Good Job, Move On

The Turkish Opposition's Constitutional Reform Proposal

Cem Tecimer

13.12.2022 doi: 10.17176/20221213-121611-0

In May 2022, I was interviewed by Nick Stadtmiller on legal and constitutional changes in Turkey. There, I expressed my hope that the opposition forces would soon agree on a constitutional amendment package.

Six months later, in early December, six political parties from the Turkish opposition – including the Republican People's Party (*Cumhuriyet Halk Partisi*), the main opposition, and the Good Party (*İyi Parti*), all six collectively labeled the "Table for Six" (*altılı masa*) – have announced a joint and comprehensive constitutional reform proposal. If enacted, the proposal would amend a total of 84 articles of the Turkish Constitution, almost half of the nation's governing charter. While this proposal deserves praise as a unique example of consensus building in Turkish political and constitutional history, the opposition should now focus on winning the upcoming elections instead of getting bogged down in the details of the proposal.

We know little of the specifics of the drafting process and the matters that were subject to negotiation and concession; there are no recorded minutes of the deliberations that generated the amendment package, which some believe has rendered the preparation phase of the text opaque and inaccessible to scholars and the broader public. We do know, however, that constitutional law scholars from each of the six parties came together and held the pen on the drafting, including, most prominently, Professor Serap Yazıcı, one of Turkey's most respected constitutional scholars, now also deputy chair of the Future Party (*Gelecek Partisi*), founded and headed by Mr. Ahmet Davutoğlu. I welcome Professor Yazıcı's authorship in the process, as she has been an advocate of human rights for all factions of the Turkish public for decades, a rarity among Turkish constitutional law scholars who have long held staunch Kemalist and ultra-secularist views at the expense of numerous constitutional freedoms.

While it is impossible to get into all the details of this extensive amendment package, as a general overview, it is possible to note the three main themes undergirding the proposal. *First* are amendments to structural constitutional law, that is, Turkey's separation of powers arrangements: on this front, the proposal repudiates Turkey's transition to a turbo-presidency under Erdoğan and avows to transition back to a parliamentary system of government (or at least a semi-presidentialist system, as some have argued). The proposal restores the office of the prime minister and reorganizes the presidency as a symbolic and impartial state office with mostly nominal powers. The Constitutional Court is reorganized as a 22-member court, a seven-member increase from its current composition of 15 members. *Second* are amendments to fundamental rights and freedoms: among other things, the amendment package makes it more difficult to ban political parties, uses the word "ecosystem" and the term "animal rights" for the first time, and expands the Constitutional Court's jurisdiction by enabling it to review the constitutionality of laws that are implicated in individual applications alleging a violation of a fundamental constitutional right. *Third* are miscellaneous amendments not neatly falling under the first two categories, including, first and foremost, a general principle of constitutional interpretation added to the text: "Freedom is the rule, limitation is the exception. When in doubt, interpretation is to be in favor of freedom."

I. In Defense of the Proposal

The most commendable aspect of the proposal does not have to do with the substance of the text at all.

This amendment package deserves praise for its mere existence: it is an unprecedented act in consensus building by a diverse set of political parties, ranging from the Islamist Felicity Party (*Saadet Partisi*) to the Republican's People Party that describes itself as a social democratic party. This is especially important given Turkey's history of constitution-making: with the possible exception of the 2001 amendments, most if not all episodes of constitution-making and amendment have been the product of wars, coups or intensely polarized and democratically questionable referenda. Against this backdrop, that six ideologically diverse political parties have agreed to amend almost half of the extant constitution and have done so peacefully and following intense and regular discussions and negotiations is a rare example of an unprecedentedly calm and rational deliberative process in Turkish legal politics. This is perhaps more important than the text of the amendment package itself.

More substantively, while announcing its emphatic intention to repeal Turkey's present presidential(ist) system configuration and to transition back to a parliamentary system, the amendment package simultaneously situates and justifies this move in a broader context of Turkish constitutional history: ever since the enactment of the Ottoman Constitution of 1876 and the successive constitutional periods, the amendment package's preface announces, Turkey's constitutional trajectory has centered around a parliamentary system of government. In that sense, the current presidential(ist) system is not only dysfunctional on its own terms, but also, and equally importantly, against Turkey's lived experience with constitutionalism spanning nearly 150 years. This is a crucial historical observation.

Even more substantively, an overwhelming majority of the proposed amendments can be viewed as democracy-enhancing moves. One striking example is the addition of "withdrawing from international treaties" to the Turkish Parliament's enumerated powers. To most, this had already been an inherent function of parliament, especially given that the ratification of most international treaties under Turkish constitutional law requires the affirmative consent of parliament in the form of an approving legislation. The recent Istanbul Convention debacle, where President Erdoğan unilaterally withdrew Turkey from the Convention despite overwhelming scholarly consensus that such unilateral executive withdrawals from international treaties ratified by the Turkish Parliament are blatantly unconstitutional, has proved otherwise. The opposition forces seem to have wanted to explicitly repudiate this move by Erdoğan by making it textually unambiguous that withdrawing from international treaties is a legislative, and not an executive, power.

