RULE BY LAW

The Politics of Courts in Authoritarian Regimes

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In the Turkish case, dissonant institutionalization has led to a bifurcated political system, where parts of the system aim at transforming the society, while others try to maintain the status quo. The consequence has been a high level of tension between what the Turks refer to as the State (*devlet*), consisting of the security establishment, the presidency, the judiciary, and parts of the civilian bureaucracy, and the government (*hükümet*), consisting of the elected Parliament and cabinet. The management of the resultant tensions is a fundamental concern of the political system.

At the same time, however, the system's continued survival depends on maintaining a high level of tensions between the competing institutions. While the continued coexistence of the wolves and the sheep in the same cage requires mechanisms to keep the two separate from each other, it also needs constant justification. As I have discussed elsewhere, "a regime based on divided sovereignty must prevent social and political tensions from boiling over and threatening the stability of the system, while at the same time generating enough tensions to justify the continued presence of both heads of the executive" (Shambayati 2004).

Regimes such as that found in Turkey are particularly vulnerable to societal challenges. Dissonant institutionalization is an indication that the ideological basis of the regime is weak (Brumberg 2001). In the Turkish case, the state is officially based on Kemalism. Kemalism, however, has never evolved into a full-fledged coherent ideology.

Kemalism aims at transforming society, particularly in areas such as secularism and nationalism, or, in the words of Ataturk, to bring the people to "the level of contemporary civilization."[2] The Turkish state elites see the state and the law as mechanisms for the transformation of society and often find themselves at odds with powerful societal actors whose interests are threatened by the civilizing mission. Furthermore, as the emergence of a modernist Islamist movement and Kurdish nationalism suggests, state policies have had unintended consequences and have led to the emergence of new social and political movements that are not easily incorporated into the existing political structure. From the perspective of the state elite, including many judges, the proper function of the courts is to defend the civilizing mission against potential threats from society, even if at times that means acting against the will of the nation as expressed through elections.

Dissonant institutionalization also contributes to judicialization at another level. As the story of the wolves and the lambs demonstrates, the division of

[2] This oft-repeated phrase is from a speech delivered by Ataturk on the Occasion of the Tenth Anniversary of the Foundation of the Turkish Republic (29 October 1933). See http://www.allaboutturkey.com/ata_speech.htm

sovereignty between elected and unelected executives is public and formally sanctioned. Both the Constitutions of 1961 and 1982 and other laws provided for a military-dominated National Security Council as an important part of the decision-making process and gave the military considerable power in the formulation and implementation of policies through a variety of nonpolitical regulatory and supervisory boards, such as the Higher Education Board and the Board of Radio and Television. The Turkish military is not merely the "guardian of the system," but is an active participant in the political decision-making process.

Nor is the military shy about its political role. In fact, suggestions that the military might not be interested in a given political issue are often met with a statement from the high command denying the lack of interest. For example, a few months prior to the selection of a new president by the Parliament in 2000, the chief of the general staff declared that it was "inconceivable that the military would not have an opinion on who will be the next president" (*Hürriyet*, 15 April 2000). Similarly, in 2003 when a meeting between the Commander of the Land Forces and a group of university rectors who opposed a government proposal to reform the Higher Education Board and the university entrance requirements caused a public controversy, the general staff circulated a formal statement that read "it is natural that developments pertaining to the national education system, which is of vital importance for Turkey, are followed by the General Staff" (*Turkish Daily News*, September 16, 2003)

Furthermore, the military's role is accepted as legitimate by a large segment of the political leadership and the public in general. For example, the military statements quoted above were immediately justified by the political leadership as "natural." In the first instance, as the then-prime minister Bülent Ecevit put it, "it is only natural that the military will be interested in these elections especially when the president is also the commander in chief of the armed forces and the head of the National Security Council" (*Turkish Daily News*, 16 April 2000). Similarly, the main opposition party (the Republican People's Party) characterized the rectors' meeting with the generals "as very normal" (*Turkish Daily News*, 16 September 2003)

Despite its influence, the fact that the military has to share power with popularly elected politicians means that it can only be effective if it can maintain its above-politics stature in public's mind. The framers of the Turkish constitutions tried to achieve this objective by transferring potentially contentious policy debates away from the Parliament and entrusting them to the so-called neutral institutions such as courts. As Haggard and Kaufman have argued, regimes with guardians create "insulated decision-making structures that can be counted on to pursue [the guardian's] policy agenda" (Haggard and Kaufman 1995: 121).

