

Turkey's Procedural Challenges to Making a New Constitution

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I. INTRODUCTION

Designing, adopting and implementing a new liberal democratic constitution focused on the rights of the individual, pose a formidable challenge to Turkey. Virtually all non-governmental organizations, political parties and legal scholars have criticized the Constitution of 1982 as a reflection of an authoritarian and statist spirit, largely as a result of the very process by which the constitution was made and adopted. The question then arises as to why all subsequent efforts to make and adopt a new constitution have failed. Focusing on only the content and context of a new constitution, rather than also emphasizing a democratic constitution-making process, ignores a significant principle of modern constitution-making. We therefore come to the question of what possible solutions may be applicable to Turkey's dilemma. Designing, adopting, and successfully implementing a new democratic constitution require transparency and a comprehensive consensus, which can only be achieved through an inclusive process that is suitable to Turkey's circumstances and the core values of Turkish society.

I will begin by examining Turkey's experience with the constitution-making process, giving a brief background on the constitutional debate in Turkey and mentioning some of the most important features that appear to have had an effect on the process of its creation. I will then analyze the main constitutional-making systems in the world. Ultimately, I

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am not going to give a magical solution regarding which system would be suitable to Turkey's circumstances. Instead, I will argue that even though there is no set prototype for the structural design of a new constitution, there are principles that should be followed in order to maintain a democratic constitution-making process.

II. THE FACTORS THAT CAUSE TO CHANGE THE 1982 CONSTITUTION IN TURKEY

Designing, adopting and implementing a new democratic constitution focused on the rights of the individual pose a formidable challenge to Turkey. Almost all non-governmental organizations, political parties and legal scholars have criticized the Constitution of 1982 as a reflection of authoritarian and statist spirit, mostly as a result of the process by which it was made and adopted. Moreover, drafts of amendments prepared by individuals and groups such as think tanks and legal scholars have increased dramatically over time. So why have all efforts to make and adopt a new constitution failed?

As a consequence of Turkey's own unique political development, there have been ongoing debates related to making a new constitution for a long time. Especially since 2007, making a new democratic constitution has become a significant priority for Turkey. In 2007, a new Turkish draft constitution was prepared by a group of constitutional law professors at the request of the Justice and Development Party (AK Party). However, many objections have been raised by civil-society organizations and opposition parties. The legitimacy of the structural design behind the making of the constitution has been questioned. The latter criticism, raised by some legal scholars, has been based on whether the current parliament even has the authority to make a new constitution. Following these criticisms, the draft itself was no longer discussed. It is important to note that this draft was neither the first, nor the only draft constitution at the time. The number of drafts made by legal scholars and groups such as the National Platform on the Constitution, which had 83 non-governmental organization representatives including the Turkish Bar Association and

the Union of Chambers and Commodity Exchanges of Turkey, were increasing every day.

Following certain political developments, the AK Party reintroduced a constitutional amendment intended to do away with the headscarf ban at universities. This was overturned by the Constitutional Court.² According to the court, the constitutional amendment package was an attempt to change non-amendable articles of the Turkish Constitution including articles 2 and 4. Basically, the Court's argument focused on the impossi-

² E. 2008/16, K. 2008/116, June 5, 2008, <http://www.anayasa.gov.tr>, 01/15/2010. The phrase "in utilization of all forms of public services" following the phrase "in all their proceedings" in section four of Article 10 is annulled by the Constitutional Court ruling. "Article 10: (As amended on Feb 9, 2008) All individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations. Men and women have equal rights. The State shall have the obligation to ensure that this equality exists in practice. No privilege shall be granted to any individual, family, group or class. State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings."

