

Rule of Law Perceptions in Turkey

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Abstract

The rule of law is a pillar in the constitution of Turkey. Although it is prescribed in the constitution, the relation of Turkish politics with the concept of rule of law was always problematic. During the recent years in turkey, it is observed that Turkey has dropped down in the rule of law index. There has been published extra-judicial and non-constitutional texts like “the Red Book”, foreseeing the threats to the republic with binding affects towards the administration. In collaboration with these texts, the judiciary can lose its impartiality and independence as some groups that declared as threats in Red Book may receive enormous pressure. The judges who have decided against this current have been detained and prosecuted, as well as citizens who have criticized the president. On the other hand, the ministry of justice is trying to take control by not letting its members to receive education fulfilling international standards. These developments force Turkey drift apart of rule of law and losen its momentum on democratization process. It is discussed in the article by giving concrete examples that clinging on democracy, rule of law and human rights will change to promote and raise the humanitarian level of development of Turkey.

Key Words: Rule of law, democratization, Turkey, human rights, Red Book

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I-Introduction

It has been a while since Republic of Turkey passed to democracy and rule of law has been prescribed in the constitution. However, the application and implementation of this basic and simple rule of constitutional law was always problematic in Turkey. In this article, I've tried to focus on current Turkish government's perceptions on rule of law by giving concrete examples that I believe they are seminal and helpful to understand status quo of Turkish democracy and human rights as of 2015.

II-Turkey Falling on Rule of Law Index

The World Justice Project (WJP) is an independent, multidisciplinary NGO working to advance the rule of law around the world¹. The Washington-based organization has a rule of law index that is becoming more well-known. According to the NGO, there are four pillars that define the rule of law in a state: the government, including all its officials and agents, as well as individuals and private entities, must be accountable according to the law; laws are clear, publicized and just, protect fundamental rights and are applied evenly; all processes must be accessible, fair and efficient; and justice must be delivered timely by competent, ethical, independent and impartial representatives who are sufficient in number and have adequate sources².

These pillars are now internationally recognized and the WJP has built up nine factors to measure the rule of law in a country: constraints on government powers, the absence of corruption, an open government, fundamental rights, order and security, regulatory enforcement, civil justice, criminal justice and informal justice³.

Turkey is ranked 80th out of 102 countries measured. In Eastern Europe and Central Asia, our country is placed 12th out of 13, coming in better than only Uzbekistan, according to the index. Georgia, Bosnia and Herzegovina and Macedonia are the first three countries in the region that the index shows as having a great difference with Turkey. I do not want to mention the difference between EU countries and Turkey, as the only word in our hands will be "frustration."

¹ <http://worldjusticeproject.org/> (01.06.2015)

² <http://worldjusticeproject.org/what-rule-law> (01.06.2015)

³ <http://worldjusticeproject.org/what-rule-law> (01.06.2015)

There is a decreasing trend in three factors regarding Turkey: constraints on government powers, the absence of corruption and fundamental rights. I pay greater attention to the last one, as Turkey is at the bottom of the list, ranking 96th out of 102. The worst grade is seen on the criminal justice factor, as the “no improper government influence” sub-factor received a score of 0.14, one of the worst scores across the world.

Even in Egypt, which had a coup d'état in 2013 and is ranked 86th on the rule of law index, the “no improper government influence in criminal justice matters” score, 0.46, is more than triple that of Turkey. This situation shows that President Recep Tayyip Erdoğan and the government of Prime Minister Ahmet Davutoğlu are performing worse than the government of President Abdel Fattah el-Sisi in Egypt on criminal justice matters by putting extreme pressure on the judiciary. You may hear Erdoğan criticize Sisi every day but the index shows there are no limits to his powers over the judiciary, the opposite of Sisi.

In my opinion, it is not surprising to see that our judicial system is currently worse than a pro-coup mindset's, but to see Turkey becoming a member of the least developed countries group because of weak rule of law is a real disappointment.

The late former US President Dwight D. Eisenhower said, “The clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law.” As we have forgotten in Turkey what the rule of law means, we hope a new government that abides by the rule of law and the Constitution can help us recall this basic principle again after the June 7, 2015 election.

