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ANALYSIS:

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Gareth H. Jenkins

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THE TURKEY ANALYST

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TURKEY'S CONSTITUTIONAL AMENDMENTS: ONE STEP FORWARD, TWO STEPS BACK?

Gareth Jenkins

On March 22, Turkey's ruling Justice and Development Party (AKP) announced a package of 26 proposed changes to the country's constitution, including a restructuring of the Constitutional Court and the Supreme Board of Prosecutors and Judges (HSYK). Hailed as a major step towards full democratization and the harmonization of Turkish legislation with the requirements for EU accession by AKP supporters, the constitutional amendments are conversely criticized by the party's opponents as an attempt by the AKP to seize control of the judicial system.

BACKGROUND: There has long been a general acknowledgment that the current Turkish constitution, which was promulgated in 1982 during a period of repressive military rule, needs to be either radically overhauled or replaced completely. After its landslide election victory in July 2007, the AKP began work on drafting a new constitution. In early December 2007, Prime Minister Recep Tayyip Erdoğan promised that the draft would be made public by the end of the month. But, in early 2008, the AKP abruptly abandoned the draft in favor of attempting to amend the 1982 constitution to lift the ban which currently prevents women wearing the headscarf from attending university.

The reasons for the timing of the AKP's current attempt to amend the constitution appear to be threefold. First, a desire to be seen to be implementing reforms in the hope of its revitalizing its jaded image in the run-up to the 2011 general election; second, fear of another closure case; and third, an attempt to assert governmental control over the judiciary.

Many of the AKP's critics – including elements in the state establishment – are opposed to another closure case against the party on the grounds that

it would boost the party's popularity and lend it democratic credibility at a time when its image has been badly tarnished by allegations of corruption and the abuse of power, economic mismanagement and fiascos such as the collapse of its “Democratic



Opening” to the Kurdish minority. Nevertheless, in recent months there have been persistent rumors in Ankara that another closure case is being prepared against the AKP.

The EU has repeatedly called on the AKP to reform the Turkish legal system, including restructuring the Supreme Board of Prosecutors and Judges (HSYK). In April 2009, a 30-page report commissioned by the EU detailed a number of problems in the judiciary that needed to be addressed. But it was only when the HSYK challenged the authority of the Justice Ministry that the AKP decided to act.

In 2007, İlhan Cihaner was appointed the public prosecutor in Erzincan and began targeting the activities of Islamic networks in the province, such as the İsmailağa community and the powerful Fethullah Gülen movement. During the course of his investigation, Cihaner claimed to have uncovered evidence that members of the networks, including individuals close to the AKP, were involved in a number of criminal activities, such as running illegal Quran courses and fixing state contracts. Although it has no legal powers to do so, the Justice Ministry attempted to persuade Cihaner to drop his investigation. When he refused, he was stripped of his powers and the case transferred to Osman Şanal, the public prosecutor in Erzurum. Cihaner was subsequently charged with membership of the alleged “Ergenekon terrorist organization”. He is currently in prison awaiting trial.

The HSYK currently consists of the Justice Minister, the Justice Ministry Undersecretary and five members of the judiciary. The latter reacted to Cihaner’s dismissal by holding a meeting and stripping four public prosecutors perceived of being sympathetic to the AKP – including Şanal – of their powers. The AKP reacted furiously, accusing the five members of the HSYK of being politically motivated and questioning the legality of their decision to remove the four public prosecutors from their posts. Regardless of the truth of the accusations, the incident underlined how the judicial system has become an ideological

battlefield between the AKP and its sympathizers on the one side and the remnants of Turkey’s hard-line Kemalist establishment on the other.

Despite their numerous absurdities and manifest abuses of the law, cases such as the Ergenekon investigation – and more recently the so-called “Sledgehammer” and “Cage Plan” arrests – have demonstrated the dramatic decline in the political influence of the Turkish military, which has been powerless to prevent scores of serving and retired personnel being detained and imprisoned.

