

The 2001 Amendments to the 1982 Constitution of Turkey

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ABSTRACT

The 1982 Constitution of Turkey was amended extensively on 3 October 2001 by the Turkish Grand National Assembly (TGNA). This was the most comprehensive modification in the Turkish Constitution since its inauguration. The Constitution of 1982, which had been criticized by almost all political parties after returning to multi-party politics in 1983, was amended by the TGNA in 1987, 1993, 1995, 1999 (twice), 2001 and 2002. However, none of these amendments was adequate for scrapping the remnants of the military regime from the Turkish constitutional system. This article analyses the 2001 amendments, which can be seen as a crucial step towards the elimination of non-liberal and non-democratic elements from the 1982 Constitution.

ÖZET

1982 Anayasası, Türkiye Büyük Millet Meclisi (TBMM) tarafından 3 Ekim 2001 tarihinde kapsamlı biçimde değiştirildi. Bu değişiklik Anayasa'nın yürürlüğe girişinden bu yana yapılan en kapsamlı değişiklikti. 1983 yılında çok partili siyasi hayata dönüşün ardından hemen hemen bütün siyasi partiler tarafından eleştirilen 1982 Anayasası TBMM tarafından daha önce; 1987, 1993, 1995, 1999 (iki kere), 2001 ve 2002 yıllarında değiştirilmişti. Ancak bu değişikliklerden hiçbiri Türk Anayasa Sisteminden askeri rejimin kalıntılarını silmek için yeterli olmadı. Bu makalede, 1982 Anayasası'ndan liberal olmayan, demokratik olmayan unsurların ayıklanması konusunda önemli bir adım olarak görülebilecek 2001 değişiklikleri ele alınmaktadır.

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KEYWORDS

1982 Constitution of Turkey, 2001 amendments, Turkey and EU. Democratization in Turkey, Human rights in Turkey

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1982 Anayasası, 2001 değişiklikleri, Türkiye ve AB, Türkiye'de demokratikleşme, Türkiye'de insan hakları

Introduction

The current Constitution of Turkey, which entered into force on 9 November 1982, was amended extensively on 3 October 2001 by the Turkish Grand National Assembly (TGNA). These amendments came into effect on 17 October 2001 with their publication in the Official Gazette. This was the most comprehensive modification in the Turkish Constitution since its inauguration. The current Constitution of Turkey was drawn up by a constituent assembly appointed and supervised by the leaders of the 12 September 1980 military intervention and was adopted by a nation-wide referendum held under the extraordinary conditions of the military regime at the time. The Constitution of 1982, which had been criticized by almost all political parties after returning to multi-party politics in 1983, was amended by the TGNA in 1987, 1993, 1995, 1999 (twice), 2001 and 2002. However, none of these amendments was adequate for scrapping the remnants of the military regime from Turkish constitutional system. This article analyses 2001 amendments, which can be seen as a crucial step towards the elimination of non-liberal, non-democratic elements from the 1982 Constitution.

The Constitutional Amendment Process in Turkey under the 1982 Constitution

Before proceeding to the business of the next section, the political background of the constitutional amendments, it would be of some use to explain the constitutional amendment process under the 1982 Constitution.¹ The amendment process of the Constitution of 1982 is regulated by Article 175, which was itself amended in 1987 by the TGNA under the Government led by Turgut Özal. The amendment in question, on the one hand, made the procedure more complicated, but on the other hand gave the president broader powers in

¹ For the official translation of the original version of the 1982 Constitution of Turkey see **The Constitution of the Republic of Turkey**, Publication of the Prime Ministry of the Republic of Turkey, Ankara, 1982. For the unofficial translation of the amended version of the 1982 Constitution of Turkey see the **Official Website of the Turkish Grand National Assembly** at <http://www.tbmm.gov.tr/anayasa/constitution.htm>

the approval of constitutional amendments. According to the modified version of Article 175, constitutional amendments are realized in the following stages:

Proposal: According to the Constitution, constitutional amendments are proposed by at least one-third of the total number of members of the TGNA, i.e. by at least 184 deputies. Once the proposal has been signed by the required majority of deputies, it is submitted to the TGNA which debates constitutional amendments twice. The Standing Orders of the Assembly (Article 93) envisages a 48-hour inter-regnum between the two rounds of debates. This means that, having completed the first round, the Assembly must wait at least two full days before starting the second round of debates.

Debates and Adoption: In the first round of debates, the TGNA considers the whole amendment package. Firstly, the Assembly decides, by absolute majority of those present, on whether or not to open discussions on the articles. If it fails to take such a decision, the package is considered to be rejected as a whole. If the Assembly decides to proceed with the discussions, each and every article in the package is then discussed. The first round of debates is completed by a vote on the discussed articles. Although the Constitution mentions that “The adoption of a proposal for an amendment shall require a three-fifths majority of the total number of members of the Assembly”, those articles, supported by less than a three-fifths majority of deputies in the first round, cannot be considered rejected. For, according to the Standing Orders of the Assembly, those articles failing to tally the 330-vote support during the first round are considered to be rejected, if they also fail to win the “yes” votes of the required majority in the second round (Article 94). This means that the TGNA votes on every article in the second round irrespective of the support they get from the members of the Assembly in the first round. As for the debates, only new proposals, submitted by the deputies in the first round, are discussed. After these two rounds of debates and voting, the second stage of the amendment process concludes with a final voting on the overall amendment package. A three-fifths majority is sought in the final vote for the adoption of the whole package by the TGNA.

