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What is at stake in the Turkish constitutional referendum?

Policy Brief

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The Social and
Political
Foundations of
Constitutions

What Is at Stake in the Turkish Constitutional Referendum?

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Policy Brief

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The Foundation for Law, Justice and Society

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The Foundation for Law, Justice and Society

The Social and Political Foundations of Constitutions

Constitutions take various forms in different societies, but essentially determine how policy issues, often of fundamental social importance, are to be decided and implemented.

Constitutions and constitutionalism are usually studied either doctrinally, as the source of fundamental legal doctrine, or conceptually, as the subject of philosophical methods of analysis. The approach of this programme offers a third way: the study of constitutions and constitutionalism in their social context, emphasizing their social character and role, their social goals, and their links to other parts of society, especially economic and political aspects.

Drawing on the research and literature of politics, economics, and sociology, the programme examines the concept and practice of representation, the legislative process and the character of modern administrative government, and the role of the judiciary in shaping constitutional instruments such as bills of rights.

Executive Summary

- In April the Turkish public will be asked to vote on the most ambitious changes to the existing Turkish constitution since it became law in 1982, in a referendum that will take place under the state of emergency declared in the aftermath of the failed military coup of 15 July 2016. There is no general consensus for this change and the outcome of the referendum remains uncertain. If passed, the referendum will allow the president to dissolve the parliament and declare a state of emergency.
- This policy brief outlines the passing of a consensual approach to constitution-making, and views the changes as part of a process of partisan entrenchment, under which the dominant AK party has gradually gained control of state institutions in Turkey.
- The amendments are being made in accordance with constitutional rules; the fear of some experts however, is that, if passed, the proposed presidential system will take Turkey beyond constitutionalism altogether.
- Another issue is whether the polarized and violent conditions that now exist in the country will allow for a free and fair vote on the changes. The policy brief places the dynamics of the complex constitutional amendment in the context of a polarized party system and discusses:
 - The failure of the consensus approach in Turkey.
 - President Erdoğan's desire to codify the executive power he already exercises.
 - The divergent attitudes of the political parties to the current proposals.
 - Fears that the changes will create a presidential system without effective checks and balances.
 - The origins of what may be a system of pure majoritarian rule in Turkey.

What Is at Stake in the Turkish Constitutional Referendum?

On 16 April 2017 the Turkish public will vote on an eighteen-article amendment to the Turkish constitution that will establish a presidential system. The referendum will take place under the state of emergency declared in the aftermath of the failed military coup of 15 July 2016. The current president, Recep Tayyip Erdoğan, had stated that this will offer ‘a comfortable ground’ for the vote.¹ Two weeks later, in early February 2017, Dr Ibrahim Kaboğlu, Professor of Constitutional Law at Marmara University Istanbul, became one of 330 academics dismissed from their posts as part of the latest post-coup investigations.² He had publicly stated that a referendum held during a state of emergency could not be constitutional. If passed, the referendum will allow the president to rule by decree and to declare further states of emergency. Kemal Kılıçdaroğlu, leader of the opposition CHP (*Cumhuriyet Halk Partisi*, or Republican People’s Party), says that the outcome will be ‘a totalitarian Presidential system.’³ The atmosphere has moved far from that in October 2011, when an all-party Conciliation Commission began work on drafting a new constitution. This proved a false dawn: when the Commission was dissolved in December 2013, few predicted the chain of events that was to follow.

From consensus to partisan entrenchment

What is the best way to enact constitutional change and reform an authoritarian constitution? A natural response is to assume a connection between the way a constitution is drafted and its chances of success. An array of constitutional experts once saw an opportunity for the parties to craft a consensus in a country where a spontaneous consensus was in short supply. When he was prime minister, President

