

# TURKEY: THE POLITICS OF A NEW DEMOCRATIC CONSTITUTION

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Most Turks agree that their current constitution — written in 1982 by the generals who had seized power on September 12, 1980 — is too authoritarian, statist and tutelary. Thus, it needs to be replaced by a more democratic one that reflects Turkey's new political maturity and promotes greater civil liberties. Such a document would befit a candidate for European Union accession while also contributing to a solution to the long-festering Kurdish problem.<sup>1</sup> As the latest (2011) EU Progress Report on Turkey's accession candidacy put it: "A new Constitution would cement the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities and address long-standing problems, including the Kurdish issue."<sup>2</sup> Indeed, the ruling Justice and Development Party (AKP) government of Prime Minister Recep Tayyip Erdogan, promised that, following its tremendous victory in the national elections held on June 12, 2011, it would renew its efforts to draft such a constitution with the broadest possible participation of all other

political parties and civil society. (Earlier efforts to draft a new constitution following the AKP's 2007 electoral victory were dropped in 2008, as will be discussed below.) The purpose of this article is not only to illustrate this situation, but also to show how the continuing political and social divisions among the AKP, opposition Kemalists, and military and Kurdish elements probably preclude agreement on a new constitution at this time.

## THE 1982 CONSTITUTION

Most observers agree that "the primary objective of the . . . [1982] Constitution was to protect the state from the actions of its citizens, rather than protecting the individual liberties from the encroachments of the state."<sup>3</sup> (Given the internal anarchy Turkey had fallen into by 1980, however, such an authoritarian constitution was understandable.<sup>4</sup>) Thus, the preamble to the 1982 constitution stresses that "no protection shall be afforded to thoughts or opinions contrary to Turkish national interests, the principle of the existence of Turkey as an indivisible entity with its state and territory, Turkish historical and moral values,

or the nationalism, principles, reforms, and modernism of Atatürk.”<sup>5</sup>

The first three articles of the 1982 constitution further define this situation. Article 1 says, “The Turkish State is a Republic.” Article 2 describes this republic as “a democratic, secular and social State governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice . . . loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble.” Article 3 declares that “the Turkish State, with its territory and nation, is an indivisible entity. Its language is Turkish. Its flag . . . is composed of a white crescent and star on a red background. Its national anthem is the Independence March. Its capital city is Ankara.” Article 4 then seeks to lock these provisions in perpetuity by declaring that the first three articles “shall not be amended, nor shall their amendment be proposed.” In addition, Atatürk’s name is mentioned on eight separate occasions, twice in the preamble as well as in Articles 2, 42, 58, 81, 103 and 134. Furthermore, the phrase “the indivisibility of the country, the Republic and democracy,” or similar phrasing, appears 14 times (the Preamble and Articles 5, 13, 14, 28 [three times], 30, 68, 81, 103, 122 and 133). Although numerous articles in the 1982 constitution list fundamental civil liberties also found in modern Western constitutions, the grounds for restricting them are so severe and numerous that the document has been satirically referred to by some of its many critics as a “yes, but, constitution.”<sup>6</sup>

As for the restless Kurdish minority,<sup>7</sup> Articles 26 and 28 of the original 1982 constitution banned “language prohibited by law” for speech and press. This attempt to prohibit the Kurdish language without even specifically mentioning it was elimi-

nated by a constitutional amendment in 2001. However, Articles 68 and 69 of the 1982 constitution continue to block Kurdish interests by provisions regarding “the indivisible integrity of the State” and “the domination of a class or group.” Moreover, the Law on Political Parties (1983) and more recent Anti-Terrorism Law (2006) — both products of the mentality of the 1982 constitution — continue to permit harassment of Kurds who peacefully pursue their cause.

For example, under Article 80 of the former, political parties shall not aim at changing the unitary nature of the state, a provision that bans pro-Kurdish parties that might advocate decentralization. Article 81 states that political parties shall not “maintain that there are minorities in the territory of Turkey based on differences of national or religious culture, or race, or language,” adding that parties shall not “harm national unity by way of creating minorities in the territory of the Republic of Turkey through protecting, developing or spreading languages and cultures other than the Turkish language or culture.” The Constitutional Court (see below) has not hesitated to ban pro-Kurdish parties that have run afoul of these provisions.

