TESEV DEMOCRATIZATION PROGRAM
POLICY REPORT SERIES

KURDISH QUESTION 2

TOWARD A SOLUTION TO THE KURDISH QUESTION:

CONSTITUTIONAL AND LEGAL RECOMMENDATIONS

DİLEK KURBAN
YILMAZ ENSAROĞLU

TESEV

TOWARD A SOLUTION TO THE KURDISH QUESTION: CONSTITUTIONAL AND LEGAL RECOMMENDATIONS

DİLEK KURBAN – YILMAZ ENSAROĞLU

SEPTEMBER 2010

TESEV
PUBLICATIONS

TOWARD A SOLUTION TO THE KURDISH QUESTION: CONSTITUTIONAL AND LEGAL RECOMMENDATIONS

ISBN: 978-605-5832-55-1

TESEV PUBLICATIONS

Authors: Dilek Kurban, Yılmaz Ensaroğlu
Prepared for publication by: Serkan Yolaçan

Translator: Fethi Keleş

Design Supervisor: Rauf Kösemen, Myra
Cover Design: Banu Yılmaz Ocak, Myra
Page Layout: Serhan Baykara, Myra

Printed by: İmak Ofset

Türkiye Ekonomik ve
Sosyal Etüdler Vakfı
Turkish Economic and
Social Studies Foundation
Demokratikleşme Programı
Democratization Program

Bankalar Cad. Minerva Han No: 2 Kat: 3
Karaköy 34420, İstanbul
Tel: +90 212 292 89 03 PBX
Fax: +90 212 292 90 46
info@tesev.org.tr
www.tesev.org.tr

The viewpoints in this report belong to the authors, and they may not necessarily concur partially or wholly with TESEV's viewpoints as a foundation.

TESEV would like to extend its thanks to the Royal Embassy of the Netherlands in Ankara, Open Society Foundation and the TESEV High Advisory Board for their contributions with regard to the publication and promotion of this book.

Table of Contents

Acknowledgment...

A great many people contributed to this report. And we owe thanks to all of them. First of all, to Serkan Yolaçan: He managed the project on behalf of the TESEV Democratization Program, held the preliminary workshops, established communication between authors and workshop participants, had countless phone conversations and written correspondence with the legal practitioners and experts who contributed to the report, exercised incredible patience and diligence in staying on top of all the changes we have made down to the last second, and worked very hard on tens of draft texts to lead a coordinated effort and the communications between the translators, editors, and page setters. We thank Serkan for his support, patience, and that smile on his face which we never had in short supply, even in the most stressful of times. We are grateful to Sibel Doğan and Gülderen Rençber Erbaş, the beloved employees of Myra Ajans, who treated us with utmost understanding and worked those long and miraculously dedicated hours on the design of the TESEV report. We also wish to acknowledge the hard work of our translator, Fethi Keleş. The efforts of the interns at the TESEV Democratization Program should not go unnoticed: We gratefully acknowledge the meticulous and solid research support provided by Firdevs Güreşçi. And we would like to express our sincere thanks to Damla Büyükonat and Kaitlin Conklin for their assistance with the editing of the text. We also would like to thank TESEV Democratization Program Assistant Esra Bakkalbaşıoğlu who attended the Ankara workshop and provided out-of-office support. We also acknowledge the efforts of all of the Program staff. A heartfelt thank you goes out to Etyen Mahçupyan, TESEV Democratization Program Director, for paving the way over the years for the Program to undertake pioneering and courageous efforts regarding the Kurdish Question, and to Can Paker, TESEV Executive Board Chairman, for his support throughout the project.

Though it was eventually us who authored the report, we could not have undertaken this effort without the long-lasting legal struggles and works of legal practitioners and experts who shared with us their invaluable opinions and recommendations during and after the workshops. We are thankful to Emin Aktar, Yusuf Alataş, Vahap Coşkun, Demir Çelik, Meral Danış Beştaş, Tahir Elçi, Fazıl Hüsnü Erdem, Levent Kanat, Hasip Kaplan, Hüsnü Öndül, Sezgin Tanrıkulu, Şehnaz Turan, Öztürk Türkdoğan and Reyhan Yalçındağ. Mehmet Uçum, Hatice Uçum and Gülçin Avşar were generous enough to return our call of support for the report's section on children aggrieved by the Anti-Terror Law. They produced a unique text for the report and made valuable suggestions on the report in general in a very limited amount of time. We gratefully acknowledge their efforts.

We hope that the report opens up the space for a calm and constructive debate that has no room for political heroism and sentimentalism, and eventually contributes to a democratic and just answer to the Kurdish Question ...

DİLEK KURBAN- YILMAZ ENSAROĞLU

Preface

The new global context that budded in the last quarter of the previous century impacted not only the economic and cultural space but also directly modified the form of political practice. States faced the need to undergo a multi-dimensional process of adaptation. The new world invited more than spatial interpenetration; it also called for a peaceful approach based on negotiation and reconstituted political norms from within a democratic framework.

Turkey responded rapidly to the call in terms of international relations and set out to develop a web of relations with its neighbors based on equality and dialogue. But national politics followed a different track, for the very same norms were perceived as threats to Turkey's republican project and its administrative heritage. This led to a state approach which had a theoretical idea of where to go, but did not know how to go there and was in fact ideologically timid to take the step further.

The deadlock was most keenly felt with respect to the Kurdish question. Inasmuch as the state was rendered passive as a result of the pressure created by the context of violence, Kurdish politics too assumed a uniform character. The result was an official attitude that shied away from the Kurdish issue instead of solving it and neglected the troubles and demands of Kurdish citizens. This approach found its way across the legal framework from the Constitution to laws and regulations.

The construction of citizenship on the grounds of Turkish identity reduced the concept of the Republic of Turkey to a 'Turkish' state. The notion of indivisible state, on the other hand, resulted in all cultural identities other than the Turkish one 'not being seen' by the state in equal terms. The legislative order that came into being out of such an administrative mentality was interpreted by Kurds as a sign of 'bad faith', and all that was done in the name of justice proved that a multicultural social structure was yet to be digested.

Since it put the Kurdish question on its agenda in 2005, TESEV has published a book analyzing forced migration and six reports on issues ranging from socioeconomic structure to social reconciliation. These works offered an orderly arrangement of the demands of Kurds on the one hand, and a review of the steps taken by the state, on the other. Crafting a solution to the question, however, requires that human rights reforms that need to be undertaken in the legislation not wait any longer. Without that legal background, there is no chance that the government's 'good' will may yield any fruit. This report lists the conditions for the constitution of that legal background and lays out the framework for democratic politics which may be undertaken in the meantime, and thereby presents possibilities for a genuine solution. We hope that the debate it will generate will add to and reinforce mutual understanding.

ETYEN MAHÇUPYAN
DIRECTOR, TESEV DEMOCRATIZATION PROGRAM

Acronyms

BDP	Peace and Democracy Party
BİHB	Human Rights Presidency of the Prime Ministry (*Başbakanlık İnsan Hakları Başkanlığı*)
BİHDK	Human Rights Advisory Board of the Prime Ministry (*Başbakanlık İnsan Hakları Danışma Kurulu*)
CRC	UN Convention on the Rights of the Child
DTK	Democratic Society Congress (*Demokratik Toplum Kongresi*)
DTP	Democratic Society Party (*Demokratik Toplum Partisi*)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LDPP	Law on the Duties and Powers of the Police
SHP	Social Democratic People's Party (*Sosyal Demokrat Halkçı Parti*)
TİHK	The Human Rights Institute of Turkey (*Türkiye İnsan Hakları Kurumu*)
TRT	Turkish Radio and Television Corporation (*Türkiye Radyo ve Televizyon Kurumu*)

Foreword

TESEV Democratization Program issued a report in December 2008, entitled "A Roadmap for a Solution to the Kurdish Question: Policy Proposals from the Region to the Government." Drafted following meetings and written exchanges with individuals carrying vast representative capacity, the report featured, as it were, a classification and arrangement of Kurds' demands. As such, it triggered various discussions and blazed the trail for the myriad works that followed suit. On the other hand, the Kurdish Question increasingly became a matter of public knowledge and debate thanks to the conversations generated by the approximately one-year old government initiative, initially dubbed the "Kurdish Initiative" and later called the "Democratic Initiative." But the polemics that concentrated around the initiative fell a bit short of laying out opinions and recommendations as to the steps that need to be taken for a solution to the question. In other words, not only does the government fail to make concrete and comprehensive explanations in a manner which meets expectations on how it approaches the question, what it contemplates for a solution, what it seeks to do, or what it is unable to do, and what kind of steps it will take in the short and long term, but also the opposition and the Kurdish political actors calling for a solution have failed to adequately put forth their own demands and recommendations. The works performed and the suggestions made by the Kurdish political movement and Kurdish civil society were either entirely unnoticed by the public or failed to ignite controversy to the extent they were expected to. The initiative has now reached a deadlock due both to tensions created and fears spread by the opposition front imposing a political stalemate among the proponents of a solution. It is therefore possible to conclude that this has resulted, to say the least, in public opinion losing a great deal of optimism and enthusiasm about the whole process.

Thus, it now behooves us to redefine the Kurdish Question. Instead of simply being the stuff of unproductive political ploys we must now come up with tangible recommendations toward a democratic solution to the Kurdish Question as part of the democratization process. That, in fact, is where the present report sets its sights. By improving upon and expanding the recommendations under the "Constitutional and Legal Reforms" section of the 2008 report, this report seeks to provide public opinion and decision makers with as much comprehensive and detailed review and analysis of the legislation as possible. Undoubtedly, there may be certain issues on which sufficient research has not yet been carried out or on which we have failed to make any significant recommendations, or even if such research has been carried out, there may be certain laws or provisions which might not have been accessed or may have been neglected. Similarly, even Kurdish jurists and opinion leaders have various disagreements among themselves with respect to this report's recommendations. Accordingly, we hope that this report will serve as an initial text geared toward identifying possible steps for crafting a legal solution to the Kurdish Question, and will provide background for more comprehensive research in the future.

Methodology

We believe this report represents common wisdom built upon an intense process of negotiation and consulting. Initial groundwork for the report was laid in the workshops TESEV Democratization Program held in Diyarbakır on 25 September 2009 and then in Ankara on 15 January 2010. Attendees to the workshops included legal practitioners who have conducted studies on the legal aspect of the Kurdish Question. Workshop participants contributed to the meeting with their opinions and recommendations, and subsequently shared with the authors studies they themselves or others have prepared on the issue. A draft text was then produced following deliberations using resources gathered in the two workshops and their aftermath. To procure further input, the draft was shared with not only the workshop participants but also other lawyers, academics and politicians familiar with the Kurdish Question. The text was reviewed and finalized in line with the feedback provided by the experts consulted, which then led to the present report. As will be seen below, alternative recommendations have been offered with respect to a number of constitutional articles and legal provisions. The variation is a result of contributing experts expressing differing views as to how the legislation in question needs to be amended. To allow the public and decision makers to assess the multiple opinions on the solution to the question, all recommendations that the report's authors could access are offered in a non-hierarchical order. There is no doubt that there are many other experts and legal practitioners who could not be consulted on the matter. Thus, as the report undergoes public discussion, we hope that critiques and suggestions to be offered along the way will allow the report to contribute to the formation of a much sounder platform to reach a solution.

Introduction

There is more to the dominance of "rule of law" or "supremacy of law" in a state than the mere availability of a constitution or laws, or the presence of judicial institutions. Indeed, it is a fact of history that even the bloodiest dictatorships had their idiosyncratic laws and courts. In addition, there are countless historical examples of tyrannical and oppressive policies being implemented through courts. Thus, in paying special attention to the matter, international human rights law emphasizes in the Universal Declaration of Human Rights that "...it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." Article 3 of the Statute of the Council of Europe follows suit: "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms..." Article 1 of the European Convention on Human Rights, in addition, states: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

These and other instruments of law confer on the states substantial responsibilities for the protection of human rights. Of a state's obligations in that regard, the most important include constitutional and legal recognition of citizens' human rights, non-interference in individuals' exercise of those rights as long as such exercise does not violate the freedoms of others, and protection of those rights against interventions by others. These obligations have also become sources and criteria for a state's claim to legitimacy. In other words, states are now considered to be legitimate to the extent they recognize and protect human rights. As a matter of fact, the protection of *states' rights to sovereignty* cannot hold its ground against human rights, thus no state can have recourse to the 'non-intervention in domestic affairs' discourse in the face of violations within that state's borders.

The judiciary is the most important mechanism that will check the compliance of government policies and practices with the law and protect citizens' rights and freedoms. This is why all acts and transactions of the administration need to be subject to judicial review in a state where rule of law prevails. In short, the judiciary is the one and only power that will put the principle of the rule of law into practice. In order for the judiciary to serve that function, that is, to protect human rights, it is indispensable that constitutional and legal arrangements be compatible with human rights law. Put differently, implementing the principle of rule of law necessitates that the law should, instead of siding with the state, have an autonomous standing vis-à-vis the state. The law must maintain equal distance to the state and the citizen. Otherwise, it will not be able to serve its arbitral function between the two sides, and as a result, its legitimacy becomes contested.

Considering Turkey in this light, one sees that the legal framework has adopted the ideology of creating a homogenous society and a modern nation, instead of securing all individuals' rights. Founded as a modern state upon the remnants of the multi-religious, multilingual, and multiethnic Ottoman Empire, the Turkish Republic decided that it would not be possible for it to realize the plans to construct the new nation without denying room to the distinct identities. In line with the secularist and nationalist policies pursued as an outgrowth of this approach, the legal framework underwent a complete overhaul. It has become widely accepted today that Kurds were one of the primary targets of these policies.

As a matter of fact, in addition to general legal and constitutional amendments necessary for a Turkey committed to human rights and the rule of law, a number of particular arrangements are also required for a lasting and democratic solution to the Kurdish Question. Constituting the main focus of this report, these arrangements can be broken down into two groups: constitutional and legal. Although the constitutional articles and legal provisions examined in detail and the regulations and statutes which occupy lesser space in the report might appear to have a general character and do not include the words "Kurd" or "Kurdish", they are essentially instruments aiming to restrict Kurds' fundamental rights and freedoms and practically causing indirect discrimination against the Kurds. It goes without saying that several administrative measures that do not necessitate any particular legal arrangements must also be taken to solve the Kurdish Question. Discussed as part of the debates on the 'democratic initiative',

some of these measures include the restitution of names in Kurdish and other languages to places plastered with Turkish names, removal of nationalist slogans etched by the state onto mountain slopes in Turkey's eastern and southeastern region, changing the militarist names given to schools in the same region, and appointment of Kurdish-speaking public servants in the region to facilitate the use of Kurdish language in accessing public services. Though they are outside the scope of this report, these administrative steps and similar others need to be negotiated upon with Kurdish political representatives and opinion leaders and put in practice soon.

1. RECOMMENDATIONS ON THE PROTECTION OF HUMAN RIGHTS

A. International Policy Recommendations

Turkish foreign policy concerning international conventions on the protection of human rights is simultaneously an expression of the country's policies on identities and minorities. In deciding upon which international convention will be ratified and what type of reservations will be entered into those that will be ratified, the state's main concern has been not to expand the rights and freedoms of Turkish citizens in line with the progress in universal principles of law, but to maintain the minority policy established by the 1923 Treaty of Lausanne. This concern is based on two objectives: granting no further rights and freedoms to non-Muslims accorded a minority status by the state than those provided in Lausanne, and avoiding the expansion of rights and freedoms non-Muslims have to the point where such expansion would cover other groups the state does not consider to be minorities.

The approach adopted in Turkish foreign policy has the following concrete effects on the country's decision making with respect to international conventions: When there is a particular international convention concerning minorities, Turkish policy inclines toward not signing it. When the convention is not particularly related to minorities but includes specific provisions regarding the protection of minorities, however, the convention is signed with reservations to those provisions. These reservations on international human rights conventions are generally expressed with the use of similar phrasing: "The Republic of Turkey reserves the right to interpret and apply the Article…of the …Convention in accordance with the spirit and the text of the Constitution of the Republic of Turkey and the Treaty of Lausanne of 24 July 1923."

It needs to be emphasized further that Turkey has since 1923 been in systematic violation of non-Muslim citizens' rights to establish and manage educational, medical, religious and charitable organizations granted under the Treaty of Lausanne. Turkey also violated the linguistic rights granted as per Article 39 of the Treaty to all communities, including Kurds, speaking a language other than the official one. Article 39 grants all Turkish citizens the right to use *any language* they prefer in their private dealings, commerce, press, and public gatherings, and the right to defend themselves in courts in *their mother tongue* where a Turkish citizen does not speak Turkish.

The foreign policy ramification of the Turkish state's identity politics based on ignoring and getting rid of the cultural diversity present in Turkey has been behind the abstention from signing international conventions concerning minority rights. For instance, Turkey did not sign the Council of Europe's Framework Convention for the Protection of National Minorities which prohibits discrimination against ethnic, linguistic, religious and other minorities and calls the states to provide affirmative guarantees for persons belonging to national minorities to ensure full and effective equality between them and those belonging to the majority. Similarly, Turkey did not sign the European Charter for Regional or Minority Languages which calls the states to take due steps both for the protection and continuation of minority languages and the provision of facilities to enable persons belonging to linguistic and ethnic minorities to speak, learn, and receive education in their mother tongues. The signature and ratification of both conventions, however, is among the Copenhagen Political Criteria to be met by European Union (EU) membership candidates during accession negotiations. In addition, although Turkey signed Protocol No. 12 concerning the prohibition of discrimination under the European Convention on Human Rights, it has yet to ratify the Convention.

A most striking example of the effect of Turkish domestic politics on the country's foreign policy concerning international conventions is the way the European Charter of Local Self-Government has been ratified. The charter adopts the principle of "autonomous local government" and seeks to reinforce local governments vis-a-vis central administrations. Turkey signed the Charter in 1988 and the Turkish Grand National Assembly ratified it by way of a law enacted in 1991.[1] Differing from Turkey's policy of entering reservations against certain articles of those international conventions that the country does not adopt in its entirety, the said law specified exactly which provisions of the Charter were being ratified. True to expectations, provisions granting autonomy to local governments and entitling them to participate in the central administration's decisions concerning the local government were excluded from the scope of the law. It is obvious that the Kurdish Question was the reason behind Turkey's attitude toward this Charter.

1 **The Law Regarding the Ratification of the European Charter of Local Self-Government, No. 3723, 08.05.1991, Official Gazette No. 20877, 21.05.1991.**

Some of the major provisions of international conventions Turkey registered reservations against so as to maintain existing minority policies include the following:

- UN International Covenant on Civil and Political Rights (ICCPR)

  Article 27: Protection of Minorities: In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

- UN International Covenant on Economic, Social and Cultural Rights (ICESCR)

  Article 13(3): The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

- UN Covenant on the Rights of the Child (CRC)

  Article 17: States Parties recognize the important function performed by the mass media

  [...]

  d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous.

  Article 29(1): States Parties agree that the education of the child shall be directed to:

  [...]

  c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

  [...]

  Article 30: In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

- ECHR, Protocol No. 1

  Article 2: The right to education: No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.

RECOMMENDATIONS:

In line with the assessments above, some of the foreign policy steps Turkey needs to take in the short-term toward the sustainability of the democratization process, continuity of accession negotiations with the EU, and the reinforcement of legal guarantees for human rights include the following:

- The international conventions and protocols below must be signed and/or ratified immediately without any reservations against their text and spirit:
  - Council of Europe's Framework Convention for the Protection of National Minorities
  - European Charter for Regional or Minority Languages
  - ECHR, Protocol No. 12
- Existing reservations that run contrary to the text and the spirit of the following principal UN and Council of Europe conventions must be removed immediately:
  - UN ICCPR; Article 27
  - UN ICESCR; Article 13
  - UN CRC; Articles 17, 29 and 30
  - ECHR, Protocol No. 1; Article 2
- All provisions of European Charter of Local Self-Government excluded from the scope of the Law dated 1991 must be signed and ratified. Relevant constitutional and legal arrangements need to be made so that the said provisions become part of the national law.

