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PSIR 263 - Fundamental Principles of Law

The Constitution of the Republic of Turkey [1982]

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Outline

The Constitution of the Republic of Turkey [1982]

In 1980, Turkey was a complex situation due to political impotence, and right and left conflicts. The mechanisms established by the long and detailed provisions of the 1961 Constitution failed to function well. Due to the division of sovereignty among various organs, a harmonious working environment could not be provided between institutions. Economic, political and social instability led to crises. The 1971 memorandum had not achieved its full purpose. The elements threatening terror, anarchy and national security in the country could not be prevented. In 1972, the events increased, especially on the execution of a number of revolutionaries such as Deniz Gezmiş, armed conflicts increased. A bomb exploded in the country almost every day. By 1979, the footsteps of the coup began to manifest themselves. The assassination of Nihat Erim on July 19, 1980, was a turning point in which the events erupted. As a result, on the night of September 12, 1980, the Turkish Armed Forces regularly seized state administration. The 1961 constitution was abolished and all political parties were closed down. In 1982, a new constitution was prepared. With the military coup of September 12, 1980, the army seized the government for the third time.

The legal framework of the new regime, which emerged with the military intervention of 12 September, was drafted by the Law on the Constitutional Order dated October 27, 1980, and numbered 2324, adopted by the National Security Council[1]. Article 2 of the Law on the Constitutional Order gives the powers of the Presidency to the President of the National Security Council, who also acts as head of state. The Law on the Constitutional Order has not touched the judicial body. During this period, the ordinary courts, the Council of State and the Constitutional Court continued to exist. With the Law No. 2485 of the Constituent Assembly dated 29 June 1981, a Constituent Assembly was established to prepare a new constitution[2]. The duties of the Constituent Assembly are listed in Article 2 of the Law No. 2485 on the Constituent Assembly dated 29 June 1981. The most important task is to prepare the new constitution. In addition, drafting the Law on Political Parties and the Election Law are among the duties of the Constituent Assembly.

[1] Düstur, Tertip 5, Cilt 19, p.106; Resmî Gazete, 28 Ekim 1980, Sayı 17145, p.233-234.
[2] Düstur, Tertip 5, Cilt 20, p.316; Resmî Gazete, 30 Haziran 1981, Sayı 17386 Mükerrer; Kili ve Gözübüyük, op. cit., p.237-245.

Comparison of 1961 and 1982 constitutions in terms of preparation

It has been customary to compare the 1961 Constitution with the 1982 Constitution in terms of the construction process in Turkish constitutional law books[3]. According to Ergun Özbudun, the similarities regarding the preparation of these two constitutions are as follows[4]. Both constitutions were prepared as a result of military interventions. Both constitutions were made by the Constituent Assemblies, some of which consisted of a military intervention committee (the National Union Council and the National Security Council), and the other part was composed of civilians (the House of Representatives and the Advisory House). In the preparation of both constitutions, the civil wing of the Constituent Assembly (House of Representatives and Advisory House) was not elected. In both cases, the Constitution, which was prepared by the Constituent Assembly, was finalized by a public vote. Following Ergun Özbudun, the differences in the preparation of these two constitutions are as follows[5]. 1961 The House of Representatives is more representative than the 1982 Advisory House. Two parties (CHP and CKMP), other than the Democrat Party, which were closed down in the House of Representatives, participated in the preparation of the Constitution. However, no political party participated in the preparation of the 1982 Constitution. One condition for membership of the Advisory Council is not to be a member of any political party on 11 September 1980. The 1961 constitution stipulated what to do if the text presented to the referendum was not accepted. In this case, the new House of Representatives would be elected and the preparation of the Constitution would be resumed. In the system of drafting the 1982 Constitution, it was not stated what would happen if the Constitution was rejected. Therefore, when the bill was rejected, it was pointed out that the idea of driving the military administration for a while came to mind[6]. In the 1961 referendum, political parties, apart from the Democrat Party, played an active role in raising public opinion. However, political parties did not play a role in the voting of the 1982 Constitution. Contrary to the 1961 referendum, the adoption of the Constitution in the 1982 referendum was combined with the election of the President.

