

The Role of Constitutional Courts in Upholding the Democratic State of Law: The Case of Turkey

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Introduction

Democracy, rule of law and human rights are the most fundamental principles of a state in today's world. Constitutions are in place to establish a state mechanism based upon those principles and to ensure its sound functioning. Accordingly, the political model embracing those principles may be formulated as "democratic state of law based on human rights".

Based on the judgments of the Turkish Constitutional Court (TCC), a democratic state of law may be defined as a state where the political power is restricted to protect fundamental rights and freedoms and the rulers, as well as the governed, are bound by the rule of law.

In the broadest sense, the role of constitutions in protecting democratic state of law are two-fold: first, they provide the necessary legal framework for functioning of a sound democratic order through the exercise of fundamental rights in normal times. Second, they prescribe special procedures and allow greater restriction of fundamental rights when a substantial threat exists against the democratic order.

The role of constitutional courts is to interpret and apply these constitutional provisions in concrete cases. Indeed, the Turkish Constitutional Court's stance in the recent years very well portrays these two basic constitutional patterns. After introduction of individual application to the Turkish legal system, the Constitutional Court delivered landmark decisions concerning the exercise of fundamental rights.

On the other hand, during the state of emergency following the heinous attack of July 15 coup attempt to democracy and rule of law, the Court's focus shifted to the emergency provisions of the Constitution which aim to strike a delicate balance between protecting the democratic constitutional order and basic rights and liberties of individuals.

Now let me explain these roles of the Constitutional Court in further details.

1. The Constitutional Court as the bulwark of rights

In Turkish constitutional system, there are two legal means to protect constitutional rights and liberties. First is the constitutional review of laws and decree laws. From the very beginning of the establishment of the Constitutional Court in 1962, the Turkish Constitution provided the exception of unconstitutionality and annulment action.

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The second constitutional tool to protect fundamental rights is called individual application or constitutional complaint which provides individuals with the chance to have direct access to constitutional justice.

Leaving aside the issue of judicial review, today I would like to concentrate on the implementation of the individual application system.

Individual application was introduced by the constitutional amendment of 2010. This was a significant step in Turkey towards the development of democratic rule of law based on human rights and enhancing the standards of fundamental rights. A paragraph was added to Article 148 of the Constitution, enabling that “everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities”.

Upon the introduction of the individual application mechanism in our legal system, a new era started in the protection of the constitutional rights and freedoms. Since 23 September 2012, the date when the Constitutional Court started receiving individual applications, it has assumed a direct and active role in protecting and thereby enhancing democratic rule of law and human rights.

The Court has rendered around 2450 judgments finding violations of human rights. Indeed, some of those judgments are of particular concern on our discussion topic today. Those judgments relate to certain rights that are significant to maintaining democratic order. In other words, certain rights such as freedom expression and the right to be elected are of operational values in a democracy. In this respect, the Constitutional Court emphasized in its judgments that the freedom of expression is a sine qua non element of a democratic society and that this freedom is a requirement of pluralism, tolerance and broad-mindedness.

I would like to briefly mention some of the important judgments that the Court found violation. Those judgments indeed received great attention and sparked public debate.

For example, in the much-highlighted Twitter and YouTube cases, the Court found violations of freedom of expression. The Court received individual complaints after the administrative authorities had blocked the access to Twitter and YouTube. The Court based its analysis on the premise of rule of law and found that relevant law failed to meet the certainty and foreseeability criteria for restriction of human rights, also emphasizing the crucial role of social media in democratic societies as a form of exercise of freedom of expression.¹

¹ *Yaman Akdeniz and others*, App. No: 2014/3986, 2/4/2014; *Youtube LLC Corporation Service Company and others [Plenary]*, App. No: 2014/4705, 29/5/2014.

The Court also found a violation of freedom of expression concerning the detention of two well-known journalists, much to the outrage of public and political opinion. The Court has emphasized that the detention based on merely journalistic activities constituted a violation of both the right to personal security and freedom of expression.²

Also in reviewing the case of applicants who were detained on remand and thereafter elected to the Parliament, the Court emphasized that the public interest inherent in the right to be elected and to engage in political activities must be taken into account when reviewing the length of detentions. In those applications, the Court found a violation of the right to liberty of person as well as the right to be elected on the ground that the detentions exceeded the reasonable time. The Court thereby contributed to the advancement of political rights in the broad sense.³

Another significant judgment relates to headscarf, which had been a major human rights issue in Turkey until recently. The applicant, who was a lawyer, demanded to participate in a hearing with her headscarf as she wears it in her daily life. The judge of the first instance court did not permit her to participate in the hearing by referring to the judgments of the Constitutional Court and the European Court of Human Rights. The applicant then filed an individual complaint with the Constitutional Court. The Court concluded that the prevention of the lawyer from participating in the hearing due to wearing headscarf violated freedom of religion and conscience and the prohibition of discrimination.⁴

2. The role of the TCC in state of emergency

It was unfortunate that at a time of great progress in the advancement of human rights, Turkey experienced the heinous and bloody coup attempt of July 15, which constituted a heavy threat against the existence of the Nation and State.

