

## An Overview of the 1982 Constitution in Terms of Turkish Criminal Judiciary Law

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### Introduction

The 1982 Constitution, approved on 07.11.1982 as Act No. 2709, includes rules that were reaction to the 1961 Constitution and the events took place during the period that it was in force. I must say that as of the time it was made, the 1982 Constitution provided provisions to impose more limitations on the individual's rights and freedom<sup>1</sup>. We can easily conclude that the 1982 Constitution aims to provide more power to the authority if we look at its "Introduction" section before it was amended on 23.07.1995 through Section 1 of Act 4121 where it had begun with the wordings, "...when leading to a situation of a civil war that may cause a threat, that has never been seen during the Republic era, to the territory and unity of the Turkish nation and to the existence of its honourable state..."<sup>2</sup>.

The amendments made in 1995 as well as with the latest amendments dated 03.10.2001 through Act 4709, both, are the attempts to change its characteristic of providing more power to the authority.

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<sup>1</sup> See Erdener Yurtcan, *Ceza Yargılaması Hukuku*, 1996, İstanbul, Alfa Yayım, p. 7.

<sup>2</sup> See Ersan Şen, *İçtihatlı ve Gerekçeli Ceza Hukuku ve Ceza Yargılaması Hukuku Mevzuatı*, İstanbul, 1996, Beta Yayım, p. 3.

These legislative efforts, which are limited to certain areas and far from being changes in the entirety of the Constitutions, fall too short to bring serious results. Such efforts should focus on the whole Constitution and should consider the principles of contemporary law.

When we look at the 1982 Constitution, we find that the general provisions for apprehension-custody and arrest, which are considered as protection measures, are provided under Article 19 of the Constitution. We see that the maximum custody period under this article was reduced through the amendment made on 03.10.2001 by Section 4 of Act No. 4709. It says, "*the apprehended or arrested person must be brought before a judge, with the exclusion of time required to deliver the suspect to the nearest court, within 48 hours, and in the case of organised crime (where three or more people participate in the criminal act) within four days after the arrest*". These custody periods, which differ depending on individual crime and organised crime, are too long. They have to be limited to 24 hours by being based on the principles of "State of Law" and "presumption of innocence". The Prosecution of the Republic and the security forces of the judiciary should have collected enough evidence on the suspect they accuse and have included them in the file when the suspect is presented to the judge. Following the opposite course, in other words, arresting the suspect with no evidence and trying to reach evidence by starting from the suspect, applying some arbitrary methods is totally inconsistent with law. According to Article 19/IV of the 1982 Constitution, "*the apprehended or arrested suspect has to be informed with the reason and the allegations for the arrest in writing, if not possible orally, and in organised crimes before they are brought before a judge at the latest*". This rule of the Constitution and new Section 13/IV, unfortunately based upon this rule, of the Police Duties and Powers Act amended on 03.08.2002 through Section 10/E of Act No.4771, violates "the suspect's right to be informed of the allegations when first arrested", which is a modern criminal judiciary principle, because a suspect arrested on the allegation of involving in an organised crime would not be able to know why he was arrested when the arrest was made or right until the time when he was required to make his first statement, and thus he would be unable to use his defence rights. The suspect may be subject to arbitrary treatment by the prosecutor and security forces because of the possibility of not being aware of what he would be charged with until he is brought before a judge. Article 19/IV

of the Constitution must be changed and the distinction related to "organised crime" has to be eliminated immediately without delays.

Article 19 and 38 of the Constitution include provisions protecting the suspect's defence rights. Article 36, especially, states "right to genuine trial" under the heading "freedom of in search of justice". Of course there is a reason for choosing the expression "right to a genuine trial" instead of the expression "right to a fair trial" that was added to Article 36 of the Constitution through Section 14 of Act 4709. The "genuine trial" principle, in a formal sense, goes beyond providing the suspect his rights and the opportunity of exercising his rights to defence<sup>3</sup>. "Genuine trial is not only related to the formation and working of the court, it also implies the objective and non prejudicial trial of the suspect. Not hiding, changing and getting rid of evidence that may benefit the suspect are all covered by the "genuine trial" principle. When you look at a trial, in a formal sense you may form the opinion that the suspect is provided with all of his rights. It might be possible to talk about a fair trial in a situation whereby the trial is run just as a matter of formality, the decision is made beforehand by pretending that the suspect was provided with all his rights and the evidence in favour of the suspect is hidden or consciously not presented, but we certainly would not be able to talk about a genuine trial<sup>4</sup>.

