Turkey's Illiberal Judiciary: Cases and Decisions

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ABSTRACT

Turkey is moving toward achieving an ever-greater level of democracy by removing the remnants of restrictive and paternalistic administrative structures. The judiciary in Turkey has been one of the most influential instruments of state power in maintaining these structures. In the wake of the recently passed constitutional amendments, the question of whether the current government is trying to create a docile judiciary for its political purposes has been widely circulated. However, such questioning misses one of the most crucial motivators of the much needed reform package, i.e., the undemocratic record of the Turkish judiciary. The Turkish judiciary has traditionally considered itself as one of the guardians of the Turkish republic alongside the military. It has consistently delivered undemocratic decisions in the name of protecting the state. This article focuses on many examples of restrictive and paternalistic judiciary decisions in order to highlight the judiciary's undemocratic role in the Turkish political system.

Insight Turkey Vol. 12 / No. 4 / 2010
pp. 43-67

Turkey is undergoing a very important transformation. Topics, which have been considered taboo during the Republican era, are now being publicly debated. Demands for solutions to the accumulated problems of the past decades are on the rise. These demands are impacting the political arena and Turkey is moving away from a restrictive and paternalistic administrative model, and taking crucial steps towards becoming a democratic society guaranteeing human rights and freedoms.

The attitude of the judiciary is very important during such times of social change, given the quintessential position the judiciary holds as one of the three main pillars of the political system. What is expected of the judiciary is that it solves disputes between the individuals and the state, guarantees individual rights and freedoms, and protects the rule of law by scrutinizing the power of special interest groups. If the judiciary is unbiased and independent in per-

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forming its duties, it can help strengthen democracy and stability, contributing to change in a positive way. However, if the judiciary does not function in an effective manner and abandons justice, it will degenerate the political system.

Today, in Turkey, decisions delivered by the judiciary are making social and political change more difficult and increasingly problematic. Turkish judiciary, with its uncompromising attitude in contravention of the 'spirit of the times,' is unable to uphold democratic values or contribute to societal peace. While the judiciary contends itself with checking the executive and the legislative powers in democratic countries, it often renders the legislative branch dysfunctional in Turkey by making purely political decisions. Because of its tendency to step outside of its boundaries, the judiciary remains the focal point of disputes.

Discussions about the judiciary can be summarized under two main headings: political and social. At the political level, courts such as the Constitutional Court (AYM), High Court of Appeal, Council of State, and High Council of Judges and Prosecutors (HSYK) have constrained the freedom of choice of the political power especially through recent rulings they have delivered. These judicial bodies oversee "appropriateness" instead of "lawfulness" of a given legislation. Judiciary sometimes goes as far as to assume the role of the legislature by instituting a new ruling that interferes with the political decision making processes. Governments in Turkey are often confronted with the courts as a result of rulings that tie their hands. In this way, the courts become an active party to political tensions.

At the societal level, people do not trust the judiciary for various reasons. They complain that the courts are biased, partisan, and discriminatory. The prolonged lengths of the legal process, violation of basic rights during the court processes, and general disappointment with the outcomes of cases are some of the major areas of discontent with the judicial system. Ultimately, people's trust in courts is deteriorating and there is a profound and widespread belief that the courts do not distribute justice.[1] The proportion of those who see the state upholding the rule of law is decreasing daily.

When we consider the fact that the judiciary has been the subject of controversy as a result of its partisan attitude in political tensions, it is important to note that this is not a new phenomenon. For a proper account of the judiciary's controversial role in Turkish politics, we need to examine its historical background.

The Roots of an Illiberal Judiciary

The foundations of the current political and legal system in Turkey were laid down after the military coup d'état of 1960. The transition to a multi-party democracy with the elections held on May 14, 1950, which resulted in the victory of the Democratic Party (DP), represented the unsettling of the position of the military and civilian bureaucracy that had previously wielded the political power in Turkey in an unchallenged manner. The state elites, who claimed to represent the will of the people in their name since the Tanzimat era, lost their power as a result of these fair and free elections. The military and civilian bureaucracy did not expect this result. They had hoped that they could determine the main tenets of the political system in Turkey's multi-party political life along with what they perceived as modern and secular values. They thought there would be no fundamental change in the power structure. However, this was not the case. People, who now were in a position to determine the direction of politics, "have relegated the previously most dominant groups such as the military and civilian bureaucracy to a secondary position and even tied them to itself."[2] In that sense, the military coup d'état of May 27, 1960 was a reaction by the military and civilian bureaucracy to their being relegated to this secondary position during the Democratic Party rule in the 1950s.

The 1961 Constitution, drafted in the aftermath of the coup d'état, institutionalized this reaction and laid the foundations of a dual power structure. Designers of the new system included certain segments of the military and civilian bureaucracy in the exercise of power in order to preclude the danger of losing institutions in the political system to a popularly elected government. They undermined the superiority of the parliament by establishing certain conditions in the new constitution.

According to the 1924 Constitution, sovereignty rested solely with the parliament representing the people: "*The Grand National Assembly of Turkey is the only and the true representative of the people, it exercises the right of sovereignty in the name of the people*." In the 1961 Constitution, this article was radically changed. Although Article 4 stated that "*Sovereignty belongs to the people without conditions*," it was also added that "the people exercise its sovereignty through *authorized organs* (emphasis added) according to the precepts of the Constitution." In this way, the parliament was transformed into an institution that no longer exercised full sovereignty and became just another institution exercising sovereignty along with others. The parliament had to share sovereignty with institutions and bureaucrats that were not elected by the people.

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This regulation represented a serious level of mistrust, hesitation, elitism, and paternalist attitude on the part of the drafters of the 1961 Constitution. Because of the distaste for the principle of "majority rule," various mechanisms were put in place by the statist elites representing their political values and interests at the expense of the will of the people. Institutions such as the Republican Senate, the Constitutional Court and the National Security Council were designed to scrutinize the exercise of power.[3]

A dual power structure was created with democratic institutions on one side and bureaucratic ones on the other. The democratic institutions - parliament and government – represented the political power while the bureaucratic institutions - army, judiciary, and universities – represented the *state* power. Furthermore, the secularist intelligentsia and the Republican People's Party (CHP) had significant roles to play in exercising the *state* power.

