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THE RULE OF LAW IN TURKEY: SOME PROCEDURAL ASPECTS IN CRIMINAL CASES

Thank you for inviting me to the Conference of the Rule of Law organized by University of Warsaw to celebrate 20th anniversary of the Center for American Law Studies. I am the director of Institute for Global Understanding the Rule of Law (IGUL) which is established at Bahçeşehir University Faculty of Law in Istanbul and celebrating 15th anniversary of it's foundation.

I am reporting here the development of the main principles of the Rule of Law during the parliamentary democracy age in Republic of Turkey. I am excluding the regulations under the presidential democracy Turkey has adopted in 2018. The Presidential government system is developing while it's application, and we may draw the consequences of this essential transformation only in the future.

1. THE PRINCIPLE OF THE RULE OF LAW

1.1. THE CONCEPT OF THE RULE OF LAW

The principle of the Rule of Law which has its roots in medieval England, started to influence the Ottoman Empire in 1839, when the Sultan issued the Imperial Edict of Reorganization, and promised to share his power with the Parliament. As a consequence[1], some basic laws have been adopted from France, and secular law as well as religious law had been applied side by side[2]. After the establishment of the Parliament of the new Turkish Republic under the leadership of Atatürk on 23 April 1920, religious laws and courts have been repealed in 1924.

[1] The source of law until then were religious rules stemming from *Quran* and the ruling power was devoted only to the Sultan.

[2] After the advocacy was incorporated into the criminal justice system in 1875, secular courts were established in 1879, and the office of the Public Prosecution was adopted.

The principle of the Rule of Law is laid down in the Article 2 of the Constitution of 1982: The Republic of Turkey is a democratic[3] secular and social state, governed by the Rule of Law. This principle is the pillar of democracy, fosters the diversity and equality amongst people.

The Constitutional Court has been established in 1961 and contributed in a great deal to the better understanding of the Rule of Law in Turkey.

The first function of the Constitutional Court deals with norm control which prevents the Parliament from passing a law that is not in line with the Rule of Law. Executives and judges handle individual cases, but legislature should generalize[4]. Decisions related to the norm control are binding for everyone, including the executive (Article 153 AY).

The Constitutional Court rendered several decisions based on the definition of the State Governed by the Rule of Law, emphasizing the following aspects: "A state governed by the Rule of Law is a state which makes actions and interactions that are conform with law; it respects, protects and furthers human rights that may be limited in accordance to the rules set by the Constitution and by law, but the essence of the right is inviolable; it establishes and maintains a just legal order in every field of legal interactions; it refrains from situations and actions violating the Constitution; it considers himself bound with the Constitution and the supreme principles of law, and it is a state that is open for legal control by the justices"[5].

The second function of the Constitutional Court deals with ruling on individual application*s* against government actions[6]. Petition with the Constitutional Court is open for individuals after exhausting all ordinary remedies, such as opposition or appeal procedures. However, there is no clear regulation saying that decisions of the Constitutional Court related to the individual applications are binding[7].

The next step after the ruling of the Constitutional Court is an individual application with the European Court of Human Rights[8].

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[3] The notion of democratic society is linked to the principle of the Rule of Law (European Court on Human Rights "ECtHR" *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 45).

[4] Statutes that are not in line with the Rule of Law are criticized as being undemocratic. See A. Scalia, *The Rule of Law as a Law of Rules*, "University of Chicago Law Review" 1989, Vol. 56, No. 4, p. 1176.

[5] G. Özkan, *Anayasa Mahkemesine Göre Hukuk Devletinin Anlamı ve Yargının Konumu* [The Meaning of the Concept of the Rule of Law According to the Constitutional Court and the Position of the Judiciary], "Türkiye Adalet Akademisi Dergisi" 2010, issue 1.

[6] Adopted by the referendum on 12 September 2010, individual application to the Court of Constitution is designed as a relief for ECtHR in order to reduce the number of application stemming from Turkey.

[7] Therefore, the executive sometimes try to avoid to comply with unfavorable decisions, rendered against it's interests.

[8] Turkey has adopted the jurisdiction of the ECtHR in the field of individual petition in 1987. From that date on rulings of the ECtHR have influenced the legislation and application of law in Turkey.

