# Opening Speech of the 47th Anniversary of the Foundation of the Constitutional Court (April 22nd, 2009)

■ *by Haşim Kılıç**

*Distinguished President,*

*I would like to thank especially to You, to the esteemed chief judges coming from abroad as well as their accompanying delegates, and to all our guests for being here with us to share the pleasure of celebrating the 47th Anniversary of the Foundation of the Constitutional Court and opening of our new premise. The aim of the Constitutional Court is to perform the 'rule of law', to safeguard the 'fundamental rights and freedoms' of the people, and to make the 'rule of law principle' prevail over all public and state institutions.*

*The most important function of a democratic constitution is to safeguard the fundamental rights and freedoms of an individual by way of restricting the political power effectively. This function of the constitutional laws is indeed the result of seeking a balance between freedoms and authority both of which are the prerequisites of the social living. It is obvious that individual freedoms can be assured only when the scale of the power is outlined and restricted with the legal rules. The history has witnessed that unlimited power can jeopardize the rights and freedoms severely.*

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*This also applies to modern democratic regimes which are built upon the majority principle. Democracy presupposes that the public holds the sovereignty; however, authority of power of a political majority which uses the sovereignty is not limitless. The 'limit' here is the rights and freedoms of an individual. However, it is an actual fact that substantial problems arise during the process of identifying and protecting these rights and freedoms.*

*This also applies to modern democratic regimes which are built upon the principle of rule by majority. Democracy presupposes that the people hold the sovereignty; however, the authority of power of a political majority which uses this sovereignty is not limitless. The 'limit' here is the rights and freedoms of an individual. However, it is an actual fact that substantial problems arise during the process of identifying and protecting these rights and freedoms.*

*As stated by one of the most important liberal philosophers of the last century, Friedrich Hayek, 'how to restrict the willpower of public will without introducing a superior will over it' constitutes the basic question of the democratic regimes. This question asked by Hayek actually outlines the existence and limits of the constitutional jurisdiction.*

*Constitutional courts were established in order to restrict the powers of the legislative and executive branches which reflect the public will. The legitimacy of such courts has also resulted from the function of restricting the power of the majority in order to protect fundamental rights and freedoms. However, constitutional jurisdiction will face a crisis of legitimacy if the actors performing in the area of constitutional law – also called the "negative legislator" – diverge from the reason of their existence or when they do not duly protect the rights of individuals or otherwise attempt to place the democratic political will under guardianship.*

*The sixth paragraph of the preamble to our Constitution states that "Each and every Turkish citizen has a natural right and authority to avail themselves of the fundamental rights and freedoms stated in this Constitutional Law without prejudice to equality and social justice; to live "AN HONORABLE LIFE" as shaped by the national culture, civilization and legal order; and to develop their tangible and intangible assets in this direction."*

*Such an understanding, which associates the development of tangible and intangible assets of a Turkish citizen with "an honorable life" is one of the most important constitutional elements which need to be considered.*

*Until the 19th century, "human dignity" had been an ethical neces-*

*sity in the studies of philosophers and thinkers. However, "human dignity" started to have a political meaning following the social fractures after the introduction of industrialization, colonialism and national states. Ensuring that life and social conditions which comport with the human dignity turned into a discourse which would affect the post 19th Century period.*

*Dignity came into existence with humans; although not called so initially, this basic value of dignity was already in the minds of all people. It was only in the 20th century that this basic value was adopted by state institutions and organizations, or in other words, incorporated into constitutional law. Constitutional laws and international documents generated in this century included the concept of human dignity. This concept reflected a historical knowledge in one way, but it was also a reaction against the huge disasters experienced in the same century. Nevertheless, it is not fully understood yet that 'human honor and dignity' must be recognized and safeguarded by the democratic systems by which the nations generate their constitutional laws and fundamental values with their own free will.*

*A pluralistic society must protect some common, universal values despite opposite prejudices, beliefs, opinions and diverse life styles so that it can survive to be have a liberal and democratic structure based on the principle of the rule of law. Therefore, the concept of human dignity should be seen at the top of all these universal values reflecting social awareness and representing the response for the protection of human rights.*

