

The Macrotheme Review

A multidisciplinary journal of global macro trends

JUDICIAL SYSTEMS IN GENERAL AND BRANCHES IN TURKISH JUDICIAL SYSTEMS

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Abstract

Judicial activity is the third element of the state in addition to legislative and executive activity. Judicial power is used by independent courts on behalf of the Turkish nation (The Constitution of the Republic of Turkey Art. 9). Judicial activity can be defined in two ways, including the shape and material sense. Judicial activity in sense of form contains a definition considering the organ which operates. Accordingly judicial activity in sense of form includes any kind of activity of courts given by law. Judicial activity in the material sense is implementation of objective law to the concrete event or relationship by impartial judiciary (courts) accordance with judicial procedures. The systems of the courts as subjects where they operate can be divided into three. These are; judicial unity system, separation system and combined system. In Turkey, where judicial separate system is accepted, jurisdiction is allocated into branches considering the nature of the dispute in order to fulfill judicial activities. Turkish judicial system can be divided into six sections. These are; constitutional jurisdiction, civil jurisdiction, administrative jurisdiction, Court of Jurisdictional disputes, election jurisdiction and accounting jurisdiction.

Keywords: Judicial activity, The systems of the courts, Judicial unity system, Separation system, Combined system, Constitutional jurisdiction, Civil jurisdiction, Administrative jurisdiction, Court of Jurisdictional disputes, Election jurisdiction, Accounting jurisdiction.

1. JURISDICTION

1.1 JUDICIAL ACTIVITIES

Judicial activities of the state, in addition to the legislative and executive activities represents a third power. Jurisdiction, is used by independent courts on behalf of the Turkish nation (Turkish Constitution Art. 9).

Judicial activities intend the realization of the rule of law in general in addition to providing the protection of subjective rights of individuals. This activity is an obligation for the state as well as a right. Judicial activities can be defined in two ways: from a material and formal sense (**Arslan, Ramazan/Tanriver, Süha, Yargı Örgütü Hukuku**, B. 2, Ankara 2001, p. 35; **Kuru, Baki/Arslan, Ramazan/Yılmaz, Ejder, Medeni Usul Hukuku**, B. 23, Ankara 2012, p. 56; **Pekcanitez, Hakan/Atalay, Oğuz/Özekes, Muhammet, Medeni Usul Hukuku**, B.13, Ankara 2012, p. 81).

Judicial activity in a formal sense takes the operating body into account. Accordingly, in the formal sense the judicial activity covers all kinds of duties given to the courts by law and acts performed by them (**Kuru/Arslan/Yilmaz**, p. 56). In this context, hearing a case, the final judgment, a notice issued to the parties or witnesses, the inner system of the court order, the disciplinary process concerning court clerks and so on can be referred to as judicial activities. This formal sense of view is inadequate in explaining all aspects of the activity.

One needs to consider the material aspects and determinants of trial activity to decide the scope of the judicial activity. In this respect, the judicial activities in the material sense are the application of the law (abstract legal rules) by the independent and impartial institutions (courts), in accordance with judicial procedures to concrete events or relationships (**Kuru/Arslan/Yilmaz**, p. 56). Therefore judicial activities in the material sense include the final decision given by an independent and impartial court, as a result of the trial. Becoming conclusive and final, the decision of the court in this way constitutes a final judgment (*res judicata*). *Res judicata* binds the parties.

Judicial activity, resulting in the form of legal protection and judicial review, constitute two specific aspects which complete and connected to each other. The first of these serve to the realization of subjective individual rights, and the second is directed to the protection of the rule of law (objective law).

1.2 JUDICIAL SYSTEMS

Fulfilling the trial activity in the material sense (the courts), can be divided into three regarding the area where they operate. These are: the separation system, the unity system and the mixed system. The separation system solves the disputes by determining the nature of the problem and canalizing the case to a certain type of court. According to the nature of the dispute, each case is solved by a designated judicial authority. Today many of constitutions including ours in developed countries use the judicial separation system. Judicial unity system on the other hand, solves the disputes irrespective of any discrimination regarding their nature in the same judicial system. This system exhibits more or less a monopolistic approach as a state structure. Mixed systems, combine the various aspects of judicial separation and unity systems.

