SAM PAPERS No. 3/99 - TURKISH LEGAL SYSTEM AND THE PROTECTION OF HUMAN RIGHTS

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I INTRODUCTION

Human rights are individual rights and freedoms, that are held or exercised primarily in relation to the state.1 There is a continuous tension and struggle between the individual and the state in this connection: The individual tries to widen his sphere of freedom against the state and the latter attempts to interfere in it in order to fulfil its growing duties in particular in social fields. A balance between these different interests must be found. This is why most international legal instruments in the field of human rights are designed to restrain the state rather than the individual from violating human rights. This should not be surprising, because the state rather than the individual is endowed with the legal authority and power to regulate lifestyle, liberty and property in society.2

There are many ways and methods of classifying human rights. According to Georg Jellinek's ‘status doctrine’, human rights are first of all the traditional rights of the individual against the state, in which it can in no way interfere (status negativus). The second category of these rights is the political rights of the individual, which enable him to take part actively in the political life of society (status activus). Then come the economic, social and cultural rights of the individual which give him a claim for an equitable share of the state fund (status positivus).3

History shows that the holder of state power has had, in general, a tendency to misuse it.4 The main concern of great thinkers and philosophers has been, therefore, to restrict the power of the ruler, who has unlimited power over other people, and may often use it unfairly and cruelly. In this regard, the history of the United Kingdom represents a very important example because of its recognition of some traditional rights and liberties in the early Medieval Age. As the Universal Declaration of Human Rights quite rightly indicates in its preamble: “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.”

Towards this purpose John Locke and Charles-Louis Montesqieu proposed the concept of separation of powers, though one can find its roots in Aristotle.5 Their starting point was the protection of people’s life and property against arbitrary state power. According to them, if state power is divided between the executive, legislature and judiciary and each checks and balances the others, it can no longer be misused and individual rights and freedoms can best be protected.

Nowadays, in addition to the concept of separation of powers, other techniques and methods of limiting state power have been found.6 First of all the constitutions of most modern democracies provide a human rights catalogue that contains a large number of individual rights and freedoms as primarily binding norms of state authorities. Second, constitutions guarantee the minority against suppression by the majority. The right of the individual to apply to constitutional courts in cases of human rights violations and the various kinds of parliamentary inquiries aim at the protection of minority rights. However, the best guarantor of human rights is the judiciary. The independence of the judiciary, which all democratic constitutions

recognise, is therefore a conditio sine quo non in this regard. The separation between the judicial and, in particular, the executive branch of government is not simply a matter of theory but of crucial importance for the protection of human rights. Nevertheless, the importance of the role of the courts in balancing interests and the application of laws impartially, without fear or favour, is not as widely understood as it should be.

Aristotle said more than two thousand years ago: “If the rule of people rests not on the rule of law but on human beings, there is no freedom.” The concept of the rule of law to which Aristotle refers was carefully elaborated in practical terms by the famous British jurist, Albert Dicey, during the second half of the last century. According to Dicey, the cornerstone of the British constitution was the assurance that all governmental powers depended upon the rule of law.7 This concept, in which not only state power but also the individual is subordinated to the rule of law includes three principles: “Firstly, that transgressions of the law are to be established in accordance with the law in the ordinary legal manner and before the regular courts and that persons in authority are therefore not to be endowed with arbitrary, prerogative or discretionary powers; secondly, that no person is to be above the law and that all persons are therefore entitled to be treated as equal before the law; and thirdly, that the constitutional rights of the subjects are to be determined in the ordinary course of justice and that no special significance is to be attached to constitutional law.”8

Indeed, in a democracy based on the rule of law it is required that every state act of interference in the sphere of an individual’s freedom and security must be in accordance with the material and procedural laws that are established beforehand. This is a prerequisite of a person’s security and legal guarantee in a state under the rule of law. Briefly, in a democracy governed by the rule of law, each person must have the right to live without fear of being attacked by the state authorities in a way that is not allowed by the law. As the European Commission of Human Rights states in its report in G. v. Federal Republic of Germany9 “Precisely because of the cardinal importance to be attached to the preservation of the rule of law and the democratic system, the Convention requires a clearly established need for any interference with the rights it guarantees before such interference can be justified on that basis.”

British constitutional history has a long and very rich tradition in this field, from Magna Charta (1215) onwards through the Habeas Corpus Act of 1679 and the Bill of Rights of 1689.10 This development was followed by the declarations of the American (1776) and French Revolutions (1789) which led to the recognition of the eternal and inviolable rights of man as a citizen.11 These are regarded as milestones in the history of human rights. The Gülhane Decree of 1839 and the Reform Decree of 1856 can be given as examples of a similar development in the Turkish context.

The Turkish legal system differs completely from the Common Law concept of the United Kingdom, which derives mainly from judicial decisions.12 Turkish law is based on the Civil Law tradition of continental Europe which had its origin in Roman law and is based on statutory or legislative enactments. After the foundation of the Turkish Republic, Turkey initiated a law reform within the framework of the westernisation and modernisation process of the country. On this occasion, the basic codes were imported from various European countries, like Switzerland, Germany, France and Italy.

II THE CONSTITUTION AND STRUCTURE OF THE TURKISH STATE

A Structure of the State

The Turkish Republic is founded on the principle of the unitary state. The organisation and functions of the administration are based on the principles of centralisation and local administration. The individual rights of each and every citizen, regardless of ethnic background are important and protected. According to the preamble of the Constitution, "... it is the birthright of every Turkish citizen to lead an honourable life and develop his material and spiritual resources under the aegis of national culture, civilisation and the rule of law, through the exercise of the fundamental rights and freedoms set forth in this constitution, in conformity with the requirements of equality and social justice."

Article 2 of the Constitution describes the characteristics of the Republic as a "... democratic, secular, and social state governed by the rule of law; bearing in mind the concept of public peace, national solidarity, and justice; respecting human rights."

According to Article 4 of the Constitution the provision of Article 1 establishing the form of the state as a Republic, Article 3 which guarantees the indivisible entity of the Turkish State with its territory and nation and provides the Turkish as official language and finally the previous provision on the characteristics of the Republic shall not be amended, nor shall their amendment be proposed.

The notion of the rule of law signifies a system where the government and the administrative authorities must operate within the framework of the law and their acts and actions have to be subjected to review by independent judicial authorities. In a democracy, all acts and actions of the government must have a firm basis in law. This requires that all governmental actions can be challenged in the courts.13 In recognition of this fact, Article 125 of the Constitution states that "... Recourse to judicial review shall be open against all actions and acts of the administration." Besides the ordinary law courts Turkey has a long tradition with special administrative tribunals on the French model, namely, the Turkish Council of State, which was already established already as eary as 1865.

In this connection, special consideration should be given to the role of the Turkish Constitutional Court. The 1961 Constitution created the Court to strengthen the constitutionally defined legal order and the observance of the principles of equality before the law and of the citizen's rights and liberties. The Court's application of judicial review concerns the consistency of statutory law and other acts of the executive and legislative organs with all provisions of the Constitution, including those provided in international conventions, that Turkey has ratified. So far, the Court has examined, by way of the abstract and concrete control of norms, many formal laws and government decrees. Thus, with reference to the Constitution and to relevant international legal instruments, including the European Convention for Human Rights, the conventions of the International Labour Organisation, the Convention on Non-Discrimination of Women, many provisions of basic codes have been declared null and void.14

Therefore, based on the concept of separation of powers15 and effective judicial control, the structure of the state offers a strong foundation for the preservation of the legal security and the fundamental rights of the individual.

B Judicial System

The effective protection of human rights depends on the independence and impartiality of the judiciary. This independence and impartiality can only be realised when the judicial institution as such, is recognised as having a status that is external to the other political and 'special' powers in a given state.16 This status enables the judges to resist improper external pressures without fear or penalty and render their decisions with impartiality and neutrality.17

Taking this situation into consideration, Article 138 of the Constitution states that, "... .Judges shall be independent in the discharge of their duties; they shall give judgement in accordance with the Constitution, law; and their personal conviction conforming with the Law." This Article 138 also stipulates that, "... No organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, or send them circulars, make recommendations or suggestions." It continues, "No questions shall be asked, debates held, or statements made in the Legislative Assembly relating to the exercise of judicial power concerning a case under trial."

In recognition of the proper function of the judiciary, protection from unjustified removal from office for judges and public prosecutors has also been recognised. Article 139 of the Constitution, reads, "... .Judges and public prosecutors shall not be dismissed or retired before the age prescribed by the Constitution; nor shall they be deprived of their salaries, allowances or other rights relating to their status, even as a result of the abolition of court or post. "Thus, the Constitution grants judges and public prosecutors a status highly superior to that of other civil servants. As a consequence of this privilege, the status of judges and public prosecutors has been regulated in a special code.