III-The Red Book and the Leviathan

Thomas Hobbes published his book “Leviathan” in 1651. Its name was derived from the biblical Leviathan, a sea monster, a dragon ready to eat and destroy everything. The work concerns the structure of society and legitimate government, and is regarded as one of the earliest and most influential examples of social contract theory. In his work, Hobbes symbolizes the state with a sea dragon. It is the protector of all human beings in the beginning, the protector of rights

and liberties, but when it grows up, it turns into an evil monster living in the kingdom of darkness, a tyranny that suppressed humans and rights.

Recently, a judge referred to a political document called the National Security Strategy Paper (MGSB), often referred to as the “Red Book,” as justification for the arrest of police chiefs allegedly acting within the so-called “parallel state structure.” The Red Book describes threats to the state but has no legal status. It is alleged that this parallel structure was defined as a threat in the Red Book and that addition was subject to criticism from opposition and human rights groups. The Red Book was often abused by government and military authorities previously in their witch hunts of opponents.

As far as I understand, the system works like this: All ministries related to state security make their assessments of security and send those drafts to the National Security Council (MGK). The MGK compiles these drafts and produces a final draft. This draft is then brought to the agenda of the MGK to be discussed and approved by both the civilian and military sides of the council, led by the president. After the approval, they send it to the Council of Ministers to be approved as the “National Defense Strategy.” No matter what Parliament is elected or which political party comes to power, they have to obey this document. No code, bylaw or regulation passed by Parliament can be contrary to this document. The interesting thing is that Parliament is not able to see or discuss this document. It works as a shadow constitution -- in fact, a real parallel one⁴.

During the Feb. 28, 1997 postmodern coup era, some parts of the Red Book were leaked and the public in Turkey learned that “separatism and religious reactionaryism” were the basic threat elements in Turkey. Turkish nationalism that turned to racism was counted as another threat and a determination was also made about extreme leftism, which has softened in recent years⁵. Now, according to media outlets, it was updated again last week to include the “parallel structure.”⁶

Neither the Turkish Penal Code (TCK) nor the Code on Criminal Procedure (CMK) contain references to the Red Book, and it is unconstitutional to accuse and defame people by using non-

⁴ For more information on Red Book, please see Dündar, Can: Kırmızı Kitap <http://candundar.com.tr/v3/index.php#!#Did=376> (01.06.2015)

⁵ Milli Güvenlik Kurulu [https://tr.wikipedia.org/wiki/Mill%C3%AE_G%C3%BCvenlik_Kurulu_\(T%C3%BCrkiye\)](https://tr.wikipedia.org/wiki/Mill%C3%AE_G%C3%BCvenlik_Kurulu_(T%C3%BCrkiye)) (01.06.2015)

⁶ “Devlet Kırmızı Kitabı’nı Güncelledi”, Milliyet, 29.04.2015 <http://www.milliyet.com.tr/devlet-kirmizi-kitabi-ni-guncelledi/siyaset/detay/2051901/default.htm> (01.06.2015)

legal, political documents such as the Red Book for that purpose. Our Leviathan in Turkey has long since grown up and its appetite is too big for it. We do not know what the consequences will be, but it is not very hard to see that another step backwards has been taken from the rule of law. As our “impartial and independent” judges have started to use and refer to the Red Book as a justification for arrests, are they aware that they are contributing to the construction of another parallel state structure, a real, non-legal alternative to the rule of law and the Constitution?

Thomas Hobbes said: “All generous minds have a horror of what are commonly called 'Facts.' They are the brute beasts of the intellectual domain.” Our Leviathan is ready to eat all of us and the only exit is through the law.

IV-Lawless Rule of Law

On 25 Apr., 2015, the İstanbul 32nd Court of First Instance ordered the release of Hidayet Karaca, CEO of the Samanyolu Broadcasting Group, and some 63 police officers who had been arrested previously⁷.

However, it is alleged that İstanbul Chief Public Prosecutor Hadi Salihoğlu held an emergency meeting at the İstanbul Courthouse on the same day to block the execution of the court decision by closing down access to the National Judiciary Network Project (UYAP). If a court decision is not entered into the network system, it is not possible for it to be executed. The debate about the case and pressure on the prosecutor who is responsible for executing the court decisions continues, and we are still hoping that all those who have been arrested can be released soon.

