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I

THE STRUCTURE AND CHARACTERISTICS OF THE TURKISH CONSTITUTION

by

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The present Constitution of the Republic of Turkey which was adopted on 20 of April 1924 is composed of six chapters and 105 articles. The text of our Constitution includes about 2600 and its English translation about 4300 words. These numbers of words show that Turkish Constitution is relatively short. The consequence of shortness of our Constitution is its flexibility and elasticity.

The shorter and more general the constitutions are, the less frequently do they undergo amendments. Despite the fact that the Turkish Constitution is amendable with less formality than is required in any American Constitution¹ it has had only four real amendments since 1924².

The titles of six chapters of the Constitution are following:

1 — Fundamental provisions (1-8); 2 — Legislative func-

1) Article 102 of the Turkish Constitution provides that if a motion for amendment has been filed by at least one third of all members of the assembly it can be adopted by a vote of two-thirds of the Assembly membership.

2) These amendments were effected in 1928, 1931, 1934 and 1937, and less important three others in 1937, 1945 and in 1952.

tion (9-30); 3 — Executive function (31-52); 4 — Judicial power (53-67); 5 — Civil liberties of Turkish citizens (68-88); 6 — Miscellaneous (89-105).

The form of Republic established in the Turkish Constitution exhibits a number of important principles :

The first one of them is that sovereignty resides in and stems from the people. The 3rd article of Constitution says so in clearly understandable language; " Sovereignty belongs unconditionally to the nation. "

It may also be said that the Unitary Turkish Republic is a representative Democracy, for the power of the people is not exercised by them directly, but through their elected and responsible representatives; the outgrowth of Rousseau's concept of Democracy A unicameral or one-house legislature — The " Grand National Assembly of Turkey — elected for four years by Turkish citizens over the age of twenty-two — is the sole representative of the Nation.

Reformism, one of the six principles of Kemalism which expressed the fundamental political philosophy of the New Turkish Republic and were in 1937 formally incorporated into the Constitution, means the determination to depart from tradition and precedent if they did not serve national interest and gives large possibility to the state principles of government for an expanding future. With the 1937 amendments of the Constitution the principle of " Etatism — State Ownership also has been set as a constitutional principle, by being introduced into the Constitution. This new economic policy of the Republic was explained in 1935 as follows : " The State will undertake all the economic enterprises that are necessary for the public interests, although the private enterprises are left free. "

As Professor Onar explained, in his article³ published by " La Revue Internationale des Sciences Administrative, " In Turkey the State Control of the economic sphere and the creation of the public corporations are not the triumph of Socialism. The

3) Onar (S. S.) The Analysis and the criticism of the causes of appearance of the Public corporations in Turkey and the legal and administrative structures of these corporations.

dominant factor in the Etatism of Turkey has not been the desire to nationalize capital and profit, but has been the necessity to meet public needs, to perform public services. Furthermore, Turkish economical structure couldn't meet the needs of its people. There was not enough developed industry, not enough private capital and means. The State should take upon itself the responsibility for administrating and developing the economy.

II

The rigid British conception of the Political Doctrine of Separation of Powers of 18th century (which is based on the idea that those who hold power are likely to extend it as far as they can and thus to encroach on the liberties of the people) have generally not been observed in continental constitutions between the executive and the legislature, though they have made the judiciary independent.

5th and 8th articles of Turkish Constitution say that legislative and executive power (functions) are concentrated and manifested in the Grand National Assembly, but that judicial power is exercised by independent courts (in the name of the Nation in accordance with laws).

For this reason it is generally asserted that bipartite separation of power with tripartite separation of functions is one of the most characteristic point of present Turkish Constitution. A natural corolary of this theory is the concept of a limited government possessing not unlimited discretion but only such powers which have been conferred upon it, by the Constitution.

The Grand National Assembly exercises its legislative authority directly (by itself) and its executive authority through the President of the Republic elected by it for four-year term and a council of Ministers (cabinet) appointed by the president.

Although the President is the titular head of State seen as emblem of National Unity, the real executive powers are lodged, not in a single person but in a cabinet which is composed of a prime minister and other ministers selected from parliament. In the other words, Turkish Executive, like in other Parliamentary systems, is a product of the legislative body.

Contrary to the multiparty cabinet system, the present Turkish system, thanks to its majoritaire elective mechanism, like the British and American, is based primarily on two-party democracy or on the predominance of one political party which normally supports the policies of the Cabinet. Consequently this is party government.

According to Article 7 of Constitution the Turkish Parliament may at any time control the activities of the government (Council of Ministers) and dismiss it.