In order to secure the independence of the judiciary, the Constitution makes the initial appointments of judges and public prosecutors and their subsequent promotions to the Supreme Council of Judges and Public Prosecutors.18 According to Article 159, the Supreme Council is composed of seven members. The president of the Council is the Minister of Justice. The Undersecretary of the Ministry of Justice is also an ex-officio member of the Council. The remaining five members, constituting the majority of the Council, are members of the 'High Court of Appeals': 'Council of State', nominated by their respective courts and appointed by the President of the Republic.

Since the judiciary also supervises and administers general elections it is no exaggeration to say that all political life in Turkey is under the control of the judiciary. It is therefore not surprising that there is a continuous tension between the judiciary and the executive and legislative powers. Highlighting the judges' power vis-à-vis the government, the judiciary is widely criticised by the latter for interference in state affairs. Professor Ernst E. Hirsch describes the new administration by stating that, "it is rather a state governed by judges instead of the rule of law."19

In this connection, sme circles have criticised the Minister of Justice's position as president of the Supreme Council of Judges. It is argued that judicial independence would be threatened by political pressure. Indeed, the Minister of Justice is constitutionally a member both of the executive and of the judiciary, and in his dual role he has to safeguard the independence of the judiciary from interference and to answer to the parliament for the machinery of justice.

Apart from the fact that the Minister of Justice does not attend the meetings of the Supreme Council regularly, this criticism is not justified. First, being a part of the government the administration of justice is a very important public service. Second, in a parliamentary democracy the Minister of Justice should be responsible for the proper functioning of the judiciary, which is financed by the budget. Who else could be held accountable?

Another criticism relates to the finality of decisions of the Supreme Council. That is, there is no judicial remedy against the decisions of the Supreme Council concerning disciplinary sanctions.

This criticism is not a reasonable one, because, one can raise objections against the disciplinary decisions of the Supreme Council. In this case the Minister of Justice and the Under-secretary of the Ministry are replaced by the substitute members of the Council, who are professional judges. At this time, being composed of the high judges, the Supreme Council considers the objections and renders its decisions like any other Supreme Court. The Supreme Council of Judges has been introduced according to the French model. In France, the President of the Republic is also the President of the Supreme Council (Conseil Superieur de la Magistrature) and the Minister of Justice is its Vice-president. Furthermore, like Turkey there is no judicial review of the decisions of the French Supreme Council.

C Legal Status of the European Convention on Human Rights

Fundamental rights and freedoms have long been established in the Turkish constitutional tradition. Like the Constitution of 1961, the Constitution of 1982 contains a large human rights catalogue that is formulated in almost the same wording as the provisions of the European Convention on Human Rights and other related international legal instruments.

Article 12 of the Constitution recognises the inherent character of human rights by stating, "Everyone possesses inherent fundamental rights and freedoms which are inviolable and inalienable." The Constitution devotes its first chapter to fundamental rights and freedoms by using the same classifications as the International Human Rights Covenant, which can be itemised as: personal, political, economic, social and cultural rights and liberties.20

It is worthy note that, according to Article 11 of the Constitution, "... The provisions of the Constitution are fundamental rules binding upon legislative, executive and judicial organs, and administrative authorities and other agencies and individuals."

Turkey ratified the European Convention on Human Rights on 18 May 1954. However, the jurisdiction of the European Commission of Human Rights was recognised 33 years later, namely on 28 January 1987. This was followed by the recognition of the compulsory jurisdiction of the European Court of Human Rights on 22 January 1990. According to the usual practice of the contracting states, the jurisdiction of both organs was initially recognised for three years, this being prolonged subsequently.21

The fact that the jurisdiction of these organs was recognised after a long period does not necessarily mean that the Convention was totally ignored in the meantime. The legal status of international conventions is regulated in Article 90 of the Constitution. According to paragraph 5 of this provision, "... International agreements duly put into effect carry the force of law. No appeal to the Constitutional Court can be made with regard to these agreements, on the grounds that they are unconstitutional."

Consequently, all international agreements are transferred automatically into domestic law by means of ratification by the Parliament. As a part of domestic law, they are directly applicable if they contain self-executing provisions like the European Convention on Human Rights. Though disputed, international agreements are considered to have constitutional or at least supra-legal status,22 since challenging their constitutionality is impossible. In practice, it is accepted that if a provision of domestic law conflicts with that of an international convention, the provision of the latter is applicable. Even in cases of incompatibility with a provision of the Constitution, preference has to be given not to the provision of the Constitution, but to that of the convention.23

To our view the Turkish Courts have to interpret the domestic law, regardless of its compatibility with the Convention, in the light of the jurisprudence of the European Court of Human Rights. The Convention would only in this sense prevail over the laws and the Constitution. Having accepted the jurisdiction of the Court it is also a contractual obligation.

Though there has been a considerable delay in the recognition of the compulsory jurisdiction of the control organs of the Convention on Human Rights, the provisions of the Convention have been incorporated meanwhile into domestic law with the rank of constitutional norms.24

Since the provisions of the Convention are general in character, they must be interpreted in such a way that they provide highest degree of protection to the individual. The European Commission and the Court of Human Rights have gained a great deal of experience in this field over 40 years. They have developed, with their capacity of independence and impartiality in case law, a remarkable jurisprudence which has been described as setting uniform minimum standards for Europe.25 Nevertheless, since the Commission and Court as control organs have a secondary role in this regard, the promotion and protection of human rights rest first of all on the national authorities of the contracting parties to the Convention. Again, this requires that national law must be brought in line with the Convention, with a view to giving clear guidance to the hands of national authorities.26

D Criminal Justice System

The present Turkish Penal Code No.765, of 1 March 1926, originated from the Italian Penal Code of 1889. During Atatürk's law reform in respect of the reception of foreign codes, the Italian Code was translated and adopted entirely. The Code has been changed many times since then. The most important amendment was made by Act No. 2790, on 22 January 1983, whereby approximately half of its provisions were amended and thus the Code acquired almost a domestic character.27

The Turkish Code of Criminal Procedure was also introduced within the framework of the “global reception of foreign law” after the foundation of the Republic. Its model was the German Code of Criminal Procedure of 1877. The present code, which was enacted on 20 April 1929, Law No.1412, has been changed many times. The last significant amendment was carried out by Act No. 4229 of 6 March 1997, with the intention of, to bring the Code's provisions into line with international human rights standards which will be discussed in some detail below.

1. Ordinary Criminal Courts

According to Article 142 of the Constitution "the organisation, function, and jurisdiction of the courts, their functioning and trial procedures shall be regulated by law."

In the Turkish judicial system there are only two instances. Throughout the country the Courts of First Instance have jurisdiction. Since Courts of Appeal do not exist, one can apply directly to the ‘High Court of Appeal’ in Ankara against the judgements of these courts, as the second and last revision instance that decides on points of law and facts. Nevertheless, for the reintroduction of courts of Appeals which were abolished in the late 1920s several draft laws have been prepared, but none of them passed the parliament yet.

Article 141 of the Constitution guarantees the publicity of court hearings. The requirement for a public hearing is in the interest of not only the parties but also of the public. Not every stage of the hearing must be public; purely administrative, interlocutory matters can be held in private. Furthermore, as Article 6 of the European Convention on Human Rights states, the

public can be excluded in the interests of morals, public order or national security, and for the protection of juveniles and private life etc.

Article 373 of the Turkish Code of Criminal Procedure provides also that the hearings are in principle open to the public. The Code bars the public, like the Convention, only under on the above-mentioned grounds. However, a public hearing does not necessarily mean that everybody will have access to the courtrooms. According to Article 378, the conduct of the hearings rests on the presiding judge of the court. In order to establish rule and order in the courtroom, the presiding judge has the competence to restrict the number of visitors, regardless of the previous grounds.

All being Courts of First Instance, there are three categories of ordinary criminal courts.

a. Aggravated Felony Courts: these deal with offences requiring a minimum of 10 years of imprisonment. They are located in provincial capitals and in some large sub-provincial capitals.

b. Courts of General Criminal Jurisdiction: These deal with cases that do not fall under the jurisdiction of Aggravated Felony Courts and Criminal Courts of Peace. They try every kind of criminal case except those expressly excluded from their jurisdiction by law. They are located in each sub-provincial capital.

c. Criminal Courts of Peace: these courts try general misdemeanours and they issue the arrest order at the first stage. Those accused of criminal acts and taken into custody by the police is are brought before these courts with a view to obtaining an arrest order. They are widely spread throughout the country.