1.2. THE SUPREMACY OF LAW

Adherence to the law, or the supremacy of law is one of the layers of the Rule of Law. All citizens and the government must obey and follow the law[9]. Also the Legislator is bound by the Constitution and the supreme principles of the Rule of Law. If the Legislator violates these rules, it loses it's legitimacy[10]. The control lies in the judges, as their function is to resolve conflicts in applying the law.

The Rule of Law has also a formal understanding which means that the state is bound with statutes. As the individuals use legal provisions to guide their actions, all law should be prospective, stable, open, clear and should not be vague or retroactive. In a state governed by the Rule of Law, the influence of arbitrary governmental power must be prevented by the supremacy of regular laws. State officials exercising arbitrary power must be responsible for their illegal behavior, since every citizen is subject to the ordinary law and to the jurisdiction of ordinary courts.

The principle of equality before the law is also located as one of the general principles under the roof of the Rule of Law. This means that, without any discrimination, persons in the same situation will be subject to the same treatment before the law. The principle prohibits discriminatory laws and includes the right to equal access to the courts and equal procedure before the courts.

1.3. THE PRINCIPLE OF LEGALITY

The principle of legality and the legal certainty are other fundamental aspects of the Rule of Law. The types of crimes and all sanctions, aggravating and mitigating reasons, as well as measures of security must be determined by law (Article 38/1 AY, Article 2/1 TCK)[11].

The principle of legality is enshrined in Article 7 ECHR as an essential element of the Rule of Law: The quality of criminal statutes must be satisfactory. This standard was not met in Article 220/6 of the Turkish Criminal Code (TCK) which makes it a crime committing crimes on behalf of an illegal organization without being member of it. ECtHR ruled in the case of *Işıkırık v. Turkey*, that this provision was not foreseeable, thus lacking of clarity[12].

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[9] Decision of the Turkish Court of Constitution (AnyM) October 11, 1963, No. 243; AnyM November 29, 1966, No. 44, AnyM March 18, 1976, No. 18, and AnyM May 5, 1979, No. 28.

[10] AnyM March 27, 1986, No. 111 and AnyM June 16, 1992, No. 39.

[11] Adultery is one of crimes against God in *Quran*, it was also a crime under the repealed Criminal Code. The Court of Constitution annulled this provision based on inequity between the definition of adultery of men and women. The new Criminal Code does not include this crime.

[12] Işıkırık who stayed in pre-trial detention for four years and eight months was charged with making propaganda for a terror organization by doing victory sign in a demonstration in a funeral and convicted to imprisonment. The ECtHR ruled that the lack of clarity of the criminal statute

All norms must be foreseeable so that the individuals can trust the state in all their actions and transactions. In a state of law, all statutes must be done in a way to enable the citizens to predict the consequences of their actions. It is also necessary that legal regulations are clear, understandable, practical and objective in order to avoid any doubt against governmental interference.

2. THE RULE OF LAW AND CRIMINAL PROCEDURE

There are relationships between the Rule of Law, human rights and judicial control in connection with the independence of the judiciary and open hearings without excessive delays.

The security of investment, economic confidence and the growth of the social welfare all depend on a well functioning administrative and judicial system under the Rule of Law and the principles of fair trial[13].

In reality, the notion of the Rule of Law will be effective by the rulings of judges that reflect a set of criteria, rules, customs which are a part of the political and legal culture.

2.1. THE SUBSTANTIVE FAIR TRIAL PRINCIPLES

Fair trial, one of the most important aspects of the principle of the Rule of Law, recognizes rights for the suspect and the accused, which ensure that the government is accountable and transparent.

The right to a fair trial is existing in Article 38 of Turkish Constitution, but is mentioned only by wording, and the contents of this principle will be derived from the Article 6 of ECHR, as this Convention is a part of domestic legal order of Turkey according to the Article 90/5 of the Constitution: In case of a conflict between the provisions contained in the Constitution and international treaties, treaties related to human rights and fundamental freedoms take precedence over the constitutional regulations, if ratified by the National Grand Assembly. Thus decisions of the Constitutional Court rendered upon individual application may apply ECHR as a tool and reflect the principles of the Rule of Law enshrined in this norm into the domestic legal order.

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resulted in a violation of Işıkırık's freedom of assembly and association (*Murat Işıkırık v. Turkey*, 14 November 2017, § 63).