Judicial Empowerment in Turkey

The empowerment of the judiciary in Turkey dates back to the military-inspired Constitution of 1961, when "the judiciary was given a considerable share in the exercise of sovereignty" (Aybay 1977: 24). This so-called liberal constitution was a reaction to what many believed to have been serious abuses of political power by the elected Democratic Party governments (1950–1960) that had necessitated the 1960 military intervention. Like their counterparts in some other developing countries, the Turkish military turned to the legal community to legitimate the military intervention. As Rona Aybay notes, "one of the most interesting aspect of the May 27 [1960] coup is its legalistic tendency" (Aybay 1977: 21). Within hours after the coup the junta asked for and received the endorsement of a group of law professors who issued a rather lengthy statement in support of the coup. The statement in part read as follows:

> It is not right to regard the situation in which we find ourselves today as an ordinary political *coup d'État*. The political power which should represent the conception of State, law, justice, morality, public interest and public service and should protect public interests had for months, even years, lost this character, and had become a material force representing personal power and ambition and class interests.
>
> The power of the State, which before all else should be a social power bound by law, was transformed into an instrument of this ambition and power. For this reason this political power lost all its moral ties with its army . . . with its courts and the bar, with its officials who wanted to be loyal to their duties, with its universities, and with its press which represents public opinion, and with all its other social institutions and forces, and fell into a position hostile to the State's genuine and main institutions, and to Ataturk's reforms, which are of extraordinary value and importance if Turkey is to occupy a worthy place among the nations of the world as a civilized State (cited in Ahmad 1977: 162–163).

The experiences of the 1950s and the coup had convinced the military leadership and their civilian allies that the new constitutional structure should impose limits on the powers of the Parliament and prevent any single party from dominating the government. To meet this requirement, the 1961 Constitution adopted a new concept of sovereignty. Article 4 of the Constitution declared,

> Sovereignty is vested in the nation without reservation and condition. The nation shall exercise its sovereignty through the authorized agencies as prescribed by the principles laid down in the Constitution.

These words were repeated in article 6 of the 1982 Constitution and, as the official history of the Constitutional Court interprets them, were meant, "to put an end to the principle of the supremacy of the parliament."[3]

The 1961 Constitution took two steps to operationalize this provision. First, it increased the internal autonomy of some institutions such as universities and the radio and television authority and imposed severe limits on the ability of the Parliament to interfere in their internal affairs. Similarly, in an attempt to increase the independence of the judiciary, the newly established Supreme Council of Judges was given the responsibility to administer all judicial personnel matters (Devereux 1965). Furthermore, to further protect the autonomy of the universities and the judiciary, the constitution authorized the two institutions to petition the Turkish Constitutional Court (TCC), another new institution, in matters relating to their own functions.

Second, the 1961 Constitution divided sovereignty among a number of newly created institutions. Chief among these was the newly established National Security Council, which for the first time provided a formal venue for military participation in political decisions. In the judicial arena, the constitution enhanced the powers of the Council of State, an administrative court dating back to the Ottoman era and modeled after the French *conseil d'etat*, and created a Constitutional Court.