In the absence of an effective political opposition, many secularists regard the higher echelons of the judiciary as the last bulwark against what they believe is the AKP’s ambition to seize complete control of the apparatus of state and dismantle Turkey’s official ideology of Kemalism. In this context the most controversial parts of the AKP’s constitutional reform package have been those which deal with restructuring the HSYK and the Constitutional Court.

IMPLICATIONS: The reform package announced on 22 March contains several provisions which are wholly or partially compatible with the demands of the EU, although there are also others which simply contradict the EU’s recommendations. More significantly, the AKP has been highly selective; it has either advocated changes or retained clauses which restrict the room for maneuver of its opponents and increase its own influence, while refusing to contemplate any reforms which would curb its own power.

The package provides for the establishment of an Ombudsman and responds to a long-lasting demand of the Turkish women’s movement by proposing to amend Article 10 of the constitution to remove the legal obstacles to positive gender discrimination, although there is no indication of whether or not positive discrimination will

actually be introduced. Similarly, the package proposes changing Article 53 of the constitution to allow civil servants to join trade unions, but stops short of giving them the right to strike.

Proposed changes to Article 145 of the constitution would make serving military personnel liable to prosecution in civilian courts, rather than military courts, for all offenses except those directly related to their military “duties and responsibilities.” The package also advocates amending Article 125 to allow officers dismissed by the Supreme Military Council (YAS), which frequently cashiered officers suspected of Islamist activism, the right to appeal. In addition, the package proposes abolishing Provisional Article 15 of the 1982 Constitution, which prevents the prosecution of those responsible for the 1980 coup. However, the statute of limitations and the advanced age of the surviving members of the junta make it extremely unlikely that any would actually face trial.

The package seeks to make it more difficult to outlaw political parties by making closure cases subject to the approval of a special committee consisting of members of the parties in parliament. It is currently unclear how this would work in practice, although it would appear to transfer a measure of judicial authority from the courts to parliament and put smaller parties at a distinct disadvantage.

However, the reform package makes no attempt to address other long-standing anomalies. For example, the package contains no provisions to reduce the national threshold for representation in parliament from its current level of 10 percent. Nor are there any proposals to limit parliamentary immunity or address the discrimination faced by ethnic and non-Sunni Muslim religious minorities.

Most attention has focused on the AKP’s plans to restructure the Constitutional Court and the

HSYK. The package proposes increasing the number of members of the Constitutional Court to 17 from 11 at present. Of these, 14 would be appointed by the president and three by parliament. As at present, six of the members would be selected from candidates proposed by Turkey’s higher courts; although the increase in the number of the court’s members would mean that they would form a numerical minority, rather than a majority as at present.

Equally controversial are the provisions for the restructuring of the HSYK, which the AKP proposes increasing to 21 members. This is broadly in line with the recommendations of the EU report of April 2009, which advocated allowing a broader cross-section of the judiciary to be represented on the HSYK, without going into details. However the EU report described the presence on the HSYK of the Justice Minister as chair of the council as being incompatible with the separation of powers. But the reform package announced on March 22 proposes retaining the Justice Minister as chair of the HSYK; thus preserving the AKP’s current influence on the council while – through the appointment of new members to the council – diluting any opposition to the government.

In order to be enacted, constitutional amendments must receive the support of 367 of the 550 members of parliament. The AKP currently has 336 deputies. However, if constitutional amendments receive the support of 330 members of parliament, the president can decide to put them to a public referendum, which would probably be held in late June 2010.

If the reform package is passed by parliament, it appears almost inevitable that the opposition parties will apply to the Constitutional Court for its annulment. But it is currently unclear not only how the court will rule, but when it will issue a decision. If the ruling comes after the referendum, then some of the members of the newly expanded



Constitutional Court could effectively be asked to vote on whether or not they should retain their posts.

