

# Constitutional Amendments Under the Justice and Development Party Rule

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**ABSTRACT** *Turkey's 1982 Constitution does not reflect the values of modern constitutionalism. Originally, the Constitution maintained a state-centered, authoritarian character and failed to meet society's expectations. Pro-reform parties sought to replace the Constitution to address various societal demands. The AK Party also identified the drafting of a new Constitution as a primary objective and attempted thirteen amendments. There were two main motivations behind the amendments: Turkey's EU membership bid and frequent constitutional crises. In this sense, the amendments promoted individual rights and liberties in Turkey. The Constitution today is a legal text that underwent major changes over the years to establish more effective safeguarding mechanisms for individual rights and liberties. Turkey's need for a new constitution, however, remains alive.*

**C**onventionally, constitutions serve two main purposes. First, they determine who exercises power under what circumstances. They provide the structure of governance; regulate the organization, limits, and inter-relations of institutions that are authorized to exercise governmental power.

Second, constitutions aim to guarantee and safeguard individual rights and liberties. Modern theories of constitutionalism are based on the idea that human beings hold inherent universal rights. These rights simultaneously serve as the basis of moral claims intended to enhance social life and, along with popular consent, represent the foundation of the legitimacy of political regimes.<sup>1</sup> As such, constitutions are expected to acknowledge these universal rights and to safeguard them against government authority whose potential to violate human rights is an ever-present possibility.

In this context, the Constitution is an official document of the highest legal authority that protects individuals' rights and liberties and imposes legal restrictions on the sovereign's actions and transactions.

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## Turkey's 1982 Constitution, which still remains in force, fails to comply with the values of modern constitutionalism

As such, the fundamental purpose of constitutionalism is to replace arbitrary rule with a government in which rule of law is given primacy and power is constrained by various rules as well as legal and institutional mechanisms. To provide a more concrete definition, constitutionalism “requires that the state’s basic functions be distributed among various organs and offices, fundamental rights be constitutionally acknowledged and safeguarded, government authority be subjected to certain legal norms and independent courts be established as an ultimate warranty of all aforementioned requisites.”<sup>2</sup>

Unfortunately, Turkey’s 1982 Constitution, which still remains in force, fails to comply with the values of modern constitutionalism. Particularly keeping the Constitution’s original text in mind, the following holds: The government authority that drafted the 1982 Constitution chose to protect the interest of the state instead of the individual, privileged the state authority instead of individual liberties. Consequently, the text of the Constitution contained a number of statements incompatible with the principles of democratic government and the rule of law. While restrictions became the rule in Turkey’s 1982 Constitution, liberties represented exceptions to the rule. In this conceptualization, the state was perceived as a sacred end in itself, instead of an instrument as it is conventionally considered. The government’s legitimacy rested on a notion of a “divine/holy state” as opposed to the people’s will. The Constitution violated the first principle of rule of law by subjecting governmental acts to judicial review. The text recognized the authority of military courts in addition to the country’s civilian judiciary and thereby strengthened the military tutelage regime.

“In short, it would be possible to conclude that the 1982 Constitution in its original form did not constitute a ‘guarantist’ constitution that restricted arbitrary exercises of government authority and safeguarded liberties in accordance with the philosophy of constitutionalism, and instead represented a ‘pseudo constitution’ that effectively sought to mobilize, not restrict, government authority.”<sup>3</sup>

### Drivers of Change in the 1982 Constitution

The 1982 Constitution envisaged a political life along the lines of the official ideology, strived to design a homogeneous society and effectively blocked all efforts to promote a more liberal society. As such, it was a practical impossibility for a legal text of this nature to remain unaltered and committed to its fundamental values. The Constitution received heavy criticism from all social groups as soon as it entered into force, who voiced their demand for amend-

ments. Consequently, successive governments began to amend the original text shortly after its adoption. Legislators amended the 1982 Constitution a total of 21 times since its first amendment in 1987.

There were three main reasons behind the subsequent and comprehensive efforts to amend the 1982 Constitution: First, the restoration of civilian rule in the country relieved some of the state-imposed pressures on society. The military junta that came to power with the 1980 coup, transferred the power to a civilian government with parliamentary elections in 1983, only after having shut down all existing political parties, and outlawed all forms of civilian political activism. Without a doubt, the restoration of civilian government did not eliminate the influence of the junta completely. However, the holding of elections, re-emergence of civilian organizations and the revival of political life all contributed to the increasingly vocal critique of the 1982 Constitution that served as an embodiment of the military's authority. As a result of these new developments, legislators either amended or abolished certain parts of the Constitution that imposed restrictions on democratic politics. For instance, the first amendment to the constitution, in 1987, repealed Article 4 that banned a group of former politicians from practicing politics. With the reversal of this article, which was supposed to be temporary to begin with, the banned politicians were able to become active in the political sphere once again, as they had been prior to September 12, 1980.

Moreover, the winds of globalization outside Turkey's borders intensified identity-related popular demands in the country. Up until the 1990s, constitutional amendments remained an issue in which certain academic circles and politicians –almost exclusively– held an interest. The rise of globalization in the 1990s, however, motivated excluded, disadvantaged and isolated identity groups across the world to break their silence. Turkey, too, experienced the various repercussions of this new global trend: People of all cultural identities, whom the political system had ignored, denied, suppressed, and excluded rose to the occasion and challenged their previously uncontested standings. Consequently, the question of constitutional amendments evolved into an area of interest for the general population beyond academic and political circles. Turkey's Kurdish, Alevi, non-Muslim, religious Sunni communities, and others demanded their governments to recognize their particular identities and expand their liberties. The sole means to meeting such popular demands was to amend the Constitution.