[3] Kuzu, Burhan, 1982 Anayasasının Temel Nitelikleri, op. cit., p.31-287.
[4] Özbudun, Ergun, Türk Anayasa Hukuku, op. cit., p.30-31.
[5] Özbudun, Ergun, Demokrasiye Geçiş Sürecinde Anayasa Yapımı, op. cit., p.60-70.
[6] Özbudun, Türk Anayasa Hukuku, op. cit., p.32; Tanör, İki-Anayasa, op. cit., p.105.

Main features of the 1982 Constitution

The 1982 Constitution is not a 'framework constitution' that outlines the basic foundation and basic rights of the state, but a 'regulatory constitution' that seeks to regulate everything in every detail[7]. In other words, it is a constitution prepared with the 'casuistic method'[8]. Although the 1961 Constitution is shorter and less casuistic than the 1982 Constitution, the same can be said for the 1961 Constitution in general. According to Ergun Özbudun, this is because of the 'legalistic' nature of Turkish political culture which tends to find a legal solution to every political and social problem [9].

The 1982 Constitution is a rigid or harsh constitution, which is subject to procedures that are more difficult to amend than ordinary laws. The number of provisions that are prohibited to be changed in the 1982 Constitution has been increased. Secondly, the 'ratification' phase, which was not present in the 1961 Constitution, was added to the constitutional amendment process. The President may submit to the referendum the constitutional amendment which he did not approve[10].

In accordance with the general trend in the world, the 1982 Constitution strengthened the executive organ within the state structure[11]. The 1982 Constitution tried to provide this strengthening by increasing the powers of the President on the one hand and by giving the Prime Minister a superior position within the Council of Ministers[12].

The 1982 Constitution provides for ways to resolve congestions in the political system[13]. In certain circumstances, the President was authorized to renew the elections of Turkey's Grand National Assembly. In this way, the crisis resulting from the failure of the government to be established within a certain period of time can be solved. Had there been a similar provision in the 1961 Constitution, many government crises in the 1970s would have been solved[14]. Blockages emerged in the election of the President during the 1961 Constitution. In 1980, the President was not elected for six months.

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[7] Gözübüyük, Seref Anayasa Hukuku, op. cit., p.147.
[8] Kuzu, 1982 Anayasasının Temel Nitelikleri, op. cit., p.32.
[9] Özbudun, Türk Anayasa Hukuku, op.cit., p.36.
[10] Özbudun, Türk Anayasa Hukuku, op. cit., p.36-37; Kuzu, 1982 Anayasasının Temel Nitelikleri, op. cit., p.39-41.
[11] Kuzu, 1982 Anayasasının Temel Nitelikleri, op. cit., p.41.
[12] Kuzu, 1982 Anayasasının Temel Nitelikleri, op. cit., p.41-42.
[13] Özbudun, Türk Anayasa Hukuku, op. cit., p.40-42; Kuzu, 1982 Anayasasının Temel Nitelikleri, op. cit., p.42-44.
[14] Kuzu, 1982 Anayasasının Temel Nitelikleri, op. cit., p.43-44.

According to the 1961 Constitution, the quorum for assemblies was the absolute majority of the total number of members. Due to this provision during the 1961 Constitution, the work of the Assemblies was not possible from time to time[15]. Against this blockage, the 1982 Constitution reduced the quorum to one third of the total number of members. The 1982 Constitution reduced the number of MPs required for political parties to form groups in the Assembly from 10 to 20, reducing the likelihood that groups would use the work of the Assembly in a way that would prevent them[16]. Such institutions and rules, which aim to prevent blockages in the parliamentary system, are called 'rationalized parliamentarism' in the constitutional law literature[17].

The 1982 Constitution adopted a less 'participatory' model of democracy than the 1961 Constitution[18]. The 1982 Constitution aimed to a certain degree of depoliticization, that is, to move away from politics[19].

