THE UNION OF TURKISH BAR ASSOCIATIONS

SPEECH OF THE PRESIDENT OF THE UNION OF TURKISH BAR ASSOCIATIONS, PROF. METİN FEYZİOĞLU, ON THE 146TH ANNIVERSARY OF THE ESTABLISHMENT OF THE COUNCIL OF STATE AND "ADMINISTRATIVE COURTS DAY"

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Mr. President,

In the presence of Your Honour I would like to congratulate the President of the Council of State and members of the administrative courts on the 146th anniversary of the establishment of the Council of State. I would like to emphasize that this important institution, which is tasked with protecting the citizenry against the unlawful acts and actions of the administration, is indispensable for the rule of law and the democratic state of laws.

I also would like to remember Mustafa Kemal Atatürk, to whom we owe much gratitude for these days we live today and tomorrow, which will, no doubt, be brighter than today, his brothers in arms, all statesmen that have contributed to the foundation of our Republic, and Mustafa Yücel **Özbilgin**, who was martyred in the attack against the Council of State.

Today is the first day of Disability Awareness Week. We have 8.5 million citizens with disabilities in Turkey. I begin my speech by wishing that the provision regarding positive discrimination in favour of the handicapped that is provided in our Constitution is implemented in all areas of social life. In fact, I would like to draw your attention to the fact that the demands of our handicapped citizens are not privileges or discrimination for them at all, and that all that they ask for is to participate in social life on the basis of equal citizenship.

Mr. President,

A few days ago, May 3rd was "World Press Freedom Day". Journalists protested the censorship of the press by marching with their mouths taped shut for a free press, and asked for freedom for their imprisoned colleagues. Hopefully, the marches to be held in the future will not be organized in protest, but celebration.

The principle of legal security that is the defining element of the state of laws cannot be ensured without effective oversight by the administrative courts. An independent and impartial judiciary which believes in the rule of law, which ensures that human dignity is protected, and which adopts the distribution of justice not just formally but in essence as well, is the fundamental element of democracy and state of laws. Such a judiciary is respected by everyone and instils confidence in every person that acts in accordance with the law.

Let us not forget that courts, where justice is dispensed, are the last refuge for all of us; they are where we look with

hope. If their doors are closed, or if they do not open easily or open too late at times when we need them, then legal security is shaken deeply. In other words, if it becomes a widespread opinion that the judiciary does not treat everyone fairly, or if citizens begin to think that they cannot successfully assert their rights in the courts and they fear that they will be convicted even if they are innocent, then the state, that is our country, will lose its foundation. Justice runs away from courts where politics get involved. Democracy cannot survive without justice. In democracies, political parties bid for power by agreeing in advance to be controlled by the judiciary. Of course, this should not be political, but legal control. Thus, the independence, impartiality, effectiveness and trustworthiness of the judiciary is of vital importance for every person, just like bread, water and air. There are thousands of lawyers, judges and prosecutors in Turkey who selflessly strive to dispense justice by practicing their profession with a sense of responsibility. It goes without saying that human-related problems may arise in every place where human beings live. None of these problems are insoluble. What needs to be done is to establish a reliable system that prevents all extra-judicial interventions on the judiciary. We all are assigned with this task. Solutions can be generated only by talking, not fighting.

Mr. President,

Today, we are in urgent need of an Attorneys' Code that will solve the problems of the legal profession and thus help our people of seventy-six million succeed in their "struggle to become an individual" through ensuring that they can exercise the rights that they have in theory. Such a law can only