The phrase "No one can be deprived of the right to higher education due to any reason not explicitly written in the law. Limitations on the exercise of this right shall be determined by the law." in section six of Article 42 is annulled by the Constitutional Court ruling. "Article 42: (As amended on Feb 9, 2008) No one shall be deprived of the right of learning and education. The scope of the right to education shall be defined and regulated by law. Training and education shall be conducted along the lines of the principles and reforms of Atatürk, on the basis of contemporary science and educational methods, under the supervision and control of the state. Institutions of training and education contravening these provisions shall not be established. The freedom of training and education does not relieve the individual from loyalty to the Constitution. Primary education is compulsory for all citizens of both sexes and is free of charge in state schools. The principles governing the functioning of private primary and secondary schools shall be regulated by law in keeping with the standards set for state schools. The state shall provide scholarships and other means of assistance to enable students of merit lacking financial means to continue their education. The state shall take necessary measures to rehabilitate those in need of special training so as to render such people useful to society. Training, education, research, and study are the only activities that shall be pursued at institutions of training and education. These activities shall not be obstructed in any way. No language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institutions of training or education. Foreign languages to be taught in institutions of training and education and the rules to be followed by schools conducting training and education in a foreign language shall be determined by law. The provisions of international treaties are reserved.," <http://www.tbmm.gov.tr>, 01/15/2010.

bility of amending the first three articles of the constitution, which define the Republic's core values, including secularism. Subsequently, the Prime Minister has stated that there have been ongoing preparations since 2007 for a small constitutional amendment package rather than a detailed constitutional change.³ Most recently, the Parliamentary speaker, Mehmet Ali Sahin, has emphasized that if there is a draft that will be proposed to the Parliament, he will call opposition parties to negotiate and reach an agreement. Thus, on the one hand, both the uncertainty of the political landscape and the policy of the opposition parties of being closed to any negotiations related to changing the constitution made it difficult to reach an agreement on many contentious issues. These issues should have taken place in an open and public debate. These factors have caused the constitution-making process to proceed in uncertain terms. On the other hand, the approach of focusing on the substance of a new constitution rather than also emphasizing a democratic constitution-making process, ignored a significant principle of modern constitution-making. Ultimately, a combination of uncertainty and limited debate made the process inaccessible to the public.

Before further exploring the current issues related to constitution-making, a brief look at what the current constitution regulates in terms of amending the constitution will help shed light on a key point of the debates.

III. CONSTITUTIONAL AMENDMENT PROCESS IN THE 1982 CONSTITUTION

According to Article 175, the amendment process differs from the legislative act process.⁴ In fact, at least one-third of the members of Parliament must propose amendments in writing. These proposals must be debated twice and with a 48 hour interregnum at a plenary session. The constitution requires three-fifths or two-thirds majority of the members

³ "Basbakan Erdogan'dan Anayasa Degisikligi Mesaji", Radikal, <http://www.radikal.com.tr>, 01/15/2010.

⁴ Özbudun, Ergun, *Türk Anayasa Hukuku*, 8th ed., Ankara, 2004, pp. 147-158; Atar, Yavuz, *Türk Anayasa Hukuku*, 2nd ed., Konya, Mimoza, 2002, pp. 391-400.

of Parliament for the adoption of amendments. These majorities are based on the process of approval. If a proposed amendment is adopted by more than three-fifths majority, but less than two-thirds majority and the president does not send it back to the Parliament, the president has no choice but to submit it to a referendum. If the amendment is adopted by a two-thirds majority, the president may approve it or submit it to referendum. When the president sends the proposal back to the Parliament, the unchanged proposal must be adopted at least by two-thirds majority for progression of process.⁵

Article 175, which concerns the process of constitutional amendment, requires either a mandatory or voluntary referendum before its adoption. If the proposal is not submitted to a referendum, it is adopted and becomes formalized by the promulgation of the amendment in the Official Journal.⁶

The procedure for revising the constitution is a reflection of the general spirit of the 1982 Constitution, which is strict and conducive to the idea of the constitution acting as a framework for every undertaking.⁷ Ultimately, the constitution does not include a clause for creating a new constitution, but it includes a formal amendment clause for some changes as is evinced by the 1995, 2001, and 2004 amendments.⁸ Debates in Turkey start at this point, because there is a distinction between constitutional amendment, which is a legal and technical act, and consti-

⁵ See, the Constitution of the Republic of Turkey, Article 175, <http://www.tbmm.gov.tr>, 01/15/2010.

