Turkey acknowledged the jurisdiction of the European Commission and, in 1990, the European Court of Human Rights. Turkey hesitated until nowadays with ratifying the International Covenants on Civil and Political Rights as well as on Social and Economic Rights (signed in August 2000⁵, but not yet ratified). Further, no measures have been taken towards signature of the European Convention for the Protection of Minorities, though it is difficult to consider the signature of this Convention as a pre-condition for accession, as long as other member states of the EU have not yet signed and ratified this Convention. The jurisdiction of the European Court of Human Rights shows in many respects the deficiencies of implementation of human rights practices in Turkey.

On the other hand, many important steps to the adaptation of the legal and administrative systems have been taken, especially on the economic sector. After some constitutional amendments as well as reforms in the fields of commercial law, the Customs Union came into force with the beginning of 1996.⁶ This accelerated visibly the process of accession of Turkey to the EU and, especially, the process of reforms in the Turkish legal order.

Very few politicians and not more than one or two Turkish scholars defended the Constitution as it was. If, under the heading IV., we comment the amendments critically, we are aware, that objection would concern the method (there is no scholarly method, because this contribution has to be understood as a kind of preliminary report) more than the contents and the criticism. But we should emphasize that the quality of a Constitution does reveal itself by its text, but by interpretative practice. So we must be aware that the need for constitutional adaptation to modern constitutional standards as reflected in the European *acquis* does by far not end with the amendment of the text.⁷ Nonetheless, a well elaborated text helps better interpreting in good faith.

II. The Position of the EU in regard to the Turkish Constitution

For an evaluation of the steps which have been made or are to be made by the Turkish constitution-maker, the last decision of the EU-Council of Ministers seems to be a proper starting point.⁸ Of course, the European Charter of Fundamental Rights⁹ plays a decisive role when determining the adaptation of constitutional structures to the European *acquis*, though the Charter does only address the institutions of the EU, and

⁵ The “Covenants” have been signed on 15 August 2000 (<http://www.un.org.tr/25coretraties.htm>), but not yet ratified.

⁶ For more information see: Christian Rumpf, *Die Zollunion zwischen EU und Türkei*. RIW (Recht der internationalen Wirtschaft – Journal of International Commercial Law) 1997, pp. 46-53.

⁷ Cf. the very interesting booklet of Kemal Gözler, *Anayasa Degisikligi Gerekli Mi? 1982 Anayasası İçin Bir Savunma* (Is the amendment of the Constitution necessary? Defence of The 1982 Constitution), Bursa 2001.

⁸ For an overview on EEC/EC/EU-Texts on the accession process cf. “Enlargement: Preparation for Accession - Turkey's pre-accession strategy (<http://europa.eu.int/scadplus/leg/en/lvb/e40113.htm>.)

⁹ OJ, 18 December 2000, C364/1.

the member states only in the case that they implement EU law (Art. 51 of the EU Charter).

By the said decision, the so called „Accession Partnership“ between EU and Turkey has been enforced.

“Accession Partnership” is, in legal terms, not a satisfactory description for a relationship which is actually supposed to be enforced. It might even seem to be created to freeze the EU-Turkey relationships on the level which has been achieved until now. As a matter of fact, such “partnership” had already been installed with the Agreement of Association (1963), which is not an ordinary contract for cooperation, but an instrument envisaging accession within a period of time. A first step of enforcement had been made by the Additional Protocol, 1973. Thus, “Accession Partnership” does not mean anything else than the expression of the will by the side of the EU, to obey to an agreement concluded 40 years ago, but under new political conditions. This is not the place to question such new conditions, especially as laid down with the Copenhagen criteria. Politically, it is legitimate to urge “candidate countries” to do somewhat more than to adapt the commercial law to the “acquis”, which itself has developed far beyond a mere commercial system of regulations and rules and reached a kind of constitutional structures, including certain understandings of human rights.

The interesting points of the decision of the Council can be found in the Annex to this decision.

First, the Annex recalls the latest history which started with the European Council in Luxemburg 1997, later followed by the European Council in Helsinki in December 1999, passing through a proposal of the Commission for a regulation (26 July 2000)¹⁰, based on the Council Regulation No. 622/98¹¹, which was drafted for the implementation of the financial support for Turkish activities towards accession.

Second, the objective of the Accession Partnership is defined as

„... to set out in a single framework the priority areas for further work identified in the Commission's 2000 regular report on the progress made by Turkey towards membership of the European Union, the financial means available to help Turkey implement these priorities and the conditions which will apply to that assistance. This Accession Partnership provides the basis for a number of policy instruments, which will be used to help the candidate States in their preparations for membership. It is expected that Turkey on the basis of this Accession Partnership adopts before the end of the year a national programme for the adoption of the acquis. This is not an integral part of this Partnership but the priorities it contains should be compatible with it.

Furthermore, the decision stresses that Turkey has to meet the Copenhagen criteria which state that membership requires

¹⁰ Another proposal for a regulation has been made by the Commission on 25 April 2001.

¹¹ OJ L 85/1, 20.3.1998.

- that the candidate State has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities,
- the existence of a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union,
- the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.

and that the *acquis communautaire* has to be incorporated in theory and practice of the Turkish legal order.

This is not the place to repeat the whole of the text of the decision. For the purpose of this report it seems to be sufficient to point to the specific constitutional issues. From the point of view of the Council of Ministers the following tasks have to be accomplished by Turkey:

- Strengthen legal and constitutional guarantees for the right to freedom of expression in line with Article 10 of the European Convention of Human Rights. Address in that context the situation of those persons in prison sentenced for expressing non-violent opinions.
- Strengthen legal and constitutional guarantees of the right to freedom of association and peaceful assembly and encourage development of civil society.
- Strengthen legal provisions and undertake all necessary measures to reinforce the fight against torture practices, and ensure compliance with the European Convention for the Prevention of Torture.
- Further align legal procedures concerning pre-trial detention with the provisions of the European Convention on Human Rights and with recommendations of the Committee for the Prevention of Torture.
- Strengthen opportunities for legal redress against all violations of human rights.
- Intensify training on human rights issues for law enforcement officials in mutual cooperation with individual countries and international organisations.
- Improve the functioning and efficiency of the judiciary, including the State security courts in line with international standards. Strengthen in particular training of judges and prosecutors on European Union legislation, including in the field of human rights.
- Maintain the *de facto* moratorium on capital punishment.
- Remove any legal provisions forbidding the use by Turkish citizens of their mother tongue in TV/radio broadcasting.
- Develop a comprehensive approach to reduce regional disparities, and in particular to improve the situation in the south-east, with a view to enhancing economic, social and cultural opportunities for all citizens.

- Ensure that the conditions are in place for an active and autonomous social dialogue, inter alia, by ensuring that trade union rights are respected and by abolishing restrictive provisions on trade union activities,
- Guarantee full enjoyment by all individuals without any discrimination and irrespective of their language, race, colour, sex political opinion, philosophical belief or religion of all human rights and fundamental freedoms. Further develop conditions for the enjoyment of freedom of thought, conscience and religion
- Review of the Turkish Constitution and other relevant legislation with a view to guaranteeing rights and freedoms of all Turkish citizens as set forth in the European Convention for the Protection of Human Rights; ensure the implementation of such legal reforms and conformity with practices in EU Member States
- Abolish the death penalty, sign and ratify Protocol 6 to the European Convention of Human Rights
- Ratify the International Covenant on Civil and Political Rights and its optional Protocol and the International Covenant on Economic, Social and Cultural Rights
- Align the constitutional role of the National Security Council as an advisory body to the Government in accordance with the practice of the EU Member States
- Lift the remaining state of emergency in the south-east.
- Complete alignment of audio-visual legislation and strengthen the capabilities of the independent television/radio regulatory authority.
- Further develop and strengthen JHA institutions with a view in particular to ensuring the accountability of the police.
- Complete public administration modernisation reform to ensure efficient management of Community policies.

III. The National Program

On March 19, 2001, the Turkish government officially adopted the “National Program for adopting European Union Legislation and Regulations (Acquis)” (Ulusal Program¹²). Thus, Turkey fulfilled a formal obligation which has been imposed on all of the candidate countries who wish to access to the European Union. This program shows in details, to which extent Turkey had already reached the “acquis communautaire” and to which extent there is still work to do. It reflects nearly all of the criteria and conditions of accession to the EU.

¹² See for the full text in Turkish: <http://www.kobinet.org.tr/kosgebabm/yayinlar/up.html>;
<http://ekutup.dpt.gov.tr/ab/ulusalpr/>

The National Program contains proposals for 90 new laws and 89 amendments to existing legislation in all. Each section of the Program identifies short and medium term priorities for the legislative work to be done. Actually, the Program does not show the whole of the scope of reforms which Turkey is facing. If we take, for example, the reform of the Civil Code which finally, after more than thirty years of struggle, has come to an end and which goes farther than only guaranteeing equality of women and men, or the reform of the Commercial Code which is expected to take place within the next two years, or the reform of the Penal Code which is already passing through legislature procedures, it becomes clear that there is a general will and intent to deep structural reforms which reach beyond the demands of the European Union or the Council of Europe. On the other hand, we will see that at the present the “break-through” has not yet taken place.

The National Program addresses – according to a statement of the Turkish government¹³ –

“... a wide range of key issues identified as crucial for Turkey’s EU membership. These, including measures in the area of human rights and political freedoms, will require the adoption of 26 new laws and 32 legal amendments. The plan also refers to the need to find a ‘mutually acceptable settlement’ for the Cyprus problem and improvements in relations with Greece, which is urged by the EU.¹⁴ Changes are to be considered in the fields of freedom of expression; political parties law; rights to form associations and engage in peaceful assembly; combating ill-treatment and torture; improving prison conditions; the judiciary; the abolition of the death penalty; cultural life and the use of languages; equal rights for women; ending the state of emergency.”

Part of the National Program is, especially, legislation such as

- the amendment of the Constitution (for details see below IV.)
- a reform of the anti-terrorism legislation, among which primarily the abolishment of Article 8 of the Anti-Terrorism Act and Article 312 of the Turkish Penal Code are discussed,
- on political parties
- on the security forces
- on prisons
- on the judiciary, especially criminal procedure including the State Security Courts, as well as courts of appellation
- death penalty

and the ratification of international instruments on human rights. In this respect it should again be mentioned that Turkey is already a party to many of such instruments and that one of the major problems is not the being a party to but the practical

¹³ <http://www.turkishembassy-london.com/eu.htm>

¹⁴ The Council of Ministers in his decision of 8 March 2001 demands for a settlement until the end of 2004 by application to the International Court of Justice.

implementation of such instruments. On the other hand, the subject of minorities is still handled with great retention.

The Cyprus issue may be mentioned here, but it raises no specific problem as to the internal legal order of Turkey. Bakir Caglar, in his paper, tries to create a connectivity between this question and the Constitution through the “concept of national security” which is an incident principle of the Constitution. We do not think that this justifies the making the Cyprus question an issue of the constitutional structure of Turkey, neither on the normative nor on the institutional level. Nevertheless, the solution of this problem might be the keystone for accession, not only if we consider the position of Turkey in this conflict, but also, if we look at the position of the competent EU-organs; this one does unfortunately not reflect a proper approach to the issue.¹⁵

IV. The Amendments of 4 October 2001¹⁶ to the Turkish Constitution¹⁷

The package of constitutional amendments has come into force very recently.¹⁸ Although it is not yet sufficient¹⁹, it has been the most prestigious and most comprehensive step towards leaving the string of constitutional developments which had been set up by the military coup of September 12, 1980, in order to adapt the constitutional structures of Turkey to the main principles of constitutional law which have been acknowledged by all of the European countries willing to access to the European Union. On the other hand, we should also remind the constitutional amendments of 1995, which already had prepared the floor for more political liberalism, especially as far as the space of activities for political parties, but also as the liberties of the trade unions are concerned.

