A Road Map of a New Constitution for Turkey

Essays in Comparative Constitutional Law

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This book is dedicated to Ali Arslan,
my long-time friend.

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Foreword

In the last twenty years, the making of constitutions has seriously gained momentum, especially with the constitutionalism movement that has surfaced in the Old Eastern Bloc countries who have left either colonialism or communism. Even though this new constitutionalism movement was received favorably for the most part, some political scientists and lawyers, however, approached these constitutionalism activities with suspicion—and rightly so. One of these individuals, and perhaps the most important, was Ran Hirschl. He claims that it's misguided to believe that the courts have the sense to preserve economic developments, distributive justice, and social welfare rights connected to constitutionalism and judicial review in the modern world. In other words, Hirschl expressed that it does not coincide with reality to believe that establishing judi-cial review and constitutionalizing rights will have benefits such as fair redistribution of social reforms and the spread of power. About the new constitutionalism activities, Hirschl states that it is more accurate to believe that this is a strategic product of some (homogenous) political elites in management, their effective economic interest groups, and judiciary directors (leaders). He adds that this interested coalition of judicial makers who only think of themselves are the decision makers when constitutional reforms should take place, as well as the scope and structure of said reforms.[1] Many examples can be given of these constitutional implementations in Turkey: the review of constitutional changes based on principle; the shutting down of political parties; privatizing, or the unbreakable system of guardianship; and statues made by legal or constitutional reforms related to religion freedom or liberty of conscience. Our hope is that the new civil constitution being prepared will not end up with a similar fate and will be constructed based

[1] See Fatih Öztürk, Karşılaştırmalı Anayasa Yargısında Politik Sorun ve Yargısal Aktivizm Doktrini, Anayasal Yargı Denetimi Gerekli mi? [Political Question and Judicial Activism Doctrines in Comparative Constitutional Law: Do We Need Judicial Review?], Istanbul, Beta Yayıncılık, 2012.

on a model that allows for public input. The summary of the articles that are included in this book are as follows.

In Professor Brice Dickson's article, "Making a Constitution in a Globalized World," he stresses the fact that constitutions must be documents that meet the needs and the demands of the people. He points out that, compared to the past, a nation's relationship with the world beyond its borders has increased in complexity, and an individual's expectations for a constitution have also increased considerably when compared to the past. Focusing on Northern Ireland as an example, Dickson discusses what kinds of changes have been made in the United Kingdom's constitutional system. He also suggests that Turkey should continue on its path in the process of making a constitution without falling into despair and hopes that Turkey will be successful in this venture.

In Professor Christina Murray's article, "Public Participation in ConstitutionMaking and the Future," she discusses the constitution-making process of South Africa and Kenya. Murray states that the public actively participated in the South African and Kenyan constitutional process. She notes that the 1996 South African Constitution was formed with 73% of the public included in the constitutionmaking process in some way. In Kenya, seventy thousand people offered their input during the constitutional process. The experience of both the nations showed that it was not easy for the public to participate in the constitution-making process. Murray claims that the right to participate in public life to should be included as a permanent right in the constitution. For this reason Murray states that while the legislators were making laws during the 1996 South African constitutional process, they established a rule ensuring the participation of the public. The writer makes the observation that this rule allowing participation of everyday people in the legislation process has given rise to a model of accountable government. Lastly, Murray expresses that people in this modern world are not provided with enough opportunity to participate in the constitution -or law- making process, but that developments are heading in that direction and that this should be permanently accepted as a right and included in the constitution.

Professor Jeffrey Thomas' article, "Making and Amending of Constitutions: Comparative and Rule of Law Perspectives on Turkey's Constitutional Reform," expresses that Turkey has an opportunity to establish the rule of law by making a new civil constitution. This new

constitution will make a great contribution in creating an environment where the principles of the rule of law can be exercised by protecting all individual and minority rights.

In Professor Craig Green's article, "In Human Hands: Constitutional Meaning and Judicial Responsibility," he states that written constitutionalism is important, as an indication of USA's constitutional experience. Constitutionalism leads to the formation of a democratic dialog between the public, judiciaries and management, and the rule of law also prepares the ground for the constitution, which continues to be more and more useful.