This model was a hierarchical one built upon a declared supremacy of the state power over the political power. The state power was the representative of the "center" and derived its legitimacy from the claim that it was the true guardian of the state. Because of this, it perceived itself authorized to determine the limits of the "common good" and to manage and rule over Turkish society. The political power, however, represented the periphery; it had a limited space despite its representation of the will of the people. It had to operate without violating the values and the interests of the elites.

The continuation of this paternalistic power structure depended upon those on the side of the state power to fulfill certain functions. The army, which claimed to be the founder of the Republic and the standard-bearer of the republican values, occupied a semi-independent and privileged status within the system. The 1961 Constitution bestowed upon the army certain extensive powers violating the main tenets of a representative democracy, rendering the army an institution with more powers than elected officials held. This situation would be perpetuated even after the transition to civilian life would be completed.[4] Through its direct (coup d'états of 1961, 1970, and 1980) and indirect (1997) intervention and interference with Turkey's social and political life, the army secured the continuation of its privileged status.[5]

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In this system, the universities were expected to protect the "red lines" of the state and legitimate its official ideology. Similarly, the intelligentsia was expected to relay this ideology to the general public through the use of the media. The CHP functioned as the political basis of the state power. The main idea behind the 1961 Constitution drafted by the CHP-dominated parliament was the following: if brought to power by the people, the CHP could set up a strong government owing to its traditional alliances with the bureaucracy, the judiciary, the army and the universities. But if the Justice Party (AP), which was an offspring of the Democratic Party (DP) of the 1950s, came to power, the government would be kept in check and slowed down by the bureaucrats of the executive branch.[6] Thus, whoever came to power, the civilian and military bureaucracy's sovereignty would be secured.

The system set up in 1961 was kept intact to a large extent and perpetuated by the 1982 Constitution. At the expense of majority rule principle, both constitutions allowed a system where the authority of the elected political power would be checked by other constitutional institutions.[7]

Turkish Judiciary's Ideological Function

When Turkey is compared to other democratic countries, which have political and judiciary systems based on the rule of law, it is hard to say Turkey's judiciary system meets the same standards, nor does it contribute to social justice and peace. On the contrary, the judiciary - in itself - constitutes a major source of many disputes and much discontent. Several reasons are often cited for this state of affairs: technical and logistical shortcomings in the legal system, insufficient budgetary resources for the judicial staff, and the political authority's ability to interfere with the judiciary.

Undoubtedly, technical, logistical, and fiscal problems along with regulations and guidelines allowing the executive branch to interfere with the judiciary do, indeed, prevent the judiciary from performing its duties fully. These problems should be remedied and the independence of the judiciary before the executive should be enhanced. This is a necessary condition for Turkey to provide its citizens with a fair justice system and to join the European Union (EU). In all of its progress reports, the EU has pointed out these obstacles, which include the judicial independence and impartiality, the security of the judges, and judicial ef-

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fectiveness. In its own reports on the EU accession process, Turkey has promised to eliminate these problems.

Having conceded the existence of the problems mentioned above, it would be incomplete to attribute the judiciary's problems to only technical, logistical, and fiscal difficulties, and executive interference. Such an approach reveals the lack of judiciary's independence from the executive but fails to consider the problem of judicial independence from the *state* power. Arguably, this should be considered an even bigger problem. For, the current political system in Turkey has the status of an "overseer" in terms of its nature, structure, and ideological outlook. And this overseer influences the judiciary as much as it does the legislative and the executive branches, determining the main parameters of the judiciary's attitude, decisions, and legal opinions.[8]

The most valued and privileged institution in the Turkish political system is the state itself. The state is not conceived of as a civil mechanism in the service of the people, but rather, a "goal" in itself. The state is "sacred" and it has a will independent of the individuals and the society. Its security and interests come before the security and interests of the people. The state exists not for the citizens but the citizens exist for the state.

The entirety of the political system in Turkey is built on the concept of the "permanence of the state." Because of this, it is of the utmost importance that the state be protected against "internal" and "external" enemies. The definition of the internal threat and the identity of the external threats are determined by the two foundational tenets of the official ideology: nationalism and secularism.[9] Any chance of straying from the concept of a unified society based on the official ideology's principles of nationalism and secularism would be considered a danger/threat and the promoters of this dissent would be labeled as an "enemy" of the "State."

The main task of the elitist bureaucracy is to fight against this enemy. The judicial system should be understood in this context. In order to protect the permanence of the state, legislative and judicial "precautions" are taken. Thus, the role of the judiciary, as is the case with other institutions of the state bureaucracy, is to "protect" the state power according to the state's ideological precepts.

It would not be an exaggeration to assert that the majority of the judiciary has internalized this role and behave accordingly. Starting with the high courts, the main judicial body prioritizes the state and its interests above all else.

> "Although the Constitution states that the judiciary exercise its power 'in the name of the Turkish nation,' a portion of our judges gives the impression that they exercise their authority 'in the name of the state' instead. The fact that the members of the judiciary, just as the majority of the people, see the state not as a neutral political organization in service to the people but a sacred value to which they owe their existence plays a significant role. Justices with such a perspective would naturally perceive themselves as 'civil servants' and act accordingly."[10]

An Analysis of Judicial Decisions

In general terms, we can say that the judicial power in Turkey is in harmony with the state power and acts as a protector and guardian of the official discourse produced by the state elites. The best indicators of the judiciary's openness to the state power's conditioning and pressure are actual decisions delivered by various courts. When examined closely, we can summarize the four main characteristics of these decisions as follows:

a) Prioritization of the militarist sensibilities,
b) Protection of the statist ideology,
c) Relatively easy punishment of those known to be opponents of the official ideology as opposed to the protection of those supporting the official ideology,
d) Protection of civil servants.

Military Sensibilities in the Judiciary's Decisions

It is clear from an analysis of the current judicial system that the judiciary prioritizes the state power's sensibilities instead of universal legal principles. The Constitutional Court decisions of the past and present illustrate this flaw.

The main purpose of the Constitutional Court, set up by the 1960 Constitution, was to protect the state against individuals. Because of this, since its inception the Court has delivered many decisions incompatible with the supremacy of the constitution and pluralist democracy; it has not been able to create a legacy of precedents that would strengthen individual freedoms.