2. State Security Courts

The State Security Courts were incorporated into the Turkish judicial system in 1971 according to the French model.28 According to Article 143 of the Constitution, these Courts have "... to deal with offences against the indivisible integrity of the state with its territory and nation, the free democratic order, or against the Republic whose characteristics are defined in the Constitution, and offences directly involving the internal and external security of the state."

The State Security Courts consist of a president, two regular and two substitute members, one public prosecutor and a sufficient number of deputy public prosecutors. The State Security Courts, which are mainly concerned with cases of terrorism, have, as part of their responsibility, jurisdiction over specified offences in the Penal Code, offences included in the Law on Fire-Arms, offences committed jointly or by an established organisation and offences relating to the facts that cause a declaration of a state of emergency.

These courts apply in principle the provisions of the Code of Criminal Procedure. There is a legal remedy against the judgements of these courts at the High Court of Appeal which decides on law and facts as the second and last instance.

III TERRORISM AND STATE OF EMERGENCY

A Terrorism

Many western societies are living today with a domestic terrorism threat. They have to deal with this evil within the framework of democratic principles and the rule of law. Unfortunately, there has been a tendency in recent years in some human rights circles to neglect terrorist activities and methods and to accuse states of human rights violations and breaches of the rule of law. This approach, apart from influencing world public opinion negatively, not only encourages the terrorists but also serves their purposes.

Since the motivation of terrorist groups often derives from an extreme left-wing ideology, such as the Red Army Faction in Germany, Red Brigades and Prima Linea in Italy and Action Directe in France, terrorism has been defined as "... a threat to democracy". Even if, ideologically, they deny the democratic system and values that represent capitalism and imperialism, their "... objective is to force the government concerned to negotiate and not to subvert the political system. Similarly "local" terrorism (i.e. operating in an immediate and restricted area) based on national claims does not seek to undermine democracy as such, but is directed against the state, regardless of whether it is democratic. The military wing of ETA is fighting the hold of the state over Basque Country and not Spanish democracy. In Northern Ireland it is the British presence and domination which is at issue, not democracy."29

The method adopted by the Kurdish Workers Party (PKK) terror organization to impose its demands is based simply on murder and destruction. "During a recent discussion on terrorism at the United Nations, it became clear that the aim of terrorists is not to defeat government forces in armed struggle, but to demonstrate that the established authority cannot assure the security of ordinary people. Their secondary aim is to provoke the security forces to overreact. The common thread of terrorism is to use violence to instil fear and thus extract concessions. Although terrorists may use the concept and language of human rights, their real aim is to achieve a political goal by intimidation rather than persuasion."30

Indiscriminate violence and terror waged by the PKK has claimed thousands of lives since 1984. Not even women, children and the old have been spared. PKK terrorists kill civilians if they do not belong to their group or share their views. They kill Kurds if they do not accept and subjugate themselves to their views and demands. Thus, many have been cold-bloodedly murdered before their family members or kidnapped and summarily executed. The PKK also attacks civilian targets, in order to weaken state authority. They destroy schools and kill innocent teachers, set forests on fire, blow up railways and bridges, plant mines on roads, burn construction machines and demolish health centres.

PKK militants have also killed many Turkish police officers and soldiers in cross-border raids, fleeing to their sanctuaries in neighbouring countries. It should be remembered that, as a consequence of these incidents, Turkey has recently intervened in hot pursuit in the northern part of Iraq in order to destroy the militants' bases and establish law and order in a region where there is a lack of authority. These premeditated killings and raids are not isolated cases: they are part of an overall strategy aimed at shaking confidence in democracy, and weakening state authority and control.

B State of Emergency Law

1. Constitutional Provisions

Crisis situations involving grave acts of terrorism and violence can arise in the life of every nation. Therefore, every constitution must consider this possibility and provide appropriate means to deal with it, in the framework of democratic principles and the rule of law.31 “Less well known is the paradox of tolerance: Unlimited tolerance must lead to the disappearance of tolerance. If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them.”32 Otherwise, if the democratic state is not prepared to overcome these kinds of situations, terror and violence become a part of daily life and desperate people look elsewhere in search of their own security and order, for a strong man who can master the situation. This means the end of democracy.

In cases where terror and violence increase and reach a certain threshold the existing law in a given state may not be sufficient to combat it properly. Therefore, the need for the invocation of emergency powers to deal with these situations is recognised not only by various national constitutions but also by various international instruments. For instance in Italy in a well known decision of 1982 the Constitutional Court recognised the proportionality and validity of norms which had been promulgated during a time of emergency even though they were highly restrictive of fundamental rights. The Constitutional Court, however, emphasized that the legitimacy of these restrictive provisions, to the extent that they resulted from an abnormal situation, was dependent on their provisional status.”33 For example, Article 15 of the European Convention on Human Rights expressly permits the contracting parties to take measures derogating from the obligations under the Convention.34 Likewise Article 4 of the UN Convention on Civil and Political Rights also contains a similar provision.

Similarly, in Article 120 the Turkish Constitution makes the following provision: “In the event of the emergence of serious indications of widespread acts of violence aimed at the destruction of free democratic order established by the Constitution or of fundamental rights and freedoms, or serious deterioration of public order because of acts of violence, the Council of Ministers, meeting under the chairmanship of the President of the Republic, after consultation with the National Security Council, may declare a state of emergency in one or more regions or throughout the country for a period not exceeding six months.”

It is beyond doubt that wide-spread terrorism is within the meaning of Article 15 of the Convention, “... a public emergency threatening the life of the nation.” However, this does not mean that the state, in combating terrorism, can do everything that it considers necessary. As the European Court of Human Rights clearly states, it has its limits.35

The state of emergency in Turkish law is a constitutional institution and functions according to democratic principles under the control of Parliament. First of all the conditions of an emergency situation are considered and then reviewed at four-monthly intervals. Thus, the legislature has the power to approve the declaration, alter its terms of reference or revoke it. And second, every act and action of the government in the application of state of emergency powers is subject to parliamentary and judicial review.36 In addition to these safeguards, the control organs of the Convention also have the right to examine whether all the conditions laid down in Article 15 have been met.

a. Restriction of Fundamental Rights in General

The Convention lays down one by one, in Articles 8 to 11, justification for restricting fundamental rights.These justifications include, national security, public safety and, the

prevention of crime, etc. A contracting state can rely upon each one of these grounds to restrict the relevant right and freedom. “However, its power and competence is again limited by t the expression ... measures necessary in a democratic society.” The Court has had to interpret this notion in a large number of cases and to determine whether concrete measures were indeed necessary for the preservation of democratic society.

Like the Convention, the Turkish Constitution permits the restriction of the rights and freedoms of the individual only with respect to the requirements of democratic society. Article 13 of the Constitution states in this connection: “Fundamental rights and freedoms may be restricted by law, in conformity with the letter and spirit of the Constitution ... The grounds for restrictions of fundamental rights and freedoms shall not conflict with the requirements of democratic order of society and shall not be imposed for any purpose other than those for which they are prescribed.”

This provision provides a second safeguard, namely that the rights and freedoms of the individual can only be restricted by a formal act of the legislature. According to Article 91 of the Constitution, the government can issue, by way of delegation, decrees having the force of law. Even in this case, except during periods of martial law and states of emergency, the government can not regulate fundamental rights by means of such decrees.

b. Derogations in Case of Emergency

Article 15 of the Convention gives the contracting parties the ability, “... in time of war or other public emergency threatening the life of the nation” to derogate from the rights and liberties protected under the Convention. However, the second paragraph of the Article specifies that certain rights are not subject to derogation (the right to life, prohibition of torture and slavery, and the non-retroactivity of criminal law.)

Article 15 of the Turkish Constitution also aıthorises, in almost the same wording to that of Convention, such derogations: “In times of war, mobilisation, martial law, or state of emergency the exercise of fundamental rights and freedoms can be partially or entirely suspended, or measures may be taken, to the extent required by the exigencies of the situation, which derogate the guarantees embodied in the Constitution, provided that obligations under international law are not violated. Even under the circumstances indicated in the first paragraph, the individual’s right to life and the integrity of his material and spiritual entity shall be inviolable except where death occurs through lawful acts of warfare and execution of death sentences: no one may be compelled to reveal his religion, conscience, thought or opinion, nor be accused on account of them: offences and penalties may not be made retroactive, nor may anyone be held guilty until so proven by a court judgement.”

The scope of the second paragraph of the above provision is wider than that of the Convention. This is because it covers, in addition to those rights and liberties as mentioned in the second paragraph of Article 15 of the Convention, the rights to freedom of thought, conscience and religion and the presumption of innocence as well as other rights and liberties that cannot be subject to derogation.