Erdoğan himself spoke of societal consensus and advanced democracy. The Turkish experiment with constitutional government had been punctuated by instability and polarization. In the past, the state found itself having to intervene to maintain order and impose new rules of the game. The prospect of elected politicians doing so consensually might show that such tutelage is no longer necessary. The pattern had also been for state elites to play a disproportionate role in constitution-making, with the result that the 1924, 1961, and 1982 constitutions were not the work of a broadly representative Constituent Assembly.⁴ Recently, the courts and the government-controlled parliament have struggled for the right to determine constitutional change. The courts consistently ruled that any changes to the foundational rules of the polity could not emerge through normal legal procedures; President Erdoğan’s AKP (*Adalet ve Kalkınma Partisi* or Justice and Development Party) was forced to rely on its electoral strength to create the possibility for constitutional change. The party won parliamentary elections in 2002, 2007, and 2015. Only in June 2015 did it lose its parliamentary majority; the transition to a presidential system began in earnest after a snap general election, held in November 2015, restored its majority position.

Constitutional politics once seemed open to a less zero-sum approach. In the early 1990s a consensus emerged that the existing 1982 constitution should be replaced by a more democratic document. Passed in the shadow of the 1980 military coup, this constitution became associated with the tradition of military tutelage and too centralized and nationalist a state tradition. The need was for a ‘civil constitution’: the preferred method for drafting it

became consensus-building. By 2011, agreement had been established for a way forward: the result was that each of the four parties on the Conciliation Commission would have equal voting rights; they would also have an absolute veto. Significantly, the Kurdish BDP (*Bariş ve Demokrasi Partisi*) was one of these four parties. In 2009, a 'Kurdish opening' was announced by then Prime Minister Erdoğan: it was renewed once in 2012. Before starting its formal work, the Commission had also decided to wait for the input of civil society organizations (suggestions, reports, and drafts). It began its own work in April 2012. Reportedly on first-name terms, relations on the Commission were amiable enough.

Yet few were surprised when the Commission was dissolved in December 2013, having reached agreement only on technical articles. There were three reasons. The level of consensus required for agreement (even before the parliament considered any draft) was unrealistic. Second, there was no acceptance on the part of the three nationalist parties for change to foundational issues: they resisted the Kurdish perspective on citizenship, language, and nationality. Thirdly, there was an atmosphere of mistrust concerning the intentions of the governing AKP. Erdoğan, in power since 2003, could (according to his own party rules) only serve as prime minister for three terms, and some of the party's elites had made their desire for a presidential system clear as early as 2005. The other parties were opposed to this move. Erdoğan was elected president in a direct vote in 2014. In the summer of 2015, the Kurdish peace process broke down in the context of opposition from the pro-Kurdish HDP (*Halkların Demokrat Partisi*, People's Democrat Party) to the plans for the presidential system. Since then, the serious violence of the 1990s has returned.

The truth is that the consensus approach did not reflect a need felt by *all* sections of Turkish society to repudiate the past in the wake of despotic rule, as in South Africa in the 1990s; or of catastrophe, as in West Germany in the 1940s. Instead, 'democratization' in Turkey has proceeded through intense struggles within state institutions; struggles which have intensified since the split between the

AKP and the Islamist Gulen movement in December 2013 and the failed coup of 15 July 2016.⁵ On the other hand, these divisions have left their mark on the constitutional order, as the balance of power between the old Kemalist and military elites and the new challengers decisively shifted. The amendments to be put before the people on 16 April 2017 have already passed the parliamentary stage, achieving nine more votes on 20 January than the three-fifths majority of 330 required by the constitution. Following constitutional referendums held in 2007 and 2010, they represent the most ambitious changes proposed in Turkey since the 1982 constitution.

Both the mode and content of the proposed changes have thus come to reflect a process of 'partisan entrenchment', in which a party with a guiding ideology (in this case political Islam) gradually gained control of state institutions. One can view these proposals through the concept of path dependency. The introduction of popular elections for the presidency in 2011, greater party political control over the judiciary, and the move to a presidential system are consistent with the pure majoritarianism of the 1924 constitution.⁶ Institutions are generally given two main roles in the comparative politics literature: 'as contingent effects of strategic interaction and as predictable bases for democratic consolidation.'⁷ Two trends suggested predictable change: the general resilience of majoritarian institutions, even in countries which change constitutions, and the fact that Turkish elites (including most of those in opposition) have no incentive to liberalize institutions which concentrate power; whether the centralized and unitary state structure, executive dominance of parliament, leader-dominated political parties, or the disproportional electoral system.⁸ Under the current amendments, future elections to the parliament and the presidency will take place concurrently; this will either further the concentration of power under the AKP or lead to a constitutional breakdown.