B. National Policy and Law Recommendations

Although international instruments and mechanism have a significant place and role for the protection of human rights, their effectiveness and functionality are substantially and directly related to the availability and productivity of national institutions and non-governmental organizations. It is therefore necessary to discuss the institutionalization process in Turkey concerning human rights, a process that has been underway for a while under the auspices of public administrative bodies. The process started with the inception of the Human Rights Investigation Committee in the Turkish Grand National Assembly, and soon moved ahead with the creation of various units within the executive branch. these establishments primarily focused on educating their respective staffs on human rights and to some extent on harmonizing their respective institutional practices with human rights. Standing out among these units have been the Human Rights Presidency of the Prime Ministry (*Başbakanlık İnsan Hakları Başkanlığı*, BİHB), Human Rights Advisory Board of the Prime Ministry (*Başbakanlık İnsan Hakları Danışma Kurulu*, BİHDK), Provincial and District Commissions on Human Rights. In addition, there are human rights departments within various institutions, such as the Justice Ministry, Foreign Ministry, Security General Directorate, and Gendarmerie Headquarters.

Nevertheless, there has not been any meaningful communication and cooperation between these institutions and experts, universities, professional associations, and non-governmental organizations working in the area of human rights. Thus, they, first and foremost the Provincial and District Commissions on Human Rights, have not been as functional and productive as expected. Additionally, as Turkey becomes party to more and more human rights conventions, it feels the need to initiate an internationally acceptable process of institutionalization, in part as a consequence of the agreements the country signed. It is in this context that the government has recently put on its agenda the making of four different laws and the creation of four organizations. It is fair to conclude that the concrete product of the "Democratic Initiative" process has been the commitment made with respect to said laws and organizations.

The four organizations are the following: The Human Rights Institute of Turkey (*Türkiye İnsan Hakları Kurumu*, TİHK), Institute for Combating Discrimination and Promoting Equality, Optional Protocol to the Convention against Torture and Independent Mechanism for Complaints Against Law Enforcement. It is without a doubt a very positive development and important to establish these independent bodies for the improvement and protection of human rights in Turkey. A draft law concerning the TİHK was submitted to the Grand National Assembly on 28 January 2010[2]. Efforts toward the establishment of TİHK date back to 2004, as a matter of fact. Nevertheless, the government maintained utmost secrecy in its preparatory work in that regard. The United Nations Paris Principles, which include the criteria such bodies must be based upon, need to be given consideration in terms of not only the institutional structure but also the process by which they will come into being. The Principles state/suggest/outline that human rights institutions should be set up through transparent and participatory processes and upon cooperation between the government and human rights organizations.

Given that the establishment of independent human rights institutions is a matter that reaches beyond the Kurdish question, this report will touch on that establishment process briefly. Currently being discussed by the Constitutional Committee of the Turkish Grand National Assembly, the draft law contemplates a structure in which there will be an Authority and a Board within TİHK. Upon receiving serious reaction and criticism concerning the idea that the Council of Ministers will be appointing not only the 11 members of the Board, but also its chair, deputy chair and vice-chair; that all duties and powers will vest with the Authority; that the Board has not been given sufficient powers; as well as concerning the lack of independence, financial autonomy, and pluralist representation of TİHK, the Constitutional Committee relayed the draft law to one of its subcommittees. The subcommittee continues its negotiations with concerned parties and organizations, and the extent to which the draft law may

2 General Directorate of Laws and Regulations, Office of the Prime Minister, Republic of Turkey, 28 January 2010, Reference: B.02.0.KKG.0.10/101–1712/370.

possibly be improved during discussions at the Committee and General Assembly sessions will soon become clear. If the negotiations in the Assembly sessions produce no improvements, Board members, even if appointed by the Council of Ministers, will not have any effect or function, and all the authority will lie with the Chair and the public officials reporting to the Chair, in other words, with the bureaucratic structure of the Authority.

As a parallel development, the Interior Ministry produced a draft law for the establishment of an Institution for Combating Discrimination and Promoting Equality and delivered it first to the relevant public bodies and universities, and then to non-governmental organizations for their comments and suggestions. Although the draft features an extended section including definitions of fundamental concepts concerning discrimination, the extent to which it could meet the need for a framework law on discrimination is open to debate. But it should also be noted that this draft includes fairly advanced regulations as compared to the TİHK Draft Law. For instance, it contemplates a 15-member board and distributes the task of member appointment across the Council of Ministers, Turkish Grand National Assembly and the President. In addition, professional associations and non-governmental organizations have a certain amount of say in appointing members. Board members shall elect the Chair and deputy Chair from among themselves. This draft, too, received critical responses from public bodies, universities and non-governmental organizations which were offered to the Interior Ministry.

One can say the legal groundwork for the remaining two institutions will soon be put on the agenda. The constitutional amendment package, which the Turkish Grand National Assembly adopted on 7 May 2010, to be voted on in the referendum to be held on 12 September 2010 includes an arrangement concerning the establishment of the Ombudsman's Office, which could not proceed due to a Constitutional Court annulment.[3] To address the Constitutional Court reasoning concerning the annulment, this arrangement contemplates the establishment of an Ombudsman's Office under the Office of the Speaker of the Turkish Grand National Assembly and the election by the Assembly of a Chief Ombudsman for a four-year term. Procedures and principles concerning the mandate of the Authority, its operations, steps it will take upon an audit, the qualities, election, and personnel rights of the Chief Ombudsman and other Ombudsmen will be established by way of a pertinent law.

A general argument could be advanced for approaching these and similar structures positively. But in addition to issues with the policies pursued in this area, it only takes a second's attention to notice the serious problems in the history of the relationships between members of the bureaucracy, within past governments as well as the present one, and the scholars studying human rights and non-governmental organizations. Human rights policies followed and relations with experts and non-governmental organizations both show that there are serious issues of knowledgeableness, prejudice, sincerity and, as an inevitable consequence, of confidence and political will. For several years, experts and non-governmental organizations were not even considered worthy of consideration, and their efforts toward communication and cooperation fell on deaf ears. When talks were initiated with civil society as part of the EU process, relations with human rights organizations were kept to a minimum. Further proof of the government failing to pay sufficient attention to human rights issues is provided not only by the current policies in effect, but also by the fact that the human rights units created within public institutions were not vested with necessary powers and facilities and that staff members making great sacrifices in their work in those units faced obstacles and even punishment. For instance, Turkish Grand National Assembly's Human Rights Investigation Committee worked effectively from time to time and produced competent reports. But no political authority gave the Committee the credit it deserved, and at times it was not even possible for the Committee to submit its reports to the General Session of the Grand National Assembly. Committee Chairs who undertook these reports always faced political sanctions and were, to say the least, not nominated again. Since 2004, the works of the BİHDK have been brought to a complete halt in arbitrary fashion. The BİHB was not given any serious attention even by the bureaucracy itself, its requests were not fulfilled, and in the end it was transformed into a fruitless entity with no function. As a result of the unchanging attitudes, the Provincial and District Commissions on Human Rights were also neglected. Likewise, no president, prime minister, or a minister responsible for human rights affairs ever bothered to consult a human rights expert or employ a human rights advisor.

In conclusion, it could be argued as follows: The human rights institutionalization process within the state apparatus in Turkey is handicapped by serious troubles concerning the method chosen and the objective adopted while said units were being created, as well as the powers and practices of those units. First and foremost, it would be far-fetched to claim that they were genuinely created for the purpose of protecting human rights and reducing

3 **Law Concerning Amendments to Certain Articles of the Constitution of the Republic of Turkey, No. 5982, 07.05. 2010, Official Gazette No. 27580, 13.05.2010, Art. 8.**

violations. On the contrary, the human rights institutionalization within public administrative bodies began almost entirely as a requirement of, and at the pressure of, EU candidacy. The missing motivation in the objective adopted took its toll upon the method chosen in the creation, and the structure of institutions whose duties and powers were designated accordingly. They have never been given the mandate they would need to be effective and functional. This is the reason the government in general and these institutions in particular failed to establish sound lines of communication and cooperation with pro-human rights organizations and individuals.

Absent a change in this highly problematic approach, there is no reason to think that any other human rights institutions which may be set up from this point forward will be able to be healthy and effective. In other words, future independent institutions are sure to face similar troubles. It is thus a serious cause of concern that the only concrete product to date of the government's efforts, first under the "Kurdish Initiative" and then the "Democratic Initiative", is the four institutions discussed above. These efforts concern not only the Kurdish Question in particular, but also the solution of Turkey's human rights problem in general. Moreover, failures in past initiatives like the present one cause questions to be raised at the outset regarding said efforts.

2. RECOMMENDATIONS ON A SOLUTION TO THE KURDISH QUESTION

Introduction

Although articles of the constitution and laws regulating various aspects of social life have been reviewed as comprehensively and specifically as possible in this report, it is important to note at the beginning that there may be articles and provisions that escaped observation. There are hundreds of regulations, circulars and statutes in effect concerning several domains such as education, politics, health, fundamental rights and freedoms, press, and higher education. Such a vast collection could not reasonably be expected to be covered in a report. Furthermore, there are documents not published in the *Official Gazette* and subsequently not disclosed to the public, such as circulars, and they are obviously not accessible.

Therefore, the constitutional articles and the laws and regulations discussed below do not exhaust the entirety of the problematic legislation concerning the Kurdish Question. Rather, the legislative and the executive branches should, in light of the analyses and recommendations that follow, embark upon a comprehensive review of not only the constitutional articles, laws and regulations discussed in this report, but also the entire Turkish legislation, and make the necessary amendments for a democratic solution to the Kurdish Question in consultation with the political and other representatives of Kurdish people. For example, the assessments under "Constitutional Amendment Recommendations" below in the context of Article 66 of the Constitution and the recommendation to remove emphasis in that Article on Turkish ethnic identity are also valid for the rest of the legislation, given that phrases such as "Turk", "of Turkish descent", "Turkish identity", "Turkish line", "of Turkish blood", "Turkish race", "of the same line" are fairly widely used across the entirety of legislation.[4] For a striking example, one can consider Article 14 of the still effective 1934 Statute on Exceptions from Resettlement regulates the acquisition of refugee status by "persons of Turkish race or faithful to Turkish culture" upon request.[5] The emphasis on ethnic identity is one of the indicators that Turkey's foreign policy is based on ethnicity.

4 Hüsnü Öndül, *Kopenhag Siyasi Kriterleri ve Türkiye (Mevzuat Taraması)*, (Kopenhagen Political Criteria and Turkey (A Review of the Legislation)) İnsan Hakları Derneği Yayınları, 2000, p. 31 http://www.ihd.org.tr/images/pdf/kopenhag_siyasi_kriterleri_ve_turkiye_mevzuat_taramasi.pdf

5 Excerpted from Hüsnü Öndül's unfinished study including a review of Turkish legislation in line with the United Nations Convention on the Elimination of All Forms of Racial Discrimination. Statute on Exceptions from Resettlement. Council of Ministers' Decree, No. 2/1777, 27.12.1934, Supporting Law, No. 2510, 14.06.1934, Official Gazette No. 2898, 05.011935.

A. Recommendations on Constitutional Amendments

The currently effective 1982 Constitution was put together by the junta that carried out the 1980 military coup, and as such it does not have democratic legitimacy. It holds the interests, security and continuity of the state above individual rights and freedoms, human security and social demands, and its content is anti-democratic.

A majority of Turkey's current political and social problems stem from the authoritarian and statist structure of the 1982 Constitution. Both the demands for change and democratization emanating from various social groups and the Copenhagen Political Criteria which Turkey must meet along the path to EU accession negotiations make it clear that a new constitution is a must.

There is no doubt that providing a solution for not just the Kurdish Question but also all of Turkey's social problems make it immediately necessary to adopt a new constitution, a pluralist and democratic one based on principles of human rights and the rule of law, after a negotiation process which includes contributions and opinions from all segments of society. The new constitution must have a democratic character in terms of its drafting and voting processes as well as its ratification and content, not be based on any particular ideology including Kemalism or nationalism, avoid privileging the interests of any ethnic, religious, cultural segment or class in society over those of another and maintain equal distance to all individuals, rest upon a comprehensive notion of citizenship that reflects the society's pluralist structure, and gain its legitimacy from universal values such as democracy, human rights, equality and justice.

On the other hand, in light of the government's consideration that the adoption of a new constitution is not likely in the short run, there are a number of constitutional amendments to be urgently made as part of the government initiative with respect to the Kurdish Question. The constitutional amendment recommendations offered in this report can guide future efforts to put together a new constitution. Constitutional amendments necessary for a solution to the Kurdish Question can be grouped under a few headings: a preamble which recognizes Turkey's multiethnic, multireligious and multilingual structure and therefore makes no reference to any particular ethnic, religious or sectarian identity; a comprehensive citizenship definition which does not rest on any identity or class, and a decentralized administrative structuring based on democratic government.[6]

Two points require emphasis before proceeding to an assessment of the Constitution: First, the analyses and recommendations in this section are offered on the basis of the current constitution. Although the most recent constitutional amendment package adopted by the Grand National Assembly includes constitutional articles, which are discussed below, concerning the Kurdish Question, it is uncertain whether those amendments will take effect, which is why the constitution as it is now is given consideration below. Second, it will be seen in the following that alternative recommendations are offered with respect to certain constitutional articles. The variation is a consequence of legal practitioners, whose names are found at the end of the report, making different recommendations. To enable policy makers to consider a variety of recommendations, the report includes all recommendations that were accessed.

1. GENERAL REMARKS

An emphasis on Turkish ethnic identity dominates the entire Constitution, including its Preamble. This emphasis is expressed in oft-used phrases like "Turkish homeland and nation", "the supreme Turkish state", "Turkish nation", "Turkish society", "all Turks", "Turkish citizen", "Turkish language", "Turkish culture", "Turkish history."[7] This phraseology is incompatible with the pluralist structure of Turkish society which is composed of persons belonging

6 Sezgin Tanrıkulu, "Demokratik Açılım: Kürt Meselesinde Hukuk ve Adalet" (*The Democratic Initiative: Law and Justice in the Kurdish Issue*), *Güncel Hukuk*, September 2009/10–70, p. 36.

7 Hüsnü Öndül, *Kopenhag Siyasi Kriterleri (Copenhagen Political Criteria)…*, p. 36.

to different ethnic roots. Therefore, the new constitution should not include any such references to an ethnic identity. The phrase "Turkish nation", found in many articles of the constitution as well as in several laws, must be replaced with "citizens of the Republic of Turkey."[8] Some legal experts suggest that it would be enough to simply use the word "nation" for purposes of convenience.

2. THE PREAMBLE

Amended two times in 1995 and 2001 since the ratification of the Constitution in 1982, the Preamble has features unknown in democratic and libertarian constitutions. For one, it is unduly long, and instead of offering a list of socially agreed upon fundamental principles such as democracy, human rights, rule of law, which pertain to state government and show the limits of the powers held by the administrative officers of the state, the Preamble champions the loyalty of the state to a particular ideology – Kemalism – and excludes individuals who do not follow that ideology. The emphases in the Preamble on Turkish identity favor only one of the ethnic and cultural identities that make up the society and as such it excludes other ethnic and cultural identities and reflects a monist social philosophy. Imagining society as a homogenous entity disregards Turkey's multicultural, multiethnic, multireligious social structure, and represents a constitutional philosophy that is out of touch with social facts, anti-democratic and authoritarian.

In authoring a Preamble to a constitution, certain fundamental principles must be given consideration, as in the case of constitutions of democratic societies. The Preamble needs to be brief and concise; avoid phrases that exclude, discriminate against or humiliate a particular segment or segments of the society; include expressions recognizing the society's multicultural, multiethnic, multireligious structure and consider such structure as a source of prosperity; avoid referencing any particular ideology; avoid attributing sacredness or loyalty to any particular person, institution, or value; and express the state's commitment to universal values such as pluralism, democracy, human rights and the rule of law.[9]

RECOMMENDATIONS:

In line with the principles specified above, the preamble might have the following two forms:

FIRST RECOMMENDATION:

We, the citizens of the Republic of Turkey, believe all individuals are entitled to universal rights and freedoms. We acknowledge the equality of all individuals without regard to race, language, sect, gender or ethnic roots. We consider our differences the source of our cultural prosperity and the foundation of our social unity. We consider the state's fundamental duty to act fairly in all of its transactions and to secure individual rights and freedoms in all cases. As individuals committed to the ideal of perpetual peace, we stand against wars and the use of force against other peoples' freedoms, except in cases sanctioned by international law.[10] We seek to establish a social order based on human dignity, supremacy of law, peace, freedom and equality, and we acknowledge and affirm this constitution as an expression of our loyalty to these values.[11]

SECOND RECOMMENDATION:

Believing that all individuals are entitled to universal rights and freedoms, rejecting all forms of discrimination, recognizing all differences and considering them to be sources of democratic and cultural prosperity, sharing in the ideal of universal peace and considering ourselves to be responsible for contributing to world peace, we, the citizens of the Republic of Turkey;

Acknowledge and affirm this constitution as a charter of our willingness to coexist so as to establish a democratic order based on human rights, the supremacy of law, freedom and equality and seeking for all a dignified life all human beings deserve.[12]

8 Recommendations for draft constitution produced at the end of the Joint Constitutional Workshop of Democratic Society Congress (*Demokratik Toplum Kongresi-DTK*) Regional Bar Associations, pp. 9-10 (shall be referred to as "DTK-Bar Associations Constitutional Workshop Draft" hereinafter).

9 *Id.* p. 1.

10 Some legal experts objected to this exception in the TESEV Ankara workshop.

11 DTK-Bar Associations Constitutional Workshop Draft p. 1. A similar recommendation exists among the recommendations made by the Peace and Democracy Party (*Barış ve Demokrasi Partisi-BDP*) in response to the government's amendment package. In the text prepared by BDP, the phrase "except in cases sanctioned by international law", which in included in DTK-Bar Associations Constitutional Workshop Draft, is replaced with "except in cases of self-defense." BDP Comparative Constitutional Package Draft, Recommendations for Additional Articles, p.1.

12 DTK-Bar Associations Constitutional Workshop Draft pp. 1-2.

3. CONSTITUTIONAL PROVISIONS

I. UNAMENDABLE ARTICLES (ARTICLES 1, 2 AND 3)

Article 1, one of the unamendable articles as per Article 4 of the Constitution, identifies the form of Turkey's government as a republic. Article 2 lists the qualities of the republic. Accordingly, Republic of Turkey is a democratic, secular and social state governed by the rule of law; respecting human rights, loyal to the nationalism of Atatürk. Article 3 stipulates that the Turkish State is "an indivisible entity with its territory and nation", its capital is Ankara, its language is Turkish, and its national anthem is the Independence March, and defines the form of the flag.

The inclusion of unamendable laws in the Constitution is a cause of concern because it prevents future generations from amending the constitution, contradicts the principle of democratic government, and blocks the political process. If it is nevertheless considered inevitable to have unamendable articles in the constitution, "the scope must be kept very narrow and limited to the provision that the form of the government is a Republic."[13] Moreover, the unamendable articles are problematic in terms of their content. For instance, staying "loyal to the nationalism of Atatürk", an unamendable quality of the republic, is not a universal value and it is a reference to a particular ideology.

RECOMMENDATIONS:

Four alternative recommendations are offered below with respect to Articles 1, 2 and 3:

FIRST RECOMMENDATION:[14]

Article 1: The Republic of Turkey is a secular, democratic and social state governed by the rule of law based on human rights and founded upon the values of freedom and justice.

Article 2: The Republic of Turkey is an indivisible entity which recognizes different identities and cultures.[15] Its official language is Turkish. Its flag, the form of which is prescribed by law, is composed of a white crescent and star on red background. Its national anthem is the 'Independence March'. Its capital is Ankara.

