



## **Middle Democracy Problems**

### **And Way of Solution**

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The impetus that brings us together is that we all have the strong desire to make Turkey prosper. I would also like to mention that Turkey does have the potential to sustain a powerful and great future. It will be my great pleasure for me to see you wearing smiles, with bright lights shining in your eyes.

When the words “Turkey” and “Structural Reforms” are spoken together, the first reaction is to talk about historical records and to compare Turkey with other countries. Our beloved country is labeled as undeveloped in some selected examples. This positioning is then considered to be inevitable, together with the feelings of helplessness and hopelessness filling our hearts.

Turkey is being compared with Singapore. I would like to state that I am proud that Singapore’s leader, Lee Kwan Yew, who turned Singapore from being a third-world country into one of the world’s major emerging countries in only 40 years, is a lawyer, just like me. On the other hand, with Singapore’s less than 5 million in population, this city-state is not a good candidate for comparison with Turkey, and with which to carry out a cross-country analysis.

At times, even I compare Turkey with South Korea, but South Korea’s national defense is funded by the USA. The country also receives further economic support from the



USA, as well. Moreover, the geo-politics of South Korea is completely different from that of Turkey's.

It would be more appropriate if the cross-country analysis be carried out with a country that shares similar geographic and other features with Turkey.

Also, since we aim to carry out structural reforms to shape the future of our country, the comparison should be carried out to make projections regarding our future, not that of the past. This will allow us to clearly see our potential and set the targets desired to be achieved through reforms. Are we not yet finished with discussions as to what occurred in the past and, instead, optimistically looking forward to the future, at the end of the day?

We will be clearly outlining our potential if we compare Turkey and Germany. Both countries are generously endowed with plenty of natural resources; Turkey perhaps even being more privileged in this respect.

Both countries have similar populations, around 82 million people. Land per capita in Turkey is twice that of Germany. This tells us that the geographic area of Turkey is enough to feed a population that is twice that of Germany's, or that a person in Turkey can produce twice that of a person living in Germany.

All in all, Turkey can achieve twice that of Germany in terms of prosperity and power.

Leaving these considerations aside, if Turks can achieve similar a GDP, Turkey will become one of the world's top geo-political centers, bringing to its own citizens, and also to its' neighbors, wealth and prosperity.

It is this bright potential future that should bring us smiles and hope. What we did not achieve in the past should guide us to what we should do to realize this bright future.

What are the causes of such divergence between Turkey and Germany? Why is it the case that while it is a common phenomenon that Turks work in Germany as 'Arbeiders,' but the opposite is not common?

International indices provide the answer to which we all have become inured:

First: Germany is at least twice more democratic than Turkey.



Second: Germany ranks twice more than Turkey in terms of the Rule of Law Index.

The reason Germany is far more democratic is also that Germany is far more advanced in sustaining the Rule of Law.

Therefore, if we are to economically perform as Germany does, we should ask the reasons behind the divergence in the Rule of Law and democracy indices, and why Turkey lags behind.

Firstly, and perhaps most importantly, Germany outperforms Turkey in dispute resolution.

Consider that a dispute emerges between an investor company that is seeking to build a large factory, and a company that is to manufacture and operate the machinery for the factory. If this dispute takes one year to be settled in Turkey, it takes only six months to reach settlement in Germany.

We are faced with hundreds of thousands of disputes in Turkey every year. These take years to reach settlement; meanwhile, and unavoidably, all of the funds and investments in establishing the company are wasted, and the parties that once collaborated to raise the other's economic value become enemies.

In societies, judicial bodies should act as the last resort to settle disputes. These last resorts should be trusted by the members of the society in their capability to provide fairly perfect resolutions. This is the first condition of effective resolution of disputes, and how alternative mechanisms develop.

The second criterion that will bring effectiveness to the system is just how accountable the judiciary is in providing its services.

The German Judiciary System is three times more accountable in its actions as compared with the Turkish Judiciary.

Thirdly, the German Judiciary is twice as independent as the Judiciary of Turkey.

The important lesson to be taken from this analysis is abundantly clear: The more accountable that a judicial system is and, at the same time, the more capable it is to effectively resolve disputes, the more independent it is. Judicial systems deserve their independence given their high performance.



The core issue is this: The Judiciary deserves its independence only by providing effective resolutions to disputes and being accountable in its actions and decisions. Of course, the fact that Germany is more adept in its provision of the Rule of Law is not the only reason behind its advanced democracy. Germany is far better at accountability, participation in government, constitution, and the protection of its constitutional order.

