

TURKEY'S ATTEMPT AT A NEW CONSTITUTION IN POLITICAL CONTEXT*

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ABSTRACT

In the context of right-wing populism in North America and Europe, embracing a strategy of associating Islam with violence, Turkey's Justice and Development Party (AKP)'s three successive electoral victories, pro-European Union position (though there is a current retreat), participation in the Alliance of Civilizations Project, "National Unity and Brother/Sisterhood Project," and its willingness to replace the 1982 military coup constitution has kept the AKP politics rather free from critical analysis. However, an analysis of the tendencies in the past years against freedom of speech, political rights and pluralism, together with a critical analysis of the moments presented often as further democratization under the AKP government shed new light onto the constitution writing process which could never turn into a constitutional moment, and was instead overwhelmed by "normal politics."

Keywords: Turkey, Constitution, Justice and Development Party, Democracy, Constitutional Politics.

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I. Introduction

In the context of right-wing populism in North America and Europe, embracing a strategy of associating Islam with violence, Turkey's Justice and Development Party (AKP) has been rather free of a critical public gaze. Three successive electoral victories, its pro-European Union position (though there is a current retreat), participation in the Alliance of Civilizations Project, the "National Unity and Brother/Sisterhood Project" it launched in 2009, and its willingness to replace the 1982 military coup constitution have all been presented as evidence for a democratizing AKP. The opposition between the AKP and the two last bastions of Kemalist establishment— military and the constitutional court— which for a decade were the main axes of Turkish politics, seems no longer to be there. The mass arrests which started after a gunman shot a judge in 2006 (known as the *danıştay affair*), continued with trials (known as *ergenekon trials*) first against coup-prone factions in the military, but later also targeting civil democratic opposition, and the reappointments of high rank military officers following the *ergenekon trials*, started a restructuring of the military institution. The Judiciary was restructured through the 2010 constitutional referendum. On the 50th anniversary of the Turkish Constitutional Court in 2011, the President of the Court even made a public statement against separation of powers, saying that "the Constitutional Court is not a place to trip and make fall those who represent the will of the people." He was criticized by a Professor of Constitutional Law.¹

During this recent attempt at writing a Turkish constitution— which failed at the end of 2013, after AKP members successively did not attend the meetings of the Constitution Compromise Commission— theoretical, comparative academic discussions on the past and present constitution writing episodes in Turkey, both with a focus on procedures for writing a constitution and the content of a democratic constitution, flourished.² And, finally, the academic discussions now turn towards

¹ "Adaletle 'Kılıç' Saplandı", *Birgün* 26 April 2012.

² İbrahim Ö. Kaboğlu, "Anayasa: Yenileme Arayışı ve Değişikliklerin Sürekliliği arasındaki ikilem," *Anayasa Hukuku Dergisi* 1: 1 (2012); İbrahim Ö. Kaboğlu, "Akdenizde Anayasacılık Hareketleri Karşısında Türkiye," *Anayasa Hukuku Dergisi* 1: 1 (2012); İbrahim Ö. Kaboğlu, "Yeni Anayasa: Süreç, İçerik ve Düzen" *Anayasa Hukuku Dergisi* 2: 3 (2013), Ergun Özbudun, "Anayasa Yapımında Yöntem Sorunları," *Anayasa Hukuku Dergisi* 1: 1 (2012).

explaining the failure of the attempt to write a constitution.³ This article examines the failed constitution-writing episode in the more general context of some political and social dynamics under the Justice and Development Party. This contextual analysis poses a challenge at the least for two disparate and overlapping fields of research. The first challenge is to the literature on Turkish politics. A mutually exclusive dichotomy between Kemalist Laicism and Political Islam has for long dominated research on Turkey,⁴ despite well-documented criticisms of the empirical reductionism of this dichotomy,⁵ and the past decade has witnessed a further deepening of this distinction by the elevation of the AKP to the status of the architect of "democracy in a Muslim-majority country." The military coup record granted, AKP politics and the turn recently taken by state institutions have serious anti-pluralistic, anti-political rights and anti-freedom of speech aspects, and AKP's challenge of the 1982 military constitution does not touch some of the coup heritage in the constitution. The second challenge is to the literature on constitutional politics. Part of this literature distinguishes between constitutional politics and normal politics.⁶ It describes the moments when constitutions are written or rewritten (constitutional politics) as moments when there is significant engagement with principled discussion on the common good. By contrast, in daily politics, whose perimeters are set by the constitution (normal politics), a simple pursuit of factional/political interests through given institutions becomes the norm. In the recent attempt at writing a new Turkish constitution, normal

³ Alain Bockel, "Türkiye'nin Zorlu Demokratik Anayasa Arayışı," *Anayasa Hukuku Dergisi* 2: 4 (2013).

