

The Turkish Constitutional Court and Civil Liberties: Question of Ideology and Accountability

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Summary

The Turkish Constitutional Court's verdict annulling the Parliament's amendments to Articles 10 and 42 of the Constitution disregards popular will, legalizes arbitrary restrictions on the right to equal access to education, and erodes the separation of powers by permitting itself to act outside of the legal order. The emergence of a new precedent of judicial activism is now the biggest threat to the future of Turkish democracy. Turkey cannot afford an unaccountable judiciary exercising substantial powers of governance through judicialization of politics. The Parliament must reassert its authority and reconfigure the Court's competences and composition to bring it into line with liberal-democratic principles as part of a comprehensive constitutional reform.

On June 5, 2008, the Turkish Constitutional Court annulled the Parliament's amendments to Articles 10 and 42 of the Constitution. The amendments, which had been adopted with overwhelming support by 411 MPs from several parties, would have strengthened equality before the law and expanded the right to education by eliminating the unconstitutional denial of these fundamental rights to women wearing the headscarf. In reaching its verdict, the Court ruled that the amendments violated the unchangeable laws of the constitution that define the essential characteristics of the Republic. However, by reaching this verdict through an evaluation of the amendments on substantive grounds, the Court overstepped the competences laid down for it in the Article 48 of the 1982 Constitution which states that the Court can review constitutional amendments on procedural grounds alone.

The Court's verdict disregards popular will, enforces arbitrary restrictions on the right to equal access to education, and perhaps most importantly erodes the separation of powers by permitting itself – the figurehead of the judiciary branch – to act outside the legal order. The Turkish judiciary's insistence on a new precedent of judicial activism is now the biggest threat to the future of Turkish democracy, for it undermines the democratic political system and with it the viability of a democratic political community. If the judicialization of politics continues unabated, it will not merely represent a coup attempt against the incumbent government; it will signify a fundamental overhaul of the whole

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Turkish political system, transmogrifying it from a popular democracy into an undemocratic juristocracy accountable to no one.

Threat to Democratic Polity

The Court's decision shatters the balance between the branches of government, in particular the legislature and the judiciary. The Constitutional Court is the court of highest instance, tasked with reviewing the constitutionality of legislative and executive acts. Its breach of the letter and spirit of the Turkish Constitution has dragged Turkey into a new period of legal and political uncertainty. With its latest decision, the Court strengthens a precedent which was pronounced with its infamous 2007 decision regarding the presidential election quorum of 367. The Court has empowered itself to issue verdicts based on subjective evaluations that were in contravention of positive law as well as the basic rights protected by international conventions and the Turkish Constitution itself. The latest decision is a first in the history of 1982 Constitution in that the Court annulled amendments to the Constitution on substantive grounds although the Article 148 of the Constitution clearly prohibits it. Experts of constitutional law and the Court's own rapporteur earlier had stated that it would be impossible for the Court to declare the amendments null and void. Now that the Court rendered this decision, what does it imply for the Turkish legal and political order?

Under this emerging precedent, the Court oversteps its competences by violating the jurisdiction of the executive and judicial branches. If this extralegal practice is not challenged, it threatens to develop into a new norm in constitutional law, destabilizing the political system. On the one hand, allowing the practice to proceed unchallenged will legitimize the judicialization of politics by tacitly condoning the Court's deliberate attempt to act as a political body in shaping the direction of politics and society. On the other hand, it will render the Turkish Parliament dysfunctional and illegitimate; the possibility that the Court can eventually review and squash any legislative act will hold representative institutions hostage to the whims of unaccountable justices. Since no constitutional appeal mechanism exists to review the Court's decisions, the Court in effect emerges as an institution exercising substantial governance powers above and beyond politics, and without the balancing force of democratic accountability. This is the end of democracy as we know it and the emergence of juristocracy in its place.

A related issue, therefore, is the Court's betrayal of the purpose of judicial review in a system of democratic checks and balances. Even in a healthy democracy, a nation's high court is granted the authority to oversee the actions of the executive and legislative branches, and thus runs contrary to the spirit of direct democracy. However, in doing so it serves an important function in pluralist societies, protecting basic rights by preventing the tyranny of the majority over individuals and dissenting groups. The judiciary's 'undemocratic' constraint on the expression of popular will is intended to limit the excesses and abuses of popular sovereignty and state power. That is partly why the autonomy and independence of judges from the influence of political authority has emerged as an important principle in most countries. The corollary of this principle, however, is the disengagement of judicial organs from partisan politics.

