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Towards a Participatory Constitution Making Process in Turkey

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On January 12, 2011, Recep Tayyip Erdoğan, the Prime Minister of Turkey, made the following statement to the representatives of some daily newspapers on the new constitution:

The new constitution will be prepared not by constitution experts but by the wide segments of the society. The constitution will be prepared by civil society organizations, youth and women's associations, trade unions, economists and social scientists. We will ensure the broadest possible participation. We will recourse to constitution experts at the last phase to receive technical assistance. The society will not need an interpreter to understand the constitution. After the general elections, we hope to have a parliamentary composition which will allow us to realize this process. Currently some efforts have been initiated by civil society organizations. We are proud of this and we encourage such efforts. I envision a short, concisely written and comprehensible constitutional text aiming at advanced democracy and guaranteeing fundamental rights and liberties.¹

What should one make out of this statement? Has Turkey entered a new and critical turning point in the debates on the new constitution, which have been a persistent item on the political agenda in the recent years? Or, is this just another attempt to utilize the constitutional issue as a device to set and control the political agenda, a stratagem which we have frequently witnessed in the past? In our opinion, this declaration should be read as the expression of the quest for change in the method of constitution making by the ruling Justice and Development Party (AKP). However, it would be unrealistic to expect that the framework broadly drawn by the Prime Minister can easily solve Turkey's chronic "constitutional problem". There is no doubt that the popular constitution making may sound quite good as a rhetoric; however, success of such process, which is going to be finalized with the adoption of a highly legitimate constitution in compliance with the principles of democratic constitution making, depends on whether this rhetoric is backed by action. A discussion around the issues raised by the questions and problems below might contribute to the definition and design of such a process.

¹ For the news item in Turkish, see "Yeni Anayasayı Halk Yapacak" [New constitution will be made by the people], *Sabah*, 13.01.2011.

Does Turkey Really Need a New Constitution?

The 1982 Constitution of Turkey has been amended 16 times since its inauguration. The latest amendment was made through the referendum on September 12, 2010 in a tense political atmosphere. As a result, almost half of the 1982 Constitution was rewritten. Now, it is highly legitimate to ask the following questions: Does Turkey still need to revise its constitution, or even to make an entirely new one? Are the amendments introduced so far insufficient for Turkey's future progress? The true addressee of these questions is definitely the citizens, the actual holder of the constitution. Results of the survey prepared by the A&G research company and TEPAV (Economic Policy Research Foundation of Turkey) and conducted before the referendum on September 12, 2010 reflected the citizens' tendencies regarding this issue: According to the results of the survey, 49.5% of the respondents are not happy with the current constitution and 43.5 percent think that a new constitution is needed regardless of the outcome of the referendum².

This need that finds an expression at the grassroots is frequently pronounced also by political and social actors in the recent milieu. One may justify Turkey's need for a new constitution on the following grounds:

Firstly, and most importantly, a new constitution making process might serve as a platform for deliberating Turkey's long-lasting unresolved problems. Each and every segment of society needs, more than ever, to face up to the fundamental problems of Turkey. If the constitution is the most fundamental legal document in a country, then the most legitimate platform for debating and solving fundamental problems of a society should be the constitution making process. Such process might also contribute to fostering a climate of political tolerance and dialogue which will benefit all political actors in the long run. A total constitutional mobilization in Turkey can initiate "constitutional politics"³, which denotes the concentration on the essential problems of the society outside and beyond the sphere of

² See the opinion poll conducted on 28-30 August 2010 by TEPAV and A&G research company in 46 cities with 3,681 respondents through the method of face-to-face interview, pp. 5-6.

³ Ackerman, Bruce A., *We the People: Foundations*, Harvard University Press, Cambridge, Mass, 1991.

narrow-scoped debates and activities which aim at satisfying the short-term interests of “everyday politics”. The aforesaid survey indicates that there is the will and the desire to this end among the citizenry. As the survey results reveal, 78.1% of the respondents stated that citizens should definitely contribute to the new constitution making process; 53.8% said that they would devote time to non-partisan meetings in which the problems of Turkey and possible solutions will be discussed; and 73% stated that people with diverse political orientations can come together to talk about the future of the country⁴.

Secondly, it is evident that a complete change of the constitution will have positive effects on society in psychological terms. The shadow of the 12 September 1980 coup d'état still looms over the 1982 Constitution, despite the fact the original content of the latter was revised to a large extent through consecutive amendments. A new constitution is needed to thoroughly erase the traces of the 12 September coup d'état from our constitutional system in symbolic as well as real terms.

Thirdly, the new constitution is a necessity both in terms of the development of constitutional law and from the perspective of constitution writing techniques. Despite the comprehensive amendments introduced so far, many constitutional institutions fail to properly respond to the needs and expectations of the society. New examples and best practices in the world can comparatively be studied to come up with more functional constitutional solutions.