⁴ Binnaz Toprak, "Islam and Democracy in Turkey," *Turkish Studies* 6: 2 (2005), p. 167– 86; Hakan Yavuz, *Secularism and Muslim Democracy in Turkey* (Cambridge: Cambridge University Press, 2009); Ahmet Kuru, *Secularisms and State Policies Toward Religion: The United States, France, and Turkey* (Cambridge: Cambridge University Press, 2009).

⁵ Taha Parla and Andrew Davison, "Secularism and Laicism in Turkey," in *Secularisms*, eds. J. R. Jacobsen and A. Pellegrini (Durham: Duke University Press, 2008). Taha Parla and Andrew Davison, *Corporatist Ideology in Kemalist Turkey: Progress or Order?* (Syracuse: Syracuse University Press, 2004).

⁶ Bruce A. Ackerman, "Neo-Federalism?," in *Constitutionalism and Democracy*, eds. Jon Elster and Rune Slagstad (Cambridge: Cambridge University Press, 1988), p. 162-163; Jon Elster, "Introduction," in *Constitutionalism and Democracy*, eds. Jon Elster and Rune Slagstad (Cambridge: Cambridge University Press, 1988), p. 6.

politics overwhelmed constitutional politics; in other words, the distinction did not hold.

The first process of writing which started off with professors drafting a constitution in 2007, broke off in 2008 when AKP reduced the question of a new constitution to the question of the veil so insistently that discussion over piecemeal constitutional change and changes in particular laws replaced the general discussions on constitution and constitution writing. The Constitutional Court case for party closure against AKP right after, which concluded with a warning and a partial cut of its state budget, listed this agenda combining--veiling the constitution--in its indictment.⁷ The most recent process of constitution writing started with the establishment of a constitution compromise commission (AUK) in October 2011. The Commission was comprised of 12 members, 3 members each from Justice and Development Party, Republican Peoples Party, National Action Party, and Peace and Democracy Party, only one women member out of the 12, and it was headed by the speaker of the Grand National Assembly (from AKP). This was the first time since the 1961 Constitution that professors took no part in the process. In the writing of both the 1961 and 1982 military constitutions, professors had a role. The memoirs of the 1980 military coup leader attests that the 1982 Constitution was almost single-handedly dictated by the military with the minimal procedural façade.⁸ Yet, in the writing of the 1961 constitution arguably it was the professors' presence that ignited the most interesting debates and hence expanding the space of discussion, to the degree that was possible under a military regime.⁹

In May 2012, the Commission started drafting a constitution; yet, the whole constitution writing process which had started with the establishment of the Commission, did not take as much stage light in the Turkish political scene as would be expected by the distinction in constitution-writing scholarship between constitutional politics and nor-

⁷ Constitutional Court, Decision 2008/2.

⁸ Kenan Evren, *Kenan Evren'in Anıları*. 3 Volumes, v. 3 (Istanbul: Milliyet Yayınları, 1991), p. 276.

⁹ See Murat Akan, "The Infrastructural Politics of Laiklik in the Writing of the 1961 Turkish Constitution," *Interventions: International Journal of Postcolonial Studies* 13: 2 (2011).

mal politics. Instead, since two years or so before the start of the drafting, the Turkish political scene was rather heavily burdened with violations of basic conditions of democracy such as freedom of expression, political rights, freedom of press, right to fair trial, and right to be free of arbitrary state coercion.

II. Political and Social Turmoil

The police violence at Gezi Park in the summer of 2013 was when the iceberg peaked. The last years are full of instances of different degrees and kinds of arbitrary state violence against civilians. For instance 35 civilians, at least half under the age 20, smuggling across the border out of need, were killed by Turkish war plane bombing in Şırnak, Uludere at the Iraqi border on 28 December 2011. The task of investigation was delegated to a parliamentary commission and the issue had fallen from the printed press, until an American journalist wrote in the *Wall Street Journal* that intelligence was also delivered by U.S. planes before the bombing. The government was caught off guard in this return of public discussion, the curtain parted for a split second, and the distaste for anti-government speech showed one of its clearest and most radical expressions; the government wanted silence on arbitrary state violence against civilians. The Prime Minister cried out; "It can be a mistake. We declared the mistake, we declared an apology, we declared the reparation. But some people are abusing the situation. For the love of God, if it is reparation, here is the reparation... We offered more than the official reparation."¹⁰ The Minister of Interior's public statement had its own distinct flavor; he remarked; "if they had not died, they would have been tried in court for smuggling." The Minister of National Defense stated that they are trying to denigrate the Turkish Armed Forces. And finally, the Prime Minister completely changed the public discussion to abortion by bursting out in the May 2012 congregation of his party that the critics of the government on Uludere are "necrophiles" and "every abortion [kürtaj] is an Uludere," sending off the feminist wings of the public mobilizing around the *Uludere Incident*, to ponder upon losing abortion rights.

