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REPORT

The idea behind the constitutional review of constitutional amendments Some comparative and Turkish remarks

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The issue of constitutional amendments

No constitution is eternally binding. Almost every modern constitution provide for rules according to which they may be amended. In many states in the Americas and the USA specific institutional, extra parliamentary mechanisms such as constitutional conventions (constituent assemblies) designated for constitutional reforms must be set up in order to draft constitutional amendments.

In many other countries, the power to amend the constitution is vested solely with the parliament in which case the parliament is both law and constitution giver.

A third possibility is to combine parliamentary initiatives with popular referendum.

Indeed, in countries where democratically elected constitutional conventions or constituent assemblies are mechanisms to modify the basic law, there exists usually a constitutional mandate of a self-imposing review of the constitution by popular vote, mostly every 20 years. (The US State constitutions, latest constitutions of some Latin American states). Here the electors are regularly asked "whether the constitution should be amended". This corresponds to the empirical fact and human experience that the average lifespan of a given constitution is around 15 to 20 years in most of the world states except for USA and some European states.

▪ The issue of unconstitutional constitutional amendments is controversial in the field of constitutional law.

▪ 'The global trend is moving towards accepting the idea of limitations – explicit or implicit – on constitutional amendment power'. (Roznai, 2013).

▪ Reportedly, about seventy-eight constitutional documents in the world contain some kind of eternity clause that seeks to entrench democratic values and/or the most fundamental features of the constitutional order concerned.

▪ Many jurisdictions moreover, recognize doctrines that indicate what kind of changes may and may not be brought about by way of constitutional amendment. And a significant amount of contemporary states has a practice of judicial review of constitutional amendments.

On the other hand, the role of judicial review in enforcing constitutional limits is unsettled and European constitutional courts have adopted differing approaches.

The French *Conseil constitutionnel* considers itself not competent to review constitutional amendments unless there is an express mandate. In some states like Ireland, where constitutional amendments are adopted by referendum, popular sovereignty prevails and no court "is competent to review a decision of the people".

However a constitutional amendment brought about by parliament is quite different than the one brought about by popular vote. For the former case, it might easily be claimed that Constitutional Courts cannot be denied the authority to review constitutional amendments to the extent acceptable.

For instance the Hungarian Constitutional Court held that it could review the procedural – but not substantive – regularity of an amendment; meanwhile the German Constitutional Court has affirmed its competence to assess both compliance with formal requirements

and the substantive, entrenched constitutional principles of federalism and human dignity.

The idea behind this approach is that there is a *constitution of the constitution*, i.e. a "core constitution" for if there weren't any core principles, then the very limitation of the parliamentary power and sovereignty of the people would be meaningless in a constitutionalist state.

The German Constitutional Court goes beyond this stance and holds that "even the people themselves may not alter the democratic order of the state!"

▪ Modern, democratic constitutions are entrenched by their very nature for the sake of the universal doctrine of "ultra vires" for the parliament is a representative body that may not go beyond the "power of attorney" it takes from the people.

▪ No representative body may go beyond the most fundamental limits it has been imposed by the founding document which composes it and sets limits to its powers. If the representative body is unlimitedly allowed to go beyond those, than there appears what we call "paradox of constitutionalism", whereby, the representative body is allowed to compose itself and set its own limits (for instance amends the constitution so to provide for elections to be held every 50 years!). That would be contrary to the idea of modern constitutionalism itself.

▪ This idea is in line with the very basic principle that sovereignty unconditionally belongs to the nation/people.

▪ Many Constitutional Courts in the world endorsed this approach even for constitutions without an eternity clause) Example: (Constitutional Court of Columbia).

Thus the idea of "constitution within the constitution", i.e "eternity clauses" + absolute bans (for instance the constitutional criminal law: no torture, no inhuman treatment, etc.) + core principles, values + numerous constitutional norms of which legislation requires "organic laws" in some states. For instance: state borders (land), nationality (people), and the very basic composition of fundamental organs.

Highlights of the Turkish constitutional history and the rules concerning constitutional amendments

▪ In the Ottoman Empire, first democratic elections took place in 1876 when a constitutional monarchy was established by the first elected assembly of the Empire.

▪ First democratic elections following the establishment of the Republic of Turkey were in 1920 following which the First Grand National Assembly (The Founding Assembly) was established (23 April 1920).

The following numbers indicate the years in which major historical constitutions were made:

▪ 1876 (the very first constitution made during the Ottoman era following transition to constitutional monarchy/the first limited government: Meşrutiyet).

▪ 1921 (the first republican constitution made by the Grand National Assembly of the Republic of Turkey).

▪ 1924 (The second republican constitution made by the Grand National Assembly).

▪ 1961 (The third republican constitution made following a military intervention, submitted to and approved by referendum).

▪ 1982 (The fourth republican constitution made following a military intervention, submitted to and approved by referendum; still in force and has been amended numerous times since 1982).

Since 1961 Turkish constitutional system provides for a Constitutional Court that is competent for abstract and concrete-norm review as well as for individual applications. In 2010 the right to individual application before the Court (similar to the ECHR model) was introduced by an amendment to the constitution.

In Turkey, there have been many major (and politically significant) controversies related to the competence, function and powers of the Constitutional Court since its establishment in the year 1961. Indeed there is pro-parliamentarian and pro-constitutional supremacy "partisanship" in Turkey although there has never been a parliamentary majority that manifestly did not respect a ruling emanated from the Court.

On "Review of Constitutional Amendments", the following stance by the Court has remained valid despite the obvious historical fact that at times parliamentary politics tended strongly to denounce the philosophy behind it: Theory of "Eternity Clause": "A parliament infringing (even indirectly) upon the eternity clause with a constitutional amendment is no more distinct than any other incompetent body, i.e. a body that is not "parliament" at all".

