

# COUNTRY REPORT

## TURKEY



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## Introduction<sup>1</sup>

Turkey represents a case of majoritarian imposition in constitution-making. In this report we explore Turkey's legal framework of constitutional change and constitution-making dynamics, the absence of deliberative democracy in Turkey's constitutional history and investigate the episode of drafting a new constitution that attempted to incorporate a deliberative process but failed. We conclude with a discussion of the challenges faced and potential future developments.

## Legal Framework of Constitution-Making & Constitution Making Dynamics

Turkey's current constitution was drafted by the military regime and has been amended 19 times since it entered into force in 1982. The latest amendments in 2017, adopted under a state of emergency, transformed the parliamentary form of government to an executive dominated presidential system. Before the changes, the head of state also had substantial political powers for a classical parliamentary system but essentially its role was mostly symbolic. The 2007 constitutional change that allowed the direct election of the president and the 2010 constitutional change that allowed the ruling party, the AKP, undercut the influence of the military and the judiciary were instrumental in perpetuating AKP's majority rule. Including the latest amendments in 2017, these constitutional changes were approved via referendums.

The amendment-making rule allows for two constitutional amendment routes. According to Art. 175 (as amended in 1987) constitutional change must be proposed by at least one third of the members of the parliament and the proposal must be debated twice and requires a secret ballot. However, depending on the majority threshold required for approval, there are two paths. A constitutional amendment can be either approved via two-thirds majority (with optional referendum) and another via three-fifths majority (with obligatory referendum). Accordingly, either the proposal for constitutional change can be approved by two-thirds majority and the president, in that case, must either ratify the bill or submit it to the referendum or the proposal for constitutional change must be approved by three-fifths but less than two-thirds majority, and in that the president must submit it to the referendum.

The fact that there is an alternative mechanism of constitutional change that requires a reduced majority but also approval by people, has allowed majority governments to push for constitutional change with the stamp of approval provided by the referendum without seeking parliamentary consensus. There is no minimum turnout threshold and approval by a referendum requires a simple majority of the votes cast. According to Art. 175, the parliament decides, in case of obligatory or optional referendum, which amendments will be voted together and which will be voted separately but this provision has not been complied during the three referendums held under the AKP government.

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Among the 19 instances of constitutional change, we can distinguish between two tracks. The first track refers to constitutional change through a consensual parliamentary process with a qualified majority (two-thirds of the MPs). These include the amendments (1993-2004) approved in the context of the EU accession process, which overall strengthened and expanded constitutional rights and freedoms. The second track refers to constitutional amendments that were first adopted by a three-fifths majority (but less than two-thirds), and later approved by a referendum. These changes mostly reflected the preferences of the ruling party. It should be noted that all five referendums that took place since the 1982 Constitution entered into force, took place under a majority/single party government. Under the AKP government, Turkey adopted constitutional changes via referendums in 2007, 2010 and 2017 where recourse to popular vote allowed majority imposition and dismissal of parliamentary compromise. The 2017 constitutional amendments approved by a referendum on April 16, 2017 not only took place under a state of emergency, but it also expanded the powers of the executive, consolidated it in the hands of one person, weakened checks and balances and eliminated the nonpartisan status of the head of state. Therefore, the availability of an alternative mechanism of constitutional change that can be achieved with a reduced majority and a referendum that purports to represent the will of the people, helped the governing party and its leader to entrench its majoritarian rule. In addition to these five referendums, the 1961 and 1982 Constitutions, which were both drafted under the supervision of military rule, were put to popular vote to provide a stamp of popular legitimacy.

The Turkish Constitution does not stipulate a provision for its total replacement. In fact, it includes three unamendable articles on the republican form and other characteristics and symbols of the Turkish state.

### **Constitution Making and Deliberative Democracy**

Outside of the referendums, where the people effectively have veto power over the proposed changes, the Turkish constitution does not stipulate a formal role. As a result, Turkey's constitution-making has mostly included elite deliberations. The 1924 Constitution has been drafted and ratified by the parliament but unlike the wartime 1921 Constitution, its drafters did represent a diverse group of actors and interests. The constituent assembly that deliberated and adopted the 1961 Constitution was formed after the 1960 coup and was made up of one committee with military officers and an assembly of representatives partly appointed and partly indirectly elected. The 1982 Constitution was similarly drafted after a military coup also included a two chamber constituent assembly, a council with the members of the junta and a consultative assembly with members directly appointed and selected by the military council. Both instances of constitution-making included an exclusionary approach, not only because they were drafted under military influence and control but also because in both cases, groups within the political elite were also excluded and deliberations took place behind closed doors. Public deliberation was limited in the former as well, but it was completely suppressed before the 1982 referendum.