The provision provided under the heading "legal justice process" of the Article 37 of the 1982 Constitution should have been "natural justice process". Although Article 37 of the 1982 Constitution states that the case cannot be brought before any judicial organ other than the one empowered with the jurisdiction to deal with it at the time of the alleged crime, it falls short in conforming to "natural justice process" provided under the original form of 1961 Constitution. "Legal justice process" does not mean that the judicial organ would exist prior to the alleged criminal act, rather it means that the organ would be established before or after by law. Article 37's ground implies the sense of "natural justice

<sup>3</sup> See Feyyaz Gölcüklü-Şeref Gözübüyük, *Avrupa İnsan Hakları Sözleşmesi ve Uygulaması*, Ankara, 1994, Turhan Kitabevi, pp. 204-207.

<sup>4</sup> See for the details Friedrich-Christian Schroeder-Feridun Yenisey, *Dürüst Yargılanma Hakkı (Fair Trial)*, İstanbul, 1997, Alkım Yayımevi, pp. 42-44.

process”, but it still does not provide a complete guarantee of a judicial organ that has existed prior to the alleged criminal act<sup>5</sup>.

Article 138 of the Constitution foresees the independence of justice, and Article 138 has provisions for judiciary and prosecution processes. So, the Constitution aims the development of a justice system that would not be influenced by third parties<sup>6</sup>. Article 138 foresees judges, who are particularly the decision-making authority, to behave impartially and not to be influenced by others when making decision. However, the extent of how the independence of our justice system is under threat can be better and more clearly understood when we consider that the Supreme Council of Judges and Prosecutors, of which the Justice Minister and the Justice Minister’s Advisor are members, has the authority of appointing judges and controlling their personnel affairs, and that decisions made by this council cannot be appealed against. (See Article 159 of the 1982 Constitution)

In the following, you will find some evaluations based upon Turkish Criminal Judiciary Law, and some recommendations related to it. Given the significant relevance of the individual’s basic rights and freedom to Turkish Criminal Judiciary Law, the critics outlined below are worth considering and will benefit the recently proposed legislative efforts to amend the Constitution. In this work, I will not concentrate on the criminal judiciary law’s principles and provisions covered or deemed to have been covered by the 1982 Constitution, but I will try to evaluate some of them.

## **I- The Constitution**

Starting with its “Introduction” part, the constitution has to undergo some general amendments and has to be shaped up by being based upon the individual’s rights and freedom. Such a general amendment should be based entirely upon the individual’s basic rights and freedom, and should not try to structure every single institution and concentrate on details by attempting to avoid ‘being contradictory to the constitution’ allegations. When we look at the 1982 Constitution, we see that it provides for many

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<sup>5</sup> See Erdener Yurtcan, *ibid.* pp. 64-66.

<sup>6</sup> See for the details Bahri Öztürk, *Uygulamalı Ceza Muhakemesi Hukuku*, Ankara, 1994, Dokuz Eylül Üniversitesi Hukuk Fakültesi Yayını, pp. 133-135.

institutions that are harmful to the contemporary principles of law as a result of its propensity to avoid nullity orders by control mechanism established to avoid contradictions to the constitution. "National security courts" are very good example of such wrong practices violating the "the unity of justice" principle, and unfortunately the establishment of these courts is based upon the Constitution. (See Article 143 of the Constitution) Again, the category "absolute decision that cannot be appealed against" intending to avoid "judicial control" of some institutions' decisions is another example of a similar kind of mistakes. (See Article 159/IV of the Constitution)

The 1982 Constitution should be strengthened in terms of the modern principles of law and basic rights and freedom of the individual. For example, the "unity of justice" principle should be secured by the Constitution, and the judiciary should be organised under a single roof. Such a course will, at least, prevent the establishment of courts, even by law, that would use different judicial procedures.

## **II- The Constitutional Court**

We should never forget that it is an important judicial body in terms of maintaining general principles of modern law as well as protecting basic rights and freedom of the individual, therefore in this sense its control scope and powers have to be broad. It has to be furnished with full authority that would enable it to carry out its judicial review function over constitutional amendments, laws and government decrees in, both, formal and foundation terms, in carrying out this judicial review function it should not limit itself only with avoiding violation of the constitutional inconsistency, it should also ensure that there is no violation to the principles of modern law. We must accept that the strengthening is highly essential in terms of maintaining basic rights and freedom of the individual, and that such strengthening is particularly necessary at the point of curbing arbitrary practices of the legal authority.