However, the oft-cited report by the Venice Commission of the Council of Europe entitled “Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures” (1999) declared that “prohibition or enforced dissolution of political parties may only be justified in the case of parties which advocate the use of violence or use violence. . . . The fact alone that a party advocates a peaceful change of the Constitution should not be sufficient for its prohibition or dissolution.”

During the 1990s, Article 8 of the Anti-Terrorism Law (1991) also notoriously

made it possible to consider academics, intellectuals and journalists speaking up for Kurdish rights to be engaging in terrorist acts: “Written and oral propaganda and assemblies, meetings and demonstrations aimed at damaging the indivisible unity of the Turkish Republic, with its territory and nation, are prohibited, regardless of the methods, intentions and ideas behind such activities.” Under these provisions, practically anybody could be imprisoned for advocating a political solution to the Kurdish problem, and hundreds were.

The new Anti-Terrorism Law (TMY) that entered into force in 2006 represented little improvement and constitutes an affront to the rule of law. Its definition of terrorism is vague, overly broad and lacking in clarity on the nature of the crime. For example, Article 6 of the new law has the potential to make anybody who expresses an idea contrary to the official state ideology guilty of being a “terrorist,” even when the accused may be completely opposed to the use of violence. Under Article 6, “terrorists’ offences” are broadened to include the carrying of an emblem, sign or placard of a terrorist organization and attempting to conceal one’s own identity during a demonstration. Indeed, mere criticism of the law can result in an accusation of “terrorism.” *Info Turk* pointed out that even the “Turkish media criticized the government’s proposal, . . . saying the draft [of the TMY] defined too many actions as terror and could easily be misused.”<sup>8</sup>

The *Cumhuriyet* newspaper also devoted its front page to criticizing the proposed

law: “The reforms passed in the European Union process will be erased by a definition of terror that encompasses all crimes. . . . There is nothing left out in the definition.”<sup>9</sup> Furthermore, Article 7 of the TMY too broadly defines the offense of “financing terror” to include providing funds “directly or indirectly” knowing they would

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“entirely or partially” be used to commit terror crimes. Under such definitions, it will be dif-

ficult for the ordinary, law-abiding Turkish citizen to regulate his or her behavior so as to avoid criminal liability.

Finally, according to Nalan Erkem, a lawyer for the Izmir Bar Association Prevention of Torture Group (IOG): “The arrangements the draft (TMY) makes with regard to access to an attorney take away all of the rights of the defendant. . . . While it opens the way for torture and mistreatment, the draft also aims to prevent lawyers from proving their existence.”<sup>10</sup> By the end of 2011, thousands of ethnic Kurds or those in sympathy with them were in prison for violating various provisions of the anti-terrorism law, even though they had acted only peacefully. The arrest of Professor Busra Ersanli of Marmara University in November 2011, for example, illustrated how engaging in a single peaceful protest could constitute evidence for support of terrorism either directly or by association.<sup>11</sup>

In addition to the authoritarian nature of the 1982 constitution detailed above, there is that document’s tutelary character, intended to check the powers of democratically elected majorities. For example, the president, indirectly elected by the Parlia-

ment and serving a single seven-year term staggered with that of the Parliament, was given wide substantive powers beyond its control.<sup>12</sup>

The military-dominated National Security Council long enjoyed autonomy and the right to make “recommendations” to the civilian government and thus constituted a second leg of the constitutional triad established by the 1982 constitution to implement its tutelary goals. On four separate occasions (1960, 1971, 1980 and 1997), the military also successfully intervened in politics to establish a new government more to its liking. Only recently, as a result of Turkey’s EU harmonization laws, has the military’s remit been reduced. For example, the latest (2011) EU Progress Report on Turkey concluded:

*Overall, good progress has been made on consolidating the principle of civilian oversight of security forces. . . . However, further reforms — on the composition of the Supreme Military Council, military justice system and the Personnel Law of the Turkish Armed Forces — are still needed. In several instances, legislation intended to increase civilian oversight of the military . . . was amended in parliament, weakening such oversight.<sup>13</sup>*