[13] ECtHR *Golder v. UK*, 21 February 1975, § 34; *Amuur v. France*, 25 June 1996, § 50; *Engel v. the Netherlands*, 8 June 1976, § 69.

A strong administration of justice in both civil and criminal matters helps to keep crime rates low and contributes to be free from fear of crime. All crimes, but especially crimes committed by the state agents must be investigated properly, and the outcome of the criminal proceedings should be enforced[14].

The proper administration of justice ensures also the application of individual fair trial rights which should be enforced from the moment of arrest until the execution of the final judgment.

Tribunal established by law is the first important aspect of a fair and public hearing (Article 36/1 and 138/1 AY). The Act on Courts Organization dated 26 September 2004, No. 5235 regulates the structure of ordinary courts in Turkey. There are courts of the first instance for general jurisdiction and courts for heavy crimes, together with juvenile courts. Military courts have been abolished recently[15]. The second level of courts are the Regional Courts of Appeal which act as fact and law review[16]. The third level is the Court of Cassation in Ankara, a law only review court.

The jurisdiction of courts are regulated by law. Courts shall not make rulings beyond their jurisdiction[17]. Exceptional courts shall not be established in order to try a crime after it has been committed. A body that gives only advisory decisions may not be considered as a court in the sense of the Convention.

All decisions and judgments of courts must be furnished with motives. There are differences between the details of court decisions: The motives of a decision on wire taps at the preliminary investigation phase may be covering minimum aspects of facts, but a court judgment on conviction must be detailed. A satisfactory motive should give at least answers to the requests of the petitioner. As the Constitution (Article 143 AY) and the Criminal Procedure Code (Article 34 CMK) require motives as a must, the absence of or a poor motive violates the principle of legality.

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[14] ECtHR *Okkalı v. Turkey*, 17 October 2006, § 65.

[15] Military courts had been established as a single judiciary at the time of Ottoman Empire in 1837. Military Court of Cassation (1962) and Military High Administrative Court (1972) were founded in the Republic era. The presence of military members at state security courts had been criticized by the ECtHR on the grounds that they were not independent and impartial, which resulted in the decisions of violation of fair trial rights on many occasions. In order to provide unity in the judiciary, all military courts were abolished with the Constitutional amendment in 2017 and their duties were transferred to the general criminal courts.

[16] After the repeal of courts of appeal on fact and law (*istinaf*) in 1924, the Court of Cassation remained the only court of legal remedy. Due to accumulating all cases from the whole country, the case load of this court became very intense, increasing in number, and the chamber could not help to overcome delays. As a consequence, Regional Courts of Appeal have been re-introduced in 2016 which have civil and criminal divisions.

[17] ECtHR *Belilos v. Switzerland*, 1988.

The independence of judiciary, an essential element of a democratic state, is the outcome of separation of powers between the executive and the judiciary and ensures the establishment of the Rule of Law that protects the human rights.

The actual independence of judges is related to the procedure for their appointment, the security of their tenure, promotion, transfer and suspension of their functions. Members of tribunals may be appointed by the executive[18] or by the legislative power. Important is the duration of their office term. This should be long enough to be immune from the pressure of the executive[19]. The government should not attack on the judiciary in cases of unfavorable court rulings[20].

The Council of the Judges and Prosecutors is empowered for the appointment of judges and prosecutors in Turkey. This constitutional body (Article 159 AY) which has thirteen members, is theoretically designed to be independent from the executive, as seven members are elected by the National Grant Assembly. But the executive has a substantial influence on the election of members: Four members are elected by the State President and the State Secretary to the Ministry of Justice is the natural member of the Council; the Minister of Justice is the head of it. This composition of the Council of the Judges and Prosecutors is in power since the amendment done by the Act No. 6771 in 2017[21].

There is another discussion in Turkish Law related to the independency of public prosecutors. Some argue that prosecutors should be as independent as judges, but we take the view that being the state party in a criminal case, prosecutors may not be independent like judges. However, they should have some guarantees related to the office they are performing.

The concept of the impartiality of justices is a core principle laid down in the Penal Procedure Code (Article 22 CMK). The amendment to the Constitution made in May 2017 by the Act No. 6771 secured this concept at the constitutional level (Article 9 AY).