We shall now try to explain the amendments in the light of Turkish constitutional law as well as in the light of the European texts which reflect the *acquis* and the demands

¹⁵ Cf. the judgment of the ECHR, 10 May 2001, *Cyprus vs. Turkey* (Appl. No. 25791/94); Christian Heinze, On the question of the compatibility of the admission of Cyprus into the European Union with international law, the law of the EU and the Cyprus Treaties of 1959/60, Appraisal Study Munich 1997 (<http://www.mfa.gov.tr/grupa/ad/add/heinze2.htm>); Christian Rumpf, Die staats- und völkerrechtliche Lage Zyperns, EuGRZ 1997 (Europäische Grundrechte Zeitschrift – European Journal of Human Rights), pp. 533-546. Furthermore, it is often forgotten that – if we ever take Turkey responsible for the present situation – that there are more parties to the conflict which have to be held responsible: in the first instance Greece but also Great Britain and, of course, the government of the “Republic of Cyprus”.

¹⁶ The later additional amendment of Article 86 of the Constitution, Law No. 4720, 21 November 2001, Resmî Gazete No. 24600, 01 December 2001, concerns payment and pension of the members of parliament.

¹⁷ On the Turkish Constitutional law in general see especially: Ergun Özbudun, *Türk Anayasa Hukuku* (Turkish Constitutional Law), Ankara 2000; Kemal Gözler, *Anayasa Hukukuna Giriş*, Bursa 2001; Seref Gözübüyük, *Anayasa Hukuku*, Ankara 2000; Erdogan Teziç, *Anayasa Hukuku*, Istanbul 1998; Christian Rumpf, *Das türkische Verfassungssystem*, Wiesbaden 1996; Tugrul Ansay/Don Wallace (ed.), *Introduction to Turkish Law*, Deventer 1996.

¹⁸ Resmî Gazete (Official Journal) No. 24556^{bis}, 17 October 2001.

¹⁹ Another package of constitutional amendments was in parliamentary discussion when finishing this report by the end of November 2001.

of the European Union as well as the member countries which have finally to decide on the accession of Turkey to the EU.

1. Freedom of opinion and expression of ones opinion in the Preamble

The constitutional guaranty of the freedom of opinion had been shaped, until now, by Articles 25 to 27 and – if we include the freedom of press – Articles 28 to 30. Restrictions and limitations of the execution of such freedoms have been shaped not only with some provisions within these articles, but also with the general provisions of Articles 13 and 14. And finally, the preamble has to be mentioned which is, by Article 176, considered as “integral part of the text of the Constitution”. The preamble may even be considered as one of the most important texts of the Constitution, for it briefly and effectively describes the spirit of the Constitution as a whole. As far as the freedom of opinion is concerned it stipulated before the amendment

“The determination that **no protection shall be afforded to thoughts or opinions** contrary to Turkish National interests, the principle of the existence of Turkey as an indivisible entity with its State and territory, Turkish historical and moral values, or the nationalism, principles, reforms and modernism of Atatürk,...”²⁰

The highlighted phrase has been amended by “no protection shall be accorded to **activities** contrary...”.

As the preamble is part of the constitutional text (cf. Article 176), it at least reveals some importance in the course of interpretation of other constitutional norms. It would be wrong saying that the text of the preamble is of no importance as far as it describes the ideology and the spirit of the whole of the Constitution. Consequently, the guaranty of the fundamental right of free expression of opinions or thoughts is highly endangered if such notions as “Turkish National interests” or “Turkish historical and moral values” are not only taken as normative limitations to the execution of the freedom of expression, but as a justification to deprive the individual of such freedom. When Article 8 of the Antiterror Act passed the judicial control of the Constitutional Court – with the objection of a judge who is today the President of the Republic –, it is the “concept of national security”, which protected this Article from being squashed. It further shows, that this concept which entails also the Turkish perception of a “militant democracy” (Caglar), is quite different from the German and other concepts of the “wehrhafte Demokratie”.²¹

This change reveals its importance only if it is interpreted in the light of the supposed will of the legislator. The meaning of the notion of “activity” has a very wide range which also may cover typical forms of the expression of ones opinion, such as on the

²⁰ Official translation.

²¹ See Christian Rumpf, Das türkische Antiterrorgesetz Art. 8 - Staatsschutz und Gesinnungsstrafrecht im demokratischen Rechtsstaat, KAS (Konrad-Adenauer-Stiftung) Auslandsinformationen 2/1996, p. 27; Jürgen Becker, Die wehrhafte Demokratie im Grundgesetz, in: Josef Isensee and others (ed.), Handbuch des Staatsrechts, Heidelberg 1992; Helmut Ridder, Art. 21 Abs. 2, No. 25, in: Kommentar zum Grundgesetz für die Bundesrepublik Deutschland (Rudolf Wassermann (ed.), Alternativkommentar), vol. II, Neuwied 1984. The German concept has been developed especially in relation to the banning of political parties. After the events of 11 September 2001, it again plays a dominant role in public discussion (see a vast number of references in the internet).

occasion of a demonstration. It is not clear enough if the “active” expression of such opinions shall remain within the scope of possible restrictions or not. And if we consider that the possible reasons for such limitations and restrictions remain untouched, it seems doubtful if the change is going deep enough. It is without any question that a State is allowed to restrain the execution of freedoms and the expression of opinions if certain public interests, especially state security interests are involved. The criteria for this are found Article 10 para 2 of the European Convention of Human Rights and the jurisprudence of the Strasbourg Court. This has to be emphasized, for the spirit of a constitutional system is shaped much more by the definition of the public interests to justify the limitation and restriction of fundamental rights than the positive guaranty of such fundamental right. If on one hand we admit that a step towards the right direction has been made, on the other hand it is established that the spirit itself which has been criticized so far does not seem to have undergone an essential change.

2. The General Limits of Fundamental Rights and Freedoms

The Turkish Constitution of 1961 already had introduced a system of “general” and “special” limitations of fundamental rights and freedoms. This means that beside specific conditions of limitation or restriction laid down in the articles which regulate the specific fundamental right, a general clause for the main conditions of limitation and restriction had been introduced. In 1982, the respective Article 11 had been replaced by Article 13²². Thus, a “triple” concept governed the regime of the fundamental rights: “general” and “special” limitations, encountered by “limits of limits”²³, such as the spirit of the Constitution and the necessities of a democratic society. This system²⁴ has again changed with the amended and shorter version of Article 13, which now reads:

“Fundamental rights and freedoms may be restricted only on the basis of specific reasons listed in the relevant articles of the Constitution without prejudice to the values defined therein and only by law. These restrictions shall not conflict with the letter and the spirit of the Constitution and the requirements of the democratic social order and the secular republic and the principle of proportionality.”

²² Former version:

“Fundamental rights and freedoms may be restricted by law, in conformity with the letter and spirit of the Constitution, with the aim of safeguarding the indivisible integrity of the State with its territory and nation, national sovereignty, the Republic, national security, public order, general peace, the public interest, public morals and public health, and also for specific reasons set forth in the relevant articles 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.

The general grounds for restriction set forth in this article shall apply for all fundamental rights and freedoms.”

²³ Cf. Rumpf, *Verfassungssystem* (note 17) p. 228.

²⁴ Cf. Rumpf, *Verfassungssystem* p. 219.

This amendment of Article 13 reaches to the very heart of the Turkish human rights regime, which may be commented in five eminent points.

- (1) Since the coming into force of the 1982 Constitution, there has been an extensive discussion on the question, if the German concept of the “**guaranty of the core of the respective fundamental right**” (Wesensgehaltsgarantie or “essence of those rights and freedoms”, Art. 52 of the European Charter) or the concept introduced by the 1982 Constitution (see beneath (4)) is the better one. The text is still not very clear, as it recovers the wording of the previous version. But drawing both limits of limits into the same semantic framework, one may incline to the position that the Constitution emphasizes in a stricter manner what the Constitutional Court already has held in several decisions: that the concept of Article 13 entails the concept of “guaranty of the core of the respective fundamental right”. But on the other hand it has to be emphasized, that the kemalist concept, laid down in Article 2, remains upheld by the notion of “letter and spirit”. And when the new text also expressly refers to the “principle of secularism” which is anyway part of the “spirit of the Constitution” (Article 2), this is not more than a reaction to a specific political problem of our times. Nevertheless, the new text enforces a range of possibilities of interpretation which enables the relevant courts, especially the Constitutional Court, to react adequately on any new developments. The new provision seems to be adequate by an European point of view.
- (2) It has especially to be pointed out that a long development of constitutional jurisprudence has now reached to its end. The **principle of proportionality**²⁵, which is, nowadays, a well established principle in most of the European legal systems and in the jurisprudence of the European Court of Human Rights as well as of the European Court of Justice, has found its place in Article 13 which is the proper environment for this eminently important means of interpretation and implementation of fundamental rights and freedoms. The constitution-maker thus acknowledged the doctrine which had extracted the principle of proportionality from the general fundamental rights regime, as it has also been done when stipulating Art. 52 of the European Charter.²⁶ This amendment also shows that from now on, there will be no need to refer to either the principle of the rule of law or the principle of equality²⁷ or any other attempt to find a proper constitutional basis for the principle of proportionality.
- (3) At this place the concept of “Vorbehalt des Gesetzes”, which – as an institution which has emerged in the tradition of German constitutional law – may be translated as “**reservation of/by law**”, has to be mentioned.²⁸ This

²⁵ Cf. Rumpf, *Verfassungssystem* p. 232

²⁶ When Gözler (note 7) criticizes this step urging to refer to the “necessity of the situation” he seems not to be aware of the fact, that proportionality is something different. Proportionality entails more than “necessity”: suitability and adequacy. If a limitation is “necessary”, but not adequate, it is unconstitutional as the result of a proper balance of interests.

²⁷ Turkish Constitutional Court in some cases, such as a decision of 21 March 1992, *Resmî Gazete* No. 21478^{bis}, 21 January 1993 (Antiterror Act).

²⁸ Cf. Rumpf, *Verfassungssystem* p. 238

concept is reflected Article 52 of the European Charter as well as in the ECHR, e.g. in its Article 10 para 2, which says that

“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”

In this text, two strings of meaning are hidden, which both are elementary within the concept of the rule of law. One string is, that restrictions or limitations may be brought to a fundamental right only by a statute law. This means, that government and administration may, as far as fundamental rights are touched, only act on the basis of a law which empowers the government accordingly. This principle is also called the **principle of legality**. This principle has been emphasized by Article 13 when it says in paragraph 1 “and only by law”. This again has to be seen in the light of Article 91 para. 1, which prohibits the limitation of political freedoms by “decree with the force of law.”²⁹

The other string of the meaning of “Vorbehalt des Gesetzes” is, that the Constitution provides for general norms which cannot be stipulated in details in a constitutional text, and therefore leaves to statutory law the completing of a normative notion in the Constitution. This is the point where the Constitution confers to the statutory lawmaker’s discretion and a margin of appreciation, as to what extent and with what content he would implement constitutional rules and principles, including fundamental freedoms and rights, in the social, economic and political practice of the State. Some present provisions and some new amendments emphasize this by using phrases such as “The formalities, conditions and procedures to be applied in exercise of the right to ... shall be prescribed by law.” (e.g. the new Article 26/3).