*There is no doubt that even feudal, militarist, theocratic or hierarchical states can claim the inclusion of the concepts of freedom, equality and fellowship. However, in such states, freedom applies to only some people, and equality and fellowship are available only among people who share common beliefs or ideologies. The fight against such systems was seen also when today's pluralistic democracy was created, and it continues forward to the future.*

*Human dignity constitutes the main axis of the Universal Declaration of Human Rights which was agreed to by the nations of the world following the devastating impact of militarist, autocratic and totalitarian systems. The first article of the Declaration states "All human beings are born free and equal in dignity and rights." Our national law adopted this Declaration on 6 April 1949.*

*Human dignity requires that no one can be owned, deprived of his/her rights or be subject to degrading punishment or treatment; it also requires that torture be prohibited; ending someone's life can not be*

*acceptable, and no one and no state institution can act against the belief that human life is the most valuable asset.*

*Human dignity is such a fundamental value that not only privileged or reputable people have it but also any human being has it without condition or without necessarily being a member of any organization or institution. Human dignity does not segregate people according to their gender, ethnicity, religion, or philosophical or moral values. Dignified treatment does not require ethnic, religious or ideological homogeneity, either. Human dignity is such a value that no system or state can dare to defy it. Political systems must take human dignity as granted, respect it and dedicate themselves to protect it. Treatment of human beings is the one and only basis to value such systems. States, systems, justice and similar structures can be respected as long as they serve humans and their freedoms and maintain their dignity. The renowned philosopher Kant says that a "human being is the true end of nature; and in no circumstances can be used simply as a means. "*

*Human dignity can neither be nullified on the grounds of others' fundamental rights nor be overridden by the prevailing "constitutional values" in the political structure. Constitutional norms actually indicate how far human dignity is protected. If human dignity is overridden in a constitution, then this law is not generated purely with the free will of that society.*

*Fundamental values regarding rights and freedoms identify the content and the direction of political function. In pluralistic democracies, the fundamental values have been freedom and democracy since the French Revolution of 1789. In other systems however, such values are based on the ideologies which steer state organizations and institutions.*

*From this perspective, we can say that human dignity can be made more visible by*

- *Respecting and protecting the bodily integrity*
- *Ensuring legal and social equality*
- *Providing humanitarian living conditions and*
- *Allowing the self determination of one's identity and personality according to his/her preferences. This also complies with the historical development of the fundamental rights and freedoms. As stated by Mirandola, this is indeed the process of self-actualization and self-control of one's destiny for the purpose of autonomy.*

*Distinguished President,*

*Being the "core" element of rights and freedoms, human dignity has bonds with the stable features of the state.*

*Pluralism, which already exists in human nature, does not allow single ideas or single beliefs. Democracy necessarily includes the existence of minorities and their right to express themselves. Democracy is based on diversity, which embraces tolerance and patience. A democracy which is devoted to such values should be given the chance to resolve its problems.*

*Differences and diversities in social opinions, which exist in democratic regimes, are necessarily reflected in political life and are important to have a sound political life. Internal peace can be ensured in that way only. Institutionalized pluralism and participation will be the remedy for chronic depressions.*

*It is now too late to turn around the Turkish people since they have already experienced democracy and have fundamental rights and liberty, along with democracy to guarantee their human dignity. Our people, who have made the principles of democracy a part of their way of life, cannot be dissuaded from these. Contrary to pluralism, single beliefs and single ideologies compel people into being hypocritical and to live a life that is not theirs. It would be completely irrational to say that democracy can allow such an attack on human dignity. Fanaticism, living in the concept of a 'single truth,' may establish an environment where 'the different' is transformed into 'the other' and destroyed. Each opinion, belief or ideology that defines its existence as the absence of 'the other' is clearly fanaticism. However, libertarian and pluralist democracy make it a must to conceive the existence of the different or "the other" as the warranty of its very existence. As long as we fail to establish a healthy relationship with 'the other' and do not deem it to be 'a friend,' it is impossible to reach the tolerance and pluralism required by contemporary democracies.*