A tribunal must satisfy the requirements of independence from the parties as well. The ECtHR has considered consistently held that military judges sitting as

[18] ECtHR *Campbell and Fell v. United Kingdom*, 28 June 1984, § 79; *Clarke v. United Kingdom,* 2005.

[19] The ECtHR has developed the following criteria in order to establish if a judicial body is independent or not: (a) the manner of appointment, (b) the term of office, (c) the existence of guarantees against outside pressure and (d) the appearance of independence (*Incal v. Turkey*, 28 June 1984; *Pohoska v. Poland*, 10 January 2012).

[20] For example, shortly after the judgment of ECtHR in case of *Selahattin Demirtaş v. Turkey* (No. 2), rendered on 2 November 2018, holding that there was a violation of Article 5§3 of the Convention, there were some critics against this ruling.

[21] Prior to this statute, the then *high* Council of Judges and Prosecutors was composed of twenty-two members and twelve spare members: Ten members and six spare members were elected by their peers. This election process by their peers resulted in illegal groupings taking control over the Council which have allegedly played role in the failed coup of 15 July 2016.

members of the state security courts is questionable in respect of their dependency to the executive[22]. Judges must also appear independent[23].

The right of access to the courts is another aspect of the principle of the Rule of Law. Every individual must have been provided with the opportunity to have his or her case heard. The state cannot restrict or eliminate judicial review in certain fields or for certain classes of individuals.

The right of access to court ought to be effective. This means that the individual must have a clear, practical opportunity to challenge an act that is an interference with his rights. There should be no obstacles in the way of bringing a criminal case in front of the court. However, the right of access to court is not absolute and it may be subject to limitations. In Turkey, there are some statutes that require an authorization of the executive in order to try a civil servant, or prevent suing state officials related to the crimes committed in the course of suppressing the uprising of 15 July 2016.

There is a unique regulation in Turkish Penal Procedure Code under the name of delayed announcement of the judgment: If the conviction is related to an imprisonment term less than two years, and the accused who covered all damages of the victim has no prior conviction of an intentional crime, and the court is of the opinion that he would not reoffend, the court may drop the case (CMK 231/6). This provision has been broadly applied in recent years, but has also been criticized by the ECtHR for causing an ineffective punishment policy especially in cases of crimes committed by civil servants[24]. Similarly, at the early stages of the investigation, the public prosecutor may close the procedure, if the crime falls under the mediation regulations (Article 253/1 CMK), and if the parties agreed on a compensation under the guidance of the mediator.

The administration has an obligation to execute final judgments. This is an essential characteristic of the State subject to the rule of law, and a consequence of the right to access to court. If a final judgment is not executed, this situation affects the principle of a law-based state, founded on the rule of law and

[22] ECtHR *Öcalan v. Turkey*, 12 May 2005, §§ 112 and 114.

[23] In this regard, two decisions, which were rendered when State Security Courts were existing in Turkey, are Case of *Incal v. Turkey* and Case of *Çıraklar v. Turkey*. The European Court of Human Rights regarded the participation of a military judge on the panel and a military public prosecutor as a violation of the independence of judges. These judgments resulted in an amendment to the Constitution and to the Act on State Security Courts, but did not prevent further judgments finding that Article 6 had been violated, such as the ECtHR decision in Case of *Sadak and Others v. Turkey*. Upon this decision, the Constitution and procedural laws have been amended as well. But soon afterwards some courts of general jurisdiction were empowered to hear cases related to terrorism, and specialized terror courts emerged again.

[24] ECtHR *Böber v. Turkey*, 9 April 2013, and *Taylan v. Turkey*, 3 July 2012. Turkish Court of Constitution ruled at the same direction in it's decision dated 10 December 2014.

the principle of legal certainty[25]. Where the administrative authorities execute a final judgment, this shows that the State is in compliance with the principle of to the Rule of Law and that there is a proper administration of justice[26]. The enforcement of final judgments in private disputes may require the assistance of the police, in order to avoid any risk of private justice which is contrary to the Rule of Law[27].

There must be a consistency between final judgments of different courts related to the same legal issues. The role of the Court of Cassation in Turkey is assuring the unified application of criminal statutes[28]. After establishment of Regional Courts of Appeals in 2016, there was a need for a mechanism that would help in cases of divergent rulings at this level. The law-maker helped this situation by amending the Article 35 of the Act on Organization of Courts No. 5235. This new provision enables the Court of Cassation to give a decision in cases of divergence[29].

