

Turkey's Bid for the New Constitution

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Summary

This paper aims to analyse the basic parameters of the new draft constitution in Turkey. Having outlined the radical amendments to the current Constitution in terms of both fundamental rights and state organs, the paper takes up the procedural and substantial criticisms directed against the draft Constitution. It also contains a number of policy recommendations for taking necessary measures to ensure the broadest possible participation of the Turkish people in the constitution making process. The paper concludes that adoption of the proposed constitution will remove the psychological obstacle to democratisation of the Turkish political regime by disproving the deeply embedded belief that civilians in Turkey cannot make a new constitution under truly democratic circumstances.

Turkey is witnessing an unprecedented debate on the adoption of a new constitution. The Justice and Development Party (AKP)'s election promise triggered this heated debate. Prior to the last general election held on 22 July 2007, the AKP as the ruling party declared that it would make a new, civilian and democratic constitution during its second term. The AKP's election declaration laid down the basic parameters of the future constitution. Accordingly, the new Constitution will be shorter and clearer, and a "social contract" to be prepared through the broadest possible participation of the people. The declaration also underlined the basic targets concerning the substance of the new constitution. It must (a) regulate the relations between state organs in clear and understandable terms in accordance with the parliamentary system, (b) redefine the status and powers of the President of the Republic, and (c) transfer representative democracy into participatory democracy.

In order to initiate the preparation of the draft Constitution based on these parameters, the AKP did not even wait for the results of the election which brought a landslide victory. One month before the election the Prime Minister Erdoğan requested Professor Ergun Özbudun, a prominent constitutional lawyer in Turkey, to set up a committee of scholars with a view of drafting a new constitution. This committee, composed of liberal minded constitutional lawyers and political scientists, completed the draft text within a relatively

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short period of two and a half months. To evaluate the draft the AKP installed another committee consisting of some ministers and leading party members. The two groups came together in a joint meeting last September to discuss the draft constitution and suggested some minor modifications. The AKP's official proposal will be made public when the Prime Minister and the Central Executive Committee of the Party give their consent to the final draft. Meanwhile the draft constitution prepared by the academic committee was declared and disseminated through internet.

What is new in the Draft Constitution?

The draft adopts a liberal and rights-based approach to the relationship between individual and state. Unlike the current constitution, it gives priority to individual and his/her rights vis-à-vis the state. The liberal nature of the draft constitution can be seen in a number of provisions. The Preamble emphasises that the constitution primarily aims to protect universally accepted individual rights and liberties, the rule of law, equality and pluralism. Similarly Article 4 stipulates that the principal aim and duty of the State is to remove all obstacles before the realisation of individual rights and liberties and to prepare the necessary conditions for fostering the material and spiritual well being of individuals.

The draft constitution introduces substantial changes to the concepts of sovereignty, positive discrimination, fundamental rights and state organs. Under the heading of "sovereignty", Article 5 introduces two significant changes. First, it reiterates the long established principle that sovereignty belongs to the nation without any reservation and condition. The current Constitution, like the 1961 constitution, points to the "empowered organs" to use sovereignty in the name of people. This gave rise to the arbitrary use of powers by some bureaucratic organs claiming that they share national sovereignty with democratically elected organs. This interpretation of sovereignty tends to undermine the very idea of supremacy of elected organs in democracies. Therefore, the draft constitution clearly indicates that the Turkish nation uses sovereignty through the legislative, executive and judicial organs. Second change in the concept of sovereignty is concerned with the delegation of some part of sovereignty to international and supranational organisations to which Turkey is a party. This provision is necessary because some academic lawyers have insistently argued that under the current Constitution, the delegation of sovereignty to supranational entities like the European Union is impossible.

The provision of the draft constitution on equality adopts the idea of positive discrimination concerning such fragile groups as women, children, elderly and the disabled. This provision was reformulated in the light of the Charter on Fundamental Rights of the European Union. The draft also takes crucial steps to better protect the constitutional rights and liberties. For instance, it removes the unnecessary reasons for restricting rights. Some new rights like the right to get information and children rights are included in the proposed constitution. The legal status of political parties are strengthened by making the dissolution process more difficult than ever. The draft provides also more protection to political parties by removing the five-year ban of political activities for those party members whose declarations or activities lead to the dissolution of the party.

As to the state organs, the draft constitution makes necessary amendments to reestablish the parliamentary regime by curbing the excessive powers of the Head of State. These amendments will become crucial after the referendum on the constitutional amendments concerning the popular election of the President. Unless his powers are constrained, the future Presidents of the Republic will likely act as the heads of a semi-presidential regime. The draft also attempts to reorganise the judiciary in a more democratic and participatory manner. The Constitutional Court, for example, is restructured in terms of its composition and powers. Whereas currently all members of the Court are appointed directly or indirectly by the President of the Republic, the draft grants the Parliament with the power to select almost half the members of the Court. This radical change will help end the ongoing debate about the democratic legitimacy of the Constitutional Court. According to the draft, the terms of the members of the Constitutional Court as well as the Court of Cassation (Yargıtay) and the Supreme Administration Court (Danıştay) will be limited to nine years.