⁶ Erdoğan Teziç, *Anayasa Hukuku*, ed. 11, İstanbul, Beta, 2006, pp. 165, 166; Article 175/5 of 1982 Turkish Constitution.

⁷ Onar, Erdal, *1982 Anayasasında Anayasayı Değiştirme Sorunu*, Ankara, 1993, s. 23.

⁸ These amendments which brought the restriction of fundamental rights and freedoms into consonance with the European Convention on Human Rights in which Turkey is a state party, improved personal liberty and security, provided the guarantee of exercising the freedom of association, freedom of assembly and demonstration, abolished death penalty reflected the requirement of fulfillment of the European political and democratic conception, Yuksel, Saadet, “**Constitutional Arrangements of Turkey in 2001 Under the Framework of the European Union Adaptation Process**”, *Annales de la Faculté de Droit d'Istanbul*, Vol. 39, No. 56, Istanbul, 2007.

tution-making, which is the result of political dialogues and consensus and involves multiple actors.⁹

IV. COMPARISON OF THE TURKISH AND SPANISH PROCESS OF MAKING A NEW CONSTITUTION

Pursuant to the ongoing debates related to making a new constitution in Turkey, the Spanish model has been suggested as one to follow. I will briefly explain the reason why this is so. The same two factors which made it impossible for Turkey's drafting process to proceed, namely having a small, closed group of drafters and political uncertainty, were what made it possible for the process to proceed in Spain. I should briefly get into the circumstances of Spain when its constitution was made and adopted because I believe that considering the problems and questions created by other systems may sharpen the understanding of how we are different.¹⁰ The constitution-making process in Spain took place between 1977 and 1978. The delegation drafting the constitution, which was approved by a referendum, was a group of seven lawyers and legal scholars. At that time, political reform legislation was ambiguous and created confusion among people. Up until now, the Spanish process looks almost the same as what Turkey has gone through.

While this discussion is not meant to be all inclusive, I do want to pose two questions that could have been addressed by the drafters: first, why didn't the same model work for Turkey? And second, which feature of the Spanish process made it possible for their constitution-making to proceed successfully? In Spain, some of the drafters were representatives of the major political parties and were consequently responsible to their parties.¹¹ However, these parties were able to reach an agreement on

⁹ "Constituent Assemblies and the Process of Making a Constitution", International Institute for Democracy and Electoral Assistance, <http://www.idea.net>, 01/24/2010.

¹⁰ Jackson, Vicki C., "**The Supreme Court, 2004 Term: Comment: Constitutional Comparisons: Convergence, Resistance, Engagement**", *Harvard Law Review*, 2005, 119 *Harv. L. Rev.* 109, 14/01/2010.

¹¹ "Suarez' UDC, the Socialist and Communists, Popular Alliance, the principal rightist

many important issues. Even if Turkey had followed the Spanish model exactly, the process would still have been likely to reach a deadlock. For instance, even though the group of drafters in Spain worked in secret, they did not alienate a large segment of population. This made it possible to deal with contentious issues and to proceed by means of consensus.¹² In contrast, almost every group which worked on drafts in Turkey did not take into account their opposition's point of view and essentially made a consensus impossible.

V. MODELS OF COMPARATIVE CONSTITUTIONAL LAW FOR A DEMOCRATIC CONSTITUTION MAKING PROCESS

The key challenge for Turkey is how to keep both sides of the debate happy by addressing their opposing requirements, without ignoring a consultative process that enhances political and social dialogue.¹³ One of the most important opportunities for social dialogue is the adoption of a participatory **constitution-making process**. Based on the importance of including the public in constitution-making, I should briefly address the internal participatory system. An internal participatory system requires either the direct engagement of citizens or their engagement through representatives and proposals. Instead of focusing on obtaining support only for political elites¹⁴, an internal participatory process includes citizens in

party and the Catalan party were the represented parties.” Rosenfeld, Michel, “**Peaceful Transitions to Democracy: Constitution-Making Identity Building, and Peaceful Transition to Democracy: Theoretical Reflections Inspired by the Spanish Example**”, *Yeshiva University Cardozo Law Review*, 1998, 19 *Cardozo L. Rev.* 1891, 01/15/2010.