¹⁰ 'Allah Aşkına Tazminat' *Radikal*, 22 May 2012.

The Uludere Incident, for which the government was publically criticized by a wide range of societal organizations and political parties, was the moment when the continuous police and judicial attacks on basic rights in the past two years was replaced by state coercion in its bare military form. In the past two years, the number of arbitrary and longtime detentions by the police have peaked; journalists, lawyers, syndicate leaders, scholars, students, human rights activists, elected representatives. In sum, a significant amount of democratic opposition imprisoned and/or on trial, and continuous judicial attacks on political rights hinder any possibility of a societal deliberation on a new constitution.

University students are one part of society who are paying heavy costs for freedom of expression. Two students were detained for displaying a placard demanding “free and public education” during a public speech of the Prime Minister. After having spent 19 months of detention time in prison, they were released on conditions of trial without arrest, and finally received a sentence of 8 and-a-half years. In another trial of a student who was detained as a “terrorist” just for wearing a *poşu* (a scarf), he was released after 25 months in detention on conditions of trial without arrest, and finally he was sentenced to 11 years and 3 months. Progressive Lawyers’ Association (*Çağdaş Hukukçular Derneği*) had released a detained students report in October 2011 stating that “the majority of detained students face prosecution under the context of the TPC [Turkish Penal Code] Articles 220 and 314, as well as Terrorism Prevention Act No. 3713 Article 7/2. One group of students resisting against officers on duty were charged on the grounds of violating Demonstrations and Marches Act No. 2911 (TPC Article 265).”¹¹ These are the precise laws that had not made it to the agenda of the Constitution Compromise Commission (AUK).

Artists and journalist also received their share. A singer was given 10 months in prison for mentioning in a concert a revolutionary activist who was tortured, killed and handed over to his father in pieces in the 1970s. A theater actor who staged a one-person play on Karl Marx adapted to the Turkish context, similar to Howard Zinn’s *Marx in Soho*, was tried and found guilty for insulting the Prime Minister with a joke

¹¹ Progressive Lawyers Association, ‘Detained Students Report’, October 2011, p. 2.

during the play. And finally in 2012, applauding the privatization of the state theater, the Prime Minister literally attacked the theater actors for criticizing the state while on the state payroll.

Two journalists, one investigating how a certain religious movement was taking over the police forces, and who penned a book entitled *The Army of the Imam* (the book was banned prior to publication), the other who was investigating the murder of Hrant Dink (the editor in chief of the only in Turkish Armenian newspaper who had written a book entitled *Red Friday: Who broke Dink’s Pen?*), were arrested, charged with being a part of the very movements that they were revealing through their investigation, and included in the *ergenekon trials*. They had their first trial after 8 months of detention time and were released after the 11th trial, having spent a total of 13 months in prison, on conditions of continuing trial without arrest. The *ergenekon trials* were launched to dismantle a coup prone military institution, but these trials look more and more like a restructuring of the military in line with the new bourgeoisie interests encapsulated in the AKP government. After his release, on 28 March 2012, the author of the *Army of the Imam* spoke at the European Parliament underscoring the imprecision of Anti-Terror Laws—last amended in July 2010, right before the famous 2010 referendum on the constitution—, pressures on journalists in the form of imprisonments and lay offs, and inroads to the police forces and the military made by a certain religious movement.

One wave of mass arrests also included a faculty member who would have had a direct role in the writing of the constitution, and also a publisher and human rights advocate who joined his son in prison. International Publishers Association called for the immediate release of the publisher, who was the recipient of the 2008 IPA Freedom to Publish Prize. He was released on 10 April 2012 to continue his trial without being detained after having spent close to 6 months of detention time. A professor at the Department of Political Science and International Relations at Marmara University, also member of the Peace and Democracy Party (BDP), and the faculty member in BDP’s constitution commission was arrested for giving a lecture on her own research in the “politics academy” of the BDP, a party organization which makes academic and field research meet the public through open courses by volunteers. She was detained in prison for around 9 months, 5 months of which was without an indictment. The indictment asked for 22 and-a-

half years in prison. Middle East Studies Association wrote a letter to the Prime Minister for the immediate release of the professor.

More examples can be enumerated. Human Rights Watch has reported on some of these detentions, trials and court sentences. Turkey already has a heavy record of past witch-hunts, and it looks like we are facing another cycle. According to the Reporters without Borders (RSF) press freedom index, press freedom has steadily declined during AKP and many recent reports on Turkey, for instance one by RSF entitled "A Book is not a Bomb" or another one entitled "Turkey: Set Journalists Free" compiled collectively by an International Press Freedom Mission to Turkey, including the Association of European Journalists, Freedom for Journalist Platform in Turkey, RSF, European Federation of Journalists, International Press Association lay bare Turkey's race to the bottom in press freedom. The international petition campaign launched right after the last wave of mass arrests has currently passed 6000 signatures.

