

A Key to the “Democratic Opening”: Rethinking Citizenship, Ethnicity and Turkish Nation-State

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ABSTRACT

This article focuses on the ongoing process of transition in Turkey from a “homogeneous national identity”, which produced a notion of “equality as sameness”, to a “multiculturalist democracy” that requires a new constitutional system that has a conception of “equality in difference”. The organization of this paper is as follows: First a brief evaluation of the Kemalist foundations of the Republic will be provided to establish how the official ideology in Turkey conceives of state-society relations. An evaluation of the persistence of this official ideology under the multiparty political system is provided in the second part. The final part of the paper concentrates on the rising public presence of the Kurdish problem, which is forcing Turkish politics to change its constitutional identity, most notably aided by the process of change driven by EU reforms. The article concludes with a call for the inevitability of a radical change in Turkish constitutional identity to include a public recognition of multiculturalism through an acceptance of linguistic and other cultural rights, but leaves open the question of how this change will be realized.

In the crisis-ridden series of events that led to the early general parliamentary elections in July 2007, the most important topic in Turkey’s public debate was the need for a new and democratic constitution.¹ The Justice and Development Party (*Adalet ve Kalkınma Partisi*, AKP), the party in government then and now, made an explicit bid in its electoral campaign for a new, civilian and democratic constitution and initiated a process for preparing a draft constitution for extensive public debate. With the single exception of the main opposition party in the parliament, the Republican People’s Party (*Cumhuriyet Halk Partisi*, CHP), all other parties, including the ultranationalist Nationalist Action Party (*Milletçi Hareket Partisi*, MHP), the party predominantly representing Kurdish interests, the Democratic Society Party (*Demokratik Toplum Partisi*, DTP), and most of the independent deputies, were supportive of this idea for a new and democratic constitution.

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The July 2007 elections produced a parliament with a representative quality unprecedented since the 1960s in Turkish politics. The electoral participation rate was over 85% and despite the existing non-democratic 10% national threshold, more than 87% of the total votes cast were represented in the parliament. All in all, the 2007 Turkish Grand National Assembly (TGNA), which is still the existing parliament, was able to represent almost all political ideas and positions in Turkish politics. Although the 2007 TGNA was representative and had a very strong societal legitimacy, the attempt to provide Turkey with a new constitution failed. If one reason behind this failure was the AKP's unjustified majoritarian attitude that contributed to the already existing polarization between its supporters and the diehard secularist state elites, the other was the equally unjustified intervention of the military and civilian bureaucracy in the political process.

Crisis in the State Identity

Let me open with this final point. Beginning just before the presidential elections in April 2007, the CHP, Ahmet Necdet Sezer, the then president, and General Yaşar Büyükanıt, the then chief of the general staff, delivered public statements voicing concerns about “the hidden Islamist agenda” of the AKP government. Following a public statement by the main opposition leader claiming that “the *turban* [a Turkish term for Islamic headscarf or *hijab*] cannot make its way to Çankaya [the presidential residence]”, Sezer, in an inaugural speech he delivered on April 11 at a ceremony at the War Academy (*Harp Akademileri*) in Ankara, referred to Article 5 of the Turkish constitution that stipulates that “the state has the duty to protect the Republic”. The next day, General Büyükanıt, addressing journalists at a press conference and after stating a not-very-sympathetic attitude towards the EU and the USA, defined in general terms the qualifications he wanted for the next president: The president of the Republic “should be loyal to the principle of laicism not in words but in essence”. Two days later, on April 14, a series of public demonstrations were organized under the banner of “Republican Meetings” (*Cumhuriyet Mitingleri*) to prove that the concerns about the AKP's hidden Islamist threat to the secular Republic had significant social support. On April 27, the TGNA convened to initiate the process of electing the president and Abdullah Gül was the only candidate. According to the Turkish constitution, a candidate must garner 367 votes to be elected president in the first and second rounds, whereas only a simple majority (276 out of 550 total seats) would suffice in the third and fourth rounds. Manifesting the concerns over the AKP's threat to secularism and assuming that the presidency of Abdullah Gül, with a first lady with a *hijab* in Çankaya, is going to be the end of the Republic, the CHP immediately filed a case with the

Turkish Constitutional Court (TCC) to halt and annul the presidential election, arguing that the convening of the TGNA without the presence of at least 367 deputies is unconstitutional. On the same day, towards midnight, there appeared a “memorandum” on the website of the Turkish military (“the notorious e-memorandum”), with a very strong conclusion that reiterated Atatürk’s statement, the founding father of the secular Turkish Republic, “how happy is he who says that he is a Turk” is “the enemy of Turkey and will remain so.” Three days later, the TCC made one of its swiftest decisions in the nearly 50 years of its history and declared the presidential election process unconstitutional and therefore must be stopped. The TCC explicitly violated the limits of its jurisdiction set out in the constitution, and thus entered into the unfolding of events as a major political actor, taking sides with the CHP and the military.

Turkey’s current crisis is a consequence of the failure of the early 20th century nationalism which had the aim of creating a homogeneous cultural entity called the “nation”

The constitutional crisis that emerged was resolved partly by the AKP’s opting for early elections in July, instead of November when it was originally planned, and the amending of the constitution to adopt a new method for electing the president by popular vote, leaving untouched the underlying issue of the role of the military and civilian bureaucracy in Turkish democracy. Any democratic solution to this issue, referred to time and again as “bureaucratic guardianship”, certainly requires a constitutional revision. It should be noted, however, that amending the constitution to become a more democratic institutional framework will not suffice, because even though the present constitution has been amended several times between 1987 and 2006, resulting partly in a more *prima facie* civilian democratic control over the decision-making process, the practice of bureaucratic guardianship continues. This became evident in 2008 when the TCC turned down the constitutional amendments regarding the ban on female students’ headscarves in higher education, and when the same court closed the DTP.

