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2010 Proposed Constitutional Amendments to the 1982 Constitution of Turkey

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The current constitution of Turkey, which was adopted by a nationwide referendum on 7 November 1982, has been amended sixteen times since its inception. Nine of these amendments were implemented under the rule of the Justice and Development Party (JDP), since its coming to power through the elections of 2002. If adopted in a referendum scheduled on 12 September 2010, this will be the tenth amendment initiated by the JDP. The 2010 constitutional amendment proposal is going to be voted as a package in a referendum, which will be held on 12 September 2010. Majority of those participating citizen's support would be sufficient for the adoption of these amendments.

The amendment proposal package, submitted to the Turkish Grand National Assembly (TGNA) on 30 March 2010, adopted by the Assembly on 7 May 2010 and published in the Official Gazette to on 13 May 2010 to be put to referendum, consists of twenty-six articles. Article 26 is the commencement article. Article 25 adds two interim provisions to the Constitution, which mainly explains how the new regulations concerning the composition and competences of the Constitutional Court and the Supreme Council of the Judges and Prosecutors shall be applied, in case of the amendment package enters into force after its approval in the referendum. Article 24 of the package, in turn, repeals the "Provisional Article 15" of the current constitution, which provides judicial immunity for the leaders and top officials of the 12 September 1980 Coup as well as those civil and military bureaucrats serving under the military regime.

Putting aside these three articles, the rest of the 2010 constitutional amendment package envisages several changes and additions to the existing provisions of the 1982 Constitution. We may distribute the latter in accordance with the sections of the current Constitution: "Judiciary" (9 amendments); "Fundamental Rights and Duties" (7 amendments); "Executive" (3 amendments); "Legislature" (2 amendments); "General Provisions" (1 amendment); "Financial and Economic Provisions" (1 amendment). Merely this numerary exhibition reveals that the crux of the 2010 constitutional amendment package is the overhauling the judiciary. However, amendments concerning the fundamental rights and liberties are as weighty as those concerning the composition and competences of judicial organs. These articles can be analyzed by following the order of relevant sections of the Constitution of 1982.

General Provisions

Article 10 of the current constitution, placed within the section of “General Provisions”, deals with the equality before the law. Second Paragraph of Article 10, as amended in 2004, reads as follows: “Men and women shall have equal rights. The State has the duty to ensure that this equality is put into practice.” This paragraph is complemented with the following sentence in the draft: “Measures taken for this purpose shall not be interpreted as contrary to the principle of equality.” Moreover, a new paragraph is added to the article: “Measures taken for the children, the elderly and the disabled persons, widow spouses and orphans of persons who died in war or on duty and incapacitated persons and veterans cannot be considered as contrary to the principle of equality.”

Fundamental Rights and Duties

There are two totally new rights in the proposed package; right to the protection of personal data and children’s rights. According to the proposed amendment package, everyone shall have the right to request the protection of his or her personal data. The content of this right is specified in the relevant article as follows: Everyone shall have the right to obtain information about data concerning him or her, to access to or request the rectification and erasure of these data and to be informed about whether these data are used in conformity with envisaged purposes. The proposed article allows the process of the personal data on the grounds provided by law or by the consent of the data subject.

Children’s rights are also new to the Constitution of 1982. The proposed regulation reads as follows: “Every child has the right to adequate protection and care and the right to have and maintain a personal and direct relation with his/her parents unless it is contrary to his/her high interests.” With this new category of right, the constitution-makers also impose a duty on the state to take measures for the protection of the child against all kinds of abuse and violence.

Along with the new rights we mentioned above, another novelty in the field of fundamental rights and liberties is the creation of the “ombudsman”, or the “public auditorship” as termed in the draft. The ombudsman is regulated under Article 74 of the Constitution, titled “Right of Petition”. The title of the article is changed in the draft as “Right of Petition, Right to Information and Appeal to the Ombudsman” and the ombudsman, who would act as a mediator between state and citizens, is charged with assessing complaints about the functioning of the administration. It should be noted that the institution of ombudsman shall be created under the TGNA Presidency and the Chief Ombudsman shall be elected by the TGNA for four years. The election of the ombudsman shall be completed in four-round elections. The draft requires the support of a two-thirds majority of the members of the TGNA in the first two rounds, however, if this majority cannot be obtained, “absolute majority” (garnering the support of at least %50+1 of TGNA members) and “simple majority” (receiving the greatest number of votes) shall be sufficient in the third and fourth rounds respectively.

According to Article 23, titled “Freedom of Residence and Movement”: “A citizen’s freedom to leave the country may be restricted on account of civic obligations, or criminal investigation or prosecution.” The proposed amendment changes this provision: “A citizen’s freedom to leave the country may be restricted only by a court decision based on criminal investigation or prosecution.” Accordingly, if the amendment package is adopted in the referendum and enters into force, citizens of the Turkish Republic cannot be prevented from leaving the country on the ground that they have not fulfilled their civic obligations. Here, it should be underlined that the term of “civic obligations” refer to “tax obligation” and “national service” under the Constitution of 1982.

