LEGAL REFORMS IN TURKEY: AMBITIOUS AND CONTROVERSIAL

Both domestic demand and the EU accession process have trigerred a significant legal reform agenda in Turkey. Some important improvements are already in force, but there are still a number of reforms needed. Meanwhile, new controversies have arisen, especially with respect to the independence of the judiciary as well as the worrisome quality of justice. Important inconsistencies between normative acts and legal practice are the subject of heated discussion, thus eroding public confidence in the judiciary system and accordingly, in the rule of law.

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After a decade of weak and ideologically diverse coalition governments, since the 2002 November elections Turkey has been enjoying political stability under the rule of the Justice and Development Party (AKP).

The official recognition of Turkey as a candidate for European Union (EU) membership in 1999, at the EU Helsinki summit, accelerated a process of substantial legal reforms in order to meet the Copenhagen political criteria. Indeed, these reforms–initially launched by the previous coalition government in 2000 and 2001– were carried out by the AKP government to further its democratic reform and EU accession agenda.

Within a relatively short period of time, Turkey amended some infamous articles of its Criminal Code, abolished death penalty, provided for greater gender equality, and more generally, improved individual rights and liberties. This process was tantamount to a "silent revolution" and expanded the scope of Turkish democracy.

Despite this positive outcome, which was the product of both domestic demand and the EU accession process, there are still a number of reforms that need to be addressed. Meanwhile, new controversies have arisen, especially with respect to the independence of the judiciary as well as the quality of justice. Some important inconsistencies between the normative acts and legal practice are the subject of heated discussion and have eroded public confidence in the judiciary system.

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Having won three consecutive elections with greater margins each time, there is no doubt that the AKP government enjoys popular support. It is also recognized that the judiciary, with the 1982 Constitution drafted under the military regime, enjoyed a privileged position and acted ideologically in order to limit the power of elected governments.

Now, however, there are claims that the judiciary has lost its independence in another way, having become subject to the executive branch. It is argued that military tutelage is being replaced by civilian tutelage with the complacency of some prosecutors and judges.

The concerns expressed by some legal authorities and civic organizations are relevant: Relationships between the executive, legislative and judiciary are blurred by recent legislation that changed the election system of the high judiciary bodies. Long detention periods, extraordinarily lengthy trials, and the violation of fundamental rights and individual liberties distort the very meaning of justice. These concerns cast a shadow over the direction and purpose of legal reform path of Turkey.

Changing Paradigms

Dynamic leaders have the ability to introduce and frame a paradigm, influencing the population to change the dominating system of thought. No doubt, Turkey is experiencing such change of paradigms, under Prime Minister Recep Tayyip Erdoğan's leadership.

The AKP government broke the long lasting military tutelage over the Turkish institutional system and initiated the questioning of the very tutelary philosophy promoted by the 1982 Constitution. Civilian control over the Turkish military is indeed a prerequisite for true and advanced democracy. However, this control should be established in a process that respects the law and human rights. Otherwise, the real motivation behind such a change becomes questionable and its democratic credentials doubtful.

Today, the paradigm shift away from military tutelage is being carried out through some specific court proceedings that are perceived as illegitimate due to indictments with vague-wording by public prosecutors and long pre-trial detentions.

AKP claims to prefer peer-to-peer approaches over top-down policymaking. The ruling party advocates the solution to all problems resting in the will of the people and the involvement of citizens in public administration. However, it appears that the reality on the ground is unchanged. The law makers in today's Turkey follow the path of their predecessors who defended for decades that the source of law is the will of the rulers (elected MPs or military following each coup) enacting the laws. The laws drafted in the absence of efficient contacts with the civil society are still coming from the top, to rule the Turkish society down. The best and recent proof of the gap between the perception of the paradigm shift and the reality is the reform of the judicial bodies, elaborated on below. The traditional way of law making remains in force.

This article aims to point out the relevance of legal reforms, with respect to both demands emanating from the Turkish society and demands based on the ongoing harmonization process with EU norms. It is nevertheless impossible to disregard

the inconsistencies between normative acts and legal practice, the gap between the reformist ambitions of the AKP government and the harsh reality of the practices on the field.

Encouraging Legal Reforms

Recent legal reforms are partly aimed at facilitating Turkey's longstanding effort to join the EU. Turkish public opinion still actively supports EU membership and the government knows that the democratization process needs to continue for Turkey to become an EU member. These facts and the ongoing accession process have had a deep imprint on Turkey's legal reform agenda. Since 2001, Turkey has chosen a path of reforms practically in all spheres of social life, including human rights, judiciary system, and political participation.

Improvement of Fundamental Rights

The Civil Code adopted in 2001 enhanced the legal framework relating to the protection of women's rights, promoting gender equality. In practice however, there has been cultural resistance originating either from the judicial bodies or from some segments of society. Laws can be changed overnight, but not preexisting mentalities. Thus, there were inconsistencies in the implementation of the legislation in various regions of Turkey due to the local specificities and strong conservative mindset.