In this race to the bottom, with the imprisonment of kids, there is no doubt that Turkish society actually hits the bottom. In the city of Diyarbakır, infrastructural insufficiencies due to incoming forced migration, disrupted families, lost economies, and many other dynamics initiated by the state's forced migrations is causing a lumpenization of kids. Some of these kids below the age 18 have been sentenced under terror laws to very heavy terms in prison for protesting. Earlier in 2011, the court asked for 24 years each in prison for kids aged between 13-17.

Yet, in some other trials, the judiciary does not seem to be so heavy-handed. In one of the biggest corruption cases of a Turkey-based religious charity association involving Turkish state bureaucrat among the suspects, which first shook Germany (a German judge reported that it was the biggest case Germany had ever seen) and then Turkey, the suspects were being tried without being detained. In a rape case of a 12 year old girl by about 20 men including state employees – gendarme, primary school vice-president, neighborhood authorities, employee from a municipality –, the court reduced the verdict by passing a judgment that the girl had consented. A police officer who killed a Nigerian refugee professional soccer player in the police station, got less than 5 years after the court case concluded in December 2011.

III. Speech?

These are just some examples. What is striking that such facts are easily covered up by the pens of organic academics and journalist who rely heavily and selectively on speeches of government representatives, and particularly of the Prime Minister himself and who seek and often find an international audience which cannot weigh these speeches in context. A pertinent example is the Prime Minister's speech in the Council of Europe Parliamentary Assembly on 13 April 2011 in the midst of all the turmoil in Turkey. When he was posed a question on the banned book, *the Army of the Imam*, in the Council of Europe Parliamentary Assembly on 13 April 2011, the Prime Minister could state that the judiciary in Turkey is independent and charge European politicians for discriminating against Turkey. I quote at length from his speech in the Council of Europe Parliamentary Assembly:

It is a crime to use a bomb, but it is also a crime to use the ingredients for the making of a bomb. Let's say that there is a denunciation that in a particular place, those ingredients for making a bomb, all of them, from its fuse to other materials, are present. Don't the security forces go and collect them? This is also a crime so they would go and take them. In this situation as well, if the information previously collected embodies these kind of preparations, justice has made its decision, and asked the security forces to pick and deliver the preparation in question... This preparation has entered internet websites as a book later on, it is out in the open what its [book's] content is. Therefore, I think that it is pertinent to see these realities. And this is not an act of the executive, but a decision of the judiciary. I have to say this here: All the time when it suits us we talk about independent judiciary. We defend an independent judiciary everywhere. But when it comes to Turkey, in Turkey you do not want an independent judiciary... you want a judiciary dependent on the executive. There isn't a judiciary dependent on the executive.¹²

The three main aspects of this speech, the claim of an independent Turkish judiciary, the 'Europe is discriminating against Turkey' theme,

¹² <http://www.youtube.com/watch?v=AVntVuVKTmU>, accessed 11 November 2013, my translation.

and the “violent” bomb-book analogy form a distinct synthesis. These are recurring themes which hold clues to the Turkish Government politics. For instance in the interview the Prime Minister gave to the Italian newspaper *Corriere Della Sera* on 7 May 2012, these themes were present again, as he played on how he had been a victim himself--he served time in prison himself-- and therefore appreciates the importance of freedom of speech, but that 90% of the journalist in jail are so, not because of what they write but because they have links with terrorist organization, and that the British journalists arrest do not raise a controversy and everyone picks on Turkey.¹³

The first claim on the independence of the judiciary needs closer evaluation in light of all the events I have listed above. The second theme underscores the politics of victimhood which has to be systematically integrated to analytical frameworks for the study of Turkish politics. A recent culmination of such politics was the Prime Minister declaring all the opposition parties in parliament fascistic, while his own government is silent on police violence. The third, ‘book-bomb’ analogy’ underscores the government party’s take on freedom of expression and it is just one among many incidents. The Prime Minister’s defense, in May 2012, of the privatization of the state theater against the critique of intellectuals and theater actors is worth quoting at length:

We see how despotic intellectuals attempt to advise us and excuse me, maybe it will be a slightly heavy expression, but we pity these poor things [the intellectuals]...They began to denigrate and belittle us as well as all conservatives because of a change in the regulation of State Theaters [the regulation change allows for a bureaucrat to preside over the Theaters instead of a theater actor]. I am asking, look here! Who are you? Is theater in your monopoly in this country? Is art in your monopoly in this country?...From now on, belittling this nation, scolding this nation, by pointing out your finger with your despotic intellectual attitude remains in the past. Almost in none of the developed countries, there is theater by means of the state...We will privatize theaters. With privatization, you are welcomed to stage your plays as you like. When necessary,

