Turkey: A Republic with Double Constitution

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History is full of documents
That may support all your allegations.
Paul VALERY (1871-1945)

Constitutional Documents of the Ottoman Empire

The first constitutional act created in the last century of the Ottoman Empire, on whose ancient and devastated heritage the Turkish Republic is built, was a document called *Sened-i İttifak*. This was an agreement between Sultan Mahmut II (1808-1839) and the Rumeli notabilities called "ayan".

Ottoman Empire, which had several ethnic groups under its sovereignity that did not peacefully coexist, found herself in the depths of internal conflict. She moved fast towards a decline that had actually started a century earlier and was accelerated by the "habitualized" *Yeniçeri* riots. Efforts in vain to rebuild the State was started by Selim III (1789-1807), but was halted because of his dethronement. Selim's devoted men collabarated under the name *yaran* (friends) in Rusçuk on the Danube river and tried to enthrone him once more. Mustafa IV (1807-1808), however who succeeded to the throne, had Selim murdered in order to avoid a coup. However, he himself was unable to prevent his dethronement. Alemdar Mustafa Pasha, the respesentative of the so-called *friends* in Rusçuk, got the possession of the imperial stamp and enthroned Mahmut II. Thus Pasha became the Grand Vizier.

Notabilities that preferred a system which consttuted a local government in addition to the existing authority of the central one, was influenced by the "Rusçuk yaran" and

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presented a document that consisted of a new *modus vivendi* principles to the Sultan.[1]

This agreement was binding for the central government authorities as well as the notabilities and was sanctioned by a juridico-moral oath in the name of God and his Prophet Mohammed. This political agreement[2] was never observed. However, because of its significance in creating rules even over the Sultan, it is considered as the most important internal affair of the reign of Mahmut II, who was the first Sultan of the enlightenment period.

Sened-i İttifak[3] is a document that is being thoroughly debated by scholars, however it has never deceived its full value. It is worth considering this document carefully, with a special emphasis on the interesting similarity with the Magna Carta.[4]

Abdülmecit I (1839-61) succeeded to the throne when he was only 16. He wanted to further the reform movement started by his father Mahmut II, and under the influence of the great statesman Mustafa Reşid Pasha, he accomplished a group of acts to achieve his goal.

"Gülhane" to be the first and foremost of all, these imperial decrees form a reform period called "Tanzimat" in Ottoman history.

In the *Gülhane Hatt-ı Hümayunu*, the Sultan agreed to constitute a new legal order to replace the Islamic system that allowed him limitless discretion. The new system was based on an understanding that both the Sultan and his government would respect the legal rights of his subjects. A penal code was announced to be issued in order to sanction the statesmen in case they violated

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1 The *Ayan*, who had been respectful to Alemdar, but did not trust Sultan, were called to the Capital. They arrived there with all their military forces, just as the barons had come to the outskirts of London to meet King John in 1215; and they also camped at the outskirts of the Capital.

2 In this document, the Sultan promised not to take the life and the property of the *Ayan* by his adjudications. On the other hand, the *ayan* made a pact of solidarity to help any one of their members who was unjustly threatened. These norms were to create a checks and balances of the system and to transform the so-called Babıali (Sublime Porte), that was the rank of the Grand Vizier, into the executive center of the imperial decrees.

3 *Senet* in Turkish means "contract" as well, and thus a verbatim translation may be "contract for alliance". For an abridged translation of this document into English and Franch *see* "Ensiclopedia de l'Islam:" Aperçu sur les Constitutiones des Etats Arabes et Islamiques (Bernard Lewis), Paris 1934.

4 *See* note 3, at 4.

the rules. The Sultan also gave an official oath to respect these rules in his forthcoming decrees.

The Tanzimat period includes other legal regulations to modernize the structure of the Ottoman Empire. *The Islahat* (Reform) decree is to be considered one of the constitutional documents of this period of transformation in structure and in institutions.

Whatever the legal identity of the decrees enacted during *Tanzimat* period may be, leading Turkish scholars come to the concurring opinion that *Gülhane Hatt-ı Hümayunu* is essentially a "charte".