Finally, Turkey sought to participate in the Customs Union and to subsequently join the European Union. The country's bid for EU membership inevitably called for a reconsideration of its entire body of law. After all, one of the most important prerequisites of EU membership was to develop a democratic political system that respected human rights. Turkey, in the process of accession

to candidacy was forced to raise its democratic standards to European standards. Ensuring democracy and the rule of law necessarily entailed a variety of institutional reforms whose main precondition was to amend the 1982 Constitution. Closer relations between Turkey and the European Union resulted in constitutional amendments and legal changes. According to Özbudun and Gençkaya, the EU was particularly influential over constitutional amendments between 1998 and 2006. In this context, The EU became the leading external factor behind Turkey's democratization and served as "an incentive for the democratization" of the country.<sup>4</sup>

## The Justice and Development Party and the 1982 Constitution

The 1982 Constitution, which failed to reflect the sociological realities of the Turkish society, the aspirations of the country and the global developments of the time, had been the subject of heavy criticism from various perspectives since its adoption. Reformist political parties attempted to amend the 1982 Constitution in order to meet society's ever-growing demands. Similarly, the Justice and Development Party prioritized the drafting of a new Constitution as an item on its political agenda since its establishment.

According to the Party, it was necessary to eliminate "the laws of the state" and establish the rule of law, to foster confidence in the legal system, and to consolidate the country's democracy. A new and liberal Constitution had to replace the 1982 Constitution in order to attain the above-mentioned goals. In this respect, the Party had to make progress in its efforts to draft a new Constitution. The Justice and Development Party program made reference to this objective in its following section:

"[Our Party] shall prepare an entirely novel draft Constitution that responds to the population's needs, corresponds with the standards of democratic countries in terms of the principles of democracy and the rule of law, and aims to establish a new 'social contract.' The draft shall represent a document that projects the people's will and demands onto the state organization on democratic footing as opposed to a new attempt of 'constitutional engineering'"<sup>5</sup>

The Justice and Development Party won a landslide victory in the 2002 parliamentary elections. Due to Recep Tayyip Erdoğan's ineligibility to participate in the elections, Abdullah Gül formed the first JDP government. Turkey's 58<sup>th</sup> government, headed by Prime Minister Gül, pledged to draft a new Constitution:

"We shall draft a new participatory and liberal Constitution to replace the existing Constitution that no longer meets our country's needs. Our new Constitution shall represent a notion of democracy and the rule of law with strong popular

legitimacy, high compatibility with international -most notably European Union- norms, an emphasis on upholding individual rights and liberties and a pluralistic and participatory democracy at its core. We shall pay attention that the Constitution will be brief, clear, and comprehensible in terms of its form.”<sup>6</sup>

In December 2002, the Parliament amended the Constitution to abolish the clause that prevented Erdoğan’s participation in the elections and allowed the JDP leader to run for Parliament in his home district of Siirt in a March 2003 by-election. Upon his election for public office, Erdoğan formed the 59<sup>th</sup> government whose program echoed the need for a new Constitution:

“We shall draft a new participatory and liberal Constitution to replace the existing Constitution that no longer meets our country’s needs. In drafting this Constitution, we pledge to not only follow our own ideas but also to actively seek participation from opposition parties and all social groups. Drafting a Constitution that will carry our country into the future to replace a Constitution whose certain articles must be amended time and again is a responsibility that we must address in the name of our children’s future. Our new Constitution shall represent a notion of democracy and the rule of law that enjoys strong popular legitimacy, remains compatible with international –most notably European Union- norms, upholds individual rights and liberties and maintains individual rights and liberties at its core.”<sup>7</sup>

The Justice and Development Party’s 60<sup>th</sup><sup>8</sup> and 61<sup>st</sup><sup>9</sup> government program as well as the party’s *The 2023 Political Vision Document*<sup>10</sup> that manifests its future expectations echoed the objective of drafting a new and democratic Constitution to replace the 1982 Constitution. Briefly put, all Justice and Development Party documents, whether they were related to the party itself or its governments, emphasized that the 1982 Constitution was incompatible with the times and the people’s demands, declared that the existing constitution jeopardized Turkey’s progress and highlighted a grave need for a new Constitution. Nevertheless, over the course of the JDP’s 11-year tenure, efforts to draft a new Constitution proved inconclusive for two main reasons.

First, the Justice and Development Party did not enjoy any genuine political power during its first term in power. The Party won a total of 363 seats in the Parliament as a result of its landslide victory in the 2002 parliamentary elections. Although this number was legally sufficient for JDP to draft a new constitution and present it for a plebiscite, the political tradition out of which JDP emerged, was not deemed legitimate by the power holding actors of the establishment, the President’s office, the Constitutional Court, the military, main-



## **Legislators amended the 1982 Constitution a total of 21 times since 1987**

stream media, and the universities. As such, the establishment approached the Party with caution and sought to restrict its room for political maneuvering.<sup>11</sup> Lacking the necessary confidence to push forward under such unfavorable circumstances, the Justice and Development Party avoided radical political steps including the drafting of a new Constitution.

