Turkey's People Grapple With

Unjust Law

By Itir Yakar

Growing up in Turkey until the age of 15, I didn't know any Armenians.

In fact, it wasn't until I moved to the United States and became a minority myself that I learned about my home country's rich yet uneasy ethnic and religious makeup.

When I came here I knew two things about Armenians. One was a familiar Turkish sound bite: They perished in exile in 1915 after they collaborated with the Ottoman Empire's enemy in World War I, the Russians. The second was that you could know somebody was Armenian by the "-yan" suffix in their last names. This last one was offered by a history teacher.

I certainly was not prepared for the anger some of the Armenians I met here had toward Turks, nor did I know the pain in their history. They said my ancestors had implemented a campaign of genocide against the Armenians, which the Turkish government denies to this day.

On Jan. 19, Armenian journalist Hrant Dink was murdered after publicly arguing for years that there had been a genocide. Dink, 52, the founding editor of Turkey's sole Armenian newspaper, was shot point-blank in the head and neck on a busy Istanbul street. He was killed for his courageous assertion of freedom of speech and human rights in Turkey — probably by someone who had never read his columns.

Just months before his murder, Dink was convicted under Turkey's controversial new law that makes it a crime to "insult Turkishness." Those convicted under the law can be imprisoned between six months to three years. Dink received a suspended six-month prison sentence.

The law prescribes additional jail time if the purported insults are made through the media or abroad.

As a Turkish citizen working as a journalist in the United States, I am subject to this law. But I find inspiration in Dink's life, as I hope other writers will inside and outside of Turkey.

According to a 2007 Reporters Without Borders report, 65 people, including numerous journalists, have been prosecuted under the law, Article 301 of the Turkish Penal Code. Turkish law lets private citizens bring charges against others they suspect of breaking the law. In most cases, including Dink's, ultranationalist lawyers brought the charges.

In his final column, published a day after his murder, Dink recounted how he was called in to the Istanbul mayor's office in 2004 and warned that his writings might create a tense atmosphere in the country.

He also wrote about the hundreds of death threats and hate mail he had been receiving. Dink said he was particularly disturbed by one sent from the city of Bursa, near Istanbul, because it warned of imminent danger. He noted that he had not received any results after turning the letter in to local prosecutors.

"2007 will probably be a more difficult year for me," he predicted in the column. "Prosecutions will continue, new ones will begin. Who knows what other injustices I will be faced with."

Dink described living in a state of psychological torture after his conviction but still had the utmost faith in Turkey. He had resolved not to leave for Western countries.

The truth is that the law against "insulting Turkishness" cannot be the will of a confident nation.

"Comfort would bother me!" Dink wrote. "It wasn't in my nature to leave 'boiling hells' for 'ready heavens.'"

In the days since Dink's murder, many Turkish officials promised to bring his assailants to justice. But it seems convenient for a government that passed a law so blatantly antithetical to freedom of conscience and expression — and stood by as Dink received death threats — to now turn around and decry his murder.

The truth is the law against "insulting Turkishness" cannot be the will of a confident nation. Such a country would welcome opposing views and unpopular speech, as Turkey should do, and not make it a crime to utter them.

The Turkish public should demand that lawmakers immediately repeal the 2005 law. Pending cases brought under the law must be dismissed. So must the remaining cases against Dink.

For Dink's mourners, a beam of light has given us hope in recent weeks. It is the thousands of Turkish citizens who took to the streets to condemn Dink's murder and the 100,000 across ethnic and religious backgrounds who attended his funeral in Istanbul last month.

Dink's killers surely did not anticipate that their bullets would mobilize thousands to declare "We're all Armenian, we're all Hrants!" at his funeral, declarations unimaginable until that day.

The thousands must not let up. They must preserve their united spirit to demand some real answers into the ugly forces of hatred and intolerance that resulted in Dink's politically motivated murder.

The investigation that has been started should be conducted according to the highest standards. This is even more crucial after news broke across Turkish media that Turkish police officers who arrested Dink's killer first offered him a congratulatory welcome and took photographs with him with a Turkish flag.

