

Perils of the constitutional amendment proposal of the opposition

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Leaders of the six opposition parties, Kılıçdaroğlu, Babacan, Uysal, Davutoğlu, Akşener and Karamollaoğlu at Strengthened Parliamentary System Constitutional Amendment Proposal Promotion Meeting held in Ankara. (Photo: CHP)

I agree with my editor Murat Yetkin that it is a good thing for the 6 political opposition parties **unite around a table** and dream of a better Turkey. Nonetheless I have serious doubts whether the aspired Turkey is a better one, and it is my duty to highlight the risks of the **proposed amendments** that are issued.

It is a package that could be construed as “how we would have dominated the state institutions through parliament” instead of an intent to create an ideal constitutional text. Given it is assumed that the opposition wouldn’t achieve a majority that is sufficient enough to amend the constitution, a couple of questions pops up to my mind: What is the purpose of these amendments at this stage? Why were they brought up? How will the public or the opposition benefit from those?

Puppet President and the Executive Power

The powers of the president is diminished when compared to the times prior to presidential system in which the president shared the executive power with the cabinet. It is proposed that the leader of the winning party forms the government. Vote of confidence is by simple majority, while the vote of no-confidence is subject to absolute majority. I find these pragmatic though the governments’ sustainability would be increased if the vote of confidence is raised to absolute majority and no confidence to a qualified majority such as 3/5 of the parliament that would require engagement of a different party outside of the rigid blocks.

Amendments envision that the winning political party’s leader would first be given the duty to form the government and to obtain the vote of confidence. Upon the expiry of 15 days his duty will expire and the president will invite the next political party to form government in 15 days. In

the event of any 3 political party leaders cannot form a government and secure vote of confidence within 45 days, there might be re-elections. Consequently, every person who put forward a government for vote of confidence but fails to receive one will take turns to govern temporarily even though they do not receive a vote of confidence. They would have different strokes for different folks, and the country will go back to the old times and fall in the old turbulent days under subsequent caretaker governments lacking legitimacy and authority.

What is Affirmative Vote of No-Confidence?

Proposed Article 99 requires motions for vote of no-confidence to either contain the name of proposed new prime minister or be signed by absolute majority of the parliament. Accordingly, the parliament, voting for no-confidence would have, at the same time, approved the new prime minister. However, it is not sufficient to form a new government. The new and approved prime minister would need to form the cabinet and obtain vote of confidence. Until then, as the justification also confirm “the current cabinet will continue its legal existence – though it is sacked by vote of no-confidence – and will continue to rule until a new government is formed and approved by the parliament”. In this case a government that has lost its legitimacy and therefore the authority to govern would continue to remain in power. What would happen if the new approved prime minister cannot form government or receive confidence vote? Would the prime minister become the cabinet on his own? It is impossible to predict the difficulties and damages that this situation might bring. Therefore, I find it incorrect to present this as affirmative vote of no-confidence.

If the amendment had stipulated as follows: “If the parliament gives a vote of confidence in the formation of a new cabinet while the government is in office, the old government falls and the new one takes office immediately.” then it would have achieved the opposition’ objective and it would have helped to establish a culture of shadow cabinet.

Issue with Freedoms and Constitutional Court

While the freedom issues emanate mainly from implementation some cosmetic improvements are proposed on freedoms terminology and related provisions Prof. Dr. İbrahim Kaboğlu, an MP in CHP People’s Republican Party also concurs that at this stage it was not necessary to include cosmetic changes.

Issue identification relating to Constitutional court is shallow and sporadic. The causal link between the issues and the proposed solutions that increases the number of members to 22 from 15 and to 4 chambers has not been established. Fiscal audit provision remains the same ignoring that it is insufficient to discover and prevent illegal financing. The right to sue for invalidation of parliamentary enactment of laws is still with a few people and is absent of innovative solutions. There are no solutions to prevent the heavy politicisation of the court’s members and the resulting discrepancies in its jurisprudence. Only change is to dilute the current membership aimed at gaining some ground within the court while maintaining the current fallacies.

Council of Judges and Council of Prosecutors

Council of Judges and Prosecutors is being split into two councils: Council of Judges and Council of Prosecutors.