Approval: As we have seen above, constitutional amendment proposals are considered to be adopted by the support of at least a three-fifths majority of all members of the TGNA. However, this majority is not sufficient for their approval. The Constitution envisages various options in accordance with whether the proposed amendments are adopted by a three-fifths (330 deputies) or a two-thirds majority (366 deputies) of deputies. If a proposed amendment is supported by more than a three-fifths majority, but less than a two-thirds majority, the president may refer the amendment back to the TGNA for further consideration or submit it to referendum. If the president chooses to send the proposal back to the Assembly, the latter must adopt the unchanged proposed amendment at least by a two-thirds majority for the continuation of the constitutional amendment process. After the adoption of the amendment by the

TGNA with a two-thirds majority, the president may not send it back again. He or she may, however, approve the amendment or submit it to referendum. If a proposed amendment is supported by more than a two-thirds majority, the president has three options; he or she can approve the proposed amendment, submit it to referendum or refer it back to the TGNA. In the latter case, the above-mentioned steps are repeated, i.e. the proposed amendment is to be adopted without change by at least a two-thirds majority of the TGNA. After that, again, the amendment is approved or submitted to referendum by the president. One should note that the president's power to call referendum in these cases is considerably different. In the case that a constitutional amendment proposal is adopted by more than a three-fifths majority but less than a two-thirds majority, the president has no choice except calling referendum, if he or she decides not to send it back to the Assembly. In the case that an amendment proposal is adopted by more than a two-thirds majority, the president's referendum power is discretionary. This means that he or she may choose one of the three options mentioned above.

To sum up, according to the current Constitution, there are two ways for the adoption of a proposed constitutional amendment: it may be adopted by the deputies in the TGNA or by the people in a referendum. In either case, the process is consummated by the promulgation of the amendment in the Official Gazette. As we shall try to demonstrate in the next section, of the thirty-seven articles in the 2001 constitutional amendments package, thirty-four of them were adopted by the TGNA in their first consideration. Three of them were rejected during the debates. Of those thirty-four articles, thirty-three of them came into effect after their publication in the Official Gazette. One of them, concerning the salaries and allowances of deputies, was submitted to referendum by the President. However, the referendum was cancelled following the adoption of a constitutional amendment reverting the controversial article to its original wording.

The Political Background of the 2001 Constitutional Amendments²

A debate over the term of the president was the starting-point for the recent constitutional developments in Turkey. Certain groups in the TGNA, particularly the Democratic Left Party (DLP) and its leader Bulent Ecevit, saw President Suleyman Demirel, whose term of office was to expire on 16 May 2000, as the "source of stability" in Turkish politics. These groups sought to find a way to enable Demirel to continue to stay at the Çankaya Presidential Palace. The proposed constitutional amendment, known as the "5+5 formula", would allow the election of the same person as president for two consecutive five-year terms. During discussions of the "5+5 formula", two arrangements

² This section is based on the review of the reporting that appeared in various issues of following newspapers: **Turkish Daily News**, **Cumhuriyet**, **Radikal**, **Milliyet**, and **Hürriyet**.

were added to the latter concerning the closure of political parties and the deputies' salaries and allowances, which all made up a constitutional amendment package.

The first round of voting on the three-article constitutional amendments package was held on 29 March 2000. In this round, none of the proposed amendments could win the support of the deputies in the TGNA to be legislated without submission to referendum. In the second round of voting, which took place on 5 April 2000, while the amendments to articles 69 and 86 passed the hurdle of a minimum 330 votes, the amendment to Article 101, i.e. the "5+5 formula", could only win the support of 303 deputies. Faced with such a political fiasco, the Government withdrew the whole package before the last round of voting. Thus, the Government failed in its plans to extend the term of office of the president through constitutional stratagems. In any case, the issue of constitutional change was dropped from the political agenda when Ahmet Necdet Sezer, the Chief Justice of the Constitutional Court, was elected president as the joint candidate of all political parties on 5 May 2000.

The Constitution was again in the headlines at the end of the year 2000. This time, however, another crucial problem in Turkish politics, the fate of the Virtue Party (VP), the main opposition party at the time, renewed the public interest in constitutional issues. As the Constitutional Court convened to hear the case on the closure of the VP, certain groups in the TGNA began to brood over several scenarios about its future. Most worryingly, the Supreme Court would decide not only to disband the Party, but also to cancel the TGNA membership of the deputies responsible for the unconstitutional activities of the Party. Thus the vacant seats in the TGNA would reach the amount requiring an immediate by-election according to the Constitution. As the political parties in the TGNA were discussing these problems, bad news came from the Constitutional Court. The Court annulled the second Paragraph of Article 103 of the Law of Political Parties regulating the criteria of being the hub of unconstitutional activities. According to many, with this decision, the Court was clearing its way to close down the VP. So, a new constitutional amendment was proposed, on the one hand, to save the VP, on the other, to prevent an immediate by-election. The draft proposal aimed at the limitation of the Court's wide discretion power in the closure cases of political parties by regulating the criteria of being the centre of unconstitutional activities in the Constitution.

Constitutional amendments, as had done before, were presented in a package. First, the so called "5+5 formula" was brought back and included again. Second, one of the most controversial arrangements of the 1982 Constitution, Temporary Article 15 prohibiting the contestation of unconstitutionality of laws and decrees passed by the military administration between 1980 and 1983, was proposed to be deleted from the Constitution. Third, Article 86 regulating the salaries and allowances of the deputies, was rewritten in a manner to afford them certain financial privileges. However, at the

last minute, the latter, known as “a cushy pension”, was excluded from the package in the presence of growing public reaction.

Turkey entered the year of 2001 with debates over these newly proposed constitutional amendments. Particularly, the concept of the “centre of unconstitutional activities” in the party closure cases was the subject of discussions. Coalition partners first defined the criteria of such activities in the related article of the Constitution. Then, they introduced a gradual punishment system which would be applied in accordance with the severity of the unconstitutional activities of the political party concerned. Accordingly, the Constitutional Court would decide to deprive the guilty party from Treasury aid or to ban it from participating in parliamentary and local elections before ultimately deciding to its closure. The VP claimed that the proposed amendment did not make it harder but easier to close political parties. The Party leaders argued that a *res judicata* of a competent court should be sought before deciding on whether a political party became the focal point of unconstitutional activities. In addition they demanded the reduction of the time of political bans deriving from Article 86 of the Constitution from five years to three years which would result in the return to politics of Necmettin Erbakan, their politically-banned veteran leader.

