

The Appointment of the Former Chief Prosecutor

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The Final Death Blow to the Turkish Constitutional Court

On 22 January 2021, Turkish President Erdoğan appointed Mr. İrfan Fidan to the Turkish Constitutional Court (TCC). Besides his alleged close ties to Erdoğan, Fidan was the prosecutor of many high-profile criminal cases that have been at the heart of the current backlash against democracy and human rights violations in Turkey. The TCC is already borderline “tamed”, serving only occasionally as a Constitutional safeguard. Fidan would be the final blow to shift the balance and slim majorities to fully serve Erdoğan’s interests.

Everything Is by the Book but There Is an “Anomaly” Here!

Mr. Fidan was elected to the TCC according to a quota, allocated to the Court of Cassation. According to the Turkish Constitution, the Court of Cassation nominates three candidates, in an election held in its general assembly, for each allocated position on the TCC, to be submitted to the President (Art.146). The President then appoints one of the candidates presented to him. Mr. Fidan’s election procedure is unprecedented in the more-than-half-a-century history of the TCC. He had barely been elected as a member of the Court of Cassation on 27 October 2020, when, within a week, he publicly announced his candidature for the TCC. Only twenty days after the official beginning of his tenure at the Court of Cassation, on 27 November, Mr. Fidan was on the top of the list submitted to Erdoğan, having won the highest number of the votes.

At first sight, there is nothing unconstitutional with this appointment. All relevant constitutional and statutory provisions were respected during the process. However, there is still an “anomaly”, as Kemal Gözler put it: A member of twenty days defeating all other members who have served at the Court of Cassation for many years. On average, the 44 former Constitutional Court judges who were elected and appointed from the ranks of the Court of Cassation served nine and a half years before joining the TCC. In addition, the last-minute withdrawal of some other candidates and the postponement of the nomination election by fifteen days from 2 to 17 December shed further doubt to the process.

Mr. Fidan’s appointment looks like a method of “abusive constitutionalism”, which is, as David Landau defines, “the use of mechanisms of constitutional change to erode the democratic order [...] rework[ing] the constitutional order with subtle changes in order to

make the [populist leaders] difficult to dislodge and to disable or pack courts and other accountability institutions.” Evidence suggests that President Erdoğan appointed Mr. Fidan to the TCC as a reward for his allegiance and commitment to the current authoritarian regime, and as a secure ally for his cause. A look at recent TCC judgments finding violations of constitutional rights reveals that almost all of them originate from criminal cases either directly prosecuted by Fidan, or which he was indirectly involved in, in his former capacity as the Istanbul Chief Public Prosecutor. To illustrate, these decisions include: and Atilla Taş. He was also the main actor behind very important criminal cases, such as FETO media trial and Büyükada.

The Academics for Peace case is particularly concerning. Following the press announcement of the Academics for Peace Petition in 2016, nationwide criminal proceedings, coupled with administrative sanctions, were launched against the signatories. Particularly during the state of emergency declared after the failed coup of July 2016, 406 signatories were subjected to the practice of ‘civil death’ by various formal and informal ways of preventing them from working in public and private sectors.

On 26 July 2019, the TCC gave its landmark decision (Z. “Füsun Üstel and others”). It decided that the criminal charges against the signatory academics violated their constitutional right to freedom of expression under the Turkish Constitution. By deciding that relevant petition was within the limits of freedom of expression, rather than terrorist propaganda as the government alleged, this judgment refuted the related arguments that formed the basis of the criminal and administrative sanctions. Yet, as of today, despite the dropping of the criminal charges, none of the signatories has been returned to their jobs in academia.

Mr. Fidan was responsible for the indictment in the relevant criminal proceedings. It accused the academics of the crime of terrorist propaganda because they demanded the state to stop- and compensate the effects of- the human right violations in South Eastern Turkey. The overall content and style of the indictment has been described as filled “with extreme prejudice, “delusional”, “subjective”, and “lacking a solid legal foundation”. More significantly, the pivotal evidence on which the whole indictment was built has turned out to be a hoax, as demonstrated by the TCC – the institution Fidan is about to join.

