

## Constitutional Referendum in Turkey: What next?

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A series of constitutional amendments met the approval of 58% of Turkey's electorate in the September 12<sup>th</sup> referendum. The 26 amendments cover a wide variety of issues ranging from the granting of positive discrimination to women to the creation of an ombudsman office, from the right to information to the reform of the judicial system. The approval of the package was in general received positively by the EU,<sup>1</sup> while it has been strongly contested within Turkey.

Regarding its overall political effects, firstly the referendum testifies to the continuing resilience of the power of Mr Erdogan's Justice and Development Party (AKP) and the relative weakness of the opposition in the wake of the 2011 general elections. Secondly, it raised questions of legitimacy, particularly in the Southeast region where a sizeable majority of the Kurdish electorate did not turn up at the ballot box following the boycott policy of the Kurdish nationalist Peace and Democracy Party (BDP). This has once again highlighted the significance of the Kurdistan Workers' Party (PKK) as a political actor in the region and the urgency of finding a political solution through dialogue between the government and the BDP. Thirdly, the referendum has shown that the opposition can no longer hope to win elections by a strategy that solely rests on AKP bashing. In the case of the main opposition Republican People's Party (CHP), fundamental changes are required in its position on religious freedoms, commitment to EU membership (despite the low credibility and expectations) and the Kurdish issue (including the prospects of decentralisation) for it to be a serious contender to AKP rule.

The constitutional package can be considered as a step forward towards the drafting of a new civilian constitution, which is needed for a rapidly changing, vibrant and dynamic Turkey that can no longer operate within the restrictive confines of its 'coup' constitution. Looking at the new package in depth, these include measures such as the article that will now allow the Supreme Military Council's decisions on the expulsion of military officers to be taken to court; strengthening of children's rights; strengthening the right to information; lifting the judicial impunity of the perpetrators of the 1980 coup, the creation of an ombudsman office to investigate complaints against state institutions; and establishing a Secretariat for the High Council of Judges and Public Prosecutors separate from the Ministry of Justice. Nevertheless, the referendum was bitterly fought between the governing AKP and the opposition parties – CHP and the ultra nationalist MHP (Nationalist Movement Party) – both of which launched a 'no' campaign. Some 42% of the population voted

<sup>1</sup> In fact, some of the amendments were already suggested in a 2004 CEPS study conducted by the author with Fuat Keyman on the democratic reforms that Turkey needs to undertake to achieve a consolidated democracy on its path towards the EU. See *European Integration and the Transformation of Turkish Democracy*, Senem Aydın and E. Fuat Keyman, CEPS EU-Turkey Working Paper No. 2, August 2004.

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against it and it still continues to be subject to debate and criticism in some segments of the mainstream media. So what is all the fuss about?

Some of the debate centres on the ‘insufficiency’ and/or the ‘hollowness’ of the reforms. For example, it is expected that the perpetrators of the 1980 military coup will not in fact be tried since the statute of limitations has been exceeded. Similarly, while the ombudsman institution can be considered an important measure in combating corruption in public administration, there are question marks as to whether an ombudsman elected by a simple plurality of votes in the Parliament (thus, under the current conditions, by the governing party that is itself responsible from the administration) can undertake this task in a fair, non-partisan manner.

