Turkey's Search for a New Constitution

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ABSTRACT

The article analyzes the historical roots and the current nature of the constitutional crisis in Turkey. The Constitution of 1982 strongly reflects the authoritarian, statist, and tutelary mentality of its military founders. The Constitution established a number of tutelary institutions designed to check the powers of the elected agencies and to narrow down the space for civilian politics. Consequently, it has been the subject of strong criticisms since its adoption. There is also a general consensus that despite the 17 amendments it has gone through so far, it has not been possible to fully eliminate its authoritarian spirit. The article also deals with the constitutional crises of 2007 and 2008 over the election of the President of the Republic, and the annulment of the constitutional amendment of 2008 by the Constitutional Court. It concludes with an assessment of the constitutional amendments of 2010.

In this article, Turkey's constitutional developments will be briefly explained and it will be asserted that none of the three Republican Constitutions (those of 1924, 1961, and 1982) was made by a freely chosen and broadly representative constituent assembly through inter-party negotiations and compromises. On the contrary, state elites played a predominant role in the making of all three constitutions with little input from civil society. This is particularly so with the current (1982) Constitutionw, which reflected the authoritarian, statist, and tutelary mentality of its military founders. The article analyzes the partial amendments that the Constitution has undergone so far and Turkey's ongoing search for an entirely new liberal and democratic constitution.

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The History of Constitution-Making in Turkey

Historically speaking, none of the three Republican constitutions of Turkey (those of 1924, 1961 and 1982) was made by a freely chosen and broadly representative constituent or legislative assembly through a process of inter-party negotiations and compromises. The 1924 Constitution was made by an essentially single-party legislative assembly almost totally dominated by Mustafa Kemal's (Atatürk) newly founded People's Party. Although the Constitution was democratic in spirit and contained no signs of the approaching authoritarian single-party regime (1925-1946), it provided a convenient instrument for this regime, since it established no checks and balances against the absolute power of the parliamentary majorities.

The 1961 and the 1982 Constitutions were both products of military interventions (those of 1960 and 1980, respectively). In their making, the military committees that carried out the coups (the National Unity Committee, NUC, in 1960; and the National Security Council, NSC, in 1980) played a prodominant rule. In both cases, the ruling military council was one of the chambers of the bicameral constituent assemblies. In neither case, was the civilian wing of the constituent assembly (House of Representatives in 1960-61, and the Consultative Assembly, 1981-83) based on free popular elections. The former was based on an essentially cooptative system which totally excluded the supporters of the overthrown Democratic Party (DP), and the latter was composed of 160 members all of whom were appointed by the ruling NSC.

The NSC went much further than its predecessor in excluding all civil society inputs in the making of the 1982 Constitution. All political parties were closed down, and no political party member (as of 11 September 1980) was made eligible for the Consultative Assembly. Besides, in contrast to the 1961 Constitutient Assembly, the powers of the two chambers were excessively unequal. The NSC had the final say over the draft prepared by the Consultative Assembly, with no mechanism to resolve the differences of opinion between the two bodies. Thus, the Consultative Assembly, composed mostly of bureaucrats, played only a consultative role as its name indicated. In the referendum stage, only "constructive" criticisms were allowed, as critical comments about the transitional articles as well as propaganda for a "no" vote was banned. Moreoever, no criticism was allowed against General

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Evren's (the chairman of the NSC and the Head of State) speeches in favor of the new Constitution and finally, the constitutional referendum was combined with the election of the President of the Republic for seven years in which Evren was the sole candidate. Thus, a "yes" vote for the constitution also meant a "yes" vote for the presidency of Evren. Under these circumstances, the referendum of November 7th 1982 produced a 91.37 percent majority for the Constitution, a result reminiscent of election results in totalitarian countries.

The General Characteristics of the 1982 Constitution

The way in which it was made, strongly determined the content of the 1982 Constitution. Thus, it clearly reflected the authoritarian, statist, and tutelary mentality of its founders. The military founders of the Constitution had very little trust in civilian politicians, which they often expressed in highly blunt terms. Thus, they designed a constitution that would limit the area of civilian politics as much as possible. Under the original version of the Constitution, all civil society organizations other than political parties were banned from engaging in political activities. Trade unions, voluntary asssociations, foundations, public professional organizations, and cooperative societies were not allowed to support, or receive support from, political parties, or to engage in joint action among themselves. These restrictions were repealed by the constitutional amendment of 1995.