be drawn up under the leadership of the Union of Turkish Bar Associations and the Bar Associations. Towards this end, we established a working commission with participation from all regions of Turkey and created a draft. We will finalize this draft bill in light of the opinions to come from our Bar Associations. In the same period, a separate commission was established under the umbrella of the Ministry of Justice, and we participated in that commission as well, as required by our will to solve our problems together. We presented our reservations related to various provisions of the draft that was prepared by this commission and submitted for seeking the opinion of relevant institutions after being amended by the Ministry of Justice, in particular its provisions regulating the delegate structure of the bar associations without regard to the principle of fair representation, and those provisions making the legal profession a commercial activity conducted by equity companies and rendering it possible for firms established in big cities to establish branches and deprive attorneys in other cities of their breathing space. I will not waste your time by explaining all of these aspects one by one here. However, I would like to underline that what we need most vitally in terms of our profession and the state of laws is to urgently introduce an examination at the beginning of the legal internship and an examination at the beginning of legal practice in addition to a modern legal education. The draft law that was submitted for review provides for this exam to be given by the Ministry of Justice. It is impossible to comprehend the logic behind the attorneyship exam being given by the Ministry of Justice when the exam for Judges and Prosecutors is not given by the Union of Turkish Bar Associations. This provides for a new tutelage regime. On the other hand, forty-one thousand students already studying in law faculties are exempted from the exam. This means that the number of attorneys working today will

increase almost by half the current number in five years at the latest and the legal profession will thus be impossible to practice. Exempting the students studying in law faculties right now from exams is not in their interest, but is to their detriment. This is because this disproportionate increase that will make our profession impossible to practice will impair the quality of the defence institution and thus of democracy, and the insurmountable competition will darken the future of young attorneys.

An amendment regulation which introduces evaluation criteria for acceptance to and completion of the internship, to be in place until a new exam is introduced by law, was adopted based on the power vested in the Union of Turkish Bar Associations by the Attorneys' Code and submitted to the Prime Ministry to be published in the Official Gazette. However, the Prime Ministry General Directorate of Legislation Development and Publication unlawfully refrained from publishing this duly adopted regulation. That an administrative authority responsible for the printing of the Official Gazette deems itself authorized to run a review for compliance with the law and acts as both the lawmaker and the judiciary is a situation that cannot be experienced in a state where the state of laws functions with all of its institutions and rules. Is the General Directorate in question going to review laws for compliance with the Constitution with the same approach from now onward? An annulment action has been filed against this unlawful procedure which constitutes a wrongful seizure of a function.

I would like to express that the administrative restrictions imposed on our colleagues with regard to file requisitions in the Council of State and certain issues concerning front office practices are unlawful, and that they prevent us from

duly exercising our profession and thus cause harm to our citizens. We hope that these problems will be solved through dialogue.

The Bar Associations and the Union of Turkish Bar Associations are not professional guilds; they are the organized power of attorneys, who are a constituent element within the judicial power, which is one of the three branches of the state. Therefore, the Bar Associations and the Union of Turkish Bar Associations are tasked with defending and safeguarding the rule of law and human rights in accordance with Articles 76 and 110 of the Attorneys' Code. Due performance of this duty is in the interest of the entire society. Unfortunately, recent decisions of the Council of State have begun to limit the right of the Bar Associations and the Union of Turkish Bar Associations to file actions under the abovementioned articles of the law. This is to ignore the historical development and the indispensable role of the legal profession and bar associations in ensuring realisation of rule of law and democracy, and to leave defenceless the citizenry and in particular the environmental right of the citizens.

It can be seen that there is no effective administrative judicial review of appointment and transfer procedures left when one considers together the amendment to Article 27 of the Administrative Adjudication Procedures Law, which prohibits motions for stays of execution from being granted without hearing the administration's defence in actions filed against appointments and transfers of civil servants, and the amendment to Article 28 of the same Law, which prohibits reappointments of civil servants to their former positions

following the cancellation of their appointment or transfer if another public servant has been appointed to their position in the meantime.

In the Draft of the Council of State Law, which was finalized by the Justice Commission of the Grand National Assembly of Turkey, and which restructures the Plenary Body of Administrative Law Chambers and the Plenary Body of Tax Law Chambers that are the determinants of administrative adjudication, there are provisions regarding the shortening of trial and appeal periods in disputes stemming from administrative procedures and decisions in relation to problematic issues such as tenders, expropriation, privatization, shore protection, EIA reports and urban transformation, and the removal of the option to appeal the decisions for stays of execution taken against such procedures and decisions of the administration. We expect that the Council of State, which is one of the most important guarantees of individuals, and all relevant persons to show the necessary sensitivity in order for these mistakes not to become law.