Thus, Turkey’s constitutional crisis continues. Events suggest that there happens to be a Schmittian dimension which causes the protraction of the crisis, making Turkey’s politics vulnerable to a chronic pathology. Based upon his criticism of a purely formal idea of rule of law in a parliamentary democracy, Carl Schmitt tried to develop a more substantive understanding of democracy. His conclusion in this respect is that constitutions are based upon the will of a people who define themselves as belonging to a “national” community.² In this sense Schmitt is sometimes

regarded as the true theorist of the modern nation-state³ in his conceptualization of the state as the concretization of the “political” will of a collectivity (the *Volk* — nation — as “us”), and hence, for Schmitt, the existence and legitimacy of a nation-state’s constitution is dependent upon underlying political decisions reflecting the “constitutional identity”⁴ of the state. As in the above-mentioned “midnight memorandum” of the Turkish military and the TCC decisions, the Turkish constitution has an underlying political decision made by the founders of the Republic in the 1920s and the 1930s that Turkey was founded as a nation-state whose identity is defined by “Turkishness” and “secularism”. Without going into a detailed account of the historical background of this political decision, it would suffice here to say that the present crisis, and the potential for it to evolve into a chronic pathology, stems from this founding decision that was based on an idealized homogeneous national identity which is in sharp conflict not only with the existing heterogeneity of Turkish society, but also with the idea of a multicultural democracy.

In this light, this paper focuses on the ongoing process of transition from a “homogeneous national identity” which has produced an accompanying notion of “equality as sameness” to a “multiculturalist democracy” that requires a new constitutional-legal system and the adoption of a new conception of “equality in difference”.⁵ The main line of argument in this paper will be as follows: First a brief evaluation of the Kemalist foundations of the Republic will be provided to establish how the “official ideology” in Turkey conceives of state-society relations. An evaluation of the persistence of this official ideology under the facet of multiparty politics denying any form of genuine social and cultural pluralism in politics is provided in the second part. The third and concluding part of the paper focuses on the rising public presence of the Kurdish problem, and how it is forcing Turkish politics to change its constitutional (legal-normative) identity, aided most notably with the process of change to become a full member of the EU. To conclude, the paper argues for the inevitability of a radical change in Turkish constitutional identity to include a public recognition of multiculturalism through an acceptance of linguistic and other cultural rights, but leaves open the question of how this change in constitutional identity will be realized.

The Foundations of the Kemalist Constitution: From the Predominance of Religion (Islam) to “Ethnicity” (Turkishness)

The term “Kemalist” was used first in the days of “National Struggle” (early 1920s) to denote the followers of Mustafa Kemal, later to refer to those deputies in the TGNA known as the members of the “first group”. Before the 1930s the term did not have much ideological content. A single-party regime was consolidated

after a series of reforms beginning with the abolishment of the sultanate in 1922 and the proclamation of the Republic in 1923; the abolishment of the caliphate, the banning of Islamic brotherhoods, tarikats, medresehs, the unification of education, the abolishment of the Office of Sheikh-al-Islam and the foundation of the Presidency of Religious Affairs, all in 1924; and culminating in the adoption of the Civil Code (1926), and in 1928 the abrogation of the constitutional provision promulgating that the religion of the state is the religion of Islam plus the adoption of the Latin script.

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In an overt rejection of social and political pluralism and with the adoption of a Durkheimian notion of social solidarity, the single-party regime aimed to justify its rule by defining itself as the “(Republican) People’s Party” (CHP) which regarded the people as a unity of different occupational groups who are attached to one another on the basis of mutual need. What ensued from this practice was an ideology with historically rooted elements refashioned according to the requisites of single-party rule and the ideology was named in the official documents of the CHP as Kemalism. In the official party program of 1935, it was written that “the outline of our ideals not only for a couple of years but also comprising the future” and these ideals were labeled as Kemalism and comprised “six principles” symbolized with six arrows in the party emblem (still retained by today’s CHP, albeit with modified definitions of the principles).

The essential aim of the Kemalist ideology and practice was to create a unified nation-state, and the important principles to that end were those of nationalism, populism and secularism. The principle of nationalism as defined in official CHP documents of the 1930s reflected a clear emphasis on the aim of creating a “modern nation-state” whose fundamental purpose was to “walk on equal footing and in harmony with other civilized nations on the road to progress and development albeit preserving the specificities of Turkish society and its thoroughly independent identity.”⁶

A very crucial point here is reflected by the phrase “preserving the specificities of Turkish society and its thoroughly independent identity.” This phrase gains meaning if we consult other documents like the civic education textbooks of the 1930s authored by Atatürk himself. According to this secondary school textbook’s definition, “the nation” meant “unity” in “political existence, language, origin and race, history and morality”.

This definition of nation as a unity did not reflect the socio-historical reality, but rather was designed to function as a basis of legitimacy for the new “Republican” state. A new form of polity that emerged out of the ashes of a multi-ethnic and multi-religious empire, the Turkish Republic tried to forge a new national identity by using the relatively powerful state apparatus. From the perspective of Ernest Gellner’s analysis of nationalism as a type of “marriage” between the nation (culture) and the state, Kemalism can be seen as a form of nationalism where a state apparatus exists in the absence of a national culture. Hence the need for building a national culture that would provide for the grounds of legitimacy of the new political order.