Despite some limited improvements brought about by the constitutional amendments of 1995 and 2001, the legal regime of political parties still constitutes one of the most objectionable "democracy deficits" in the Turkish political system

The military founders of the 1982 Constitution also restricted the activities of political parties by a long list of vague party bans in the Constitution and even more draconian restrictions in the Law on Political Parties. Thus, so far 25 political parties (6 under the 1961 Constitution and 19 under the 1982 Constiution) were banned by the Constitutional Court, and many leaders and members of such parties were banned from political activities for a period of five years from the prohibition ruling of the Court. Despite some limited improvements brought about by the constitutional amendments of 1995 and 2001,[1] the legal regime of political parties still constitutes one of the most objectionable "democracy deficits" in the Turkish political system. Thus, a recent (March 2009) report by the Venice Commission (European Commission for Democracy through Law) of the Council of Europe strongly criticized the Turkish constitutional and legal rules

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concerning the prohibition of political parties. The report concludes that "the basic problem with the Turkish rules on party closure is that the general threshold is too low, both for initiating procedures and for prohibiting or dissolving parties. This is in itself *in abstracto* deviating from common European democratic standards, and it leads too easily to action that will be in breach of the ECHR, as demonstrated in the many Turkish cases before the European Court of Human Rights."[2]

With this aim in mind, the Constitution established a number of tutelary institutions designed to check the powers of the elected agencies and to narrow down the space for civilian politics. Foremost among such institutions was the Presidency of the Republic. The combination of the constitutional referendum with the election of the next President of the Republic gave General Kenan Evren (the sole candidate) the possibility of exercising tutelary powers over elected governments for a period of seven years (1982-1989). In fact, he often described himself as the "guarantor" of the Constitution. This tutelary role was strengthened by the broad powers given to the President by the Constitution, as will be alluded to below. The military founders of the Constitution might have possibly thought that after Evren's term came to an end, his successor would again be a military person or at least someone acceptable to the military. Another one was the strengthened National Security Council. The original text of the Constitution gave the military members a majority in the Council and stipulated that the decisions of the Council should be given priority consideration by the Council of Ministers, thereby rendering such decisions binding if not in theory, at least in practice. A third tutelary institution was the Board on Higher Education (YÖK) that was designed to organize universities and keep them under strict discipline of the military-dominated secular state. The President of the Republic was given the power to appoint the chairman and some members of the YÖK and the university rectors. The President of the Republic was also given broad discretionary powers with regard to the judiciary, such as appointing the judges of the Constitutional Court (three of them directly, and eight of them from among three candidates nominated by the other high courts and the YÖK), one-fourth of the members of the Council of State (the highest administrative court), the members of the Supreme Council of Judges and Public Prosecutors (from among three candidates nominated by the two high courts) and the Chief Public Prosecutor of the Court of Cassation (the Supreme Court) and his deputy from among five candidates nominated by the Court of Cassation. Thus, the judiciary was

conceived as another tutelary institution designed to protect the values of the state elites against the actions of elected governments.

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The military obtained important powers, privileges, and immunities as a price for relinquishing power to elected civilian institutions (exit guaranties as they are commonly called). In addition to the National Security Council mentioned above, the military was exempted from the review of the Court of Accounts, the High Board of Supervision, and the decisions of the Supreme Military Council regarding high-level military appointments, promotions, and expulsions from the military were closed to judicial review. The laws and law-amending ordinances (decree-laws) passed by the National Security Council regime (1980-1983) were exempted from the review of constitutionality by the Constitutional Court. Furthermore, the Law on the General Secretariat of the National Security Council provided that the Secretary General shall be a high-level military person and endowed the Secretariat with broad executive powers.

The Politics of Constitutional Amendments

It is no wonder that the 1982 Constitution met with severe criticisms almost from its inception. In the following years, most political parties and the leading civil society institutions such as the Turkish Bar Association (TBB), the Union of Turkish Chambers of Trade and Industry (TOBB), and the Association of Turkish Businessmen and Industrialists (TÜSİAD) proposed entirely new constitutional drafts or at least radical changes in the Constitution. Consequently, starting from 1987, the Constitution has undergone 17 amendments. The general direction of these amendments was to improve liberal-democratic standards, although some of them dealt with rather trivial matters. Despite these positive changes, it is generally agreed that it was not possible to completely liquidate the illiberal and tutelary spirit of the 1982 Constitution. In the summer of 2007, constitutional debates took a new turn when the governing AKP (Justice and Development Party) initiated a process for the making of an entirely new constitution, as will be analyzed below.

