

# The Turkey Analyst

BI-WEEKLY BRIEFING

VOL. 1 NO. 16

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*Central Asia- Caucasus Institute*  
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# THE TURKEY ANALYST

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**CONCLUSIONS:** ca. 200 words that strongly state your conclusions about the impact of the event or issue.

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## TURKISH CONSTITUTIONAL COURT SETS FRAMEWORK FOR POLITICS

*Svante E. Cornell*

*Turkey's Constitutional Court has published its detailed reasoning in two landmark cases, in which it rejected the AKP government's lifting of the headscarf ban in universities, and found the ruling party guilty of having undermined secularism, but stopped short of closing down the party. While the two cases have been dismissed as political, a closer reading suggests a much more complex reality. The court offers a sophisticated legal and philosophical reasoning, seeking to balance competing principles. This could suggest that the Turkish Constitutional Court is seriously beginning to step into a role as the constitutional provider of check and balances.*



**BACKGROUND:** Turkey went through a hectic political week. On October 20, the trial in the Ergenekon conspiracy started; the day after, the Constitutional Court issued its reasoning in the case (decided on June 8) that rejected last spring's constitutional amendment lifting the headscarf ban in universities. Then, on October 24, the Court issued a mammoth 770-page reasoning in an even higher-profile case (decided July 30)

regarding the prosecutor general's demand to close down the ruling Justice and Development Party. The Constitutional Court has long been a controversial body. Over the past decade, it has handed down key rulings with important political implications – ranging from closing down political parties with orientations deemed to reflect political Islam or Kurdish separatism, to throwing out last year on a technicality the presidential election process in which the AKP's candidate, Abdullah Gül, was elected president by parliament. Hence, many observers within and outside Turkey have called the Court's legitimacy in the two high-profile cases decided this year into question.

The reasoning in the headscarf case comes as no surprise, following the reasoning of a 2005 decision

(Leyla Sahin vs. Turkey) by the European Court of Human Rights (ECHR), which upheld Turkey's ban on the Islamic headscarf in universities. It found that the amendments to articles 10 and 42 of the Constitution violated the principle of secularism enshrined in the Constitution. In its detailed reasoning, the Court argued that the suggested amendment would "indirectly change and make non-functional the basic features of the republic". The court reiterated that the use of religious symbols in university settings would generate a vehicle of pressure upon individuals that have chosen a non-religious lifestyle, or who have different political views or beliefs.



As for the second case, the reasoning carried much greater implications, given the mixed message sent by the Court in August. In its decision released July 30, the Court did find the AKP guilty of conspiring against the constitutionally enshrined secularism of the Turkish state, and that it had functioned as a focal point of anti-secular activities. However, all the same, it found that the party's activities did not warrant its closure, and delivered the relatively mild punishment of cutting the party's state financing by half. (See August 29 issue of the Turkey Analyst)

Four judges in the 11-member court wrote the majority opinion, as they supported the declaration of the AKP as a focal point for anti-secular activities, but did not find that these warranted the party's closure. Six judges, just short of the qualified majority needed for a decision, actually wanted to go further and close the party; these six judges wrote a dissenting opinion, though they supported the majority opinion. Finally, though vastly outnumbered, the court's Chairman, Hasim Kiliç, wanted the case to be rejected wholesale, and authored a dissenting view to that effect.

The majority opinion delivers a strong blow to the AKP. It finds it beyond doubt that the AKP has purposefully and over an extended period of time sought to undermine the secular principles of the republic, instead seeking to build the basis of a society ordained along religious principles. The Court decision also makes clear that Prime Minister Recep Tayyip Erdogan has been the leading force in the AKP's efforts to undermine secularism, while also listing a number of party officials that it finds especially implicated.

In its reasoning, the Court specifically raises the headscarf amendment as an example of anti-secular activities, but also cites the systematic efforts to broaden religious education, including the party's aggressive efforts to lower the minimum age for children to be registered in Quranic courses, and to facilitate the acceptance of graduates of religious high schools to universities. The Court also noted the AKP government's staffing policies, especially the fact that it has given precedence to religious views over merit-based criteria in appointments to high-level positions in the state bureaucracy. In addition, the court notes the AKP government's policy to emphasize the celebration of religious holidays over national ones.

The court's reasoning for deciding not to close down the AKP, in spite of these findings, merits equal attention. The Court finds that the prosecution failed to prove that the AKP has "encouraged the use of violence" to accomplish its aims; or, alternatively, that the AKP had "turned into a party aiming to eradicate democracy and the rights and freedoms recognized in a democracy". In addition, the Court noted the AKP government's positive record in the areas of human rights, specifically the improvement of the rights of women and minorities, as well as the abolition of the death penalty.