Most of the dispute, however, concentrates on two amendments that concern the composition of the Constitutional Court and the High Council of Judges and Public Prosecutors, the latter of which determines the career paths of judges and prosecutors through appointments, transfers, promotions, reprimands and other mechanisms. The constitutional package increases the number of the members of the Constitutional Court from 11 to 17 and reduces their tenure from 25 to 12 years. The reduction of tenure is particularly important to prevent the entrenchment of certain ‘cliques’ within the highest court. Under the former constitutional arrangement, all of these members were selected and appointed by the President. The new amendments retain the right of the President to select 14 of these members (10 to be appointed indirectly from the candidates proposed by the High Courts as well as the High Education Board (YOK), whose composition is already determined by the President, and 4 to be appointed directly from a pool of lawyers, high-level state executives, first-class judges and public prosecutors and Constitutional Court rapporteurs). The main novelty, however, consists of the right of the Parliament to select and appoint three members by a simple plurality of votes. This amendment can be interpreted in two different ways. On the one hand, it can be argued that the highest court in Turkey will now be more democratic and thus more responsive to the demands of society since the background of its members will now be more diversified. Another reading suggests that the new arrangement may allow for more politicisation of the Constitutional Court in a system where the election of the President by the public (a measure previously introduced by the AKP) in a polarised society such as Turkey may ultimately lead to a dangerous dominance of the executive in the Constitutional Court. This is feared to be the case especially in situations where the President comes from the same political family as a single party in government (as exists today).

The second controversial amendment changes the composition of the High Council. It increases the number of its members from 7 to 22, which was largely necessary given the size of the Turkish judiciary, and widens its composition from the representatives of the High Courts to legal scholars, lawyers and representatives of the low courts, elected mostly by the judiciary itself. It can be argued that this creates a Council that is much more representative of the judicial sphere than the previous one. The fact that the judges and the public prosecutors will also be evaluated by inspectors appointed by the Council and not by the Ministry as before remedies an important source of judicial dependence on the executive, which was much criticised in the past by the EU and scholars alike. Yet, as before, one also needs to look closely at the other side of the coin to understand the intense debates over this amendment. The main problem here lies with the role of the Minister of Justice in the Council. One crucial element of the 1982 constitution concerns the presence of the Minister in the High Council. The new amendment abolishes the right of the Minister to attend the meetings. Yet, he is still endowed with the task of ‘representing’ and ‘administering’ the Council, he can still decide on the Secretary General, he still has the ultimate approval concerning the inspections against judges and prosecutors and his Undersecretary will still be present in the Council meetings. Perhaps more importantly, the way in which decisions will be taken in the Council is still unknown and left to regulations that will be passed by the government. They will be crucial, particularly in determining the relationship between the Minister and other members of the Council.

From a strictly institutionalist point of view, the above discussion suggests that some of the new changes can be considered improvements over the former state of affairs. Yet it can also be observed that the ‘negative interpretations’ are closely concerned with the degrees of mistrust felt towards the government. It is the ‘mistrust’ that breeds concerns over the appointments of the President to the Constitutional Court or the Minister’s continued future role in the Council. A non-negligible percentage of the Turkish population does not trust the government’s normative commitment to democratisation. This lack of trust is not completely unfounded. The government’s track record in democratisation feeds into these perceptions. One blatant example concerns the way in which the government has chosen to operate with one of the most infamous remnants of the coup, namely the High Education Board (YOK), instead of abolishing it. In a similar vein,

the way in which the government went against the Venice Commission's decisions by compiling all the amendments in one vote (where internal coherence of the package is contested) further boosted the view that this is in fact a referendum on the restructuring of the judiciary, whereas most of the other amendments are cosmetic changes geared to allure the electorate.

It is in fact the case that the Turkish judiciary has never been sufficiently independent or impartial. The hegemony of the Kemalist legacy allowed for little diversity and offered only limited ground for the expansion of fundamental freedoms. Yet, what is now feared is the replacement of one form of ideological favouritism with simply another that rests on the power of the executive. Whether this scenario materialises depends on implementation as the only means through which intentions will be revealed. Hence, while the amendments may be considered 'positive' on paper, much will depend on the practice as well as the next reform steps that the government will take. It is yet to be seen whether the government will start working on a new civilian constitution, or insist on selective reforms aimed at further reinforcing its power, such the introduction of a Presidential system (as hinted at by the Prime Minister in the immediate aftermath of the referendum). Reforms of the latter type could potentially strengthen authoritarian tendencies in a country already marked by strong fault lines.