Recognizing Court-Packing

Perception and Reality in the Case of the Turkish Constitutional Court

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There is near scholarly consensus that President Recep Tayyip Erdogan has successfully packed the Turkish Constitutional Court (TCC). Court-packing in the commonly understood sense of expanding the membership of the court, appointing judges with long tenures that extend beyond a couple of election cycles, and who are ideologically committed to the executive's constitutional vision, however, is still foreign to Turkey's political elites.

The constitutional amendments introduced in 2017 set the number of TCC judges at 15 and abolished military high courts, ending the practice of selecting judges among military judges. Currently, the TCC has 16 members – a temporary anomaly: the position of the one military judge, currently on the Court, Serdar Ozguldur, will not be filled when he retires, which is imminent. Apart from Ozguldur, who was appointed by Ahmet Necdet Sezer, President Gul's predecessor, all members currently serving on the TCC have been appointed either under Gul or Erdogan's presidency.

The scholarly position that the Court has been packed rests on these facts that no one disputes: Erdogan has already made 5 appointments to the Court since he became president in 2014, 2 of which were enabled by the vacancies created after the dismissal of two Gul appointees from the Court for their alleged involvement in the 2016 coup attempt (Alparslan Altan and Erdal Tercan). 1 member was appointed by Parliament in 2015, under Erdogan's effective control. The next presidential and parliamentary elections, assuming that there will be no early elections, will be held in 2023. Between 2019 and 2023, 5 additional members of the Court are expected to retire, and all 4 remaining vacancies will be filled by incumbent political elites: 2 directly by Erdogan, and 2 by Parliament under Erdogan's control, due to his party's *de facto* coalition with the right-wing Nationalist Action Party (*Milliyetci Hareket Partisi*). In sum, by 2023, Erdogan will have directly appointed 7 members to the Court and supervised 3 Parliament-made appointments. That adds up to 10 members of the 15-member Court. If and when the opposition reshuffles Turkish politics in the 2023 parliamentary and presidential elections, they will be confronted with a Court whose members have been directly or indirectly appointed by their chief political rival President (or perhaps *former* President) Erdogan to a large extent.

Given these existing and anticipated numbers, how does the situation not amount to court-packing?

Short Judicial Tenures

As of 2019, excluding the judges currently serving on the Court (16 and soon to become 15), I have compiled and evaluated publicly available data on *all former 115 Constitutional Court judges* who served on the Court since its founding in 1962. Most of the data on 113 of the judges come directly from the Constitutional Court's official website containing basic biographical information on all but 2 former judges.

The results indicate that the average tenure was around *2607 days* or about *7 years*.

A judge serving an average of 7 years cannot hope to accomplish much. The 7-year average is undesirable from a technocratic point of view, as it is simply not long enough for a judge foreign to constitutional law to develop the requisite expertise. Second, the 7-year average falls short of covering even two election cycles. Under Article 77(1) of the current Turkish Constitution, with the 2017 amendments, parliamentary and presidential elections are held every 5 years. One reason for granting constitutional court judges relatively long tenures – though not necessarily life tenure

– is that they extend beyond several election cycles and thus effectively insulate judges from ordinary politics. The 7-year average defeats that purpose.

The 1961 and 1982 Constitutions stated that constitutional court judges were to serve on the Court until they had reached the age of 65. In 2010 a further limitation was imposed. Judges appointed after this amendment took effect are to serve for a non-renewable term of 12 years. This means that starting with appointments made in 2010, members of the TCC must retire either after 12 years from the time of their appointment or when they turn 65, whichever is earlier. Members appointed before the 2010 amendments, however, are only bound by the mandatory retirement age.

The following example shows how consequential this combination of limitations can be for the Court: The current president of the TCC, Prof. Dr. Zuhtu Arslan, a constitutional law scholar who almost always sides with the court's liberal wing, was appointed to the Court in 2012 by former President Gul. Since Arslan was appointed 2 years after the 2010 amendments had gone into effect, he is expected to retire either when he attains the age of 65 or when he has served on the Court for 12 years, whichever is earlier. Born in 1964, he would have been able to serve until the age of 65 under the pre-2010 tenure rules, i.e. until 2029. But since the 12-year term rule applies, he must retire in 2024, five years earlier than would have been the case otherwise. Compare his case to that of Prof. Dr. Engin Yildirim. He was also appointed by Gul and is undoubtedly the most liberal member of the Court. Yildirim was appointed in 2010, right before the amendments went into effect. He is thus not bound by the 12-year term rule, but only by the mandatory retirement age of 65. Born in 1966, Yildirim is expected to retire in 2031.

Patronage Appointments

There is some, albeit inconclusive, evidence that some current members of the Court have had extensive relations with the governing political elites prior to their appointments. 3 out of 4 of President Erdogan's most recent appointments to the Court are all overtly political appointments: Mr. Yildiz Seferinoglu and Mr. Selahaddin Mentes both previously held the explicitly political title of Deputy Justice Minister and Mr. Recai Akyel, served at the Court of Accounts while simultaneously being an aide to the president.

Similarly, Prof. Dr. Yusuf Sevki Hakyemez, appointed by Erdogan in 2016, was a member of the now-defunct "Wise People" – an AKP-organized group of intellectuals tasked with aiding the government's former policy of resolving what was then termed "the Kurdish problem".