I am of the view that the judicial duties and powers carried out like a criminal court within its status of the Council of State should be brought to an end. These duties and powers, provided under Article 148/III of the 1982 Constitution, should be transferred to courts of law,

and its sole duty should be to concentrate fully on protecting basic rights and freedom of the individual against the authority and to determine principles pertaining basic rights and freedom of the individual. The criminal judiciary function as the Council of State can be assumed by the Criminal Division of the Court of Cassation or by other courts of law as, indeed, the basic scope of these courts is the criminal judiciary.

People should be allowed to apply the Constitutional Court when their rights and freedom are violated provided only when the demand for retrial is based upon this ground. In other words, an individual unhappy about the final decision of a criminal trial, who claims that one or more of his basic rights and freedom were violated during the preliminary or final inquiry or appeal stages, should be allowed to take the matter to the Constitutional Court, so long as it is limited only with the issues related to the violation of basic rights and freedom, to within for instance a month after the final decision was made. The period required for the application, the beginning of this period, and the application procedures should be determined, and the individual should be able to apply by being bound by these conditions. This is what the task of the Constitutional Court is, in other words, it is preventing any possible generalisation of basic rights and freedom violations, setting up binding principles, and foremost of all, ensuring that the principles of modern law are enforced. When talking about the Constitutional Court, we should not perceive and consider it in a limited sense only as a court that controls the constitutionality of laws. Another main function of the Constitutional Court should be to develop precedents that would ensure the exercise of basic rights and freedom of the individual, set out necessary principles, and to prevent all the possible violations, particularly at the judicial stage. The Constitutional Court should review the matter brought before it in this regard to see whether or not there is any such violation and then it should make its final decision. The whole justice system should be bound by this decision, and the ruling on which the application to the Constitutional Court was based should be corrected.

According to Articles 150 and 152, it is not possible for the individual to directly apply to allege unconstitutionality of laws or government decrees. When we have a close look at these articles, we see that this right is available to only a limited number of individuals and institutions, and individuals can exercise it only indirectly under a limited

condition where an appeal application is made to the relevant court on the ground of unconstitutionality of a law or a government decree concerning an area of practice or possible practice, and where the said court sees the allegations serious enough and refers it to the Constitutional Court as an appeal case against the unconstitutionality allegations<sup>7</sup>.

The current arrangement of the Constitution, unfortunately, strictly restricts the individual to make applications against Constitutional amendments, laws or government decrees on grounds of being unconstitutional or contradicting with the principles of modern law, and as a result of this, many issues are left outside "judicial control" of the Constitutional Court. It is, undoubtedly, not appropriate to bring every ordinary matter to the Constitutional Court, however, individuals can be provided direct access to the Constitutional Court by including some provisions under the Constitution that would set out similar conditions required in making application to the European Human Rights Court provided under the European Human Rights Agreement and the additional protocols. This way, we can overcome the current difficulties and barriers to avoid illegal interventions in the individual's rights and freedom. So, the individual can request from the court that deals with the case or from the judicial review authority, at any stage before the absolute decision is made, to file an appeal case at the Constitutional Court by being based on the allegations that relevant issues related to the matter or possible constitutional amendments, or laws, or government decrees are contradictory to the Constitution or the principles of modern law. But, if the relevant judicial authority rejects his request, the individual can, then, take his rejected request to the Constitutional Court within a certain period of time after the conclusion of the matter. From the point of view of the individual, the possible outcome of the Constitutional Court in this request will be the basis of a retrial. Furthermore, even if the individual does not make any claim based upon 'being contradictory to the Constitution', he should be provided with the opportunity of making a claim based upon 'a ruling being contradictory to the Constitution' within a certain period of time after the case. The conditions required here can be outlined as using that particular ruling in the case, conforming to the time limits when applying to the

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<sup>7</sup> See Bülent Tanör, *İki Anayasa 1961-1982*, İstanbul, 1986, Beta Yayın, pp. 116-119.

