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Comparing Constitutional Adjudication
A Summer School on Comparative Interpretation of European
Constitutional Jurisprudence


Social Rights

Turkey

Social Rights in Turkish Constitutional Law

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1. THE LAW

* Relevant Provisions of the Constitution,

Characteristics of the Republic

Article: 2 The Republic of Turkey is a democratic, secular and social State governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble.

Fundamental Aims and Duties of the State

Article: 5 The fundamental aims and duties of the State are; to safeguard the independence and integrity of the Turkish Nation, the indivisibility of the country, the Republic and democracy; to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, social and economic obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social State governed by the rule of law; and to provide the conditions required for the development of the individual’s material and spiritual existence.

(The original text)

The Extent of Social and Economic Rights

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Article: 65 The State shall fulfil its duties as laid down in the Constitution in the social and economic fields within the limits of its financial resources, taking into consideration the maintenance of economic stability.

(As amended on October 17, 2001)

The Extent of Social and Economic Duties of the State

Article: 65 The State shall fulfil its duties as laid down in the Constitution in the social and economic fields within the limits of its financial resources, taking into consideration the priorities appropriate with the aims of these duties.

An outline of the Constitution and place of Social Rights in it

Parts of The Constitution:

GENERAL PRINCIPLES

FUNDAMENTAL RIGHTS AND DUTIES

FUNDAMENTAL ORGANS OF THE REPUBLIC

FINANCIAL AND ECONOMIC PROVISIONS

PROVISIONAL ARTICLES

FINAL PROVISIONS

MISCELLANEOUS PROVISIONS

Sections of Part Two (The Fundamental Rights And Duties)

GENERAL PROVISIONS

THE RIGHTS AND DUTIES OF THE INDIVIDUAL

SOCIAL AND ECONOMIC RIGHTS AND DUTIES

POLITICAL RIGHTS AND DUTIES
Articles in Section Three (Social and Economic Rights and Duties)

I. Protection of the Family (Art. 41)

II. Right and Duty of Training and Education (Art. 42)

III. Public Interest

A. Utilisation of the Coasts (Art. 43)

B. Land Ownership (Art. 44)

C. Protection of Agriculture, Animal Husbandry, and Persons Engaged in These Activities (Art. 45)

D. Expropriation (Art. 46)

E. Nationalisation and Privatization (Art. 47)

IV. Freedom to Work and Conclude Contracts (Art. 48)

V. Provisions Relating to Labour

A. Right and Duty to Work (Art. 49)

B. Working Conditions and Right to Rest and Leisure (Art. 50)

C. Right to Organise Labour Unions (Art. 51)

D. Activities of Labour Unions (Art. 52) (abrogated)

VI Collective Bargaining, Right to Strike, and Lockout

A. Right of Collective Bargaining (Art. 53)

B. Right to Strike, and Lockout (Art. 54)

VII. Guarantee of Fair Wage (Art. 55)

VIII. Health, the Environment and Housing

A. Health Services and Conservation of the Environment (Art. 56)
B. Right to Housing (Art. 57)

IX Youth and Sports

A. Protection of Youth (Art. 58)

B. Development of Sports (Art. 59)

X. Social Security Rights

A. Right to Social Security (Art. 60)

B. Persons Requiring Special Protection in the Field of Social Security (Art. 61)

C. Turkish Nationals Working Abroad (Art. 62)

XI. Conservation of Historical, Cultural and Natural Wealth (Art. 63)

XII. Protection of Arts and Artists (Art. 64)

XIII. The Extent of Social and Economic Duties of the State (Art. 65)

2. DEVELOPMENT OF SOCIAL RIGHTS IN TURKISH CONSTITUTIONS

The 1961 Constitution played a major role in development of social rights in Turkey. Before the 1961 Constitution, although a state controlled economic model was adopted during thirties and there were some legal developments in terms of promotion of social justice and social development, there were no comprehensive constitutional approach towards social state and social rights. The 1961 Constitution stipulated in Article 2. that the Turkish Republic was a social state. The approach of the 1961 Constitution to human rights was also requiring adoption of social rights. Article 10. of the Constitution adopted a “positive liberty” approach in Berlin’s sense about the nature of human rights. Article 10 was read as follows:

