

To the presidential candidates and leaders: Call for a judicial reform

By Mehmet Gün / 01 May 2023, Monday / Published In Politics



President Recep Tayyip Erdoğan, President of the Court of Cassation Mehmet Akarca, President of the Council of State Zeki Yiğit, CHP Chairman Kemal Kılıçdaroğlu and members of the higher judicial bodies attended the ceremony held for the 61st anniversary of the establishment of the Constitutional Court. (Photo: Constitutional Court)

The politically impartial Better Justice Association (BJA), of which I am the Chairman, released a call to action on the 14th of May 2023 addressing the presidential candidates and political party leaders. It asks them to pledge to tackle judicial reform, which is the root cause of all Turkey's issues, as their **priority upon assuming office**.

One wouldn't expect justice from an unjust election, but...

There is a short time to the 2023 elections, which may as well have ABBA's famous "The Winner Takes It All" as background music. We find ourselves in an election period where the ruling party has received twice as much campaign financing from the Treasury as the main opposition while also being able to make use of the state's capacities to campaign; the president and the ministers are exempt from electoral restrictions in place on other candidates to name just a few instances of the injustice which is dominating this election period.

It is difficult to imagine that the elections will return a fair result when conducted so unfairly. And it is perhaps equally as difficult to expect politicians who are used to competing in inequity to enact the judicial and structural reforms which would bring justice to the country.

The public's desire for an independent judiciary is crystal clear

I toured the country three times leading up to 2023, meeting with local businesspeople, entrepreneurs, NGOs and jurists in 17 different cities across Türkiye. I was able to meet them at structural reform focused meetings organised by the BJA in cooperation with other prominent business focused NGOs. The first was organised with the Turkish Industry and Business Association (TÜSİAD) and Turkish Enterprise and Business Confederation (TÜRKONFED) and was focused on the quality of judicial services. The second, organised with TÜRKONFED discussed Türkiye's "Middle-Democracy and Middle-Income Traps". Finally, the third was organised with the daily NB Ekonomi (previously Dünya) newspaper and focused on the importance of judicial reforms to sustainable economic development. Representatives from business and legal spheres made it very clear that they want no less than the following: an efficient judiciary producing quality services, transparency, true accountability and full independence of the judiciary, the rule of law, and an advanced democracy.

The most fundamental issue is independence

The first and foremost condition for the provision of quality judicial services is judicial independence. And yet the judiciary in Türkiye is not independent! The judiciary is de jure dependent on the legislature and executive and de facto bound to the Ministry of Justice. A judiciary cannot be impartial if it is not also independent. Democracy and the people's welfare regress when the judiciary is not independent.

The rule of law is faltering, even in the judiciary

The rule of law is seriously neglected within the judiciary. All the Council of Judges and Prosecutors' (HSK) decisions except for removal from office are beyond judicial review. Offences committed by judges and prosecutors can only be prosecuted if the HSK allows it while the offences of members of the Court of Cassation and State Council can only be prosecuted if the respective organisations and their colleagues consent to the prosecution. Their refusals to consent are final, cannot be appealed, and are without any legal remedy or scrutiny.

The class of untouchable public officials

Public officials are exempt from The Constitution's foundational principles of "equality before the law" and the "rule of law". They have become a privileged group that is immune from responsibility and untouchable by the judiciary. The judiciary's hands are bound against offences committed by public officials. The judiciary's ability to enforce the law against offending public officials is entirely contingent on the precondition of permission by the officials' superiors:

- a) Prosecuting the offences committed by the president or ministers are as difficult as amending the Constitution. 301 MPs' votes are needed to propose their prosecution, and 360 are required to proceed with the prosecution.
- b) As was the case with the Pamukova train and Soma mine disasters, offending high-ranking public officials cannot be prosecuted unless the president and relevant ministers grant the judiciary permission to do so.
- c) In addition, the prosecution of other public officials requires the permission of their superiors.

This situation whereby culpable individuals can gain de facto immunity by the decision of their superior or relevant institution and innocents may be unjustly indicted and tried has forced the judiciary and civil service into absolute subordination to politicians, removing them from their roles as guardians of the rule of law and guarantors of stable governance, respectively.

A disabled judiciary

MPs' immunity needs to be strengthened and developed in a manner that prevents its abuse. MPs' immunity may be revoked for ulterior political motives, while also being abused by some politicians to avoid prosecution for committed offences.

The judicial system is inefficient and unable to resolve the millions of disputes it handles with reasonable quality, within a reasonable length of time and at reasonable cost. It fails to provide quality judicial services and facilitate societal reconciliation, establish peace in society, and strengthen trust in justice.

The flaws' diseconomies and the solutions' benefits

Türkiye is struggling to solve its social, political, and economic problems and realise its rich potential because of judicial issues in dire need of solution. Our country is unable to surpass the middle income, mediocre education, and middle-democracy traps and it has regressed into a hybrid regime. Income inequality is growing, and societal peace and calm is being eroded.