This precarious attitude of the VP towards constitutional change alerted the coalition partners to the possibility that the support for the amendments in question in the TGNA would be well below the required majority by the Constitution. To guarantee the adoption of the amendments without referendum, the coalition partners decided to try to convince the VP during the work on the draft proposals. Thus, the package was referred to a sub-commission. It soon became apparent that it would not be easy to break the resistance of the VP on certain issues, particularly on the criteria that would be used in the closure of political parties by the Constitutional Court. However, as a result of negotiations and compromises, the coalition partners managed to reach an accord with the VP in the sub-commission. First, the arrangement concerning the barring of political parties from parliamentary and local elections within the framework of proposed gradual punishment system was discarded from the package. Second, the required majority to decide on the closure of political parties in the Constitutional Court was changed from three-fifths to two-thirds. Thus, the revised version of the three-article constitutional amendments package came before the Constitutional Commission in Parliament. The amendment to Article 69 was adopted with 19 votes in favour, 4 votes against; whereas Article 101 was adopted with 18 votes in favour, 5 against. The amendment to the Temporary Article 15 of the Constitution, in turn, was accepted by the members of the Commission unanimously. It is interesting to note that although the Constitutional Commission in Parliament managed to produce a document which would be acceptable by the major political forces in the TGNA, none of them were thoroughly happy with the result. While the DLP and the Nationalist

Action Party (NAP) were criticizing the amendment to Article 69, the amendment to Article 101 was the main target of the Motherland Party (MP).

As the work on the constitutional amendments was coming to an end, a declaration, issued by the Constitutional Court on 22 January 2001, subverted the political agenda. On behalf of the Constitutional Court, Chief Justice Mustafa Bumin expressed the uneasiness of the judges about the proposed amendment to Article 69 which would make harder the closure of political parties. In fact, this was the repetition of their critical remarks that they had expressed during their visit to Prime Minister Bülent Ecevit a short time before, though couched in a stronger language. This statement had far-reaching repercussions within political circles in terms of the debates over constitutional change. Allegedly, this statement was the main reason that made coalition partners decide to suspend the work on the three-article constitutional amendments package on 23 January 2001.

The issue of constitutional change was forgotten until the adoption of the “National Program” in the TGNA on 19 March 2001 declaring Turkey’s undertakings to the European Union (EU). With this document, Turkey promised to fulfil certain reforms before becoming eligible for full membership of the EU. Thus the issue of constitutional change landed again on top of the political agenda, but this time not because of internal political problems such as the extension of the president’s term of office or the closure of political parties, but because of Turkey’s international commitments, which would deeply affect many generations of the Turkish nation in every aspect of life. In accordance with the short-term and mid-term goals in the National Program, the Government gave priority to the preparation of a new constitutional amendment package within the framework of the EU standards.

Again, first a sub-commission in Parliament was set up to work on the amendments. This Commission, composed of the representatives of all political parties in the TGNA, produced a proposal that would introduce the most comprehensive modification to the 1982 Constitution since its inauguration. A fifty-one-article constitutional amendments package was transferred to the All-party Accord Commission for final touches. While the work of the Accord Commission was in progress, the text of the amended articles was unveiled in major Turkish newspapers on 25 May 2001.

During the discussions in the Accord Commission, the stance of the coalition partners on certain issues became clearer. The NAP particularly expressed its critical opinion on such issues as broadcasting in languages other than Turkish, the abolition of the death penalty and expanding the scope of civil and political rights and freedoms. Not only political parties, but also other actors in Turkish politics, e.g. the President, the Constitutional Court and the military, participated in these discussions. As a result, taking into account the considerations of these powerful actors, the All-party Accord Commission

eliminated certain arrangements and settled on a smaller thirty-seven-article package.

The original intention of the coalition partners was to pass the package before the summer recess of the TGNA. However, given the difficulties arising during the work of the Commission, the coalition partners were convinced that it would be better to leave the final discussions on amendments to the new legislative period. Thus, the leaders of the coalition decided to take the summer recess according to the normal schedule of the TGNA, but agreed on to call an extraordinary session in September.

When the TGNA convened on 17 September 2001, two weeks earlier than its official opening, to discuss the thirty-seven-article constitutional amendments package, the positions of the political parties were as follows: The DLP, the MP and the Justice and Development Party (JDP) unconditionally declared support for the package. The NAP, although with certain reservations on the amendments to articles 13, 14, 26 and 28, was generally in favour of the amendments. It is here interesting to note that the reservations of the NAP coincided with the “sensitivities” of the General Staff. The Happiness and Contentment Party (HCP), in turn, was preparing itself for a hard bargaining over the package. The HCP alluded that it would lend its support in exchange for the lift of political bans on their veteran leader Necmettin Erbakan.

Discussions on constitutional amendments commenced in a tense atmosphere. Before the Constitutional Commission in Parliament went about its business, the coalition partners handled a very controversial issue, the issue of the abolition of the death penalty, which obviously would create serious problems during the constitutional amendment process. The solution found by the partners was to leave the regulation of the issue to a separate arrangement in Criminal Law. Accordingly, the amendment regarding the death penalty was excluded from the package in the very beginning of the process.

After long and heated discussions, the Constitutional Commission adopted an amendment package on 20 September 2001. This package, however, was not the same as the one agreed upon by the leaders of the Coalition and the All-Party Accord Commission. The weight of the criticisms and demands of powerful political actors, particularly the military, was felt at every stage of the Commission's work. As a result of these external influences, certain arrangements in the package, e.g. the amendments to the Preamble, as well as articles 13 and 14, were reformulated. These modifications were supported by the NAP, which also managed to convince its partners for the inclusion of the death penalty explicitly in the Constitution. More importantly, another familiar arrangement, that of providing a constitutional guarantee of privileged financial benefits for deputies, was inserted in the package as a last minute manoeuvre with the support of all political parties in the TGNA. Consequently, it seemed that major political forces in the country were now content with the final

document, except the HCP whose proposal of reducing political bans from 5 years to 4 years was rejected by other parties.