Second, political parties that held seats in the Parliament failed to reach a consensus on the constitution. Since the 2007 parliamentary elections, four political parties (i.e. the Justice and Development Party, the Republican People's Party, the Nationalist Movement Party, and the Peace and Democracy Party) have attained parliamentary representation. If these four parties were able to reach an agreement on a new Constitution, the draft Constitution would have received parliamentary approval with great ease. Similarly, it would be considerably easier for the proposed changes to receive public support in a constitutional referendum and the political risk would have been reduced to a minimum for all parties involved in the process. Having agreed on the methodology of the drafting process, however, the political parties have been unable

to develop a mutually agreeable draft constitution. Although the parties' parliamentary groups maintain a shared understanding of fundamental rights and liberties, efforts to promote common ground vis-à-vis issues such as citizenship, local governments, and education policies that affect key areas that the 1982 Constitution declared to be unchangeable proved futile.

One way for the Justice and Development Party to overcome this obstacle would have been presenting its own draft Constitution to the Parliament and the

general public.<sup>12</sup> However, the party proved unwilling to bear the political risks associated with the process alone and has been reluctant to take such a step thus far. Instead, the party opted to hold discussions about the new Constitution over an extended period of time and sought to amend the 1982 Constitution with regard to certain articles whose abolishment it deemed urgent.

Successive JDP governments passed a total of 13 amendments to the 1982 Constitution since 2002. While 10 amendments entered into force, the remaining three have not yet been approved: Out of these three proposed amendments, one<sup>13</sup> has been declared unconstitutional by the Constitutional Court while the remaining two<sup>14</sup> have been set aside by the Parliament following presidential vetoes. Among numerous JDP-sponsored constitutional amendments, a series of changes in 2004, 2007, and 2010 have had significant political and legal consequences.

## Closer relations between Turkey and the European Union resulted in constitutional amendments and legal changes

## 2004 Amendments

Law No. 5170 dated 7 May 2004 amended nine articles of the 1982 Constitution and abolished an additional article of the Constitution. As such, the Parliament:

- established constitutional guarantees for gender equality. (Article 10/2)
- abolished all references to capital punishment in the Constitution. (Articles 15/2, 17/4, 38/9 and 87)
- abolished the confiscation of vehicles belonging to the media press property on criminal grounds. (Article 30)
- established that courts cannot rule for capital punishment and overall confiscation of property. (Article 38/10)
- allowed for Turkish citizens' extradition to foreign countries with regard to crimes under International Court of Justice (ICJ) jurisdiction. (Article 38/11)
- eradicated the Chief of Military Staff's right to appoint one member of the Board of Higher Education. (Article 131/2)
- abolished State Security Courts. (Article 143)
- abolished constitutional obstacles before the Court of Exchequer's auditing of the Armed Forces. (Article 160)

The European Union was without doubt *the* leading force behind the 2004 amendments. Improving Turkey's relations with the organization was of vital importance to the JDP government. After all, the party sought to use the EU as leverage to overcome domestic obstacles that the establishment kept intact. Meanwhile, EU membership called for a total cleansing of Turkey's body of law from illiberal and anti-democratic elements. The JDP government circumvented the potential resistance to and criticisms against the democratic changes it undertook by declaring full membership in the EU as one of its main goals. This strategy proved so effective that the 2004 amendments, having received the main opposition party's active support, passed without significant objections.

The EU connection facilitated certain changes that were somewhat radical for the country. The most important among the 2004 amendments was that international treaties regarding fundamental rights and liberties gained precedence over national legislation. The government amended Article 90 of the 1982 Constitution to establish that international treaties would take precedence over national laws if and when the two were in contradiction over fundamental rights and liberties. As such, the amendment granted international treaties on fundamental rights and liberties a status between the Constitution and national legislation: "This amendment facilitated the implementation of ECHR and other international conventions regarding fundamental rights and liberties to expand the room for liberties through legal channels."<sup>15</sup>

The 2004 constitutional amendment package contained propositions that collectively sought to strengthen human rights, democracy, and the rule of law in Turkey. The country made considerable progress toward liberalization and democratization following the adoption of aforementioned amendments.

## 2007 Amendments

The main objective of JDP-sponsored constitutional amendments between 2002 and 2006 was to make improvements to the country's political system in accordance with EU criteria, to further liberties, and to expand the domain of civilian politics. Various amendments including the reorganization of the Supreme Board of Radio and Television (*Radyo Televizyon Üst Kurulu – RTÜK*)<sup>16</sup>, the expansion of parliamentary supervision over the government budget<sup>17</sup> and the lowering of the minimum age to hold a public office from 30 to 25 worked to attain this objective.<sup>18</sup> From 2007 onwards, however, constitutional amendments concentrated on overcoming emerging constitutional crises at the expense of consolidating the country's democracy. It was the 2007 presidential election that gave rise to the crisis.

By the time, President Ahmet Necdet Sezer's 7-year term in office came to an end, the Justice and Development Party enjoyed a vast majority at the Parliament that allowed the government to elect any candidate of its choice to the highest office in the country. Article 102 of the Constitution regarding the election of the President stipulated that any given candidate needed a two-thirds majority (367 votes) in the first two rounds and a simple majority (276 votes) in the third and fourth rounds. Although the size of JDP's parliamentary group would not suffice to elect the country's next President in the first two rounds, it could nonetheless unilaterally win the race in the third round or thereafter.