¹² Rosenfeld, Michel, *a.e.*

¹³ Samuels, Kirsti, “**UN Reform: Post-Conflict Peace-Building and Constitution-Making**”, *Chicago Journal of International Law*, 2006, 6 *Chi. J. Int'l L.* 663, 14/01/2010.

¹⁴ This system can be called “external participatory system” and does not include the public in the substantive decision-making forums. In this system, public interacts with the drafters through meetings and written submissions, Banks, Angela, “**Challenging Political Boundaries in Post-Conflict States**”, 2007, *University of Pennsylvania Journal*

the drafting. This extensive participation could enable the “development of a national consensus”¹⁵ and the resolution of many political and social conflicts.¹⁶ Here arises the question of how much agreement drafters should ensure. There is no simple answer to this issue yet there is an answer as to how hard they should try in achieving agreement. Look, we all know that a democratic constitution making process does not mean or guarantee %100 agreement. However, constitution makers should be aware of the responsibility they have in maintaining an ongoing integrity of the process. This requires careful weighing of the current political environment, social expectations and internal enforcement capability since all constitution-making processes involve many factors¹⁷. The more participatory the process, the more it is seen to broaden social dialogue and avoid the possibility of having the process disintegrate into political conflicts.¹⁸

Even though many democratic constitutions share a commitment to similar constitutional principles and also experience similar challenges in applying these principles to reality,¹⁹ there is no single constitutional system which can serve as a prototype for constitutional drafters. If modeling means searching for a structural design for prospective constitutional-making, **a new democratic constitution cannot exactly be “modeled.”**²⁰ For ordinary legislative acts, law makers can either adopt rules from other jurisdictions without independent inquiry into their institutional system or attempt a thoroughly independent assessment of

of International Law, 29 U. Pa. J. Int’l L. 105, 01/25/2010.

¹⁵ Banks, Angela, a.e.

¹⁶ Ibid.

¹⁷ Arato, Andrew, “**Post-Sovereign Constitution-Making and Its Pathology in Iraq**”, 2006/2007, New York Law School Law Review, 51 N.Y.L. Sch. L. Rev. 534, 01/16/2010.

¹⁸ Samuels, Kirsti, a.e.

¹⁹ Rahdert, Mark C., “**Comparative Constitutional Advocacy**”, American University Law Review, 2007, 56 Am. U.L. Rev. 553, 14/01/2010.

²⁰ Ludwikowski, Rett R., “**Mixed**” **Constitutions – Product of an East-Central European Constitutional Melting Pot**”, Boston University International Law Journal, 1998, 16 B.U. Int’l L.J. 1, 13/01/2010.

optimal design.²¹ This critical methodology is not that easy for constitution makers. But what they do have are universal values, reflecting a democratic constitution-making process, which should be embedded in the process by the drafters. Since the Constitution can be viewed as a site of engagement with the international, informed but not controlled by consideration of other nations' legal norms, they can apply the "engagement model"²² of comparative constitutional law to the constitution-making process. Modern democratic constitutions have many components including principles of fundamental human rights and freedoms and rule of law which the drafters of the constitutions should internalize.²³ Therefore, engagement between internal factors such as a more refined understanding of our own constitutional system and external factors such as shared commitments to fundamental rights and freedoms can be an effective source for national dialogue.²⁴ These principles can serve as a basic methodology for constitution drafters.