The Constitution, by its 46th article, adopted the collective and individual responsibility of Ministers.

But since the cabinet can not dissolve the " Grand National Assembly, one can say that the Turkish Constitution, to preclude historical exercise of arbitrary power by executive, theoretically, like the French Constitution of 1946, adopted the principle of supremacy of the legislative body over the executive. To this day the fear of a arbitrary and tyrannical executive has remained strong, the corollary being the desire for a weak executive. Generally speaking, to drafters of the 1924 Constitution doctrine of " Separation of Powers " meant the independence of the legislative control.

However it is only fair to add that in practice executive function in Turkey was and is much more positive than the Turkish Constitution would suggest.

III

In a modern state the liberty of individuals depends upon the fairness of courts in protecting them both from other individuals and from tyrannical or overzealous governmental officers.

Separation of the Judiciary from the control of legislative and executive powers is considered essential to the preservation of individual liberty. The 54th article (which is one of the articles of the 6th and Judiciary chapter of Turkish Constitution) says that the judges are independent in the trial and in the rendering of their verdicts; they are free from all kinds of interference, and are subject only to the provisions of the law.

For review of executive and administrative acts, 51st article

of our Constitution established in Turkey a system of independent administrative courts similar to France. The Turkish Conseil d'Etat is the general administrative court, the last resort for appeals for the decisions of the lower administrative agencies and tribunals. Interference by the judiciary in administrative matters is forbidden; courts of general jurisdiction cannot annul administrative acts. Administrative acts are not thus revived as in common law systems by ordinary courts.

Separation of powers in this area means independence of the executive vis-à-vis the judiciary.

The Constitution of the United States says that "this constitution ... shall be the supreme law of the land ... Under this provision the Supreme Court of United States is plainly empowered to exercise judicial review in respect to state constitutions, and state laws. Nowhere does the American Constitution grant to the federal judiciary the power to declare unconstitutional acts of Congress.

Despite this fact, the Supreme Court of the United States boldly asserted the power in the famous case of Marbury/Madison (1803) and or more than 160 years has continually expanded its observance and interpretation of the Constitution.

Since the notion of parliamentary supremacy has its important consequences in Turkey too, it was one of the tenets of Turkish constitutional theory, that no Turkish court can hold invalid or set aside as unconstitutional a legislative act.

However according to a point of view of some political scientists and lawyers, and some decisions of the Turkish courts, the characteristic provision of the 103rd article of the Turkish Constitution which states that "No law may contain provisions contrary to the Constitution" means that Turkish Constitution is the supreme law of land too and that judges must extend their interpretative power. In fact however the Turkish Judicial Supreme and appellate court (of private law matters) called the "Court of Cassation" in December 3 of 1952 decided that no Turkish court has the power to invalidate a law passed by the Grand National Assembly as violating the Constitution (Court of Cassation, Civil Assembly, 3 section). Nevertheless the Court of Cassation itself is free to disregard its earlier decision in future ca-

ses. Furthermore I think that this decision does not prevent the judicial power to interpret legislation.

IV

The title of Chapter V of the Turkish Constitution is Civil Liberties of Turkish Citizens and it stresses those substantive and procedural civil freedoms and privileges which are characteristic of the heritage of the West. In particular it provides for individual liberty; equality of the heritage of the West. In particular it provides for individual liberty; equality of the citizens before the law ; freedom of conscience, of thought, of speech and of the press; the right to work and to travel; the right of private property and of association; freedom from arbitrary arrest, the prohibition of torture and forced labor; the sanctity of private residence, the inviolability of mail; compulsory and free primary education; and freedom from discrimination on account of religion and race.

However in contrast to the guarantees of individual rights set forth in the federal and state constitutions in the United States directly applied and construed by the courts as law, the 5th Chapter of the Turkish Constitution, like other European constitutions, is essentially a statement of political aspiration, an acknowledgment of the existence of fundamental individual rights and an outline of a program to be rendered effective by legislative action. Despite the fact that every constitution was meant to be observed, there is a wide difference of opinion between Americans and most Europeans as to the methods of enforcement of constitutions ; the American regards his Constitution as law to be enforced, like other kinds of law, by the courts. The European even British regards his constitution as fundamental but can not understand why the courts more than other branches of government should be its special guardians. To him, a legislature which is representative of the electorate seems better fitted for the task; if the legislature should err then the electorate may elect different members to the next legislature.

The 63th article which provides that the limit of an individual liberty extend only to the point where it infringes on the liberties enjoyed by other citizens means that no restraint can be

justified unless it is clearly and closely related?⁴ to the protection of some identifiable public interest.

