The Rule of Arbitrariness as the New Constitutional Order in Turkey

Gülçin Balamir Coşkun & Ertug Tombus

14.11.2023 doi: 10.59704/d41a7ae8ac03b28c

Nearly two weeks after the 100th-anniversary celebrations of the Republic, Turkey's constitutional order faced one of the most significant judicial crises in its history when the Court of Cassation, the highest court of ordinary jurisdiction, and the Turkish Constitutional Court (TCC) clashed over the fate of imprisoned opposition politician Can Atalay. After reviewing his individual application, the TCC ruled on October 25, 2023, that Atalay's election rights had been violated and requested the Istanbul 13th Heavy Penal Court, the court that initially sentenced Atalay, to release him. However, the relevant court, in a way, avoided taking responsibility and referred the TCC's decision to the Court of Cassation. The long-awaited verdict of the Court of Cassation was made public on November 8,2023. Members of the 3rd Penal Chamber concluded that the TCC had exceeded its jurisdiction and violated the constitution. Therefore, they refused to implement the TCC's ruling. They also decided to file criminal complaints against the nine Constitutional Court judges who voted in favour of Atalay, marking an unprecedented act in the constitutional history of Turkey.

How should we interpret this constitutional crisis? Is it the death of constitutionalism in Turkey? Is it an attempt to test the boundaries of legitimacy before establishing the rules of a new constitutional order? To address these questions and assemble the political-legal pieces of the puzzle, it is imperative to trace its preliminary signs. This crisis was foreseeable, given past political discourse and alarming judicial tensions between the Turkish Constitutional Court (TCC) and certain first instance courts.

Early Warning Signs of the Crisis

On January 11, 2018, the Constitutional Court ruled that the pre-trial detention of journalists Mehmet Altan and Şahin Alpay violated their rights. Despite the court's decision, however, Alpay and Altan remained in prison as the penal courts overseeing their trials refused to implement the ruling. This defiance marked a significant shift, as prior to this judgment, first instance courts had consistently adhered to the Constitutional Court rulings. Başak Çalı characterized this disobedience as "the first legalist defence of anti-constitutionalism furnished by a first instance court in Turkey," raising concerns about the future of constitutionalism in the country. This marked the initial blow to the authority of the TCC.

This initial legalistic challenge to the legitimacy of the TCC was followed by public statements from Devlet Bahçeli, leader of the Nationalist Movement Party (MHP), a partner of the Justice and Development Party (AKP) in the ruling People's Alliance. Two illustrative examples demonstrate how the government ally criticizes the TCC when a judgment deviates from their desired alignment. Firstly, following the TCC's ruling on July 26, 2020, that the conviction of Academics for Peace constituted a violation of their freedom of expression, Bahçeli reminded that "the Constitutional Court was founded after the 1960 military coup for the protection of the non-democratic structure that was attempted to be established by putschists" and suggested that it be reconstructed in accordance with the new presidential system. The second statement was more severe than the first. When the TCC, on March 31, 2021, returned an indictment seeking the closure of the Peoples' Democracy Party (HDP) for alleged "terror" activities on proce-

dural grounds, Bahçeli openly criticized the Court, stating that "as much as the HDP's closure, the closure of the Constitutional Court should now also be a nondeferrable target". Both the previous legalistic challenge and the political attack on the TCC and, by implication, constitutionalism started to set the stage for a possible constitutional change.

Depicting the Legal Crisis

"The Court of Cassation challenged the Constitutional Court's decision to release Can Atalay, who had secured a seat in the May elections." In this statement, three key actors need clarification regarding their roles and positions in the unfolding crisis: Can Atalay, the Court of Cassation, and the Constitutional Court.

Can Atalay, a defendant in the Gezi Park trial, has been held in prison since April 2022, facing charges of attempting to overthrow the government of the Republic of Turkey. After Atalay won a seat in the 2023 May elections as a Member of Parliament for the Workers' Party of Turkey (TİP), his lawyers applied for his release under Article 83[1] of the Constitution to enable him to carry out his parliamentary duties. However, the Court of Cassation dismissed the release application. The 3rd Criminal Chamber of the Court of Cassation contended that Can Atalay had been convicted for aiding the coup attempt, asserting that this offense fell outside the protection of legislative immunity as outlined in Article 14 of the Constitution. Subsequently, Atalay submitted an individual application to the TCC on July 27. On September 28, 2023, the Court of Cassation upheld Atalay's 18-year prison sentence, ensuring his continued imprisonment.

