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A JUDICIAL CONUNDRUM: OPINIONS AND RECOMMENDATIONS ON CONSTITUTIONAL REFORM IN TURKEY

EDITOR:
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Preface

Turkey calls herself a democracy while in reality she is still struggling to become one. We have recognized only recently that our Republic was structured as a tutelary regime and now we are ready to change our mindsets so that we can start a transformation. Probably, the rule of law is the epitome of the difference between democracy and a tutelary regime. This principle requires all governmental bodies, including the judiciary, to abide by the law and to respect universal rights and freedoms. However, in Turkey, the judiciary sees itself as the definer of the law because of its privileged position created by the coup constitution. This situation indicates that one of the critical steps that has to be taken to establish democracy is to reform the judiciary. Therefore, in the last four years, judiciary has been one of the areas on which TESEV completed the highest number of projects. Studies led by Mithat Sancar were carried out in regards to judges and prosecutors and then to the judicial system of the society and its functions. These studies were all compiled in a book and published in May 2009. In March 2010, another study was published. This study, authored by Meryem Erdal, takes a look at how different media organizations cover certain litigations and approach the judiciary.

Thus, it became possible to discuss the perception problems surrounding the judiciary system. However, democratization of the judicial system needs to have a policy of “reform” and to share this policy with the society. It is possible to say that this reform has two aspects. One of them is to review the issues of “independence”, “impartiality” and “legitimacy” in terms of the whole system and the position of the judiciary, and secondly to ensure that international norms are applied to these concepts. In this context, the relationship between the executive branch and the judiciary, the position of the judiciary between the official ideology and universal law, and election system of higher judicial bodies appear as major problematic areas.

This report edited by Serap Yazıcı discusses these issues, which also constitute the subject matter of the government’s judicial reform, from the point of view of universal democratic criteria and creates a meaningful basis for the direction and framework of the reform. This report also contains a short review on the constitutional amendment proposal drafted and submitted to the National Assembly on 30 March 2010 by the Justice and Development Party. The judiciary does not only need a systemic reform, but also needs a transformation and needs to be dealt from a new perspective, as a mechanism which has to meet citizens’ needs for justice. This issue will be brought to the attention of the public with two reports that will be prepared by TESEV within this year. These reports are intended to discuss “access to justice” and “right to a fair trial” which are among the major demands of the citizens from the judiciary.

Thus, we hope that we will help covering essential elements that have to be present in a modern judicial reform and will respond to the public’s need for information and discussion to a certain extent.

ETYEN MAHÇUPYAN

TESEV DEMOCRATIZATION PROGRAM

CONSTITUTIONAL AMENDMENTS IN THE SCOPE OF THE JUDICIAL REFORM STRATEGY

Introduction

Serap Yazıcı

The “Judicial Reform Strategy” paper, published on the website of the Ministry of Justice on 24 July 2009 and submitted to the Council of Ministers on the same day, contains ten objectives aiming at enhancing the independence, impartiality, effectiveness and efficiency of the judiciary. These ten objectives are listed below:

1. Strengthening the independence of the judiciary
2. Promoting the impartiality of the judiciary
3. Enhancing the efficiency and effectiveness in the judiciary
4. Enhancing professionalism within the judiciary
5. Improving management system of the judicial organization
6. Enhancing confidence in the judiciary
7. Facilitating access to the judiciary
8. Ensuring effective implementation of measures to prevent disputes and improving alternative dispute resolution mechanisms
9. Improving the penitentiary system
10. Continuation of legislative works in line with the needs of our country and for harmonization with the EU acquis.

The “Judicial Reform Strategy Action Plan” paper details the actions that have to be taken to achieve these objectives and lays down a timetable. Achieving these objectives will, on the one hand, enable the establishment of a legal order meeting the requirements of a democratic state governed by the rule of law, enshrined in Article 2 of our Constitution which defines the characteristics of the republic. On the other hand, it will ensure the fulfillment of the Copenhagen Political Criteria laid down in the EU accession process.

In a state governed by the rule of law, three fundamental branches of the state and all administrative agencies exercising public authority are responsible for abiding by the law. This principle dictates that the law has supremacy over state authority and its main purpose is to prevent arbitrary administrative acts and build a system where individuals face the future with confidence. In fact, in its various rulings, the Constitutional Court used similar definitions to describe the state governed by the rule of law.¹ A state governed by the rule of law must have various constitutional institutions and mechanisms in order to create a system limited by the supremacy of the law. The most important of such mechanisms is probably the judicial review of legislative and executive actions, and administrative decisions in terms of their conformity with the law. The judiciary may fulfill its review function arising from the principle of rule of law, only when there are mechanisms guaranteeing its independence and impartiality and making it effective and efficient. Therefore, the objectives of the judicial reform project may help fulfilling the requirements of a state governed by the rule of law as described in Article 2 of our Constitution.

¹ E. 1991/7, K. 1991/43, k.t. 12.11.1991, AMKD, Issue 27, Volume 2, p. 652; E. 1976/1, K. 1976/28, k.t. 25.5.1976, AMKD, Issue 14, s. 189; E. 1985/31, K.1986/11, k.t. 27.3.1986, AMKD, Issue 22, p.120; E. 1988/36, K. 1989/24, k.t.2.5.1989, AMKD, Issue 25, p.262; E. 1989/11, K. 1989/48, k.t. 12.12.1989, AMKD, Issue 25, p.433-434.

Copenhagen political criteria contain minimum requirements that have to be met by the constitutional and political orders of the candidate states in order to continue the accession process. These requirements include the establishment of stable institutions which guarantee principles of democracy, the rule of law, and human rights, and protect and respect minority rights.² It is necessary to ensure the independence and impartiality of the judiciary and to enhance its effectiveness and efficiency in order to guarantee the principle of rule of law. Therefore, when implemented, this judicial reform project will not only be the cornerstone of a democratic state founded on human rights and governed by the rule of law, which has been needed in Turkey for long years, but also it will help fulfilling some of the Copenhagen political criteria and allow Turkey to make progress in the EU accession process.³ While all objectives of the judicial reform project are important for establishing a judicial order required by the rule of law; this paper will only discuss those objectives which require constitutional amendments. These objectives include the restructuring of the Constitutional Court and the High Council of Judges and Prosecutors (HCJP), regulating the jurisdiction of military courts, instituting a two-instance system of the High Administrative Military Court, and finally establishment of an Ombudsman's office.

² Serap Yazıcı, *Demokratikleşme Sürecinde Türkiye*, (Turkey in Democratization Process) İstanbul Bilgi Üniversitesi Yayınları, İstanbul, 2009, p. 319-322.

³ In the 2004 Progress Report, it was stated that Turkey sufficiently met Copenhagen political criteria thanks to the constitutional and legal reforms it made in the recent years. Thus at the summit held on 17 December 2004, it was decided to start negotiations with Turkey. The important thing is that in the 2004 Progress Report, Turkey was described to have *sufficiently* met the Copenhagen political criteria; *not completely*. This statement indicates that Turkey has to make a series of reforms in order to meet these criteria completely. In fact, annual reports published since that date point to reforms that have to be made by Turkey to completely meet Copenhagen political criteria. Finally, required reforms were included in the 2009 progress report. This report also indicates that the "Judicial Reform Strategy" published by the Ministry of Justice in August 2009 is a significant step in terms of the consultative method employed in developing this strategy, and its objectives.

The Principle of Rule of Law and Judicial Impartiality with a Dimension Beyond Normative Law

Ozan Erözden

Today, judicial independence and impartiality is one of the major building blocks of the principle of rule of law,¹ which is accepted as an indispensable element of democratic regimes. A state governed by rule of law, in its simplest definition, is a state that abides by the law in all its acts and actions. And the best way known to prevent arbitrary or unlawful acts and actions by organs of the state is to put them under the supervision of an independent and impartial organ. In traditional theory, this supervisory function is assigned to the judiciary. The judiciary is expected, on the one hand, to produce rulings in litigations initiated by individuals, on the other to supervise acts and actions of state organs in terms of conformity to law. In this context, normative procedures and ethical criteria have been developed in order to ensure independence and impartiality of the judiciary against the other branches of the government.²

Although the independence and impartiality of the judiciary is essentially addressed within the normative framework, there is no doubt that the issue has one dimension that goes beyond this.³ In order to be able to explain this dimension, it is necessary to first address the question of whom and what the judiciary, as a public body, and its members, as public agents using the power of the state, will be independent from and impartial to. The judiciary must first of all be independent against interventions of the executive and the legislature, and must be impartial when judging their acts and actions. This is what normative guarantees target. However, the subjective, i.e. internalized impartiality of the members of the judiciary is also very important. A member of the judiciary is equipped with various thought and behaviour patterns as is the case with every human being living in a society. Nevertheless, when performing a judicial act, and particularly when formulating a legal judgement, a member of the judiciary should be able to keep himself as independent as possible from his own personal thought patterns and value judgements, and should be able to remain impartial in this sense.

Subjective impartiality also requires the member of the judiciary to insulate himself/herself from the influence of the worldview he holds as a human being, when applying legal norms to the matter being tried. However, when it comes to his/her perspective on the source, purpose and function of the law –which is a point that can in general be addressed within the framework of one’s worldview– pulling free from influence will not be possible. When applying an abstract statutory rule to a concrete case, the member of the judiciary will inevitably make an interpretation, and this interpretation will inevitably be shaped around his/her view on the source, purpose and/or function of law. This the very point where appears the important connection between the perception of law prevailing in the judicial sub-culture and the implementation of the principle of rule of law. If a paradigm which advocates that in a democratic legal order universal principles of law, including human rights are binding for and superior to the sovereign will is not valid in the judicial sub-culture, it will not be possible to fully implement the principle of rule of law, regardless of how strong the normative guarantees may be. In the context of actual democratization of Turkey, the ongoing debate on the judicial power constitutes a tangible example of this connection.

In Turkey, during the early republican era, there is no doubt that the law was conceived as an instrument of social transformation and modernization. Reforms made in the area of law constituted a significant part of the republican revolution. The main goal of the extensive reception in the domain of law⁴ carried out after the second half of 1920s

1 This principle, known as *rule of law* in the Anglo-Saxon literature, corresponds to “Rechtsstaat” in the German law and “état de droit” in the French law.

2 See Yılmaz Aliefendioğlu, “Adil Yargılanma Hakkı Etik (éthique) Açından Yargı Bağımsızlığı ve Yansızlığı”, *Özgürlükler Düzeni Olarak Anayasa: Fazıl Sağlam 65. Yaş Armağanı*, by Osman Can, A. Ülkü Azrak, Yavuz Sabuncu, Otto Depenheuer, Michael Sachs, Türk-Alman Kamu Hukukçuları Forumu Yayını, İmaj Yayınevi, Ankara, 2006, p. 9-40.

3 For a study addressing this dimension based on Turkey, see Osman Can, “Yargı Bağımsızlığı: Yalnızca Normatif Bir Sorun mu?”, *Prof. Dr. Bülent Tanör Armağanı*, by Mehmet Ö. Alkan, Oğlak Yayınları, İstanbul, 2006, p. 97-118.

4 Gülnihal Bozkurt, *Batı Hukukunun Türkiye’de Benimsenmesi*, Türk Tarih Kurumu, Ankara, 1996.

has been, as stated by state officials, Westernization of the society.⁵ In this context, the legal reform was considered as an instrument of institutionalizing secularism, which is the utmost republican reform. Yet transforming the legal order in this way had also a philosophical background. In the terminology of philosophy of law, this intellectual enterprise can be called legal positivism based on an absolute interpretation of the theory of national sovereignty.

Legal positivism, in a generic definition, is the school of philosophy of law which claims that the only source of law is the will of the body equipped with the power of enacting laws. In contrast, the school of natural law, advocates that the source of law is beyond the will of the law-maker, and that the law has an essence which cannot be changed by the will of the law-making authority.

A political-legal system in which the principle of national sovereignty is adopted in its most absolute sense is based on legal positivism. In this perspective, since there is nothing that restricts the sovereign will of the nation, the nation, which makes the laws either directly or through its representatives, can shape the law in any way it wants. The principle of national sovereignty, openly declared as the guiding principle in the beginning of the struggle for national independence with the opening of the Turkish Grand National Assembly (TGNA) and included in all subsequent constitutional documents, carries a dual meaning in the discourse of Kemalist revolution. By adopting this principle, first of all, the concept of monarchic sovereignty is rejected, and the will of the Sultan becomes no longer a source of law. In addition, by establishing the law on such a foundation, religious rules originating from “the will of God”, are also left outside the legal domain. The secularist reform, gaining impetus after the second half of 1920s, makes strong references to this aspect of legal positivism and completely rejects religious rules as legal norms from this perspective.

Transfer of sovereignty to the people or to the nation is one of the significant democratic leaps taken through bourgeois revolutions. This phenomenon, occurring first with the French Revolution of 1789, still maintains its validity today. Democratic regimes are still founded on the principle of national sovereignty or the sovereignty of the people. Yet, if national sovereignty merges with pure legal positivism, it would lead to the conclusion that there is nothing that limits the nation’s will, which in turn would make impossible to describe a safe-haven for human rights protected from interventions of the sovereign power, or rather to prescribe the norms of human rights as fundamental law in a democratic order. This would also give rise to significant consequences in terms of the rule of law. When defining the rule of law, it becomes inevitable to ask the question “which law?”. In this context, when law is defined from a purely positivist perspective, i.e. when law is assumed to consist of rules set by the law-making authority, then the concept of the rule of law (*Rechtsstaat*), as put by Kelsen,⁶ becomes a tautology. If law originates from the will of the nation that has organized itself in the form of a state, any state constitutes automatically the rule of law. Nevertheless, if the rule of law is a principle that restricts the state’s power, then it will be necessary to find another source for law, a source other than all the organs of the state including the legislature. To clarify, unless the presence of some universal principles of law that includes human rights superior to the sovereign will of the nation is envisaged, it will not be possible to formulate a coherent definition of a democratic state governed by rule of law.