*Democracy is a technique for peace that, although it does not claim to dissolve tension and conflicts, persuades the parties to live together in a tolerant atmosphere. A statement by Tolstoy which says "there are as many opinions as heads and are as much love as hearts" clearly underlines this colorfulness of a society's natural structure.*

*Our great savior Gazi Mustafa Kemal, who said "I do not want dogmas, otherwise we would stand aghast," as well points to a society that questions, criticizes and tries to find what it has lost on the bright way of science and draws the program of an honorable life of national will and democracy.*

*Briefly, it can be said that a democratic, secular and social state of*

*law described in the Article 2 of our Constitution, takes its strength from the immunity of human dignity.*

*Distinguished President,*

*The concepts of religion and secularism, while supporting some political movements strategically and logistically, have caused some restrictions on individual rights and freedoms. Border conflicts involving religion and politics have abolished the sound basis for disputes. It is inevitable that politics live within religion as long as the problems concerning freedom of thought and faith are unresolved.*

*Secular and democratic principles of our constitutional law make it a must that the state develops an objective and egalitarian attitude towards ideologies, beliefs and disbeliefs. The quality of being a state having the principle of rule of law means undertaking the mission to ensure impartiality.*

*The people of Turkey, who are determined to protect the democratic and secular structure of the Republic despite all these challenges, are aware through experience that the fact that their social demands are perceived as hostility against the state only defers and aggravates problems. Government institutions cannot cause discrimination by declaring part of the society as their allies and part of it as their enemies. A psychological atmosphere in which a victory for a segment of the society is the defeat of another segment, while bringing about solutions to social problems, does not contribute to peace and democracy, but rather triggers revenge. "Establishing counter balances" that are required by democratic insight will facilitate the solution of these problems while ensuring social conciliation. Thus, attempts to solve each and every social problem on the basis of constitutional norms that depend on the power of quantitative majority, regardless of counter balances, have resulted in historical mistakes that are very difficult to fix in the short term.*

*Beliefs and opinions hidden underground experience the advantage of a charm they do not deserve. Elimination of this unfair competition depends on the existence of a platform for discussion in a free atmosphere. The barriers against freedom of expression that force individuals to use pseudonyms should be abolished without harming human dignity. In this context, political parties continue to experience problems regarding freedom of expression. Although the unconstitutional actions of political parties are stated in paragraph four of Article 68 of the Constitution, judicial decisions are filled with ambiguities due to the fact that these unconstitutional actions are not explained in the Law on Political Parties.*

*The sanction of closing down a political party permanently should not be abolished, however, a framework should be adopted in accordance with the standards determined in the European Convention of Human Rights. The sanctions to be implemented should be adjusted without delay by separating actions and expressions involving terror, violence, pressure from peaceful actions; closure cases should not be instruments to shape democratic political life. Depriving treasury aid to political parties that act contrary to constitutional values under protection by Article 68 in the Constitution, instead of closing them permanently for these crimes by the Constitutional Court, is an interim sanction incompatible with the nature of a political crime. This is not a counterbalance and it needs to be reconsidered. Interim sanctions to be taken before closing down a party should be diversified depending on the severity of the offense and should be compatible and balanced with political concerns. Thus, there is no doubt that the inequality of sanctions in closure cases will be removed between political parties that receive treasury aid and those that do not. It may be appropriate to impose financial sanctions on political parties which have stated their accounts deficiently, incompletely or not at all during financial audits, but not otherwise.*

*Neither the 10% election threshold applied in elections throughout the country nor the 7% vote threshold for financial aid to political parties from the treasury can be justified based on the principles of democracy and fair distribution. These arrangements can be changed without harming the essence of democratic participation.*

*On the other hand, the link between human dignity and a state governed by the rule of law besides democratic and secular principles cannot be ignored.*

