

Top election authority undermines itself and Turkish Democracy

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“The members of the The Supreme Election Council, YSK, continue to neglect their foremost duty to complete the proper legal constitution of the Council. By not determining the principal and reserve members and thus not properly constituting the Council the YSK members open the legitimacy of the YSK itself and the validity of its decisions to debate.”

In line with his previously stated intent, President Recep Tayyip Erdoğan has used the authority provided by Article 116(3) of the Constitution and declared Sunday the 14th of May 2023 as the date of the centenarian Turkish Republic's upcoming presidential and parliamentary elections. The Supreme Election Council (YSK) has already accepted and declared the presidential candidacies of Mr. Kemal Kılıçdaroğlu, Mr. Recep Tayyip Erdoğan, Mr. Muharrem İnce and Mr. Sinan Oğan.

The fierce debate already underway about Mr. Erdoğan's eligibility to run for a third presidential term indicate that many similarly heated discussions will emerge over the course of this highly controversial election period which started on 15 March 2023. In my opinion, the 2023 elections will be an even more critical turning point in Türkiye's democratic history than those in 1950. The YSK will have a massively decisive impact on Türkiye's trajectory at this critical juncture, determining whether the Republic will progress towards becoming a better democracy or plunge further into the morass of the current electoral autocracy.

To strengthen our social unity, confidence in the rule of law, and justice, I hope that the YSK act in a manner beyond reproach with regard to matters specified in the Constitution and the law.

The Supreme Election Council is not legally constituted

As of February 28, 2023, according to the information on the Council's website and despite the requirement of the Constitution and Law No. 7062, only the roles of president and vice president have been allotted. The law clearly states that the Council is only legally constituted once the roles of principal and reserve membership has been allotted to the remaining 9 members that would comprise the Council. This determination of roles, without which every act of the Council is legally void, has not been completed.

In response to this disappointing state of affairs, I submitted a petition to the Supreme Election Council (YSK) on the last day of February, requesting that it determine its principal and reserve members and complete the constitution of the Council.

Article 79, paragraph 3 of the Constitution outlines the procedure for election of members to the YSK:

"The Supreme Election Council (YSK) consists of seven principal and four reserve members. Six of the members are elected by the General Assemblies of the Court of Cassation and five by the Council of State from among their members by an absolute majority and secret ballot of their members."

Paragraph 4 of Article 79 continues by specifying how the roles within the YSK are to be allotted:

"Two reserve members per electing body are separated from the members elected to the Supreme Election Council from the Court of Cassation and the Council of State by drawing lots. The President and Vice President of the Supreme Election Council do not participate in the draw,"

Together, these articles clearly explain how the Council must be constituted.

The new members replacing the 5 members of the Council whose term of office expired on 24 January 2023 have been elected by the Council of State and the Court of Cassation. Subsequently, in accordance with Paragraph 4 of Article 79 of the Constitution, the 11 members of the YSK elected a president and a vice president from among themselves.

The Supreme Election Council is only properly constituted as a legal entity after the determination of the roles of its 11 principal members: 5 principal members, the president and vice-president, and 4 reserve members. Decisions of the Council can only be made by the president and vice-president, and the 5 as-of-yet undetermined principal members. That is because this authority may only be exercised by the principal members. Reserve members may only perform the duties of a principal member when the principal member cannot fulfil his/her role.

The YSK undermines its own legitimacy

I received a response to my petition from the YSK on 21 March 2023. In its response dated March 15, the Council labelled my request a "special request" and on that basis did not deign to respond to the issues I raised in the petition.

The members of the YSK continue to neglect their foremost duty to complete the proper legal constitution of the Council. They have clearly failed to meet the unambiguous requirements of Article 79 of the Constitution and Article 5 of the Law No. 7062. This is evident in decision 2023/254 dated 24 March 2023 signed by all 11 members of the Council.