¹³Erdogan: “Siamo stati pazienti, ma se la Siria continua a sconfiggere la Nato dovrà reagire”, *Corriere Della Sera*, 7 May 2012.

we, as the government, give our sponsorship and support to the plays we want. Here it is! Freedom, stage the plays you want as you like wherever you like. No one will prevent. But excuse me!, In a city theater, you will take your wages from the municipality and then criticize the administration as you like. This is nonsense.¹⁴

Along the same lines but more radical, the minister of interior, earlier in the year almost coined a concept of “terrorist art”. All these statements on intellectuals and artists are just short of the response of 1980 military coup leader General Kenan Evren in 1984 to the famous “Intellectuals Petitions” for democracy with 1260 signature handed in to the President and the Parliament. Military President Evren publicly called all signatories “Traitors.”

IV. History or Present?

Two previous cases which have put the judiciary and public conscience at odds are the Dink trial and the Sivas Massacre trial. Hrant Dink was the editor-in-chief of the only Turkish language Armenian weekly and was assassinated on 19 January 2007, the trial was recently concluded. The court could not find any “organized” crime and the convicted got short terms in prison, and some police officers received only warnings. By contrast, the journalist who exposed the state corruption behind the investigation of the Dink Case in his book *Red Friday: Who broke Dink's Pen?* was imprisoned. The trial for the 1993 Sivas Massacre, the clearest case of religious violence of the past 2 decades in Turkey was recently dismissed because the time within which a case must be concluded had expired. In 1993, a mob attacked the Madımak Hotel in the central Anatolian city of Sivas where the Pir Sultan Abdal Association (an Alevi¹⁵ Association) was hosting invited writers and poets for a festival. A religious mob set the hotel on fire, 37 writers and poets were killed. This was not the first mob violence against Alevis and Alevi organized events.

The 19-24 December 1978 Maraş Massacre was one of the major events provoked in order to precipitate the 1980 military coup. After right wing provocations pitting Sunnis against Alevis in 1978 in Maraş,

¹⁴ ‘Gidin Başka Yerde Oynayın!’, *Bianet*, 2 May 2012, my translation.

¹⁵ Alevis are a heterogeneous group within Islam.

left wing and Alevi citizens, adults as well as children, were massacred by mobs in their homes. Many civil society organizations today, put facing the Maraş Massacre as one of the necessary conditions for dismantling the military heritage in contemporary Turkish politics and for writing a new democratic constitution against the 1982 military constitution. Yet, just recently in 24 December 2011, the Mayor of Maraş—with full support of the Minister of Interior—banned a commemoration gathering and mobilized the gendarme to prevent the commemorators from accessing the city center.¹⁶ Again recently just before the Sivas Massacre trials ended, the doors of Alevi residences were marked in the city of Adıyaman, later in the city of İzmir and in May in the town of Didim, and written statements calling Alevis to the right path to God were left on their doors. The Minister of Interior refused to acknowledge the situation and declared on 1 March 2012 that the signs were most probably put by kids for they are at low height.

V. National Unity and Brother/Sisterhood Projects in 2009, democratization?

In 2007, the European Court of Human Rights¹⁷ and the Turkish State Council¹⁸ both decided in favor of the application of a parent to have his child exempted from the required Sunni-based religion and ethics courses¹⁹ in Turkish public schools on grounds of being of Alevi faith. According to Article 28 paragraph 1 of the Procedures of Administrative Justice Act, Turkish national court decisions are binding on the administration, and the “administration must implement the acts and take the actions required” within 30 days.²⁰ Yet, this is not what happened. Those parents who wanted to benefit from this court decision and exempt their children from the course were asked to present a court decision in their name. Instead, a rewriting of religion and ethics text books was launched, and the government started talking about a

¹⁶ ‘Maraş Katliamı protestosu engellendi’, *Bianet*, 24 December 2011.

¹⁷ *Hasan and Eylem Zengin v. Turkey*, no. 1448/04 (Sect. 2), ECHR 2007-XI – (9.10.07).

¹⁸ Danıştay Sekizinci Daire, yer 207, decision no 7481, decision date 28/12/2007.

¹⁹ This course was put in place by the 1982 military constitution and is constitutionally required (article 24).

²⁰ Law number 2577, “Procedure of Administrative Justice Act”.

