

## IN-DEPTH ANALYSIS

# Turkey:

## The Venice Commission's Opinion on the amendments to the Turkish Constitution to be submitted to a national referendum on 16 April 2017

### Highlights

Author: André DE MUNTER

#### **Turkey at a historic crossroads**

Ever since President Erdoğan's election in the first-ever direct presidential elections in August 2014 there has been a heavy domestic focus on the introduction of a 'Turkish-style' presidential system. After two readings in the Grand National Assembly of Turkey (GNAT) that were marred by heated exchanges and occasional violence a 18 article constitutional change package to that effect was adopted on 21 January with 339 votes, which is 9 votes more than the 330 (60%) needed to put the package to a referendum. This was made possible by 'ad hoc' cooperation between the ruling AKP (317 seats) and the ultranationalist MHP (Nationalist Movement Party, 39 seats).

As a consequence, on 16 April<sup>1</sup> Turks will have to say 'yes' or 'no' to the proposed constitutional changes<sup>2</sup> in what will be the most decisive and fate-determining referendum since the foundation of the Turkish Republic. The campaign officially started on 16 February and will finish on 15 April. The stakes are exceptionally high and the pre-referendum climate is very tense, with frequent attacks on 'no' campaigners and blatantly disproportionate media coverage of the 'yes' campaign.

It is both surprising and telling that – contrary to what happened on past occasions – Turkey itself did not seek the Venice Commission's opinion on this crucial constitutional amendments package<sup>3</sup> which, if adopted, will fundamentally change the country's political system. It was the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (PACE)<sup>4</sup> which requested this opinion in December 2016. It is the single most authoritative analysis of the likely consequences of the proposed shift to a presidential regime in Turkey.

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The very few, slogan-like reactions from the Turkish authorities following the publication of the opinion on 13 March 2017 show an astonishing 'ad hoc' contempt for a key body of the Council of Europe, of which Turkey is a member. By acting in this manner, the Turkish authorities seem to confirm and even reinforce the candid messages and warnings conveyed by the Venice Commission.

Regardless of the actual outcome of the 16 April referendum, the European Parliament and other EU institutions will need to face up to the 'day after reality' in Turkey and (re)position themselves accordingly. The objective of this paper is to identify and list the main findings of the Venice Commission in a reader-friendly way.

<sup>1</sup> Turks living outside Turkey can cast their votes earlier, between 27 March and 9 April. Voting at border crossings is possible until 16 April included.

<sup>2</sup> The absence of an actual referendum question is striking and may pave the way for post-referendum legal challenges.

<sup>3</sup> The full text of the Venice Commission's opinion can be accessed [here](#).

<sup>4</sup> On 26 January 2017 the PACE Monitoring Committee adopted a [statement on the proposed constitutional reform in Turkey](#).

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## 1 Parliamentary debate, vote and timing

### Parliamentary debate

"(...) The daily debates lasted, virtually uninterrupted, from the afternoon till the following morning. Such lengthy sessions led to a very quick completion of the procedure: at both readings in the plenary, the amendments were discussed and **adopted within twelve days** (the debates within the constitutional committee had lasted nine days). However, after the deliberations were completed, **the text was kept within parliament for thirteen days, and the President held it for fourteen more days**. It is difficult to reconcile the rushed discussions in parliament with these delays." (paragraph 24)

### Irregularities during the voting process

"The Venice Commission is of the view that the **breach of the secrecy of vote** is a serious flaw of the procedure of constitutional amendment, as it casts a doubt on the genuine nature of the support for the reform and on the personal nature of the deputies' vote. It is also regrettable that the parliamentary procedure did not provide a genuine opportunity of open discussions with all the political forces present in parliament. At the time of the parliamentary vote, **11 members of parliament were in custody**." (paragraph 26)

### The timing: state of emergency

"Following from all that precedes (...) the Venice Commission considers that **it is highly doubtful that the constitutional referendum** scheduled for 16 April 2017 **could and would meet the democratic principles of the European democratic tradition**." (paragraph 41)