The 1982 Constitution had arranged the political system such that the President constituted the center of the entire structure. The Constitution's authors equipped the President with vast authority to contradict the spirit of classical parliamentary regimes. As such, it would be possible to claim that the authors predicted that either a military leader or a civilian with close links to the military would hold the office in the future and distributed political power accordingly. The real reason behind the President's wide range of powers, however, was that the Constitution's authors expected the President to oppose and keep under control any elected government that the establishment did not deem credible. Former President Sezer, too, had repeatedly acted on his mandate to seek control over the JDP government.<sup>19</sup>

The Justice and Development Party nominated Foreign Minister Abdullah Gül who was a leading figure within the ruling party alongside Prime Minister





Members of the Supreme Council of Judges and Prosecutors, and military commanders visit Atatürk's mausoleum.

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Recep Tayyip Erdoğan. Certain self-proclaimed guardians and rightful owners of the regime viewed the Presidential Palace as the “last stronghold of the Republic” and challenged the JDP government simultaneously on two fronts to prevent the Presidential Palace’s ‘capitulation.’ First, the Armed Forces stepped up to issue a memorandum to the elected government on April 27<sup>th</sup>, 2007. The Chief of Military Staff headquarters’ website published the memorandum that claimed that only a ‘genuinely secular’ politician would be able to become the country’s next President and threatened to act on the military’s “legal mandate” to safeguard the secular Republic. The military’s message to the JDP was beyond dispute: Know your place or suffer the consequences.

The high judiciary followed suit. Sabih Kanadoğlu, a retired Chief Public Prosecutor with the Supreme Court of Appeals, argued that the Parliament required a two-thirds majority not only to elect a President but also to convene in the first place. The Republican People’s Party owned up to Kanadoğlu’s speculations and opposition MPs boycotted the first round of presidential elections at the Parliament’s General Assembly. The main opposition party appealed to the Constitutional Court that ruled to effectively terminate the Parliament’s presidential election process.<sup>20</sup>

The Parliament's aborted presidential election brought the political system to a standstill. The Justice and Development Party developed three initiatives to tackle the situation at hand: First, the party –unlike its predecessors- did not keep silent in the face of the military's memorandum, reminded the military that it answered to the country's civilian leadership and warned that it would not refrain from acting on its mandate from the people. Second, the government called for early parliamentary elections and delegated the crisis' resolution to the people. Finally, the JDP government amended the Constitution

## Successive JDP governments passed a total of 13 amendments to the 1982 Constitution since 2002

to institute direct presidential elections in order to not encounter the same conflict in the future.

President Sezer vetoed the constitutional amendment and appealed to the Constitutional Court when

the Parliament re-adopted the amendment without any changes. However, the Constitutional Court ruled the amendment constitutional. In response, President Sezer called for a constitutional referendum where 68.95 percent of the people voted in favor of the amendment.

Özbudun refers to 2007 as “the year of many constitutional battles.”<sup>21</sup> The emergence of such intense constitutional confrontation over a presidential election owes to the peculiar circumstances of Turkey's political system:

“The secular government elite that always exerted decisive influence over Turkey's politics regard the Presidency as their indisputable domain and a safety mechanism against anti-secular inclinations. The President's vast authority under the 1982 Constitution transformed the office into a high-value asset within broader political struggles. The secularist front often voiced concern that an Islamist President could use its constitutional mandate to gradually de-secularize the Constitutional Court, the high judiciary, and the universities. A commonly repeated slogan, that the Presidency represented the final stronghold of the secular Republic that can under no circumstances be entrusted to an Islamist, manifests this fear more dramatically.”<sup>22</sup>

The rapidly-escalating Constitution wars entailed a rather important consequence: The Justice and Development Party received additional support from the people in July 2007 parliamentary elections to establish its superiority over the military and the high judiciary, two fundamental components of the tutelage regime. A tutelage regime's efficient functioning depends on elected governments' compliance with tutelary actors' demands. The regime remains intact so long as elected officials regard the guardians' demands as unquestionable orders and strive to meet their expectations. However, the guardians' failure to impose their will on elected officials effectively renders the tutelage

regime unsustainable. In this context, it would be no mischaracterization to claim that the 2007 showdown between the JDP government and proponents of the tutelage regime resulted in an undisputed and dramatic defeat of the latter group and eradicated the secular establishment's psychological advantage over the elected government.

## 2010 Amendments

The headscarf ban had been a long-standing problem that caused grievances for a significant part of society. The Justice and Development Party had failed to tackle the issue during its inaugural term in power. However, the party's sweeping victory in the 2007 parliamentary elections and a society-wide consensus that the headscarf ban represented an unnecessary measure encouraged the JDP leadership to address the matter. While the Nationalist Movement Party and the Democratic Society Party supported a limited constitutional amendment that the JDP group believed to be sufficient, the Republican People's Party and the Democratic Left Party ardently opposed the amendment.

The Parliament's General Assembly passed amendments to Articles 10 and 42 of the Constitution with 411 votes in favor.<sup>23</sup> Following the vote, RPP and DLP MPs challenged the amendments at the Constitutional Court. The Court ruled that the proposed amendments violated Article 2 of the Constitution on "secularism" and declared the parliamentary vote null and void.<sup>24</sup> The Constitutional Court's ruling was, however, legally controversial: According to the 1982 Constitution, the Constitutional Court had a mandate to exclusively monitor constitutional amendments with regard to procedure as opposed to their contents. Furthermore, the Constitution clearly defined the limits of procedural supervision. Despite its lack of legal authority, the Court annulled the constitutional amendment due to its contents. The ruling severely reduced the Parliament's legislative capacity.