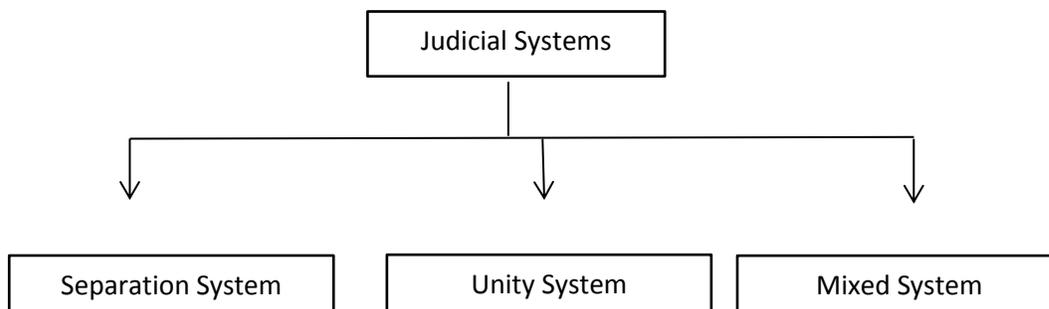


Diagram 1: *Judicial Systems*

2. COURT STRUCTURE

In Turkey where the judicial separation system is adopted, to carry out a better judiciary service, the courts are branched in various ways. Although judicial activities constitute a whole, these activities are branched in various ways for a better fulfillment of the service (**Schlosser**, Peter, *Zivilprozeßrecht*, 2.Auflage, München 1991, 118f; **Karsh**, Abdurrahim, *Medeni Muhakeme Hukuku*, B.3, İstanbul 2012, p. 100; **Kuru/Arslan/Yılmaz**, p. 56; **Pekcanitez/Atalay/Özekes**, p. 82). In this context, in accordance with its nature each dispute is resolved through the competent courts. Judicial structure reflects equality and there is no hierarchy between them (**Bruns**, Rudolf, *Zivilprozessrecht*, 2., neuarbeitete Auflage, München 1979, § 4 33f). Also the courts are independent from each other in this system. In each branch independent courts function using different procedural rules.

It is possible to divide Turkish judicial system into six branches:

Constitutional Court

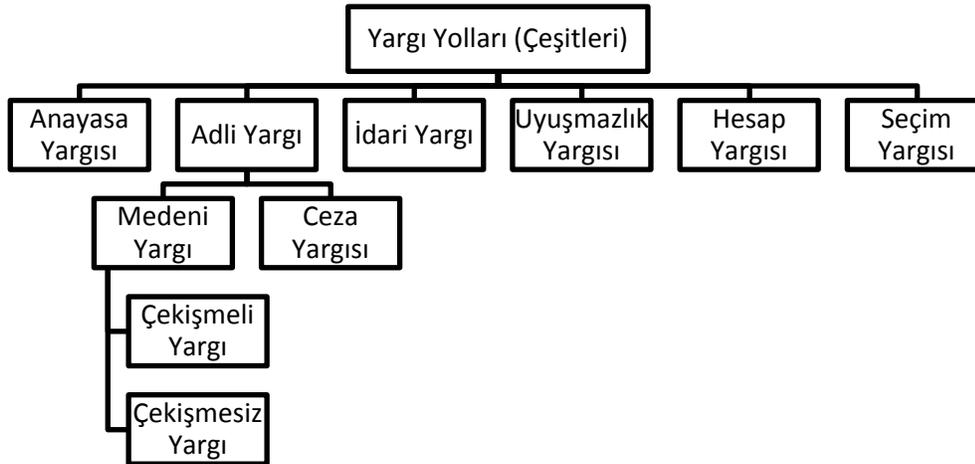
Judicial courts

Administrative courts

Court of Jurisdictional Disputes

The Supreme Court of Elections

The Court of Accounts



(Constitutional Court-Judicial Courts (Civil Courts-Criminal Courts)- Administrative courts- Court of Jurisdictional Disputes- The Court of Accounts- The Supreme Court of Elections)