- (4) A word has to be said in respect to the notion of “**requirements of democratic society**”³⁰. Here, Article 13 seems to adopt the system of “limits of limits” of Articles 8 to 11, para 2, ECHR. But if we read it properly, there is an important difference. The Turkish version means, that a measure which interferes in fundamental rights, shall not be in conflict with the requirements of a democratic society, whereas the ECHR puts it in another way: restrictions have to undergo the test of necessity as they must not only not be in conflict with the requirements, but must be required themselves by the necessity of a democratic society. On the other hand, we should not put too much emphasis on this difference. There has, since 1982, accrued a tradition of constitutional jurisprudence in Turkey which applies correctly the “requirements of a

²⁹ Cf. Rumpf, *Verfassungssystem* pp. 158, 239.

³⁰ The official translation says: “democratic social order”. This translation is not correct. For the concept of “requirements of a democratic society” see Rumpf, *Verfassungssystem* p. 229.

democratic society” as “limit of limits”.³¹ And by watching again the concept of “Wesensgehaltsgarantie” in the present Constitution, the normative goal of such “limit of limits” is easily reached.

- (5) It seems to be wrong to blame the systematic of the constitution-maker in 1982 when he decided to follow the method of general – special principles. As long as one can hardly imagine that even a modern constitution would be able to enumerate all possible freedoms and rights, it makes sense to provide for general principles of limitation. It is the task of the judge in good faith to apply such principles adequately to the individual case, reflecting counter-principles such as “proportionality”, “protection of the core” or other constitutional principles, rights and duties.

3. Prohibition of Abuse of Fundamental Rights

Article 14 has been one of the most discussed articles of the Turkish Constitution.³² Erroneously, it has often been compared with Article 18 of the German Constitution. The latter stipulates that an individual may be deprived of the exercise of freedoms if he/she abuses a fundamental freedom or right, such freedoms and rights which may be subjected to this article being enumerated therein; it is the Federal Constitutional Court who decides on the contents and the scope of such deprivation. Article 14 of the Turkish Constitution, however, has a different approach, for it neither specifies the fundamental rights to be restricted on its basis nor provides for specific sanctions which would stipulate something essentially different from Article 13, if not a kind of justification for some specific legislation on the field of the protection of state security.³³

The amendment of Article 14³⁴ is said to follow the example of Article 17 ECHR³⁵. In fact, this is true for the second paragraph, whereas the amendment of the first

³¹ Cf. Rumpf, *Verfassungssystem* p. 229.

³² Cf. Rumpf, *Verfassungssystem* p. 224.

³³ The old version of Article 14 read:

“None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the State with its territory and nation, of endangering the existence of the Turkish State and Republic, of destroying fundamental rights and freedoms, of placing the government of the State under the control of an individual or a group of people, or establishing the hegemony of one social class over others, or creating discrimination on the basis of language, race, religion or sect, or of establishing by any other means a system of government based on these concepts and ideas.

The sanctions to be applied against those who violate these prohibitions, and those who incite and provoke others to the same end shall be determined by law.

No provision of this Constitution shall be interpreted in a manner that would grant the right of destroying the rights and freedoms embodied in the Constitution.”

³⁴ After the amendment, Article 14 reads:

“None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the State with its territory and nation, **or for activities undertaken with the aim of destroying the democratic and secular Republic based on human rights.**

paragraph is not yet satisfactory. The difference consists in the introduction of an element of “activity”. But this slight revision will not put an end to the discussion on its precedent, which has been deemed unnecessary and without sense in a modern system of balance between fundamental rights and public interests, primarily the interest of the State to protect itself from attacks against its democratic principles. Whereas Article 14 made some sense within the character of the Constitution of 1982 as a product of the military coup 1980, there is no need – beside the provisions of Article 13 – for such provision. As a whole, it is neither a kind of a Turkish version of Article 17 ECHR nor a remake of Article 18 of the German Constitution. Finally, it has no similarity with Article 54 of the European Charter. At the end, Article 14 in its amended version does not really satisfy neither from an European nor a Turkish point of view. It should be totally deleted.

4. Personal Liberty and Security

“Personal Liberty and Security” are guaranteed under Article 19 of the Constitution. The amendments are easy to comprehend. In the amended version of Article 19, the phrase **“in the case of offences committed collectively, within fifteen days”** in the fifth paragraph is replaced by the phrase **“in the case of offences committed collectively, within four days.”** The problem had been that most of the state security crimes had been prosecuted under the allegation of “organized crime” which had led to detention periods of up to fifteen days without regard to if actually more than one person had been detained. Additionally, it has often been criticized that there was no practical need for longer periods of detention without referral to the judge other than a possible interest of the security forces in hiding traces of ill treatment.

The sixth paragraph which reads **“Notification of the situation of the person arrested or detained shall be made to the next of kin without delay, except for cases of definite necessity pertaining to the risks of revealing the scope and subject of the investigation compelling otherwise”** is replaced by **“Notification of the situation of the person arrested or detained shall be made to the next of kin without delay.”** By this amendment, the widespread practice of not informing relatives of the detainee at all is hopefully been put an end to.

The phrase **“according to principles of the law on compensation”** is added to the last paragraph on the right to seek compensation from the State provided for persons subjected to treatment contrary to these provisions.

The amendments to Article 19 are possibly highly relevant not only for the theory of normative stipulation, but also directly for the practice. It is crucial for the principles

No provision of the Constitution shall be interpreted in a manner that **grants the State or individuals** the right of destroying the fundamental rights and freedoms embodied in the Constitution, **and of staging an activity with the aim of restricting rights and freedoms more extensively than is stated in the Constitution.**

Sanctions for persons undertaking activities in conflict with these provisions shall be defined by law”.

³⁵ Article 17 ECHR: “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

of due process and fair trial that the investigations are under some control from the very beginning of pre-trial detention. Proper and timely information of the relatives do not necessarily endanger the coming out of proper results of an investigation. On the other hand, such information prevents from disappearing and ill-treatment of the detainee, which has unfortunately happened under the existing law. Of course, no prosecutor or police officer will be obliged to inform the relatives about details of the allegations and the course of the investigations, with other words, there has been no obvious and rational public interest to be protected by the existing provisions.

Similarly, the obligation to refer a detainee of organized crime to a judge earlier than fifteen days after the first detention by the security forces does not endanger investigations. The judge will of course consider if there is an adequate justification for the detention of an individual, especially a well founded suspicion which may justify deprivation of liberty until the investigations have been completed. It is clear – this is a fundamental principle of human rights – that without a well founded suspicion and at least some evidence the right to liberty of the individual has to prevail (principle of proportionality). If we have a look at the practice, we easily understand the importance: at the beginning, it is more or less the police who decides if there is organized crime involved or not; as a consequence, participants to “illegal” demonstrations have often been detained in this context.³⁶

5. Privacy

The protection of privacy is warranted by several provisions of the Constitution, Articles 20 to 22.

a) Secrecy of individual life is guaranteed under Article 20³⁷.

Amendments to this Article have been brought to two important subjects. The last sentence of the first paragraph has been deleted, to the second paragraph there have been added the classical conditions for the limitation of that right.³⁸

³⁶ “Illegal” is any demonstration which is held without prior permission as laid down in the respective law. Thus, a merely administrative illegality, by means of the penal sanctions provided for in this law, may, by interpretation of the security forces, turn into “organized crime”. This interpretation is even logical because of the pretended background of the perpetrators and the mere fact that they proceed together – which is a typical implication of every demonstration .

³⁷ The old version read:

“Everyone has the right to demand respect for his private and family life. Privacy of individual and family life cannot be violated. Exceptions necessitated by judiciary investigation and prosecution are reserved.

Unless there exists a decision duly passed by a judge in cases explicitly defined by law, and unless there exists an order of an agency authorised by law in cases where delay is deemed prejudicial, neither the person nor the private papers, nor belongings of an individual shall be searched nor shall they be seized.”

³⁸ The amended version reads:

“Everyone has the right to demand respect for his private and family life. Privacy of individual and family life cannot be violated.

Behind this amendment we find a discussion which is also common to other European countries, such as Germany who just amended the famous “G10”³⁹: in how far may security forces be enabled to interfere into privacy, be it by means of search or be it by technical means, such as listening telephone or other private conversations. Interference in privacy is, according to the Turkish Constitution, possible on the grounds specified in the text of the Constitution and only on the basis of a law. Essentially, such interference may never take place by a mere administrative act, but only on a written judicial decision. Therefore, this solution presented by the Turkish Constitution seems to be adequate in the light of Article 8 ECHR and does not need further comment.

b) Similarly, the inviolability of domicile is protected by Article 21⁴⁰.

The amendment brought to this provision is similar to the amendment to the previous one.⁴¹ Thus it is sufficient to refer to the comment a). Additionally, the protection of property is now better respected (Art. 1 of Protocol No. 1 to the ECHR).

c) Freedom of Communication and Correspondence is guaranteed under Article 22⁴².

Unless, for the grounds of national security, public order, the prevention of crime, public health, public morals, or for the protection of the rights and freedoms of others, there exists a decision duly passed by a judge in cases explicitly defined by law, or unless there exists a written order of an agency authorised by law in cases where delay is deemed prejudicial, neither the person nor the private papers, nor belongings of an individual shall be searched nor shall they be seized.”

³⁹ Law on the limitation of the privacy of correspondence and communication, 26 June 2001 (BGBl. I p. 1254); cf. German Constitutional Court, 14 July 1999 (1 BvR 2226/94, 1 BvR 2420/95, 1 BvR 2437/95) (<http://www.jura.uni-sb.de/jurpc/rechtspr/19990134.htm>, JurPC Web-Dok. 134/1999, para. 1 – 277; BVerfGE 100, pp. 313 etc.); Turkey has regulated this subject within the Law No. 4422 of 30 July 1999, Resmî Gazete No. 23773, 01 August 1999, on the struggle against organized crime.

⁴⁰ The old version read:

“The domicile of an individual shall not be violated. Unless there exists a decision duly passed by a judge in cases explicitly defined by law, and unless there exists an order of an agency authorised by law in cases where delay is deemed prejudicial, no domicile may be entered or searched, or the property therein seized.”

⁴¹ The amended version reads:

“The domicile of an individual shall not be violated. Unless, **for the grounds of national security, public order, the prevention of crime, public health, public morals, or for the protection of the rights and freedoms of others**, there exists a decision duly passed by a judge in cases explicitly defined by law, and unless there exists a **written** order of an agency authorised by law in cases where delay is deemed prejudicial, no domicile may be entered or searched, or the property therein seized.”

⁴² Article 22 read:

“Everyone has the right to freedom of communication.

Secrecy of communication is fundamental.

Communication shall not be impeded nor its secrecy be violated, unless there exists a decision duly passed by a judge in cases explicitly defined by law, and unless there exists an order of an agency authorised by law in cases where delay is deemed prejudicial.

