TURKEY'S MIDDLE DEMOCRACY ISSUES

Judiciary, Accountability, Fair Representation and THE WAY TO SOLVE THEM

Executive Summary

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EXECUTIVE SUMMARY

As modern economists have proven, Turkey's avoidance of the middle income trap through economic growth and sustainable increases in GDP is dependent upon freeing herself from the middle democracy trap.

In order to avoid the middle democracy trap, it is necessary and sufficient to ensure (i) that the rule of law and accountability prevails the public sector by (ii) improving the judiciary to be fully independent, efficient and accountable, and (iii) fair representation in all types of elections including elections in political parties and public professional organizations.

Standards of Democracy and Judicial Independence

Along with 172 other member states, Turkey agreed in the United Nations General Assembly Resolution no A-RES-59-201 that the basic principles of democracy are: (i) separation and balance of powers, (ii) independence of the judiciary, (iii) pluralistic system, (iv) respect for the rule of law, (v) accountability and transparency, (vi) free, independent, pluralistic media, (vii) respect for human rights and political rights.

UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 set out the basic principles of judicial independence to be "(i) the judiciary as a whole must be independent from the executive branch and other powers; (ii) the independence of the judiciary must be respected and observed, and (iii) the judiciary must be free to decide without any restrictions, influences, inducements, pressures, threats or interferences."

An independent, efficient and accountable judiciary is the most important element of a democracy because it is the only means to preserve the separation of powers and balance between the branches of the state on the one hand and on the other hand to protect civil and political rights, including the right to vote and be elected, and freedom of expression and to ensure the rule of law throughout.

Rule of Law, Accountability and the Judiciary

Turkey's two fundamental problems of "judiciary" and "rule of law" have become an intertwined Gordian knot. The lack of accountability of members of the judiciary and other public officials is one of large black holes that ripped into the rule of law.

Need for Judicial Reform

It is urgently necessary for Turkey to comprehensively reform her "hands and feet tied up" judiciary to transform it into an institution contributing to the general welfare by generating justice, conciliation, harmony and peace from being an expense item that restricts her own motions.

It is wrong to make the judicial reform as a topic for international political negotiations and to index it to the EU's willingness to open chapters 23 and 24 for negotiations.

Problem of the Separation and Independence of the Judicial Branch

The judicial branch is on the one hand dependent on politicians as if it were an extension of the legislative and executive branches because they appoint the members of the Council of Judges and Prosecutors ("HSK") and on the other hand is dependent upon the executive branch, through minister of justice and his undersecretary simply in order to perform its regular functions.

Issue of the Lack of Judicial Accountability for the Judiciary and its Members

The Judiciary have become unaccountable as the HSK's non-transparent decisions concerning the appointment, tenure and discipline of judges and prosecutors including members of the highest judicial authorities were taken outside judicial review with the inclusion of such provisions in the 1982 Constitution that had been found to be contrary to the "Republican" nature of the state, as well as violating the Constitutional principles of equality before the law, rule of law and human rights by the Constitutional Court's ruling of 27 January 1977.

Even though all should be equal before the law, the members of the judiciary have gained immunity from the law and accountability. The legal framework that leaves judicial accountability even for their personal offences to their own institutions even in with regard personal crimes has granted the high courts' judges a lifetime of invulnerability and de facto immunity. This has spread from the Court of Cassation, to the Council of State, to Court of Accounts, BRSA, ICTA and lack of accountability has spread throughout the state's higher administrative echelons like a cancer.

Judiciary's lack of accountability has led to substantial complaints concerning violations of public nature of trials, the right to appropriate reasons for judicial decisions on the adjudication of even the most ordinary disputes.

The Judiciary's Capacity to Perform its Duties

As lying to the court, concealing evidence relevant to adjudication and acts to obstruct justice are considered as part of the right of defense the judicial process has virtually turned into a race of trickery and our courts have become unable to resolve complex disputes.

The shortcuts being taken in procedural rules purporting to facilitate the workload of judges have reduced the courts to a state unable to fulfill their function as well as generating a heavy cost on the public. A simple case that could be effectively resolved in a maximum of 100 days can only be resolved by our commercial courts, which are presided over by our most competent judges, on an average of 1,500 days.

Having become dependent upon the executive in a number of ways, the Turkish judiciary has long been delegating its judicial powers to persons who are mostly not judges so regularly that this practice has become virtually institutionalized.