«Article 10: Every individual is entitled, in virtue of his existence as a human being to fundamental rights and freedoms, which cannot be usurped, transferred or relinquished.»
The state shall remove all political, economic and social obstacles that restrict the fundamental rights and freedoms of the individual in such a way as to be irreconcilable, with the principles embodied in the rule of law, individual well-being and social justice. The state prepares the conditions required for the development of the individuals’ material and spiritual existence.

According to this provision the duty of state relating to protection of human rights is not only negative (not to interfere) but also positive (to provide). Following this approach the Constitution regulated fundamental rights and duties in the second part, in four sections. These sections were composed of, general provisions, the rights and duties of the individual, social and economic rights and duties and political rights and duties. As can be seen from these sections, the 1961 Constitution followed the triple taxonomy of Jellinek, in which human rights are divided into three category according to individuals’ position before the state: negative status rights, positive status rights and active status rights.

Although the 1961 Constitution included a section about social and economic rights, those rights were far from being individual claim rights because of Article 53 of the Constitution which regulated the extent of the economic and social duties of the state. Article 53 stipulated that «The state shall carry out its duties to attain the social and economic goals provided in this section only insofar as economic development and its financial resources permit». Therefore, the state was under the duty to provide those rights as far as its financial resources were enough to provide such rights. An individual could not claim provision of social rights from state organs. So, those provisions of the Constitution could be described as policy goals for the state to take into account when determining social policies rather than guaranteeing individual constitutional rights.

The 1982 Constitution of Turkey preserved the same approach to social rights with minor differences. As indicated above, Article 2 of the 1982 Constitution describes the Turkish Republic, inter alia, as a social state. Article 5 of the Constitution indicates among fundamental aims and duties of the state that «to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, social and
economic obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social State governed by the rule of law; and to provide the conditions required for the development of the individual’s material and spiritual existence».

In order, the state, to pursue the goals stipulated in these provisions, it is necessary to recognise social and economic rights. Therefore, the Constitution includes a section (section three) about social rights in part two which regulates fundamental rights and duties. There are 25 articles in this section. While the right to property was regulated among social and economic rights in the 1961 Constitution, it was moved to section on “rights and duties of the individual” without making any change in the content of the right in the 1982 Constitution. The 1982 Constitution also includes some rights such as protection of youth, protection of art and artists which were not existed in the 1961 Constitution. But in essence there is no big difference between two Constitutions in terms of their approach to social and economic rights.

Some of the articles in the section regulate some policy goals for the state, while some others endow rights to individuals. But those rights cannot be considered as subjective rights which can be claimed before a court by right holders. Rather, such rights can be considered as directives for the Parliament to regulate individual subjective rights. Therefore, the Constitutional provisions relating to social rights are not directly applicable in any court case.

There is an article (Article 65) about the limits of social rights in the Constitution. The article was amended in 2001. Before the amendment the title of the article was “the limits (or extent) of social and economic rights”. The article was read as follows:

«Article 65: The State shall fulfil its duties as laid down in the Constitution in the social and economic fields within the limits of its financial resources, taking into consideration the maintenance of economic stability». 
The 2001 amendment changed the title of the Article as “the limits of the social and economic duties of the state” and the Article as follows:

«Article 65: The State shall fulfil its duties as laid down in the Constitution in the social and economic fields within the limits of its financial resources, taking into consideration the priorities appropriate with the aims of these duties».

The basic aim of these amendments was to strengthen the binding power of social rights on the Parliament and narrow its margin of discretion while determining policy priorities.