All of these 4 post-coup attempt appointments are, to varying degrees, political. As such, the political nature of these appointments says nothing positive or negative about the appointees' qualifications. And this is precisely the irony of patronage appointments that the opposition may take advantage of in the future: Erdogan chose these appointees because they were considered "safe" candidates. Safe in the sense that they are expected to avoid decisions that would impair the interests of the AKP, and in the sense that they are believed to lead social lives similar to those of the governing elite. But it is precisely because the constitutional vision of the appointee – if *he* has one, of course (and I say *he* because AKP's past appointees to the Court have all been men) – does not factor into AKP's nominee selection deliberations, "safe" candidates do not always produce "friendly" outcomes. Yusuf Şevki Hakyemez, for example, though appointed by Erdogan in 2016, consistently sides with the liberal half of the Court – unsurprisingly so, given his many contributions to Turkish constitutional law literature as a liberal constitutional law scholar prior to joining the Court. The other Erdogan appointees seem to align with executive policies in high profile decisions *for now*, but that is no guarantee that they will continue to do so if the governing party loses political support.

Had Erdogan appointed judges with sufficiently complex and established ideas about constitutional law and doctrine that favored his own vision of the Constitution, he might have been said to have packed the Court. But that is not the case. *"Insufficient and unideological short-term political capture that is bound to disintegrate if and when Erdogan loses power"* might

be a more accurate way of describing the current situation of the Court.

Looking Ahead: Any Hope for the Opposition?

Still, the fact that Erdogan will have had a direct or indirect say in 10 out of the 15 appointments to the TCC by the end of 2023 shows that the opposition's task in seeking to appoint judges with favorable judicial philosophies is daunting. Should he run for another term in 2023 and win (which would be constitutionally problematic under the 2-term limit for presidents, as I argued in a previous blogpost), the fate of the Court might be sealed.

Should the opposition win both the presidential and parliamentary elections in 2023, they will be able to make a total of 8 appointments to the Court, as 8 members of the current TCC will retire between 2023 and 2028 (2 of the 8 are expected to retire in August 2028; should the presidency be reclaimed by Erdogan-led forces before August 2028, the opposition forces between 2023-2028 can still make 6 appointments to the 15-member Court).

Below is a list of all *current* appointees, the president who appointed them, their tenure, and the year in which they are expected to retire. In an 8-8 decision, the Court recently ruled, that penalizing members of Turkish academia who signed the "Peace for Academics" declaration for spreading terrorist propaganda violated their constitutional rights of freedom of expression. Since there was a tie, which will not be possible after Ozguldur's retirement, the vote cast by President Arslan became decisive, and he voted with the liberal wing. While one should be cautious as to generalizing about judicial behavior from this particular case, it may still serve as a good proxy for overall judicial inclination. Those who voted *yes* on the question of whether the "Peace Academics'" freedom of expression was violated can be assumed to constitute the liberal wing of the Court. The opposition should study this list as the 2023 elections draw near:

Name	Appointed by	Start of Tenure / Subject to 12-year term limit?	End of Tenure	Academics' freedom of expression violated?
Serdar Ozguldur*	Ahmet Necdet Sezer	2004/NO	2020	NO
Recep Komurcu	Abdullah Gul	2008/NO	2020	**YES**
Burhan Ustun	Abdullah Gul	2008/NO	2021	NO
Engin Yildirim	Abdullah Gul	2010/NO	2031	**YES**
Hicabi Dursun	Parliament	2010/YES	2022	**YES**
Celal Mumtaz Akinci	Parliament	2010/YES	2022	**YES**
Muammer Topal	Abdullah Gul	2012/YES	2024	NO
Zuhtu Arslan	Abdullah Gul	2012/YES	2024	**YES**
Mehmet Emin Kuz	Abdullah Gul	2013/YES	2024**	**YES**
Hasan Tahsin Gokcan	Abdullah Gul	2014/YES	2026	**YES**
Kadir Ozkaya	Erdogan	2014/YES	2026	NO
Ridvan Gulec	Parliament	2015/YES	2027	NO
Recai Akyel	Erdogan	2016/YES	2028	NO
Yusuf Sevki Hakyemez	Erdogan	2016/YES	2028	**YES**
Yildiz Seferinoglu	Erdogan	2019/YES	2031	NO
Selahattin Mentes	Erdogan	2019/YES	2031	NO

**Vacancy will not be replaced once he retires.*
***Normally, a 12-year term would have meant 2013+12=2025, but Kuz will retire in 2024 when he reaches 65.*

If an ambitious opposition secures a sufficient majority to amend the Constitution in 2023, which seems unlikely, it could abolish the 12-year term rule but preserve the mandatory retirement age of 65, and then appoint relatively young judges in their early 40s whose commitment to the opposition's conception of constitutional law is firm and well-known. However, if and when the opposition replaces Erdogan, it will most likely be a coalition of political factions from the center right and left, making it difficult to appoint judges who espouse a particular judicial philosophy. Compromise will be unavoidable. But even then, appointing judges with a more liberal worldview might still be something the opposition can try to agree on.

Of course, the meta-question of whether court-packing *per se* is desirable, regardless of who engages in it, is a persisting question. Bracketing the question of whether it *should try to do so*, only time will tell if the Turkish opposition *will be positioned to* pack the TCC.

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