**IMPLICATIONS:** Two implications stand out from the court's decisions. First, the court's reasoning must lead to a reassessment of Turkey's political struggle, which has been largely perceived to be purely about power rather than principle. The court's sophisticated reasoning, based to a large degree on European and international law, suggests that this interpretation is at best simplistic. Secondly, the court reasoning provides the framework for the AKP's continued exercise of power. This entails that the main question determining Turkey's near-term future will be whether the AKP accepts this framework, or whether it will seek to undermine the institutions underwriting it.

On the first issue, it is worth recalling that the Court's decision had been unexpected: Almost all Turkish pundits had expected the AKP to be closed. This expectation had been based on a perception of the judicial process as entirely politicized, and as a mere formality. The logic was that the secularist state establishment had decided to destroy the AKP; rather than doing so through a military intervention, it had supposedly decided to close the party through a "judicial coup". Erdogan and other leading AKP members would be prohibited from politics, thereby decapitating the Islamic movement and opening the door to power

for forces more amenable to the secularist state's wishes. Hence once the decision to close the party had been arrived at, the judicial process was seen as a formality. When this did not happen, a number of theories emerged, including in this publication, to explain the court's leniency. The most popular ones featured external pressure on the secularist state institutions by Europe and the U.S.; the weakness of these institutions in the face of the AKP's growing influence and popular support; and speculations that a form of compromise had been reached between the warring power centers in the country.



While such analyses cannot be discounted, the Court's reasoning does merit closer study, as it suggests both a sophisticated analysis and an attempt to weigh competing legal and philosophical principles against one another. In the headscarf case, the court rejected the AKP's attempt to introduce a libertarian definition of secularism. The AKP has long sought to recast secularism as an issue of individual freedom of religion, as opposed to the state's traditional definition, which emphasizes freedom from religion, ensuring that both the state and individuals are protected from religious dogma. In its ruling, the court engages in a principal argument on how secularism should be defined.

This issue may seem irrelevant in the West, but it is of crucial importance in a Muslim country where the societal and political force of religion is incomparable to what is the case in Europe.

The Court's reasoning in the AKP closure case is also principally interesting, as it acknowledges the complex and to some extent contradictory nature of the AKP. On the one hand, the reasoning acknowledges that the AKP has implemented serious reforms that have improved human rights in many areas; on the other, it makes it abundantly clear that it has indeed sought to realign Turkey's

state and society along religious lines – something that in the long run cannot fail to undermine the foundations of liberal democracy.

What is more important, both cases highlight the importance accorded by all forces in Turkey to European legal principles and institutions. Indeed, both the AKP and the prosecution have sought to rest their arguments on European legal principles. The AKP cloaks its entire program in the improvement of individual rights, and has seen Europe as the chief cheerleader in its efforts to weaken the “rigid” Turkish state. This, in turn,



*AKP Headquarters, Ankara*

explains the AKP's utter disappointment with the ECHR's 2005 ruling. Likewise, in the closure case, the prosecutorial argument began with a long treatise on the permissibility in European and international law of the closure of political parties. And in both cases, the Court rested a solid portion of its reasoning on European legal principles. In the headscarf case, this was the ECHR's 2005 ruling; in the closure case, it was the Venice Commission's principles, specifically as concerns the advocacy of the use of force as a prerequisite to closing a party.

Meanwhile, the court's reasoning carries political implications. While allowing the AKP to continue to govern, it has effectively branded the party – and the prime minister personally – as forces seeking to undermine the constitutional order. Assuming that the jurisdiction of the Court is accepted, that obviously serves to weaken the legitimacy of Erdogan's personal leadership, as well as the AKP as a whole. In such a perspective, the rulings could be said to have drawn a framework for the AKP's continued stay in power. The headscarf ruling may effectively shelve any attempts by the AKP to unilaterally amend the constitution, let alone proposing an entirely new one. The ruling in the closure case, meanwhile, could be interpreted as a warning to the AKP. On the one hand, the court tells the AKP to continue with its democratic reforms and EU harmonization – more or less explicitly saying that those efforts saved it from closure. On the other, the court effectively warns the government that any further efforts to undermine the secular state are likely to lead to its closure. But the AKP will also be tempted to interpret the rulings of the court as an admittance of secularist weakness..