The dilemma here is that, in contrast to the Ottoman efforts to prevent the dismemberment of the empire by creating the idea of Ottomanism (Ottoman citizenship), and also under war conditions, the new Republican establishment had to opt either for Islam or Turkishness, or both, as the fundamentals of the new identity. In the early 1920s Islam was picked as the most powerful pillar of the newly emerging political organization while the Kemalists emphasized Turkishness from the 1930s onwards. During the troubled days of the National Struggle, Islam was the dominant ideological element. The Ottoman-Turkish term “*millet*” meaning “religious community”, as in the “*millet* system”, was used widely and “*millî mücadele*” (national struggle) was meant to be a struggle to liberate the office of the caliphate and the sultanate from the invasion of the infidels. The national borders in the “national pact” (*misak-ı millî*), made first by the Ottoman parliament and adopted later by the TGNA in Ankara, were also determined according to the criterion of religion. In the Lausanne Treaty the majority-minority distinction was made according to religious belief and linguistic, religious, educational and other cultural and civil rights of “non-Muslim minorities” were guaranteed. In conformity with the Lausanne Treaty, an agreement with Greece to exchange populations was made in 1924, which resulted in the further Islamization of Anatolia, a process that had a tragic beginning with the Armenian “Great Catastrophe” of 1915. Likewise, Atatürk’s personal speeches on several occasions emphasized also the unifying power of Islam. In an oft-quoted speech in 1920 in the TGNA he said:

Gentlemen, with the request of not bringing the matter [of the problem whether Turkishness or Islam is going to be the principle in government] to the fore once again, I would like to present on or two points. The persons who are purposefully present here to make up the sublime Assembly of yours are composed of not only Turks, not only Circassians, not only Kurds, not only Laz. But they are a combination of elements of Islam, a genuine convention. Thus, the purposes which this sublime delegation repre-

sents and which we try to save the rights, lives, honor and glory does not only pertain to one element of Islam. They belong to a mass composed of elements of Islam. All of us know that this is so. One of the principles and probably the first principle that we have always adopted is that as regards the problem of the determination and fixation of borders, we said that our national borders pass through the south of Iskenderun, leads to the east and comprises Mosul, Sulaymaniyah and Kirkuk! *In fact, in the north of Kirkuk there are Turks as well as Kurds. We did not differentiate them. Accordingly, the nation whose protection and defense we are endeavoring for is composed not of course by one element. It is a combination of various elements of Islam*⁷ [emphasis added].

This important statement shows very explicitly that in the formation of the new nation-state, Turks and Kurds were treated as equally valued ethnicities within the same cultural (i.e., Islamic/religious) framework. This was the case even when the debates over the constitutional definition of citizenship were taking place in the TGNA. Article 88 of the first (1924) constitution of the Republic stipulated that “the people of Turkey, regardless of religion and race, as regards citizenship are called Turks.” Although the wording of the article might seem at first sight to support the interpretation of the Kemalist idea of Turkish citizenship as a “civic” and “legal” bond devoid of ethnic and religious undertones between the individual and the state, the real meaning behind the scenes was very different.

The debates in the TGNA regarding the wording of this article are quite revealing in this respect. A deputy, Hamdullah Suphi, objecting that the provision initially proposed as “the people of Turkey, regardless of religion and race are called Turks”, argued that there are “non-Muslim minorities” in society and it was inadequate, if not false altogether, to call them Turks. For him and those sharing his views, there had to be a way to define Turkish citizenship without including these “non-Muslims” as Turks. The final solution was to add three words “as regards citizenship” to the provision.⁸ It is interesting that during the debates, only the status of non-Muslims was discussed, leaving aside other, most notably Kurdish, ethnicities. Even though this could be taken to mean that the Kurds were not excluded from citizenship, it is certainly problematic in that there was now a distinction between “Turkishness as citizenship” and “Turkishness as a status more than citizenship.”⁹ This distinction, as Yeğen persuasively shows, functioned on the one hand to exclude non-Muslim minorities from the actual practice of citizenship and paved the way for forceful assimilation policies on the other.¹⁰

Not only the normative framework of the constitutional-legal system adopted after the Republic, but also the policies implemented by the single-party (CHP) government from the second half of the 1920s until the late 1940s makes the

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intentions of the Republican establishment to bring about a homogeneous ethnic nation-state clear. This shift from the predominance of Islam in the early 1920s as the constituent element in national identity to ethnic Turkishness from the 1930s onward is explicitly reflected in the exclusionary approach

to the non-Muslim minorities. In spite of the fact that the religious, linguistic, educational and other social and economic rights of non-Muslim minorities in Turkey were recognized by the Lausanne Treaty, their legal status as “Turkish citizens” seemed far from being a status of “full citizenship” devoid of any kind of discrimination. If one sign of this exclusionary attitude towards non-Muslims was the case of “1936 Settlement Deed” (*1936 Beyannamesi*) for non-Muslim foundations, the other was the tragic case of the “Asset Tax Law” (*Varlık Vergisi Kanunu*) of 1942. This exclusionary attitude towards non-Muslims continued even after the transition to “multiparty” politics in 1945, culminating in the tragic event of September 6-7, 1955, street riots and the plundering of shops owned by non-Muslims in Istanbul. Originating from a Turkish secret service conspiracy, these events were a sign for many non-Muslims to leave the country, leading to a dramatic decline of the total number of non-Muslims and an accompanying increase in the overall ratio of Muslims in Turkey. What followed from this series of historical events in the following decades has been an understanding of citizenship identity in terms of a synthesis of ethnic (Turkish) and religious (Islamic) elements. Illustrated ironically by some supreme court rulings mentioning non-Muslim “Turkish” citizens as “native foreigners” (*yerli yabancı*), these policies towards non-Muslims have helped create an entrenched conception of citizenship as “Turkish and Muslim”.¹¹

If one consequence of this has been the exclusion of non-Muslims from the political public sphere, the other is to treat all Muslims in the country as “ethnic Turks”. In the words of Michael Gunter,

[f]ollowing the nationalist victory, a series of steps were taken in an attempt to eliminate the Kurdish presence in the new Republic of Turkey through legal fiat and gradual assimilation. On March 3, 1924, for example, a decree banned all Kurdish schools, organizations, and publications, as well as religious fraternities and *medresehs*, which were the last source of education for most Kurds. Deportation of Kurds to the West began after the Sheikh Sait rebellion was crushed in 1925. The purpose was to dilute the Kurdish population in order to facilitate its assimilation. The Kurdish areas were

declared a military zone forbidden to foreigners until 1965. In 1928, the entire civil and military administration of the Kurdish provinces in the east placed under an “Inspector General of the East”.¹²

