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The Military in the Material Constitution of Turkey

Tarik Olcay¹

Abstract:

The concept of material constitution is helpful to understand how particular constitutional orders are created and how they operate. It invites observers to look beyond the formal constitution, showing the shortcomings of the exclusive focus on the formal constitution and offering tools to enquire into the materiality that underpins it. Whilst the material study of a particular constitution may require a detailed and thorough research of the forces that condition a material constitutional order, it is possible to show the usefulness of the enquiry through selected aspects of a constitutional order. The aim of this chapter is to do that by explaining the military's role in constitution-making in Turkey. Whilst the military is a defining constitutional actor in Turkey, the recognition of this in the formal constitution is very limited. This chapter argues that only through accounting for the constitutional role of the military can the materiality of the Turkish Constitution be grasped, and a more accurate description of the Turkish constitutional order be provided. Through an overview of its role in the making and re-making of the 1961 and 1982 Constitutions, the chapter introduces the military as an ordering force in the Turkish Constitution. It explains the military's constituent and ongoing authority over the constitutional order and its role in guaranteeing the fundamental political objectives of the constitutional order.

Keywords: material constitution, constitution-making, constitutional change, military, Turkey

1. Introduction—accounting for the military in material constitutional enquiry

The rediscovery of the concept of material constitution² offers many avenues to study the operation of particular constitutional orders. The material study of constitutions opens up lines of enquiry that legal constitutionalism and political constitutionalism struggle to register,³ and helps to provide an explanation, if not justification, of political practice that the formal constitution fails to capture or simplistically labels 'unconstitutional'. It helps to look beyond the formal constitution in a systematic way to understand and explain why particular constitutional orders are created in the way they are and why they operate in the way they do. It calls for a focus on the institutions in the society that condition—or precondition—the constitutional order that the formal constitution may not fully account for. Above all, it is an enquiry that is curious to understand and interested in explaining why some seemingly unconstitutional or extra-constitutional political values or practices can have a central place in a given constitutional order.

What is material to a constitutional order is not always captured in formal constitutional arrangements. This may be due to oversight or poor design, but it can be also the result of negotiation, concealment, manipulation or deferment in formal constitution-making. The exclusion of aspects of the material constitution in the formal constitution can have a profound impact on the constitutional order over time, either by the constitutional form moulding the materiality of the constitutional order or the formal constitution amounting to a sham

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² M. Goldoni and M. A. Wilkinson, 'The Material Constitution' (2018) 81 *Modern Law Review* 567-97.

³ M. Goldoni and T. Olcay, 'The Material Study of Constitutional Change', in X. Contiades and A. Fotiadou (eds.), *Routledge Handbook of Comparative Constitutional Change* (Abingdon: Routledge, 2020), pp. 262-68.

constitution,⁴ but in any case, constitutional analysis is poorer when the material forces that condition the constitutional order are not taken into account only because they are absent from the formal constitution.

The material study of the constitution captures what underpins the formal constitutional values and structures, and helps to explain how a constitution operates beyond its formal confines, providing tools for constitutional explanation and prediction, in addition to its significant epistemic value. The identification of how the constitution operates within a polity through a study of the ordering forces that permeate the constitutional order is a more holistic enterprise of recognising loci of constitutional power compared to not only formal enquiries but also enquiries that centre around constituent power, which tend to focus on the extraneous shaping of constitutional orders.

There are many places one can look to understand the material constitution of Turkey. Indeed, some of the chapters in this handbook, which apply the conceptual framework of the material constitution to other constitutional orders, show the relevant places to look at in particular constitutional orders. These may include, broadly, political economy, political culture, social structure, religion, geopolitics, international relations, and imperial factors.⁵

Specifically with regard to the Turkish constitution, the role of religion in public life as well the role of the state in organising religion,⁶ including the current religious-corporatist structure of bureaucracy,⁷ the independence of the Central Bank,⁸ the ‘deep state’,⁹ the rise of alternative—and conservative—business elites especially in the past few decades,¹⁰ may be relevant to a material study. This chapter aims to offer a modest starting point for an enquiry into the material constitution of Turkey by looking at perhaps the most obvious aspect of the Turkish Constitution beyond its formal boundaries: the military. Although some constitutional powers are given to senior military officials in Turkey, no other central aspect of the Turkish constitutional order is more understated in the formal constitution than the military. There has been an overbearing presence of the military on Turkish politics, ranging from explicit institutional expectations to a constant threat of a coup d’état. Against this background, the aim of this chapter is to introduce the military as an ordering force in the Turkish Constitution, through an examination of its role in the making and re-making of the 1961 and 1982 Constitutions. The chapter explains the military’s constituent and ongoing authority over the constitutional order and its role in guaranteeing the fundamental political objectives of the constitutional order. What this reveals is that, although recognition of its constitution-making role is limited in the formal constitution, the military is a defining constitutional actor in Turkey. Only through accounting for the constitutional role of the military can the materiality

⁴ D. S. Law and M. Versteeg, ‘Sham Constitutions’ (2013) 101 *California Law Review* 863.