The Turkish public's next challenge should be to help create peaceful forums of open discussion on the subject of the massacre of the Ottoman Armenians at the turn of the 20th century.

It is all too easy to label as traitors those who challenge the official government line, as Dink did, and characterize their views as "insults on Turkishness." In my mind, the real insult on Turkishness is the creation of an atmosphere in which journalists and the public at large cannot voice their opinions for fear of persecution and death.

Dink became the 62nd journalist to be killed in Turkey since 1909. It must stop now. Journalists should be encouraged to keep on writing freely, not be forced to check their surroundings for possible threats as Dink was.

Finally, Turkey should start acknowledging and teaching its children that its minorities — including Armenians, Kurds, Greeks, Assyrians, Roma, Alewites, Jews and Christians – are not a threat to the physical and social unity of the country and that, quite to the contrary, Turkey is all the richer for it.

I, for one, don't know if I will forgive myself for not writing this column when Dink was first charged with and convicted of betraying his country. Looking back, I must have resigned to that sense of "what I have to say won't change anything," that I had no way of reacting other than bafflement. Today, I no longer have the luxury.

I find strength today in the 100,000 people who trailed down the streets of old Istanbul on the day of Dink's funeral, a procession that promised hope.

I also find hope in the dozens of people I've met in the San Francisco Bay Area since Dink's murder who have mobilized to work toward a new dialogue between Armenians and Turks.

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Associated Press

Demonstrators carry a picture of the slain journalist Hrant Dink and a banner that reads "Damn to murderers of Hrant Dink!" during a protest in downtown Istanbul, Turkey Jan. 19, 2007. Thousands of Turks marched down the street where Dink was killed.

Justice Thomas Is a Cogent Thinker

By Edward J. Loya Jr.

Over the years, Justice Clarence Thomas has acquired an ill-deserved reputation as a detached jurist who does not engage his colleagues or the lawyers in the cases that come before the Supreme Court, and he often has been accused of riding Justice Antonin Scalia's intellectual coattails for want of a developed jurisprudence of his own. But if January is any indication, 2007 may be the year for reconsidering these characterizations.

With the publication of "Supreme Conflict: The Inside Story for Control of the United States Supreme Court," ABC News legal correspondent Jan Crawford Greenburg has brought to light important records (such as the papers of Justice Harry Blackmun), and made a strong case that Thomas is not the "dutiful understudy to Scalia" but rather an independent-minded justice who has been making an impact on the court since his first private conference with his colleagues.

Brooklyn Law School professor emeritus Henry Mark Holzer follows Greenburg with "The Supreme Court Opinions of Clarence Thomas, 1991-2006: A Conservative's Perspective," in which he examines 346 majority, concurring and dissenting opinions written by Thomas during his 15 complete terms on the court. The study presents Thomas as a cogent, consistent and principled thinker.

Take, for example, Thomas' Eighth Amendment jurisprudence. The amendment, enacted in 1791 as part of the Bill of Rights, provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In *Robinson v. California*, 370 U.S. 660 (1962), the Supreme Court made the Eighth Amendment applicable to the states through the Due Process Clause of the 14th Amendment.

According to Holzer, "[t]he Eighth Amendment's Cruel and Unusual Punishments Clause has been bedeviling the Supreme Court in recent years and appears to be an area of special interest to Justice Thomas." Analyzing Thomas' dissent in *Hudson v. McMillian*, 503 U.S. 1 (1992), Holzer shows that Thomas does not find the clause so perplexing.

For 185 years, the Cruel and Unusual Punishments Clause was understood to apply only to torturous punishments mandated by statutes or sentencing judges — that is, a fine, penalty or term of confinement imposed on a person by legal authority and the judgment and sentence of a court for the commission of a crime or offense.

The case of *Estelle v. Gamble*, 429 U.S. 97 (1976), marked a fundamental departure from this two-century-old understanding. *Estelle* applied the Cruel and Unusual Punishments Clause for the first time to prison deprivations that were not formally imposed as a sentence for a crime, and the decision held that the Eighth Amendment proscribes "deliberate indifference" to serious medical needs of prisoners.

