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Turkey's New Constitution: Transformation, Democratization, and Living Together

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FUAT KEYMAN, JUL 25 2012

The June 12, 2011 general elections resulted in the victory of the ruling Justice and Development Party (the AK Party). The AK Party received 50% of the national vote, which meant a record level of popular support and the highest level of votes that a political party ever received in national elections in Turkey. Moreover, this was the third consecutive victory of the AK Party since 2002. The AK Party has become not only a strong majority government that rules Turkey without a strong opposition, but also, a "dominant party" that is likely to continue to maintain its position and win the elections to come. Turkey with the AK Party majority government without alternatives seems to remain a defining feature of Turkish politics in near future. It is also important to note that participation in the elections was 87%, the highest level so far, and the representation capacity of the parliament increased to 95%, with more women, more youth, and more voices from different ethnic and religious identities. In this sense, the 2011 general elections constituted a milestone in Turkish politics as the path of democratization, underway in Turkey since 2002, seems to have finally culminated in a highly representative parliament.

At the same time, this newly formed parliament is faced with a number of daunting tasks as it needs to tackle the Kurdish problem, draft a new Constitution, sail Turkey out of the troubled waters of the global economic crisis, as well as the growing risks and insecurities in the Arab Spring, particularly in Syria. Moreover, the path of democratic consolidation in Turkey has never been smooth.[1] The Turkish political system has been shaped by the political struggles, even antagonisms, which mainly revolve around the ethnic and religious cleavages in Turkey.[2] These cleavages have given rise to the increased and deepened social polarizations, making Turkey a divided society with a low degree of general trust, on the one hand, and the risk of social segregation in the area of the Kurdish question, on the other.[3] In addition, as will be elaborated later, the problem of checks and balances, as well as the separation of powers, which has been one of the main obstacles to the consolidation of democracy in Turkey, remained unsolved in the AK Party majority government. Finally, Turkish politics is currently characterized by a dominant party and a weak opposition. The AK Party enjoys both electoral hegemony and being the dominant party of Turkish politics, enabling it to control both state institutions, regulatory institutions, the judiciary, the universities, the media, and even civil society. The opposition parties are weak, in that they have been unable to initiate an effective opposition politics to the AK Party, or to increase their linkages with the different segments of society. During the 1990s, Turkish politics had suffered immensely from weak coalition governments, creating economic and political crises. Today, it seems to suffer from the extremely strong and dominant government, governing society without being subject to an effective system of checks and balances, and strong opposition.

The AK Party seems to be able to maintain its dominant party position in the next decade, so it is almost certain that it will remain the main political actor shaping the democratic consolidation process. However, the 2011 elections' results have also indicated that despite its electoral hegemony, the AK Party does not completely control the parliament or the whole electorate. Even with its 50% of popular support, the AK Party does not have the absolute majority to make a new constitution unilaterally. Turkish voters gave the AK Party a strong governing mandate, but not a constitutional mandate.[4] In fact, they gave the AK Party the message that it should compromise with other political parties in order to amend the constitution. This is critical as one of the main tasks for the new parliament is to adopt a new Constitution replacing the 1982 Constitution.^[5] It is now certain that constitutional reform is not possible without societal consensus and/or political compromise.

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In this paper, I will focus on what has come to be called “a new and civil constitution making” process, which has been initiated after the elections, and now it has reached its second stage of “drafting”. In doing so, I will first explain the need for a new and civil constitution for Turkey, then attempt to elaborate on the constitution making process. I will conclude by making a number of suggestions as to how to link this process with the possibility of democratic consolidation in Turkey.

