The Final Trick? Separation of Powers, Checks and Balances, and the Recomposition of the Turkish State

Felix Petersen & Zeynep Yanaşmayan

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The Turkish parliament has recently passed constitutional amendments that will, pending the public referendum in spring 2017, set aside decades of parliamentary system tradition.[1] Presumably aimed to repair the dysfunctions of the current regime and to respond to the need of a "stronger Turkey", the proposed draft does not only eradicate the principle of separation of powers but rebuilds the state according to the interests of ruling groups, without much consideration being paid to the overall integrity of the system and long term implications. These amendments constitute the final trick the AKP government plays in pursuing their agenda of system-change. Call it sultanism, presidentialism a la Turca orabsolute presidentialism, one thing is clear: the state is increasingly centralized into a political regime that can be controlled rather easily bypassing important constitutional counterweights.

Separation of Powers and the Turkish State: Before the Proposed Amendments

In the current Turkish Constitution (TC) the separation of powers principle, as one of the core principles of state organization, is attributed a high importance. The principle is limited to a division of functions and does not imply a hierarchical order of state organs (TC, Preamble). According to Art. 7 the (non-delegable) legislative power is vested in the Turkish Grand National Assembly (TGNA). Executive power and function are exercised by the President of the Republic and the Council of Ministers (Art. 8). Judicial power is exercised by independent courts (Art. 9). The substantial changes the amendments bring are not to be found in the three fundamental articles. We recognize how these changes undermine the principle of separation of powers only if we read all amended provisions together, including the ones that received less publicity.

Separation of Powers and the Turkish State: After Amendments

As said, the three fundamental articles were only slightly modified. Whereas Art. 7 is left untouched, the Council of Ministers is erased from Art. 8 and "impartiality" of courts has been added to Art. 9. However, other changes that seek to influence the power balance have been introduced. For instance, the provisions on military justice are abolished (Art. 145); and with it all military courts (Art. 156, 157). This has also implications for the composition of the Constitutional Court as the two justice positions nominated by the military court have now been removed, reducing the total number of justices from 17 to 15 (new Art. 146). By disabling the military judiciary the number of actors included in governing the judicial branch is reduced. Thus giving executive and legislative an advantage over the judiciary (as well as of civil over military actors) in the appointment of justices. Furthermore, as Maria Haimerl shows in her article, the fact that the Council of Judges and Prosecutors is also curtailed and its influence on the Constitutional Court limited, demonstrates that the power of judiciary and military is significantly minimized.

Most interesting from our standpoint is the recomposed relationship of the executive and the legislative. Turning first to changes introduced to the TGNA, we notice that the number of deputies is increased from 550 to 600 (new Art. 75); the eligibility age to become a member of parliament is lowered from

[1] A translation of the amendments can be found on our Blog *Politics and Law in Turkey*.

25 to 18 (new Art. 76); and the term of office is increased from 4 to 5 years (new Art. 77). Most importantly, Parliament loses influence over the government, because ministers are now appointed by the President (new Art. 104), and the Council of Ministers is abolished (Art. 109). Parliament may however investigate Vice Presidents and Ministers when the required majorities are met (new Art. 98, Art. 106). And it can also investigate and impeach the President (new Art. 105). The amendments stipulate that all such procedures against Ministers, Vice Presidents or the President of the Republic can be proposed by an absolute majority of the total number of members, must be initiated after debate by a three-fifth majority of the total number of members, and investigated by a 15-member committee of the TGNA that is composed according to the distribution of seats in the house (new Art. 105, 106). An impeachment process through the Supreme Court, i.e., the Constitutional Court acting as Supreme Court, can be opened upon referral of the case to the court by a two-thirds majority of the total number of members. So there are veto powers of parliament vis-a-vis the President and his government. But the hurdles to initiate and open investigations are rather high. These amendments are, hence, to the disadvantage of the legislative.

What about the core legislative power, the power to make laws? Although legislative power is vested in the TGNA also after the amendments, the President can rule by decree. True, laws made by parliament trump presidential decrees (new Art. 104). Nonetheless, introducing presidential decree power clearly constitutes a considerable detour from the system of the 1982 constitution. Under the current provisions, the Council of Ministers is only allowed to issue decrees that have the force of law by explicit parliamentary permission. There is no such right for the President in the 1982 constitution. With the current amendments this condition is lifted, although some limitations still apply. General provisions of the constitution, rights and duties of the individual, issues that are stipulated to be or are exclusively regulated by law are beyond the scope of presidential decrees (new Art. 104). Furthermore, in case of conflict between the provisions of laws and presidential decrees, the former prevail. Since this will in practice lead to contestation, as Maria Haimerl argues, a clear mandate to the Constitutional Court could have cleared the air. Nevertheless, this arrangement in principle grants priority to the parliament in legislative work. When this change is read together with the amended Article 89 – which requires a higher majority than before for the Parliament to return a bill back to the President after a first rejection – the picture gets blurry. Stronger willingness to legislate on an issue is required in order to impede the President from blocking legislative initiatives. As long as areas yet unregulated by law exist, the President will be free to issue presidential decrees.

