

Turkey's Constitutional Reform and the 2010 Constitutional Referendum

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Most observers, Turkish and foreign alike, acknowledge that Turkey has a constitutional problem. It is paradoxical that Turkey, after more than six decades of competitive multi-party politics, has not been able to consolidate fully its democratic regime and in this regard lags behind some of the newer “third wave” democracies, such as the three Southern European countries (Spain, Greece, and Portugal) and many Eastern European democracies. The immediate blame for this failure may be laid at the feet of the Constitution of 1982, the product of the military regime of 1980-83 (the National Security Council, NSC regime). The military rulers of this period blamed what they saw as the excessive liberalism of the 1961 Constitution for the breakdown of law and order in the late 1970s. Consequently, they set out to make a constitution that would strengthen the authority of the state at the expense of individual liberties and to create a set of tutelary institutions that would exercise strict control over elected civilian authorities. This meant a considerable narrowing down of the legitimate area of democratic politics. It has often been observed that the primary goal of the 1982 Constitution was to protect the state against the actions of its citizens, rather than to protect the citizens against the encroachments of the state, which is what a democratic constitution should do.

It is no wonder that the 1982 Constitution, devised through entirely undemocratic and unrepresentative procedures that left the final say to a five-member military council, led to a constant wave of criticism and demands for change as soon as civilian authority was restored in the fall of 1983. Consequently, the Constitution has undergone 16 amendments since 1987, some major, others minor. The general trend of constitutional change has, no doubt, been towards liberalisation and democratisation, so much so that the EU Commission observed that Turkey “has sufficiently satisfied the Copenhagen political criteria,” thus opening the way for accession negotiations to commence at the beginning of 2005. It is commonly admitted, however, that such reforms were not sufficient to completely eradicate the authoritarian, statist and tutelary legacy of NSC rule.¹ On the other hand, it would be a simplification to blame Turkey's constitutional problems entirely on the NSC legacy. As I have tried to explain elsewhere in greater detail, deeper problems can be found in the incompatibility between the requirements of a truly liberal democracy and some of the principles of the founding philosophy of the republic (Kemalism).² Notably, three principles (nationalism, populism and secularism as understood during the single-party period) still create obstacles to the development of a genuinely liberal and pluralistic political system. Turkish nationalism, while never racist, nevertheless carried ethnicist overtones. Thus, the Republican People's Party (CHP) programme of the 1930s and 1940s defined the nation as a “body of people united in language, culture, and ideal.” The insistence on

¹ For details, see Ergun ÖZBUDUN and Ömer Faruk GENÇKAYA, *Democratization and the Politics of Constitution-making in Turkey*, Budapest and London: Central European University Press, 2009; and Ergun ÖZBUDUN and Serap YAZICI, *Democratization Reforms in Turkey, 1993-2004*, Istanbul: TESEV Publications, 2004.

² Ergun ÖZBUDUN, “Turkey: Plural Society and Monolithic State.” Paper presented at the conference on “Democracy, Islam, and Secularism: Turkey in Comparative Perspective,” 6-7 March 2009, Columbia University, New York.

linguistic and cultural unity and the goal of creating an extremely homogeneous society make it difficult, even today, to recognise a legitimate space for cultural and linguistic diversity and thus lie at the root of Turkey's Kurdish problem.

Similarly, populism as defined in this period was clearly synonymous with corporatist and solidarist ideologies that rejected class struggle and entrusted the paternalistic state with the duty of harmonising the diverse but compatible interests of occupational groups. Another ideological principle of the CHP, statism (or *étatisme*), was seen as a method of accomplishing such harmonisation.³ Secularism was understood not as the separation of governmental and religious spheres, as in most Western democracies, but as a total way of life and a totalistic positivist ideology that aimed to consign religion solely to the conscience of individuals and to deny it a legitimate role in the public sphere. As a corollary of this revolution from above, the state elites that spearheaded the Kemalist revolution have maintained a paternalistic and tutelary attitude towards civilian democratic politics coupled with a deep distrust of civilian political actors. The Kemalist ideology and its tutelary mentality are strongly reflected in the 1982 Constitution.