The Need for a New and Civil constitution

As Ergun Ozbudun, one of the leading experts on constitution making in Turkey, has put eloquently, “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 Atatürk’s new 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 1982, respectively). In their making, the military committees that carried out the coups (the National Unity Committee in 1960; and the National Security Council in 1980) played a predominant role. 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 essential cooptive system which totally excluded the supporters of the overthrown Democratic Party, and the latter was composed of 160 members all of whom were appointed by the ruling National Security Council.”[6]

Turkey’s 1982 Constitution was an undemocratic text solidifying the authoritarian state structure as well as bureaucracy and military tutelage. Since its ratification, it faces a serious legitimacy problem, and has been amended 17 times between 1987 and 2010. Many recent amendments were made under Turkey’s bid to become a full member of the European Union (EU). Latest amendments to the Constitution in 2010 were crafted by the AK Party government, and included dramatic changes to the judiciary system and fundamental rights and freedoms. The Constitutional Changes Package Referendum held on 12 September 2010 for the amendments resulted in public support for the amendments – almost 58% of the public favored the changes. With the referendum, 24 articles of the 1982 Constitution have been changed, and two provisional articles concerning the organizational structures of the Constitutional Court and the High Council of Judges and Public Prosecutors have been added. Moreover, both the 58% Yes vote and the existence of a group of voters who called themselves as “Not Enough But Yes Camp” clearly indicated that there is a public demand for either radical changes to the Constitution or for a brand new one. This result was also reflected in the 2011 general election campaign period, with many of the major political parties including a new constitution vision in their party platforms. This was simply because of the fact that despite amendments and changes, the undemocratic and authoritarian spirit and philosophy of the 1982 Constitution limiting rights and freedoms in order to secure state power has remained unchanged. Without a new constitution, Turkey seemed to be unable to consolidate its democracy and strengthen the culture of living together in diversity.

It should also be pointed out that besides the undemocratic structure of the 1982 Constitution, the recent radical transformation of Turkish society, that has been going on since the 1990s, but has accelerated its pace and consolidation since the 2000s, has made a new constitution necessary for the good, just and democratic governance of Turkey. Throughout the transformation process, Turkey has become **actively globalized** in its economy, foreign policy and culture; **Europeanized** through its full membership negotiations with European Union, and also its Custom Union agreement which has had significant changes especially in the Anatolian medium and small-size economic actors; **urbanized** through a significant urban transformation process in Anatolian cities, radically changing the relationship between the urban and the rural areas, in that we have been observing a transformation of a highly rural society into an urban society covering almost the 80% of Turkey; and **postmodernized**, in that identity politics has replaced the long dominance of the conventional center-left and right politics, giving rise to the AK Party majority government as the dominant party of Turkish politics, on the one hand, and the Kurdish question as the main obstacle of democratization and social unity. Furthermore, transformation has led to the increasing power shift in

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Turkey, creating new middle classes, new claims to modernity, and new actors in economy, bureaucracy, and civil society. With the emergence of new power configurations, Turkey has become *politically and culturally polarized*, even a *divided society* in religious and ethnic terms. While religious and ethnic identities have been making their demands for recognition and demanding for a more plural and multicultural Turkey, the increasing power and visibility of conservative modernity has created a socially polarized society in terms of the negotiation of life styles. Today, it is no longer possible to maintain a state-centric secular and homogenous Turkish modernity; yet, transformation has created ambiguity in the future formation of modernity; whether it will be a more plural and democratic modernity or a conservative modernity has become a serious question whose answer remains uncertain.[7] All of these developments have made a new, civil, and democratic constitution necessary, and have increased the level of societal support for it.

The Process of Constitution Making

What Turkey is experiencing today, for the first time in its history of constitution-making, is a parliamentary-based process, involving also societal deliberation and participation. As noted, the 2011 general elections creating a parliament with 95% representation capacity has constituted a suitable platform for it. Those voices demanding for a separate constitutional assembly from the existing parliament have lost, and a strong consensus has emerged on the idea that the new constitution should be made by the existing parliament with societal participation through deliberation. The three-track or staged process of constitution making has been initiated after the election; the first track is the creation of a constitutional commission in the parliament that will open itself, as well as listen to, to societal deliberation, the second track is the process of drafting, in which the process is undergoing now, and the third track where the societal deliberation and then parliamentary approval of the draft will take place, and finally the approved draft will go to a referendum.