One can easily provide concrete instances for the above-mentioned abstract propositions by examining Turkey’s past and present. Given the revolutionary conditions of the time it has been quite normal for the Kemalist cadres to adopt the principle of national sovereignty in its purest form with a positivist approach. These cadres legitimized their breakthroughs by claiming that these were based on the nation’s will, while rejecting any superior rule that could restrict this will. Yet, as the will of the nation started to be manifested not through single party rule but general elections in a multi-party system following 1946, the problem of the legitimacy of the Kemalist reforms started to occur. The dilemma stems from the belief on which the Constitutions of 1921 and 1924 are based, that is democratic legitimacy is ensured if sovereignty is exercised by the nation. In this system, if the ruling party winning the general elections is an “anti-revolutionist”, there is no answer to the question of what foundation the legitimacy of the revolutions will be based on. In the 1950-60 period, Kemalist cadre, believing that the ruling Democrat Party (DP) was anti-reformist, sought to establish that legitimacy through a constitution and laws reflecting Kemalist revolutionary philosophy. On the other hand, the project⁷ of educating jurists in a way that they adopt the principles of Kemalist revolution, the revolutionary law and the main philosophy behind it was also successfully accomplished,

5 The Justice Minister of the period, M. E. Bozkurt, gave the following statement in 1925: “Turkish revolution is resolved to adopt the Western civilization unconditionally and make it its own. This resolution is based on such a clear ambition that anyone who dares to stand on its way is doomed to annihilation by iron and fire. In the view of this principle, we have to take all our laws from the West. By doing so, we will be acting in line with the will of the Turkish nation.” Cited by: Gülnihal Bozkurt, “Atatürk’ün Hukuk Alanında Getirdikleri”, *Atatürk Araştırma Merkezi Dergisi*, Issue 22, Vol. VIII, November 1991, p. 45-53.

6 Hans Kelsen, “Saf Hukuk Kuramı: Devlet ve Hukuk Özdeşliği”, *Devlet Kuramı*, der. Cemal Bali Akal, Dost Kitabevi Yayınları, Ankara, 2000, p. 450-451.

7 At the opening ceremony of the Ankara Law School, Atatürk said: “We are attempting to uproot the old principles of law by formulating completely new laws. We are establishing these institutions to educate a new generation of jurists from the very beginning with new principles.” Cited by: Bozkurt, op. cit., 1991.

and a judiciary able to defend Kemalist revolutions on the basis of law was put in place. As expressed by Osman Can, it is not a coincidence that the constitutional shortcomings regarding guarantees of judicial independence and the judicial control of the legislature and the executive, which were never uttered during the single-party era, started to be frequently discussed throughout the DP rule.⁸

Even during the era of the 1961 Constitution, which placed the principle of rule of law among the main tenets of the republic and which, as a result, introduced judicial control over the acts of the legislature and the executive while insuring judicial independence and impartiality in keeping in line with general normative criteria, many problems in the area of human rights occurred, and some of the violations of human rights originated directly from the judiciary.⁹ During the era of the 1961 Constitution, the normative guarantees introduced for judicial independence and impartiality were designed not entirely from the perspective of a democratic state governed by the rule of law, but also as an institutional guarantee against the “risk” that those who opposed the modernization project of the Kemalist revolution gain the majority in the parliament through general suffrage.¹⁰ To put it more clearly, in the 1961 system, the reason behind the complete actualization of the normative dimension of the principle of rule of law was not a philosophical standpoint that held universal principles of law and the human rights compendium above the sovereign will, but a mentality that aimed to limit the government elected through popular vote by the principles of Kemalist revolution. The body of law enforced during Kemalist reforms was once again entrusted to jurists graduated from law schools opened under the project to educate jurists by Kemalist principles. This perspective would become more obvious with the coup of 12 March 1971, in the aftermath of which the large portfolio of human rights protection mechanisms of the original 1961 Constitution was amended in a restrictive manner. The same trend continued and grew stronger in the system of the 1982 Constitution, which from the beginning aimed to protect the state against the individual and seriously downgraded constitutional guarantees for fundamental rights and freedoms.¹¹

These concrete examples show that, as long as members of the judiciary are not equipped with a perspective of law based on the principle of supremacy of fundamental rights and freedoms and universal principles of law, it will not be possible to fully implement the principle of democratic state governed by rule of law, regardless of how strong the normative guarantees of judicial independence and impartiality may be. Unfortunately, the “Judicial Reform Strategy” (2009) document prepared by the Ministry of Justice also mostly includes suggestions that remain within the normative framework, under the sections on strengthening independence of the judiciary and promoting impartiality of judiciary.¹² Yet, the findings of one of the rare studies¹³ on the perception of law among members of the judiciary in Turkey shows that a statist and sexist perspective is dominant among the judges and prosecutors, while there is a lack of trust and interest in universal human rights standards and, in this context, in the decisions of the European Court of Human Rights (ECtHR).

SUGGESTION

Unless members of the judiciary subscribe to a new perception of law that holds human rights and other universal democratic standards as supreme values, it will not be possible to implement the principle of democratic state governed by rule of law. Therefore, in a judicial reform aiming at strengthening the independence and impartiality of the judiciary it is inevitable to consider also measures that will ensure the subjective impartiality of the members of the judiciary. In this context, as a short-term remedy, one may suggest add to the constitution a provision that defines the supremacy of the universal principles of law, including human rights over the sovereign will. In this way –even though it may appear paradoxical–, legal positivism prevailing among the members of the judiciary can be shattered with a positive legal norm. In addition, as a long term solution, one may be suggest to introduce courses on philosophy of law focusing on the natural law perspective in the curricula of law faculties and the Justice Academy. Similarly, the content of current human rights trainings, which address the subject from a positivist perspective, should be changed, and replaced with a perspective that gives more weight to the philosophical foundations of human rights.

8 Can, op. cit., p. 108.

9 On this subject, see Bülent Tanör, *T.C.K. 142. Madde: Düşünce Özgürlüğü ve Uygulama*, Forum, İstanbul, 1979. Also see Bülent Tanör, *Türkiye'nin İnsan Hakları Sorunu*, BDS Yayınları, İstanbul, 1994.

10 Hootan Shambayati & Esen Kırdış, “In Pursuit of ‘Contemporary Civilization’: Judicial Empowerment in Turkey”, *Political Research Quarterly*, volume 62, issue 4, December 2009, p. 767-780.

11 The Constitutional Court, in a decision it ruled during the era of the 1982 Constitution, clearly expresses the equation it assumed between Kemalist revolutions and rights and freedoms: “The Constitution, which is based on the Turkish Revolution and which attributes special importance and supremacy to secularism in this structure, has aimed to diligently protect the principle of secularism despite freedoms and has not allowed these freedoms to compromise this principle.” E. 1989/1, K. 1989/12, dated, 7.3.1989. AMKD, No 25.

12 “Judicial Reform Strategy”, Turkish Ministry of Justice, 2009, p. 5-13

13 See Mithat Sançar & Eylem Ümit Atılğan, “Adalet Biraz Es Geçiyor...”, *Demokratikleşme Sürecinde Hâkimler ve Savcılar*, TESEV Yayınları, İstanbul, 2009.

Restructuring of the Constitutional Court

Ergun Özbudun

The composition and powers of the Constitutional Court have been controversial issues for a long time in Turkey. In the “Judicial Reform Strategy” paper prepared by the Ministry of Justice in 2009, it was stated under the heading of the “Restructuring of the Constitutional Court” that the competences of the Court would be redefined in the light of international documents, and constitutional amendments would be made with regard to its composition. However, this paper does not give any details on these issues or make concrete proposals.

The constitutional judiciary or the judicial review of the constitutionality of laws is a phenomenon which emerged at a relatively late stage of democratic development. This institution was first established in the case of *Marbury v. Madison* in the United States of America in 1803, but, for a long time it was seen as one of the peculiarities of the U.S. such as Broadway musicals or Western movies. Europe was dominated by the French approach which considered law as “an expression of national will” and the English “parliamentary sovereignty” theory which was reflected in the saying “the parliament may do anything but to make a man woman and a woman a man”. During this period, almost all written constitutions were rigid, yet it was accepted that the constitutionality of laws could be reviewed only politically, not judicially.

The first step in Continental Europe towards the establishment of a constitutional judiciary was taken after the World War I, with the Austrian Constitution enacted on 1 October 1920 under the influence of the famous Austrian jurist Hans Kelsen. Kelsen was aware that European political elites would not accept an American type diffuse constitutional review where all general courts were authorized to exercise such review. Therefore, he came up with an intermediate formula where the constitutional review would be exercised by a very specialized court. In other words, he aimed to “demonstrate that such a system could provide the benefits of constitutional review without turning it into a government of judges”.¹ Therefore the Austrian Constitutional Court was first formed as a very special structure where only the state bodies listed in the constitution could file appeals (the federal executive could appeal against state laws, whereas constituent states could appeal against federal laws). Until the amendment in 1929, the general courts were not able to refer to the Constitutional Court any constitutional issue even through concrete norm control. All members of this Constitutional Court were elected by political bodies. Kelsen also argued that constitutions should not contain provisions related to fundamental rights and freedoms. In his opinion, these provisions were inherently open-ended and might lead the constitutional court to intervene in the discretionary domain of the legislative branch and shift from being a “negative lawmaker” to being a “positive lawmaker”. Even this intermediate formula was criticized from two opposing aspects. Conventionalists like Carl Schmidt claimed that this organization was not a court, but rather a kind of higher legislative body, while the advocates of a U.S. type review saw it as a political review rather than a judicial one. Therefore, no countries followed the example of Austria between the two world wars, except two unsuccessful experiences in Czechoslovakia (1920) and Spain (1931).²

In the post Second World War era, a Kelsen-type central review system became widespread in constitutional judiciary. Learning from their bitter experiences during the Nazi and Fascist periods, Germany and Italy were determined to restrict the powers of elected bodies more effectively and therefore established constitutional courts through their post-war constitutions, whereas Austria returned to the system that was introduced in its 1920 Constitution. With its 1958 Fifth Republican Constitution, for the first time in its history France established a Constitutional Council that was given the power to exercise constitutional review. However, unlike other examples, the Constitutional Council can only make “*a priori review*” before laws come into force. Moreover, until 1974 when sixty members of the National Assembly or sixty members of the Senate were authorized to seize the Council by a

¹ Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*, Oxford University Press, Oxford, 2000, p. 35.

² *A.g.e.*, p. 34-37; Mauro Cappelletti, *Judicial Review in the Contemporary World*, Bobbs-Merrill, Indianapolis, 1971, s. 50, 71-74.

constitutional amendment, the Council remained as an instrument protecting the executive against the abuse of authority by the legislature, manifesting the tendency of the 1958 Constitution to strengthen the executive branch. Therefore, it was more of a political review rather than a judicial one. In fact, before the 1974 amendment, only the President of the Republic, the Prime Minister and the Speaker of one of the houses were entitled to seize the Constitutional Council. With its 1961 Constitution, Turkey became one of the first European countries which adopted constitutional review.

Constitutional Justice became even more widespread during the “third wave of democratization”, which started with the 1974 Portuguese revolution. Spain and Portugal, two of the three Southern European states which made transition to democracy in the 1970s, established constitutional courts, whereas, Greece opted for a U.S. type diffuse review system. Following the collapse of the Berlin Wall, almost all of the formerly communist Central and Eastern European states and former Soviet countries which became independent adopted constitutional review. Today, it is commonly argued that constitutional review is an essential part of constitutional democracy, if not a *sine qua non*.

Constitutionalism and democracy are two fundamental political values in our era and the prevalence of constitutional judiciary has increased the tension between these concepts arising from their very nature. Until recently, the legislative power was considered to belong solely to elected parliaments, in a sense, the establishment of constitutional courts means sharing this power with the judicial branch. As Ran Hirschl says, “there is now hardly any moral or political controversy in the world of new constitutionalism that does not sooner or later become a judicial one. This global trend toward juristocracy is arguably one of the most significant developments in late-twentieth and early twenty-first century government.”³

The unique character of the constitutional judiciary and the political nature of the majority of cases referred to the constitutional courts require the adoption of very different methods in the selection of members of these courts compared to general courts. In fact, the common practice in Western democracies is the selection of all or the majority of members of the constitutional courts by political bodies. The intention is not to make constitutional courts servants of the governing party as believed or claimed by some groups in Turkey. On the contrary, the intention is to strengthen the democratic legitimacy of these courts vested with extra-ordinary powers such as the authority to annul laws.

In some of the European countries (Germany, Poland, Hungary) all members of the Constitutional Court are elected by parliament. In Austria, the President, Deputy President, six regular and three substitute members of the Constitutional Court (Article 147 of the Constitution) are selected by the President of the Republic upon the proposal of the federal government. National Council and the Federal Council nominate three candidates each, to be selected by the President as the remaining six regular members. In Spain, (Article 159 of the Constitution), the King appoints twelve members comprising four candidates nominated by the Congress of Deputies, four candidates nominated by the Senate, two candidates nominated by the government, and two candidates nominated by the General Judiciary Council. In Portugal, (Article 224 of the Constitution) ten out of thirteen members are elected by parliament (Assembly of the Republic), and three members are elected through co-optation: six members have to be selected from among judges of other courts. In France, three out of nine members of the Constitutional Council are elected by the President of the Republic, three by the President of the National Assembly, and three by the President of the Senate. In Bulgaria, (Article 147 of the Constitution) one-third of twelve judges is elected by the National Assembly and one third by the President of the Republic. The remaining judges are elected during the joint meeting of the judges of Supreme Court of Appeals and the Council of State. In Romania, (Article 140 of the Constitution) the Chamber of Deputies elects three of the nine judges, the Senate elects three, and the President of the Republic selects three. In the Czech Republic, (Article 84 of the Constitution) fifteen members of the court are appointed by the President of the Republic subject to the approval of the Senate. In Italy, (Article 135 of the Constitution) one-third of the members of the Constitutional Court is selected by the President of the Republic. One-third is elected at the joint meeting of two houses of the parliament, and the remaining one-third is elected by the judges of supreme general court and supreme administrative court. There are many other similar examples.

Thus, there is no Western democracy, except for Turkey, where the power to elect judges of the Constitutional Court is completely detached from parliament. Moreover, it should be remembered that the 1961 Constitution gave an important role to the Grand National Assembly in the election of judges of the court, somewhat parallel to the Western models. Article 145 of this Constitution reads as follows:

3 Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Harvard University Press, Cambridge Massachusetts and London, 2004, p. 1.