## 2 'Turkish-style' and US presidential regimes

"The United States is often cited as the example of democratic presidentialism, and has been used to support the transition to a presidential regime in Turkey. (...) There is **very little resemblance** between the constitutional amendments pending in Turkey and the political regime of the United States. As will be explained in more detail below, the draft Turkish constitutional amendments would confer substantially more power on the President, and **include substantially fewer checks and balances** between the executive, legislature, and judiciary, than the US constitutional system. Under the amended Turkish constitution, unlike under the American one, there would be no bicameralism, no federalism, no election of the Vice-president, no influence of parliament on appointments within the executive power, while the President would have the power to dissolve parliament at his or her will (though putting his or her own mandate at stake). Presidential elections would be held jointly with parliamentary elections every five years, while in the US the voters have the possibility to vote in mid-term elections every two years. **There would not even be a strong, independent judiciary**." (paragraph 45)

## 3 President versus Parliament

### **A more empowered President versus a weakened Parliament**

"The analysis of the amendments, however, brings the Venice Commission to conclude that they lead to an **excessive concentration of executive power in the hands of the President** and the weakening of parliamentary control of that power. (...) The democratic accountability of the President is virtually absent during the mandate; it only comes into play if the President runs for a second mandate. (...) The TGNA may not hold a vote of confidence in the President. There is no possibility of interpellations. Only written questions are allowed and must be addressed to Vice-presidents and ministers (amended Article 98(5)). In addition, the President will benefit from a general immunity for any criminal act besides those committed in the exercise of the presidential functions, for which he or she may be subject to a very complex procedure of impeachment with the final judgment being made by the Constitutional Court, whose members are appointed directly or indirectly by the President." (paragraph 47)

### **The President and his/her membership of a political party**

"The current Constitution states that "if the President-elect is a member of a party, his/her relationship with his party shall be severed and his/her membership of the Grand National Assembly of Turkey shall cease" (Article 101). Whereas the latter requirement is maintained under the draft amendments, the former is not. This entails important consequences: the rule that, with one exception (see *infra*), presidential and parliamentary elections must take place simultaneously, and the removal of the prohibition on the President being a member of a political party, makes it **probable that one party will dominate the executive and also have a majority or at least a very significant representation in the legislature**. The President is likely to be and stay the leader of that party. Moreover, the danger of an overly close relationship between the executive and legislature is increased because the President is vested with the power to call the elections in the first place." (paragraph 51)

### **Risk of the President hijacking parliament's agenda**

"(...) The President will have the power to appoint and dismiss ministers, choosing some of them from among members of the legislature (Article 106 § 4). This will give him or her an effective source of patronage over the legislature. This creates a **danger of the President taking control of the legislative agenda**. It might also be remembered that the legislature will have no power to approve or veto appointments, again in sharp contrast to the U.S. system. This significantly undermines the legislature's control over the executive." (paragraph 52)

### **Dissolution of parliament and the 'benefits' of simultaneous parliamentary and presidential elections**

"The President has however been given a power to dissolve, on any grounds whatsoever, the TGNA which is symmetrical to the power of the TGNA to dissolve itself (on any grounds whatsoever, but with a majority of 3/5); the Turkish authorities refer to this as a "bilateral" renewal of the elections, because in both cases, the result is the renewal of both the presidential and the parliamentary elections. (...)" (paragraph 86)

"(...) The TGNA needs a majority of 3/5 to decide to renew its elections. This, coupled with the President's powers of patronage over the parliament (see above), will mean that **in practice parliament is not likely to be a hurdle to the President's action**. Instead, under these conditions the power of the TGNA to dissolve itself during the President's second mandate, thus provoking anticipated presidential elections in which the President may run, effectively opens the way for the President to obtain a third mandate." (paragraph 88)

"The elections of deputies of the TGNA and of the President are to be held on the same day (amended Article 77). This will mean [in practice that usually the President will also control the parliamentary majority](#). This is motivated by the need to avoid conflicts between President and parliament, which are a characteristic feature of presidential systems. But this goes against the very logic of a presidential system which is based on the separation of powers and therefore on the possibility of conflicts among these powers. (...) If the draft is based on the systematic holding of simultaneous elections to the presidency and parliament, this shows that it [does not follow the model of democratic presidential systems based on separation of powers](#). (...)" (paragraph 98)