Further, parliamentary and presidential elections are no longer to take place on the same day: the president is elected for a non-renewable term of seven years, while parliamentary elections are to take place once every five years. This responds to two problems associated with Erdoğan's one-man rule: (1) Holding elections for both branches of government on the same day was no doubt a tactical move to ensure that these two branches would be dominated by the same political party or coalition (which is indeed the case today). The two-year time gap between presidential and parliamentary elections is intended to ensure that this will not happen moving forward or at least will happen less frequently. (2) The seven-year, non-renewable term limit is also intended to prevent future Erdoğans from clinging to Turkey's political ecosystem in the future.

The proposed increase in the Constitutional Court's membership from 15 to 22 is also a welcome remedy to the short-term political capture of Turkey's highest court, most likely intended to dilute the power held by Erdoğan appointees to the Court (who are not an ideologically unison block anyway, as I have argued in a previous post).

Finally, the comprehensiveness of the proposed amendment package is evident in that it moves beyond being a mere reaction to the authoritarian latter part of Erdoğan's regime: the drafters clearly wanted to use this amendment package as an opportunity to respond to more systemic problems associated with the 1982 Constitution, which, after all and despite having been amended on multiple occasions, is the product of a military coup whose perpetrators played a key role in

the drafting process. The proposed constitutional interpretive rule favoring freedom over limitation, the recognition of animal rights, and many others are all indications that the amendment package serves a broader purpose of rectifying the authoritarian letter and spirit of the 1982 Constitution which predates Erdoğan's rule.

II. Some Cautionary Notes

Having said all of the above, it is impossible for such a comprehensive text to be immune from criticism. The first cautionary note to be mentioned is the fact that, despite its unprecedentedly inclusive nature, the pro-Kurdish People's Democratic Party (*Halkların Demokratik Partisi*), currently the second largest opposition party in parliament, has been absent from the negotiating table. The opposition forces comprising the "Table of the Six" have so far been timid to engage with the People's Democratic Party, largely out of fear that such engagements will result in a loss of political support, since this will give the AKP and its de facto coalition partners cannon fodder to paint the opposition as being in cahoots with "terrorists." Relatedly and more broadly, the inclusivity of this amendment package is an inclusivity at the political party level (noting again the absence of Kurdish political input to the package). Notably, input from civil society, scholars not engaged in politics, and from the broader public has so far been absent. Yet, as Professor Şule Özsoy Boyunsuz, a Turkish constitutional scholar, rightly points out, the amendment package should be viewed not as a final product but rather as a work-in-progress – one to be amended and finessed with input from civil society, scholars, and even the broader public over time.

A second point of caution, more substantively, relates to how the presidency is configured under the amendment package, which has prompted some scholars to criticize the proposal as not delivering on its promise to transition Turkey back to a parliamentary system but rather creating a semi-presidentialist system: some scholars rightly point out the fact that, according to the amendment package, the president is still elected by Turkish citizens, as opposed to being appointed by a qualified majority of the parliament. Skeptics reasonably question the tension between a president with significantly reduced powers under the proposal on the one hand and the fact that he or she will assume the presidency with a democratic mandate which will presumably make him or her – desire to become – an active figure of daily political life on the other. Simply put, and as Professor Kemal Gözler, by far Turkey's most prolific and most read constitutional law scholar incisively asks, how can a president elected by popular vote be a symbolic, unifying figurehead rather than just another politician dabbling in the vicissitudes of ordinary politics?

The third and final critique to be made is this: that the opposition forces have come together to generate such a comprehensive and, on balance, democratic text is commendable. Short term political victory, however, should be a higher priority for the opposition for at least two reasons. First and most obviously, the enactment of this amendment package will depend on a sweeping opposition victory. I should note as a side, though, this document, even in a scenario in which AKP and its partners retain their control over both the parliament and the presidency, will remain a touchstone for future efforts to amend the Constitution. The second reason why a short term electoral victory in the 2023 elections is vital and more important than the amendment package itself is that reversing Turkey's democratic backsliding does not strictly require amending the Constitution: while that may be an ideal, the more realistic scenario in which Turkey's democratic restoration happens will be through amending ordinary legislation – and not necessarily the Constitution – as I have argued in a previous post, in addition to others, such as Professor Ece Göztepe, who have made similar arguments.

III. A Concluding Reality Check

On balance, this is a very encouraging text, and the result of a very encouraging consensus-building mechanism. But constitutions are not panaceas to all evils. They run the risk of being dead texts when their words lack political support to enforce them. It is therefore time for the opposition to park the constitutional

amendment question aside and focus on winning the upcoming elections. Good job, move on!

ABOUT THE AUTHOR
Cem Tecimer
Cem Tecimer ist Postdoc an der Harvard Law School.Cem Tecimer is a postdoctoral fellow at Harvard Law School.

SUGGESTED CITATION
Tecimer, Cem: Good Job, Move On: The Turkish Opposition's Constitutional Reform Proposal, Verfassungsblog, 13.12.2022, doi: 10.17176/20221213-121611-0.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20221213-121611-0.