I have written about my observations on these topics in my book, “TURKEY’S MIDDLE DEMOCRACY PROBLEMS AND WAY OF SOLUTION: The Judiciary, Accountability and Fairness in Representation.” In a short period time, 11,000 copies of my book have been distributed in Turkey. I would be happy if you would also obtain a copy, and share with me your feedbacks and opinions.

I would like to talk shortly about my observations, as follows:

The problems regarding the participation in government turns out to be related to the problems in the provisioning of the Rule of Law, mainly, in political parties, professional organizations, electoral law, central government, delegation and block lists.

The sad experiences of our country in recent years have shown us how important it is to effectively protect the constitutional order. On the other hand, as accepted by every person and every segment in Turkey, our current constitution, unfortunately, is not enough for the effective governance of Turkey with its population of 82 million, and its promising potential.

In this panel, I would like to share with you my observations about the Rule of Law and the Judiciary and, as well, my suggestions for solutions.

Freedom of opinion and expression is the priority that needs to be protected and developed in order for countries to move forward.

Different opinions develop each other. Where there is no difference in opinions, there is no progress. Freedom of expression and the right to information, on the other hand, allow the dissemination of, and learning from, different opinions and, thus, progress.

Indeed, between the 7th and 12th centuries, during the times when Turks accepted Islam, the most advanced civilization of that time was founded upon the different opinions that were flourishing in Central Asia. When the diversity of opinions was restricted, and the state power imposed a single way of thoughts and beliefs, this



advanced civilization began its decline. Four centuries later, the West advanced on the opinions of the mentioned Turkish-Islamic world, developed their own opinions in addition thereto and, in the end, rule the world today.

First of all, we need the Rule of Law for freedom of opinion and expression.

Some call it STEM and, when adding the arts component, it becomes STEAM (Science, Technology, Engineering, Arts and Mathematics), and say that countries will advance via learning and developing on the mentioned components.

Yes, STEAM is important to prosper. But before STEAM, the right to freedom of opinion, expression and information must be realized and guaranteed, because, even if you have the most advanced universities in the world, how can people benefit from each other's opinions if teachers and students in these universities cannot express their own opinions?

Recently, a friend of mine who is a professor of criminal law told me that someone he knew had sent him a cartoon via WhatsApp that satirized a political person, and that when he wanted to forward it to another friend of his. He was worried whether something would happen to him and, ultimately, did not send the message. If a university professor, a professor of criminal law, cannot convey different opinions to even a friend, not to mention the public, how can differing opinions find a way to be expressed?

Can the soul and mind of a person, who is worried about being caught at dawn and taken to court and immediately arrested for expressing his opinions or criticizing someone, feel free enough to make innovations? Does this make people want to come and work in our country and share their opinions?

In addition, in order to ensure the Rule of Law, we also need diversity of opinions, freedom of expression, and the right to information. Because it is only then possible to see and eliminate disruptions and irregularities in governance.

It is, therefore, essential that if Turkey is to progress like Germany has, it must have an effective, accountable, and fully independent judiciary that actively protects and develops freedom of opinions and expression.



For prevalence of the Rule of Law, it is not enough that the Rule of Law is merely present among private individuals or companies, to those who trade with each other, or to borrowers, lenders or those who are getting married or divorced.

What should be understood from Rule of Law is that it is superior to the Executive power, that the organs and elements of the Executive - in other words, public officials - are accountable in the eye of law. The accountability of the Executive requires it to be transparent in its actions and to share information about the public, with the public, to make decisions on behalf of society, to make timely and sensible decisions, to be predictable, and to comply with the law.

The accountability of the Executive also requires that public officials - civil servants and other officials - who assume executive duties - act in accordance with the law and, in the event of any negligence, violation or offense, should be accountable to the Judiciary for their actions and decisions.

Let us consider that you have capital and would like to invest that capital in the fight against our country's energy deficit in converting solar energy into electricity. In order to make this investment decision, you need information about alternative energy resources in order to substitute solar energy at night, or how to make the investment, where you can connect to the transmission network in order to transmit the electricity you produce, if no transmission network is present, and you must be informed about when it will be in place, etc. Such information should be transparent and available to the public so that anyone interested in such an investment should be able to access this information in equal terms.

Aside from this information, if you finally decide to make the investment, the conditions regarding whether you will be provided with the necessary investment permits must also be foreseeable. The merits of such decisions regarding the permits should be publicly announced, and the process should be trusted by the investors as being carried out under reasonable conditions complying with the norms of transparency.

You should also be able to go directly to the Judiciary and defend your rights if there happens to be any negligence, violation, or criminal offense against your rights.

Does the Judiciary fulfill its duty to ensure the Rule of Law effectively and efficiently?



I know that you will promptly say “no” as an answer to this question. But we should not be unfair by saying “No!” right away.

