Turkey's Constitutional Amendments: Between the status quo and Limited Democratic Reforms

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ABSTRACT

This article deals with debates surrounding the package of constitutional amendments proposed by AK Party deputies. The proposal consists of 27 articles; its general aims are to improve human rights standards, strengthen the rule of law, make the prohibition of political parties more difficult, and increase the democratic legitimacy of the judiciary. With regard to the last objective, the proposal suggests changing the composition and function of the Constitutional Court and the High Council of Judges and Public Prosecutors (HSYK). Among other innovations in the proposal are the introduction of a provision for constitutional complaint and the establishment of an Ombudsman. The article concludes that the proposal, despite certain deficiencies, is on the whole a positive step in the process of democratization. It should not, however, preclude the need for a totally new liberal and democratic constitution.

The constitutional amendment proposal, prepared by the AKP and submitted to the Grand National Assembly on March 30, 2010, is causing massive debates not only because of its content but because of its approach. The proposal, which consists of 30 articles including three provisional articles, recognizes new rights such as the protection of personal data, the rights of children, and collective bargaining for public servants. It also strengthens safeguards supporting fundamental rights and liberties by introducing positive discrimination measures for women, children, the disabled, and the elderly, and enlarges the scope of certain rights and liberties such as the freedom of settlement and travel, and the freedom of political parties. In addition, the proposed amendment strengthens the safeguards for the rule of law by abolishing judicial immunities for certain administrative decisions such as those of the Supreme Military Council and the Supreme Council of Judges and Pub-

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Insight Turkey Vol. 12 / No. 2 / 2010
pp. 1-10

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lic Prosecutors. Moreover, the proposal contains a provision empowering the Constitutional Court to try the Chief of General Staff and four force commanders, as well as the Speaker of the Grand National Assembly. Indeed, the original text of the Constitution had no provision indicating a competent court to try these persons for crimes connected with their duties. Since the proposal eliminates this ambiguity it indirectly strengthens the principle of the rule of law. Finally and most importantly, the proposal contains provisions to restructure the Constitutional Court and the Supreme Council of Judges and Public Prosecutors in accordance with the requirements of the rule of law and plural democracy.

Strengthening the Rule of Law

The Abolition of Certain Judicial Immunities

In its article 12 the proposal introduces two important changes in article 125 of the Constitution regulating judicial review of the administration. One of these changes is a partial abrogation of the judicial immunities that the Constitution provides for the decisions of the Supreme Military Council. The other is to add a provision to article 125 of the Constitution stating that: "the judicial power is restricted by the review of legality of the administrative actions and decisions, and this power shall never be exercised as a review of opportunity." The proposal introduces judicial review of the decisions of Supreme Military Council only in cases of dismissal from the Turkish Armed Forces. Therefore, this change may play a limited role in strengthening the rule of law. Adding a provision to article 125 restricting judicial review to review of legality simply repeats a well-known principle of administrative law. Contrary to expectations, it may only have a declarative rather than a constructive effect on the system of administrative justice. However, considering the Turkish judiciary's strong tendency to exercise the review of opportunity concerning legislative and executive acts, this attempt may be understandable.

The proposal also abolishes judicial immunity concerning the disciplinary decisions stated in article 129, and abrogates judicial immunity recognized in article 159 concerning the decisions of Supreme Council of Judges and Public Prosecutors. However, it limits such abrogation only to those decisions concerning dismissal from the judiciary.

The proposal also aims at abolishing provisional article 15 of the Constitution. This provision provides judicial immunity for the members of National Security Council, members of the Council of Ministers who served during the military regime (between September 12, 1980 and December 1983), members of the Consultative Assembly (one of the chambers of the Constituent Assembly that prepared the 1982 Constitution), and all bureaucrats who acted under the orders and instructions of military leaders. This has meant that no human rights violations perpetrated during the military regime could so far be investigated or tried. However, since the proposed abolition of article 15 does not contain any concomitant provision concerning the effects of the statute of limitations, contrary to certain expectations, no trial or investigation shall be rendered possible. Nevertheless, the abrogation of this article may have a symbolic and moral effect on deepening democratic culture.