(i) In Civil and Administrative Proceedings: judges are being required to obtain expert reports for nearly all of their cases, which in turn has led to the *de facto* transfer of the power of adjudication to experts. The disputing parties' right to obtain expert opinions has been usurped by the judiciary. Adjudication has become a process for collecting the documents and petitions to be sent to the experts, whose identities are not known to the parties, virtually turning into an exchange of letters between the parties and *ex parte* persons.

The coterie of court appointed experts have virtually been allowed free reign to plunder those cases in which the no ex parte communications rule has been severely violated, particularly during expert examinations.

(ii) In criminal proceedings: a significant portion of judicial powers have been given to prosecutors who in turn have delegated some of their powers to the police to temporarily restrict the freedoms of persons; and have become dispensing justice through decisions not to indict suspects and/or to issue bills of indictments on the basis of files prepared by the police.

Almost half of the persons officially charged by the prosecutors, who have been granted privileged judicial powers, are privileged to use of the Republic" in their titles having the power to restrict the freedom of individuals, are innocent. This means that half of the people the prosecutors decide not to prosecute must be guilty. Also, prosecutors routinely delegate their responsibilities to the police causing the investigation process to become unnecessarily rigid and as a result suspects are being harassed in their daily lives by means of traumatic events such as being taken from one's hotel room at dawn, dawn raids, being held at police stations until the very last minute of the legal holding period and general maltreatment.

The elimination of interrogation courts and transfer of their powers to prosecutors in the 1980's was a step backwards in criminal justice. These courts should be reinstituted in the form of Courts of Investigation, Evidence Gathering and Arraignment combining the powers of the public prosecutors and of the judges of criminal peace courts.

Better Judicial Organizational Structure – Supreme Council of Justice

The judicial branch must be saved from being at the focus center of the political tug of war for control over the state power.

The judicial branch must be separated from the other branches of the state, both in terms of its power and its functions, and in particular its independence from the legislative and executive branches must be established so as not to leave any room for doubt.

The reasons for complaints that have led to the restriction of the judiciary's independence since the 1961 Constitution are as much strongly justified as the reasons justifying its full independence. As such that judiciary, with its own flaws has caused to restriction of its own independence. Addressing those complaints leading to restrictions is possible by making the judiciary institutionally accountable allowing a judicial review of all decisions and actions made and taken by the judiciary.

Similar to France and Germany, judicial remedies must be made available against any and all decisions of the HSK, which were made immune from judicial review by enactment of an unconstitutional law in 1981 during the coup era.

Resolving all of the known problems of the judiciary requires the establishment of a sophisticated organizational structure composed by the representatives of all stakeholders, clearly separating its political, policy and preference functions from the professional operations and allowing for judicial remedies against any and all decisions and acts of the judiciary and all its organs.

Under such organizational structure, which could be named the “Supreme Council of Justice” (AYK), the professional associations of the three components of the judicial branch, namely judges, prosecutors and lawyers, should be separated and have their own autonomous professional entities that would ensure equality of all these professions and pave the way to improving their efficiency and accountability.

Accountability for the Executive Branch and General Administrative Law

The foremost obstruction in Turkey’s democratization is the weakness in ensuring that the rule of law prevails in the public domain and over public officials. One of the fundamental reasons for this weakness is the fact that the rules determining the behavior of public institutions and in particular high-level public officials are not have not been clearly set out; an as a result, the accountability in the public domain and the release or discharge from liability of public officials has faltered. Another fundamental reason is the fact that the prosecution of public officials for their offences both professional and personal felonies is subject to pre-conditional permission of the executive branch.

For this reasons, consequently, it is necessary to first enact a general code of administrative procedure indicating how administrative powers are to be exercised in line with the provisions of articles 1, 2, 10, 66, 125 and in particular article 8 of the Constitution stating that “executive powers […] must be exercised and implemented in accordance with the Constitution and the laws,” to ensure competence, rationality, transparency and accountability in government.

A general code of administrative procedures has become absolutely necessary to balance out the executive branch in the presidential system that has been adopted in Turkey.

Competence and Accountability in Appointments to Public Office

Every stage and result of the process in the appointment of public officials, a must be transparent, objective and open to judicial review to ensure that the public and all parties concerned are able to participate in the process, agrees with such appointments.

