

## **The Three Most Important Features of Turkey's Legal System That Others Should Know**

**Prof.Dr. A.Can TUNCA Y**

The most important features about the Turkish legal system can be commented under the following three headlines:

### **I. Historical Background in the Ottoman Empire period**

The motherland of Turks was the Central Asia. They have lived in that part of the world for thousands of years and founded powerful states and developed their own cultures. At that time their religion was Shamanism. The Shamans used to believe in good and bad spirits; the gods of earth and sky, water and fire. Starting from 5<sup>th</sup> century AD they started to immigrate to the west, particularly to Caucasia, the Middle East and the middle Europe. A part of them came to Anatolia and settled there in the beginning of 11<sup>th</sup> century after defeating the Byzantine (East Roman) forces. With the immigration when they contacted the Arabs they started to convert to Islam gradually starting from the 8<sup>th</sup> Century AD. By the time Ottoman Empire was first founded in 1299 in the western Anatolia the Turks have already adopted the Islam.

#### 1. The Era Based on Entirely Religious Law ( 1299- 1839)

The Ottoman Empire was a classical type of monarchy. The entire power and authority was collected in the hands of one man, the Sultan. The sultans ruled the Empire from its foundation until its fall under an absolute authority. They had an absolute authority of possession and disposition on the land, state, goods and even the lives of the people in the Empire. They were not only the absolute ruler of the Empire but also the highest leader of the whole Islamic world. As can one imagine, in such a state there was no constitution. The rules of Islam were the only legal order in the Empire. Islamic order is called "Shariah" means the way to follow. Islam is not only a religion but also a way of life based on the commandments of Allah (God) contained in the Koran. The Shariah regulates the life and behavior of the individuals. It is believed that the legal order is not made by mankind but it has already been made by almighty God.

There are four sources of Islamic Law: The highest and most important source is the holy Koran. Second comes the "Sünnet" ("Sunna"), the total of the inspired practices of the prophet Mohammed that can be regarded the interpretation of Koran by the prophet. The third source is "İcma" ("İjma") comprising the consensus reached by the islamic community on any question concerning the duties of the faithful. The fourth source is the "Kıyas" that means juristic reasoning by analogy. The Islamic law is called "Fıkıh" which consists all sorts of the Islamic rules.

#### 2. The Era of Joint Application of Islamic and Secular Laws

The secularization and westernization of law began in 1839 by the promulgation of "Tanzimat Fermanı" (Reorganization Charter) in the Ottoman Empire. Inspired by the 1789 French Revolution and its effects on the legal and political systems, the western minded "viziers" have persuaded the sultan to proclaim The Tanzimat Fermanı. With this Charter, the Ottoman rulers aimed at renewing the social and political life and structure of Turkey in line with

western formats and some European codes of law were adopted. Particularly in the fields of criminal, commercial, civil and procedural law some western tenets were adopted. The promulgation of Tanzimat Fermanı made great repercussions and received positive reactions from the European states. With this Charter the sultan restricted some of his absolute powers unilaterally and promised to obey the laws he passes, guaranteed everyone right to live and right of property and guaranteed that there would be no discrimination among the people due to religion. The Charter of Improvement (Islahat Fermanı) declared in 1856 is regarded as a confirmation of the 1839 Charter. Consequently in 1840 a new criminal code was issued but in 1851 it was replaced by a new code inspired by the French Criminal Code. This code contained the religious and secular law dualism. In 1856 a new Code of Commerce based on the principle of secularism inspired by the French Code of Commerce and in 1864 the Maritime Commercial Code were issued.

The most important reform in that period was the enactment of the Civil Code in 1876 which was called the “Mecelle-i Ahkamı Adliye” (“The Medjelle”). This was the first civil code ever made in the Ottoman Empire. Refusing the proposal of receiving a civil code from the west (namely Code Civil of France) only Islamic principles were adopted in Medjelle. Although it contained 1851 articles, some very important fields such as law of persons, family law, law of inheritance and partially real estate law had not been included. The casuistical method had been applied in Medjelle. Although its language was easy to understand it can not be regarded as a modern and sufficient civil code which meets all the needs. The Medjelle remained in force until the adoption of the Swiss Civil Code in 1926, 2 years after the proclamation of the Republic.