The Constitutional Court is composed of fifteen regular and five substitute members. Four regular members are elected by the Plenary Assembly of the Supreme Court of Appeals, three by the Plenary Assembly of the Council of State from among their own chairmen, members, Chief Prosecutor and Chief Attorney by the absolute majority of the members and by secret ballot. One member is elected by the Plenary Assembly of the Court of Accounts from among its chairman and members following the same procedure. The National Assembly elects three and the Senate of the Republic elects two members. The President of the Republic also selects two members. The President of the Republic selects one of these members from among three candidates nominated by the Plenary Assembly of the Supreme Military Court by the absolute majority of its members and by secret ballot. The legislative assemblies elect the members of the Court from among non-members of the National Assembly by the absolute majority of its members and by secret ballot. In elections to be made by legislative assemblies, the procedures and principles governing eligibility criteria of candidates and elections are regulated by law.

The 1982 Constitution changed this system radically and gave the President of the Republic a determining role in the selection of the judges of the Constitutional Court. This system is still in force and accordingly, the President of the Republic appoints three of the eleven regular members and one of the four substitute members from among senior administrative officers and lawyers at his sole discretion; eight regular and three substitute members from among three candidates nominated by other higher courts (Court of Cassation, Council of State, Supreme Military Court, High Military Administrative Court and the Court of Accounts) and the Council of Higher Education (Article 146). That the 1982 Constitution gave the President of the Republic a determining role in the selection of the judges of the Constitutional Court reflects the general tendency of this constitution to strengthen the authority of the President of the Republic and to design this office as a tutelary institution over elected civilian political institutions, acting on behalf of the state elites. The military makers of the 1982 Constitution must have thought that this position would also be filled in the future by a person with military background, or at least by a person approved by the Turkish Armed Forces.

Therefore, it is possible to understand why certain groups are making strong objections to proposals for changing the structure of the Constitutional Court and giving a more important role to parliament in the selection of its members. In modern Turkey, the main political conflict is among those advocating the continuation of the tutelary philosophy and institutions of the 1982 Constitution and those who want to eliminate this conception and to transform it to a “normal” liberal democracy. This conflict concerns not only the selection of the members of the Constitutional Court, but also the powers of this Court, especially its power to review constitutional amendments; the structure of the HCJP, the presence and jurisdiction of the military courts; the method of the election of the President of the Republic, the role of the Turkish Armed Forces in political life, relations between civilians and military authorities, political party bans, minority rights, and limits to the freedom of speech. Those advocating the maintenance of the status quo are concerned that a democratic regime which is free from such tutelary “filters” and meets universal democratic standards may lead to the emergence of an Islamic regime or to secession, either gradually or rapidly. In my opinion, both fears lack realistic foundations. No one has the right to use such imaginary fears and scenarios to doom Turkey to a second class democracy or to a “partly free” “semidemocratic-regime” as defined by the Freedom House. The political maturity of the Turkish people is well established with more than sixty-years of experience in multi-party politics.”

One of the issues that have to be discussed in relation to the restructuring of the Constitutional Court is the limitation of the term of membership. This is a general tendency in Europe. This term is twelve years in Germany, ten in the Czech Republic, and nine in France, Italy, Spain, Hungary, Poland, Romania, and Slovenia. The purpose of limiting such term is to ensure that changes in public opinion are reflected on the composition of the constitutional courts, thus preventing the court from being detached from the society. In Turkey, however, a person selected to the Constitutional Court at the age of forty may remain on duty for twenty five years until he reaches the mandatory retirement age; i.e. sixty-five years of age.

The reform must also explicitly prevent the Constitutional Court from reviewing constitutional amendments as to their substance. Neither the 1961 Constitution nor the 1982 Constitution gave such a competence to the Constitutional Court. On the contrary, both Constitutions limited judicial review solely to certain specific procedural defects. Yet, in both periods the Constitutional Court stepped over its authority and reviewed certain constitutional amendments with regard to their substance and annulled them. The most recent example is the annulment of the amendment to Articles 10 and 42 of the Constitution which was called the “headscarf amendment” by the public. There is no example of this practice in established European democracies. There are only very few states in Europe which authorized their constitutional courts to review constitutional amendments, such as Romania, Moldavia, Ukraine and Azerbaijan. Moreover, the judicial review exercised in these states is only an *a priori review*. In a democratic

regime, constituent power, i.e. the power to enact or amend the constitution, undoubtedly rests with the people. This supreme power cannot be shared with a body not elected by the people.

The constitutional review of the standing orders, or the rules of procedure of parliaments exists in only a few European states. Therefore, it seems advisable to either abolish this review or restrict it to an *a priori review*. Indeed, during the periods of the 1961 and 1982 Constitutions, the Constitutional Court relied on this provision to review and annul many parliamentary resolutions that were not actually covered by its competence, considering them to be “*de-facto* amendments to the standing orders”. In fact, one of the fundamental rules of Western parliamentary regimes is the procedural independence of parliaments. This rule means that legislative assemblies are entitled to determine their own operating procedures with their free will and without any external intervention.

All these needed reforms can be realized by enacting a totally new liberal constitution meeting universal democratic norms rather than making partial constitutional amendments. Predictably, the pro-status quo forces will react strongly to such proposals. Therefore, the solution to the conflict ultimately depends on Turkish society which has to make a choice between maintaining the existing tutelary regime (at most with some superficial amendments) and a liberal and truly democratic regime satisfying the standards of established Western democracies.

RECOMMENDATIONS:

In the light of the above-mentioned considerations, the following points should be taken into account when drafting a new constitution or making partial amendments to the existing one.

1. The composition of the Constitutional Court must be amended and a significant role must be given to parliament in the selection of its members. The term of duty of members must be limited to a certain period. Article 112 and 113 of the “civilian constitution” drafted by a committee of experts in May 2007 constitute a starting point for further discussions:

Composition of the Constitutional Court

Article 112

- (1) The Constitutional Court is composed of seventeen members.
- (2) The Turkish National Assembly elects eight members with the three-fifths majority of its full membership and at least three of these members have to be elected from among professors specialized in constitutional law, public law or political sciences. Four members are elected by the Plenary Assembly of the Court of Cassation, four by the Plenary Assembly of the Council of State, and one by the Plenary Assembly of the Court of Accounts from among their own presidents and members by the absolute majority of the members and by secret ballot.
- (3) To qualify for selection as members of the Constitutional Court, members of the teaching staff of institutions of higher education, senior administrative officers and lawyers are required to be over the age of forty and to have completed their higher education in law, political sciences, economy and administrative sciences and to have served at least fifteen years as a member of the teaching staff of institutions of higher education or to have actually worked at least fifteen years in public service or to have practiced as a lawyer for at least fifteen years.
- (4) The Constitutional Court elects a president and deputy president from among its members for a term of four years by secret ballot and by an absolute majority of the total number of members. The president and deputy president may be elected for maximum two terms.
- (5) The members of the Constitutional Court may not assume other official and private functions, apart from their main functions.
- (6) The principles and procedures of the election to be made by the legislature shall be regulated by a law.

Term and termination of duty

Article 113

- (1) Members of the Constitutional Court are elected for a single nine-year term. Members of the Constitutional Court shall retire when they are sixty-five years old.
- (2) Membership in the Constitutional Court terminates automatically if a member is convicted of an offence requiring his dismissal from judicial profession; it terminates by a decision of an absolute majority of the total number of members of the Constitutional Court if it is definitely established that he is unable to perform his duties on account of ill-health.

This proposition aims at strengthening the democratic legitimacy of the Constitutional Court by giving the parliament an important role in the election of members of this vital institution. Furthermore, attention was paid

to ensure that the majority of the members of the court shall be elected by judicial authorities. These members shall not be selected by the President of the Republic from among three candidates nominated by the higher courts as they are today. They will be directly elected by these courts. In order to prevent excessive influence of the political majority in Parliament in the election of the Court members, the quorum is determined as the three-fifths of the total number of members. Limiting the term of membership to nine years will ensure that changes in public opinion will be reflected on the composition of the Constitutional Court.

2. The draft civilian constitution does not propose radical changes in the competence of the Court. However, in the second paragraph of Article 114 of the draft, it is stated that the constitutionality of the standing orders of the National Assembly could be subject only to an *a priori* review. This proposal aims at preventing the review of ordinary parliamentary resolutions as “*de-facto* amendments to standing orders”. As regards the review over constitutional amendments, the draft maintains the provisions of the existing Constitution which states that constitutional amendments could be reviewed only with respect to their form and such review should be restricted to consideration of whether the required majorities were obtained for the proposal and adoption and whether the procedure requiring two rounds of debates was complied with. However, despite the clear wording of Article 148 of the existing Constitution, the Constitutional Court exceeded its competence and reviewed constitutional amendments as to their substance. Therefore, it is necessary to adopt a more explicit provision. This may be accomplished either by completely abolishing the Court’s competence to review constitutional amendments or by stating explicitly that such review does not permit the review of the compatibility with the unamendable articles of the Constitution.

In the draft, the Constitutional Court’s power to issue stay orders is also restricted. Accordingly (Article 118, paragraph 3);

If the Constitutional Court is in the opinion that the implementation of the provision subject to an annulment action will cause irreparable damages and that the said provision clearly appears to be unconstitutional, it may, upon request, stay its execution by a reasoned decision taken by a two-thirds majority of the present members. The Constitutional Court’s final decision on the merits of the case shall be published in at the latest sixty days in the Official Gazette. Otherwise, the stay order shall become ineffective.

Neither the 1961 nor the 1982 Constitutions had any provision regarding stay orders, and the Constitutional Court dismissed such requests until 1993. However, in this year it changed its ruling, and started to issue stay orders frequently even without an assessment of the criteria of a clear unconstitutionality and the possibility of irreparable damage, the two long-established criteria in administrative justice. Consequently, the Court’s authority should be restricted as proposed above.

Another proposal in the “civilian constitution” draft is to empower the Constitutional Court to annul a law that violates an international treaty on fundamental rights and liberties that was duly put into effect by Turkey. Indeed, the amendment of Article 90 of the Constitution in 2004, provided that “in case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail”. However, given that the annulment of the law was not allowed in such cases, it was possible for different courts to make different decisions and that some of them may be reluctant in giving priority to international agreements. Thus, the proposed change will be a more effective means to harmonize Turkish legislation with the international human rights standards.

Judicial Reform Project: High Council of Judges and Prosecutors

Serap Yazıcı

In the “Judicial Reform Strategy” paper, Article 1 titled “Strengthening the Independence of the Judiciary” emphasizes the aim of “restructuring the High Council of Judges and Public Prosecutors to provide representation of the judiciary as a whole, to provide objectiveness, impartiality and transparency in the light of the international documents, to provide an effective appeal procedure against the decisions of the High Council and subject them to judicial review. The “Judicial Reform Strategy Action Plan” contains reforms that have to be made to accomplish this aim. According to this document, the HCJP will be formed according to the principle of broad representation; will have two or three chambers; the Supreme Court of Appeals (Court of Cassation) and the Council of State will be represented in the HCJP by their members who are selected in their plenary assemblies; in order to represent the judiciary as a whole, effective representation of the first rank judges and prosecutors in the HCJP will be ensured through selection by their peers; representation of the Turkish Justice Academy (TJA), academics in the field of law, and lawyers in the HCJP will be provided; effective judicial remedy against decisions of the HCJP will be ensured; the Minister of Justice, and the Undersecretary of the Ministry of Justice will also take part in the HCJP. The former to ensure accountability before parliament for the performance of judicial services, and the latter to ensure coordination with the Ministry.

The High Council of Judges and Prosecutors is governed by Article 159 of the Constitution. It is composed of the Minister of Justice, Undersecretary to the Ministry of Justice, and three regular and three substitute members appointed by the President of the Republic from among candidates nominated by the Supreme Court of Appeals and two regular and two substitute members similarly appointed from among candidates nominated by the Council of State. Pursuant to the third paragraph of Article 159, the Council “recruits, appoints, and transfers judges and public prosecutors of courts of justice and administrative courts; delegates temporary powers; promotes and allocates them to the first category; allocates posts, decides on those who are not found suitable to continue their profession; imposes disciplinary actions, and removes them from office.” Although the HCJP is authorized to decide on such crucial matters as the personnel regime of judges and public prosecutors, according to the fourth paragraph of the same Article, decisions of the Council are not subject to judicial review.

The composition of the Council and the lack of judicial review over its decisions have been criticized since the Constitution came into force. It is argued that the independence of the judiciary is undermined because of the membership of the Minister of Justice and the Undersecretary to the Ministry of Justice in the Council, and that the lack of judicial review over its decisions conflicts with the rule of law.

Clearly, the absence of judicial review over the decisions of the Council is incompatible with the rule of law. This principle requires all kinds of acts and actions of all state bodies and authorities to be in conformity with law. This may only be possible in a system where all acts of legislative and executive branches and administrative authorities are subject to the review by independent judicial authorities for their legality. The HCJP is an administrative body and it is authorized to decide on the personnel rights of judges and public prosecutors. Thus, all decisions of this body are, by their nature, administrative acts. Therefore, the absence of judicial review over these decisions in terms of their legality is against the rule of law. Moreover, this immunity from judicial review deprives members of the judiciary of their security of tenure and threatens their impartiality. Therefore, this item in the reform project does not seem to be controversial.

On the other hand, two items in the Judicial Reform Strategy paper gave rise to a heated public debate. One such item involves increasing the number of the members of the HCJP; appointing first-degree judges and prosecutors in courts of justice and administrative courts to the Council in addition to members from higher courts, and more importantly allowing the National Assembly to elect some of the members of the Council¹ while keeping the

¹ The “Judicial Reform Strategy” and the “Judicial Reform Strategy Action Plan” papers do not mention that some of the members were to be elected by the National Assembly. This was announced by Sadullah Ergin, Minister of Justice during the meeting he held on 5 September 2009 with press members

Minister of Justice and the Undersecretary of the Ministry of Justice in the Council. The main criticism about the paper is that it may allow the HCJP to be controlled by the majority party in parliament since it proposes to keep the Minister of Justice and the Undersecretary of the Ministry of Justice in the Council and to authorize the Turkish Grand National Assembly (TGNA) to elect some of the members.