8 of the 15 members of the Council of Judges would be appointed by the parliament. Politicians will elect and appoint 7 of the 12 members of the Council of Prosecutors, along with the Minister of Justice and her undersecretary, who are natural members. The Parliament would make this election by drawing lots between the 2 members who received the most votes in the second round, with a quorum of 2/3 in the first round. Out of the remaining 7 members 2 would be elected by the president, 2 by the Court of Cassation, 2 by the State Council and 1 by the Union of Turkish Bars.

Only the admission to profession and the disciplinary measures of the two councils can be appealed. Judicial review remedy is denied for other types of decisions and acts. Depriving judicial review remedy especially in respect of career promotions, assignments and rotations is prone to cause to formation of internal dependencies similar to Italy and Slovakia and allow for circumvention of guarantees of judges against assignments.

Geographical guarantees for judges

Judges who have reached to first (top) degree are granted a geographical guarantee against transfers to other cities and courts without their consent unless there is a court order or a lawful reason. I don’t think this is an effective guarantee because no judicial review is available against the Council of Judges’ decisions. Therefore thus guarantee will not be sufficient enough to protect judges against politicians’ grudge. On the other hand, it should be considered; “why aren’t the other judges granted with this security but only the first degree judges are? What is the reason behind this discrepancy? It is immensely crucial for almost all of the judges and prosecutors.

Why do politicians want to appoint judges to State Council?

It is proposed that the parliament would appoint a quarter of the judges in the State Council. Why would the politicians want to appoint judges to the State Council?

The rest of the members i.e., ¾ of the judges in the State Council would be appointed by the Council of Judges and Council of Prosecutors. As I discussed above, two councils already are under politicians’ control. Respectively politicians would, directly and indirectly, dominate the

appointment of judges to the State Council.

State Council is the judicial organ that forces politicians to obey the rule of law. It is evident that the opposition, if they come in power, would like that the State Council to be obedient to them.

Consequently removing the minister of justice from the council of judges is no more than a charade for public support.

Political parties, financial aid, and dissolution cases

There are no proposals to terminate the oligarchical system, leaders' tyranny or to recede the domination by central management in political parties, i.e., there are no solutions to incentivise the grassroots of parties, to restrict the authorities of central management, to annul or to discipline the archaic delegates system that deteriorates the democracy at political party levels.

Treasury's financial aid is not regulated for benefiting the society. A fraction of the total aid is evenly distributed between all political parties meeting the country threshold while the majority is distributed pro rata to the percentage of votes of large parties. It would have benefitted the society if a system ensuring fair competition between parties were created by designing two or three aid bands and treating equal those in the same band.

The parliament's prior permission has been made a precondition for commencement of dissolution cases. Hence implementation of a legal sanction has been made subject to the politicians allowing according to political scene and circumstances. It is a proposal to make the functioning of the judiciary conditional upon the consent of the politicians.

Politicians should refrain from meddling judiciary's activities. Opposition's justification for this proposal ill addresses the problem and the solution. Chief Public Prosecutors' independence is the issue here. The way to solve the problem is by removing any political interference over prosecutors. In the event it is desired to make dissolution cases more difficult to commence then appropriate checks and balance should be proposed such as a specialised high court reviewing cases before they can be filed with the Constitutional Court.

Forming a Majority at the Parliament is not a magic cure-all

We have witnessed the politicization of Radio and Television Broadcasting Authority ("RTÜK") through members being appointed by the majority in the parliament i.e., by the ruling party. It has been plainly displayed for several times now that it is not enough to have form a majority in the parliament to accurately address the issues that concern the society.

Yet, reading through the opposition's draft I cannot help myself repeating the tune of ABBA's famous song "The Winner Takes it All." Indeed, the opposition for sure is dreaming a different Turkey but conceptualize an inferior system. The powers given to the impartial president prior to current presidential system now are handed over to the political majority in Parliament purporting strengthen the parliament.

Judiciary gets its fair share from this mindset. Opposition is proposing a system where politicians would interfere with the judiciary more than ever, to an extend of making it much more political and fragmented.

Giving every power to the parliament and the political majority does not strengthen the cabinet, on the contrary, it weakens the government system of the state and destabilizes it. It is necessary to create a balance between institutions, their functions, and powers. It is imperative to keep the judiciary, which provides this balance at the last check point, of the reach of the politicians' influence.