The amendment concerns its paragraph 2.⁴³ It enforces the freedom of correspondence as a substantial part of privacy as well as of freedom of opinion. Thus, both Article 8 ECHR and Article 10 ECHR are involved. To our opinion, with this amendment, the Turkish Constitution meets the conditions of these articles.⁴⁴

6. Freedom of Residence and Movement

Article 23⁴⁵ became relevant in Turkish politics when the government restricted, at the end of the seventies, the right to travel abroad on the grounds of the economic situation. The real reason was the fear that Turkish citizens would exhaust hard currency reserves when traveling abroad or moving hard currency capital illegally to foreign countries. This fear had been perpetuated by Article 23 para. 2, where the phrase which concerns grounds “of the national economic situation” has been deleted.

The amendment has been made in respect of Article 2 of Protocol No. 4 to the ECHR. Restrictions for economic reasons – flow of foreign currency back to foreign countries diminishing the foreign currency reserves in Turkey – have been in contradiction not only to the freedom of movement itself, but also been thought as limitation of the flow of capital (one of the four freedoms of the EU treaties). This flow of foreign currency was the only reason for such restrictions and can hardly be considered as appropriate justification of such limitation. Instead, the government collects from Turkish citizens, according to a current practice, an amount of hard currency in favour of a fund.

7. Freedom of Expression and Dissemination of Thought

This freedom has been the most endangered one in recent Turkish politics. The two best known examples on the statutory law level are Article 8 of the Antiterror Act, which sanctions the dissemination of separatist propaganda, and Art. 312 of the Penal Code which sanctions the incitement of the people, especially on the grounds of race or religion, against the government or the law. In fact, the political discussion is to be

Public establishments or institutions where exceptions to the above may be applied will be defined by law.”

⁴³ Article 22 para. 3 now reads:

“Communication shall not be impeded nor its secrecy be violated, unless, **for reasons of national security, public order, the prevention of crime, public health, public morals, or for the protection of the rights and freedoms of others**, there exists a decision duly passed by a judge in cases explicitly defined by law, and unless there exists a **written** order of an agency authorised by law in cases where delay is deemed prejudicial.”

⁴⁴ See note 38.

⁴⁵ Article 23 reads, the highlighted phrase having been **deleted**:

Everyone has the right to freedom of residence and movement.

Freedom of residence may be restricted by law for the purpose of preventing offences, promoting social and economic development, ensuring sound and orderly urban growth, and protecting public property; freedom of movement may be restricted by law for the purpose of investigation and prosecution of an offence, and prevention of offences. A citizen's freedom to leave the country may be restricted on account of **the national economic situation**, civic obligations, or criminal investigation or prosecution.

Citizens may not be deported, or deprived of their right of entry into their homeland.”

conducted much more on the statutory but on the constitutional level. Nevertheless, a constitutional amendment (see also the Preamble and the regime of limitations) was necessary in order to prevent constitutional jurisprudence such as to Article 8 of the Antiterror Act which has passed the judicial control of the Constitutional Court.

As it has been done in the above mentioned Articles, the main conditions of restriction and limitation which, before, had been part of Article 13, are now inserted into Article 26⁴⁶. Further, a paragraph has been added at the end. For the national and international discussion, however, the most important item is the freedom of expression in ones own language. On the basis of this article, a statute law had been passed in 1983, prohibiting the use of languages which are not “official languages of a State internationally acknowledged by Turkey”.⁴⁷ This law had been lifted by Article 23 of the Antiterror Act, whereas similar restrictions have been kept in other laws such as

⁴⁶ Old version:

“Everyone has the right to express and disseminate his thought and opinion by speech, in writing or in pictures or through other media, individually or collectively. This right includes the freedom to receive and impart information and ideas without interference from official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, and similar means to a system of licencing.

The exercise of these freedoms may be restricted for the purposes of preventing crime, punishing offenders, withholding information duly classified as a State secret, protecting the reputation and rights and the private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.

No language prohibited by law shall be used in the expression and dissemination of thought. Any written or printed documents, phonograph records, magnetic or video tapes, and other means of expression used in contravention of this provision shall be seized by a duly issued decision of a judge or, in cases where delay is deemed prejudicial, by the competent authority designated by law. The authority issuing the seizure order shall notify the competent judge of its decision within twenty-four hours. The judge shall decide on the matter within three days.

Provisions regulating the use of means of disseminating information and ideas shall not be interpreted as a restriction of the freedom of expression and dissemination unless they prevent the dissemination of information and thoughts.”

New version:

“Everyone has the right to express and disseminate his thought and opinion by speech, in writing or in pictures or through other media, individually or collectively. This right includes the freedom to receive and impart information and ideas without interference from official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, and similar means to a system of licencing.

The exercise of these freedoms may be restricted for the purposes of **protection of national security, public order, public security, the fundamental characteristics of the Republic and the protection of the indivisible integrity of the State with its territory and nation**, preventing crime, punishing offenders, withholding information duly classified as a State secret, protecting the reputation and rights and the private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.

Provisions regulating the use of means of disseminating information and ideas shall not be interpreted as a restriction of the freedom of expression and dissemination unless they prevent the dissemination of information and thoughts.

The formalities, conditions and procedures to be applied in exercise of the right to freedom of expression and dissemination shall be prescribed by law.”

⁴⁷ For more information, see Christian Rumpf, *Das türkische Sprachenverbotsgesetz unter besonderer Berücksichtigung der völkerrechtlichen Verpflichtungen der Türkei*, *Orient* 30/1 (1989), p. 413.

the law of associations. In this respect, it should be expected that the new constitutional situation is implemented also on the level of statutory law. One may now say that the new provision is in accordance with Articles 9, 10, 14 and 18 ECHR as well as Article 1 of Protocol No. 12.

8. Freedom of the Press

This freedom is especially protected by Article 28⁴⁸, followed by some supplementary guaranties.

The most doubtful provision within this very long article has, at the end, been deleted. For more comments see above No. 7.

9. Law of the Media

⁴⁸ Amended version, the deleted part is highlighted:

“The press is free, and shall not be censored. The establishment of a printing house shall not be subject to prior permission and to the deposit of a financial guarantee.

Publication shall not be made in any language prohibited by law.

The State shall take the necessary measures to ensure the freedom of the press and freedom of information.

In the limitation of freedom of the press, Articles 26 and 27 of the Constitution are applicable.

Anyone who writes or prints any news or articles which threaten the internal or external security of the State or the indivisible integrity of the State with its territory and nation, which tend to incite offence, riot or insurrection, or which refer to classified State secrets and anyone who prints or transmits such news or articles to others for the above purposes, shall be held responsible under the law relevant to these offences. Distribution may be suspended as a preventive measure by a decision of judge, or in the event delay is deemed prejudicial, by the competent authority designated by law. The authority suspending distribution shall notify the competent judge of its decision within twenty-four hours at the latest. The order suspending distribution shall become null and void unless upheld by the competent judge within forty-eight hours at the latest.

No ban shall be placed on the reporting of events, except by a decision of judge issued to ensure proper functioning of the judiciary, within the limits to be specified by law.

Periodical and nonperiodical publications may be seized by a decision of judge in cases of ongoing investigation or prosecution of offences prescribed by law; and, in situations where delay could endanger the indivisible integrity of the State with its territory and nation, national security, public order or public morals and for the prevention of offence by order of the competent authority designated by law. The authority issuing the seizure order shall notify the competent judge of its decision within twenty-four hours at the latest. The seizure order shall become null and void unless upheld by the competent court within forty-eight hours at the latest.

The general common provisions shall apply when seizure and confiscation of periodicals and nonperiodicals for reasons of criminal investigation and prosecution take place.

Periodicals published in Turkey may be temporarily suspended by court sentence if found guilty of publishing material which contravenes the indivisible integrity of the state with its territory and nation, the fundamental principles of the Republic, national security and public morals. Any publication which clearly bears the characteristics of being the continuation of the suspended periodical is prohibited; and shall be seized by a decision of judge.

Article 31, which protects especially the accession of individuals and political parties to mass medias and all kind of means of communication, has only been amended by transferring the conditions for limitation from the old Article 13 to Article 31 para. 2. The amendment is therefore a natural result of the amendment of Article 13. In this respect, it is not this amendment, but the statutory law which has to be discussed and which is still disputed in Turkey. The practice of the Council of Radio and Television (“RTÜK”) under the respective law is often said to be unconstitutional. As a matter of fact, most of the existing channels already have been closed down once or more often for a period of time on the grounds of disseminating news or information which are not in conformity with the principles of national security, public order or public morals.

10. Freedom of Association

Article 33⁴⁹ has been amended quite substantially.⁵⁰ The right of association was, until now, one of the most critical points of constitutional politics and of Turkish administrative and constitutional practice. The legal regime of the right of

⁴⁹ Old version:

Everyone has the right to form associations without prior permission.

Submitting the information and documents stipulated by law to the competent authority designated by law shall suffice to enable an association to be formed. If the information and documents submitted are found to contravene the law, the competent authority shall apply to the appropriate court for the suspension of activities or dissolution of the association involved.

No one shall be compelled to become or remain a member of an association. The formalities, conditions, and procedures governing the exercise of freedom of association shall be prescribed by law.

Associations shall not contravene the general grounds of restriction in Article 13, nor shall they pursue political aims, engage in political activities, receive support from or give support to political parties, or take joint action with labour unions, with public professional organisations or with foundations.

Associations deviating from their original aims or conditions of establishment, or failing to fulfill the obligations stipulated by law shall be considered dissolved.

Associations may be dissolved by decision of judge in cases prescribed by law. They may be suspended from activity by the competent authority designated by law pending a court decision in cases where delay endangers the indivisible integrity of the State with its territory and nation, national security or sovereignty, public order, the protection of the rights and freedoms of others, or the prevention of crime.

Provisions of the first paragraph of this article shall not prevent imposition of restrictions on the rights of Armed Forces and Security Forces officials and civil servants to form associations, or the prohibition of the exercise of this right.

This article shall apply equally to foundations and other organisations of the same nature.

⁵⁰ The new version reads:

Everyone has the right to form associations, to become, or to cease to be a member of an association without prior permission.

No one shall be compelled to become or remain a member of an association.

The right to form associations shall only be restricted on grounds of national security, public order, the prevention of crime, public health and morals, and protection of the rights of others and only by law.

associations, beginning with the political parties and ending by students associations or human rights associations has been restrictive to an extent merely incompatible with Article 11 ECHR. Until 1995, the “association” was a notion which primarily caused suspicion. The Constitution and the administrative practice were far from considering association as one of the essentials of a democratic society; this is still reflected in the law of associations. The banning of associations which might develop political activities, be it on the university campus, be it in the field of human rights, was a permanent part of judicial practice. Before the legal and constitutional background, neither the principle of proportionality nor the necessity of a democratic society was enabled to play the role of “limits of limits” in order to diminish the tendency of government and administration to restrict the freedom of association. Together with the amendment of Article 13, the amendment of Article 33 raises the hope of compatibility with the provisions and the related jurisprudence of Article 11 ECHR. It should now be expected that the law of associations shall be revised in the light of the amendments.

11. Meetings and Demonstrations

Like the freedom of association, the right to assemble not only in the open air, but also in closed places suffered under the failing respect of Turkish governmental and administrative bodies against one of the pillars of public democratic life. The protection under Article 34⁵¹ remained insufficient. With the amendment the Article

The formalities, conditions, and procedures governing the exercise of freedom of association shall be prescribed by law.