SECOND RECOMMENDATION:

Article 1: The State of Turkey is a republic. The Republic of Turkey is a secular, democratic, and social state governed by the rule of law based on human rights and founded upon the values of freedom and justice.

Article 2:

(1) The Republic of Turkey is an indivisible entity which recognizes different identities and cultures.[16]

(2) Its official language is Turkish.

(3) Its flag, the form of which is prescribed by law, is composed of a white crescent and star on red background.

(4) Its national anthem is the "Independence March."

(5) Its capital is Ankara.

THIRD RECOMMENDATION:

Article 1: The State of Turkey is a republic.

Article 2: The Republic of Turkey is a secular, democratic and social state governed by the rule of law based on human rights and founded upon the values of freedom and justice.

Article 3:

(1) The Republic of Turkey is an indivisible entity which recognizes different identities and cultures.

(2) Its official language is Turkish.

(3) Its flag, the form of which is prescribed by law, is composed of a white crescent and star on red background.

(4) Its national anthem is the "Independence March."

(5) Its capital is Ankara.

13 *Id*. p.3.

14 Three of the recommendations are extracted from the DTK-Bar Associations Constitutional Workshop Draft *Id*. pp. 4-5.

15 One view expressed in the TESEV Ankara workshop suggested the following amendment to this phrase: "The Republic of Turkey is an indivisible entity which recognizes and protects different identities and cultures under law."

16 One view expressed in the TESEV Ankara workshop suggested the following amendment to this phrase: "The Republic of Turkey is an indivisible entity which recognizes and protects different identities and cultures under law."

Some legal experts argue[17] that the state's policies on the use and teaching of the official language and other languages are issues that need to be regulated under a different article. In a dedicated article which will include the regulation on the official language and other languages, Turkish society's pluralist structure hosting diverse cultural and ethnic groups must be given consideration and the Turkish language must be defined as 'the official language of the state', rather than as 'the language of the state', for languages do not belong to states or institutions, but to people. In the same article, constitutional guarantees must be provided for rights to freely use, develop and protect all mother tongues in addition to the official Turkish language in all areas of social life, as per "the principle of cultural freedom"[18]

> FOURTH RECOMMENDATION:
>
> Article 3 must be amended as follows:
>
> (1) The official language of the Republic of Turkey is Turkish.
>
> (2) This constitution guarantees the rights of the citizens of Turkish Republic to use, protect and develop their mother tongues. The State is responsible for providing necessary resources for mother tongues in addition to Turkish to ensure their use in education and teaching, access to public services and in all areas of social life.

II. ARTICLE 5:

Article 5, which concerns the fundamental objectives and duties of the state, lists them as follows:

> The fundamental aims and duties of the state are: to safeguard the independence and integrity of the Turkish Nation, the indivisibility of the country, the Republic and democracy; to ensure the welfare, peace, and happiness of individual and society; to strive for the removal of political, social and economic obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social State governed by the rule of law; and to provide the conditions required for the development of the individual's material and spiritual being.

However, Turkey's multiethnic structure must have been given consideration and the state must have been charged with a duty in that regard.

RECOMMENDATION:

Article 5 must be amended as follows:

> The fundamental aims and duties of the state are: to safeguard the independence and integrity of the Turkish Nation and democracy; to ensure the welfare, peace, and happiness of individual and society; to eliminate political, social and economic obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of pluralism, social state governed by the rule of law, and justice; to strive for the provision of the conditions required for the development of the individual's material and spiritual being; to develop policies and make legal arrangement necessary to protect and ensure the survival and development of diverse languages and cultures existing in Turkey.[19]

III. ARTICLE 42:

As per the final paragraph of Article 42 of the Constitution,

> No language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institutions of training or education. Foreign languages to be taught in institutions of training and education and the rules to be followed by schools conducting training and education in a foreign language shall be determined by law. The provisions of international treaties are reserved.

Excepting the right to education in one's mother tongue granted to non-Muslims under the Treaty of Lausanne, and the schools offering training and education in Western languages such as English, French, German, Italian, this Article essentially prohibits, without explicitly saying so, the use of Kurdish language in training and education by designating Turkish as the language of education.[20] The prohibition undoubtedly applies to not just Kurdish,

17 **Views expressed by legal experts who attended the TESEV Ankara workshop.**

18 **Presidency of Diyarbakır Bar Association, *Kürt Sorunu'nun Çözümünde Öncelikli Yapılması Gereken Hukuk Reformu*, (*Legal Reforms to be Undertaken as a Matter of Priority for a Solution to the Kurdish Question*), Diyarbakır Bar Association. p. 5.**

19 **Developed on the basis of views and suggestions expressed in the TESEV Ankara workshop.**

20 **Presidency of Diyarbakır Bar Association *Id.* pp. 13-14.**

but to all other mother tongues other than Turkish, it thusly disregards the cultural diversity of Turkish society. This article also introduces an unlawful discrimination between non-Muslim students whose mother tongue is not Turkish and all students getting their education and training in Western languages on the one side, and students, though being part of Muslim majority, belonging to Kurdish, Laz, Bosniak and Arab ethnicities, on the other. This demonstrates that the state discriminates between its citizens with respect to the exercise of the right to education, which is a fundamental human right. Considering especially that a substantial number of Kurdish children living in country's east and southeast do not speak Turkish when they reach school age, this particular constitutional ban on the provision of education in Kurdish mother tongue also blocks equal opportunities in education.

In order to secure equal opportunities for all students without regard to their ethnic, cultural, religious identities, the constitutional article regulating the right to education must be rid of phrases prohibiting education in one's mother tongue. The new regulation must provide constitutional guarantee for the right to education in one's mother tongue.

RECOMMENDATIONS:

Article 42 might have the following two forms:

FIRST RECOMMENDATION:

(1) No one shall be deprived of the right to education and learning.

(2) All individuals have the right to education in their mother tongue. The state shall be responsible for providing the necessary resources and making legal arrangements to ensure the exercise of this right, if there is sufficient demand therefor.[21]

(3) Training and education shall be provided in line with the universal scientific and educational principles, under the supervision and control of the state.

(4) Eight-year primary education is compulsory for all citizens and is free of charge in state schools.

(5) Turkish is the language of training and education. Principles concerning provision of training and education in languages other than Turkish shall be prescribed by law in accordance with international conventions and the requirements of democratic social order.[22]

SECOND RECOMMENDATION:

(1) No one shall be deprived of the right to education and learning.

(2) All individuals have the right to education in their mother tongue.

(3) Training and education shall be provided in line with the modern scientific and educational principles, under the supervision and control of the State. Training and education institutions which do not comply with these principles shall not be allowed.

(4) Primary education is 12 years long and compulsory for everyone. The State has to provide education for all citizens at no charge, including higher education.[23]

IV. ARTICLE 66:

Article 66, entitled "Turkish citizenship", stipulates as follows:

Everyone bound to the Turkish State through the bond of citizenship is a Turk.

The child of a Turkish father or Turkish mother is a Turk.

Citizenship may be acquired under conditions stipulated by law, and shall only be forfeited only in cases determined by law.

No Turk shall be deprived of citizenship, except if he commits an act incompatible with loyalty to the motherland.

Recourse to the courts in appeal against the decisions and proceedings related to deprivation of citizenship, shall not be denied

Article 66 is one of the most problematic constitutional articles for citizens of Turkey who are not ethnically Turkish. In stipulating that "Everyone bound to the Turkish State through the bond of citizenship is a Turk", Article 66 provides a citizenship definition based on ethnicity. This definition contradicts the multiethnic composition of

21 **Some legal experts attending the TESEV Ankara workshop objected to the phrase "if there is sufficient demand therefor" on the grounds that it would lead to arbitrary conduct when it is put in practice.**

22 **DTK Bar Associations Constitutional Workshop Draft, p. 6. The phrase "international treaties" was added to the phrase in paragraph (5) after suggestions advanced at the TESEV Ankara workshop.**

23 **BDP Comparative Constitutional Package Draft, Recommendations for Additional Articles, p. 3.**

Turkish society, and it excludes citizens who are ethnically non-Turk. In light of increasing social demands for the adoption of a new, comprehensive and egalitarian constitution that mirrors the pluralist structure of Turkey, the necessary step to take is to develop a citizenship definition which includes all differences without regard to religion, language, ethnic identity, culture and gender, and to make the constitution and the entire legal framework reflect this inclusive philosophy.

RECOMMENDATIONS:

- The title of Article 66, "Turkish Citizenship", must be replaced with "Citizenship of the Republic of Turkey."
- Article 66 must be amended as follows:

  FIRST RECOMMENDATION:[24]

  Citizenship is a fundamental right. The acquisition, exercise and forfeiture of this right shall take place without regard to religion, language, ethnic root, culture, gender and similar differences. Principles concerning the acquisition and forfeiture of the right to citizenship shall be prescribed by law.

  SECOND RECOMMENDATION:

  Any person bound to the Republic of Turkey through the bond of citizenship shall be considered a citizen of the Republic of Turkey without regard to differences in religion, sect, race, ethnic root and culture.

  THIRD RECOMMENDATION:[25]

  Citizenship shall be acquired under conditions stipulated by law and it shall only be forfeited under conditions stipulated by law.

  FOURTH RECOMMENDATION:[26]

  Everyone bound to the Republic of Turkey through the bond of citizenship shall be considered a citizen of the Republic of Turkey without regard to differences in religion, sect, race, ethnic root, gender, culture etc. No one shall be deprived of citizenship without their own will.

- A paragraph to the following effect must be added to Article 66:
- The state shall make available all conditions necessary for the protection, survival and improvement of Turkey's pluralist ethnic, religious and cultural composition within territorial integrity.[27]
- In light of these arrangements, the instances of the "Turkish nation" expression, especially those in Articles 6, 7 and 9, in the Constitution must be replaced with "citizens of Turkey." A similar arrangement must be made in laws, regulations, circulars and statutes, that is, across the legislation in general.

IV. ARTICLES 68, 69 AND 84:

Constitutional provisions in Turkey concerning dissolution of political parties are found in Articles 68 and 69 of the Constitution.

> Article 68(4): The statutes and programs, as well as the activities of political parties shall not be in conflict with the independence of the state, its indivisible integrity with its territory and nation, human rights, the principles of equality and the rule of law, sovereignty of the nation, the principles of the democratic and secular Republic; they shall not aim to protect or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime.

Sanctions applicable if these prohibitions are violated are regulated in Article 69. Accordingly, the process of dissolving a political party is initiated by the Chief Public Prosecutor of the Court of Cassation (Article 69/4) who files a case with the Constitutional Court. When the Constitutional Court resolves that the *statute and program* of a political party violates Article 68/4, the party shall be dissolved permanently (Article 69/5). A political party shall be dissolved because of its *activities* only if the Constitutional Court establishes that such party has become the center of activities prohibited under Article 68/4 (Article 69/6). The conditions under which a political party shall be deemed to have become such a center are specified in the same provision as follows:

24 **The first and second recommendations are extracted from the DTK-Bar Associations Constitutional Workshop Draft, p. 10**

25 **Suggested at the TESEV Ankara workshop.**

26 **BDP Comparative Constitutional Package Draft, Recommendations for Additional Articles, p. 3.**

27 **Suggested at the TESEV Ankara workshop.**

> ...only when such actions are carried out intensively by the members of that party or the situation is shared implicitly or explicitly by the grand congress, general chairmanship or the central decision-making or administrative organs of that party or by the group's general meeting or group executive board at the Turkish Grand National Assembly or when these activities are carried out in determination by the above-mentioned party organs directly.

In this case, the Constitutional Court may resolve to deprive the concerned political party of Treasury aid in part or in full, instead of terminating the party altogether (Article 69/7). A dissolved political party may not be established again under a different name (Article 69/8). Party members whose actions statements and actions cause the party to be terminated may not hold membership in a political party for a period of five years following official dissolution of the party (Article 69/9). Where such persons are members of parliament, they shall lose such status (Article 84).

In its judgments on Turkey, the ECHR emphasized several times that it is a violation of the European Convention on Human Rights to dissolve political parties simply due to their statutes and programs[28]. The ECHR holds that political parties may be dissolved only when they follow policies geared toward overthrowing the democratic order or resort to violence to realize their objectives or promote violence.[29] The European Commission for Democracy through Law, established by the Council of Europe and also known as the "Venice Commission", sets a similar threshold in its guiding principles issued in relation to dissolution of political parties.[30] The Commission holds that dissolution may be justified only in the case of political parties "which advocate the use of violence or use violence as a political means to overthrow the democratic constitutional order."

The current Turkish constitution contradicts basic principles of international law because it allows for the dissolution of political parties only due to their programs and statutes. Article 68/4, which regulates the grounds for dissolution of political parties, lists a number of abstract criteria with undefined limits. In particular, the principle of "the indivisible integrity of the state with its territory and nation" sets a major challenge for political parties that have the Kurdish Question at the core of their programs or even make reference to a solution to the Kurdish Question therein. Several parties were dissolved by court in the past on the grounds of said principle due to their members' and administrators' statements and actions that were otherwise within the scope of their fundamental rights and freedoms. Moreover, vesting politically unaccountable prosecutors with the authority to file a case for political party dissolution and only one individual being in a position to make such a decision, which is critically important in terms of the democratic order, are anti-democratic practices without any counterparts in advanced democracies. In addition, the prosecutor is authorized under the Constitution to file a case *sua sponte*, that is, at his own discretion and without any institution advancing a request to that end. As the Venice Commission stated in its special report concerning political party dissolutions in Turkey, "this stands in contrast to other European countries that have rules on party dissolution, in which –because of the exceptional nature of such cases- the decision to raise a case either rests with the democratic political institutions or at least is subject to some element of direct or indirect democratic political control"[31]

The constitutional amendment package put together by the AK Party (Justice and Development Party) government in March 2010 and adopted by the Turkish Grand National Assembly on 7 May 2010 once again opened to discussion the constitutional provisions concerning dissolution of political parties. Negotiations over the constitutional amendment package began on 8 April 2010 in the Constitutional Committee of the Grand National Assembly, and the package contemplated a series of advances, limited and incomplete but nevertheless in favor of political parties and democratic order. First of all, the package contemplated the annulment of paragraph 5 of Article 69 of the Constitution, and the reduction to 3 years of the 5-year period in which party members whose statements and actions caused the party to be dissolved were banned from politics as per paragraph 9 of Article 69. In addition, annulment of paragraph 8 of said Article which stipulated that dissolved parties may not be established under a different name would be symbolically significant, though practically inconsequential, in a country like Turkey where dissolved parties would not lose a second in re-establishing themselves under different names. Yet another important amendment in the package is that the Chief Prosecutor would need the approval of a commission where political parties that have a group in the Grand National Assembly would each be represented by 5 members to be able to file a case for dissolving a party. Another amendment to the sixth paragraph of Article 69 contemplated that

28 For an example, see ECtHR, *Turkish United Communist Party and Others v. Turkey*, 30 January 1998.

29 ECtHR, *Welfare Party and Others v. Turkey* (Grand Chamber), 13 February 2003.

30 See Guidelines on Prohibition and Dissolution of Political Parties and Analagous Measures, Venice Commission, 10 June 2000, Strasbourg http://www.venice.coe.int/docs/2000/CDL-INF(2000)001-e.asp

31 See Guidelines on Prohibition and Dissolution of Political Parties and Analagous Measures, Venice Commission, 10 June 2000, Strasbourg http://www.venice.coe.int/docs/2000/CDL-INF(2000)001-e.asp

in establishing whether a party, subject to dissolution case, has become such a 'center', the Constitutional Court may not consider votes cast and statements made by parliamentarians who are members of the said party. There were significant flaws in the constitutional amendment package the government drafted, as well. For instance, no amendment was contemplated with respect to Article 68/4 which listed the grounds for the dissolution of political parties.

Nonetheless, Article 8 concerning the dissolution of political parties was taken out of the package as it did not garner a sufficient number of votes in the second round of negotiations in the Grand National Assembly. The fact that the Peace and Democracy Party (*Barış ve Demokrasi Partisi-BDP*) parliamentarians did not attend the vote on the package also had a role in that result. As a result, the Grand National Assembly voted against an amendment which authorized it with respect to dissolution of political parties and expressed its will to continue with the existing practice whereby the Chief Public Prosecutor of the Supreme Court has had the power to single-handedly make a decision to open a case.

RECOMMENDATIONS:

- Article 68/4 must be amended as follows:

  FIRST RECOMMENDATION:

  Statutes and programs as well as activities of political parties shall not be in conflict with human rights, principles of equality and rule of law, nor shall they aim to protect or establish any other type of dictatorship. Political parties may not support or encourage violence or racism.[32]

  SECOND RECOMMENDATION:

  Statutes and programs as well as activities of political parties may not be in conflict with the independence and integrity of the state, human rights, principles of equality and rule of law, national sovereignty, democratic and secular principles, and may not promote racism and criminal conduct.[33]

- Article 69/4 should be amended as follows: The Constitutional Court shall give the final ruling on dissolution of political parties upon the resolution passed by the Turkish Grand National Assembly. To this end, a parliamentary commission shall be set up to make a decision for filing a lawsuit for party dissolution on behalf of the Turkish Grand National Assembly, and in case the party, against whom the lawsuit will be filed, is not one of the parties that have a group, or are represented in the Grand National Assembly, this party should be represented by the commission with the same number of members.[34]

- Article 69/5 must be abolished.

- One of the following recommendations must be considered the basis in amending Article 69/6 concerning dissolution of political parties:

  FIRST RECOMMENDATION:[35]

  The practice of dissolving political parties must be ceased. Instead, lighter penalties must be assessed, such as temporarily depriving the party of treasury aid or placing a temporary ban on electoral participation.

  SECOND RECOMMENDATION:

  The dissolution of political parties which use violence or promote the use of violence if such parties constitute an immediate and actual threat against the democratic order and only at the decision of the Grand National Assembly must be considered exceptional practice.

- Article 69/7 should be amended as follows:

  Those political parties which have been found by the Constitutional Court to have become the center of activities in violation of above-mentioned provisions may, upon the resolution becoming final, be partially or fully deprived of State aid by the Constitutional Court, depending on the gravity of such activities.[36]

- Article 69/8 must be abolished.

- Article 69/9 must be abolished.

32 **BDP Comparative Constitutional Package Draft, Recommendations for Additional Articles, p. 6.**

33 **Suggested at the TESEV Ankara workshop.**

34 **Prepared on basis of the BDP Comparative Constitutional Package Draft.**

35 **Both recommendations are extracted from BDP's opinion on the constitutional amendment package. *Id*.**

36 **BDP Comparative Constitutional Package Draft p. 4.**

VI. ARTICLES 120 AND 121: DECLARATION OF STATE OF EMERGENCY

Article 120 authorizes the Council of Ministers, convening at the leadership of the President and after consultation with the National Security Council, to declare a State of Emergency "In the event of the emergence of serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms, or serious deterioration of public order because of acts of violence."

Article 121/1 stipulates that a State of Emergency declared by the Council of Ministers shall, upon being published in the Official Gazette, be submitted to the Grand National Assembly for approval. The said Article authorizes the Assembly to alter or extend the duration of the State of Emergency or to lift the State of Emergency.

Article 121/3 authorizes the Council of Ministers to issue decree-laws throughout the duration of and as necessitated by the State of Emergency. The authority provided to the Turkish Grand National Assembly is limited to a grant of approval upon publication of decree-laws in the Official Gazette.

Articles 120 and 121 are problematic for a number of reasons. First of all, authorizing the executive branch to declare the State of Emergency and granting the legislative branch a chance to make an assessment only after the State of Emergency is implemented violate the principle of separation of powers within democracy. A State of Emergency must be declared exclusively and only at the decision of the Grand National Assembly. By the same token, the legislative must be the only branch authorized to establish as well as take the measures necessary during the period of the State of Emergency, and the only legal grounds for said measures need to be the laws passed by the Assembly. In addition, room for arbitrariness is left in the declaration of the State of Emergency under Article 120, given that "serious indications of acts of violence" are considered sufficient to declare the state and no factual evidence is sought and no criterion is specified as to what those indications could be.