The Constitutional Court shares the state power. When deliberating on cases related to other state institutions exercising state power, the Constitutional Court

demonstrates the utmost care for their sensitivities. This is especially striking when we look at the Court's decisions on cases related to the Turkish Armed Forces. The Court consistently acts to strengthen the army's position in the state's power structure.

The Court has declined three separate motions arguing, "The 'unadulterated prison term,' as defined in the Military Penal Code's articles 23, 25, 26, 27, 28, 165, 183, was incompatible with human dignity and constituted a cruel punishment amounting to torture."[11]

The Constitutional Court tried to prove that the unadulterated prison term was, in fact, compatible with human dignity and that this punishment was fair given the difficulty of the military service. The Court's opinion is particularly telling:

> "The only difference between an 'unadulterated prison term' and a regular prison term is that the food given to the prisoner is reduced every three days. Just as giving alcohol to an addict prisoner is not acceptable, the concept of punishment cannot be taken so lightly as to suggest that it would constitute torture to leave a smoker without tobacco for short periods of time…
>
> Finally, it would not be realistic to consider it cruelty or torture that a prisoner is forced to eat only bread for three days in a row in a country where bread is, unfortunately, the main source of nourishment for majority of its people. In the military, which has to accommodate various people with different moral characters, some people may choose to incriminate themselves, and, therefore, go to prison willingly in order to avoid the heavy duties of the military service. It should not be forgotten that such people may consider solitary confinement as a blessing and they can only be put on the right path with unadulterated prison term. The punishment is not served in an actual prison but in a room, secretly, and in confinement. It does not have any degrading features and does not go beyond a simple reduction of food and drinks for short periods of time. When considered from the viewpoint of 'human dignity,' it is very clear that this punishment does not degrade the prisoner to less than the bare level of being human."

The Constitutional Court describes the features of military service:

> "For this trying duty to be conducted successfully, measures commensurate with the task are required. The most important features of the military service are those who constitute the rank and file and the respect of the military hierarchy… These can be maintained at the level required by the service only through strong discipline… In other words, the foundation of military service is discipline. It is for this reason that special laws and regulations are made to protect and perpetuate the principle of dis-

cipline. Any indication, word, writing, or behavior that threatens the notion of obedience are prohibited and would be met with punishment."

This decision is a clear violation of the "*punishment incompatible with human dignity cannot be employed*" principle of the Constitution. Furthermore, it is clear that the Court is not integrating any'moral values' when making its decision. The fact that the Court tries to explain its decision with the requirements of the military profession is particularly bizarre. The members of the Court did not even consider the dissenting opinions, which argued that the requirements of the military profession are inadmissible in terms of determining the constitutionality of the punishment.

The Constitutional Court made a similar decision when it found constitutional the "tart punishment" in Article 31 of the Constitution.

"Military service is an honorable duty. The concern for protection of this honor justifies the heaviest sanctions. Those who stain the honor of the military may be imprisoned and even face heavy imprisonment depending on the case. Even execution may not be severe enough of a punishment. Such persons should be alienated and all of their ties to the military service should be severed. It is necessary to purge any trace of their footprints and it should be as if they have never been in the military service… Every punishment brings a little or much deprivation. This is why it is called a "punishment." Surely, the tart punishment, too, will cause some deprivation, which would be in correlation with the gravity of staining the honor of the military. As such, there is no reason to think that this practice is unconstitutional."

Clearly, the Constitutional Court attaches excessive importance to the requirements of the military service, surpassing the soldiers themselves. To the degree that the Court "sets aside the articles of the constitution itself, judges based on the personal views of each of its member, and defends the view that even execution, let alone imprisonment, would not be enough when it comes to military service."[12]

The fact that the Court did not find unconstitutional the law prohibiting criticism of the 1960 coup d'état indicates the level of Court's sensitivity towards military matters. Those who staged the coup forced all the political party leaders to sign the document "Çankaya Protocol" in order to protect themselves when faced with the unexpected result of the general elections following the coup. By signing this document, the politicians made several promises: Democratic Party members tried and convicted in Yassıada could not return to politics; military officers retired by the stagers of the coup could not return to the army; and they would

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When it comes to crimes committed by the security forces, the judiciary bends the law, in its favor, as much as possible, and in some cases ignores it completely to protect these officials.

work to make Cemal Gürsel the next president of the country. Moreover, it was made a crime on March 2, 1962 to criticize the 1960 coup with a piece of legislation brought before the parliament by the political leaders, including the Prime Minister İsmet İnönü.

Later on, this legislation was brought before the Constitutional Court on the grounds that it was against freedom of thought and conviction, which is protected by the Constitution. However, the Court found constitutional the section 1/B of Article 38 regulating "Some Actions Disturbing the Constitutional Order, National Security, and Tranquility," which prohibited any criticism of the coup even through insinuation.This included even the smallest criticism against the institutions founded after the coup.

> "… Would stir feelings of hostility and hatred, violating the national tranquility; this would lead to the damage of the foundational principles of the Constitution; hence, such a behavior is incompatible with the mentioned principles… the aforementioned section of the law does not constitute a limitation on the exercise of freedom of thought and conviction according to its true purpose. As such, the section of the article does not relate to or damage the core of freedom of thought and conviction."[13]

This decision by the Court is one worth analyzing. The Court starts with equating democracy and the rule of law with the military administration, while at the same time, finding it constitutional that the legislation is prohibited from criticizing coup stagers. These decisions, which are representatives of an interpretation that disregards basic human rights, are important for two main reasons: first, they show how closely the Court aligns itself with the demands of the military; and second, the Court is incapable of protecting the freedoms and rights of its citizens.[14]

Many examples may be given to illustrate the military's influence over the Constitutional Court's decisions. But the so-called "367 decision" represents the ultimate representation of such influence. The regulations governing the presidential election process in the 1961 Constitution was quite difficult. It was made easier with the 1982 Constitution given the lessons learned as a result of the political tensions and instability the presidential election process caused. Drafters of the 1982 constitution aimed to allow for the election of the president after four rounds of voting in the parliament, and, in this way, prevented these elections from creating extended political disputes. Turgut Özal, Süleyman Demirel and Ahmet Necdet Sezer all were elected presidents according to this regulation and there were no disputes on the election process.

