The Constitutional Reform Proposal of the Turkish Government: The Return of Majority Imposition

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The package of constitutional reforms just recently offered to the Grand National Assembly[1] by the Turkish government seems highly attractive in many respects. It is the whole that should be rejected by liberals and democrats in and outside of Turkey.

After the 2008 decision of the Turkish Constitutional Court invalidating amendments to articles 10 and 42 of the Turkish constitutions, the so-called headscarf amendments, and the refusal of the same Court to dissolve the AKP (Justice and Development Party), the Government led by that party had three choices.[2] The first, indicated by the Court's return to the language of the original constituent power, was entirely unrealistic and to me and most Turks undesirable, namely to sponsor a program of revolutionary transformation where the constitutional regime of 1982 would be replaced *outside its own rules of change*. The point of the conservative Court even raising this idea was merely logical and rhetorical. When it was said that certain kinds of changes, as the alteration of the eternity clauses, namely articles 1–3 of Constitution, as entrenched by art .4, would require a return to the original constituent power, and thus by implication would be a revolution, the point was to indicate all the more strongly *what could not* be done through ordinary amendments. Yet, to tell the Turkish people that they must stage a revolution if they wish to make an entirely new constitution was, to say the least, unfortunate and in fact erroneous. Nevertheless, in a toned down version, the same type of rupture was actually recommended by the noted constitutional scholar Serap Yazici in a recent book[3] where she claimed that a democratically elected assembly need not be bound by either the eternity clauses nor even the procedures indicated by article 175, the amendment rule of the Turkish Constitution. While she was very right in suggesting that the highly undemocratic 10% threshold in elections should be abandoned, we can still be grateful that the AKP has never imagined that it could take the road of explicit legal rupture in constitution making. As I told a meeting last December in Istanbul: I do not want to be in this country when anyone tries this method!

The second option was to return to a consensual form of constitution making, a method, also hinted at by the Constitutional Court in the same 2008 decision, that could have led to the creation of a package that all Turkish political forces could identify with to some extent. Such a solution would also mean that perforce there could not be 110 deputies to apply to the Court for a review of the amendments or of the new constitution. This was the position I represented in the debates. My idea was to draw the non-parliamentary parties into a consultative assembly (a "convention") elected by straight proportional representation without a cut-off, that would present an initial draft for a civilian constitution to a new Grand National Assembly still structured by the (otherwise undesirable) undemocratic 10% threshold. In any case, the AKP government never showed any interest in any consensual alternative, including a return to the parliamentary All Party Accord Commissions of yesterday (that is prior to 2002).

What the AKP government has chosen instead is a return to the method of majority imposition, which has been its method in constitutional politics since the 2007 crisis over the presidency. Of course the Constitutional Court *did allow* (in spite of the leading narrative about the quorum affair) that imposition in 2007 by opening the way to a referendum that

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would predictably enact the election of the president of the republic in national referenda. But since that time, the Court has stood in the way of a repeat performance as indicated in 2008 with its headscarf amendment decisions. These seemed to renew the activist jurisprudence of the 1970s when constitutional amendments were repeatedly reviewed, a jurisprudence that by the way was very much disliked by the military and tried to block it at several junctions including the new wording of art .175 of the 1982 Constitution. Given the evolving nature of Turkish politics, such a renewed role for the Court was not the appearance of a juristocracy, but the establishment of at least one check and balance in an increasingly monolithic system desperately in the need of it. Those democrats who in that context attacked the Court for historically understandable reasons were nevertheless fighting the battle of yesterday, failing to see the very possible if not inevitable dangers of tomorrow.