Three proposed articles within the section of “Fundamental Rights and Duties” are related with the labour relations and conditions. We may summarize the new and changed provisions as follows: First, with the deletion of the relevant paragraph from Article 51 of the current constitution, simultaneous membership in more than one labour union in the same work branch shall become possible. Second, the draft grants public servants and other public employees right to conclude collective agreements. According to the proposed amendment, however, in case of the rising of a dispute between the latter and the Government, the parties may apply to the “Public Officials Arbitration Board”, whose decisions shall be final and have the force of a collective agreement. Third, the right to strike is re-regulated by the draft. On the one hand, the labour union shall no longer be liable for any material damage in a work-place, ensuing from deliberately negligent behavior by the workers and the labour union during a strike. On the other hand, “politically motivated strikes and lockouts”, “solidarity strikes and lockouts”, “occupation of work premises”, “labour go-slows” as well as other forms of obstruction shall not be prohibited.

Legislature

The first article in the 2010 constitutional amendment package concerning the legislature repeals the following paragraph from Article 84, titled “Loss of Membership”: “The membership of a deputy whose statements and acts are cited in a final judgment by the Constitutional Court as having caused the permanent dissolution of his party shall terminate on the date when the decision in question and its justifications are published in the Official Gazette. The speaker of the Turkish Grand National Assembly shall immediately take the necessary action concerning such decision and shall inform the plenary of the Turkish Grand National Assembly accordingly.” That means that a member of the TGNA, who is responsible for the closure of his or her political party by the Constitutional Court with his or her acts and statements, shall continue to stay in Parliament as an independent MP.

The second article in the package within the framework of the legislative organ related with the duration of the Bureau of the TGNA. According to the current provision: “Two elections to the Bureau of the TGNA shall be held in the course of one legislative term. The term of office of those elected in the first round is two years and the term of office of those elected in the second round is three years.” This provision was drawn up in accordance with the original regulation of the 1982 Constitution, which envisaged the term of the TGNA for five years. However, with the adoption of the 2007 constitutional amendment package in a referendum, the term of the TGNA was reduced from five to four years. So, it became necessary to adjust the duration of the Bureau of the TGNA accordingly. The proposed regulation solves this problem by providing that the term of office of the

Bureau of the TGNA in the first round shall be two years and that in the second round shall continue until the end of the relevant legislative term.

Executive

The first proposed amendment within the framework of the executive organ intends to strengthen the principle of the rule of law by expanding the scope of the judicial review of the administration. According to the Paragraph 2 of Article 125: “The acts of the President of the Republic on his or her own competence, and the decisions of the Supreme Military Council are outside the scope of judicial review.” Now, the draft lifts this judicial immunity and opens the decisions of the Supreme Military Council regarding expulsion from the Armed Forces to judicial review. Another change in this article concerns the limits of the judicial review. The first sentence of Paragraph 4 of Article 125 originally envisages that: “Judicial power is limited to the verification of the conformity of the actions and acts of the administration with law.” and with the 2010 constitutional amendment package it is provided that: “...and in no case it can be used as review of expediency.”

Amendment to Article 128 is closely related with the amendment to Article 53, allowing public servants and other public employees to conclude collective agreements. Paragraph 2 of Article 128 provides that: “The qualifications of public servants and other public employees, procedures governing their appointments, duties and powers, their rights and responsibilities, salaries and allowances, and other manners related to their status shall be regulated by law.” The following sentence is added to the latter by the draft: “...without prejudice to provisions on collective agreement concerning financial and social rights.”

Last change concerning the executive would also serve to strengthening the principle of the rule of law. Paragraph 3 of Article 129 grants judicial immunity for disciplinary decisions in the form of “warning” and “reprimand”. The proposed amendment abolishes this exception.

Judiciary

Those amendments concerning the judiciary essentially aim at restructuring the Constitutional Court and the Supreme Council for Judges and Prosecutors.