The constitutional order: The first constitution of the Ottoman Empire was enacted in 1876 right after the proclamation of the constitutional monarchy (meşrutiyet) as a result of vigorous activities performed by the Young Turks (a reformist action) against the Sultan’s absolute authority. This constitution which restricted the power and authority of Sultan considerably could last for only less than one year. The new Sultan suspended this constitution and his absolute regime returned. The Young Turks resumed their activities to oust the Sultan from office but this aim was reached only after 31 years and the Sultan put the previously suspended constitution into effect again in 1909. The amendments of 1909 Constitution expanded the legislative authority of the representative assembly to a considerable extent and for the first time a parliamentary government was established which exercised the executive power in the western sense. This document survived until the end of World War I. Upon losing the war the already shrunk Empire was invaded and divided by the victorious western states. But the Turkish nation did not give up and resisted this fait accompli. The national independence war started under the leadership of Kemal Atatürk which lasted three years and ended with the independence (1922) and foundation of a new Turkish State with new national borders. During the war the Grand National Assembly of Turkey was established in 1920 and an interim Constitution was declared in 1921.

### 3. The Era of Secular and Westernized Legal Order

After the proclamation of the Turkish Republic in 1923 an array of reformist movements began under the leadership of Kemal Atatürk. Atatürk indicated the future and the new destination of the Turkish Nation as the west. The Sultanate and Caliphate were abrogated. The most important reform of the modern state was the adoption of the Civil Code and the Code of Obligations of Switzerland in 1926. At that time the newest and the most reformist

civil act in Europe was the Civil Code of Switzerland that had been enacted in 1912 influenced by Roman-German legal systems. The public law-private law separation which goes back to the Roman Law and still prevails in the Continental European legal systems was also adopted by the Turkish Law System. Generally speaking a French influence can be seen in the public law while a Swiss-German influence is observed in the private law field. With the enactment of the new Civil Code in 1926 the Medjelle and all its Islamic extensions were abrogated and the equality of men and women was adopted. In 1926 a new Criminal Code was adopted from the Italian Criminal Code. After remaining in force for sixty years it was repealed in 2005 by a new Criminal Code which included some principles of European Union like the abolition of the capital punishment. The year 1926 was a very prolific year. In that year a new Code of Commerce was put into effect influenced by German and Swiss laws. This was replaced by a new code later in 1956. A new Civil Code based on more liberal rules and an absolute equality of men and women was put into force in 2000.

It should be noted that in the entire legal system today there are no Islamic rules and tenets, on the contrary the system is based on the classical Roman and Continental legal systems since the proclamation of the Republic in 1923. The equality of men and women, the independence of the judiciary and courts, the rule of law, the protection of human rights and freedoms and the secularism are the fundamental principles of our legal system today.

## **II. The Legal System**

The main features of Turkey's legal system can be summarized in two parts.

### **1. Constitutional Principles**

Since the foundation of the Turkish Republic the Turks tried three Constitutions. The Constitution which is in force today is the 3<sup>rd</sup> and last one. It stipulates that the Turkish State is a republic (Art.1). Art 2 enumerates the principle features of the republic as "the Republic of Turkey is a democratic, secular and social state governed by the rule of law, bearing in mind the concepts of public peace, national solidarity and justice respecting human rights, loyal to the Atatürk nationalism and based on the fundamental tenets set forth in the Preamble".

a) Nationalism: The Republic of Turkey is committed to Atatürk nationalism. This nationalism is different from some other versions of nationalism. It implies a rejection of racism, chauvinism, religion and language. However the Turkish State is an indivisible whole with its territory and nation (Art.3).

b) Democratic state: That means free and, competitive elections shall be held in the country. Since the western democracy is a multi- party democracy the parties can be founded without any limitation and prior permission, can operate and take part in the elections freely.

