THE STATE OF LAW, ECONOMY, AND STABILITY

It has been observed in the recent period that, unfortunately, there is a relentless, devastating conflict among all bodies of the state. Turkey has rapidly shifted from having a separation of powers towards the union of powers as a result of a dramatic increase in the powers of the government. In a place where the judiciary is not independent, it is not possible to talk about the rule of law. It is a proven fact that the more that confidence is felt towards the law and functioning of the law in a country, the greater economic growth will be. The more independent the judiciary is in a country, the more confidence the investor will feel towards that country, and thus, the more employment opportunities will emerge, the greater Gross Domestic Product and economic growth will be achieved, and of course, the more tax opportunities will be ensured for the state.

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Since the 1980s and 1990s, and as a consequence of a globalizing world, Turkey has been affected by strong internal-external dynamics in the context of modernization and democratization. As a result, Turkey has gone through a rapid process of transformation. Indeed, significant turning points have emerged in the relations between the state, society, and individuals. However, the changes experienced in Turkey have not served its interests. This is mostly due to the failure of all relevant and responsible persons, especially political actors, to convert the dynamic that could arise from these changes into synergy, and use it in the interests of our country.

In a period when "identity politics" increasingly constituted the core of discussions revolving around a knot of problems – such as the Kurdish issue, the rise of Islamic identity, and Alevi and other religious minorities issues – the center-right and center-left parties significantly lost their previously strong positions in the political spectrum. AKP took advantage of this vacuum.

Thirteen years ago, AKP voiced strong support for and effectively pursued the EU integration process and it received significant support from the public on this account. However strains have increasingly been incurred in Turkey's EU accession process, and in the last few years, virtually no progress in this direction has been made. Furthermore, relations with neighbors did not progress in a positive direction. The opposition parties were not able to bring these deficiencies of the government to the attention of the Turkish public adequately.

Political actors are unable to produce satisfactory and permanent solutions for social problems, do not possess a culture of reconciliation, and are driven to obtain political rent and votes. Therefore in Turkey, political parties rank towards the end of the list in terms of social trust.

Turkey has experienced very rough transition periods, but the threats regarding the future of the country have never reached such grave levels. Both various

institutions within the state and the groups within these institutions have come face to face and a devastating, fierce struggle continues.

We are seriously dissociated from each other with regard to fundamental values. We now have great difficulty in producing a common response to the question of who we are. Perhaps for the first time in our history, the Republic of Turkey is about to come face to face with the "issue of survival."

"Turkey has rapidly shifted from the separation of powers towards the union of powers as a result of a dramatic increase in the strength and capacity of the ruling party."

Turkey has arrived at a point characterized by progressively deepening political and social polarization and inter-institutional conflict, a situation brought about through the impact of illegal intervention in the law and politics. In short, Turkey has a democracy that cannot govern and a judiciary that cannot ensure justice; a "prime-ministerial system" in which the legislative and executive are controlled by a single hand. Efforts to dominate the judiciary as well come to the forefront, and no dissident pressure group, in particular the media, is tolerated.

Turkey displays a national assembly that cannot perform its duty to supervise as it has surrendered to the power of the leader under the disguise of so-called "party discipline!" The threat of civil tutelage even finds itself among the cries for "modernization" and "democratization."

Under these circumstances and in a period in which there is undoubtedly a need for concrete legal reform through a new constitution symbolizing the "social consensus document" of Turkey, the current ruling party enacted a Constitutional Amendment Package through the referendum held on 12 September 2010. This package contained neither parliamentary immunity reform, nor any solutions with regard to intra-party democracy, the anti-democratic Political Parties Law, or the 10 percent election threshold. It did not propose an answer to the question of how to achieve justice in the quickest way with minimum costs, or include issues of unemployment, poverty, and education. It also did not cover the Radio and Television Supreme Council (RTÜK), the Council of Higher Education (YÖK), or the Kurdish issue. It did not mention Alevis, either.

The Package was formed out of the desire and purpose of the current ruling party, which pulls the strings on the legislative and executive, to dominate the judiciary. It was also intended to prevent supervision of the party by the independent judiciary. The democratic and secular state of law has been rendered defenseless as the result of this operation for creating a friendly judiciary, performed through the Package's amendments.

At this point, Turkey has rapidly shifted from the separation of powers towards the union of powers as a result of a dramatic increase in the strength and capacity of the ruling party.

"Democracy cannot survive in a place where there is no faith and confidence in the judiciary!"