In Turkey there are some extraordinary ways of legal remedies against final decisions or judgments[30]. However, where a court has finally determined an issue, this ruling should not be called into question. Regulations which allow for the quashing of a final judgment for an indefinite period of time are incompatible with the principle of legal certainty which requires that the principle of *res iudicata* be respected.

2.2. SPECIAL FAIR TRIAL RIGHT

Special fair trial rights are regulated in ECHR under the third paragraph of Article 6. The first right under this section is to be informed promptly and in detail about the nature and cause of the accusation in a language which one understands. The second special fair trial right is to have adequate time and facilities for the preparation of defense (Article 6/3-a ECHR). The third special right

[25] ECtHR found that there was a breach of Articles 6 and 8 (procedural aspect) of the Convention since the production at a gold mine continued after the final judgment ordering its termination (*Taşkın and others v. Turkey*, 30 March 2005, §136).

[26] *Hornsby v. Greece*, 24 February 1997, § 41; *Antonetto v. Italy*, 20 July 2000, § 28; *Surugiu v. Romania*, 20 April 2004, § 65.

[27] ECtHR *Matheus v. France*, 31 March 2005, § 70.

[28] ECtHR considers the existence of conflicting decisions within the supreme court level contrary to the principle of legal certainty, which constitutes one of the basic elements of the Rule of Law (*Beian v. Romania*, 6 December 2007, § 39).

[29] Decision of ninth Chamber of the Court of Cassation, 5 November 2018, K.2018/11325.

[30] The Minister of Justice has the power to give a written order to the Attorney General to seek review of a final judgment of the Court of First Instance, or any decision of a magistrate that is *res iudicata*, if this judgment of the court or judicial decision was not previously reviewed in any way by the Court of Cassation (CMK 309) and this review is designed to improve the law and unify the application of the law in the county.

is to defend oneself in person or through legal assistance of his own choosing or, if one has not sufficient means to pay for legal assistance, to be given it free when the interests of justice require so (Article 6/3-c ECHR).

There is a mandatory defense attorney clause under Turkish Criminal Procedure Code (Article 150 CMK)[31]. This lawyer will be appointed by the local Bar Association, but the fee of his service is provided by the Public Prosecution Office. Since the fee for bar-appointed lawyers is lower than average lawyer fees, the service provided by them is sometimes not satisfactory. Even in such cases the state is under the obligation of appointing a competent lawyer. However, in line with the landmark decision of the ECtHR in the case of *Salduz*[32], the mere presence of a lawyer during the police interrogation has cut down the allegations of torture in a great deal.

Every one has the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him (Article 6/3-d ECHR). This rule is weakened by some exceptions related to organized crime and to the protection of vulnerable victims.

In cases of witness protection programs, the identity of the witness, whose life would be in danger if he testified in open hearing, may be kept secret, or the hearing may be conducted through video-conferencing while the image and voice of the witness shall be disguised (Article 58 CMK). Such procedure should not prevent the producing all evidence at the courtroom[33] and the accused should be in a position to ask all his questions to the witness[34].

The audiovisual system (SEGBIS) was introduced to Turkish legal system by the Criminal Procedure Code in 2005 in order to strengthen the victims' rights. This procedure enables parties, witnesses and experts in a court proceeding to be involved in a hearing from a remote location (Article 236/2 CMK). Meanwhile, the application of this technology has been broadened to witness hearings (Article 180/5 CMK), to the interrogation of suspects after the arrest in investigation phase

[31] The police must inform the suspect of his rights during the arrest, and if he requests so, he has the right to have his counsel present during the interrogation (Article 150/1 CMK). For children and for suspects of crimes carrying imprisonment at the lower level of more than five years, there is an obligation to appoint a lawyer if the suspect does not already have one (Article 150/2 and 150/3 CMK).

