



THE FORMATION AND DEVELOPMENT OF MODERN TURKISH LAW

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ABSTRACT

The formation and development of modern Turkish law goes back a long time. The formation of law in Turkey is inextricably linked with the state. The legal system of Turkey was perfectly formed during the Ottoman period and increased its influence. We will consider the emergence and development of constitutional law, administrative law, criminal and criminal procedural law in the common law system.

Keywords: formation of Turkish law, legal system in the Ottoman Empire, constitutional law, administrative law, criminal law, criminal procedural law.

ANNOTATSIYA

Zamonaviy turk huquqining shakllanishi va rivojlanishi uzoq davrlarga borib taqaladi. Turkiyada huquqning shakllanishi davlat bilan uzviy bog'liqdir. Turkiya huquqiy tizimi usmoniy davrida mukammal shakllanib o'zining nufuzini oshiradi. Umumiy huquq tizimida konstitutsiyaviy huquq, ma'muriy huquq, jinoyat va jinoyat protsessual huquqning paydo bo'lishi va rivojlanishini ko'rib o'tamiz.

Kalit so'zlar: turk huquqining shakllanishi, Usmoniy imperiyasida huquq tizimi, Konstitutsiyaviy huquq, ma'muriy huquq, jinoyat huquqi, jinoyat protsessual huquqi.

I. CONSTITUTIONAL LAW

The Ottoman Empire was an absolute monarchy in terms of its state administration system. All state powers were concentrated in the sultan. In the Ottoman Empire, as in the West, a constitutional state order could not be established in the 18th and 19th centuries. It is stated that the reasons for this can be gathered in three points, generally military, Islamic and structural reasons.

The "Sened-i İttifak", which was accepted and signed between the representatives of the central government and the notables in 1808, is shown as the first step of the constitutional development in the Ottoman Empire. Sened-i İttifak is an attempt by the ayan to strike a balance against the Palace; but it was not successful. With this Act, there were provisions such as that no one other than officials with official titles could interfere in the affairs of the state, that the grand vizier would participate in the use of power and that he would be responsible for this. However, a mechanism has not





been introduced to ensure the implementation of these provisions. Later, the movements in the Tanzimat period, which started with the Gülhane Calligraphy Imperial (1839), were reform attempts to strengthen the authority of the Palace and would not result in the limitation of power. The desire to limit the authority of the palace will not come from the masses of the people, but from the intellectuals (Young Ottomans). The first written constitution, 1876 Kanun-i Esasi, was the work of intellectuals. The Constitution of 1876 established a parliament called the "Meclis-i Umumi", consisting of two chambers, one formed by election and the other by the appointment of the sultan. However, the powers of the Parliament were kept very narrow. For example, in order for a member of parliament to propose a law, he first had to get permission from the sultan. The bills accepted by both assemblies could not enter into force without the approval of the sultan. The sultan had the authority to dissolve the elected assembly at any time. As a matter of fact, in 1878, Sultan Abdulhamit II, benefiting from this authority in the Constitution, dissolved the parliament and started to rule the country again with absolute monarchy. This period II. It lasts until the end.

II. The Constitutional Monarchy was the period in which the Kanun-i Esasi was re-implemented in 1908, as a result of the influence of an opposition movement called the "Young Turks" and the revolt of the military units in Rumelia in 1908 in 1909; With the changes made in Kanun-i Esasi, a democratic constitutional monarchy constitution was created and a parliamentary system was introduced in the Ottoman Empire. The Sultan's right to dissolve the assembly in the Constitution and the requirement to obtain the permission of the sultan in order to propose laws were abolished with these amendments. II. The Constitutional Monarchy and the constitutional changes brought by it became a broader 'intellectual movement'. This regime collapsed with the defeat of the First World War, in which the Ottoman Empire also participated. In 1919, Turkey was occupied by the allied states.