Thus, at the present time, the judiciary is the sole remaining instrument left to implement the tutelary goals of the 1982 constitution. As Zuhtu Arslan has pointed out, “The judiciary has impeded the development of political liberalism, . . . [by] the self-declared mission of the courts in Turkey, which is to protect the state and its official discourse rather than the individual and his/her rights and liberties. . . , which is generally known as the judicialisation of politics.”<sup>14</sup>

Chief among these tutelary judicial bodies has been the Constitutional Court. Under the 1982 constitution, this judicial body has closed down 19 political parties, mostly on the grounds of alleged violations of the constitutional provisions regarding the indivisible territorial integrity or secular character of the state. As recently as December 11, 2009, the Constitutional Court banned the pro-Kurdish Democratic Society Party (DTP). Even more striking, in 2008 the court came within just one vote of banning the governing AKP and implementing a judicial coup that would have overturned the results of the national elections held on July 22, 2007.<sup>15</sup> Thus, the court has also claimed the power to review constitutional amendments as to their compatibility with the unamendable articles of the 1982 constitution, despite the explicit wording of Article 148 of the constitution limiting its remit to mere procedural rather than substantive review. These court actions have served to make it the ultimate authority over constitutional amendments and thus the last bulwark of the 1982 constitution against unchecked majority rule. The successful constitutional amendments carried by the AKP in the referendum held on September 12, 2010, have only served to make the Constitutional Court slightly more pluralistic and representative of the majority.

## **PROSPECTS FOR A NEW CONSTITUTION**

Based on the analysis above, it seems apparent that Turkey needs to adopt a new, more democratic constitution if it is to become a fully democratic state that respects, promotes and defends the civil liberties of all its citizens.<sup>16</sup> Thus, the current constitutional struggle is between those led by the governing AKP who want to create a more

libertarian, democratic/majority constitution and those led by the Kemalist Republican People's Party (CHP), the military and their last constitutional bulwark, the judiciary, who seek to maintain the state's authoritarian/tutelary nature.<sup>17</sup>

The initiative for changing the constitution is not new. The AKP pledged during the election campaign of 2007 that it would produce a new civilian constitution based on a social contract of broad consensus.

The document was to protect fundamental rights and liberties in line with the standards established by the Universal Declara-

tion of Human Rights (1948) and the European Convention on Human Rights (1953).

Prime Minister Erdogan established a small group of constitutional-law professors headed by Professor Ergun Ozbudun early in June 2007 to prepare a draft, which was presented to the AKP leadership at Sapanca following the party's victory in July.

However, this draft met with strong opposition from the secular Kemalist elements. They feared the loss of their long-held privileges, as well as AKP "hidden intentions" to gradually introduce Islamic laws through unchecked majority rule. Subsequently, the AKP seemed to give credence to this fear when it pushed through a constitutional amendment permitting headscarves to be worn in universities. The AKP's resulting near-death experience at the hands of the Constitutional Court mentioned above temporarily shelved the issue of writing a new constitution.

During the following year, however, the AKP returned to the road of reform and

proposed a democratic opening to solve the Kurdish problem, an initiative that once again implied constitutional revisions or even a new constitution. Although the Kurdish Opening proved a dismal, inept failure,<sup>18</sup> a series of more democratic constitutional amendments were approved by a referendum in September 2010, once again raising hopes for a new constitution following the election of June 12, 2011.

Unfortunately, despite the claims of all the important parties to favor a new, more democratic constitution, the social and political divisions in Turkey will probably

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preclude the two-thirds majority (367 of 550 members of Parliament) required to approve the

document. The AKP, for example, wants a majoritarian constitution, while the second-largest party, the Kemalist CHP, as well as the military and judiciary, prefer the current, more authoritarian and tutelary document for the reasons already discussed.

The third-largest party is the ultranationalist Nationalist Action Party (MHP). Although to some extent it shares with the AKP the wish for a less strict version of secularism and the lessening of tutelary controls, the MHP is passionately opposed to any Kurdish opening as a threat to the Turkish state it sees itself defending. On the other hand, the new pro-Kurdish Peace and Democracy Party (BDP) — closely associated with the position of the illegal, insurgent Kurdistan Workers Party (PKK) — pursues a policy of major constitutional change that would radically alter previous conceptions of the Turkish constitutional order: (1) civic, rather than ethnic (Turk-

ish) citizenship, (2) broad decentralization of government that would grant the Kurds living in southeastern Anatolia de facto federalism,<sup>19</sup> and (3) mother-tongue (Kurdish) education. Clearly, fundamental differences over the very nature of the political order divide the major parties.

