

How to Make a Constitution? Current Developments and Debates in Turkey

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Abstract: *It is common wisdom that Turkey, with its divided society, has a long but troubled history with democracy. Especially with respect to the last three decades, one should remember the making and functioning of the current constitution. Since its adoption in 1982, current constitution of Turkey has been a target of condemnations, since it had been a fruit of a military coup d'etat . Falling short of the current international standards of democracy and rule of law, this Constitution has undergone seventeen amendments. A considerable number of liberalization and democratization packages to the constitution were made during the last eight years of Justice and Development Party (Adalet ve Kalkınma Partisi: AKP) With the electoral victory of the AKP on 12 June 2011, the process of the resolution for Turkey's chronic "constitutional problem" took a new pace. As its third term has started, the AKP stated that Turkey needed an entirely new constitution and this would be done in a constitution making process, where all segments of the political spectrum would be represented. This presentation aims to explore the question of constitution making considering the most recent developments and debates surrounding the present Constitution of Turkey. For this, we will first consider the question of constitution making in terms of constitutional law, as well as political science. Then we will go on to explore the major legal and political problems in this framework.*

Introduction

It is common wisdom that Turkey, with its divided society, has a long but troubled history with democracy. Especially with respect to the last three decades, one should remember the making and functioning of the current constitution. Since its adoption in 1982, current constitution of Turkey has been a target of condemnations because it had been an outcome of a military *coup d'état*. Falling short of the current international standards of democracy and rule of law, this Constitution has undergone sixteen amendments. A considerable number of liberalization and democratization packages to the constitution were made during the last eight years of Justice and Development Party (Adalet ve Kalkınma Partisi: AKP) With the electoral victory of AKP on 12 June 2011, the process of the resolution for Turkey's chronic "constitutional problem" took a new pace. As its third term has started, AKP stated that Turkey needed an entirely new constitution and this would be done in a constitution making process, where all segments of the political spectrum would be represented.

This presentation aims to explore the question of constitution making considering the most recent developments and debates surrounding the present Constitution of Turkey. For this, we will first consider the question of constitution making in terms of constitutional law as well as political science. Then we will go on to explore the major legal and political problems in this framework.

1. Formal And Material Approaches to the Constitutions

Constitutions may be discussed from both material and formal sense. The discussions within the framework of material sense revolve around the issue of an ideal state design, where the rights and freedoms of the citizens are effectively protected and the state power is limited for this purpose. Formally, the question is; "how to make a constitution?" Modern political philosophy is unequivocal about it: the people should be included in the process and participation is an indispensable element in the democratic legitimacy of constitution making. The accounts on this principle are always associated with the doctrine of the consent of the governed and social contract. (Borgeaud, [1895] 1989); (Kalyvas, 2005); (Preuss, 2007) The method of involving the people may generate a further antithetical debate. The ones who defend a direct form of democracy assert the need for people's participation in the process by means of the devices such as election of a constitutional convention and referendums. On the contrary the representative responsible elites' approach tends to limit peoples' presence only to the election of the representatives who will then prepare the final document. For them, constitution making is a highly technical concept, which should not be left to the ignorant hands of the ordinary people. (Butler & Ranney, 1994)

In law, the question of the legal evaluation of constituent power, the constitution making activity, is problematic and is a subject of an everlasting debate. The difficulty is about legal regulation of process of constitution making. As one commentator put it, "Studying constituent power from the juridical perspective presents an exceptional

difficulty...constituent power always remains alien to the law." (Negri, 1999) In terms of legal typology of the concept of constituent power, formalist French conceptions of "original constituent power" (*pouvoir constituant originaire*) (OCP) and "derived constituent power" (*pouvoir constituant derive*) (DCP) may be useful. The former entails the process of foundational constitutional transformations in times of revolutionary changes, such as revolutions, *coup d'états* and, wars. The latter refers to constitutional amendments made according to and in compliance with the procedural rules laid by the prevailing constitution. (Gözler, 1999)

From a material sense, we may list three controversial issues in Turkey as follows: 1. Secularity 2. The Kurdish issue 3. The role of the executive in the governmental system. These questions constitute the basic terms of the debate that the future constitution has to address in order to attain a high quality of democracy as underlined by the Western standards. They are also the origins of major ideological cleavages that bitterly divide the Turkish society, of which effective and consensual resolution may well contribute to a stable and robust democratic culture in the country. Yet, in this presentation I wish to focus on the form: most recent developments on the current constitution making process.