This violent attack was an assault on the constitutional democracy and rule of law. As the Council of Europe Commissioner for Human Rights has stressed in his Memorandum, “the success of (coup attempt) would have marked the end of democracy in Turkey and the defeat of all the values underlying the Council of Europe”.⁵ Likewise, the Venice Commission indicated in its opinion on emergency decrees that “[a] military coup against a democratic government, by definition, denies the values of democracy and the rule of law”.⁶

² *Erdem Gül and Can Dündar [Plenary]*, App. No: 2015/18567, 25/2/2016.

³ *Mustafa Ali Balbay*, App. No: 2012/1272, 4/12/2013; *Mehmet Haberal*, App. No: 2012/849, 4/12/2013.

⁴ *Tuğba Arslan [Plenary]*, App. No: 2014/256, 25/6/2014.

⁵ Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, CommDH (2016)35, Strasbourg, 7 October 2016, par. 4

⁶ Opinion on Emergency Decree Laws Nos. 667- 676 Adopted Following the Failed Coup of 15 July 2016, CDLAD (2016)037, Strasbourg, 12 December 2016, par. 7.

The Republic of Turkey responded to this deadly attack swiftly. The government declared state of emergency and derogated from the European Convention on Human Rights.

2.1. Constitutionality review of emergency decrees

The state of emergency raises a great deal of constitutional issues. The most important of them is the issue of judicial/constitutional review of emergency decree laws issued by the Council of Ministers, meeting under the chairmanship of the President of the Republic.

Under normal circumstances, the Constitutional Court shall examine the constitutionality of decree laws. However, Article 148 of the Turkish Constitution stipulates that decree laws issued during a state of emergency, martial law or in time of war shall not be brought before the Constitutional Court alleging their unconstitutionality.

Within this scope, at the end of the last year, the Court held unanimously that it did not have the jurisdiction to review the decree-laws issued under the state of emergency. The Court pointed out that decree laws must be subject to judicial review in a democratic state of law, but the current constitutional provisions is binding on the Court itself.⁷

However, it must be noted that under the current Constitution the emergency decree laws are subject to constitutional review following their ratification by the Parliament. As a matter of fact, actions for annulment of certain decree-laws which had been issued under the state of emergency and subsequently enacted upon being ratified by the Grand National Assembly of Turkey were filed with the Constitutional Court.

2.2. Constitutional complaints in state of emergency

The effect of the emergency measures on constitutional complaint had been drastic. First, the complaints to the Constitutional Court skyrocketed following the July 15 coup attempt. The day before the coup attempt, the number of pending individual applications before the Court was about 22.500. After the emergency measures were put in place, the numbers of applications reached over 107.000 in a year. Accordingly, the Court has received about 80.000 applications relating to the emergency measures. Those applications practically paralyzed the functioning of the individual application system, considering that even just reception and registration of them required a tremendous volume of work.

Second, the Constitutional Court faced a formidable challenge to maintain its well-established rights based approach for protecting constitutional rights and liberties. This is an inevitable result of the shift from default human rights protection regime of Article 13 of the Constitution to the emergency regime of Article

⁷ E.2016/166, 2016/159, 12.10.2016; E.2016/67, K. 2016/160, 12.10.2016.

15. During the state of emergency, the Court adjudicates complaints relating the emergency measures under Article 15, which allows greater limitation of human rights and freedoms.

Article 15 of the Constitution, an almost identical counterpart of Article 15 of the European Convention on Human Rights, reads that in a state of emergency “the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures may be taken, to the extent required by the exigencies of the situation”.

In its pioneering judgment, delivered in July this year, the TCC has stressed that the public authorities have a very broad margin of appreciation as to the adoption of policies and means to eliminate the dangers led to the state of emergency, but they have no unlimited power. It is the task of the TCC to review the emergency measures such as detentions in light of constitutional principles enshrined in the Constitution.⁸

The Court pointed out that any interference with constitutional rights in a state of emergency must meet three criteria set by Article 15. In other words, the TCC applies a three-level test in a constitutional complaint if it is related to the emergency measures.

First of all, an emergency measure must not interfere with non-derogable, absolute rights and liberties stated in Article 15 of the Constitution. Secondly, the interference or restriction must not violate the obligations under international law. Thirdly, any restriction on derogable rights and liberties must be required by the exigencies of the situation. The last level of the test under Article 15 involves the application of well-known constitutional principle of proportionality.

In short, the Constitutional Court makes a great effort to handle these cases in due time, as well as other non-emergency complaints.

Conclusion

In conclusion, constitutions and constitutional courts play very crucial role in upholding democratic state of law during normal and exceptional times. Indeed, constitutional courts assume a very difficult yet critical role in states of emergency. During such times, it is upon constitutional courts to undertake the endeavor for protecting fundamental rights while respecting the extended authorities of executive branch under emergency provisions to protect constitutional order.

Thank you for your attention!

⁸ *Aydin Yavuz and others [Plenary]*, App. No. 2016/22169, 20/6/2017.