In addition to these inhibiting constitutional fissures, social and economic divisions also serve to block constitutional consensus. The ruling AKP, for example, is based in the new market-capitalist Anatolian middle class, which is socially conservative and religious but politically and economically liberal.<sup>20</sup> The older secular Kemalist state-capitalist and Istanbul-based industrial elites and their supporters represent an opposing social and economic order that sees their long-established prominence being challenged. The pro-Kurdish BDP, of course, has its own agenda. None of these competing social groups seems capable of the compromise necessary to forge a new and more democratic constitution.

The constitutional referendum in September 2010 — that somewhat liberalized the 1982 constitution and was carried by a vote of 58-42 percent — clearly illustrated these foundational divisions.<sup>21</sup> This AKP majority, however, is not strong enough to carry a new, more democratic constitution by itself. To achieve the necessary two-thirds majority of 367 votes in Parliament, the AKP will either need the support of the Kemalist CHP, the ultranationalist MHP or the pro-Kurdish BDP, none of whose support was forthcoming either in the initial parliamentary vote or the subsequent constitutional referendum held in 2010.

Based on this analysis, it would seem as if — although most objective observers agree that Turkey very much needs a more democratic constitution — the opposing political parties and social classes cannot agree on what such a document should contain. Thus, Turkey seems destined to continue to be bound by the existing framework of the authoritarian, statist and tutelary 1982 constitution.

<sup>1</sup> For background on the process of drafting new constitutions in Turkey, see Ergun Ozbudun and Omer Faruk Genckaya, *Democratization and the Politics of Constitution-Making in Turkey* (Budapest and London: Central European University Press, 2009). The best up-to-date study in English of the problems entailed in the present 1982 constitution is Ergun Ozbudun, *The Constitutional System of Turkey: 1876 to the Present* (Palgrave Macmillan, 2011). Also see Ergun Ozbudun, "Turkey's Search for a New Constitution," *Insight Turkey* 14 (Winter 2012), 39-50; and Henri Barkey and Direnc Kadioglu, "The Turkish Constitution and the Kurdish Question," Carnegie Endowment for International Peace, August 1, 2011, <http://carnegieendowment.org/2011/08/01/turkish-constitution-and-kurdish-question/4e14>, accessed January 1, 2012.

<sup>2</sup> European Commission, Commission Staff Working Paper, *Turkey 2011 Progress Report* {COM(2011) 666}, Brussels, October 12, 2011, 7.

<sup>3</sup> Ozbudun, *Constitutional System of Turkey*, 44.

<sup>4</sup> For analyses of the anarchy that led to the authoritarian 1982 constitution, see the General Secretariat of the National Security Council, *12 September in Turkey: Before and After* (Ankara: Ongun Kardesler Printing House, 1982); Mehmet Ali Birand, *The General's Coup in Turkey: An Inside Story of 12 September 1980*, trans. by M.A. Dikerdem (Brassey's Defence Publishers, 1987); and George Harris, *Turkey: Coping with Crisis* (Westview Press, 1985).

<sup>5</sup> Citations from the 1982 Turkish constitution are taken from the version contained in Prime Ministry Directorate General of Press and Information, *Turkey Yearbook 1983* (Ankara: Donmez Ofset Basimevi, 1983),

594-656. Over the years, 16 successful amendments have been added to the 1982 constitution, resulting in a somewhat more democratic document.

<sup>6</sup> Ozbudun, *Constitutional System of Turkey*, 50. Another joke currently making the rounds, however, argues that nothing in the 1982 constitution prohibits amending Article 4, which prevents amending the Preamble and the first three Articles. Thus, if Article 4 were to be dropped, the supposedly unamendable Preamble and first three Articles could be amended! It is doubtful, however, that the Constitutional Court (see below) would agree with this reasoning.

<sup>7</sup> On the Kurdish problem in Turkey, see Michael M. Gunter, *The Kurds Ascending: The Evolving Solution to the Kurdish Problem in Iraq and Turkey*, 2nd ed. (Palgrave Macmillan, 2011), and the many other works cited therein.