⁵ M. Goldoni and M. A. Wilkinson (n. 2), p. 580.

⁶ A. Kuru, *Secularism and State Policies toward Religion: The United States, France, and Turkey* (New York: Cambridge University Press, 2009), pp. 161-235.

⁷ D. Coşan and C. Uğur, ‘Cults in Turkey on the move to replace Gülen community’, *Birgün Daily*, 29 October 2016.

⁸ S. B. Şahin, ‘Central bank independence in Turkey: A neo-Gramscian analysis’ (2012) 47 *Cooperation and Conflict* 106-23.

⁹ M. Soyler, *The Turkish Deep State: State Consolidation, Civil-Military Relations and Democracy* (Abingdon: Routledge, 2015).

¹⁰ D. Kenner, ‘The happy story of the Anatolian tigers’, *Foreign Policy*, 19 March 2010.

of the Turkish Constitution be grasped, and a more accurate description of the Turkish constitutional order be provided.

Whilst the chapter will argue that the military's role has been central in shaping Turkey's constitutional order, it is worth noting that its involvement has not been confined to a founding moment in Turkish constitutional history. The military has been part of a wider web of institutional ordering forces, albeit with a central role, but it has been tasked within this wider web to provide security for the top-down secularist and nationalist reforms made during the founding era of the Turkish Republic in the 1920s and 1930s, and has been designed to have tutelage over democratic politics.¹¹ The motivation behind this role has not been to provide for a protracted military rule, but to protect the secular order and the state apparatus;¹² and the Turkish military has been a crucial institutional guarantor of the constitutional principles of secularism and nationalism, which have been protected by unamendability clauses in both the former 1961 Constitution and the current 1982 Constitution.

2. The Place of the Military in Turkey

Looking at the role of the military in constitution-making in Turkey is an obvious starting point for a material study of the Turkish constitution. The involvement of the military in Turkish constitutional politics pre-dates the Republic of Turkey, which was founded in 1923, but the chapter will focus specifically on the 1961 and the current 1982 Constitutions, both of which were made following coups d'état and under strict military control. Not only was the current 1982 Constitution drafted by military generals who carried out the 1980 coup d'état, but the previous 1961 Constitution was also drafted under the control of the military junta responsible for the 1960 coup d'état. In addition to such direct involvement in constitution-making, the military has also had indirect, yet defining, influence on constitutional change in Turkey from the time the 1982 Constitution has been in force to this day. The military's failure in the 2016 coup attempt, for instance, inversely reshaped the constitutional order by paving the way for the constitutional changes that created an autocratic system of presidential government.¹³

The central role of military is not simply about the threat of physical power it may exert but also the place and perception of the military in Turkish society more generally. Turks consider themselves a military-nation as evident in the adage 'every Turk is born a soldier'.¹⁴ Turkey has a considerably large military force, having the highest number of military personnel in NATO after the United States,¹⁵ military service is compulsory for every male Turkish citizen,¹⁶ and mandatory national security curriculum has been taught in high schools by active servicemen until recently.¹⁷ The military also has long been the institution enjoying the highest

¹¹ A. T. Kuru, 'The Rise and Fall of Military Tutelage in Turkey: Fears of Islamism, Kurdism, and Communism' (2012) 14(2) *Insight Turkey* 37-57.

¹² Z. Sarigil, 'The Turkish Military: Principal or Agent?' (2014) 40 *Armed Forces & Society* 168-190, 169.

¹³ Z. Yilmaz, 'Erdoğan's presidential regime and strategic legalism: Turkish democracy in the twilight zone' (2020) 20 *Southeast European and Black Sea Studies* 265.

¹⁴ A. G. Altınay, *The Myth of the Military-Nation* (New York: Palgrave Macmillan, 2004), pp. 13-32.

¹⁵ 'International comparisons of defence expenditure and military personnel' (2021) 121 *The Military Balance* 517-22.

¹⁶ 1982 Constitution of Turkey, Article 72.