Let me first ask: Can the Judiciary act on its own as to the negligence, violation, and offenses of public officials or, in other words, can it function independently?

Our answer is a resounding “No!” This is because the Judiciary cannot function independently. It must obtain the permission of the Executive to inquire into any misconduct. You file a complaint with the prosecutor's office, but these petitions are sent to the public officer's supervisor saying “For your review.”

Secondly, are the elements of the Judiciary, judges and prosecutors sufficient enough in terms of quality, quantity, or the legal education they have received? Our answer is again a loud NO!

Thirdly, are the admission and appointment of judges and prosecutors based on merits and objective criteria? We need to place our hat forward and accept that yet again the answer is a big NO!

There may be fair historical reasons behind this situation. But this is not the issue of our discussion: Our aim is to design the future, and it falls to all of us to accept the truth in a sincere way. We must admit that the merits and objectivity in the Judiciary is failing.

My other question is: Do judges and prosecutors have any job guarantee; does it actually happen? NO. The recent Judicial Reform Strategy 2019 document stated that some judges would be provided with a geographical guarantee.

Imagine a judge who lives in Istanbul and whose two children are studying at university. If this judge is appointed to another city by a decree of The Council of Judges and Prosecutors (“CJP”), can he still afford to pay for the education of his/her children in İstanbul? Can such a judge make an independent decision that would reject a request of a member of the CJP who is responsible for such appointments?

I would surely cleanse the members of the CJP. I am not saying that they make such requests; I am just asking, as an example: If you were in that judge's shoes, if someone whose case you are investigating brought you the greetings of a CJP member, would you feel free to decide against that person?



That is what I want you to consider. When the CJP can appoint judges according to its own wishes, the citizen would eventually find a way to influence the judge's decision. What is worse is that when this becomes accepted by the public, society and the judiciary rapidly become corrupt.

My last question is: Do the processes that judicial bodies and elements have to comply with while performing their duties provide them with the opportunity to carry out their activities in the most accurate and efficient way? Unfortunately, no!

Facts regarding cases are hidden from the courts, and the ones that are finally declared are brought to the courts in very complicated ways, and are quite delayed. Lying to the court is considered as a right to defense. Legal professions have turned into professions of perfecting incomplete and unreal stories, of hiding and destroying facts and evidence.

The courts are expected to establish justice among such lies, although the truth is not being fully and frankly disclosed.

Moreover, the judges who are struggling with the burden of the proceedings must act as if they are the attorney for both sides, and work hard to collect the evidence and match any missing information for the sake of parties. On the other hand, the lawyers, who constitute 90% of the human resources within the Judiciary, are trying to cover the inadequacies of the experts who are appointed to the cases by the judges in an effort to cope with their enormous work loads.

In such a situation, what falls to our part is to accept and acknowledge that the Judiciary is unable to fulfill its duty, i.e. the duty of resolving disputes effectively and efficiently.

The truth of the situation is that the Judiciary cannot fulfill its duty effectively and efficiently, but is accountable for it.

In other words, does the Rule of Law also hold for judicial bodies and elements? Is the law superior to the Judiciary, itself?

Let us seek the answer, together:





Firstly, are the decisions of the CJP open to Judicial monitoring?

The CJP is the highest organ of the Judiciary; it makes decisions concerning the progressions in the careers of judges and prosecutors, their positions and appointments. Each year, thousands of judges are appointed from one place to another through rotation.

Among those thousands of decisions, there are always erroneous ones. We are aware of judges who do not like their places of appointment in Ankara are speaking of their concerns to the authorities and so on. Afterwards, decrees to amend the appointment decrees are issued.

Judicial auditing and objection against these decisions of the CJP do not exist. Objection to the decisions of the CJP is only possible in the case of dismissals from professions. Prior to 1981, however, objections to CJP decisions could be brought before the Council of State. That possibility was abolished in 1981.

Hence, the CJP, the highest organ of the Judiciary, is not accountable for its decisions and actions.

How many of the lawyers here in this room can say that the reasons behind theory judgments are reasonable and sufficient to justify the judgments?

Is there any jurist who has not seen dozens of dismissals of appeals due to fact that “the reasons for appeal are not seen,” as the only reason given.

Yes, we understand: The first instance courts and the courts of appeal are struggling under heavy workloads. But I would like to ask: Is there a rule that says that the right to justification can be waived in the face of such heavy workloads?

Almost all professionals of law know, and they are now expressing without hesitation that judges delegate their duties to experts, even though this is prohibited by law. Away from the courts, the parties and all types of monitoring, experts are chucking away at the case files.

Self-employed lawyers know much better: When an expert is appointed, the case is infested with expert disgrace. It takes a lot more time and effort to fix the expert gibberish than to settle a case.