The TBBM, the new parliament established since Istanbul was under occupation, convened in Ankara on April 23, 1920, and the Teşkilat-ı Esasiye Law, a short constitution dated 1921, was adopted. The 1921 Teşkilat-ı Esasiye Kanunu, in fact, is about the constitutional order of the new Turkish State, which will gain independence, and includes a radical revolutionary change in the understanding of sovereignty. This constitution is the first time that sovereignty belongs to the nation. Its main difference from the Ottoman constitutions is that all powers are gathered in the Grand National Assembly of Turkey and the executive is now an organ that comes out of the legislature and is subordinate to it. In this Constitution, executive and legislative powers are gathered in the Assembly, and the Assembly is empowered to guide and change the





ministers whenever it wishes. This system of government is the “assembly government” system. With the arrangements in the Constitution, the transition to the principle of decentralization in provinces and sub-districts has been prepared.

The Turkish Grand National Assembly proclaimed the Republic on 29 October 1923. The 1924 Teşkilat-ı Esasiye Kanunu, which was prepared shortly after the proclamation of the Republic, envisages the TBBM as the sole authorized body in the exercise of sovereignty, as in the 1921 Constitution. Unlike the 1921 Constitution, the 1924 Organization-ı Fundamental Law accepted the concept of “natural right”, which has been going on since the French Revolution, and included classical rights and freedoms (art. 68-88). According to Md 68, Every Turk is born free, he lives free. Freedom is being able to do anything that will not harm others. The limit of freedom, which is one of the natural rights, for everyone is the limit of the freedom of others. Only the law draws this limit. Rights and freedoms are not regulated in the Constitution in a wide and detailed way, and only their names are often listed. There are no regulations regarding the protection of these rights and freedoms; As in the 1876 Kanun-ı Esasi, the protection of rights and freedoms consisted of “legal guarantees”. The democratic understanding of this Constitution is based on the majoritarian understanding of democracy, which is rooted in Rousseau's view of the general will. However, in the Ottoman Empire, the Sultan's understanding of sovereignty was ended and the Grand National Assembly of Turkey representing the whole nation was considered the greatest assurance. While the Assembly exercised its legislative power (art. 6), the executive power could be exercised by the President and the Council of Ministers (art. 7). The Assembly had only the authority to give a vote of confidence in the formation of the government (art. 44). Thus, the transition process from the parliamentary government system to the parliamentary government system was started. Some changes were made in the 1924 Constitution from time to time. The most important of these, in terms of accelerating Turkey's westernization, was the inclusion of the principle of secularism in the Constitution in 1937.

The 1924 Constitution was repealed by the 1961 Constitution, which was prepared by a Constituent Assembly and adopted by popular vote. The military movement of May 27, 1960, which led to the constitution of 1961, is considered as the aspiration of the military and civilian bureaucracy to reorient the state. Those who drafted the 1961 Constitution, first of all, will remove the TGNA from being the only authorized body in the exercise of sovereignty, against the pressure of the parliamentary majority. Thus, while a regulation was introduced to restrict and supervise the powers of the parliament for the realization of democratic life, on the other hand, with an optimistic point of view, it was aimed to limit the political power by creating a balance through





independent courts and autonomous institutions. For the first time, a Constitutional Court was established, modeled after the German Federal Constitutional Court, to oversee the constitutionality of laws. The independence of the judiciary is guaranteed against the executive branch. The legislature is composed of two chambers. The powers of local governments have been increased. Political parties were accepted as indispensable elements of the democratic system, and the right to form associations and unions was guaranteed. Fundamental rights and freedoms have been guaranteed by the constitution, and the limits of their regulation by laws have been drawn. For the first time, the social state principle was adopted.

However, these regulations in the 1961 Constitution failed to deliver what was expected in terms of the development of the country. When 1980 is entered, the multifaceted turmoil in the society will lead to the military operation of September 12, 1980, this time depending on the chain of command. With the military operation of September 12, 1980, the implementation of most of the provisions of the 1961 Constitution was terminated, and studies for a new Constitution began. The 1982 Constitution was drawn up by a Constituent Assembly made up of civilians. The members of the Constituent Assembly were not elected by the people in general elections, but by the National Security Council, which took the military action. The National Security Council gave its final shape to the 1982 Constitution before it was put to the public vote, unlike 1961. Thus, the result was that the Constituent Assembly, which was formed by civilians who prepared the constitution, only acted as “consultants”. It was put to a public vote in 1982 and accepted by a great majority and is still in force.