Diagram 2: *Court Structure*

2.1 CONSTITUTIONAL COURT

Constitutional jurisdiction is divided into two: in the broad sense and in the narrow sense. In the broad sense constitutional jurisdiction includes any judicial process which directly intends to ensure compliance with the Constitution. In the narrow sense constitutional jurisdiction refers to the judicial control of laws, decree-laws and the internal regulations of Parliament (**Karsh**, p. 100; **Pekcanitez/Atalay/Özekes**, p. 83). The main regulation relating to the constitutional jurisdiction is in the 1982 Constitution Art. 146 ff. The only high court in constitutional jurisdiction is the Constitutional Court (**Blomeyer**, Arwed, *Zivilprozeßrecht*, Berlin 1985, p.22; **Arslan/ Tanriver**, p. 49; **Kuru/Arslan/Yilmaz**, p. 57). The main regulation concerning the structure of the Constitutional Court is between the articles 146-153 of the 1982 Constitution. Besides this basic regulation of the Constitutional Court, the duties, powers and procedural rules of this high court are in the Law No. 6216 from 30.03.2011 on the Establishment and Trial Procedures of the Constitutional Court. In addition, in order to regulate the inner working procedure of the Constitutional Court, a bylaw dated from 12.07.2012 has been issued. The Constitutional Court is composed of seventeen members. The Constitutional Court has the following duties:

- The Constitutional Court shall examine the constitutionality, in respect of both form and substance, of laws, decrees having the force of law and the Rules of Procedure of the Grand National Assembly of Turkey.
- To decide on the claims of unconstitutionality before other courts.
- The Constitutional Court in its capacity as the Supreme Court shall try, for offences relating to their functions, the President of the Republic, the Speaker of the Grand National Assembly of Turkey, members of the Council of Ministers; presidents and members of the Constitutional Court, High Court of Appeals, Council of State, High Military Court of Appeals, High Military Administrative Court, High Council of Judges and Prosecutors, Court of Accounts, and Chief Public Prosecutors and Deputy Public Prosecutors.
- Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities.
- The dissolution of political parties shall be decided finally by the Constitutional Court, following the filing of a suit to that effect by the Office of the Chief Public Prosecutor of at the Court of Cassation.
- If the parliamentary immunity of a deputy has been lifted or if the loss of membership has been decided according to the first, third or fourth paragraphs of Article 84, the deputy in question or another deputy may, within seven days from the date of the decision of the Plenary, appeal to the Constitutional Court, for the decision to be annulled on the grounds that it is contrary to the Constitution, law or the Rules of Procedure.
- The Constitutional Court shall also perform the other duties given to it by the Constitution.

The decisions of the Constitutional Court are final (**Pekcanitez/Atalay/Özekes**, p. 84). Decisions of the Constitutional Court shall be published immediately in the Official Gazette, and shall be binding on the legislative, executive, and judicial organs, on the administrative authorities, and on persons and corporate bodies (**Arslan/Tanriver**, p. 53) (Turkish Constitution Art. 153).

2.2 JUDICIAL COURTS

Judicial courts, in ways both qualitative and quantitative terms constitute the most comprehensive judicial remedies. This way is usually called general jurisdiction (**Karsh**, p. 102). Indeed, disputes which do not belong to other jurisdictions are generally solved in judicial courts. Accordingly, judicial courts solve private law disputes and problems stemming from criminal acts (**Bruns**, § 3, 17a; **Jauernig**, Othmar, Zivilprozeßrecht, 24. Auflage, München 1993, § 2, p.5; **Schlosser**, 119f; **Zöller**, Zivilprozeßordnung, 17. Auflage, Köln 1991, Rn 28, 39f; **Rosenberg**, Leo/ **Schwab**, Karl Heinz/ **Gottwald**, Peter, Zivilprozessrecht, München 1993, p.4) .

Judicial courts are divided into two sections: civil courts and criminal courts (**Blomeyer**, p.23; **Zöller**, Rn 28, 39f; **Rosenberg/ Schwab/ Gottwald**, p.1; **Arslan/Tanriver**, p. 53; **Kuru/Arslan/ Yilmaz**, p. 57; **Karsh**, p. 102).