In Professor Beverley Baines' article, "Gender Equality in the Constitution: The Canadian Experience," she observes that constitution making has been intensely increasing in recent years. A great deal of literature has been published related to these constitutional organizations, but that the efforts related to how the making of a constitution should materialize is still fairly weak. When considered from this aspect, she is contemplating whether making a constitution in a democratic or autocratic way is more important. For this reason, she claims that there is a need to focus on the new organizations that are going to be included in the constitution is crucial. As Baines states, women, unfortunately, are considered second-class citizens in many of the judicial systems of the world. For this reason, there is a need to include regulations that protect the equality of women in both the constitution and the laws.

Professor Cleveland Ferguson III's article, "Whose Constitution: State or Nation?," expresses that constitutions are social contracts between the government and the people and that the owners are the individuals. Ferguson states that, in the final analysis, the United States constitution belongs to the people and the public will decide whether the constitution will continue or not.

In Professor John C. Knechtle's article, "Constitutions and Irrevocable Articles," he claims that the reason there are laws related to the basic rights and basic principles which are included in the constitution is because of their close ties to the principle elements of liberal democracy. Knechtle states that constitutional laws represent an unchangeable combination of democratic structure and political organizations. However, these laws must be enforced in such a way that they continue and maintain short-term stability. He expresses that, with the exception

of these, the other constitutional laws must be easily amendable in order to control the economic, political and social conditions and to put effective management in place when needed.

In Professor Warren J. Newman's article, "The Role of Unwritten Constitutional Principles in Interpreting the Constitution of Canada," he states that the constitutional principles not written into Anglo-Saxon or other judicial systems can be included in the constitutional documents (not in the constitution) and that these play an active role in the interpretation of the constitution. In the situation where these principles are neglected, the fortress of the constitution will face the danger of turning into a sand castle.

In Professor David Pimentel's article, "Culture and the Rule of Law: Cautions for Constitution-Making," he claims it is extremely importance for the community to have a global understanding in order for the rule of law to be properly executed. In some cultures, however, this may give rise to a totally opposite effect. This kind of situation will be encountered especially if there is an environment where corruption has been dominant for a long time. For this reason he expresses that while making a constitutional reform even the most well-intentioned regulation could give rise to poor results and backfire because of the cultural environment. Therefore, those who are making the new constitution should be aware that they are participating in the formation of a new culture, and this should be manifested in the form of protection of human rights, support for economic opportunities and developments, and support for the rule of law. Pimentel, lastly, states that the people who are making the constitution should be part of a smooth transition from the existing cultural medium to a new one without emphasizing cultural imperialism.

In Professor Maria Cahill's article, "Making and Amending Constitutions: Some Reflections," she states that according to article 46 of the 1937 Ireland Constitution, in order to make a constitutional amendment, after both parliamentary assemblies have approved the referendum proposal it is presented to the public for the approval of the constitutional amendment, like the proposed direct democracy model. Cahill states that even though the number of yes and no votes of the plebiscite voting ended up very close to each other, the Ireland Supreme Court has decided that the result of this voting is definite and is not subject to change. Cahill states that the United States only changed its

constitution 27 times in 224 years of history. She also says that German constitution can only be changed with the approval of a two-thirds majority in both of the chambers; the federal structure, however, cannot be changed. Human dignity must be protected, and is seen as an exception to the untouchable topics of democratic system. Lastly, Cahill expresses that constitutional changes can cause deep scares in the society and for this reason they need to be done very carefully.

Professor Rod Sullivan's article, "World Citizenship, National Citizenship and the Constitution of a Nation," claims that the new constitution needs to place emphasis on local governments and construct a model where problems can best be solved at the local level and not at the central government. Sullivan states that the new constitution should ensure that national and personal debts are reduced, which, in turn, will contribute to economic stability. Sullivan also states that if there must be a constitutional principle of separation of powers but the public can't change the constitution, or the high court cannot make its decisions effective, keep the elected legislators away or obtain execution power, then democracy has lost its function. Sullivan expresses that all the courts, including the constitutional court, should be designed on the basis of control and balance. The writer claims that in a democracy based on legislature there should be a mechanism in place that may render ineffective the decisions of the constitutional court. He also states that a strong constitutional democracy must accept that family is the cornerstone of society. Furthermore he says that when a nation has a strong constitutional democracy, it means that the country will also increase its effectiveness in the international community. The writer alleges that the Europeans are aging and are buried in debt; Turkey, on the other hand, is young and has a developing structure. Thus, Sullivan argues that membership to European Union is no longer something that is in the national interest of Turkey and that Turkey could possibly be a democratic model for the Islamic World. He says that Turkey could demonstrate to the whole world that Islam and democracy can co-exist together and a strong democratic constitution can help to achieve these goals.