When the revised version of the thirty-seven-article constitutional amendments package came before the TGNA, a ten-day marathon of constitutional change started. In the first round of voting, held on 24 September 2001, all the arrangements in the package, except the one granting international agreements supremacy over domestic laws, garnered the amount of the votes which would be sufficient for their legislation without referendum. In a second round of voting, which took place on 3 October 2001, along with the arrangement concerning the supremacy of international agreements, two arrangements (that concerning Article 86, which would open a way for Recep Tayyip Erdoğan, the politically banned leader of the JDP to the TGNA and that concerning Article 100, which would accelerate the legal procedure for lifting the immunity of deputies for non-political crimes) failed to pass the hurdle of 330 votes. Thus with the elimination of these three articles, the package was reduced to thirty-four articles. Of the 499 deputies who participated in the last round of voting, 474 of them voted in favour of the whole package. Thus the most comprehensive constitutional amendment in the history of the Constitution of 1982 was accomplished by the TGNA. Unfortunately, this genuine success was overshadowed by the controversy over the arrangement concerning the salaries and allowances of deputies. The rest of the constitutional amendments' story was tainted by a war of words between the Government and the President against a background of a growing public reaction to the salaries arrangement.

The President, from the very beginning of the controversy, revealed his intention to take more serious steps in terms of invalidating this unscrupulous operation of deputies. What was worrying the political parties in the TGNA was that the President would exercise his power to submit this particular arrangement to referendum. At the time, political and scholarly circles began to discuss whether the President had the right to pick a particular arrangement from the package to submit to the popular vote. President Sezer argued that the Constitution granted him this right, however, he did not conceal his hesitation about whether such an untimely referendum would be appropriate under the current political, economic and social conditions of the country. According to the Turkish Press, Sezer took the following considerations into account: First, politically, such a referendum would create an election atmosphere which would certainly negatively affect the political stability in Turkey. Second, economically, such a move would put a heavy financial burden on the Treasury. Third, socially, such a move would pit the people and the representatives against each other.

It is still debatable that the deputies could foresee that the "a cushy pension" arrangement would cause such counteraction from the President, but it is apparent that his adamant position, backed by a growing public reaction, played a significant role in deputies' retreat. First, Ömer İzgi, Head of the

TGNA, made a statement, which was found unsatisfactory by the public in general. İzgi pointed out that the deputies' salaries could not be increased before the enactment of an adaptation law. The deputies were aware that they had to take more concrete steps to ease the tension between them and the President as well as to appease the public outrage. Thus, with such an intention, they inserted an article in Tax Law to revert their salaries to their original level. However, none of these attempts of the deputies could dissuade President Sezer from submitting the amendment in question to referendum.

The decision of the President rekindled the controversy between the President and the Government. The first move came from the Government, who applied to the Higher Electoral Commission to clarify the referendum schedule. In its reply, the Commission announced that the referendum process would not start before the publication of the referendum decision in the Official Gazette. Having obtained this opinion, the Government decided to withhold the text of the whole amendment package including the controversial Article. However, it soon proved that this move of the Government lacked a solid legal ground. Thus, the Government changed its action plan and sent the amendment text for publication with the exception of the Article which had already been put to referendum by President Sezer. To justify this move, the Government argued that the statement of the President, which had been attached to the endorsed text of the amendment, was not clear on the point that whether or not it included an order for the publication of the referendum decision about the arrangement concerning the deputies' salaries and allowances. This argument of the Government, again, was not legally defensible. In the end, the Government asked the President to issue an order for the publication of the referendum decision. President Sezer responded immediately and issued the requested order. Thus with the publication of the referendum decision on 22 October 2001 in the Official Gazette, the 120-day period, envisaged by the Constitution for the referendum preparations, was started.

The publication of the referendum decision left the deputies without choice. As the clock was ticking, the deputies began to work on a one-article constitutional amendment proposal on their salaries and allowances which would invalidate the President's referendum decision. This proposal was prepared in a rush and adopted in the TGNA on 22 November 2001. The amendment was approved by the President on 30 November 2001 and came into effect on 1 December 2001 upon its publication in the Official Gazette. Thus this controversy, overshadowing the success of the TGNA in amending the military-scissored 1982 Constitution, came to an end.

Analysis of the Recent Amendments to the 1982 Constitution³

The 2001 amendments to the Constitution of 1982 can be analysed in four categories: those concerning fundamental rights and freedoms, those concerning state organs, those concerning civil-military relations, and those concerning the nullification of the long-term effects of the 12 September 1980 military intervention.

Fundamental Rights and Freedoms

a) *General Principles*: The general principles of the rights and freedoms are regulated in the 1982 Constitution between articles 12 and 16. The 2001 amendments modified two of these articles, Article 13 and 14. Within this context, the most important arrangement introduced by the amendment package was that general grounds for restricting all rights and freedoms in the Constitution were deleted from Article 13. Before the 2001 amendments, Article 13 enumerated the general reasons for restrictions; namely, the aim of safeguarding: a) the indivisible integrity of the state with its territory and nation, b) national sovereignty, c) the Republic, d) national security, e) public order, f) general peace, g) the public interest, h) public morals and i) public health. More importantly, Article 13 stipulated that the rights and freedoms in the Constitution can be restricted on these general grounds as well as for specific reasons in related articles. Thus, in its original version, Article 13 envisaged a cumulative restriction system for fundamental rights and freedoms. The 2001 amendments expanded the scope of rights and freedoms by revising this system. Now, fundamental rights and freedoms can only be restricted in accordance with the reasons mentioned in the relevant articles of the Constitution. Undoubtedly, the repealing of the general grounds can be seen as a progressive step towards more effectively guaranteeing basic rights and freedoms. However, this would provide a relative ease in the restrictive constitutional regime of rights and freedoms, so long as the specific reasons in the related articles remain the same.