Constitution-making is much more difficult today than it has ever been because of the complexity of social and political circumstances. However, we do not see a global monoculture yet.²⁵ Therefore, a great deal of social, political and even legal diversity among peoples and every society's own core values and political developments should be carefully taken into account. In identifying a constitution-making process linked to a distinct social and political context, the term "organic constitutionalism"²⁶ is used to capture the spirit of culture, history and social circumstances of the country. Butleritchie's use of the term *organic* is meant to convey that not only should constitutional formation be

²¹ Vermeule, Adrian, "The Constitutional Law of Congressional Procedure", University of Chicago Law Review, 2004, 71 U. Chi. L. Rev. 361, 01/14/2010.

²² Jackson, Vicki C., a.e.

²³ Ludwikowski, Rett R., a.e.

²⁴ Rahdert, Mark C., a.e.

²⁵ Butleritchie, David T., "Organic Constitutionalism: Rousseau, Hegel and the Constitution of Society", Wayne State University the Journal of Law in Society, 2005, 6 J.L. Soc'y 36, 01/15/2010.

²⁶ Butleritchie, David T., a.e.

home-grown, but so should the process of constitution-making in order to maintain the most healthy and robust formation.²⁷

Keeping this in mind, I will give some examples of constitutional-making from other nations in the world in order to make a realistic comparison, because recognizing the differences in the designs of systems and procedures will provide us a starting point for thinking about how to maintain a democratic process at home. Since I am focusing on the process of making a new constitution rather than making constitutional amendments and since, with the exception of Spain almost every constitution²⁸ in Europe lacks a clause addressing the constitution-making process, I will briefly address the Spanish Constitution's mechanism for creating a new constitution. According to the Constitution of Spain, when a total revision of the Constitution is proposed, this proposal must be approved by a two-thirds majority of the members of each Chamber, and the Parliament shall immediately be dissolved. The Chambers elected must ratify the decision and proceed to examine the new Constitutional text, which must be approved by a two-thirds majority of the members of both Chambers. Once the amendment has been passed by the Parliament, it shall be submitted to ratification by referendum.²⁹ Finally, the draft constitution which is approved by Parliament shall be reviewed by an elected constituent assembly before being submitted to a referendum. The Constitution of Spain could be seen as the only European model which addresses a new constitution-making process, but it is not the only system which requires the approval of a constituent assembly.

We see that constituent assemblies have been convened all over the world. A constituent assembly is an assembly of representatives whose primary purpose is to draft or consider changes to a constitution. Before

²⁷ Ibid.

²⁸ For instance, The Swiss and Australian Constitutions require the consent of a majority of the voters in the entire federation and a majority of voters in a majority of States to approve a proposed alteration of the Constitution. In Switzerland, a constituent assembly drafted a proposed constitution which was approved in 1977, Aroney, Nicholas, "**Formation, Representation and Amendment in Federal Constitutions**", 2006, *The American Journal of Comparative Law*, 54 Am. J. Comp. L. 277, 01/20/2010.

²⁹ See, the Constitution of Spain, Article 168, <http://www.servat.unibe.ch>, 01/18/2010.

I proceed, I should identify four main types of constituent assemblies based on how their delegates can be selected. As we will see, the division is somewhat misleading, but it serves as a useful starting point for comparative thinking. The four main types are as follows: (1) a directly elected constituent assembly such as the 1897 Australian Assembly³⁰; (2) an indirectly elected convention such as constitutional convention of Germany/1948 and Australia/1973; (3) an appointed council such as the 1848 Swiss assembly which had some delegates appointed by government; and (4) the mixed system, which uses more than one delegate selection procedure. Delegates of this type of assembly can be elected directly or indirectly or through a combination of direct election and appointment such as in Spain/1977.³¹ Even though “constituent assemblies are rarely self-created”³², each selection system has its own characteristics in accordance with the social and political circumstances of its environment. As I will argue in my conclusion, this fact is important in understanding the nature of the draft they will make.