Constitution of Turkey is consisted of the following main pillars:

▪ Sovereignty of the People

▪ Exercise of sovereignty through "authorized organs"

▪ Rigid and including an eternity clause

▪ Amenable with a qualified parliamentarian majority + popular referendum to amend

▪ Constitutional Court

"…VI. Sovereignty

ARTICLE 6 - Sovereignty belongs to the Nation without any restriction or condition.

The Turkish Nation shall exercise its sovereignty through the authorized organs, as prescribed by the principles set forth in the Constitution.

The exercise of sovereignty shall not be delegated by any means to any individual, group or class. No person or organ shall exercise any state authority that does not emanate from the Constitution. Here lies the idea that there is a "core constitution" that the parliament is not allowed to infringe upon. Here lies also the idea that the "Turkish Nation" shall exercise its sovereignty not only through parliament but also its other authorized organs.

VII. Legislative power

ARTICLE 7 - Legislative power is vested in the Grand National Assembly of Turkey on behalf of Turkish Nation. This power shall not be delegated.

VIII. Executive power and function

ARTICLE 8 - Executive power and function shall be exercised and carried out by the President of the Republic and the Council of Ministers in conformity with the Constitution and laws.

IX. Judicial power

ARTICLE 9 - Judicial power shall be exercised by independent courts on behalf of the Turkish Nation.

XI. Supremacy and binding force of the Constitution

ARTICLE 11 - The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals.

Laws shall not be contrary to the Constitution."

In the case of Turkey, Art. 175 of the Constitution includes the following provision: The consideration and adoption of bills for the amendments to the Constitution shall be subject to the provisions governing the consideration and adoption of laws, with the exception of the conditions set forth in this Article. The President of the Republic may send back the laws on the amendments to the Constitution to the Grand National Assembly of Turkey for reconsideration. If the Assembly readopts, by a two-thirds majority of the total number of members, the law sent back by the President of the Republic without any amendment, the President of the Republic may submit the law to referendum. 3/5-less than 2/3: If a law on the amendment to the Constitution is adopted by a three-fifths or less than two thirds majority of the total number of members of the Assembly and is not sent back by the President of the Republic to the Assembly for reconsideration, it shall be published in the Official Gazette and be submitted to referendum.

2/3 Rule: A law on the Constitutional amendment adopted by a two thirds majority of the total number of members of the Grand National Assembly of Turkey directly or upon the sending back of the law by the President of the Republic or its articles deemed necessary may be submitted to a referendum by the President of the Republic.

The Constitutional Court shall examine the constitutionality, in respect of both form and substance, of laws, decrees having the force of law, and the Rules of Procedure of the Turkish Grand National Assembly (TGNA) and decide on individual applications. Constitutional amendments shall be examined and verified only with regard to their form. However, no action shall be brought before the Constitutional Court alleging unconstitutionality as to the form or substance of decrees having the force of law issued during a state of emergency, martial law or in time of war.

The verification of laws as to form shall be restricted to consideration of whether the requisite majority was obtained in the last ballot; the verification of constitutional amendments shall be restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under

urgent procedure was complied with. Verification as to form may be requested by the President of the Republic or by one-fifth of the members of the TGNA.

Applications for annulment on the grounds of defect in form shall not be made more than ten days after the date.

Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities. In order to make an application, ordinary legal remedies must be exhausted.

▪ "The verification of constitutional amendments shall be restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under urgent procedure was complied with."

▪ However, the Constitutional Court continued to review the substance of the amendments for their compatibility with the "eternity clause" in some exceptional cases, for the Court considers that in a case where the parliament touches upon the clause (even indirectly), there has been no "proposal" (the parliament was not "competent" to "propose").

Organic laws and their relation to the constitution

Organic laws are fixed list of statutes provisioned by the text of the Constitution itself. They usually have a higher rank than ordinary laws but a lower one vis-à-vis the constitution itself. For instance, under the current Spanish constitutional system an Organic Law has an intermediate status between that of an ordinary law and of the constitution itself. It must be passed by an absolute majority of the Congress of Deputies. The Spanish Constitution specifies that some areas of law must be regulated by this procedure, such as the laws developing fundamental rights and freedoms recognized in the first section of Chapter Two of Title I of the Constitution, as well as the laws that approve the Statutes of Autonomy of the autonomous communities of Spain, among others. Prior to the 1978 constitution, this concept had no precedent in Spain.

Also, most of the Latin American constitutions provide for organic laws that have similar intermediate status between that of an ordinary law and of the constitution itself.

According to the framing of some constitutions (for instance, French Constitution of 1958), organic laws are of constitutional scope and have constitutional force. This means that they overrule ordinary statutes, and they may even complement the constitution. They are enacted by the Parliament. In France the Constitutional Council of France must be consulted before any organic law is enacted. So certain significant dispositions are delegated to organic laws, which reduces the need for amendments to the constitution.

I have noted numerous articles in the Constitution of Kyrgyzstan that, for certain dispositions, require an organic law to be enacted by a much more qualified majority than it is needed for ordinary laws.

A curious issue that comes to mind concerning the Kyrgyz system of constitutional amendments is whether it is possible to amend the constitution before 2020 without first amending the particular "organic law on the Constitution" which stipulates, in its Art. 4, that Art. 114 of the Constitution does not enter into force before the year 2020.

“The provisions of part two article 114 of the Constitution of the Kyrgyz Republic envisaging the procedure of introducing changes to the Constitution of the Kyrgyz Republic by the Jogorku Kenesh shall come into force since September 01, 2020.”

The proposed amendments under review should also be discussed with a view to the above-mentioned rule as well as to the Constitutional Status of “Organic Laws” in the Kyrgyz Republic.