The expert's law, which had been constructed without taking into consideration the warnings of the wise, placed the experts almost on the same level as deputy judges, making the corruption of the expert institution spread to the proceedings.

As if the transfer of judicial powers to experts is not enough, methods, such as compulsory mediation and settlement, are imposed.

How then can the judiciary -under these circumstances- effectively function, and which is not accountable, be independent? Does it deserve to be independent?

Six of the 13 members of the highest decision-making body of the Judiciary; namely, the CJP, are directly appointed by the Executive; the remainder are appointed by the political parties in the Grand National Assembly – and, thus, by the majority political party and, again, therefore, indirectly by the Executive.

Therefore, the Executive power determines the administration of the Judiciary, which is the power responsible for controlling and balancing the Executive. But the Executive's control in the Judiciary is not limited only to this. The Minister of Justice and its Undersecretary, which are elements of the Executive power, are the president of the CJP; the CJP cannot make decisions without the participation of these two.

The principle of a natural judge is widely distorted by the replacement of judges by regular or non-regular appointments before the close of their cases. The only way to ensure the independence and impartiality of judges and prosecutors, which is through geographical and seat guarantee, has not been available since 1981.

Furthermore, the Judiciary is dependent on the Executive power via the Administration, for its budget, judicial administration, and penalty execution system, and even via information processing systems. The ability of the Judiciary to react to the crimes of public officials who are under the command of the Executive depends on the permission of the officials' superiors to investigate. Therefore, it is clear that the Judiciary is not independent in the face of the international document.

In Turkey, it is, of course, known how to provide judicial independence and what elements it should contain. As a matter of fact, this issue is well-defined in the UN resolutions we have signed with 172 countries.



We know for sure that for our future, for our democracy, for peace and for prosperity, the Judiciary must be independent in order to be able to ensure the Rule of Law!

But, given our past unfortunate experiences, and the fact that Judiciary cannot effectively perform, and that it is not accountable for its actions and decisions and, in the face of the risk of the Judiciary being used as a tool to obtain political power, we end up saying: Oh, the Judiciary should not be independent!

It is this dilemma that is the root cause preventing the rapid progress of Turkey towards the bright future that I showed in the first slides. This dilemma is a complicated obstacle that the Turks and Turkey, themselves, create.

The key that will lead Turkey to a bright future is the solution to this dilemma. Once this dilemma is solved, then Turkey will satisfy the Rule of Law and become an advanced democracy.

For this dilemma to be solved:

The Judiciary should be made to function effectively and efficiently. The process of trials should be simplified and modernized, so that lawsuits that are currently taking four or five years, on average, in the courts should be finalized in 50 to 100 days, on average, in a single court hearing.

But while these reforms are undertaken, the quality of the exercise of jurisdiction should be considered as the top priority, any short-cuts that contain the risk of causing deterioration to the quality should be avoided.

The unbalanced workload distribution throughout the judicial process should be improved and duties and responsibilities should be distributed more proportionally to the judicial bodies – judges, prosecutors, attorneys - the quality of material truth, as well as the evidence brought to the courts, should be improved, and disputes should be effectively and promptly resolved.

Public prosecutors' authority to limit people's rights and freedoms must be subject to decisions to be made by special courts that are established with this purpose in mind. All judicial organs including, but not limited to, the CJP, judges, prosecutors and advocates, should be held accountable for their actions and decisions. Judicial reviews or legal remedies against the decisions made by the Council of Judges and Prosecutors



should be available, and the Council should be accountable for all of its decisions concerning judicial organs or components. The mechanism that allows judicial organs to make decisions concerning their own colleagues should be abrogated.

Personal or duty-related misdeeds of the members of higher judicial organs should be examined and prosecuted without the requirement of obtaining permission and following specific procedures. A specialized court should be created to conduct cases regarding judicial organs or components.

Once the effective and efficient functioning of the Judiciary and trust is achieved, higher judicial organs should be designed to be fully independent and accountable. Members of this upper body should be appointed with the participation of a wide range of the stakeholders in the society, and with broad representation so that no one can dominate.

What I say is that we should depend on our own power to carry out reforms. We can easily achieve these once we benefit from the wisdom that the competition of different opinions brings.

I remember the days when I was herding donkeys in the village: “One looks for the missing donkey of a stranger by singing a song!” We can search for our own donkey and find it the best. We do not need the EU nor international institutions to realize our Rule of Law and advanced democracy.

Afterwards, we will become the country that we dream of. We will have caught up with the level of contemporary civilization, achieve our privileged position among the developed countries as we deserve, will be able to shed light upon our own land, spreading the rule of democracy and law, enriching Turkey, and the world.