The proposal aims at restructuring the Constitutional Court by increasing the number of its members, changing the method of their selection, their terms of office, their eligibility conditions, and the working methods of the Court

Article 9 of the proposal introduces the institution of Ombudsman. In point of fact, this institution had already been established by an ordinary law in 2007. However this law was annulled by the Constitutional Court on the grounds that the establishment of this institution would require a constitutional basis. Although the reasoning of the Court is debatable, it obliged the legislature to adopt a specific provision concerning the Ombudsman. The establishment of an office of Ombudsman is among the obligations that Turkey has to fulfill in its quest for EU membership. Nonetheless, the proposal may be criticized on two grounds. It states that the office of Ombudsman shall be attached to the Speaker of the Grand National Assembly. This provision may weaken the autonomy of the Ombudsman vis-à-vis parliament. Indeed, the autonomy of this institution must be guaranteed vis-à-vis all branches of the government and public administration. Moreover, the proposal states that the Ombudsman shall be elected by a two-thirds majority of the full membership of the GNA. If this majority cannot be obtained on the first two rounds, on the third round a majority of the full membership of the Assembly shall be required. If such majority cannot be obtained, the fourth and the last round shall be held between the two candidates who win the most votes on the third round and a simple majority shall be sufficient on this fourth round. Thus, the proposal allows the Ombudsman to be selected by a simple majority, or in effect by the majority party in the Assembly, which may likewise damage its impartiality.

The Constitutional Court

The proposal aims at restructuring the Constitutional Court by increasing the number of its members, changing the method of their selection, their terms of office, their eligibility conditions, and the working methods of the Court.

Composition of the Court

The present article 146 of the Constitution states that the Constitutional Court shall be composed of 11 regular and 4 substitute members. It requires that a majority of the members be appointed by the President of the Republic from among the candidates nominated by the Court of Cassation (2 regular, 2 substitutes), the Council of State (2 regular 1 substitute), the Military Court of Cassation (1 regular), the Supreme Military Administrative Court (1 regular), the Court of Accounts (1 regular), the Council of Higher Education (1 regular) from among their own members. Three regular members and 1 substitute member shall be appointed by the President from among senior administrative officers and practicing lawyers.

The AKP's proposal states that the Constitutional Court shall be composed of 17 members. Three of its members shall be elected by the GNA from among candidates nominated by the Court of Accounts (2 members), and presidents of the bar associations (1 member). This provision provides a limited degree of democratic legitimacy for the Constitutional Court. However, this may be considered insufficient given the composition of its counterparts in Western democracies. In fact in Germany, Hungary and Poland all members of the constitutional courts are elected by parliament. In Italy and Spain a strong majority of their members are likewise elected by parliament and the government. It must also be noted here that one-third of the members of the Constitutional Court were elected by the GNA under the 1961 Constitution.

The new proposal stipulates that the three members elected by GNA will need to win a two-thirds majority of the assembly's full membership. If this majority cannot be obtained on the first round, on the second round an absolute majority shall be required, and if such a majority cannot be obtained on the third round a simple majority shall be sufficient. A qualified majority would have been preferable to ensure the impartiality of the Constitutional Court judges.

The proposal involves the President of the Republic in the election of the remaining 14 members of Constitutional Court. It states that the President shall exercise this power indirectly in the election of 10 members from among the three candidates nominated by the Court of Cassation (3 members), the Council of

State (2 members), the Military Court of Cassation (1 member), the Supreme Military Administrative Court (1 member), and the Council of Higher Education (3 members). Four members shall be directly elected by the President from among senior administrative officers, lawyers, judges and public prosecutors of the first degree, and reporting judges of the Constitutional Court. The present provision of the Constitution authorizes the President in the election of three regular members and one substitute member on his own discretion. Hence the proposal does not increase the number of members to be directly elected by the President, but adds the reporting judges of the Constitutional Court and all judges and public prosecutors of the first degree to this category. Considering the former group's experience in constitutional justice, this may positively affect the quality of the Constitutional Court decisions.

Term of membership

In its article 18, the proposal limits the term of the Constitutional Court members to 12 years and introduces the principle of no reelection. Article 147 of the present Constitution sets the minimum age for members at the age of 40 and provides that membership will continue until the compulsory retirement age of 65. Thus, a person who is elected to the Court at the age of 40 would be able to remain on the Court for 25 years. This rule makes it difficult for the Court to reflect social changes. The term for Constitutional Court members is limited to 9 or 12 years in most democratic countries, without the possibility of reelection. Nevertheless, article 25 of the proposal states that the present substitute members of the Court would become regular members, and all present members would maintain their position until they reach the age of 65. In other words, the 12-year rule will not be applied to them. This means that the composition of the Constitutional Court would change only gradually in the long term. It would have been preferable to apply the 12-year term to the present members as well, since it is generally accepted that no acquired rights can be claimed in connection with continuing public statues.