RECOMMENDATIONS:

- The phrase "emergence of serious indications of widespread acts of violence" in Article 120 must be replaced with the phrase "occurrence of widespread acts of violence."
- The authority to declare the State of Emergency granted to the Council of Ministers under Articles 120 and 121 must be transferred over to the Turkish Grand National Assembly. Legislative must be set as the only branch authorized to declare, specify the duration of, and lift the State of Emergency. Therefore, the practice of issuing decree-laws must be ceased with, and Article 121 must be amended to that effect.

B. Recommendations on Legislative Amendments

Several laws that regulate diverse domains of social life include references to and emphases on Turkish ethnic identity. As noted previously, this is incompatible with the pluralist structure of Turkish society, as the Kurdish people and other citizens who do not carry Turkish ethnic identity are excluded. Thus, a comprehensive review of the legislation must be undertaken and references to Turkish ethnic identity in various laws must be removed. In addition, the following remarks and recommendations concerning laws that regulate various aspects of social life must be given consideration.

1. LAW ON POLITICAL PARTIES

Law No. 2820 on Political Parties is incompatible with principles of democracy and the rule of law, and it needs to be changed entirely. Priority must be given in the short run to a review of Articles 43, 81, 82 and 103 of said Law, in view of finding a solution to the Kurdish Question.

I. ARTICLE 43

> ...candidates for nomination may not make any promises at the local, national or professional levels, except as part of the program of the party of which they are members and as part of the decisions made by that party's grand congress and authorized central organs and except in the election manifesto of such party, nor may they use any language or script other than Turkish.

II. ARTICLE 81

Political parties:

> a) may not claim that there are minorities in the Republic of Turkey that are based on differences in national and religious culture, sect, race or language;
>
> b) may not aim to disturb national unity by creating minorities in the Republic of Turkey through the protection, improvement or dissemination of any languages and cultures other than Turkish language and culture, nor may they perform activities to that end; and
>
> c) may not use any language other than Turkish in drafting and publishing their statutes and programs, in their congresses, open or closed hall meetings, meetings, propagandas; may not use and distribute banners, signs, plates, audio and visual recordings, brochures and statements written in languages other than Turkish, nor may they remain indifferent to others committing these acts. However, statutes and programs can be translated to a foreign language excluding those prohibited by law.

Given that a substantial section of the constituency in the east and southeast –especially the elderly and women beyond middle ages, do not speak Turkish or simply express themselves better in Kurdish, the restrictions imposed in Articles 43 and 81 result in the practice of ethnic discrimination between citizens. The freedom of expression and association and the right to elect and to be elected are obviously linked to the right to the mother tongue organically. Restrictions on the ability of Kurdish citizens who do not speak Turkish to follow political parties' election propagandas violate not only their rights to their mother tongue but also the right to participate in democratic life, which is their fundamental citizenship right. The ban imposes serious restrictions on political party members' right to be elected, freedom of association and engage in politics.

Despite the bans and regardless of the party backing their candidature, politicians engaged in electoral work in the region frequently speak Kurdish with their constituents in local and general election campaigns. The discord between the Law on Political Parties and the actual circumstances is evidenced by the hundreds of public cases filed against the parliamentarians, administrators and mayors of the now-dissolved Democratic Society Party (*Demokratik Toplum Partisi-DTP*), the current BDP, and many other Kurdish politicians on the grounds that they used Kurdish in written or spoken form in their electoral campaigns and other political propagandas. Today the

general public acknowledges the social fact that an important part of Turkey's population does not speak Turkish or expresses itself better in Kurdish. In a Turkey where a state channel TRT 6 (Şeş) began broadcasting in Kurdish and is on air 24 hours a day, having a legal ban which is still in effect on the conduct of politics in the Kurdish language is a sign of how far out of touch the law is with society.[37]

RECOMMENDATIONS:

For a democratic solution to the Kurdish Question, the Kurdish constituency's and politicians' rights to participate in democratic life must be recognized and these rights must be rendered exercisable. To that end:

- The phrase "may not use any language and script other than Turkish" in paragraph 3 of Article 43, and
- All of Article 81 must be abolished.

III. ARTICLE 82

This article stipulates that political parties "may not, in the indivisible country, have regionalist or racist aims or carry out activities to that end." The phrase "regionalist" in the Article is highly ambiguous. If this phrase means a political party operating to solve the problems of a particular region in the country, it is not clear why this would constitute a threat for the country's indivisibility. If it means advocating for a different type of administrative structuring such as federalism, the same objection remains. Moreover, the ECtHR resolved that political parties may champion federalism as long as they do not resort to violence or aim to bring an end to democratic government.[38] As a matter of fact, European countries such as Spain, Belgium and Germany are governed democratically and have a federal structure.

RECOMMENDATION:

- The phrase "regionalist" must be removed from the text of the Article.

IV: ARTICLES 101 AND 103

As per paragraph (a) under Article 101 of the Law on Political Parties, if a political party "has a statute and a program that are in conflict with the independence of the state, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law, sovereignty of the nation, the principles of the democratic and secular republic; aims to protect or establish class or group- dictatorship or dictatorship of any kind and incites citizens to crime" it shall be dissolved by the Constitutional Court. Paragraph (b) of Article 101 which refers to paragraph (d) of Article 68 of the Constitution stipulates that political parties shall likewise be dissolved by the Constitutional Court if they become the center of activities geared to those ends. The notion of "center" is defined as follows:

> Article 103: A political party shall be deemed to have become such a center when such actions are carried out intensively by the members of that party and the situation is shared implicitly or explicitly by the grand congress, general chairmanship or the central decision-making or administrative organs of that party or by the group's general meeting or group executive board at the Turkish Grand National Assembly or when these activities are carried out in determination by the above-mentioned party organs directly.

Turkish legal and constitutional framework are so restrictive as to render parties' freedom of organization meaningless, and several political parties were dissolved as a result. Four of the eight political parties[39] established in the last two decades to provide a solution to the Kurdish Question were dissolved by the Constitutional Court, and three of them[40], having been subject to dissolution cases, dissolved themselves without awaiting the court's ruling. Political parties that were not established for the purpose of offering a solution to the Kurdish Question or representing Kurds in the parliament, but were critical in their party programs of the official policies toward the Kurdish Question and offered alternative policies, were also dissolved.[41] The latest in the series of dissolution of parties belonging in the Kurdish political movement is the dissolution of the Democratic Society Party (*Demokratik Toplum Partisi-DTP*) by the

37 Presidency of Diyarbakır Bar Association, *Id*. p.204.

38 EctHR, *Socialist Party and Others v. Turkey*, 25 May 1998, para. 47.

39 The HEP (People's Labor Party) which was dissolved on 14 July 1993; The DEP (Democracy Party) which was dissolved on 16 June 1994; The HADEP (People's Democracy Party) was dissolved on 13 March 2003, and finally the DTP was dissolved on 11 December 2009.

40 ÖZEP (Freedom and Equality Party), ÖZDEP (Freedom and Democracy Party) and DEHAP (Democratic People's Party)

41 United Communist Party of Turkey was dissolved on 16 July 1991 and Socialist Turkey Party was dissolved on 30 November 1993.

Constitutional Court on 11 December 2009.[42] The Court held that DTP's own "actions and its connections with the terrorist organization, when considered together, show that the party became a center of activities in violation of the state's indivisible integrity with its territory and its nation", and resolved to dissolve DTP.

The remarks above on Constitutional articles concerning dissolution of political parties also apply substantially to the Law on Political Parties. As in the case of the Constitution, the relevant articles of this law must also be rearranged and dissolution of political parties must become a difficult undertaking. Although the amendments[43] to the Law on Political Parties made on 26 March 2002 contemplated sanctions other than dissolution in the case of violations of paragraphs (a) and (b) of Article 101, the Constitutional Court may opt for not exercising that authority granted by the parliament, as clearly seen in the example of DTP.

RECOMMENDATION:

- Article 101 of the Law on Political Parties must be rearranged and political party dissolution must be turned into a difficult undertaking in light of ECtHR's case law and the Venice Criteria. Accordingly, only when a party explicitly advocates for the use of violence or resorts to violence, should its dissolution be contemplated.

2. LAW CONCERNING THE ELECTION OF THE MEMBERS OF PARLIAMENT

> Article 33: Parties failing to gain 10% of valid votes across the nation in the general elections, and across the entire electoral region in the interim elections, shall not be entitled to having members in the parliament.

This percentage is justified with reference to ensuring political stability, and it is the highest electoral threshold among Council of Europe member countries where the average is 3% to 7%.[44] Though all parties are subject to it, the 10% threshold practically prevents candidates of political parties established to contribute to a solution to the Kurdish Question from becoming members of the Parliament. In recent years, political parties belonging to the political tradition whose current representative is the BDP have gained the majority of votes in the eastern and southeastern provinces composed largely of Kurdish constituencies, but they were not able to become parliamentarians because their party did not surpass the 10% threshold throughout the nation. As a matter of fact, this prevents not only the wills of the voters casting their ballots for political parties representing the Kurdish political movements, but also the wills of those voters who voted for parties remaining below the 10% threshold from being reflected in the Grand National Assembly. In the 2002 general elections, 45.3% of the entire vote in the nation went to parties that were unable to go to the Grand National Assembly because their respective votes were below the threshold.[45] That approximately half of the votes cast are not represented in the Parliament stands not only in contrast to the principle of fair representation, but also makes the 'representative' and 'democratic' character of parliamentary democracy in Turkey questionable.

RECOMMENDATIONS:

- The electoral threshold, which was not in effect before the 1982 Constitution, is so high as to prevent the political will of society finding its way to the Parliament, and as such it must be reduced to 5%.
- All political parties must be entitled to treasury aid in the amount of 3%, regardless of their size and the number of votes cast for them.
- These two recommendations must be secured with constitutional guarantees by way of provisions to be added to the Constitution.
- In addition, various electoral systems must be considered, including the narrow district, two-round system which safeguards fair representation, democratic regime and inter-party democracy on the one hand, and ensures political stability, on the other.

42 **Constitutional Court decision, 11.12.2009, No.E.2007/1, K.2009/4, Official Gazette No. 27449, 31.12.2009.**

43 **In the paragraph added to Article 101 of the Law on Political Parties, the sanctions contemplated instead of dissolution involves partially or completely depriving political parties of the financial aid provided by the state.**

44 **Presidency of Diyarbakır Bar Association, Id. p.21.**

45 **Id.**

III. LAW CONCERNING THE FUNDAMENTAL PRINCIPLES OF ELECTIONS AND THE ELECTORAL REGISTER

I. ARTICLE 58/2

Law No. 298 which regulates the elections and electoral registers was amended on 11 April 2010, and as a result the following phrase in Article 58/2 thereunder was removed: "Propaganda to be aired on radio and broadcast on television, as well as other propagandas, may not use any language and script other than Turkish." The amended Article 58/2 runs as follows: "Political parties and candidates should make their propaganda in Turkish."

This amendment is a welcome one in terms of the lifting of the ban before political parties concerning the use of languages other than Turkish. However, the lifting of the ban does not by itself mean that parties have been granted the right to make propaganda in Kurdish and other languages. Furthermore, given that paragraph (c) under Article 81 of the Law on Political Parties is still in effect, it is seen one more time that the amendment was undertaken without considering the legal framework in its entirety.

RECOMMENDATION:

- Article 58/2 must be abolished altogether, and the law must explicitly state that political parties may use languages other than Turkish in their electoral efforts.

4. TURKISH CRIMINAL LAW

The new Turkish Criminal Law which took effect on 1 June 2005 as part of the EU harmonization process is a very problematic law in terms of rights and freedoms.[46] Many arrangements undertaken in the name of reform rendered the law even more objectionable in terms of human rights and the fundamental principles of criminal law, and resulted in irreparable rights violations.

A fundamental principle of criminal law is that criminal provisions must be "sufficiently precise", "definite" and have "absolute expressions." This principle contemplates that definitions of offenses should not include stretchable concepts, and aims to set the minimum and maximum limits of a penalty and thereby to prevent the awarding of sentences that are disproportionate with the nature of the offense. Yet another principle of criminal law entails, as stated in Article 3 of the Turkish Criminal Law that the penalty awarded must be proportionate with weight of the act that constitutes the basis of the offense committed, and the actual or threatened danger/damage of such act must be proportionate with the penalty applicable. These two fundamental principles have a significant place as regards the principle of rule of law enshrined in the constitution and the right to a fair trial secured under the ECHR.

However, because certain articles of the Law includes ambiguous phrases concerning the nature of the offense, minimum and maximum limits of penalties have not been delineated, no reasonable and fair proportion was set between the offense and the penalty, the judicial authority construes provisions of the Law very expansively in practice and impose punishments upon accused parties that are excessive and disproportionate with the offenses they are alleged to have committed. This situation manifests itself in the case of court rulings made in cases where Kurdish citizens being tried while detained and without being detained as per the Turkish Criminal Law and the Anti-Terror Law after being detained during and following protests, demonstrations and Newroz festivities taking place in eastern and southeastern Turkey. This in fact shows that those articles of the Turkish Criminal Law and the Anti-Terror Law, which are problematic for all of Turkey's population, which are discussed in this report have unfavorable effects on Kurds, especially on those living in the said regions. These two laws do not include any phrases which may be considered discriminatory against Kurds, but the reason their relevant articles are discussed in this report is the judicial practices that constitute indirect discrimination.

Although national and international public opinion have come to focus on Article 301 of the Turkish Criminal Law as the main obstacle before freedom of expression in Turkey, the Law has several other articles that are problematic with respect to Kurds. Politicians, local governors and representatives of civil society who voice demands and suggestions for a peaceful solution of the Kurdish Question, criticize state policies, and defend Kurds' fundamental rights and freedoms are being tried while detained and without being detained under Articles 216, 220, 222, 314 and 318 of the Law and receive heavy imprisonment sentences.

46 Turkish Criminal Law, No. 5237, 26.09.2004, Official Gazette No. 25611, 12.10.2004.

Securing freedom of expression to all citizens of Turkey will only be possible if the Turkish Criminal Law is considered and reviewed as a whole. In the section below, those articles and provisions of the Law that are problematic for Kurds are discussed along with court rulings concerning enforcement of the said articles and provisions. The reasons for their problematic nature, grounds for their abolishment or amendment will be discussed in this section together with enforcement examples and concrete cases.

I. ARTICLE 66

For a state to be really considered to be governed by the rule of law, a fundamental condition is that offenders be brought to justice and penalized accordingly. This is especially a must when offenses in question involve human rights violations and the offenders are members of the military and police forces. The situation in Turkey, however, points in exactly the opposite direction. Security officers who committed human rights violations were provided with impunity in the entire country by the regime put in place by the military coup of 12 September, and in the east and the southeast thanks to the State of Emergency which took effect in 1987. Thus, far from punishing members of the military and police forces accused of gross human rights violations including village evacuations, murders by unknown assailants, disappearances while in detention, torture and abuse, they did not ever face a proper judgment. The legislative branch put in place statutory limitations on these violations; the executive branch provided members of the security forces who committed the violations with impunity; and the judiciary entered *nolle prosequis* during proceedings by way of prosecutors and awarded lack of jurisdiction decision by way of courts, as a result of which justice was obstructed and the branches became accomplices in the offenses. In fact, in hundreds of rulings made with respect to that particular time period, the ECtHR established that several members of the military, gendarmerie, police forces, and local guards committed gross human rights violations in the State of Emergency region, and that national judiciary authorities remained silent on those violations.

As a result of certain favorable amendments to the legislation as part of the EU harmonization process, heavy sentences were imposed on the offenses of torture and abusive treatment, and deterrent measures were contemplated such as reference of the compensation the state is obligated to pay due to such offenses to the public officers established to have committed them. However, the policy of impunity is well in effect, and law enforcement officers are prevented from being brought to justice by way of mechanisms such as statutory limitations. The new Turkish Criminal Law stipulates that statutory limitations shall not apply in the case of the crime of genocide (Article 76) and crimes against humanity (Article 77). Trials of offenders in the case of other gross human rights violations including torture, murders by unknown assailants, and disappearances are still subject to the statute of limitations. As is seen in many court cases followed by the public, the statutory limitations contemplated in respect of said offenses can in practice be abused by the courts, and the time-out is achieved by way of tactics including change of hearing venues and postponement of hearing dates, and a regime of impunity not available under law is created *de facto*.

One of the major requests Kurds advance today to make peace with the state involves trying and punishing members of the military, gendarmerie, police forces, and local guards who committed gross human rights violations especially during the State of Emergency and particularly in the said region, so that justice can be achieved.

RECOMMENDATION:

- A provision must be added to Article 66 of the Turkish Criminal Law which regulates the statute of limitations, stipulating that no statutory limitations shall apply in the case of gross human rights violations such as torture, abusive treatment, murder, extrajudicial killings, murders by unknown assailants, and disappearance while in detention.

II. ARTICLE 220

Those paragraphs of Article 220 of the Law which put obstacles before a democratic solution to the Kurdish Question include the following:

(6) An offender committing a crime on behalf of the organization without being a member thereof shall be additionally punishable for the offense of membership in the organization,

(7) An offender knowingly and willingly aiding the organization without being a part of the hierarchical structure of the organization shall be punishable as a member of the organization,

(8) An offender making propaganda for the organization or its aims shall be punishable by a prison sentence of one to three years.

Article 220/6 of the Turkish Criminal Law employs highly ambiguous vocabulary and vests the enforcement with excessive discretionary authority, and "it lacks such qualities as 'sufficiently explicitness', 'definiteness' and 'absolute expressiveness' which must be part of a criminal norm."[47] The meaning of the phrase "committing a crime on behalf of the organization" has not been made explicit, and no regulation has been provided in Article 6 of the Law entitled "definitions" to get rid of the uncertainty[48]. Organizations may have various legal and illegal objectives including legitimate requests for the recognition and exercise of democratic rights, and various legal and illegal activities to achieve those objectives. Individuals who are not members of an organization cannot be expected to be aware of the organization's objectives and activities in their entirety and therefore to foresee what kind of activities could be deemed as "offense committed on behalf of the organization" by judicial authorities. Moreover, even individuals who are aware of an organization's or organizations' illegal objectives and activities cannot be considered to have committed an offense on behalf of the organization solely because of such 'awareness' and on the grounds that they have exercised their constitutional right to attend social demonstrations.

In addition, deeming even those persons who are proven to have been involved in statements and activities 'on behalf of the organization' as members of the organization even if they are not is compatible with the principles of proportionality of crime and punishment and of justice. This practice puts persons who are actually members of an illegal organization, carry and use guns, conduct illegal activities and engage in terrorism on a par with those persons who, though being sympathizers of the organizations, are not members thereof, and the two are tried for the same offenses and are punishable by the same sentences. This is a violation of the principle of "proportionality of crime and punishment" secured in Article 3 of the Turkish Commercial Law. This approach holds civilians equal to members of the terrorist organization, and as such contradicts the principles of human rights and the rule of law, and it is indeed not an effective method of combat against terrorism. In fact, in the case filed in 1991 by the then-existing Social Democratic People's Party (*Sosyal Demokrat Halkçı Parti-SHP*) for the annulment of Article 2/2, which had content similar to that time period's Anti-Terror Law, the Constitutional Court did not annul the paragraph but specified the notion of "committing an offense on behalf of the organization."[49] The Court held that "an offense can be considered to have been committed on behalf of the organization if it was committed in the awareness and at the request of the organization, and not after a general call by the organization."[50]

The ambiguous phrases in the text of the law vest the judiciary authorities with an excessive discretionary power which allows room for arbitrary practices, and result in the courts making awards in violation of justice. In fact, thousands of individuals who attended community celebrations or protests held in Turkey's eastern and south-eastern regions were tried and punished under the Turkish Criminal Law and the Anti-Terror Law with very heavy sentences even if they were neither proven nor even alleged to have connections to any illegal organization. As secured under Article 34 of the Constitution and Article 11 of the ECHR, everyone has the right to freedom of peaceful assembly and demonstration without prior permission. In their rulings contradicting justice and the law, the courts did not offer their reasons as to the type of causal link that would constitute an "offense committed on behalf of the organization" they have established between the individuals' activities for which they are tried and the 'organization'. Courts have tried and punished individuals simply because they attended demonstrations and marches, shouted slogans, and threw stones sometimes, and at other times because they threw stones as claimed by law enforcement officers and not as substantiated by evidence.