The Court has determined on various occasions the scope of application of Article 15 of the Convention in relation to terrorism in Northern Ireland.*

Because of terrorism in Northern Ireland, the Republic of Ireland proclaimed a state of emergency and (under Act No.2 1.940), special powers of detention without trial came into force. Mr Lawless was detained under this Act and held without trial in a detention camp for around five months. The Court considered the situation as follows:37 “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the

organized life of the community of which the state is composed ... reasonably deduced by the Irish Government from a combination of several factors, namely, the existence in the territory of the Republic of Ireland of a secret army engaged in unconstitutional activities and using violence to attain its purpose; the fact that this army was also operating outside the territory of the state, thus seriously jeopardising the relations of the Republic with its neighbour; and thirdly the steady and alarming increase in terrorist activities."38

As the Court stated, the measures of the Irish Government could not meet the danger:39 "The ordinary criminal courts, or even special criminal or military courts could not suffice to restore peace and order."

Following this reasoning, the Court came to the conclusion, "... the Irish Government was justified in declaring that there was a public emergency in the Republic of Ireland threatening the life of the nation" and, consequently, the administrative detention "... of individuals suspected of intending to take a part in terrorist activities, appeared, despite its gravity, to be a measure required by the circumstances."40

When, after 20 years, the Court came to deliberate the case of Ireland v. United Kingdom it expressed itself in the following terms:41 "Being confronted with a massive wave of violence and intimidation, the Northern Ireland Government and then, after the introduction of direct rule (30 March 1972), the British Government were reasonably entitled to consider that normal legislation offered insufficient resources for the campaign against terrorism and that recourse to measures outside the scope of ordinary law, in the shape of extrajudicial deprivation of liberty, was called for."

Leaving wide powers of discretion to the contracting parties, the Court continued:42 "... the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it. In this matter, Article 15(1) leaves those authorities a wide margin of appreciation... Nevertheless, contracting parties do not enjoy an unlimited power of appreciation. It is for the Court to rule on whether inter alia the states have gone beyond the "extent strictly required by the exigencies" of the crisis. 'The domestic margin of appreciation is thus accompanied by a European supervision."

The Court came to its conclusion by stating that: "... the limits of the margin of appreciation left to the Contracting States by article 15(1) were not overstepped by the United Kingdom." Accordingly, "... derogations from Article 5 were not, in the circumstances of the case, in breach of the Convention."43

It is beyond all doubt that these judgements represent very reliable grounds for the justified struggle of Turkey against the same evil.

2. Statutory Law

a. Decrees with the Force of Law

In order to combat terrorism more effectively the government proclaimed, upon the approval of the Grand National Assembly in 1987, a state of emergency in 8 provinces of southeastern Turkey. The government then enacted decrees, Nos. 410 and 413, giving special powers to the office of the Regional Governor, which was established for co-ordinating work between provinces. These decrees have been replaced by decrees Nos. 424 and 425, and, later by 430 which have been in force since 1991.

The civil administration under the Regional Governor is charged with maintaining law and order in the region. If he considers that he is unable to overcome a serious disturbance by means of ordinary police forces, he is entitled to call on military troops. “In times of civil disorder troops may be employed in aid of the civil power. Both police and the armed forces may use reasonable force to restore internal order. When the military are so used upon the occasion of riots they are subject to the direction and control of the civil authorities.”44

Military troops can interfere only upon the request of the civil authority and they are subject to the direction and control of the civil governor who is subordinated to the Minister of the Interior. Thus, the government can, through the Minister of the Interior and Defence, retain authority over the employed troops. However, because of the vast and mountainous character of the region in question, certain exigencies may occur. For example in the case of Ireland v. United Kingdom, Ireland put forward 228 cases of ill treatment in its application. In the relevant case hundreds of suspected was captured and put in military barracks in Northern Ireland. By applying an “interrogation in depth” British authorities obtained valuable intelligence information, “including the identification of 700 members of IRA faction and discovery of individual responsibility for about 85 previously unexplained criminal incidents. Suspects were kept by using so called “five technics” which consisted of the following methods: wall standing in a stress position for periods of some hours (spread legged against the wall, standing on their toes, their fingers put as high as possible over their heads against the wall); hooding (head kept in a black sack); uninterrupted noise (subjection to loud lissing voice); deprivation of sleep; deprivation of food and drink ... The Commission had concluded unanimously that the use of five technics constituted “a practice of an inhuman treatment and of torture” ... “By finding the relevant acts to be in violation of the Convention only as inhuman and degdading treatment, the Court failed to draw attention to what distinguishes a democracy from a dictatorship or a totalitarian system.” 45

Such situations happen because the civil authorities do not have direct competence of command in operations. In these cases, in particular in cases of over-reactions, the commander of the troops and his subordinates are responsible for their unlawful actions. They have to show great restraint in not responding to the hostile attacks of terrorists in an excessive manner. Article 40 of the Constitution provides an additional remedy in such cases by stating, “Damages incurred by any person through unlawful treatment by holders of public office shall be compensated by the State.”

The new decree, No. 430, excludes the adjacent provinces from the competence field of the Governor of the emergency region. The special powers given to the Governor by previous decrees have been reduced to measures strictly necessary in dealing with terrorist activities. The new decree also restricts the Governor's authority to order persons to settle at a specified place outside the emergency region. Those persons expelled from the region will be free to choose their residence outside the region, except when they request financial aid.46 The new decree also contains a new clause, safeguarding the right to file an action against the administration for loss or damages arising out of its acts and activities.

The Constituonal Court has declared null and void the provision of the decree that prohibited the pPress from reporting events in southeastern Anatolia without the approval of the state of emergency authorities. Today, even in the state of emergency region, all facilities are available to the Media in order to provide an easy working environment for reporting. Media people have easy access to every corner of the region, except for areas where their safety may be in danger. However, the decree has brought about some restrictions, but only on the reporting of certain publications that support terrorism or have become propaganda instruments of terrorist organisations. Today, a cursory look at the dailies will suffice to realise the extent of Media freedom prevailing in the country.47

b. Anti-Terrorism Act

The Anti-terrorism Act No. 3713, adopted on 12 April 1991, is not a government decree but a formal Act of Parliament aimed at prescribing measures for combating terrorism."48

As soon as the Act came into force it became the subject of meuch discussion. The critics were directed in particular to the definition of terrorism (Art. 1) and terrorist organisations (Art. 7). Meanwhile, the Constitutional Court has declared various provisions of the Act, which were the subject of public controversy, null and void, namely:49

- Article 9, which limited the number of the defence counsel to three.50

- Article 10, which provided that oral communication between the accused and his counsel could only be effected under the supervision of officials.

- Article 12, which provided the hearing of policemen, who took the confessions of the accused should take place in camera.

- Article 15, which provided that penal procedures against officials could only be initiated with the prior consent of the administration.

Thus, most of the provisions of the Anti-terrorism Act, in particular those aimed at the encouragement of officials in the struggle with terrorism, have been declared null and void. This makes it easier to take effective measures against officials who attempt to resort to unlawful acts and actions. As to Article 8 of the Act, considered by some circles a threat to freedom of expression and which raised confusion and controversy at home and abroad, various amendments have been prepared.51

A short look to the respective legislations of the United Kingdom, France, Spain and Italy shows how the struggle against terrorism can be conducted within democratic norms. Since Turkey’s code is similar to the German Code of Criminal Procedure it would be proper to refer to some provisions of Code.

- According to Article 137/1, the number of the defence council has been reduced to three.

- Article 138 (a), enables the court to exclude the defence lawyer, if among others he or she is involved in the offence or abuses the right of defence.

- According to Article 138 (b), a defence lawyer can be excluded from the hearing, if he or she endangers the security of the state.

- According to Article 148 and 148 (a), correspondence between the accused and a defence lawyer can only be carried under the supervision of the competent judge.

Furthermore, the Law on the Introduction of the Organisation of the Courts (Gerichtsverfassunggesetz) was amended on 27 January 1987. According to Article 31 of this law arrested or sentenced persons, who are charged with terrorist crimes within the scope of Article 129 (a) of the Penal Code, can be held in solitary confinement if there is a danger to the life or freedom of persons threatened by a terror organisation. In this connection, all contact between the arrested person and the outside world can be cut, including other prisoners and with his defence lawyer. “Whether a person has a right to communicate with the outside world, for instance to inform his family or write letters to friends, depends on the other provisions of the Convention. In the early years of the Commission, there was a tendency

to argue that deprivation of liberty must have "inherent effects" so that visit or other contacts, for instance would not be able to be claimed as a right. This theory and practice is now abandoned. In the De Wild, Ooms and Versyp (Vagrancy) case and later in the Golder Case, the Court rejected the "inherent features" theory and held that every restriction has to be reviewed for its justification on one of the grounds mentioned explicitly in the Convention.52 Articles 80-84 of the Greek Penal Code provides in addition to censorship further restrictions concerning the right to correspondence of prisoner, such as the number of pages, the number of letters which can be sent each month and the person with whom the detained may correspond.