Associations may be dissolved or their activities be suspended by decision of judge in cases prescribed by law. In cases where delay endangers national security or public order and in cases where it is necessary to prevent the perpetration or the continuation of a crime or to effect apprehension, an authority designated by law may be vested with power to suspend the association from activity. The decision of this authority shall be submitted for approval to the competent judge within twenty-four hours. Unless the judge declares a decision within forty-eight hours, this administrative decision shall be annulled automatically.

Provisions of the first paragraph of this article shall not prevent the imposition of restrictions on the rights of Armed Forces and Security Forces officials and civil servants to the extent that the duties of civil servants so require.

This article shall apply equally to foundations.

⁵¹ The old version reads:

“Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission.

The competent administrative authority may determine a site and route for the demonstration march in order to prevent disruption of order in urban life.

The formalities, conditions, and procedures governing the exercise of the right to hold meetings and demonstration marches shall be prescribed by law.

The competent authority designated by law may prohibit a particular meeting and demonstration march, or postpone it for not more than two months in situations where there is a strong possibility that disturbances may arise which would seriously upset public order, where the requirement of national security may be violated, or where acts aimed at destroying the fundamental characteristics of the Republic may be committed. In cases where the law

became shorter.⁵² The logic is again to restrain to essential regulation on the constitutional level and to leave details to the law. This means at the same time that the law has to respect the wording and the spirit of the Constitution as a whole. The restrictions stipulated in the former paragraph 2 are not constitutionally founded any more and have, if repeated in statutory law, to be measured with the principles of proportionality and the core of the fundamental right itself. Therefore, the new version seems to be better compatible with Article 11 ECHR than it had been before, amendments on the statutory level will be needed.

12. Fair Trial and Due Process

Under this heading, several provisions may be resumed for consideration.

a) Access to the courts and the right to be heard is regulated in Article 36⁵³. In respect to the fundamental rights in trial and legal proceedings, Turkey had, on the constitutional level, already reached European standards. There was – if ever – few need for amending the Constitution in this respect. It is, however, worth to note that Turkey is following international developments, especially pushed forward by the European Commission and Court of Human Rights, accepted by some national constitutional courts (such as the Federal Constitutional Court in Germany), which try to collect specific principles under the roof of the notion of “fair trial” and/or “due process”, which are the core of the principle of the rule of law. Thus, under the new Article 36 paragraph 1, the individual will have a “right to fair trial”. It is not yet clear, if such notion really has a normative meaning of its own beside all other principles such as the “right to sue”, “right to be heard” and others (see Articles 37 to 40).

forbids all meetings or demonstration marches in districts of a province for the same reasons, the postponement may not exceed three months.

Associations, foundations, labour unions, and public professional organisations shall not hold meetings or demonstration marches exceeding their own scope and aims.”

⁵² It now reads:

“Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission.

The right to hold meetings and demonstration marches shall only be restricted on grounds of national security, public order, for the prevention of crime, public morals, public health, or for the protection of the rights and freedoms of others, and by law.

The formalities, conditions, and procedures governing the exercise of the right to hold meetings and demonstration marches shall be prescribed by law.”

⁵³ The old version reads:

“Everyone has the right of litigation either as plaintiff or defendant before the courts through lawful means and procedure.

No court shall refuse to hear a case within its jurisdiction.”

The first paragraph after the amendment:

“Everyone has the right of litigation either as plaintiff or defendant **as well as the right to fair trial** before the courts through lawful means and procedure.”

b) Improvement may be stated also in respect to Article 38. The old version already had shown a quite high standard.⁵⁴ Now, three paragraphs have been added.⁵⁵ These additional provisions close the circle of principles within the frame of the procedural rule of law. In fact, the second additional paragraph is not new to the Turkish legal practice under the Criminal Procedure Code. But it puts the prohibition of using illegally obtained findings for evidence in a general way which means, that this rule shall be valid for all kinds of procedure where “evidence” has to be presented for a criminal, civil or administrative charge. It has especially to be seen in the light of late news of the Turkish press on the denunciation of politicians by presenting phone conversations which had been listened without authorization or a legal interest.

The prohibition to “imprison” a person “merely on the grounds of inability to fulfill a contractual obligation”, however, repeats exactly the wording of Article 11 of the UN Covenant on Civil and Political Rights and Article 1 of the Protocol No. 4 to the ECHR. This provision could also have been inserted in Article 19.⁵⁶ It should not be confounded with the possibility to detain a person as a means of execution of civil court decision for a reasonable time.

13. Death Penalty

⁵⁴ It read:

No one shall be punished for any act which did not constitute a criminal offence under the law in force at the time it was committed; no one shall be given a heavier penalty for an offence than the penalty applicable at the time when the offence was committed.

The provisions of the above paragraph shall also apply to the statute of limitations on offences and penalties and on the results of conviction.

Penalties, and security measures in lieu of penalties, shall be prescribed only by law.

No one shall be held guilty until proven guilty in a court of law.

No one shall be compelled to make a statement that would incriminate himself or his legal next of kin, or to present such incriminating evidence.

Criminal responsibility shall be personal.

General confiscation shall not be imposed as penalty.

The Administration shall not impose any sanction resulting in restriction of personal liberty. Exceptions to this provision may be introduced by law regarding internal order of the Armed Forces.

No citizen shall be extradited to a foreign country on account of an offence.”

⁵⁵ The wording of the added provisions:

“The death penalty may only be imposed in time of war, imminent threat of war and for crimes of terrorism.

Findings obtained in a manner not in accordance with the law may not be admitted as evidence.

No one shall be deprived of his liberty merely on the grounds of inability to fulfill a contractual obligation.”

⁵⁶ Cf. Article 8 of the Czech Charter of Fundamental Rights and Basic Freedoms, 1992 (<http://pravo.pinknet.cz/ustavni/czelistinae.txt>); Article 20 of the Estonian Constitution (<http://www.president.ee/eng/ametitegevus/?gid=10761>).

The discussion in Turkey about the abolition of the death penalty had been extremely influenced by the struggle against terrorism, especially against terrorist groups such as Dev Sol or PKK. After the imprisonment of the leader of the PKK, Abdullah Öcalan, three main wings split the public opinion: the one saying, that the Öcalan case should be a turning point in criminal policy with abolishing the death penalty for any crime; the second saying, that at least crimes of terrorism should be punished with the death penalty and the third wing saying that Turkey should not incline to European pressure and keep the legal situation as it is.

When Bakir Caglar in his paper speaks about the “constitutionalisation” of the death penalty, it reflects a certain disappointment about the Turkish constitution-maker. Before the amendment, the problem had been discussed only on the statutory level, as there was no clear regulation on the death penalty, except showing it as an exception to the fundamental right to life. Now, by adopting the provision as cited above (No. 12), Turkey chose the second way to handle the problem. Actually, this choice is not in compliance with Protocol No. 6 to the ECHR, which does not provide for the exception of “crimes of terrorism”. One may admit, as Özbudun in an oral intervention put it, that this version does not hinder the legislator to abolish the death penalty on the statutory level and do so – as the representent of the Foreign Ministry emphasized – in a medium term. But abolishment of the death penalty in a constitutional sense is not confined to the possibility of the legislator to determine the scope and the time of reduction or abolishment, but to insert into the constitution a normative prohibition of death penalty. In view of Protocol No. 6, a clear and unconditional stipulation such as we find it in Art. 102 of the German Constitution (“The death penalty is abolished”), may go too far for a political system which has not suffered from historical experiences such as Germany. Additionally, the experience with the up-rise and the bloodshed caused by the PKK and – more recently – Hizbullah terrorist activities, should explain a certain hesitation of the responsible political parties when trying to explain to their electors that leading terrorists should not be hanged and leave prison after twenty years which is the realistic maximum for lifelong imprisonment. So it seems to be possible to consider the compromise to which the recent amendment has reached to, already as an achievement under the condition that the moratorium (since 1984) of the execution of death penalties is continued. But this does not set the Turkish legislator free from its responsibility to change the present, newly amended text, again.

14. Access to the Courts

Turkey has split up the “right to access to the courts” into two different provisions, Article 40⁵⁷ and Article 125. This is not the place for arguing if this makes sense.

⁵⁷ Article 40 reads (the newly added paragraph highlighted):

Everyone whose constitutional rights and freedoms are violated has the right to request prompt access to the competent authorities.

In all of its acts, the State must determine the legal course of action and authorities that may be applied to by persons concerned.

Damages incurred by any person through unlawful treatment by holders of public office shall be compensated by the State. The State reserves the right of recourse to the official responsible.

Actually, Article 125 is confined to action against administrative acts, whereas Article 40 has a broader meaning of “access to the courts” which comprises any kind of courts. On the other hand, the former paragraph 2 (new paragraph 3) seems to deal with the right to sue the State for compensation which is quite similar if not the same as Article 125 para. 7. Nonetheless, if we see both of these two provisions together, one can say that the “right to access to the courts” as a major item of the rule of law has been completed by the amendment.

At the end, the new para. 2 should be mentioned. To show to the citizen the way to the court and the periods within which this should be done (instruction on remedies, German: Rechtsbehelfsbelehrung), is an improvement in favor of legal security within the relationship between the State and the citizen. It will work if the legislator implements this rule into the administrative court procedure laws in a manner that periods for action against administrative acts should only start running when the instruction on remedies has been provided together with the administrative act.

15. Protection of the Family

Article 41 which deals with the protection of the family as an “institutional right” has been amended in a way which shall guarantee the equality of male and female spouses. This principle has, in the meanwhile, also been implemented within the frame of the reform of the Civil Code which has passed Parliament. Thus, a step towards implementation of Protocols No. 7 and 12 to ECHR has been made. The amendment may also be seen as an accomplishment of Article 10 of the Turkish Constitution which already prohibits any discrimination in the sense of Article 14 ECHR.

16. Protection of Property

Property is protected in a general way under Article 35⁵⁸. This does not hinder expropriation within the framework of Article 46⁵⁹. The amendment constitutes a

⁵⁸ This provision reads:

“Everyone has the right to own and inherit property.

These rights may be limited by law only in view of public interest.

The exercise of the right to own property shall not be in contravention of the public interest.”

⁵⁹ This provision reads, the added words highlighted:

“The state and public corporations shall be entitled, where the public interest requires so, to expropriate privately owned real estate wholly or in part or impose administrative servitude on it in accordance with the principles and procedures prescribed by law, provided that compensation **in real terms** is paid in advance.

Compensation and the amount of additional compensation as finalized by court judgment shall be paid in cash and in advance. However, the procedure to be applied in paying compensation for land expropriated in order to carry out land reform, major energy and irrigation projects, and housing and resettlement schemes and reforestation, and to protect the coasts and to build tourist facilities shall be regulated by law. In previous cases where the law may allow payment in installments, the payment period shall not exceed five years; in such case payment shall be made in equal installments.

reaction on unsatisfying practices, such as withholding compensation for years and paying low interests. At the present, there has been a jurisprudence which puts the public servants under a certain pressure to comply with the principles which now are part of this amendment.

