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The Rule of law in Turkey

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It is generally accepted that there is a strong relationship between implementation of the principle of rule of law (supremacy of law to be the basis of government) and creation of a democratic system. As a matter of fact, this is true for many systems and countries. But empowering the institutions to supervise the supremacy of law without democratizing their structure can work completely adversly. That is, constitutionally empowered and protected bodies which lack democratic legitimacy may prevent establishment of democratic institutions and realization of substantial rule of law, the equality of individuals before the law and respect for human rights. The position in Turkey is more close to the latter. The constitutional and legal organization of the state institutions complies with the formal requirements of the constitutional state. Furthermore, basic requirements of a democracy have also been established like political parties, free elections, parliament elected by universal suffrage. Nevertheless, most of constitutional institutions were designed –by the constitutions and laws made by military after coup d'états in 1960 and 1980- to preserve state ideology characterized by nationalism and (positivist-constructive) secularism (in fact interests of a civilian and military bureaucratic oligarchy namely military, judiciary, universities and their (so called) civil allies like some political parties, some elements of media and bourgeoisies created by the state support) rather than protection of individual rights and democracy and they function as supervisory bodies over democratic ones. That is why, despite legislative improvements in terms of protection of fundamental rights, protection of minorities and democratization in the process of accession negotiations between Turkey and EU, there is a very small and slow improvement in the application in those areas.

Dissolution of political parties is still a significant and acute problem in Turkey. Freedom of expression is threatened by high number of criminal investigations against intellectuals and writers. The existence of unresolved extra judicial killings and political assassinations committed within last two decades cast shadow on judi-

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cial system. Ethnic and religious social minority groups have serious problems. Human rights problems of religious Muslim community like prohibition of wearing headscarf in the public places and university campuses are still awaiting solution. Conscientious objection has not been recognized yet. While some of these problems arise from constitutional and legal regulations, most of them do not stem from bad or inadequate norms; rather they are caused by judicial or bureaucratic interpretation or approach. And these judicial and bureaucratic bodies are resisting against legal and constitutional changes in those areas. Therefore, the problem relating to rule of law is not, in essence, a normative problem, but an implementation problem caused by ideologically oriented elites in the constitutional bodies in Turkey.

I. The Rule of law in the Constitutional Text

The principle of the rule of law (*hukuk devleti*) is one of the basic tenets of the Turkish Republic and it is enshrined in the Constitution. Article 2 of the Constitution, which defines the characteristics of the state and which is an irrevocable provision, stipulates that "*Turkey is a democratic, secular and social state governed by the rule of law*". Article 5 of the Constitution states that it is fundamental aim and duty of the state "*to strive for the removal of political, social and economic obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by the rule of law*". Article 68/4 of the Constitution, also, requires that the statute, program and activities of political parties can not be in conflict with, inter alia, the principles of equality and the rule of law.

The concept of the rule of law is understood in the formal and substantive lines comprising both guarantees of basic rights and some formal requirements for the state organization and procedure, the state architecture. These formal requirements include separation of powers, judicial review of state activities and independence and impartiality of the judiciary.

II. Separation of Powers

There is only one direct reference to the principle of separation of powers in the preamble of the Constitution, but the state architecture is established on the basis of it. The legislative, executive and judicial powers are vested in three different branches of government in the Articles 7, 8 and 9 of the Constitution respectively. According to Article 7 the legislative power is vested in the Turkish Grand National Assembly on behalf of the Turkish Nation and this power cannot be delegated. However, Article 91 made an exception to this rule by giving the Parliament a power to authorize the Council of Ministers to issue decrees having the force of law. But, the fundamental rights,

individual rights and the political rights cannot be regulated by decrees having the force of law except during periods of martial law and states of emergency. The executive power is vested in the President and the Council of Ministers and the judicial power is vested in the independent courts.

The preamble of the Constitution says that "the principle of the separation of powers, which does not imply an order of precedence among the organs of state, but refers solely to the exercising of certain state powers and discharging of duties which are limited to cooperation and division of functions, and which accepts the supremacy of the Constitution and the law". This approach to the principle of the separation powers supports a parliamentary government system and constitutional architecture of the executive and its relations with the parliament creates a parliamentary system. But following the Constitutional amendment in 2007, which brought the election of the President directly by public, the government system has come close to the French system.