However, in 2007, when President Sezer completed his term in office and the next presidential election was to take place, Abdullah Gül of the Justice and Development Party (AKP) declared his candidacy. The composition of the parliament was suitable for his election. But those opposed to his candidacy began working on certain scenarios to prevent him from becoming president. The most notable among these was the argument that "in every round of the presidential election, there has to be 367 parliament members present," voiced by the former High Court of Appeals judge Sabih Kanadoğlu. Based on this argument, CHP brought the matter to the Constitutional Court. In the meantime, military circles started voicing their opinion as to undesirability of Gül as an appropriate president for them. On April 27, 2007, the Turkish General Staff posted a memorandum on its website against Gül's candidacy. The Constitutional Court rendered a decision that was largely colored by this memorandum and based on the demands of the military.

Undoubtedly, it is not entirely unique to the Constitutional Court to take into consideration the demands of the military circles; other courts behave in a similar manner as well. A striking example of this is the "Eğitim-Sen" case. Eğitim-Sen, the Educators' Union, added the following article to its regulations during its Congress in September of 2001: "The Union defends the right of all members

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of society to receive democratic, secular, scientific, and impartial education in their mother tongue in an equal and free manner." The Ankara Governer's Office issued a warning to the union because of this article and asked that the article be changed. When the union refused, the Governor's Office petitioned the Ankara Attorney General's Office. Upon this, Eğitim-Sen changed the "in the mother tongue" phrase to "in an *individual's* mother tongue" and the issue was resolved. The Attorney General's Office decided not to press charges against the union board members in March 2002. Next, the Work and Social Security Ministry sent a letter to the union stating, "the change in the union's internal regulations have been reviewed and no illegality was detected" and the case was closed.

However, the Turkish General Staff became involved in the matter. Chief of Operations, Lieutenant General Köksal Karabay, sent a letter to the Labor and Social Security Ministry on June 27, 2003. The letter stated, "the union's internal regulations are against the laws and the Constitution" and asked that "necessary actions be taken to change the regulations." The Ministry, which declared before that there was no violation of the law, went to the Ankara Governor's Office for the regulations to be changed. The Governor's Office opened a "closure case" against the union. The Ankara Business Court 2 denied the case based on the European Convention on Human Rights (ECHR). But the Ninth Circuit of the High Court of Appeals reversed the decision with astounding speed –in only 13 days.

Protection of Statist Ideology in Judiciary's Decisions

Especially in political cases, the judiciary sides with the statist ideology as opposed to upholding individual rights and freedoms. Since its foundation, the Constitutional Court used its power to limit, instead of extending, freedoms in cases concerning freedom of thought. The same goes for 'party closure cases'; the Court has rendered decisions based on values such as "protection of the state" and "guarding the interests of the state," but not on universal legal values. For instance, the Court's opinion in the 'party closure case' against the Socialist Party was as follows:

> "… Another matter is the Socialist Party's ideological opposition to "Atatürkist nationalism" and the perception of it as inappropriate for Turkey's realities. "Atatürkist nationalism" eliminates ethnic differences and renders the differentiation of treatment impossible. It is a unifying and complementary principle that the Turkish Republic cannot give up. It values commitment to the homeland and the state; peace at home

> and peace in the world. A viewpoint against this principle is surely against the unity of the country and the nation."[15]

A similar approach is observable in other 'party closure cases' as well. Since its foundation, the Constitutional Court has closed down a total of 25 (6 under the 1961 Constitution and 19 under the 1982 Constitution) political parties. One reason for this is the existence of constitutional and legal judgments limiting the space of political rights. A second reason, which is just as important, is that the Court has a tendency to interpret the law with an authoritarian mentality.

The Court, as a result of its ideological prejudices and anti-freedom perspective, may ban even the freedoms sanctioned by the law.The Court's decisions on the headscarf issue are a clear example of this. On 7 March, 1989, the Court found unconstitutional the Amendment 16 to the Higher Education Law, which read "in higher education institutions, classrooms, laboratories, clinics, and corridors, it is required to wear modern attire. Coverage of the neck and hair with headscarves and headgear is allowed."[16]

Following this decision, Article 3670 of the Higher Education Law was amended with Amendment 17 as follows: "Attire is not restricted in higher education institutions as long as it is not against the existing laws." In its opinion of the Amendment 17 when rendering a judgment against a case brought against the relevant law, the Court stated,

> "The Amendment 17, which is not based on religious beliefs and requirements, which is not in violation of the March 7, 1989 decision of the Constitutional Court, which does not prescribe freedom of religious attire violating modern attire in universities, is not unconstitutional."[17]

This way, the Court did not annul the Amendment 17; however, it gave an interpretation in clear violation of the spirit of the clause by stating, "the amendment did not prescribe full freedom of attire." Therefore, the Court chose to limit the scope of a freedom that was afforded by the law.

The main mission of the Court, who guards the state ideology through its decisions, is to control the legislative measures incompatible with the constitution's ideological outlook. In order to accomplish this mission, the Court does not shy away from violating the boundaries established by the law. The latest example of this is the Court's annulment of Article 5737 (February 9, 2008), which aimed to secure education for everyone regardless of their attire by amending the Constitution's Articles 10 and 42.

In its first form, the 1961 Constitution did not include a clause about the authority of the Constitutional Court over future constitutional changes. The Court's jurisdiction acquired in 1971 gave the Court authority to oversee constitutional changes but it was limited to the "form" of such changes. This was done because the Court had overstepped its limitations by examining a constitutional change's "content" in 1970. However, the Court continued to scrutinize the content of constitutional changes. The Court developed the argument, in its annulment decisions, that the irreversibility of the Republic was not only a material rule but also a formal one. As such, a constitutional change violating Article 2 of the Constitution would come to violate the Constitution in their form as well.[18]

In reaction to the Court's scrutiny of the content of constitutional changes, which was in clear violation of the Constitution itself, the 1982 Constitution clearly defined what constituted a "formal deliberation." Formal deliberations became limited in that the Court would determine whether the constitutional change followed the proper procedures: audit, proposal, majority vote, and speed of consultation. Article 148 regarding this law was written in very clear and plain language. Moreover, the Court developed a precedent that avoided a liberal interpretation of the formal deliberation in many cases.[19]

Despite all of this, the Court overturned the constitutional changes made to Articles 10 and 42 by delving into the content of the change once again. Thus, the Court rendered the authority of the parliament to amend the Constitution meaningless.[20] The Court decided that it had to, first, annul this law because it related to one of the foundational principles of the state, secularism, and second, produce arguments that would render the law acceptable. The Court followed a three-step approach for this. First, it added the condition of "acceptability" as a new component to Article 148. Second, it enlarged the scope of the ban on constitutional change proposals, making it include almost all of the articles of the Constitution. Third, it annulled the constitutional change by deliberating on the law based on the "secularism" principle of Article 2 of the Constitution. This was the Court's main intent.[21]

With this decision, the Court paved the way for supervision of any constitutional change made by the legislature. It acquired the role of an "absolute authority overseeing the constitutional changes with veto power." While doing this, the Court both violated Article 148 of the Constitution and ignored its own precedents.