The opposition, faced with a simple fait accompli, may have to acquiesce in the new presidential system if (a) they recognize that more powerful

actors will defend the new rules, and (b) there are insufficient resources to communicate an alternative set of constitutional rules around which mutual expectations could build.⁹ As the conditions for a free and fair referendum recede, this second condition seems especially pertinent to the coming referendum. Since July, the government has been suppressing not just the coup plotters but, more broadly, 'the Fetuhullahist Terror Organisation' of 'FETÖ' (a name for the Gulen movement blamed for the failed coup), the Kurdish movement, and intellectuals and leftists generally. On 9 January 2017, fifty civil society organizations, including the Turkish Bar Association, were denied the right to protest the charter talks at the parliament by the police. Only a small part of the parliamentary debates on the constitution — which were acrimonious — were aired through the official parliamentary TV station.¹⁰ An emergency decree passed on 9 February 2017 has also ruled that the Supreme Election Board (YSK) will cease to monitor private television channels during the referendum campaign (ruled on 9 February): this means that the YSK will not be able to punish private channels for unequal or biased broadcasting of the yes and no sides in the campaign.

Constitutionalism without checks and balances

With the collapse of the tutelary system, the outstanding question was whether a new system of constitutional checks and balances could be established in its place. Turkey's constitutional life has been shaped by two conceptions of democracy. One (Rousseauist) conception sees sovereignty resting on the national will (*milli irade*), in effect the elected majority. The other harbours distrust of governing majorities, and seeks to constrain them through a system of guardianship. Since guardianship — by the army, the courts, or the bureaucracy — is no longer possible, only a pure majoritarian understanding of democracy survives. Yet this understanding has real sociological content. Even if the presidential system becomes a form of personalized rule under Erdoğan, it will be welcomed by those who identify the Turkish nation as being religious, conservative, and nationalist.

Journalist Nuray Mert sees the proposed changes as deriving from 'the majority's aspiration of power'.¹¹ Those not part of this majority — secularists, leftists, Alevites, and Kurds — could remain excluded from power for a long time.

When parliament is composed of many parties with different ideologies and power is dispersed, checks and balances are inherent in the legislative process. In the absence of such 'extra-constitutional' checks and balances, formal rules bear the burden of preventing majoritarian democracy from eclipsing constitutional government.¹² Yet despite the proposed shift from parliamentarism, such rules are not intended in the proposed amendments. The consensual model envisaged that they would emerge inductively from a carefully managed situation of strategic interaction without a dominant player, as with the Conciliation Commission. This interaction could also have produced a constitution supported by all parties afterwards, thus furthering general reconciliation. Since 2013, exactly the opposite scenario has arisen. The main opposition CHP is bitterly opposed to this 'regime change', and given that the armed conflict with the Kurdish PKK is also ongoing, the government denounces its opposition as national 'sabotage'. The HDP is in no position to campaign freely. After seeing the parliamentary immunity of their elected representatives lifted, co-leaders Selahattin Demirtaş and Figen Yüksedağ have been in prison since late 2016, alongside around ten other deputies.

The government in turn complains about 'Erdoğanophobia' in the European Union, and argues that the changes are only intended to bring the 1982 constitution in line with how the country is actually governed. Under the amendments, the president will assume the powers of the prime minister and the cabinet. He will be able to rule by decree and appoint vice-presidents and officials who are not necessarily elected to the parliament. The president will be able to declare further states of emergency, during which he can rule by decree. He will have the power to dissolve the parliament and call elections. The size and independence of the Supreme Board of Judges and Prosecutors (HSYK) will be drastically reworked. The office of 'Head of State' will be written into the constitution for the first time since Kenan Evren, the leader of the 1980 coup, was referred to in

that way in a provisional article of the 1982 constitution. Some predict that Erdoğan will be enabled by these changes to remain president until 2029.