2.3 ADMINISTRATIVE COURTS

The function of the administrative courts is the judicial control of the administration (**Jauernig**, § 3, p.7; **Schlosser**, 10f, 119f; **Knack**, Hnas Joachim, Verwaltungsverfahrensgesetz Kommentar, 3., neubearbeitete und erweiterte Auflage München 1989, § 9, p.9). Recourse to judicial review shall be available against all actions and acts of administration (Turkish Constitution Art. 125/1). The administration shall be liable to compensate for damages resulting from its actions and acts (Turkish Constitution Art. 125/7). Within the framework of these provisions, the administrative courts solve the judicial problems which arise from the administrative activities (**Karsh**, p. 100; **Arslan/Tanriver**, p. 134; **Kuru/Arslan/Yilmaz**, p. 61; **Pekcanitez/Atalay/Özekes**, p. 84).

As a result of the judicial separation system, administrative courts are expert institutions and solve the conflicts which arise from the actions and acts of administration (**Blomeyer**, p.23) . The reason for the creation of separate administrative courts arise from the principles which dominate the nature of administrative conflicts as well the necessity for the protection of the citizens.

Administrative courts are divided into two: general administrative courts and military administrative courts (**Arslan/Tanriver**, p. 135; **Pekcanitez/Atalay/Özekes**, p. 85). General administrative courts solve the legal problems which are outside the scope of these military administrative courts. General administrative courts solve administrative conflicts and tax conflicts. General administrative courts are structured on a two instance basis. First instance courts are administrative courts, tax courts and regional administrative courts. The Supreme Court in the general administrative court system is the Council of State. The Council of State is the last instance for reviewing decisions and judgments given by administrative courts and not referred by law to other administrative courts. It shall also be the first and last instance for dealing with specific cases prescribed by law (Turkish Constitution Art. 155). The procedure to be applied during the judicial activity of the administrative courts is constructed in the Law no. 2577 Code of Administrative Judicial Procedure. But if there is no regulation in this code

concerning a concrete procedural problem, the regulations in the Code of Civil Procedure shall be applied (Law no. 2577 art. 31).

Military administrative courts are responsible for the judicial supervision of disputes arising from administrative acts and actions involving military persons or relating to military service, even if such acts and actions have been carried out by non-military authorities (**Arslan/Tanriver**, p. 155). The High Military Administrative Court (**Arslan/Tanriver**, p. 156), on the other hand, shall be the first and last instance for the judicial supervision of disputes arising from administrative acts and actions involving military persons or relating to military service, even if such acts and actions have been carried out by non-military authorities. However, in disputes arising from the obligation to perform military service, there shall be no condition that the person concerned be a member of the military body. The procedure to be applied during the judicial review of the High Military Administrative Court is regulated in a special code named Code of High Military Administrative Court and unless otherwise specified the related principles of the Code of Administrative Judicial Procedure and the Code of Civil Procedure shall be applied.

2.4 COURT OF JURISDICTIONAL DISPUTES

Court of Jurisdictional Disputes is an independent court empowered to conclusively settle the jurisdictional and adjudication disputes between judicial, administrative and military judicial authorities assigned by the Constitution of the Republic of Turkey and conducting adjudication following its establishment on this legal basis (**Ansay**, Sabri Şakir, *Hukuk Yargılama Usulleri*, B.7, Ankara 1960, p. 23; **Kuru/Arslan/Yılmaz**, p. 185; **Blomeyer**, p.26) .

Raising a positive jurisdictional dispute is a request submitted to the Court of Jurisdictional Disputes by the related Chief Prosecutor or Chief Law Officer for the review of jurisdiction at issue upon rejection of objection of a jurisdictional duty contended in a case filed before a judicial, administrative and military authority of judiciary.

For a competent Chief Prosecutor or Chief Law Officer to submit a request to the Court of Jurisdictional Disputes, the jurisdictional objection must be raised in the first session at the latest in civil courts, whereas before presenting the evidentiary materials in criminal courts, as for administrative venues of judiciary, prior to the completion of petition and defense phase; besides, it is obligatory that the venues of judiciary also judge for their own jurisdiction.

