

The Can Atalay Case: the quake in Turkey's rule of law

By Mehmet Gün / 06 February 2024, Tuesday / Published In Politics



After a series of forceless actions and decisions contrary to law, at the session of Turkey's Grand National Assembly (TBMM) on January 30, 2024, chaired by one of the deputy & acting Speaker Bekir Bozdağ, the relevant memorandum was read and the parliamentary membership of Can Atalay, attorney and MP from the Workers' Party of Turkey (TİP) in Hatay, was revoked. "In Turkey, the situation came to a point that the politicians become so powerful and influential that it is impossible for the law and the judiciary to touch them."

The game played at the highest levels of the state has come to the end long expected of it. After a series of forceless actions and decisions contrary to law, at the session of Turkey's Grand National Assembly (TBMM) on January 30, 2024, chaired by one of the deputy & acting Speaker Bekir Bozdağ, the relevant memorandum was read and the parliamentary membership of Can Atalay, attorney and MP from the Workers' Party of Turkey (TİP) in Hatay, **was revoked**.

The Can Atalay case: Background and those who are responsible

There are many events and people who are responsible for the matter reaching this point. The events giving rise to the liability of those responsible and those persons can be summarized as follows:

1. Members of the Court of Cassation 3rd Criminal Division who, instead of immediately halting the unfinished appeal process when Can Atalay was elected to the TBMM, continued the appeal process, and confirmed his conviction,
2. Members of the 13th Serious Crimes Court who did not suspend the trial to remedy the initial violation of rights, upon its determination by the Constitutional Court (AYM), until a decision was made by the TBMM to lift the immunity of Can Atalay as a member of parliament,
3. The presiding judge of the 13th Serious Crimes Court who should have had his court adjudicate on remedying the violation determined by AYM but instead sent the file to the Court of Cassation 3rd Criminal Division,
4. Members of the Court of Cassation 3rd Criminal Division who refused to implement a remedy following the AYM's first determination of a violation of rights, despite it falling outside of their remit and their lack of authority of authority to do so;
5. Members of the 13th Serious Crimes Court who were required to remedy the violation upon the second determination of a violation of rights by the AYM,

6. The presiding judge of the 13th Serious Crimes Court who should have had his court adjudicate on remedying the violation following the second determination by the AYM but instead sent the file to the Court of Cassation 3rd Criminal Division,
7. Members of the 3rd Criminal Division who refused to fulfil their duty to remedy the violation determined in the second decision of the AYM, despite a comprehensive explanation by the AYM that matter was only judiciable by the 13th Serious Crimes Court and that they had role to perform and no authority to make a declaration of incompatibility,

The decision to read the void ab initio decision of the Court of Cassation 3rd Criminal Division in the TBMM was made by:

1. The President of the Court of Cassation and the Chief Public Prosecutor of the Court of Cassation who created the impression that no investigation into the Court of Cassation 3rd Criminal Division members' breach of duty and abuse of office would be allowed, by speaking as if the 3rd Criminal Division had the authority to disobey the decision of the Constitutional Court despite Article 153 of the Constitution clearly establishing the Constitutional Court as the highest in the hierarchy of decisions and binding upon the Court of Cassation;
2. The Deputy Speaker of the TBMM who read the Court of Cassation's invalid decision in session, disregarding the AYM's decisions declaring the Court of Cassation's 3rd Criminal Division decision to not comply null and void, and despite the clear provision in law and the Constitution that such a decision to not comply with the AYM's decision could not be made, effectively revoking Can Atalay's parliamentary membership,
3. The individuals who gave verbal, written, and other forms of instructions and assurances to these people, and those who heeded their instructions, carried them out, and continued to violate the **rights of Can Atalay** by taking actions, operations, and decisions that were clearly contrary to law, the Constitution, and the AYM's decisions.

All these individuals should at the very least be investigated for negligence, breach, and abuse of their office, for undermining the constitutional order, and for other crimes corresponding to their actions and their transgressions must immediately be ceased.

