

# The Constitutional Referendum in Turkey: A step toward democracy?

Dietrich Jung

On September 12, 2010, the Turkish voters approved in a popular referendum a heavily debated package of constitutional amendments with a particular focus on the judicial institutions of the country. How to assess the outcome of the referendum? Is Turkey on the path to more democracy and coming closer to EU membership or was the AKP's success another step toward the Islamization of Turkish state and society? In order to answer these questions, this essay assesses recent events against the background of a brief history of Turkish constitutionalism.

On September 12, 2010, the Turkish voters approved in a popular referendum a heavily debated package of constitutional amendments with a particular focus on the judicial institutions of the country. Precisely thirty years after the military coup of 1980 which put the current Turkish constitution in place, 58 percent of the voters supported the reform package that passed Turkish parliament in May 2010 (42 percent voted NO by an overall turn-out of approximately 77 percent). The outcome of the referendum was immediately welcomed by both representatives of the EU commission and US President Obama. The amendments make decisive changes regarding Turkey's Constitutional Court and its Supreme Board of Prosecutors and Judges (HSYK), re-structuring the two juridical bodies in size and membership, as well as strengthening democratic and representational elements in the appointment procedures. In addition, the new constitution will pave the way for the trial of military personal by civilian courts with regard to all issues which are not internal military affairs. In terms of civil liberties, the amendments will improve the protection of family, women, disabled and children's rights, as well as liberalize organizational rules with regard to public employees and trade unions. Moreover, for the first time in Turkish history they will introduce the institution of an ombudsman who will be appointed by the parliament.

The campaign that preceded the referendum, however, turned into a vicious battle between the ruling AKP (Justice and Development Party) and the Kemalist opposition in parliament, the CHP (Republican Peoples Party) and the MHP (National Movement Party), the military, and the juridical establishment. For the Kemalist camp, the constitutional amendments mark a new step in the attempt of the government under Prime Minister Erdogan to monopolize power and to move away from the secularist nature of the Turkish state. In particular, the opposition accused the AKP for trying to put the judiciary under government control. Erdogan, instead, praised the reforms as a major advancement toward democracy and the rule of law. How to assess the outcome of the referendum? Is Turkey on the path to more democracy and coming closer to EU membership or was the AKP's success another step toward the Islamization of Turkish state and society? In order to answer these questions, this essay will assess the recent events against the background of a brief history of Turkish constitutionalism.

Turkish constitutionalism has its roots in the Ottoman reform process of the nineteenth century. Initiated by Sultan Mahmut II (1808-1839), the Ottoman reforms were basically aiming at the centralization and modernization of the state apparatus. The major political-administrative trends of the *Tanzimat* (1839-1878) were the abolishment of the patrimonial system of tax-farming, the secularization and formalization of education and of the administration of justice, the functional differentiation between branches of government, an increasing division of powers of government, and the introduction of a new system of provincial administration. In the context of these reforms, a constitutional movement emerged that achieved the proclamation of an Ottoman constitution in 1876. Based on the sovereignty of God and its legal order defined by religious law, this first Ottoman constitution had a strong religious connotation. The absolute authority of the sultan was at least formally grounded in religious legitimacy and the Ottoman parliament was only an advisory body.

The eventual transition to a secular constitutional order took place with the constitutional enactment of January 1921 by the oppositional National Movement in Ankara. This provisional constitution replaced the principle of divine sovereignty with the sovereignty of the Turkish nation. In April 1924, the Grand National Assembly adopted a new republican constitution that basically retained the essential elements of the previous enactment. With the introduction of the national principle of sovereignty, these constitutional reforms mark a decisive change in political legitimacy, transforming the patrimonial Islamic Empire into a republican nation-state. However, this move from religious to secular political legitimacy took place only gradually. During the war of independence (1919-1922), for instance, the national resistance movement largely relied on religious symbols in mobilizing the population and the adherence to the Sunni branch of Islam was a major criterion for the acquisition of Turkish citizenship during the apparently so secularist early republican period. In this regard, Islamic symbolism played an essential role in the foundational phase of the Turkish Republic and consequently article two of the first republican constitution retained Islam as state religion. It was not before April 1928 that the words "The religion of the Turkish state is Islam" were, together with other references to Islam, deleted. In February 1937, secularism as one of the six Kemalist principles – republicanism, reformism, nationalism, statism, populism, and secularism – eventually assumed constitutional status.