Another legal development that led to a political crisis in 2008 was the case to shut down the Justice and Development Party. Briefly after the Parliament passed a constitutional amendment to put an end to Turkey's controversial headscarf ban, Chief Public Prosecutor Abdurrahman Yaçınkaya presented the Constitutional Court with an indictment where he accused the JDP of "becoming the focal point of anti-secular activities" and thereby demanded that the party be outlawed and a total of 71 JDP leaders, including President Gül and Prime Minister Erdoğan, be banned from politics. The indictment heavily relied on newspaper articles and other media coverage of recent events. The Court ruled that the JDP remained intact even though the ruling reduced the treasury's financial aid to the party by half.<sup>25</sup>

The Constitutional Court's headscarf ruling had effectively paved the way for the Court's (unlawful) monitoring of all constitutional amendments that the Parliament approved. The Court's abuse of power rendered efforts to draft a new Constitution a practical impossibility. Furthermore, the Constitutional Court's recent rulings about the headscarf ban's abolishment and the Justice and Development Party's outlawing had clearly demonstrated that the high judiciary represented a major obstacle before a much-needed transformation of Turkey's political and legal system. As such, the country's progress depended on a simultaneous strengthening of liberties and a restructuring of the judiciary.

The 2010 constitutional amendments precisely served this purpose. A government-sponsored Parliament bill that sought to amend large sections of the 1982 Constitution received over three-fifth of the vote even though it failed to secure a two-thirds majority. As such, the proposed amendments had to receive public approval in an upcoming referendum. Prior to the constitutional referendum, a three-way division emerged among voters: (1) Proponents of the amendments, (2) opponents of the amendments, and (3) boycotters. The Justice and Development Party and liberal groups, recognizing the proposed changes as an opportunity to finally break out of the political system imposed by the 1982 Constitution, were in favor of the amendments. Meanwhile, the Republican People's Party and the Nationalist Movement Party argued that seeming improvements to fundamental rights and liberties represented a tactic to divert attention from the JDP government's takeover of the judiciary as a result of the proposed amendments and therefore called for a negative vote. Finally, the Peace and Democracy Party supported a boycott of the vote due to the amendments' dissatisfactory contents, the JDP's unilateral approach, and failure to take their demands into account. During the period leading up to the constitutional referendum, spokespeople for all three camps engaged in a heavily-contested debate about the Constitution.

The 2010 constitutional amendments represented, particularly with regard to the judiciary, a radical move away from the 1980 military junta regime and – ironically enough- received 58 percent of the vote in a referendum held on the military coup's 30<sup>th</sup> anniversary on September 12<sup>th</sup>, 2010. The adopted amendments fell into two general categories: (1) Liberties and (2) the rule of law.

Amendments that sought to strengthen liberties constituted three distinct sub-groups: First, the amendments established constitutional guarantees over certain rights and liberties that the 1982 Constitution failed to address. In this context, the referendum approved the right to protect personal information (Article 20/3), children's rights (Article 41/3-4), and the right to access information (Article 74/3).

Second, the amendments expanded the scope of certain existing rights and liberties. Among these rights and liberties were the requirement of a judge's

approval to restrict the liberty to travel abroad (Article 23/5), the right of citizens to become members of multiple labor unions at the same time and in the same line of work (Article 51/4), the right of civil servants and other public employees to collective bargaining (Article 53/3), additional organized labor, strike and lockout rights (Article 54), and the abolishment of a clause which stipulated that MPs whose statements and actions led to the outlawing of their political party would lose their parliamentary seat (Article 84/5).

Finally, the amendments established positive discrimination regarding members of certain disadvantaged social groups who require special protection. As such, Article 10/3 of the Constitution was amended to explicitly state that additional measures that legislator may take to benefit women, children, the elderly, the disabled, widow(er)s and children of military and civilian service people who died in action or as part of their professional responsibilities, and veterans.

Similarly, amendments with regard to the rule of law fall within three subgroups. First, the adopted constitutional amendments established new institutions that effectively monitored the administration's actions, implemented new paths of legal remedy for the violations of citizens' rights and liberties, and broadened the scope of public accountability. The creation of a Public Monitoring Institution, which was regulated by the Parliament to investigate complaints regarding the state's abuse of power (Article 74/4-6), the recognition of the right to submit constitutional complaints (Article 148/3), the institution of judicial monitoring of Supreme Military Council decisions to terminate employment with the exception of promotions and mandatory retirement due to shortage of adequate positions (Article 125/2), subjecting all decisions involving disciplinary penalties for civil servants and other public employees and the Supreme Board of Judges and Prosecutors' decisions of expulsion can all be listed in this context.

## **The 2010 constitutional amendments represented a radical move away from the 1980 military junta regime**

Another rather important constitutional amendment was the abolishment of Temporary Article 15 that granted all members of the legislative and the executive branches immunity before the law regarding the entirety of their decisions. The abolishment of the aforementioned article that effectively sheltered perpetrators of the military coup and provided legal immunity for members of the military junta, who committed crimes against humanity, represented an important step for Turkey's democracy and the rule of law.

Another group of amendments clarified and restricted the jurisdiction of state and military courts. In order to prevent state courts' monitoring of the *suitabil-*

## Constitutional amendments in recent years marked a decisive defeat for Turkey's tutelage regime

*ity* as opposed to the *legality* of legislations in the future, the Constitution was amended to explicitly state that “the judiciary may under no circumstances monitor suitability.” With regard to military courts, the amendments imposed new restrictions on military courts’ jurisdiction (Article 145/1), established that military courts may not try civilians with the exception of wartime conditions (Article 145/2), and improved the working conditions of military judges (Article 145/4).

A third set of amendments restructured the high judiciary. Even though the courts claimed to administer justice in the name of the people, the judiciary was entirely detached from the general population.