³ Analyses of various aspects of 2001 constitutional amendments can be found in several sources in Turkish. See for example: Ergun ÖZBUDUN, **2001 Anayasa Değişiklikleri ve Siyasal Reform Önerileri**, TESEV Yayınları, İstanbul, 2001; Mustafa ERDOĞAN, "Anayasa Değişikliği Üstüne", **Açık Toplum**, Liberal Düşünce Topluluğu <<<http://www.liberal-dt.org.tr/guncel/guncel.htm>>>, 01.10.2001; Mustafa ERDOĞAN, "Anayasa Değişti mi?", **Açık Toplum**, Liberal Düşünce Topluluğu <<<http://www.liberal-dt.org.tr/guncel/guncel.htm>>>, 07.10.2001; **Anayasa ve Uyum Yasaları, Açık Oturum Tutanakları**, Türkiye Barolar Birliği Yayınları, Ankara, 2002; **Türkiye Büyük Millet Meclisi Anayasa Hukuku 1. Uluslararası Sempozyumu, Bildiriler, Tartışmalar, Değerlendirmeler**, TBMM Yayınları, Ankara, 2003; **Anayasa Yargısı-19**, Anayasa Mahkemesi Yayınları, Ankara, 2002. See also those in English: **Grand National Assembly of Turkey 1st International Symposium on Constitutional Law, Papers, Discussions, Evaluations**, TBMM Yayınları, Ankara, 2003; Esin ÖRÜCÜ, "The Turkish Constitution Rewamped?", **European Public Law**, Vol. 8, No. 2, 2002, pp. 201-218.

Another innovation in Article 13 is that the 2001 amendment reinstated the principle of “the essence of rights,” which was one of the main pillars of the rights and freedoms system of the 1961 Constitution. Although the 1982 Constitution did not include this principle, it survived particularly in the jurisprudence of the Constitutional Court. Accordingly, the amendment only inserted an already existing practice into the Constitution. According to this principle, fundamental rights and freedoms can only be restricted without infringing upon their essence.

With the amendment to Article 13, the limits of the grounds for restrictions of rights and freedoms (i.e. the limits which determine legitimately how far the state may go in interfering in the domain of individuals by restricting their rights and freedoms), were also rearranged. First, the original version of Article 13 provided that: “... grounds for restrictions of fundamental rights and freedoms shall not conflict with the requirements of the democratic order of society and shall not be imposed for any purpose other than those for which they are prescribed.” The second part of the sentence was deleted from the text of Article 13, thus the amendment only preserved the criterion of “the requirements of the democratic order of society.” Second, the original version of Article 13 stipulated that: “Fundamental rights and freedoms may be restricted ... in conformity with the letter and spirit of the Constitution ...” This sentence had been in the first paragraph of the Article. This means that the Constitution mentioned this criterion, maybe not appropriately, along with the general grounds for restrictions of rights and freedoms. With the 2001 amendments to this Article, this criterion was rewritten in a negative manner and placed among the limits of the grounds for restrictions. Now, Article 13 reads: “...restrictions [of rights and freedoms] shall not be in conflict with the letter and spirit of the Constitution.” Third, two additional criteria, namely the “secular Republic” and the “principle of proportionality,” were added to Article 13 as the limits of the grounds for restrictions of rights and freedoms. The inclusion of criterion of the “secular Republic”, in fact, signifies the importance of this issue in Turkish society. Particularly, the recent tide of Islamist movements in Turkey alerted a large portion of Turkish society, both at mass and elite levels, committed to republican secular principles. This amendment can be seen as the expression of this broad-based sensitivity. The “principle of proportionality,” in turn, derives from the jurisprudence of the German Constitutional Court and the European Court of Human Rights. In fact, the formula of “... grounds for restrictions of fundamental rights and freedoms ... shall not be imposed for any purpose other than those for which they are prescribed” in the original version of Article 13 embraced the core of the principle of proportionality. Nevertheless, the explicit inclusion of this criterion in the Constitution would help judges to utilize such other principles as necessity and suitability, related with the principle of proportionality, for a better protection of human rights through judicial mechanisms.

The 2001 amendments seemed to provoke a discussion about whether it is possible to restrict rights and freedoms by law-amending ordinances, which have the force of law in Turkish constitutional system. According to the original version of Article 13, rights and freedoms could be restricted by law. Thus, given the fact that the Constitution prohibits only the regulation of the rights and freedoms in the First and Second Chapter of the Second Part of the Constitution and those in the Fourth Chapter (i.e. civil and political rights and freedoms), it was tenable before the new arrangement that those rights and freedoms in the Third Chapter of the Constitution, i.e. social and economic rights and freedoms could be regulated, even restricted, by law-amending ordinances. Recent amendment to this Article added the adjective of “only” to the text. According to the revised version of Article 13, rights and freedoms may be restricted “only” by law. Accordingly, now it becomes debatable whether it is possible to restrict rights and freedoms, including social and economic ones, by law-amending ordinances.

Those circumstances which had been considered as the abuse of fundamental rights and freedoms were also reduced in number and limited in content by the 2001 amendments within the framework of a general regime of fundamental rights and freedoms. According to the original text of Article 14, “None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation, of endangering the existence of the Turkish State and Republic, of destroying fundamental rights and freedoms, of placing the government of the state under the control of an individual or a group of people, or establishing the hegemony of one social class over others, or creating discrimination on the basis of language, race, religion or sect, or of establishing by any other means a system of government based on these concepts and ideas.” The new arrangement kept only the criterion of “the indivisible integrity of the state with its territory and nation.” Other circumstances were deleted and the formulation “None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of ...endangering the existence of the democratic and secular order of the Turkish Republic based upon human rights” was added.

Two points also deserve to be mentioned with respect to the amendments to Article 14. First, the original version of Article 14 provided sanctions not only against those violating the prohibitions of abuse of fundamental rights and freedoms, but also for those inciting and provoking others to abuse. The new arrangement sanctioned only the former. Second, according to another new arrangement in Article 14, not only individuals, but also the state can perpetrate activities, which can be considered as the abuse of rights and freedoms. These arrangements, needless to say, would pave the way for a better protection of individuals against the state.