In Turkey, many attribute significance to a “constituent assembly” that simply does not exist. A constituent assembly is not a magic solution; it is made up of regular human beings after all. Instead, it is an important alternative for countries that lack public and political consensus to have rather than having an exact substitute for democratic constitution-making. It also reflects political circumstances³³, which is important in Turkey where some fear alienating political parties from the process. In such a formation, even in Turkey political parties will not be ignored and neither should they be.

³⁰ One of its delegations was indirectly elected by a state legislature, “**Roadmap to Constituent Assemblies Around the World**”, June 1996, Canada West Foundation, <http://www.uni.ca>, 01/24/2010.

³¹ “**Roadmap to Constituent Assemblies Around the World**”, June 1996, Canada West Foundation, <http://www.uni.ca>, 01/24/2010.

³² Elster, Jon, “**Forces and Mechanisms in the Constitution-Making Process**”, 1995, *Duke Law Journal*, 45 *Duke L.J.* 364, 01/16/2010.

³³ Elster, Jon, “**Arguing and Bargaining in Two Constituent Assemblies**”, 2000, *University of Pennsylvania Journal of Constitutional Law*, 2 *U. Pa. J. Const. L.* 345, 01/15/2010.

Does such a strong focus on the constitution-making process change or devalue our understanding of the constitution? No, because the democratic constitution-making process matters. No, because it is not just the constitution, but also the processes of its creation and adoption that provide sufficient safeguards for society.³⁴ The democratic constitution-making process has significant influence on the democratic content and substance of a constitution. "Since a constitution regulates and protects democratic principles, it is important that the constitution persists so that the democracy does also."³⁵ In my view, there are basically three principles that would help to maintain a democratic and legitimate constitution-making process: Consensus, Publicity, and Optimal Timing of Constitution-Making: Comparative examples show that consensus on the most important issues have been preferred in modern constitution-making. Even before constitution drafters start to work on a draft, the main political parties, institutions and scholars should meet to discuss a strategy that incorporates the values of all sides. Comprehensive consensus also avoids reflecting only the majority's point of view.³⁶ Public access to the process should not be resisted. Even where drafters work in secret, an extended public discussion has an essential role in containing the main conflicts between divisive interests and the expectations of society.

When is the right time to make a new constitution? There are several circumstances which force constitution-making, such as social and

³⁴ Ku, Raymond, "**Consensus of the Governed: The Legitimacy of Constitutional Change**", *Fordham Law Review*, 1995, 64 *Fordham L. Rev.* 535, 01/15/2010.

³⁵ Piotrowski, William, "**Commentary Introduction: Democracy and Constitutions: One Without the Other?**", *Connecticut Law Review*, 2005, 37 *Conn. L. Rev.* 851, 01/15/2010.

³⁶ Arato, Andrew, "**International Conference on Comparative Constitutional Law: Contribution: Forms of Constitution Making and Theories of Democracy**", 1995, *Yeshiva University Cardozo Law Review*, 17 *Cardozo L. Rev.* 191, 01/16/2010.

economic crises³⁷, regime collapse³⁸, and the creation of new state.³⁹ In some cases, it might be said that Turkey does not have any of these circumstances. In other cases, it should be remembered that almost every legal and political issue since 2007 has caused a constitutional crisis, starting with the election of our current President. In either case, main political actors and drafters should choose to act when the constitution can no longer respond to society's expectations.⁴⁰

The more difficult it is to change the constitution; the more people tend to see it as an insupportable prison.⁴¹ However, since the constitution represents fundamental law, constitutional changes should be rare.⁴² If a constitution is easily changed, the distinction between its fundamental nature and regular legislation could be lost.⁴³ Therefore, there is a need for a reasonable degree of rigidity.⁴⁴ A constitution which embraces democratic principles should be structured, yet open-ended enough to adapt to the future, so that people "view the constitution as a given framework for policy rather than as a tool for policy"⁴⁵. However, the drafters of a new constitution should distinguish between flexibility and uncertainty. The strategy of sticking to your guns followed by political parties in Tur-

³⁷ The social and economic crisis impelled the process in the making of the French Constitution of 1791 and American Constitution of 1787, Elster, Jon, "**Forces and Mechanisms in the Constitution-Making Process**", 1995, Duke Law Journal, 45 Duke L.J. 364, 01/16/2010.