Constitutional Complaint

Article 19 of the proposal introduces a provision for lodging a constitutional complaint by adding a new paragraph to Article 148 of the Constitution on the competences of the Constitutional Court. The aim of constitutional complaint, as practiced in such countries as Austria, Germany, Spain, Switzerland, Belgium and Hungary, is to provide constitutional review over acts performed by a public power. Thus, it expands the scope of constitutional justice by including in it all public acts, other than laws and decree-laws. Precisely for this reason, the introduction

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of constitutional complaint is opposed by the Court of Cassation and the Council of State in Turkey. They argue that such a procedure would put the Constitutional Court above all other high courts. Nevertheless, the view shared by many circles in Turkey is that the introduction of constitutional complaint would assure the exercise of all public powers in accordance with the Constitution. The constitutional projects prepared by the TOBB (Union of Turkish Chambers of Commerce and Industry) in 2000, and the TBB (Union of Turkish Bar Associations) in 2001, and 2007 all advocated granting such competence to the Constitutional Court. In all these projects, the procedure remained limited to the rights recognized by the European Court of Human Rights (ECtHR).

It may be argued that the paragraph added to Article 90 of the Constitution in 2004 serves essentially the same purpose as the constitutional complaint clause in the new proposal. According to this paragraph: "in cases of conflict between laws and international agreements on fundamental rights and liberties that were duly put into effect, on the same question, provisions of international agreement shall have priority." In view of this provision, all courts must apply this norm in all cases before them. Therefore, granting the Constitutional Court the competence to review constitutional complaints would not create a novel situation, but would only add to the workload of the Constitutional Court. It would certainly delay applications to the ECtHR, since such applications are possible only after the exhaustion of all domestic legal remedies. However, since there is a strong feeling for constitutional complaint in parts of Turkish public opinion, the amendment proposal will probably satisfy the public's expectations.

Finally, Article 20 of the proposal aims at restructuring the Constitutional Court to be composed of a plenary and two chambers. Given the fact that the introduction of constitutional complaint will greatly increase the workload of the Court, such a change is clearly necessary. Indeed, a similar proposal was made in the TBB project.

The Closure of Political Parties

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The proposal strengthens safeguards supporting fundamental rights and liberties by introducing positive discrimination measures for women, children, the disabled, and the elderly, and it enlarges the scope of certain rights and liberties.

freedom, albeit rather timidly. Article 8 proposes to abolish paragraph 5 of Article 69 of the Constitution that permits the closure of a political party on account of statements in its program and its constitution. Considering that many parties have been closed down in the past on account of such statements even before they began their activities, this would be a welcome change. Furthermore, it would expand not only the freedom to organize political parties, but the freedom of expression as well, thus saving Turkey from many adverse decisions of the ECtHR.

Furthermore, the proposal aims at abolishing paragraph 8 of Article 69 that stipulates that "a permanently closed party cannot be reorganized under a different name." Given the fact that so far all prohibited parties have been reestablished under a different name, the abolition of this paragraph, would bring the text of the Constitution into harmony with social and political realities.

The proposal also introduces certain improvements concerning the secondary consequences of a closure ruling. Thus, it is proposed to abolish the last paragraph of Article 84 which states that "the status of a deputy who caused the permanent closure of his/her party by his/her own words and deeds would terminate with the publication of the closure ruling of the Constitutional Court in the

Constitutional amendment package, if adopted, will be a significant step forward in the democratization process of Turkey

Official Gazette." Another secondary consequence of a closure ruling is the ban on political activities provided for in paragraph 9 of Article 69, according to which "members of a party, including its founding members, who have caused the permanent closure of their party by their own words and deeds, shall not be founding members, members, administrators, or controllers of another party for a period of five years, starting from the publication of the closure ruling of the Constitutional Court in the Official Gazette." The new proposal reduces this ban to three years. It should have been totally abolished, however, in view of the decisions of the ECtHR.