On the other hand, occurrence of delays in complying with the decisions of administrative courts or failure to sometimes follow these decisions in effect deprives the citizenry of the assurance of administrative court review. In a state of laws, the administration is obliged to conform to court decisions even if it is not satisfied with the content of these decisions.

Finally, in this regard, implementation of the precedent-setting decisions of the Council of State to similar cases without hesitation will not only save the citizenry from major woes, but will also reduce the number of cases significantly.

Mr. President,

The administrative or judicial hindrances imposed on social media that we have witnessed recently, which evoke the prohibitionist mentality of the past, are contrary to our Constitution, the European Convention on Human Rights, and the Law on Regulation of Publications on the Internet and Suppression of Crimes Committed by Means of Such Publications. Moreover, it is technically impossible to fully hinder access. That is to say, the measure taken was not worth damaging the reputation.

Stays of execution granted by the administrative courts against these inhibitions and the verdicts of the Constitutional Court finding that the same violated the law were well founded. We all should evaluate these decisions calmly and reveal our criticisms, if any, in a constructive way. He who starts up in anger sits down with a loss. The loss mentioned here is a common loss. Those who communicate by respecting each other, on the other hand, reach common wisdom.

We happily welcomed the opening of Taksim Square to the May 1 celebrations in 2011. As you will remember, May 1 was celebrated with enthusiasm in Taksim Square in 2011 and 2012, and there was no rampage. The ban imposed this year in contravention of Article 34 of our Constitution, Article 11 of the European Convention on Human Rights and the established case law of the European Court of Human Rights, on the other hand, prepared a favourable climate for the provocateurs who wanted the people to clash with the police and contributed to many upsetting incidents we no longer want to see. Unfortunately, the police once again failed to distinguish between those who resorted to violence and those who wanted to exercise their right to peaceful demonstration, and exerted disproportionate force.

Mr. President,

I am obliged to convey to your Honour and the honourable delegation here certain greetings, those of the tenants who continue to live in shipping containers in Van. The Republic of Turkey is a social state of laws. A social state is obliged to resolve the housing needs of its citizenry. The earthquake demolished the buildings and killed our people without distinguishing between the owners and renters; however, the housing units built after the earthquake were primarily assigned to owners and only few number of houses were allocated to renters, by lot. The Republic of Turkey undoubtedly has the might to resolve the grievances of these people. Wishing that this problem, for which, we believe, a solution can be generated with a simple amendment to the relevant regulation, will be solved in a short time, I convey these greetings to you.

The local election of March 30th is now behind us. Frankly, we went through a process in which politics sharpened its language and thus contributed to an increase in the polarization within society. Now is the time to heal the wounds. Society cannot tolerate new tensions to arise. We must learn our lessons and continue on our way. At this point I would like to touch upon three important issues.

The first of these issues is that proof must be based on documentary evidence in election law and that the legislation grants the political parties the authority to supervise the voting and vote counting procedures. Therefore, the political parties which do not duly use the authority to supervise and collect minutes vested in them by the legislation would have failed to fulfil their duties. In such a case, objections made against election results remain

devoid of sufficient support. Declaring the ballot boxes to be suspect based on unsubstantiated objections is nothing more than discrediting the ballot box. Of course democracy is not all about the ballot box, but leading the voters to think that the political power will not change through elections causes great damage to democracy. In such a case, the greatest harm is suffered by the opposition parties. This is because voters who believe they cannot change the political power through the ballot box fall into discouragement and may give up exercising their right to vote, which is one of the most important civil rights. Therefore, what needs to be done is for political parties to fully discharge the supervision and control responsibility vested in them by the election law in a disciplined organization. It is only after all of these responsibilities are discharged that allegations of impropriety, if any, can be made and necessary actions can be expected to be taken.