It is necessary to draw attention to the concerns raised by a decision of the Criminal General Council of the Court of Cassation made on 4 March 2008 with respect to children who attended or are alleged to have attended demonstrations that took place in Diyarbakır on 28 March 2006.[51] The events lasted three days and resulted in the killing of 10 persons ranging from 6 years to 78 years old, and about one thousand individuals were detained and a significant number of them were arrested. Diyarbakır 4th Assize Court held in the trial of a certain F.Ö. that the accused shall be punished for violating Law No. 2911 on Assembly and Demonstration which prohibits illegal demonstrations and Article 7 of the Anti-Terror Law which prohibits making propaganda for the organization. The Court did not consider it necessary to additionally assess the accused's conduct within the scope of Article 220/6 of the Turkish Criminal Law. Pointing that the text and reasoning of Article 220/6 of the Law did not include specifics on the phrase "committing an offense on behalf of the organization", the Court held that said article

47 Presidency of Diyarbakır Bar Association, *Genel Değerlendirme (General Review)*, Issue: 2009/136, 16 February 2009, p. 2.

48 *Id.*

49 Tahir Elçi, "Yargıda Yeni Kriz Dalgası" (The New Wave Crisis in the Judiciary), *Çağdaş Hukuk Dergisi*, 18 January 2010, p. 4

50 Constitutional Court decision,31.03.1992, No. E.1991/18, K.1992/20, Official Gazette No. 21478, 27.01.1993.

51 The decision by the Criminal General Council of the Court of Cassation dated 04 March 2008 and numbered E.2007/9-282, K.2008/44.

aimed to punish "individuals who commit offenses as proxies on behalf of the organization...for offenses such as bombing, murder, brigandage." The lower court held on to its decision despite the reversal decision made by the Supreme Court's 9th Criminal Chamber, which held that the F.Ö. must also be punished as per Article 220/6 of the Law, and then the file was delivered to the Criminal General Council of the Court of Cassation. The General Council resolved that the F.Ö. is punishable not only due to participation in illegal demonstrations and making propaganda for an illegal organization, but also under Article 314 of the Turkish Criminal Law which regulates the penalty for committing a crime on behalf the organization since the accused admitted to have committed a crime on behalf of the organization pursuant to Article 220/6 thereof. In its precedent-setting ruling, the General Council noted that the PKK made calls in its publications for attendance in the meeting, and all individuals who attended the meeting have heeded this call and therefore committed an offense on behalf of the organization and thus they must be deemed as members of the organization. Following this precedent-setting decision, any individuals who attend meetings called for in PKK's publications can be considered PKK members without regard to whether they were aware of the call, whether they abided by the call, and whether they were genuinely connected with the organization. As a result of this Supreme Court decision, the way is paved for punishing those accused, who only made propaganda for the organization, both for the propaganda offense as defined in the Anti-Terror Law and also for the organization membership offense as defined in the Turkish Criminal Law, as a consequence of the same offense.

The remarks concerning Article 220/6 in particular also apply to a great extent to Article 220/7. In the context of the latter, criminal law principles of "proportionality of crime and punishment", "equivalence between crime and punishment", and "lawfulness in crime and punishment" are violated when individuals who knowingly and willingly aid the organization shall be considered organization members "even if they are not part of the hierarchical structure of the organization."[52] Considering non-members to be members on the sole grounds that they have aided or alleged to have aided the organization renders the notion of organization membership obsolete, and more importantly violates the fundamental human rights of individuals tried as per that provision. Moreover, the offense of "organization membership" is already regulated under Article 314 of the Turkish Criminal Law. In addition, the offense of "aiding and abetting the organization" regulated in Article 169 of the previous Law did not find its way to the new one, which results in aiding and abetting type of acts being deemed as organization membership and being included within the scope of Article 220/7 of the new Law. This situation constitutes a violation of the principle of lawfulness which states that the penal sanctions applicable to each offense must be subject to a separate legal arrangement.[53]

"Making propaganda for the organization or its aims," which is regulated as an offense in Article 220/8 of the Turkish Criminal Law, institutes a new criminal category that did not exist in the previous Law. This provision allows for the trial of people's *intentions* due to the phrase "or its aims" included therein, and as such it contradicts fundamental principles of criminal law. Courts must base their rulings on objective factual evidence and they can only try statements and actions, not the intentions susceptible to subjective interpretation. The phrase "or its aims" may cover all kinds of conceptions, and therefore violates the freedom of expression. Even though no reference is made to an illegal organization, all kinds of expressions are accepted as "the propaganda for the organization" and the persons making such expressions are penalized. Considering that it was recommended to abolish Articles 7/2 and 7/3 of the Anti-Terror Law, which regulate other offenses relating to the creation of propaganda for illegal organizations, since a concern is likely to arise as there will be the impression that the offense of making propaganda for illegal organizations will no longer exist, removal of the phrase "or its aims" from the text, one might instead opt for the entire abolishment of the Article 220/8.

RECOMMENDATIONS:

- Given the availability of Article 314 of the Turkish Criminal Law which regulates "membership of an armed organization", there is no need for Article 220/6. Therefore, Articles 220/7 and 220/7 must be abolished.
- The offense of aiding and abetting illegal organizations must be regulated in a way similar to that which was provided in Article 169 of the former Law.
- The phrase "or its aims" should be removed from the text of Article 220/8.

52 **Presidency of Diyarbakır Bar Association, *Genel Değerlendirme*, p. 3.**

53 ***Id.***

III. ARTICLE 301

Despite improvements, Article 301 of the Law continues to function as a serious obstacle to the freedom of expression.

RECOMMENDATION:

- Article 301 must be abolished.

IV. ARTICLE 318

Entitled "Disinclining the Public to Perform Military Service", this article's full text runs as follows:

> (1) Persons who give incentives or make suggestions or spread propaganda which will have the effect of discouraging people from performing military service shall be sentenced to imprisonment for a term of six months to two *years*.
>
> (2) If the act is committed through the medium of the press and media, the penalty shall be increased by half.

Any piece of writing critical of the Turkish Armed Forces and security policies in the context of the Kurdish Question is likely to be considered within the scope of Article 318. As a matter of fact, ever since the law took effect, several dissidents have been tried as per this article due to their anti-war statements and writings. The phrase "discouraging people from performing military service" is highly ambiguous, not defined in the law and leaves excessively wide discretionary room to courts in practice. It is being utilized against conscientious objectors and total objectors who are against compulsory military service, and against Kurdish and other dissidents who are critical of the methods and policies the state pursues in combating PKK.

RECOMMENDATION:

- Article 318 must be abolished.

5. ANTI-TERROR LAW

This Law was adopted in 1991, four years after the declaration of State of Emergency in Turkey's eastern and southeastern regions.[54] But terrorism was a problem in Turkey before that date. Previously legal combat against terrorist organizations was waged by way of the Law on the Duties and Powers of the Police (LDPP) and the Provincial Administration Law, and no separate legislation was needed for combating terrorism. The decision was nevertheless made to adopt a new law to combat terrorism in the early 1990s when armed struggle against the PKK intensified. This adoption brought about a law that punishes the same offenses as the Turkish Criminal Law and suggests heavier penalties for them than are stipulated in the Law.

Although the Anti-Terror Law saw a number of improvements since 2002 when the EU reform process took root, the amendments made in June 2006 meant backtracking. As it currently stands, the Anti-Terror Law prefers the state's security over individuals' freedoms and security, imposes serious restriction on fundamental rights and freedoms, limits the availability of legal remedies substantially in the event of human rights violations, and provides impunity for public officers charged with the duty to ensure security.[55]

As a matter of fact, the step to take is to abolish the Anti-Terror Law, in view of the availability of comparable provisions in other legislation including in particular the Turkish Criminal Law. As noted above, the penalties outlined in the Turkish Criminal Law are currently heavier and more deterrent than necessary and incompatible with the principle of proportionality of the crime and the punishment. For that reason, the Anti-Terror Law must be abolished altogether. Based on the idea that this law needs to be abolished, some legal experts object in principle to making amendments to the existing text. Others, however, suggest that a political will to abolish the Anti-Terror Law is unlikely to come into being in the short run and offer recommendations for amendments to be effected urgently with respect to some of the most problematic articles of the Law.

54 Anti-Terror Law No. 3713, 12.04.1991. Official Gazette No. 20843, 12.04.1991

55 Meral Danış Beştaş, "Kürt Sorununda İfade Özgürlüğü: Mevzuatta-Uygulamada Ayrımcılık ve Çifte Standart," (*Freedom of Expression in the Kurdish Question: Discrimination and Double-Standards in Legislation-Enforcement*) pp. 125-126. *Türkiye'de İfade Özgürlüğü (Freedom of Expression in Turkey)*, BGST Yayınları, 2009, pp. 123-150.

I. ARTICLE 2

> Article 2/1: An offender committing a crime on behalf of the terrorist organization without being a member thereof shall also be considered a terrorism offender and be punishable as members of the organization would be.

The most fundamental principles of criminal law are violated when courts hold non-member offenders who are found to have committed a crime "on behalf of the organization" on a par with organization members. On the basis of this provision, courts have held that thousands of Kurdish citizens, and especially the "children aggrieved by the Anti-Terror Law", have committed offenses on behalf of the organization and punished them as if they were organization members simply for having exercised their constitutionally secured rights and attended protests, distributed flyers, held press conferences, made statements or engaged in similar actions.

RECOMMENDATION:

- Article 2/1 must be abolished.

II. ARTICLES 3, 4 AND 5

As noted previously, several offenses regulated under the Turkish Criminal Law are also held to be offenses under the Anti-Terror Law and are punishable separately. Article 3 of the Anti-Terror Law regulates offenses referred to in 10 different Articles of the Turkish Criminal Law as "terrorism offenses." Article 4 of the Anti-Terror Law stipulates that offenses regulated in 50 other articles of the Turkish Criminal Law shall be considered terrorism offenses if they are committed "as part of the activities of a terrorist organization." Thus, offenses regulated in 60 different articles of the Turkish Criminal Law, which is composed of 345 articles, are separately punishable under the Anti-Terror Law as "terrorism offenses."

Article 5 stipulates as follows:

> (1) Prison sentences or monetary fines to be assessed with respect to offenders committing the crimes listed in Articles 3 and 4 shall be multiplied by one-half and assessed as such. Maximum assessable sentence can be exceeded with respect to both the offense in question or in the case of any other sentence in the event of a sentencing as described above. However, a sentence of aggravated life imprisonment shall be imposed instead of a penalty of life imprisonment.
>
> (2) If the sentence shall be multiplied on account of the offense being committed as part of the activities of the organization, the sentence shall be multiplied only as stipulated in this article. However, such multiplication may not be at a rate less than two-thirds of the original sentence.

According to these regulations, an individual accused, for instance, of aiding and abetting a terrorist organization is separately tried under both Article 314 of the Turkish Criminal Law and Article 3 of the Anti-Terror Law. If such person is convicted, the punishment to be assessed as per Article 314 of the Law will be followed by another that consists of the original punishment increased by one-half. Some legal experts argue that Article 5, which orders a 50% increase in the punishment and leaves no discretionary room to the judges, is the most problematic article of the Anti-Terror Law.

RECOMMENDATIONS:

- Article 3 must be abolished.
- Article 4 must be abolished.
- Article 5 must be abolished.

III. ARTICLE 7

> [...]
>
> (2) An offender making propaganda for a terrorist organization is punishable by a prison sentence of one to five years. Where such offense is committed via instruments of press, the punishment shall double by one-half. In addition, owners and chief editors of press organs who were not complicit in the crime shall be subject to a monetary fine covering a period of one thousand days to ten thousand days. The maximum limit in the case of chief editors, however, shall be five thousand days. The following actions and conduct shall be punishable under the provisions of this paragraph:

a) Covering the face in full or in part to hide one's identity in meetings and demonstrations converted into propaganda for the terrorist organization,

b) Bearing organizational emblems and insignia in a manner to manifest membership of or support for the terrorist organization, chanting slogans or making broadcasts with sound devices to that effect, or putting on a uniform bearing terrorist organization's emblems and insignia.

(3) The offenses listed in the second paragraph shall be doubly punished under this paragraph if they are committed in buildings, clubhouses, offices belonging to associations, foundations, political parties, labor or professional organizations or their auxiliary buildings, or in educational institutions or student dormitories or their attachments.

Article 7 is incompatible with the freedoms of expression and of association secured under the Constitution and the ECHR. This article punishes offense of making propaganda for the terrorist organization without defining that offense. It does not list the resort to violence, compulsion or threat as the elements of the propaganda offense.[56] In addition, it was not specified what principles the courts would rely on in establishing whether demonstrators made propaganda for the terrorist organization and vested the judiciary authority with an excessive discretionary power in practice.[57] Because no criterion has been set as to how to establish the fact of propaganda for the terrorist organization, courts have come to impose arbitrary restrictions on the freedom of expression. For example, many demonstrators have been tried and punished on charges of making propaganda for the terrorist organization on the grounds that they wore clothing or carried banners featuring yellow, green and red, colors that are found in the PKK flag as well.

RECOMMENDATION:

- Articles 7/2 and 7/3 must be annulled.

IV. ARTICLE 10

This Article restricts seriously the rights to defend oneself, a fair trial, protection against torture and abusive conduct, and the right to life, security, and freedom granted to individuals under the constitution, laws and international law. Undoing the improvements achieved as a result of reforms undertaken since 2002 to implement ECtHR decisions and to fulfill EU criteria, this article stipulates as follows:

a) If the aims of the investigation are likely to be harmed, the individual who is captured, detained or who will be kept longer in detention, the person's situation shall be notified to only one of that person's relatives upon the order of the Public Prosecutor.

b) While in detention, the accused may receive legal support from only one counsel. At the Public Prosecutor's request and upon the order of the judge, the detainee's right to contact the counsel may be restricted for a period of twenty-four hours; however, no depositions may be taken within such period.

c) While law enforcement takes the deposition of the accused, only one counsel may be in attendance.

d) Records kept by law enforcement shall only bear the registration numbers of the relevant officers, and not their full identity information.

e) If the counsel's review of the contents of the file or taking copies of documents is likely to harm the aims of the investigation, such right of the counsel may be restricted at the Public Prosecutor's request and upon the order of the judge.

f) In an investigation made due to offenses within the scope of this law, the counsel's defense documents, files and records of communications with the detained accused may not be reviewed. However, if it is found or documented that the counsel acts as intermediary between members of the terrorist organization to facilitate their conversations for organizational purposes, an officer might be in attendance in the meeting at the request of the Public Prosecutor and upon the order of the judge; in addition, the judge may review the documents passed on to the counsel by said persons or vice versa. The judge will decide whether the document in question may be handed in part or in full. Concerned parties may object to such decision.

While Article 10 limits the number of counsel that may be retained by detained accuseds to one, Article 15 of the same law grants security officers and other staff charged with the duty of combating terrorism the right to retain three counsels in the investigations and prosecutions initiated against them due to offenses they are alleged to have committed while fulfilling their duties. Article 15 further contemplates that defense expenses of public officials

56 *Id.* p. 127-128.

57 *Id.*

who have capacity as accused will be covered by the state without being bound by the tariff on attorney's fees. In other words, while providing that security officers accused of rights violations can retain three counsels, attorney's fees payable to those counsels could be above normal rates, and such fees are payable out of public sources composed of taxpayer money, the law allows aggrieved parties whose rights are violated to retain only one counsel whose fees are not payable by the state and such right to retain counsel can be restricted for the first 24 hours. This discriminatory regulation violates detained individuals' rights to a fair trial and defense rights on the grounds of violating the Anti-Terror Law, and it reinforces the privileges and impunity provided to security officers under the legislation and in practice.

Article 10 of the Anti-Terror Law further stipulates that judges shall have the right to prevent accused persons from contacting counsel in the first 24 hours of detention, to request the presence of a public officer during such contacts and to review and seize the documents exchanged between accuseds and their counsels. These arrangements point to a fundamental reversal of the legislative reforms undertaken in recent years to fulfill the advisory tasks suggested by the Council of Europe Committee of Ministers in line with ECtHR rulings.

The practical consequences of Article 10 of the Prevention of Terrorism are a cause for alarm. Especially in the prosecutions where the Diyarbakır Assize Courts with Special Powers are in charge, law enforcement officers and the prosecutors prevent detainees from contacting their counsels in the first 24 hours without a court order to that effect, and they do so as if one existed and in a way in which they would obtain the required court order after the fact.[58] "It is observed that the first 24 hours where no contact could be established pave the way for torture and abusive conduct and result in all sorts of arbitrary practices."[59] In addition, at the request of prosecutors, judges issue confidentiality decisions concerning the files of detainees, which prevent attorneys from accessing their clients' files and from putting forth adequate defense. The right to a fair trial is violated as a result.

RECOMMENDATION:

- Article 10 must be abolished.

V. ARTICLE 17

The content of this article imposes much heavier conditions while enforcing punishments of terrorism offenders than in the case of judicial offenders. The article stipulates as follows:

> In terms of the application of the provision on parole and probation, persons convicted of offenses within the scope of this Anti-Terror Law shall be subject to paragraph 4 under Article 107 and Article 108 of the Law on the Enforcement of Criminal and Security Provisions dated 13 December 2004 and numbered 5275.
>
> Persons convicted of prison escape or riot while under arrest or conviction and persons sentenced to solitary confinement three times as a disciplinary measure shall not be eligible for parole even if such disciplinary measures are lifted.
>
> Persons convicted of offenses within the scope of this Anti-Terror Law shall not be eligible for parole if they commit a crime within the scope hereof after the date on which their sentence becomes final.
>
> Terrorism offenders whose capital punishments have been converted into heavy imprisonment for life as per the Law No. 4771 Concerning Amendments to Miscellaneous Laws dated 3 August 2002 and amended by way of Article 1 of Law No. 5218 dated 14 July 2004, and terrorism offenders whose capital punishments have been converted into aggravated life sentence or who are sentenced to aggravated life sentence shall not be eligible for parole. The aggravated life sentence for such persons shall remain in effect until death.

Under the provisions of the Article, persons convicted of terrorism offenses shall be eligible for parole only after they have been through three-fourths of their term. Persons sent to solitary confinement as a disciplinary measure three times shall no longer be eligible for parole. In the case of judicial offenses however, one becomes eligible for parole upon going through two-thirds of one's term. Disciplinary measures are not cause for parole ineligibility in that case, either. The only requirement is that no parole may be provided in that case until the person serves the disciplinary punishment and then the disciplinary record is erased. Even in that instance, though, the period in which the disciplinary punishment is served may not go beyond the date of parole eligibility the person is entitled to. While on the one hand there is the regulation in Article 5 whereby regular punishments are multiplied by one-half to two-thirds of the original term, on the other hand there is a very heavy enforcement regime. Such a state of

58 *Id.* p.129-130

59 *Id.*

affairs violates the principle of proportionality between the crime and the punishment. Therefore, not only Article 5 must be abolished, but also a new regulation must be effected within the scope of Article 17. Articles 107 and 108 of the Law Concerning Enforcement must be reviewed while such regulation is being made.