The historical account of Republican Turkey’s policies regarding the issue of ethnicity and religiosity as “exclusion” for non-Muslims and “forceful assimilation” for the Kurds refuted the official (predominantly Kemalist) narrative of history and thus challenged the constitutional identity of the state. According to the Kemalist narrative, “Turkishness as citizenship” provided equal rights and liberties to every Turkish citizen and did not discriminate against any ethnic or religious identity in Turkish society. As far as the presence of Kurds as a people with distinct national identity and culture was concerned, the official ideology always took pains to prove that Turks and Kurds have been so inseparably mixed that it is impossible to distinguish one from the other. Leaving aside the extreme “Turkist” absurdity that “Kurds are, in fact, mountain Turks”, this idea of “inseparable mixture” depends on an interpretation of “Anatolian culture” as one and the same in its basics that, in spite of linguistic differences, Turks and Kurds share the same “national (traditional) culture”.

In a similar vein, Metin Heper’s recent study proposes an “alternative paradigm”. For Heper,

The [Turkish] state has not resorted to forceful assimilation of the Kurds, because the founders of the state had been of the opinion that for long centuries, both Turks and Kurds in Turkey, particularly the latter, had gone through a process of *acculturation*, or steady disappearance of cultural distinctiveness as a consequence of a process of *voluntary*, or rather *unconscious*, assimilation.¹³

Having subscribed to the official narrative, Heper’s alternative paradigm reiterates “that due to the centuries old mutual acculturation on the part of Turks and Kurds.... ethnicity would not be considered as the primary cause of troubles.”¹⁴ As Gunter has already pointed out, Heper’s attempt at rejecting the forceful assimilation thesis fails itself, because Heper simply replaces “forceful assimilation” with “prevention of de-acculturation”, which in the end means “assimilation”.¹⁵ All in all, in the formative years of the Republic, Kemalist policies of creating a new national identity in the form of “Turkishness” required the suppression of all non-Turkish identities to make “Turkishness” as a kind of overarching identity or a “metaindentity”.¹⁶

Although this process of neglecting the existence of a Kurdish identity continued during and after the transition to multiparty politics in 1945, Kurdish rebel-

lions in the single-party era were stalled thanks partially to the Kurds feeling more at ease with the Democrat Party (*Demokrat Parti*, DP) government. As Martin van Bruinessen wrote,

The Menderes years (1950-60) brought a certain measure of liberalization and relaxation of the policy of forced assimilation. Most of the village police posts were abolished. The government tried to keep the area under control by co-opting Kurdish tribal and religious leaders and landlords. Through the party system, these local authorities allied themselves with political forces in the capital.¹⁷

The relative liberalization of the political situation under DP rule between 1950 and 1960, however, did not alter the legal framework that endorsed the Kemalist idea of establishing a homogeneous nation defined exclusively as “Turkish”. It will be illustrative at this point to emphasize two aspects of the Kurdish problem in Turkey. First is the fact that the relative liberalization Kurds enjoyed under DP rule seemed to be a restoration under new circumstances of the relative autonomy the Kurdish tribes used to have under Ottoman rule. So, this was not liberalization in the true sense of the term meaning the recognition of fundamental human rights including the cultural rights of an ethnic identity. Liberalization in this period meant the formation of an alliance, albeit a loose one, between the DP leadership and the local (mostly tribal) leaders of the eastern and southeastern provinces. The second point related to that is that in order for a true liberalization to take place, there had to be a fundamental change in the constitution of the Republican state. Here I refer not only to an inevitable change in the definition of citizenship, but also a mutation in the fundamental idea of conceiving the state as the expression of a unitary will of the nation. It should be noted that the DP did not have any intention to modify the Kemalist constitution and there was not any demand in that direction made from society, most notably the Kurds.¹⁸

When the DP period ended with a military coup in 1960, the first in Republican history, the authors of the new Turkish constitution (the 1961 Constitution) redefined the new nation-state identity in stronger terms, reflecting this time a more explicit commitment to “Turkishness”. According to the 1961 Constitution, “Anyone who is attached to the Turkish State with bonds of citizenship is Turkish.” It is worth noting here that the same definition was retained in the current 1982 Constitution (Article 66), written once again by the generals after the second military takeover in 1980.

We have to point out that, between the two military interventions of 1960 and 1980, the Kurdish problem in Turkey gained a new momentum with substantial



The Kemalist idea of a unitary nation-state has been entrenched in the constitution and statute law of Turkey.

sociological modifications. Having begun as tribal revolts in the Ottoman era, the Kurdish movement started to represent a “nationalist” ideology with the Sheikh Sait rebellion in 1925. If the 1925 rebellion was the historical breaking point between the tribalism of the earlier period and the modern nationalism of the latter,¹⁹ then the 1960-1980 period should be seen as the time of change in the sociological bases upon which a nationalist movement could be built. Based on the increasing pace and magnitude of urbanization, the Kurdish movement has adopted a kind of nationalism with a heavy and dual emphasis on the exploitation of the Kurdish people and their struggle for recognition and liberation.

In due course, the Kurdish movement relegated the socialistic dimension in its ideology to the background and more strongly emphasized the dimensions of identity politics, defined in its most compact form as a demand for the public recognition of the Kurdish identity. Leaving aside whether this identity politics requires the establishment of an independent Kurdish nation-state or not, we can now turn to the ways in which the Turkish state reacted to the increasing regional popular strength of the Kurdish movement in its various roles in Turkish politics. Needless to say, the immediate reaction of the Turkish state to the Kurdish

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uprisings before the 1980 military coup took the form of a struggle against street violence, within which clashes between various groups on the left and ultranationalist right had taken place. From that experience in the 1970s, the PKK emerged as the bearer of a Kurdish nationalism which meant Kurdish separat-

ism in the eyes of the Turkish state. It is certainly true that the PKK movement gained not insignificant societal support as even after a protracted armed struggle against the Turkish military and security forces for more than 25 years, and despite the imprisonment of its leader in Imrali (a prison island near Istanbul), it still has considerable power to influence the public political debate regarding the Kurdish issue.

