

A Tradition in Delivering Injustice: Judiciary and Rights in Turkey

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ABSTRACT

This piece is on a number of critical rulings issued recently by high courts in Turkey in brazen disregard of the discourse of human rights, to which a growing commitment appears paradoxically to be the case in democratic politics. The bureaucratic authority that characterizes the dissipating old regime in the country is often associated with the military. Yet the civilian bureaucracy, in particular the high judiciary, with justices long handpicked from among the legal elite with a disdain of democratic politics, has been just as crucial in sustaining the old order molded by anachronisms of the 1930s, when the regime that defines this order, Kemalism, emerged in concerted thinking with authoritarianisms prevalent in Europe at the time. The overhaul of the system of high courts from 2010 has clearly been momentous in seeking to bring the judicial establishment into line with democracy and human rights. Still, the settled reflexes seem on the whole to be resilient in dictating the outcome in crucial cases, rendering the transformation both sluggish and painful.

School children in Turkey have been making a “gift” of their budding little selves to what seems to be a menacingly demanding “being” every school day in the morning, before classes, since 1933. This act of devotion from children comes in a pledge that is compulsory in all primary schools, state-funded or private. According to the Regulations of the Ministry of Education on Institutions of Primary Education, only the non-nationals attending Turkish schools are exempted from swearing it. Penned originally by a Minister of Education of Atatürk, the founder of modern Turkey, the pledge came to include in 1972 a direct address to Atatürk himself, whose name literally reads “the father of Turks.” This pledge extended within the cult of an overbearing yet watchfully beneficial father, all too familiar to those who have visited Turkey and have been practically bewildered by the omnipresence of this figure in the country, articulates:

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I’m a Turk, upright and hardworking. My principle is to protect my younger, respect my older, and love my homeland and nation more than myself. My goal is to rise and go forward. O Great Atatürk! I swear pledge to marching ceaselessly on the road you paved, and towards the target you laid out. May my being be a gift to the [collective] Turkish being. Lucky to be a Turk!

The last sentence, which is a motto introduced by Atatürk, more literally translates: “how happy is the one who says I’m a Turk.” If the language of the pledge sounds broken, let alone bizarre, let me add that it feels no less forced and unreal in the original Turkish.

The injustice of painting the mountains of the Kurdish-populated South-eastern Turkey in huge letters of the motto “Lucky to be a Turk,” a long enduring practice of the military in active combat with the Kurdish guerrillas in the region, was once pointed out by Abdullah Gül (*The Guardian*, 1995). This criticism, found to be in evident resentment of the settled order, would later be used against Gül, in the company of several other insinuations, to justify a coup attempt in April 2007, when Gül was nominated (and subsequently elected) president. The thwarted coup

would effectively mean the beginning of the end for the official ideology that emerged in the 1930s, Kemalism, named after Kemal Atatürk. Yet, full political normalization that would free the country of the anachronisms of the 1930s is likely to take time. Not surprisingly, the State Council, the highest administrative court seated in Ankara, summarily dismissed in April 2011 a long overdue application by a human rights organization that challenged the compulsory student pledge on grounds of human rights violation.

Transitional Justice

The transition in Turkey, since the early 2000s, involving some public confrontation with the past and present brutalities of the established regime, combined with political efforts to transform the existing power structure in a bid to integrate with European democracies, is proving to be slow and frustrating. The legacy of systematic human rights abuses in a drive to create a homogenous and secular Turkish nation, within the span of a century immediately before and during modern Turkey, includes the harsh policies targeting two sizeable ethnic minorities, namely Kurds and Alevis, the official control of the recent history that censures and punishes discussions of the fate of the Turkish Armenian minority annihilated during World War I, and the disenfranchisement of pious and practicing Muslims, as reflected in the ban on the Islamic headscarf in public employment and in all levels of education.

The gradual democratization in the last decade has allowed for relative improvement on these issues. Legal investigations, if somewhat hesitant, have been initiated into the callous practices of law enforcement in the oppression of Kurds, with some tangible results toward accomplishing social reconstruction. However, Kurds still have to fight to receive full political recognition and some basic rights and freedoms, such as the right to education in their mother tongue. The official policies against Alevis in the 1930s have been described as akin to genocide by none other than Prime Minister Erdoğan, although his concern may be viewed as cynical political maneuvering that falls seriously short of convincing the Alevis, coupled especially with the fact that the government led by Erdoğan continues by default the age-old policy, resisting the basic and most unobjectionable Alevi demands. The emerging new climate has also facilitated daring public debates on the massacre and ethnic cleansing of Armenians, which significantly dispute

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the received accounts. Finally, a big leap has been achieved on the headscarf issue through a new and de facto consensus that effectively relaxes the ban for university students. Yet, a remarkable resistance to the transition is still the case, including, incredible as it may sound, an active defiance by the high judiciary in the country, a crucial bastion of the old guard.