Before discussing whether these criticisms are justified, it is necessary to examine the structure of similar institutions in Western democracies, especially in the EU member states. In France, the power to decide on the personnel matters of judges and prosecutors belongs to two separate bodies: Council of Judges and Council of Prosecutors. The Council of Judges is composed of twelve members. It is presided by the President of the Republic and his deputy is the Minister of Justice. The President of the Republic, Speaker of the Senate and Speaker of the National Assembly each selects one member each from among individuals who are not members of the legislature and the judiciary. In addition, the Council has five judges, one prosecutor and one member of the Council of State. In Italy, the Higher Council of Judges is composed of twenty-seven members and it also has a mixed composition. The President of the Republic is the president of the Council, while the President and the Chief Prosecutor of the Supreme Court of Appeals are natural members of the Council. First-degree judges elect ten members from among themselves, and two members are elected from among the members of the Supreme Court of Appeals; first-degree prosecutors elect four members from among themselves; and remaining eight members are elected from among lawyers and law professors by the three-fifths majority in Parliament. In Spain, the General Council of Judiciary is composed of twenty members and all members are appointed by the King. Twelve members are appointed from among judges in all judicial categories, four members nominated by the Congress of Deputies, and four by the Senate. In the Netherlands, the King appoints three out of five members of the Council from among first-degree judges and the remaining two from among officers who were trained in business administration, management, etc. upon the proposal of the Minister of Justice. Thus, in many democratic countries, members of the high judicial councils are not elected only by judicial bodies. The legislative and executive branches are also entitled to elect some members. Such a mixed system gives the judicial councils democratic legitimacy and accountability.

At present, the composition and working methods of the HCJP conflict not only with similar institutions in European democracies, but also with the observations in the reports by the Council of Europe, of which Turkey has long been a member. One of them is the report on “Judicial Appointments” adopted by the European Commission for Democracy Through Law (Venice Commission).² The other document is the 10th Opinion of the Consultative Council of European Judges (CCEJ).³ These two reports point to the significant role of the judicial councils in relation to the rule of law, democracy, independence and impartiality of the judiciary and confidence of citizens in justice. According to the CCEJ:

The Council for the Judiciary is intended to safeguard both the independence of the judicial system and the independence of individual judges. The existence of independent and impartial courts is a structural requirement of a state governed by the rule of law. (para. 8) [...] The independence of judges, in a globalised and interdependent society, should be regarded by every citizen as a guarantee of truth, freedom, respect for human rights, and impartial justice free from external influence. The independence of judges is not a prerogative or privilege granted in their own interest, but in the interest of the rule of law and of anyone seeking and expecting justice. Independence as a condition of judges’ impartiality therefore offers a guarantee of citizens’ equality before the courts. (para. 9)

The report of the Venice Commission reads as follows on this matter: “[T]here is no standard model that a democratic country is bound to follow in setting up its Supreme Judicial Council so long as the function of such a Council falls within the aim to ensure the proper functioning of an independent judiciary within a democratic State.” (para. 28)

The independence of the judiciary is the most important guarantee of a democratic state governed by the rule of law. Therefore, it has to be protected from all kinds of ideological, political or cultural pressures from the legislative and executive bodies and even from the judiciary itself. The accomplishment of this aim is closely related to the composition of the judicial council and protection of its autonomy before political bodies and the courts. In fact, according to the CCEJ:

Beyond its management and administrative role vis-à-vis the judiciary, the Council for the Judiciary should also embody the autonomous government of the judicial power, enabling individual judges to exercise their functions outside any control of the executive and the legislature, and without improper pressure from within the judiciary. (para. 12) [...] Furthermore, considering that the Council for the Judiciary does not belong to the hierarchy of the

2 Venice Commission, *Judicial Appointments*, 15 March 2007, CDL-JD (2007)001rev. www.venice.coe.int

3 Consultative Council of European Judges [CCEJ], *Opinion No. 10* (2007), Strasbourg, 21-23 November 2007, http://www.coe.int/t/dghl/cooperation/ccje/textes/Avis_en.asp

court system and cannot as such decide on the merits of the cases, relations with the courts, and especially with judges, need careful handling. (para. 13) The Council for the Judiciary is also obliged to safeguard from any external pressure or prejudice of a political, ideological or cultural nature, the unfettered freedom of judges to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in accordance with the prevailing rules of the law (para. 14)

Both reports underline the advantages of having a mixed composition of judges and non-judges in the judicial council. Both the CCEJ and the Venice Commission indicate that when the judicial council has a mixed composition, the majority of the members should be judges (CCEJ, para. 18; Venice Commission para. 29). The method employed to select the members is as important as the composition of the judicial council in terms of its autonomy, and ultimately on judges' and prosecutors' security of tenure.

According to the CCEJ, judge members of the judicial council have to be elected by their peers from every level of the judiciary. This method will allow full representation of the judiciary in the judicial council. Moreover, it will ensure the independence of judges of first instance courts vis-a-vis higher judicial bodies. (CCEJ para.27).

The non-judge members of the judicial council may be selected by parliament from among university professors, lawyers, business managers or distinguished citizens. Although some circles in Turkey may find it odd to have non-judges in the judicial council, the CCEJ believes that modern management of the judiciary requires more significant contributions from members experienced in areas outside the legal field, such as management, finances, information technology, and social sciences (CCEJ, para. 22).

The Venice Commission emphasizes that the council will gain democratic legitimacy when some of the members of the judicial council are elected by parliament. According to the Commission;

The participation of the legislative branch in the composition of such an authority is characteristic. In a system guided by democratic principles, it seems reasonable that the Council of Justice should be linked to the representation of the will of the people, as expressed by Parliament. In general, the legislative bodies are entitled to elect part of the members of the high judicial councils among legal professionals (para.31)

Both reports point that parliament's power to elect members to the judicial council has to be exercised by qualified majorities. This rule will prevent parliamentary majorities to fill vacancies in the judicial council with their own supporters and will encourage political parties with different tendencies to reach a consensus during the election process. In conclusion, both reports state that a mixed composition of the judicial council would contribute more to the quality of the management of judicial services. According to the CCEJ;

Such a mixed composition would present the advantages both of avoiding the perception of self-interest, self protection and cronyism and of reflecting the different viewpoints within society, thus providing the judiciary with an additional source of legitimacy. However, even when membership is mixed, the functioning of the Council for the Judiciary shall allow no concession at all to the interplay of parliamentary majorities and pressure from the executive, and be free from any subordination to political party consideration, so that it may safeguard the values and fundamental principles of justice. (para. 19)

According to the Venice Commission;

In general, judicial councils include also members who are not part of the judiciary and represent other branches of power or the academic or professional sectors. Such a composition is justified by the fact that "the control of quality and impartiality of justice is a role that reaches beyond the interests of a particular judge. The Council's performance of this control will cause citizens' confidence in the administration of justice to be raised. Moreover, an overwhelming supremacy of the judicial component may raise concerns in regards to the risks of "corporatist management". (para. 30)

Thus, the present composition of the HCJP and the method employed to select its members do not comply with the recommendations of these reports. First of all, the HCJP is composed of seven members: two from the executive branch and five from the judiciary. However, this composition does not conform to the model of a mixed body described by these reports. Both reports recommend a mixed model composed of judges and non-judges elected by parliament. Thus, the HCJP is a body which lacks democratic legitimacy and accountability. Moreover, the qualifications of the judge members of the HCJP and the method adopted to select them do not comply with these reports. According to the Constitution, five regular and five substitute judge members of the Council are selected by the President of the Republic from among candidates nominated by the Supreme Court of Appeals and the Council of State by their peers. Therefore, the HCJP does not represent the entire judiciary. Instead, it represents only a portion of the higher judiciary. Furthermore, a closed cast system has been created since the Supreme Court of Appeals and the Council of State are authorized to select HCJP members and the HCJP is authorized to select all

of the members of the Supreme Court of Appeals and the three-fourths of the members of the Council of State.⁴ This indicates that there is a professional cooptation process which will damage the independence and impartiality of the judiciary. In restructuring the HCJP, a mixed-composition should be introduced; judge members must have a majority and represent the entire judiciary, and non-judge members must be elected by a qualified majority in parliament. With this aim, it is necessary to amend Article 159 of the Constitution governing the HCJP and Article 104, concerning the powers of the President of the Republic.

The question of the chairmanship of the HCJP is another important issue to be analyzed. Neither the CCEJ nor the Venice Commission objects to the presidency of the head of the state in parliamentary systems where the head of the state has only formal powers. However, CCEJ emphasizes that in other systems, where the head of the state is given broad powers, the chair should be held by one of the judge members of the council. The Venice Commission proposes the selection of the president from among non-judge members (CCEJ, para. 33; Venice Commission, para. 34). On the other hand, the Venice Commission commented as follows on Turkey regarding the presidency of the Minister of Justice.

In Turkey, the Minister of Justice and the Undersecretary of the Ministry of Justice are *ex-officio* members of the High Council of Judges and Public Prosecutors [...] Such presence does not seem, in itself, to impair the independence of the council, however, the Minister of Justice should not participate in all the council's decisions, for example, the ones relating to disciplinary measures.⁵ (para. 33)

In the light of these comments, the Minister of Justice may remain as the president of the HCJP. However, in such case, he should not have the right to vote in disciplinary matters. This is important for maintaining the independence and impartiality of the judiciary before political bodies.

RECOMMENDATION

I was one of the members of the Committee that prepared the "Draft Civilian Constitution". Article 109 of this draft governing the HCJP proposes a structure which fits the models adopted in the democratic world, and meets the criteria laid down by the Venice Commission and the CCEJ. Therefore, the relevant Article of this draft may be taken into account for restructuring the HCJP, which is one of the objectives of the judicial reform project.

Draft Civilian Constitution Article 109:

The Higher Council of Judges and Prosecutors is composed of seventeen regular and four substitute members. The Undersecretary of the Minister of Justice is an *ex-officio* member of the Council. Parliament elects five regular and one substitute members from among first-degree judges and prosecutors with the absolute majority of the total number of its members and by secret ballot. One substitute and three regular members are elected by the Plenary Assembly of the Supreme Court of Appeals and one substitute and two regular members by the Plenary Session of the Council of State; one substitute and four regular members by the first-degree judges and prosecutors in courts of justice from among their peers, and two regular members by the first-degree judges and prosecutors in administrative courts from among their peers. Regular and substitute members are elected for four years. No member may be re-elected for a second term. Members to be elected by the Plenary Assemblies of the Supreme Court of Appeals and Council of State must have reached the age of sixty. Regular members of the Council elect a president and deputy president from among themselves. (2) The Council convenes with seventeen members and decides with the absolute majority of its members. Decisions to remove from post are taken by the two-thirds of the members present at the meeting. (3) Elected regular and substitute members of the Council cannot assume another function as long as they hold their posts. (4) The High Council of Judges and Prosecutors recruits, appoints and relocates civil and administrative judges and prosecutors; gives temporary competence; promotes and allocates them to first degree, allocate posts, decides on those that are not found fit for tenure; imposes disciplinary sanctions and decides on dismissals. It decides on proposals of the Ministry of Justice for abolishing the post of a court or a judge or a prosecutor, or changing the jurisdiction of a court. The Ministry also fulfills other duties arising from the constitution and laws. (5) The Minister of Justice is authorized to appoint judges and prosecutors to work temporarily or permanently at the central organization of the Ministry of Justice, subject to the consent of such judges and prosecutors. (6) The Minister of Justice may assign judges and prosecutors temporarily to avoid any interruption in the service, provided that such assignment is submitted to the approval of the HCJP during its first meeting. (7) Principles governing the fulfillment of the duties of the Council, procedures related to the election of its members and activities and to the review of appeals within the Council shall be regulated by law.

4 The criticism on this issue is not new. It has been raised since the 1982 Constitution came into force. See Ergun Özbudun, *Türk Anayasa Hukuku*, (Turkish Constitutional Law) Yetkin Yayınları, Ankara, 1986, p. 338-343.

5 Kemal Gözler also says that the presence of the minister of justice in bodies such as judicial council, is also seen in Western democracies and that it is a method in compliance with comparative law. Moreover, the author indicates that the Minister of Council is responsible against the parliament for provision of judicial services and that the presence of the Minister in this council is suitable to the nature of parliamentarism. Kemal Gözler, *Türk Anayasa Hukuku Dersleri*, (A Textbook on Turkish Constitutional Law) Ekin Basım Yayın Dağıtım, Bursa, August, 2009, p. 541.

Military Judiciary Problems within the Framework of Judicial Reform

Ümit Kardaş

Part of the discussion in the “Judicial Reform Strategy” and the “Judicial Reform Strategy Action Plan” papers issued by the Ministry of Justice involves objectives concerning military judiciary. One finds the remarks on these objectives in subsections 7, 8, 9, and 10 under the first Section, titled “Strengthening Independence of the Judiciary”, of the former paper, and under subsections 7, 8, 9, and 10 under the identically-titled first Section of the latter. This report will primarily and solely discuss those objectives in the two papers which require constitutional amendment. My analysis here concerns whether the directions suggested in them are favorable to and adequate for democratization and a state governed by the rule of law.