CONCLUSIONS: As so often in Turkey, when it comes to the constitutional reform package, the devil is not so much in the details as in the context. Opponents of the package complain, with some justification, that it increases the control of the government and President Abdullah Gül (who is a former AKP politician) over the choice of

members of the HSYK and the Constitutional Court, and thus reduces the independence of the judiciary. However, there is also considerable justification to the claim by the AKP's supporters that, even if they have been "independent", the higher courts in Turkey have hardly been impartial. In recent years, there have been several instances in which decisions of the higher courts appear to have been based on a specific ideology – namely a hard-line interpretation of the doctrine of Kemalism – rather than the law.

Yet, particularly since the party's reelection in July 2007, there have also been numerous examples of the politically motivated abuse of power by AKP officials and party sympathizers in the lower echelons of the judiciary and the law enforcement system. When taken together with the self-serving selectivity of the content of the AKP's proposed constitutional amendments, such precedents raise concerns that the package will not serve the goal of moving Turkey closer to a pluralistic fully-functioning democracy.

Gareth Jenkins, a Nonresident Senior Fellow with the CACI & SRSP Joint Center, is an Istanbul-based writer and specialist of Turkish Affairs.

THE TURKISH NATIONALIST OPPOSITION AND ITS FOREIGN POLICY VIEWS

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Opinion polls in Turkey show that there is a very real possibility that the next general election may return one or two of the nationalist opposition parties, CHP and MHP to power. The nationalist opposition, together with strong resistance within the ruling AKP itself and the government's mishandling of those initiatives, has in fact already helped force the AKP to abandon its openings to Armenia and to the Kurdish minority. A Turkey ruled by the secularist-nationalists would be more circumspect in its dealings with Muslim countries. Yet in a fundamental sense, the secularist-nationalists are, just like the current government, inclined to defy the West, strategically as well as ideologically.

BACKGROUND: Opinion polls show that there is a very real possibility that the next general election may return one or two of the nationalist opposition parties – the Republican people's party (CHP) and the Nationalist Movement party (MHP) – to power. The polls put the CHP's

support at around 25 percent, with the MHP receiving a few points less. The ruling Justice and development party (AKP) receives around 35 percent, a significantly lower support than the 47 percent the party received in the general elections of 2007. The surge in the support for the

nationalist

opposition parties suggests that the Turkish electorate is not yet ready to abandon old habits. Nationalism seems to be re-imposing itself as an electoral necessity: tellingly, the support for the AKP fell sharply (to under 30 percent in some polls) after the government launched its opening to the Kurds, to recover after the



opening for all intents and purposes was abandoned with the clampdown on Kurdish nationalist politicians in late December and January.

The recent passing of the Armenian Genocide resolutions in the U.S. House foreign relations committee and the subsequent decision to the same effect of the Swedish Parliament has served as an occasion to reassert Turkish nationalism. Turkey reacted by calling back its ambassadors from both countries, and Prime Minister Recep Tayyip Erdoğan and Foreign Minister Ahmet Davutoğlu did not mince their words when condemning the resolutions.

Erdoğan announced that there are about 170,000 Armenians in Turkey and claimed that around 100,000 of them are illegal workers from the Republic of Armenia, whom he went on to threaten with expulsion. The statement was harshly criticized by liberals in Turkey. However, Erdoğan's threat was met with approval by the MHP and in fact echoed earlier statements in the same vein by representatives of the CHP; its foreign policy spokesmen, Onur Öymen and Şükrü Elekdağ, had preceded Erdoğan by calling for solid measures against the Armenians.

The threat to expel Armenians working in Turkey in retaliation to Western genocide resolutions serves as a reminder of the strength of Turkish nationalism. Although the AKP has sought to downplay nationalism – as was initially manifested in its since abandoned openings to Armenia and to the Kurdish minority – the party is nevertheless quick to adopt the nationalist rhetoric of the opposition when the circumstances seem to require that. Liberal Turkish commentators deplore that the AKP has shelved the Armenian opening, a move which they claim testifies to the fact that the nationalist parties have been accorded a veto right over foreign policy. Indeed, Egemen Bağış, Turkey's EU negotiator,

recently impressed that the AKP government can go only so far in offering new concessions on Cyprus, since it has to take the views of the opposition into account, as “Turkey is not a sultanate or emirate”.