So far as the Kurdish problem is not unidimensional, that is not represented by the PKK alone and thus not limited to the problem of “terror” and, on top of that, since it is admitted even by the higher ranks of the Turkish army that “the struggle against terrorism” must be supported by social and economic measures, we can now turn to the still existing reasons in the Turkish legal system that prevent a permanent and democratic solution to this problem in Turkey.

The Turkish Constitution and Its Guardians: A Nationalist Legal Culture

The constitutions of 1961 and 1982 followed the Kemalist project in establishing a modern state based on the principle of nationalism. As noted earlier in this paper, Kemalist nationalism typically follows the line of reasoning that the state as a complex of political and administrative institutions must be legitimized in its ties with the society-as-nation, that is, as the bearer of a homogeneous cultural identity.²⁰ From within this perspective, two principles, that of nationalism and secularism, are the most durable, and are thus essential constitutive elements of the Kemalist official ideology of the Turkish nation-state. Accordingly, first the 1961 Constitution and later, and probably in more accentuated ways, the 1982 Constitution refashioned the constitutional expressions of these ideological pillars of the Turkish nation-state.

What the two constitutions share in common can be summarized as follows: The first commonality is the new definition of citizen identity. Secondly, both constitutions endorsed immutable articles in the constitution and established

guardian institutions that protect the immutables of the constitution, like the TCC, the National Security Council and, in the 1982 Constitution, a strong presidency. And thirdly, both constitutions recognized a constitutional status for the Presidency of Religious Affairs. The 1982 Constitution provided this specific institution with an extended role in its normative function as one of the core state organs in the maintenance of national integrity and solidarity.

Ethno-nationalist emphasis in the definition of citizen identity has been supported further by specific statutes prohibiting the public use of the Kurdish language enacted by the 1980-1983 military regime

Take, for instance, the definition of citizen identity. In a rather different phrase from Article 88 of the 1924 Constitution, the 1961 and 1982 constitutions define Turkish citizenship as “Everyone bound to the Turkish state through the bond of citizenship is a Turk” (1961 Constitution, Article 54; 1982 Constitution, Article 66). Here, we encounter a difficulty in translation. In English there happens to be a distinction between Turkish and Turk and the distinction is important because the word Turkish, like words of similar structure, e.g. English, Scottish, Spanish, German, French, Italian, etc., refer predominantly to the land and its inhabitants without an ethnic denomination whereas the term Turk includes the same territorial reference only secondarily, putting the emphasis more on a membership in an ethnic and thus linguistic community. This shows quite clearly that the somewhat vague reference to ethnicity in the 1924 Constitution was made quite visible in the 1961 and 1982 constitutions. This predominantly ethno-nationalist emphasis in the definition of citizen (i.e. national) identity has been supported further by specific statutes prohibiting the public use of the Kurdish language enacted by the 1980-1983 military regime. We have to note that the basic statute prohibiting the Kurdish language remained in force between 1983 and 1991 and the final “statute law” residues of this overtly illegitimate ban on Kurdish was eradicated only recently.

Although the ban on the public use of the Kurdish language does not exist anymore, thanks in great part to the constitutional amendments and statute law reforms under EU conditionality, the role of guardianship as reflected most notably in the upper echelons of the military and civilian bureaucracy remains in force. This brings us to discuss the second dimension of the Turkish legal and political system established after 1960. I have already mentioned the reinforced role of guardianship institutions in the Turkish 1982 Constitution. If one such institution is the National Security Council, the other is the TCC. For the purposes of this paper and as a result of reforms which reduced not only the role of the high ranks

of the military but also the overall significance of the National Security Council in Turkish politics, I will mainly dwell upon the TCC.

Without going into a prolonged discussion into the role of the judiciary in democracies, we might say that the importance of a constitutional review of the legislature for the “democratic rule of law” is justified in many undeniable ways. This is also partly true for the TCC, especially in some of its decisions that endeavored to enhance the possibilities of a well-established democratic rule of law in Turkey. In some, mostly recent, decisions, however, the TCC has shown itself as an institution which does not pay much attention to universal values and the principles of law as mentioned in international legal instruments such as the UN Universal Declaration of Human Rights, the twin international covenants of 1966 on social, economic, cultural, civil and political rights, and the European Convention on Human Rights (ECHR). Turkey has signed and ratified all of these legal documents, and more importantly perhaps is that Turkey, a member of the Council of Europe, also recognized the individual right to appeal to and the jurisdiction of the European Court of Human Rights (ECtHR).²¹

Although this is the case, Turkey has probably one of the worst records in the history of ECtHR judgments. Most human rights violations committed by Turkey pertain to those of the right to freedom of thought, conscience and religion and the right to form associations (Articles 10 and 11 of the ECHR). Among these violations party closures have a specific status. The TCC has closed down 26 political parties since its inception in 1962, and 19 of these closure cases took place under the 1982 regime. Among the political parties closed by the TCC, only the closure of the Welfare Party has not been judged by the ECtHR as a violation of the European Convention. All the others who have brought their cases to the ECtHR have been judged as violations of the freedom of expression and freedom to form associations, and most cases involved the political representations of the Kurds. Almost all of these political parties were closed because either their program or bylaws, or their public and political actions violated and attacked the constitutional principle of “the unity of the state together with its territory and its nation”.²²

Without going into detailed legal and technical arguments of the cases mentioned, I wish to stress several points regarding the closure of political parties that were representing, at least partially, Kurds in Turkey. The first point worth mentioning is that having the parties closed, including the most recent (2009) case of the DTP,²³ renders democratic representation impossible for that part of Turkish citizens with a Kurdish ethnic identity. This is especially true if we take into account that almost all of the parties had a considerable number of seats in the parliament and thus

they could not be treated as marginal formations in Turkish politics. The second point, related to the first, is that the European system of party closure emphasizes that closing a party must be the last resort and it should not target parties with relatively strong representative power. A third and final point is that, according to a 2004 amendment to the Turkish constitution, international legal instruments in the field of human rights have precedence over statute laws if there happens to be a conflict. Even though the TCC’s record clearly shows that such a conflict has been taking place for some time now, party closures continue. This contradictory legal practice of the TCC reflects the fact that the TCC is more concerned with its role as a guardian institution of the Turkish constitution than with its rather “abstract” role as an important safeguard for the democratic rule of law.