The court synthesized the post-*Estelle* decisions in *Wilson v. Seiter*, 501 U.S. 294 (1991), recognizing that, to state an Eighth Amendment prison-deprivation claim, an inmate must satisfy both the "objective" component (Was the deprivation sufficiently serious?) and the "subjective" component (Did the official act with a sufficiently culpable state of mind?) of the Eighth Amendment.

Against this background, and in Thomas's first term, the court decided *Hudson*. The issue was whether the use of force against a prisoner can constitute cruel and unusual punishment when the inmate does not suffer serious injury.

In a 7-2 decision, the court answered in the affirmative. Writing for the majority, Justice Sandra Day O'Connor stated that, in an excessive-force case, the core judicial inquiry is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." The absence of serious injury, O'Connor wrote, is "relevant to the Eighth Amendment inquiry, but does not end it."

Thomas did not think so, and he dissented. "In my view," he wrote, "a use of force that causes only insignificant harm to a prisoner may be immoral, it may be tortious, it may be criminal, and it may even be remediable under other provisions of the Federal Constitution, but it is not cruel and unusual punishment."

After explaining that the court's early Eighth Amendment decisions and the scholarly commentary written in the 19th century made no reference to protection against harm that was not imposed as part of a criminal sentence, Thomas observed, "[our judges and commentators] simply did not conceive of the Eighth Amendment as protecting inmates from harsh treatment."

With candor rarely found in a Supreme Court opinion, Thomas told us what he really thought about the case. He stated, "Today's expansion of the Cruel and Unusual Punishments Clause beyond all bounds of history and precedent is, I suspect, yet another manifestation of the pervasive view that the Federal Constitution must address all ills in our society."

Thomas concluded, "The Eighth Amendment is not, and should not be turned into, a National Code of Prison Regulation."

Needless to say, Thomas's dissent was extremely controversial. As Holzer puts it, "when the *Hudson* case came down, [liberals] lambasted Thomas wrongly — and viciously — for being a justice indifferent to physical abuse of a prisoner."

Even a cursory review of the newspaper coverage of the *Hudson* decision reveals the importance of Holzer's attempting to set the record straight. Thomas' dissent, critics argued, served as "payback" for the way he was treated during the confirmation process. It proved that, although Thomas had risen from poverty and overcome discrimination, he had not "learned any lessons." It showed that Thomas' statements before the Senate Judiciary Committee — particularly his comment about the busloads of prisoners he viewed from his window at the District of Columbia Circuit ("I say to myself almost every day, there but for the grace of God go I.") — were "insincere" and "calculating." And as an article in The New York Times put it, the dissent established Thomas as "the youngest, cruelest justice."

Of course, Thomas' dissent did no such thing. Putting aside their failure to engage in an intellectual debate about the Eighth Amendment, as well as their tendency to demean Thomas by resorting to character assassination, the "Thomas-haters" overlooked what Holzer rightly recognizes as "an important point central to [Thomas'] federalism jurisprudence": The primary responsibility for preventing and punishing abusive prison conduct "rests not with the Federal Constitution but with the laws and regulations of the various states."

By meticulously examining cases such as *Hudson*, Holzer places many important issues in the broader context of the court's constitutional jurisprudence and demonstrates the sober and appropriate means by which Thomas dealt with them. Holzer not only forcefully rebuts Thomas's critics but also better prepares readers to distinguish between baseless criticisms and meaningful debate.

The book would have been even more valuable if Holzer had addressed the view that, in some areas, Thomas has abandoned his originalist position to promote a "conservative agenda." (For instance, University of Chicago law professor Cass Sunstein argues that Thomas has "voted in favor of striking down affirmative action programs without even bothering to investigate the question of whether such programs are inconsistent with the original understanding of the Fourteenth Amendment.") But before one considers whether Thomas has deviated from his originalist philosophy, one should learn to appreciate — and accept — Holzer's basic thesis: Thomas is a thoughtful conservative whose originalism deserves more careful attention.

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Book Review

Holzer, Henry Mark. "The Supreme Court Opinions of Clarence Thomas, 1991-2006: A Conservative's Perspective" (McFarland & Co., 232 pp., $39.95)