### **Parliament's investigative powers – impeachment procedure**

"The TGNA may launch a parliamentary investigation into the alleged criminal responsibility of the President, Vice-presidents and ministers. (...) Investigations may be requested by "an absolute majority of the total number of members of the Grand National Assembly" (draft Articles 105(1) and 106(6)). The opening of the investigation requires three-fifths majority. These are [high bars which it will be difficult to meet, especially if a large part of deputies would belong to the same political party as the President and members of the cabinet](#). In any case, investigations are limited to "task-related crimes" of the respective office holders, which should be rare. (...)" (paragraph 102)

"The [impeachment procedure](#) foreseen by the draft amendments is therefore quite broad in terms of the potential reasons for removal it covers but, at the same time, [very difficult to put in motion and proceed with, due to the high majorities required](#). (...) Such procedure, to be applied only in extreme circumstances, cannot really serve as a common supervisory mechanism in day-to-day operation of the State." (paragraph 105)

"In addition, the fact that the President would be tried by the Constitutional Court, when the President is likely to have appointed some of its members (see below), may affect the independence and impartiality of the decision." (paragraph 106)

### **Parliament's power to check presidential decrees**

"The Assembly has no power to ratify presidential decrees, except for those adopted in the state of emergency, although it can bring an annulment action before the Constitutional Court against them. [The President does not need an empowering law to issue Presidential decrees](#). Instead, the President has the power to veto any laws he or she considers unsuitable, and parliament needs an absolute majority of all MPs to overcome the veto (see above)." (paragraph 107)

"While the amendments enshrine the welcome principle that laws prevail over presidential decrees and that no presidential decrees may be issued in the areas reserved to legislation by the Constitution, in practice [there are serious doubts that the mechanisms to prevent the President from invading the legislative domain of the TGNA would function in practice](#)." (paragraph 108)

"In the light of the above, [the Grand National Assembly's counter-powers](#) in respect of the President's new powers [are insufficient](#): it is unlikely that the TGNA may stand as a balancing counter-weight to the President." (paragraph 109)

## 4 Nature of the Presidency and presidential powers

### **The symbolic nature of the Presidency**

"At the same time, the President is expected to "represent the Republic of Turkey and the unity of the Turkish nation" and "ensure implementation of the Constitution and the regular and harmonious functioning of the organs of the State" (Article 104). The Venice Commission has doubts whether a person closely affiliated with a particular political party may assume, and be seen as assuming, this role. [A symbolic, politically neutral presidency can hardly be reconciled with a politically engaged presidency](#) (holding the whole of the executive power). The amended constitution has failed to make a choice between these two opposed visions." (paragraph 53)

### **Immediate effect of political partisanship**

"(...) Once a multi-party model was embraced, the requirement for the presidents-elect to sever the ties with their political party was introduced. The mere fact that this requirement is now abolished is a signal that political partisanship is desired. In addition, it should be noted that this provision is to enter into force immediately, while the changes to the distribution of powers will only enter into force after the elections of 2019. This shows that [the immediate consequence of this amendment is to enable the current President to take up official functions in his party, although he was elected on a different basis](#). (...) However, for the Venice Commission it is difficult to see why this proposed change should not be postponed until after the next election as is being done for the other changes to the constitutional balance." (paragraph 55)

### **How long can the President stay in office?**

"As a rule, the President may serve only two five-year terms (Article 101), which already allows for a quite long ten-year total mandate. However, in case new elections have been decided by the Grand National Assembly during the second term of the President, he/she can run for the presidency once more (Article 116, see below). This would de facto give the President a third term, thus extending the total length of his or her mandate much longer than the original ten years. It cannot be excluded from the letter of Articles 101 and 116 that a further renewal of elections would not have the same effect, as the Turkish authorities argue. In such a case, [the President could stay in office for a potentially unlimited period of time, which is clearly unacceptable](#)." (paragraph 56)