**CONCLUSIONS:** The AKP's interpretation of, and reaction to, the court's decisions will frame the nature of Turkey's protracted political crisis.

Simply put, the AKP has a choice. It can either accept the framework presented to it by the court for its continued tenure in power as a manifestation of checks and balances in the system; or challenge the very legitimacy of that framework. Should it choose the former option, it would be likely to return to a focus on general democratizing reforms, and to abandon, at least for the time being, its efforts to undermine the secular order. That would provide Turkey with the type of political stability that it enjoyed in the AKP's early period in power in 2002-5.

Unfortunately, the AKP's initial reaction has been the opposite. Prime Minister Erdogan reacted strongly to the court's reasoning, blaming it for undermining "the will of the people". Moreover, senior AKP representatives have threatened to undermine the Court's powers, and to expand its membership – a not-so-veiled reference to inserting loyal AKP supporters to an expanded court and thereby gaining control over it.

The AKP's initial reactions make it clear that Erdogan continues to focus on a simplistic, majoritarian understanding of democracy as the will of the people, accepting no check and balances. Effectively, this indicates that the AKP has yet to come to terms with the idea of constitutional or liberal democracy – where the state institutions have the explicit purpose not of protecting the majority but of reining it in. If the government continues to pursue such a reasoning, Turkey's political crisis is unlikely to be resolved anytime soon.

On the other hand, the recent episode has shown a level of maturity on the part of the Constitutional Court that is seldom ascribed to it. It has shown a capability of stepping into a position as the institution providing checks and balances in the Turkish political system. That is a tendency to be recognized and supported.

## ERGENEKON TRIAL: BREAKING WITH THE DEEP STATE PAST, OR ARE THE TABLES SIMPLY TURNED?

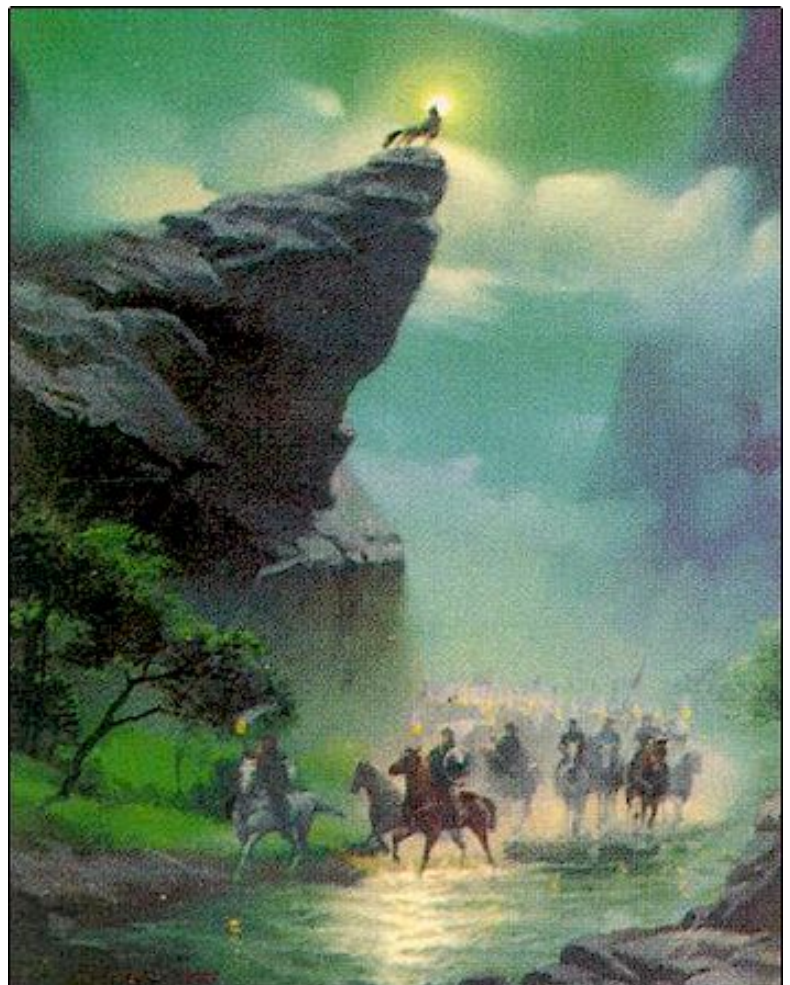
*Halil Magnus Karaveli*

*The trial against the alleged “Ergenekon” conspiracy would seem to suggest that Turkey is about to settle accounts with its “deep state”, thus auguring a more liberal, more transparent state. However, the judicial procedure in the case so far has been marred by deficiencies and outright violations of human rights that undermine its legality. The Ergenekon trial is yet another chapter in what is a political battle..*

**BACKGROUND:** Ergenekon is the name of the mythical valley in the Altai region of Central Eurasia from which the Turks, according to their founding myth, were led to liberty by a wolf. It is a name that has come to acquire right-wing nationalist connotations; today it is used to designate the alleged acts of shady, anti-democratic, ultra-nationalist groupings within the security apparatus of the Turkish state – the so called deep state.