More importantly, the 1982 Constitution's statist-solitarist-tutelary philosophy is not limited to such abstract and philosophical notions, but is supplemented by carefully designed and elaborate tutelary mechanisms. Chief among these is the Office of the Presidency of the Republic. This office was designed to be impartial and above party, controlled by the state elites, with extensive supervisory powers over civilian politics. Through his broad powers of appointment, the president was expected to influence the composition of other tutelary agencies, such as the Constitutional Court, other elements of the higher judiciary and the Board of Higher Education (YÖK). Another important tutelary agency is the National Security Council, first created by the 1961 Constitution but substantially strengthened in its 1982 counterpart. Before the constitutional amendment of 2001, military and civilian members were represented in equal number on the Council, assuming that

the president of the republic, who presides over the Council, is a person of civilian background. Furthermore, under Article 118 of the Constitution, the Council of Ministers had to give "priority consideration" to the recommendations of the NSC. The 2001 constitutional amendment gave civilian members a majority and underlined the advisory character of the NSC's recommendations. The amendment was accompanied by changes to other laws, particularly to that on the NSC secretariat. The net effect of these reforms was a significant degree of civilianisation of the political system. Yet it is no secret that the military still enjoys much greater power and influence than the military of any consolidated democracy and far beyond what the letter of the Constitution and the relevant laws suggest.

The experience of other democratising countries suggests that the removal of such vestiges of military regimes, or "exit guarantees," is not impossible in the long or even medium run. Two important and inter-related factors affecting the long-term viability of exit guarantees are the probability of a new military coup and the degree of unity or disunity among civilian political forces with regard to the military's role in politics. Commenting on the Latin American experience, Agüero observes that "by failing to display a united front, civilians have shown no common understanding of the obstacles which the military present for the prospects of democratic consolidation. A critical deterrent against the military, which would increase the costs of military domestic assertiveness, is thus given away, opening up civilian fissures for utilization by the military."⁴

This analysis seems to fit the present Turkish case. The complete civilianisation of the regime and the elimination of other tutelary features are obstructed by a numerically not so large but politically strong coalition of civilian forces, such as the main opposition party, the CHP, the Constitutional Court, the higher judiciary and a sizeable portion of the mainstream media and academia. The unifying factor is their deep attachment to the Kemalist legacy and their fear that the present governing party, the conservative AKP, may lead the country towards an Islamic regime.

³ For a comprehensive study on this point, see Taha PARLA and Andrew DAVISON, *Corporatist Ideology in Kemalist Turkey*, Syracuse: Syracuse University Press, 2004.

⁴ Felipe AGÜERO, "The Military and the Limits to Democratization in South America," in Scott MAINWARING, Guillermo O'DONNELL, and J. Samuel VALENZUELA (eds), *Issues in Democratic Consolidation: The New South American Democracies in Comparative Perspective*, Notre Dame: University of Notre Dame Press, 1992, p. 177.

Where such deep societal division exists, it is difficult to expect democratic institutions to function normally. Thus, the AKP government has had to face not only parliamentary opposition, but also the opposition of many state institutions, including the former president, Ahmet Necdet Sezer (until the end of his term in August 2007), the military, the Constitutional Court and the higher judiciary in general and, until quite recently, the YÖK. Of these state institutions, the Constitutional Court deserves special attention since in recent years it has become an active participant in the ongoing political conflict. Created by the Constitution of 1961, the Court was viewed and viewed itself as the guardian of the fundamental values and interests of the state elites and their Kemalist ideology.⁵ In its practice over close to half a century, the Turkish Constitutional Court has essentially behaved consistently with the expectations of the state elites that created and empowered it. In other words, it has acted as the guardian of the two basic pillars of the Kemalist ideology, the national and unitary state and the principle of secularism.

The state-oriented attitude of the Constitutional Court can most clearly be observed in cases involving the prohibition of political parties. The court has consistently closed down Kurdish ethnic political parties through an extremely rigid interpretation of the Constitution and the Law on Political Parties. The court's attitude towards the allegedly Islamist parties has been no more tolerant. So far, the court has closed down five parties on account of their alleged anti-secular activities. More recently, the Constitutional Court refused to close down the present governing party, the AKP (Justice and Development Party), but ruled that it had become a focal point of anti-secular activities and deprived it of half its state subsidies.⁶ In these decisions as well as in others related to secularism, the Constitutional Court defined secularism not as the simple separation of the state and religion but as a total philosophy, a way of life, reminiscent of Comtean positivism and scientism.

Certainly, Turkish rules on the prohibition of political parties do not exhaust the area of democratic deficit. Restrictions on freedom of expression; reluctance to broaden cultural rights for linguistic minorities; discriminatory practices against the heterodox Alevi minority; over-politicisation of the judiciary; and, above

all, civil-military relations are other obstacles in the way of full democratic consolidation.

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Thus, the ongoing constitutional debate centres around the question of the liquidation of the authoritarian, statist, and tutelary features of the 1982 Constitution. This debate has gained particular intensity after the coming to power of the conservative AKP, which, in the view of its opponents, is an Islamist-leaning party. The constitutional amendments of 2010 constitute an important step forward in this direction. The amendment package, consisting of 25 articles, was adopted by the Grand National Assembly with a more than three-fifths but less than two-thirds majority, and, consequently, it was submitted to a mandatory referendum in accordance with Article 175 of the Constitution. The text was finally adopted by a 58% majority in the referendum of 12 September 2010, following a bitterly contested campaign.