The period of 'democratization', which can be traced to the late 1980s, has thus mutated into one of autocratization. It has allowed the dismantling of the tutelary system, only for a new combination of elections and authoritarianism to force its way onto the constitutional agenda. Such was the resistance to change under the old system that a juridical theory upheld by the Constitutional Court initially denied constituent power to the parliamentary majority, which then used its constant electoral victories to impose its will on the secular elites. The system that could result may be a local version of what the Argentinian political scientist Guillermo O'Donnell called 'delegative democracy': in which a strong president uses his or her direct mandate to rule in the name of the nation at the expense of horizontal accountability and of the rule of law.¹³ Middle Eastern parallels also suggest themselves: some Arab countries have also seen their constitutional provisions for a 'semi-presidency' transformed in order to establish a personalized dictatorship. Erdoğan claims he is simply making the *de facto* the *de jure* reality. The main impetus for the current changes in Turkey was the first election to the presidency by means of popular vote in 2011. This allowed Erdoğan and his predecessor Abdullah Gül to accumulate more powers, to such an extent that the ultra-nationalist MHP (*Milliyetçi Hareket Partisi*, National Movement Party) is backing the current changes on the grounds that the constitution needs to be amended to fit the new reality. Without its support, the three-fifths threshold for staging a referendum might not have been passed.

Importantly, article 101 of the current constitution stipulates that the president be non-partisan. The atmosphere of polarization is such that the government feels under little pressure to explain how the law's stipulation that the president be above party politics is compatible with Erdoğan's fierce public advocacy for changes that will make him the sole source of authority in the country. Upon taking office, the president is supposed to sever his relations with his party and cease being a member of

the parliament. Erdoğan has derided such an ornamental 'flower pot' role for himself in the future: claiming that earlier presidents, such as Ahmet Sezer, were, in fact, not neutral. In contrast, Erdoğan claims he will bring both state and nation together in his person, compared to the elitism of the past, when those that dominated the state did not and could not represent the nation.¹⁴ Constitutional populism of a religious kind.

Under the proposed changes to Article 101, the president will remain leader of his party and his tenure will not be automatically restricted to one term. Erdoğan has not been chairman of the AKP since 2014; in the event of victory in the referendum, sources close to the presidency suggest that an extraordinary Congress of the Party will be convened to re-elect him to that role. On the other hand, the first four articles of the 1982 constitution, which the MHP considers red lines, will remain untouched. These articles also express a strong nationalist conception of the state. The MHP's support for the changes is not based on its belief in one-man rule. The Party has agreed to become part of a nationalist-religious alliance in the knowledge that, given the absence of checks and balances, the new ruling majority will never lose power under the new system.¹⁵ Its leader, Devlet Bahçeli, announced that his party would be saying yes to the survival of the system, to the presidency not to a president, 'to the continuity of the Republic', and to 'the eternity of the State'.¹⁶

The uncertain future

If these amendments are approved by the voters, attention will no doubt become fixed on the huge opportunities they create for financial gain and the distribution of patronage within the governing party.¹⁷ This will be ironic given CHP claims that President Erdoğan is making these changes precisely in order to protect himself and his family from prosecution. For others, at stake is the future of democracy. Former President of Turkey's Supreme Court of Appeals Sami Selçuk argued that what determines whether a presidential system is oppressive or not is the existence of a separation of powers. He quoted the (August 1789) French Declaration of the Rights of Man that states that, where there was no separation of powers, there could be no constitution. Selçuk's article was titled 'From a constitutional state to a state with a constitution'. The

problem he identified was that Turkish public opinion was insufficiently alert to the possibility that, even with general elections, virtues like democracy, secularism, rights, freedom, the separation of powers, and judicial independence could go by the board.¹⁸

Either way, the amendments will break a thread of legal continuity between the Republic of the early twenty-first century and the Republic founded by Atatürk and his associates in 1923. Turkey's experience of democracy can be divided into what once seemed three successive stages. The first saw the establishment of parliamentary sovereignty and national independence, when the 1921 and 1924 constitutions were passed. The second saw a transition to competitive elections and multi-party politics, between 1946 and 1950. Beginning in the 1980s, calls were made for a further transition, to a more pluralist democracy compatible with contemporary doctrines of human rights. Until recently, it was felt that the first two transitions were consolidated, if insufficient, achievements. The failings of the system were acknowledged; it was not thought that the foundations themselves were fragile. Yet the problem with talking about any constitutional or ideological foundation is that it is always possible to slip another one underneath it.