In the field of property rights, some improvements were made by the amendment of the Law on Foundations in August 2011. Non-Muslim community foundations may now apply to recover their rights over all real estate unlawfully seized by public authorities since 1936.[1] The new legislation opens the gate to eventual compensation claims regarding real estate properties seized by public authorities but later sold to a third person and for which no restitution to the concerned foundation is possible.[2]

Reforms in the Judiciary System

Since the 12 September 2010 constitutional amendments, significant judiciary reform has been undertaken in Turkey. The latest EU Progress Report states that "the adoption of legislation on the High Council of Judges and Prosecutors (HSYK) and on the Constitutional Court marks progress in the independence and impartiality of the judiciary. Steps have also been taken to improve the efficiency of the judiciary and address the increasing backlog of the courts."[3]

[1] Law on Foundations No. 5737, 27 February 2008, http://www.alomaliye.com/2008/5737_sayili_kanun_vakiflar.htm
[2] Application Decree of the Law No. 5737, announcement No. 45 at http://www.vgm.gov.tr/index.aspx?Dil=EN
[3] Turkey 2011 Progress Report, Sec (2011) 1201 Final, Chapter 23.

However, these changes created controversy as to the independence of the judiciary *vis-à-vis* the executive branch. The Minister of Justice alongside his Undersecretary are still present on the board of HSYK, as the issue of governmental interference in the judiciary remains unresolved.

In March 2011, an important step towards reducing the workload of the first-instance courts was taken. New chambers within these courts were established and the working methods modified. Moreover a large number of new judges and prosecutors were appointed to the Supreme Court of Appeals ("Yargıtay") and the Council of State ("Danıştay").

Reforms in Military Justice

The prosecution of some active and retired military personnel since 2007 opened the way for the AKP government to enact constitutional amendments and laws to end the dual judiciary system characterized by the functioning in parallel, of the civil courts and the military courts. Today, military officers may be tried before civil courts and civilians cannot be tried before military courts.

However, there are still traces of this dual judiciary system within Turkish legislation. For instance, neither has the Military High Administrative Court been abolished nor the Military Supreme Court. Two of the 17 judges sitting at the Constitutional Court restructured pursuant to the 2010 constitutional amendments are proposed by these two military courts to the President of the Republic who officially appoints them.[4]

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Finally, since the 2010 Constitutional amendments, it became possible to appeal against the expulsion of some staff members (due to their religious affinities or on similar grounds) from the Turkish Armed Forces traditionally decided by the Supreme Military Council (YAŞ) every year in August.[5] Nevertheless, no possibility of appeal against the decisions of YAŞ related to the forced retirement of some military personnel has been introduced in the new legislation.

[4] "Türkiye Cumhuriyeti Anayasası [The Constitution of the Republic of Turkey] ", Article 146 and 147 of the 1982 Constitution as modified in 2010, *T.C. Anayasa Mahkemesi* [The Constitutional Court of Turkey], http://www.anayasa.gov.tr/index.php? l=template&id=188&lang=0

[5] Under the previous law, the Supreme Military Council decisions to expel military officers from the armed forces were not subject to judicial control.

Reforms in the Field of Commercial Law

The AKP brought the legal framework of the Turkish economy more in line with liberal standards, which may be illustrated by the new Commercial Code due to enter into force in July 2012. This Code will fundamentally modify the regulatory framework of companies in Turkey.

Despite serious criticisms regarding the highly severe sanctions companies may suffer for not complying with some minor requirements put forward in the new Code, practitioners within the field agree that it aims to introduce transparency and good corporate governance. As a consequence, this law is meant to attract international investment and meet EU harmonization criteria at the same time.

Among the major changes, the new Turkish Commercial Code foresees the establishment of a joint-stock or limited liability company by a single person. In the field of incorporations open to public, the corporate management principles shall be identified by the Capital Markets Board of Turkey (SPK) as of July 2012. During the incorporation of a company, equities corresponding to a particular amount of the capital may be offered to the public. On the other hand, demerger proceedings are included in the new legislation. Financial statements of companies and their mandatory books will need to comply with particular accounting standards. However the obligation imposed on small and medium enterprises to employ a certified public accountant is criticized by almost everyone, including some AKP ministers.

Another aspect of the new law is related to capital markets. As of July 2012, SPK's permission will be required for fundraising in order to establish new companies or to increase the capital of existing companies. Moreover, SPK will control the purpose behind each company's applications for raising funds.

These changes are only a few examples of a very large and ambitious package. An exhaustive list of the reforms would be too long.

Inconsistency between Legislative Modifications and Legal Practice

The objective set by the AKP government is to make the Turkish legal system compatible with the supremacy of fundamental rights and freedoms and universal principles of law. However, it appears that this objective is pursued selectively. And Turkish judiciary authorities remain ill-prepared to fully implement the principles of a democratic state governed by rule of law.

Proceedings Relating to Criminal Affairs

Despite the fact that the reforms aiming to further strengthen the fundamental rights have gained new momentum, the considerable time lag between the arrests and the presentation of indictments does hurt general confidence in the judicial system. There are other serious concerns such as the limited access of defense lawyers to evidence, haphazard indictments based on police investigation, records of private telephone conversations and the breach of secrecy of the investigations.