By law, 4 (reserve) members of the Council should have had no role in YSK's decision-making unless stepping in for a principal member. It is worth noting that the Council also evaluated and accepted the presidential candidacies, especially Mr. Erdoğan's, without any reasoning or discussion. This is exceedingly unfitting for senior judges of the Council of State and Court of Cassation. I must reiterate again that the candidacies' acceptance was carried out by a legally unconstituted entity.

How the YSK must be constituted, and how and by whom its powers may be exercised is clearly defined in the Constitution and the YSK Law 7062. By not determining the principal and reserve members and thus not properly constituting the Council the YSK members open the legitimacy of the YSK itself and the validity of its decisions to debate.

The YSK cannot act before its legal constitution

The Supreme Election Council (YSK) can only exercise its authority as specified in the Constitution and the law after its proper constitution.

For the Council's decisions to be legally valid beyond doubt the board's principal and substitute members must be determined. The Constitution is unambiguous on this point. As confirmed by the Constitutional Court in its decision no. 2016/171 and 2016/164, and according to the explicit provision in Article 6 of the Constitution:

"No person or organ can exercise a state authority that does not originate from the Constitution."

That this is binding for the YSK is seen in Article 11 of the Constitution:

"Constitutional provisions are the basic legal rules binding the legislative, executive, and judicial organs, administrative authorities, and other institutions and individuals."

It follows that the members of the Council cannot make decisions on behalf of the Council until their roles have been determined and the Council has been legally constituted according to the law. They do not have the authority to act as if they are all principal members of the YSK or to make decisions in the name of the YSK until that is done.

Similarly, these members do not have the right to avoid attending meetings or fulfilling other duties as if they were reserve members. Therefore, the 9 members cannot legitimately represent the Council. Decisions made in the name of the Council while this situation persists are not legally valid.

Neither principal nor reserve: indeterminate members

For as long as the principal or reserve member positions remain undetermined, the role of the 9 members is indeterminate. It cannot be said whether they are one or the other. While they are in this state, they cannot act as either principal or reserve members.

They cannot forgo the proper constitution of the Council under any pretence, such as it being irrelevant which of them are what type of member, and make decisions as a collective of 9 plus the president and vice-president. They have absolutely no authority to bend the rules of the Constitution and the law, or to set rules for themselves. Until the roles of all the members have been determined none of them do or will have the authority to vote with the authority of permanent members.

Any act by these 9 members in the name of the Council will constitute a usurpation of the YSK's authority. It is undisputed under Turkish law that decisions taken by usurpation of authority are null and void ab initio meaning they have no legal effect from the outset. Therefore, the form of any decision taken by the YSK in its unconstituted state would be misrepresented as a lawful one, being legally void and invalid ab initio.

If such void decisions are complied with in adherence only to its visible form and not their legality, then the Constitution and the constitutional order will have been violated.

Competency does not confer validity

The fact that the YSK is comprised of senior judges from the Court of Cassation and the Council of State does not guarantee that their decisions will be correct and legally valid. Given that they have not fulfilled the clear and explicit rules of the Constitution and the YSK, even those providing their authority, it is only natural to be concerned that they may make inaccurate and incorrect decisions or be unduly influenced when dealing with the highly contentious issues they now face.

The fact that the YSK makes the final decision on presidential candidacy applications, and that its decisions are not subject to any form of judicial review, justifies the wide-ranging public concern regarding these matters. This is especially true when it comes to their acceptance of President Recep Tayyip Erdoğan's **candidacy for a third term**.

Indeed, Kemal Kılıçdaroğlu, the leader of the Republican People's Party (CHP), expressed his distrust in the YSK's members and decisions saying that they would decide as Erdoğan wishes. Undeterred, he also expressed his desire to beat Erdoğan at the polls, a electoral victory being a stronger hand than a procedural one. Perhaps tellingly, when asked about Erdoğan's eligibility for a presidential candidacy, a senior AK Party member evaded the question by saying that the YSK will make the final decision.

Is Mr. Erdoğan eligible for a third presidential term?