Statist reflexes are not unique to the Constitutional Court, as other judicial bodies, too, suffer from the same problem. For example, the Supreme Election

Board had to deliver a decision in 2002 regarding the future of about 10,000 candidates (including banned politicians such as the current Prime Minister Erdoğan, Necmettin Erbakan and Akın Birdal), deliberating on whether they could run for office during the upcoming elections. The Board's President Tufan Algan cited the following in a press release as criteria for the decision:

> "We look at Atatürk's sayings, the important date of August 30th and Çanakkale. We consider whether you have wronged the country … The Judiciary looks at the file that comes to it, based on the law, and the country's interests. It looks at Çanakkale, at the Great Offensive that started on August 26th and the Battle of Dumlupınar on August 30th … as judges; you will consider whether they have hurt the country as well. You will think again of: why 300,000 of our people sacrificed their lives in Çanakkale [in WWI].[22]

In order to further demonstrate the level to which the Judiciary acts based on a certain political ideology, it is important to note the recent decisions made by the Council of State with respect to coefficient calculations in university placement. Prior to February 28, 1997, there was no distinction between the general public high schools and the occupational high schools in the national university placement exam. Students would take the same exam and be placed according to their success in this exam regardless of what high school they came from.

With the February 28 process, this situation was radically changed. When the National Security Council made a declaration calling for "struggle against reactionary activities" on February 28, 1997, all the dynamics were altered. The Higher Education Council (YÖK) hanged the method of calculations at the university exam at the expense of the occupational schools. According to this, students coming from occupational high schools would score fewer points even if they solved more questions than others, making their university placement very difficult. The main target of this discriminatory practice was the *İmam-Hatip* high schools, which provided partial religious education.

On July 21, 2009, the YÖK reversed that decision by eliminating the difference in coefficient calculations in university placement exams. Graduates of both the general and occupational high schools will be subject to the same calculations and those who want to move on to a subject matter at the university different than their specialization in high school will no longer be disadvantaged.

The Istanbul Bar sued the YÖK to annul and stop the implementation of the decision. Chapter 8 of the Council of State unanimously decided to stop the implementation of the decree. The Council based its decision on the premise that

Judicial authorities perceive themselves as the standard-bearers of the official ideology. Thus, they position themselves against dissenters of the official ideology and punish them

the coefficient cannot be implemented equally. To a certain extent, it opined that a decree securing equality between students was in fact against equality.

Following this, the YÖK moved to reconsider the matter and reduced the differences between the two schools' coefficient calculations while keeping the inequality between them. However, the Istanbul Bar went to the Council of State once again. The same court decided that the newly proposed difference between coefficients was not enough. The court annulled the YÖK's decision.

Both decisions by the Council of State are incompatible with both the Constitution and the basic tenets of administrative law. First of all, while prescribing that all activities and decisions of the administration are subject to the judiciary's scrutiny, Article 125 also describes the limits of this authority. According to the constitution, judicial offices can only determine "agreement with the law" but not "appropriateness with the law."

However, it is clear that Council of State scrutinized appropriateness with the law in the above-mentioned decisions. The Council acts as if it is itself the relevant administrative office and can decide that there should be no equality between the general and occupational high school students. Then, it determines with what proportion this inequality should be applied.

In this decision, the Council of State sees the necessity of a difference between coefficients while stating that this difference should not have "a quality that can be overcome." One of the most important features of education is the fact that it allows mobility between different segments and classes of society. The Council clearly indicates in this decision that it considers education within a "caste system" mentality.

According to Council of State, there are two groups: 1) students of general high schools, science high schools, and Anatolian high schools with higher coefficient marks who are given a "higher legal status," and 2) students of occupational high schools with lower coefficient marks who have a "lower legal status." The Council appears to want that there be no mobility between these two groups. As a result, the Council of State decided that the difference between the two should be so high as not to allow students of higher and lower social classes to co-mingle at the university level.

There is no legal reason why the Council of State should consider it imperative that there should be an "insurmountable" difference. The Council's decision is ideological and this can be traced back to the 28 February process. This ideological influence on court decisions is the most critical issue for the judiciary. If this problem is not resolved, neither the independence and impartiality of the judiciary can be achieved nor can democracy and the rule of law be established.

Punishment of Opponents in Judicial Decisions

Freedom of expression is one of the main foundations of a democratic society. Especially in political issues, this freedom should be interpreted most liberally given that the political issues concern the entire society. Freedom of expression in political matters is the value that needs to be the most protected. In a democratic country, the judiciary should protect and enhance this freedom and open up the public space for debate.

In Turkey, judicial authorities perceive themselves as the standard-bearers of the official ideology. Thus, they position themselves against dissenters of the official ideology and punish them. The judiciary is very insistent on sentencing critiques opposing the judiciary's ideological position.

Hrant Dink published a series of commentaries in Agos newspaper arguing that the Armenians Diaspora's anger and hatred for Turks poison Armenians in Turkey. The High Court of Appeal – despite the court experts' reports to the contrary – found Dink's speech in violation of Article 301 of the Turkish Penal Code (denigrating 'Turkishness'). This decision became an important turning point in the process leading up to Dink's assassination.

Orhan Pamuk was prosecuted when he said, "we have killed one million Armenians and forty thousand Kurds." The High Court of Appeal decided that all Turkish citizens could sue Pamuk. In terms of standing before the law, the judiciary ignored the basic principle of "one's interest should directly be violated."

Constitutional jurist Prof. Mustafa Erdoğan was sentenced to pay a fine of 5,000 TL ($3,000) to each member of the High Court of Appeal for saying, "they do not know the law."