Finally, the proposal brings about changes in the procedure of party prohibition cases. According to Article 69, paragraph four of the Constitution and Article 100 of the Law on Political Parties, prohibition proceedings can be started on the initiative of the Chief Public Prosecutor of the Court of Cassation. This is quite different from the rules in Germany and Spain where such proceedings start on the request of the government or one of the chambers of parliament. In Spain, although the Ministerio Fiscal (the equivalent of the Chief Public Prosecutor) can also start the proceedings, he is a political appointee, appointed by the government. In Turkey, the fact that the sole initiative rests with the Chief Public Prosecutor is surely one of the main reasons why there have been so many closure cases in the past. Turkish rules in this regard were strongly criticized by the Venice Commission in its 2009 report on Turkey. The Commission is of the opinion that such initiative should belong to elected (political) bodies that are accountable to the people. Moreover, the proposal changes the decisional quorum of the Constitutional Court for closure rulings from the three-fifths to the two-thirds of its full membership, and thus can be considered an improvement of political party freedom. However, the proposal provides that the request of the Chief Public Prosecutor will be decided upon by a special parliamentary committee composed of five members, each from all parliamentary groups (a parliamentary group must have a minimum of 20 deputies), and that consent can be given only by a two-thirds majority of its full membership. This proposal can be criticized on several grounds. First, a refusal by the committee could be perceived by some sections of the public as an effort to protect the "guilty." Secondly, equal representation by all parliamentary groups is against the principle of proportionality and far from giving political parties adequate constitutional protection, since a sufficient number of small parties could collaborate against a major party.

The main deficiency of the proposal is that paragraph 4 of Article 68 of the Constitution, which contains a long and vague list of party bans, is preserved verbatim. No doubt, this provision gives the Constitutional Court a very wide latitude in party closure cases. It would have been much more preferable if the proposal had limited bans to those parties using or advocating violent methods as proposed by the Venice Commission in its 1999 report on the guidelines for the prohibition of political parties.

The Restructuring of the Supreme Council of Judges and Public Prosecutors (HSYK)

The HSYK is currently composed of the Minister of Justice, the Undersecretary of the Ministry of Justice, and the five regular and five substitute members appointed by the President of the Republic from among candidates nominated by the Court of Cassation and the Council of State. Thus, the composition of the Council and the method of election of its members are radically different from their counterparts in Western democracies where such bodies have a mixed composition of judges and non-judges. Judicial members of the councils are normally elected by their peers, representing all levels of the judiciary. Non-judicial members are normally elected by a qualified majority of parliamentary assemblies. Election by parliaments provide democratic legitimacy and accountability for the council. Such a mixed structure is also suggested by the reports prepared by the Council of Europe bodies such as the Venice Commission and the Consultative Council of European Judges (CCJE).

Article 19 of the AKP's proposal aims at restructuring the HSYK in accordance with these reports and Western models. According to this provision, the HSYK would be composed of 21 regular and 10 substitute members, and would function in three chambers. The Minister of Justice would be the chairman of the Council, and the Undersecretary of the Ministry of Justice an ex-officio member. The proposal authorizes the Court of Cassation, the Council of State, the Justice Academy, regular and administrative judges and public prosecutors of the first degree to elect 15 regular and 10 substitute members. Four members would be elected by the President of the Republic from among senior administrators, practicing lawyers, and university professors in the fields of law, economics and political sciences. Thus, the proposal restructures the Council by increasing the number of its members and providing representation of the entire judiciary rather than only of the two high courts. It also limits the powers of the Minister of Justice and the Undersecretary of the Ministry of Justice essentially to symbolic matters. In addition, it provides a separate budget and an autonomous secretariat

and puts judicial inspectors under the control of the Council instead of the Ministry of Justice.

Despite these improvements, the proposal can be criticized on the grounds that it grants no role to the Turkish Grand National Assembly (TGNA) in the selection of the non-judicial members of the HSYK. Such a system would have been more in line with the widespread European practice, and would have bestowed greater democratic legitimacy upon the HSYK. The proposed model may also be criticized on the grounds that it increases the powers of the President of the Republic, already too broad for a parliamentary head of the state.

Conclusion

In general, it may be concluded that the proposal contains provisions that will strengthen fundamental rights and the rule of law. Furthermore, its provisions regarding the restructuring of the Constitutional Court and the HSYK may be expected to change, albeit to some extent, the present tutelary character of the higher judiciary. Such a partial constitutional amendment package, if adopted, will be a significant step forward in the democratization process of Turkey. It should not, however, obviate the need for a totally new and truly democratic constitution.