But let's forget predictions for the moment. What is clear is that the AKP government is following the pattern of other populist and especially authoritarian leaders and governments in attacking the supreme or constitutional courts that stand in their way. On the democratic side, Franklin Roosevelt, and Indira Gandhi[4] come to mind; on the undemocratic one Peron, Fujimori and Chavez. But whether democratic or not, the attacks are always wrong headed. Their logic, whatever the specific intentions of the leading protagonists, is the establishment of the kind of monolithic power that no government should have. Indira Gandhi aimed at a social revolution much needed in India, but we should recall that she became the lord of a destructive period of emergency rule in the 1970s, after weakening the Court temporarily, almost destroying Indian democracy. And even Roosevelt, the creator of the American welfare state, as deficient as it still is today, was also the jail master of 140,000 Japanese Americans, mostly citizens, which was an entirely unnecessarily act allowed by a cowed Supreme Court in *Korematsu v. the U.S.*, a case whose dissenting opinions today are far more significant than the controlling opinion itself. What all these leaders, including in earlier periods the Turkish military, and now the AKP have in common is that they have seen Court decisions interfering with their constitutional and political plans. Instead of modifying their plans, they chose to move in various ways to transform the membership of constitutional courts or greatly limit their jurisdiction or both so the same thing could not happen again. On the basis of the record, we can say that only in non-democratic countries or in countries where democracy is lost can such a project fully succeed.

There is no question whatsoever that the Court re-organization plan and the related project revising party closings are the only things really important in the present context in the AKP government's proposal. Within a new and properly negotiated constitution, even these provisions may be unobjectionable and even desirable. But here is my thesis. When the cart is put before the horse, as it already was in the case of the headscarf amendments, the new amendment package stands very much in the way of properly negotiating such a consensual, civilian constitution.

It does not much improve things that the package has many random features anticipating elements of a future better constitution. Liberal and progressive in themselves, here their purpose is entirely instrumental. Yes it is a good idea to promote affirmative action, collective bargaining and abolish an amnesty for the perpetrators of the bloody coup of 1980 even if the statute of limitations will not be thereby overcome. But the very randomness of the provisions indicates that they are included to attract various constituencies: above all liberal democratic opinion in Turkey and abroad, and of course the voters in a projected referendum. Obviously, the AKP is not expecting to have the 2/3 parliamentary votes to pass the package, but with presidential agreement 3/5 are enough, under article 175, to go to a referendum.

So what is wrong with the essence of the plan, i.e. the planned judicial re-organization and party closing schemes? Even this is a complex matter, and here I must forego a complex analysis. The ex European deputy, always friendly to the AKP, Joost Lagendijk is certainly right: provisions like this are to be found in democratic countries, while Turkey's existing rules very much need revision. But what may be good as part *of a whole liberal democratic constitution* as in the European countries he is thinking of may not have the same meaning when enacted in context of a constitutional crisis and especially during a struggle between the government and the Court. And, what may be good and fair in one democratic setting may be unfair and authoritarian in another. One could indeed put together quite an authoritarian system by choosing some particular mix of regulations from various liberal democratic states.

In Turkey the issue is very particular, however. If I am not very wrong on this, the implication of the amendment is that the present Constitutional Court that stands in the way of the current government would be entirely replaced relatively soon, at the latest by the end of the next electoral cycle. Moreover, what is proposed would, in the current electoral situation, give a party with a great parliamentary majority – namely the AKP (based *nota bene* on less than 50% of the votes) – in the case of judicial re-organization, a very large degree though not absolute control over the memberships of the highest Courts. It would also give it near immunity in relation to any future prospect of being closed as a party. Admittedly, both of these goals are sought in ways to avoid the appearance of any overkill. What is highly likely is that the combination of presidential and parliamentary choice would give the majority party enough judges from the beginning of the regulation, but still in the current parliamentary cycle, when six new judges would be added according to a provisional article (#19), four former substitute members and two elected by parliament ultimately by the majority. This makes it likely from the moment of the amendment entering into force that, in light of the 2/3 thresholds required (raised from 3/5 by the reform), no Constitutional Court would judge any of the government's future amendments unconstitutional, nor would it rule the party itself worthy of being closed. And that is the whole point here.