The Problem of Trust in the Constitution Making Process

At the current state, the vital issue about constitution making in Turkey is the establishment of trust in the constitution making process. The debates before and after the latest constitutional amendment have revealed that the constitution making process in Turkey has been highly politicized and that the actors taking part in the process has lost trust to each other. Each amendment, proposed or realized, has been criticized or considered in relation to the world view or political program it supposedly served rather than the potential political, social and legal gains and losses it gives way to for the coming generations. So to speak, the relevant political and social actors have first chosen their sides and shaped the debates on those

⁴ See the opinion poll conducted on 28-30 August 2010 by TEPAV and A&G research company in 46 cities with 3,681 respondents through the method of face-to-face interview, pp. 9-10.

grounds. However, as comparative examples have suggested, each constitutional matter should have been discussed at length in all aspects and actors should have taken sides on the basis of the attitudes to specific debates related to the particular constitutional matters. Within this context, the constitution making process must go beyond day-to-day political concerns. To put it differently, instead of continuing the political game played every day on the pitch, the rules of the political game should have been thought through outside the pitch. There is no doubt that it is not always possible to completely separate the constitution making or constitutional amendment process from politics. However, putting much emphasis on the concerns and strategies of everyday politics to the point of allowing them to supersede real constitutional debates bears the risk of not only causing social and political actors to lose their trust in each other, but also fostering distrust of the constitution making process among citizens.

Overcoming this problem of trust depends fundamentally on the embracement of the constitution making process by the people and the social and political actors that represent them, and on their “voluntary” and “sincere” participation to the process. This is the prerequisite for making a constitution that will be accepted by large segments of the society. The Prime Minister’s statement that the constitution will be prepared by the people must be read from this perspective.

How Does the People Make the Constitution?

Constitution making with the participation of all citizens is simply an “ideal” in the modern constitution making techniques, for it is physically impossible that millions of citizens come together to discuss, prepare and write the constitution. Similarly, it is unrealistic to expect that all citizens have the sufficient knowledge about constitutional principles and institutions to contribute to the process. Therefore, what is meant by constitution making by the people is the design of the constitution making process with participation of the social and political actors as much widely and effectively as possible that represent the people in a regular and organized manner (i.e. the civil society organizations and the political parties) and the involvement of the public directly as a whole at certain phases, especially at the stage of the adoption of the new constitution.

“Hourglass” Formula in the Constitution Making Process

The process which will involve the participation of wide segments of society and result in the adoption of a highly legitimate constitution made in accordance with the principles of democratic constitution making can be described and concretized with the help of the “hourglass” metaphor. Basically, the “hourglass formula” has two aspects: First, constitution making process must be extended over a period of time; that is instead of announcing the prewritten texts, the constitution must be written step by step and the public must be informed of the constitution making process at all phases. Second, the process must schematically look like an hourglass. The process will be initiated with the “people”, the largest element within the hourglass in quantitative terms. At this phase, mainly abstract principles will be discussed and the constitutional demands and expectations of the people will be determined. As the process moves through the neck of the hourglass, the debates will focus on more concrete issues and the number of participating actors will decrease. Moving from abstract principles to concrete provisions and thus from the people to civil society organizations and political parties, the process will reach the narrowest section of the hourglass, that is its neck where the constitution will be adopted by the Parliament. After the adoption of the constitution, the hourglass will widen again; the most numerous element in the process, that is the people will step in to ultimately approve the constitution. Let us explain the process in more detail:

i) Identifying constitutional demands and expectations:

At the beginning of the process, it is necessary to identify and classify constitutional demands and expectations of the people by allowing them to express their opinions about fundamental social problems and their views on which of these problems can be constitutionally solved and how this can be done by the constitution. Public opinion polls, online surveys and provincial and regional meetings to be carried out with the support of the local units of civil society organizations can facilitate the compilation of such information. The information to be gathered at this stage can be regarded “raw material” of the constitution making process. It is evident that concrete constitutional provisions can be proposed by the participating actors, yet the main purpose at this stage must be set as to achieve a consensus on certain fundamental principles and institutions, that is, to create the “principal and institutional backbone” of the constitution rather than to formulate individual constitutional provisions. At this stage, it would be expected that demands and expectations about the fundamental rights and freedoms

which are of higher interest to individuals and civil society organizations will be voiced predominantly.

ii) Academic Expertise and Institutional Experience:

Simultaneously or at the next phase, the information compiled in the first stage will be processed. This is the stage for applying academic expertise and institutional experience. That means that, academics will begin to evaluate the constitutional demands and expectations at this stage, which were expressed at the ‘grassroots’ level and addressed as comprehensively as possible during the first stage. The raw material will be processed by economists, public administration experts, political scientists, etc. particularly in “expert meetings”. At this stage, existing institutions regulated by the constitution (e.g. legal institutions or universities) must be given the opportunity to voice their institutional interests about the proposed amendments or new regulations. Here, mainly demands and expectations about the constitutional mechanisms of checks and balances are expected to be highlighted.