³⁸ Regime collapse caused the constitution-making process in Eastern Europe in the early 1990s. However, in the making of French Constitution of 1958, there was fear of regime collapse and the constitution was imposed under the shadow of a military rebellion, Elster, Jon, **a.e.**

³⁹ There was creation of a new state in Poland and Czechoslovakia after the First World War, Elster, Jon, **a.e.**; Erdoğan, Mustafa, **Anayasal Demokrasi**, 7th ed., Ankara, Siyasal, 2005, pp. 48, 49.

⁴⁰ Arato, Andrew, **a.e.**; Eroğul, Cem, **Anayasayı Değiştirme Sorunu (Bir Mukayeseli Hukuk İncelemesi)**, Ankara, Sevinç, 1974, pp. 173-175.

⁴¹ Piotrowski, William, **a.e.**

⁴² Ku, Raymond, **a.e.**

⁴³ Ku, Raymond, **a.e.**

⁴⁴ Elster, Jon, "**Constitutionalism in Eastern Europe: An Introduction**", University of Chicago Law Review, 1991, 58 U. Chi. L. Rev. 447, 14/01/2010.

⁴⁵ Elster, Jon, **a.e.**

key, particularly the opposition, is simply a road to deadlock manifested as an unwillingness to accept even mere meetings with the other side. Analysts of democratic transitions state that no democratic constitution can be adopted and respected before the main political parties engage as bargaining partners and be mutually open to criticisms from the other side.⁴⁶ Why is this mutual agreement possible in Turkey? Because, unlike many European systems, Turkey does not have a close link between constitution-making and changes to the political structure.⁴⁷ Also, at least right now, we are not searching for a way to show how modern we are by drafting a democratic modern constitution.⁴⁸ So, in Turkey's case, an agreement by both sides to engage should be easier because everyone is aware that this is necessary. This should be represented differently in different settings.⁴⁹

In Turkey's case, the issue requires a deeper understanding of what factors and influences lead to "the constitution of Turkish society." Before I proceed, I should make clear my use of the term *the constitution of Turkish society*. In identifying a constitution as *the constitution of a society*, I intend to convey that the constitution should be a reflection of core values and needs of the society and/or with Rousseau's term, its "general will". Since constitutions do not shape social circumstances but rather follow from social circumstances we must recognize Rousseau's notion of the "true constitution," which is the most important form of law in the heart and

⁴⁶ Kolarova, Rumayan, "Tacit Agreements in the Bulgarian Transition to Democracy: Minority Rights and Constitutionalism", The University of Chicago Law School Roundtable, 1993, 1993 U Chi L Sch Roundtable 23, 01/14/2010.

⁴⁷ "Symposium: Constitutional 'Refolution' in the Ex-Communist World: The Rule of Law: September 26, 1996", 1997, The American University Journal of International Law & Policy, 12 Am. U.J. Int'l L. & Pol'y 45, 01/20/2010.

⁴⁸ "The Central and Eastern European drafters look much more closely at Western European models. The German and French constitutions are especially influential. The reasons for European influence are fairly obvious. Not only are these models readily available, but there is a powerful wish on the part of Europeans who lived under communism once again to be part of the family of Europe.", "Symposium: Constitutional 'Refolution' in the Ex-Communist World: The Rule of Law: September 26, 1996", 1997, The American University Journal of International Law & Policy, 12 Am. U.J. Int'l L. & Pol'y 45, 01/20/2010.