Criticisms of the Draft Constitution

Having resolved the crisis of the presidential election, the AKP declared that Turkey should discuss the adoption of a new “civilian” Constitution. This declaration immediately alarmed some circles of state elites and media to launch an all-out war campaign against the draft Constitution. The objections mainly revolve around the method and content of the draft Constitution.

a) The question of methodology: How to draft a new Constitution?

As soon as the debate on a new constitution began, some politicians and retired prosecutors presented an argument that the current Parliament is not eligible to make a new constitution because it is not a “constituent power” designed for specifically making a constitution. This argument was falsified by leading constitutional lawyers and political scientists at both theoretical and empirical levels. Theoretically speaking the Turkish Parliament which has a clear mandate to amend the Constitution, is also empowered to make a new constitution under the procedural rules of the current constitution. This will not be the first constitution that the Parliament has ever made. Likewise, the 1924 Constitution was produced by the ordinary legislative parliament which was not elected as a “constituent assembly”. Moreover, in the political language of Turkey the term “constituent assembly” reminds the military interventions in this country.

More convincing argument about the procedure of drafting the new constitution has been presented by those who claim that since a constitution is a kind of “social contract”, it should not be prepared and imposed by a single political party. This objection is based on the view that the draft is the final version of the constitution to be presented to the Parliament. The draft obviously suffers from this premature assumption despite PM Erdoğan’s repeated public statements that the new constitution will be prepared by the broadest participation of the people.

b) The content of the draft: One step forward, two steps back?

There are mainly two different and apparently incompatible criticisms against the content of the draft Constitution. The majority of the opponents argue that the draft is designed to weaken the basic principles of the political regime in Turkey. They argue that the draft ignores and even undermines the two red lines of the Republic, namely the principles of secularism and the integrity of the country. The "evidences" presented in support of this assertion are Articles 24 and 45 of the draft constitution respectively. Article 24 which secures the freedom of religion and belief was reformulated in light of the provisions of the European Convention on Human Rights.

It also incorporated Article 2 of Protocol 1 of the Convention (P1-2) which imposes on the contracting states the positive obligation to respect religious and philosophical convictions of parents in "the exercise of any functions which it assumes in relation to education and to teaching". Besides, the draft rejected the compulsory religious instruction in primary and secondary school curriculums and instead provided the pupils and their parents with the right to choose or opt out of the course entitled "The Culture of Religion and Knowledge of Ethics". Ironically, both secular and conservative groups have raised objections to the same provisions of this article. Some secular columnists and academics have claimed that freedom of individual to manifest his or her religion in public may create potential threats to the secular Republic by leading to the reestablishment of the religious orders (*tariqats*) banned by the state in early periods of the Republic. They also argue that the incorporation of Article 2 of Protocol 1 into the Constitution is dangerous because it may give rise to the parents' requests to educate their children in separate religious schools. This will clearly contravene the "Law on the Unification of Education" which ended the practice of separate schools and brought all educational institutions under the control and supervision of the Turkish state.

These criticisms are not persuasive for a number of reasons. First of all, the alleged dangers to the secular nature of the regime currently exist, because the Strasbourg convention has already been incorporated into Turkish domestic law through Article 90 of the current Constitution which provides the provisions of the treaties in the field of human rights with superiority to the laws of the country. Secondly, the draft constitution does not protect freedom of religion in absolute terms. On the contrary, the third paragraph of Article 24 subjects the worship and religious observations to restrictions such as protection of public order, general morals and the rights and freedoms of others. Thirdly, neither the draft nor the Convention impose an unlimited obligation on the state to respect the religious and philosophical convictions of parents in formulating curriculums. In interpreting this provision, the European Court of Human Rights constantly speaks of striking a delicate balance between the rights of parents and the necessities of running an efficient educational system. The Court states that Article 2 of Protocol No 1 "enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire State education programme". According to the Court "the verb "respect" means more than "acknowledge" or "take into account"". The Court also points out that "in addition to a primarily negative undertaking, it implies some positive obligation on the part of the State." However, this article "does not prevent States from imparting through teaching or education information

or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable.”¹ Finally, Article 24 of the draft is to be interpreted and applied in the light of reservation Turkey made with respect to Article 2 of the Protocol 1. This reservation is concerned with the Law on the Unification of Education which has been protected by the draft as well as the current Constitution.

The most recent judgement of the Strasbourg Court about the violation of P1-2 by Turkey reveals that the reformulation of compulsory religious instruction in the draft is appropriate and sufficient enough to meet the basic criteria at constitutional level. In the case of *Zengin v. Turkey*, the Court has emphasised that there is no single model of religious instruction in the member states of the European Council. According to the Court, the presence of compulsory religious instructions in state schools does not contravene the Convention, provided that they meet the criteria of objectivity and pluralism enshrined in the Second Article of Protocol No1. The Court found a violation of this Article on account of the fact that the syllabus and textbooks of the course “religious culture and ethics” does not sufficiently respect the religious convictions of Alevi citizens.²

Those who argue that draft constitution undermines the principle of indivisibility of the state frequently refers to last paragraph of Article 45 which regulates the languages to be used in education. Having first stated the principle that Turkish is the language to be used in education and teaching, this article provides that “the rules concerning education and teaching in the languages other than Turkish or teaching of these languages will be regulated by law in accordance with the requirements of democratic society.” This provision does not mention any particular language to be taught in schools. Nor does it grant categorically a right to individuals to be taught in their native languages. It merely leaves the parliament to decide on the question of which languages other than Turkish and to what extent these languages may be taught in institutions of education and training. The only condition the draft imposes on the legislature is the criterion of the necessities of democratic society. This gives the state a well-framed margin of appreciation as to the implementation of language rights.