2. Brief Outline of Turkish Constitutional History

Current constitution of 1982, as well as the previous one of 1961, is not the fruit of a democratic process. Both of these constitutions were made following a military coup and the constituent power was exercised under the military rule. In both of the cases, the constituent assemblies were not chosen by the people but by the cooptation within the groups of diverse professions in the former, and by the election by the army in the latter. There were referendums in both cases. In fact, the importance of the referendum by which the 1961 Constitution was adopted was that it was the first national referendum that has ever been held in Turkey. Yet, it was flawed with democratic deficit since the Democratic Party (representing a considerable vote of the electors) was excluded from the campaign. On the other hand, the 1982 referendum was undoubtedly a farce: all the political parties were banned from the campaign, the propaganda against the draft constitution was explicitly prohibited and the secrecy of the vote was not respected.

The 1982 Constitution of Turkey has been amended sixteen times since its adoption. The most recent amendment was made through the referendum on September 12, 2010. This was the most comprehensive one among other amendments made during the AKP government and almost half of the 1982 Constitution was amended. Despite the comprehensive amendments made so far, many constitutional institutions fall short of a proper satisfaction of the needs and expectations of the society. Moreover, an entirely new constitution is needed to completely remove the traces of the 12 September 1982 *coup d'état* from our constitutional system in both symbolic and real terms. (Gönenç, 2011c)

3. Amendment Procedure of the Constitution as Stipulated by the 1982 Constitution

The Article 175 of the 1982 Constitution regulates the process of constitutional amendment. In this framework, a constitutional amendment project should first be proposed by at least one-third of the total number of members of the Turkish Grand National Assembly. (184 over 550)

If the amendment proposal receives a number of votes between a three-fifths and two-thirds majority of the total number of the assembly (this equals to a number of votes between 330 and 366), the President decides: either he sends the proposal back to the Assembly for it to reach a number of votes more than 366 (at least 367), or he submits the project to the referendum. If in the second consideration of the amendment, the votes cannot reach the number of 367, the project should then be submitted to the referendum.

If the amendment proposal receives the minimum number of 367 votes, either in the first consideration or in the second one, the President may still submit the amendment proposal to the referendum. If in any case, the project is submitted to the referendum, there is no quorum requirement or an enhanced majority for the adoption of the amendment.

Thus we may conclude that according to this procedural framework; the decisive actors in the constitutional amendments may be the parliamentary majority of at least 330 deputies, the President and the people.

4. The Issue of the Making of a New Constitution and Current Developments

After the general election of 12 June 2011, there are now four major political parties in the Turkish Grand National Assembly (TGNA): 1. The government party AKP (*Adalet ve Kalkınma Partisi- Justice and Development Party*), 2. The major opposition party CHP (*Cumhuriyet Halk Partisi-Republican People's Party*) 3. MHP (*Milliyetçi Hareket Partisi-Nationalist Action Party*), 4. BDP (*Barış ve Demokrasi Partisi-Peace and Democracy Party*)

In the run up to the election, all of these major political parties acknowledged the need for a participatory constitution making process and admitted that the new constitution should be a genuine social contract. Nevertheless, none of them offered a clear procedural model. (Gönenç, 2011b)

AKP denounced the making of the 1982 Constitution by mentioning its *post-coup d'état* nature. In its election manifesto it was stated: "Turkey may no longer live under a constitution that was imposed to the society by a military coup" The same document also said, that procedural framework of the current Constitution (Art. 175) for the constitutional amendment would be legitimately used for the constitution making. It was clearly stated that in the forthcoming elections the electorate would vote for the new Assembly, which would (also) be in charge of making the new constitution. Finally, the elements of "discussion", "participation" and "consensus" were identified to be the *sine qua non* of making of the new constitution. (AK Parti, 2011)