The second issue I want to touch on in respect of the elections is the emergence in circulation as election materials of voice recordings, whose recorder and method of recording, where they are archived, when and against whom they will be used, is not known. What we have learnt from these elections is that blackmail by way of confidential recordings relating to our private lives is no longer an accepted approach. In other words, discrediting materials served to the public have discredited those who have recorded or produced them. As a matter of fact, those who have made these recordings have refrained from disclosing their identities so far. If what they did was a reputable thing, they would have unveiled their identities as in the case of Snowden. In saying this, I would like to express that everyone should take lessons from such incidents by remembering how they reacted when others were blackmailed in a similar

way in the past. On the other hand, I feel obliged to remind that again in the case of Snowden, no investigations were conducted against those who published the documents in the United States, the social media websites were not banned and relevant proceedings were initiated only against Snowden. Democracy is challenging, but is the only form of government that can ensure the freedom and legal security of individuals and the welfare of society. We have to understand each other and act calmly, not in anger, to overcome difficulties. It would be to the detriment of us all to reverse the flow of streams after such long distances have been covered and to leave the system of values of the European Union and the Council of Europe only to change our course towards authoritarian regimes.

As for the recordings, the contents of which constitute crimes, whether they are doctored or produced must be evaluated in investigations to be conducted by neutral international organizations in a manner to resolve all doubts.

At this point, it is necessary to evaluate in a few sentences the illegal recordings that are understood to have been made in the Ministry of Foreign Affairs during a meeting that was supposed to be top secret and the illegal circulation of these recordings. The meeting that is the subject matter of the illegal eavesdropping is understood to be a meeting held in preparation to presenting opinions to decision makers. The matters spoken at the meeting left the impression that our foreign policy, which is supposed to be based on the principle of peace at home, peace in the world, is desired to be transformed into an adventurous foreign policy, and this has led to great concerns. On the other hand, it is evident that this illegal eavesdropping constitutes the crime of espionage. Moreover, it is not known what other records

have been made by these people who have made these recordings. What other conversations have those who have recorded these conversations, which are understood to have been put into circulation with a view to affecting the results of the elections, recorded up until that day, and where have they served them? Have the lives of our soldiers and police been risked or have any of them been martyred due to the espionage activities in question? Is there a connection between these espionage activities and the shooting down of our aircraft in Syria or the suspicious deaths of ASELSAN, HAVELSAN, ROKETSAN or TAI engineers that run major projects that save our defence industry from foreign dependency? Every citizen has the right to ask these and similar questions.

The third issue I would like to mention is the corruption allegations and investigations that came up before the elections. Leaving aside the motives that led to the launch of these investigations, the perception that the investigations were hindered by the reigning political power has become widespread in society has distorted the sense of justice. Unless the light of truth enlightens our path, everyone will suffer from the consequences.

All of the aforementioned issues lead to the conclusion that potential illegitimate structures within the state must be fought and that corruption allegations must be investigated thoroughly. A reliable judiciary that can ensure an impartial, independent and fair trial is needed for this purpose.

The reflexive fight against illegitimate structures should not give rise to regulations that are contrary to the Constitution and the European Convention on Human Rights.

In this context, the authority vested in the National Intelligence Organization (MIT) to access personal data, professional and trade secrets and databases without any need for a court decision; the authority to identify communications and to access certain investigation and case files without a court decision; empowering the MIT with the authority to carry out operations within the country; and subjecting the investigations to be launched against the members of the MIT to prior authorization, all as a result of the amendments to the Law on State Intelligence Services and National Intelligence Organization, have created a new and unsupervised law enforcement unit. The fact that unauthorized publication of information and documents related to the duties and operations of the MIT has now become a crime that is punishable with three to nine years of imprisonment, and that the owners of the publication used for this purpose will be held accountable, will lead to compulsory self-censorship to avoid this crime the scope of which is completely uncertain.