17. Social State and Social Rights

The Federal Republic of Germany is proud of having “invented” the “Social State”. We are not sure if this allegation is true in all respects. But with its extensive jurisprudence in this respect, the Federal Constitutional Court was able to fill with life this principle which is often cited in connection with the rule of law – the “social state of law” –, assisted by a vast legislation. Nevertheless, the German Constitution is not a good example for showing how the principle of the social state should be shaped within a constitutional text. The Turkish Constitution itself seems to be the better example.⁶⁰

a) Right to work

Art. 49⁶¹ has been amended⁶² not really substantially. It reflects that Turkey has become aware of the fact, that unemployed workers have deserved protection and integration in the economic system. It is not quite clear why the third paragraph has been deleted. A reason may be that such provision could be understood as empowering the state to interfere in worker-employer relations in a way which may be considered un-democratic. In practice, this constitutional provision has lately been implemented by the establishment of a – hopefully – more effective employment administration and an unemployment insurance system.

Compensation for land expropriated from the small farmer who cultivates his own land shall in all cases be paid in advance.

For the remainder of the installments provided for in the second sub-paragraph, and in cases of any standing expropriation payments not honored for any reason, an interest rate equivalent to the highest interest paid on the public debt shall be paid.”

⁶⁰ Cf. Rumpf, *Verfassungssystem* p. 121.

⁶¹ It read before the amendment:

“Everyone has the right and duty to work.

The State shall take the necessary measures to raise the standard of living of workers/employees, to protect them in order to improve the general conditions of labour, to promote labour, and to create suitable economic conditions for prevention of unemployment.

The State shall take facilitating and protecting measures in order to secure labour peace in worker-employer relations.”

⁶² ... and reads now:

“Everyone has the right and duty to work.

The State shall take the necessary measures to raise the standard of living of workers/employees **and the unemployed**, to protect them in order to improve the general conditions of labour, to promote labour, and to create suitable economic conditions for the prevention of unemployment.”

b) Trade Unions⁶³

Article 51, which has already been changed in 1995⁶⁴, was again amended⁶⁵, similarly to the right of associations. First of all, we should mention that the English translation

⁶³ For more information see: Christian Rumpf, *Barrieren auf dem Weg zur Gewerkschaftsfreiheit für Beamte in der Türkei*, EuGRZ 1995, p. 390.

⁶⁴ After the 1995 amendment it read:

“Workers/employees and employers have the right to form labour unions and employers' associations and higher organisations, without prior permission, in order to safeguard and develop their economic and social rights and the interests of their members in their labour relations.

In order to form unions and their higher bodies, it shall suffice to submit the information and documents prescribed by law to the competent authority designated by law. If this information and documentation is not in conformity with law, the competent authority shall apply to the appropriate court for the suspension of activities or the dissolution of the union or the higher body.

Everyone shall be free to become a member of or withdraw from membership in a union.

No one shall be compelled to become a member, remain a member, or withdraw from membership of a union.

Workers/employees and employers cannot hold concurrent membership in more than one labour union or employers' association.

Employment in a given workplace shall not be made conditional on being, or not being, a member of a labour union.

To become an executive in a labour union or in higher organisations of them it is a prerequisite condition that the workers/employees should have held the status of a labourer for at least ten years.

The status, the administration, and the functioning of the labour unions and their higher bodies should not be inconsistent with the characteristics of the Republic as defined in the Constitution, or with democratic principles.”

⁶⁵ ... and now reads:

“Workers/employees and employers have the right to form labour unions and employers' associations and higher organisations, without prior permission, in order to safeguard and develop their economic and social rights and the interests of their members in their labour relations and shall be free to become a member of, or withdraw from membership in a union. No one shall be compelled to become a member, remain a member, or withdraw from membership of a union.

The right to form labor unions and employers' associations and higher organizations shall only be restricted on grounds of national security, public order, prevention of crime, public health and morals and the protection of the freedoms of others.

The formalities, conditions and procedures governing the exercise of the right to form labour unions and employers' associations and superior organizations shall be prescribed by law.

Workers/employees and employers cannot hold concurrent membership in more than one labour union or employers' association.

The scope and exceptions of and limitations in this field to the rights of public employees who do not have the worker status, shall be prescribed by law in accordance with the nature of the service that they provide.

The regulations, management and functioning of labour unions and their higher bodies shall not violate the fundamental characteristic of the Republic and the principles of democracy.”

of the Turkish text is misleading, as it makes of the notion “workers” (which has been changed into “workers/employees” in our translation), whereas the Turkish version is speaking about “working people” which comprises also the employees. Thus, all kind of employees are comprehended as being entitled to claim these rights. On one hand, this provision reflects a hard public dispute, with repercussions within the jurisprudence of the Turkish courts, which has been resolved in favor of trade unions for the civil service. On the other hand, the provision leaves unclear, if workers in the public service should have the right to form trade unions or not, or if it only means that, after workers having been assigned such right to themselves, employees should have such right, too. If we look at the practice, the latter seems to be true.⁶⁶

c) Fair Salary

Briefly, the principle of “fair salary” has been amended by the criteria of “the minimum of living standards of employees”, which have been respected when setting the minimum wage, which already is constitutionally guaranteed (Article 55).

d) Limits of the Social State

The reality of social state policies shows that the budgetary framework of the State may set some limits to the expenses to be made for a far going protection of social rights. Accordingly, the Turkish Constitution has introduced Article 65, the final provision under the heading “The Extent of Social and Economic Rights”.⁶⁷ Few has changed by the amendment⁶⁸, which obtained a more realistic heading: “The Limitations of the Social and Economic Duties of the State”.

18. Citizenship

According to Article 66, “Everyone bound to the Turkish State through the bond of citizenship is a Turk.” The paragraph

“The child of a Turkish father or a Turkish mother is a Turk. The citizenship of a child of a foreign father and a Turkish mother shall be defined by law.”

has been deleted. Thus, the violation of the principle of equality between men and women has been abolished, the provision being adapted to Article 5 of Protocol No. 7 of the ECHR as well as to Article 1 of Protocol No. 12.

⁶⁶ Cf. Rumpf, *Verfassungssystem* p. 250.

⁶⁷ It read until the amendment:

“The State shall fulfill its duties as laid down in the Constitution in the social and economic fields within the limits of its financial resources, taking into consideration the maintenance of economic stability.”

⁶⁸ ... and now reads:

“The State shall fulfill its duties as laid down in the Constitution in the social and economic fields within the limits of its financial resources, taking into consideration **the priorities in line with the objectives of these duties.**”

19. Elections and Political Participation

Elections and the rights thereto are regulated in Article 67⁶⁹. The amendments mark the half way of what the constitution-maker should have done.⁷⁰

Nonetheless, slowly, the Turkish electoral system approaches European standards. By this amendment, persons sentenced for negligence will be allowed to vote. This amendment has been undertaken in the light of Article 3 of the Protocol No. 1 of the ECHR. On the other hand, in the same light, there is no substantial change. It still seems doubtful if the denial of vote for military personnel is an adequate constraint of the right to vote.

Furthermore, it has to be said that on the statutory level there exists a bar of 10% for political parties to be achieved in the whole of the country. This regulation is contested in public discussion in Turkey as “undemocratic”. The political reason for this regulation was to prohibit a too vast number of parties being elected into the

⁶⁹ Article 67 read before the amendment:

“In conformity with the conditions set forth in the law, citizens have the right to vote, to be elected, and to engage in political activities independently or in a political party, and to take part in a referendum.

Elections and referendums shall be held under the direction and supervision of the judiciary, according to the principles of free, equal, secret, direct, universal suffrage, and public counting of the votes. However, the conditions under which the Turkish citizens who are abroad shall be able to exercise their right to vote, are regulated by law.

All Turkish citizens over 18 years of age shall have the right to vote in elections and to take part in referenda.

The exercise of these rights shall be regulated by law.

Privates and corporals serving in the armed services, students in military schools, and convicts in penal institutions cannot vote. The Supreme Election Council shall determine the measures to be taken to ensure the safety of the counting of votes; such voting is done under the on-site direction and supervision of authorized judge.”

⁷⁰ Now, Article 67 reads:

“In conformity with the conditions set forth in the law, citizens have the right to vote, to be elected, and to engage in political activities independently or in a political party, and to take part in a referendum.

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. However, the conditions under which the Turkish citizens who are abroad shall be able to exercise their right to vote, are regulated by law.

All Turkish citizens over 18 years of age shall have the right to vote in elections and to take part in referenda.

The exercise of these rights shall be regulated by law.

Privates and corporals serving in the armed services, students in military schools, and convicts in penal institutions, with the exception of those convicted for negligent conduct, cannot vote. The Supreme Election Council shall determine the measures to be taken to ensure the safety of voting and the counting of votes; such voting is done under the on-site direction and supervision of authorized judge.

When there is less than one year for elections, amendments made to electoral laws shall come into force for the second consecutive elections.”

National Assembly as well as not to have regional parties be represented in the Parliament. Thus, especially political parties with a Kurdish background who regularly obtain important majorities in their respective region, were not able to gain seats through election. At the present, it is envisaged to pull the bar down to 8%.⁷¹

21. Political Parties

The right to form political parties and to participate thereto, is regulated in Articles 68 and 69⁷². The latter one has been amended⁷³, especially concerning the issue of the

⁷¹ See e.g. “Yüzde 8 bilmecesi”, in: Milliyet, 17 November 2001

⁷² Article 69 read before the amendment:

“The activities, internal regulations and operation of political parties shall be in line with democratic principles. The application of these principles is regulated by law.

Political parties shall not engage in commercial activities.

The income and expenditure of political parties shall be consistent with their objectives. The application of this rule is regulated by law. The auditing of the income and expenditure and acquisitions of political parties as well as the establishment of the conformity to law of their revenue and expenses, methods of auditing and sanctions to be applied in the event of unconformity shall also be regulated by law.

The Constitutional Court shall be assisted in performing its task of auditing by the Court of Accounts. The judgments to be rendered by the Constitutional Court as a result of the auditing shall be final.

The dissolution of political parties shall be decided finally by the Constitutional Court after the filling of a suit by the office of the Chief Public Prosecutor of the Republic.

The permanent dissolution of a political party shall be decided when it is established that the statute and programme of the political party violate the provisions of the fourth paragraph of Article 68.

The decision to dissolve a political party permanently owing to activities violating the provisions of the fourth paragraph of Article 68 may be rendered only when the Constitutional Court determines that the party in question has become a centre for the execution of such activities.

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.

Political parties which accept financial assistance from foreign states, international institutions and persons and corporate bodies shall be dissolved permanently.

The foundation and activities of political parties, their supervision and dissolution, as well as the election expenditures and procedures of the political parties and candidates, are regulated by law in accordance with the above-mentioned principles.”

⁷³ The new Article 69:

“The activities, internal regulations and operation of political parties shall be in line with democratic principles. The application of these principles is regulated by law.

Political parties shall not engage in commercial activities.

The income and expenditure of political parties shall be consistent with their objectives. The application of this rule is regulated by law. The auditing of the income and expenditure and

banning of political parties. At this place, the amendment of Article 149 – within the powers of the Constitutional Court – should be mentioned. Decisions on the dissolution of political parties have to be taken with a majority of the Court of 3/5.

Turkey has a long experience in the banning of political parties. This practice had become one of the most critical points when determining the extent of the implementation of democratic principles in Turkey. Accordingly, there is a vast jurisprudence of the ECHR⁷⁴ who only in one case – the case of the Welfare Party⁷⁵ – upheld the dissolution of a political party by the Constitutional Court. Actually, on one hand one can say that the Turkish system of dissolving political parties follows the principles of due process and fair trial; it is not a question of political discretion if a suit is filed to the Constitutional Court. On the other hand, it is problematic to

acquisitions of political parties as well as the establishment of the conformity to law of their revenue and expenses, methods of auditing and sanctions to be applied in the event of unconformity shall also be regulated by law.