According to the prosecution in the Ergenekon case, a miscellaneous group of former generals, journalists, academics, various professionals and criminals appropriating that name ganged together with the intention of bringing down the moderately Islamic AKP government. The group includes leftists as well as rightists, but the common denominator is their opposition to the AKP government. After several waves of arrests during the past year, the trial against the 86 suspects – of which 40 are held in custody – began on October 20 at the premises of the Silivri prison, located

some sixty kilometers west of Istanbul. The proceedings got off to a bad, chaotic start, as the premises were revealed to be inadequate, leading



the court to decide to separate the trial of those who are held in custody and of those who are not.

There is no doubt that a “deep state” really does exist in Turkey. Its existence, significantly the ties between various groupings within the Turkish state security apparatus and elements of organized crime, were exposed in the mid-1990s. The suspicions concerning such a structure, that it in fact pulls strings in the shadows, manipulating

of these were well-known secularists, and their assassinations were at the time attributed to Islamic fundamentalists with alleged ties to the Islamic republic of Iran. Such a connection cannot be ruled out. However, as the perpetrators remain unknown, the suspicions about the possible involvement of shady elements of the Turkish state have inevitably lingered on. Notably, former Interior minister Mehmet Agar is reported to have



told the widow of the well-known center-left, secularist journalist Ugur Mumcu – who was blown to death in 1993 – that it would have been impossible to inquire into the

political life with targeted assassinations that serve to create the environment for desired changes of political course, have been voiced ever since the late 1970s, when Turkey was ravaged by the violence of the extreme right and the extreme left. To this day, the run-up to the 1980 coup remains unresolved. Since then, Turkish commentators in general have come to question the assumption that these groups acted independently; rather, there are growing allegations that at least part of the violence was in one way or another orchestrated by a covert state security organism that sought to and managed to create the conditions for the military coup of 1980.

The same kind of suspicions have come to be voiced about the wave of assassinations of academics and journalists from 1990 to 1999; most

assassination, since that would have displaced to many bricks in the state structure.

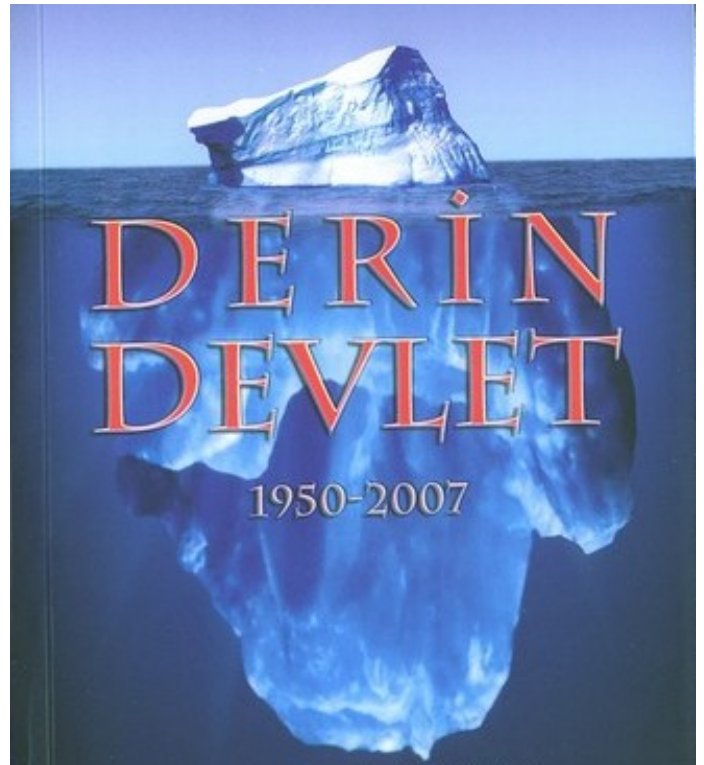
**IMPLICATIONS:** Certain ingredients of the Ergenekon case do seem to fit into a broader pattern of “manipulated” political violence: The prosecutor holds that the 2006 assassination of a secularist judge and the bombings the same year of the premises of the secularist, center-left daily *Cumhuriyet* (which caused no serious damage) were in fact the makings of the Ergenekon gang.