This issue clearly shows the extreme pressure on the judiciary. I read the court decision, and the rationale is the illegality of the arrests of Karaca and the others. The court clearly states that they have to be released immediately, but since it is not in accordance with the Justice and Development Party (AKP)'s policy, the chief public prosecutor is trying to undermine the decision by putting pressure on prosecutors or unplugging the network system. This ridiculous action can only create a

⁷ Frifrini, Roberto: Turkey's imperiled rule of law and judicial independence http://www.todayszaman.com/op-ed_turkeys-imperiled-rule-of-law-and-judicial-independence_380616.html (01.06.2015)

belief that there is no impartial and independent judiciary in Turkey. It is out of the question that a court decision could not be executed when there is true rule of law. Previously, Karaca's and the police officers' lawyers have given hundreds of statements to several courts and objected to the arrests. None of these courts ruled that the arrests were illegal. They all knew that the judicial action taken to arrest Karaca and the others was illegal, but they failed to determine that it was so in their rulings.

The separation of powers is an aspect prescribed by the Constitution in Turkey and the executive branch is not allowed to intervene in the judiciary. It is also explicitly stated in Article 2 of the Constitution. This famous rule is not being applied in Turkey, especially in the last two years. The political party that is in charge has openly declared several times that it is against any kind of thought which doesn't support their party policy. For this reason, they do not hesitate to intervene in the judiciary or try to influence it by oppressing members of judiciary. All judges and public prosecutors are under severe pressure now.

In recent years, the AKP made many amendments to the Code on Criminal Procedure (CMK), and this large number of amendments created gaps between the articles. There had been Criminal Courts of Peace and one could bring an objection regarding the decisions of these Criminal Courts of Peace to the Courts of First Instance. The AKP amended the law more than 40 times after it entered into force in 2005, and established Criminal Judges of Peace who would serve instead of the Criminal Courts of Peace in 2014. There is a debate now as to which court is entitled to review objections. Whatever the result is, we see again that making this many amendments in a short time period harms the legal field.

President Recep Tayyip Erdoğan confessed previously why these Criminal Judges of Peace were established. He said: “The tools of the Supreme Board of Judges and Prosecutors [HSYK] are very limited. Now the judicial process regarding this ‘parallel structure’ is starting. Criminal Judges of Peace will follow this process.” We see clearly that it is a tool in the government's hands to control the opposition by suing them and bringing criminal proceedings against them.

The Greek philosopher Socrates said, “The only true wisdom is in knowing you know nothing.” The AKP policy shows that they don't know anything about criminal law but they are not aware of this.

V-Detention of Judges, End of Rule of Law

As of 30 May 2015, the Supreme Board of Judges and Prosecutors (HSYK) removed two judges from office based on two decisions they had given. One of them was arrested early on Friday, following his recent ruling for the release of journalist Hidayet Karaca and 63 police officers who have been under arrest for four-and-a-half months, while another judge who contributed to the release order was also put under arrest⁸.

If this had happened in an African dictatorship, or in Iraq or Syria, I could again criticize it, but since those countries are not democratic and make no claim to be, I could understand. But these happened in Turkey, a 92-year-old republic and a candidate country to join the European Union. Every day we see further interventions into the judiciary, which makes us think that we've hit the bottom, but the next day something worse happens. It seems there is no limit. Our fallen judicial system is totally bound to one political party and the politburo is deciding what can and will happen judicially. This is something out of juristocracy; it means we are living under an oligarchy and a dictatorship.

President Recep Tayyip Erdoğan is continuing to press charges against individuals on allegations that they've insulted him. Human Rights Watch (HRW), a New York-based worldwide human rights organization, issued a press release on the same week calling on Erdoğan to end prosecutions based on insulting the president⁹.

The HRW press release cites six more instances. These include Uğur Kılıç, a lawyer who was detained and arrested after he was interviewed by HSYK to become a judge, before being released a few days after; a 16-year-old student and his 17-year-old friend who were detained in Konya because they allegedly spoke of the president as “the chief of corruption, bribery and theft...” in a political meeting; Onur Kılıç, a political activist who is alleged by the police to have shouted the slogan “Thief, murderer” about Erdoğan; Kadir Yavaş (22) and Şafak Kurt (24), two

⁸ Frifrini, Roberto: Turkey's imperiled rule of law and judicial independence http://www.todayszaman.com/op-ed/turkeys-imperiled-rule-of-law-and-judicial-independence_380616.html (01.06.2015)

⁹ “Turkey: End Prosecutions for Insulting The President”, Human Rights Watch, <https://www.hrw.org/news/2015/04/29/turkey-end-prosecutions-insulting-president> (01.06.2015)

university students from Edirne and Akhisar, respectively, who are alleged to have insulted Erdoğan; Feyzi İşbaşaran, a previous member of Parliament from Erdoğan's former Justice and Development Party (AK Party), who sent tweets about the president after he had clashed with him over his Kurdish policy; and İlker Bulundu, a 40-year-old craftsman from Silifke, who criticized Erdoğan on social media. HRW is clearly seeing what is happening in Turkey, thus they are calling on Turkey to stop these prosecutions¹⁰.