¹⁷ A. G. Altınay, 'Human rights or militarist ideals? Teaching national security in high schools' in D. T. Ceylan, G. Irzik (eds.) *Human Rights Issues in Textbooks: The Turkish Case*. (Istanbul: Tarih Vakfı Yurt, 2004).

levels of public confidence in Turkey.¹⁸ It is therefore a socially and materially very powerful institution that retains its influence on the daily lives of the citizens of Turkey.

The Turkish constitutional order is embedded within the civil law tradition with an apparent commitment to legalist formalism. A conscious choice was made to adopt this legal tradition in the formative years of the Turkish Republic, where public law was heavily based on the French tradition.¹⁹ Coupled with a tradition of a ‘strong state’,²⁰ this resulted in a legalist approach to law whereby a gargantuan body of administrative law has been legislated. This, in turn, created a formalist public law culture that mainly dealt with a detailed body of public law, focussing its enquiry on the forms that the constitution and other administrative laws create.

The influence of legalist formalism has resulted in the concealment of certain aspects of the legal and constitutional order from view. While, on the face of it, Turkey has had a formally advanced constitutional and administrative law with established administrative judiciary and administrative traditions, the body of public law remained insufficient to account for certain phenomena within the constitutional-legal order. The history of modern Turkey is rife with constitutional crises, where certain political issues could not be resolved within the operation of the formal constitutional mechanisms or the major political actors feel that way, resorting to (formal) constitutional amendment,²¹ or simply (at least temporarily) setting the formal constitution aside.²² Whilst the former also tells an important story as to the place of the formal constitutional text and whether it is truly *constitutional* if it is amended at every critical political juncture,²³ the focus of this chapter is on the latter as that is where the role of the military has been most significant in constitution-making.

Considering its key role in shaping the Turkish constitutional order, the place of the military in the formal constitution seems modest. The main constitutional provision that gives the military an important albeit rather limited constitutional role is the one creating the National Security Council.²⁴ This body was created by the 1961 Constitution and was tasked to

¹⁸ M. Aydın, M. Çelikpala, E. Yeldan, M. Güvenç, O. Z. Zaim, B. B. Hawks, E. C. Sokullu, Ö. Şenyuva, O. Yılmaz, S. D. Tıgılı, *Kantitatif Araştırma Raporu: Türkiye Siyasal Sosyal Eğilimler Araştırması* [Quantitative Research Report: Turkey Political Social Leanings Research] 2020, İstanbul, Kadir Has Üniversitesi, Türkiye Çalışmaları Grubu, Akademetre ve Global Akademi, 7 January 2021, available at https://www.khas.edu.tr/sites/khas.edu.tr/files/inline-files/TEA2020_Tur_WEBRAPOR_1.pdf [last accessed on 3 June 2021].

¹⁹ For example, see K. Gözler, ‘Türk Belediye Sistemi Üzerinde Fransız Etkisi: 3 Nisan 1930 Tarihli Belediye Kanunu Fransa’dan mı İktibas Edilmiştir?’ [French Influence on the Turkish Municipality System: Is the Law on Municipality Dated 3 April 1930 Adapted from France?] (2019) 28(1) *Çağdaş Yerel Yönetimler* 1 (arguing that the Turkish municipality regime is inspired by the French one); K. Gözler, ‘Osmanlı/Türk Köy İdaresi Sistemi Üzerinde Fransız Etkisi: 1864 ve 1871 Osmanlı Nizamnamelerinin Köylere İlişkin Hükümleri ve 1924 Köy Kanunu Fransa’dan mı İktibas edilmiştir?’ [French Influence on the Ottoman/Turkish Village Administration System: Are the Provisions of the Ottoman 1864 and 1871 Laws on Villages, and the 1924 Law on Villages Adapted from France?] (2019) 68(2) *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 413 (arguing that the Turkish village regime is inspired by the French one).

²⁰ M. Heper, ‘The Strong State as a Problem for the Consolidation of Democracy: Turkey and Germany Compared’ (1992) 25 *Comparative Political Studies* 169.

²¹ As of 2021, the current 1982 Constitution has been amended 19 times, including several major omnibus amendments.

²² The governmental system was arguably changed unconstitutionally with a *de facto* amendment. See T. Olcay, ‘The Turkish Constitution as a Disrespected Idol’, IACL-AIDC Blog, 14 January 2021, available at <https://blog-iacl-aidc.org/cili/2021/1/14/the-turkish-constitution-as-a-disrespected-idol> [last accessed on 3 June 2021].

