



Rapport national / National report / Landesbericht /

национальный доклад

**RÉPUBLIQUE DE TURQUIE / REPUBLIC OF TURKEY / REPUBLIK
TÜRKEI / ТУРЕЦКАЯ РЕСПУБЛИКА**

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English / Englisch / английский

Role of the Constitutional Courts in Upholding and Applying the Constitutional Principles

Questionnaire

TURKEY

I. The Role of the constitutional court in defining and applying explicit/implicit constitutional principles.

1. Turkish Constitutional Court (the Court) invokes constitutional principles in the process of constitutional adjudication, particularly the principles of the rule of law (state of law), proportionality, reasonableness, and democratic order. The court also refers to other principles when they are relevant to the subject matter of a constitutional case. The court often assesses a case in the context of constitutional principles, if it is not particularly related to a specific constitutional provision. The Article 148 of the Constitution stipulates that the Court shall examine the constitutionality of laws or decree laws. Accordingly, the Constitution is the only legal source in the constitutional decision-making. There is no other provision or law that designates specific legal sources to be considered in constitutional review. However, universal principles and European human rights law may be regarded as an indirect source, since the Constitution contains similar fundamental principles with them, and the Court takes universal principles into consideration when interpreting fundamental constitutional principles.
2. The preamble of the Constitution is rather in the nature of moral importance. Article 2 (unamendable provision) includes the principles of democratic, secular and social state, rule of law, and respect for human rights. Other principles are included in various provisions of the Constitution, e.g., the Article 13 on the restriction of human rights

refers to the principle of proportionality. Accordingly, there are explicit provisions setting out fundamental principles in Turkish Constitution, and the ones included in eternal provisions reflect more fundamental values. In a way, the compliance with the fundamental principles is examined through application of specific principles, such as proportionality in the context of restriction of human rights. However there is no hierarchy between constitutional provisions. The court very often refers to those principles in relevant cases, and there is plenty of case-law applying and interpreting those principles.

3. The fundamental principles are explicitly provided in Turkish Constitution. The court builds its case-law on these explicit principles in consistency with international and European law. Also, the court predicates upon those explicit principles when incorporate implicit principles in constitutional decision-making. Therefore, the source of implicit principles is primarily the interpretation of the explicit constitutional provisions through case-law in accordance with international principles. For example, the court expands the principle of rule of law to include principles of legal certainty, predictability (foreseeability) and public interest. Scholars and societal groups undoubtedly contribute to this process indirectly.
4. The court puts a special emphasis on the basic principles and universally recognized principles in interpreting and defining constitutional principles. A combination of textual and teleological method is preferred, and historical method is of secondary importance. The universal principles gain relevance in this process as an indirect source.
5. Constitutional principles are embedded in constitutional provisions, and they are in nature of constitutional norms. Traditionally, the court defined those principles in an abstract manner. More recently, the court interprets and applies those principles in the context of fundamental human rights. This shift resulted with a more emphasis and greater protection of fundamental human rights. However, fundamental

principles cannot constitute a separate ground for unconstitutionality without connection to a constitutional norm. The constitutional analysis is not based solely on the principle; rather, it is based on the principle with connection to the relevant article. For example, if the Court considers a norm contrary to the rule of law, it annuls it on the ground that the norm is in conflict with Article 2. Technically, it is the provision in which the principle is embedded constitutes the ground for unconstitutionality. There are no specific regulations with respect to the enforcement of constitutional principles. Those principles are in place to guide constitutional adjudication, and once the Court finds a norm contrary to those principles, it annuls the law.

6. The fundamental principle that is most applied by the Court is the rule of law (state of law or legal state). The court interprets it in an encompassing and broad manner. The court states that this principle requires the state to respect, preserve and advance human rights, that its acts and actions must be in accordance with the rule of law and subject to judicial oversight, and it must prioritize to establish and advance a just order in the society. The Court predicates upon this principle when invoking the principle of legal certainty, predictability, and public interest. The court often invokes this principle and Article 2 as a ground for unconstitutionality, if the case is not related to a particular constitutional provision.

II. Constitutional principles as higher norms? Is it possible to determine a hierarchy within the Constitution? Unamendable (eternal) provisions in Constitutions and judicial review of constitutional amendments.

1. There is no basic law in Turkish legal system, and the Constitution is highest level in the hierarchy of legal norms. The Constitution contains similar fundamental principles with international and European law. No provisions of European Union law or international law are deemed superior to constitutional principles in our jurisprudence. It should be

noted, however, the last paragraph of Article 90 of the Constitution provides that no appeal shall be made to the Constitutional Court with regard to international agreements duly put in effect on the ground that they are unconstitutional. Therefore, although provisions of international agreements are not considered to be superior to constitutional principles, unconstitutionality of international agreements cannot be claimed. Besides, in the case of a conflict between international agreements concerning fundamental rights and freedoms and the domestic laws, the provisions of international agreements shall prevail. In other words, international agreements on human rights are superior to the domestic law, but lower to the Constitution. The superiority of constitutional provisions is highly respected by practitioners and scholars, because these principles reflect universally recognized and general legal principles.