As for appointment powers, in the 1982 constitution the President was to appoint diplomats, the chief of staff, members and the chairperson of the State Supervisory Council, members of the Council of Higher Education, and members of the judiciary (judges and prosecutors)[2]. Paying attention to the details here is vital: Whereas the reduced number of the Constitutional Court justices may simultaneously slightly reduce the influence of the President as he appoints 12 out of 15 instead of 14 out of 17, he has still influence over the Council of Judges and Prosecutors. Of the 13 members, 7 are appointed by the TGNA, 4 are appointed by the president, and the remaining 2 are the Minister of Justices and the Undersecretary of Justice, who are also to be appointed by the President of the Republic (new Art. 159). Furthermore, the amendments give the President appointment powers that he did not have beforehand. He appoints and dismisses the Ministers and Vice Presidents, that is the governing part of the executive. At the same time he also appoints and dismisses high ranking public executives and bureaucrats, that is the administrative part of the executive (new Art. 104). This shows that the President gains with the amendments very strong appoint-

[2] Before and after the amendments, Art. 108 establishes that the President appoints the members and chairperson of the State Supervisory Council; Art. 117 establishes that the President appoints the chief of the general staff; Art. 154 establishes that he appoints the Chief Public Prosecutor and the Deputy Chief Public Prosecutor of the High Court of Appeals; Art. 155 establishes that the president appoints ¼ of the members of the Council of State.

ment powers. And since Parliament does not have to confirm his appointments, he can fully determine the composition of government and its personnel, as well as domestic and foreign policy.

Finally, what can we say about the rights to dissolve Parliament or call for new presidential or parliamentary elections? Both are granted the power of renewing elections. Again, this in principle implies that executive and legislative are on equal footing. However, a few points should be brought into daylight. First, in the current system, Parliament has the authority to unseat the Council of Ministers, which is admittedly what the President will replace in the new system,[3] with an absolute majority of the total number of members (Art. 99). Failure to form another government within a fixed period leads to renewed elections. Instead, the amendments introduce a requirement of a three-fifths majority (new Art. 116) in order for the Parliament to renew presidential elections. Each time the elections are to be renewed, decided either by the President or the Parliament, they are renewed for both bodies and are held together. This is even so when the position of the President of Republic falls vacant for whatever reason (new Art. 106). Therefore, the draft is wary of independent elections that might potentially produce a majority in the Parliament that is not aligned with the President's political views and gives more instances to the executive for renewal. Second, the decision of renewal by the Parliament comes with an unintended consequence – at least for a Parliament that wishes to replace the President. Despite the provision that limits the election of the same candidate as the President to a maximum of two terms (Art. 101), when elections are renewed by the Parliament for a President who is already in his second term, he can become a candidate again (new Art. 116). It is open to interpretation to what extent this provision may be used or abused as a means for uninterrupted power by a concerted President and Parliament or, alternatively, may generate political deadlock in an already polarized society.

It seems that although both powers have ultimate rights to dissolve/dismiss each other and call for new elections, a trial of strength would go most likely to the disadvantage of the legislative. This is also reflected in the new budget rights. Under the 1982 constitution, budget decisions were left to the government, and the President had nothing to do with it. The Council of Ministers had the right to submit the budget bill and estimates of government to parliament. This bill had to be adopted by the Budget Committee in which the government always had the majority of seats (25 of 40). Afterwards, the proposal of the committee would be debated in the plenary and had to be adopted in its entirety by Parliament (Art. 162). The proposed amendments change this state of affairs. According to the new amendments, the President submits the budget to Parliament, were it is still discussed by the Budget Committee and afterwards in the plenary which is required to adopt it. The President also replaces the Council of Ministers in submitting the final accounts bill (new Art. 161). Though the power over budgetary decisions is still divided between President and Parliament to some extent, a majority for one party in both the executive and legislative branch can make this a very uncontested subject of politics and government.

On a general note it seems the pendulum swings toward the President also through small and largely unnoticed changes that for no apparent reason are now to be regulated by presidential decrees instead of laws: such as the organisation of the National Security Council (new Art. 118) or the State Supervisory Council (new Art. 108).

Conclusion

The direct popular election of Presidents was introduced to the Turkish constitution in 2007 with a heavily debated amendment. Prior to that amendment the President of the Republic was elected indirectly through Parliament. Thus the legislative could determine the executive to a greater extent. After the 2007

[3] Since the President is under the current system is an impartial office independent of party affiliations, the parliament does not have an authority to dismiss the President of Republic. It may however impeach the President for high treason on the proposal of at least one-third of the total number of members (old article 105).

amendment this changed; and with it the balance of powers between Parliament and President was modified. Introducing the direct election can be in retrospect understood as a first step toward the current regime change, and it was ostensibly used by the AKP and Erdogan to justify the amendments as a means to legalize a de facto situation.

There is no doubt that the constitutional amendments were prepared by the AKP senior members mirroring their experience in Turkish politics so far: an overwhelming majority in the Parliament and a single party government. However, what the AKP seems to fail to grasp is the unpredictability of such accumulation of power and the peril of erosion of checks and balances when the tide unexpectedly turns. Separation of powers and checks and balances are cornerstones of non-tyrannic, non-arbitrary, democratic regimes, the deconstruction of which will bring nothing but more instability to a country that is already torn along several societal axes. Although Turkey was never a model student among the democratic nations, an even more centralized political regime as foreseen by the constitutional amendments will erase any remaining democratic characteristics of the state and push the country further into the abyss.

This is the second part in a three-part series of articles about the Turkish constitutional reform. For the first part, see here.

ABOUT THE AUTHORS

Felix Petersen
Felix Petersen is a research fellow at the Institute of Political Science at the University of Münster. He leads the transdisciplinary research project "Shaping Democracy: Institutionalizing Citizens' Assemblies in Germany," which is funded by the Volkswagen Foundation as part of the "Transformational Knowledge on Democracies in Transition – Transdisciplinary Perspectives" initiative.

Zeynep Yanaşmayan
Zeynep Yanaşmayan is a research fellow at the Department of Comparative Democracy and Eastern-European Political Systems Studies at the Institute of Social Sciences of Humboldt University of Berlin.

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