RECOMMENDATION:

- Conditions of the heavy enforcement regime imposed in Articles 107 and 108, which are related to Article 17, must be relaxed, though not to the extent provided in the case of judicial offenses, and especially regulations must be introduced which rule out enforcement practices that result in isolation.

6. LAW ON NATIONAL EDUCATION

To enable Kurdish children and youth to genuinely take advantage of the rights to education secured under the constitution, a number of legislative amendments must be made in addition to the constitutional provisions offered under "Constitutional Amendment Recommendations" above. The education legislation, including its laws, regulations and circulars in Turkey needs to undergo a complete overhaul in line with the principles of peace in society, human rights, equality and on the basis of pluralism and an approach respecting diversity. This is necessary for providing equal opportunities in education for all children and youth without regard to ethnic and religious identity, class, or place of residence. Now that this report's aim is to offer recommendations toward the Kurdish Question and, in that context, Kurdish children's and youth's education problems rather than offering solutions for Turkey's education problem, the remarks and suggestions below should better be viewed in that context.

The Article in the National Education Law concerning the objectives of education manifest the state's ideological and monist approach toward education.

The Law's articles on pre-school education prevent the establishment of kindergartens offering education in Kurdish as well as Turkish languages. Article 20 of the Law notes that one of the objectives in pre-school education is "ensuring that children speak Turkish accurately and well." Article 7 states that pre-school education must "pay primary attention to ensuring that children use Turkish accurately and well while expressing themselves." However, children starting school with Kurdish as their mother tongue and without knowledge of Turkish cannot speak Turkish accurately and well, at least not in the first few years of their lives in school. Although it is natural for an education law to aim for primary school kids speaking the official language accurately and well, the very same law does not consider that kids without knowledge of the official language need to learn Turkish before starting school and that the trauma they would undergo in primary school need to be prevented as such. This is a sign that the Law was drafted with ideological concerns and not with pedagogical ones.

RECOMMENDATION:

- National Education Law must be amended to allow children whose mother tongue is not Turkish or who do not speak Turkish or cannot speak or write in it accurately to have access to pre-school education in their mother tongues and to learn Turkish while in pre-school.

7. LAW ON FOREIGN LANGUAGE EDUCATION AND TEACHING

The Law on Foreign Language Education and Teaching[60] is a typical example of the inconsistencies created across the entire legislation by a political will that lacks the courage to amend the existing constitutional order and the ideological background behind it, while seeking in the meantime to harmonize Turkish legislation with that of the EU. The amendments to the law made since 2002 show that the aim has been to save the day with palliative fixes instead of creating comprehensive and democratic legislation based on rule of law and human rights.

I. ARTICLE 2

The first paragraph of Article 2 runs as follows: "In institutions of education and training, no language other than Turkish may be taught to Turkish citizens as a mother tongue." This is the paragraph that maintains the ban on instruction and teaching in Kurdish language. It is similar to the regulation in Article 42 of the Constitution.[61] The phrase "provisions of international treaties shall remain reserved" in the article makes, as the Constitutional Article

60 Law on Foreign Language Education and Teaching No. 2923, 14.10.1983, Official Gazette No. 18196, 19.10.1983.

61 Presidency of Diyarbakır Bar Association, *Id*, p. 145.

42 does, an indirect reference to the 1923 Treaty of Lausanne. This ensures that the right to education and teaching in mother tongue granted to non-Muslim citizens is left outside of the scope of the ban imposed in the law. As noted in that section of the report where Article 42 of the Constitution is discussed, it is a discriminatory practice to separate, without lawful grounds, citizens whose mother tongue is Armenian, Greek and Turkish, from citizens whose mother tongue is Kurdish, Lazish, Bosnian, Arabic, as these groups of citizens are equal before the law and they have the same subjective conditions.

As part of the EU harmonization process, the following provision was added to Article 2/a of the Law:

> However, private educational centers may be established subject to provisions of Law No. 625 on Private Educational Institutions[62] for the purpose of learning the different languages and dialects Turkish citizens use traditionally in their daily lives; and language courses may be offered in these centers and in others for the same purpose.

While the Constitution and a law prohibit education and training in Kurdish, another law permits the establishment of Kurdish language centers. This illustrates the inconsistent and fragmentary structure characterizing Turkish legislation. If the teaching of one particular language in public and private schools is a cause of concern for the state, why is it not so to teach that language in private language centers? To put it differently, if teaching a particular language in private language centers is not a cause for concern, why is it so to teach that language in public and private educational institutions? In addition, considering Kurds' demands to receive *education and training* in their mother tongue and to receive that not just in private but also in public schools, this amendment is obviously a cosmetic 'reform' attempt as it involves only the grant to Kurds and others whose mother tongue is not Turkish the right to learn their mother tongues in private centers they will attend at their own costs.

RECOMMENDATION:

- Article 2/a must be abolished.

8. LAW ON PROVINCIAL ADMINISTRATION

Several international human rights documents have guaranteed that members of minorities cannot be deprived of their right to have their own cultural lives, to believe in and practice their own religions or to use their own languages in countries with racial, religious or linguistic minorities. Registering reservations in some of those documents and not signing others at all shall not absolve the Republic of Turkey, a country that defines herself as respectful of human rights, democratic, and as a state abiding by rule of law, of its responsibilities. On the contrary, such practices render the country's legitimacy questionable.

Names given by people, including Kurds in the first place, with diverse cultures to themselves or their children as well as to places of residence, mountains, plains, rivers are the products and integral parts of those cultures. In other words, mass residential areas, starting with cities, are not just places where people live; they are also spaces where people create civilization and culture. Thus, cities as the products of human thought and commonly created civilization, and the names given to them, must be protected. For the people of a particular country, but for the whole humanity also, it is all the more an entitlement to request protection for the cities in that country if they have historical significance. This is why some of the more recently emphasized human rights include "the right to respect humanity's common heritage", peace, environment, and development rights.

Looking at the practices in Turkey in that regard, one unfortunately sees that the 30,280 residential areas representing diverse languages and cultures in Mesopotamia, Thrace, and Anatolia were renamed simply because they were named in Kurdish, Georgian, Tatar, Circassian, Lazish, or Arabic languages or languages of other minority groups. The renaming practice dates back to 1925 when Georgian-language names of residential areas in Artvin were changed. In 1940, the practice became official policy by way of Interior Ministry Circular 8589. Legal ground was provided for name changes in 1949 through the Law No. 5442 on Provincial Administration. The 'Committee of Experts in Renaming' set up in 1957 reviewed the names of 75 thousand residential areas until 1978 and renamed more than 30 thousand areas.

To bring an end to this practice which is unacceptable from a human rights perspective, Kurdish members of parliament submitted proposals from time to time, and in fact Beşir Atalay, Minister of the Interior and Coordinator of the 'Initiative' made positive remarks in that regard. However, no concrete step has been taken thus far. A very

62 Following an amendment in 2007, this law now has the reference number 5880.

practical proposal was voiced by Hasip Kaplan, Member of Parliament representing the province of Şırnak, two years ago. Mr. Kaplan's legislative proposal, submitted to the Office of the Speaker of the Grand National Assembly on 24 April 2008, which contemplated that residential areas' previous names would be used along with the new names, has been awaiting discussion by the Assembly's Committee for Interior Affairs since 6 May 2008.[63]

Provincial Administration Law No. 5442[64] was amended in 1959[65] to stipulate that "non-Turkish village names giving rise to confusion will be promptly renamed by the Interior Ministry upon receiving the opinion of the relevant Permanent Provincial Committee." Under this provision, thousands of village names throughout Turkey have been changed in the last 50 years.[66] Village names originally in Kurdish, Armenian, Syriac, Arabic and Lazish were replaced with new Turkish ones assigned arbitrarily by the state.

This law and practice prevent the collective exercise of the right to a name, which is a fundamental human right. Just as it is a fundamental right of individuals to have a name they wish for themselves, it is an equally fundamental right of coexisting groups of people to collectively name the geography, local and administrative area in which they reside or to use the names given by past groups of people. There is no doubt that the idea is not to change village or other place names under any conditions whatsoever. But it is the residents of the place who should have the discretion in that regard.

The law currently in effect in Turkey grants the state an arbitrary authority to rename villages. In certain situations, public bodies exercise this authority in a way to repeal decisions made democratically. For instance, the decision by the Diyarbakır Provincial General Assembly to return previous names to renamed places within the provincial borders was relayed to the administrative litigation at the objection of Diyarbakır Governor's Office, and the Council of State affirmed Diyarbakır Administrative Court's verdict that Diyarbakır Provincial General Assembly did not have the authority to make such a decision.[67]

RECOMMENDATIONS:

- Article 2(d)(2) must be abolished.
- Previous names must be returned to the renamed places by way of a temporary article to be added to Provincial Administration Law.

9. LAW AND STATUTE ON SURNAMES

As per Article 3 of the 1934 Law No. 2525 on Surnames:

> Rank, status, tribe names, and names belonging to foreign races or nations, names violating public morals, disgusting or absurd names may not be taken as surnames.

As per Article 6 thereof:

> At the writ served by the highest level provincial administrator, the Chief Public Prosecutor may request from the court that persons using surnames in contravention of the prohibition set forth in Article 3 change such names and request further that names indicating relationship to historically famous personalities not be used, upon claiming that no such relationship exists.

The 1934 Statute on Surnames include similar restrictions, as well.[68] Despite comprehensive amendments to the Statute effected on 25 March 2009, these restrictions were kept in place, and it is stipulated that "new surnames shall be in Turkish language" (Article 5), "names belonging to foreign races and nations may not be taken as surnames" (Article 7), and "names indicating relationship to a clan or tribe may not be taken as surnames or used subsequently" (Article 8).

Considering that a new surname may not be taken except in the case of persons acquiring Turkish citizenship subsequently, the restrictions in the Law on Surnames and Regulations on Surnames rather give rise to problems

63 The legislative proposal by Şırnak MP Mr. Hasip Kaplan can be accessed at http://www2.tbmm.gov.tr/d23/2/2-0233.pdf.

64 Provincial Administration Law, No. 5442, 10.06.1949, Official Gazette No. 7236, 18.06.1949, Art. 2(d)(2).

65 Law No. 7267 Concerning Amendment to Paragraph (D) under Article 2 of Provincial Administration Law No. 5542 dated 11 May 1959, Official Gazette No. 10210, 21.05.1959, Art. 1.

66 Sezgin Tanrıkulu, *Id*. p. 41.

67 *Id*. Decision by the 8th Circuit of the Council of State, 10.06.2009, No. E.2007/8635, K.2009/4200.

68 Regulations on Surnames, The Decision by the Council of Ministers, No. 2/1759, 24.12.1934, Official Gazette No. 2891, 27.12.1934.

when individuals wish to change their current surnames.[69] Although the Kurdish citizens of Turkey do not belong to a "foreign" race or nation, courts prevent individuals from taking Kurdish surnames on the grounds of Article 3 of the Law on Surnames. This is problematic for two reasons: First, this shows that the judiciary treats citizens of Turkey who are of a different ethnicity as 'foreigners'. Second, while no obstacles are put before persons who wish to replace their existing surnames with Turkish ones, courts block persons who choose Kurdish names, which shows that the judiciary discriminates between persons who have the same legal standing. There is no doubt that the problem applies not only to the Kurdish people but also to others in Turkey who belong to other ethnicities.

The application submitted by an Assyrian citizen of Turkey who wanted to change his last name and adopt a Syriac surname recently constituted, as held by the Mardin Civil Court of First Instance, a serious legal problem. The Court relayed the matter to the Constitutional Court by way of a special plea.[70] If the Constitutional Court decides against the applicant, a highly negative precedent will have been set with respect to the right to a name, and finding a solution to the problem will become an even more complicated task. Without awaiting the Constitutional Court's decision, the following amendments to the Law on Surnames must be made as soon possible:

RECOMMENDATIONS:

- The phrase "tribe names, and names belonging to foreign races or nations" in Article 3 of the Law on Surnames must be removed.
- The discretionary power granted to the administration in Article 6 of the Law on Surnames with respect to the choice of a surname must be revoked.
- Articles 5, 7 and 8 of the Regulations on Surnames must be abolished.

10. LAW ON DEMOGRAPHIC SERVICES

Law No. 5490 on Demographic Services adopted in April 2006 annulled the 1972 Population Law No. 1587 which had provisions preventing individuals from giving their children first names of their choice. Thus, Turkish legal framework currently includes no laws that prevent the right to a first name.[71] Nevertheless, bureaucratic authorities can in practice raise difficulties when individuals wish to change the names written in their identity cards or to give their children first names of their choice. When legal remedies are sought in such instances, courts are seen to have resolved to prevent the exercise of the right to a first name, although there is no legal obstacle before such exercise. In particular, persons who have not registered the Kurdish first names given to them by their families during the time period in which the prohibition was in effect had to actually carry with two names for years and use two different names in their private and public lives. Following the lifting of the prohibition, persons seeking to replace their names on identity cards with the ones they used in private and/or register the Kurdish names they gave to their children filed applications with the population registers and then initiated actions in administrative courts when their applications were rejected. A legal arrangement is needed to get rid of the arbitrarily used discretionary power granted to bureaucrats and judicial authorities and to secure the right to a name which is a human right.

RECOMMENDATION:

- A temporary article must be added to the Law on Demographic Services to stipulate that individuals may replace the names written in their identity cards with the names of their choice and that they would need to apply to civil registry within one year to be able to do so.[72]

11. THE SCRIPT LAW

As per Article 2 of the Law No. 1353 Concerning Adoption and Application of Turkish Script, public institutions, private companies and organizations are "obligated to adopt Turkish script in their writings and apply that script in their dealings."[73] Article 4 of the Law stipulates likewise that "it is obligatory to use the Turkish script in printing and writing private or public signboards, plates, announcements, adverts and movie posters in Turkish language, and also in periodical or non-periodical dailies, booklets and journals of private and public nature in Turkish language"

69 Sezgin Tanrıkulu, *Id.*, p. 41.
70 *Id.*
71 *Id.*
72 *Id.*
73 Law Concerning Adoption and Application of Turkish Script, No. 1353 , 03.11.1928, Official Gazette No. 1030, 03.11.1928.

The 1928 Script Law required the use of Turkish script in all areas of life ever since it took effect, but it did not contemplate sanctions for practices to contrary. However, Article 222 of the Turkish Criminal Law imposes sanctions if the said requirement is not honored. Several cases were filed with the courts as per Article 222 of the Criminal Law in the country's eastern and southeastern regions on the grounds of violation of the Script Law. An example involves the organizers printed in two languages, Turkish and Kurdish, for members of the Diyarbakır Bar Association, which were the subject of a legal action initiated by the Diyarbakır Chief Public Prosecutor's Office.[74]

Several native languages, including Kurdish, other than Turkish spoken in Turkey include letters such as q, w, x that are not part of the Turkish alphabet. Considering that, the restriction in the Script Law and the penal sanctions contemplated in the Criminal Law are obviously discriminatory and they limit the right to a name and language. As a matter of fact, TRT 6 (Şeş), a public institution, uses letters, as does the private broadcasting company Show TV, that are not part of the Turkish alphabet. This demonstrates that the restrictions in the Script Law are incompatible with the social reality and that the prohibitions stipulated in the Criminal Law are used biased and selective fashion. The said letters are commonly used in the titles of private companies in foreign languages such as English without any sanctions, which shows that the state accords to foreign languages rights it does not provide for the mother tongues of its citizens.

RECOMMENDATION:

Legal obstacles in the Script Law before the use of letters not available in the Turkish alphabet, and the sanctions in Article 222 of the Turkish Criminal Law must be removed. To that end:

- Articles 2 and 4 of the Script Law must be abolished.
- Article 222 of the Turkish Criminal Law must be abolished.

12. LAW ON THE ESTABLISHMENT AND BROADCASTS OF RADIOS AND TELEVISIONS

As per Article 4 of the Law No. 3984 on the Establishment and Broadcasts of Radios and Televisions:

> Broadcasts must be in the Turkish language. However, broadcasts may also be made for the purpose of teaching foreign languages which contribute to the creation of universal cultural and scientific works or delivering music and news in those languages

While prohibiting the use of mother tongues other than Turkish spoken in Turkey in making broadcasts, the state paves the way for broadcasts in foreign languages such as English. By doing so, the state grants to foreigners rights it does not make available to its own citizens.

In a series of amendments to Law No. 3984 in 2002 and 2003, the ban on broadcasting in non-Turkish languages, including Kurdish, was lifted. Provided that no violations of "the fundamental characteristics of the Republic as specified in the Constitution, the indivisibility of the state together with its territory and its nation" are the case,[75] broadcasts "by public and private radio and television companies in the diverse languages and dialects Turkish citizens traditionally use in their daily lives"[76] will be possible. As a typical example of introducing a reform for the purpose of saving the day in the EU harmonization process, the right to broadcast in mother tongues was provided without lifting the ban in Article 4 on mother tongue broadcasts, causing the same law to include provisions that contradict one another.

In addition, the regulation dated 25 January 2004[77] issued to enforce the legal amendments made by way of the 2002 and 2003 reforms introduced restrictions not contemplated in the law. First of all, the regulation limits the right to broadcast in mother tongues to five state-sanctioned languages including the Zaza and Kırmançi dialects of Kurdish, Bosnian, Arabic and Circassian. No justification was offered for this limitation, and it is an illegitimate, arbitrary and discriminatory practice to not grant the right to broadcast in mother tongues to other languages such as Lazish. The regulation also limits the right to broadcast to a total of five hours per week not to exceed 60 minutes a day on radio, and to four hours a week not to exceed 45 minutes a day on television. These broadcasts

74 Sezgin Tanrıkulu, *Id.*, p. 42.

75 Law Concerning Amendments to Certain Laws, No. 4771, 03.08.2002, Official Gazette No. 24841, 09.08.2002, Art. 8.

76 Law Concerning Amendments to Certain Laws, No. 4928, 15.07.2003, Official Gazette No. 25173, 19 .06.2003, Art. 14.

77 Regulation on Radio and Television Broadcasts in Different Languages and Dialects Used Traditionally by Turkish Citizens in Their Daily Lives, Official Gazette No. 25357, 25.01.2004.

can only be geared toward adult viewers, offering content in news, music and traditional culture. No broadcasts may be made for the purpose of teaching these languages. The regulation further imposes a requirement to provide Turkish translation, which shall match the original broadcast in terms of content and duration, to be offered after the original radio broadcast, and in the form of subtitles during a televised broadcast.

The regulation imposes restrictions on a right granted under the law to which the regulation is subject, which is a violation of the principle of hierarchy of norms. It also contradicts Laws No. 4771 and 4928 which pave the way for private radio and television companies to broadcast in Kurdish. Adopted as part of the EU harmonization process, these laws granted Kurdish broadcasting rights to private broadcasting companies in addition to public ones, and local radio and televisions located in the eastern and southeastern regions where a high concentration of Kurdish people live began broadcasting in Kurdish on the basis of the law. However, the bureaucratic reporting requirements imposed in the regulation as well as the obligation to provide word by word Turkish translation put the local broadcasting companies with limited human and financial resources in a tight spot. In addition, the ban on programming for children and on the teaching of Kurdish language has an adverse effect on the continued survival and development of the language, and prevents Kurds from teaching their mother tongues to their children.

Although Laws No. 4771 and 4928 paved the way for public and private broadcasting companies to broadcast in Kurdish with limited content and duration, it is still not possible to have 24-hour Kurdish broadcasting in Turkey. Even though TRT 6 (Şeş), which began broadcasting on 1 January 2009 following the June 2008 amendment to the Turkish Radio and Television (*Türkiye Radyo ve Televizyon Kurumu,* TRT) Law, is an exception to the rule with its 24-hour broadcast, a contradiction arises between the two different laws, a point which will be discussed in the next section. In any case, private television and radio channels are still not allowed to broadcast in Kurdish – and other languages- without limitations on time and restriction on content which are not imposed on radio and television companies broadcasting in Turkish.