c) Separation of powers: As it is common in western democracies, the sovereignty is based on the separation of powers in Turkey. The sovereignty belongs only to the nation and shall be exercised by the authorized organs (Art 6). Such as, legislative power is exercised by the Grand National Assembly of Turkey, the executive power is exercised by the State President and the Government, while the judicial power is practiced by the independent courts.

d) Human rights: The Constitution of 1982 recognizes all basic human rights commonly found in liberal democratic states. The provisions of the European Human Rights Treaty are also applicable directly by the Turkish courts.

e) Secularism: This was one of the pillars of the reforms of Atatürk. This means the religious and state affairs shall completely be separated. The Constitution of 1982 like its predecessors retained the Kemalist notion of secularism. It bans the exploitation of religion for political purposes and personal benefits (Art.24).

f) Social state: This concept refers to commonly known as “welfare state” in the west. It comprises social rights (right to strike, unionize, collective bargaining etc.), social security and social justice.

g) Rule of law: This principle signifies the supremacy of law, in other words governing bodies must operate within the framework of law and their actions are subject to review by the independent judiciary. The Constitution states that “all acts and actions of the administration are subject to judicial review”. The legality of the acts and actions of the administrative organs are reviewed by the administrative courts and Council of State while the constitutionality of laws are reviewed by the Constitutional Court. The Constitution safeguards the rule of law with many other provisions, such as non- retroactivity of criminal laws, no one can be put to trial before a court other than the one previously determined by law, no court shall refuse to deal with a case within its jurisdiction etc.

h) The independence of the judiciary: The jurisdiction is carried out by the independent courts. The rule of law can only be preserved by the independent functioning of the judicial organs. No other state organ or body or any authority or any individual may give orders or instructions or make recommendations or suggestions to the courts or the judges. The courts decisions have a binding effect on the legislature, executive and the administration (Art.138).

i) Principle of equality: The equality of the individuals before the law without any discrimination, irrespective of language, race, color, sex, political opinion, philosophical belief, religion and the like is one of the most important features of the Turkish legal order. The Constitution emphasized the equality of men and women particularly (Art.10).

j) Direct effect of the Constitution: The provisions of the Constitution are the fundamental legal rules which bind the legislative, executive, judicial organs and other administrative organs and the individuals as well (Art.11).

## 2. Organization of Judiciary

The judiciary consists of the courts. The judicial system comprises a network of ordinary courts and high level courts. The judiciary is separated into four categories.

### a) Constitutional judiciary

The Constitutional Court takes the first place in the judicial hierarchy. It is the guardian of the constitutional order. It is empowered with the review of the acts passed by the legislative organ and annuls any act entirely or partially against the Constitution. There are two other highest level courts in Turkey. They are the Court of Cassation and the Council of State.

b) Judicial jurisdiction

This is separated into two: The civil and the criminal. The criminal judiciary refers to the judiciary of criminal offences, fines and punishment to be applied to those who violate the legal order. The penal courts apply the Penal Code of Turkey 2005 which repealed the former code enacted in 1926. The civil judiciary, on the other hand, deals with the civil law matters and conflicts. The civil judiciary courts are divided into two. The peace courts and first instance (essential) courts. The criminal courts are divided into three, as the peace criminal, the first instance criminal and the heavy criminal courts. Both types of courts are ordinary courts and deal with the conflicts stated specifically in the law according to the type and weight of the conflict. If appeal is made against their decisions, no matter they are criminal or civil law disputes or awarded by peace or first instance courts, they all are supervised by the highest court named the Court of Cassation. There are no second (intermediate) instance courts in Turkey. The Court of Cassation, divided into 21 civil and 11 criminal chambers is overburdened with too many cases appealed for review and reversal every year. There is no jury Turkish legal system.

The first instance courts in the civil judiciary are divided into some specialization courts such as commercial courts, labour courts, land register courts, family courts and consumer's courts. They handle the cases specified in the relevant laws. The criminal courts have also some specialization divisions such as juvenile courts and intellectual property courts. The peace and first instance civil and criminal courts are established in every district of the country. The ordinary courts consist of one judge while the commercial and the high criminal courts consist of three judges.