²³ Ibid.

²⁴ 1982 Constitution of Turkey, Article 118.

‘communicate’ its views on national security policy to the Cabinet until the 1971 constitutional amendment that gave it the power to make ‘recommendations’ to the Cabinet.²⁵ According to the amended 1982 Constitution, the National Security Council currently consists of the President, deputies of the President, Ministers of Justice, National Defence, Internal Affairs, and Foreign Affairs, the Chief of the General Staff, and the commanders of the Land, Naval and Air Forces.²⁶ While this formal arrangement gives the military a central role in shaping the national security policy, it does not do justice to the actual constitutional power it is capable of exerting.

Both the 1961 and 1982 Constitutions were adopted in the aftermath of military coups d’état and under military junta rule. Throughout the period they have been in force they have undergone several major reforms, and experienced further military intervention. As mentioned, the Turkish military has enjoyed high public confidence especially in comparison with the political elite, and it was therefore able to intervene in constitutional politics with no significant backlash from the general population. Although it has suffered major setbacks since the 2007 Presidential election,²⁷ including the *Ergenekon* and *Balyoz* trials of active and retired military officials,²⁸ and the 2016 coup attempt and its aftermath,²⁹ on the whole, but not necessarily in all sectors of the society, it remains a powerful and trusted institution in Turkey.³⁰

3. Military Involvement in Constitution-Making

The military has had a double function in the Turkish constitutional order. First, it played various direct and indirect roles in creating the conditions for major constitutional changes as well as in constitution-making processes. Secondly, through its involvement in constitution-making it placed itself as one of the guardians of secularism and nationalism, the fundamental constitutional principles of the Republic of Turkey. Due to the abrupt end to the multi-national and Islamic Ottoman Empire and the top-down nature of the Kemalist revolution, the Republican political elite, itself originating from the Ottoman military, designed the Turkish military as a central constitutional actor having the power to wield physical force whenever secularism or nationalism are considered to be under threat in domestic politics.

Direct military involvement in constitution-making has occurred since the first constitution of Turkey during the Ottoman Empire. Two of the 28 members of the committee that drafted the 1876 Constitution, which was the first step towards a constitutional monarchy, were military officials.³¹ The Committee of Union and Progress, which carried out the Young Turk Revolution in 1908 that led to the Second Constitutional Era of the Empire, had infiltrated the Ottoman military, and the Republic was founded in 1923 under the leadership of Mustafa Kemal Atatürk, a field marshal. The more focussed and direct involvement in constitution-making, however, came following Turkey’s transition from one-party state to multi-party state

²⁵ 1961 Constitution of Turkey, Article 111.

²⁶ 1982 Constitution of Turkey, Article 118/1.

²⁷ R. Karakaya Polat, ‘The 2007 Parliamentary Elections in Turkey: Between Securitisation and Desecuritisation’ (2009) 62 *Parliamentary Affairs* 129-148.

²⁸ E. Aydınli, ‘Ergenekon, New Pacts, and the Decline of the Turkish “Inner State”’ (2011) 12 *Turkish Studies* 227-239.

²⁹ L. Haugom, ‘The Turkish Armed Forces and Civil-military Relations in Turkey after the 15 July 2016 Coup Attempt’ (2019) 2(1) *Scandinavian Journal of Military Studies* 1-8.

³⁰ See above n.17.

³¹ B. Tanör, *Osmanlı-Türk Anayasal Gelişmeleri* [Ottoman-Turkish Constitutional Developments] (Istanbul: YKY, 2008), 17th ed., p. 133.

in 1945 and the eventual rise of the Democrat Party, which broadly represented the conservative masses against the secularist-nationalist elites of the Republic. In 1960, a group of middle-ranked officers in the Turkish military overthrew the Democrat Party government and set up a military regime with a view to ‘ending the increasingly oppressive Democrat Party regime’.³² This coup d’état has been looked on favourably by many constitutional scholars due to its claims of reorienting the country towards ‘Atatürk’s path’ and away from ‘religious manipulation’.³³ The 1960 coup was recently even reconceptualised as a ‘democratic coup d’état’.³⁴