The whole country has become a prison due to the so-called liberal policy of the president. Don't drink alcohol, don't draw caricatures, don't shout political slogans against a specific political leader, don't criticize the government and don't act as an impartial and independent judge. I do not understand the support of liberal leaders for Erdoğan. Is this a real liberalism? Can a person who calls himself liberal support these policies wholeheartedly? What is the real meaning of detaining two judges because of their decisions? Do we only have a rule of law when we write it in the Constitution but never feel beholden to it? Have we reached bottom, or will we see things getting worse in the coming days?

Chinese philosopher Confucius said: "Our greatest glory is not in never falling, but in rising every time we fall." Maybe it's true that the darkest moment really does come just before the dawn.

VI-What Sort of Criminal Law Is This?

"Obey the state or perish." This is what President Recep Tayyip Erdoğan said on the plane when he was returning from Kuwait¹¹. As is known, he regularly makes this kind of statement. I believe that politicians, leaders and prominent figures in society have to be very careful about their statements because they can end up having a 10-times bigger effect. When it was said that the "'parallel structure' will perish," this statement resonates differently with supporters of Erdoğan, who might use violence against the targeted group. This can constitute hate speech and politicians must stay away from it. If there is a crime by other groups, there should be

¹⁰"Turkey: End Prosecutions for Insulting The President", Human Rights Watch, <https://www.hrw.org/news/2015/04/29/turkey-end-prosecutions-insulting-president> (01.06.2015)

¹¹ "Targeting Hizmet, Erdoğan says 'Obey the State or parish'", Today's Zaman, 29.04.2015, http://www.todayszaman.com/anasayfa_targeting-hizmet-erdogan-says-obey-state-or-perish_379339.html (01.06.2015)

accountability for everyone under truly independent and impartial rule of law, but making hate speech can't be a counter move. Besides this, since Turkey's judiciary is under severe pressure and it is uncertain which independent and impartial judiciary could deal with any kind of claim.

On the other hand, the president is so sensitive about the speech that is used against him. Lawyer Uğur Kılıç, who wants to become a judge, allegedly insulted the president and the board members during his interview. He was detained and stayed in prison for a few days in order to create an example for those who might dare to do so in the future. Yesterday he was released, but his trial will carry on¹².

On several occasions, the European Court of Human Rights (ECtHR) has released standards of freedom of expression. The court states that politicians must be tolerant to any kind of opinions about their policies even they are shocking, disturbing or unfavorable; thus the interpretation of freedom of expression towards politicians should be broad. Contrary to this, the court also mentions that politicians must be very careful in their statements and should not make any use of hate speech. In Turkey, we see the reverse.

Since 2005, the entry-into-force date of the Turkish Penal Code (TCK) and the Code on Criminal Procedure (CMK), both codes have been amended more than 40 times in total. Because the Justice and Development Party (AKP) has amended them this much, we see empty parts, incompatibilities and contradictions between articles. It is prescribed in the law that first instance courts are entitled to review the judicial challenges of criminal judges of peace, but it is not certain in the law which court is authorized to see the case if a claim is accepted. You can read or hear dozens of different opinions of jurists but it is another belief we hold that there is no rule of law in Turkey anymore. It is alleged that the chief public prosecutor of İstanbul has attempted to close the National Judiciary Network Project (UYAP), and a public prosecutor responsible for the execution of court decisions openly declares that he is under severe pressure and that he can't fulfill the court decision. After a change of judges in the court, it is declared that the previous judge's decision is null and void. What kind of criminal justice system is this?

¹² "Hakimlik mülakatına giren avukat tutuklandı", Hukuki Haber, 22.04.2015, <http://www.hukukihaber.net/mesleki-hukuk/hakimlik-mulakatina-giren-avukat-tutuklandi-h56463.html> (01.06.2015)

American Judge Louis Brandeis said: “To declare that in the administration of the criminal law the end justifies the means -- to declare that the government may commit crimes in order to secure the conviction of a private criminal -- would bring terrible retribution.” This bad administration of criminal law will result in worse implementation and the only loser will be Turkey and its citizens.