[32] Salduz, a 17 year-old boy, who had participated in an unlawful demonstration was arrested, and confessed while being interrogated by the police in the absence of his lawyer. Access to lawyer was denied as the crime he was suspected of was an offence related to the national security. A medical report stated that Salduz had no trace of ill-treatment on his body (§ 13,14). Later he confessed before the public prosecutor and the investigating judge as well. He was subsequently allowed access to a lawyer and sentenced based on the alleged facts. The ECtHR ruled that denying legal assistance to Salduz while he was held and interrogated in police custody was a violation of his right to a fair trial (*Salduz v. Turkey*, 27 November 2008).

[33] *Barbera, Messegue, and Jabardo v. Spain*, 1988.

[34] *Bremont v. Belgium*, 1989.

(Article 94 CMK), as well as to the interrogation of the accused during the main hearing at prosecution phase (Article 196/4 CMK)[35].

The second exception to the rule of asking questions to the witness directly to his face at the courtroom has been created in order to protect vulnerable victims. In cases related to children and sexual offenses there may be a secondary victimization through confrontation of the victim with the offender.

At the early stages of the investigation, Child Monitoring Centers and University Child Protection Centers make the initial step. The public prosecutor goes to this center and poses his or her questions to the child victim about the allegedly committed crime through an expert-interviewer. This conversation shall be recorded and used as an evidence at the mean hearing (Article 58/3 CMK). The downside of this procedure is cutting the defense rights: The suspect or his defense attorney can not ask questions to the victim at this hearing.

Since the application of Child Monitoring Centers are limited to the investigation phase, the Ministry of Justice has launched a plan in 2017 for establishing specially *designed judicial interview rooms* in courthouses to be utilized during the main hearing at the trial[36]. Research shows that victims from vulnerable groups may suffer a secondary victimization from the complexity of judicial process. A judicial interview room in the courthouse is equipped with high-technology and designed to minimize secondary victimizations. This ensures safe and less intimidating judicial interview, conducted in accordance with the age, the level of development and the psychology of children or vulnerable adult victims of crime. An interview by an expert avoids the victim from confrontation with the offender, thus secondary victimization is prevented. Secondly, oral evidence provided through expert's questions is more reliable in contrast to the questions of the parties in the courtroom.

This new approach brings limitations to fair trial rights of the accused, but must be implemented in certain cases where the danger of secondary victimization is a bigger harm compared to the limitations of fair trial rights. In order to compensate the cut-down on fair trial rights, this oral evidence, obtained from the victim through an expert, should not be the only evidence used for conviction of the offender or not the main evidence against him.

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[35] The law-maker rely on the case of *Viola v. Italy* for justification of this broad application of SEGBIS in Turkey.

[36] The child-friendly judicial interview rooms were developed under the Justice for Children Project funded by the EU and implemented by UNICEF. Training seminars were held on certain dates throughout the months, in order to ensure that more efficiently and qualified interviews are carried out in those rooms and more people can benefit from the service. These training sessions were conducted with juvenile justice system professionals such as judges, public prosecutors, and social work officers. National and international consultants organized discussions, shared the international best practices to develop standards for the interview rooms.

2.3. HUMAN SECURITY AND THE RULE OF LAW

The right to individual liberty is enshrined in the Constitution (Article 19 AY). Security of personal life is guaranteed by the prohibition of arbitrary arrest and by the right to a fair hearing by an independent and impartial judge after arrest, meeting the requirements of *habeas corpus*. Article 5 of the Convention, which guarantees the right to liberty sets also the requirement of compliance with the law: lawfulness of the detention requires adherence to the rule of law[37]. Even though the law may have been formally respected, there may be a breach of law if the authorities attempted to circumvent the statute[38]. Detaining an individual without the basis of a concrete legal provision or a judicial decision is itself contrary to the principle of legal certainty.

Turkish law sharply distinguishes between arrest (*yakalama*, Article 90 CMK), police custody (*gözaltı*, Article 91 CMK) and pre-trial detention (*tutuklama*, Article 100 CMK). An arrest deprives the suspect of his personal freedom when he is caught red-handed. It can be made without a written order of a court. Pre-trial detention always requires a written order of a magistrate. Human security and respect for the rights of an arrested suspect cannot be realized without the rule of law in criminal law.