In fact, however, modern constitutions are meant to set up controlling and balancing mechanisms that enable individual rights and freedoms to be exercised effectively, without injuring the delicate balance between political authority and freedoms. Democracy comes with independent and impartial justice, not with packages, as we have quite often observed in the recent period. Democracy cannot survive in a place where there is no faith and confidence in the judiciary!

It should also be noted that rights and responsibilities with regard to the administration of a country can only be conferred with the condition of being controlled by the independent judiciary in accordance with the principle of separation of powers in modern democracies.

Another important fact in this respect that should be brought to the public's attention is that the independence and impartiality of the judiciary are in close association with the interests of the man on the street. In other words, in the event that these grave violations of law continue to exist, vast masses of people will have to resort to the representatives of government instead of courts when they suffer injustice, opting to ask political power-brokers for help instead of hiring a lawyer.

In brief, it has been observed in the recent period that, unfortunately, there is a relentless, devastating conflict among all bodies of the state. Unfounded accusations, spurious warning notes, secret witnesses, arrests in lieu of convictions, trials

in courts to drive people from pillar to post even though it is known that they will be acquitted, and devastation campaigns run with the emphasis that everyone is equal before the court have become commonplace.

This grave, but true picture I have tried to draw is only a brief summary of the legitimate concerns regarding the future of Turkey.

In this context, the following is to be reminded to those trying to convince the masses with statements such as, "more democracy will be brought to Turkey;" "Turkey is breaking its chains;" "it is being democratized, or advanced democracy, if not enough, full democracy:" A regime in which the legislative, executive, and judiciary are united at a single source cannot be called a "democracy!"

"In the event that these grave violations of law continue to exist, vast masses of people will have to resort to the representatives of government instead of courts when they suffer injustice."

In such a regime, it will never be possible to control, supervise, or restrain a government that has become almost the only authority in terms of the appointment, assignment, promotion, and control of the judges and prosecutors, as was observed particularly in the case of High Council of Judges and Prosecutors (HCJP).

The recent discussions on the HCJP have once more shown that the conclusion reached in an environment in which justice is intended to be left to the mercy of the Minister of Justice, instead of at its discretion, is an unlawful state, an unfair law, and a judiciary without lawyers.

In short, when judicial security has been greatly injured and claiming one's rights has become jeopardized, democracy and judicial independence will lose space in which to exist and Turkey will lose its characteristic of being a "state of law." Turkish people will thus have no other choice apart from living as obedient subjects in the empire of fear.

Why do I bring these up? We are now going through a period in which the perception that the judiciary has been under pressure and is inadequate in its distribution of justice has spread among various sectors of society.

The State of Law and Democracy

I want to stress that the Union of Turkish Bar Associations, as one of the three constituent elements of the judiciary, has assumed a social responsibility and protects human rights and freedoms as well as the rule of law. On behalf of the Union of Turkish Bar Associations, I proudly would like to express that we take sides, particularly with the indivisible unity of the Republic of Turkey. The Republic embodies a democratic, secular, and social state of law organized under a single roof, and is based on the rule of law and Atatürk nationalism.

"It is not a coincidence that the rule of law dominates and economic prosperity is higher in industrialized countries as compared to developing countries."

In our opinion, in a democratic, secular, social, and modern state of law where the rule of law applies and sovereignty belongs unrestrictedly and unconditionally to the nation, no one can be right just because he/she is powerful.

In such a state, the national will is superior. Sovereignty belongs to the nation. Fundamental rights and freedoms are under a constitutional guarantee. There are democratic institutions and rules, and full confidence is felt towards the judiciary as it is ultimately independent and impartial. Everyone is equal before the law. No privilege or supremacy can be granted to any individual, institution, or organization.

In other words, what needs to be targeted is a form of governance in which democracy will no longer be considered as a purpose, but only as a tool to ensure the freedom and happiness of the people. That is to say, the target is not only a state of law, but a social state of law. In such a state, anyone who thinks his/her right has been violated can resort to the independent and impartial courts within the framework of "the principle of natural judge," which foresees that everyone must be tried by the courts that had authority at the time the crime was committed. In a place where the judiciary is not independent, it is not possible to talk about the state or rule of law.

The Relationship Between the State Of Law, Economic Growth, and Stability

Defining the state of law only in political or legal terms and prioritizing the ways in which it performs in these two fields creates a serious deficiency. Politicians and

practitioners of law sometimes ignore the vital correlation between the state of law, democracy, and the economy due to their training and experience. However, it is a proven fact that the more that confidence is felt towards the law and functioning of the law in a country, the greater the economic growth will be. At this point, I would like to underline carefully that falling into the error of considering the law as simply a detail should be avoided.