Evaluation of the 1982 Constitution in terms of the basic requirements of the state of law

Security of fundamental rights and freedoms

In liberal-democratic political regimes, fundamental rights and freedoms, which are defined as the foundations of political order and social peace, constitute the reason of existence of the rule of law principle[20]. Therefore, securing fundamental rights and freedoms is one of the basic requirements of the rule of law. The main means of achieving this is to count and regulate them in constitutions, which are texts that cannot be easily changed[21]. When we look at the 1982 Constitution, it is seen that this constitution does not pay attention to the principles of guaranteeing fundamental rights and freedoms and does not show the sensitivity expected from a libertarian constitution. Indeed, it is clear that this section of the Constitution on fundamental rights and freedoms is regulated by a reaction to liberal constitutionalism, which aims to protect the individual against state power. Acting with the motive of protecting the state against the individual, the 1982 Constitution has virtually blocked the use of freedoms with the three-ring restriction technique it has brought to fundamental rights and freedoms[22]. The rings prescribed by the Constitution for the

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[15] Özbudun, Türk Anayasa Hukuku, op. cit., p.41; Kuzu, 1982 Anayasasının Temel Nitelikleri, op. cit., p.42.
[16] Özbudun, Türk Anayasa Hukuku, op. cit., p.41; Kuzu, 1982 Anayasasının Temel Nitelikleri, op. cit., p.42.
[17] Özbudun, Türk Anayasa Hukuku, op. cit., p.42.
[18] Özbudun, Türk Anayasa Hukuku, op. cit., p.43; Kuzu, 1982 Anayasasının Temel Nitelikleri, op. cit., p.37.
[19] Özbudun, Türk Anayasa Hukuku, op. cit., p.43.
[20] Çağlar, Bakır, Anayasa Bilimi, p.126
[21] Soysal, Mümtaz, Anayasaya Giriş, op. cit., p.245
[22] Erdem, Fazıl Hüsnü, 1982 Anayasasında İnsan Hakları ve Hukuk Devleti: Eleştirel Bir Bakış, Yeni Türkiye. Sayı 21. p.639

use of freedoms; the general limitation reasons for all rights and freedoms, the reasons for special limitation and the non-abuse of fundamental rights and freedoms. Looking at the reasons for the general restriction of the constitution, it is seen that the constituent party counts all the conceivable reasons for limitation and aims to limit even the rights and freedoms (freedom of thought, freedom of science and art, etc.). On the other hand, when the nine general reasons for limitation in the constitution are taken into account, it is understood that these are ambiguous concepts. Therefore, it cannot be said that this regulation constitutes a guarantee for fundamental rights and freedoms. On the other hand, in the 1982 Constitution regulation, the judiciary was pushed to the second level in limiting the use of rights and freedoms such as 'immunity of persons', 'freedom and security of persons', 'privacy of private life', 'immunity of housing'. In the words of Bülent Tanör, “the right of the administration to speak on the freedoms regime has ceased to be an exception and has become a general rule”[23]. In summary; When it is evaluated in terms of the general regime of freedoms, it should be said that the 1982 Constitution does not show the attention and diligence required by the modern constitutionalism concept in guaranteeing fundamental rights and freedoms and makes arrangements incompatible with the requirements of a democratic state of law.

Judicial review of government

Another requirement of the principle of rule of law is to subject judicial control of the lawfulness of the actions and procedures of the administration. This means that the state paves the way for the freedom of the right to seek rights, and in this way enables judicial supervision to be realized and to ensure the realization of justice. It is important to note that in order for the judicial review of the administration to be effective, the principles of the extent and depth of the audit must be met. This means that no managerial transaction is excluded from the audit and that the proceeding can be considered by the judge with all its elements[24]. The biggest drawback of the 1982 Constitution regarding judicial supervision of the administration is that the provision “may limit the decision to stop the execution in case of emergency, martial law, mobilization and war as well as national security, public order, general health reasons”. It can be seen that the 1982 Constitution severely damaged the principle of the rule of law with the restrictions imposed by the administration on judicial supervision.

[23] Tanör, Bülent, İki Anayasa, p.137.
[24] Kaboğlu, İbrahim Ö., Kollektif Özgürlükler, p.161-162.