MILITARY CRIMINAL JUDICIARY

PROBLEM 1: MILITARY JUDGES VS. INDEPENDENCE, IMPARTIALITY AND SECURITY OF TENURE

a) In terms of Establishing, Decommissioning, and Changing the Jurisdiction of Military Courts

The second paragraph of Article 1 of the Law No. 353 on the Establishment and Procedures of the Military Courts stipulates that the Ministry of National Defense is responsible for establishing, decommissioning and changing the jurisdiction of military courts at the recommendation of force commands or the direct request of the General Staff. The Minister of National Defense may decommission a military court or change its jurisdiction upon a request to that end by the military bureaucracy. It goes without saying that this deprives military judges of security of tenure. During past periods of martial law, certain military courts were decommissioned to obtain desired results. This stipulation conflicts with the principle of independence of judges, and impairs the right to a fair trial.

b) In terms of the Supervisory Authority of the Minister of National Defense over Military Judges

Article 23 of the Military Judges Law No. 357 provides that in the event that a complaint is raised, information is given or acquired, the course of events reveals that a military judge has committed an offense because of his position or while in office, is in a situation or has taken any action which is unfitting with his title or duties, or has committed any personal offense within the scope of military judiciary, the Minister of National Defense commissions a military justice inspector, who is senior in rank to the relevant judge, to determine whether an investigation authorization is warranted. Furthermore, this inspector may request the Minister of National Defense to suspend the military judge. Vesting a political body with the power to supervise military judges undermines the independence of judges.

c) In Terms of the Power of the Minister of National Defense to Impose Disciplinary Punishment on Military Judges

Article 29 of the Law No. 357 stipulates that the Minister of National Defense may impose warnings, censures and disciplinary punishments on military judges and such punishment decisions are final. A judge who is concerned that he can be punished at any time by the Minister of National Defense at the recommendation of military bureaucracy cannot be deemed to have security of tenure, and thus to be independent. Nor can such a judge be expected to be impartial.

d) In Terms of the Mandatory Retirement of Military Judges due to Age Limit

According to the first paragraph of Article 21 of Law No. 357, military judges are subject to the same retirement age as that applies to military officers. Pursuant to the paragraph (ç) of Article 40 of the Pension Fund Law No. 5434, a colonel must retire when he is sixty. Therefore, a colonel judge is retired when he reaches this age. However, Article 140 of the Constitution provides that judges remain in their post until they are sixty-five years old. Military judges do not have security, because they have been deprived of the constitutional guarantee on the age-limit and instead have to observe the age limit imposed on military officers.

e) In Terms of the Appointment and Relocation of Military Judges

The executive branch implements an appointment system to appoint and relocate military judges. The Minister of National Defense and the Prime Minister make a joint decision, subject to Presidential approval, to appoint and relocate military judges. Principles applicable to military officers hold for the appointment and relocation decisions. This system allows the military bureaucracy, particularly the Minister of National Defense, to exert pressure on military judges. Moreover, the military administration overseeing the military judge may be influential in the appointment and relocation of the military judge. Therefore, it is obvious that military judges may feel uncomfortable and uneasy although they are expected to be independent and impartial.

f) In Terms of the Promotion of Military Judges

Article 12 of Law No. 357 provides that two types of service records are kept for military judges: officer service records and professional service records. Paragraph (a) of the article stipulates that administrative superiors keep officer service records for all military judges, notwithstanding their position and title. Paragraph (b) lists the three superior supervisors who will issue service records. The first-line service record supervisor is the judge who is on the same bench as, but senior to, the relevant judge. The first-line service record supervisor of a senior judge is the commander or the head of the military institution before whom the trial of the military court is held. The second and third-line service record supervisors are the next-level commander depending on the organization chart. When senior judges keep service records of other judges and the generals keep service records of military judges they work with, there cannot be any mention of a judge's independence. It is not possible to say that military judges have security of tenure as long as their promotion is left at the discretion of the administration. Military judges are subject to an administrative and professional hierarchy. This is impossible to reconcile with the principle of independence and impartiality of judges. In fact, an important development took place in regards to the issue: With its ruling dated 8 October 2009 and numbered E. 2006/105, K. 2009/142, the Constitutional Court annulled a part of the first paragraph of item (b) of Article 12 of the Law on Military Judges which reads that "the commander or the head of the military institution before whom the trial of the military court is held depending on the position of the military officer-judge inside the organization chart" and the statement in sub-item (1) of the same item which reads that "senior judges will [...] judges they work with". The annulment ruling held that the quoted phrases violated Articles 9, 138, 139, and 145 of the Constitution. However, the provisions related to second and third-line service record supervisors have been maintained. In our opinion, this cast a shadow of doubt over whether service record supervisors of the military judges are indeed able to keep their service records.

g) In Terms of Termination of Employment of Military Judges due to Incompetence, Lack of Discipline and Moral Issues

According to Article 22 of the Law No. 357, administrative service records of military judges are taken into account when determining whether these grounds for termination are present. Using administrative service records for that determination violates the principle of independence of judges. This article further provides that a judge will be removed from his post if his attitudes and behaviors show that he adopted illegal views. This rule alone abolishes judges' security of tenure.

h) In Terms of Presence of Soldiers on the Bench in Military Courts

Paragraph four of Article 138 of the 1961 Constitution stipulated that it was obligatory for the "majority" of the members on the bench during military trials to hold the title of "judge". In Article 2 of the Law No. 353 drafted pursuant to the above-mentioned provision of the 1961 Constitution, it is stated that two military judges and one officer have to be on the bench of military courts. However, the 1982 Constitution does not have a mandatory provision related to the composition of military courts, which allows the legislature to regulate the composition of military courts as it desires, and it is not mandatory for the majority of the members on the bench in military trials to hold the title of "judge".

Located close to the premises of the General Staff, the Military Court of General Staff is authorized to try generals and admirals for their crimes with a panel of three military judges and two generals or admirals. Courts of Honor are established under the Law No. 477 on Establishment of Courts of Honor and try soldiers for their disciplinary offenses. Courts of Honor have three officers on their panels: one who presides over the panel and two others who sit as members. During trial of petty officers, non-commissioned officers and privates, one of the members on the panel is a petty officer.

Pursuant to Article 4 of the Law No. 353, every December, the commander or head of the military institution where the military court is established selects officer members of the panel – both regular and substitute members - for a one year term, in which the selected members may not be replaced, from among officers of the unit or institution that is in the jurisdiction of the military court. It is obvious that such an appointment creates insecurity among individuals who will be tried before a military court. It is not possible to consider a court constitutional when public servants, who are not qualified as judges, directly participate in the trial and judgment. In fact, Constitutional Court made an important ruling on this matter. With its decision dated 7 May 2009 and numbered E. 2005/159, K. 2009/62, it annulled the statement “one officer” included in the first sentence of the first paragraph of Article 2 of the Law No. 353 on the Establishment and Proceedings of Military Courts on the grounds of violation of Articles 9, 138, 140 and 145 of the constitution, and considering that the legal loophole arising from the annulment would be against the interest of the public, it decided that the annulment should come into force one year later, i.e. on 7 October 2010, as of its publication. The provision “three military judges and two generals or admirals are assigned to the military court formed at the General Staff to try generals and admirals” included in Article 2 of the Law is still in force, since it was not the subject matter of the annulment action. Presence of officers on the panel of military courts creates the same adverse consequences when generals and admirals are tried.

PROBLEM 2: EXPANSION OF THE JURISDICTION OF MILITARY COURTS AGAINST THE INTEREST OF CIVILIAN JUDICIARY

Article 9 of Law No. 353 has been drafted in a manner that parallels the text of Article 145 of the Constitution and defines the jurisdiction of military courts in relation to soldiers. Accordingly, military courts try soldiers for their military offenses, for offenses they commit against other soldiers, and for offenses committed in military zones or related to military service and duties.

a) Military Offense Criterion

Though the definition of the concept of military offense is critically important, the Military Penal Code does not offer one. The jurisdiction is determined according to this concept. In Turkey, civilian and military judiciary systems are different from each other and they follow different procedures. Moreover, regulations related to the independence and guarantees of judges are vary in these two systems. This obviously runs contrary to the principles of natural judge and the uniformity in prosecutorial decision-making. Therefore, it is immensely important to define the concept of military offense clearly and expressly without leaving any room for interpretation. Making a broad definition of military offense to cover political offenses led to the expansion of the military judiciary against the interest of civilian judiciary and the trial of military and civilian individuals by authorities which were not their natural judges.

b) Criterion Which Requires the Offenses Committed by Soldiers to be Related to Military Service and Duties

One of the criteria stipulated in Article 9 of Law No. 353 governing the jurisdiction of military courts is the relationship between the offense committed by a soldier and the military service and duty. Periodic tasks that are notified and assigned to military personnel under legal regulations constitute military duty (Articles 6, 7, 14, 15 of the Internal Service Law; Articles 4-47 of the Internal Service Regulations). Under the said legislation, superiors may give written or verbal orders to meet military needs (Article 8 of the Internal Service Law; Articles 28-34 of the Internal Service Regulations). Military courts have jurisdiction over offenses committed by soldiers related to such tasks. However, the fact that service and duty were included in the military legislation will not necessarily make the offense a military one. The offense might have been committed in relation to military service and duty, however, there may be no violation in terms of the protection of military interests and needs as a result of such commitment. The service and duty assigned as per the legislation may not be directly related to principles of defending the country, establishing military discipline and protecting military interests and needs. In that situation, military service and duty will not be the case. Since the nature of the concrete action of the offender which will determine the competent jurisdiction is open to interpretation, this criterion is also against the principle of natural judge, because the borderline between the respective jurisdictions of ordinary judiciary and military judiciary is not clearly defined. The offender has to know clearly which jurisdiction is competent in relation to the offense he has committed; this is the most important element of the principle of natural judge. This situation causes jurisdictional disputes between ordinary judiciary and military judiciary that take long time to settle. Therefore, many years are spent waiting for the Court of Jurisdictional Disputes to solve the conflict over the jurisdiction.

c) Military Zone Criterion

The offense committed by a soldier might be falling within the scope of Turkish Penal Code, Law No. 6136 or in another dedicated law, in addition to the Military Penal Code. However, if the offense is committed in a military zone, the military courts will have jurisdiction. When precedent-setting decisions of the Military Court of Cassation are examined in light of Articles 12, 51, and 100 of the Internal Service Law, one sees that places where soldiers work, practice and are trained or educated, and are accommodated are considered military zones. The following are also within the scope of detachments, headquarters, and military institutions, as listed in Article 12 of the Internal Service Law: military hospital, school, officers' club, sewing workshop, military factors, military service office, procurement center, and warehouse.

As seen, this Article lists the locations considered "military zones". However, there is no definition which explains the concept. The definition of a military zone does not exist in Law No. 353 or in Internal Service Law No. 211. The Law contains definitions related to locations that have been listed. For instance, Article 12 of the Internal Service Law defines the military institution. Detaching the connection between soldiers and natural judges just because the offense has been committed in a place considered to be a military zone deprives the relevant person of his right to a fair trial.

d) Commitment of an Offense by Soldiers against Soldiers

Offenses committed by soldiers against other soldiers fall in the jurisdiction of military courts. Such an offense may or may not be one of the military offenses listed in the Military Penal Code. It is sufficient for an offense to have been committed against a soldier to fall in the jurisdiction of military courts. A soldier who commits theft, fraud, forgery against another soldier or violates the privacy of his home is tried before a military court. There is no single reference to these offenses in the Military Penal Code. In other words, these offenses are not even "quasi-military offenses". It is not appropriate to authorize the military courts just because an offense has been committed against a soldier. This rule is against the principle of natural judge. Accepting that military courts have jurisdiction just because the offender and the victim are soldiers and failing to give jurisdiction to civilian courts related to the events between soldiers may be explained with the desire to maintain a culture of institutional secrecy no matter what.

CONCLUSION AND RECOMMENDATIONS

- 1) It is obvious that military judges do not have the independence and guarantees which will allow them to be impartial, despite two annulment decisions made by the Constitutional Court in 2009, and that this structure violates the right to fair trial of individuals who are tried before these courts. Worldwide, particularly in European and African countries, there is a growing tendency to abolish military courts through civilianization. Some of the democratic states governed by the rule of law do not have military penal proceedings excluding disciplinary proceedings. In Germany, Austria, Switzerland, Denmark, and Japan there are no military courts. In Netherlands, France, and Spain there are military courts where civilian judges are also present on the bench. This model is adopted in other countries as well, including Algeria, Morocco, Tunisia, and Madagascar. However, the legal review of the rulings of these courts is performed by the civilian court of cassation. There is no military court of cassation in Netherlands, France, Greece, Algeria, and Tunisia. In Russia appeals are filed with the Russian Higher Court. In the U.K. and the U.S., civilian judges work in the military court of cassation. In Canada, the Canadian Higher Court exercises appellate review. Thus, in these countries there is no duality in the judiciary and as a rule of a democratic state governed by rule of law, the right to a fair trial is secured through the uniformity in prosecutorial decision-making.

RECOMMENDATION

It is necessary to annul Article 145 of the Constitution which governs military judiciary and turns military courts and courts of honor into constitutional bodies. Military court and court of honor duality has to be eliminated and a "military court" which is composed of civilian judges, who will only try military offenses, must be a part of the ordinary jurisdiction as a specialty court. The Military Court of Cassation, governed by Article 156 of the Constitution causes duality, prevents democratic, civilian and legal review and it does not exist in democratic countries. Therefore it has to be abolished and second instance review must belong to courts of appeal and appellate review has to be exercised by one of the chambers of the Supreme Court of Appeals.

- 2) The military jurisdiction defined by the constitution and Law No. 353 is so broad for military persons that it abolishes principles of the uniformity in prosecutorial decision-making and natural judge. The right to a fair trial is very important for every citizen, including soldiers. Upon Amendment of Article 250 of the Code of Criminal Procedure by the Law numbered 5918 and dated 26 June 2009, it became possible for soldiers who have committed organizational crimes, and offenses described in Section 4-7, Chapter Four, Volume 2 of the Turkish Criminal Code (excluding Articles 305, 318, 319, 323, 324, 325, and 332) to be tried by their natural judges, i.e. civilian judges. Thus a democratic standard was introduced in terms of the trial of soldiers. This amendment was considered a significant step towards democratization in the EU 2009 Progress Report. Since some of these offenses were incorporated into the Military Penal Code (such as incorporation of Article 302 of the Turkish Criminal Code into Article 54 of the Military Penal Code), the principle of natural judge was adopted for these offenses which were not related to the military service and military interests. Some of the offenses listed in Article 250 were not incorporated into the Military Penal Code (such as Articles 309, 311, and 312 of the Turkish Criminal Code), but they fell under military jurisdiction because of the military zone criterion, although they were civilian political offenses. The principle of natural judge is also applied to these offenses. However, since these amendments did not aim at the foundation of the system and failed to take into account the uniformity in prosecutorial decision-making, they served as quick fixes and became contentious because of the continuing effect of Article 145 of the Constitution. In fact, the Constitutional Court found this amendment unconstitutional and annulled it with its ruling dated 22 January 2010.

RECOMMENDATION

The 1930 Military Penal Code is outdated and conflicts with the new Turkish Criminal Code. Therefore it should be annulled together with Law No. 477 on Courts of Honor. A new military penal law, to be composed of 25-30 Articles, needs to be enacted. This law has to describe military offenses as acts committed directly by the soldiers, which disturb military discipline and are against military interests and needs. Thus, right to fair trial can be maintained in terms of disciplinary offenses which are not subject to legal review.

- 3) Upon enactment of Law No. 5530 on 29 June 2006, civilians can now be tried before ordinary courts for their offenses subject to the Military Penal Code in time of peace. Thus, civilians were removed from the military jurisdiction in terms of several offenses listed in the Military Penal Code, in accordance with the principle of natural judge (Articles 55, 56, 57, 58, 59, 61, 63, 64, 75, 79, 80, 81, 93, 114, and 131 of the Military Penal Code). With Law No. 5918 dated 26 June 2009, a paragraph was added to Article 3 of the Code of Criminal Procedure to stipulate that when a civilian person commits an offense jointly with a military person, such civilian may be tried before an ordinary court even if the offense is a military one. Thus, trial of civilians before military courts was prevented. However, these amendments do not provide a constitutional guarantee. In fact, in his "Report on Independence, Impartiality and Administration of the Judiciary" of 14 April 2009, law professor Thomas Giegerich of Virginia University stated: "This is a positive first step, but does not go far enough, as long as the Constitution expressly permits a return to the former system"

RECOMMENDATION

The trial of civilians before military courts has been prevented through legal amendments; however, the second paragraph of Article 145 of the Constitution which enables trial of civilians before military courts is still in effect. It is always possible to enforce this provision by making other legal amendments. Therefore, Article 145 of the Constitution has to be annulled completely.