The second constitution of 1961 was drafted under the supervision of the National Unity Committee (NUC), a heterogeneous junta which ruled the country according to the officer's decisions during the interim period after the military coup of May 1960. The new constitution reflected the democratic shortcomings of the previous, in particular the all-powerful position of the majority group in parliament which was an instrument for the authoritarian rule of Atatürk and his successor İnönü. The former principle of unity of power was replaced by a system of checks and balances to prevent the majority group in the assembly from having an almost free hand. Despite the introduction of an upper house (Senate) and of proportional representation, the juridical control over state activities was enhanced and therewith the role of the non-elected judiciary. Furthermore, the new constitution contained a full bill of civil liberties with article two declaring the Turkish republic to be a national, democratic, secular and social state based on human rights. Yet this military-guided top-down "democratization" did not provide what its instigators sought: political stability. On the contrary, the new constitution became the legal background for the Second Republic's slide into social conflicts and a series of political crises leading to two further military interventions (1971 and 1980).

On 12 September 1980, General Evren announced that the military had taken control of the government. Again, the country was for an interim period of 36 months under military rule. During this period a third constitution was drafted under military supervision and approved by a compulsory public referendum in November 1982. The military held both the more liberal political structures introduced with the 1961 constitution and the politicians themselves responsible for the failure of the Second Republic (1961-1980). Consequently, the new constitution of the Third Republic curtailed the rights to enjoy basic democratic liberties and enhanced the military's role in the realms of politics and jurisdiction. Moreover, a series of laws enforced under military rule (1980-1983) and the subsequent civilian government of Turgut Özal violated established democratic practice in such matters as political parties, trade unions, collective and individual freedoms, the press, and higher education.

In the constitution of 1982, this enhanced political control was reflected in the irrevocable establishment of the secular principle. In the preamble it is already stipulated that "as required by the principle of secularism, there shall be no interference whatsoever of sacred religious feelings in State affairs and politics." Similar to the constitution of 1961, article two defines the character of the repub-

lic, thereby adding the indispensable loyalty to the nationalism of Atatürk and to the fundamental tenets outlined in the preamble. Article four declares that the provisions of the first three articles – the republican form of the state, its characteristics, territorial and national integrity, and the declaration of Turkish as state language – are not subject to any amendments. In this way, the new constitution intertwined the integrity of the state, secularism and the political legacy of the Kemalist revolution and made them irrevocable legal principles of the Turkish republic. Although article 24 grants freedom of religion, this individual right is only guaranteed as long as enjoying it does not violate the indivisible integrity of the Turkish state (article 14). At the same time, article 24 prohibits the political exploitation of religious feelings and all attempts to base “the fundamental, social, economic, political, and legal order of the State on religious tenets.” Finally, article 136 puts the administration of religious affairs under the “Department of Religious Affairs,” which shall exercise its duties “in accordance with the principles of secularism.”

In the past decade, this constitution has been subject to numerous amendments as a result of the reform measures related to Turkey’s EU accession process. However, the legacy of its drafting and its in principle un-democratic character have not been eradicated. Therefore, the full democratization of Turkey’s public institutions and legal system demands a new constitution. The recent referendum was just another step in this direction. In light of the historical path which Turkish constitutionalism has taken, it certainly represents also a step toward democracy. The drafting of the constitutional amendments and their approval by the elected representatives of the Turkish parliament mark a decisive break with the authoritarian way in which Turkish constitutions traditionally have been put in place. The reform package was not designed by an “enlightened” state elite without a popular mandate, but by the democratically elected government. Moreover, the Turkish voter had a double choice: the choice of participation in the referendum and the choice to say no.

It is this clear break with the authoritarian tradition of Turkish constitution-making which should first of all attract our attention, rather than speculations about the democratic credentials of the AKP party and their “hidden” motives in making these constitutional amendments. In the context of Turkey’s current reform process, the challenges to Turkish secularism also reflect this departure from the authoritarian state tradition that has characterized Turkish history. In the modern history of Turkey, secularism developed into a core element of Ke-

malist state ideology, justifying the authoritarian nature of the country's political institutions. However, the secularist state elite did not hesitate to draw on symbolic and institutional resources of Sunni Islam in discriminating against non-Muslim and Alevi minorities. The way to democracy, therefore, also demands a transformation of Turkish secularism into a real separation of state and religion, representing the model of a twin toleration. To be sure, the AKP in power has not only advanced democratic reforms, but also shown signs of undemocratic behavior. This applies in particular to Prime Minister Erdogan. In his patriarchal and self-centered attitude, as well as in his often nationalist rhetoric he certainly does not make a difference to most of his predecessors. Moreover, with its origin in the Islamist wing of Turkish politics, the party's commitment to secular politics should not be taken at face value. Yet in a functioning democracy it is not the military or the judiciary that sanctions the political actions of an elected government. This is the task of the voter at the ballot box. Already in 2011, the Turkish voters will have a choice to give their verdict about the AKP in government and it is now up to the opposition parties to convince them that they could do better.