Vice President of the Democratic Society Party, Aysel Tuğluk, made the following speech to the Batman city council meeting of her party:

> "Mr. Prime Minister says, 'declare PKK a terrorist organization and then we will meet with you.' Even if we declare the PKK a terrorist organization, this problem will not be resolved; those you qualify as terrorists are heroes for some. Despite our demands

> for peace, troops were massed at the border. If we call Abdullah Öcalan a terrorist, then we cannot face the people. The Kurdish people have shown their preference for a democratic struggle, but if you do not allow a people to develop their own language freely, this policy will create the conditions for violence."

Following the speech, Diyarbakır Republican Prosecutor's Office filed charges based on Article 220/8 of Turkish Penal Code against the speech stating, "The speech, in terms of content and main theme, has the quality of propaganda for the PKK terror organization." First, the Diyarbakır High Criminal Penal Court decided to stop the prosecution based on the fact that Tuğluk was a parliamentarian, which gave her immunity. But this decision was appealed and the High Court of Appeals overturned the decision, which allowed the local court to continue the case. At the end of the prosecution, the court charged and sentenced Tuğluk for "propaganda for the terrorist organization." The Court did not use any of the legal or discretional reduction in its sentencing nor did it apply any decision in her favor, because it had no positive opinion of Tuğluk.[23]

Following the launch of a cross border operation into Iraq by the Turkish Armed Forces, the Democratic Society Party gathered at a meeting and organized a demonstration on February 25, 2008. At the end of the demonstration, the party's Diyarbakır city president, Necdet Atalay, and Diyarbakır's Mayor, Osman Baydemir, delivered speeches. Baydemir said the following:

> "This problem cannot be solved through operations and deaths. My heart is aching. No police, no soldier, no guerilla should lose their lives. Let us live in brotherhood, unity, and cooperation with dignity. Enough is enough. By killing, neither Kurdish people nor Turkish people will run out. This is only a press conference. Let Erdoğan see, let Büyükanıt see. This people has not revealed its hand yet. If you respect this people, stop the war. If a guerilla loses his life, if a soldier loses his life, there will be hundreds to take their place. Because of this, listen to the voice of this people for every second and every minute."

Atalay made a similar speech. Because of their speeches, Atalay and Baydemir were prosecuted for the propagation of an illegal terror organization's cause. During their prosecution, the two stated that they had no intention of breaking the law. In summary, they said that their speeches were to help end the conflict in Turkey, to express their regret over all loss of life (of police, soldiers, civilians, and PKK members), and to share the pain of the mothers of the dead. They added that there was no praise, exaltation, or criticism of the police, soldiers, or guerillas. However, the court overseeing the case stated that the PKK and Öcalan carried out propaganda during the organized march and the meeting turned into

an illegal demonstration. Baydemir and Atalay, according to the court, were "in unison with the group by making statements against the Turkish Armed Forces' operations against the PKK terror organization." The court sentenced Baydemir and Atalay to 10 months in prison for actively propagating on behalf of PKK and Öcalan.[24]

While the judiciary punishes the most minor criticisms of the official ideology by parliamentarians, writers, and academics, it acquits insults and slanders if they are not in opposition to the official ideology

While the judiciary punishes the most minor criticisms of the official ideology by parliamentarians, writers and academics, it acquits insults and slanders if they are not in opposition to the official ideology. Many examples of this can be provided.

The journalist Can Ataklı authored an article arguing that the founders of the Helsinki Citizens' Association (HYD) and signers of the 'Apology Campaign' (Ahmet İnsel, Şerafettin Elçi, Halil Berktay, Murat Belge and Adalet Ağaoğlu) were receiving funds from the EU. He wrote that the two separate funds from the EU were given directly to the individual organizers. With his title reading, "Why was this money taken?" Ataklı wrote, "One of the main signatories, Ahmet İnsel, received 107,414 Euros from the EU. I wonder what he did with this money and what good services he provided for Turkey?" The court did not find any offensive elements in this and did not even require that the journalist correct the article.

In a TV show, Mustafa Balbay said, "it is a serious practice that Turkish intellectuals are being bought with material and spiritual means… if need be, I am going to provide the name too, I do not like polemics but I will say the name: Prof. Baskın Oran." Oran went to the court. The local court decided in Oran's favor citing that his individual rights were violated, sentencing Balbay to pay damages. However, the Court of Appeal reversed the decision with an ironic statement, "Baskın Oran writes for Agos, he writes on Armenian issues; he has to bear the statements of opinion that will be leveled against his opinions, even though they may be harsh."

Baskın Oran's report, "Minority Rights," prepared for the Prime Ministry's Human Rights Agency, caused much controversy following its publication. A defamation campaign was started against Baskın Oran and the President of the Agency, İbrahim Kaboğlu. However, all of the following slander and defamation was acquitted:

1) "I think the people's hearts would be relieved if these men were beaten. Those in support of Sevr [Treaty of Sevres] deserve slaps and kicks."
2) "This report is the product of divisionist thinking. I swear that the land is worth spilling blood, if need be it will be spilled."
3) "These are a bunch of shmucks."
4) "Take those made up minorities of yours and go stick them to your Europe."
5) "Calling these guys 'Turkish' is injustice to the snakes, frogs, and jackals of Turkey."
6) "There are those who walk this land swearing at it. Traitors, collaborationists, you name them. Like a dog, they shut up with a bone."
7) "Poodles that kiss up to you and wag their tails when their cups are filled with food and bone meat, stupid smartasses, half-witted, confirmed traitors, miserable ones. Knifing our Turkish state and people's unity with the dagger of treason."
8) "Minority seekers should ask their mothers and fathers once again who they are."[25]

On October 11, 2008, there appeared a piece by Işın Erşen in the Bolu Express newspaper titled, "Turk, here is your enemy." The writer said, "five DTP parliamentarians, mayors, and administrators should be killed for each soldier killed in a PKK attack." He made the following call upon Turkish "patriots": "From now on, they are going to become the targets of civilian patriots.To clean up 3-5 microbes, we will say, 'from now on, one from us, five from you, okay or do we continue?' Patriots capable of saying this will surely emerge."

DTP's Selahattin Demirtaş went to the Bolu Republican Prosecutor's Office. First the Prosecutor's Office and then the Bolu High Criminal Penal Court considered the commentary within the bounds of "freedom of thought" and found it "appropriate according to the law."