The National Unity Committee (NUC), the military junta that took power after its overthrow of the democratic government in 1960, commissioned a group of legal academics to draft a new constitution. The draft produced by the commission received wide criticism for weakening the principle of universal suffrage by creating a second chamber with a corporatist character, as well as excessively limiting the executive power for the benefit of various autonomous institutions it proposed, such as a State Council, a National Security Council, a National Economy Council, a National Bank of Turkey, and universities.³⁵ The NUC then created a constituent assembly that consisted of two chambers: (i) the NUC itself, and (ii) the House of Representatives. Despite what its name may suggest, the latter chamber was not elected; rather, it consisted of members appointed by the head of the state (10 members), the NUC (18), provinces (75), the Republican People’s Party (49), the Republican Villagers Nation Party (25), bar associations (6), press (12), the Veterans’ Association (2), small businesses (6), youth (1), trade unions (6), chambers of commerce (10), teachers’ unions (6), agricultural unions (6), universities (12), and the judiciary (12).³⁶ The Democrat Party, which had received 48.6% of the votes in the 1957 general election and had been overthrown in the 1960 coup d’état, was not represented in the Constituent Assembly.

To draft the new constitution, a Constitution Committee was established in the House of Representatives, consisting of 20 members. The process designed regarding the approval of the draft of the Committee gave similar powers to each chamber of the constituent assembly, which is significant especially when contrasted to the system adopted in the making of the 1982 Constitution that is completely deferent to the military wing as explained below. Still, given the considerable control of the NUC over the House of Representatives and the complete absence of the Democrat Party which represented almost half of the electorate before the coup d’état, it would be difficult to imagine that the substantive demands of the military were not catered for in the drafting of the constitution in the process.

Following the approval of the final constitutional text in a referendum by 61.5% of the votes on 9 July 1961, the NUC forced the leaders of the political parties to sign a joint declaration, which among others things recognised the legitimacy of the 1960 coup d’état, denounced the Democrat Party ideology as well as ‘partisanship’ generally.³⁷ The military elite also ensured that the Justice Party, a descendant of the Democrat Party, did not put forward a

³² Ibid., pp. 365-66.

³³ Ibid., p. 365.

³⁴ O. O. Varol, ‘The Democratic Coup d’État’ (2012) 53 *Harvard International Law Journal* 291, 323-28.

³⁵ K. Gözler, *Türk Anayasa Hukuku* [Turkish Constitutional Law] (Bursa: Ekin, 2018), 2nd ed., p. 105.

³⁶ B. Tanör (n. 31), pp. 369-70.

³⁷ Ibid., pp. 376-77.

presidential candidate so that Cemal Gürsel, the leader of the NUC, could be elected President.³⁸

The 1961 Constitution is commonly regarded as a constitution that prioritised the individual over the state, rather than the other way around.³⁹ This is especially the case when it is contrasted with the 1982 Constitution, which is—or at least in its original form was—a more authoritarian constitution with a state-centric approach to rights and freedoms. That said, the 1961 Constitution contained many provisions that demonstrate a serious distrust in democratic politics and provide for bureaucratic mechanisms to keep it under control.⁴⁰ For instance, the members of the NUC were made Senators for life in the Senate of Republic, the second parliamentary chamber created by the 1961 Constitution.⁴¹ The Constitution also gave the President the power to directly appoint another 15 Senators.⁴² This was designed to ensure that the interests of the military bureaucracy were sufficiently present in the legislature to keep democratic politics in check. The 1961 Constitution also entrenched the military judiciary and the Military Court of Cassation as constitutional authorities.⁴³ More importantly, it created the National Security Council for the first time, with a view to creating a mechanism that would liaise the Cabinet with the military bureaucracy, placing it hierarchically at the same level as the Cabinet in the Constitution.⁴⁴

The next direct military involvement in constitution-making came on 12 March 1971, this time in the form of a memorandum with an ultimatum to end ‘social and economic unrest’ in response to the political violence between rightist and leftist groups,⁴⁵ and form a ‘strong and credible government’. The generals signed the memorandum as “members of the National Security Council”,⁴⁶ demonstrative of the intended uses of the creation of the National Security Council. Following the 1971 memorandum martial law was declared, and this lasted over two years, during which three constitutional amendments were made to the 1961 Constitution. These amendments extended the scope of the military courts in a way that allowed certain civil matters to be tried before them due to martial law, strengthened the National Security Council by giving it recommendatory powers, and strengthened the executive to the detriment of the legislature.⁴⁷

The military once again stepped in as political violence spread during the late 1970s, claiming the lives of not only left- and right-wing militants but also of public figures, including a former prime minister.⁴⁸ On 12 September 1980, the military announced that it had taken over political power claiming that the state organs had stopped functioning, and dissolved the Turkish Parliament. The military made it clear that it intended to hand back political power, but not before significant reforms had been made to the political system. The junta set up the National Security Council (not to be confused with the constitutional organ with the same

³⁸ Ibid., p. 377.