The powers of arrest are regulated by Article 90 CMK. Any citizen may arrest an offender during the commission of the crime, or during hot pursuit, if in the meantime the offender might escape or not be identified (Article 90/1 CMK). The police have a broader power of arrest[39] in cases where the requirements of issuing of a pre-trial detention order exists, but if there is no time for applying to the judge (Article 90/2 CMK)[40]. The public prosecutor shall be immediately informed about the arrest, and the police shall act upon the orders of the public prosecutor (Article 90/5 CMK). The public prosecutor may issue an order for police custody, if there is concrete evidence that indicates the suspicion of the committed crime (Article 91/2 CMK).

If the police have interviewed a suspect upon the order of the public prosecutor once, and later there is a need for further questioning, the police are not empowered to re-interview the same person for the same investigation

[37] *Winterwerp v. the Netherlands*, judgment of 24 October 1979, § 39.

[38] *Karagöz v. Turkey*, 8 November 2005, § 59.

[39] See footnote 31.

[40] Additionally, if the public prosecutor had issued an arrest order (*yakalama emri*), which was provisionally applicable during the state of emergency administration (2016-2018) to terror related crimes, the police were also empowered to arrest suspects (Article 3/1-a KHK 668, approved by Act No 6755 on 8 November 2016).

(Article 148/5 CMK)[41]. The internal security package (2015-6638) extended police powers for preservation of the public order[42].

The arrested suspect will be brought to a Justice of the Peace within 24 hours for interrogation; the time necessary to bring him before the judge is not included in the 24-hour requirement, but it may not exceed twelve hours (Article 91/1 CMK). Turkish Law has a special regulation for collectively committed crimes (Article 91/3 CMK).

Police powers related to police custody have also been extended in 2016-2018 period of state of emergency[43]. The Act No. 5175 introduced new regulations[44] for terror related police custody in July 2018 by adding a provisional Article 19 of the Anti-Terror Act No. 3713, which will be in force for 3 years. Here is an interesting regulation for extension of the police custody: in cases where collection of evidence poses difficulties, or if the investigation is comprehensive, the public prosecutor may ask for an extension[45]. The judge shall inspect this request by interviewing the arrested suspect personally, and shall give a decision to extend the police custody, limited with 48 hours or 4 days, respectively.

If the judge decides to detain the suspect, there shall be a periodical control of pre-trial detention, during which the suspect and his defense attorney must be present. The control cannot be conducted on examination of the file (Article 108/1

[41] Act No. 7145 dated 25 July 2018 has introduced a provisional regulation, valid for 3 years and applicable for terror crimes only, by inserting the Provisional Article 13 to the Anti-Terror Act No. 3713 which reads as follows: "In situations where the need to interview the terror suspect in relation with the same case arises again, this interview maybe conducted by the public prosecutor, or by the security forces upon a written order of the public prosecutor". This regulation can result in delays of cases due to requirements of *Salduz v. Turkey* decision of ECtHR, if the defense lawyer is not present at the second police interview, the submissions of the suspect may not be used as evidence at the judgment. Furthermore allegations against police regarding the unlawful interrogation techniques may increase.

[42] For preservation of the public order, the police chief appointed by the governor may issue a detention order in flagrant crimes listed in Article 91/4 CMK as amended by Act No. 6638.

[43] In this context, it is also necessary to say a few things about the recently lifted state of emergency regime in Turkey. There can be no contradiction to the rule of law principle in periods of state of emergency. Only certain rights were suspended during such periods as a result of needs, but there are some rights which cannot be restricted and cannot be intervened in any way, such as right to life, prohibition of torture, prohibition of slavery etc. In its famous case law (*Aksoy v. Turkey*), the ECtHR had the opportunity to examine measures taken by Turkey during states of emergency in the 1990s, finding for example that, despite a derogation, holding a suspect for fourteen days or more in detention without access to a judge was not necessitated by the exigencies of the situation.

[44] According to this amendment, police custody shall not exceed 48 hours (and in collectively committed crimes 4 days) from the moment of the arrest; time required for the arraignment to the nearest judge or court is not included to this time (Provisional Article 19/1-a, sentence 1 TMK).

[45] As extension maybe repeated twice the most, police custody may be 6 days, or 12 days in collectively committed crimes, but with a judge's decision (Provisional Article 19/1-a, sentence 2 TMK). The same procedure is also applicable for suspects arrested upon an arrest order of the public prosecutor (Provisional Article 19/1-a, sentence 3 TMK).