During the process all information on the candidates' qualifications should be revealed to the public and the candidates should be required to make full, accurate and honest disclosure about themselves concerning the public duty so as to ensure that only the most qualified persons are appointed.

Judicial Accountability of Public Officials

Preliminary authorization conditions and procedures required for criminal prosecution of public officials put in place in purporting to safeguard them due to the sensitivities of their public duties have been stretched thus far out of bounds with regards to the personal and work related offences and negligence of the members of high courts and high level officers that a privileged class of immune persons have emerged who cannot be held accountable or penalized while they are free to arbitrarily exercise public authority.

The preliminary authorization conditions and procedures for the prosecution of public officials must be abolished. The judiciary must be able to commence investigations and prosecutions on any matter within its purview without having to obtain permission regardless of the identity, position or title of the suspect; public officials also must be investigated for any unlawful actions; no circumstances of immunity and impunity should be allowed to occur, only an independent judicial authority should decide on public officials' innocence; and not by the suspect's administrative superior.

The sensitivities of public duties should be justification for establishing competent and specialized judicial bodies for the public officials only.

Participation in Governance and Fair Representation

Elections (for Political Parties, General Elections and Professional Associations)

The use of the delegate system that violates the Constitution's democratic governance and fair representation principles, in the elections for the central management and and organs of political parties and public professional organizations prepares the grounds for a small number of persons to dominate these institutions through abuse of central polling, fixed lists and closed lists. The lack of a healthy membership registration and record system in political parties creates an environment suitable for "feudal master delegates", "nylon lists" and similar abuses.

The unconstitutional delegate system should be completely eradicated from elections for the organs and administrators of political parties, municipalities and professional associations. The practice of fixed lists should be prohibited.

All intra political party elections should be conducted under the observation and supervision of a judicial authority.

Political party candidates for elections to single person positions, such as presidency, chairmen and other similar positions should be nominated through two-round elections under judicial supervision similar to the presidential election.

All political views exceeding 3% of the votes nation-wide should be allowed the opportunity to be represented in Parliament in some manner. Accordingly, the size of electoral districts should be of a size that provides opportunity for all political views to express themselves and be elected, with each electoral district electing a minimum of 7 and preferably, 9 or 11 members to Parliament.

Political Parties

Academic works express a broad array of justified criticisms that the Political Parties Act prevents intra party competition; membership registration systems are unhealthy; the administration of parties has been taken over by a political elite through various unlawful methods and authoritarian leadership has become the norm; government resources and facilities are being used to sustain the rule of political elites, to strengthen and enrich their supporters; illegal funding has become a part of politics; the party base is unable to control or direct the administration, to the contrary, the central administration is placing restrictions on the choices of the party base; that in conclusion politics has become a means to rule and exercise the power of government rather than a means of reflecting the nation's will onto parliament.

a) Political Party Organization and Intra-Party Democracy

It is necessary to grant exclusive jurisdiction to regional Courts of Justice where the party's headquarters are located to resolve disputes relating to any bylaws, memberships, organs or members concerning political parties and dealing with such cases should be given priority and ruled on speedily.

The member admission, rejection, registration and recordal transactions in parties should be carried out by judicial authorities and the complaints about unlawful practices such as "feudal master members" and "nylon registration should be terminated

indefinitely.

The Political Parties Act should no longer restrict parties to a single type of organization structure; instead it should only indicate which models are prohibited.

The political party candidates concerning elections for a single person positions, such as party leaders, provincial heads, county heads as well as the President, mayor and similar positions, should be determined through two round elections under supervision of judicial authorities similar to the presidential elections where the two of the candidates who gained the most votes in the first round compete in the second round.

Candidates of the parties for the positions where multiple persons will be elected should be determined through proportionate majority in preliminary elections held under judicial supervision.

The power of central management of political parties to nominate candidates and their turn in candidate lists should be limited to a small number and declared prior to preliminary interparty elections.

b) Funding Politics and Political Parties

Subsidies from the treasury should be distributed fairly and equally to ensure a fair race between competing views. Accordingly, mainstream political views should be considered in one band while non-marginal political views are considered in a secondary band. Treasury subsidies within the same band should be distributed equally.

c) Election Bribes and Off the Record Funding

A system should be established that is able to identify and audit all unlawful and off the record donations and donators to political parties for an expectation in return; and the donations in kind should be recorded as much as cash donations.