Turkey's bitter truth

However, Turkey's bitter truth is as follows:

1. For an investigation to be opened against the members and chairman of the 13th Serious Crimes Court, permission from the Board of Judges and Prosecutors (HSK), presided over by the Minister of Justice, is required. Despite complaints from the bar associations, this permission has not been granted and is not expected to be. The HSK members who do not grant the investigation permission, including its chairman, should be included in the list of those who need to be investigated.
2. For an investigation to be opened against the members of the Court of Cassation 3rd Criminal Division who insistently refused to comply with the AYM's decision, the Court of Cassation's Council of Chief Judges needs to see the necessity in and open an investigation. The remarks of the Court of Cassation President and Chief Public Prosecutor in favour of the members who made the non-compliance decision to the Constitutional Court indicate that such an investigation will not be opened, and its opening should not be expected. Those who do not start this process and those who do not grant investigation permission should be included in the list of those who need to be investigated.
3. Despite it being clearly legally void and thoroughly explained as such in the decisions of the Constitutional Court, the person who initiated the reading process of the void Court of Cassation decision in the TBMM, the Deputy Speaker of the TBMM who decided to read it in the TBMM, should be investigated for the misuse of his presidential powers in the TBMM and likewise for misuse of powers as a member of parliament. However, a simple majority of 301 votes is needed to propose an investigation of TBMM members, and a 2/3 majority (enough to change the Constitution) is needed to open an investigation. Without the votes of the ruling AK Party and its coalition partner MHP, this is not possible. Therefore, it is not possible to investigate TBMM members for unconstitutional acts. This situation provides a suitable environment for the ruling political parties to violate the constitution and disrupt the constitutional order. The fact that the Court of Cassation's Chief Public Prosecutor has approved the ongoing legal violations with his statements should be interpreted to mean he will not file a lawsuit against the disruption of the constitutional order.

The ruling class of impunity

In short, in Turkey, politicians who come to power and take control of critical judicial institutions such as the Court of Cassation, the Court of Cassation's Chief Public Prosecutor's Office, the Board of Judges and Prosecutors, and even the Constitutional Court by appointing their loyal men, become so powerful and influential that it is impossible for the law and the judiciary to touch them. This makes Turkey an unlawful state in the real sense of the term and turns it into a country where state power is shared among various power centres behind closed doors, through secret bargains, and privileged classes consisting of politicians, their appointed senior judiciary and public officials, and those who stand to benefit.

How can Turkey escape this vicious cycle?

Turkey must escape from this maelstrom that continuously pulls it down as soon as possible. For this to happen:

1. Politics must completely withdraw from the judicial appointments, and key appointments must be made under judicial supervision in a transparent manner that involves the public.
2. A Supreme Court of Justice should be established to investigate offences committed by all judicial members and high-level public officials without the need for anyone's permission.

3. The parliamentary immunity of TBMM members should be reconfigured so as not to grant prospective and retrospective blanket immunity but rather on a case-by-case basis upon completion of necessary investigations and having gathered all relevant evidence. The initiation of an investigation against TBMM members should be permitted solely by the expert Supreme Court of Justice, instead of a immunity waiving decision by the political majority in the TBMM. The filing of a lawsuit against MPs should be possible only if the TBMM does not recognize immunity.

For all this to happen, the judiciary must be transparent and accountable to the law, and thereby gain complete independence. However, the political class won't make the judiciary independent; on the contrary, they want to bind it to themselves in every possible way. To make the judiciary completely independent, a Supreme Court of Justice consisting of expert, competent, and unblemished jurists should be established, which will ensure transparency and accountability in politics, eliminate the requirement of permission to investigate, and transition to a new and advanced system where immunity for TBMM members is granted on a case-by-case basis and after investigation. Only then can laws be universally enforced and the rule of law be restored, and sustainable judicial independence achieved.

Translated by Charles Ediz Gün