Canan Aritman

The threat against the Armenians in Turkey was welcomed by none less than Canan Aritman, one of the most fiercely nationalist deputies of the opposition CHP, who claimed ownership for the idea, stating that the proposal had first been made by her. However, another CHP deputy, Şükrü Elekdağ, Turkey's former ambassador to Washington, had already in 2006 proposed that the “70,000 Armenians who are working illegally in Turkey should be repatriated”. The AKP can thus count on being seconded by the nationalist opposition parties when it takes a nationalist stand against what is perceived as expressions of Western hostility to Turkey.

Incidents like the passing of the genocide resolutions bring to fore a Turkish nationalism that is also innately anti-western. That stance is a strong undercurrent in Turkish politics, and it in fact unites the AKP and the two unabashedly nationalist opposition parties of CHP and MHP,

the former officially center-left and the latter explicitly right-wing.

IMPLICATIONS: On a personal level, both parties' foreign policy is shaped by three former ambassadors, Şükrü Elekdağ and Onur Öymen in the CHP and Deniz Bölükbaşı in MHP. Their respective diplomatic careers have been dominated by issues – Cyprus, the Armenian problem, and the PKK – that for years have brought Turkey and its Western partners into conflict. Turkish nationalists tend to suspect Turkey's Western allies of harboring designs against Turkey's territorial integrity. Indeed, it is principally against this emotional backdrop that the secularist nationalists assail the foreign policies of the AKP.

In a recently published book, Onur Öymen of the CHP restates the nationalist case against the AKP: “the AKP government relies on foreign support for its legitimacy. It assumes that it can escape closure only by soliciting support from abroad. And of course, since foreign powers would not be doing this without being offered something in return, they demand concessions and the government gives the impression that it is prepared to be forthcoming, even if it is not able to go all the way. Turkey (ruled by the AKP) offers the specter of a country ready to make concessions on Cyprus, meeting the demands of the Greek Orthodox patriarchate, and offering to be accommodating on Middle Eastern issues and the Armenian question.”

The catalogue of Öymen's grievances offers something of a blueprint for what would be the foreign policy of a Turkey ruled by the nationalist parties, and it also highlights the secularist-nationalist view of the Western countries – the foreign powers that Öymen has in mind are obviously none other than the EU countries and the United States.

During the rule of the AKP, Turkey has privileged its relations with Middle Eastern and other Muslim countries, while relations with the West have been more or less neglected. The EU membership process has stalled, and the development of Turkish-American relations – although in a significantly better shape today than what was the case during the period that followed upon the invasion of Iraq – is impeded by the fact that both sides do not see eye-to-eye on the matter of Iran and its nuclear ambitions. The AKP has raised doubts in Western quarters about Turkey's ideological appurtenance by its vocal support for Hamas, Sudan and Iran. The Middle Eastern tilt of Turkish foreign policy under the AKP has generally lent credibility to the assertion that Turkey is “drifting” eastwards. Yet as Öymen's statements make clear, the nationalist opposition is hardly advocating any reorientation toward the West. The foreign policy spokesman of the CHP impresses that it is in Turkey's

interest to develop equally strong ties with a wide range of countries, from Russia and China to the



Ambassador Onur Öymen

United States; the U.S. is thus not singled out as an ally.

A Turkey ruled by the CHP would be more circumspect in its dealings with Muslim countries: Öymen is critical of the AKP's support for Hamas and he deplors the fact that Turkey, as a result, has lost leverage in the Middle East and is no longer accepted as a mediator. And the Turkic nationalist MHP would rather see that Turkey strengthens its ties with the wider Turkic region of Central Asia – with which the AKP has downgraded relations in favor of the Muslim Middle East where religious fervor is stronger. Yet although it is reasonable to expect that religion would have less impact on the foreign policy of a nationalist-ruled Turkey, the Iranian issue seems poised to remain as contentious as it is today. Indeed, the nationalist opposition does not seem to have any strong objections to the Iranian policies of the AKP government. The “Middle Eastern issues” that the CHP's Öymen alludes to, and on which he claims foreign powers are demanding concessions from Turkey, can be presumed to include Iran. Historically, Turkey and Iran have been geopolitical rivals; however, more recent history – notably the consequences of the U.S.-occupation of Iraq – has made the Turks ill-disposed toward taking a favorable view of another western incursion into the region.