ADMINISTRATIVE MILITARY JUDICIARY

Upon amendment of the 1961 Constitution following the military intervention of 12 March 1971, a portion of the administrative judiciary involving military personnel and even some civilians was separated and vested to a higher court which could be described as a military council of state: High Administrative Military Court. Thus, the duality created in the criminal law was replicated in the domain of the administrative law. This arrangement was repeated in Article 157 of the 1982 Constitution. This Court carries the statuses of court of first instance and court of last instance and exercises judicial review over disputes arising from administrative acts and actions which involve soldiers and which are related to military service, even though such acts and actions belong to non-military authorities. Disputes arising from military duty of civilians are also argued before this court. Members of this court include military judges, as well as non-judge officers selected by the President of the Republic from among candidates nominated by the General Staff. This court does not have any precedent in our history and it is obvious

that it causes duality in administrative judiciary and eliminates the right to a fair trial since military judges and officers do not have security of tenure. At a time when it is discussed whether the administrative judiciary should be incorporated into ordinary judiciary to avoid duality, it is all the more unacceptable to divide administrative judiciary into civilian and military administrative judiciaries. As long as such mentality prevails in administrative judiciary, it will only be natural for the Ministry of Internal Affairs or Ministry of National Education to request a special council of state for themselves. In the “Judicial Reform Strategy Action Plan”, it is proposed to divide this court into two-instance courts. This proposal indicates that the question has not been well understood. The very existence of military administrative judiciary is against the law. Dividing military court into two-instance courts will not give any guarantees to military or civilian persons in terms of the right to fair trial. Moreover, this privilege given to armed bureaucracy in terms of administrative judiciary prevents the institution from being transparent and accountable. In his report, Prof. Giegerich stated that the review of military administrative court decisions could be entrusted to the Council of State, noting that an autonomous military administrative court is the exception in Europe. In our opinion, the existence of local military administrative courts conflicts with the the uniformity in prosecutorial decision-making, as well. Therefore, civilian administrative courts must have jurisdiction in terms of administrative acts of military authorities.

RECOMMENDATION

This court was introduced to our legal domain in 1971 as a result of a military intervention and it causes duality in administrative court, violates the right to fair trial and prevents exercising democratic civilian review over the armed forces. When Article 157 of the Constitution is annulled, the administrative judiciary will step in and there will be no loopholes.

The Institution of Ombudsman

Serap Yazıcı

One of the objectives of the “Judicial Reform Strategy” paper is “Ensuring Effective Implementation of Measures to Prevent Disputes and Improving Alternative Dispute Resolution Mechanisms”. Item 8 of the same document is entitled “Functioning of the Ombudsman Institution”. As mentioned in this document, although the ombudsman institution was established under Law numbered 5548 and dated 28 September 2006, this law was later annulled by the Constitutional Court. Therefore, in the “Judicial Reform Strategy” it is stated that necessary constitutional and legal amendments will be made to establish the institution of Ombudsman, taking into consideration the ruling of the Constitutional Court.

Although the members of the Ombudsman’s Office are elected by parliament, this office has autonomy from the parliament, government and the judiciary; it oversees public authorities in terms of their conformity both to law and equity upon complaints by citizens; thus ensures that public authority is exercised in compliance with the prohibition on discrimination, which is one of the elements of the rule of law and equality. The Ombudsman’s Office does not take executive decisions even when it determines as a result of its investigation practices contrary to law or equity; it informs the public by reports issued after such investigation and urges decision makers to take measures to prevent such violations.¹

The Ombudsman was first established in Switzerland with its 1809 Constitution. It was accepted in Finland in 1919, in Denmark in 1955, and in Norway and New Zealand in 1962. Today, there are ombudsman’s offices at national, regional, provincial and municipal levels in several countries, including U.K., Italy, Germany, Austria, Netherlands, and Poland. In the European Union, the Maastricht Treaty of 1992 created the office of Ombudsman, where citizens could submit complaints against EU acts.² Based on a comparative overview, it is possible to summarize the structural characteristics, powers and functions of this office as follows:

- Ombudsmen are elected by parliament, and their autonomy from parliament, government and the judiciary is guaranteed because of the nature of its duties.
- The main duty of this office is to oversee acts of public authorities in terms of their conformity to both law and equity. It may be assumed that this mechanism has a function similar to the function of the administrative justice; however, there is an important difference between them. Above all, the administrative courts may examine the acts and actions of administrative authorities only in terms of their conformity to law. However, the Ombudsman is entitled to examine acts of all public authorities in terms of their conformity to both law and equity. Therefore, institutions and bodies which are not subject to the review of administrative courts fall within the purview of the Ombudsman. Secondly, because of the discretion held by the administration, the review exercised by the administrative courts does not cover examination of acts in terms of equity, while the Ombudsman is entitled to do so. Finally, the administration is obliged to perform actions ordered by the courts, and therefore judicial decisions must be executed. Decisions by the Ombudsman do not have any executive consequences for the administration. The office encourages decision makers to eliminate illegal and inequitable practices by informing the public. Therefore, the Ombudsman mechanism exists even in countries like France, where the administrative justice system has long been established.
- The Ombudsman acts upon complaints filed by citizens. It submits the results of its examinations and investigations to decision makers and the public in the form of annual reports. Thus, decision makers are encouraged to remedy illegal and inequitable acts, and the public is informed of these practices.
- The Ombudsman institution may function properly as long as it is autonomous. Therefore, public authorities are responsible for providing all kinds of information and documents required by the Ombudsman to complete his investigation.

1 For more details on the ombudsman mechanism see Serap Yazıcı, *Yeni Bir Anayasa Hazırlığı Ve Türkiye Seçkinlikten Toplum Sözleşmesine*, (Preparing for a New Constitution and From Elitism to Social Contract in Turkey) İstanbul Bilgi Üniversitesi Yayınları, İstanbul, 2009, p.138-151.

2 B. Zakir Avşar, *Ombudsman (kamu hakemi) Türkiye İçin Bir Model Önerisi (An Ombudsman Model Proposed for Turkey)*, Hak-İş Confederation Ankara, 2000, p. 46-49; *The European Ombudsman Origins, Establishment, Evolution*, ed. by P. Nikiforos Diamandouros, Luxembourg: Office for Official Publications of the European Communities, 2005.

- Proper functioning of the Ombudsman office requires the Ombudsmen to be impartial. Therefore, Ombudsmen are elected from among individuals who are trustworthy and respected widely by the society, and have equal distance to all political and social groups. A qualified majority of parliament is required for the election of the Ombudsman. Thus, it is possible to elect persons acceptable to different political parties.
- Yet, although the institution of Ombudsman encourages public authorities to act lawfully and equitably, it cannot be a substitute for constitutional, administrative, and general systems of justice which are the real guarantees for a state governed by the rule of law.

The competences of the Ombudsman's office varies from country to country. In Switzerland, the central administration, local administrations and military institutions fall under the competence of the Ombudsman's office. In Finland, any individual described as a public servant under the criminal law falls under the competence of the Ombudsman. Therefore, the Ombudsman in Finland is able to investigate all public officers working in various agencies, including the government, ministries, and courts. In Denmark, the Ombudsman is entitled to make investigations into the central administration, local administration, and military institutions. In Norway, all elements of the central administration and local administrations covered by the concept of public administration fall under the competence of the Ombudsman.³

Introducing the institution of Ombudsman mechanism has been long discussed in academic and political circles in Turkey. Furthermore, the establishment and efficient functioning of this mechanism is among the obligations that have to be fulfilled by Turkey in the EU accession process. In fact, the progress reports by the European Union on Turkey have emphasized the need for establishing the Ombudsman office to encourage public administration to function in compliance with law. In the 2005 progress report, it was indicated that there were no significant efforts to establish the office of Ombudsman that would improve the efficiency of the administration and contribute to the prevention of corruption. Finally, the establishment of the Ombudsman office was made possible with the Law dated 28 June 2006, numbered 5548. Thus, in the 2006 progress report, favorable comments were made on the enactment of the Ombudsman Law, and it was emphasized that this mechanism would help citizens to be informed of and evaluate administrative activities.

Article 1 of the Law No. 5548 titled "Purpose" reads as follows:

The purpose of this Law is to create an ombudsman institution which will investigate and examine complaints of real and legal persons related to the functioning of the administration within the framework of characteristics of the Turkish Republic described in the Constitution and to all kinds of acts, actions, attitudes and behaviors of the administration in terms of respect to human rights, conformity to law and equity in parallel with an understanding of justice, and make recommendations to the administration

According to the Law, the Ombudsman office will be composed of a Chief Ombudsman and a board (Article 4, paragraph 2). It is also stated in the law that there will be one Chief Ombudsman, maximum ten Ombudsmen, a general secretary, experts, junior experts and other employees (Article 4, paragraph 3). Article 9 of the Law regulates the duties of the Ombudsman's office. According to this Article, the office is responsible for investigating all kinds of administrative acts and actions upon complaints of citizens, in terms of their conformity both to law and equity and for submitting its recommendations to administrative authorities (paragraph 1). However, pursuant to this Article, "acts, decisions, and orders of the President of the Republic acting alone; legislative and judicial acts; acts and actions of the members of the judiciary, and the actions of the Turkish Armed Forces related solely to military service" are not subject to examination by the Ombudsman (paragraph 2).

Article 10 of the Law governs the qualifications of individuals to be elected as ombudsmen. Inter alia, an ombudsman should not be a member of any political party, to guarantee his impartiality. Article 11/5 of the Law stipulates that the Chief Ombudsman and other Ombudsmen who will be assigned to the Ombudsman's Office have to be elected by the two-thirds majority of the total number of members of the National Assembly, and failing to reach this quorum in the first round of voting, by the absolute majority in the second round; if the absolute majority cannot be reached in the second round of voting, simple majority will suffice in the third one, provided that the quorum for decision making is present. Seeking two-thirds majority in the first round and absolute majority in the second round of voting will encourage the election of an Ombudsmen from among impartial individuals. However, this Article also allows election by simple majority in the third round and this may lead to the election of an Ombudsman by the governing party majority in parliament. This may compromise the election of an impartial individual trusted by more than one party. In most countries, qualified majority in parliament is designed to guarantee the proper functioning of this institution.

3 Oğuz Babüroğlu and E. Nevra Hatiboğlu, *Ombudsman (Kamu Hakemi) Kurumu İncelemesi (Analysis of the Ombudsman Mechanism)*, Türk Sanayicileri ve İşadamları Derneği, January 1997, p. 22-23.

The independence of the Ombudsman office is guaranteed by Article 12 of the Law which reads as follows: “No organization, authority, agency or person may give orders or instructions, send circulars, make recommendations or suggestions to the Chief Ombudsman and Ombudsmen in regards to their duties.” Article 18 states that it is obligatory to provide the Ombudsman’s Office with requested information and documents within maximum thirty days. However, in the second paragraph of the same Article, it is also stated that government secrets and trade secrets may be exempted from this obligation. According to Article 22, the Ombudsman’s Office has to submit annual reports to the Joint Committee composed of the Petitions Committee and the Human Rights Examination Committee of the National Assembly and that these reports will be published in the Official Gazette to be submitted to the information of the public.

The Law No. 5548 was annulled by the Constitutional Court on 25 December 2008.⁴ The Court based its ruling on the grounds of violation of various articles of the Constitution: Article 6 governing sovereignty, Article 87 governing the duties and powers of the National Assembly and Article 123 governing the unity of the administration and its public legal personality. The reasoning of the decision related to Article 87 was as follows:

When the Law is examined as a whole, it is understood that the National Assembly has been assigned to elect the chief Ombudsman and Ombudsmen, to remove them from office, and to enforce relevant provisions of the Law. Article 87 of the Constitution defines the duties and powers of the National Assembly clearly: “The functions and powers of the National Assembly comprise the enactment, amendment, and annulment of laws; the supervision of the Council of Ministers and the Ministers; authorization of the Council of Ministers to issue governmental decrees having the force of law on certain matters; debating and approving the budget draft and the draft law of final accounts, making decisions on the printing of currency and the declaration of war; ratifying international agreements, making decisions with 3/5 of the Turkish Grand National Assembly on the proclamation of amnesties and pardons according to the Constitution; and exercising the powers and executing the functions envisaged in the other articles of the Constitution.” Powers and duties stipulated in other articles of the Constitution have been incorporated into this Article, which governs general duties. This Article has been designed to cover all duties and powers of the National Assembly regulated in this Article and other Articles of the Constitution. The duties and powers of the National Assembly described in the Constitution do not include the duty and power to elect the chief Ombudsman and Ombudsmen to the Ombudsman’s Office and there is no natural relationship between this Office and the National Assembly arising from the Constitution, which may permit this election. Therefore, the Law is not in conformity with Article 87.

This decision of the Constitutional Court is not in conformity with the Constitution; however, it binds all governmental bodies and administrative authorities under Article 153 of the Constitution. Therefore, the creation of an Ombudsman office as proposed in the “Judicial Reform Strategy” would require the adoption of an explicit constitutional provision in this regard.

RECOMMENDATION

Article 87 of the Constitution governing the duties and powers of the National Assembly may be amended to include the following statement: “electing the chief ombudsman and ombudsmen”. Following this constitutional amendment, the National Assembly may enact a new law governing the establishment and duties of the Oombudsman’s office. When drafting this law, the number, qualifications, and election methods of the members should be determined according to models adopted in the democratic world.

As a result of being sharply polarized in terms of religion, language, ethnicity, sect and gender for long years, Turkey is now facing a growing major conflict. Therefore, when creating the Ombudsman office, this conflict must be taken into account. Thus, this office must include ombudsmen authorized to deal with questions of discrimination on the grounds of religion, sect and ethnicity; of gender, and discrimination against disabled individuals. On the other hand, as proposed by Hakan Yılmaz, there should be an Ombudsman who will review public acts in terms of conformity to the secular state.⁵ In Western countries with an Ombudsman office, it generally includes members investigating such discriminatory practices in different areas. Thus, all such practices will be disclosed in reports to inform the public and the decision makers. It is expected that this flow of information will help the decision makers to make necessary changes in legislation and policies, and ensure that the public is sufficiently informed to put pressure on the relevant public authorities.