“Democratic Opening Period” (*Demokratik Açılım Süreci*), entitled “National Unity and Brother (Sister) hood (*Milli Birlik ve Kardeşlik Projesi*)” calling for a dialogue with many groups including the Alevi organizations. Rule of law had judged against the government and now the government was saying “let’s talk about it.” In June 2008, the AKP parliamentary consultant to the Prime Minister on the “Alevi Opening,” resigned from the party prior to the start of the workshops on the “Alevi Question,” on grounds that AKP was not dedicated to ending discrimination against Alevis.²¹ AKP still carried on with the “opening,” and launched 7 workshops (3 June 2009 – 30 January 2010) on what it called the “Alevi Question,” one workshop with Alevi organizations and the another six with Faculties of Social Science, Faculties of Theology, Civil Society Organization, Media, Current and Old Parliamentarians, and a final three day workshop with certain participants invited from the previous 6 workshops. A workshop with Alevi organizations was not enough, the government had to continue the workshops and have “everybody” speak on what it coined as the “Alevi Question” until it found the mix of political and intellectual elite that would give the right answer to the “Question”: The status quo was not that bad after all.

The understanding of “dialogue” behind these workshops was quite peculiar, Turkish media reported the invitation of the number one suspect behind the bombings and violence in the 1978 Maraş Massacre of the Alevis to the 2008 Alevi Workshops. The invitation that was later withdrawn, and the faculty member moderating the workshops verified this fact during the workshops.

One very vivid axis of disagreement in the 8-month workshop period in 2009-2010 for “brother and sisterhood” was on the place of history in democratization. The government side presented itself as “cordial” but was not much interested in the history of massacres. The pro-government consensus in the workshops was that talking about the history of conflict and massacres will contribute to conflict in the present; for brotherhood and sisterhood in the present, history had to be buried. But, replaced with what? Brotherhood and sisterhood, of course, but how?

²¹ “AKP’de Alevi Sıkıntısı”, *Milliyet*, 13 June 2008.

VI. A misunderstood constitutional referendum in 2010

The referendum was rushed with a generously financed campaign employing all kinds of visual and verbal populist tools. A set of selective constitutional changes, mainly on the restructuring of the judiciary, were presented as the dismantling of the 1982 military constitution. For example, constitutional article 24 on required religion and ethics courses in public schools, a clear expression of the military's mobilization of religious morality as a cement of society was excluded from the agenda for change. The amount of money spent on the campaign by political parties was matter for a written question in the parliament two months later, and it was revealed that the AKP had spent more than twice the amount spent by the major party in opposition, the Republican Peoples Party (CHP).

One aspect of the referendum rush was AKP's huge "emotional" mobilization. Some AKP parliamentarians literally shed tears in parliament for the victims of the 12 September 1980 coup violence while 2 years later they were short on "emotions" on the *Uludere Incident*. But not only that, just in August 2010, a month before the 12 September 2010 referendum, in the city of Izmir, a local AKP group opposed the building of the statue of the famous 1970s socialist head of the municipality of the town of Fatsa, who was tortured under the 1980 military government.

The referendum was acclaimed as a success in the international and national media, and was polished with phrases such as "Turkey is passing from the law of the rulers to the rule of law."²² Actually, evaluated in context of the marks the 1980 military coup has left on the bodies and minds of Turkish society, a voter turnout of 77.4 % (elections turn out; 83% in 2011, 85.1% in 2007) and "No" vote of 42% is quite significant for a referendum mobilized against a military coup constitution.

VII. 2011 elections

Democratic elections and violence are mutually exclusive practices. Daily politics in the months before and after the 12 June 2011 elections in Turkey proved to the contrary. Some examples were: a teacher who had a heart attack after police used tear gas; another child

²² From pamphlet distributed in the streets.

killed by a police officer in Diyarbakır; many activist and non-activists taken from their homes under police custody without the necessity to provide a reason under terror laws; anti-syndicalism propaganda by some imams and gendarmes; a woman's rights activist whose hips were broken by the police; and many other similar incidents in the context of the approaching elections.

A demonstration against AKP's election campaign in May 2011 in Hopa, Artvin in North Eastern Turkey protesting against a government push nationwide for hydroelectric dams and tea prices ended with a police gas bomb killing a teacher. This police murder was followed by arrests and a court case opened against protestors who had their first trial after 5 months and were released because there was no evidence of any sort. In February 2012, Justice Medicine Institution²³ and Turkish Medical Association issued contradictory autopsy reports. The former stated that the person had died not from a gas bomb but from a heart condition he had already had, while the latter stated that the person's heart condition was not advanced enough to cause his death and that he had died from the gas bomb. The court had asked for a third report, and meanwhile, in such a context, in a belated written response to a written question on the use of tear gas in parliament, 22 May 2012 the Minister of Interior wrote the following lines:

According to the Chemical Weapons Agreement our country has signed in 1997, "tear making munition has to meet the condition of not having a lasting effect on human health" and gas munition which has met the condition of not having a lasting effect on human health, is being used.²⁴

This technical, cold response rocked the Turkish public for a week, many opposition party politicians suggesting that the minister should maybe try the gas himself. Turkey has already been convicted at least once at the European Court of Human Rights for arbitrary and reckless use of tear gas. During the May 1st celebrations in 2007, tear gas had taken another life, and in May 2012 a thirty year old citizen died from tear gas.