### **Duties and powers of the President: general observations**

"Article 104 lists the "duties and powers" of the President. This enumeration, however, is not exhaustive, as the President shall "also exercise powers of election and appointment, and perform the other duties conferred on him/her by the Constitution and laws" (Article 104(19)). Accordingly, certain competences which are not or no more listed in Article 104 appear elsewhere in the Constitution (for example, the power to renew parliamentary elections (Article 116); the declaration of the state of emergency (Article 119); the preparation of the budget and its submission to the TGNA (Article 161)). The competences of the President may even be extended by ordinary laws. In times when the President would be the leader of the political party with the majority in the TGNA, [his/her competences could thus become almost unlimited](#). In addition, some of the new competences of the President are drafted in vague terms, leaving [large space for interpretation and discretion](#)." (paragraph 59)

### **The power to appoint and dismiss Vice-presidents and ministers**

"Amended Article 104 stipulates that the President "appoints and dismisses Vice-presidents and ministers". [The President has the exclusive power to decide \(Article 106\) whether and how many Vice presidents and ministers will be established](#) (although there must be at least one Vice-president, given that the Constitution attributes some powers to him/her). The distinction between Vice-presidents and ministers is unclear. Parliament cannot express its approval for the appointment, which is the case in democratic presidential systems. The only criterion fixed in the Constitution is that Vice-presidents and ministers shall be appointed from among those eligible to be elected as deputies (Article 106(4))." (paragraph 61)

"(...) the fact that the President may select his Vice-Presidents and ministers from among members of parliament gives the President an [effective form of patronage over the legislature](#), thus putting the separation of powers between the legislative and the executive into jeopardy." (paragraph 62)

"(...) despite not being members of parliament, Vice-presidents and ministers during the term of office enjoy parliamentary immunity as stipulated in Article 83 of the Constitution (Article 106(11)). The extension of parliamentary immunity to ministers who are not MPs already exists under the current Constitution. The very complex procedure of impeachment which will be examined below will be applicable to Vice-presidents and ministers only for "task-related offences" (Article 106(6)). (...) [Granting parliamentary immunity to non-elected officials exercising executive functions](#), thus weakening their ordinary criminal liability (in order to prosecute them, it will be necessary either to lift the parliamentary immunity during their office or to wait until its expiry) [entails a breach of the principle of equality](#) which is not justified within the framework of a democratic presidential system." (paragraph 63)

### **An undemocratic change: non-elected Vice-Presidents**

"The Venice Commission has previously expressed very strong criticism of the creation of a position of non-elected Vice-presidents exercising executive power in substitution for the President. (...) The Commission has said that "If Vice-Presidents are going to govern, they should have an electoral mandate and not take office by appointment of the President. In addition, since Vice-Presidents may temporarily exercise the powers of the President pending new presidential elections, they will be in a privileged position to win these elections. The possibility for the President to designate a Vice-President therefore gives to the incumbent President a lot of influence on the choice of his or her successor. [New Article 103-1 is therefore incompatible with democratic standards.](#)" (paragraph 65)

"Although the Vice-President is supposed to serve as the acting President on a temporary basis, there is no time-limit – except for the length of the mandate itself – imposed in case of temporary absence of the President (as opposed to the 45-day limit in case of vacancy). Moreover, [having the most powerful, and largely uncontrolled and uncontrollable, position in the country occupied by a non-elected person is problematic even when this occupation is only temporary](#). That is why in the United States, the Vice-President is elected together with the President and it is known in advance, and determined by the people, who the holder of this office will be." (paragraph 66)

### **Appointment and dismissal of 'high level state officials': Turkey versus the US**

"Under Article 104(8), the President "appoints and dismisses high level State officials and regulates the procedures and principles relating to the appointment of these, by presidential decrees". Whereas the current text contains an enumerative list of those appointed and dismissed by the president, the draft amendments speak generally about "[high level state officials](#)". It would be up to the President to determine which positions fall under the notion. [If s/he opts for an extensive interpretation of the term, s/he would get an enormous power to decide upon who the holders of important posts in the country will be \(and to](#)



dismiss these holders at her/his leisure). The President not only appoints these officials but s/he also, by his/her decrees, regulates the procedures and principles relating to their appointment. S/He is, in this case, both a "legislator" and executor at the same time." (paragraph 68)