IV THE COMPATIBILITY OF THE TURKISH CRIMINAL JUSTICE SYSTEM WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS

A General Remarks

Under Article 15 of the Convention, Turkey made a declaration of derogation in relation to Article 5 of the Convention. Article 5 of the Convention, which reflects the Anglo-Saxon legal tradition,53 guarantees a fundamental right: the right to liberty and security of person. The cases in which a person can be deprived of his liberty are enumerated in this provision. Statistics show that human rights issues raised by criminal justice and penal systems within the scope of the application of Article 5 have considerably increased in recent years.54

It was especially the influence of the jurisprudence of the European Commission of Human Rights and the European Court of Human Rights that led the contracting states to review their criminal justice systems and to make necessary adjustments. Detention on remand and the length of criminal proceedings were the main concerns. Therefore, legislative reforms were needed to reduce both the length and frequency of pre-trial detention and to accelerate criminal proceedings. In Turkey also, an important reform was carried out in this field. The law amending the relevant provisions of the Code of Criminal Procedure came into force on 18 November 1992.

The new law raised considerable difficulties, not only in the interested circles but also between the governing coalition parties. Finally, a compromise formula was found, according to which crimes within the jurisdiction of the State Security Courts were removed from the scope of its field of application. On the other hand, in order to establish a balance between ordinary courts and State Security Courts and to widen the sphere of application of the new law as far as possible, the number of offences which fall under the jurisdiction of the State Security Courts has been reduced and enumerated.

According to the new regulation, the State Security Courts have jurisdiction over fewer crimes; arms and drug smuggling and offences that cause a declaration of a state of emergency.

The controversies over the new law reform continue at home and abroad. Though it has led to relief in government circles, it has caused confusion for the public. Some lawyers and legal experts engaged in human rights issues have claimed that although the new law seemed to have some positive aspects, the changes reflected no progress in the field of human rights. Amongst others, the representative of the Turkish Human Rights Foundation claimed, "... the new law is deficient because it does not comply with fair trial regulations set down under Article 6 of the European Human Rights Convention."55

It is therefore necessary in view of such criticism to highlight the major points of the new law on the Code of Criminal Procedure in an objective manner and to compare its provisions with the right to liberty and the rights of persons deprived of their liberty as guaranteed by Article 5 of the Convention.

B The Characteristics of the New Law

1. Arrest and Detention: Under Article 5(1) of the Convention, a person may be arrested for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence. In this context the United Kingdom's Criminal Justice (Terrorism and Conspiracy) Bill of 1998 contains remarkable provisions. Among others, according to Article 217 of the Bill a police officer or an above rank of Superintendant can orally state that in his opinion the accused belongs to a terror organisation. In this case, even if the accused can not beconvicted solely on the basis of such a statement and it needed further evidence, it is accepted as an admissible evidence. Furthermore, if a person being charged with the offence fails to mention a fact which is material to the offence and which he could reasonably be expected to mention, can simply be tried on the basis of his failure. The same applies on the latter point in Northern Ireland, Paragraph 4 of Article 2 of "Offences Against the State (Amendment) 1998" provides in this connection the following provisions: "a. reference to any question material to the investigation include references to any question requesting the accused to give full account of his or her movements, actions, activities, or associations during any specified period b. references to a failure to answer include references to the giving of an answer that is false or misleading and references to the silence or other reaction of the accused shall be construed accordingly."

Being contrary to the Convention and after all to the established tradition in common law countries, to tell the suspected that he has the right to remain silent, this is rather an excessive practice which has not been checked by the European Court of Human Rights yet.

Likewise, the new law prohibits arbitrary arrest and declares that detention must be in accordance with the procedures established by law. To this end Article 108 of the Code of Criminal Procedure states that a person can be arrested solely for the purpose of bringing him before a competent judge with a view to a decision as to whether detention will continue or not.

Furthermore, in order to prevent arbitrary arrest, the conditions are strictly reduced and enumerated. These are in general as provided in Article 104 of the Code; suspicion of escape, destroying evidence and the seriousness of the crime.

According to Article 106 of the Turkish ode of Criminal Procedure, "The arrest of a suspect can only be ordered by the judge. The suspect, if he is present, is priorly heard before the decision and if he so wishes, his lawyer may also be present during interrogation without asking for a proxy, and the public prosecutor, the defence lawyer are heard before the decision is taken."

2. Right to information of the charge

Under paragraph (2) of Article 5, in connection with article 6(3)(a) of the Convention, everyone who is arrested shall be informed promptly, in a language that he understands, of the reasons for his arrest and of any charge against him.

The new Turkish law complies fully with this requirement. According to Article 135 of the Code, police officers, public prosecutors and judges are under obligation to inform the accused immediately about the offence ascribed to him, during the investigation.

Furthermore, in this connection Article 38 of the Turkish Constitution guarantees the fundamental principle of the presumption of innocence by stating that "noone shall be held guiltyuntil proven guilty by a court of law". In Italy, according to Articles 49 and 115 of the Penal Code the liberty of personmay without conviction be as a preventive measure restricted

on the solely ground of public danger. The European Court of Justice found in two cases (Guzzardi, Ciulla) violation of the Convention regarding court orders for compulsory residence.56

3. Obligation to Bring the Arrested Person Promptly before a Judge

According to Article 5(3) of the Convention an arrested person shall be brought promptly before a judge or other officer authorised by law to exercise judicial power. By using the word "promptly" the provision restricts the length of police custody, without giving a specific period.

The corresponding provision of the Code of Criminal Procedure was the subject of lengthy debates in Parliament. The Turkish legislature, taking the above-mentioned provision of the Convention, the traditions of other democratic countries and, in particular, the jurisprudence of the European Commission and Court of Human Rights into consideration, decided in principle for a detention period of 24 hours in police custody. As provided in Article 128 of the Code of Criminal Procedure, this period can be prolonged for up to four days by the Public Prosecutor, for offences committed collectively by three or more persons. According to paragraph 3 of Article 128 of the Code: "If the investigation cannot be concluded within four days due to the type of the offence which is the subject of investigation or difficulties in collecting necessary evidence or the existence of many perpetrators and other similar reasons the period foreseen in the second paragraph may be prolonged up to eight days with the decision of the judge and upon request by the public prosecutor."

In order to bring this provision into line with the jurisprudence of the European Court of Human Rights, it has been amended further by Law No. 4229 of 6 March 1997 providing that the second prolongation upon request of the public prosecutor may not exceed 7 days. Likewise, in Spain, according to Article 16 of the Law of 26 December 1984, anyone suspected of having committed any of the offences set out in Article 1 of the Law (terror crimes) can be held under custody for seventy-two hours. This period may be extended, for the purposes of investigation, for a further period of not more than seven days. However, the extention must be notified to a judge who is authorized to refuse it within twenty-four hours. The authority which decided to detain a suspect may prohibit all communication during the time necessary for the investigation. In the United Kingdom also, according to the Emergency Powers Act of 1978 a person may be detained for 48 hours by the police or by the immigration authorities, but this period may be extended by the Home Secretay to a maximum of seven days.

The Turkish Code does not leave such a crucial decision as the extension of the custody period to police authorities57 and, going one step further, recognises the right to oppose such decisions. According to the last paragraph of the above mentioned Article: "Against the written order of the public prosecutor for the prolongation of the custody period or against the custody procedure, the person under custody or his defence counsel or his legal representative or his first or second degree blood relatives or his/her spouse may apply to the judge in order to provide the immediate release of the person in question."

4. Prohibited Interrogation Methods

Article 3 of the Convention declares that no one shall be subjected to torture or to inhuman or degrading treatment and punishment. Although this provision does not make a specific reference concerning detainees, it is beyond all doubt that it also covers them.58

Article 17 of the Constitution expressly prohibits torture by stating: "No one shall be subjected to torture or ill-treatment; no one shall be subjected to penalty or treatment incompatible with human dignity."

According to Article 243 of the Penal Code, a public official who uses torture or inhuman acts to make suspects confess to crimes will be punished by up to five years in prison and will be put on mandatory permanent leave from public office. Likewise, Article 245 of the Penal Code penalises such mistreatment.

For years Turkish courts have in no way accepted confessions as proof if there was even the slight evidence that they were taken under pressure of torture and mistreatment.59

Having thought that an express provision might be more useful, the Turkish legislature has decided in favour of a specific provision that provides for the strict prohibition of certain investigation methods in order to prevent all cases and allegations of torture. According to Article 135 of the Code: “The statements of the defendant and the testifying person must reflect his own free will. Maltreatment, torture, giving medication forcefully, physical force or violence, physical or emotional disturbances that mislead his will such as the use of instruments of torture are prohibited. An illegal advantage cannot be promised. Even if there is consent, testimony extracted by using the above mentioned prohibited methods cannot be considered as evidence.”