Through its latest decision, the Turkish Constitutional Court has demonstrated once again that it does not respect fundamental human rights, particularly the right of equality before the law. The Court's expansionist interpretation of the rights of the state, and its corresponding restrictive position regarding the rights of the individual, has been one of the major impediments to the progress of Turkish democracy. Instead of upholding the basic rights of Turkey's citizens, the judiciary has opted instead to restrict their rights and liberties in order to protect the state and the status quo.

In addition to reaffirming its practice of undemocratic political intervention in violation of the purpose of judicial review, through its latest decision the Court empowers itself to deny equal access to public services outside the scrutiny of legal order and democratic accountability. Its self-empowering interpretation sets a dangerous precedent for any political-legal order in general and those of a democratic polity in particular. If a secularist cohort of high Court judges can breach the sanctity of the constitutional-legal order and endorse unequal access now, while further seeking to institutionalize their extra-judicial act as a new precedent, the Turkish polity is left with no neutral basis from which to object to other excesses. If a fascist, totalitarian or fundamentalist cohort of judges were to dominate the Court in the future and seek to impose their worldviews on society, they would have every right to do so under the emerging precedent. When the highest Court is granted the right to overstep the law, no institution will have the power to stop subsequent acts of judicial 'guardianship.' This dangerous imbalance of power in effect delegitimizes the entire political system.

The Court's constant abuses of the review power by violating positive law, as in the case of revoking the recent amendments without any material basis and on the basis of subjective evaluations, has undermined the legitimacy of the judicial branch as an institution vital to the functioning of a pluralist democracy. The Court is increasingly viewed as a player in partisan politics which, under the pretext of upholding the rule of law, occasionally disregards popular will and breaches the legal-constitutional order. Further, the precedent set by the Court's actions may undermine the stability of the country by eroding the rule of law and the judiciary's role as a neutral arbiter. The tarnishing of the judiciary's image, in turn, erodes people's sense of justice and respect for law and order in society, both of which are needed if democracy is to function at all.

Threat to Turkey's Democratic Political Community

In addition to undermining individual rights and delegitimizing the democratic system, judicial activism also emerges as a major threat to the democratic community and to social stability at large. Since a healthy and viable community undergirds a democratic polity, one purpose of constitutional jurisprudence is to uphold that community. The Court's activism has bedeviled this goal and proven destructive to its long-revered mission of maintaining the Republic's fundamental principles. For instance, its dogmatic attachment to a narrowly-defined form of secularism undermines this principle's utility as a mechanism with which to regulate state-society relations and relations between societal groups. Rather than serving

this function, “secularism” rather becomes the ideology of a numerically small but politically vocal group that exercises disproportional influence. The Court’s attempt to impose this form of secularism on the country pits various sectors of society against each other, undermining social peace and harmony.

Few would object to granting the Court the right to defend the constitutional order and the Turkish Republic. However, the definition and reinterpretation of the basic principles of the Republic, and with them the social contract that unites the diverse political community, is too precious to be left to the Court alone. The political community, as a dynamic and changing entity, interprets and reinterprets its basic norms, and most importantly its social contract. The form this contract should take is essentially a political question and, as such, needs to be decided collectively through a process of democratic deliberation, rather than by the verdicts of an 11-member body. The Turkish judiciary has reserved to itself an exclusive right to define what is meant by the state and the constitutional order, ignoring the fact that this is an essentially political and democratic act. By isolating the act of defining and interpreting the essential characteristics of the state from the institutions formed by popular mandate, i.e., the executive and the legislative organs, the Turkish judiciary positions itself above and beyond the will and reach of the people, creating and perpetuating a rift between society and the state. Given its current structure and composition, the Court could hardly be called representative of Turkey’s social and political diversity. At the heart of the current crisis, therefore, stands the undemocratic nature of the Constitutional Court, the highly politicized nature of its decisions, and its advocacy of parochial interests that isolate it from the reality of Turkish society as a whole.

Moreover, the Constitutional Court is the civilian institution least equipped to propose a social contract because of its lack of commitment to freedoms and diversity, other essential prerequisites of democracy. Opening the way for the arbitrary denial of equal access to the public realm through its latest decision, the Court not only violated basic rights but also insisted on preventing a genuine public debate on the nature of the Republic. The Court does not tolerate dissent, which is needed in order for a pluralistic democratic political community to flourish. Because of its statist mentality, the Court disregards the diversity of Turkish society in terms of ethnic, religious and ideological orientations and lifestyles. In its failure or refusal to recognize the multiplicity of religious experiences, it goes so far as to monopolize the principle of secularism, turning it into a static ideology, and preventing its plural expressions in society. However, just like religious dogmatism and ethnic chauvinism, ideological reactionarism too is an equally important threat to an open society. By seeking to impose an archaic ideology through judicial activism, the Court hinders the emergence of a vibrant civil society. Its attempt to perpetuate an imagined nation-state and a conception of a homogenous nation corresponds neither to the reality, nor the best interests, of Turkish society.