Of course, the main factors that contribute to the commercial success of a business person include his or her level of competitiveness, networking success, financial and technological strength, and quality of the product or service rendered. However, when we consider the matter realistically, the main factor that will protect investments is the agreement, i.e., the contract. That is to say, it is still the law – namely the sovereignty of the state of law and the existence of an independent and impartial judiciary – that is most important.

Growing market economies take support from a powerful state that guarantees private property rights and their voluntary transfer, but investors base their decisions prior to investment on beliefs as to whether the state will keep its word after the investments are made. At this point, the guarantee that the powerful state will not impose its power on the investor can only be an independent judiciary that will treat both parties equally. The more independent the judiciary is in a country, the more confidence the investor will feel towards that country, and thus, the more employment opportunities will emerge, the greater Gross Domestic Product and economic growth will be achieved, and of course, the more tax opportunities will be ensured for the state.

The lower the confidence is in the institution of law, rule of law, and independence of the judiciary in a country, the more risky that country is likely to be considered by investors. They will, most likely, refrain from investing in that country.

In short, it goes without saying that there is a direct causal relation between the state of law, economic growth, and stability. It is not a coincidence that the rule of law dominates and economic prosperity is higher in industrialized countries as compared to developing countries.

Opinions and Recommendations from the Union of Turkish Bar Associations Regarding Sustainable Development

As the Union of Turkish Bar Associations, we carefully evaluate the global effects and approaches that determine the conditions under which the Turkish development efforts, albeit successful, can become permanent and sustainable. For us, the only means for sustainable development, including being protected from the effects of the current global crisis, is to be able to produce the most creative technology with the highest quality. Government policies can create production environments in which innovation will flourish. To this end, the presence of a judiciary that can dispense justice, as well as a democracy that can govern, is necessary for the determinant force of the rule of law.

As I expressed in the opening speech I gave for the 2013-14 Judicial Year, the fact that "Turkey participates at the G-20 Summit as one of the major economies of the world will not be permanent unless the lead is taken in the fields of free-thinking and thus, the science and art. Equitable distribution of welfare will otherwise not come true."

In our opinion, sustainable development, which is of vital importance for Turkey, can be achieved only in an environment of stability. Stability, in turn, can be ensured only in a democratic and secular state of law where the law prevails in the true sense.

In addition, we, as the Union of Turkish Bar Associations, know that there is no place for dreams in the globalization process; that is a fact of the 21st century. We also always keep in mind that we have to be ready with the sufficient capacity and appropriate means to address global challenges.

For us, in addition to placing Turkey at the core of today's information society, the *sine qua non* for Turkey is to achieve the "vision of a competitive Turkey" that produces, creates jobs, and aims at equally distributing what it produces by turning all the values it has, in particular its demographic dynamism, into synergy. This synergy should be used as an element of power in the development of the country.

In conclusion, our priorities with regard to our efforts to be a member of the family of contemporary countries of the 21st century with equal rights and obligations should be production, commercial activities, and speculative activities at the minimum level.

Having evaluated the overall situation from these points of view, the Union of Turkish Bar Associations continues its activities in order to contribute to the formation of a judicial system that can be trusted based on the fact that justice is the foundation of the state.

"Restructuring the HCJP and the Constitutional Court is a must, and a new regulation that will release the judiciary from political pressure is required."

To this end, and in addition to the purpose of distinguishing between right and wrong, fair and unfair, and guilty and innocent, we have drawn up recommendations in order to restore confidence in the judiciary. Our recommendations factor in the violations of the right to a fair trial in the special courts, and acts that violate freedoms of expression and the right to hold meetings and demonstration marches. These recommendations were recently shared with the public under the title of "Immediate Solution Recommendations of the Union of Turkish Bar Associations for Turkey."

In this statement, considering the administration weaknesses of our democracy and the fact that our judicial system is unable to dispense justice, we stressed that the "confidence of the society in justice" was shaken and the perception that "the judiciary was under pressure" could lead "the state to remain unfounded." We also noted that if this deadlock, which has reached an extent that could harm our national unity and solidarity, persisted, it could contribute to permanent damage for our state and democracy. Moreover, the need "to find a common solution altogether and thus, ensure a communal embrace" was identified.[1]

Our recommendations that I have briefly summarized have been submitted to the Ministry of Justice with the title of "Bill of Law on Amending Some Laws Related to the Criminal Procedure to Put the Right to a Fair Trial into Practice."