The establishment of the Constitutional Court was achieved with little controversy. The idea for a constitutional court with the power to review the constitutionality of legislative acts was first proposed in the mid-1950s by the Republican People's Party (RPP; McCally 1956), which as the main opposition party suffered the most under Democratic Party rule, and had little difficulty in passing through the RPP-dominated constituent assembly (Kili 1971: 139). Modeled after continental European constitutional courts, the Constitutional Court "was expected to counterbalance political institutions, especially the parliament, which would abuse their powers."[4]

The 1961 Constitution was "a last-ditch effort by the bureaucratic intelligentsia to set the substantive, as well as the procedural, rules of the political game in Turkey" (Heper 1985: 89). It tried to enhance the autonomy of the state by protecting it against interest-based politics. Although it granted the right of political participation, it also created bureaucratically staffed agencies to act as watchdogs over political institutions. Accordingly, in their structures and powers the TCC and other judicial organs reflected a constitutional design

[3] These words had originally appeared in a 1977 article by Rona Aybay (Aybay 1977: 23) and were repeated without attribution on the TCC's Web site.

[4] Official Web page.

that assumed a fundamental "mistrust of the organs dependent upon universal suffrage" (Aybay 1977: 24).

The consequence has been that the Turkish courts have not shied away from challenging the Parliament and elected officials. Between 1962 and 1980 the TCC reviewed 350 petitions for abstract review and annulled 37 percent of them (Shambayati 2008). In its attempts to the "tame the Parliament" the TCC was joined by the Council of State, which annulled 1,400 governmental decrees between 1965 and 1971 (Heper 1985: 92). The hyperactivity of the courts in the pre-1980 period led to charges that the courts were making it impossible for the governments of the day to govern and undoubtedly contributed to the political tensions and instability that finally resulted in the September 12, 1982, military takeover (Ahmad 1977; Dodd 1983).

Once again the period of direct military takeover was short, and power was returned to elected civilian officials within three years. Again, the military tried to restructure political and social life by introducing a new constitution. In the rising political polarization of the 1960s and the 1970s the internal autonomy of the universities and other institutions proved destabilizing, and the 1982 Constitution reversed the trend. This, however, did not result in an increase in the powers of the Parliament. Instead the 1982 Constitution relied on a number of so-called "neutral" institutions and commissions such as the Higher Education Board to administer the previously autonomous institutions.[5] A common feature of these institutions is that until the recent EU-inspired reforms they included a military representative on their boards.

The 1982 Constitution not only maintained the division of sovereignty introduced in 1961, but further limited the powers of the Parliament by stripping it of its appointment powers and transferring them to the president, an indirectly elected nonpartisan figure. This enhancement of presidential powers was designed to increase the military's influence. Under the new constitution, the leader of the military junta, General Evren, automatically assumed the presidency upon its formal adoption.[6] Furthermore, the framers hoped that the pre-coup practice of the Parliament choosing a retired military officer for the presidency would continue. Although of the four men who have occupied the office since 1983, Evren is the only one with a military background, the presidency, particularly under its current occupant Ahmet Necdet Sezer, a former president of the TCC, continues to be identified with the state and

[5] This controversial body is charged with supervising universities and was first introduced in the 1970s, but was ruled unconstitutional by the Constitutional Court because it violated the constitutionally guaranteed principle of the autonomy of the universities. It was given constitutional status in the 1982 Constitution.

[6] Provisional Article 1.

acts as a brake on the powers of the Parliament. As the next section shows, the changes in the powers of the president were also designed to reduce the influence of the Parliament over the judiciary.