²³ Under the Ministry of Justice and does all medical reports necessary for courts.

²⁴ Answer to written question no: 7/5537, 22 May 2012, my translation.

For the past three general elections (2002, 2007, 2011) minority parties have participated with independent candidates and not as political parties. Running as independents offers a higher probability of having representation in parliament, because of the anti-minority electoral system facilitated by the 10 percent threshold. The BDP's success in the last elections was to include candidates from marginalized socialist parties and groups on its independent lists and have 36 independents elected.

Yet the security the 10-percent threshold—highest among European Council Member countries—offered to AKP was apparently not enough and the incident which served as the last drop to spill the water of Turkish politics before the elections was the High Council of Elections' (YSK) decision on 19 April 2011 vetoing 12 out of the 61 BDP-supported independent candidates on grounds of having a past "criminal" record. Some independent candidates who got elected in the June elections were imprisoned. Following the YSK decision, the Prime Minister hailed in his election speech in the city of Muş on 30 April 2011 – where in the 2007 general elections an independent candidate had been elected – the motto, "single nation, single patrie, single flag and single state," which he had repeated in December 2007, right after the parliamentary decision to send the Turkish troops across the Iraqi border. After protests against the YSK decision, YSK took the decision back; the police shot a child in Diyarbakır while countering the protests.

And after the elections some persons were seriously injured by police raids at the victory celebrations of the independent candidates for parliament. Clearly, AKP had entered and exited the elections with the backing of police violence demobilizing through fear in general, and in particular taking into custody all BDP-elected mayors, politicians and activists, who were expected to work at the approaching election campaign.

These blows on political rights recall the 1987 referendum on the removal of the ban on political rights—on whether those politicians banned by the military regime could return to political activity-- in the transition period from military regime to democracy. The 1987 referendum on political rights showed no signs of support for democratization in the hotbeds of religious conservatism, all responding in a range of 61.1—71.3 % "no" to political rights" where the nationwide answered 50.2% "yes." Among the top 6 cities saying "yes"

to political rights were Tunceli—Homeland of Kurdish Alevis (78.7%), Mardin—Southeastern City—(67.1%), Hakkari—Southeastern City—(63.4%), Zonguldak—city of miners— (61.9 %). These statistics can make us start thinking about current misconceptions of Turkish politics.²⁵

In announcing the electoral success of AKP, another detail is often not mentioned. The parliament's over all representativeness of the vote, but not its overall representativeness, has increased from 2002 to 2011. The parliament represented 53.67% of the total voters in 2002, 81.72% in 2007 and 88.7% in 2011; and not only AKP, all big parties increased their votes. In other words, the 10% threshold probably caused a "lost vote" concern, and small party supporters shifted their support to one of the three major parties fearing that their small party would not make the threshold.

IX. Against History: The Constitution in the Writing?

In this context and given the working principles of the Constitution Compromise Commission (AUK), Turkey could be heading for yet another constitutional change, but definitely not for societally-based and well-deliberated democratic constitution writing. According to article 5 of the working principles, it could convene with one member each from three of the four political parties. According to article 7, the Commission could decide not to keep records when it saw that to be necessary, and no record was made public until the Commission concluded its task of drafting a new constitution. Arguably, even during the drafting of the 1961 military constitution by professors, which also had no published minutes, agreements and disagreements in the professors commission during the process of drafting was exposed as much in the media as now. According to article 10 of AUK's working principles, the meetings of the commission was closed to the media, and the commission—through the head of the commission—would make media statements after a meeting as it saw fit. The most significant fact that found expression in the media was when the commission members raised concerns that the drafting would not finish before the end of the year 2012 as originally planned, and the Prime Minister responded; "This task [the drafting] is

²⁵ Turkish Statistical Institution, 1987 Referendum Results.

finished by the end of the year, or finished. If not, we will say it has kept us busy too long, and continue our path.”²⁶

Many associations and other platforms were making public statements on a new constitution and universities were asked to express their positions in writing, and the Constitution Compromise Commission held 13 outreach meeting with citizens in various cities before starting the drafting. The most comprehensive report was issued by the Constitutional Law Research Association (Anayasa-DER) and presented to the Turkish Grand National Assembly Constitution Compromise Commission on 20 March 2012. The report underlined some criticisms of the constitution making process in content and in procedure.²⁷ First, the report presented a list of the laws embodying sections which violate the rights to freedom of expression, freedom of press and freedom of association, and these violations have also been underscored by many European Union institutions: Turkish Criminal Code, Anti-Terror Law, Radio and Television Establishment and Broadcasting Law, Information Technologies and Communications Institutions Establishment Law, Law on regulating broadcasting on the internet and combating crimes committed by these broadcasts, Meetings and Demonstrations Law, Police Duties Law, Associations Law.