The role of the TCC as a guardian institute of the Turkish constitution gains more visibility when we especially look into its decisions made in cases regarding freedom of religion and secularism and the Kurdish problem. Reflecting a strong commitment to the Kemalist principles of secularism and nationalism, the court has rejected all demands for female students to be free to wear headscarves in institutions of higher education. In a 2008 decision, the TCC turned down constitutional amendments aiming at lifting the unjustified ban on female students’ headscarves in higher education. The ban is unjustified not on moral grounds but also from a legal positivist point of view because the Turkish constitution does not allow for any restriction on fundamental rights and liberties without an explicit provision in statute law and in the case of headscarves, what we have at hand is only a ban grounded allegedly on TCC jurisprudence. In an earlier ruling in 1991 on this case, the TCC decided that the law prescribing that “clothing is free in higher education institutions” cannot be so understood as to permit female students to wear headscarves in universities and colleges. The 2008 decision that annulled the constitutional amendments was based on this interpretation and in this case the TCC very explicitly violated the limits on its competences set by the constitution, i.e. that the powers of the TCC in reviewing the constitutionality of the amendments are restricted to formal, not substantial grounds.²⁴

It is not only the TCC that is haunted by this overstated concern about the protection of “the indivisible integrity of the state together with its territory and the nation”.²⁵ The Turkish Court of Cassation (*Yargıtay*) is another case in point. In a very important decision made in 2005 by one of its grand chambers (the Grand Chamber in Civil Law, or *Hukuk Genel Kurulu*, HGK), the court found an article in the bylaw of a trade union in the education sector as “illegal”. Article 26 of the Trade Union in Education (*Eğitim-Sen*) stipulated that the trade union “defends the right to education in the mother language.” The decision of the HGK bears

Democratizing an authoritarian constitution tailored according to the anti-democratic worldview of the 1980 military regime was no easy task

significance in at least two respects, one pertaining to the constitutional and legal order of Turkey, the other regarding the mentality or what I wish to call, following Friedman, as the “internal legal culture”²⁶ of the Turkish judiciary.

The decision of the HGK said that the bylaw of the trade union mentioned above as violating the unity of the state. The interesting point here is that HGK reached this verdict through a series of references to several articles in the 1982 Constitution, the Law of Public Servant Trade Unions and a rather inadequate reading of Articles 10 and 11 of the ECHR.

To begin with, the court mentioned Turkey’s “constitutional identity” as the “Turkish Republic is a unitary state with a monolithic structure”. Mentioning Article 3 of the constitution that promulgates that “the Turkish State is an indivisible whole with its territory and nation”, the court argued that this provision is supported further by Article 42, which says that “No language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institutions of training or education”. Relying primarily on these articles, the court also mentioned Article 26 which says that trade unions cannot be involved in acts against the constitutional order of the state, and following a line of reasoning that sees advocating education in a mother language other than Turkish implies at least the existence of different mother languages in Turkey, and judging that this would amount in the end to arguing even tacitly that there are different peoples on Turkish territory. On these ground, the court, taking account of the fact that the ECHR does not prohibit limitations on human rights and freedoms and for the court the protection of the state is a reasonable purpose for the limitation of the freedom of expression and freedom of association, issued its final verdict and the trade union was to be closed unless it got rid of the bylaw.²⁷

All this shows how well the Kemalist idea of a unitary nation-state has been entrenched in the constitution and statute law of Turkey. But more than that, this decision gives us an important clue about the “inner legal culture” now prevailing in Turkey. Upon closer examination, even if this decision was in 2005, after the 2004 constitutional amendment mentioned above and thus even if it took into account the possibility of a violation of the ECHR only from the perspective of the question regarding the ways in which the ECHR may justify a decision of court that closes down a public organization, the decision was not made within a broader perspective of thinking of the ways in which the court may enhance the

freedoms of Turkish citizens and thus promote the further democratization of Turkish politics and law.

Bearing in mind the results²⁸ of a relatively recent survey carried out among the judges and public prosecutors in Turkey where more than half answered “yes” to a question if human rights may be a threat to the security of the state, the already mentioned high court decisions must be treated as normal.

Concluding Remarks: Prospects for Turkey’s Bid for a “Democratic Opening”

Be as it may, however, Turkey has been coping with a series of societal problems since the EU recognized its candidate status for full membership in 1999. Leaving aside the impact of the deep economic crisis in 2001, Turkey has implemented very important constitutional and legal reforms. Democratizing an authoritarian constitution tailored according to the anti-democratic worldview of the 1980 military regime was no easy task. Turkey embarked upon reforming the constitution in 1995 and abolished almost all the constraints and prohibitions the military junta imposed upon popular political participation. In 2001 further amendments were made to enhance the scope of fundamental rights and liberties, and these reforms continued in 2004 and after. Although the pace of constitutional and legal reforms slowed down after accession negotiations with the EU began in 2005, Turkey, now in a point of no return in the process of further democratization, has come to see, more than ever, the need to perhaps have a totally new constitution. This need for a new constitution might be seen as an outcome of the recent crisis that was triggered by a particular TCC decision in May 2007 that halted the process of presidential elections in the parliament. This may not be the real case in point; however, the increasing visibility of the judiciary as a guardian institution of the Republican establishment suggests that there happens to be a deeper current which includes a clash between social and political forces of change and the forces of the defenders of the *status quo*.