The Judiciary After 1982

The 1982 Constitution maintained the basic division of sovereignty introduced by its predecessor and further enhanced the role of nonelected institutions in the decision-making process. The earlier constitution had relied on a number of institutions in which members appointed by the Parliament and those appointed by the various state agencies jointly exercised power. This cooperative structure, however, proved unsatisfactory as political tensions and violence continued to increase in the 1960s and the 1970s. Therefore, the 1982 Constitution abandoned the cooperative framework in support of a new structure that sharply reduced the role of the Parliament in determining the membership of the so-called neutral institutions and boards while increasing the role of state institutions. The most dramatic example was the National Security Council whose powers were greatly enhanced and in which the number of military members was increased at the expense of the civilian wing.[7]

A similar design was introduced for judicial institutions. Table 11.1 shows the appointment procedures for various judicial institutions. Under the 1961 Constitution the two houses of parliament appointed one-third of the members of the Supreme Council of Judges and Public Prosecutors and one-third of the justices of the Constitutional Court. The 1982 Constitution, however, under the guise of protecting the independence of the courts completely eliminated the role of the Parliament as either a nominating or an appointing body.[8]

Similarly, the 1982 Constitution reduced the number of judges on the Constitutional Court and drastically altered the appointment procedure. Under the original design, the Parliament appointed five of the justices while the other high courts and the president appointed the other ten permanent justices. Under the system in place since 1982, the Parliament and the cabinet have no role in the appointment process. Instead, the courts are the nominating bodies in the current system, while the president appoints all justices. For each seat the appropriate court submits a list of three candidates drawn from among its own justices and prosecutors to the president, who makes the final

[7] A series of constitutional amendments adopted since 2001 have increased the number of civilian members of the NSC in an attempt to "civilianize" the organization.

[8] The Minister of Justice and his deputy take part in the meetings of the council in an *ex officio* capacity.

TABLE 11.1 *Judicial appointment procedures*

Institution	1961 Constitution	1982 Constitution
Constitutional Court	**Permanent 15 Substitute (5)**	**Permanent 11 Substitute (4)**
Court of Cassation	4 (2)	2 (2) *nomination*
Council of State	3 (1)	2 (1) *nomination*
Court of Accounts	1	1 *nomination*
Military Court Cassation		1 *nomination*
Military Admin. Court		1 *nomination*
Higher Ed Council		1 *nomination*
Nat'l Assembly	3* (1)	0
Senate	2* (1)	NA
President	2**	11 (4)
Supreme Council of Judges	**Permanent 18 Substitute (5)**	**Permanent 6 (Substitute 5)**
Court of Cassation	6 (2)	3 (3) *nomination*
Judges of 1st rank	6 (1)	
Nat'l Assembly	3 (1)	
Senate	3 (1)	
Council of State	0	3 (2) *nomination*
President	0	6 (5)
Council of State		
Constitutional Court	All members	0
Supreme Council of Judges		3/4 of members
President		1/4 of members

* One has to be a member of the teaching staff of the departments of law, economics, or political science.

** One had to be a member of the Military Court of Cassation.

Figures in *italics* are nominations.

appointment. Finally, under the 1982 Constitution the military courts nominate two of the permanent justices of the TCC, a provision that is reminiscent of the Chilean Constitutional Tribunal in which the national security council appoints two of the justices.

The military was also given a role in the administration of justice through the controversial State Security Courts. The establishment of these courts had been a long-term military objective dating back to the coup by the memorandum of March 12, 1971 (Hale 1977: 187). They were established in 1973 through a constitutional amendment and special legislation to deal with the increasing political violence coming from both the right and the left of the

political spectrum. In 1975, the Constitutional Court, acting on a petition from the Diyarbakir State Security Court, ruled that the tribunals were unconstitutional and ordered their closure.[9] The abolishment of these courts was given as a reason by the leaders of the 1980 coup as to why the 1961 Constitution was inadequate.