In this tense politico-legal environment, on October 25, the TCC ruled by a majority that his continued detention violated his 'right to be elected and to engage in political activity' (Art. 67 of the Constitution) and his 'right to personal liberty and security' (Art. 19 of the Constitution). Referring to its previous rulings in Ömer Faruk Gergeroğlu and Kadri Enis Berberoğlu cases, the Court reminded that the Constitution entrusts the legislator with the responsibility of clarifying the meaning of the term 'cases under Article 14 of the Constitution' and does not grant the judiciary explicit authority to identify offenses falling within the purview of Article 14 through interpretation. Clearly, since the judiciary lacks the capacity to create laws, it cannot define the extent of legislative immunity and, consequently, the right to stand for election and participate in political activities through interpretative means (Şerafettin Can Atalay Judgment, §47). In short, the Court highlighted that Can Atalay would enjoy legislative immunity unless a constitutional or legal framework is established to ensure certainty and predictability, along with fundamental safeguards to protect the right to be elected and to engage in political activity.

The third participant, the Court of Cassation, reappeared on the scene when the Istanbul 13th Heavy Penal Court, which sentenced Atalay and other defendants in the Gezi Park trial, declined to follow the TCC's decision and instead referred the case back to the Court of Cassation. The 3rd Penal Chamber of the Court of Cassation gave three important decisions. First, members of the 3 rd Penal Chamber unanimously agreed not to recognize the TCC's decision, claiming that it lacked legal value and validity. Subsequently, they argued that Can Atalay, having already been convicted, had no right to apply to the TCC. Second, they recommended that a copy of Atalay's decision be sent to the Grand National Assembly of Turkey in order to initiate proceedings for the revocation of his parliamentary seat. Finally, they decided to file a criminal complaint to the the Chief Public Prosecutor's Office of the Court of Cassation against the TCC members, who, according to the Court of Cassation, violated the Constitution by illegally exceeding their authority with their vote in the TCC's decision on right violation.[2]

[1] Article 83: "(...) A deputy who is alleged to have committed an offence before or after election shall not be detained, interrogated, arrested or tried unless the Assembly decides otherwise. This provision shall not apply in cases where a member is caught in flagrante delicto requiring heavy penalty and in cases subject to Article 14 of the Constitution as long as an investigation has been initiated before the election. However, in such situations the competent authority has to notify the Grand National Assembly of Turkey of the case immediately and directly. (...)"

A judicial coup attempt or judicial activism of the TCC?

In the first 20 pages of its decision, the Court of Cassation endeavours to provide legal justifications for the claim that the Constitutional Court does not have the authority to adjudicate on Atalay's case, and thus, the TCC's decision is deemed unacceptable. The most noteworthy aspect of this decision is the Court of Cassation's accusation against the TCC of misusing individual applications as a novel form of appeal. The Court further contends that the TCC is assuming the role of a "super-appeal authority" and positioning itself as a "tutelage institution" over the entire judiciary, including higher courts (pages 21-22).

The Court of Cassation's decision had a profound impact and quickly became a matter of public concern. Lower courts in Turkey decided not to implement the TCC's ruling before, as mentioned above. But it is the first time that a lower court openly challenged the constitutional function and authority of the TCC. Atalay's party (TİP), the main opposition party, the Republican People's Party (CHP), and the Union of Turkish Bar Associations denounced this move as a "coup attempt" against the constitutional order. Legal experts emphasize two legally problematic aspects of the Court of Cassation's decision. First, according to Article 153 of the Constitution, "Decisions of the Constitutional Court (...) shall be binding on the legislative, executive, and judicial organs, on the administrative authorities, and on persons and corporate bodies," implying that the members of the Court of Cassation are in violation of the Constitution. Second, according to Article 16 of Law 6216[3], the initiation of an investigation about the president and the members of the TCC is contingent on the decision of the General Assembly of the TCC, making the General Assembly the recipient of a complaint for professional misconduct. In summary, the Chief Public Prosecutor of the Court of Cassation, or any individual external to the Constitutional Court, does not have the legal authority to initiate an investigation against the president and the members of the TCC.