The most important provisions of the amendment package are those related to the composition of the Constitutional Court and the High Council of Judges and Public Prosecutors (HSYK). With regard to the Constitutional Court, the number of its judges was raised from eleven (with four alternates) to seventeen, three of whom are selected by parliament from among candidates nominated by the Court of Accounts (two) and the presidents of the bar associations (one). Four members are directly elected by the President of the Republic from among all judges and public prosecutors, rapporteur judges of the Constitutional Court, practising lawyers, and high-level public administrators. The president also chooses three members from among three candidates nominated for each seat by the YÖK, three members nominated by the Court of Cassation, two

⁵ Ergun ÖZBUDUN, "Political Origins of the Turkish Constitutional Court and the Problem of Democratic Legitimacy," *European Public Law* 12, 2 (June 2006): 213-23.

⁶ Constitutional Court Decision E. 2008/1, K. 2008/2, 30 July 2008, *Resmî Gazete* (Official Gazette), 24 October 2008, No. 27034.

nominated by the Council of State (the supreme administrative court), one nominated by the Military Court of Cassation, and one nominated by the High Military Administrative Court, again from among three nominees from each vacant seat.

The changes with regard to the composition of the Constitutional Court are not radically different from the previous system, under which all judges of the Court were appointed either directly (3 out of 11) or indirectly (upon the nominations of the other high courts and the YÖK) by the President of the Republic. The novelty introduced by the constitutional amendment essentially involves a limited role for parliament in the selection of judges and an increase in the number of judges nominated by the YÖK (from one to three). Probably, a more consequential novelty is the introduction of constitutional complaint by individuals whose constitutional rights have been violated by an administrative or judicial decision. Another positive change is the raising of the decisional quorum of the Court from a three-fifths to a two-thirds majority in party prohibition cases and in the review of the constitutionality of constitutional amendments. This change will no doubt make it more difficult for the Court to close down political parties.

The changes with regard to the High Judicial Council (HSYK) are more radical. Under the previous arrangement, the HSYK was composed of three members (and two substitutes) nominated by the Court of Cassation and two members (and two substitutes) nominated by the Council of State, with the Minister of Justice and the Undersecretary of the Ministry of Justice as *ex-officio* members under the chairmanship of the Minister. Now, the number of members has been raised to twenty-two, with twelve substitutes. Seven regular and four substitute members are elected by the judges and public prosecutors of all regular first-degree courts, three regular and three substitute members by the judges and public prosecutors of administrative courts, three regular and three substitute members by the Court of Cassation, two regular and two substitute members by the Council of State, and one regular and one substitute member by the Justice Academy. The President of the Republic appoints four regular members from among law professors and practising lawyers. The Minister of Justice and the Undersecretary

of the Ministry remain as *ex-officio* members. The Minister is still the chairman of the Council. However, his/her role is reduced to a mainly symbolic and ceremonial one. The constitutional amendment was intended to break the monopolistic domination of the two high courts over the HSYK and to make it more representative of the judiciary as a whole by allowing a strong majority of the Council to be composed of judges of all degrees elected by their own peers. Another improvement is that the HSYK shall have its own budget, building and secretariat (under the previous arrangement secretarial services were provided by the Ministry of Justice), and judicial inspectors shall heretofore be attached to the HSYK instead of the Ministry of Justice.

The constitutional amendment package also contains other improvements, such as the introduction of an Ombudsman; the narrowing down of the area of competence of military courts in favour of civilian courts; the strengthening of positive discrimination (affirmative action) in favour of women, children, the elderly, the disabled, and widows and children of war veterans; and the introduction of new rights, such as personal data protection, the removal of certain restrictions on the right to travel abroad and children's rights.

However, the referendum campaign was bitter and divisive. The opposition parties argued that changes with regard to the judiciary were intended to make it an obedient servant of the majority party, even though most foreign observers, including the Venice Commission, saw them as an important step forward in the right direction.⁷ In any case, the constitutional debates did not end with the referendum. The leaders of the AKP often stated during the campaign that the amendment package was only a first step on the way to a totally new and more liberal constitution and that the National Assembly to be elected in June 2011 should take up the task of preparing such a constitution. Thus, it appears that the forthcoming election campaign will centre mostly on constitutional issues. However, bitter divisions over such critical issues as minority (essentially Kurdish) rights, the principles of the nation-state and nationalism, the limits on the freedom of religion, and civil-military relations make the adoption of a constitution based on a broad consensus unlikely.

⁷ VENICE COMMISSION, "Interim Opinion on the Draft Law on the High Council for Judges and Public Prosecutors (of 27 September 2010) of Turkey," Venice, 17-18 December 2010, CDL-AD (2010)042.