As four political parties (AK Party, Republican People's Party, CHP; Nationalist Movement Party, MHP; and Peace and Democracy Party, BDP) entered the parliament in June 2011 general elections, Speaker Cemil Çiçek has initiated discussions on ways in which the new constitution should be drafted. As an initial step, Speaker Çiçek called on a meeting on 19 September 2011 with constitution and public law professors for a discussion on whether the constitution should be written by the members of the newly elected parliament or by an assembly specifically designed for drafting a new constitution. The meeting concluded with a consensus that the current parliament have legitimacy to deliberate on and draft a new constitution. With the political buy-in of all political parties represented in the parliament, an ad-hoc Constitution Consensus Committee was formed with equal representation (3 members each) from four political parties. The Committee determined and penned its own rules and procedures in a series of meetings which started on 19 October 2012. Similar ad-hoc committees were previously formed in the Turkish parliament for extensive constitutional amendments in 1999 and 2001. Differing from the standing committees in the parliament, consensus committees agree on their own set of rules and procedures to complete their tasks, all decisions taken have to be based on consensus, discussions on contentious issues are postponed to be discussed later.

Constitution Consensus Committee has certain key elements in its rules and procedures which have direct impact on both the content and the process of the constitution making. These key elements are: a) decision to conduct a consultation process with the participation of different segments of the society; b) to seek consensus for all the decisions made; and c) decision to get approval of the consensus committee and seek consensus of all political parties in case any amendments are made to the draft constitution during the standing committee and general assembly deliberations. The Consensus Committee also defined four main phases for the constitution making process. In the first phase, the committee conducted a consultation process which continued until the end of April 2012. In the first period of the consultation process all civic groups, platforms, initiatives, government departments as well as individuals are called for submitting written testimonies. According to the data of the committee more than 68 thousand written comments and testimonies were sent through the committee's website, email and post. The committee also held 160 hearings during the process which continued until April 2012.

The second phase which is the deliberation and the writing of the articles has started in May 2012. A sub-committee designated for the writing process has reached consensus on 12 articles by mid-June and will continue to work

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during summer when the parliament is not in session. No date has been set for the completion of an initial draft. The draft will be made public and will be open to public discussion in the third phase. The committee will finally reshape the draft to be sent to further deliberations in the standing Constitution Committee and the General Assembly. Speaker Çiçek has stated they were aiming for this process to be completed by the end of 2012. According to the statements of political parties, the final version of the constitution will be voted on in a referendum, although this is not required by the law.

Strengthening Checks and Balances

The new constitution has to overcome the two most significant problems of Turkish democracy and modernity; first, the creation of social unity within diversity, that is, strengthening the culture of living together by recognizing difference and plurality, and, second, the consolidation of democracy by strengthening the system of checks and balances in a way not only to govern society democratically, but also to solve societal problems through democracy and deliberation rather than violence and othering. In this context, a number of civil society organizations have made proposals; (a) to integrate into the philosophy of the new constitution the ideas of human dignity and the protection of human rights and freedoms; (b) to eliminate all of the ethnic connotations and references from the constitution; (c) to promote an equal and multicultural constitutional citizenship as the basis of both the recognition of cultural rights of different cultural identities, and also, the culture of living together in diversity; (d) to recognize the principle of "education in mother tongue"; and (e) to strengthen the role and autonomy of local government and politics. With these proposals the aim is to create a new social contract between state and society/individual, as well as within society, through the transformation of the regime of the Republican and duty-based citizenship privileging state power over individual rights and freedoms into the regime of the democratic and multicultural citizenship based on the enlarged rights and freedoms. All of these proposals have been deliberated within the public sphere, and presented to the Constitution Committee.

The second problem concerns the regulative dimension of the new constitution, in which the main issue is to create an effective and democratic system of checks and balances in a way to establish the basis of a much needed good and democratic governance in Turkey. An effective and democratic system of checks and balances is also needed to consolidate democracy in Turkey. With this vision, one of the most detailed and comprehensive proposal has been prepared and presented by Istanbul Policy Centre (IPC), The work on "Strengthening Checks and Balances in Turkey Through Constitutional Reform" began in July 2011 and finished in January 2012. The Constitution Committee and its head, Cemil Çiçek, took the project and its hundred concrete proposals seriously, and in what follows I, as the director of the project, will provide a brief account of the project. With this program IPC aimed at bringing together decision makers and civic groups to have dialogue on institutional reform in parliament, judiciary system and political parties and the election system which eventually would lead to a sound checks and balances system in the new constitution.