There was a debate about the scope of Article 65 among scholars before the amendment, because there are some articles in section three which impose only negative duties to the state like Articles 51, 53 and 54. For example, Article 51 guarantees right to organise labour unions, Article 53 right of collective bargaining and Article 54 right to strike, and lockout. None of these rights impose direct economic burden on the state treasury. Therefore, some scholars argued that such rights could not be limited for the reasons of lack of economic resources and to maintain economic stability. The amendment aimed to clarify that reasons of lack of economic resources and maintenance of economic stability can be raised for only rights, provision of which impose positive economic obligations to the state treasury.

The aim of the amendment in the text of the Article was to narrow the Parliament’s discretion while determining policy priorities and to constrain the Parliament to give priority to the duties about social rights. But the real effect of this amendment has not been tested by the Constitutional Court yet. In fact, it is quite difficult to expect from the Constitutional Court to control and decide which social policy should be prioritised. It will politicize the Court. Therefore, it should be considered as a programme norm for the Parliament, rather than a reference norm for the Court.

The Constitution made another exception for social and economic rights. According to Article 13 of the Constitution «fundamental rights and freedoms may be
restricted only by law», for this reason, fundamental rights and freedoms cannot be regulated by decrees having the force of law. But the Constitution exempted social and economic rights from this requirement and they can be regulated by decrees having the force of law. According to Article 91 of the Constitution «The Turkish Grand National Assembly may empower the Council of Ministers to issue decrees having the force of law. However, the fundamental rights, individual rights and duties included in the First and Second Chapter of the Second Part of the Constitution and the political rights and duties listed in the Fourth Chapter, cannot be regulated by decrees having the force of law except during periods of martial law and states of emergency».

To sum up, the Turkish Constitution includes a special section for social and economic rights and guarantees most of the social and economic rights in 25 articles. Nevertheless, because of Article 65 of the Constitution, the state is under the duty to provide these rights as long as it has enough economic resources. Although the binding power of social and economic rights was increased by the amendment of 2001, they are still far from being individual claim rights, rather they can be called as programme norms to be taken into the account by the Parliament. They can only become enforceable if the parliament enacts a law in this regard. Therefore, these rights can be regarded as legal rights rather than constitutional rights or human rights.

The Turkish Constitutional Court in many cases rejected annulment claims on the ground that it is within the parliament’s discretion to decide public policy priorities considering the economic resources and economic stability\(^1\). But, in some cases, the Court annulled laws regulating social rights of public servants on the ground that they are contrary to the principle of social state and principle of equality without mentioning Article 65.

3. AN EXAMPLE DECISION OF THE CONSTITUTIONAL COURT

Concrete Review of the Law No: 6245 -Article 10 (As amended by Law No:4969) (The Law on Per Diems)

The Turkish Constitutional Court, Date of the Decision: 4.5.2005; Registry No: E. 2004/54, Decision No: K. 2005/24; Published in Resmi Gazete (Official Gazette), 26.11.2005, 26005

Summary of the Decision:

Several first instance courts asked the Constitutional Court to assess the compliance of Article 10/1 of the Law No: 6245 amended by the Law No:4969 (The Law on Per Diems) with the Constitution. Article 10/1 of the Law No: 6245 rules that public servants who demanded appointment of himself or herself to another city are not entitled to transportation allowance. It means that if a public servant is appointed to another city without his or her own demand, he or she will be entitled to claim transportation allowance but when a public servant demands his or her own appointment to another city, he or she could not claim transportation allowance.

The Constitutional Court ruled that the principle of “social state governed by the rule of law” requires a state to realize and guarantee fundamental rights, to observe social requirements and public interest, to strike a balance between individual and common interests, to realize social solidarity to the possible maximum level, to realise social justice and equality by protecting weak against powerful, to protect employees by taking necessary measures to enhance working conditions, to solve social security problems, to aim development of the country and to aim just allocation of national income among different social groups of the society.

A public servant who is appointed to another city has to make some expenses to move his or her home and family to the new work place even if he or she demanded appointment. Such expenses should be shared by the community. Therefore, the rule is contrary to the Article 2 of the Constitution.
The Court also found the rule contrary to the principle of equality in Article 10 of the Constitution and annulled the rule unanimously.