The constitutional amendments of the 1990s, as well as those of 2001 and 2004 were accomplished through a process of intense inter-party negotiations and compromises and adopted by strong majorities in parliament.[3] Thus, it was hoped that after so many decades of internecine inter-party conflict, time had

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come for a period of "elite convergence," that would result in the making of a liberal and democratic constitution based on a broad consensus.[4] However, the constitutional crisis of 2007 seems to have reversed this trend towards elite convergence. At the end of 2011, Turkey is still engaged in constitutional debates with little hope of achieving constitutional consolidation in the near future.

The Constitutional Crisis of 2007-2008[5]

The constitutional crisis of Turkey took on an acute form starting from the spring of 2007, and was triggered by the conflict over the election of a new President of the Republic. Article 102 of the Constitution in force at that time

had foreseen four parliamentary rounds for the election of the President. The decisional quorum was two-thirds of the full membership of the Assembly on the first two rounds and the absolute majority of the full membership on the third and fourth rounds, a minimum of 367 and 276 votes, respectively. The Constitution contained no special quorum rule for opening of the meeting of the Assembly, in which case according to the general rule in Article 96, the quorum should have been one-third of the full membership, namely 184 deputies. At that time, the AKP did not have a sufficient majority to elect its own candidate on the first two rounds, but had a comfortable majority to elect him on the third or fourth rounds.

At that point, maneuverings of dubious legal validity started. It was claimed that the two-thirds majority on the first round was not only the decisional quorum, but also the quorum required for the opening of the session. After the first round on which two-thirds majority was not obtained because of the boycott of the opposition deputies, the main opposition party, the CHP (Republican People's Party) carried the case to the Constitutional Court, and the Court in an extremely controversial ruling rendered on 1 May, endorsed the claim of unconstitutionality.

As a result of this deadlock, the parliament decided to call new elections, as required by the Constitution. At the same time, the AKP majority in parliament, with the support of a minor opposition party, ANAP (the Motherland Party), amended certain articles of the Constitution shortening the legislative period from five to four years, and providing for the popular election of the President for a maximum of two five-year terms. The amnedment was challenged by the outgoing President Sezer before the Constitutional Court, who also submitted it to a referendum. However, this time the Court rejected the claim of unconstitutionality, and the amendment was approved by referendum on October 21 with a 68.95 percent majority with a turnout rate of 67.51 percent.

The period starting from the so-called "367 crisis" can indeed be characterized as a series of "constitutional battles." The two other peak points of this battle were the annulment by the Constitutional Court of the constitutional amendment concerning Articles 10 and 42 of the Constitution, and the closure case against the AKP.

The first issue is popularly known as the "headscarf amendment." Evidently, its aim was to abolish the headscarf ban on female university students by changing Article 10 on equality adding the phrase "in the utilization of all kinds of public services," and adding a new paragraph to Article 42 on the right to education that runs as follows: "No one shall be deprived of his/her right to higher education for any reason not explicitly specified by law. The limits on the exercise of this right shall be regulated by law." The amendment was supported not only

by the AKP deputies, but also by those of the ultra-nationalist MHP (Nationalist Action Party), the Kurdish Nationalist DTP (Democratic Society Party), and some independents, and adopted by a record-high majority of 411 votes.

However, the amendment was brought to the Constiutional Court by the CHP and DSP (Democratic Left Party) deputies, on the contention that it was against the first three unamendable articles of the Constitution (in this case, against the principle of secularism) and therefore, null and void. On 5 June 2008, the Court, in another controversial ruling, annulled the amendment. In fact, article 148 of the Constitution precludes substantive review of constitutional amendments, and limits the Court's competence over them to three specific procedural questions, i.e., whether the proposal is signed and adopted by the required number of deputies, and whether it is debated twice in the plenary. The Constitution has no explicit or implicit rule allowing the Court to review the compatibility of a constitutional amendment with the unamendable articles of the Constitution. Indeed, under the 1982 Constitution, the Court rejected three requests for such review (one in 1987 and two in 2007) declaring itself not competent in the matter.

The resulting situation gave the Court almost total power of control over constitutional amendments. Since the characteristics enumerated in Article 2 and 3 ("a democratic, secular and social state governed by the rule of law, respectful of human rights, commited to Atatürk nationalism, and based on the principles specified in the Preamble within an understanding of social peace, national solidarity, and justice.") are so vague and broad that almost no constitutional amendment can be conceived that is not in one way or another related to one of these characteristics. Thus, this interpretation amounted to an almost complete usurpation of the constituent power by the Constitutional Court, which can only be described as an extreme example of "juristocracy."