*A state governed by the rule of law is a state in which rights and freedoms are assured, all actions and transactions of the government are subjected to judicial review and individuals are provided with legal security far from any kind of fear and concern.*

*The state means power and authority. In cases where this is not limited and controlled, one can talk about arbitrariness and unlawfulness. The judiciary, as the fundamental element of the state governed by the rule of law, naturally decontaminates the society through the filter of law. There is no doubt that a judiciary that is not independent and impartial will increase the contamination rather than decontaminate the society. A strong and impartial judiciary is the guarantee of democracy, secularism and social state. The impartiality and independence of the judiciary which guides mavericks of law is vital to the authority of having the final word. The impartiality of a judge is his*

*dignity. The judge has to be indifferent to his feelings that will influence his impartiality, subjective opinion and anger in the court of his conscience. Feelings of friendship and hostility that affect the conscience of the judge remove his impartiality. The judge's fear of isolation from the social environment in which he lives, due to unpopular decisions that he has taken or he will take, is a feeling that never suits professional dignity and the most significant contribution he can make to his impartiality would be to save himself from this social pressure.*

*Since the duty to protect, seek and assure rights and freedoms, or in other words human dignity, has been consigned to the judiciary, this sacred duty can only be assured by the impartiality of the judge.*

*Distinguished President,*

*Although it is stated openly in Article 138 of the Constitution that "no body, authority, institution or individual can give orders and directives, send circulars, make recommendations or suggestions to courts and judges while exercising judicial power," attempts to influence and orient the judiciary are still continuing.*

*In every important case, while the judiciary is surrounded by political opinions, the 'judges' of the media and politics 'take' decisions and 'conclude' the case before the judges in court do. The efforts to orient and influence courts as well as the attempts to detract judges and prosecutors from their personal convictions by teasing out their private lives are simply crimes. Our prosecutors' failures to act against these crimes are thought-provoking and sad. The dignity of people who are declared guilty without a judicial decision is destroyed; this is a crime against humanity. Negligence at the stage of implementing laws causes wounds on people's dignity and honor that are difficult to recover from. Human dignity and personal immunity are the most important foundations of our system and declarations of human rights; it is the only value above the Constitution. Any kind of necessary adjustments should be made urgently before the anger caused by the destroyed human dignity turns into the feeling of revenge against democracy and state of law.*

*Although it is openly stated in Article 153 of the Constitution that the decisions of the Constitutional Court bind legislative, executive and judiciary branches and all natural and legal persons, the fact that the grounds for decisions which are so clear as to not cause any reservations are reinterpreted and amended, changed, made inefficient and rendered meaningless, and that these attempts are supported, disables this Article. The conjectural tension in political life has not allowed the continuation of statements against such attitudes.*

*Distinguished President,*

*The reform of the judiciary has turned into a symphony that has not ended for years. In almost every period, attempts and discussions have been made and statements have been issued on this topic, but the reforms have not yet been realized.*

*Problems pertaining to the judiciary that have been postponed or concealed are growing year after year. Despite the fact that the court houses built all over the country for ameliorating the working conditions of the judges and prosecutors is a promising development that has increased motivation, delaying contemporary reforms regarding the functionality of the judiciary for years is upsetting. I do not want to talk about the structure of the Supreme Council of Judges and Public Prosecutors, the actions and transactions of some institutions that were excluded from the judiciary and problems regarding the discipline and promotion of judges like Presidents of the Court have insistently done in previous years. Yet all these problems are facts already known by those outside the world of law. However, the fact that the faith in law and justice has weakened, due to an important blockage in judicial and administrative justice as the workload has increased significantly in these institutions in recent years, is followed with concern and worry.*

*I need to state immediately that the extraordinarily devoted efforts of our distinguished colleagues in judicial and administrative justice have not sufficed to decrease this rapidly increasing accumulation. Increasing the number of members of the judicial chambers has not contributed to the solution of the problem either. The "right to a fair trial" assured in our Constitution and fundamental human rights conventions to which we are a party is seriously violated when trials go on for years or lapse due to the increasing number of cases.*