Sultan rules us, but never posesses.
Namık KEMAL (1840-1888)

In spite of all his promises in the *Gülhane* and *Islahat* decrees, Abdülmecit I never ruled accordingly. Ever increasing royal expenses based on a passion for luxury; the explicit reactions of the fanatic islamic groups against the rights granted to christians; the expanding western political and social ideas among the officers that were introduced to the French in the Crimean War were reasons for discontend. These led to the foundation of an illegal association in 1859. Intelligentsia was not only anxious to protect the structure and the religious foundation of the declining empire, but also the human rights and liberties. As soon as Abdülaziz (1861-1876) got accession to the throne, he published a decree and announced that he was the Sultan of the Islam and the non-Islam, without mentioning his title as the Caliph. Meanwhile, a second illegal association, *the Young Turks* worked enthusiastically to expand progressive ideas, and identified these ideals with a constitutional monarchy.

A very important step taken at this point towards a constitutional regime, was the establishment of a "Council of State" in 1868 with administrative, juridical and adjudicial functions. This Council was a primitive parliament to exercise a modest experiment of a constitutional regime.

A new administrative division was thus formed, and provincial councils to be the first institutions of local governments appeare. These had also the duty to prepare reform projects and submit to the Council of State through their representatives that served there.

Sultan Abdülaziz, in his opening speech of the Council of State, referred to the principle of seperation of powers and expressed his belief in the necessity

of the executive power to be seperated from the legislative and juridico-religious power.

A European type Constitution did not appear in the horizons of the Ottoman Empire until 1876. Abdülhamit II, who succeeded to the throne after the dethronement of Murat V and was the second longest reigning Sultan after Süleyman the Magnificient, promised a constitution. There was already a draft prepared under the influence of Belgian Constitution of 1831. Abdülhamit formed a commission of 28 members including 16 non-military men (three of them being Christians), 10 scholars and two military officers. These adopted the Prussian Constitution of 1859 as an example. The constitution that was drafted consisted of 119 articles. The traditional structure of the State was to be transformed into new European institutions and it was announced that the empire was a constitutional monarchy, with a political leader that was both the Caliph of the Islam, and the Sultan of all the ottomans. The foremost reform for the Empire was the establishment of a bicameral legislative body and a government liable towards this body. Also the guarantee for liberties expressed in all the *Tanzimat* decrees was confirmed at the constitutional level.

The first session of the parliament took place in Sultan's audience on March 17, 1877. The second session started in December of the same year and went on until February 14, 1878 when the Sultan postponed the proceedings *sine die*.

It was not until 31 years later that the regime was reestablished and a second period of constitutionalism started. Meanwhile a *Balkan* crisis sourced from nationalist movements helped the young Turks to realise clearly once again the inefficiency of the government. A new group then appeared under the name of *İttihat ve Terakki* (Union and Progress) with the goal to liberate and to apply the constitution fairly. Abdülhamit had to put the army started an unavoidable move towards the Capital. He, on the other hand, provoked the fanatical groups in order to eliminate once more the above mentioned pressure groups. This so-called Fact of March 31[5], in Ottoman history caused a military reaction and

5 This date which is March 31, 1325 according to Islamic calender is actually April 13, 1909.

resulted in the dethronement of Abdülhamit II on April 27, 1909. His brother Reşat under the name Mehmet V (1909-1918) succeeded to the throne.

The oligarch named *İttihat ve Terakki*, and the ever increasing military dictatorship revealed sourly once more that ready-made constitutions were never a solution for an efficient and a fair democratic system respectful to rights and liberties.

The last Sultan of the Ottoman Empire had accession to the throne on July 3, 1918 under the name Mehmet VI. Mondros Armistice (October 30, 1918) announced the death of the "sick man". The Capital of the Empire, called *Dersaadet* (land of Blessing) was occupied on March 16, 1919 and the Ottoman Parliament functioned for the last time on March 18.

Gathering of Ankara parliament on April 23, 1920 was the beginning of a new constitutional era that went on until the decleration of the Republic of Turkey on October 29, 1923.

