



WHERE TO START TO DISCUSS THE CONSTITUTION? The Importance of Constitutional Engineering in Constitution Debates

In modern societies, constitutions serve three main functions: (1) reflecting the dominant values of the society they apply for, (2) checking the political power, and (3) guaranteeing the fundamental rights and freedoms of individuals by restraining political power. In the current days in which Turkey attempts to make a new constitution, the following questions in the context of the said functions can initiate a fruitful debate: Which one of these functions must be concentrated on during a constitution making process? Is there a certain order to be followed when assessing these elements? Would it be more fruitful to mature one of the functions before others? The present policy note seeks to answer these questions.

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Reflection of Dominant Values of a Society in the Constitution

For some, constitutions must be “neutral” documents that do not involve or impose any set of values or any ideological preference. This view is predominantly advocated in liberal circles; however, many constitutions in effect today express the dominant values of the respective societies in form of constitutional principles and in many cases do not refrain from using an ideological language when doing this. After all, this set of principles and values which constitute the basis of constitutional legitimacy can be compared to the pillars on which the constitutional architecture is built. Even though constitutions do not always explicitly declare, such values can be read in between the lines and constitutional institutions gain a shape accordingly.

For the constitution to reflect certain values, a set of values agreed on by the society must be present before the constitution making process. Nevertheless, such consensus cannot be attained in societies the political culture of which is divided with deep fault lines. It is observed that, in such societies, the most heated debates in constitution making processes are locked on and even blocked when discussing constitutional principles and values. In some cases, a set of principles that will guide the process is adopted at the outset of the process, which is followed by the actual constitution making phase. In fact, this would imply nothing but the reflection of the existing chronic antagonisms of the society onto the constitution making process. It is doubtless that, to talk about an ideal-case constitution, there is need for a foundation on which the constitution will be built, that is, a frame of social principles and values about which a consensus is reached. On the other hand, the constitutional making process or the constitution to be adopted in the end can neither create these principles nor solve the principal conflicts in this respect. The constitution making process or the constitution to be adopted in the end can contribute to the solution of such conflicts; but should not be considered as a magic pill for treating the disease. To treat the disease, it is needed to establish a political and social platform for dialogue and develop negotiations on this platform. Constitution making process does and should serve as a legitimate platform where chronic social problems are faced and discussed by the relevant parties. Nonetheless, building and concentrating constitution debates on this frame might leave the other two factors in the shade preventing the maturing and even initiation of the debates on these. In this context, political and social dialogue mechanisms to be developed simultaneously with the constitution making process will not only disburden the constitution making but also ensure a healthier process.

Functions of Organizing and Restraining Political Power

Law is a system of rules regulating the social relations and, in this context; constitutional rules are involved in the legal system of a country. On the other hand, constitutions are distinguished with legal rules with respect to the fields and subjects they apply to: the former organize the political power directly and at the highest order. Here, we should emphasize the notion of “organizing” since constitutions fulfill this function regardless of the regime. In other words, under any regime – democratic, totalitarian or liberal-democratic – there is need for the organization of the power, that is, a “power map”¹ that shows the establishment, structure, functioning, duty, powers and relations of state institutions.

¹ Ivo D. Duchacek, *Power Maps: Comparative Politics of Constitutions*, ABC-Clio, Santa Barbara, 1973.

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On the other hand, in liberal-democratic regimes, constitutions serve another important function that authoritarian or totalitarian constitutions do not: protecting fundamental rights and freedoms. In these regimes built on the opinion that individuals are born with inalienable and untransferable rights, constitutions, on the one hand, guarantee the rights and freedoms of individuals and, on the other hand, develop check and balance mechanism that will constrain the political power in order to bring those guarantees into action.²