Despite all these provisions and good intentions and the determination of governments, one cannot eradicate this shameful evil completely. In particular, in times of disorder and terrorism, these kinds of events are unfortunately almost unavoidable.

In Turkey, in order to prevent these kinds of allegations, the Ministry of the Interior has instructed the police authorities to undertake a medical examination of all detainees before and after their arrest. Moreover, the training of law enforcement officials in the field of human rights has been increased and new courses added to the curriculum of police colleges and academies. The Ministry of Justice has also sent repeated circulars to public prosecutors requiring that allegations of torture and mistreatment be properly examined and prosecuted. Today, public prosecutors have to report the results of these kinds of investigations and prosecutions to the Ministry at monthly intervals.60

5. Length of Detention on Remand

Article 5(3) (c) of the Convention provides, in connection with article 5(1)(c), that those detained on a criminal charge have the right to trial or release within a reasonable time. Article 6(1) also contains the same principle in the context of fair trial. These provisions impose an obligation on the courts to limit the period for which an accused person may be detained. According to the Court's judgement in the Wemhoff case, the period to be taken into account within the meaning of Article 5(3) ends, either when the accused is released, or if he remains in detention, at the date on which the final judgement is issued.61

Furthermore, these provisions give an individual charged with a criminal offence the right to a trial without undue delay. Whether the length of detention on remand exceeds what is permitted by the Convention depends on an examination of the actual situation in each case.62 The organs of the Convention decide on a case by case basis without setting precise deadlines for issuing a judgement.

According to the above provisions, the contracting parties are under an obligation to take all necessary measures in order to enable their courts to complete the entire process without delay. Although Turkish courts are under an excessive workload, the Turkish legislature has decided, unlike the jurisprudence of the organs of the Convention, to set down specific periods of time within which the prosecutions and proceedings have to be concluded. If these periods are exceeded, the detainee must, in principle, be released on bail or without condition, as the case may be. The relevant Article 110 of the Code reads as follows: “The maximum period of

detention is six months during preliminary investigation. In cases of a public action is launched, this period cannot exceed two years, including six months that pass under detention during preliminary investigation."

If the public action has not been instituted or if the verdict has not been reached at the end of the periods cited above, due to the comprehensiveness of the case or certain difficulties of in its investigation or prosecution, the arrest order is lifted for crimes that entail imprisonment of less than seven years. For crimes that entail imprisonment for seven or more years or the death penalty, a decision may be made for the continuance of arrest or the defendant may be released on the condition that he pays the amount required for bail."

Furthermore, in order to avoid excessive detention periods the court has to review the case at monthly intervals and decide whether the conditions that led to detention are still valid or not. Despite this reform, because of the complexity of cases and the shortage of court personnel, lengthy proceedings and consequently long periods of detention are almost unavoidable. It is an irony that the very first cases against Turkey taken up by the European Court of Human Rights, related to excessive periods of detention.63

6. Attendance and Examination of Witnesses

Article 6(3)(d) of the Convention provides that the accused has the right "... to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

This provision requires that the prosecution and defence be treated equally in a criminal trial. The court cannot act in a way which gives the prosecution advantage over the defence.64 The right of the accused to obtain the attendance and examination of defence witnesses "... under the same conditions" as witnesses against him is a result of the general principle of equality of arms. It aims to put the accused on an equal footing with the prosecution regarding the hearing of witnesses.65

The new Turkish law also guarantees the principle of the equality of arms and gives the accused the right, in general terms, to all adequate means for the preparation of his defence . Thus, he can request, on an equal footing with the prosecution, that "... concrete evidence be gathered so as to relieve him of doubt and he is given the opportunity to eliminate the reasons for doubt attributed to him and to submit the facts which are in his favour."

7. Defence in Person or through Legal Assistance

Article 6(3)(c) of the Convention provides the accused with the right "... to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient mean s to pay for legal assistance, to be given it free when the interest of justice so requires."

According to this provision, which declares one of the basic rules of the principle of fair trial in criminal matters, the accused has an absolute right to defend himself through legal assistance of his own choosing, provided that he has the necessary means. If he does not have sufficient means to pay a lawyer, he has, in principle, to defend himself in person. According to the above provision, he is given free legal assistance only where the interests of justice so require.

Whereas, according to this provision and to the jurisprudence of the organs of the Convention, the right to choose a lawyer is not in any event an absolute one,66 the new Turkish law makes it an absolute right and, on this particular point, goes far beyond international standards.

First of all, under the new regulation, the accused has an absolute right from the very beginning to choose his lawyer. That is to say, if he requires legal assistance, the Bar Association appoints him a lawyer as soon as he is in police custody.

Second, under the jurisprudence of the organs of the Convention, the seriousness of the case, the importance of what is at stake for the accused and the relative complexity of the facts and the law, play an important role in the appointment of a lawyer.67 Under the new Turkish law for the appointment of a lawyer, the seriousness of the case makes no difference. It is sufficient if the accused is thought to have committed an offence , whether felony or misdemeanour. According to Article 136 of the Code, he has an absolute right to the appointment of a defence counsel at any stage and level of the prosecution and proceedings.

It should be noted in this context that, in the rulings of the European Court of Human Rights against Turkey, the Court emphasised the Turkish legal system is sufficiently in line with the provisions of the Convention. It is in the application of the domestic law, according to the Court, that the Turkish system faces some problems.68

V CONCLUSION

Ethnic groups living in various countries show different characteristics. As regards Turkey, the great majority of the ethnic Kurdish population has long been integrated into Turkish urban society and shares common traditions, culture and religion with the majority other Turkish citizens. Calls for Kurdish separatism represent the demands of a very small, violent and shortsighted minority. The people of Turkey, including those of Kurdish origin, have had a common life for about one thousand years. Anatolia has served as a melting pot for many cultures throughout the centuries.

Today, more people of Kurdish descent live in major cities like Istanbul, Ankara, Izmir, Antalya and Adana than in Southeast Anatolia. They have no problems beyond those faced by the general populace and and they are fully integrated in society. Problems are concentrated in the economically depressed southeastern regions of Anatolia which have been designated as a special development area. The government itself tries to promote welfare by investing heavily in the region and encouraging new industries to settle in the area so that more jobs will be created. The Southeastern Anatolia Project (GAP) is one of the major regional development projects in the world. There will be important developments and positive changes in the social and economic structure of the region with the realisation of this project.

Despite all these positive developments, the PKK started a bloody terrorist campaign in 1984. To combat terrorism by authorised legal means is the main duty of every government. Turkish governments have continuously declared that this struggle will be carried out according to democratic principles and by respecting the rule of law and international standards of human rights.69

Demands can only be justified if there is discrimination that prevents Kurds from taking part in the economic, social and political life of the country. Special emphasis is given to the principle of equality in Article 10 of the Constitution: “All individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations. No privilege shall be granted to any individual, family, group or class. State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings.”

Despite all contrary allegations,70 it is quite fair to say that up to now “... no legal or social has barrier has prevented them from rising to high positions in the Turkish state. In fact, there have always been distinguished representatives of Kurdish origin in the ranks of the civil and military bureaucracy, in Parliament, and even in the cabinet.”71

Fighting terrorism and defending national integrity are not a violation of the principles stipulated in international legal instruments. On the contrary, the Universal Declaration of Human Rights, the CSCE Helsinki Final Act, the Copenhagen Document and the Paris Charter clearly commit participating states to combat terrorism or violence aimed at overthrowing the regime of any participating state. These instruments are also based on the maintenance of territorial integrity.72

The vast dimensions of terror and violence forced the Turkish governments to proclaim a state of emergency and to make a declaration of derogation under Article 15 of the Convention. Since the “... normal legislation offered insufficient resources for the campaign against terrorism and that recourse to measures outside the scope of ordinary law”73 were needed, it was necessary to resort to emergency legislation.

The Constitution provides special safeguards for the implementation of a state of emergency. Even if the executive initiates the procedure of emergency, it can only be declared by the approval of the legislature for a fixed period of time. It is a civil administration under the instruction and control of political power. The terms of the emergency are reviewed on each occasion by the Parliament and if necessary they can be changed and the state of emergency can be lifted altogether. Indeed the state of emergency was proclaimed initially in 8 provinces of southeastern Turkey. Meanwhile it has been reduced to 4 provinces.

In this connection, that the Parliamentary Human Rights Commission carried out investigations into the implementation of the administration. So far the most important of these investigations were carried out by sending special missions to southeast Anatolia to investigate the methods applied by the police and military troops in operations and interrogations.