Influential columnist Fehmi Koru of the daily *Yeni Safak*, which is close to the ruling AKP, hailed the Ergenekon trial as a settling of accounts with “Turkey’s last, mostly lost, fifty years.” “It may of course be legitimate to ask if those on trial are responsible for the pre-1980 violence and the

assassinations of the 1990s, but we should hope that the prosecution will succeed in persuading the judges, after which we will be in a better position to ascertain which individuals were implicated in what acts”, Koru wrote. The fact that Fehmi Koru, who is known to be close to Prime Minister Recep Tayyip Erdogan, more or less explicitly makes an association between the present case and violent events thirty years ago is telling. Such an association serves to enhance the image of the trial as a heroic assault on an anti-democratic state structure, and not un-importantly, to further tarnish the opposition figures who stand accused in the Ergenekon case. In fact, nothing suggests that any light at all will be shed on earlier, deep state history; indeed, the same day as the Ergenekon trial began, another court declared that the period for prosecution in the case of a bombing in 1978 – when seven Istanbul university students were killed and forty one were injured – had expired.

While commentators who support the AKP government chose to interpret the Ergenekon case as a settling of accounts with the inner, anti-democratic security structures of the state, those who are in opposition to the AKP hold that the case is political, and that it is as such intended to intimidate the secularist opposition. The political nature of the case has indeed been underlined by Prime Minister Erdogan, who has declared himself “the chief Ergenekon prosecutor”. Even a conservative commentator as Taha Akyol of Milliyet, who is a supporter of the ruling party, recently voiced his concerns that a large part of the prosecutor’s case seems to rest on the assumption that political commentaries made by opinion makers can constitute evidence of crime. Notably, the prosecutor has submitted the writings of the publisher of Cumhuriyet as evidence that he was implicated in the bombings of the newspaper. In a column in 2006, after Cumhuriyet had been

bombed twice, Ilhan Selcuk had reacted to the lack of media interest in the attacks, and written “do we have to see to it that we are bombed again in order to get the attention of our colleagues?”. Selcuk – who faces life sentence for “terrorism” – recently wrote that “it is incredulous that the prosecutor – who should be able to understand the nature of writing – could interpret my words as a call for a criminal act”.



*The Deep State: Cover of Cüneyt Arcayürek’s Book*

It is probably safe to assume that some of the 86 accused could have been implicated in illegal activities. Yet, even so, that does not mean that the Ergenekon trial constitutes a settling of accounts with the inner security structures of the state. On the contrary, the evidence suggests that there is tacit collusion between the deep state and the AKP government. If there indeed was a plot against the government, then it was not sanctioned by the primary custodians of the

security of the state, the high military command. The fact that two former, four-starred generals are among the detainees (the formal charges against former generals Sener Eruygur and Hursit Tolon are however yet to be made) is indicative both of the unrest that by all accounts simmers in military ranks, but also concurrently of the cooperation of the General staff with the prosecution, since the detention of the generals would have been inconceivable lacking the tacit approval of the General staff.

According to former member of parliament Mehmet Elkatmis, who chaired the parliamentary inquiry commission about the deep state after the ties between the inner, security structures of the state and organized crime were revealed in 1996, “the main reason that the Ergenekon inquiry has been able to make progress is the change of mentality within the military.” Recalling that the military had desisted from giving any assistance to the parliamentary Susurluk investigation, Elkatmis continued by stating that “today we can observe that the High Command displays much greater sensitivity. There is a change of mentality. They realize that things have to change and want the issue to be pursued.”

If so, that change of mentality has probably something to do with the events that reportedly took place within the military in 2003 and 2004, when a fierce, internal battle was allegedly fought within the High Command, in which leading generals, including Ergenekon-suspects Sener Eruygur and Hursit Tolon pleading for a coup. In the end, the proponents of a coup were defeated. Against such a backdrop, the alleged Ergenekon coup plot, if there ever was one, takes on the look of being the doing of free-lancers acting on their own, rather than being the result of the machinations of deep state structures



**CONCLUSIONS:** That would be reassuring, demonstrating a certain democratic evolution of the Turkish state, deep or otherwise. Yet, the way the Ergenekon case has been conducted serves as a caution against too optimistic assumptions of democratization. Riza Türmen, a former Turkish judge at the European Court of Human rights, has warned that the proceedings in the case are indeed far from measuring up to the criteria set by the European Court of Human rights, and that there is consequently a strong case to be made for it to be declared a mistrial. The former judge notably observed the fact that several of the suspects have been held in detention for a long period of time without any charges being brought against them, that wire-tapping has been indiscriminate and used without due consideration to the right of privacy of citizens, that the records of the wire-tapping have been disseminated in the media, and that the prosecution relies heavily on secret witnesses. In Türmen’s view, this adds up to making the Ergenekon trial a strong candidate for a declaration of mistrial by the European Court of Human rights.