CONCLUSIONS: In a more fundamental sense, the secularist-nationalists of Turkey are ideologically inclined to defy the West. Kemalist

ideology has little appreciation for liberal Western notions of societal pluralism. Absent the conditions of the Cold war, during which the urgency to stand shoulder to shoulder against the common Soviet enemy drew Turkey and the West together, there is very little that unites the old, Kemalist custodians of Turkish state power and the U.S. and Europe.

Reverting to pure and simple nationalism during the last decade, the secularist-nationalist tradition has shed any pretenses of being inspired by the West – or more precisely by the liberalism that defines the West. That in turn has a particularly adverse effect on internal Turkish dynamics, as the nationalism of the secularists serves to reinforce the nationalism of the Islamic conservatives. Although a departure from age-old non-libertarian traditions is envisaged by more liberal-minded representatives of the AKP, there seems to be little chance that liberalism can flourish with the secularist opposition fanning nationalism. And a nationalist foreign policy, haunted by the notion of supposedly colluding external enemies, will inevitably hamper the cautious attempt to rid Turkey of the habit of conceiving of expressions of pluralism as the “enemy within”.

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WHAT THE COLUMNISTS SAY

The question where Turkey is headed has acquired a new urgency with the proposal of the AKP government to amend the constitution. There is a consensus among liberal commentators that the changes are insufficient in addressing the issue of democratization. However, many liberals nevertheless welcome the amendments as a first, crucial step toward an eventual, comprehensive constitutional overhaul. The secularist-nationalists on the other hand decry the constitutional reform package as an attempt by the AKP to rid it of checks and balances.

TÜRMEEN: THE AKP WANTS TO RID ITSELF OF CHECKS AND BALANCES

Rıza Türmen in *Milliyet* writes that the governing party does not look favorably on notions like the rule of law, checks and balances, or an independent judiciary that constitute the very core of democracy. It tries to control independent institutions like the media, the universities and the judiciary that restricts the reach of its power. The political power, supported by the majority, cannot accept to be checked by a judiciary that is empowered by the constitution. It does not care that this is indeed a requirement of the rule of law. It wages a battle in order to pull the judiciary to its own side. If we keep this perspective in mind, it becomes abundantly clear why the focus of the constitutional amendments is on the judiciary and why nearly half of the proposed changes concern the system of law. Meanwhile, the ruling party fears to be closed down. It is pretty obvious that the package of constitutional amendments is intended to offer a solution for these two problems – removing the checks and balances and the threat of closure. The

other proposals are included in order to serve as sweeteners that will make the digestion of the package easier.

ALTAN: ALTHOUGH FLAWED, THE CONSTITUTIONAL REFORM IS A HUGE STEP IN THE RIGHT DIRECTION

Ahmet Altan in *Taraf* writes that the constitutional reform proposal is admittedly seriously flawed. Those who want Turkey to change, who hope for the dismantlement of the oppressive regime, should – while pointing to these shortcomings – nevertheless not withhold their support for the AKP's demand that the old system be changed. These shortcomings should not be used as an excuse for refusing the package. Yes, this blueprint does not hold forth change in every one of those aspects that is necessary: Above all, it is parsimonious concerning the rights of the Kurds. It grants excessive power to the president. It does not dismantle the Higher Education Council (through which the state controls the universities), it keeps the ten

percent threshold to parliament in place, and it does not restrict the power of the state in general. We should keep on demanding that these changes are realized. However, if we oppose this package because it is insufficient and because we desire more freedom, if we fail to see what a revolution it is, we will only contribute to blocking the way that leads to freedom. In my estimate, the most crucial part of this blueprint is that the political power is emancipated from the oppression of the judiciary, and that it raises our system of law to the standards of Europe.