The origins of some of these laws and plus others such as the Political Parties Law, Parliamentarians elections law, Higher Education Law, all date back to the time period between 1980 and 1983 when the National Security Council had the power of legislation.²⁸ For instance, the most debated 10 percent threshold in the general elections is article 33 of the Parliamentarians Elections Law. The report concluded that the heritage of the 1980 military regime was in the legislation between 1980-1983, and tackling this legislation is at the top of the list for dismantling the military heritage of Turkish politics and taking a step towards a new constitution.²⁹

²⁶ ‘Önümüzde Üç Dönüm Noktası Var’, *Ntvmsnbc*, 02 October 2012.

²⁷ Anayasa Hukuku Araştırmaları Derneği, *Anayasa Raporu Çalışması*, (İstanbul: Legal Yayıncılık, 2012).

²⁸ Anayasa Hukuku Araştırmaları Derneği, *Anayasa Raporu Çalışması*, (İstanbul: Legal Yayıncılık, 2012), p.27.

²⁹ Anayasa Hukuku Araştırmaları Derneği, *Anayasa Raporu Çalışması*(İstanbul: Legal Yayıncılık, 2012), p.27.

Yet, in a recent public statement in an academic conference,³⁰ one Republican Peoples Party (CHP) member of the Constitution Compromise Commission (AUK) remarked that it was precisely this 1980-83 legislation that the AUK does not address, because of the opposition by the AKP:

That coup spirit is not only in the constitution, but it is also in our legislation between 12 September 1980 and 6 December 1983. Approximately 105 coup laws are still in effect. Which laws are these? Political Parties Law, election law, meetings and demonstrations law, police duties laws, 10 percent threshold, syndicate laws...we have to change them. In a subcommission of the Constitution Compromise Commission where Mr. Bal and Mr. İyimaya are also members, we expressed our will in the direction of a change in coup laws along with the constitution...Who does not want to discuss this matter? The government.³¹

On the one hand, the talk about dismantling the heritage of the 1980 military coup was the central momentum for a new constitution, but what passed for “dismantling” can be best described in one formulation: “against history.” The wills and voices of the actors and associations which suffered from the 1980 military coup did not bear on the process of “dismantling.” For example, the All Teachers Union and Solidarity Association (TÖB-DER) was closed down during the military regime by a military court decision in 1981. It was a strong association in the 1970s, and, particularly, a stronghold against ultra-nationalists. One key act of the ultranationalist provocations leading up to the 1978 Maraş Massacre was the murder of two TÖB-DER member teachers. In 2008, TÖB-DER’s application to the Ankara Mayorship for re-opening the association was turned down. TÖB-DER took the matter to court and, in 2010, an Ankara administrative court upheld the 1981 military court decision not to reopen. The number of examples can be increased. The quite striking example along these lines of my “against history” thesis is that one of the AKP members of the AUK was actually the

³⁰ Akdeniz Havzasında Anayasal Süreçler özel sayısı, *Anayasa Hukuku Dergisi* 1: 2 (2012).

³¹ Atilla Kart, “Demokrasi ve İnsan Hakları Önünde bir engel olarak 1982 Anayasası Ruhu,” Akdeniz Havzasında Anayasal Süreçler özel sayısı, *Anayasa Hukuku Dergisi* 1: 2 (2012), p. 164, my translation.

lawyer of military coup leader General Kenan Evren and defended him against public intellectuals in a court case which concluded in 1990. Aziz Nesin a very famous writer had opened a court case against General Kenan Evren when Evren called the 1260 signatories of the famous 1984 "intellectuals" petition, traitors.

At the time of the writing of this article, AKP had 327 out of 549 seats in parliament and around 50 of those seats are the effect of the 10-percent threshold. This raises further questions on the legitimacy of the current parliament for writing a constitution. This is even more so given the typical vicious circle which marks the start of constitution writing episodes; that is, the current power holders decide on the procedures for writing a constitution which also has to bind the current power holders. On 19 September 2011, 24 constitutional lawyers were called in for a meeting in the parliament and there was a division among scholars on whether a constituent assembly or the parliament would make the new constitution, and not surprisingly, the latter path was decided by the majority in the parliament.

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