We may summarize the new regulations related with the Constitutional Court as follows:

1. The proposed constitutional amendment package changes composition of the Constitutional Court. The number of the member of the Court increases from 11 to 17. The draft envisages no substitute members for the Constitutional Court, in which originally 4 substitute members serve. Currently all 11 regular and 4 substitute members of the Court are elected by the President either among the candidates nominated by high courts as well as the Council of Higher Education or on his own discretion. Now, the draft provides that three constitutional judges shall be elected by the

TGNA; 2 members from among the candidates nominated by the Court of Accounts and one member from among the candidates nominated by the presidents of bar associations. 14 members of Constitutional Court shall be elected by the President who shall wield his appointing power directly for 4 members and indirectly for 10 members. The President shall elect 4 members of the Constitutional Court on his own discretion among senior administrative officers, lawyers, judges and public prosecutors of the first degree, and reporting judges of the Constitutional Court. He or she shall elect the other constitutional judges from among the three candidates nominated by the following institutions: the Court of Cassation (3 members), the Council of State (2 members), the Military Court of Cassation (1 member), the Supreme Military Administrative Court (1 member), and the Council of Higher Education (3 members). According to the draft, the members of the Constitutional Court shall serve for 12 years and a member shall not be re-elected.

2. The proposed constitutional amendment package introduces the institution of “constitutional complaint”, which enables individuals to access to the Constitutional Court directly. According to the proposal, basically three conditions must be met to be able to apply to the Constitutional Court individually: (a) One may apply to the Constitutional Court on the grounds that one of his or her fundamental rights and freedoms is violated by public authorities; (b) The concerned right or freedom, which is guaranteed by the Constitution, must be enumerated in the European Convention on Human Rights; (c) Before making the individual application, ordinary legal remedies must be exhausted.

3. The proposed package also re-regulates the competence of the Constitutional Court as Supreme Court. According to the current provision, the Constitutional Court, when functioning as Supreme Court, has the power to try high rank officials, including the President, members of the Council of Ministers, and high courts’ judges and prosecutors. According to the draft, the Speaker of the TGNA and the Chief of Staff, the Commanders of the Land, Naval and Air Forces and the Commander of the Gendarmerie shall also be tried in the Constitutional Court in its capacity as the Supreme Court.

Similarly, the proposed constitutional amendment package foresees significant modifications in the composition of the Supreme Council of Judges and Public Prosecutors. According to the original provision the Supreme Council comprises the Minister of Justice, the Undersecretary of the Ministry of Justice, 5 regular and 5 substitute members appointed by the President from among candidates nominated by the Court of Cassation and the Council of State. The draft increases the number of the members of the Supreme Council; 21 regular and 10 substitute members. Moreover, the Supreme Council is divided into three chambers in draft. The position and the status of the Minister of Justice and the Undersecretary of the Ministry of Justice is not changed; The Minister shall be the Chairman of the Council, and the Undersecretary shall be its *ex-officio* member. 15 regular and 10 substitute members of the Supreme Council shall be elected by the Court of Cassation, the Council of State, the Justice Academy, regular and administrative judges and public prosecutors of the first degree. The President shall elect 4 members from among senior administrators, practicing lawyers, and university professors in the fields of law. Another novelty in the draft concerning the Supreme Council of Judges and Public Prosecutors is that its decisions regarding the prohibition of the pursuit of the profession shall be subject to judicial review. According to

the current regulation there is no recourse to any judicial remedy against the decisions of the Supreme Council.

Lastly, a provision in the draft concerning the military justice worth to mention. According to the proposed amendment, military courts and military disciplinary courts shall only have jurisdiction to try military personnel for military offences related to military services and duties. Cases regarding crimes against the security of the state, constitutional order and its functioning shall be heard before the civil courts in any event and non-military personnel shall not be tried in military courts, except war time.

Financial and Economic Provisions

The draft constitutionalize the Economic and Social Council. Accordingly, the Economic and Social Council shall be established to provide the Government with consultative opinions in the formulation of economic and social policies.

Concluding Remarks

The 1982 Constitution, which was drafted in 1982 under the aegis of the military regime, has seen as one of the major obstacles against Turkey's further democratization. The Constitution has been subject of criticisms from almost all political and societal actors. Accordingly, more than one-third of the original text of the Constitution was amended in time. The nine reform packages passed between 2002 and 2004. These packages brought about noteworthy improvements in terms of democratic standards. However, most of these nine reform packages at least gained opposition parties' tacit approval or even consent. Current constitutional amendment package is not an outcome of political bargaining process. It has been opposed by all of the major opposition parties. In addition to this, intense campaign process just before the referendum has also politicized the constitutional amendment and bolstered already existing political cleavages. Under such a tense political climate, the campaigning parties emphasized their ideological party position instead of providing adequate information about the amendments.

The result of the upcoming referendum should be seen a starting point for future discussions, which would result in a wholesale constitution-making campaign. Since the current amendment package is open to criticisms, both procedurally and substantially, in terms of its conformity with the universal democratic standards, a more participatory and comprehensive constitution-making initiative should be kept in Turkey's political agenda, even after the referendum of 12 September 2010. Consequently a societal demand toward a wholesale new constitution should be complemented with a participatory process and a societal consensus as much as possible. Otherwise, Turkey continues to strive between tutelary democracy and electoral authoritarianism with such narrow amendments.