The cornerstone of this legal continuity was the idea of national sovereignty expressed in a system of parliamentary rule. For political theorist Taha Parla, the first steps in the process of erosion came in 1961 and 1982, when constitutions were passed by parliaments that gave themselves foundational powers, even though they were products of states of exception declared during two military coups.¹⁹ The more recent proposals remain consistent with legal theorist Carl Schmitt's argument that effective government requires a strong dictatorial approach that embraces permanent crisis to free the executive from normal legal restrictions. What will happen if the AKP's amendments are rejected, if later parliamentary elections do not return an AKP majority (but Erdoğan is elected president), or if Erdoğan himself were to retire from his role? Faced with uncertain waters, perspectives are necessarily historical. The move to a presidential system will break a thread of parliamentary continuity between the present and the past, which had the advantage (if only for scholars) of enabling observers to trace the constitutional origins of the

Republic to some Ottoman reform ideas of the late nineteenth century.

If these proposals are backed by the Turkish public — there will be an early general election if they are not — policymakers will have to come to terms with a new constitutional reality. One aspect of that reality — the case while Ahmet Davutoğlu was prime minister — is that external powers like the European Union will no longer have a relatively emollient prime minister to deal with, but the president. And the advantage of seeing these reforms in the context of a decades-long process of partisan entrenchment, is that outsiders will have to recognize the sociological reality behind this new system. That system may be partisan; it represents, nonetheless, a predictable if undesirable outcome to the unresolved contradiction of having competitive elections, historically won by conservative or Islamic parties, within a secular tutelary legal framework.

Were the European Union or countries like Great Britain to have influence on the AKP — currently they are not listened to — they could consider these proposals as a potential source of regime instability. Thus far, no constitutional framework has contained the potential for polarization and violence in Turkish politics, and as most political scientists, notably Juan Linz, believe, this presidential form of majoritarianism is unlikely to be different. The outcome of this particular regime change could, in the long term, be regime breakdown. Less obvious is the way a more personalized system of rule will be tested by the economic performance of the AKP in the future. Aside from its ability to play on historical divisions within Turkey, its economic record has, on the whole, been one of growth and dynamism. Yet, as anthropologist Jenny White has argued, the AKP project currently combines order, selective benefits, and opportunities for its supporters.²⁰ When the system fails to make its 'majority' feel looked after, support for the president may decline. And the economy has been a source of anxiety recently.

For the European Union, there is a short- and long-term calculus. Reliant as they are on Turkey for its acceptance of a huge burden of Syrian migrants, the evidence is that European leaders, from Merkel to May, are all too aware of how dependent they are on Erdoğan right now. If they liberalize the visa situation for Turks, future migration may well come from many of those who will be voting against the proposals on 16 April. The crisis

will be resolved to the benefit of the AKP. In the long term, if the European Union (or Britain) wants to promote democracy in Turkey, the potential rests with the younger generation, not with the political elite. The policy of the current EU High Representative for Foreign Affairs and Security Policy, Federica Mogherini, is to continue dealing with Turkey as an accession country, despite her opposition to the arrest of the two HDP leaders last November on the grounds that it undermined parliamentary democracy. If, beyond this referendum, there is stock-taking, the European Union needs to consider whether democratization can be the fruit of something other than the intergovernmental project it has been engaged with for the past twenty years. That engagement was based on an illusion; if democratization once had potential in a different mode, it can now only come from a non-governmental source.

