Will Legalism be the End of Constitutionalism in Turkey?

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On 11 January 2018, Turkish constitutionalism entered a new phase of decay. This phase was not triggered by criticism of its judgments by the government nor by the retreat of constitutional protections by the Turkish Constitutional Court (TCC) nor by constitutional court packing as seen in Hungary or Poland. Instead, first instance courts became the newest actors to challenge the authority of the country's constitution and how it is interpreted by the TCC. The new rebels against Turkish constitutionalism are ordinary judges. What is more, in a twist that ought to baffle any student of constitutional law, the core objection of the judges against Turkish constitutionalism is that fundamental rights guarantees as interpreted by the TCC do not comply with ordinary domestic law.

This new force of legalist resistance unleashed itself in the aftermath of two TCC decisions delivered on 11 January 2018. These applied to the cases of two journalists — Mehmet Altan and Şahin Alpay — and their long-term pre-trial detention for offences related to terrorism and the failed coup attempt of 2016. The claims of the applicants before the TCC do not engage with novel points of constitutional interpretation and, as such, cover the same ground as many similar cases before the European Court of Human Rights that have been brought by journalists from Turkey and other Council of Europe member states.

The applicants argue that being in pre-trial detention for over a year was not constitutional, that they were not able to benefit from fair trial guarantees in the course of the legal proceedings against them and that their journalistic activities form the core of the charges against them, thus rendering the totality of the legal proceedings a violation of their freedom of expression. They also allege that their treatment in detention amounted to inhuman treatment. In ECHR parlance, the journalists were arguing for violations of their Article 3, 5, 6, and 10 rights. These are rights which are equally protected under the Turkish constitution.

In response to these claims, carefully citing Strasbourg jurisprudence as well as emphasising that its review is confined to assessing whether the reasoning of the lower courts for continuing detention of the journalists was relevant and sufficient, the TCC found violations of Article 19 of the Constitution (corresponding to Article 5 of the ECHR) and Articles 26 and 28 of the Constitution (corresponding to Article 10 of the ECHR) by a majority vote of 11 to 6. The TCC highlighted that the reasoning of the lower courts was not sufficient. Not only the reasons for detention were based solely on newspaper articles written by these individuals, but also these articles did not convincingly constitute evidence that the individuals were implicated in the failed coup attempt. In reaching this outcome, the TCC also considered the state of emergency rule in Turkey. It held that standards of more lenient review may apply for derogable constitutional rights in times of state of emergency, but the onus of providing sufficient reasons on the part of first instance courts is not affected by this. The TCC dismissed article 3 claims due to the non-exhaustion of domestic remedies and did not find any breaches of fair trial rights.

The TCC instructed that a copy of its judgment be transmitted to the first instance courts so that that the consequences of the violations could be removed. It also awarded non-pecuniary compensation to the applicants for their unconstitutional pretrial detention.

The legalist rebels: first instance Heavy Penalty Courts

Given the number of journalists detained in Turkey, the TCC judgement quickly trended on social media, and the lawyers of the applicants announced that they were on their way to pick up their clients. Their expectation, however, was quickly quashed when the 13th Heavy Penalty Court declared that it was refusing to release one of the journalists, Şahin Alpay. The 26th Heavy Penalty Court, before which the case against the second journalist Mehmet Altan was under trial, quickly followed suit.

The 13th Heavy Penalty Court cited four grounds for its refusal. First, as a formal point, the court held that even though it had seen the judgment on the TCC's website, it would need to wait until its publication in the Resmi Gazete (Official Gazette). Second, the court went on to carry out an abstract review of the powers conferred to the TCC for ruling on individual cases and declared that it has not been given powers to review and assess evidence in an ongoing trial. Third, the court accused the TCC of acting as a first instance court in the case at hand. It held that its review of the reasons for detention was contrary to the law that established the right to individual petition. Finally, and most importantly, the court, by quoting extensively from the judgment of the TCC about the lack of relevant and sufficient reasons for the detention of the journalists, defended itself, stating that first instance courts do not have to write all the reasons for continuing detention in an ongoing trial, as this may constitute evidence of judicial bias as to the outcome of the case. The 13th Heavy Penalty Court, thus, in effect, stated that it had the right to have its cake and to eat it. If the court does not need to provide all of its reasons for ongoing detentions, the review of the reasons provided cannot be the basis for releasing the detainees.

What of the bindingness of the TCC's right to individual petition judgments?

The right to individual petition, which became part of the Turkish Constitutional landscape in 2012, allows for individuals to bring cases to the TCC for rights that are protected at the intersection of the European Convention on Human Rights and the Turkish Constitution. It is no secret that this constitutional remedy was introduced to decrease the number of cases going to Strasbourg and to remedy human rights cases at home. This is also how the TCC, until now and for the most part, has interpreted its mandate. The TCC has been a close follower of Strasbourg jurisprudence for the past six years. It has done this, in particular, with respect to Articles 2, 3, 5, 6 and 10 of the European Convention. That is not to say that the TCC is a shining beacon for human rights protection in all circumstances. It declared, for example, that it has no powers to review the constitutionality of the state of emergency originally declared in the summer of 2016 and, at the time of writing, this was extended six times. Flooded by hundreds of thousands of individual cases since the declaration of the state of emergency, the TCC has also been slow to react to concrete fundamental rights violations claims directly stemming from it.

The case of the two journalists is one of the first cases in which the TCC has signalled that it may be time to bring fundamental rights protections in Turkey back to its normal level. In so doing, it has followed its own case law concerning the constitutional review of detentions of first instance courts and the high constitutional value it attaches to the right to freedom of expression. The judgments of the Turkish Constitutional Court are binding on all organs of State. The practice of restitution ad integrum in unconstitutional detentions was also followed by first instance courts in earlier cases — cases prior to the declaration of the state of emergency, that is. Overall, the direct effect to TCC judgments was respected by first instance courts in a diverse range of cases. The relationship between the TCC and the other higher courts of Turkey (the Supreme Administrative Court and the Court of Cassation) was also marked by the spirit of judicial dialogue, where the courts accepted the TCC as a central actor in fundamental rights protection, even though they at times dug their heels in before grudgingly changing their case law in response to TCC judgments.

Where from here?

In response to the first argument of the 16th Heavy Penalty Court (that judgments must be published in the Official Gazette to have legal effect), the TCC expedited the publication of its judgment. This is despite the fact that first instance courts never emphasised this point previously. On 19 January 2018, the judgment appeared in the Official Gazette. As of 22 January 2018, the first instance courts have not followed this judgment to its legal conclusion as demanded by the TCC: the release of the journalists and the continuation of the trials by using less restrictive measures to the liberty of person than detention.

The crux of the matter, thus, is not whether the judgment is published or not. It is whether the heavy penalty courts are developing a first instance doctrine of immunity from constitutional review for their detention practices.

The reasoning of the 16th Heavy Penalty Court is the first legalist defense of anti-constitutionalism furnished by a first instance court in Turkey. It relies on autonomous interpretation of domestic ordinary law despite what the Constitution or the TCC says. Who needs political meddling with fundamental rights protections in the Constitution or constitutional court packing when you have first instance court judges reviewing the legality of constitutional court judgments? It is this new legalist rebellion against the Constitution and the TCC that may herald the death of Turkish Constitutionalism.

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