All political party activities that could be a source of income or expenditure should be recorded and audited.

The activities of all candidates for any public office open to election, including candidates for any office in political parties, their assistants and any persons they assign any responsibilities should be logged and open to public review and audit.

Aside from the Constitutional Court’s auditing, political parties should be required to obtain independent internal audits, and the results should be disclosed to the public.

Local Governance

Representation unfairness in metropolitan municipal councils should be remedied. For this purpose county heads may be stripped off their natural memberships, direct election of the metropolitan municipal councils or allocation of memberships in the metropolitan municipal councils pro-rata the votes throughout the metropolitan area may be considered.

The Provinces' Bank's structure should be reformed (İller Bankası or İlbank) for it function more democratic and more independent from the central government; and complaints that it cannot make decisions autonomously, is open to political influence and acts as an extension of the central administration must be addressed.

The central government's administrative control over municipalities should be limited and authority to apply heavy sanctions such as removal from office should be subject to a judicial decision.

Managements of the YIKB and Provinces' Bank should be made more democratic and better representing the voters, similar to the special provincial administrations.

Professional Associations Characterized as Public Institutions

Of the means and practices employed in elections of the organs for the provincial and central management of public professional entities the delegate system should be eliminated while the practices of fixed and closed lists should be prohibited. If the delegate system is maintained, then the differentiation in the representative powers of delegates that the Constitutional Court found to be unconstitutional in 1991 and 2002 should be remedied.

Thus a wide segment of their members who are required to become members and pay membership dues in order to be permitted to carry out their professions should be included in the administration of their own professional associations.

Faith Based Organizations and Societies

Turkey must take stock of the last 40 years that culminated in the attempted coup on 15 July and learn the important lessons deserved.

The fact that freedom of religion and faith are protected under the Constitution in Turkey provides a suitable environment for faith based societies to emerge, to flourish and grow rapidly.

Turkey, while still protecting the freedom of faith, needs to find a way to prevent faith based societies from becoming a threat by burrowing deep under society's skin and to avoid the harm they may cause, taking into consideration that their activities are often off the record, outside of the monitoring, control or even knowledge of the government, and they are prone to infiltration and control for malicious intent as they can easily turn their members, who are generally innocent persons of faith, into becoming threats to the very survival of our nation,

To ensure that faith based societies operate within the boundaries of the law, they must be closely observed and audited by the state. Ensuring that the leaders, members, activities, as well as administrative and financial structures of such societies are made transparent and accountable will be sufficient to achieve this objective while still respecting the purpose and function of these kinds of societies.

Need for a Civil and Effective Constitution

Drafting and Methodology of a Civil Constitution

Turkey is in desperate need of agreeing – and not just on the basics but in comprehensive detail – on a new and civil constitution that solidifies social consensus, addresses polarization and adopts principles of compromise, understanding, reconciliation, persuasion and tolerance.

In order for efforts to draft a new constitution to succeed it is necessary to pass a framework law for this purpose establishing the organizational structure, secretariat and method to be followed while outlining a basic framework and plan for the work that will be carried out and ensuring diversity of society participate in deliberations and the way that the concerns of those with different and opposing views will be addressed.

Effective Potection of the Constitution and the Constitution Protection Institution

Turkey's Constitution protection system is limited, simple and inadequate. Due to this weak and ineffective protection exposes the constitutional order to external powers and influences and invites tutelage for its protection. Serious gaps occur in compliance with the Constitution as unconstitutional laws and decree-laws remain in force for years. While it is not possible to prevent unconstitutional laws before they coming into force the Constitutional Court also lacks the authority to redress the consequences of such unconstitutional laws.

The duty to protect the Constitution and constitutional order should be entrusted to an efficient functioning organization the Constitutional Protection Institution, transforming the Chief Public Prosecutor's Office.

Within this framework, filing for annulment actions against enactment of laws and decrees on unconstitutionality grounds should be facilitated by also allowing individuals file such actions. Allegations of unconstitutionality regarding rules, regulations, circulars and general regulatory administrative acts issued by the executive should be reviewed by the Constitutional Court.