A consensual parliamentary process did produce amendments that had a democratizing effect (1993-2004). Specifically the 1995 and 2001 constitutional reform processes were carried out by an All-Party Accord Commission, that included all political parties with equal representation and provided for open parliamentary and societal deliberation. This ad-hoc model provided a general blueprint for the 2011-2013 constitution-making process that ultimately failed after agreeing on mostly relatively uncontested issues on rights and freedoms.

Accordingly, each of the four political parties in the parliament provided three members to the Constitutional Conciliation Commission (Anayasa Uzlaşma Komisyonu, AUK). The committee was formed from the members of the ordinary parliament and chaired by the President of the parliament. The procedural constraint to adopt provisions unanimously made the process difficult and resulted in deadlock when the governing party AKP insisted on presidentialism. Although this was mostly an elite-driven process, it did also include consultation with civil society members and received the opinions of individuals. Before the AUK began its deliberations, the commission, organized in three subcommittees heard from different organizations. In total there were 160 hearings and subcommittees met with 42 organizations, including twenty universities and fourteen political parties; 39 professional associations and unions; 79 foundations and other civil society organizations (Ucum and Genc 2012). In addition, individuals and civil society organizations were asked to share their opinions via mail, e-mail or through the website set up for the new constitution. In total, the AUK received inputs from 64 thousand people, including 440 civil society organizations. Besides this formal method of consultation, the AUK collaborated with the roundtables organized by the Economic Policy Research Foundation of Turkey (TEPAV- Türkiye Ekonomi Politikaları Araştırma Vakfı). TEPAV organized meetings in thirteen provinces. Known as “Turkey Speaks” (Türkiye Konuşuyor), these conventions brought together 500-1000 people (Buburoglu and Göker 2014). The meetings provided a venue for citizen deliberation and surveys were also conducted to collect opinions.

The AUK was originally conceived to work in a two-tiered structure, where the writing commission included the members of AUK, as well as their legal experts and consultants and produced draft provisions which were later debated and voted by the upper commission. However, the lack of progress despite the approaching deadline led the AUK to forego this structure and carried out the deliberations, drafting and decision making in the writing commission. The upper chamber only met to discuss more general issues pertaining to the process.

The AUK was dissolved in December 2013. The inputs received from civil society organizations, as well as the proposals received during the public consultation phase, were not effectively integrated into the drafting process. In fact, with the exception of a few instances where drafters referred to public input, the drafters did not factor in or appealed to the opinions received during the public consultation process. Although, the AUK initially planned to also have public consultation after the drafting process was complete, this phase could not be carried out because the AUK was adjourned indefinitely (Petersen and Yanasmayan 2020).

## Challenges and next developments

Following the failure of popular constitution-making in 2013, Turkey under the AKP government retreated to majoritarian constitution-making. The 2016 amendment, sponsored by AKP introduced a temporary provision to remove the parliamentary immunity of those deputies that were facing criminal investigations at the time of its adoption. This was a maneuver to target mainly the pro-Kurdish opposition, yet it was also backed by some members of the other opposition party based on the argument that, if they did not support the proposal, it would nevertheless be approved in a referendum. Following the coup attempt in July 2016, a state of emergency was declared and AKP, in coalition with the nationalist party (MHP) proposed constitutional amendments in late 2016 and a referendum in April 2017 approved those changes that effectively centralized power in the executive and weakened checks and balances.

Following the general and presidential elections in June 2018- also held under a state of emergency, the new constitutional order entered into force on July 9, 2018. The executive centered presidential system, has allowed the institutionalization of an authoritarian regime. However, the opposition victories in 2019 local elections have increased the opposition parties' call for bringing back a "strengthened parliamentary system". Yet for the opposition parties, the main challenge is to organize such an alliance that could facilitate such a transition. However, the absence of deliberative democracy in Turkey's constitutional history and the abuse of referendums as tools of majoritarian imposition in the last decade, suggest that breaking the path dependent history of constitutional change may also prove to be difficult.

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