Indeed, the YSK's indeterminate members decided on 24 March 2023 to allow Mr. Erdoğan to run for a third time in presidential election. Political parties and many lawyers have already filed objections to the Council's arbitrary decision. The Council has declared on 30 March 2023 that it has rejected all these objections. That the Council made this decision on the highly contentious and long-discussed issue of Mr. Erdoğan's eligibility without giving any reasoning is particularly indicting, not to mention that being unconstituted it cannot issue legally valid decisions. The Council's members have not even attempted to address constitutional jurists' nearly unanimous view that Mr. Erdoğan cannot run for a third term as president.

When making the 2017 constitutional amendments Mr. Erdoğan may have intended for them to enable his candidacy in the 2023 elections. However, the explicit provisions of Article 101 of the Constitution which states as "One person can become candidate to the presidency a maximum of two times" does not allow him to do so. It is clear that the 2017 amendments would have had to make a provision explicitly providing for Mr. Erdoğan's wishes. Scholars are united that it is impossible for Erdoğan to run in 2023 presidential election in the absence of such an exceptional term.

Şentop's argument on Erdoğan's candidacy

Mr. Mustafa Şentop of AK Party has spearheaded arguments **in favour of Mr. Erdoğan's eligibility**. He recruits several fallacies of constitutional interpretation in his argument that the rule introduced in 2007 that the rule in Article 101 of the Constitution: "One person can become candidate to the presidency a maximum of 2 times" was introduced only in 2017. He supposes based on this absurdity that Mr. Erdoğan is eligible for another term. His reasoning is that this is only Mr. Erdoğan's second candidacy since the introduction of the term limit. There is almost no need to point out that this is being read into and not from the Constitution. The relevant article of the Constitution explicitly states the that a person is only eligible to become a candidate for the presidency twice. It is even more clear that this is not Mr. Erdoğan's first or second candidacy.

Mr. Şentop is not a constitutional law expert, he is a legal historian. He is one of the few people within AK Party that drafted and steered the 2017 constitutional amendments through parliament. Additionally, Mr. Şentop, who is currently serving as the Speaker of the Parliament, was the chairman of the Constitutional Commission of the parliament during the 2017 amendments. He is clearly responsible to his superiors in the party for the contention stemming from the failure to include a clear provision in the 2017 amendments allowing Mr. Erdoğan's third candidacy.

It appears as if the dismal saying "might is right" is proven one more time. The Council's indeterminate members appear to be kowtowing to AK Party circles' clearly flawed views. It also gives rise to the troubling question of whether the determination of the YSK's members' roles has been

omitted in order to avoid being held accountable for acting against the law in accepting Mr. Erdoğan's membership. To illustrate, they are in a position to argue that they are guilty not of violating the Constitution but rather of the lesser crime of usurpation of authority, if the opposition coalition is victorious. On the other hand, if Mr. Erdoğan is victorious, then they will have shielded themselves from his wrath by enabling his candidacy.

Proper decision-making requires clear accountability

When a decision-making body's acts are not open to judicial review, a clear definition of the decision-makers' responsibilities is required. It is not possible to hold individuals involved in the making of erroneous and illegal decisions responsible if the responsibility of each of the decision-makers remains uncrystallised.

The principal members who legitimately participate in the decision-making on behalf of the Supreme Election Council are legally and criminally liable for their decisions made thereof. The liability of the principal members arises from the Constitution and the law. While violation of the Constitution is a serious offence, usurpation of authority may not even constitute a punishable offence.

The principal and reserve members of the top election council YSK must be determined in order to ascertain the validity of the decisions taken on behalf of the YSK or to identify the YSK's members responsible for the decisions. It is not possible to hold someone liable for their decisions when their occupation of the office in the name of which the decisions are taken remains undetermined.

By failing in the manners laid out above, it is right to conclude that the members of the Supreme Elections Council are undermining its legitimacy and Turkish democracy. Such decision-making authorities must be decentralised. Procedures must be established to ensure accountability of vital decision makers in an efficient manner.

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