That the terrorist acts fall under the jurisdiction of the State Security Courts in no way violates the principle of fair trial, because, these courts are established by the Constitution within the meaning of Article 6(1) of the Convention.74

There is also a remedy against State Security Court judgements, like those of any other ordinary criminal court, at the High Court of Appeals. In this context, Article 37 of the Constitution provides: “No one may be tried by any judicial authority other than the legally designated court. Extraordinary tribunals with jurisdiction that would in effect remove a person from the jurisdiction of his legally designated court shall not be established.”

Turkey has opened its implementations in the field of human rights to the control mechanism of the Convention by recognising the jurisdiction of the Commission and Court. Both organs have so far shown admirable restraint and understanding to the contracting states in their struggle against terrorism by giving national authorities, even if not unlimited, wide discretionary powers. It is expected that they will maintain the same attitude towards Turkey. If it comes to judgments resulting in the violation of the Convention, it is beyond all doubt that the practice or legislation will be changed accordingly, as the case may be.

Almost all allegations of violation of the Convention have related so far to the implementations of Turkish authority’s actions against terrorism. When this state of affairs ends, the Turkish State will lift the state of emergency and consequently end the derogatory measures. As the present constitutional system and the ordinary criminal justice procedure fully comply with the requirements of the Convention, complaints should then be reduced to that of the other contracting parties. According to the figures of individual application to the European Court of Human Rights in 1998 Turkey is on the sixth place, namely Italy (686), France (602), Poland (526), Germany (412), United Kingdom (290), Turkey (220)

As İsmet İnönü, the head of the Turkish delegation at the Lausanne Conference of 1924 said in reply to Lord Curzon: “The government of ... Turkey is the government of the Kurds as much as of the Turks, for the true and legitimate representatives of the Kurds take their seats in the National Assembly and participate to the same extent as the representatives of the Turks in the government and administration of the country.”75

1 Jack Donnely, The Concept of Human Rights, London 1989, p. 45.

2 S. Sunga Lyal, Individual Responsibility in International Law for Serious Human Rights Violations, Geneva 1992, p. l.

3 Otfried Höffe, 'Transzentrale Interessen: Zur Antropologie der Menschenrechte', Turkish Yearbook of Human Rights, Vol. 9-10, 1987-88, p. 23.

4 M. Duverger, Colloguy on the Concept of Democracy, Strasbourg 23-25 March 1983, p. 3

5 Stanley de Smith and Rodney Brazier, Constitutional and Administrative Law, Penguin Books, 7th. ed. 1994, p. 18.

6 Duverger, op. cit., p. 3.

7 John N. Adams and Roger Brownsword, Understanding Law, London 1992, p. 55.

8 Johann David van der Vyver, Seven Lectures on Human Rights, Johannesbourg 1976, p. 107.

9 Report of 11 may 1984, para. ll0, Digest of the Strasbourg Case Law Relating to the European Convention on Human Rights, Vol. 3, 1994, p. 251.

10 John Avery Joyce, The New Politics of Human Rights, London 1978, p. ll.

11 Asbjorn Eide, Pocket Guide to the Development of Human Rights Institutions and Mechanisms, Strasbourg, 1989, p. 6.

12 William Geldart, Introduction into English Law, London 1981, p. 1.

13 T. C. Hattley, J. A. G. Griffith, The Government and Law, Second Ed., London 1981, p.8.

14 For instance, among others the relevant provisions of the Turkish Civil Code, notably Article 159, according to which a husband could oppose his wife entering a profession, Article 440, which provided that a child born out of wedlock would inherit a half share of that of a legitimate child, have been annulled.

15 Preamble of the Constitution: "The understanding that separation of powers does not imply an order of precedence among the organs of the state, but reflects a civilised division of labour and mode of co-operation restricted to the exercise of specific state powers, and that supremacy is vested solely in the Constitution and the laws". Nevertheless, according to the state of affairs, it is quite fair to say that the equilibrium leans in favour of the judiciary.

16 Christian Panier, 'Administration of Justice', Journal of Human Rights and Practice, Vol. 1, No. l, 1 May 1991, p. 104.

17 Gavin Drewry, 'Constitutional Studies', Contemporary Issues and Controversies, edited by Rober Blackburn, London 1992, p. 151.

18 A similar Judicial Services Commission has also been proposed for the United Kingdom; see, A Written Constitution for the United Kingdom, Institute for Public Policy Research, London 1991, p. 17.

19 Staatsverfassungen der Welt, Bd. 7 Türkei, Frankfurt - Berlin 1966, p. 475.

22 See, Feyyaz Gölcüklü, 'Quelques principes fundamentaux de la nouvelle Constitution de la Republic de Turquie (1982) et la Convention Européenne des Droits de 1'Homme', Protecting Human Rights: The European Dimension, Munich 1988, p. 231.

23 See, Seref Gözübüyük, 'La place des traites internationaux dans le droit Turc', Turkish Yearbook of Human Rights, Vol. 13, 1991, p. 8.

24 See similar efforts, A Written Constitution for the United Kingdom, Institute for Public Policy Research, London 1991, p. 14: "Among the member states of the Council of Europe the UK is the only state which has no written constitution or enforceable Bill of Rights."

25 A. Drzemczewski, European Human Rights Convention in Domestic Law: A Comparative Study, 1983, p. 326: "There appears to be emerging a sort of European quasi-constitutional or common law, the maintenance of whose uniform minimum standards is considered the responsibility not only the Convention's organs but also that of the domestic judiciary."

26 Francis G. Jacobs, 'The Convention and the English Judge', Protecting Human Rights: The European Dimension, Munich 1988, p. 273: "The first months of 1987 have seen a renewed campaign, vigorously fought but in the short term unsuccessful, to incorporate the Convention into United Kingdom law by Act of Parliament." The author sees the hesitation of British judges as the root of the failure of this attempt, stating: "The hesitations of the judges in these and other cases can be explained in part by the uncertain status of the Convention in English law in the absence of its incorporation by Act of Parliament.", Ibid., p. 274

27 A very important amendment was then carried out on April 12, 1991, whereby the Articles 141, 142 and 163 of the Code relating to restrictions of communist activities and communist propaganda and religious propaganda were altogether abolished. The corresponding provisions of the Italian Penal Code (Art. 271, 272) are still in force.

28 These courts were abolished in France in 1982 and in 1986, and replaced by a special court, composed of 7 judges sitting in Paris, having jurisdiction throughout the country. Nevertheless this new court has also been criticized widely in particular on the following points: as under law of 30 December 1986, No.86-1322, a terrorist act was described as an ordinary offence, the establishment of a special court for this purpose is a contradiction. Second, there is no legal remedy against the judgements of this court. Being final, its judgements are directly applicable. Finally, unlike the jury system of the ordinary courts this court has no jury. The same applies on the last point in the United Kingdom, where terror crimes under the "Prevention of Terrorism Act" in Northern Ireland are being tried by a single judge without jury, which is considered as a fundamental right in the rest of the country. In Spain also, according to Article 11 of the Organic Law a central court (Audencia National) with its seat in Madrid has been entrusted with the judicial inquiry of terror offences. Likewise, in Switzerland where the Federal Court in Lausanne has jurisdiction in these kinds of crimes in first and last instance. Again, the Federal Republic of Germany has authorized an Oberlandesgericht in each land dealing with terror crimes and crimes against the free democratic order. It is obvious that terror crimes are being tried in most of the Western democracies more or less in a special way and the ordinary courts are not entrusted with this task.

29 Gerard Soulier, 'The European Convention for the Protection of Human Rights: International protection versus national restrictions', edited by Mireille Pelmas-Marty, Dordrecht 1992, p. 16.

30 Human Rights and Responsibilities in Britain and Ireland, edited by Sydney D Bailey, Sydney 1988, p. 164

31 K. R. Popper, The Open Society and its Enemies, London 1965, Vol. 1, p.265.

32 Hans Newiasky, Allgemeine Staatslehre, Zurich - Köln 1955, Bd. 2, p. 108

33 A. Bermardi and F. Palazzo, European Convention for the Protection of Human Rights: International Protection versus National Restrictions, ed. by Mireille Delmas-Marthy, Kluwer Academic Publishers, Dordrecht 1992, p. 207,

34 H. P. Lee, Emergency Powers, Sydney 1984, p. 3.

35 Case of Klass and Others, 6 September 1978, Series A, Vo1. 28, para. 49. The Court considered that "powers of secret surveillance of citizens, characterizing as they do in police state, are tolerable only in so far as strictly necessary for safeguarding the democratic institutions ... the relevant legislation defined precisely and exhaustively the grounds for such measures: the defence of "the free democratic constitutional order" or the existence or security of the federation or of a land" against "imminent dangers" ... The aim was indeed therefore the defence of national security, the prevention of disorder and of crime, as provided for in the Convention ... and accordingly the state must be able ... to undertake the secret surveillance of subversive elements. Same applies in Italy, according to Article 226 sexies (?) of the Code of Penal Procedure. Article 706.24 of the Code of Penal Procedure France provides in this context that the officer of the Criminal Investigation Department are authorized to organise any search, domiciliary visit or seizure without the prior authoritization of the person concerned, "if the inquiry concerning the terrorist infringement requires." The same applies according to Article 16 of the Organic Law of 1984 in Spain.