Placing the Inspection Board indirectly under the Minister of Justice through an amendment to the Law on Judges and Prosecutors especially does not comply with the principle of judicial independence under any circumstances. The amendment in question is clearly contrary to the leading motives put forward in the "yes" campaigns in the run up to the 2010 Constitutional amendment referendum. The annulment decision taken by the Constitutional Court in this regard is quite correct.

The structure of the Council of Judges and Prosecutors prior to the 2010 referendum was wrong. It was a structure that functioned in closed circuit, excluded the first instance judges and prosecutors and did not ensure democratic

legitimacy. Unfortunately, the structure formed after 2010 could not ensure independence and impartiality either. Now is the time to collectively create a reliable and accountable judiciary that has internalized performing independent, impartial and fair trials. For this purpose, we have presented to the Ministry of Justice and all political parties that have a group in the Grand National Assembly of Turkey a proposal which proposes the abovementioned Board to be divided into two separate boards for judges and prosecutors; which balances the number of members elected by the members of the higher judiciary and the first instance judiciary; which ensures that the elections are conducted democratically; which stipulates that the Grand National Assembly of Turkey elects members to boards with a qualified majority; and which ensures that the Union of Turkish Bar Associations also elects a member for each board, so as to emphasize the fact that the defence institution is a constituent element of the judiciary. The concrete proposal I have just mentioned is a constructive proposal drawn up in compliance with the reports of the Venice Commission, the directives of the Council of Europe and the Copenhagen criteria. Unfortunately, we have not yet received any evaluation on this proposal from any of the political parties.

Finally, we recommend that the legislature launches a parliamentary investigation in order to carry out necessary examinations about, determine the state of, and devise solutions for the alleged illegitimate structures that exist within the state, and especially the judiciary and the national police. In such a parliamentary investigation, everyone will, so to speak, let the chips fall where they may and many issues will thus be clarified. I would like to let you all know that as the Union of Turkish Bar Associations, we have prepared a report analyzing the Sledgehammer Case

(*Balyoz Davası*), in which final judgement has been handed down, especially in terms of manufactured evidence, and we will soon share this report with both the public and the parliamentary investigation committee we have proposed, if it is to be established.

Mr. President,

As you are well aware, the Special Courts and the anti-terror courts have been abolished by the Grand National Assembly of Turkey (GNAT) considering the concrete proposal of the Union of Turkish Bar Associations. This way, our country has been freed from the double-headed criminal justice system for the first time in the last 44 years. We want to thank primarily Your Honour and the ruling government, the main opposition party, all political parties that have a group in the GNAT and distinguished members of the Parliament for your contributions to this significant step. Thanks to this step, courts of general jurisdiction have examined detentions and issued many release orders, following findings of unlawful detention taken by the Constitutional Court in response to individual applications regarding detentions; the case known as the KCK Case was transferred to courts of general jurisdiction and many people were released following this development.

However, other arrangements that are necessary to redress the grievances caused by the special courts have not yet been made. If the Grand National Assembly of Turkey had not adopted the provisional article 2 stipulating that the special courts would continue ruling on the cases they had been working on when it adopted the law abolishing the special courts on 2 July 2012, many cases known by the public as

the Sledgehammer, Ergenekon, Fenerbahçe cases would be heard by the courts of general jurisdiction. Thus, we would not be facing a situation that cannot be justified by law, in which the courts that have been acknowledged to be anti-democratic directly by the GNAT still continue to rule on various cases, and our people would not have suffered due to sentences that cannot be accepted in good conscience. For this reason, it is again the responsibility of the Grand National Assembly of Turkey to redress the grievances caused by this unlawfulness. To resolve the unfair treatment in question the Union of Turkish Bar Associations has put forward a concrete solution that accepts the date of 2 July 2012 as a breaking point, and stipulates that judgments handed down after this date but have yet to be finalized should be reversed by the Supreme Court without further inquiry and that those that have been finalized should be subject to retrial for that reason alone. However, unfortunately, no progress has been achieved in this regard so far, and grievances suffered by people have not been resolved. The following are some other solutions we have proposed to ensure Turkey has a reliable criminal justice system:

Abolition of the institution of secret testimony that has no peer in democratic countries;

Prohibition of the acceptance of voice recordings and digital data, which are not reliable and can be doctored or adulterated, from constituting evidence without collaboration;

In the event that Turkey is sentenced by the European Court of Human Rights or the Constitutional Court to pay indemnification based on unjustified convictions and arrest warrants, ensuring that the judge responsible for such sentence be impleaded in relation to such indemnification.