One wonders whether President Trump would admire the force of Erdoğan's constitutional populism, or whether he still has a sneaking regard for the spirit of

the American constitution. Notably, none of his broadsides against Muslims have been directed at Turkey; this would in any case strengthen the AKP's popular support among the population. In the context of the Middle East, Turkey has an alternative ally in Russia, and its own geopolitical interests in Iraq and Syria. One crucial test case for any new relationship with the United States will be the Turkish demand that Fetullah Gulen be extradited from his base in Pennsylvania for his supposed role in the July coup attempt. Other issues surround Cyprus, the Kurds, and NATO. And one argument in favour of the current changes is that Erdoğan will have a freer hand in dealing with these issues than under a parliamentary system. Turkey is not only a large state, under the AKP it has become a regional player with a much greater international presence than it had during the Cold War. Given the strategic opportunities and pressures, whatever the outcome in April, it is hard to see Erdoğan being willing to give up the highly centralized decision-making that has evolved up to now.

Notes

- ¹ 'State of emergency may offer "comfortable ground" for the referendum, Erdoğan says', *Hürriyet Daily News*, 27 January 2017.
- ² These academics were among a total of 4,464 public servants dismissed from their posts that week. 'Expelled academics in Turkey who could also have been coup victims', *Hürriyet Daily News*, 9 February 2017.
- ³ 'Main opposition head says Erdoğan is insisting on system change "out of fear of prosecution"', *Hürriyet Daily News*, 2 February 2017.
- ⁴ E. Özbudun and O. F. Gençkaya, *Democratization and the Politics of Constitution-Making in Turkey* (CEU Press: Budapest New York, 2009), p. 21.
- ⁵ Ali Bayramoğlu, 'Talk on "Democratization and Political Change in Turkey: what future for Cyprus?"', House of Commons, Grand Committee Room, 12 December 2011.
- ⁶ Ceren Lord, 'The Persistence of Turkey's system of majoritarian government', *Government and Opposition* (2012): 3.
- ⁷ Ibid.
- ⁸ A. Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty Six Countries* (New Haven and London: Yale University Press, 1999), p. 305.
- ⁹ J.M. Carey, 'Does it Matter How a Constitution is created?', in Z. Barany and R. G. Moser (eds.) *Is Democracy Exportable?* (Cambridge: Cambridge University Press, 2009), pp. 160, 176.
- ¹⁰ Serkan Demirtaş, 'Towards a more Unstable Turkey', *Hürriyet Daily News*, 3 February 2017.
- ¹¹ Nuray Mert, 'Presidential system as the majority's aspiration of power in Turkey', *Hürriyet Daily News*, 13 February 2017.
- ¹² Robert Dahl, *A Short Preface to Democratic Theory* (New Haven: Yale University Press, 1956), p. 36.
- ¹³ Hakkı Taş, 'Turkey — from tutelary to delegative democracy', *Third World Quarterly* 66 (4) (2015): 776–91.
- ¹⁴ 'Erdoğan: I will not be an impartial president', *Hürriyet Daily News*, 13 February 2017.
- ¹⁵ Mert, 'Presidential System as the majority's aspiration for power', *Hürriyet Daily News*, 13 February 2017.
- ¹⁶ 'MHP leader: I prefer Erdoğan to naysayer comrades', *Hürriyet Daily News*, 7 February 2017.
- ¹⁷ On the diversion of the government's holdings in several countries to a new sovereign-wealth fund to finance large infrastructure projects, see Ercan Ersoy, 'Turkey Plans Massive Transfer of Assets to State Wealth Fund', *Bloomberg*, 6 February 2017.
- ¹⁸ Sami Selçuk, 'Anayasal devlet'ten 'anayasalı devlet'e', *Cumhuriyet*, 10 January 2017.
- ¹⁹ Taha Parla, *Türkiyede Anayasalar: Tarih, İdeoloji, Rejim 1921–2016* (Metis: Istanbul, 2016), pp. 119–20.
- ²⁰ Jenny White, 'The Turkish Complex: Big Man, Hero, Traitor, State', Campagna-Kerven Lecture, 15 April 2015, Boston College (accessed on YouTube 15 February 2017).



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