36 Jaime Oraa, op. cit. p. 17, "The permanent control by the UK Parliament of the emergency in Northern Ireland has been important in guaranteeing an avoidance of human rights abuses."

37 Lawless Case, European Court H R Series A, 1960-61 Judgement (1 July 1961), p. 56, para. 28.

38 Lawless v. Ireland, Ireland v. United Kingdom, Brannigan McBride v. United Kingdom Council of Europe, Survey for Fort Years of Activity, 1959-1998, Strasbourg 1998, p. 21

39 The same circumstances which Turkey faces today!

40 Ibid., para. 36.

41 European Court of Human Rights: Ireland v. United Kingdom, 18 January 1978, Series A, No. 25, pp. 80-81, para. 2l2.

42 Ibid., para. 207.

43 Ibid., para. 224.

44 Michael Supperstone, Brownlies Law of Public Order and National Security, second ed. London 1981, p. 21: "The General Officer commanding the British troops in Northern Ireland is subject to the political direction of the United kingdom government. As the relevant section of the Manual of Military Law headed 'Employment of Troops in Aid of the Civil Power' states: it is to be expected that a disturbance grave enough to be beyond the power of the police to suppress would be a matter of national concern in which counter-measures would be taken only under close control of the government." Ibid., p. 11.

45 Delmas- Marty, op. cit. p. 25

46 Part I of the Prevention of Terrorism Act (1976) restricts freedom of association and Part II, freedom of movement within the United Kingdom. "It authorises the Secretary of State to issue exclusion orders to those suspected of being concerned in terrorist activities... Orders made under S4 exclude persons from Great Britain, orders under S5 from Northern Ireland." Michael Supperstone, op. cit., p. .218.

47 The Media has a great responsibility in a democratic society. By showing self restraint it has to avoid reporting events in a way which would cause confusion, uncertainty or lack of order in the public or tend to undermine the authority of the state. Otherwise, every democratic country is entitled to resort to these kinds of restrictions. For instance, a broadcasting ban was applied in Northern Ireland in the 1970s which was then extended to the territory of the United Kingdom.

48 In fact, such specific anti-terrorism laws are also in place in other European countries, such as the United Kingdom, France, Italy, Spain, Greece and Portugal.

49 Judgement of the Constitutional Court of 31 March 1992, E.1991/18,K.1992/30.

50 Karin Rose, The Review, International Commission of Jurists, No.l5, December 1975, p. 46, The German Code of Penal Procedure was amended on 1 January 1975. "Indeed, the Act itself has come to be known as the 'Lex Baeder Meinhof'. These provisions deal with the right of the accused to be present during the hearing, restriction on the number of defence counsel (up to three, Art.l37), a prohibition against counsel appearing for more than one defendant and provisions for the exclusion of defence counsel in certain cases." Unlike the in Turkey the German Constitutional Court has refused requests for the annulment of these amendments.

51 The German Penal Code also prohibits, in its Articles 86 and 86a, the dissemination of the propaganda of unconstitutional organisations that, is directed against the free democratic system of government.

52 Donna Gomien, David Harris, Leo Zwaak, Law and Practice of the European Convention on Human Rights and the European Social Charter, Council of Europe Publishing 1996, p. 143.

53 J. L. Murdoch, Article 5 of the European Convention on Human Rights, Strasbourg 1994, p. 7.

54 Stefan Trechsel, 'The Right to Liberty and Security of Person', Human Rights Law Journal, Vol. I, No. l-4, p. 88.

55 Turkish Daily News, 20 November 1992.

56 Council of Europe, Survey Forty Years of Activity 1959-1998, Strasbourg 1998, p. 5

57 In this context, the United Kingdom lodged a derogation: 'Brannigan and McBride v. United Kingdom', European Human Rights Reports, edited by Peter Duffy, Vol. 17, June 1994, Part 6, p. 571, "The Coutt first observes that the power of arrest and extended detention has been considered by the Government since 1974 in dealing with the threat of terrorism. Following the Brogan and Others judgement the Government were then faced with the option of either introducing judicial control of the decision to detain under Section 12 of the 1984 Act or lodging a derogation from their Convention obligations in this respect. The adoption of the view by the government that judicial control compatible with Article 5(3) was not feasible because of the special difficulties associated with the investigation and prosecution of terrorist crime rendered derogation inevitable. Accordingly the power of extended detention without such judicial control and the derogation of 23 December 1988 being clearly linked to the persistence of the emergency situation, there is no indication that the derogation was other than a genuine response."

58 Unlike Articles 7 and 10 of the UN Covenant which make specific reference to them.

59 Plenary Judgements of the Court of Cassation: 17.11.1986, 5.12.1988, 28.9.1987, 2.2.1987, 17.4.1989.

60 Individual cases in which lower grade officials are involved may occur in any democratic country. For instance: Judgement of 26 April 1994 in the case of Diaz Ruano v. Spain, 'allegation of torture and Individual death of the applicant in police custody', European Court of Human Rights Press (18 April-2 May 1994),' p. 39; judgement of 28 January 1994 in the case of Hurtado v. Switzerland, 'maltreatment of suspect during and following arrest', European Court of Human Rights Press (2-24 February 1994), p. 5; both cases were resolved by way of friendly settlement.

61 Council of Europe, Human Rights Files, No.4, Strasbourg 1981, p. 14.

62 Ibid., p. 15

63 See the case of Mansur v. Turkey; the judge has refused to release the applic FACE="Times New Roman">ant 44 times in monthly review processes; European Court of Human.Rights Press (21-25 November 1994), p. .l3; case of Mitap and Müftüoğlu v. Turkey, the application for release made by the accused during the proceedings were refused on account of the nature of the offences, the date on which the accused had been detained on remand and the fact that all the evidence was unchanged; European Court of Human Rights Press (23 January-February 1995), p. 2l.

64 UN, The Administration of Justice and the Human Rights of Detainees, E/CN.4/sub.2/1991/29, 5 July 1991, p. 14.

65 Grotrian, A. Article 6 of the European Convention on Human Rights, Strasbourg 1992, H(92)3, p. 27.

66 Ibid., p. 25.

67 Ibid., p. 26.

68 See among others, European Court of Human Rights, case of A FACE="Times New Roman">kdıvar and others v. Turkey (99/1995/605/693) judgement, 16 September 1996; Case of Aksoy v. Turkey (100/1995/606/694), judgement, 18 December 1996.

69 Human Rights and Responsibilities in Britain and Ireland, ed. Sydney D Bailey, Sydney 1988, p. 165: “The forms of intimidation practised by terrorists in Northern Ireland amount to a total denial of fundamental human and civil rights. Murder, bombing, abduction, secret courts, and punishment shootings are all part of the tactics employed. Those who deny the most basic rights of others have little credibility when they criticise the security forces - a point underlined by Article 17 of the European Convention of Human Rights when it states that nothing in the Convention implies a right to engage in any activity ... aimed at the destruction of any others' rights and freedoms' set forth in the Convention.”

70 See among others, Martin van Bruinessen, ‘The Kurds in Turkey, Further Restrictions of Basic Rights’, The Review, International Commission of Jurists, No. 45 December 1990, p. 46.

71 Münci Kapani, ‘International Protection of Minority Rights’, Turkish Yearbook of Human Rights, Vol. l3, 1991, p. 17.

72 Article 30 of the Universal Declaration of Human Rights prohibits acts and activities aimed at destroying the FACE="Times New Roman"> rights set forth in the Declaration. Finally, among other international legal instruments, the Resolution on ‘Human Rights and Terrorism’ adopted by the U.N. General Assembly on 23 December 1994, reiterated grave concern over the gross violation of hıuman rights perpetrated by terrorist groups and the increasing number of innocent persons killed, massacred and maimed by terrorists in indiscriminate and random acts of violence and terror.

73 Court's expression in the case of Ireland v. United Kingdom.

74 Nevertheless, there is a tendency towards modification and even the abolition of these courts. However, it should be pointed out that the amendment of the Constitution requires a two-thirds majority.

75. The Review, International Commission of Jurists, No. l2, June 1974, p. 29.

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