CMK); the judge must hear the suspect and/or his lawyer when reviewing, on a monthly basis as provided for by the law, whether the conditions for continued detention are met[46].

The duration of pre-trial detention from the time of detention until the final judgment of the court is limited by maximum five years in Turkey (Article 102 CMK). The Constitutional Court however, extended this period by calculating it until the rendering of the judgment at the first instance court, thus excluding the period of appeals. The main problem related to exceeding the reasonable duration of detention lies in the fact that the sessions at main hearings at prosecution phase are conducted by intervals of few months each time. Additionally, the appeal procedure lasts sometimes years, and the detained accused waits for a decision of the court of first instance, or of the regional court of appeal, or of the Court of Cassation while sitting in jail.

3. CONCLUSION

The principle of the Rule of Law has a long history in Turkey and has achieved high standards until today. Efforts must be made to keep these standards in the future. We do rely on the next generation lawyers in this endower who will utilize the core principles of law: *honeste vivere, alterum non laedere* and *suum cuiue tribure.*

Summary

Supremacy of law, the principles of legality, legal certainty and fair trial recognizing rights for the suspect and the accused, are fundamental aspects of the Rule of Law. Tribunal established by law, accessible by citizens, composed of impartial and independent judiciary that furnish their decisions with motives are the core of "a democratic secular and social state, governed by the rule of Law", as defined by the Constitution of 1982, has a long history in Turkey.

[46] The Act No. 7145 dated 25 July 2018 introduced a regulation in Anti-Terror Act, as a Provisional Article 19, applicable for 3 years which reads as follows: "Motions for opposition to the pre-trial detention orders and motions for release from detention may be examined on case file in absence of the parties. Motions for the release from detention may be ruled on case file together with the examination of continuation of detention the latest within 30 days of duration. The examination of continuation of detention according to Article 108 CMK shall be conducted the latest within 30 days of durations on case file, with 90 days durations, however, by listening to the individual or his lawyer; without the requirement of a motion" (Provisional Article 19 TMK, added by Act No 7145, dated 25 July 2018).

Fair trial rights such as having mandatory defense attorney for suspects at very early stages of the investigation, the right to examine witnesses against him and protection of vulnerable victims, have developed in Turkey under the Parliamentary Democracy Regime, which was applied until 2018. Regulations for terror related investigations, introduced after the 2016-2018 period of state of emergency applicable under the supervision of judges shall only be in force for three years. The newly implemented Presidential Democracy Regime will certainly enhance the development of the Rule of Law.

KEYWORDS

Rule of Law, supremacy of law, principle of legality, legal certainty, fair trial, protection of vulnerable victims, state of emergency, police custody, pre-trial detention

Streszczenie

Nadrzędność prawa, zasady legalności, pewność prawa i sprawiedliwy proces uznający prawa podejrzanego i oskarżonego są podstawowymi aspektami państwa prawnego. Trybunał ustanowiony przez prawo, dostępny dla obywateli, składający się z bezstronnych i niezawisłych sędziów, którzy swoje decyzje opierają na zasadach będących rdzeniem „demokratycznego państwa świeckiego i socjalnego, rządzonego przez prawo", jak stanowi Konstytucja Turcji z 1982 r., ma długą historię w Turcji.

Prawa stanowiące o rzetelnym procesie, takie jak ustanowienie obowiązkowego obrońcy przez podejrzanego na wczesnym etapie dochodzenia, prawo do przesłuchiwania świadków zeznających na niekorzyść podejrzanego i ochrona „wrażliwych" pokrzywdzonych, rozwinęły się w Turcji w ramach parlamentarnego systemu demokratycznego, który obowiązywał do 2018 r. Regulacje dotyczące postępowania w przypadku aktów terroryzmu, wprowadzone po okresie stanu wyjątkowego przypadającego na lata 2016-2018, są aktualnie pod nadzorem sędziów i obowiązywać będą przez trzy lata. Nowo wprowadzony reżim demokracji prezydenckiej z pewnością wzmocni rozwój państwa prawa.

SŁOWA KLUCZOWE

praworządność, nadrzędność prawa, zasada legalności, pewność prawa, rzetelny proces, ochrona szczególnie narażonych ofiar, stan wyjątkowy, areszt policyjny, areszt przedprocesowy