*In this context, it would be useful to examine the statistical situation of our country in terms of the applications and concluded cases in the European Court of Human Rights.*

*According to the activity report of the European Court of Human Rights, among 97.300 pending claims at the Court at the end of 2008, 11.100 are applications against Turkey. Therefore, 11.42% of the claims that the Court deals with pertain to Turkey. It can be inferred from these numbers that Turkey, after Russia, is the country against which most applications have been made. In the last decade, 1652 of 8172 violation decisions made by the European Court of Human Rights pertain to our country and more importantly, half of these decisions are related to the violation of the right to a fair trial. In terms of*

*our country that has a rooted constitutional jurisdiction tradition, this situation indicates that it is a vital responsibility to remove the obstacles in a judicial system which should assure justice independently, impartially, rapidly, efficiently and effectively.*

*The most important reason for this negative situation is, doubtlessly, the fact that the necessary internal auditing system has not been established and operating effectively. As correctly stated in various forums, the most important step that should be taken is made the "constitutional complaint," which is a method to ensure that the applications are examined within domestic law before they are sent to the European Court of Human Rights.*

*In order for the Turkish Constitutional Court, the 47th establishment anniversary of which we have reached today and which was established as the fourth such court after those of Austria, Italy and Germany, to conduct its function as the "court of freedoms" as expected in this process, the right of individual application is needed. The European Council Committee of Ministers mentioned in its advisory decision 2004/6 of the need to recognize the individual application method in domestic law in order to reduce the case load in the European Court of Human Rights. Likewise, the European Council Commission of Democracy through Law, otherwise known as the Venice Commission, expressed their positive opinion on a Constitutional amendment recommending the constitutional complaint that had been declared to the Turkish public in 2004. However, despite all these calls, assurance has been left only to the constitutional control of "laws" against the concrete, current and painfully recurrent violations of fundamental rights and freedoms through the actions of thousands of institutions.*

*An individual application or constitutional complaint is defined as an extraordinary legal method that individuals resort to in cases when fundamental rights and freedoms guaranteed in the Constitution are violated by legislative, executive and judicial branches.*

*The way to instigate an individual application differs from country to country, however, it has been implemented in countries such as Federal Germany, Austria, Spain, Russia, Hungary, Ukraine, Poland, Czech Republic, Slovakia, Switzerland, Belgium, Mexico, Chile, Brazil, Argentina and South Korea.*

*The supremacy of human dignity should be effective not only against the legislative branch, but also against all authorities and persons using state power. In cases where social will cannot rule the state, it will not be possible to protect human dignity stated in constitutions because the state cannot take fundamental political decisions con-*

*cerning itself through its representatives, since it cannot know which powers belong to whom or the democratic control of these fields do not function properly or they have been transferred to bureaucratic mechanisms. This is because democracy is the way to attain and protect freedoms. This principle requires social pluralism to be reflected not only in the legislative branch but all other state institutions.*

*For more than twenty years, Turkey has accepted the binding jurisdiction of the European Court of Human Rights, the judicial body of the European Council, of which Turkey has been a member since its establishment. While the violation decisions taken in the process that started with the applications of our citizens who have exhausted domestic remedies are enriching the case law of the European Court of Human Rights, they also contribute to the strengthening of fundamental rights awareness of individuals. This interaction process created opportunities for a social transformation in our country through legal and constitutional transformations through the contribution of international relations. Our citizens who saw that they are subjects of both their own state, and directly the international community, are pleased to be able to obtain legal protection through international institutions. However, this also has a sad aspect – although our citizens can sue for their fundamental rights and freedoms through international jurisdiction authorities, they do not have the opportunity for constitutional complaint through which they can sue for fundamental rights and freedoms here in Turkey. This is a deficiency that needs to be included in the Constitution and a negative limitation in terms of having a right to legal remedies. While this situation turns into a belief that they can only protect their fundamental rights and freedoms through international judicial bodies, it causes a lack of faith in their national institutions, and can also weaken the legitimacy of a political system that is indifferent to these demands.*