³⁹ B. Tanör, *İki Anayasa: 1961-1982* [Two Constitutions: 1961-1982] (Istanbul: XII Levha, 2013), 5th ed., p. 17.

⁴⁰ E. Özbudun, *Türk Anayasa Hukuku* [Turkish Constitutional Law] (Ankara: Yetkin, 2010), 11th ed., pp. 45-46; B. Tanör (n. 31), pp. 399-401.

⁴¹ 1961 Constitution of Turkey, Art. 70.

⁴² 1961 Constitution of Turkey, Art. 70.

⁴³ 1961 Constitution of Turkey, Art. 141.

⁴⁴ B. Tanör (n. 31), p. 400.

⁴⁵ E. J. Zürcher, *Turkey: A Modern History* (London: I. B. Tauris, 2004), 3rd ed., pp. 253-58.

⁴⁶ B. Tanör (n. 31), p. 411.

⁴⁷ B. Tanör (n. 39), pp. 217-22.

⁴⁸ E. J. Zürcher (n. 45), p. 264.

name), which consisted of the Chief of the General Staff, the three Commanders of the Land, Naval, and Air Forces, and the General Commander of the Gendarmerie. Whilst the National Security Council delegated day-to-day government business to an unelected civil cabinet, it dictated the government programme.⁴⁹

The National Security Council bestowed upon itself constitutional reform powers.⁵⁰ In 1981, it established a constituent assembly that consisted of (i) the National Security Council, and (ii) an Advisory Assembly.⁵¹ The Advisory Assembly was not elected and its members were not affiliated to any political party, all of which had already been dissolved. 120 of the 160 members of the Advisory Assembly were recommended by unelected governors in each province and appointed by the National Security Council, and the remaining 40 members were appointed directly by the National Security Council. Ensuring its complete control over the constitution-making process, the National Security Council also empowered itself to approve or amend and approve the draft constitution passed by the Advisory Assembly.⁵² The 1982 Constitution was drafted under these conditions and the draft finalised by the National Security Council was approved in a plebiscite by 91.37% of the votes on 7 November 1982 with a 91.3% turnout. It is worth noting that the National Security Council officially banned criticism of the National Security Council's campaign for the draft constitution and strongly implied that if the draft constitution was rejected, military rule would continue for the foreseeable future,⁵³ prompting voters to vote for the lesser of two evils.

The resultant 1982 Constitution created a more authoritarian constitutional order as well as strengthening the military's constitutional position in several respects. It provided that the number of civil members would not exceed the number of military members of the National Security Council (the constitutional organ), and further escalated the role of this Council in a way that forced the government to prioritise the Council's decisions. It expanded the scope of national security to bring social and political conflicts into the constitutional remit of the military. It also gave even more powers to the executive branch than the 1971 amendments, including an easier process for the President to dissolve the parliament. It provided extensive Presidential powers to appoint members of the senior judiciary, and placed several restrictions on the activities of political parties. It also made it easier to place limitations on all fundamental rights and freedoms on general grounds such as national security, public order, public utility, and public morality.

As the approval of the referendum on the 1982 Constitution also automatically elected Kenan Evren, the Chief of General Staff and the leader of the National Security Council (the organ of the military junta) as President as per Provisional Article 1 of the Constitution, the junta had direct control over democratic politics until late 1980s. Following the end of Evren's presidential term, Turkish politics became more plural and eventually the Welfare Party, an Islamist political party and the political ascendant of the Justice and Development Party (AKP), came to power in 1996 leading a coalition government with two centre-right political parties. This government lasted only for a year after the military issued a memorandum on 28 February 1997 to force out the government due to activities it regarded as a threat to secularism. The

⁴⁹ E. Özbudun (n. 40), p. 52.

⁵⁰ Law on the Constitutional Order, No. 2324, dated 27 October 1980, Art. 6.

⁵¹ Law on Constituent Assembly, No. 2485, 29 June 1981, Art. 1.

⁵² Law on Constituent Assembly, No. 2485, 29 June 1981, Art. 26.

⁵³ E. Özbudun (n. 40), p. 56.

Welfare Party was eventually banned by the Constitutional Court in 1998 as it had become a ‘focal point’ of activities against secularism, which is an unamendable principle of the Turkish Constitution.⁵⁴ This military intervention is widely known as the ‘post-modern coup’ as it forced a government out through a memorandum with a thinly veiled threat of an actual military coup by the National Security Council yet it did not dissolve the parliament as in previous interventions.