The added value of this program to the constitution process can be elaborated in two parts. First, the program brought together a diverse group of civic groups, trade unions, think tanks, academia, media and decision makers including all four political parties in the parliament and senior judges to have dialogue on parliamentary, judiciary and political party reform. This is especially important since such platforms bringing together diverse groups and decision makers are very few in number. The second significant element of the program is its unique and specific focus on strengthening the checks and balances system in the new constitution and bringing specific recommendations to the governing structure of Turkey.

IPC specifically focused on institutional reform and checks and balances concepts under its constitution program. This comes from the notion that a democratic government system is required for the implementation of any right and freedom granted in the constitution. A well structured and functioning parliamentary oversight, political parties with internal party democracy and a judiciary independent from government and all other external pressures are necessary for the implementation and protection of rights and freedoms.

With this perspective, IPC has collected the consensus areas and contentious areas through workshops, one-to-one interviews and focus groups. Final analysis of the discussions revealed that in all three reform areas, participants

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have reached consensus on almost 100 areas, whereas contentious areas were less than 10. This result can be interpreted as a consensus and a call for much needed institutional reforms in the political and governing structure of Turkey. A final report including recommendations was then presented to the President, Speaker of the Parliament, political party leaders and the Constitution Consensus Committee.

While there is an agreement that a judiciary reform is necessary, reforms done in this area have not delivered the expected results. Previous research demonstrates that there is a need for a change in the mentality of judges and prosecutors who consider their first and foremost job as to protect the interests of state rather than individual rights and freedoms and to grant a fair trial. Recommendations of IPC program also reflect similar results. There is a wide consensus that the independence of judiciary from the government and all other external actors is needed. While independent judges are essential for an independent judiciary, recommendations include that Siracusa Principles should be adopted and implemented for the independence of judges.

It is also recommended that a pluralistic structure for Supreme Board of Judges and Prosecutors (HSYK) – the board in charge of appointment and promotion of judges and prosecutors – should be ensured. The necessity to keep the board independent from the Ministry of Justice is also emphasized. Financial independence, oversight and accountability of judiciary along with transparency of judicial decisions are also recommended. Another outstanding issue on judiciary reform is the efficiency and accelerating the pace of judicial processes. Opening of second instance courts are recommended as a requisite to achieve efficiency.

Governed with a parliamentary system, fundamental changes have to be made to strengthen the deliberative and oversight capacity of the Turkish National Grand Assembly (TGNA). In the current situation, the deliberation process of the government bills drafted in the ministries remain weak with limited time frame for committee process and government party dominance in the standing committees. As a remedy to this it is recommended that members of parliament from opposition parties could chair certain committees that play a key role in the legislative process. Establishing a systematic consultation process in the parliament, therefore creating a platform to include civic groups and citizens in the legislative process are also stressed.

Strengthening oversight capacity of the parliament emerges as another significant reform area. Right now, the parliament exercises very little oversight over the government's actions and policies, current mechanisms (written and oral questions) have limited impact on checking government policies. Question time period with the participation of the prime minister at general assembly and similar sessions for ministers in relevant committees are among the suggestions in the report. Similarly the participants agreed that the committees should hold special testimony sessions for senior government appointees. Improving the effectiveness and influence of members of parliament both in the party groups and in the whole legislative system which will enable them to submit bills without prior approval of the party group leadership are also essential.

In the absence of a political party and election system reform many reforms in the parliament will not be implemented properly. The current 10% threshold in the parliamentary elections stands as a big obstacle for democratic representation of various political currents in the parliament. All previous proposals to lower the threshold have been declined on the basis of maintaining political and economic stability. Nonetheless a policy document of Economic Policy Research Foundation of Turkey (TEPAV) demonstrate that both stability and fair representation could be achieved with a 3–4% threshold. Similarly the participants have largely agreed that the threshold should be lowered to 4–5% level.