In case of a decision of lack of jurisdiction rendered by the judicial authority reasoning its grounds as proper, a review to be conducted by the Court of Jurisdictional Disputes on the jurisdiction depends on the reversal of this judgment subsequent to an appeal and the existence of a decision rendered by the judicial authority for the jurisdiction upon compliance with the reversal.

For contending the existence of a negative jurisdictional dispute, at least two parties amongst judicial, administrative and military authorities of judiciary, as regards a case whose subject and reason are the same, their consideration concerning a lack of jurisdiction and finalization or conclusiveness of the decisions rendered are required.

The authority empowered to request for a dispute is the Chief Public Prosecutor, provided that the objection rejected concerning lack of jurisdiction is raised in favor of the judiciary,

spokesperson for President of the State Council has competence, in case no jurisdiction is contended in favor of administrative judiciary and if contended for the criminal judiciary of military, Chief Public Prosecutor of the Military Supreme Court of Appeals; as for an objection raised in favor of administrative judiciary of military, spokesperson for the President of that specific Court are empowered to submit a request for jurisdictional disputes.

In criminal cases where the rejection judged for the objection to jurisdiction is open to legal action, no such request shall be submitted before finalization of the judgment of rejection (**Kuru/Arslan/Yılmaz**, p. 186; **Blomeyer**, p.27). The Court of Jurisdictional Disputes shall be empowered to deliver final judgments in disputes between civil, administrative, and military courts concerning their jurisdiction and judgments. The organization of the Court of Jurisdictional Disputes, the qualifications and electoral procedure of its members, and its functioning shall be regulated by law. The office of president of this Court shall be held by a member delegated by the Constitutional Court from among its own members. Decisions of the Constitutional Court shall take precedence in jurisdictional disputes between the Constitutional Court and other courts.

2.5 THE COURT OF ACCOUNTS

Turkish Court of Accounts shall audit the financial activities, decisions and transactions of public administrations within the framework of accountability and submit accurate, sufficient, timely information and reports to the Turkish Grand National Assembly on the results of these audits (**Arslan/Tanrıver**, p. 167); audit whether or not accounts and transactions of public administrations within the scope of the general government with respect to their revenues, expenses and assets are in compliance with laws and other legal arrangements, and take final decision on matters related to public loss arising from the accounts and transactions of those responsible, submit the Statement of General Conformity to the Turkish Grand National Assembly (**Arslan/Tanrıver**, p. 167). No applications for judicial review of such decisions shall be filed in administrative courts.

In case of conflict between the decisions of the Council of State and the Court of Accounts, regarding taxes, similar financial obligations and duties, the decision of Council of State shall prevail.

The Court of Accounts is regulated as a Supreme Court in the 1982 Constitution Art. 160.

2.6 THE SUPREME COURT OF ELECTIONS

The Supreme Board of Election shall execute all the functions to ensure the fair and orderly conduct of elections from the beginning to the end, carry out investigations and take final decisions, during (**Blomeyer**, p.25; **Arslan/Tanrıver**, p. 162) and after the elections, on all irregularities, complaints and objections concerning the electoral matters, and receive the electoral records of the members of the Grand National Assembly of Turkey and presidential election (**Arslan/Tanrıver**, p. 162).

The Supreme Board of Election shall be composed of seven regular members and four substitutes. Six of the members shall be elected by the General Board of High Court of Appeals, and five of the members shall be elected by the General Board of Council of State from amongst

their own members, by the vote of the absolute majority of the total number of members through secret ballot. These members shall elect a chairperson and a vice-chairperson from amongst themselves, by absolute majority and secret ballot.

No appeal shall be made to any authority against the decisions of the Supreme Board of Election.

3. CONCLUSION

Turkish judicial system consists of the bodies that have different nature, are independent of each other to a large extent but have close relationships as well. This system includes many judicial institutions from courts to the Ministry of Justice and from justice commissions to the supreme boards.

The main purpose of this study is to provide a summary on general structure of courts and give fundamental information.

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