Turkish society, which is deeply embedded in a rapidly globalizing world, is too dynamic and diverse to fit into the judiciary’s ideological mold. The judiciary’s insistence on a static identity, which comes to be viewed as a tool to legitimize and maintain the privileges and

rights of a particular political group against all social trends only serves to undermine Turkey's democratic political community and breeds social fragmentation.

Democratic Accountability: Key to Governance

The judicialization of politics, particularly through constitutional law, is not unique to Turkey. Nor can the inevitably political nature of seemingly technical judicial decisions be denied. Law *is* politics by nature and any legal decision will have political repercussions. As always, however, gradations matter. What is unique to the judicial activism rampant in Turkey is the highest court's deliberate attempt to expand its power into the political realm in blatant disregard for positive law, and its efforts to restrict equal access to the public realm, thus legalizing arbitrary discrimination.

A proper understanding of what might be construed as a merely legal crisis requires an appreciation of Turkey's underlying socio-economic and political dynamics. The judiciary's activism is part of a struggle waged by a reactionary old guard seeking to preserve its reserved domains of power and privilege against a dynamic and upwardly mobile society. The judiciary's use of the principle of rule of law as a cloak to elevate this essentially political realm above and beyond politics and escape public scrutiny subjects the legitimacy and future of the constitutional order to disarray. The fundamental challenge is thus to move the Turkish judiciary toward accountability, lest Turkey slip into juristocracy and witness an end to its popular democracy.

In contemporary democracies, no governance is exercised without various forms of accountability. First, democratic accountability serves as the fundamental check on public offices. In a true democracy, relations of power and the right to govern are derived from a delegation of the consenting citizens, the source of sovereignty. In return, the legitimacy of official actions is largely contingent on whether office holders are subject to democratic accountability. To the extent that their actions make a significant impact on the lives of people, those exercising the power of governance need to report to those people and stand ready to be sanctioned for the consequences of their actions. Second, another major constraint on public offices is comprised of the constitutional checks and balances inherent in the principle of separation of powers. Third, domestic offices are increasingly scrutinized by various governmental and nongovernmental organizations, and are held to the standard of global norms by the diverse range of voices constituting the international community.

The Turkish judiciary fails on all these counts. As its track record clearly demonstrates, it is ideologically predisposed against globalization and international norms; it has disregarded the popular will, and has forced the limits of separation of powers. Through its latest decision, the Court has once again annulled legislation supported by an overwhelming majority of the Turkish people and its representatives, and denied basic rights and equal access to a large segment of society. Most importantly, it has torpedoed the constitutional order and rejected the last remaining limitation on its powers. The Court's decisions have the highest impact on Turkish politics, economics and society; uncertainty over the future of the country fueled by the Court's actions has already cost the Turkish economy billions of

dollars. Turkey simply cannot afford an unaccountable judiciary exercising substantial and disproportionate powers of governance.

The Challenge Ahead: Bringing the Judiciary under Democratic Accountability

The solution to Turkey's governance crisis is contingent on the Turkish Parliament's reassertion of its authority as the representative body of democratic, popular will. Parliament must issue a declaration immediately announcing that the Court's decision is unconstitutional and it objects to the Court's assertion of a new precedent for judicial review. Parliament then must reconfigure the Court's competences and composition to bring it into line with liberal-democratic principles as part of a comprehensive constitutional reform. The only justification for constitutional review is the upholding of basic rights: protecting individuals and groups against arbitrary treatment not only by other individuals and groups but also by the state. Instead of the current system which serves to maintain state ideology against pro-democratic social trends, Turkey needs a system of constitutional review that guarantees basic rights and civil liberties without discriminating between societal preferences, as long as the latter operate within constitutional boundaries. Such a minimalist Court, devoid of an ideological mission, could act as the best guarantor that democratic control will prevail over other state organs.

Minimalist jurisdiction would also prevent the Court's own abuses of power. As a way to boost the Court's accountability, its composition should be democratized through greater involvement of Parliament in the selection of its members. In this way, the Court could turn into a more representative institution, reflective of the richness and diversity of Turkish society. Only then could the Court act as an institution of a pluralist democratic polity, rendering its decisions through public deliberation in accountable manner.

In the meantime, the democratic sectors of Turkish society should keep this issue on the agenda by expressing their opposition to the judiciary's breach of constitutional order and popular sovereignty, and pressuring their representatives to leave aside political differences and prioritize constitutional change as the most urgent issue facing Turkey today. Turkey's democratic partners in the international community likewise must condemn judicial attempts to overturn Turkey's democratic regime and restrict on the exercise of basic rights, and reaffirm their commitment to Turkish democracy.