In 2007, the military provoked an unintended constitutional change. Reflecting on its historical practices, it made its discontent with the prospect of Abdullah Gül’s presidential election clear through what has come to be known as the ‘e-memorandum’ of 2007. Abdullah Gül was the candidate put forward by the AKP and was likely to be elected President by the Turkish Parliament. The fact that he came from a religious background and that his wife wore the Islamic headscarf became an issue with the secularist parts of the society.⁵⁵ The military weighed in on the matter by publishing a statement on its website, signalling that it will ‘act’ if secularism comes under attack within the context of the presidential election. The government refused to succumb to this pressure and pressed on with Gül’s candidacy, only to find itself unable to achieve quorum in the Turkish Parliament after a move by the parliamentary opposition to innovate a new rule on quorum requiring that the number of votes required in the first round of election (367) is also the number for the session to be quorate. Although the AKP had enough MPs to elect Gül in the second round, where 276 votes were sufficient, the Constitutional Court ruled in favour of the opposition regarding the quorum rule.⁵⁶ A general election was called in response to this and the AKP, although losing some of its seats, were able to achieve quorum because the Nationalist Movement Party, gained enough seats in the Turkish Parliament to make up the 367 required for quorum. After the election, Gül was elected President, and the AKP introduced a significant constitutional amendment that provided for a popularly elected President, as well as clarifying the rule on quorum. This amendment was approved in the 2007 referendum by 68.95% of the voters.

Especially since the 1990s, there has been a constant debate regarding the democratic legitimacy of the 1982 Constitution and the need to adopt a ‘civil’ constitution to replace the current ‘military’ constitution.⁵⁷ This discourse has ranged from simple calls to formally remake the constitution by a civil body and rescue it from its military underpinnings to substantially reform it and rid it of mechanisms that maintain the tutelage of the military over democratic politics. Whilst much of the authoritarian foundations and language of the Constitution remains intact, reforms made in line with Turkey’s process of accession to the European Union in late 1990s and 2000s created, at least nominally, a less restrictive constitutional framework for the protection of fundamental rights and freedoms as well as allowing more space for democratic politics.⁵⁸

Turkey witnessed another coup attempt in 2016. This was striking for many reasons, but especially for demonstrating the ongoing relevance of the military in shaping the Turkish constitutional order. Since the early 2010s, many observers considered that military tutelage

⁵⁴ Constitutional Court, E. 1997/1 (Political Party Closure), K. 1998/1, 16 January 1998.

⁵⁵ Ş. Dinçşahin, ‘A Symptomatic Analysis of the Justice and Development Party’s Populism in Turkey, 2007–2010’ (2012) 47 *Government and Opposition* 618, 627-30.

⁵⁶ Constitutional Court, E. 2007/45, K. 2007/54, 1 May 2007.

⁵⁷ Z. Arslan, ‘Turkey’s Bid for the New Constitution’ (2007) 9(3) *Insight Turkey* 7-17.

⁵⁸ E. Özbudun and Ö. F. Gençkaya, *Democratization and the Politics of Constitution-Making in Turkey* (Budapest: Central European University Press, 2009), pp. 43-72.

over democratic politics in Turkey was over and that the military had lost its purchase within society, at least when it came to shaping domestic politics.⁵⁹ Especially after what was considered to be the AKP's victories over the military, such as the 2007 presidential election and constitutional amendment referendum, and the *Ergenekon* and *Balyoz* trials, the predominant view was that the 'era of coups' was over. The 2016 coup attempt and its aftermath are a testament to the continuing central relevance of the military to constitutional ordering in Turkey.

4. Conclusion—The Effects of Military Involvement and the Material Constitution

The formal constitution of Turkey equips the military with significant powers, including a pivotal role in making and executing national security policy. As the making of the last two constitutions and the several military interventions at critical constitutional junctures demonstrate, the military has a defining constitutional role, more than simply informing the work of the executive in Turkey. It is clear that there is a strong lingering presence of the military within the Turkish constitutional order, providing a checks and balances mechanism, not necessarily to curb excessive use of governmental power, but to keep democratic politics in check when it feels that political unity or the fundamental political objectives that make up the particular constitutional order are at stake. It is telling that the national security policy document, the 'red book', is known as the 'secret constitution' of Turkey, and a former Chief of General Staff called it "the god of all policies, the mother of all laws: it is unthinkable to act against it."⁶⁰

The Turkish Constitution has been shaped by the military more than by any other institution. Some effects of the military involvement in constitution-making in Turkey are self-evident. The current constitution itself was drafted under military control and to this day the people of Turkey are constantly reminded of its military origins. That said, enquiries into the Turkish constitution rarely take the ongoing constitutional role of the military into account. This is not to say that the military is not treated in the constitutional law scholarship as having exercised 'constituent power', but rather to emphasise that the formal constitution fails to acknowledge how much influence the military has consistently had over constitutional actors, and not only during coups d'état or the transitional periods following them. A mere focus on the act of founding with regard to the military's involvement in constitution-making in Turkey conceals the fact that the constitutional relevance of the military is reinforced by the success of the military-made constitutions.