Having considered the content and language of the indictments in these cases, one may argue that Mr. Fidan has acted as Erdoğan’s spokesperson in the judiciary. It is thus doubly alarming that Mr. Fidan was appointed to a Court which has already given several decisions against his own prosecutions and allegations. He may now easily “stop the detection of the violations that he himself caused”.

Court-Packing: The Autocrat Learns Along the Way

Earlier here, the ongoing battle between populist leaders and apex courts has been widely discussed. One common feature of this global problem is court-packing: The incumbent populist-authoritarian leader stacks the courts with loyalists. The case of Turkey has already been presented as an illustrative example for this matter.

Since its inception in 1961, until the constitutional amendments of 2010, the TCC had repeatedly disagreed with incumbent governments in “high-profile cases”. The 2010 constitutional amendments *inter alia* changed the rules pertaining to the number, tenure, selection procedure and eligibility criteria of constitutional judges. Deference to the political majority has started since. From then on, the TCC has gradually upheld the legislative preferences of the current government in many controversial cases. This development accelerated following the attempted coup in July 2016. On one occasion, the TCC dismissed two of its members by a blatantly unconstitutional decision. Also, in another decision, the Court overturned its decades-old jurisprudence, without offering a convincing argumentation, and refused to examine the executive decrees of state of emergency; a decision which undermined the very foundation of the Turkish constitutional order.

Both of these decisions were taken unanimously by the Court, leading us to infer that the TCC was “tamed”. This view was strengthened by two incidents. The first was in a speech at the World Congress of the Constitutional Courts in Vilnius: Mr. Zühtü Arslan, the President of the TCC, allegedly praised the purge of 1,000 judges by emergency decrees as a major achievement. Another incident which caused outrage was in a Victory Day Ceremony at the Presidential Palace, where Mr. Arslan bowed, in a deferential manner, before Erdoğan.

Arguably, the TCC seemed to have already been packed before Mr Fidan’s appointment. With the exception of a recently retired member, all members of the Court were appointed either under Gul or Erdoğan’s presidency. Yet such “safe” members did not necessarily produce “friendly” outcomes. As much as the TCC has been dysfunctional in protecting the constitutional order and human rights against President Erdoğan’s post-coup-attempt emergency decrees, it has given several surprising decisions contrary to his interests.

President of the TCC Mr. Zühtü Arslan was decisive in the Academics for Peace decision, acting as a tiebreaker. This decision led to the serial acquittal of the academics and added a very important constitutional argument in their toolbox, as they struggle to redeem their civil rights. Mr. Engin Yildirim adds value to the Court with his convincing and challenging dissenting opinions, whenever the TCC fails to fulfill its duty of protecting the constitutional order and rights. Mr. Yusuf Şevki Hakyemez was appointed by Erdoğan in 2016. Publicly known as a forthright opponent of an active constitutional court, he might have been deemed useful for a politician that wanted the same. However, Hakyemez has consistently sided with the Court whenever it upheld and protected a constitutional right.

Court-packing is an ongoing process; The autocrat continuously tries new tricks and learns from his past actions and preferences along the way. Against this backdrop come the patronage appointments: Rather than relying on somewhat ideologically-friendly constitutionalists, Erdoğan sought to pack the court by appointing people directly from his close circle: Mr. Yıldız Seferinoğlu was the former AKP member of the parliament and deputy justice minister; Mr. Selahaddin Menteş was the former president of the The Inquiry Commission on the State of Emergency Measures and deputy justice minister; and finally Mr Recai Akyel had served as the chief advisor for Erdoğan. Not only their career path is problematic in terms of judicial independence, but also their performance

as constitutional judges create doubt as to their legal knowledge. Most notably, these judges did not bother to offer any argumentation when they dissented (to the advantage of the government) on the Academics for Peace case. They did, however, merely paraphrase the government's position in the version of the decision as published in the official gazette.

The Worse Is Yet to Come

Currently, the division of the members of the Constitutional Court is very delicate. Most of the rights-protecting decisions were taken by slim or even bare majorities. In the latter case, the vote of the president of the Court is decisive as he has an additional tiebreaker vote. Thus, there is a knife-edge balance in the TCC, which will foreseeably change, to the detriment of effective rights protection, with the appointment of Mr. İrfan Fidan. Moreover, if he becomes the president, as recently suggested, the TCC may quickly become a rubber-stamp institution.

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