Despite the fact that Turkey is a unitary state, its administrative machinery operates at two major levels, one of which handles matters of national scope, while the other attends to matters on a purely local or regional character. The country is divided into 66 provinces (vilayet) and other local administrations. In Turkey such local administrations are organized on the constitutional principle of administrative decentralization which means that while political and local questions are dealt by local legislative-type assemblies and local officials exercising their limited powers according to special legislation.

V

It is characteristic of new Turkish trends that the Constitution followed a western democratic pattern. The Turkish revolution avoided the pitfall of the Nazi and Soviet revolutions, which replaced the old order by a new absolutism. Despite all the temptations that the fascist and communist examples provided (and despite the temptation which possession of power in itself afforded), Ataturk's Turkey instead of scorning and rejecting the western heritage (which even the western totalitarians did with particular gusto) considered it an ideal worth struggling for.

A revolution cannot be judged simply by measuring its political content. The regime may change. Sovereigns come and go. Even the constitutional forms of government can be modified without the life of the community showing any very marked result.

In the Ataturk's revolution the adoption of a Constitution and the introduction of a representative system have been the surface or crown of changes which go to the very bases of national life. It was possible to destroy Mithat Pasha's work by destroying his Ottoman Constitution of 1876.

But my own guess is that if the constitutional structure were changed tomorrow in Turkey, not more than a little fraction of

4) Albert Gorvine; *An Outline of Turkish Provincial and Local Government*, Ankara, 1954.

Ataturk's work would be undone. The complete secularization of Turkish society has caused most of the profound changes in the country's ethos.

The major objective of Turkish reform was in a general sense to separate Turkey from the Ancient (Asiatic-Arabic) sphere of culture and tradition and to transform her into a modern westernized nation.

The main attack was therefore directed against those institutions which were likely to perpetuate the old order. The abolition of the Caliphate (3 March 1924) proved to be a good point of departure.

It cleared the way not only for the establishment of a new kind of government, but also opened the way for a radical secularization of the Turkish political body.

As a result, the complete secularization of the Turkish society and the first amendment to the Constitution passed in 1928 deleted the article which stated that "Islam was a state religion, the State and law became secular and the European legal system was completely adopted and the theocratic law was altogether abandoned".

The many other reforms of Turkey, although not directly concerning religion, stemmed from the basic policy of secularization. Such were, for example, adoption of the latin alphabet, western clothes, emancipation of women and securing them equal rights with men. Poligamy was abolished and women were made eligible for public offices, professions and positions of trust in the economy and intellectual life of the country.

In 1934 an amendment to the Constitution gave women the right of suffrage and afterward a number of Turkish women deputies appeared in the Parliament.

The generations of enlightened Turkish patriots had fought and suffered through 150 years (1807) for the Democratic rule and the secular regime.

Atatürk and drafters of the constitution of 1924 took advantage of the work done along many lines by their predecessors, but made a new important contribution; they put an end to the era

of compromise and duality of secular and religious authority of prior attempts for westernization, so fatal to progress in Turkey, and laid a firm foundation for future progress and development.

Turkey stands out conspicuously among the nations of the Middle East as having undergone a tremendous change toward modernization, westernization and democratization in a radical and yet peaceful and stable manner. The moral fiber of the Turks rendered them immune to the inroads of foreign totalitarian ideologies.

To Turkey's credit it may be mentioned that she decisively remained nationalist, united and stable and pro-western in her desire for peace, national independence and economical development.

VI

In closing these extremely sketchy comments on the present Turkish Constitution and its system, I just want to say that despite some most criticized restrictive legislation and defects existing in practice, the development of Turkey's young democracy continues.

The real and strongest guarantee and support of Turkish Democracy, like elsewhere, is coming from the sensitivity of Turkish voters and public opinion.

In fact, as Mr. Hand, an American federal judge said, " Liberty lies in the heart of men and women. While it lies there it needs no constitution, no law, no court to save it. " Nevertheless as a backstop Turkey aside from this sensitivity fortunately has its constitution, law and courts.

Turkish journalists, scholars and more generally speaking, Turkish public opinion presently deal with defects which are not yet disasters.

And as Professor Walter Gellhorn said, " The time for dealing with defects is before they do become disasters. No sensible physician delays treating a patient's ailment until he has become moribund... Sensitivity to the process of alteration must be manifested before the alteration is completed."⁵

5) Walter Gellhorn, *Individual Freedom and Governmental Restraints*, 1958.