"It should be stressed that contrary to draft Article 104, the President of the United States does not have the power to unilaterally appoint cabinet or other executive branch officials or to regulate the procedures for their appointment. Article II, Section 2, clause 2 of the U.S. Constitution provides that the President shall nominate officers of the United States with the advice and consent of the Senate. Pursuant to these provisions, not merely cabinet level positions (heads of departments), but over 1,200 top personnel in the U.S. executive branch must be nominated by the President and also approved by the Senate in order to be appointed. Under the same constitutional provision, the Congress controls whether or not to give the President or other actors power to solely appoint inferior officers. Thus, the legislature controls who may be appointed solely by the President, as well as the procedures by which such appointments may occur." (paragraph 69)

### **Civilian control over the armed forces**

"In itself, securing civilian control of the armed forces may be deemed welcome. However, the way the amendments would realise this aim would further contribute to the strengthening of the President's power, which is not balanced by counter-weighting powers." (paragraph 72)

### **The power to declare the state of emergency**

"The President therefore would have exclusive powers to declare the state of emergency and will have the power to issue presidential decrees "without the limitation set forth in the second sentence of the seventeenth paragraph of Article 104", that is fundamental rights and political rights and duties (Amended Article 119(6))." (paragraph 75)

### **Presidential decrees**

"Under the amendments, the President does not have the power of legislative initiative. However, by virtue of draft Article 104(17), the President may "issue presidential decrees on matters relating to executive powers". This is a rather vague formulation, as there are hardly any matters which would not somehow "relate" to executive power. (...)" (paragraph 77)

"The principle that legislation prevails over presidential decrees is to be welcomed, as it represents a check on the President's legislative power. It will, however, have to be interpreted in conjunction with the provisions on which areas are to be regulated by law and which areas are to be regulated by presidential decree. In the – very important – areas to be regulated by decree only, it will not be possible for the TGNA to legislate and presidential decrees will prevail. Moreover, the draft amendments do not specify which organ would be competent to declare the presidential decree null and void. (...)" (paragraph 79)

"During the state of emergency, the President may issue presidential decrees with the force of law (draft Article 119). These decrees are not subject to the limitations foreseen by Article 104(17), so they can relate to any matter, including human rights. The guarantees enshrined in Article 15 would however apply here as well. (...)" (paragraph 83)

### **Budgetary powers**

"Amended Article 161 is silent about the consequences of a refusal (as opposed to a delay) by the TGNA to adopt the budget proposed by the President. This means that [the President would in any event eventually dispose of the re-evaluated budget of the previous year. This deprives the TGNA of an important check on the President.](#) According to the authorities, if the TGNA does not approve the budget, it can dissolve itself and cause new presidential elections. This "nuclear option" however, does not seem to be a realistic tool of negotiation in the hands of the parliament." (paragraph 91)

### **Presidential veto powers**

"Draft Article 89 grants the President an important veto power. If the President sends a law back to the Assembly for reconsideration, the law can only be adopted with the absolute majority of the total number of members of the Assembly. (...) The veto power thus gives the President a significant legislative tool. [The exclusive power to initiate referendums for laws amending the constitution might also be used by a President against an unsupportive parliament.](#)" (paragraph 92)

### **Appointments in the judiciary: Turkey versus the US**

"(...) The change in the role of the President should have had as a consequence to reduce his or her [role in respect to the appointment of judges.](#) Instead, this role has been [maintained](#) for the Constitutional Court and Council of State [and increased](#) for the CJP (Council of Judges and Prosecutors)." (paragraph 94)

"(...) For the sake of comparison, it should be noted that the President of the [United States](#) does not have the power to unilaterally appoint Supreme Court or other federal judges. All Supreme Court justices, and indeed all judges of the federal judiciary, must be nominated by the President and approved with the advice and consent of the U.S. Senate. (U.S. Const., art. II, sec. 2, cl. 2). Under current Senate debate rules, this in practice means that [approval of a supermajority of at least 60 members of the U.S. Senate is required.](#)" (paragraph 95)

### **Appointment of the members of the High Council of Judges and Prosecutors**

"The Venice Commission recalls that according to European standards, at least a substantive part of the members of a High Judicial Council should be judges appointed by their peers. (...)" (paragraph 116)