Constitutional Documents of the Republic of Turkey

The era between 1920-24 may perhaps be named in political science jargon as a powerful directorial period. Until April 20, 1924, the imperial Constitution of 1808-09, the legal regulations of 1920-21 and the Constitution of 1921 were all in force. Turkish parliament put a new constitution on April 20, 1924 into force and abolished all the rest. This constitutional period lasted until May 26, 1960, however, the Constitution had amendments on seven occasions in 1928, 1931, 1934, 1937, 1945 and 1952.

May 27, 1960 movement started as a simple coup d'etat, however progressed into a real revolution. After the movement, a commission including mostly the public law scholars of Istanbul University Law School drafted a constitution.

Constituent Assembly that started functioning on January 6, 1961, drafted another constitution based on the above mentioned one. This constitution that got into force on May 1961, was the fourth written document of its kind in Turkey.

The dominant characteristics of the Constitution of 1961 were: a bicameral order; establishment of a pluralist democracy based on liberties;

fulfilment of a checks and balances system by founding a Constitutional Court and a very powerful order of judicial control of the Administration; and being an expression of the intention to create the institutions of a democratic, social and secular state governed by the rule of law. As a result of certain crisis, the Constitution of 1961 was amended in 1971. These amendments were an expression of the reactionary movements opposed to the progressive character of the Constitution itself, however, its powerful quality resisted an essential change in character until September 1980. A new military coup d'etat declared the end of the so-called Second Republic that had started in May 1961.

> The Constituent Assembly which was formed by no means democratically, had very few legal scholars. Mostly consisting of experts of unrelated fields, this assembly drafted a new constitution which got info force with the acceptance of a great mejority after a referandum on November 7, 1982. It is quite predictable that the Constitution of 1982 will give rise to new crisis in a short while and will most probably last not as long as the previous one.

Constitution of 1982 that is existing in force is on the one hand a legal document that creates a very "authentic" order of a "State with double Constitution" as started in the title of this article, and on the other hand a text that intends to establish and order that is opposite to the basic principles founded by the progressive Constitution of 1961, in the sense of a democratic state governed by the rule of law, as well as the field of rights and liberties.

At this point, I would first like to mention in brief, the principles and other Constitutions that influenced the Turkish Constitution and then examine the Constitution of 1982 on a comparative basis with the one of 1961.

It may easily be said that the Constitution of the United States had no direct influence on Turkish Constitutionalism. Main reason of such a conclusion is that none of the statesmen nor the public law scholars in Turkey as well as the ones during the Ottoman Era, were acquinted with the political and legal systems of the United States. On the other hand, the non-existance of federative state structure especially since the declaration of the Republic prevented any influence of the U.S. Constitution. This fact led the Continental constitutions to have a dominant effect on the Turkish ones. The first constitutional documents of the Ottoman Empire were based on Belgian and Prussian constitutions. Starting from the *Tanzimat* period, the French state system happened to be the example taken to establish a new order. From 1950's to 1961 the constitutions of Federal Republic of Germany, Austria, and Italy influenced the Turkish constitutional system. It is a fact that the unified character of the Turkish state

effects its constitutional structure a great deal, so much that no influence of the Swiss Constitution may be traced in Turkish constitutionalism in spite of almost complete reception of the Swiss Civil Code.

A similar conclusion may be made for the Constitutional Court decisions, that is although the influences of the decisions of countries such as the Federal Republic of Germany, France, and even Swiss Federal Courts may be observed, no direct effect of England and some other Anglo-Saxon countries appear.

Against this diversified background on the rights and liberties field, the interaction of European and American ideas not only since the French Revolution but even earlier, makes it hard to speculate about direct influences, however, it should be accepted that the American Constitution has a great effect in this field on European constitutions and consequently on the Turkish ones.

One of the few affirmative points of the Constitution of 1982 was to abolish the bi-cameral parliamentary system. The most important structural characteristic of this Constitution is the detailed regulation of the procedure governing emergency rules martial law.[6] The Constitution of 1982 thus establishes a double order, one to govern ordinarily, while the other to proceed in emergency periods. This fact leads to an appearance of a state with double constitutions, not only because of the difference between the governing of execuitve and police powers in these two periods, but also it regulates the functioning of the legislative and judicial powers in quite a different order.