The High Judiciary

Observers of Turkish politics who have focused on its staunch military to make sense of the troubled democracy in the country have paid little attention to the pivotal role played by the high judiciary in sustaining the regime. The high courts have long held sway over political parties (notably by dissolving many of them), acts of parliament, government decisions, and the practice of human rights. There has always been a divide between the so-called “chair” judges of ordinary courts and those in the high judiciary. The high court judges have mostly been unwavering Kemalists through the unique role of the president, as opposed to the government, in enacting appointments to these positions, in conjunction with a co-optative system among the high courts in suggesting nominations for the posts. From the early 1990s this divide grew further, as Kemalists became more and more alarmed by the growing political confidence of both pious Muslims and Kurds. The increasing partisanship on the part of the high judiciary emboldened the like-minded judges and prosecutors functioning at ordinary courts and inhibited the rest.

The key part played by the judiciary in the ruthless oppression of the Kurds is testified in a good many cases decided by the European Court of Human Rights (ECtHR) against Turkey. In the most vicious phase of this conflict in the 1990s, the judiciary covered up, or otherwise ignored, willful destruction of villages and extrajudicial killings of innocent civilians by the security forces. The judiciary has been equally indifferent to the grievances of the Alevi minority, a heterogeneous Muslim sect that forms 10 to 20 percent of the population. Just as the compulsory school pledge Kurdish children are compelled to chant every morning, Alevi children are forced to attend religious classes in schools that virtually ignore Alevism. Over the years, the demand for Alevi children to be able to opt out of religious classes has been consistently rejected by the judiciary, culminating in a decision

of the ECtHR in 2007 (*Zengin v. Turkey*), which finds Turkey to be in blatant disregard of both the freedom of religion and the right to education.

The forced religious teaching may sound out of place, given that Kemalism is known for its avowed secularism. The practice is apparently linked to a highly securitizing approach to religion that has been in place since the inception of modern Turkey, which seeks to control the social space occupied by religion through state indoctrination, with a view to preventing, as it was put by Turkey before the ECtHR, “abuses” of religion in the hands of private believers. Accordingly, Alevism is repressed, as is devout mainstream Islam (typified by the ban on the headscarf, absurdly endorsed by the ECtHR in the wake of the events of September 11, *Şahin v. Turkey*, 2004), with the aim of creating a state religion that is in keeping with Kemalist social engineering.

Judicial Harassment of Intellectuals

The judiciary has recently been brought to the attention of international public opinion for its stringent application of a norm in the penal code that punishes “denigrating Turkishness.” (The term “Turkishness,” which refers in the local political culture to an objectified Turkish identity, an ethnic stock, including Turkic peoples outside Turkey, was replaced in 2008 by the phrase “Turkish nation.”) The norm has been used in several high profile cases, including one against Noam Chomsky in 2006, with the overall effect of intimidating and harassing intellectuals in the country. One of the most highlighted is the case of the Turkish Armenian journalist Hrant Dink for a statement he made in 2004. Dink had commented in passing in a newspaper column that the Armenian politics of identity had long been tainted by an unhealthy obsession over Turks and that they had to get rid of this bad, “poisonous” blood. An expert report requested by the court did not interpret the remarks by Dink as an insult to Turkishness. But the judgment went ahead heedless, finding Dink guilty, for associating Turkish blood with poison. This ruling was subsequently upheld by the Court of Cassation, the supreme court of civil and criminal appeals, which led to yet another negative assessment of Turkey by the ECtHR in 2010 (*Dink v. Turkey*). In its decision, the Strasbourg court concludes that Turkey has been in violation of not only the freedom of speech but also the right to life, as Dink was murdered in 2007 in the midst of a nationalist hate campaign following the case against him.