iii) Alternative Drafts

Initial information on the expectations and demands about fundamental rights and freedoms and “checks and balances” mechanisms also need to be processed. At this point, civil society organizations that gather under the roof of the constitutional platform or the constitutional initiative will prepare alternative articles or drafts. In the 2000s, Turkey witnessed a kind of “drafting wars” between organizations and institutions with different (and even contradicting) worldviews. In this period, each draft constitution debated in the media and by the people was evaluated as the materialization of a certain worldview. This made nothing but contributed to the deepening of the above-mentioned problem of trust embedded in the constitution making process in Turkey. In the light of this experience, it can be recommended for the new constitution making process that, civil society platforms or initiatives prepare alternative drafts with an objective attitude. Formulation by a single non-governmental organization or a think-tank of alternative drafts for a single constitutional principle or institution, which discuss their advantages and disadvantages by using comparative data and with the support of international experts is of great importance in terms of not only informing the people and

political parties but also establishing trust in the constitution making process. Diverse and alternative drafts produced by a single platform or initiative will contribute to the formation of an environment of trust which the constitution making process in Turkey currently lacks. If designed in this manner, this stage of the constitution making process may gain a supra-political character. Therefore, if this stage can be made free from political elements to the highest extent possible and if can be devoted to seek and discuss existing alternatives, it may facilitate the preparation of a constitutional ‘knowledge set’ to be employed in the following stage.

iv) Political Parties and the Parliament:

At this stage of the constitution making process political parties step in. They will evaluate the knowledge set provided by non-governmental organizations from the perspective of their respective party programmes, assess this information in political terms, and voice their will as a political party by writing a draft. These will be the texts to be negotiated in the Parliament at the next stage. It is evident that the drafts prepared by the political parties will mainly address the issues expressed in the political programmes of the parties. However, the quality of the drafts to be prepared by political parties will be improved as the capacity of the knowledge set obtained in the previous phase to reflect the constitutional expectations of the society and to discuss the scholarly alternatives increases.

The Parliament phase represents the narrowest part, that is, the neck of the hourglass of the constitution making process in two senses. On the one hand, the number of the actors involved is minimum—550 members of the Parliament—at this stage; on the other hand, this is the most concrete work of the process in its content, namely, the deliberation and formulation of individual constitutional provisions. At the end of this phase, a constitutional text will be adopted by the Parliament. It is here important that the Parliament that will negotiate and adopt the constitution should represent important political powers and groups of the society. To this end, it is necessary to design an electoral mechanism that will reflect the social and political outlook of the society to the highest degree possible; in other words, this necessitates a mechanism that will make sure that the election results reproduce the society as a microcosmos. The primary problem that the law makers have to solve is to decide whether the current 10 % election threshold in the parliamentary elections is compatible with the participatory constitution making process. The Prime Minister’s statement; “After the general

elections, we hope to have a parliamentary composition which will allow us to realize this process” can be regarded as the expression of the ruling party’s willingness to discuss this issue, or at least, this can be seen as an indication that the AKP will not remain indifferent to such a debate.

v) Public Approval of the Constitution

In the final stage of the constitution making process, the hourglass widens once again and the constitution adopted by the Parliament is submitted to the people for the final approval. Similar to the first stage of the constitution making process, high participation is witnessed at this stage: all citizens are called to participate in the process through a referendum. The outcome of the referendum will be a strong indicator of the level of legitimacy of the new constitution, that is the degree to which the new constitution is adopted and embraced by the public.

When do Constitution Experts Step In?

Constitutions, after all, are legal documents. This is why during the drawing up the constitutions and the formulation of constitutional rules and institutions one needs to refer to technical legal knowledge. So, a constitutional process without the involvement of constitutional experts is not possible. It is evident that constitution lawyer are able to contribute to any phase in the hourglass formula. However, their expertise is most needed in the process of writing concrete constitutional provisions. Establishing the necessary connections between the provisions, defining the status and position of constitutional principles and institutions within the whole legal system, informing interested actors about Turkey’s constitutional experience and about comparative data on constitutional law fall exclusively within the expertise of constitutional law experts. The Prime Minister’s statement; “The new constitution will be prepared not by constitution experts but by the wide segments of the society... We will recourse to constitution experts at the last phase to receive technical assistance.” should also be read from this perspective.

Conclusion

Successful constitution making processes in the world are seen to have involved broad participation by a number of political and social actors. In addition, cooperation of civil society organizations and political parties are of great importance. The main issue to consider is the question of what the division of labour and the manner of the cooperation between political parties and civil society organizations will be. It can be infer from the main arguments of this paper that civil society organizations would play a major role at the beginning of the process, i.e. in the preparation of alternative drafts; whereas political parties would take the lead in the following phases, i.e. in bringing the constitutional text to maturity and deciding on its final form. Conclusions reached at the “Constitution Platform National Workshop” which took place on 8-9 December in Ankara TOBB University of Economics and Technology with the participation of 83 non-governmental organizations and professional organizations have shown that civil society is willing and ready to undertake such a duty. The mentioned workshop has almost unanimously agreed that a new constitution with high ‘legitimacy’ cannot be made without the ‘contributions’ and ‘participation’ of the civil society⁵. A constitution making process to be designed with the participation and contributions of the relevant actors as defined above, which should be evaluated in the light of Prime Minister Erdoğan’s quoted statement, can turn out to be a new and unmissable opportunity for Turkey to solve its constitutional problem.

⁵ Constitution Platform 1st National Workshop Final Report, p. 3.