Neither those who opt for change nor those who seem to favor the existing state of affairs, on the one hand, are in a position to support the old and still enduring idea of a homogeneous nation. Hence, several concessions have been made between these conflicting forces in Turkish society. For example, 14 years after lifting the ban on the public use of Kurdish, a new law was passed in parliament allowing for private institutions to teach Kurdish. Almost a year ago, Turkish Radio and Television started a new channel (*TRT Şeş*) broadcasting in Kurdish.

As for the Kurdish problem a modification or a total abolishment of the constitutional definition of citizenship for a more inclusive and difference-sensitive political identity is inevitable

Taking the risk of reiterating the already known fact that Turkey's Kurdish problem is not a "domestic" problem only but open to international influence and is affected by the new Iraqi governmental structure, it should be stressed that Turkey now has another opportunity to find a properly democratic solution to its own problems. Turkey's politi-

cal problems, however, are not limited to the situation of the Kurds. In the bigger picture, there are many problems that stem from the straightjacket now unfit for a pluralistic national and global milieu. As has been said quite often these days, "the genie is now out of the bottle": Turkey is not a homogeneous society. There are not only "non-Muslim" minorities, there are Kurds as well with a legitimate power to demand rights to their identity. There are also Alevis, and in fact Kurdish and Turkmen Alevis as well as Sunnis. Moreover, there are Hanafis and mostly Kurdish Shafis among the Sunnis. And lastly, there are relatively pious and non-pious or observant and non-observant practitioners of religion together with diehard Kemalist secularists.

This picture of Turkish society as a combination of multiple identities poses serious problems if seen from within the framework of a nationalist ideology which, like Kemalism or the Turkish-Islamic Synthesis of the ultranationalist right, takes pains to establish and sustain a unified state. The present government, on the other hand, has publicly declared its vision of "diversity as richness" and its willingness to open up Turkish democracy.

Even though the government's discourse of a "democratic opening" promises further democratization, what this idea of opening entails and how this is going to be carried out at the level of policy making remain rather vague. Based on the discussion of the Turkish nation-state formation and the endurance of Kemalism to date, we have to point out the fact that, regardless of what the governing AKP has in mind, Turkey must find a way to renew its constitutional identity. Because the problems arose out of a denial of the public presence and significance of identity and difference, the problems cannot be handled with partial reforms which do not reflect the true will of the parties involved in the political process.

As for the Kurdish problem, for example, a modification or a total abolishment of the constitutional definition of citizenship for a more inclusive and difference-sensitive political identity is inevitable. The acceptance of the existence

of mother languages other than Turkish is also a requirement, and this would necessarily go hand in hand with a further public use of different languages in local administration. A change in the organization of the public administration seems also inevitable and the principle of the unity of state administration must be loosened to eliminate the centralist tutelary power, enabling the people of Turkey to have more open public and political participation.

Turkey’s current crisis is a consequence of the failure of the early 20th century nationalism which had the aim of creating a homogeneous cultural entity called the “nation” and uniting it with the political apparatus in such a way as to produce a legitimate order. Faced with the reality of social pluralism of various kinds, most notably the Kurdish issue, and coinciding with a global resurgence of democracy and a formation of a supranational European idea of multicultural democracy, the nationalist project has become unsustainable at least in its earlier terms. Whether it is going to be sustainable with some not essential concessions to the demands and requisites of a multicultural democracy is highly doubtful. All in all, the crisis is a crisis of Turkey’s constitutional identity and there is no doubt that this identity has to be re-written.

Seyla Benhabib, writing about Turkey and using her very insightful notion of “democratic iterations” developed in her “another cosmopolitanism,” said:

Democratic iterations are linguistic, legal, cultural, and political repetitions in transformation. They not only change established understandings but also successively transform what once was the valid or established view of an authoritative precedent. Democratic iterations are open ended. Thus, in the Turkish context, the legal reforms, even though they were overturned, could have led to a heightened debate about the illegality as well as the immorality of all forms of discrimination in the public sphere—just as they could have led to increasingly repressive measures against nonobservant Muslims and, maybe, non-Muslims in general. Democratic iterations can lead to “jurisgenerative politics,” which takes place when a democratic people that considers itself bound by certain guiding norms and principles reappropriates and reinterprets them to expand the arc of equality and freedom, thus showing itself to be not only the subject but also the author of the laws.²⁹

What is taking place in Turkey, as in many other places across the globe, can be thought of in this terminology. The terms “Muslims” and “non-Muslims” in the

Faced with the reality of social pluralism of various kinds, most notably the Kurdish issue, and coinciding with a global resurgence of democracy the nationalist project has become unsustainable

quotation above may be replaced with Turks and Kurds, or Turks and non-Turks or even Kurds and non-Kurds. The heart of the matter is that Turkey is going through a process of generating law without having a well defined constitutional identity in the sense I tried to develop in this paper. Now, as the recent failure of the AKP's initiative for constitutional renewal might suggest, is Turkey still waiting somewhat desperately for a "political actor" with constituent power to provide Turkey with a new constitution or is it in the process of creating a new one? I gather, if I may, what Benhabib argues is that a constitution-generic process is already underway through democratic iterations taking place in the public sphere, but beware that the outcome may not be democratic and legitimate.

Endnotes

1. Ergun Özbudun and Ömer Faruk Gençkaya, *Democratization and the Politics of Constitution-Making in Turkey* (Budapest and New York: Central European University Press, 2009), pp. 97-111.