Before the criminal courts, public prosecutors represent the public and prepare the indictment. The public prosecutors are bound to the Ministry of Justice from an administrative perspective. The Chief Public Prosecutor functions in the Court of Cassation.

c) Administrative judiciary

The administrative law deals with the conflicts between the state or state organs and the individuals related to the public law matters. The administrative cases are settled by the administrative courts. The tax courts are also regarded administrative courts. The Council of State operates as the last instance court and first instance court for some specific cases prescribed by law. The Council of State examines and gives its opinions on draft regulations or decrees that will be issued by the Council of Ministers as well.

d) Military judiciary

The military courts consist of the officers studied law deal only with the military criminal and discipline offences of the military personnel. The military judiciary is subdivided into military criminal judiciary and military administrative judiciary. The decisions of the military discipline courts are revised by the High Military Court of Appeals while the High Military Administrative Court of Appeals is the first and the last instance for the supervision of the disputes arising from administrative acts or actions involving military personnel or relating to military service. The military jurisdiction has been foreseen by the Constitution.

### **III. Legal Education and Profession**

1) Legal Education

In order to begin a university education one must be graduated from a high school (secondary education). But this is not enough. A secondary education graduate is required to succeed in the University Entry Exam which is held by the Higher Education Board (YÖK) every year in the country. The students eligible for university education are determined by the points scored and preferences made. There are two types of universities in Turkey: The state universities and the foundation (private) universities. Both universities function under the supervision of YÖK. The only difference between them is that those who study in the private universities must pay a higher amount of tuition. There are law faculties in the most of the universities. The legal education lasts for 4 years as a rule. But there is a project to raise the duration to five years. Those who can not succeed to finish the legal education maximum within seven years their matriculations drop. In the curriculums there are mandatory and elected legal classes beside some supplementary classes, such as political history, public finance, economics, legal sociology etc. There are some minor differences between the curriculums of the law schools. The classical and the mandatory classes are the introduction to law, civil law (family law, law of the persons, law of property, law of inheritance), law of obligations, constitutional law, roman law, administrative law, criminal law, labour law, social security law, commercial law, international law, international private law, bankruptcy and enforcement law, maritime law, civil procedural law, criminal procedural law.

## 2. Legal Profession

There are wide ranges of job opportunities present for the graduates of law schools. First of all, the law school graduates can become a judge, a public prosecutor, an attorney at law (barrister), a notary public, an academician. But law school graduates have also the right to become a diplomat, a bank employee or an auditor, a governor, a district administrator and the like. Mostly the law school graduates apply for becoming an attorney at law. Only in the Istanbul Bar (the second greatest bar in the world) there are almost 25.000 attorneys registered.

In order to become an attorney at law (barrister) the law school graduates are required to apply to a bar for training. The applicants must be a Turkish citizen first of all. The attorneyship training lasts for one year. The first 6 months period is exercised in the courts, the second 6 months period is carried out in a law firm. During this period the interns attend four classes (2 mandatory, 2 elective) and write a project (thesis) of minimum 15 pages to be defended before a jury consisting of expert lawyers. In order to practice law one must enroll to a bar. The attorneyship is regulated by a special act No. 1136(1969).

In order to become a judge or public prosecutor, the requirements stated in the Act. No. 2802 must be met. According to this Act the requirements are, being a Turkish citizen, passing an entry exam, being not older than 30 years of age or 35 years of age for those who have a PhD or master degree, not being married to a foreigner, completion of military service, not being previously convicted of some crimes specified in the law. If all the requirements are met the judge and public prosecutor internship lasts for 2 years.

It is possible to switch from the barrister(ship) to the public prosecutor(ship) or judge(ship) and vice versa by meeting some requirements. There is a draft bill before the Parliament that makes some modifications in the Act No. 2802.

It should be remembered that the prosecutors carry out their jobs under the conduct and

supervision of the Ministry of Justice while the judges work totally independently. However both of their professional promotions and appointments are carried out by an independent board, the High Board of Judges and Prosecutors in order to their independences is safeguarded.