The aforementioned legitimacy deficit of the 1982 Constitution due to its military origins may be overstated as well. There was a serious constitution-making attempt between 2011 and 2013, bringing together the four major political parties representing 95% of the voters in an *ad hoc* constitution-making committee in the Turkish Parliament with equal representation. The idea was to replace the 'authoritarian' constitution made by the military with a 'civil' one based on the protection of human rights. This attempt failed miserably as the threshold for agreement was set too high with consensus required among the four political

⁵⁹ Y. Cilliler, 'Popular Determinant on Civil-Military Relations in Turkey' (2016) 38 *Arab Studies Quarterly* 500-520. Cilliler notes strong popular support for the government in the civil and political society as well as by major economic interest groups, the power of the pro-government media, and the change in political opposition's approach to a more cautious stance towards the political involvement of the military as some of the reasons for the fading influence of the military over domestic politics (p. 512).

⁶⁰ K. Akkoyunlu, 'Chapter Two: Turkey' (2007) 47 *The Adelphi Papers* 21, 37.

parties involved in the process and three of the four political parties' reluctance to compromise on their 'red lines'—presidentialism for the Justice and Development Party (AKP), secularism for The Republican People's Party (CHP), and nationalism for the Nationalist Movement Party (MHP). This led the way to a rapid eradication of political goodwill and an increasing authoritarianism until this day.⁶¹ The failure of the process may be explained away as being unfortunate, but the political parties knew it would mean the 1982 Constitution living on. This may be, therefore, a legitimacy crisis only in name; perhaps the 1982 Constitution, at least the basic framework it sets up, caters well to the needs of the Turkish polity. This is not to praise the 1982 Constitution but rather to point out that its framework is amenable to speak to the material constitution of Turkey. This can also be observed in constitution-making debates, including the 2011-2013 constitution-making process,⁶² where there are two fault lines: (i) nationalism and the unitary character of the state, and (ii) secularism. These are the essential characteristics of Turkey's material constitution, conditioned by military tutelage.⁶³ The main political forces in the country, represented by the AKP, the CHP, and the MHP do not wish to move away from these fundamental political objectives. The perceived legitimacy deficit, therefore, seems to be a shallow and formalistic pre-occupation with the fact that it was the military that oversaw the making of Turkey's constitutions, rather than one of profound disagreement with the essence of the 'military' constitution.

This chapter has sought to show the constitutional role of the military in the Turkish constitutional order beyond its formal constitutional powers and its direct interventions to democratic politics roughly once every decade. The role of the military is ongoing and it conditions the constitutional order, protecting its fundamental political objectives and shaping the behaviour of constitutional actors. The material enquiry of the constitution promises to help to pinpoint the forces responsible for such ordering. Further studies on the material constitution of Turkey may enquire into the political interests or factions that make up the military.⁶⁴ What happened in the aftermath of the 2016 coup attempt, muddled as it may be, has exposed the presence of an organised political interest group inside the military, seeking to exert political power within the military and beyond. It would be naïve to assume that the rest of the military is not organised as such and does not consist of other interest groups that have political influence. Studying the corporatist nature of the military can yield useful data regarding the type and extent of the current constitutional relevance of the Turkish military.

⁶¹ F. Petersen and Z. Yanaşmayan (eds.), *The Failure of Popular Constitution Making in Turkey: Regressing Towards Constitutional Autocracy* (Cambridge: Cambridge University Press, 2020).

⁶² F. Petersen and Z. Yanaşmayan, 'Explaining the Failure of Popular Constitution Making in Turkey' in F. Petersen and Z. Yanaşmayan (eds.) (n. 61), pp. 49-56.

⁶³ See A. T. Kuru (n. 11).

⁶⁴ See, eg, B. Esen, 'Praetorian Army in Action: A Critical Assessment of Civil–Military Relations in Turkey' (2021) 47 *Armed Forces & Society* 201-222.