1 "Immediate Solution Recommendations of the Union of Turkish Bar Associations for Turkey," Press Conference, 30 January 2014, http://www.barobirlik.org.tr/Detay.aspx?ID=22313

Our Assessment of the High Council of Judges and Prosecutors

Restructuring the HCJP and the Constitutional Court is a must, and a new regulation that will release the judiciary from political pressure is required. Although the composition of the High Council of Judges and Prosecutors, election of its members, working procedures and principles have been regulated twice in the recent period, the Minister of Justice and the Undersecretary of the Ministry of Justice have retained their positions as President and Member of the Council, respectively.

The Minister of Justice has again assumed the management and representation of the Council as the President, and delegated the authority to supervise judges and prosecutors to the Council on paper. However, the Minister of Justice still has the authority to initiate inspections and investigations regarding judges and prosecutors. Only those decisions of the Council relating to dismissals from the profession have been opened to the control of the judiciary. However, all decisions of the Council must be open to judicial review.

With this regulation, the Justice Academy of Turkey, which is affiliated with the Ministry of Justice and whose President is appointed by the Minister of Justice, has been granted the right to elect a member to the HCJP.

We all should remember that no criteria other than "qualified majority" and "competence" can be applied to the formation and decision-making processes of the HCJP, as the institution entrusted with the authority to take decisions that may directly affect the judiciary.

In addition to other legal instruments regarding this issue, the documents of the EU Commission and the Venice Commission, which are most commonly referred to in this context, and the 2007 Report of the European Judges Advisory Council, which sets the European standards on judicial matters, recommend that the President of the HCJP and similar councils should be an impartial person. They also recommend that the President preferably should not be a member of a political party, and that members of the higher judicial organs should not be elected by political bodies. It is especially emphasized that the Minister of Justice and the Undersecretary of the Ministry of Justice should not be members of the Council. Moreover, there is neither an HCJP functioning under the presidency of the Minister of Justice in any European country, nor an HCJP in which both the Minister and the Undersecretary are a member.

To us, with the amendments to be made by taking international regulations into account and always remembering that the independence of judges and prosecutors is the most important assurance for individual rights and freedoms, the HCJP should have a structure that consists of two separate high councils just as it did before and that takes decisions based on independent, impartial, and objective criteria. As required by democratic legitimacy, its members should be elected with a high quorum of decision (3/4 or 4/5).

The indispensable priority in the new HCJP model to be created must be to secure the principles of judicial independence and security of judges and prosecutors, as well the independence of the new HCJP from the legislative and executive organs.

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It is also important that the professional competence and other necessary qualifications of the judges and prosecutors that will take part in the councils are determined based on previously demonstrated competence, and that the procedures and principles of election are designated in accordance with the desired autonomous structure.

In our opinion, the HCJP should be formed as follows: The High Council of Judges and Prosecutors must be separated from each other, as it was before the 1982 Constitution.

Starting with the Minister of Justice and the Undersecretary of the Ministry of Justice, no representative of the executive should be requisite in these councils. However, if they are to participate, they must have no voting or management rights. At least more than half of the members of high councils must be elected by the judges and prosecutors themselves.

As one of the three constituent elements of the judiciary, the Union of Turkish Bar Associations must also have a seat.

If some of the members are to be elected by the Parliament, this election must be performed on the basis of qualified majority (2/3, 3/4, or 4/5) rather than simple majority (50 percent).

For example, a 3/4 or 4/5 qualified majority in the Grand National Assembly of Turkey corresponds to 410-450 votes in a parliament with 550 members. This can only be achieved through the consensus of more than one party (even two and three parties under today's conditions).

This way, an agreement will be ensured among the parties, and the politicization of the judiciary will be prevented to some extent.

In addition, a legalization of politics will be assured as opposed to the politicization of the judiciary.

It should be noted that democracy does not and cannot survive in a place where there is no faith and confidence in the judiciary.

It is high time for the political parties to do something beneficial by abolishing the institution of secret testimony, banning voice recordings and digital data from constituting evidence on their own, and rendering the HCJP impartial and independent by amending the Constitution for the sake of themselves and the 77 million citizens of our country.

Only once we manage to judge unlawfulness as unlawful and injustice as unjust can we make substantial progress on the path towards democracy, rule of law, and justice.