The framers of the 1982 Constitution revived the State Security Courts to deal with a wide range of crimes. Unlike ordinary courts, these courts were presided over by a panel of three judges, one of whom was a military judge appointed by the military courts. The Supreme Council of Judges and Public Prosecutors appointed the civilian judges and prosecutors. Until their final abolition in 2004 under pressure from the European Union and human rights organizations, these courts were one of the mainstays of the Turkish judicial system and used special procedures to try a wide range of crimes ranging from reciting politically provocative poetry[10] to acts of terrorism. Both their composition and their procedures were found to be in violation of numerous provisions of the European Convention on Human Rights and led to many rulings against Turkey by the European Court of Human Rights. At the same time, however, in the words of one prosecutor, they also "prevented many military coups" by satisfying the military's demands for harsh punishments for those accused of violating state security laws (*Turkish Daily News* February 20, 2001). Other judicial institutions have also contributed to fulfilling this function of the courts. As I discuss in the next section, the Constitutional Court and the Council of State have been particularly important in preventing direct military interventions. Through their rulings and public pronouncements both institutions have become important actors in the political arena.

The Courts in Action

The high wall between the judiciary and elected institutions erected by the 1982 Constitution and the judiciary's belief that it has a share in the exercise of sovereignty have turned Turkey into one of the most judicialized polities to be found in the modern world. On average the Constitutional Court issues a judgment for annulment in 76 percent of the cases that it receives for abstract review. As in other countries with abstract review procedures, most petitions for review are made by the opposition party, although Turkey's current president

[9] Although the original petition was partially based on the principle of the unconstitutionality of extraordinary tribunals, the TCC based its decision on procedural grounds.

[10] This was the charge against Turkey's current Prime Minister Recep Tayyip Erdogan, who served four months in jail after being convicted by the Diyarbakir State Security Court in 1999 (see Shambayati 2004).

Ahmet Necdet Sezer, himself a former president of the Constitutional Court, has also been very active in sending legislative acts to the TCC for review (Hazama 1996; Shambayati 2007).

The high success rate of the abstract review petitions is no doubt in part due to the fact that many provisions of the 1982 Constitution are no longer applicable to today's Turkey. Furthermore, both the process of integration with the EU and the privatization of the economy have required economic and political reforms that were not foreseen by the framers of the constitution. "Radical reforms," as Stone Sweet notes, "strain or tear the web of existing legal regimes, administrative practices, and case law" (Stone Sweet 2000: 52). Radical reforms, by definition, create tensions in the society and encourage an appeal to the courts. The law and the judiciary, however, are reactionary institutions that do not welcome reforms easily (di Federico and Guarnieri 1988: 168; Stone Sweet 1992: 39).

At the same time, however, the frequent rulings against the Parliament also point to a fundamental distrust between elected and unelected institutions inherent in the Turkish system. The distrust between the judiciary and politicians is evident not only in the frequent rulings of the Constitutional Court against the Parliament but also in its frequent public warnings to the ruling governments of the day not to violate the basic principles of Kemalism, particularly when it comes to secularism and national unity. Since the election of the Islamist Justice and Development Party (AKP) in 2002, for example, high-level justices have repeatedly warned the government not to try to lift the ban on the wearing of headscarves in the universities, an issue that is very important to the party's supporters. The strongest warning came from the president of the TCC in 2005, who used the anniversary of the Court's founding to warn the government that changing the law would be unconstitutional and that even a constitutional amendment would not suffice. He went on to remind the government that the Court has closed other political parties for violating the principles of secularism[11] (*Hürriyet* April 24, 2005). In effect, the president of the TCC was reminding the government that in a "militant democracy" like Turkey, the courts sometimes go beyond the text of the constitution to protect the regime.

An important aspect of protecting the Turkish democracy has been the frequent closure of political parties (Arslan 2002; Koçak and Örücü 2003; Kogacioglu 2003, 2004). Since 1983, the TCC has closed eighteen political

[11] This, of course, was a reference to the fate of the Justice and Development Party's predecessor, the Welfare Party, which was forced from office by the military in June 1997 and closed by the Court in January 1998.

parties. The Court has been particularly tough on Islamist and pro-Kurdish parties and has accused them of undermining secularism and the unity of the country. In closing these parties, as Dicle Kogacioglu has argued, the court has been participating "in shaping the boundaries as well as the content of the political process" (Kogacioglu 2004: 459).