As to the other parties; while MHP was completely silent on the issue, BDP said it would not limit itself to the parliamentary debates but would cooperate with the public. CHP said that an assembly formed by a 10 % threshold (which is the current electoral threshold in Turkey according to the Law on Elections. No 298 Date: 26.4.1961) would not be representative and legitimate agent to make the future constitution. (Gönenç, 2011b)

After the election, it became obvious that new constitution would be made within the framework of the Article 175. Post-election statements of AKP made it clear that the making of the new constitution would be realized within the newly formed TGNA. AKP won the election with a clear majority (almost 50 %) but the number of the deputies in the parliament is now 326, which falls short of the minimum number of votes (330) to change the constitution. It is thus apparent that AKP has to convince at least four deputies to reach that majority.

Post electoral statements of AKP lead us to conclude that it would include all segments of the society in the process of constitution making. For example, the Prime Minister Recep Tayyip Erdoğan said: "I am making this call to all opposition parties. Let's put aside all the prejudice and pre-conditions, freely talk, discuss and make our proposals. Let's work to complete each other and not to obstruct one another. Let's make this constitution together." (http://www.internethaber.com/iste-erdoganin-krizden-cikis-formulu_355611h.htm#ixzz1qnY2TWWD. Retrieved: 15.03.2012)

The first step to this end was the convention of an expert panel formed by the constitutional law professors. The panel was convened on 19 September 2012 to discuss the various aspects of the future constitution both from material and procedural points of view. However, the convention remains inconclusive as to its role since, it was a one-time only meeting and it was purely consultative in nature.

Secondly, a Constitutional Conciliation Commission was formed in the TGNA. The Commission was formed *ad hoc* following an agreement between the governing party AKP and major opposition party CHP. Its task is defined to prepare the draft text of the Constitution and to steer the process. The Commission is formed by four major parties (AKP, CHP, BDP and MHP) the numbers of the members are equal: 3 members for each party. Thus both the formation and mandate of the Commission lead us to consider that the compromise is the chief basis of the current constitution making process. Same comment may be made for its working procedures. As to the quorum for example, all the above-said political parties should be represented by at least one member. Besides the by-law regulating the working procedures of the commission specified that all the decisions including the finalization of the draft text should be taken by unanimous vote. Finally in the same document, it is said that all the segments of the society should be consulted for the content of the future constitution. (<https://yenianayasa.tbmm.gov.tr/calismaesaslari.aspx>, retrieved: 15.03.2012)

In Lieu of Conclusion

By the observation of the developments so far, it may be well argued that the AKP government respects democratic principles in its process of constitution making. However, the uncertainty about the sustainability of this congenial approach still persists. First, the Article 175 that governs the constitution amendment process gives much of the strategic advantage to AKP, in the final decision. The governing party has to find only four deputies to reach the 330 votes and these need not be from CHP. The difficulty with AKP majority in the TGNA in terms of constitution making is the 10% threshold in the current electoral system. This is the basic reason of the overrepresentation of AKP in the assembly, and even if it may be acceptable for a daily politics of the country this serious flaw in the current electoral system renders the status of the current parliamentary majority in doubt as a legitimate agent for the constitution making.

One may mention the referendum, which may give the final word to the people and thus alleviate the above-said flaws. Yet, the legal framework of referendum is even more problematic. Indeed, there is no quorum or an enhanced majority for the approval of the final text. This leaves the door open for an organized minority to adopt a proposal, which

is not supported by the majority of the whole voters. Recalling that half of the voters have recently voted for AKP, the party would meet no difficulties to have its draft adopted in a referendum however contentious that draft may be.

Thus, we may safely conclude that AKP has opted for the Article 175 as the procedural model, rather than election of a constitutional convention, to control the final stage of the making of the new constitution. This generates serious doubts concerning the sincerity of the earlier statements and actions of the governing party as regards the participatory constitution making.

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