4 E. 2006/140, K.2008/185, k.t.25.12.2008, <http://www.anayasa.gov.tr> For criticism on the decision see Ergun Özbudun, “Kamu Denetçiliği ve Anayasa Mahkemesi”, *Türkiye’nin Anayasa Krizi* (“Ombudsman Mechanism and the Constitutional Court” *Constitutional Crisis in Turkey*), Liberte Yayınları, Ankara, 2009, s.231-237.

5 Hakan Yılmaz, *Laiklik Türkiye’deki Uygulamaları, Avrupa İle Kıyaslamalar, Politika Önerileri, Rapor No: 9*, (Secularism: Practices in Turkey, Comparisons with Europe, Policy Recommendations, Report No. 9) BİLGESAM.

Conclusion

Serap Yazıcı

The judicial reform project contains short-, medium- and long-term objectives aiming at strengthening the independence, impartiality and efficiency of the judiciary in Turkey. As mentioned earlier, this paper only discusses the matters that require constitutional amendments. These objectives include the restructuring of the Constitutional Court and the HCJP, restricting the powers of the military judiciary to meet the requirements of the rule of law, thus to abolish the duality in the judicial system, and finally establishing the Ombudsman office. The need for these constitutional amendments has been explained in relevant chapters. The lack of an impartial and independent judicial system in Turkey, conforming to the requirements the rule of law, is chiefly due to structural factors and these factors may only be eliminated through constitutional and legal reforms. Yet, reaching a broad social consensus on these reforms can only be possible if the public is objectively informed of the universal meanings of concepts such as the rule of law, and the impartiality and independence of the judiciary. Under the particular political circumstances of Turkey, these concepts came to be interpreted in a tutelary mentality which dominated the 1961 and 1982 Constitutions, and this peculiar interpretation was embraced by judicial authorities. Therefore, achieving the impartiality and independence of the judiciary in Turkey requires informing the public objectively as much as making structural reforms in judicial mechanisms.

The rule of law obliges all public bodies and authorities, including the judiciary, to abide by law; however, certain circles in Turkey believe that this rule only applies to elected bodies and administrative authorities. This belief held by the state elites and shared by high judicial bodies is the real reason behind the political and ideological motives often observed in judicial decisions. This perspective politicizes the judiciary and prevents it from functioning impartially. Carelessness in applying strictly legal criteria in judicial decisions led to the emergence of a “government of judges” or “juristocracy” in Turkey. Clearly, such a system is incompatible with the rule of law and representative democracy.

Another misunderstanding peculiar to Turkey is the tendency to see the independence of the judiciary solely as its institutional independence. Certainly, the institutional independence of the judiciary from political bodies has to be guaranteed in order to protect the rule of law. However, it is also necessary to guarantee the individual independence of the members of the judiciary in order to ensure that judicial decisions are taken in conformity with law and free from all kinds of pressure. This can be achieved only by granting security of tenure to members of the judiciary. In other words, they should not be concerned over their career when fulfilling their constitutional and legal duties. This requires their protection from all kinds of intervention by legislative and executive authorities as well as by the judiciary itself.

Finally, another problem inherent to our national judicial culture is the cause and effect relationship between the concepts of independence and impartiality of the judiciary. In a democratic state governed by the rule of law, the important thing is to guarantee the impartiality of judicial decisions. The independence of the judiciary is one of the tools to ensure this objective. Yet, debates in Turkey for long years have generally ignored the issue of impartiality of the judiciary and stressed the institutional independence of the judiciary. Thus, what is needed in Turkey is a fundamental change of perspective in conformity with the universal meanings of such concepts as much as constitutional and legal changes, in order to establish an impartial and independent judicial system.

A SHORT REVIEW OF THE PROPOSED CONSTITUTIONAL AMENDMENTS

Serap Yazıcı

On 22 March 2010, the Justice and Development Party announced a draft composed of twenty three articles and three provisional articles in order to amend various provisions of the Constitution. The draft was criticized as to the way in which it was prepared, as well as to its content. The draft was reviewed taking certain criticisms into account, and after the addition of certain new articles, it was submitted to the Presidency of the National Assembly on 30 March 2010 as a proposal for constitutional amendment composed of twenty six articles and three provisional articles.¹

The proposal contains amendments which will improve fundamental rights and freedoms by introducing new rights to the Constitution, strengthening constitutional protection over existing rights and widening the sphere of certain rights. These amendments include introducing positive discrimination rule in favor of women, children, the disabled and the elderly (Article 10 Const., Article 1 Proposal), protection of private data (Article 20 Const., Article 2 Proposal) and children's rights (Article 41 Const., Article 4 Proposal), giving the right of collective bargaining to public servants and other public employees (Article 53 Const., Article 6 Proposal), strengthening the freedom of residence and movement (Article 23 Const., Article 3 Proposal), and making dissolution of political parties more difficult (Article 69 Const., Article 8, Proposal). The proposal also contains reforms which will reinforce the rule of law. These reforms include introducing judicial review over Supreme Military Council decisions to expel members of the Turkish Armed Forces, HCJP decisions to dismiss the members of the judiciary from their posts, and over disciplinary punishments; enabling the trial of the Chief of Staff, Commanders of Forces and Speaker of the National Assembly before the Supreme Court, establishing an Ombudsman office, and finally annulling the judicial immunity provided under provisional Article 15. The proposal also contains provisions for the restructuring the HCJP and the Constitutional Court and restricting the jurisdiction of the military courts.²

All of these amendments are of particular importance; yet, this chapter will focus on provisions that are related to the subject matter of our report. These provisions aim at reinforcing the guarantees for the rule of law, establishing an Ombudsman office and restructuring the Constitutional Court and the HCJP.

REINFORCING THE RULE OF LAW

ANNULMENT OF VARIOUS JUDICIAL IMMUNITIES

Article 12 of the proposal makes two important amendments to Article 125. One of them is the partial annulment of the judicial immunity provided by this Article to the decisions of the Supreme Military Council. The second is the addition of the following provision into this Article: "Judicial power is limited to the review of the conformity of the actions and acts of the administration with the law and in no case it can be used as the review of expediency." The Proposal introduces judicial review over Supreme Military Council's decisions related to the expulsion of the members of the Turkish Armed Forces, but not all of its decisions. Therefore, the judicial immunity provided by Article 125 is only partially abolished.

As mentioned above, the principle of the rule of law requires all kinds of acts and actions of all public bodies and administrative authorities to be subject to judicial review in terms of their compliance with law. Therefore, the judiciary immunity provided under Article 125 for the decisions of the Supreme Military Council conflicts with the requirements of the rule of law. The partial abolition of this immunity is a step towards meeting the requirements of the rule of law enshrined in Article 2 of our Constitution.

¹ Current discussions give the impression that there may be amendments to the proposal. However, we have based our opinions presented herein on the proposal that was submitted to the Presidency of the National Assembly on 30 March 2010.

² The proposals' provisions restricting the jurisdiction of the military courts will be discussed by Ümit Kardaş in the last chapter of the report.

The rule of law requires exercising judicial review over acts and actions of legislative and executive branches and all kinds of administrative authorities in terms of conformity to law. No doubt, such judicial review has to be limited to conformity to law. This means that a governmental act may only be examined in terms of its conformity to legal rules. In other words, the rule of law does not allow exercising a review of political expediency, namely reviewing the discretion of the relevant public authority. However, since the 1961 Constitution, one of the most important problems in the practices of administrative and constitutional justice is the review of expediency. Such review of expediency undermines the impartiality of the judiciary as well as the principles of representative democracy. The result is a government by judges. Therefore, adding “Judicial power is limited to the review of the conformity of the actions and acts of the administration with the law and in no case it can be used as review of expediency.” into Article 125 of the Constitution may be considered as a solution to this problem. Such a change, however, may still not prevent the review of expediency by administrative courts. In fact, the fourth paragraph of the present Article 125 of the present Constitution reads as follows: “Judicial power is limited to the review of the conformity of the actions and acts of the administration with law. No judicial decisions shall be rendered, which restricts the exercise of the executive function in accordance with the procedures and principles prescribed by law, or in the nature of an administrative action and act, or interferes with discretionary powers”. Despite this provision, administrative courts often exceeded the limits of the review of legality, and rendered decisions in the nature of new administrative acts.. Hence, constitutional engineering may not be sufficient to prevent judicial bodies from exercising the review of expediency; what is needed is a long term policy, including the revision of the curriculums in law schools.

Article 14 of the proposal abolishes judicial immunity provided for warnings and reprimands for civil servants under Article 129 of the Constitution.

Article 22 of the proposal proposes the restructuring of the HCJP and abolishes the judicial immunity provided for HCJP decisions under Article 159 of the Constitution. According to this provision, the HCJP’s decisions on the dismissal of the members of the judiciary from their posts will be subject to judicial review.

Article 19 of the proposal contains a provision which allows the trial of the Speaker of the Assembly, Chief of the General Staff, and Force Commanders before the High Court for offenses related to their duties. Under the present constitution, no such provision exists on to the competent judicial body to try them. Clearly, such an uncertainty is incompatible with the principles of the rule of law and equality before law.

The proposal also provided an appeal mechanism for decisions made by the Constitutional Court when acting as the Supreme Court. According to this provision, “an appeal can be made for a review of the decisions of the Supreme Court.” Considering that the trial made by the Constitutional Court when acting as the Supreme Court is a criminal trial, the introduction of an appeal procedure will satisfy one of the requirements of the right to a fair trial.

Article 24 of the proposal proposes the abolition of the provisional Article 15 of the Constitution. This provision provides judiciary immunity for members of the National Security Council (MGK); governments established during the MGK administration; members of the Consultative Assembly, and those who implemented the decisions of the MGK administration. Therefore, no administrative, criminal or financial proceedings could be launched so far against extensive human right violations which occurred during the MGK regime established after the 12 September 1980 coup, and no sanctions could be imposed on those who were responsible for these violations. In fact, the main obstacle to the consolidation of democracy in Turkey has been the interruption of democratic political process with military interventions. Ruling out the threat of military intervention is possible only by holding those who actually staged the coup and caused human rights violations under military administration, in addition to punishing those who later got involved in attempts of military coups. However, the provisional Article 15 does not contain a provision stopping the application of the statute of limitation. Therefore, the period for instigating such judicial proceedings seems to have expired. Therefore, the abolition of this Article will not automatically lead to judicial proceedings for human right violations that occurred during the 12 September regime. Thus, the abolition of this Article has only a symbolic value; however, it is necessary to take radical compensatory measures to redress the grievances of those who lost their lives, physical integrity, mental health, education and training rights, jobs, and families.

OMBUDSMAN

Article 9 of the proposal provides for establishment of an ombudsman office attached to the Presidency of the National Assembly. In the light of the Constitutional Court decision mentioned above, it was necessary to amend the Constitution. The establishment of the ombudsman office is also one of the recommendations in the EU progress reports. Therefore, the proposal is a step forward in the EU harmonization process.

However, the provision in the proposal may be criticized on two grounds. According to the proposal, the Ombudsman will be attached to the Presidency of the National Assembly, which may undermine its autonomy from the legislature; secondly, according to the proposal, the Chief Ombudsman shall be elected by the two-thirds of the total number of the members of the National Assembly; if the majority is not obtained in the first two rounds, he/she shall be elected by the absolute majority of the total number of members, and in case of failure to reach this quorum, by simple majority. Thus, the Chief Ombudsman may be elected by the simple majority of parliament. This may raise questions as to the impartiality of the Ombudsman. A qualified parliamentary majority might have been preferable, since it would have allowed the election of the Ombudsman agreed upon by more than one party.

THE RESTRUCTURING OF THE CONSTITUTIONAL COURT

The proposal aims at restructuring the Constitutional Court; it also provides for its division into two chambers, increases the number of its members, and changes the method of their election.

THE COMPOSITION OF THE COURT

According to the present Article 146 of the Constitution, the President of the Republic appoints a majority of the members of the Constitutional Court from among candidates nominated by the Supreme Court of Appeals (2 regular, 2 substitute), the Council of State (2 regular, 1 substitute), High Military Court of Appeals (1 regular) and High Administrative Military Court (1 regular), Court of Accounts (1 regular) and the High Board of Education (1 regular). Three regular and one substitute member are elected by the President of the Republic from among senior administrative officers and lawyers. Therefore, the ultimate authority regarding the composition of the Court belongs to the President of the Republic. The President of the Republic exercises this authority indirectly for eight regular and three substitute members in collaboration with various institutions and directly for three regular and one substitute member.

The proposal enables the National Assembly to elect three members of the Constitutional Court which will be composed of seventeen members. The National Assembly will elect two of them from among candidates nominated by the Court of Accounts and one from the candidates nominated by the presidents of bar associations. The role granted to the National Assembly will provide democratic legitimacy to the Constitutional Court, even though to a rather limited extent. In Western democracies, all or a substantial majority of the members of the constitutional courts are elected by parliaments. Therefore, granting the National Assembly the power to elect only three out of seventeen members is a positive but insufficient improvement. A major reservation about the proposal is that it would allow the Assembly to elect members by simple majority in the third round, if the two-thirds or absolute majorities cannot be obtained in the first and second rounds respectively. This may lead to the election of members in accordance with the choices of the majority party only.

The proposal gives the President of the Republic the power to elect fourteen members of the Constitutional Court. The President of the Republic will elect ten members from among three candidates nominated for each vacant position by each of the following institutions: Supreme Court of Appeal (3), Council of State (2), High Military Court (1), High Administrative Military Court (1) and the High Board of Education (3). The President of the Republic will directly choose four members from among senior administrators, self-employed lawyers, first-degree judges and public prosecutors, and rapporteurs of the Constitutional Court. Under the existing Article 146, the President of the Republic is also given a broad discretion in the election of three regular and one substitute member from among senior administrators and lawyers. The proposal does not increase the number of the members that will be chosen directly by the President of the Republic. As a novelty, it allows choosing these members from among first-degree judges and prosecutors and rapporteurs of the Constitutional Court. The rapporteurs of the Constitutional Court examine all cases before the Constitutional Court, and submit their reports to the plenary of the Court. Their experience in constitutional justice can be expected to improve the quality of the decisions.