When we talk about the function of constitutions to organize the political power and secure fundamental rights and freedoms, we cannot argue that any one of these functions is more important than the other. On the contrary, in many cases these two functions are complementary. Still, we can argue as follows: In the current era, universal principles for human rights are established. International and supranational achievements in the field of human rights are embraced and adopted in constitutions by many states. In short, in the current era, it is almost impossible to deny and turn back to universal standards for human rights in the constitution of any state except some certain local differences and interpretations. Even the regimes that do not respect the human rights ideal include these standards in the constitutions though only on paper in order not to draw reaction from the international community. Consequently, there exists a "ready-made" catalog of international standards on human rights that constitution makers can (or, more correctly, cannot object to) refer to. In this context, we cannot talk about several "constitutional models" on human rights that constitution makers can make a selection amongst. Leaving aside the debates on social and economic rights and freedoms, which, in fact, eventually shift towards a political-ideological realm, there exists a consensus among the international community on the minimum fundamental rights and freedoms that should be involved in the constitution and the mechanisms that will effectuate these minimum rights and freedoms necessary for a modern liberal-democratic constitution to fulfill the function of securing human rights. The presence of such consensus will enable a relatively easier solution for the issue during the constitution making process. Apart from that, certain human rights problems unique to each country inevitably comes to the agenda during the constitution making process. Demands for rights and freedoms in certain realms will find a reflection in the constitution making process especially if the grassroots of the society and civil society organizations are involved. These problems can be solved with relative ease in the light of international standards.

When we talk about the constitution's function to organize political power, we cannot talk about a generally accepted single model. In current regimes that can be called liberal-democratic, a wide array of government and election systems are preferred. Which one of the existing models are the best and most appropriate for Turkey? Actually, it is not easy to answer this question. Each model has unique positive and negative features and the applicability of each shall be assessed in the specific context of the state in question. This implies, then, in the constitution making process, a comprehensive intellectual study and knowledge shall be established before adopting a certain institutional design on the organization of the political power. In terms of this function, a wider array of technical knowledge and more elaborate efforts are needed

² Levent Gönenç, *TEPAV Anayasa Çalışma Metinleri-1: Siyasi İktidarın Denetlenmesi, Dengelenmesi ve Anayasalar*, Ankara, 2010.

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compared to the above mentioned realms. Options are ample, and if the wrong one is pursued in the constitution making process malfunctioning of the political system will be unavoidable. Newton, the father of modern physics, sets forth the mechanical laws of the universe and pinpoints the perfect balance of the universe enabled by these laws. A "Newtonian constitution" or a "Newtonian democracy" represents the association of the elements of a constitutional system with each other to achieve a perfectly functioning check and balance mechanism.³ In order to ensure the functionality of today's states, which increasingly became more complex in the face of the rising needs of the society, due attention must be paid to the Newtonian character of constitutions.

Besides, establishment of appropriate institutional design and check and balance mechanisms and making appropriate definition of the relations between the execution, legislation and the judiciary will contribute to the constitution's ability to duly fulfill the function of securing fundamental rights and freedoms.

As a result, it can be recommended that when identifying the matters of debate in the constitution making process, check and balance mechanisms should be concentrated on and the establishment of relevant knowledge across experts and political parties should be prioritized. It is doubtless that this strategy does not imply that the other two dimensions of the constitution will be left unnoticed or neglected; however, prioritizing or concentrating on the debates on institutional design might generate a more fruitful constitution making process. Besides, when institutional design is prioritized over constitutional values or human rights, over-politicization, polarization and eventually the blockage of the process will be prevented. If the process starts with and evolves from design, to other realms can be added to the debate agenda in tandem with the above framework.

Perfect institutional design in the sense explained above is possible only upon good "constitutional engineering"⁴ which means designing a constitution that not causes but solves crises and that enables not cumbrous but a functional political system. In this context, constitutional engineering must focus on the following:

- Establishing appropriate check and balance mechanisms between the institutional elements constructing the constitutional system
- Designing institutional preferences in entirety rather than in form of partial revisions
- Evaluating the foreseeable outcomes of the current institutional model thoroughly with respect to the entire political system

Current studies in the field of constitutional engineering develop solutions to be employed in designing governmental systems and thus election systems. In the current period in which Turkey debates constitution making, alternative system designs based on the knowledge of constitutional engineering can pave the way for a fruitful constitution making process.

³ James A. Robinson, "Newtonianism and the Constitution", *Midwest Journal of Political Science*, Vol. 1, No. 3-4, 1957, ss. 252-266.

⁴ Giovanni Sartori, *Karşılaştırmalı Anayasa Mühendisliği*, Tranlated by. Ergun Özbudun, Yetkin Yayınları, Ankara, 1997.