The constitutional crisis was further aggravated by the closure case against the AKP. On March 2008, the Chief Public Prosecutor of the Court of Cassation started prohibition proceedings against the AKP. He claimed that the AKP had become a focal point of anti-constitutional activities intended to undermine the secular character of the state. Although evidently he had been collecting evidence against the AKP for a long time, the start of the proceedings seems to have been triggered by the constitutional amendment concerning the headscarf issue.

On 30 July 2008, the Constitutional Court announced its ruling.[6] Even though a majority of the judges (six out of eleven) voted in favor of banning the party, the qualified majority (three-fifths or seven members out of eleven) required by the Constitution was not obtained. Therefore, the party was not banned, but ten members concluded that the AKP had become a focus of anti-secular activities, and decided to deprive it partially of state funding (a sanction also provided by the Constitution for less severe cases of violation).

The Constitutional Court's ruling conforms neither to the European standards for party prohibitions developed by the European Court of Human Rights (ECtHR) and the Venice Commission of the Council of Europe, nor even to the much more restrictive provisions of the Turkish Constitution (Art. 68). It is based on a certain assertive and authoritarian understanding of secularism without any parallel in any Western democracy. One of the main justification for its ruling, according to the Constitutional Court, was the constitutional amendment concerning the headscarf issue, although the amendment was adopted by a nearly three-fourths majority of the Assembly that included not only the AKP deputies but also those of the MHP and the DTP. At any rate, condemning a party for an act of Parliament that clearly is within the limits of its constituent power is unheard of in the practice of European democracies. Furthermore, many of the accusations in the indictment of the Chief Public Prosecutor are statements by party leaders and members within the universally acceptable limits of the freedom of expression.

Constitutional Issues and Political Cleavages

The overtly antagonistic nature of the recent constitutional debates cannot be properly understood without an analysis of political cleavages in Turkey. It is generally agreed upon that the origins of the present party system in Turkey is based on a center-periphery cleavage. Starting with the Ottoman times and continuing in the Republic, the center was composed essentially of the bureaucratic state elites with a strong authoritarian and tutelary mentality as the carriers of top-down Westernizing reforms with little input from civil society. The periphery, on the other hand, comprised all the other sectors of society who had little or no part in the conduct of government. With the transition to a pluralist party system in the late 1940s, the periphery was organized and represented by a series of center-right parties, DP, JP (Justice Party), ANAP, DYP (True Path Party), and now the AKP, while the CHP remained as the main representative of the center. In the electoral arena, the center-right parties always dominated the scene. Thus, in fifteen general parliamentary elections from 1950 to 2007, the average vote percentage of the center-right (or right) parties was 63.5, as opposed to 33.8 percent of the Left parties. In this period, the percentage for the Right parties varied between 55.7 in 1977 and 71.7 in 2007.[7] However, this dominance was interrupted by three direct military interventions (1960, 1971 and 1980) and the so-called "post-modernist coup" of 1997 by another important actor of the center, namely the armed forces.

The whole philosophy of the 1982 Constitution as outlined above, clearly reflects the authoritarian and tutelary outlook of the center. Thus, once again

we are witnessing a struggle for power between the centrist coalition (CHP, the armed forces, and the higher judiciary) and the AKP that has established itself as the main representative of the periphery. The role of the higher judiciary in this conflict is evident not only in the three dramatic cases referred to above, but also in many other lesser cases. Clearly, the higher judiciary sees itself not as the defender of individual rights and liberties, but as the guardian of the "sublime interests of the State."

The Constitutional Amendments of 2010 and the Parliamentary Elections of 2011

The constitutional amendments of 2010 changed 24 articles of the Constitution, and added two provisional articles. Although the amendment package included a number of democratic improvements such as the introduction of an Office of Ombudsman, the adoption of constitutional complaint, introducing certain new fundamental rights or broadening the scope of certain old ones, and amending the article on equality permitting affirmative action in favor of underprivileged groups. In addition, its most consequential novelties concerned the judiciary, particularly the High Council of Judges and Public Prosecutors (HSYK) and the Constitutional Court.