In Professor W. Cole Durham, Jr., and Professor Brett G. Scharffs' article, "Comparative Constitutional Law Approaches to the Relationship of Religion and the State: Issues for the New Turkish Constitution," they

compare the state model that adheres to the principles of secularism and controls religion with the state model that includes pluralism and impartiality together with respect of religion. After the writers discuss different national models, they state that Turkey has very strict controls over religion and its doctrines are in some way connected to secularism; thus, the making of new constitution is an opportunity and however much politics makes religion free it normalizes it that much more. They articulate that the constitution is not going to solve every problem; however, the purpose of the new constitution is to ensure that a just and clear path is paved for politics to normalize. In any case, these writers claim that if you try to solve all the problems with the constitution, it will result in the failure of the constitution and lose its influence in a very short time. They state that the framework of the constitution should be encapsulating constitutionalism. After saying that freedom of religion is a human right and that it is not an enemy of political stability, they state that in Turkey, unfortunately, such a picture is unlikely, although in modern liberal democracies it is accepted that a religious majority is an inescapable sociological reality.

In Professor Conor O'Mahony's article, "Constitutional Protection of Social Welfare Rights," he expresses that, in the liberal Western democracies, protecting the fundamental human rights, or, in other words, civil and political rights, is in the forefront of their constitutions. He says that economic or social assistance, known as a new generation of rights, are starting to take place in these democracies to a lesser extent. He claims, however, that these rights are transferred to the political organizations and that there is no constitutional protection provided. Thus, because of the complaints that these rights are not being protected by the constitutions, they have inserted, for example, the right to education in the Ireland constitution of 1937 and socio-economic rights in the South African constitution of 1996. Also included are the rights to food, shelter, water and health. Even though both of these countries have included these rights, they have been limited in their implementations. The writer states that putting these rights under protection of the constitution is the first piece in the puzzle. Mahoney also states that when the courts want to implement these rights they will find grounds to do so. The writer claims that there are always limited resources when it comes to these rights and for this reason the courts will only provide for limited implementation. Therefore, to create a wide range of application grounds

for these rights will possibly cause the resources for the rights of other people or other rights to be limited. For this reason the easiest way to resolve this is to not include these rights in the constitution and, without including it in the constitutional judicial review, allocate the maximum level of resources through the interaction of politicians and community.

In Professor Will Kymlicka's article, "Multiculturalism: Success, Failure and the Future," he states that multiculturalism is where groups with different ethnic origins of legal and political views have a place within the society. He states that even though there are positive developments in this aspect, some political leaders claim that multiculturalism is not accepted anymore and the implementation of it is dead. In this article, the writer tries to disprove four wrongs related to multiculturalism by arguing:

a) That multiculturalism is not the cause of unemployment or social isolation; on the contrary it helps human rights as they relate to the aspect of democratic citizenship;

b) Against the claim that we are completely distanced from multiculturalism, and stating that multiculturalism has strengthened even more in recent years;

c) Against the claim that multiculturalism is not successful, arguing instead that it has been the cause of many positive effects;

d) Counter to the claim that multiculturalism is an absolute obstacle for integration into society, and stating instead that examples of multiculturalism, as it is adapted in some formats, shows that it is possible to live in peace and harmony in society.

The writer says that democratic government should produce citizenship formulas related to multiculturalism. He expresses that countries like Canada and Netherlands who have done this are successful, whereas Germany, who has denied multiculturalism, was unsuccessful.

In Professor Yusuf Şevki Hakyemez's article, "'Militant Democracy' and the Turkish Constitutional Court," he points out that the Turkish Constitutional Court damages the rights and freedoms of individuals by making judicial activism too much of an emphasis.

In Professor Hüseyin Özcan and Erdal Abdulhakimoğulları's article, "An Individual Application to Constitutional Court for Protection of Human

Rights," they state that the individual application to protect human rights will serve an important function going forward.

In Professor Faruk Bilir's article, "Methods of Making A Constitution," he states, after touching on the constitution-making methods, that the new constitution should be based on the rule of law and freedom and individually centered meaning that the individual is protected against the state.

Lastly, Professor Fatih Öztürk's article, "Introduction to Religious Education of Minorities in the Ottoman Era," points out that the practices of the religious minorities in the Ottoman Empire and their model for religious education (Millet System) could be a road map for today's liberal constitutional democracies.

Fatih Oztürk, Ph.D.
Istanbul, April 2013