The 1982 Constitution, which is still in force, is a constitution prepared with the casuistic method. There is no doubt that the legalistic nature of Turkish political culture, which tends to find a legal solution to every political and social problem, plays a role in this. The prevailing thought in the 1982 Constitutional studies is that the events experienced in the 1961 Constitution period in the past resulted from the weakness of the executive. In fact, every constitution is a reaction constitution compared to the previous constitution. The 1982 Constitution, which is still in effect, was also prepared in response to the previous 1961 Constitution.

While the 1982 founders were preparing a detailed constitutional text, they would also seek “strong power”. Thus, the powers of the President, one of the two elements of the executive branch, were increased. Provisions were introduced to eliminate the obstruction in the decision-making of the Assemblies that emerged during the 1961 Constitution period; that is, the number of Assemblies was reduced to one, the President was given the authority to dissolve the Assembly and renew the elections





under certain conditions, although it is almost impossible in practice (art. 116). Trade unions (art. 52/I, 54/VII), associations (art. 34/IV) and foundations (art. 68/VI) are prohibited from dealing with politics. As the main basic characteristics of the state, republicanism, democratic state, state of law, state that respects human rights, social state and loyalty to Atatürk's Nationalism are constitutionally determined.

Turkish constitutions are traditionally hard to change, in other words, rigid constitutions. However, the 1982 Constitution has been amended frequently within Turkey's efforts to harmonize with the European Union legislation, the death penalty has been abolished, and important amendments such as lowering the voting age to 25 and aggravating the closure of political parties are still being carried out.

II. MANAGEMENT AND MANAGEMENT JUDICIAL LAW

Administrative law is a branch of law that started to develop in continental European countries, especially towards the end of the 19th century. Administrative law in Turkey has taken its place in the legal system by taking France as an example, within the westernization efforts of the Ottomans during the Tanzimat periods. Although our administrative law is largely under the influence of French law, it shows a unique development today, as it was when it was first adopted. The basic understanding of administrative law in Turkey, unlike France, takes place in formal constitutions, many rules that direct the administration are included in the formal constitution.

The main source of Turkish administrative law is the 1982 Constitution. Administrative law system is based on the principle of written rule of law. In addition, the decisions of the courts are also effective in the formation of law. The impact of judicial decisions on administrative law, which is in a state of development, is great. He developed the jurisprudence of the French Council of State (conseil d'Etat), which greatly influenced French administrative law. The situation in our country is similar to the one in France, the Council of State is very influential in the development of administrative law. The organic administrative structure of the Republic of Turkey is similar to that of France, it is centralized and not federal. However, the parliamentary system is valid, not the semi-presidential system as in France.

An independent administrative judiciary system is valid in Turkey, separate from the judicial judiciary; Disputes are resolved in specialized courts (administrative courts) separate from judicial courts and with different methods and rules from private law disputes. The Law on Administrative Jurisdiction dated 1982 and numbered 2577 is in force. Administrative justice system, like administrative law, has been influenced by France. The Council of State, which is the highest court in the administrative



judiciary, was established for the first time during the Tanzimat period, thus, an administrative judiciary was accepted alongside the courthouses.

An Administrative Procedure Law is still being prepared in Turkey. The reason why no Administrative Procedure Law has been enacted so far is that Turkey follows France, from which it has largely quoted its administrative law and system. Likewise, in France, the administrative procedure is tried to be regulated by laws or decrees that are scattered and do not reach the essence of the business.

III. CRIMINAL AND PROCEDURE LAW

During the Ottoman Empire, the principles of Islamic law were applied. However, it was aimed to create a law that was freed from the influence of religious records, and that was subject to the legal provisions of the civilized world, especially with the Penal Code Code, which was enacted for the first time in 1858. This law is a translation of the French Penal Code of 1810. However, in some parts, provisions concerning the Shari'a law were added, for example, the institution of diet was preserved. In addition, more than one marriage that was punished in France was not punished in this Law. It remained in force until 1926 and the TCK of 1926, which is still in effect, was repealed. The drafters of the Law of 1858 failed to achieve their aim of purifying the criminal law from the influence of religion. It was stated in the law that the provisions of sharia would also be applied.