The high judiciary, in particular, followed a closed-circuit working model and as such ensured that a single type of political alignment dominated the courts. In an attempt to transform this caste-like judicial system, the 2010 constitutional amendments embarked on a restructuring of both the Constitutional Court and the Supreme Board of Judges and Prosecutors.

An amendment to Article 146 of the Constitution regarding the Constitutional Court’s composition increased the number of Constitutional Court judges from 11 full members and 4 substitutes to 17 full members and put an end to the appointment of substitute members. The new regime diversified Constitutional Court judges by mandating a variety of government institutions, including the Parliament, to appoint its members. As such, the amendment boosted the Court’s democratic legitimacy to a certain degree.

The Supreme Council of Judges and Prosecutors underwent similar changes. An amendment to Article 159 of the Constitution altered the Board’s composition from 7 full and 5 substitute members to 22 full and 12 substitute members. The amendment mandated the President, the Supreme Court of Appeals, the Council of State, the Justice Academy of Turkey and first-class judicial and administrative judges and prosecutors to elect the Board’s membership to diversify its composition. Under the old rules, the President selected the five elected members of the Board from a group of nominees from the Supreme Court of Appeals and the Council of State. The new setting allowed members of the judiciary to elect 15 out of the Board’s total 20 members and therefore increased the judiciary’s representation within the institution:

“In this regard, the increasing number of Board members, coupled with diversification of the Board’s membership and subsequent improvements to its representational capabilities, shall both put an end to the closed-circuit model and professional co-optation between the Board and the high judiciary, and render the Board more democratic and transparent.”<sup>26</sup>

The people's ratification of the 2010 constitutional amendments that boosted liberties and the rule of law entailed three significant repercussions. Primarily, the changes allowed civilian courts to hold the two surviving members of the original five perpetrators of the 1980 military coup accountable for their actions. Following the constitutional referendum, even spokespeople and members of the "no" campaign filed official complaints against junta members Kenan Evren and Tahsin Şahinkaya, whose ongoing trial carries vast symbolic value for Turkey. After all, no other military coup and their perpetrators faced trial before in a country with a long history of such crimes. For too long, the military's interference in civilian politics, clinging to power for as long as they pleased and holding public office afterwards, were believed to be natural processes. Bringing Evren and Şahinkaya to justice, however, broke that cycle of confusion. The idea that perpetrators of military coups were legally immune to accountability ceased to exist. Various documents that became public during the course of the 1980 coup trial shed light on the degree of destruction that Turkey's society experienced as a result of military coups. Consequently, the idea that military coups represented a criminal act that called for public shaming and that their perpetrators would eventually face justice gained momentum among the people.

Second, the amendments marked a decisive defeat for Turkey's tutelage regime. Having lost an important battle in 2007, the tutelage regime attempted to re-establish its dominance through the 2008 headscarf ban ruling and a closure case against the Justice and Development Party. Had the 2010 constitutional referendum failed to attract adequate support, the outcome would have no doubt given the tutelage regime the upper hand and motivate its representatives to strengthen their grip on power. However, the reformists' victory in the constitutional referendum effectively eliminated that threat.

Furthermore, the "yes" vote reaffirmed the people's determination to draft a new Constitution. Before the referendum, opponents of proposed amendments and advocates of a boycott propagated that making such vast changes to the 1982 Constitution would have reduced the people's desire for a new Constitution and as such terminate public discussions. In truth, however, all proponents of the constitutional amendments, notwithstanding their support, stated that any solution short of a new Constitution would inevitably prove dissatisfactory and insufficient.

The 2010 constitutional amendment's outcome compelled all political parties to reconsider their positions. The "yes" vote proved so influential that all political parties pledged to draft a new Constitution during their 2011 parliamentary election campaigns. Immediately after the elections, they collectively established a Parliamentary Commission for Constitutional Agreement and, despite a variety of problems that the Commission encountered, refrained

from withdrawing their representatives in order to avoid public backlash. In light of these developments, the 2010 constitutional amendments not only improved liberties and the rule of law in Turkey but also rendered the idea of a new Constitution more popular.

## Concluding Remarks

There were two main factors that motivated the Justice and Development Party to make constitutional amendments over its decade-long tenure. The first set of amendments consisted of efforts toward Turkey's full membership in the European Union. Another group represented amendments that the JDP sponsored to escape constitutional crises, which targeted its government. As a consequence of both sets of amendments, the domains of individual rights and liberties have expanded in the country. Today, the 1982 Constitution has evolved into a rather different text compared to its original form with considerably more emphasis on rights and liberties.

We must point out, however, that the need and demand for a new Constitution remains very much alive in Turkey's society. There is no question that a new, democratic, and rights-based Constitution would serve an important function in the country's efforts to tackle historic grievances that transformed into chronic problems due to their continuous postponement over the years. Nonetheless, we must not "fetishize" the Constitution and keep in mind that even an ideal Constitution shall not resolve long-standing societal problems overnight. Still, we must remember that a pluralist and liberal Constitution would greatly contribute to both the democratization of public culture and the restriction of government authority in accordance with the principle of the rule of law.