MAHÇUPYAN: AKP HAS REASSERTED ITS POSITION AS THE ONLY REFORMIST FORCE IN TURKISH POLITICS

Etyen Mahçupyan in *Taraf* ponders on the motives of the constitutional reform. It would be reasonable to assume that the AKP would not feel the need to pursue the battle with the bureaucracy any further for the moment. The AKP has already gained the upper hand against the old state elite and enjoys a comfortable seat. Yet what could cause problems for the ruling party is if it is perceived as being unable to live up to the expectations of society. Societal expectations are indeed rising in a way that any government would find difficult to live up to. On the short run, the AKP will face its real test in front of society. Opinion polls currently put the support of the AKP at around 35 percent, with a potential of slipping several points as well increasing several points. The society will pass its judgment on the AKP, not on account of what its rivals stand for, but on account of what it has come to expect of the ruling party itself; the general elections will thus more or less be a

referendum on the AKP. It is against this background that the political reasoning behind the constitutional initiative should be understood: If the AKP had chosen to passively await the general election, it would have run the risk of being perceived as politically worn out. The opposition was clearly hoping to capitalize on societal expectations with populist demagoguery. Now, the AKP has unexpectedly retaken the initiative; with a move that places democracy and freedoms at the center of the political agenda, it has pushed the social demands emanating from society to the background. It has reasserted its position as the only reformist force around.

ÇANDAR: THE CONSTITUTIONAL AMENDMENTS WILL PAVE THE WAY FOR A DEMOCRATIC CONSTITUTION

Cengiz Çandar in *Radikal* describes the constitutional amendments as a decisive attempt to curtail the power of the regime of military tutelage and to rein in the bureaucratic oligarchy. Sure enough, it does not address all of our democratic concerns and wishes; that requires that the constitution bequeathed by the military junta of the 1980s be replaced in its entirety. Significantly, Turkey's most pressing problem, the Kurdish issue, stands no chance of being solved without a comprehensive constitutional reform that rewrites the introductory section of the constitution (that lays down Turkishness as the identity of the state and of its citizens). Yet it will nevertheless pave the way for the eventual adoption of a new, democratic constitution. We do not enjoy the luxury of being able to reject these

amendments because they are insufficiently democratizing.

TÜRKER: ARMENIANS RAUS

Yıldırım Türker in *Radikal* writes that nobody was surprised to hear Prime Minister Erdoğan threaten the Armenian guest workers with expulsion. It is a longstanding tradition of our state to treat the Armenians and other minorities as hostages and to let them live under the constant shadow of threat. And with elections approaching, everyone becomes a Young Turk (the ultranationalist Young Turks ruled the Ottoman Empire in 1915). Now, we have had a little row over the ownership rights to the idea to expel the Armenians. CHP deputy Canan Aritman, who last year infamously asserted that President Abdullah Gül was untrustworthy as his mother is of allegedly Armenian extraction, claims the copyright for herself and for Onur Öymen, another CHP deputy. But it's useful to keep in mind

that every politician is in fact a Canan Aritman when it comes to the Armenians. Our past nightmare Tansu Çiller (prime minister during the 1990s) urged the Armenians of Turkey to be so good as to assist Turkey's case abroad. She addressed a letter to the Armenian community, indirectly threatening it: "I deem that it would be useful if you, in order to secure our friendship, took an initiative to plead the case of Turkey in the U.S. congress." It would seem impossible to sink below Çiller's level of unethical standards; yet the supposed champion of democracy, the AKP, has made preposterous attempts at the Armenians on earlier occasions. Then Minister of education Hüseyin Çelik required that the pupils in the Armenian schools – like their peers in the Turkish schools – write essays describing the Armenian genocide as a lie. Hostility to the Armenians is indeed something that brings the Muslim democrats and the neo-nationalists together.