I am no fan of party closings at all in spite of their German and Spanish pedigrees, except perhaps in the most extreme cases of parties with militias that aim at the violent overthrow of a constitution.[5] Even the disastrous current election in my native Hungary does not entirely shake this conviction. Thus I do not think that the new method of party closing, involving parliamentary participation by 5 members of each parliamentary group and a 2/3 rule to indict a party involves a move in a bad direction, if party closings are to be kept at all. I note only that the DTP (Democratic Society Party organizing independently elected Kurdish deputies) might not have been protected by this rule given the ambivalence of the AKP and the very likely possibility that its representatives would split their votes. Thus the DTP would have been at the mercy of the governing party entirely. Also new left wing parties would be in trouble as well given the fact that Turkey, unusually, has a parliament with three conservative parties but no center left. The obvious issue is that the criteria of party closings and the adoption of the so-called Venice guidelines that would greatly limit them is not touched upon by the new amendment. On the other hand, the immunity of a dominant party from party closing would now be triply guaranteed: by the form of judicial appointments, the old 3/5 decision rule of the Constitutional Court in these matters would now be raised to 2/3 of those present, and now by the establishment of a parliamentary screen that would require in the case of parliaments containing four parties large enough to have parliamentary groups (as in this electoral cycle) that *three out of four* (2 out of 4 is less than 2/3!) indict a fourth such party in a case of prospective closing to be then tried by the Constitutional Court. And most absurdly, when there are two such parties (as in the previous parliamentary cycle between

2002 and 2007) deputies of a party would have to vote to indict their own organization and allow the beginning of a process in the Court, forgetting the matter that the new Court would already be packed in their favor. Here we move from the highly unlikely to the literally and doubly impossible.

Note again, it is not the amendment package that is itself the problem, and especially most of its attractive parts, but a potential two-step strategy of which it may become the first step. The question is what would happen when the constitution will be changed as the result of this first step, namely after the passing of the amendment package. Since its purpose given the events of the last three turbulent years is to remove fundamental impediments in face of governmental constitution making, we have a right to expect governmental constitution making to proceed without impediments from the moment of approval in a referendum.[6] Without consensus constraining impediments, such constitution making need not be in any significant respect consensual, though various forms of democratic window dressing may be provided.

So Turks are likely to get, after the passing of the current amendment package, a flood of new constitutional amendments and perhaps the passing of a new constitution. The only question is what would be the character of the constitutional innovations of that second stage, and in my view this cannot be predicted on the basis of looking at the provisions of the first stage that were needed to get the main features passed. In that case, would the, on the whole, quite acceptable Özbudun constitution of 2008 provide the needed clues? Not necessarily. That constitution was also offered in the midst of all the existing constraints. And these were: a constitution with three "eternal" clauses (as entrenched by a fourth, itself logically also "eternal"), a Constitutional Court taking its stand on these clauses and capable of reviewing amendments, and indeed dissolving a party like the AKP. The constraint of the existing Court enforces the constraint of the eternal clauses. Without it there is no enforcement. With these constraints gone, the AKP will not be able to say to its militants, its hard liners: "Boys (indeed not girls!) we cannot do all we wish to do, you and I in our hearts, because there are all these constraints. . ."

So what can be done? The engineering of the package is very clever, as I already said. It disarms liberal opponents and helps passage in a referendum. Moreover, in light of the practice of European referenda (unfortunately and undemocratically!), and in the explicit wording of article 175 ("The Turkish Grand National Assembly, in adopting the laws related to the Constitutional amendment, shall also decide on which provisions shall be submitted to referendum together and which shall be submitted individually") it is not illegal to create packages of this type, to pass even a complete constitution as a single amendment act. The very same procedure, however, also presents some vulnerabilities. Even if not in the referendum, where the impact of each clause has been carefully calibrated in advance, in parliament it is possible that enough parts will run into intense opposition so that that threshold of 110 deputies needed to have standing in the case of amendment review at the Constitutional Court can be met. The CHP (Republican People's Party) today does not dispose over, as it is well known, these 110 votes as it did still in 2008. The fact that the package includes such heterogeneous elements may make it easier for it to get allies. Even if for understandable reasons, after the disastrous decision of the Constitutional Court on the DTP in 2009, Kurdish deputies of the BDP (Peace and Democracy Party) – who alas need constitutional protections most of all, and don't really get it in the new party closing proposal – will not be among them.