2. There is no hierarchy among constitutional provisions. Although the Court put more emphasize on certain principles such as the rule of law, this cannot be construed to constitute a hierarchy within the Constitution. All constitutional provisions and principles are of the same legal force and effect.
3. Following the 1982 military coup, the Constitution was composed by the Consultative Assembly and presented to referendum. It was adopted by a national popular vote of 91.37% to 8.63%. It explicitly provides unamendable provisions (Articles 1, 2 &3). Article 175 of the Constitution prescribes the procedure for constitutional amendments as follows: Amendment to the Constitution may be proposed by at least one-third of Parliament members. Bills to amend the Constitution shall be debated twice in the Plenary. The adoption of a bill for a constitutional amendment shall require at least a three-fifths majority of the Parliament by secret ballot. If it is adopted by a three-fifths and less than two-thirds majority, it will be submitted to referendum by the President. However, if the bill on amendment is adopted by at least two-thirds majority, the President may either submit it for referendum

or to the Official Gazette to be published for entry into force. If a referendum is held, the affirmative vote of more than half of the total valid votes is required for the adoption of the amendment.

In summary, if the amendment is adopted by the Parliament with at least three-fifths but less than two-third majority, it must be submitted to referendum by the President. If it is adopted by at least two-third majority, the President has two options: presenting it to referendum or sending it to the Official Gazette to be published for entry into force.

Turkish Constitution has been amended several times. The last amendment was made in 2010 in order to reorganize High Council of Judges and Prosecutors and to introduce individual application to the Constitutional Court to enhance the protection and advancement of fundamental human rights.

4. Prevailing legal opinion is that the amendment procedure should be left up to the political actors as they are elected to represent people, and judiciary should not be granted the authority to override the will of people. In the past, the Court scrutinized constitutional amendments and it has been subject to harsh criticism on the ground that the Court exceeded its authority granted by the Constitution.
5. The Constitution provides constitutional review of constitutional amendments only on procedural grounds. The president and the one-fifths of the Parliament can challenge constitutional amendments on procedural ground before the Constitutional Court within ten days after its promulgation. The procedural review of amendments, however, is limited to whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under expedited procedure was observed. If the court strikes down the amendment, it is annulled and has no legal force.
6. The court is not authorized to review constitutional amendments on substantive basis. Despite the absence of constitutional power, there are examples that the Court has examined constitutional amendments on

substantive grounds and annulled them upon finding contrary to the Constitution. The court invokes the unamendable provisions in exercising substantive review of amendments. The unamendable article 2 provides that Turkey is a democratic, secular and social state governed by rule of law, and the Court found amendments contrary to this provision on several occasions in the past. For example, the government made a constitutional amendment in 2008 in order to bring an end to headscarf ban implemented at universities, and the Court examined it on substantive grounds and found it contrary to the principle of secular state provided in Article 2. Although the Court has made substantive review, it ultimately annulled amendments on procedural grounds under Article 4 in connection with Article 148. Article 4 states that Articles 1, 2 &3 shall not be amended, nor shall their amendment be proposed. The court stated that because the amendment was contrary to the Article 2, it was also contrary to the proposal ban provided in Article 4, therefore it did not meet “*the proposal condition*” set out in Article 148, which provides that the Court can examine constitutional amendments on procedural grounds on the basis that whether the requisite majorities were obtained for the *proposal* and in the ballot. Ultimately, the Court held that amendment did not comply with Articles 2, 4 and 148 and annulled it. In short, the Court elaborated on its authority to exercise substantive review on constitutional amendments and concluded that amendments in conflict with unamendable provisions will not be deemed to meet procedural requirements under Article 4 and Article 148. However, this analysis attracted harsh criticism both from public and scholars. Once the Court finds it contrary to the Constitution, it annuls the amendment and it no longer has legal effect.

7. Individual application to the Constitutional Court was introduced by 2010 constitutional amendment. Since then, the court received tens of thousands of applications, and rendered many decisions finding violations of fundamental human rights. Although it is not directly

related to constitutional review of norms, individual application undoubtedly enhanced the Court's constitutional authority with respect to protecting and advancing human rights. This process is also resulted with greater awareness among both people and judicial actors in terms of respect for fundamental human rights. Therefore, introduction of individual application considerably enhanced to authority of the Court in preserving and upholding constitutional principles and contributed the realization of constitutional ends indirectly.