Here, it would be interesting to compare Article 14 of the Turkish Constitution with Article 17 of the ECHR. The second Paragraph of the revised

version of Article 14 of the Turkish Constitution repeats almost verbatim Article 17 of the ECHR. According to the revised Article 14 of the Turkish Constitution, "No provision of this Constitution shall be interpreted in a manner that enables the state or individuals to destroy the fundamental rights and freedoms embodied in the Constitution or to stage an activity with the aim of restricting them more extensively than stated in the Constitution." However, Article 14 of the Turkish Constitution contains an additional arrangement in its first paragraph: "None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation, and endangering the existence of the democratic and secular order of the Turkish Republic based upon human rights." While Article 17 of the ECHR basically safeguards the fundamental rights and freedoms in the Convention against their destruction or limitation to a greater extent than is provided for in the Convention, the first paragraph of Article 14 of the Turkish Constitution aims first and foremost at preventing the destruction of the state as well as the democratic and secular republic through the exercise of rights and freedoms in the Constitution. The 2001 amendments, although reformulated in a manner to ease the restrictive measures, kept the spirit of the first paragraph intact. The second paragraph, which would be the main guarantee for the prevention of the abuse of rights and freedoms, remained unchanged.

b) *Individual Rights and Freedoms*: Individual rights and freedoms were those that underwent the most comprehensive revision by the 2001 amendments. For the sake of clarity, we shall study these new arrangements under two main categories:

i) *Those arrangements concerning the physical domain of persons*: With the amendment to Article 19, under the heading of "Personal Liberty and Security", the period of arrest is reduced from 15 to 4 days in case of offences committed collectively; it is prescribed that the arrest or detention of a person shall be notified to the next of kin without delay; and it was accepted that those who suffered from damage within the context of this Article are to be compensated by the state. With the amendments to Article 20 ("Privacy of the Individual's Life"), Article 21 ("Inviolability of Domicile") and Article 22 ("Freedom of Communication"), specific grounds for the restriction of these rights were rearranged in parallel with the related articles of the ECHR. In the same vein, the sentence; "A citizen's freedom to leave the country may be restricted on account of the national economic situation, civic obligations, or criminal investigations or prosecution" in Article 23, regulating the freedom of residence and movement, was reformulated in a way to leave the ground of "the national economic situation" out of the text.

ii) *Those arrangements concerning the intellectual domain of persons*: Article 26 ("Freedom of Expression and Dissemination of Thought") was rewritten with the aim of harmonizing the arrangements in this area with

European standards. However, interestingly enough, those general grounds for restriction in the original version of Article 13 were reincorporated in Article 26 as specific grounds for restriction. Thus one can hardly see this amendment as the expansion of the scope of the freedom of expression in general. Another amendment to Article 26, that concerning the prohibition of languages other than Turkish, was one of the most debated amendments in the whole package. With the new arrangement, the concept of a “language prohibited by law” was deleted from the text. Although there has been no such prohibiting law in Turkey since 1991, this amendment rules out the possibility of making such a law in the future. In connection with this amendment, the sentence of “Publications shall not be made in any language prohibited by law” in Article 28, regulating the freedom of the press, was removed.

Within this context, the phrase of “thoughts or opinions” in the sentence of “... no protection shall be afforded to thoughts or opinions contrary to Turkish National interests,” in the Preamble was replaced with the term of “activity.” This change ostensibly aims at providing an additional guarantee for the freedom of expression. However, one should note that the term of “activity” encompasses the expression of thoughts and opinions. Thus, it can reasonably be asked whether this amendment has set the ground for further limitation of the freedom of expression, let alone serving the expansion of its scope. Before answering this question, we should know the value of the Preamble in the whole Turkish constitutional system. According to Article 176, the Preamble is an integral part of the Constitution. Yet, it is more a source of principles and values, which can be utilized by the courts in construing other articles of the Constitution, than a set of arrangements, which can be applied directly. Thus, even though we accept that this amendment would open the door to further limitations, this would not directly affect the freedom of expression. Nevertheless, it is obvious that this amendment would not make the job easier of the judges who seek to expand the scope of the freedom of expression through judicial interpretation, either.

The original version of Article 31, under the heading of “Right to Use Mass Media Other Than the Press That are Owned by Public Corporations”, had contained no specific reasons for restriction. Thus, this right could only be restricted in accordance with the general grounds enumerated in Article 13, which were applicable to all rights and freedoms in the 1982 Constitution. The 2001 amendments created specific reasons for restriction. Accordingly, the revised version of Article 31 provided that this right can be restricted on the grounds of “national security, public order, public moral or the protection of public health.” Since general grounds for restriction in the original version of Article 13 were more comprehensive than the current specific grounds for restriction in the revised version of Article 31, one may argue that the scope of this particular right was expanded by recent amendments.

c) *Collective Rights and Freedoms*: Article 34, regulating the right to hold meetings and demonstration marches, was brought in line with the Article 11 of ECHR by re-arranging the grounds for restriction for this right. In the same vein, Article 33 (“Freedom of Association”) and Article 51 (“Right to Organise Labour Unions”) were amended in a way to make the forming of such associations and labour unions relatively easier. Amendments to the latter articles also limited the scope of restrictions of these rights.

d) *Political Rights and Freedoms*: The most important change in political rights and freedoms in the 1982 Constitution was, undoubtedly, the amendment to Article 69, regulating principles to be observed by political parties. First, the 2001 amendments clarified the criteria of “being the hub of unconstitutional activities” which will be used by the Constitutional Court in party closure cases. Accordingly, if: a) The members of a political party carry out unconstitutional actions intensively; b) the grand congress, general chairmanship or the central decision-making or administrative organs of that party or by the group’s general meeting or group executive board at the TGNA shares this situation implicitly or explicitly; c) the latter party organs directly carry out in determination these activities: the party is to be considered to become the centre of unconstitutional activities. Second, a new gradual punishment system was brought in by the 2001 amendments, which can be applied by the Constitutional Court before deciding to close down a political party that has been found guilty for perpetrating unconstitutional activities. According to the new arrangement, “Instead of dissolving [political parties] permanently ... the Constitutional Court may rule the concerned party to be deprived of state aid wholly or in part with respect to intensity of the actions brought before the court.” The amendment to Article 69 was complemented by another amendment to Article 149: Now, the Constitutional Court shall decide the closure of political parties by a three-fifths majority.