Constitutional Court, not having a previous decision of refusal made by the Constitutional Court based on the ground. If the preliminary review on the individual request confirms that these conditions are in place, the Constitutional Court should review the matter based upon its ground and conclude it. This system will prevent the arbitrary actions of the legislative and administrative authority on one hand, and will open the ways to individuals to have legal matters that concern them be subject to "judicial review" on the other.

Considering that individuals are able make applications based on the violation of rights and freedom, directly, even to the European Human Rights Court, we must see that it is quite appropriate for an individual to make application directly, at least about matters concerning his own affairs, to the Constitutional Court related to claims of laws and government decrees being contradictory to the Constitution and/or the principles of modern law. This way, the individual's matter related to a claim of being contradictory to the Constitution will not be left up to a discretion of only the judicial authority that deals with matter. As we have explained above, the individual must certainly have the right to apply to the Constitutional Court bound by certain conditions.

In addition to the explanations given above, there is a lot of benefit in forming the Constitutional Court's panel from highly qualified academics or eminent lawyers with strong backgrounds of good character. The members of this panel should be determined by predetermining the institutions where these members are chosen by democratic election.

### **III- The Unity of Judicial Process and Natural Justice Process**

I believe that the unity of judicial process, which should be an indispensable principle of not only Turkish Criminal Judiciary Law but also be of the Turkish Judicial System, is very important. According to this principle, all the courts should be brought under the same roof, the same rules and procedures should be apply, and "division of labour" should be the basis of all judicial activities. In other words, the judicial courts, taxation courts, military courts (accept the ones that deal with disciplinary matters), and all the superior courts above these courts (the Cassation Court, Administrative Appeal Court, Military Cassation Court)



should be brought under the same roof, their working regulations and procedures should be unified under the same standards, and "division of labour" should be the basic principle of their activities. In a situation whereby the "unity of judicial process" principle is spoiled, new judicial institutions emerge and develop. Such institutions operate or are desired to operate according to different regulations and procedures, and behave differently depending on differences in the nature of cases and individuals. This sort of understanding, which would damage equal and genuine judicial treatment, should never be accepted.

"Equal and genuine judicial treatment" cannot be maintained just by providing independence to courts and judges<sup>8</sup>. Concessions made from the "unity of judicial process" principle will always lead to the establishment of extraordinary courts or judicial institutions that would work according to different regulations and procedures. This would mean the violation of the "natural justice process" principle, the main purpose of which is to provide a safeguard for the individual to have access to an appropriate judge and court to decide on his matter, not allowing for judicial discrimination between events and individuals, and avoiding the formation of judicial authorities that would lead to different practice<sup>9</sup>.

The enforcement of the "unity of judicial process" principle in the criminal judiciary should follow the same norms in all the areas of the criminal judiciary (including the inquire process); by following these norms, the establishment of courts such as national security courts that would operate by using different rules and procedures will not be allowed; and apart from this, freedom and same facilities will be provided for all the judges without creating different categories like 'the military criminal judiciary'. The "unity of judiciary process" can be maintained only when we enforce all these principles together. Within this scope, the criminal judiciary should be brought under the same roof, the duties and authorities of the criminal courts should be well defined, and specialisation in the criminal courts can be achieved only when "division of labour" in the "duties" is considered. Going to specialisation

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<sup>8</sup> See for the opposing argument Nurullah Kunter-Feridun Yenisey, *Ceza Muhakemesi Hukuku*, İstanbul, 1998, Beta Yayım, pp. 132-134.

<sup>9</sup> See Erol Cihan-Feridun Yenisey, *Ceza Muhakemesi Hukuku*, İstanbul, 1996, Beta Yayım, p. 62.

in the criminal courts would not in any way violate the “unity of judicial process” principle as long as these courts operate according to the same rules and procedures.

There would not be anything wrong with providing different regulations and procedures required for certain crimes, particularly in the protection area, within the framework of the “unity of judicial process” principle, as long as “equality” and the defendant’s rights are maintained. For example, it would be acceptable to apply secret listening and/or visual recording, or secret arresting in crimes that have certain weight. This way, no matter what the level of weight is, for every crime all the venues that might cause intervention to the individual’s rights and freedom will be closed.