<sup>8</sup> "New Anti-Terror Law: End of the Timid Democratisation," *Info Turk*, No. 333, May 2006, citing *New Anatolian* and other media, April 19, 2006, <http://www.info-turk.be/index.html#Activists>, accessed June 4, 2006.

<sup>9</sup> Ibid.

<sup>10</sup> O. Korket, "Anti-Terror Schemes May Encourage Torture," *BIA News Center*, April 26, 2006, as cited in *Info Turk*, No. 333, May 2006, <http://www.info-turk.be/index.html#Activists>, accessed June 4, 2006.

<sup>11</sup> Ayca Cubukcu, "Turkey: The 'Progressive' Land of Repression," *The Guardian*, December 11, 2011, <http://www.guardian.co.uk/commentisfree/libertycentral/2011/dec/11/turkey-progressive-repression>, accessed December 13, 2011. Also see Guillaume Perrier, "Turkey Cracks Down on the 'Parallel' Kurdish Administration," *Guardian Weekly*, December 13, 2011, <http://www.guardian.co.uk/world/2011/dec/13/turkey-crack-down-on-kurdish-organisations>, accessed December 13, 2011.

<sup>12</sup> However, a constitutional amendment following the crisis over the election of the AKP candidate for the office in 2007 and the electoral victory of the AKP on July 22, 2007, provided for the future popular election of the president. He/she would also now be eligible for two five-year terms. The victory of the AKP on this issue removed the president from the ranks of offices enforcing the tutelary character of the 1982 Constitution.

<sup>13</sup> European Commission, *Turkey 2011 Progress Report*, 14.

<sup>14</sup> Zuhtu Arslan, "Reluctantly Sailing towards Political Liberalism: The Political Role of the Judiciary in Turkey," in eds. Terence C. Halliday, Lucian Karpik, and Malcolm M. Feely, *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Liberalism* (Oxford: Hart Publishing, 2007), 220.

<sup>15</sup> The Constitutional Court was acting in this case on the grounds that the AKP had threatened secularism by passing an amendment to the constitution allowing headscarves to be worn in universities.

<sup>16</sup> On this point, see the recent resolution passed by the EU Turkey Civic Commission after its eighth annual meeting at the EU Parliament: "Given its new position of strength following its great electoral victory on June 12, 2011, the AKP government is now in a position to move towards bolder models for solving the Kurdish problem and writing a new more democratic and civilian constitution that will take Turkey further along the path to democratization and bring it in line with EU regulatory standards." Cited in "Final Resolution 8th EUTCC Conference Brussels," EU Parliament, Brussels, December 8, 2011, [Mesop@online.de](mailto:Mesop@online.de), December 9, 2011.

<sup>17</sup> For further background, see Michael M. Gunter and M. Hakan Yavuz, "Progressive Islamists versus Reactionary Secularists," *Critique: Critical Middle Eastern Studies* 16 (Fall 2007): 289-301; and Ihsan Dagı, "Why Turkey Needs a Post-Kemalist Order," *Insight Turkey* 14 (Winter 2012): 29-36.

<sup>18</sup> For an analysis, see Marlies Casier, Andy Hilton and Joost Jongerden, "'Road Maps' and Roadblocks in Turkey's Southeast," *Middle East Report Online*, October 30, 2009, <http://www.merip.org/mero/mero103009>, accessed November 4, 2009.

<sup>19</sup> However, more than half of Turkey's ethnic Kurds now live in central or western Anatolia. Indeed, Istanbul has been referred to as the largest Kurdish city in the world. (Others would give this appellation to Tehran.)

<sup>20</sup> On these points, see M. Hakan Yavuz, *Secularism and Muslim Democracy in Turkey* (Cambridge University Press, 2009); Umit Cizre, ed., *Secular and Islamic Politics in Turkey: The Making of the Justice and Development Party* (Routledge, 2007); and Marlies Casier and Joost Jongerden, eds., *Nationalism and Politics in Turkey: Political Islam, Kemalism and the Kurdish Issue* (Routledge, 2011).

<sup>21</sup> For a background analysis, see Sinan Ciddi, "Turkey's September 12, 2010, Referendum," *MERIA Journal* 15 (December 22, 2011), <http://www.gloria-center.org/2011/12/turkey>, accessed December 23, 2011.