This decision is really a seriously misguided one. This type of commentary should not be possible. It is full of insults, targeting, defaming, and incitement to violence and it should not be protected by the freedom of thought or freedom of expression principles under normal conditions. Freedom of expression concerns thoughts and their expression. In this case, however, it is not about freedom of expression or thought; it is about insults, targeting a particular group or individual, and incitement to violence. These are all crimes, they are not protected under the right of freedom of expression and the perpetrators should be punished. Yet, the judiciary did not do this; on the contrary, it left the crimes unpunished by deciding that a call to violence was appropriate according to the law.

Judiciary sometimes goes as far as to assume the role of the legislature by instituting a new ruling that interferes with the political decision making processes

Based on the analysis above, the following conclusion can be drawn: the judiciary in Turkey sees itself as the defender of the state. On the one hand, it declares illegal the use of basic rights by dissenting groups and individuals. On the other hand, it tolerates crimes committed against opposition groups and in many cases acts as a mechanism acquitting such crimes. Because of this, it secures neither freedoms nor the rule of law in Turkey.

Protection of Public Officials in Judicial Rulings

The principle of the rule of law is not applied towards certain segments of society in Turkey. The 'law' is often not fully applied against certain groups, in particular when the security forces of the state commit illegal acts. The judiciary does implement the law in the harshest manner when it comes to crimes committed between individuals and against the state. When it comes to crimes committed by the security forces, however, the judiciary bends the law, in its favor, as much as possible, and in some cases ignores it completely to protect these officials.

In this context, the example that needs to be remembered is the incident known as "forcing villagers to eat excrement." In the early morning of January 15, 1989, in the village of Yeşilyurt some seven kilometers away from Cizre, the villagers were forced to eat excrement in an operation conducted under the Army Major Cafer Tayyar Çağlayan. The villagers fought for a long time to have their case opened. Major Çağlayan denied that the event took place. He was sentenced to three months in prison for "mistreatment," but this sentence was converted to a monetary fine and was postponed. The villagers brought their case to the European Court of Human Rights (ECHR) and the Court found Turkey liable. The villagers were awarded 300,000 French Franks each, as monetary compensation.

Another example is that of Uğur Kaymaz. Kaymaz, an unarmed 12 year old with a pair of slippers on his feet, was shot dead with 13 bullets by the police. The judiciary acquitted the police citing "self-defense." In the same way, a special sergeant took random shots at a demonstrating crowd in Siirt and killed a passerby. The Court of Appeal, it its decision of March 13, 2009, acquitted the sergeant based on the 'special conditions' in the region.

The former General Chief of Staff General Yaşar Büyükanıt (Rtd.), said, "I know him, he is a good kid," giving his word of assurance about Ali Kaya, who

was the suspect of the bombing in Şemdinli on November 9, 2005. He also admitted that he was the one who delivered the April 27, 2007 electronic memorandum against the ruling government at the time, which was widely interpreted as yet another military intervention in Turkish politics, but the retired general was not prosecuted for this. No judicial authority took judiciary action against Büyükanıt, who had participated in extra-judicial activity against the government and tried to influence the judiciary. There was one exception: the Prosecutor Ferhat Sarıkaya prepared the dossier against the general but he was kicked out of the legal profession afterwards by the HSYK (High Council of Judges and Prosecutors). A high level military bureaucrat was not punished despite the fact that he was involved in an extra-judicial activity while a judicial official was severely punished for performing his duty within the bounds of the law.

The retired general, Altay Tokat, confessed to having someone throw a bomb near a housing complex for prosecutors and judges in Southeastern Anatolia in order to "get them in line."[26] When this confession stirred great controversy in public, Tokat defended his actions saying, "what is the big deal?" When the incident came to the courts, first the Military Prosecutor's Office decided not to press charges, and then, the administrative court acquitted Tokat stating, "all components of the crime were not present."

Although there are many more examples of this type of action by the judiciary in Turkey, what we have attempted to do here is to demonstrate that the judiciary is fearful and hesitant to prosecute the powerful figures and particular groups in Turkish society associated with the state. This attitude is all the more striking when it comes to the judiciary's effort to make sure that the "torture" cases brought against soldiers and the police will often fall under the "statute of limitations" clause, therefore, avoiding prosecution based on a legal technicality. The real test for the judiciary, however, is whether it can try the powerful figures and groups in Turkey. If the judiciary cannot apply the law of the land to all of its citizens equally, then the'powerful' in Turkey will always feel that they are above the law, and the Judiciary itself will remain a "secondary" power subservient to those who hold power. Such an attitude is incompatible with the principle of judicial independence as well as the laws prescribing that the citizens are equal before the law. Moreover, the prevalence of these attitudes will destroy citizens' belief and trust in the law, the judiciary, and justice in Turkey.

Conclusion

Undoubtedly, the judicial bodies in Turkey have delivered liberal oriented decisions strengthening democracy but such decisions are unfortunately very lim-

ited and proportionally low. Judicial decisions in Turkey are usually anti-liberal and intended to set out prohibitions and punishments, reflecting a certain type of mentality. The majority of those who hold power in the judiciary have not internalized the democratic culture and they perceive themselves as civil servants of the state. Because of this, they focus on protecting the state instead of establishing and maintaining justice when performing their duties. The majority of the members of the judiciary go so far as to ignore the law and principles of justice when it comes to the interests of the state. They do not hesitate to overstep the bounds of the law for the sake of the state. Especially during the periods in Turkish history when military coups occurred and in their aftermath, the judicial sector's commitment to the law appears to diminish. This can be substantiated because the Constitutional Court members actually visit the coup stagers on the anniversary of the coup, for example on September 12, or by the judicial staff's high attendance to the General Staff's "28 February briefings" in the past.

Two particular findings of studies carried out on the judiciary's general mentality and viewpoints are particularly noteworthy. First, the majority of the interviewed judges and prosecutors displayed a statist and nationalist mentality and they lose their impartiality when it comes to the state. Even the judges themselves emphasize that they should not be impartial. For example, the Chief Justice of the High Court of Appeals, Osman Arslan, states in his farewell ceremony in December 2007:

> "Judges should be independent, trustworthy, and impartial. But there are also cases where the judges will take sides. Judges are on the side of the Turkish Republic. Judges are on the side of the unitary state, and indivisible unity. They have taken sides and they will do so in the future. They are on the side of the crescent and starred flag. Judges are on the side of Ankara being the capital as well."