When these arrangements are completed, Turkey will have covered a major distance on the way to becoming a state of laws, and the politicians who have managed and contributed to this success will feel the justified pride of this success.

Mr. President,

Is there anyone among us who lives in this beautiful country and does not feel in their heart the pain caused by the execution of the prime minister and ministers of our country following the 1960 military coup and the sorrow of the execution of our three young men, Deniz, Hüseyin and Yusuf? Can any one of us not mourn the death of our children Ethem Sarısülük, Mehmet Ayvalıtaş, Abdullah Cömert, Police Commissioner Mustafa Sarı, Medeni Yıldırım, Ali İsmail Korkmaz, Ahmet Atakan, Berkin Elvan and Hasan Ferit Gedik? Are there any hearts not wrenched by the tragic deaths of 34 of our citizens in Uludere or by the deaths of our fellow brothers in Sivas, Kahramanmaraş, **Çorum** and Reyhanlı? Are we satisfied with the refusal to prosecute the Uludere massacre or the resolution of the Sivas case by way of a time bar in favour of some of the defendants? Can we consider the murders committed in the name of fighting terrorism in Direk, Mardin; Yüksekova, Hakkari; Silopi, **Şırnak**; Altınova, Muş and Yaygın, Bitlis and many other unsolved murders as legitimate and give up on finding and punishing their perpetrators? Can we ignore the pain and sorrow suffered by our poets, authors or Nazım Hikmet who were all exiled and punished just because they were communists? Or is there anyone who is satisfied even today with the imprisonment of a metropolitan mayor of this

country for reciting a poem, by reading his intentions? Can any one of you talk without a lump in his throat about the conviction of Hrant Dink by those who didn't even care to read his article in its entirety and picked two sentences with tweezers, and his later murder? This land has witnessed far too much oppression. Do our hearts not wrench … for Kuddusi Okkır, who was chained to his bed lest he escaped even though he was too sick even to go to the toilet, or for Prof. Dr. Uçkun Geray, **İlhan** Selçuk, Türkan Saylan, Engin Aydın, Kaşif Kozinoğlu, Colonel Halil Yıldız, Colonel Ali Tarık Akça, Lieutenant Colonel Ali Tatar and most recently Colonel Murat **Özenalp**?

Can cases of bombed, evacuated villages; burned forests; unsolved murders; sixteen thousand lost people, six thousand of whom are children; "Saturday Mothers" awaiting their children; members of "Vardiya Bizde (now it's our shift)" and "Silent Scream" platforms waiting for their spouses and fathers; increasing child labour; dawn raids; endless lawsuits; darkened lives; women subjected to violence; wiretappings; blacklisting; books that are banned even before they have been printed; doctors being tried only for helping the wounded during the Gezi Park protests and similar other heartbreaking tragedies be left unsolved?

In addition, as a nation devoid of art and artists cannot have a full existence, will we turn a deaf ear to the screams of our artists who seek freedom in the arts and are rightfully concerned about their future and the future of the arts in Turkey due to the Draft Law on the Turkish Art Institution?

Let those with hearts of stone get angry with us. I'm addressing the President, Prime Minister, the ruling and

main opposition parties and other political parties and members of the Parliament of my country. We all should hear this silent scream and collectively try to resolve these problems starting from the grievances caused by the special courts no later than tomorrow.

It is obviously important that the parlour style to be used in the presidential election process should be unifying and embracing, given that the President elected will be the President of 76 million of our citizens. With all these thoughts, I cordially offer my best wishes for success to all esteemed presidential candidates.

Best regards.

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