Another reflection of the “unity of judicial process” constitutes itself in bringing the suspect before the judge whoever is on duty and the court wherever it is the nearest at the time of the alleged criminal event took place. Thus, the suspect could not be brought before a judge who is not on duty or before a court, which is not authorised and therefore regarded as “extraordinary” and doubtful in terms of independence, at the time of the alleged criminal act. The heading and the content of Article 37 of the 1982 Constitution have to be changed as “natural justice process”. There is a lot of benefit in going back to the provisions provided under Article 32 of the 1961 Constitution under its form before it was amended with Act No. 1488<sup>10</sup>. Under Article 32, “*Nobody can be brought before an authority other than his natural justice. No extraordinary authority that may result in providing jurisdiction to bring the suspect before an authority other than his natural justice.*” As can be understood from this, the important point about “natural justice process” is not to determine the judge and the court by law, rather it is to have the judge and the court authorised at the time of the alleged crime to run the case. This way, the running of the case by a court established by law or by a judge appointed after the occurrence of the alleged crime can be prevented.

At national security courts, different crimes are subject to different preliminary inquiries and the public prosecutor and judges conduct final

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<sup>10</sup> See Ersan ŞEN, *Anayasa Mahkemesi Kararlarında Ceza Hukuku*, İstanbul, 1998, Beta Yayın, pp. 398-422.

inquiries. As a result of this, they can make withdrawal decisions on cases on the ground of lack of jurisdiction and can transfer inquiry matters to other public prosecutors and courts. This kind of practice slows the legal process down, as well as causing a considerable degree of unfairness as result of the enforcement of Act No. 2845 of the Establishment and Procedural Act of the National Security Courts<sup>11</sup> and leading to the situation of suspects being tried unlawfully twice with the same crime. For example, a case can be set against a suspect under Section 1 of the Act 4422 of Fighting Against Criminal Organisations Established for the Purpose of Gain, and after 1 year, the national security court dealing with the case can decide that they lack jurisdiction and transfer the matter, under Article 313 of the Turkish Criminal Code (forming an organisation to commit a crime), to a criminal court that has the jurisdiction. Thus, as a result of different judicial procedures and practices by different courts, individuals face a significant degree of unfairness and losses.

#### **IV- Decisions and Allegations Based on Grounds**

All the decisions of the judge (The 1982 Constitution, Article 141/III) and the prosecutor's indictments, allegations, and addresses must be based upon concrete bases. Therefore, we should not be satisfied with having judges' orders to include bases. Being lawyers, prosecutors should also be obliged to do the same. Prosecutors especially, who deal with a lot of procedures concerning limitations of basic rights and freedom of the individual, when obliged to provide concrete bases, they will lose the chance of taking arbitrary stand such as asking for protection whenever they feel, preparing an indictment as they like, or refusing the suspect's demand without reason.

There is another issue that may be worth mentioning about "legal basis". In practice we see that some bases which judges use in their decisions are abstract and some of them are even difficult to consider as "bases". Whatever reason there may be, this is totally wrong, and such a practice, which is entirely contradictory to law, should be brought to an

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<sup>11</sup> See for the details Kayıhan İçel-Fusun Sokullu Akıncı-Yener Ünver-Barış Erman-Hasan Sınar, *Avrupa Birliği'ne Uyum Sürecinde Türk Ceza Hukuku*, İstanbul, 2000, Beta Yayım, pp. 17-18.

end. The “decision based on a ground” principle should be strictly followed by all the judicial authorities, which are the very first places to trust in terms maintenance of the individual’s rights and freedom. They have to make their decisions by being based on legal grounds, which will also enlighten and guide the public. These decisions should include legal grounds, and foremost, an account of a lawyer.

### **Conclusion**

In my account above, I focused on the principals and provisions of criminal judiciary law set out in the 1982 Constitution. I briefly outlined in what form these principles and provisions should be provided. Then, I went on made reference to the form which the Constitution should take to provide the principles of criminal judiciary law. I focused, particularly on, the criminal judiciary law provisions provided under the Constitution and the duties and powers of the Constitutional Court which control the enforcement of these principles. I must say that there is a big need for changes to be made in the actual text of Constitution in the area criminal judiciary law provisions and principles. There is a need for the improvement in the concepts such as “natural justice process” and “independence of justice”. Furthermore, it is also essential to bring an end to the Constitution’s criminal judiciary function and strengthen its most important status and authority function of controlling constitutionality of laws. I would like to further stress that the “unity of justice” principle, which I have always stressed in all of my work, should be maintained under the safeguard of the constitution.