The bulk of criticisms focuses on the headscarf issue. Article 45 of the draft provides that no one shall be deprived of the right to higher education because of his or her dress. One of the aims of this provision is to remove the long practiced ban on headscarf in the universities. In rejecting such a provision, the critics frequently refer to the case of *Leyla Şahin* in which the Strasbourg Court found the headscarf ban compatible with the Convention. They even argue that after this judgment the Turkish parliament has no power to remove the headscarf ban by any means. This is clearly a misinterpretation of the judgment, simply because it does not mean that the Turkish government cannot amend the law or the Constitution to free headscarf at the universities.

¹ See, inter alia, *Case of Folgerø and Others v. Norway*, (Application no. 15472/02), par.84.

² See *Case of Hasan and Eylem Zengin v. Turkey*, (Application no. 1448/04).

Another line of criticism claims that the draft constitution is not sufficiently “liberal” and “democratic” and even preserves to a great extent the authoritarian aspects of the 1982 Constitution. One of the main arguments is that the draft does not reduce the number of reasons for restricting rights and liberties. On the contrary, the draft adds new restriction grounds to rights provisions like the protection of health to limit the right to travel. This argument is not convincing either. First of all, the rights provisions of the current Constitution have been successively amended several times in order to be adapted to the text of the Strasbourg Convention. Secondly, the 2001 constitutional amendment abandoned a long practiced model for restriction of rights and liberties. It repealed the provision that had contained the general restriction grounds applicable to all rights and liberties and mentioned instead particular reasons of restriction in relevant articles. This brought about the omission of some restriction grounds such as protection of general health for restricting the right to travel. Thirdly, some of these grounds like the protection of general health aim to protect not only the rights of others but also those of the users. Fourthly, it is a mirage to believe that a constitution is more liberal if it leaves the restriction grounds to the parliament without mentioning a single reason of restriction. Finally, these restriction grounds must be read and interpreted in conjunction with Article 12 of the DC which provides significant criteria for safeguarding the rights and freedoms of individuals against arbitrary restrictions. These restrictions, which may be imposed only by law, must be proportional and necessary in a democratic society. In addition they cannot infringe on the essence of rights.

Policy Recommendations

- The above criticisms directed towards the draft constitution appear to derive from the prevalence of fear and/or lack of information. The Erdoğan administration must take all necessary measures to alleviate the deeply embedded worries of certain groups and to inform society at large about the necessity and basic parameters of the new constitution.
- Unlike ordinary laws, constitutions are regarded as “social contracts” and therefore require the consensus of the people to a great extent. Constitutions are designed to unite people rather than cause tensions and polarization. The government should therefore make every effort to convince the people as to its intention.
- The government must eliminate the widely shared belief that the AKP will impose its own draft constitution. If this belief prevails, history will repeat itself and we will have another crisis of constitutional legitimacy. It must be kept in mind that the legitimacy of the 1961 Constitution was constantly questioned because of its association with the Republican People's Party (CHP).
- The government must inform the public as to the necessity of drafting a new constitution that will complement the reform process in the way of becoming a full member of the EU. The methods of informing public may vary from organising national and international conferences to broadcasting TV and radio programs about the new constitution.

- The government should mobilise the organised groups of society to ensure the widest participation in the process of drafting the new constitution. It may call the nongovernmental organisations to contribute to the new constitution by underlying the basic principles to be adopted. It may also encourage some trade unions and bars that have already begun to propose alternative draft constitutions.
- The president of the Turkish Parliament, as an impartial figure, may request all political parties to participate in the process by presenting their views on the new constitution.
- Perhaps the greatest responsibility lies with the media which provides effective means to persuade the people as to the necessity of a new constitution and discuss the basic parameters and content of the constitution. The media must criticise the proposed constitutions in a constructive way without lapsing into the traps of tabloid journalism.

Conclusion

Making a new constitution poses perhaps the most formidable challenge to the AKP in its second term. But this is also a historical mission to be completed. The last two constitutions have been the products of military interventions. Turkey has a historic opportunity to draft a constitution under normal and democratic circumstances. The belief that constitutions in this country can only be made after military coups became in a way a psychological obstacle to democratisation of political regime. Turkey is bound to overcome this obstacle by proving that civilian politicians can draft a constitution with the help of nongovernmental organisations. The liberalisation and democratization of the political regime can only be secured by drafting a democratic constitution. The existence of widespread expectation among people to draft a new and civilian constitution has been the most significant factor for the success of this endeavour.