2. Carl Schmitt, *Legality and Legitimacy* (Durham, NC: Duke University Press, 2004).

3. Cf. Gianfranco Poggi, *The Development of the Modern State, a Sociological Introduction* (London: Hutchison, 1984).

4. "Constitutional identity," according to Michel Rosenfeld, "draws on national, ethnic, cultural, historical, and political identity, but remains distinct from all of these. Specifically, constitutional identity is constructed over time through a dynamic process that involves negation of these other identities accompanied by a rearrangement and reincorporation of salient features of the latter." Michel Rosenfeld, "The European Treaty-Constitution and Constitutional Identity: a View from America," *International Journal of Constitutional Law*, Vol. 3, No. 2-3 (June 2005), p. 316-317. Differing from this invaluable and insightful definition of constitutional identity, I use the concept to refer to the identity of the state as defined and safeguarded as immutable by its constitution like the Turkish Constitutions immutable articles and also its preamble. Vulnerability to a chronic pathology, thus, stems from the notion of crisis that breaks out from the incompatibility of the supposedly homogeneous collective will of the nation as reflected in the constitutional identity of the state and the reality of societal multicultural pluralism.

5. Seyla Benhabib and Türküler Isiksel, "Ancient Battles, New Prejudices, and the Future Perspectives: Turkey and the EU," *Constellations*, Vol. 13, No. 2 (June 2006), pp. 230.

6. Kemalist definition of the principle of nationalism in the 1935 Program of CHP, cited in Levent Köker, *Modernleşme, Kemalizm ve Demokrasi* (İstanbul: İletişim yay., 2007), p. 134.

7. Cited in Levent Köker, *Modernleşme, Kemalizm ve Demokrasi*, pp. 150-151.

8. A. Şeref Gözübüyük ve Zekai Sezgin, *1924 Anayasası Hakkında Meclis Görüşmeleri* (Ankara: AÜSBF, 1957), pp. 436-437.

9. Mesut Yeğen, " 'Müstakbel Türk'ten 'Sözde-Vatandaş': Cumhuriyet ve Kürtler," Mesut Yeğen (ed.), *Müstakbel Türk'ten Sözde Vatandaş Cumhuriyet ve Kürtler*, (İstanbul: İletişim Yay., 2009), pp. 72-73. In the English version of this article Yeğen prefers to translate "Turkishness as citizenship" as "constitutional Turks" and the latter as "Turks as such": Mesut Yeğen, " 'Propective-Turks' or 'Pseudo-Citizens.' Kurds in Turkey," *The Middle East Journal*, 63 (4), Autumn 2009, p. 607.

10. Mesut Yeğen, "Citizenship and Ethnicity in Turkey," *Middle Eastern Studies*, 40 (6), (November, 2004), p. 60.

11. For a critical account see Baskın Oran, *Türkiye’de Azınlıklar, Kavramlar, Teori, Lozan, İç Mevzuat, İctihat, Uygulama* (İstanbul: İletişim Yay., 2008).

12. Michael M. Gunter, *The Kurds and the Future of Turkey* (New York: St. Martin’s Press, 1997), pp. 5-6.

13. Metin Heper, *The State and Kurds in Turkey: The Question of Assimilation* (Houndmills, UK and New York: Palgrave Macmillan, 2007), p. 6.

14. *Ibid.*, p.11.

15. Cf. Michael Gunter, “The State and Kurds in Turkey: The Question of Assimilation,” (review), *The Middle East Journal*, Vol. 62, No. 2 (Spring 2008), pp. 344-346.

16. Fuat Keyman, “Articulating Citizenship and Identity, the ‘Kurdish Question’ in Turkey,” F. Keyman and A. Icduygu (eds.), *Citizenship in a Global World: European Questions and Turkish Experiences* (London: Routledge Global Governance Series, 2005), p. 272.

17. Martin van Bruinessen, “The Kurds in Turkey,” *MERIP Reports*, No. 121, *State Terror in Turkey* (February, 1984), p. 8, from <http://www.jstor.org/stable/3011035> (01/01/2010 06:08).

18. *Ibid.*

19. Cf. Robert Olson, *The Emergence of Kurdish Nationalism and the Sheikh Said Rebellion* (Austin, TX: University of Texas Press, 1989).

20. Here I rely on Ernst Gellner’s definition of nationalism as an ideology that foresees the unity of a political structure with a “national” culture. See Ernest Gellner, *Nations and Nationalism*, (Ithaca, NY: Cornell University Press, 1983).

21. For a critical account of the role of the Turkish Constitutional Court see Levent Köker, “Turkey’s Political-Constitutional Crisis: An Assessment of the Role of the Constitutional Court,” *Constellations*, Volume 17, No 2 (June 2010, forthcoming).

22. Osman Can, *Anayasa ve Siyasi Partilerin Kapatılması* (Ankara: Seçkin Yay., 2005).

23. For an immediate evaluation which is rightly suspicious about the closure decisions compatibility with the ECtHR jurisprudence see Rıza Türmen, “DTP’nin Kapatılması ve AIHM,” *Milliyet*, December 30, 2009.

24. For an extensive account of this decision see Levent Köker, “Turkey’s Political-Constitutional Crisis: An Assessment of the Role of the Constitutional Court,” and the references cited therein.

25. For an insightful evaluation of the Turkish Constitutional Court see Ceren Belge, “Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey,” *Law and Society Review*, Vol. 40, No. 3 (September, 2006), pp. 653-692.

26. According to Friedman there is “the classic distinction between ‘internal’ and ‘external’ legal culture. On the one hand, ‘internal legal culture’ refers to the ideas and practices of legal professionals; ‘external legal culture,’ on the other hand, is the name given to the opinions, interests, and pressures brought to bear on law by wider social groups.” Lawrence Friedman, “The Concept of Legal Culture: A Reply”. Cited by David Nelken, “Using the Concept of Legal Culture,” retrieved January 2, 2010, from <http://www.law.berkeley.edu/institutes/csels/nelken%20paper.pdf>.

27. Yargıtay Hukuk Genel Kurulu, E. 2205/9-320, K. 2005/355.

28. Mithat Sancar, Eylem Ümit Atılğan, “Adalet Biraz Es Geçiliyor...” *Demokratikleşme Sürecinde Hâkimler ve Savcılar* (İstanbul: TESEV Yay., 2009).

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Democratization

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