In this respect, political parties –most notably the Justice and Development Party- who seek to alter the Constitution must develop a two-track strategy. On the one hand, they must keep open all possible channels necessary to draft a new Constitution. The political leadership should promote public debate about the new Constitution, encourage non-governmental organizations to address the issue, and create necessary incentives for other political parties to find common ground on the new Constitution. Such efforts bear importance for two reasons. First, the process shall reveal the exact details of the respective political parties' vision for society and facilitate a healthy discussion on the basis of these various visions. Thus far, the Parliamentary Commission for Constitutional Agreement made it crystal clear where political parties stand on key issues such as native languages, citizenship, local government, and the 1982 Constitution's unalterable articles among others. Such platforms increase the transparency of party politics and allow voters to relate to political parties in a more open manner. Second, the process shall demonstrate the areas




where political parties may find common ground and thereby highlight short-term objectives. After all, the four political parties in Turkey's Parliament have reached an agreement on a total of 59 articles of the draft Constitution.<sup>27</sup> In case all efforts to draft an entirely new Constitution prove futile, a comprehensive set of amendments based on these mutually-agreeable articles could foster the 1982 Constitution's liberal credentials and protection of human rights.

Political parties must continue reform efforts by making changes to the country's laws (where constitutional amendments are not necessary) while pursuing the long-term objective of a new Constitution. Even though a vast majority of Turkey's society supports the drafting of a new Constitution, a heightened sense of religious, ethnic, racial, linguistic, and/or ideological divisions may render inter-party agreement on fundamental issues elusive and thereby derail the drafting process. Under these circumstances, the Parliament might opt to change certain laws without resorting to constitutional amendments in order to reduce the risk of open conflict and engender a sense of mutual agreement among parties.

Over the past decade, Turkey made significant progress thanks to this approach that some experts call *path clearing*. "It was, for instance, possible to take rather important steps such as establishing a Kurdish-language public TV station (TRT 6), offering elective courses in native languages and lifting the headscarf ban at institutions of higher educations without amending existing laws, let alone the Constitution."<sup>28</sup>

Currently, Turkey needs to address a number of issues through legislative action. The Law on Political Parties, the Counter-Terrorism Law, the Elections Law, Criminal Law and the Law on Provincial Administration among others contain a wide range of anti-democratic clauses. Eliminating these aforementioned clauses from within the existing body of law in the absence of constitutional amendments would allow the further consolidation of Turkey's democracy and prevent the build-up of negative sentiments among the people with regard to the Kurdish question and other crucial issues.

Surely enough, taking all these steps would not eliminate Turkey's need for a genuinely democratic Constitution. "However, such a piecemeal approach could reduce tensions in an already existing conflict-ridden environment and would facilitate a more comprehensive agreement with regard to the Constitution."<sup>29</sup> As such, legislators must embark on a democratization of existing laws in order to keep the reformist momentum alive while striving to draft a new Constitution in order to not disappoint the people. ■



## The need and demand for a new Constitution remains very much alive in Turkey's society

## Endnotes

1. Jürgen Habermas, "Meşruiyet Dayanağı Olarak İnsan Hakları [Human Rights as a Source of Legitimation]", *Birikim*, Vol. 118, (Februar, 1999), p. 63.
2. Mustafa Erdoğan, *Anayasa Hukuku [Constitutional Law]*, (Ankara: Orion Publishers, 2011), p. 27.
3. Fazıl Hüsnü Erdem and Yunus Heper, *Türkiye Cumhuriyeti Anayasaları ve Anayasa Önerileri [Constitutions of the Republic of Turkey and Recommendations for the Constitution]*, (Ankara: SETA Foundation, 2011), p. 24.
4. Ergun Özbudun and Ömer Faruk Gençkaya, *Türkiye'de Demokratikleşme ve Anayasa Yapımı Politikası [Democratization and the Politics of Constitution-Making in Turkey]*, (İstanbul: Doğan Kitap, 2010), pp. 49-50.
5. The Justice and Development Party Programme <[http://www.akparti.org.tr/site/akparti/parti-programi#bolum\\_](http://www.akparti.org.tr/site/akparti/parti-programi#bolum_)>
6. Programme of the 58<sup>th</sup> Government <<http://www.tbmm.gov.tr/hukümetler/HP58.htm>>
7. Programme of the 59<sup>th</sup> Government <<http://www.tbmm.gov.tr/hukümetler/HP59.htm>>
8. "Drawing closer to the Republic's centennial, our country deserves a civilian Constitution based on reconciliation. ... The new Constitution must be drafted with the broadest possible societal agreement." Programme of the 60<sup>th</sup> Government <<http://www.tbmm.gov.tr/hukümetler/HP60.htm>>
9. "The period ahead will be a time for the new Constitution. ... We believe that the new Constitution must be comprehensible not only to experts but to all members of society, brief, concise, clear and consistent. .... In short, the new Constitution must be a pluralist and liberal text that endorses the fundamental values and principles that democratic countries embrace. Furthermore, we are of the opinion that international human rights documents –where to our country is a party– such as the Universal Declaration of Human Rights and the European Convention on Human Rights must form the basis of efforts to draft [the new Constitution's] section on fundamental rights." Programme of the 61<sup>st</sup> Government <<http://www.tbmm.gov.tr/hukümetler/HP61.htm>>
10. "The Justice and Development Party shall struggle with great patience, determination and resolve alongside the nation to ensure that Turkey has a new democratic civilian and liberal Constitution. In the future, we shall not retract from this objective regardless of others' approaches and positions. For Turkey's economic and social potential as well as the position we expect the country to attain in the world necessitates a new Constitution." The 2023 Political Vision Document <<http://www.akparti.org.tr/site/akparti/2023-siyasi-vizyon>>
11. Alleged anti-government conspirators who served in the Armed Forces during this period currently face trial as part of court cases popularly known as Ergenekon and Sledgehammer trials.
12. In 2007, the JDP commissioned a group of academics led by Prof. Ergun Özbudun to author a draft Constitution and shared the resulting document with the public. The party, however, did not present its draft to Parliament. <<http://arsiv.ntvmsnbc.com/news/419856.asp>> In the aftermath of the 2011 parliamentary elections, the four political parties established a Parliamentary Commission for Constitutional Agreement where all parties enjoyed equal representation. The JDP's proposition to the Parliamentary Commission included, unlike the 2007 draft, the institution of a presidential system.
13. Proposed amendments to Articles 10 and 42 of the Constitution dated 9 February 2008 regarding the abolishment of a headscarf ban on university campuses. The Constitutional Court declared the amendment unconstitutional in its 5 June 2008 ruling. "Anayasa Mahkemesi Kararı," *T.C. Resmi Gazete*, October 22, 2008. <<http://www.resmigazete.gov.tr/eskiler/2008/10/20081022-15.htm>>
14. Proposed amendments to Article 170 of the Constitution dated 4 April 2003 and 29 July 2013 regarding idle land no longer qualified as wild forests due to deforestation.
15. Serap Yazıcı, *Demokratikleşme Sürecinde Türkiye [Turkey in the Process of Democratization]*, (İstanbul: İstanbul Bilgi University Publishing, 2009), p. 285.