"The Commission finds that [the proposed composition of the CJP is extremely problematic.](#) Almost half of its members (4+2=6 out of 13) will be appointed by the President. It is important to stress once again in this respect that [the President will no more be a \*pouvoir neutre\*, but will be engaged in party politics: his choice of the members of the CJP will not have to be politically neutral.](#) The remaining 7 members would be appointed by the Grand National Assembly. [If the party of the President has a three-fifths majority in the Assembly, it will be able to fill all positions in the Council. If it has, as is almost guaranteed under the system of simultaneous elections, at least two-fifths of the seats, it will be able to obtain several seats, forming a majority together with the presidential appointees.](#) That would place the independence of the judiciary in serious jeopardy, because the CJP is the main self-governing body overseeing appointment, promotion, transfer, disciplining and dismissal of judges and public prosecutors. [Getting control over this body thus means getting control over judges and public prosecutors,](#) especially in a country where the dismissal of judges has become frequent and where transfers of judges are a common practice. In this context it seems significant that the draft amendments provide for elections to the CJP within 30 days following the entry into force of the amendments and that the political forces supporting the amendments control more than three-fifths of the seats in the TGNA, enabling them to fill all seats in the CJP." (paragraph 119)

## **Influence over the Constitutional Court**

"The changes regarding the manner of appointment of the members of the CJP will have repercussions on the Constitutional Court. The CJP is responsible for the elections of the members of the Court of Cassation and the Council of State. Both courts are entitled to choose two members of the Constitutional Court by sending three nominees for each position to the President, who makes the appointments. [The influence of the Executive over the Constitutional Court is therefore increased.](#)" (paragraph 121)

"The Constitutional Court will instead lose the possibility of controlling, as it does now, laws empowering the Council of Ministers to issue decrees having force of law. The President under the amendments will not need an empowering law. While the amendments define limits to the Presidential legislative activity with a formal prevalence of laws over decrees, [the Constitutional Court has not been given the express power to decide over the conflicts which will inevitably arise in this respect.](#)" (paragraph 122)

## **5 Main conclusions**

### **"a decisive break in the constitutional history of the country"**

"The proposed constitutional amendments aim to establish what the Turkish authorities have described as a "Turkish-style" presidential system, although they in no way reflect the well-rooted tradition of parliamentarism in Turkey but would constitute a decisive break in the constitutional history of the country. They are not based on the logic of separation of powers, which is characteristic for democratic presidential systems. Presidential and parliamentary elections would be systematically held together to avoid possible conflicts between the executive and the legislative powers. Their formal separation therefore risks being meaningless in practice and [the role of the weaker power, parliament, risks becoming marginal. The political accountability of the President would be limited to elections, which would take place only every five years.](#)" (paragraph 126)

### **"The amendments would weaken an already inadequate system of judicial oversight of the executive"**

"(...) However, [the proposed amendments weaken, instead of strengthen the Turkish judiciary.](#) The Council of Judges and Prosecutors, whose current composition largely meets international standards, would be immediately reformed by providing that six of the thirteen members are appointed by the President, who would no more be a *pouvoir neutre*, while seven members would be chosen by the Grand National Assembly, over which the President would have influence and which, due to the synchronization of elections, would very probably represent the same political forces as the President. [No member of the Council would be elected by peer judges anymore.](#) (...)" (paragraph 128)

### **"lacks the necessary checks and balances"**

"In the light of the above, the Venice Commission finds that the proposed constitutional amendments [would introduce in Turkey a presidential regime which lacks the necessary checks and balances required to safeguard against becoming an authoritarian one.](#) The welcome abolition of the military courts and the provision that Presidential emergency decrees automatically lose their validity if they are not approved by the Grand National Assembly do not suffice to change this conclusion." (paragraph 130)

### **"dangers of degeneration towards an authoritarian and personal regime"**

"In conclusion, the Venice Commission is of the view that the substance of the proposed constitutional amendments represents [a dangerous step backwards in the constitutional democratic tradition of Turkey.](#) The Venice Commission wishes to stress the dangers of degeneration of the proposed system towards an authoritarian and personal regime. In addition, [the timing is most unfortunate and is itself cause of concern:](#) the current state of emergency does not provide for the due democratic setting for a constitutional referendum." (paragraph 133)