III. A State Bound by the Law

The first and paramount meaning of the rule of law is adherence of branches of government to the law. That is, the state should be ruled by law not by (arbitrary) will of the men. This requires in practice the executive and the judiciary should be bound by the law enacted by democratically elected parliament and the parliament should be bound by the Constitution made by the sovereign power, the people. Adherence of state organs to the law should also be controlled by an independent judiciary. The Turkish Constitution adopted this approach in principle with some exceptions.

The constitutionality of parliamentary acts is controlled by the Constitutional Court. The Constitutional Court reviews the constitutionality, in respect of both form and substance, of laws, decrees having the force of law, and the Rules of Procedure of the Turkish Grand National Assembly through abstract and concrete control mechanisms. Individual constitutional complaint has not been recognised in Turkey. The decrees having the force of law issued by the Council of Ministers meeting under the chairmanship of the President during the state of emergency and the martial law (Arts.121-122) have been exempted from constitutionality review (Art. 148). But these decrees may regulate fundamental rights (Art. 91) unlike other decrees having the force of law issued in normal times. Having considered these two provisions together, it can be said that fundamental rights have been left unprotected during the state of emergency and the martial law. Unconstitutionality of international treaties also cannot be claimed before the Constitutional Court (Art. 90). The Constitutional amendment laws can be reviewed only in respect of form, not in substance (Art. 148) but the Constitutional

Court reviewed substance of Constitutional amendments in 2008 depending on the irrevocable articles of the Constitution (E:2008/16 K:2008/116). The annulment of the constitutional amendments by the Constitutional Court may lead it to be a supervisory board over constituent power and may create an imbalance between different branches of the government by giving last word to the Constitutional Court.

The acts of the executive should also be amenable to the judicial review in a state governed by the rule of law in order to guarantee adherence of administrative bodies to the law. The Turkish Constitution subjects administration to the judicial review and creates an administrative court system at the top of which the Council of State (Danıştay) stands. Nevertheless, some administrative acts were left outside the scope of judicial review; namely the acts of the President of the Republic on his or her own competence, the decisions of the Supreme Military Council, (Art. 125), disciplinary decisions of warnings and reprimands (Art. 129), the decisions of the High Council of Judges and Prosecutors (Art. 159). Considering these provisions it can be said that crucial decisions relating to the military, judiciary and universities (appointment of university rectors, members of the High Educational Court, and some high profile judicial posts are made by the President on his own competence (Art.104)) are exempted from judicial review.

Adherence of judiciary and courts to the law is aimed to be realized by judicial self-control through the stages of appeal and by the independency of the judges. Formal guarantees of the judicial independence and the security of tenure of judges have been provided by the Constitution (Art. 138, 139). As a guarantor of judicial independence the High Council of Judges and Prosecutors have been established (Art. 159). However, the composition, organization and powers of the High Council have been a matter of controversy since its establishment. While some critics argue that inclusion of the Minister of Justice and his/her Undersecretary into the Council jeopardize independence of judiciary, some others criticize the fact that only high courts' judges are represented in the High Council and it does not have any competence on high courts' judges. It is also criticized as having lack of democratic legitimacy and lack of transparency in its decisions as well as its decisions being immune from judicial review. Some controversial decisions of the High Council were widely criticized by the EU and the Council of Europe institutions. Therefore, it is crucial to make a judicial reform to establish an independent and accountable judiciary which has democratic legitimacy.

IV. Conclusion

The principle of the rule of law is a constitutional principle in Turkey. The basic components of the rule of law enshrined in the Constitution are recognition of fundamental rights, separation of powers, constitutional review of legislative acts, judicial review of executive acts and independence of the judiciary. The constitutional appearance seems roughly meeting the requirements of the rule of law. Nevertheless, the exceptions of judicial review and undemocratic composition of the some constitutional organs in tandem with a state ideology enshrined in the Constitution do not allow a viable rule of law application. Therefore, establishment of a democratic structure which allows plural representation of different political and social groups in the constitutional bodies seems a prerequisite condition for realization of the rule of law in practice. Sometimes the principle of the rule of law itself can be utilized to prevent democratization of the constitutional system. The situation in Turkey, at the moment, is that there is a strong resistance from civil and military bureaucratic elites against democratization process. They claim that the reforms posed in the accession process to the EU jeopardize the rule of law. As a result, while the concept of rule of law is one of the most cited notions in the court decisions, academic writings and political debates in Turkey, it is not so visible in the daily life of the people.

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