Putting pieces of the puzzle together

The actions of constitutional courts, their decisions, and their role within the political system have come under scrutiny and criticism from various actors in the political public sphere in many countries. However, this scrutiny does not justify a court, whose constitutional authority is explicitly outlined, composing a political statement that criticizes the TCC's ruling. Choosing to defy the ruling based on such criticism is fundamentally contradictory to the principles of the rule of law, as it introduces arbitrariness into the core of the legal framework.

By refusing to comply with the decision of the TCC, the Court of Cassation not only violates its own constitutional authority and limits but also issues a political statement in its reasoning. It would be wrong to categorize the Court of Cassation's decision solely as a matter of legal or constitutional interpretation. Instead, the Court of Cassation's decision appears to be a deliberate political statement intended to shape public opinion regarding the role of the TCC.

The political intent underlying the decision became evident when the Court of Cassation opted to file criminal complaints against the judges of the TCC. The Court of Cassation is well aware that such a decision holds little legal weight and cannot yield a tangible legal ramification on the TCC judges. Rather, by pursuing these charges, the Court of Cassation seeks a political impact, intending to generate a public controversy by portraying the judges as criminals. The primary goal is not to achieve a legal outcome; instead, the Court of Cassation contributes to the formation of a political narrative against the TCC.

It is crucial to assess the Court of Cassation's challenge and the political narrative it seeks to cultivate, especially in light of the escalating emphasis on a new constitution by the ruling party and its allies. It is diffi-

[2] The full official text of the decision of the Court of Cassation is accessible through a news website. https://artigercek.com/guncel/yargitayin-can-atalay-ve-aym-ile-ilgili-kararinin-tam-metni-272203h.

[3] Law 6261 – Code on Establishment and Rules of Procedures of the Constitutional Court. Art. 16 "Opening an investigation for the crimes arising from the duties of the President and the members, or that are alleged to have beencommitted during their offices, and for their personal crimes and disciplinary actions, shall depend on the decision of the General Assembly."

cult to claim that the TCC is the last bastion of the rule of law, having significantly eroded public trust and coherence. However, the ruling party cannot tolerate even the TCC's rare decisions that conflict with its aim and agenda. Following such decisions, political actors launch attacks on the TCC, providing a pretext for lower courts to disregard the TCC's rulings. The ruling party demonstrates a determination to eliminate any institution within the constitutional order that possesses even a modest capacity to constrain its political power.

When examining both the past and present cases, it becomes evident that the right to individual application to the TCC has been a source of trouble for the ruling party. The AKP introduced the right to the Turkish judicial system through the 2010 amendments, a move that initially served to obscure the AKP's true intention of court packing while garnering broader support for the amendments. Without such a need, the AKP would not retain the right to individual application in the event of a new constitution.

The early legalistic challenges and political assaults, coupled with the current crisis, indicate that the AKP aims to establish its unrestrained and arbitrary power as a fundamental characteristic of the new constitution. The decision of the Court of Cassation and the ensuing discussions serve as the needed political controversy, forming a public opinion for justifying the elimination of the TCC, at least with an effective capacity to check the political power.

ABOUT THE AUTHORS

Gülçin Balamir Coşkun
Gülçin Balamir Coşkun is Research Associate at the Department of Comparative Study of Democracy and Political Systems of Eastern Europe and Academic Coordinator of the Center for Comparative Research on Democracy (CCRD) at Humboldt-Universität zu Berlin.

Ertug Tombus
Ertuğ Tombuş is Research Associate at the Department of Comparative Study of Democracy and Political Systems of Eastern Europe and Executive Director of the Center for Comparative Research on Democracy (CCRD) at Humboldt-Universität zu Berlin.

SUGGESTED CITATION

Coşkun, Gülçin Balamir; Tombus, Ertug: The Rule of Arbitrariness as the New Constitutional Order in Turkey, Verfassungsblog, 14.11.2023, doi: 10.59704/d41a7ae8ac03b28c.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20231114-233430-0.