Second, it was found through interviews with judges and prosecutors that a large majority of them is, at the very least, skeptical and dismissive towards international law.[27] These findings explain, at the same time, the reasons of the above-mentioned decisions.

In sum, when prioritizing, the judiciary places the state above all else and is not in favor of international law. It considers that the state is worth protecting over the rights of individuals. It places a higher value on the state than the realization of justice for Turkey's citizens. Therefore, it is fearful and hesitant to bring to justice the state and its power-holders. Today, this is at the center of Turkey's problem with its judicial system. For, it should be expected that a democratic country's judiciary should be able to effectively prosecute those who hold power for their

wrongdoings. If the judiciary avoids this essential function of its duty, it will both damage the principle of equality before the law for its citizens and destroy their belief and trust in the law, the judiciary, and justice in Turkey. This picture very clearly indicates the necessity for judicial reform.

Endnotes

1. For the society's perception of the judiciary's role, see Sancar M. and Aydın S., *Biraz Adil Biraz Değil: Demokratikleşme Sürecinde Toplumun Yargı Algısı* (İstanbul: TESEV Publications, 2009), pp.30-74.

2. Mümtaz Soysal, *Anayasanın Anlamı* (İstanbul: Gerçek Publications, 1987), p.66.

3. The mistrust in the people's vote is so high that "unelected members were given their seats next to the elected ones in the Republican Senate … In the parliamentary regimes, the rule is the strength of the cabinet in a government composed of a party or a coalition of parties. However, since the 1961 did not trust the majority decision coming out of the parliament, it did not trust the government coming out of it either. In the 1961 Constitution, even the renewal of the Parliament was not given to the cabinet but to the President. Next to the government's ministers, the powerful state bureaucracy, National Security Council, military bureaucracy, and semi-independent organizations all sit." Mehmet Turhan, *Hukuk ve Siyaset* (Ankara: Gündoğan Publications, 1995), pp.138-139.

4. Serap Yazıcı, *Yeni Bir Anayasa Hazırlığı ve Türkiye: Seçkincilikten Toplum Sözleşmesine* (İstanbul: Bilgi University Publications, 2009), pp.34-35.

5. For the army's place in the system, see Fazıl Hüsnü Erdem and Vahap Coşkun, "Askeri Yargı ve Askeri Vesayet", *SETA Analysis* (Ankara: SETA Publications, July 2009).

6. Taha Parla, *Türkiye'nin Siyasal Rejimi 1980-1989* (İstanbul: İletişim Yayınları, 2002), p.31.

7. Turhan, *Hukuk ve Siyaset,* p.140.

8. Fazıl Hüsnü Erdem, "Türkiye'de "İdeolojik Devlet" Gölgesinde Yargı ve Bağımsızlığı Sorunu," *Demokrasi Platformu*, Year 1, No. 2, (Spring, 2005), p.55.

9. For the shaping of the official ideology by the principles of nationalism and secularism in Turkey, see Vahap Coşkun, "Kamusal Alanda Kimlik Sorunu", *Demokrasi Platformu*, Year 1, No. 5, (Winter 2006).

10. Erdem, *Türkiye'de İdeolojik Devlet Gölgesinde Yargı,* p.57.

11. For these decisions, see E.S. 1963/57, K.S. 1965/65, K.T. 27.12.1965; E.S. 1965/41, K.S. 1965/1966, K.T. 27.12.1965; E.S. 1963/132, K.S. 1966/129, K.T. 28.06.1966.

12. For a detailed analysis of these decisions, see Yusuf Şevki Hakyemez, *Hukuk ve Siyaset Ekseninde Anayasa Mahkemesinin Yargısal Aktivizmi ve İnsan Hakları Anlayışı* (Ankara: Yetkin Publications, 2009), pp.212-217.

13. E.S. 1963/16, K.S. 1963/83, K.T. 08.04.1963; E.S.1963/17, K.S. 1963/84, K.T. 08.04.1963.

14. For a detailed analysis of these decisions, see Adnan Küçük, "Hukuk Devleti Kavramı ve Türk Anayasa Mahkemesi Kararlarında Hukuk Devleti", Ali Rıza Çoban and others (ed.), *Hukuk Devleti* (Ankara: Adres Publications, 2008), pp.394-396.

15. E.S.1991/2, K.S.1992/1, Resmi Gazete: 25.10.1992, Sayı:21836, s.3–11.

16. E.1989/1, K.1989/12, k.t. 7.3.1989 (Resmi Gazete, 5.7.1989–20216).

17. E.1990/36, K.1991/8, k.t. 9.4.1991, AMKD Sayı 27/1, s.285 vd.

18. E.S.1973/19, K.S. 1975/87, K.T. 15.04.1975.

19. For the precedent, see E.S. 1987/9, K.S.1987/15, K.T. 18.06.1987; E.S. 2007/72, K.S. 2007/68, K.T. 05.07.2007; E.S. 2007/99, K.T. 2007/86, K.T. 27.11.2007.

20. For the Constitutional Court's judicial activism, see Yavuz Atar, "Anayasa Mahkemesinin Yeniden Yapılandırılması," in *Institute of Strategic Thought's Report on the Judiciary* (Ankara: 2010), p.15.

21. Yazıcı, *Yeni Bir Anayasa Hazırlığı ve Türkiye: Seçkincilikten Toplum Sözleşmesine,* pp. 207–213.

22. *Sabah*, September 20, 2002.

23. Diyarbakır 4th Circuit of High Criminal Penal Court's decree numbered 20009/64.

24. Diyarbakır 4th Circuit of High Criminal Penal Court's decree numbered 2009/278.

25. Baskın Oran, "Sahi Esas Sorun Nerede?", *Radikal II*, (December 2, 2007); Baskın Oran, *Demokratikleşmeye Engel Olarak Taraflı Yargı*, Presentation delivered at the Abant Platform's *"Democratization for a New Social Contract,"* (March 12-13, 2010).

26. *Yeni Aktüel*, July 27, 2006 - August 2, 2006.

27. Mithat Sancar, *Taraf*, September 24, 2009.