Within the context of amendments to political rights and freedoms, an amendment to Article 66, under the heading of “Turkish Citizenship”, can be seen as a crucial step towards reinforcing man-woman equality on a constitutional basis. The sentence of “The citizenship of a child of a foreign father and a Turkish mother shall be defined by law” was removed. Although it is regulated in the Section of “Social and Economic Rights and Duties” amendment to Article 41 (“Protection of the Family”), it is worth mentioning in connection with the amendment to Article 66. The amendment to Article 41, rather than creating or reinforcing a new right, verified the changing face of Turkish society in terms of man-woman equality. According to the revised version of Article 41, “The family is the foundation of Turkish Society and is based on the equality of spouses.”

Amendments to political rights were not limited to citizenship. Article 67 (“Right to Vote, to be Elected and to Engage in Political Activity”) and Article 74 (“Right of Petition”) were also amended. The amendment to Article 67

expanded the scope of the right to vote by allowing the exercise of this right by persons sentenced for negligence. Apart from that, the following sentence was added to Article 67: “The amendments made in the electoral laws shall not be applied to the elections to be held within the year from when the amendments go into force.” With a provisional article, it was prescribed that this arrangement would be applied after the first general election. The amendment to Article 74, in turn, granted foreigners, residing in Turkey, right of petition in accordance with the principle of reciprocity. A revised version of Article 74 also provided that the result of the application concerning him- or herself which has been made within the framework of the right of petition will be made known without delay to the petitioner in writing.

e) *Social and Economic Rights and Freedoms*: Of all social and economic rights, the revision of Article 65, regulating the extent of social and economic rights, was the most important one. This article had been criticized before the 2001 amendments on the ground that it made meaningless all social and economic rights and freedoms in the Constitution by providing the state with a reliable pretext to escape from its responsibilities towards its citizens. According to the original version of the Article: “The state shall fulfil its duties as laid down in the Constitution in the social and economic fields within the limits of its financial resources, taking into consideration the maintenance of economic stability.” The new arrangement, unfortunately, fails to invalidate these criticisms because, although the text of the Article was changed to “The state shall fulfil its duties as laid down in the Constitution in the social and economic fields within the capacity of its financial resources, taking into consideration the priorities appropriate with the aims of these duties”, the most controversial phrase in the Article, “within the capacity of its financial resources” still exists. Again, one should evaluate the meaning of those amendments to Article 49 (“Right and Duty to Work”) and Article 55 (“Guarantee of Fair Wage”) in the light of the latter account. According to the revised version of Article 49, “The state shall take the necessary measures to raise the living standard of workers, and to protect workers and the unemployed in order to improve the general conditions of labour, to promote labour, to create suitable economic conditions for the prevention of unemployment and to secure labour peace.” According to the revised version of Article 55: “In determining a minimum wage, the living conditions of the workers and the economic situation of the country shall be taken into account.” One may safely argue that these guarantees in Article 49 and Article 55 continue to be empty words so long as the controversial phrase in Article 65 is preserved.

Apart from these amendments, which made little improvement in the current system of social and economic rights, we lastly wish to mention a progressive change in Article 46, under the heading of “Expropriation”. Before its revision in the 2001 amendments, this Article caused Turkey to be found guilty before the European Court of Human Rights in a number of expropriation cases. The new arrangement, which introduced a system resembling the system

of the ECHR, would, at least, provide Turkey a solid ground to defend itself in such cases.

f) *Mechanisms for Protection of Fundamental Rights and Freedoms*: The 2001 amendments were also significant in terms of protecting rights and freedoms. Most importantly, the principle of a “fair trial” was inserted into the Constitution. According to the revised version of Article 36, regulating the freedom to claim rights, “Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through lawful means and procedures.” In addition, Article 38 (“Principles Relating to Offences and Penalties”) was rewritten in a manner to bolster the existing mechanisms for protection of human rights. The following sentences were added to the text of Article 38: “Findings obtained in a manner not accordance with the law may not be admitted as evidence.” and “No one shall be deprived of his liberty merely on the grounds of inability to fulfil a contractual obligation.” With the aim of guaranteeing effective protection of rights and freedoms through judicial means, the following sentence was also added to Article 40 (“Protection of Fundamental Rights and Freedoms”): “The state shall determine the legal course of action and authorities that may be applied to by persons concerned.”

Another addition to Article 38 deserves particular attention. With the 2001 amendments, the sentence “the death penalty may only be imposed in time of war and for crimes of terrorism” was added to Article 38. Thus, although in a limited manner, for the first time, the death penalty was explicitly written in the Constitution. Although it has been argued that this particular arrangement does not create an obstacle to the abolition of death penalty in Turkey, it is obvious that it does not facilitate it either.

State Organization

Although the bulk of the 2001 amendments are about fundamental rights and freedoms, a few of them were concerned with the state organization.

a) *Those arrangements concerning the legislature*: In this context, one of the most important arrangements was about the amnesty power of the TGNA. This issue was debated particularly after the adoption of “Special Amnesty Law” in 1998. This law, concerning the release of thousands of convicted criminals, caused serious public reaction after its application. The new arrangement, on the one hand, broadened the scope of amnesty power by covering those crimes against the state enumerated by Article 14 of the Constitution. On the other hand, it made it more difficult to make an amnesty decision in the TGNA, by requiring a three-fifths majority. It is interesting here to note that, with a provisional article, it was provided that the amendment concerning the scope of amnesty power would not be applied to the crimes against the state that had been committed before the amendment. Obviously, the aim of this arrangement was to ensure that Abdullah Öcalan, leader of the

separatist terrorist organization PKK, could not be pardoned in the future. Apart from this, two insignificant arrangements were made in Article 94 and Article 100 aiming at, respectively, speeding up the election of the Speaker of the TGNA and preventing the politicisation of parliamentary investigations.

b) *Those arrangements concerning the executive:* The only amendment concerning the executive was in Article 89, under the heading of “Promulgation of Laws by the President of the Republic.” This arrangement, known as “partial veto”, enabled the president to send statutes partially back to the TGNA for reconsideration. Interestingly enough, although the coalition partners reiterated at every opportunity that the president’s veto power should be limited, by giving him a share in the process of reshaping the statutes, the new arrangement actually made him more powerful than he used to be.

