The Turkish Constitutional Court under the Amended Turkish Constitution

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In March 2016, the Turkish Constitutional Court (TCC) ruled that the rights of the Turkish journalists Can Dündar and Erdem Gül had been violated, leading to their release from prison after three months. Recep Tayyip Erdoğan responded by criticizing the TCC sharply, questioning its existence and legitimacy. This had not been the first time over the last years, that the Court had been attacked.

The constitutional amendments, that will be put to referendum in April 2017 (see Petersen and Yanaşmayan for a detailed analysis of the amendments, to be published here), seemed to be a golden opportunity to change the composition and cut back the broad competences of the TCC. Did the AKP-led Parliamentary Constitutional Committee seize this opportunity?

Only Cosmetic Changes?

At first sight, the Parliamentary Constitutional Committee did not deem it necessary to make great modifications. The number of justices will be reduced from 17 to 15 (amended Art. 146 Turkish Constitution, TC) – the same number it already had under the 1961 Constitution. This is a result of the abolishment of two military courts having the authority to nominate candidates: the High Military Court of Appeals and the High Military Administrative Court. While this is an important step per se, its immediate consequences for the TCC are limited. The two current members, that have been nominated by military courts, will be in office until the end of the official office term: Serdar Özgüldür until 2020, Nuri Necipoğlu until 2018.

While the provisions on the TCC are not amended further, a closer examination suggests that the modifications will have a profound impact on the Court. In the future, it is unlikely that it will serve as an effective check of executive and legislative power and a guarantor of fundamental rights and freedoms.

This becomes especially plausible, if one reads the amendments against the background of the TCC's demeanor over the last months. After the attempted coup a state of emergency has been declared. And this state of emergency has already been extended twice. Since last summer Turkey is effectively governed by emergency decrees. The amendments perpetuate this executive dominance and even hint "at a sustainable state of emergency in which Turkey will be governed mostly by executive orders", as Öztürk and Gözaydın put it.

Thus, the Court's jurisdiction under emergency rule may provide some guidance how it will act under the new system.

A Tame Court under the Current State of Emergency…

In August 2016 the TCC impaired itself by dismissing two of its justices, who had been arrested in the aftermath of the attempted coup. Based on "information from the social circle" and the "common conviction" formed by the members of the Constitutional Court, the Court reached an unanimous decision that the two justices are connected with FETÖ/PYD and have to be removed from office. A few weeks after the dismissal, two new justices appointed by Recep Tayyip Erdoğan took office.

Even more importantly, in autumn 2016 the TCC chose to pursue a "hands-off" approach concerning state of emergency decrees (Olağanüstü Hâl Kanun Hükmünde Kararnameleri, OHAL KHK). Thus it dismissed its longstanding jurisdiction. According to Article 148 of the Constitution, OHAL KHK shall not be brought before the Constitutional Court. Although this provision has not been changed or amended since the adoption of the 1982 Constitution, the TCC reinterpreted the provision, which literally situates the state of emergency outside the scope of the State under the rule of law. In four landmark decisions in the 1990s and 2003 the TCC established

various limiting criteria emergency decrees have to fulfill. It reasoned that if these criteria are not met, the decrees are ordinary decrees and could be subject of constitutional review.

In its decisions in October and November 2016, the TCC unanimously rejected applications claiming the unconstitutionality of four emergency decrees put into force in the aftermath of the failed coup. Applying a literal interpretation of Article 148, it declared its former jurisdiction completely meaningless without any further argumentation.

…is Not Likely to Serve as an Effective Check in a "Presidential System"

The Court's approach in these decisions may have severe consequences under the new system: the authority to declare a state of emergency will only belong to the President of the Republic (amended Art. 119). By rejecting its former jurisdiction, the TCC has obstructed its own ability to check emergency decrees in the long term. It has given the executive almost limitless discretionary power in times of emergency.

In addition, the Court's ability to check regular KHKs will be limited under the new system:

Until now, the Grand National Assembly of Turkey (TGNA) may empower the Council of Ministers to issue KHKs with an empowering law. This empowering law shall "define the purpose, scope, and principles of the decree having the force of law, the operative period of the empowering law" (Art. 91(2) TC). After the amendment, the President will issue decrees on subjects related to executive power without empowering law. Issues that are stipulated to be exclusively regulated by laws in the constitution, cannot be regulated by presidential decrees. If the Parliament issues a law on that specific topic, the presidential decree shall become null and void (amended Art. 104).

The amendments do not answer the question who will decide in case of conflict. According to Ece Göztepe, this competence of conflict resolution should have been explicitly given to the TCC with the constitutional amendments, since all of the Court's competences are listed in it. This has not been the case. And, abolishing the necessity of an empowering law deprives the TCC of a crucial possibility to limit executive power by reviewing whether the empowering law suffices the requirements of Article 91. The Court has made use of this possibility in various decisions developing a standard of review by defining the temporal and substantial limits for delegated legislation. Already in 2011 the TCC has abandoned its long-standing jurisdiction concerning the conditions (i.e. immediacy, urgency, importance and compulsion) justifying the adoption of decrees. After the amendments, it will loose this possibility completely.

Finally, the changes regarding the High Council of Judges and Prosecutors (HSYK), that will be renamed Council of Judges and Prosecutors (HSK) will have an immediate influence on the TCC. The number of members will be reduced from 22 to 13, 7 will be elected by the Parliament, 6 by the President (amended Art. 159). The body is responsible for the election of the members of the Court of Cassation and the Turkish Council of State. Each of them sends two members to the Constitutional Court, that are appointed by the President from among three nominees by the two courts. Thus, the re-structuring of the HSK once again strengthens the executive influence on the Constitutional Court´s composition, even though the constitutional provisions on the TCC as such are not amended.

Quo vadis TCC? Apparently, the AKP-led Parliamentary Constitutional Committee did not deem it necessary to limit the Court's broad competences. The strengthening of executive power has been considered sufficient. Given the TCC's tame behavior over the lost months, they do not fear that the TCC will be a hindrance to "speedy execution mechanisms (of) a presidential system", as President Erdoğan terms it. Neither do I.

This is the first part of three-part series of reports on the constitutional reform in Turkey.

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