Some of the issues discussed in this section have been partially addressed in the "Draft Law Concerning Establishment and Broadcasts of Radios and Televisions" published in the website of the Office of the Prime Minister in May 2010 as this report was about to be issued. Article 5 of the Draft Law, which is the equivalent of Article 4 of the existing law, stipulates that "broadcasting services shall be provided in Turkish." However, broadcasts in languages and dialects other than Turkish are also allowed. "Procedures and principles concerning such broadcasts shall be established by the Higher Board through regulation." This gets rid of the discrimination in Article 4 and removes the inconsistency between Article 4 and Article 14 thereof. It will be a very positive step forward if the draft is made into law as it currently stands.

RECOMMENDATIONS:

- If the current draft is made into law in its present form, the regulation to be designed by the bureaucracy to enforce the law must not repeat the mistakes made in the existing regulation.
- In this context, a regulation must be adopted which shall ensure that broadcasting can be made in the Kurdish language indefinitely at the national, regional and local levels, by relying on the right to broadcast in languages other than Turkish granted under Article 14 of the existing law.

13. TRT LAW

An amendment in June 2008 to Article 21 of the TRT Law No. 2954 allowed TRT broadcasts in languages and dialects other than Turkish.[78] Based on the amendment, TRT 6 (Şeş) was founded to offer 24-hour broadcasts in Kurdish language, and it began broadcasting on 1 January 2009. However, because the amendment to the TRT Law granted discretionary power to the TRT, the bureaucracy raised concerns in Kurdish public opinion that a future change in the administration of TRT might put in peril the continuity of TRT 6 (Şeş).[79]

78 Law No. 5767 Concerning Amendments to the Turkish Radio and Television (*Türkiye Radyo ve Televizyon Kurumu,* TRT) Law and the Law on the Establishment and Broadcasts of Radios and Televisions, 11.06.2008, Official Gazette No. 26918, 26.062008, Art. 6.

79 Sezgin Tanrıkulu, *Id.*, p. 43.

RECOMMENDATION:

- A legal arrangement must be made in the TRT law, which shall ensure continuity of the ongoing Kurdish broadcast on TRT 6 (Şeş) and the availability of broadcasts on TRT in languages other than Turkish and Kurdish.

14. LAW ON THE COMPULSORY USE OF TURKISH IN ECONOMIC ENTERPRISES

Steps to be made in the area of law, for a permanent solution to the Kurdish Question should not remain limited to the realms of politics and civil rights. All other laws restricting freedoms in any areas of life and incompatible with the requirements of modern life must be reviewed.

To this end, one law that needs to be amended is the Law on the Compulsory Use of Turkish in Economic Organizations adopted in the early years of the Republic, only to remain out of date in the years that followed.[80] As per Article 1 of this Law, "Any type of companies and organizations within Turkey are required to use Turkish language in all of their dealings, agreements, communications, accounting and bookkeeping within Turkey."[81] It is obvious that this restriction is far too out of date at a time when the Turkish economy is increasingly integrated into the global economy and several multinational corporations are operating in various cities around Turkey, primarily Istanbul. Therefore, amendments must be made to this particular provision of the law to ensure that while the requirement to keep necessary books and records in the official language, Turkish, for purposes of audits as part of the positive legal order, shall remain in place. Facilities must be provided to use other languages preferred in both required books and records as well as in other books and recordings as a second, third or further number of option.

RECOMMENDATION:

- Article 1 must be amended to provide for the availability of other languages as further options, in addition to the requirement to use Turkish.

15. THE VILLAGE LAW

The Village Law of 1924[82] is important in terms of the Kurdish Question, for it provides the legal background for the temporary village guard system. Paragraph 2 added to Article 74 of this Law in 1985 sets the infrastructure for the temporary village guard system:[83]

> At the proposal of the Governor and upon approval by the Interior Ministry, sufficient number of "temporary village guards" may be authorized in provinces to be designated by the Council of Ministers if there are serious indications of reasons and violent activities calling for a State of Emergency declaration in or around the village, or if there is an increase in practices infringing upon the livelihood and property of villagers due to any reason. Wages payable to temporary village guards so authorized during the period they are on duty and amount of compensatory payment and clothing allowance to be extended at the end of their service shall be jointly established by the Interior and Finance and Customs Ministries, and be paid by the Interior Ministry out of the allocation to be moved over to the Interior Ministry budget from the relevant transfer payments section of the Finance and Customs Ministry budget.

In a regulation dated 1996, the *voluntary* village guard system was put in place on the basis of the Village Law, in addition to temporary village guards.[84]

According to official figures issued by the Interior Ministry, there are approximately 70,000 temporary and voluntary village guards on duty in Turkey.[85] With the onset of the EU process, it has become clear that the village guard system is one the greatest obstacles before democratization and the solution to the Kurdish Question. Both the European Commission and the United Nations designated the cancellation of the village guard system as one of reforms Turkey must accomplish in the short term. However, despite all national and international pressures, the

80 *Id* p. 44.

81 Law on the Compulsory Use of Turkish in Economic Organizations No. 805, 10.04.1926, Official Gazette No. 353, 22.04.1926.

82 Village Law, No. 442, 18.03.1924, Official Gazette No. 68, 18.03.1924

83 Law Concerning Addition of Two Paragraphs to Article 74 of the Village Law, No. 3175, 26.03.1985. Official Gazette No. 18715, 04.04.1985.

84 Regulation Concerning Enforcement of Temporary Article 9 Added to Law No. 6136 by way of Law No. 4178, Official Gazette No. 22763, 20.09.1996, Art. 3(j): "Voluntary village guards: Guards appointed by civilian authorities as per Article 74 of Law No. 442."

85 For an assessment of the number of guards, distribution across cities, distribution across the type of offenses committed, and similar issues see Dilek Kurban, "Bir 'Güvenlik' Politikası Olarak Koruculuk Sistemi" (*The Village Guard System as a 'Security' Policy*). *Almanak Türkiye (Almanac Turkey) 2006-2008: Güvenlik Sektörü ve Demokratik Gözetim (Security Sector and Democratic Supervision)*. TESEV Yayınları, 2009, pp. 253-259.

government is yet to make a commitment regarding abolishment of the system. On the contrary, although the government announced that employment of new guards was halted in 2000 as per a decision of the Council of Ministers to that effect, new guards are still being employed in the region. Moreover, an amendment to the Village Law made on 27 May 2007 authorized the government to hire up to 60,000 additional village guards.[86] As the official data issued by the Interior Ministry shows, the presence of guards who were involved in several judicial and political offenses are a threat against peace in the region, causes serious fractures and disagreements within the Kurdish community, and the presence of armed civilians who are getting more and more difficult to keep in check puts regional security in peril.

RECOMMENDATIONS:

- Paragraph 2 of Article 74 which provides legal background for the temporary village guards system must be annulled.
- All temporary and voluntary village guards must immediately be decommissioned and disarmed.
- Necessary legal arrangements must be made to bring guards who committed crimes to justice.
- Necessary legal arrangement must be made to ensure that guards who have not committed any crimes are retired if they are at the retirement age, and that others are employed in public sectors excluding the sensitive ones such as security and education.

16. COMPENSATION LAW

Law No. 5233 on Compensating Damages Arising from Terrorism and the Combat against Terrorism concerning the compensation of damages suffered by victims of forced migration took effect on 27 July 2004. The law was created to remove an obstacle to Turkey's EU membership and to ensure the inadmissibility of about 1,500 applications before with the ECtHR. It also aims to establish a relationship of trust between the state and the citizens. Although the law 'succeeded' in terms of the first two objectives, justice is yet to be reached for victims of forced migration.

According to Interior Ministry data, only half of the applications were concluded as of June 2009.[87] Given that the Law's enforcement began in October 2004, the process is seen to move forward very slowly. The state offers a far too overdue 'justice' 15-20 years after the forced migrations, and one needs to remember that late justice is no justice, especially given the fact that victims have to wait for years to see the results of the applications they made as per the law. After the long wait, 1/3 of the applications reviewed were rejected, payments made to compensation-worthy families were in very low amounts, which is a sign that the law failed in terms of actually serving justice and the state earning the trust of citizens. One of the major problems with the Law is that it does not consider damages for pain and suffering for individuals who had to leave their places of residence against their will whose houses and villages were set to fire before their very own eyes, most of whom witnessed the murder of their relatives, and suffered from extreme poverty during and after their migration. Both the fundamental principles of compensation law and entailing practices in Turkey and several ECtHR rulings concerning evacuated villages necessitate that the damages for pain and suffering felt by victims of forced migration be compensated for separately from pecuniary damages.

Currently, there are thousands of forced migrants living in the Mahmur Camp and in European countries. Although these individuals are eligible to file an application under the Compensation Law, they could not take advantage of the Law due to logistical barriers. The application deadline, which was extended a few times, expired in 2008, and a mass return migration from the Mahmur Camp to Turkey will bring the problem back to the table.

RECOMMENDATIONS:

- The compensatory amounts set in the law for cases of death, injury and disability must be increased to become compatible with the fundamental principles of compensation law.
- Persons who have thus far received compensatory payments for their damages must be paid the difference between the new amounts to be set and the amount they were previously paid.
- A special supervisory mechanism must be established to review all decisions made by the Damage Assessment Commissions. Compensations calculated thus far for movable and immovable property and for

86 Law Concerning Amendments to the Village Law and Certain Laws, No 5673, 27.05.2007, Official Gazette No. 26450, 02.06.2007.

87 Yılmaz Doruk, Interior Ministry, Presentation made at the conference held by TESEV in Van, 27 June 2009.

losses arising from inaccessibility of property must be reviewed. All dismissal decisions made by Damage Assessment Commissions must be processed again.

- A temporary article must be added to the Law, and the application deadline must be extended for the forcibly displaced individuals living in the Mahmur Camp or in Europe so that they may take advantage of the Law.
- Forced migrants entitled to take advantage of the Law must be paid damages for pain and suffering due to the psychological loss and trauma they have been through. This facility must be provided to all eligible persons who submitted or will submit an application.
- To expedite the enforcement of the Law, several additional Damage Assessment Commissions need to be set up especially in cities previously under the State of Emergency status, conditions must be created to ensure that the Commissions work full time, and all applications must have been processed by the end of 2010.

17. STATE OF EMERGENCY LEGISLATION

I. STATE OF EMERGENCY LAW

State of Emergency is a practice that was declared in 1987 and expanded in phases to 14 cities in Turkey's Eastern and Southeastern regions. The practice was abandoned on 30 November 2002 as part of the EU process. However, if a similar practice were to be implemented again in the future, the State of Emergency Law which provides the legal background still remains in effect. Aggravated human rights violations including village evacuations, torture, disappearances while in detention, extrajudicial killings that took place in the 1990s (which is probably the most troubling era of the Kurdish Question) occurred thanks to the extraordinary range of powers this law granted to the office of the governor of the State of Emergency region. Therefore, the State of Emergency Law must be reviewed and paid attention to as a priority item under the reform attempts toward finding a solution to the Kurdish Question.

Article 1 of the State of Emergency Law provides for the declaration of a State of Emergency "if there are serious indications of widespread acts of violence aiming to destroy the democratic order or fundamental rights and freedoms." Room for arbitrariness is allowed because no factual evidence is sought which demonstrates the presence of acts of violence and no criteria are set as to what those indications might be.

Article 2, without referring to the prohibition to tamper with the essence of fundamental rights and freedoms, regulates how rights and freedoms will be restricted or suspended during the period of the State of Emergency.

Article 3, in a similar fashion to Article 121 of the Constitution, vests the Council of Ministers with the authority to declare a State of Emergency upon consulting with the National Security Council. The Grand National Assembly can take part in the process for approval only after the State of Emergency is declared and such declaration is published in the Official Gazette. Although Grand National Assembly has the power to change or extend the duration of, or to cancel altogether, the State of Emergency, it is a violation of the principle of separation of powers and democracy to authorize the executive branch to declare the State of Emergency and let the legislative branch have a say in the matter only after the practice takes effect. A State of Emergency must be declared exclusively and only by way of a Grand National Assembly decision.

Article 4 stipulates that the Council of Ministers is authorized to issue decree-laws during the period of a State of Emergency. It also states that the decree-laws shall be submitted to Grand National Assembly approval after they are published in the Official Gazette. This is an anti-democratic article which grants the executive branch an authority that is reserved only for the legislative branch in democracies.

Article 11 provides that in the event of a State of Emergency declaration due to acts of violence, administrative decisions can be taken to suspend the most fundamental rights and freedoms by imposing curfew, censorship of press, forced migration and resettlement, and prohibiting the right to meet and hold protest marches.

Article 23 vests security officers with the extraordinary power to shoot directly and without hesitation at a target, in a manner in violation of the use of proportionate force for which such use is intended.

Article 33 stipulates that no stay of execution can be awarded in cases filed against administrative actions concerning the exercise of powers granted to the Interior Minister, Governor of the State of Emergency region and provincial governors. Specifying what kinds of decisions courts may take, this regulation interferes with judicial independence and violates the principle of separation of powers.

RECOMMENDATIONS:

- The State of Emergency Law must be reviewed in its entirety in light of the issues discussed above, and powers granted to the administration to suspend fundamental rights and freedoms in arbitrary fashion must be revoked.
- Article 33 must be abolished.

II. STATE OF EMERGENCY DECREE-LAWS

Although the practice of instituting a State of Emergency is now ended, Decree-Laws No. 285 and 430 which regulate the powers of the governor of the State of Emergency region are still in effect.[88] The governor of the State of Emergency region is given extraordinary authority to displace public servants (Decree-Law No. 285, Article 4), evacuate places of residence (Decree-Law No. 285, Article 4), bar the press from accessing the region and censor the press (Decree-Law No. 430, Article 1), suspend the activities of trade unions (Decree-Law No. 430, Article 2), and conduct home and workplace searches under private and public ownership without a court order (Decree-Law No. 430, Article 3). The decree-laws also prohibit legal action against these practices (Decree-Law No. 430, Article 8). There is no place in a state based on human rights and governed by the rule of law for such decree-laws which vest administrative authorities with arbitrary powers to suspend at will the most fundamental rights and freedoms and do not allow citizens to seek legal remedies when they suffer from such practices. In addition, given the enhancements in fundamental rights and freedoms effected by way of constitutional and legislative amendments undertaken as part of the EU reform process, any decree-laws that contradict the Constitution and relevant legislation are in contravention of law. As a matter of fact, not only the practice of restricting rights and freedoms but also any other administrative action must be based on laws adopted by the legislative branch and passed through democratic decision making mechanisms, and not on decree-laws issued by the executive branch. Thus, Turkey must from now on cease the practice of issuing decree-laws.

RECOMMENDATIONS:

- Both decree-laws must be abolished promptly.
- In the event of future acts which necessitate declaration of State of Emergency, measures must be taken to prevent the adoption of similar decree-laws which allow for the restriction of fundamental rights and freedoms of individuals residing in the areas covered by the State of Emergency.

18. MINORS AGGRIEVED BY THE ANTI-TERROR LAW: ANALYSIS AND RECOMMENDATIONS[89]

Mehmet Uçum, Hatice Uçum, Gülçin Avşar

The problem of children aggrieved by the Anti-Terror Law dates back to the adoption the Anti-Terror Law in 1991. But it is only in recent years that the problem received public attention in all of its dimensions. This particular group is commonly known as "stone throwing kids" due to a misperception but called "Children aggrieved by the Anti-Terror Law" by most defenders of human rights working on the matter. They came to be characterized as a social problem after the demonstrations that took place in Diyarbakır on 28 March 2006. Demonstrations started during the funerals of persons alleged to have been PKK members and later expanded to the province of Batman and were attended by many children. 10 persons, 6 of them below 18 years of age, lost their lives along the way. In his 1 April 2006 address concerning the events, Prime Minister Recep Tayyip Erdoğan warned families of the children by saying that security forces "will intervene as necessary…no matter whether the protestors are women or children." A few months after, a series of amendments were effected on 29 June 2006 which provided for the trial and punishment of children between 15 to 18 years of age, who had until that time[90] been tried in juvenile courts, instead in the Assize Courts with Special Powers vested with special powers and practically replacing the previous State Security Courts.[91]

88 Decree-Law Concerning the Establishment of a Governorship of State of Emergency Region, No. 285, 10.07.1987; Decree-Law Concerning Additional Measures to be Taken During the Tenure of Governorship of the State of Emergency Region and the Duration of the State of Emergency, No. 430, 15.12.1990.

89 This section on children aggrieved by the Anti-Terror Law was authored by Mehmet Uçum, a member of the Legal Commission of Callers of Justice for Children, with contributions from Hatice Uçum and Gülçin Avşar of the same team to be included in the TESEV report.

90 Children in the 15-18 age group, who had thus far been tried at the State Security Courts, came to be tried in juvenile courts just like other children thanks to a legal amendment undertaken on 30 July 2003 as part of the EU process. UNICEF Turkey Office, *Gösterilere Katılmaları Sebebi İle Terör Suçlusu Sayılan Çocuklar Hakkında Saha Ziyareti Raporu (Field Visit Report on Children Deemed as Terrorism Offenders for Having Attended Demonstrations)*, April 2010, p. 8.

91 *Id.*, p. 6.

A draft text reported to be put together for solving the problems of children aggrieved by the Anti-Terror Law is currently being negotiated in the Justice Committee of the Grand National Assembly. However, the draft is limited to an amendment of Articles 5, 9 and 13 of the Anti-Terror Law, and thus it is far from providing a permanent and fair fix to the problem. The recommendation for a draft law/proposal submitted to each of the Grand National Assembly and the Government on 22 February 2010 by the group Supporters of Justice for Children (*Çocuklar İçin Adalet Çağırıcıları,* ÇİAÇ)[92] includes comprehensive arrangements meant to solve the problem. The group's suggestions are offered once again to the public in this report.

I. THE PROBLEM OF NAMING

Criminal law for juveniles is subject to universal principles of protection. Turkish legislation includes these principles through the UN Convention on the Rights of the Child and Law on the Protection of the Child. Accordingly, a child is a person below 18 years of age even if such person reaches puberty at an earlier age. A child must have been older than 12 years of age to be criminally liable. Because the association of a child with an offense is mainly based on factors outside of the child's will, there is no concept of "criminal child." Instead the concept is a child "who fell into disagreement with the law" or a child who "drifted into an offense." One of the fundamental principles of the juvenile protection law is "considering children essentially as victims of a crime even when they are the offenders who committed it." In fact, the Law on the Protection of the Child which took effect on 15 July 2005 preferred the concept of "a child drifted into an offense." Thus, the same concept needs to be used for children who fell into disagreement with the Anti-Terror Law. But the problem here is not children's disagreement with the Law, but the victimization of children associated with the Anti-Terror Law through the enforcement of that law. It is therefore in tune with reality to designate the children associated with the Anti-Terror Law as "Children Aggrieved by the Anti-Terror Law." This report adopts that expression for these reasons.

II. THE DEFINITION, DEVELOPMENT AND LEGAL GROUNDS OF THE PROBLEM

Rights violations concerning children aggrieved by the Anti-Terror Law result from the implementation of the following articles with respect to children: Articles 2, 5, 7/2(a), 9, 13 and 17 of the Anti-Terror Law; Article 220/6 of the Turkish Criminal Law; and Article 33 of the Law on Assembly and Demonstration Marches. Problems emanating from Articles 2, 5, 7/2(a) and 17 of the Anti-Terror Law date back to 1991, that is to say before the year 2006, while issues with Articles 9 and 13 result in part from the 2006 amendments and in part from the previous provisions.