One of the most striking examples of such differences in legislative area is the authority of the Council of Ministers meeting under the chairmanship of the President of the Republic to issue decrees having force of law on matters necessitated by the state of emergency without prior approval of the National Assembly.[7] Such another example may be observed in the judicial area; that is, the law may restrict the recourse to judicial review and issuing of stay of execution orders in cases of state of emergency and martial law. Other indications of such a diversified system are the gathering of all public activities in the hands of the gigantic power of the military authorities to regulate public servants in such times.

In my opinion the articles under the title of "Procedure Governing Emergency Rules" in the Constitution of the Republic or Turkey, and other articles referring to such procedures, lead to constitutional system with two

6 Articles 119-122.

7 A prior approval of the National Council is required in order to issue decrees having force of law during ordinary times.

separate orders, one to be of an ordinary one, and the other to be of an emergency state. This system thus establishes a "Republic with double Constitution".

Is the former, that is the ordinary system a real democratic secular, and social one governed by the rule of law? In order to discuss the answers for such questions, I have to refer to the annexed constitutional articles as well as the Constitutional Court and Council of State decisions that are interpretations of this text.

The constitutional guarantee of a democratic system is the political institutions and above all, an elected legislative body. Unfortunately the Elections Act, that aoolies the Constitutional principles requires a minimum number of votes to be elected as well as a 35% in order to have a majority to form a government. Although these requirements were found to conform with the Constitution by the Constitutional Court, the Elections Act is explicitely opposing to the principle of democracy. It is a fact that the application of such a system has led one of the political parties to have a 65% of the representatives in the National Assembly only it had only a 35% of the overall votes, while the rest of the parties having the remaining 65% of the votes are represented only by 35% in the Assembly. Thus, the principles of "democratic state of the Constitution of 1982 means nothing any more also by the unfortunate contributions of the Constitutional Court. If only holding elections were to give a democratic quality to a system, the French regime after the Revolution which enabled voting according to income or tax payment would have been a democratic one as well. Although the French regime was one of the firs examples of XVIII. Century democracy, a constitution that gets into force in 1982 should by no means adopt the criteria of the two preceeding centuries.

The so-called principles of a "social state" in the Constitution of 1982 does not establish a welfare state. The excessive discretion given in the article that regulates the extend of social and economic rights[8]; and the permission given to require payment for the traditionally free services such as education and health-care, found to be constitutional by the Court, create a mistrust in the Constitution* of 1982 to have the characteristic of a social state. It seems that "equality for opportunity" is not more an important principle for the Constitution of 1982, although it was essential one for the Constitution of 1961. Social state gets its full meaning by providing public welfare to masses. A constitution with no measures to accomplish the duties of a welfare state with all its institutions should never claim to have the characteristic of being a social state.

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8 Article 65.

The Constitution of 1982 can by no means provide for a secular state. Although freedom of religion and conscience is regulated[9] in the Constitution, today it is enforced to have a mandatory religious education which happens to be the teachings of a certain belief. These courses are alleged to be a "humanities" one, however the requirements of those that do not associate themselves with this religion and those that have the right to be atheists according to the Constitution, are obliged to take such courses and this results in a non-secular system.

Is it possible to identify the Constitutional system of 1982 as a democratic, social and secular state governed by the rule of law?

The essential factor of a state ruled by law is an independent judiciary and efficient judicial review. It is impossible to claim any of the above mentioned principles wit a system that constitutes an institution such as the Supreme Council of Judges and Public Procecuters that is heavily composed of executive and political authorities, and can never be sued for its decisions: Thus the Constitution of 1982 establishes a state governed by the rule of law only and only on paper.

What is the prominent characteristic of this Constitution which is supposed to be the basic text to govern an excessively problemous society having universities with doubtful scientific liberty stemming from non-existance of administrative autonomy; limited rights of workers; and minorities that *de facto* exists but legally ignored? It is only a text of philosophical hopes and wishes. As American society trusts in God, Turkish society hope everything to be granted by him. Indeed, the common wish is "inşaAllah" that is "if God permits" and it is this saying and with "in the name of *Allah*, the beneficent, merciful" that Turkey knocks at the door of European Community with such a Constitution. If God actually permits, pur country will become a member of the European Community even with the Constitution of 1982. But how dare she?

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9 Article 24.