16. "5370 Türkiye Cumhuriyeti Anayasasının Bir Maddesinin Değiştirilmesi Hakkında Kanun," *T.C. Resmi Gazete*, June 23, 2005. <http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2005/06/20050623.htm&main=http://www.resmigazete.gov.tr/eskiler/2005/06/20050623.htm>
17. "5428 Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinin Değiştirilmesi Hakkında Kanun," *T.C. Resmi Gazete*, November 9, 2005. <http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2005/11/20051109.htm&main=http://www.resmigazete.gov.tr/eskiler/2005/11/20051109.htm>
18. "5551 Türkiye Cumhuriyeti Anayasasının Bir Maddesinin Değiştirilmesi Hakkında Kanun," *T.C. Resmi Gazete*, October 17, 2006. <http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2006/10/20061017.htm&main=http://www.resmigazete.gov.tr/eskiler/2006/10/20061017.htm>
19. For a more detailed assessment of Sezer's presidential style, see: Vahap Coşkun, "Hürriyetçilikten Yasakçılığa Bir Cumhurbaşkanı Portresi [Portrait of a President: From Liberalism to Prohibitionism]," *Yeni Şafak*, April 18, 2007.
20. For the Constitutional Court's ruling, see: "Anayasa Mahkemesinin E: 2007/45, K: 2007/54 sayılı Kararı (Türkiye Büyük Millet Meclisi İçtüzüğü'nün 121. Maddesi ile İlgili)," *T.C. Resmi Gazete*, June 27, 2007. <http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2007/06/20070627.htm&main=http://www.resmigazete.gov.tr/eskiler/2007/06/20070627.htm>
21. Ergun Özbudun, "Anayasa Savaşları [The Constitution Wars]," *Zaman*, August 23, 2007.
22. Ergun Özbudun and Ömer Faruk Gençkaya, *Türkiye'de Demokratikleşme ve Anayasa Yapımı Politikası* (Istanbul: Doğan Kitap, 2010), p. 103.
23. Hürriyet daily newspaper famously declared on the front page of its February 10<sup>th</sup>, 2008 issue that "411 hands rose to chaos."
24. "Anayasa Mahkemesinin E: 2008/16, K: 2008/116 Sayılı Kararı (5735 Sayılı Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinde Değişiklik Yapılmasına Dair Kanun ile İlgili)," *T.C. Resmi Gazete*, October 22, 2008. <http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2008/10/20081022.htm&main=http://www.resmigazete.gov.tr/eskiler/2008/10/20081022.htm>
25. "Anayasa Mahkemesinin E: 2008/1 (Siyasî Parti Kapatma), K: 2008/2 Sayılı Kararı," *T.C. Resmi Gazete*, October 24, 2008. <http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2008/10/20081024.htm&main=http://www.resmigazete.gov.tr/eskiler/2008/10/20081024.htm>  
The Constitutional Court reached a 6-5 decision to grant the Chief Public Prosecutor's request to outlaw the Justice and Development Party. Had seven Constitutional Court justices voted in favor, the JDP would have ceased to exist. Meanwhile, the 11-member board of judges voted 10-1 that the treasury's financial aid be reduced by half.
26. Erdem and Heper, *Türkiye Cumhuriyeti Anayasaları ve Anayasa Önerileri*, p. 53.
27. For a detailed analysis of all 59 articles that the Parliamentary Commission for Constitutional Agreement agreed upon, see: Taylan Barın, *Uzlaşma Yolunda: Komisyon'un Uzlaştığı Maddeler ve Anayasa*, (Istanbul: SETA Publishing, 2013). <http://setav.org/tr/uzlasma-yolunda-komisyonun-uzlastigi-maddeler-ve-anayasa/analiz/8051>
28. Ergun Özbudun, "Anayasa Yapımında Perakendeci Yöntem," *Yeni Türkiye*, Vol. 9 No. 50 (January-February 2013), p. 198.
29. Özbudun, "Anayasa Yapımında Perakendeci Yöntem", s. 198.



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- Maximum at the age of 27;
- Enrolled in an undergraduate or graduate program in the fields of political science, international relations or law.
- First degree relatives of the Ministry of Foreign Affairs personnel cannot apply the program.

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