III. LAWS THAT NEED TO BE AMENDED

A. ANTI-TERROR LAW

Children 16 to 18 years of age, when accused of criminal conduct under the Anti-Terror Law, are made subject to the same rules as adults deemed to be terrorism offenders, including rules on arrests, territorial jurisdiction and trial procedures, as well as punishments to be assessed and their enforcement. While children 12 to 15 years of age, when accused of criminal conduct under the Anti-Terror Law, are subject to protective provisions concerning detention, arrest, territorial jurisdiction and trial procedures, postponement of ruling announcement, adjournment, and conversion into prison sentence and other optional sanctions, they, too, are treated as per rules specific to adults considered to be terrorism offenders when it comes to the punishments to be assessed and their enforcement.

In fact, the problem has been present since 1991 when the Anti-Terror Law was adopted, and it became more visible as a result of the amendments effected in the aftermath of the Diyarbakır events in 2006. Thousands of children were investigated under the Anti-Terror Law in the last few years. The number of children tried while detained or without being detained, or who were found guilty is unknown. According to official data, 304 children below 18 years of age were detained in 2006 for "terrorism offenses."[93] Cases were filed with the Assize Courts with Special Powers against 719 children in 2006, and 869 children in 2007.[94]

It needs to be noted that the question of subjecting children to investigations and trials proper for adults is one that has been around ever since the inception of Turkish Criminal Law system, and recently steps have been taken

92 Callers of Justice For Children, *Recommendation for a Draft Law/Proposal Concerning Amendments and Additions to Child Protection Law No. 5395 and Concerning Amendments to Anti-Terror Law No. 3713*, 22 February 2010.

93 *Id.* (in reference to the 2006 data provided by Turkish Institute of Statistics on "Statistics on Children Brought to Security Units").

94 *Id.* (in reference to Justice Minister Mr. Mehmet Ali Şahin's response on 6 February 2009 to a motion to inquire).

to address it. Nevertheless, the problems of special investigation, special trial, special punishment and special enforcement regime created under the Anti-Terror Law with respect to children came into being as of 1991. *The important issue here is that the question includes not just the treatment of children aggrieved by the* Anti-Terror Law *as adults, but also their subjugation to special investigation, trial, and enforcement regimes devised in relation to terrorism offenses and for adults.* In other words, children aggrieved by the Anti-Terror Law are further victimized in both a general and particular sense by having their rights violated twice as part of the same process.

Since 1991, thousands of children across Turkey associated with illegal leftist, rightist, ethnic, and religious organizations have been investigated as adults under special procedures within the scope of the Anti-Terror Law, prosecuted as such, punished as such, and had their sentences enforced as such. Since 2006, the problem has been an ever expanding one in a numerical and political sense especially in the country's eastern and southeastern regions, covering in particular Kurdish children. But this does not alter the status of the question as principally a question pertaining to children. As long as legal conditions and practices remain the same, it is highly likely that other children facing different conditions might be victimized in the future.

A. 1. ARTICLE 2

Under paragraph 1 of Article 2 of the Anti-Terror Law, it is necessary to separate the inclusion of children in terrorism offenses from the holding of children as terrorism offenders. Persons considered children until they are older than 18 years of age should not, under the fundamental principles of child protection law, be deemed terrorism offenders. In a system where the assumption is that a child's will does not take shape under independent conditions, it shall be a contradiction of terms to deem children terrorism offenders due to activities they drifted into. Children will of course continue to carry criminal liability under general provisions with respect to offenses arising from terrorist activities they drifted into. However, all protective provisions under the Law on the Protection of the Child must be applicable with respect to children drifted into criminal conduct.

Subjecting children to paragraph 2 under Article 2 of the Anti-Terror Law results in children receiving in some cases, sentences far heavier than those of actual members of the organization who have not participated in the demonstrations. In some situations, organization members are not penalized at all under Article 221(2) on the condition that they surrender and state that they, and they are found to, have not participated in any actions. Severe injustices arise when non-member children attending demonstrations are punished for having committed an offense on behalf of the organization as if they are members of the organization.

A. 2. ARTICLES 5 AND 7/2(A)

Children are subjected also to Articles 5 and 7/2(a) whose full texts are provided in that section of the report where general remarks concerning the Anti-Terror Law are offered. This results in a violation of the principle of proportionality of crime and punishment. Under Article 5, punishments assessed for children are doubled by one-half. One of the principles of child protection follows that "where a child is convicted of a crime, the assessed punishment must be reduced in line with the child's age and regardless of the type of crime, and it must not be multiplied in view of the type of crime committed." Punishment increases applicable to adults may not be put in place when it comes to children. Punishment assessed for the child should only be reduced in consideration of the child's age. As per Article 7/2(a), the child is additionally punished for having made propaganda for the organization. In other words, a child attending a single demonstration is punished multiple times for the same law. Children who do not physically carry out, are not aware of or even did not envisage the objective elements of the crime are being penalized in accordance with regulations concerning terrorist organizations specified in the law. Although one option might be to penalize only for violating the Law on Assembly and Demonstration Marches considering the nature of the Anti-Terror Law, the principle of proportionality is violated when an additional punishment is given under Article 7/2(a). This violation must be removed by way of the recommended amendments.

A.3. ARTICLE 9

The 2006 amendments to the Anti-Terror Law provide for the trial and punishment of children in the 16-18 age group under rules specific to adults. Article 9 of the Anti-Terror Law, which stipulates that children between 16 to 18 years of age shall be tried as adults in the Assize Courts with Special Powers with respect to offenses within the scope of the Law, runs as follows:

> Cases concerning offenses within the scope of this Law shall be litigated by the assize courts identified in the first paragraph of Article 250 of the Criminal Procedures Law No. 5271 dated 4 December 2004. Cases filed due to said offenses against children older than fifteen years of age shall also be tried in the same courts.

Temporary Article 1(3) of the Child Law stipulates further:

> Where no juvenile courts or juvenile assize courts are available in a jurisdiction, investigations and prosecutions concerning offenses committed by children shall be undertaken by the Chief Public Prosecutor's Office and the courts on duty in accordance with provisions of this Law, until such courts are established and take charge.

These two provisions result in majority of the children associated with the Anti-Terror Law being tried in the assize courts with special powers. Under the UN Convention on the Rights of the Child, and the Law on the Protection of the Child,[95] it is the Juvenile Courts that shall try children who are in conflict with the law.

The new regulation introduced to Article 9 of the Anti-Terror Law additionally violates the provision of Constitutional Article 37 which stipulates that "no one can be tried by any judicial authority other than a court designated by the law" and the provision of Constitutional Article 141 which stipulates that "special provisions shall be provided by the law with respect to the trial of minors."

A.4. ARTICLE 13

The 2006 amendment to this Article provides that practices concerning offenses within the scope of the Law including postponement of ruling announcement, conversion of prison sentence into optional sanctions and deferment shall not apply to children in the 16-18 age group.

> With respect to offenses within the scope of this Law, no decision may be taken for a postponement of ruling announcement as per Article 231 of the Criminal Procedures Law; an assessed prison sentence may not be converted into optional sanctions or be deferred. However, these provisions shall not apply to children who are not older than fifteen years of age.

Article 14 of the ECHR, to which Turkey is party, regulates the prohibition on discrimination. Regardless of the crime type, discriminating among groups of children below 18 years old is a violation of that prohibition and constitutes a fundamental contradiction with respect to the rights of the child. Moreover, under international as well national legislation, a prison sentence must be the last resort when it comes to a child. Instead, other sanctions and protective measures must be implemented.

A.5. ARTICLE 17

Under Article 17 including provisions on aggravated disciplinary action and parole for offenders who committed crimes within the scope of the Law:

> In terms of the application of the provision on parole and probation, persons convicted of offenses within the scope of this Law shall be subject to paragraph 4 under Article 107 and Article 108 of the Law on the Enforcement of Criminal and Security Provisions dated 13 December 2004 and numbered 5275.
>
> Persons convicted of prison escape or riot while under arrest or conviction and persons sentenced to solitary confinement three times as a disciplinary measure shall not be eligible for parole even if such disciplinary measures are lifted.
>
> Persons convicted of offenses within the scope of this Law shall not be eligible for parole if they commit a crime within the scope hereof after the date on which their sentence becomes final.
>
> Terrorism offenders whose capital punishments have been converted into heavy imprisonment for life as per the Law No. 4771 Concerning Amendments to Miscellaneous Laws dated 3 August 2002 and amended by way of Article 1 of Law No. 5218 dated 14 July 2004, and terrorism offenders whose capital punishments have been converted into aggravated life sentence or who are sentenced to aggravated life sentence - shall not be eligible for parole. The aggravated life sentence for such persons shall remain in effect until death.

This article stipulates very heavy terms even for adult terrorism offenders and receives criticism in that regard. Subjecting children to this article is incompatible with the principle of proportionality of punishment and the fundamental principles of juvenile criminal justice.

95 **Child Protection Law No. 5395, 03.07.2005, Official Gazette No. 25876, 15.07. 2005.**

B. TURKISH CRIMINAL LAW

Article 2 of the Anti-Terror Law and Article 220(6) of the Turkish Criminal Law –by reference to Article 314 of the Law- includes provisions that result in non-member children being penalized as if they were members of the organization. As discussed in the section of the Report where general remarks on the Law were offered, the reason Article 220(6) is applied to children aggrieved by the Anti-Terror Law is a decision made by the Criminal General Council of the Court of Cassation on 4 March 2008. The remarks offered in the previous section on Article 2 of the Anti-Terror Law also hold for Article 220(6) of the Law. This practice violates proportionality, which is one of the fundamental principles in child protection law, and it subjects children to sanctions heavier than even those applicable to adults who are considered terrorism offenders. As such, it must be abandoned immediately.

C. LAW ON ASSEMBLY AND DEMONSTRATION MARCHES

As per paragraph (c) of Article 33 of this Law: "Persons using weapons or tools listed in paragraph (b) of Article 23 to resist at the time of disbandment shall be punishable by a prison term of five to eight years."[96]

Stones are among the many "weapons and tools" listed in Article 23(b).

The application of Article 33 with respect to children throwing stones is another reason the said children receive heavy and disproportionate punishments. Considering that children attending demonstrations throw stones as a result of various psychological, sociological and developmental processes, the punishment of 5 to 8 years suggested in the law violates the principles of child protection. It is necessary under juvenile criminal justice that the said article not be applicable to children at all, and that, children are sentenced only where their actions that fall within the scope of the article constitute another offense. This will convert stone-throwing to resist security forces from a "behavioral offense" to a "consequential offence"

D. CHILD PROTECTION LAW

Temporary Article 1(3) of this Law stipulates as follows:

> Where no juvenile courts or juvenile assize courts are available in a jurisdiction, investigations and prosecutions concerning offenses committed by children shall be undertaken by the Chief Public Prosecutor's Office and the courts on duty in accordance with provisions of this Law, until such courts are established and take charge.

Unfortunately, not all jurisdictions in Turkey have available Juvenile Courts. Thus, all children associated with the Anti-Terror Law cannot, under current conditions, be tried in Juvenile Courts even if Article 9 of the Anti-Terror Law is amended. What is worse, even in the aftermath of an amendment, children will continue to be tried at the Assize Courts with Special Powers in jurisdictions where no Juvenile Courts are available. This can be prevented by amending paragraph 3 under Temporary Article 1 of the Child Protection Law. If the recommended amendment is effected, children associated with the Anti-Terror Law will be tried not at Assize Courts with Special Powers, but at the regular Assize Courts, serving in the capacity of Juvenile Courts, available in the jurisdictions where Juvenile Courts are otherwise not available.

IV. RECOMMENDATIONS FOR A LEGAL SOLUTION TO THE PROBLEM

Two alternative recommendations are presented below to solve the problem: Amendments recommended with the Anti-Terror Law in mind, and amendments recommended with the Child Protection Law in mind.

A. FIRST ALTERNATIVE

Recommendation for a Draft Law/Proposal Concerning Amendments to Anti-Terror Law No. 3713, Child Protection Law No. 5395, and Concerning Addition of a Paragraph to Article 33 of the Law No. 2911 on Assembly and Demonstration

> ARTICLE 1 – The following phrase has been added as the final paragraph to Article 2, which multiplies the punishment, of the Anti-Terror Law No. 3713 dated 12 April 1991: "The above provisions of this Article and Article 220/6 of Turkish Criminal Law shall not be applicable with respect to children. General provisions applicable to children's actions shall remain reserved"

96 Law on Meetings and Demonstration Marches, No. 2911, 06.10.1983, Official Gazette No. 18185, 08.10.1983.

ARTICLE 2 - The following phrase has been added as the final paragraph to Article 5, which multiplies the punishment, of Anti-Terror Law No. 3713 dated 12 April 1991: "The above provisions shall not be applicable with respect to children."

ARTICLE 3 - The following phrase has been added to subparagraph (a) under paragraph 2 of Article 7, entitled terrorist organizations, of the Anti-Terror Law No. 3713 dated 12 April 1991: "Except children."

ARTICLE 4 – The final sentence of Article 9 of the Anti-Terror Law No. 3713 dated 12 April 1991 has been removed from the text of the Law.

ARTICLE 5 - The following phrase in the final sentence of Article 13 of Anti-Terror Law No. 3713 dated 12 April 1991 has been removed: "not older than fifteen years of age."

ARTICLE 6 - The following phrase has been added as the final paragraph to Article 17, which regulates parole, of Anti-Terror Law No. 3713 dated 12 April 1991: "The above provisions shall not be applicable with respect to children."

ARTICLE 7 – The following subparagraph has been added to Article 33 of Law No. 2911 on Assembly and Demonstration:

"d) "Subparagraphs (a), (b) and (c) of this Article shall not be applicable with respect to children. General provisions applicable to children's actions shall remain reserved."

ARTICLE 8 – Subparagraph (3) of Temporary Article 1 of the Child Protection Law No. 5395 has been amended as follows:

(3) Where no juvenile courts or juvenile assize courts are available in a jurisdiction, investigations and prosecutions concerning offenses committed by children shall be undertaken by the Chief Public Prosecutor's Office and the courts with a general mandate functioning in capacity of Child Prosecution Office and Juvenile Courts in accordance with provisions of this Law, until such courts are established and take charge.

ARTICLE 9 – This Law shall take effect on the date of its publication.

ARTICLE 10 – Provisions of this Law shall be enforceable by the Council of Ministers.

A. SECOND ALTERNATIVE

Recommendation for a Draft Law/Proposal Concerning Amendments and Additions to Child Protection Law No. 5395 and Concerning Amendments to Anti-Terror Law No. 3713

ARTICLE 1 – Article 42, subtitled "applicable provisions", of Child Protection Law No. 5395 dated 03 July 2005 has been amended to have its subtitle read "applicable and inapplicable provisions."

ARTICLE 2 – The following provision has been added as Paragraph (1) to Article 42, subtitled "applicable provisions", of Child Protection Law No. 5395 dated 03 July 2005, and Paragraph numbers (1) and (2) have been sequenced as (2) and (3).

"(1) Children who have drifted into crimes due to being made to fall into conflict with the Anti-Terror Law No. 3713 dated 12 April 1991 shall be subject to the investigation and prosecution provisions of this Law."

ARTICLE 3 – The following provisions have been added as Paragraphs (4), (5) and (6) to Article 42, subtitled "applicable provisions", of Child Protection Law No. 5395 dated 03 July 2005:

"(4) Articles 2, 5, 7/2-a and 17 of the Anti-Terror Law No. 3713 dated 12 April 1991 shall not be applicable with respect to children"

"(5) Article 220/6 of Turkish Criminal Law No. 5237 dated 26 September 2004 shall not be applicable with respect to children. General provisions applicable to children's actions shall remain reserved"

"(6) Article 33 of Law No. 2911 on Assembly and Demonstration shall not be applicable with respect to children. General provisions applicable to children's actions shall remain reserved"

ARTICLE 4 – The final sentence of Article 9 of the Anti-Terror Law No. 3713 dated 12 April 1991 has been removed from the text of the Law.

ARTICLE 5 – The following phrase in the final sentence of Article 13 of the Anti-Terror Law No. 3713 dated 12 April 1991 has been removed: "not older than fifteen years of age"

ARTICLE 6 – Subparagraph (3) of Temporary Article 1 of the Child Protection Law No. 5395 has been amended as follows:

(3) Where no juvenile courts or juvenile assize courts are available in a jurisdiction, investigations and prosecutions concerning offenses committed by children shall be undertaken by the Chief Public Prosecutor's Office and the courts with a general mandate functioning in capacity of Child Prosecution Office and Juvenile Courts in accordance with provisions of this Law, until such courts are established and take charge.

ARTICLE 7 – This Law shall take effect on the date of its publication.

ARTICLE 8 – Provisions of this Law shall be enforceable by the Council of Ministers.

Legal Experts who Contributed to the Report with their Findings, Opinions and Recommendations*

Emin Aktar, Diyarbakır Bar Association, President

Yusuf Alataş, International Federation for Human Rights (FIDH), Vice-President

Gülçin Avşar, İstanbul Bar Association, Member

Vahap Coşkun, Dicle University, School of Law

Demir Çelik, Peace and Democracy Party (BDP), Deputy Co-Chair

Meral Danış Beştaş, BDP, Deputy Co-Chair

Tahir Elçi, Diyarbakır Bar Association, Member

Fazıl Hüsnü Erdem, Dicle University, School of Law

Levent Kanat, Ankara Bar Association, Member

Hasip Kaplan, BDP, Member of Parliament for the Province of Şırnak

Hüsnü Öndül, Human Rights Association (HRA), Former President

Sezgin Tanrıkulu, Diyarbakır Bar Association, Former President

Şehnaz Turan, İstanbul Bar Association, Member

Öztürk Türkdoğan, HRA, President

Hatice Uçum, İstanbul Bar Association, Member

Mehmet Uçum, İstanbul Bar Association, Member

Reyhan Yalçındağ Baydemir, HRA, Former President

* **People listed hereby contributed to this report in their personal capacity and per their respective expertise. The ideas they expressed are their own and do not necessarily represent the views of the entities they belong to or represent. Furthermore, contributors might not necessarily agree with all of the views contained in this report.**

About the Authors

DİLEK KURBAN

She received her bachelor's degree in Political Science and International Relations from Boğaziçi University, Istanbul. She received her Master's in International Affairs (MIA) in human rights from Columbia University's School of International and Public Affairs, and her Juris Doctor (JD) degree from Columbia Law School. Between 1999 and 2001, she worked as an Associate Political Affairs Officer at the Security Council Affairs Division of the United Nations Department of Political Affairs in New York. Kurban is a page editor for Agos, a Turkish-Armenian bilingual weekly. She is an adjunct professor of law at the Political Science Department of Boğaziçi University. She has published in the areas of minority and human rights in Turkey, internal displacement in Turkey and European minority and human rights law.

YILMAZ ENSAROĞLU

He was born in Ağrı in 1959. He graduated from Ankara University Theology Faculty. From the year of 1978 to 1980, he worked as Secretary General of Structuring, Secretary General and General Manager in Öz Gıda Working Syndicate. In 1991, Organization of Human Rights & Solidarity for Oppressed People (MAZLUMDER) was established and he was elected for membership of executive board at the first General Meeting of the organization which was carried out in 1992. He worked there as Deputy General Manager from 1993 to 1996 and General Manager from 1996 to 2004. He resigned his duty on his own will in the general meeting which was carried out on 30 May 2004. In 2005-2006 he conducted research at Durham University (England) on human rights and security issues. He is still a member of MAZLUMDER, Human Rights Agenda Association and Human Rights Research Association and Chief Editor of bimonthly magazine Dialogue for Human Rights, published by IHOP. He is still working as Coordinator of Law and Human Rights Studies at SETA Foundation in Ankara. He is married and has one son.

TESEV
Bankalar Caddesi Minerva Han,
No: 2, Kat: 3 Karaköy 34420, İstanbul
T +90 212 292 89 03 PBX
F +90 212 292 90 46
info@tesev.org.tr
www.tesev.org.tr

ISBN 978-605-5832-55-1