The Constitutional Court is not alone in this task. Other courts, too, often use their powers to shape the content of politics. An example is a controversial ruling by the Council of State in October 2005 that argued that a kindergarten teacher could not be promoted because she wore a headscarf on her way to work. Although there are no laws that ban the wearing of the Islamic headscarf in public and the court recognized that the teacher in question had abided by the current regulations that forbid the wearing of headscarves in schools and government offices, it nevertheless argued that promoting her would set a bad example for the children in her charge and could undermine the secular basis of the state. Behind the Council's decision was, of course, the secular establishment's concern that the ruling AK party was systematically promoting its supporters into positions of influence in the state bureaucracy and was relaxing state regulations on religious practices.

This ruling caused a mini-crisis in Turkish politics when, in May 2006, a lawyer with ties to Islamist circles opened fire in one of the Council chambers, killing one of the justices and wounding four others. The shooting was greeted with much apprehension in Turkey, and both civilian and military leaders rushed to support the Council of State to show their solidarity with the judiciary. The president of the Council issued a statement that criticized the government's policies on secularism, blamed the attack on the government's criticism of the Council's original decision, and portrayed the attack as an attack on the secular state. The next day, large demonstrations were organized at Ataturk's mausoleum where representatives of various segments of the society including the political parties and the military gathered to defend the secular basis of the state. Public statements issued by the military, the president, and various judicial bodies emphasized the need to stay vigilant against religious reactionaries and pointed the finger at the ruling Islamist Justice and Development Party.

This tragic and inexcusable attack points to one of the shortcomings of attempts to resolve political differences through court rulings. Despite numerous rulings by the Council of State, the Constitutional Court, and the European Court of Human Rights, all of which have upheld the provisions banning headscarves in universities and state offices, the issue continues to play a prominent role in Turkish politics. Religious and center-right parties, particularly when in opposition, have repeatedly used the issue to rally their supporters. On

the other hand, the secular establishment and center-left parties have continuously presented these campaign promises as evidence of disregard for the rule of law and as threats to secularism, hence justifying the continued vigilance of the military and the judiciary in protecting the "civilizing mission" of the state.

Similarly, the closing of numerous political parties, cultural associations, and publications and the frequent jailing of political activists have only had limited success in eliminating social and political movements that challenge the ideology of the state. Closed political parties, particularly those with Islamist or pro-Kurdish social bases, quickly reorganize and appear under a new banner to challenge the boundaries imposed by the state. The continued survival of these movements, and in the case of Islamist and pro-Kurdish political parties their ability to win elections, in turn is used to justify the need to vigilantly protect the civilizing mission of the state.

Even when the courts have ruled against the state, and there are many such instances, the rulings have tended to legitimate the continued division of sovereignty. In the mid-1990s, for example, when a number of prominent secular intellectuals were assassinated or attacked by terrorists with links to fundamentalist religious circles, the Council of State ruled that the state had failed to provide adequate protection to the individuals involved and therefore was liable (Orucu 2000: 694). Although on the face of it these rulings were victories against the state, they, of course, underlined the continued threat to secularism and the inability of the elected governments to deal with it.

In short, in Turkey's bifurcated political system the courts play an important role in protecting the civilizing mission of the state and maintaining the division of sovereignty between elected and unelected institutions. As the brief discussion of the Iranian case in the next section demonstrates, this situation is not unique to Turkey and is a function of the dissonant institutionalization in the political system rather than any particular ideology.

COURTS IN THE ISLAMIC REPUBLIC OF IRAN

The Iranian constitution of 1979 recognizes God as the only legitimate source of sovereignty.[12] Nevertheless, the dynamics of a mass revolution and the pluralism of the Shia political thought and religious establishment meant that the framers of the constitution also had to recognize the people as a source of sovereignty (Chehabi 2001). Accordingly, the constitution created a number of elected institutions, including a Parliament and a president. As in

[12] Article 56.