The Constitutional Court shall be assisted in performing its task of auditing by the Court of Accounts. The judgments to be rendered by the Constitutional Court as a result of the auditing shall be final.

The dissolution of political parties shall be decided finally by the Constitutional Court after the filing of a suit by the office of the Chief Public Prosecutor of the Republic.

The permanent dissolution of a political party shall be decided when it is established that the statute and programme of the political party violate the provisions of the fourth paragraph of Article 68.

The decision to dissolve a political party permanently owing to activities violating the provisions of the fourth paragraph of Article 68 may be rendered only when the Constitutional Court determines that the party in question has become a focus of such activities. A political party will be considered to have become the focus of activities when actions of this type are undertaken intensively by the members of that party and when these actions are discreetly or openly approved by the general assembly or the chairman or the central decision-making or administrative organs or by the General Council of the Party Group at the Turkish Grand National Assembly or by the administrative board of that Group, or when these actions are directly and intentionally committed by party organs.

The Constitutional Court may take the decision to deprive the party of State funds, either partially or in full, instead of permanently dissolving the party, according to the gravity of the actions brought before the Court.

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.

Political parties which accept financial assistance from foreign states, international institutions and persons and corporate bodies shall be dissolved permanently.

The foundation and activities of political parties, their supervision and dissolution or the denial of state funds to them partially or in full, as well as the election expenditures and procedures of the political parties and candidates, are regulated by law in accordance with the above-mentioned principles.”

⁷⁴ United Communist Party of Turkey vs. Turkey, Application 19392/92, 30 January 1998, Reports 1998-I; Socialist Party vs. Turkey, Application 21237/93, 25 May 1998, Reports 1998-III; Freedom and Democracy Party vs. Turkey, Application 23885/94, 8 December 1999 (all of them to be found in the internet under <http://hudoc.echr.coe.int>).

⁷⁵ Welfare Party vs. Turkey, Applications 41430/98 and others, 31 July 2001 (ibidem).

handle the dissolution of a political party like any other criminal procedure as it is done under the Turkish system, because political parties, other than associations and trade unions or professional chambers, play a specific role within the development of public opinion and its referral to the competent legislative organs. Furthermore, the criteria and conditions on which the decision to ban a political party may be based, have been too narrow and – as to the notion of “focus of activities” – too uncertain. Third, the dissolution of a party is bound to a qualified majority of the Constitutional Court. This marks the difference between an “ordinary” political or non-political association or organization and a political party.

With the amendment, Turkey tries to find a way to preserve her faith to the system she has chosen as well as to comply with the jurisprudence of the ECHR. The future practice of the Turkish Constitutional Court will bring evidence if this compromise works.

22. Right of Petition

The Right of Petition had been reserved to Turkish Citizens. Now, it is ascribed also to “foreigners resident in Turkey in accordance with the principle of reciprocity”. This may be considered as an improvement vis à vis the principle of non-discrimination. Reciprocity, however, is still a constraint which seems, in this respect, to be at least doubtful in a modern democratic system.

Furthermore, the lacking effectiveness of Turkish petition procedures, lasting too long or never ending, shall be fought by inserting the phrase that the result of the petition shall be made known **without delay** to the petitioner in writing. However, we do not believe that this amendment bears any relevance.

23. Financial Situation of Members of Parliament

This point is not as eminent for the question of accession as most of the other amendments. Furthermore, the relevant Article 86 has been discussed in a second round in the Parliament and finally passed.⁷⁶

24. Amnesty

The political practice of amnesty plays an eminent role in Turkey. In order to aggravate the possibility to pass amnesty laws, Article 87, which deals generally with the tasks and duties of the National Assembly, connects an amnesty law to a qualified majority of 3/5 of the total of the members. The phrase “excluding those individuals convicted for activities set out in Article 14 of the Constitution” has been deleted from the text of Article 87.

Thus, an eternal struggle between the Assembly and the Constitutional Court and, of course, a permanent political discussion has come to an end. Especially the question of equal treatment of “political” and “criminal” offenses has been given an answer to, in favor of the principle of non-discrimination.

⁷⁶ Law No. 4720 of 21 November 2001, Resmî Gazete No. 24600, 01 December 2001.

On the other hand, Turkish “amnesty policies” will remain a major factor of causing legal uncertainty. The aim of criminal punishment, especially the idea of “general prevention”, has no meaning if criminals may hope to be released within much a shorter period than the law of execution of criminal punishments provides for and which is short enough (less than halftime in the average). The Turkish legislator seems to have difficulties to perceive the meaning of “peace through law”, which of course, in the long run, cannot be upheld by amnesties.

Nonetheless, the importance for the practice of this amendment remains doubtful. The simple reason for this is that the “criminal” amnesty laws passed by the Assembly during the last two decades were not “amnesties” in the technical sense but nothing else than the conditional release of prisoners on parole.

25. Promulgation of statutory laws

With a minor amendment of Article 89, it has been made clear that the power of the President of referring a law back to the National Assembly concerns both “full” and “partial” deficiencies of the law; in case of partial deficiency, the Assembly shall – according to the amendment – by now only discuss the deficient articles. The amendment touches much more a general Turkish view of the balance between Parliament and Presidency than specific European ideas of how such a balance should be established.

26. Internal Issues of the Parliament

a) Election of the Speaker of Parliament

Article 94 is amended only in respect of the delay within which the Speaker has to be elected, now five days instead of ten days.

b) Parliamentary investigation

We will not discuss the amendment of Article 100⁷⁷ in detail. The amendment has the purpose to bring more efficiency and less politicization to parliamentary investigation.

⁷⁷ It reads now:

“Parliamentary investigation concerning the Prime Minister or other ministers may be requested through a motion tabled by at least one-tenth of the total number of members of the Turkish Grand National Assembly. The Assembly shall consider and decide on this request with secret ballot within one month at the latest.

In the event of a decision to initiate an investigation, this investigation shall be conducted by a commission of fifteen members chosen by lot on behalf of each party from among three times the number of members the party is entitled to have on the commission, representation being proportional to the parliamentary membership of the party. The commission shall submit its report on the result of the investigation to the Assembly within two months. If the investigation is not completed within the time allotted, the commission shall be granted a further and final period of two months. This report shall be submitted to the Speakership of the Turkish Grand National Assembly by the end of this duration.

27. National Security Council

The National Security Council is said to be the nucleus of crucial political decisions. It is regulated in Article 118⁷⁸, which has undergone some minor amendments⁷⁹.

The report shall be distributed within ten days after the date of submission to the Speakership and it will be discussed in ten days after its distribution, and if necessary, the decision may be taken to bring the person involved before the Supreme Court. The decision to bring a person before the Supreme Court shall be taken by secret ballot only by an absolute majority of the total number of members.

Political party groups in the Assembly shall not hold discussions or take decisions regarding Parliamentary investigations.”

⁷⁸ This Article read until the amendment:

“The National Security Council shall be composed of the Prime Minister, the Chief of the General Staff, the Ministers of National Defence, Internal Affairs, and Foreign Affairs, the Commanders of the Army, Navy, and the Air Force, and the General Commander of the Gendarmerie, under the chairmanship of the President of the Republic.

Depending on the particulars of the agenda, Ministers and other persons concerned may be invited to meetings of the Council and their views be heard.

The National Security Council shall submit to the Council of Ministers its views on taking decisions and ensuring necessary coordination with regard to the formulation, establishment, and implementation of the national security policy of the State. The Council of Ministers shall give priority consideration to the decisions of the National Security Council concerning the measures that it deems necessary for the preservation of the existence and independence of the State, the integrity and indivisibility of the country, and the peace and security of society.

The agenda of the National Security Council shall be drawn up by the President of the Republic taking into account the proposals of the Prime Minister and the Chief of the General Staff.

In the absence of the President of the Republic, the National Security Council shall meet under the chairmanship of the Prime Minister.

The organisation and duties of the General Secretariat of the National Security Council shall be regulated by law.”

⁷⁹ It now reads:

“The National Security Council shall be composed of the Prime Minister, the Chief of the General Staff, Deputy Prime Ministers, the Minister of Justice, the Minister of National Defense, the Minister of the Interior, the Minister of Foreign Affairs, the Commanders of the Army, Navy and the Air Force and the General Commander of the Gendarmerie, under the chairmanship of the President of the Republic.

Depending on the particulars of the agenda, Ministers and other persons concerned may be invited to meetings of the Council and their views be heard.

The National Security Council shall submit to the Council of Ministers the advisory decisions it has taken and its views on taking decisions and ensuring necessary coordination with regard to the formulation, establishment, and implementation of the national security policy of the State. The Council of Ministers shall take into consideration the decisions of the National Security Council concerning the measures that it deems necessary for the preservation of the existence and independence of the State, the integrity and indivisibility of the country, and the peace and security of society.

The agenda of the National Security Council shall be drawn up by the President of the Republic taking into account the proposals of the Prime Minister and the Chief of the General Staff.

Indeed, the role of the military within the Turkish constitutional system has been discussed at least since the military coup of 27 May 1960. After 1980, the role of the military has been even reinforced.⁸⁰ One of the main symbols for the predominance of the military in Turkish politics is the National Security Council. Such institution is known to many countries. But in Turkey, the number of members of the military staff within the council in relation to the number of civilians seemed to be somewhat unbalanced. Even if one considers that the Council of Ministers had to take into consideration by priority the decisions of the Council which does not mean being bound to such decisions, the political impact was of a character and a quality which allowed some observations as to the independence of the political organs from military influence. Also the fact that decisions have to be taken unanimously does not change things very much. If military power is – in fact – not under the full control of the civilian government and thus constitutes a power of its own, one cannot expect that civilians would easily vote different within such a council.

By this amendment, the number of civilians in the Council has been increased thus creating a majority against the members of the military staff. Furthermore, the taking into consideration “by priority” has been slightly changed by deleting “by priority”. On the other hand, the principle of unanimous vote has not been changed. One may consider that this hits both military and civilian drafts submitted to the Council. As a matter of fact, the military prevails in such a situation by the pure fact having “force” in the background. The weight of this argument increases under the consideration of the secretariat of the Council being directed by a general. As a consequence, there remains still a question mark behind this amendment.

Beyond the setting of the National Security Council, one should additionally expect some action, be it on behalf of the electoral rights of the military personnel, be it in relation to the delimitation of the competences of the military courts who have still, in some limited respect, jurisdiction over civilians.

28. End of the “Meta Constitution”

One of the most important amendments concerns Provisional Article 15⁸¹. With the new version, the last paragraph of this article is deleted from the text.

In the absence of the President of the Republic, the National Security Council shall meet under the chairmanship of the Prime Minister.

The organisation and duties of the General Secretariat of the National Security Council shall be regulated by law.”

⁸⁰ See especially Metin Heper/Ahmet Evin (eds.), *State, Democracy and the Military - Turkey in the 1980s*, Berlin/New York 1988.