Reforms to membership structure and registers are indispensable for a meaningful political party reform. An open, transparent membership system is recommended as a remedy for one-man leadership in political parties. Representation of women, disadvantaged groups should be increased at all levels of political parties. A pre-election system in political parties should be in place to determine candidates to run in elections to prevent a handful of leaders from determining the candidates. Full disclosure of party finances through internet is also highly recommended. There is a wide consensus that the political parties should not be closed down unless they have become part of violent activities and limit fundamental rights and freedoms. Venice Commission's decisions should be taken as a basis for the party closures and a clear concise definition of violence should be made to prevent any

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ambiguity.

In the coming phase of its program, IPC together with a diverse group of civic organization representatives will monitor the constitution process and work towards creating secure checks and balances in the new constitution.

Conclusion: the Possibility of the Consolidation of Democracy

There is no doubt that Turkey needs a new, civil and democratic constitution, and the new constitution making process should be welcomed and supported. If the process will be successful, and Turkey will have a new constitution, that would open up extremely important spaces and possibilities to begin to solve the ongoing problems and challenges confronting Turkish democracy and modernity. Moreover, despite all of the significant transformations and developments in Turkey in the areas of economic dynamism, proactive foreign policy, and active globalization, Turkish democracy is still a “partial and limited democracy”, and Turkish modernity is in need of being reconstructed in a pluralist and multicultural fashion. In order to be consolidated, the rules, norms and procedures of democracy need to be *internalized* by actors, *institutionalized* through a democratic political and administrative reform process, and *implemented* in the governance of society. The new constitution would make the internalization, institutionalization, and implementation of democracy, therefore, its consolidation possible.

Yet, one should not be too optimistic, since there are serious challenges that the process faces. The two most important of these challenges have to do with; (a) the **Kurdish question** and violence embedded in it; and (b) the AK Party's, especially, the Prime Minister Tayyip Erdoğan's desire to create **apresidential** or a **semi-presidential system** in Turkey. The former creates a negative impact on the societal support for the new constitution; the later creates a negative perception, among political parties, and in society at large, that the new constitution is not Turkey's new constitution, but AK Party's constitution with which Mr. Erdoğan wants to be the first president of Turkey, and the party strengthen its dominant party position. So far, all of the proposals prepared by civil society organizations, as well as societal deliberation and public debate, have assumed that with the new constitution, what is aimed at is to strengthen Turkish parliamentary democracy institutionally and Turkish modernity with new norms and rules, so that democracy could be consolidated and modernity pluralized. Civil society continues its work on, and support for, a new constitution, and it would be pity if Turkey will miss this opportunity because of violence or wrong and untimely attempts to incorporate into the process a debate on the presidential system.

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[1] This article has been based on the Istanbul Policy Center-National Democratic Institute joint project on Turkey's new constitution, with respect especially to the much needed system of checks and balances. For the full text of the report, go to <http://ipc.sabanciuniv.edu/en>, and I would like to thank Ebru Agduk for her valuable contribution to the preparation of this paper.

[2] For detail, see E.Fuat Keyman and Ziya Onis, *Turkish Politics in a Changing World*, Bilgi University Publications, İstanbul, 2007, and E. Ozbudun, *Contemporary Turkish Politics*, Lynne Rienner, Boulder, 2000.

[3] E. Fuat Keyman, “Rethinking the Kurdish Question in Turkey”, *Philosophy and Social Criticism*, 38(4-5) 467–476/20012.

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[4] Meltem Müftüler Bac and E. Fuat Keyman, "Turkey under the AKP Rule: The Era of Dominant Party Politics,, *Journal of Democracy*, 23 (1), 83-99, 2012.

^[5] The 1982 Constitution was adopted for the transition to civilian rule after the 1980 military coup and reflected the authoritarian and undemocratic nature of the national security government.

[6] E. Ozbudun. " Turkey's Search for a New Constitution", *Insight, Turkey*, vol.14, no.1, 2012, p.40.

[7] I have analyzed this transformation process in detail in E.Fuat Keyman, *Turkey's Transformation and Democratic Consolidation*, Macmillan/Pelgrave, London, 2013.