*International judicial decisions do not have a direct effect in domestic law, but they lead to financial compensation for the victim. Besides this, with the binding effect of international relations, we are content with sometimes legal, sometimes constitutional adjustments here and there. However, when we look at the adjustments in our country, it is seen that the resistance is not against making amendments, but rather against reforms to better the practice of democracy and freedom. Despite the legislative will, it is quite difficult to overcome the habit of resistance in subjective "legal" perceptions by only making amendments. The internalization of fundamental rights and freedoms by institutions and having them practice it regularly can only be done through a sanction mechanism. Actually, in Germany where the indi-*

*vidual application method was implemented, the judicial system facilitated the authoritarian and totalitarian forces in Weimar period. However, only after 1949 did the judicial system play a role that advanced human dignity and freedoms, and it effectively influenced the case law of many national and international judicial authorities.*

*Without a doubt, with the amendment of Article 90 of the Constitution in 2004, which prioritized international conventions vis-à-vis legislation, the basic constitutional infrastructure regarding individual applications already exists. However, the fact that international conventions which have the effect of domestic law rules do not change the situation in practice because international conventions too, like our constitutional norms, include abstract expressions and such abstract expressions require the case law to further develop the rules; decisions contrary to the international conventions make the amendments ineffective. However, with this 2004 amendment, the will of the legislator requires the international freedom standards to be considered. It is clear that unless the case law of the European Court of Human Rights of more than a half century is considered, it will be meaningless for our country to be a signatory to the European Convention on Human Rights.*

*With the adoption of the individual application method, the practices in Turkey will be harmonized with international judicial practices, which are needed, and the demand for freedoms clarified through democracy will rule the state and society.*

*The criticism against the institution of the constitutional complaint since the end of the 1980s when individual applications were accepted to the European Court of Human Rights is because this institution is not known well. It can be observed that the criticism depends on the false hypothesis that if Constitutional Court is given the authority to accept individual applications against court decisions, the Court could become a "supreme court." Therefore, some points should be clarified.*

*There is no doubt that it is not possible for the Constitutional Court to function as a court of appeals for individual applications. As stated by the doctrine and academics in previous Constitutional Law symposiums, an individual application can only be made if all legal remedies are exhausted, and the control of the Constitutional Court will be limited to whether the interpretation preferred in the application of laws violates the fundamental rights and freedoms guaranteed in the Constitution. The Constitutional Court will not make case analysis, defines legislatives acts or establish provisions in the law to be implemented under any condition. As one cannot talk about the intervention of the Constitutional Court in the powers of expert courts, a new method of appeal is not at stake either. There is no doubt that there need to be*

*arrangements to prevent possible power conflicts between the Constitutional Court and other courts and to prevent the Constitutional Court from turning into an extraordinary appeal authority.*

*In the individual application method, the broad discretionary power to be assigned to "commissions" that will be formed specifically on the acceptability of the claims will function as a filter in eliminating unnecessary cases.*

*The recommendation of the individual application method which will lead to significant progress in the protection of fundamental human rights in all state institutions as well as judicial system should be seen as a way to remove obstacles in freedoms. Making these recommendations the subject of inter-institutional competition will do nothing but leave our problems unsolved.*

*Distinguished President,*

*In respect of physical location, I would like to express that the Constitutional Court, going through a significant amelioration process in Turkey's conditions with the great contributions of our State, has made considerable progress in becoming a rapid, efficient judicial body that concludes cases in periods envisaged by the Constitution with its efforts and decisions in the world of law. The devoted efforts of the officials of our Court indicate that the accumulation of cases due to various reasons will soon be cleared up.*

*Distinguished President, distinguished presidents of courts coming from abroad and distinguished guests,*

*You have honored us to share our happiness and joy; you gave strength to us. I would like to state that we are here to protect the eternal existence and integrity of Republic of Turkey and to protect the rights and freedoms of individuals in order for them to live in a state where the legal order prevails. I extend my regards to all of you on behalf of our court."*