## THE FORTNIGHT IN REVIEW

### SECTION I: WHAT THE COLUMNISTS SAY

*The beginning of the so called Ergenekon trial against alleged coup plotters was widely commented in the Turkish media. While commentators who support the AKP government hailed the trial as a settling of accounts with the so called “deep state”, those who tend to be critical of the government called the legality of the Ergenekon case into question.*

#### AKYOL: THE CASE IS SHAKY

Although he sees it as important that the charges against the alleged Ergenekon suspects are investigated, Taha Akyol of Milliyet admits to being worried about the legal foundations of the prosecution’s case. The wire-tapping and the obvious breaches of the right to privacy of individuals cast a serious shadow over the legality of the case. “I am also worried that the prosecutor may have been unable to draw the proper line between what constitutes legitimate, political commentaries



and calls for illegal acts. I am worried that too much of the case rests on interpretations of what opinion-makers have said. Political statements do not add up to legal evidence of crimes. Still, it is an undeniable fact that a military coup was planned in 2003 and 2004. It is unacceptable that that should remain uninvestigated..

#### ASIK: THE REAL ERGENEKON

Melih Asik of Milliyet recalls the attack on university students in Istanbul that took place in March 1978, when seven students were killed and over forty were injured. The same day as the Ergenekon trial started, we get the news that the period for prosecution has expired; the perpetrators of the Istanbul bombing in March 1978 will never stand trial.

That is the real deep state: its acts are never exposed in trials.

### **TÜRMEEN: ERGENEKON GOT OFF TO A BAD START**



Riza Türmen, a former judge of the European Court of Human rights, notes in *Milliyet* that the start of the Ergenekon trial was chaotic. What is important now is that the trial is

pursued in accordance with the rules of law, and that a ruling that does not give rise to any suspicions about its legality can be arrived at. For that to happen, politicians as well as the media carry a responsibility. The court must be trusted, and statements that are intended to influence the judges should be avoided. The judges must be able to arrive at their decision in an atmosphere of total isolation, in which only the voices of their own consciences are heard. Justice requires the seclusion of the judges. To guarantee that is everybody's responsibility

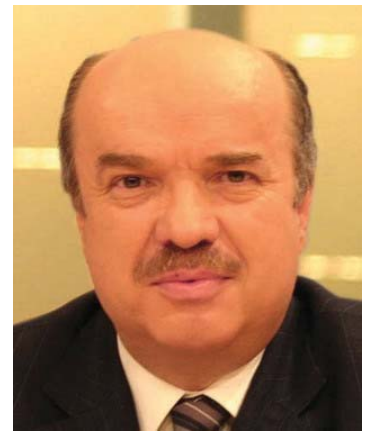
### **ÜLSEVER: THE POLITICAL IMPLICATION OF THE ERGENEKON TRIAL**

Cüneyt Ülsever of *Hürriyet* writes that he does not subscribe to any one of the two narratives about the Ergenekon trial: This is neither a settling of accounts with an anti-democratic, dark-faced deep state, nor a

punishment of those who have dared to oppose the AKP. Admittedly, there are dose of the two in the sauce, but the real signification of the trial is to be found elsewhere. The institution that is really targeted is the Turkish armed forces. The United States has decided that the Turkish military stands in the way of its plans for the Middle East, notably concerning the fate of Northern Iraq. It is in that perspective that it becomes imperative to threaten Turkey's military into submission.

### **KORU: LET'S TRUST THE COURT**

What is really on trial in Silivri is in fact Turkey's last, largely lost fifty years, writes Fehmi Koru of *Yeni Safak*. Koru reminds of the years of violence in the 1970s and of the wave of assassinations of



intellectuals in the 1990s. I know, it may be asked what those who now stand trial had to with those acts of violence. But, let's trust the court and hope that the prosecutor will convince the judges, after which we will be in a better position to ascertain which individuals were responsible of what.