Moreover, the fact that the reform project is a single amendment package must mean that even if a part of the proposal is unconstitutional the whole amendment package is also

unconstitutional and cannot go to the referendum. By not enumerating the project in terms of single amendments, the framers make it easier for the Court to invalidate the whole, though of course parliament could always re-pass the parts the Court did not find objectionable. Whether they would wish to do so, if the major parts on judicial appointments are knocked out, is very questionable. It is these parts that must be challenged because a Court that loses its independence cannot guard articles 1, 2, and 3 in the face of derogation.

In a phone interview with the New York Times,[7] professor Özbudun, supporting the package, was asked why more has not been done by the government planners (apparently he was not among them or advising them?) to liberalize and democratize the Turkish constitution. His answer is that "deep in their hearts" the AKP government would have done more, but because of their fear of the opposition and the Court, this is all they dared to do. The experience in 2008 indicates the opposite. Then instead of negotiating a civilian constitution in a process where the Özbudun's draft could have been one among many proposals, they tried to push through what apparently was really in their hearts, or at least amendments dear to their special constituency. I fear that is also the case now, even if they package what is truly important to them in a heterogeneous and unrelated set of important things dear to a variety of interests, most of them quite legitimate. But I do agree: if they get away with this, the government may indeed get a chance to show Turks what is really deep in their hearts, and that is rarely a good thing to find out in the case of any movement or government. That is the basic liberal insight. In this case too, I am afraid the result may not be as beautiful as many of my liberal friends currently seem to believe. Liberation from military tutelage has been a slow and painful process, yes it is not yet over, but it should not expose Turkey to even the possibility of another authoritarianism that could become an equal threat to both liberalism and democracy.

NOTES

1. "Draft Constitutional Amendment Proposal" March 30, 2010 Secretariat General of Turkish European Affairs.

2. For my full argument, see Andrew Arato "Democratic constitution-making and unfreezing the Turkish process" forthcoming in *Philosophy and Social Criticism.*

3. Serap Yazici, *Yeni Bir Anayasa Hazirligi ve Turkiye* [Preparation of a New Constitution and Turkey] (Istambul: Istambul Bilgi Universitesi Yayinlari, 2009). I thank Ertug Tombus for translating parts of this book.

4. As I told friends, Granville Austin's magnificent and highly readable *Working a Democratic Constitution. A History of the Indian Experience* (Oxford: Oxford University Press, 1999) should be now required reading for all Turkish democrats and liberals.

5. See the excellent articles by M. Kremnitzer, V. Ferreres Comella and G. Frankenberg in Andras Sajo, ed., *Militant Democracy* (The Hague: Boom Eleven International Publishing, 2004).

6. This is exactly what the recent interview of PM Erdogan points to. See, "Premier Erdogan Describes the Proposal of Baykal as too Diluted and Unserious," *Today's Zaman*, April 18, http://www.todayszaman.com/tz-web/news-207755-premier-erdogan-describes-proposal-of-baykal-as-too-diluted-and-unserious.html. What Denis Baykal, the chair of the Kemalist CHP suggested is that they agree on the whole amendment package now, except for the three controversial articles having to do with courts and party closings that would be left for after the next elections. As unserious and absurd as some of Baykal's other ideas may be, here he was actually right. If the AKP were equally serious concerning the whole 16 article package, why not pass by consensus what can be agreed upon now, and get the verdict of the voters on the rest? What Erdogan may have in mind for a second round of constitution making, with the impediment of the Court out of the way, is revealed in the next interview, summarized by *Today's Zaman* a day after. Here he speaks, in very confusing terms, of the introduction of a presidential system of the American type that somehow would be more effective in producing legislation, and would not have to deal with the problem of a recalcitrant constitutional review he has faced in the last two years. "PM Warm to Presidential

System switch" in Today's Zaman, April 19, 2010, http://www.todayszaman.com/tz-web/news-207831-pm-warm-to-presidential-system-switch.html.

7. *The New York Times*, Sabrina Tavernise and Sebnem Arsu "In Turkey Proposed Changes Aim at the Old Guard," April 2, 2010, http://www.nytimes.com/2010/04/03/world/europe/03turkey.html.

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