On the other hand, the broad application of the provisions in the Criminal Procedure Code relating to arrest seems to be used as a punitive measure. In the same vein, the extraordinary length of pre-trial detention, combined with the failure to give detailed grounds for detention and the fact that defense lawyers have no or very limited access to documents pointing to the innocence or guilt of their clients, constitute another source of concern on the effective judicial guarantees for all concerned.

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While the amendments of the Criminal Procedure Code enabled the release of a large number of prisoners, the practice of courts and prosecutors with special authority –former State Security Courts and Prosecutors– continues to enforce pre-trial detention as a regular feature.

There are other concerns which legitimately harm the relations between the bodies of the defense and accusation. Such tensions undermine the justice system and damage the democratic credentials of the country. Even the very symbolic example of prosecutors sitting in more elevated seats at the courtrooms compared to the defense lawyers, or the fact that their offices are in the same place with the sitting judges, constitute a violation of the principle of equality between defense and prosecution.

Proceedings Relating to Civil Affairs

Trials on affairs related to the conduct of business, such as the application of the Commercial Code, litigation, employment contracts continue endlessly without an outcome. Time is extremely important for businesses and the duration of the court proceedings result in the dissatisfaction of both parties to the trial.

An example of inconsistency is Labor Law 4857 that entered into force in 2003 and gave employees broader rights in order to challenge employers' decisions concerning the termination of employment agreements. Article 20 stipulates very clearly that the lawsuit against an employer's decision shall be initiated within one month and the judge, applying a summary procedure, shall render a judgment in two months. In case of appeal, the Supreme Court of Appeals shall give a final decision in one month. The fact is that the summary procedure takes between eight and 14 months and the Supreme Court of Appeals renders final decisions in more than 30 months.

Legal practitioners are also expressing concerns related to the New Turkish Commercial Code and the capacity of the commercial courts to implement the new provisions. One major source of criticism to the New Turkish Commercial Code is the fact that it is overregulated. It is a fact that commercial judiciary is not prepared to this law and therefore, as seen with the Labor Law, some provisions may remain unheeded. Such inconsistencies do harm the idea of the rule of law with some laws being applied while some others not.

Experts, as judiciary outsourcing of the justice

According to the civil and penal procedural laws, only matters that require "special or technical knowledge" shall be resolved by experts. As such, the conditions are explicitly limited to specialty and technicality. Additionally, the appointment of experts is a right, and not an obligation for judges. In almost all civil and commercial court proceedings, judges require an expertise report. However, the court experts are not members of the judicial system and are not bound by the constitutional duties and obligations of the judges.

One of the reasons raised by the courts is the heavy workload of the judiciary in Turkey. Practically, the experts are used by the courts in order to alleviate the burden of the judicial system. Recent statistics indicate that the judicial population of Turkey is significantly lower compared to some European judicial systems. According to High Justice Court's figures from last year, the Turkish judicial population is comprised of 5280 judges, 4014 Prosecutors, 560 Supreme Court Judges and 169 Supreme Court Prosecutors, 679 Administrative Court judges, 270 Tax Law judges, 247 Council of State judges and 54 General Attorney to the Council of State.

The uncontrolled use of experts became the norm, while decisions from the judges (under their own responsibility and initiative) became the exception. This constitutes an outsourcing of judicial power, which is unacceptable for a country that wants to strengthen the rule of law. Furthermore, this system does not provide

official lists of experts and fees. Nor does it set deadlines for submitting experts' opinions or make court experts subject to control or cross-examination.

The Duration of Trials

Since the last decade, legal professionals have been emphasizing the need for a reform in the current judicial system in order to reduce the duration of trials, an issue that has been repeatedly addressed by the EU since 2003 and has been underlined in numerous Accession Partnership Documents.

Trying to address this concern, in 2004 the Turkish Parliament approved Law 5235 which was calling for the establishment of Regional Courts. However, due to material and organizational obstacles, Law 5235 has yet to be implemented.

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The situation in criminal courts is a serious concern, since the number of pending cases is increasing year by year. More specifically, concerning first instance courts, "there were approximately 1.4 million pending criminal cases at the end of 2010, up from 1.2 million at the end of 2009. Similarly, the pending civil cases were 1.1 million at the end of 2010, up from 1 million at the end of 2009, while those at administrative courts reached 200,000 at the end of 2010, an increase of 40,000 as compared to those at the end of 2009."[6]

In conclusion, the Turkish government has initiated a large legislative transformation process in Turkey with the aim of complying with international standards of democracy. This ambition of AKP has been welcomed by a large proportion of the population because it responds to urgent needs. Furthermore, these changes are in line with EU norms. However, for various reasons, some reforms are delayed or not fully implemented. Recently, the government lost a chance to gather a consensus on the draft law on the improvement of the efficiency of judiciary which aims to reduce the work-load of the courts. This document, which relates to the day to day practices of all lawyers, has been drafted without obtaining the opinion of the Law Bar Associations and the Union of Turkish Law Bar Associations. The ruling party shall take into consideration the criticism coming from legal professionals, intellectuals and others who wish only to live in a country truly governed by the rule of law.

[6] Turkey 2011 Progress Report, Sec(2011), p. 17.