TERM OF THE OFFICE OF THE MEMBERS

According to Article 18 of the proposal, the members of the Constitutional Court will be elected for twelve years, with no re-election. Article 147 of the present Constitution requires members to be over the age of forty, and stipulates that they can stay in office until they are sixty five years old. Thus, a person elected to the Court when he was forty stays in this office for twenty-five years. This causes the ossification of the Court and makes it difficult for it to respond to social changes. In Western democracies, the term of office for the Constitutional Court judges varies between nine to twelve years, and in most countries, re-election is not possible. Therefore, the limitation of the term in the proposal may be viewed positively.

Yet, according to Article 25 of the proposal, current regular and substitute members of the Constitutional Court will maintain their status until they reach the age of sixty-five and substitute members will acquire the status of regular members when the amendment comes into force. This means that the composition of the Constitutional Court may change only gradually in the long term. In fact, the proposed limit of twelve years should also have applied to the current members. An established principle of public law is that no acquired rights can be claimed for continuing public statuses.

CONSTITUTIONAL COMPLAINT

Article 19 of the Constitution allows for constitutional complaints by adding a new provision to Article 148. Constitutional complaint is used as an instrument to review the constitutionality of public acts in such countries as Austria, Germany, Spain, Switzerland, Belgium, and Hungary. Constitutional complaint expands the sphere of the judicial review and enable the Constitutional Court to examine public acts besides laws and decree-laws, including decisions by other courts. Therefore, the introduction of this mechanism is criticized by the two high courts, namely the Supreme Court of Appeals and the Council of State. They claim that giving the Constitutional Court the power to review constitutional complaints will position it over other high courts. While this may be the case, many are convinced that constitutional complaint will encourage all public acts to be in conformity with the Constitution. In fact, drafts prepared by the Turkish Union of Chambers in 2000 and by the Turkish Bar Association in 2001 and 2007 give the Constitution Court the power to review constitutional complaints. In all these drafts, constitutional complaints are restricted to the rights contained in the ECHR. However, the provision added in 2004 to Article 90 of our Constitution governing the legal status of international agreements serves the same purpose. This provision is as follows: “In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail”. Pursuant to this provision, all judicial organizations have to follow the mandatory provision in Article 90 of the Constitution in all disputes that are referred to them. In view of this provision, allowing the Constitutional Court to examine constitutional complaints can hardly be a major improvement for the protection of human rights, it will only increase the workload of the Court.³ It will also delay applications to the EctHR, since one of the prerequisites for filing an application with the ECtHR is the exhaustion of domestic legal remedies. Yet, in Turkey, there are many advocates of constitutional complaints in the general public and among constitutional scholars. Therefore, this provision of the proposal will meet the expectations of these groups.

Article 20 of the proposal provides for the restructuring of the Constitutional Court. The Court is proposed to have two chambers and one plenary session. Clearly, the burden of the Constitutional Court, which is already heavy enough, will increase even more if it is given the power to review constitutional complaints. Thus, the reform will make it necessary for the Constitutional Court to function through two chambers and a plenary session.

DISSOLUTION OF POLITICAL PARTIES

Article 8 of the proposal contains certain provisions which will make the dissolution of political parties more difficult and expands the freedom of political parties, albeit limitedly. The proposal aims at abolishing the fifth paragraph of Article 69 of the Constitution. Thus, a political party will not be dissolved on the grounds that its program and statutes are in violation of the fourth paragraph of Article 68 of the Constitution. Given that several political parties are dissolved due to their program and statutes even before starting its activities, this can be considered a major improvement. Moreover, the abolition of the fifth paragraph of Article 69 will not only expand the freedom of political parties, but it will also abolish a restriction on the freedom of expression.

The proposal also aims to abolish the eighth paragraph of Article 69: “A party which has been dissolved permanently cannot be founded under another name”. Given the fact that all political parties that were dissolved were later founded under other names, the abolition of this provision, will make the constitution in harmony with political and sociological realities.

The proposal also contains provisions which will improve the secondary consequences of the dissolution (prohibition) rulings. One of these consequences is referred to in the last paragraph of Article 84 of the Constitution: “The membership of a deputy whose statements and acts are cited in a final judgment by the Constitutional Court as having caused the permanent dissolution of his party shall terminate on the date when the reasoned decision in question is published in the Official Gazette.” The proposal to abolish this provision is unquestionably a major

³ For detailed information on individual applications see. Serap Yazıcı, *Yeni Bir Anayasa Hazırlığı ve Türkiye: Seçkinlikten Toplum Sözleşmesine* (Preparing for a New Constitution and From Elitism to Social Contract in Turkey), İstanbul Bilgi Üniversitesi Yayınları, İstanbul, 2009, p. 131-138.

improvement. Another secondary consequence of the dissolution ruling is the political ban referred to in the ninth paragraph of Article 69, which reads as follows: “The members including the founders of a political party, whose acts or statements have caused the party to be dissolved permanently cannot be founders, members, directors or supervisors in any other party for a period of five years from the date of publication in the Official Gazette of the Constitutional Court’s final reasoned decision on the permanent dissolution of the party.” The proposal does not abolish this political ban; instead, it shortens it from five years to three years. In fact, this ban should have been abolished completely in order to achieve harmonization with the case laws of the ECtHR and to expand the domain of political freedoms.

Finally, the proposal changes the procedures for prohibition proceedings. The proposal reads as follows: “Cases for the prohibition of political parties shall start upon the request of the Chief Public Prosecutor of the Supreme Court of Appeals, subject to the authorization to be given by secret ballot and two-third majority of the total number of the members of the Committee that will be under the chairmanship of the Speaker of the National Assembly and composed of five members from each political party group in the National Assembly at the time the request reaches the National Assembly.” According to Article 69 (para. 4) of the Constitution and Article 100 of the Political Parties Law, a prohibition case is started by the Chief Prosecutor of the Supreme Court of Appeals on his own initiative or upon the request of the Minister of Justice based on the decision of the Council of Ministers or upon the request of a political party. This procedure differs sharply from those Germany and Spain where parties can also be prohibited under certain circumstances. In Germany, the power to start prohibition proceedings belongs to the two chambers of parliament or to the federal government. In Spain, too, the prohibition proceedings can be initiated either by a request of one of the chambers of parliament, or the government, or the “Ministerio Fiscal” (the equivalent of the Chief Public Prosecutor who, however, is a political appointee of the government unlike the case in Turkey). In Turkey, since the Chief Public Prosecutor has the authority to start prohibition proceedings on his own initiative, prohibition proceedings started easily and arbitrarily, and too many political parties were prohibited. In fact, despite Article 100 of the Political Parties Law, which stipulates that a dissolution action may be filed upon the request of the Minister of Justice based on the decision of the Council of Ministers or upon the request of political parties, until today all prohibition cases have been initiated by the Chief Public Prosecutor acting on his own initiative. This procedure was also criticized in the Venice Commission’s 2009 report on Turkey.⁴ The report emphasizes that prohibition cases have to be initiated by elected bodies accountable to the people. Therefore, the proposal is a major improvement. Yet, it is doubtful whether this proposal may provide a sufficient guarantee for political parties. The prohibition process will still be initiated upon the request of the Chief Public Prosecutor, but it will be subject to the approval of the relevant committee of the National Assembly. According to the proposal, this committee will be composed of five members from each political party group in the National Assembly, and the authorization for the prohibition case requires two-thirds of the total number of members. The initiation of the process by the Chief Public Prosecutor may encourage the Committee to approve the request. Moreover, the equal representation of all political party groups may encourage smaller parties to create a block and launch the prohibition process against the majority party. Therefore, the proposed amendment is far from offering sufficient guarantees to political parties. It would have been more appropriate if the Chief Public Prosecutor could start the proceedings upon the decision taken by the absolute majority of the total number of members of the National Assembly. Thus, the initiative in starting a prohibition case would have rested with parliament, i.e., a body accountable to the people, preventing minority parties from creating a block against the majority party.

In the same direction, Article 20 of the proposal provides that two-thirds majority of the total number of members of the Constitutional Court will be required for prohibiting a party. According to Article 149 of the present Constitution, such quorum is the three-fifths of the total number of members. Thus, this amendment relatively improves the freedom of political parties.

The most serious shortcoming of the proposal in terms of freedom of political parties is its failure to restrict the reasons for prohibition to the use or advocacy of violence as recommended in the 1999 report of the Venice Commission.⁵ The reasons for prohibition stipulated in the fourth paragraph of Article 68 of the Constitution are maintained. Most of these reasons are ambiguous and therefore they give a broad discretion to the Constitutional Court in prohibition cases.

4 The report of the Venice Commission titled “Türkiye’de Siyasi Partilerin Yasaklanmasına İlişkin Anayasal ve Yasal Hükümlere Dair Görüşü” (Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey) This report has been translated into Turkish by TESEV. (http://www.tesev.org.tr/UD_OBJS/PDF/DEMP/Venedik%20Komisyonu%20Raporu-Tercume.pdf)

5 The report of the Venice Commission titled “Siyasi Partilerin Yasaklanması Ve Kapatılması İle Benzeri Tedbirler Hakkında Yol Gösterici İlkeler” (“Guidelines on prohibition and dissolution of political parties and analogous measures”) This report has also been translated into Turkish by TESEV. (http://www.tesev.org.tr/UD_OBJS/PDF/DEMP/yol%20gosterici%20ilkeler-web%20versiyonu.pdf)

RESTRUCTURING THE HIGH COUNCIL OF JUDGES AND PROSECUTORS

Article 22 of the proposal provides for the restructuring of the HCJP. According to this proposal, the HCJP will be composed of twenty-one regular and ten substitute members working in three chambers. The Minister of the Justice will be the chair of the Council whereas the Undersecretary to the Ministry of Justice will be an ex-officio member. Plenaries of the Supreme Court of Appeals (three regular, two substitutes), Council of State (one regular, one substitute), Justice Academy (one regular, one substitute) will elect five regular and four substitute members of the Council from among their own members. First-degree judges and prosecutors of regular courts will elect seven regular and four substitute members from among their peers; and first-degree administrative judges and prosecutors will elect three regular and two substitute members from among their peers. The President of the Republic will elect four members of the Council, from among faculty members working in the areas of law, economics and political sciences, senior administrators, and lawyers.

Increasing the number of the HCJP members and allowing the election of first-degree civil and administrative judges and prosecutors to the Council in addition to higher judicial bodies is commendable. Thus, not only the number of the members of the council will be increased in proportion to the size of the judiciary, but also all levels of the judiciary will be represented in the Council. Moreover, all members representing the judiciary in the Council will be elected by their peers. These changes are in line with the recommendations of reports prepared by international organizations, of which Turkey is a member.

The most important shortcoming of the proposal is its failure to give a role to the Turkish Parliament in the selection of the Council members. In fact, the general practice in European democracies and the reports of the international organizations referred to above, suggest that such judicial councils should also have members elected by parliament. This shortcoming of the proposal will not allow the HCJP to enjoy democratic legitimacy and accountability, which it lacks today. The proposal may cause another problem by giving the power to select the members to the President of the Republic, instead of the National Assembly. One of the most important defects of the 1982 Constitution is that it created a very powerful presidency, together with the fundamental mechanisms of parliamentary government. This may cause a deadlock in the government when the President of the Republic and the majority of the parliament belong to different political tendencies. In fact, similar problems were experienced in the past. By giving the power to elect members of the HCJP to the President of the Republic, the proposal strengthens his already powerful authority. Yet, by abolishing the President of Republic's power to select members from among the nominees of the Supreme Court of Appeals and the Council of State and giving this power directly to the plenaries of these bodies, the proposal balances the dominant role of the President.

In conclusion, the proposal represents a step forward in strengthening fundamental rights and the mechanisms of the rule of law. Moreover, the proposal may change the existing oligarchic character of the Constitutional Court and the HCJP by restructuring them. On the other hand, this proposal fails to introduce radical changes that will restructure these institutions in full conformity with the requirements of a democratic state governed by the rule of law. Therefore, even if this constitutional amendment comes into force, Turkey's need for a more liberal and democratic constitutional order will not be satisfied. This means that debates over the making of a new constitution will remain on the public agenda for a long time to come.

MILITARY JUDICIARY IN THE PROPOSED CONSTITUTIONAL AMENDMENT

Ümit Kardaş

It seems that the amendments related to military judiciary in the constitutional amendment proposed to the National Assembly intend to overcome a bottleneck by narrowing the military jurisdiction, rather than providing a complete civilianization-democratization in parallel with principles of the uniformity in prosecutorial decision-making and natural judge. The proposed amendment on Article 145 specifying duties of military courts significantly narrows the jurisdiction of military courts by abolishing the criteria that were sought previously to determine the competent jurisdiction: military crime, military zone and crime committed against soldier by soldiers. Thus, with this proposal, the jurisdiction of the military courts is limited to military crimes solely related to military service and duties. It is also stated in the proposal that cases for crimes committed against the security of the state, constitutional order and functioning of this order will be held before ordinary courts. The same Article revokes the military court's jurisdiction under martial law, however, maintains it in the time of war. According to the same Article a full guarantee is given to civilians by stating that non-military personnel cannot be tried in military courts, except in war time. Finally, this proposed Article deletes two portions of the original article: it deletes the 'requirements of military service' from among other requirements, i.e. principles of the independence of courts and judges' security of tenure that have to be met when regulating the organization and functioning of military judicial bodies, and matters relating to the status of military judges. It also deletes the last portion which provided that the relationships between military judges and the office of commander under which they serve regarding military service apart from judicial functions should be prescribed by law. As understood from amendments proposed in this Article, the jurisdiction of military courts has been narrowed substantially, an express guarantee is given to civilians, and moreover, the insecurity created by the soldier status is avoided by deleting the requirements of the military service for regulating the organization and functioning of military judicial bodies, and matters relating to the status of military judges. There is no doubt that the amendments in this Article are very important. However, what is necessary is to abolish constitutional status of military courts and honor courts, thus to abolish Article 145 completely. The Supreme Military Court reviewing appeals for military crimes (Article 156) and High Administrative Military Court acting as an administrative court (Article 157) have been maintained. However this proposal deletes the military service requirements from among other requirements, i.e. independence of the judges and judges' security of tenure that have to be met for regulation of the organization and functioning of these two high military courts and disciplinary and personnel matters of its members. Putting this amendment into practice will require making amendments in other laws. Both courts have to be abolished in terms of principle of the uniformity in prosecutorial decision-making and the right to a fair trial. Recommendations have been made in the relevant section of the report.

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