Judicial review of legislative proceedings

Judicial control of the actions and procedures of the administration is one of the basic principles of the rule of law, but it is not sufficient in itself to realize the rule of law. This principle should be complemented by judicial review of the proceedings of the legislature. Because the judicial review of the administration will ultimately be limited to the lawfulness of an action or transaction. For this reason, in order to be considered fully settled, the constitutionality of legislative procedures should be checked not only for judicial control of the administration, but also for legislative procedures[25]. For the rule of law, the purpose of overseeing the constitutionality of laws is to impose sanctions on legislative acts that are unlawful and violate fundamental rights and freedoms. More specifically, the purpose of constitutional audit is to ensure the repeal of laws that are enacted by the legislature and which violate freedoms[26]. The constitutional judiciary, which takes its legitimacy directly from being a means of protecting the rights and freedoms of the individual, has become the focal point of the idea of constitutionalism today. The constitutional judiciary, which is the guarantee of respect for human rights, is a necessary element of the democratic political system based on the rule of law[27]. When we look at the 1982 Constitution, it is seen that this Constitution does not show the sensitivity of the constitutional judiciary in terms of the principle of the rule of law and sensitivity to contemporary developments in this field. Indeed, the 1982 Constitution has introduced significant restrictions in this area, in contrast to the widespread developments in strengthening the constitutional jurisdiction and expanding its field of activity. In particular, the reactions of the Constitutional Court to some of the decisions of the Constitutional Court in the period of the 1961 Constitution led to a more limited control mechanism in the 1982 Constitution[28].

Judicial independence and judgeship assurance

The independence of the judiciary, which is a fundamental requirement of constitutionalism and the rule of law, is the main guarantee of fundamental rights and freedoms[29]. This is because the judicial authorities are the sole authorities to take refuge in the face of possible violations from the legislative and executive powers to individual liberties. If the judicial authorities are able to fulfill this function, they should be assured of their independence against both powers. Therefore, it is

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[25] Özbudun, Türk Anayasa Hukuku, op. cit., s.94; Akad, 1982 Anayasası ve Anayasa Mahkemesi Kararları, p.126.
[26] Kaboğlu, Kolektif Özgürlükler, p.153
[27] Kaboğlu, Anayasa Yargısı, p.159
[28] Erdem, 1982 Anayasasında İnsan Hakları ve Hukuk Devleti: Eleştirel Bir Bakış, Yeni Türkiye, p.641
[29] Sarat, Austin: The Rule of Law And Its Virties, p.9

very important for the rule of law that individuals feel assured of the independence and impartiality of the judicial authorities that distribute justice[30]. On the other hand, in order for democracy to secure itself, there is a need for independent judicial power to implement and interpret the law[31]. Indeed, the determination of whether the democratic game played in the political arena is played in accordance with the rules and the proper execution of the judicial function can only be realized by independent judiciary. The independence of the judiciary, which is vital for the democratic rule of law based on human rights, means that the judiciary can perform its duties freely, without being subject to any organs or authorities, without taking orders and instructions[32]. In the 1982 Constitution, the principle of judicial independence is set forth in the general terms "judicial power is exercised by independent courts on behalf of the Turkish nation" and "judges perform their duties on the basis of the independence of the courts and the guarantee of the judiciary". The provision that gives content to these general statements is included in Article 138 of the Constitution.

Conclusion

As a principle serving the limitation of state power, the state of law, has gained the richness of its content as a result of the changes and transformations it has undergone in the historical process. Today, the rule of law; It is a concept that guarantees human rights, closes the democracy deficit and complements it. Accordingly, the state of law constitutes an inseparable integrity with the concepts of human rights and democracy. This is clearly stated in the Copenhagen Document, one of the OSCE(Organization for Security and Co-operation in Europe) instruments, which is regarded as the main determinants of the common European legal space.

1982 Constitution, the rule of the individual and the autonomy of the society with the provisions that give priority to the state, with excessive restrictions and prohibitions for the fundamental rights and freedoms, the administration of the constitutional judiciary with the provisions of the narrowing of the judicial supervision of the constitutional judiciary with the prohibition of control functions and limitations of the constitutional judiciary evacuated and almost made it dysfunctional. In this form, the Constitution itself constitutes an obstacle to the creation of a democratic state of law based on human rights. In this case, in order to establish a democratic political regime based on the rule of law with its contemporary content, the constitution should not be changed but a new constitution should be made. However, considering that it is not possible to make a new constitution in the current conjuncture, what should be done should be a radical change

[30] Street, Harry/Brazier, Rodney: Constitutional and Administrative Law, p.377
[31] Selçuk, Sami: Demokrasiye Doğru, p.42
[32] Özbudun, Türk Anayasa Hukuku, p.331

in the 1982 Constitution, in order to eliminate the problems it has within the rule of law as well as the problems of democracy and human rights.

References

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Abbreviations

CKMP - Republican Villagers Nation Party
CHP - Republican People's Party (Turkey)
OSCE/AGİT - Organization for Security and Co-operation in Europe

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