In Islamic criminal law, crimes were divided into three: 1) crimes against the rights of Allah; These were crimes punishable by hadd punishment and having a religious character, but also covering some crimes such as adultery, adultery slander, theft. These were crimes that were shown in the Qur'an, whose punishments were invariably determined, and which were prosecuted even though there were no complaints. 2) Crimes against the rights of the servants; crimes such as homicide, injury, miscarriage. It is considered that these only concern individuals, and if the relevant person sues, they would be prosecuted. In these crimes, retaliation could be applied and amnesty or peace would be valid. If only one of the heirs forgave the perpetrator, the right of retaliation would decrease and this right would turn into a compensation type payment. It was called a diet. 3) The crimes punished by Taziren were the crimes that were excluded from the crimes against the rights of Allah and the servants and that the head of state had the right to punish. Which acts were to be punished in this way was left to discretion and was not precisely determined. Tazir punishments included scolding, beatings, fines, imprisonment, and even death. On behalf of the head of state, the judges imposed the punishment they deemed appropriate for the gravity of the act and the moral status of the perpetrator.





The Turkish Penal Code, which is currently in force, entered into force in 1926 after the establishment of the Republic. The source of the TPC is the Italian Penal Code of 1889 (this Law was translated from the French text into Turkish, not from the original Italian language). Later, some changes were made based on the Italian Criminal Code of 1930. TCK divides the crimes into two as crimes and misdemeanors in accordance with the Mehaz Law. The most important criticism brought against this Law is that crimes against property are punished with heavy prison sentences.

Although there is still a draft TCK, it has not been submitted to the Turkish Grand National Assembly yet. With the important changes made in the TPC from time to time, it is tried to adapt to modern and democratic life. For this reason, it is also possible that separate laws are enacted; for example the Law on the Establishment of Juvenile Courts, the Law on the Duties and Trial Procedures (1982) and the Law on the Execution of Sentences (1965).

Criminal proceedings in today's Turkey are regulated by a separate law. During the Ottoman period, the judges were judges. The one-judge system was in effect. The main evidence was the witness statement. In some cases, the number of witnesses was predetermined. For example, adultery required the testimony of four men, and only if they testified in a certain way could it be proven that the crime had been committed. In other cases, at least two men or one man and two women were required to testify. The kadis were responsible for dealing with both criminal law and private law matters, and the procedure applied for both jobs was not different. There was no audit judgment against the decisions made. The first Code of Criminal Procedure was the Proceedings of the Criminal Procedure Law of 1879. This law is a translation of the French Code of Criminal Procedure of 1808. While the system of our courts was taken from France, the jury system there was not. It was amended in 1913 by the Law on Magistrates, which provided for a simpler and more rapid trial procedure for minor offenses. The Divan-ı Ahkâmı Adliye, which is the foundation of today's Supreme Court and the organization of the courts, was established in 1876 with a regulation. Today's Code of Criminal Procedure of 1929 was taken from the German Code of Criminal Procedure of 1877. In fact, the Italian Criminal Procedure Code of 1913 was originally intended to be translated into Turkish, but when it turned out that many articles of this law were unclear and confused during the translation, the translation commission also stated that the said law was criticized in Italy, and even new drafts were prepared there, has been waived. Thereupon, the text of the German Criminal Procedure Code dated 1877, which was accepted to be more convenient for simple and rapid trial and to secure public and personal interests, was translated into Turkish in 1926 and put into effect in 1929 with some changes. However, only 191 articles of this





law have remained unchanged until today. With the amendments, the aim of accelerating the trial was kept in the foreground in general, and instead of correcting faulty practices, principles were sacrificed. The 2000 Draft Code of Criminal Procedure exists and is still under discussion.

In conclusion, we can say that the modern legal system in Turkey was formed long ago and is still developing.