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A similar case against the Nobel laureate Orhan Pamuk is in process since 2005, when Pamuk stated in an interview in a Swiss journal: “Thirty thousand Kurds have been killed here, and a million Armenians. And almost nobody dares to mention that. So I do.” A criminal complaint was immediately lodged with an Istanbul court against Pamuk for

denigrating Turkishness. Initially, the local court did not find the complainants, well-known figures in nationalist circles, inflicted with a legally discernible damage by Pamuk’s statement, hence not qualified to be litigants and bring a case against him. However, this dismissal was swiftly overruled by the Court of Cassation. Eventually prosecuted, Pamuk was found guilty as charged in March 2011. The complainants in the case have been awarded 6 thousand Turkish liras (about \$4,000) each in damages purportedly caused by Pamuk’s statement. Presently the case is under appeal with the supreme court awaiting review. Assuming that the case will set a precedent for thousands (even millions) of other possible litigants against Pamuk, each demanding from him the amount ordered by the court in this case, the entire thing may turn into a nightmare for the novelist, although the new claims should normally be dismissed for the lapse of time that legally absolves the defendant. This being said, those familiar with the Turkish high judiciary in an array of recent political cases will know that the outcome is rather unpredictable.

Reconfiguring the Judiciary

A constitutional amendment in 2002 made Turkey’s international agreements on democracy and human rights part and parcel of its domestic law, on par with the Constitution. Yet this development, hailed by human rights activists as a breakthrough, seems to have produced little effect in practice in constraining the judiciary. The latest measures introduced in 2010 and early 2011, the first in a major amendment in the constitution through a heated referendum, attempt to break the closed system of the high judiciary and open it to the mainstream as reflected in democratic politics. The changes have been welcomed in the regular report of the European Commission on Turkey. Yet, a number of critical decisions by high courts in the aftermath of this momentous structural transformation indicate that the high judiciary will not take the defeat lying down. In March 2011, the Constitutional Court refused an application that contested, on the basis of the principle of equality protected in the Constitution, the legality of a provision in the Family Name Law, dating back to 1934, which prohibits the adoption of names traceable

to an “alien race or nation.” The case originated in Midyat, in the South-eastern province of Mardin, where a pocket of Turkey’s fast diminishing Assyrian/Syriac community resides (estimated to be around 10 thousand people). The claimant, who sought to have his Assyrian name registered, only to be turned down by the officialdom, persuaded the local court to take the matter to the Constitutional Court. Evaluating the argument communicated to it by the first instance court, the high court refused to find the rule in question at odds with the principle of equality, as had been claimed by the applicant, arguing, in a turn of phrase tinted with unwitting black humor: “the rule is being applied to all who wish to adopt a name attributable to an alien race or nation, without discrimination. Therefore, it cannot be claimed to run counter to the principle of equality enshrined in the Constitution.” The logic in the opinion of the court brings to mind the ironic justice in the “equal” treatment of the rich and the poor before the law, famously mocked by Walter Benjamin, which equally forbids both the rich and the poor “to spend the night under the bridges” (*Critique of Violence*, 1921).

The decision in the following month by the Council of State, the supreme administrative court, on the compulsory student pledge, noted above, which finds nothing wrong with the practice, is yet another indication of the unrelenting defiance by the high judiciary to the transformation under way. In its decision, adopted through a unanimous vote, the high court refers to a provision in the Constitution that states: “All who are affiliated with the Turkish state through nationality are Turks.” This definition, the Court argues, should be read into the references to the Turkish identity in the student pledge. In other words, the “Turk” and “Turkish” in the pledge refer to a civic form of identity, rather than an ethnicity; hence, no racism, no discrimination, can be claimed to be at work. According to the Court, the pledge is designed to inculcate in the new generations the “pride” and “joy” of being part of the Turkish state and society. It is highly dubious that this tired mantra of Kemalist nationalism, used when challenged by the discourse of human rights, will convince the ECtHR, where the case, just as the one on the family name, is likely to end up, particularly when combined with the textbooks and teaching on the Turkish identity, with ethnicity at the centre, thrust into the very same school children. A comparison between this decision by a Turkish high court and the celebrated ruling of the United States (US) Supreme Court in 1943 (*West Virginia State Board of Education v. Barnette*), in which the Court finds unacceptable the relatively innocuous US pledge of allegiance for denoting “compulsory unification of opinion,” should reveal how far removed the high judiciary in Turkey is from its self-declared and ironic commitment to “the most advanced levels of civilization,” another Kemalist motto.