Türkiye can effectively combat corruption and attract investment by providing stability and predictability through the strengthening of the rule of law by a proficient and efficient, high-quality, accountable, independent and impartial judiciary. Creating a climate of

freedom which upholds the rule of law can reverse brain drain, foster invention and innovation, and increase the production and export of high value-added products. This could turn the current account deficit into a surplus and quickly quadruple or quintuple our GDP per capita to around \$30,000.

The first steps towards a solution

The judiciary must be made independent of the executive and legislature, and of any other political concerns. It must be made productive, efficient, truly accountable to itself, and completely autonomous in its functioning. To achieve this, it is vital that our country prioritise the fundamental reforms listed below:

1. A Supreme Judicial Council (the Council) responsible for regulating and administering judicial services must be established. Powers relating to judicial services currently held by the HSK and Ministry of Justice must be transferred to the Council. Every section of society and members of the professions must be represented on the Council, and the composition of its membership must preclude the disproportionate influence of any one person or group of individuals.

All members of the profession must administratively be bound solely to the Council.

The institution should be supported by a Permanent Legal Council, which consists of judicial service institutions and service recipients, to consult on the adequacy of judicial services and develop recommendations accordingly.

2. All decisions relating to the administration of the judiciary must be opened to judicial review and anyone wishing should be able to commence judicial review. A specialised High Court of Justice with expedited trial procedures must be established to adjudicate such cases.

3. **The Constitutional (Supreme) Court's** capacity must be increased, and its politicisation must be ended. Anyone must be able to apply for the invalidation of any unconstitutional laws, presidential decrees, including state of emergency decrees, decisions and transactions, and all claims concerning the same subject matter must be adjudicated in a single lawsuit.

4. Judges and prosecutors must be allowed to form their own completely independent professional associations managed entirely by their colleagues.

Appointment to top courts must be transparent

5. Appointment to the Supreme Judicial Council, High Court of Justice, Supreme Court, Court of Cassation, and Council of State must be made completely transparent and the public must be involved in the appointment procedure. Candidates must be put forward elected through justified and open ballots, and the entirety of the procedure from announcement of candidacies to election and appointment must be made open to judicial review.

6. Criteria for admission into the legal profession must be brought up to standard with developed nations and a uniform path of career progression must be established across the profession to establish equivalency between the various careers within it. The members of the profession must be made equally proficient in theory and in practice and promotions must be made subject to professional and academic excellence and the ability to provide high-quality service. A transparent and fair system of competition between members of the profession must be established. The election and appointment of judges, prosecutors, and notaries must be effected through open competition between equals. Their independence and impartiality must be strengthened with guaranteed tenures and efficient accountability.

The quality of legal education must be raised and the capacity to provide it determined according to the country's needs and objectives without compromising its quality.

7. Courts should be organised into 26 official development zones, specialised tribunal courts should be centralised, and others should deliver services so as to maximise the public's access to them. The number of courtrooms should be reduced from the current approximately 7 thousand to around 2 thousand.

Use of judicial resources must be planned

8. A National Disputes Database must be established to help predict judicial workloads, and the use of judicial resources must be proactively planned, Courts and members of the profession must be made to specialise. Specialised courts must be established with the purpose of facilitating developmental purposes and priorities.

Pre-trial full and frank disclosure must be instituted to ensure the parties engage in responsible communication, to ensure full and frank disclosure of all relevant facts, encouraging parties to reach amicable settlements instead of resorting to trial. The judicial preparatory courts must supervise the full and frank disclosure and proper preparation of case dossiers, ensure preservation of the disputed interests/matters, and prevent abuses of the process. Cases which now take four to five years to conclude, should be adjudicated in three to four months with expedient and high-quality trials.

A "Judicial Procedure and Judgment Assistance System" must be established from the data and experience accumulated in the National Judicial Informatics Network (UYAP) with the use of ethical artificial intelligence.

9. All pre-permission conditions and requirements for prosecution must be abolished. The High Court of Justice must be given exclusive competence to adjudicate the prosecution of offences committed by the president, ministers of state, members of parliament, and other public officials that occupy high office or critical roles within the state.

The Better Justice Association has developed an "A to Z of Turkish Judicial Reform" proposing innovative solutions and put forward for debate in the domestic and international public sphere. These proposals that we have expounded in commercial, legal, academic, and political spheres have been accepted and supported in full without amendment.

The presidential candidates and political party leaders have taken to the electoral stage promising to solve the country's woes. It is naturally our right, therefore, to expect them to commit to the public, openly and unambiguously, that following the elections they will embark upon the structural reforms needed to solve our country's issues, starting first and foremost with judicial reform.

Translated and edited by Charles Ediz Gün