The amendment radically changed the structure of the Council. Under the new arrangement, the number of members is raised from seven to twenty-two, with twelve substitute members. Seven regular and four substitute members shall be elected by the judges and public prosecutors of all ordinary (first-degree) courts, three regular and two 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 Academy of Justice. The President of the Republic's role in the selection of these members coming from the ranks of the judiciary is eliminated. However, he/she is entitled to appoint four regular members from among law professors and practicing lawyers. The Minister of Justice and the Undersecretary of the Ministry of Justice remain as *ex-officio* members. The Minister is still the president of the Council; however, his/her role is reduced to a mainly symbolic and ceremonial one. The constitutional change was intended to break the monopolistic domination of the two high courts over the Council, and to make it more representative of the judiciary as a whole by allowing the judges and public prosecutors of the 'first-degree' courts to be strongly represented in the Council. Another improvement is that the Council shall have its own budget, own building, own secretariat, and judicial inspectors will be attached to the Council, instead of the Ministry of the Justice.

A new constitution will be possible only on the basis of inter-party negotiations and compromises. Given the depth of social and political cleavages dividing the society, this will indeed be a tall order

The 2010 constitutional amendment also changed the composition of the Constitutional Court. The number of Constitutional Court judges is raised from eleven (with four alternates) to seventeen, three of whom shall be elected by parliament from among three candidates for each seat by the Count of Accounts (two) and the presidents of bar associations (one). Four members shall be directly elected by the President from among all judges and public prosecutors, rapporteur judges of the Constitutional Court, practicing lawyers, and high level public administrators. The President also chooses three members from among three candidates for each seat nominated by the YÖK. YÖK's nominees have to be professors in the fields of law (two of the three must be in this field), economics, and political science. Finally, the President selects three members nominated by the Court of Cassation, two by the Council of State, one by the Military Court of Cassation, and one by the High Military Administrative Court, again from among three nominees for each seat. Another important novelty is the introduction of the right by individuals to file a constitutional complaint when their constitutional rights have been violated by an administrative or judicial decision. The amendment also limited the terms of office of the Constitutional Court judges to a non-renewable twelve year term.

Thus, both changes regarding the High Judicial Council and the Constitutional Court were, in a sense, designed to limit the judiciary's strong tendency toward "juristocracy," as described above. Indeed, the current arrangements are perfectly compatible with European standards. However, the opposition parties strongly objected to changes regarding the judiciary, accusing the majority party (the AKP) of the intention of making the judiciary its own hand-maiden. Consequently, the amendments were adopted only by the votes of the AKP deputies, with barely over the three-fifths majority required for constitutional amendments. Also, since it was short of the two-thirds majority, it had to be submitted to a mandatory referendum as prescribed by the Constitution. The referendum held on September 12th 2010, approved the amendment package with a 58 percent majority.

The parliamentary elections of July 12th 2011 gave the AKP a new strong mandate with almost 50 percent of the vote. This was its third consecutive electoral victory, each time increasing its share of the votes. During the election campaign, all major parties, including the AKP promised a new constitution. However, the AKP's parliamentary majority this time falls slightly shorter

than the minimum three-fifths majority required for constitutional amendments. Therefore, a new constitution will be possible only on the basis of inter-party negotiations and compromises. Given the depth of social and political cleavages dividing the society, this will indeed be a tall order.

Endnotes

1. For details, see Ergun Özbudun and Serap Yazıcı, *Democratization Reforms in Turkey, 1993-2004* (İstanbul: TESEV, 2004).

2. Venice Commission, *Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey*, Venice, 13-14 March 2009, CDL-AD (2009)006, paras. 30, 107.

3. For details, Ergun Özbudun and Ömer Faruk Gençkaya, *Democratization and the Politics of Constitution-Making in Turkey* (Budapest and New York: Central European University Press, 2009), chs., 2 and 3.

4. For "elite settlements" and "elite convergences," see Michael Burton, Richard Gunther, and John Higley, "Elites and Democratic Consolidation in Latin America and Southern Europe: An Overview," in John Highley and Richard Gunther, eds., *Elites and Democratic Consolidation in Latin America and Southern Europe* (Cambridge, Cambridge University Press, 1992), pp. 323-24, 339.

5. Here, I draw partly from Özbudun and Gençkaya, *Democratization and the Politics of Constitution-Making*, Ch. 6; also Ergun Özbudun, *Türkiye'nin Anayasa Krizi* (Ankara: Liberte Yayınları, 2009).

6. Constitutional Court decision, E. 2008/1, K. 2008/2, 30 July 2008, *Resmî Gazete*, 24 October 2008, no. 27034.

7. Ergun Özbudun, "Changes and Continuities in the Turkish Party System," *Representation*, Vol. 42, No. 2 (2006), p. 130 (adjusted according to the 2011 election results).