⁴⁹ Vermeule, Adrian, a.e.

mind of a society. The “true constitution” is an expression of the culture, experiences, desires and history of a specific people.⁵⁰ Especially in Turkey’s constitution-making process, reflecting the general will requires contribution to the process by every part of society.⁵¹ There is also the practical result of reflecting Rousseau’s “general will”. Society will be more accepting of what it views as constitution-makers putting in effort while recognizing the extent of their responsibility. Therefore, constitution-makers should not be ignorant of the fact that the “general will cannot be determined by any specific individual or group”.⁵² Most importantly, the role of society should be kept to a maximum to reflect the general will and achieve real consensus. In Turkey, after the draft made by a group of professors was presented to the public and found to lack the democratic underpinnings in its drafting process, it was difficult to get people back to a discussion of a democratic constitution. From that point on, debates became static and locked to discussing only this past drafting process. Moreover, the opposition parties became closed to every negotiation related to constitution-making. Due to these social and political circumstances, it has been and will be difficult to shift debates to a focus on the possibility of a democratic constitution-making process in Turkey. Therefore, from now on, every step related to this process will be crucial and every step should be maintained in accordance with the general will of Turkish society.

VI. CONCLUSION

Let me conclude by underlining some comments on the implications that may be drawn from the arguments I made above:

- The legitimacy of constitution-making is not simply an academic question. The process itself is shaped by political and social developments and its outcomes affect the lives of people in the country. Therefore, constitution-makers should show that they are aware

⁵⁰ Butleritchie, David T., **a.e.**

⁵¹ Butleritchie uses “the term of “organic constitutionalism” to convey that such a process is most healthy and robust when it is left to grow from within its own particular context”, Butleritchie, David T., **a.e.**

⁵² Butleritchie, David T., **a.e.**

that “what they do will intimately affect scores of people who will live under the structures they make and implement”.⁵³

- The complexity of social and political circumstances is not special to Turkey. Almost all contemporary societies are marked by complexity of social and political characteristics. Even if these characteristics might sometimes be inarticulate, constitution-makers should take them into account because they are required to look beyond their own interests.⁵⁴
- Turkish Parliament could propose and approve a draft constitution with a qualified majority. However, the Parliament may either work with a constituent convention while it is preparing the final version or the draft could be submitted to a constituent assembly’s approval before submitting it to a referendum. In this process, a constituent assembly that includes every part of society matters, because making a new constitution should reflect that society’s general will. This process will also take care not to ignore the extant political parties as main actors, because what we see is that even in modern constituent assemblies the interests of political parties are often decisive. So, in this process, the interests of political parties will also be reflected in shaping the draft. Therefore, drafting a constitution in parliament and then submitting it to a referendum without establishing and getting approval from a Constitutional Assembly that includes every part of society might not meet the requirement of democracy and most importantly the will of all parts of Turkish society.
- If a constituent assembly is created, there are principles that are fundamental components of the process that should not be forgotten:
 - Agreeing on the goals and procedures needed for making the Constitution;

⁵³ Butleritchie, David T., **a.e.**

⁵⁴ Piotrowski, William, **a.e.**; Butleritchie, David T., **a.e.**

- Consulting people and interest groups;
- Analyzing opinions;
- Holding public discussions on the draft constitution and then preparing the final version of the constitution.⁵⁵
- The determinative features that are essential to the success of the constitution-making process in Turkey can be summed up in the following two words: comprehensive consensus. The constituent will of the people cannot be expressed without their involvement in the process.
- Designing, adopting, and successfully implementing a new democratic constitution require transparency and a comprehensive consensus, which can only be provided through an inclusive process, suitable to Turkey's circumstances and the core values of Turkish society.
- If Turkey wants to become a more liberal, democratic state governed by the rule of law, one that guarantees fundamental rights and freedoms, including respect for personal choice and if Turkey wants to continue its integration into the EU, it should keep moving ahead.⁵⁶
- Since democratic constitutions are meant to be the reflections of experiences, expectations, and desires of a society, the democratic constitution-making process in Turkey should be accord with the general will of its society.
- Society's contribution to the constitution-making process should be welcomed and encouraged, not refused.

⁵⁵ Elster, Jon, **a.e.**

⁵⁶ Feldman, Noah, "**Turkey: Op-Ed: "Veiled Democracy"**", New York Times, 02/12/2008.