Constitutional and Legal Checks on Presidential and State of Emergency Decrees

a) Classification of Presidential Decrees

There is ambiguity as to whether Presidential Decrees are administrative or legislative in force of law and as such whether they fall under the jurisdiction and purview of the Council of State and administrative courts or jurisdiction and purview of the Constitutional Court. This ambiguity must be clarified by indicating that Presidential decrees are administrative and as such fall under the jurisdiction of the Council of State and the administrative courts.

b) Judicial Review of State of Emergency (SOE) Decrees

Article 148(1) of the Constitution does not grant the Constitutional Court any power to review SOE Decree-Laws. Even though the Constitutional Court had ruled on 10 January 1991 that it had the authority to determine whether the SOE Decree-Laws were in the SOE nature and in the event they were not in SOE nature then the Court had the authority to review decree-laws even if they were issued during a State of Emergency; however on 12 October 2016, the Constitutional Court revoked from its earlier jurisprudence and ruled that it had no such authority.

There might be circumstances requiring our nation to be governed under a state of emergency. However, even under a state of emergency, the Constitution must remain in effect, the rule of law must be maintained; the powers of the executive must be limited to the necessities of the state of emergency and the constitutionality of SOE Decree-laws must be reviewed. Therefore article 148 of the Constitution and the law on the duties and powers of the Constitutional Court must be amended to clarify this issue.

Laws for Harmonization with the Referendum Results

The term “Harmonization Laws” should not be understood as a reference solely to verbal amendments that are required. Circumstances requiring the harmonization of the acquis of legislation with new provisions of the Constitution should also be considered within the scope of harmonization laws; and the regulatory framework necessary for a healthy and easy transformation to the Presidential System while strengthening the rule of law should be adopted.

Law on the Principles and Procedures for Presidential Elections

Pursuant to article 101(last paragraph) of the Constitution stating that, “the other principles and procedures concerning presidential elections will be regulated under the law,” it is first necessary to enact a law that anticipates envisioning that many candidates will come forward, while requiring political parties to determine their nominations through intra party preliminary elections.

Political parties should be required to nominate their presidential candidates through two rounds of preliminary elections by the party members.

The requirement of the amended article 101(3) of the Constitution allowing 100,000 voters to nominate a candidate should be regulated facilitating, at no cost, the emergence of independent and competent leaders who have remained outside of politics but are willing to resolve the country’s issues.

Election Law

In the case of the election of a single person such as presidential elections and elections for the heads of municipal governments or professional associations or muhtars (local headman), it should be mandatory for the nominees for candidates to be elected through two rounds of preliminary elections.

The electoral districts should be of a size that provides an opportunity for all political views to express themselves, preferably so that each electoral district can elect 7, 9 or 11 members to Parliament and the size of electoral districts throughout the country should be roughly the same.

Law on the Establishment and Organization of the Supreme Electoral Council (YSK)

Article 5(2) of the Law no 7062 adopted on 20 November 2017 stating that “no

applications can be made to judicial or other authorities for judicial review against the decisions of the Council" and consequently removing YSK decisions from judicial review should be repealed and replaced with regulations allowing appeals against these decisions before the Constitutional Court.

Political Parties Act

The Political Parties Act should be amended to address current criticisms, ensure conciliation between different views, and create a parliament structure that legislative activities can balance presidential decrees. Consensus or compromise between political parties with regard to this issue should be sought but if no consensus or compromise can be found, the concerns of the opposing views should be alleviated.

General Code of Administrative Procedure

In order to prevent any confusion under the new and unprecedented Presidential System, with no customary practices, as well as taking into consideration the need to ensure lawfulness, accountability and predictability on of the executive, a general code of administrative procedure should be enacted pursuant to provision of Article 8 of the Constitution "**executive powers […] must be exercised and implemented in accordance with the Constitution and the laws**," prior to the Presidential Elections.

Constitutional Review of Decree-Laws Issued during the State of Emergency

SOE Decree-Laws that have been issued after 15 July 2016 but not yet been submitted to the Parliament will, pursuant to article 119(7) of the Constitution automatically become void and cease to have effect if not approved by the Turkish Parliament within a period of 3 months following the Presidential elections. If these SOE Decree-laws are not submitted to the Parliament earlier than the presidential elections it may not be possible for the Parliament to approve them within the 3 months period following the presidential elections. In such case, upon those SOE Decree-laws becoming automatically void may lead to a legal confusion.

To be cautious against this consideration and in order to prevent such possibility, it is necessary for these SOE Decree-laws to be submitted to the Parliament and approved prior to the presidential elections.