⁸¹ It read before the amendment (the amendment consists of the deletion of the last paragraph):

“No allegation of criminal, financial or legal responsibility shall be made, nor shall an application be filed with a court for this purpose in respect of any decisions or measures whatsoever taken by: the Council of National Security formed under Act No. 2356 which will have exercised legislative and executive power on behalf of the Turkish Nation from 12 September 1980 to the date of the formation of the Bureau of the Turkish Grand National Assembly which is to convene following the first general elections; the governments formed during the term of office of the Council; or the Consultative Assembly which has exercised its functions under Act No. 2485 on the Constituent Assembly.

This amendment means the end of the so called “Meta Constitution”. After the military coup of 12 September 1980, the military junta (the interim National Security Council) had created a new political system which was reflected in nearly 600 statute laws passed between the coup and 6 December 1983, the day of the first reunion of the newly elected National Assembly under the 1982 Constitution. Some of these laws, such as the law of associations, political parties, trade unions and many others, entailed a notion of democracy which was not compatible with the understanding of “classic democracy” within the “acquis” of the member states of the Council of Europe. Where such laws were even not in compliance with the 1982 Constitution – which already has to be considered as authoritarian and not very friendly towards the protection of fundamental rights – the last paragraph of Provisional Article 15 prohibited the courts to bring such laws to the Constitutional Court. Attempts to do so had regularly been rejected by this court, who did not dare to keep the principle of the rule of law and the principle of democracy – both of them enshrined in the fundamental provisions of Article 2 – higher than a final provision with expressly “provisional” character. Of course, parliament has always been able to amend the laws passed in the period between September 1980 and December 1983. But nonetheless, once the Turkish Constitution had, since 1961, adopted the supervision of the legislator as a condition of a modern concept of the rule of law, the system under Provisional Article 15 fell into contradiction with this concept. As the same concept had been accepted by all of the EU and CE member states, Turkey staid behind with this kind of anachronism. Thus, after this amendment, the door will be open to putting an end to such ambiguity and the Constitutional Court will fulfill its task as a counterpart to antidemocratic and unconstitutional legislation.

Still, one may miss the deletion of this article in the whole. It shows the difficulty of Turkey to question and discuss the military coup and its consequences. From the European point of view one might take the position that the military coup was clearly a breach of the 1961 Constitution and Article 146 of the Penal Code. On the other hand, it is also very difficult to imagine which other remedy could have been brought to political and social problems in the year 1980, where the means of a democratic state obviously failed to cure the disease which pushed democracy and society in a situation of a civil war. Thus, at the end, we should appreciate the step being made and honor it. At least, the Constitution does not suffer any more from constitutional schizophrenia.

The provisions of the above paragraphs shall also apply in respect of persons who have taken decisions and adopted or implemented measures as part of the implementation of such decisions and measures by the administration or by the competent organs, authorities, and officials.

No allegation of unconstitutionality shall be made in respect of decisions or measures taken under laws or decrees having force of law enacted during this period or under Act No. 2324 on the Constitutional Order.”

V. Transfer of Sovereignty Rights⁸²

Under this heading, we shall finally stress one of the most important features of the accession process. As the EU is a supranational organization which step by step approaches the structures of a constitutional system of its own, with its own powers and competences interfering directly with the national legal systems, it must be considered a *conditio sine qua non* that a candidate for accession to the EU defines its own constitutional system in a way that the execution of sovereignty rights by supranational organs such as the European Commission, the European Council of Ministers or the European Court of Justice does not come into a conflict with constitutional positions of a member state. Where at the very beginning of the European Economic Community one might have seen this item in a more pragmatic way, the experience has shown, that a smooth development of Communities to a European Union could not afford renouncing to the solution of normative problems in respect to the transfer of sovereignty rights.

Of course, there is – in theory – no expressive provision under European law, saying that and how a member state should provide for a normative link between the national and the European legal system. But on the other hand, if we speak about “adaptation” of legal systems to the *acquis communautaire*, if accession is seriously envisaged, such legal system should first of all provide for the direct applicability of European law and administrative acts, adapt its own constitution accordingly.

It must be clearly stated that Turkey did not do her homework in this respect. In order to underline this allegation, we shall have a look to the fundamental provisions of the Turkish Constitutions, dealing with “sovereignty” and the execution thereof. These articles read:

“VI. Sovereignty

ARTICLE 6. Sovereignty is vested in the nation without reservation or condition.

The Turkish Nation shall exercise its sovereignty through the authorised organs as prescribed by the principles laid down in the Constitution.

The right to exercise sovereignty shall not be delegated to any individual, group or class. No person or agency shall exercise any State authority which does not emanate from the Constitution.

VII. Legislative Power

ARTICLE 7. Legislative power is vested in the Turkish Grand National Assembly on behalf of the Turkish Nation. This power cannot be delegated.

VIII. Executive Power and Function

⁸² Cf. Füsün Arsava, Geleceğin AB Üyesi olarak Türkiye – Egemenlik Haklarının Devri Sorunu (Turkey as a member of future EU – The Problem of Transfer of Sovereignty Rights), Türkiye’de Anayasa Reformu – Prensipler ve Sonuçlar (Constitutional Reform in Turkey – Principles and Results), Konrad-Adenauer-Foundation (ed.), Ankara 2000, p. 71; Christian Rumpf, Nationale Verfassung und Beitritt zur EU - Beispiel Türkei, AÜSBFD (Siyasal Bilgiler Fakültesi Dergisi – Journal of the Faculty of Political Science, Ankara University) 50/1-2 (1995), p. 297.

ARTICLE 8. 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 laws.

IX. Judicial Power

ARTICLE 9. Judicial power shall be exercised by independent courts on behalf of the Turkish Nation.”

These provisions reflect a concept of sovereignty which does not comply any more with the principles of membership to the EU. It has been emphasized in the public and scientific discussion before and in the course of the law making process in respect of the constitutional amendments, that the constitutional concept of the European Union is based on the transfer of sovereignty to supranational organs, including administrative, legislative and judicial powers. The German Constitution – to give an example – says in its Article 24:

“(1) The Federation may transfer sovereignty rights to international institutions by law.

(1a) As far as such rights are addicted to the federate states, such states may with the prior consent of the Federal Government transfer such rights to cross-border institutions.

(2) The Federation may for the purpose of maintaining peace participate to an organization which serves collective security; it will consent to restrictions of national sovereignty rights for the purpose of maintaining a continuous order of peace in Europe and between the nations of the world.

(3) The Federation will participate to international arbitration agreements for the general, extensive and binding settlement of international disputes.”

Of course, such provision is not the only possible regulation for the transfer of sovereignty rights. But as long as Turkey does not incline to insert any provision which might be similar to Article 24 of the German Constitution or Article 28 of the Greek Constitution, the constitutionality of the accession to the EU from a Turkish point of view will remain at least questionable. Any jurisdiction of the ECJ will be in contradiction to Article 9 of the Constitution, any act of legislation will be in contradiction to Article 7 and any administrative decision with direct effect on Turkish institutions and nationals will violate Article 8 of the Turkish Constitution. At this place, we shall not go into details, which wording such a provision should have and in which context of the Constitution it should be inserted. We would prefer a provision narrowly connected to the above cited fundamental provisions, better than within to Article 90 which regulates the position of international agreements in the Turkish constitutional system.

VI. Minority Rights

The amendments of the Constitution deal with minority rights only in one respect. The possibility to ban the making use of the own mother tongue has been abolished. To our opinion, the protection of minority rights must not necessarily pass through the establishment of a kind of institutional protection of what is called “minority rights”.

But if Turkey alleges that the protection of minorities passes through the protection of fundamental rights, then it must be clear that the making use of fundamental rights must go far enough to enable the individual to develop and keep its individual identity, defined by the belonging to a specific ethnic group. This is what the EU demands when urging the “protection of minorities”. The Constitution in the new version may, if interpreted accordingly, give way to such practice which may satisfy the European Union. We all know, that other member countries have similar problems. But there are a couple of possibilities to solve conflicts between the needs of personal and social identity of individuals belonging to different ethnic groups, including their liberties, and the need to uphold national security. If we take the example given by Professor Caglar in his contribution, citing Daniel Cohn-Bendit, we have a wide range between the models of “Barcelona” and the model of “Bagdad” – one standing for a smooth solution, giving regional minorities certain rights in political and administrative autonomy and the other one standing for a strong centralism which would not be bearable under the political, social and legal conditions within the EU. Or we may put it with the OSCE High Commissioner on National Minorities Max van der Stoep who in 1999 on the OSCE-summit in Istanbul is reported to have stated, that the concepts of “internal self-determination” and “non-territorial autonomy” together could ensure better participation in public life without prejudice to the territorial integrity of a state.⁸³ For Turkey, the French model may be considerable, still within a centralistic concept, where in some sensitive regions such as Corse, Brittany, Alsace or the south (Occitany) school lessons are given to the choice of the pupils in their respective mother tongue.⁸⁴

VII. Conclusion

Accession to the EU does not mean that all national legal systems have to run synchronically in every respect. On the other hand, the *acquis* means that at least some fundamental principles have to be accepted as common. Some of these principles are even laid down in international or European legal instruments such as the ECHR and the protocols thereto or in the European Charter of Fundamental Rights. If a constitutional text is not in compliance with the wording of such instrument, there remains no way to see such violation in the light of national exception or specialty or within a kind of margin of appreciation which every state without any doubt has within the framework and scope of the wording and the meaning of binding international instruments.

Thus, we can assemble our comments within the following conclusions:

1. The system of guarantees of the fundamental rights and freedoms and their limitation has approached to the exigencies of the EU. Nevertheless we have the feeling that the Turkish constitution-maker has still some problems with the basic principle which is stipulated in Article 1 of the European Charter of Fundamental Rights as “Human dignity is inviolable. It must be respected and

⁸³ Cit. by Naz Cavusoglu, *Cultural Identity: A “Minority Question”*, presentation delivered to the symposium “Copenhagen Criteria”, Istanbul 24-25 June 2000.

⁸⁴ The daily *Dernières Nouvelles d’Alsace*, 11 November 2001, gives some examples: In 2000, 152,557 out of 12 million pupils have chosen this possibility, more of 70,000 in the south, only some 6,500 in the Alsace.

protected.” The German example (Article 1 of the German Grundgesetz), on which this provision is based, shows very well that putting this principle on the top of the provisions on the fundamental rights may be of major importance for jurisprudential tradition and the setting of fundamental rights within a constitutional system. In the German constitutional practice, the principle of human dignity has played a most important role in the protection of fundamental rights.

2. The transfer of sovereignty rights has not been regulated; therefore, to our opinion, an eminent precondition for the accession has not yet been implemented.
3. The regime of rights attributed to minorities is not yet satisfying, even if we have to admit that the most important issue – making use of the mother tongue – has been solved at least on the constitutional level.
4. The amendment in respect to the abolishment of the death penalty is not yet compatible with the Protocol No. 6 of the ECHR.
5. The role of the military has not changed essentially.

In other words: the constitutional developments, from the point of view of the European Union⁸⁵, are not yet sufficient to justify a positive decision on the accession of Turkey to the EU. But we still hope, that the responsible politicians in the decisive positions within the Turkish political system will continue working on this development⁸⁶ and come, in a second round of constitutional amendments, to more encouraging conclusions.

⁸⁵ Even if we argue that this “point of view” is going to far and aggravating the accession of Turkey, it is, also in legal terms, a fact which has been established by all of the member states.

⁸⁶ Of course, not only politicians but also judges and public officers have to fulfill their tasks within their area of competence.