VII-Denied Justice

The Jean Monnet Scholarship Programme, a project funded by the European Union, “aims to increase the number of experts in the EU field and support Turkey's administrative capacity building efforts for the effective implementation of EU acquis within the framework of Turkey's negotiation process for full membership to the EU.”¹³

The program began in the 1990-1991 academic year by providing its first scholars educational opportunities in EU member countries. It is one of Turkey's longest-running projects. More than 1,000 young scholars or experts from the public and private sectors have benefited from it up to today.

I read on adalet.org that many judges and public prosecutors commented that Turkey's Ministry of Justice has for the past several months been denying judges and prosecutors permission to pursue graduate studies abroad, even though the government continues to advertise for applications. With a little investigation, I learned that the Ministry of Justice refuses to give permission even for a few months to judges and prosecutors who apply to the program¹⁴.

The main reason for a judge or prosecutor to apply to this program is to know better the principles, applications and implementations of legal norms in the European context. I have several friends who have benefited from the program. I called a few of them and asked what they think about it. They say the Jean Monnet Scholarship Programme opened new dimensions in their life and slightly changed their way of looking at legal matters in Turkey. One of them said to me that he

¹³ European Commission, Education, Audiovisual and Culture Executive Agency, Jean Monnet Programme, http://eacea.ec.europa.eu/llp/jean_monnet/jean_monnet_en.php (01.06.2015)

¹⁴ “Adalet Bakanlığı’ndan Yargıçlara Yüksek Lisans Yasağı”, Bugün, 15.03.2015, <http://www.bugun.com.tr/www/adalet-bakanligindan-yargiclara-sok-yasak-haberi/1539202> (01.06.2015)

concentrated on European Court of Human Rights (ECtHR) applications and saw the reality of how the law must be applied and implemented in order to have a better understanding of justice.

By rejecting applications, the ministry is trying to limit judges and prosecutors' ability to learn and it tries to limit their development. The ministry wants every judge and prosecutor in Turkey to think in accordance with the ministry's subjective legal understanding of the 1950s. Starting from the end of World War II, the Ministry of Justice has been the most conservative ministry in the Turkish bureaucracy. We can see quite contemporary interpretations of public law even in the Interior Ministry, but the Ministry of Justice is not able to let lawyers to think freely, interpret intangible legal norms and implement them to concrete events. The ministry denies justice by acting so selfishly that closes its doors to new developments in the field of justice. It not only denies justice but also it closes doors to the rule of law and accountability. It means that there is neither justice nor development in the Ministry of Justice even though it is controlled by the Justice and Development Party (AKP).

I read that the fourth president of Kosovo and a female lawyer, Atifete Jahjaga, said: "Democracy must be built through open societies that share information. When there is information, there is enlightenment. When there is debate, there are solutions. When there is no sharing of power, no rule of law, no accountability, there is abuse, corruption, subjugation and indignation."¹⁵ President Jahjaga is right, and Turkey should take this as an example.

VIII-Result

Indeed, the examples discussed above are not sufficient to handle every aspect of Turkish democracy, rule of law and human rights standards in general, but I think one who tries to understand the complex status of discussions in the domestic policy of Turkey benefit to comprehend partially.

In Turkey, we have a limited experience of democracy. The first multi-*party elections were held on 1950 and there was at least one coup d'état nearly in every ten years. After coups of May

¹⁵ Jahjaga, Atifete: The four key ingredients for peace

<http://thehill.com/policy/international/232703-kosovar-president-atifete-jahjaga-the-four-key-ingredients-for-peace>
(01.06.2015)

27, 1960, March 12, 1971 and September 12, 1980, we have seen the latest “post-modern” coup d’etat on February 28, 1997. Latest was on April 27, 2007, done by an electronic memorandum, later pronounced as “e-memorandum” or “e-coup” by Turkish media and academics.

It is a matter of tradition to obey law and constitution, but this scene is not merely related to tradition but to perception of democracy and rule of law as well. Turkey has to cuddle with rule of law in order to establish a western standard democracy. Yet we are willing to establish or raise the level of our democracy, but the examples discussed above signifies steps taken backwards.

As much as we cling on democracy, rule of law and human rights, these perceptions will change to promote and raise the humanitarian level of development of Turkey.

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