Civil-Military Relations

The 2001 amendments saw another crucial arrangement concerning civil-military relations in general and the National Security Council (NSC) in particular. The NSC was bequeathed to the 1982 Constitution by the 1961 Constitution. However, when comparing the two constitutions, one may easily recognize that the Constitution of 1982 contains arrangements that make the NSC more influential. Furthermore, already powerful on paper, the weight of this institution had been felt strongly in every-day politics in recent years. Since its installation, the Council has taken many decisions not only in the area of national security, but also in the areas of foreign policy, education, human rights and economics. It is interesting to note that all governments, during the eras of the 1961 Constitution and the 1982 Constitution conformed to these decisions, which are principally advisory in nature, almost verbatim. Naturally, such a *de jure* and *de facto* powerful position of the Council has provoked criticisms outside of and inside of Turkey. Those criticizing this institution maintained that, in a democracy, it could not be accepted that a body, mainly dominated by appointed officials, could supervise, even influence, elected representatives of the people. Critics even go further to argue that the NSC, as it was created, is an obstacle to the consolidation of democracy in Turkey. Thus, recent amendments to Article 118 should be seen as a response to such criticisms. Accordingly, with the amendment to Article 118, under the heading “National Security Council”, the number of the civilian members of the NSC was increased. In addition, the advisory nature of the NSC was underscored by adding the term of “advisory decisions” to the sentence “The National Security Council shall submit to the Council of Ministers its views on taking decisions ...” Moreover, with the amendments to Article 118, instead of “giving priority consideration,” now the Council of Ministers shall “evaluate”, the decisions of the NSC.

Nullifying the Long-term Effects of 12 September 1980 Military Intervention

Lastly, the amendment concerning Provisional Article 15 was very important in terms of nullify the long-term effects of the 12 September 1980 military intervention. The 12 September 1980 intervention was a reaction of military bureaucrats to a political impasse as well as the internal violence and terrorism from which Turkey had suffered for many years. This intervention left deep scars on Turkish society. Not only the political and economic systems, but also the legal system was negatively affected by the three-year military rule. Having provided peace and security in the street, military leaders first ventured on to restructure the legal system of the country. Thus, after the suspension of the Constitution of 1961, Turkey was ruled by decrees, issued by the NSC, during the period of 1980-1982, i.e. from the military intervention until the adoption of the new Constitution. The NSC stayed in power even after the adoption of the Constitution of 1982. Thus, the military regime virtually ended only after the convention of the TGNA after the 1983 parliamentary elections. A number of basic laws (e.g. Law of Political Parties, Election Law, Law of the Constitutional Court, etc.), which would provide the bases of the current Turkish legal system, were made during the period of 1980-1983. Furthermore, these laws, known as the "12 September Laws," acquired immunity against the review of their constitutionality thanks to Provisional Article 15 of the Constitution of 1982. Thus, the bitter legacy of the 12 September 1980 military intervention survived until recently. With the 2001 amendments to provisional Article 15, it became possible to declare the unconstitutionality of decisions or measures taken under laws or decrees, having force of law, enacted during the military rule between 1980-1983. More importantly, taking into account the fact that Provisional Article 15 had created a special category of laws, which could not be annulled even though they were explicitly in conflict with the Constitution, this amendment can be seen as a crucial step towards ensuring the supremacy of the latter.

Conclusion

In this article, we have attempted to analyse the 2001 constitutional amendments in Turkey. It seems appropriate to conclude this study with a brief discussion on the significance of these amendments for the consolidation of Turkish democracy.

Firstly, the 2001 amendments were the most comprehensive ones made by civilians not only in the history of the 1982 Constitution, but also in Turkish constitutional history in general. All republican constitutions in Turkey (1924, 1961 and 1982) were drawn up under extra-ordinary conditions. More importantly, the Constitution of 1961, the 1971 amendments to the latter, and the Constitution of 1982 bore the stamp of military regimes. Thus, for the first

time, the TGNA accomplished to change the Constitution with a broad-based consensus through democratic channels. This was particularly important to restore the prestige of the TGNA, who proved to be able to modify the basic law of the country freely, as the true representative of the will of Turkish people.

Secondly, these amendments verified Turkey's zeal for joining the club of liberal-democratic states of the world more strongly than ever. We believe that particularly after the adoption of adaptation laws, Turkey will take more serious steps to heal the wounds of its democracy. Of course, merely amending the constitution or making laws does not guarantee effective protection of fundamental rights and freedoms. However, it would, at least morally, compel state authorities to observe the limits set by these documents.

Thirdly, and most importantly, external actors played a crucial role in the realization of these amendments as much as internal actors did. Particularly, those standards promoted by the EU and its organs were used as a "yardstick" during the constitution amendment process not only by Turkish law-makers, but also by those who criticize or support them. This underlined the fact that those countries who would like to be a player of the global democratic game cannot turn their back to universally accepted principles and values.

Today, it is generally accepted that, along with other factors, democracy can be considered consolidated if people agree on a country's basic political and legal institutions that are embodied in the constitution. Needless to say, such an agreement can be reached easily if the people or their representatives have real initiative to shape or re-shape these institutions freely. From this point of view, although the amendments have been criticized by certain groups on the grounds that they were not adequate for jettisoning non-liberal and non-democratic elements from the Turkish constitutional system, the 2001 amendments can be seen as a crucial step towards the consolidation of democracy in Turkey.