FOREWORD

CONSTITUTION AND CONSTITUTIONAL COURT

April 2022 marked two important anniversaries in history of Turkish Constitutional Law: 1) The 60th foundation anniversary of the Constitutional Court; 2) The quinquennial of the 2017 constitutional configuration. In this context, it is appropriate to write separate accounts for the Constitutional Court and the Constitution.

The 1961 Constitution established the Turkish Constitutional Court, in line with the European model of centralized constitutional review and inspired by the Constitutional Courts of Austria (1945), Italy (1947) and Germany (1949).

The Constitutional Court began its activities with the enactment of the founding law on 25.04.1962. Therefore, April 25 is celebrated as the founding day of the Constitutional Court.

The European model of constitutional review remained the main framework, despite many changes in Constitutional Court's structure and powers, through several amendments that the 1961 Constitution has been subjected to and its eventual abolition that led the way to the 1982 Constitution.

Since the right to individual application, which was granted in the 2010 constitutional amendment, was put into effect in 2012, we may also take the 2022, as the 10th anniversary of individual application, which merits a separate account.

However, the 2017 constitutional amendment, approved by the April 16 referendum, occupies a separate place in the decades-old tradition of constitutionalism. In this respect, one cannot consider accounts of the 60th anniversary of the establishment of the Constitutional Court and the 10th anniversary of the individual application independently of the 2017 constitutional configuration. Therefore, a realistic account of the quinquennial of the constitutional structure of 2017, may well provide realistic insights for constitutional review in general.

I. THE CONSTITUTIONAL STRUCTURE OF 2017: AN ACCOUNT FOR ITS QUINQUENNIAL

The 2017 Constitutional Amendment abolished the government, collective political decision processes and the rules of political accountability. The constitutional checks and balances mechanisms were eradicated allocating the state powers of representation and the executive to one person. This constitutional configuration, which is unprecedented in the Ottoman-Turkish constitutional and political history, is a serious disruption in the political and democratic evolution process that spanned centuries.

How can we evaluate such a structure in its fifth year, that was as a one-man rule with four-years of actual practice? Turkey's resulting constitutional problems may be summarised under the following heading:

-The dynamics of constitutional amendment.

-Amendments made under the circumstances of the state of emergency (*Olağaünüstü Hal-OHAL*).

-Transitional and harmonization laws.

-Two-Fold Constitutional Structure and *de facto* practices.

- The armor of impunity and a legal vacuum creating some sort of permanent state of emergency.

- The effect of this constitutional structure on international relations.

1. DYNAMICS OF THE AMENDMENTS

The 1982 Constitution was amended many times between 1987 and 2017. The mode of amendments and their consequences may be basically summarised as follows:

- Amendments reinforcing rights and freedoms in pursuit of a democratic constitution were made between 1987-2004.

-Amendments that resulted in the personalization of political power were made between 2007-2017.

In this respect the structure of the 2017 Constitution, which embedded the pursuit of personal power, can be defined as alien to previous civil and political efforts in the Turkish constitutional history. The reasons for the amendments were built on the failed coup attempt of

15 July 2016. The armed coup attempt to overthrow the constitutional order was prevented by the outright reactions of the Turkish Armed Forces, law enforcement officers and citizens. However, it also paved the way for the 2017 constitutional amendment.

-De-constitutionalization and the confession of the "constitutional offence": "The country is governed in contravention of the laws and the Constitution; thus a crime is committed. The President of the Republic acts as a *de facto* president (of the executive)”. [1] These comments, made at the height of the de-constitutionalization process, were the direct impetus for the amendments. De-constitutionalization in the sense of the rulers' failure to abide by the mandatory provisions and violating the prohibitive rules became particularly evident during the Gezi events in 2013 and was instrumental in moving Prime Minister Erdoğan to the position of President.

Coup Attempt and State of Emergency: Although the coup attempt was overpowered on the night of July 15, the State of Emergency (*OHAL*) was put into effect on July 21. The declaration of the state of emergency stirred the debate as to whether the coup attempt was a managed one.

State of Emergency Decrees and the Annexed Lists: The Emergency Decrees (*OHAL KHKs*) were unconstitutional in two main respects:

-The annex lists to the *OHAL KHKs,* which included names of hundreds and thousands of people being dismissed from the public service, were prepared by public officials, but not by the signatories of these *KHKs*.

-Among those who were purged, were thousands of people who were not related to the coup attempt and who fought against religious sects and all illegal organizations. The *OHAL KHKs* were used for political purposes and as means of eliminating pro-democracy human rights defenders from public service.

-The constitutional amendment proposal was prepared by two political parties (*AKP*[2]*-MHP)* following the confession of “constitutional offence” and submitted to the parliament on 10 December.

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[1] Devlet Bahçeli, chairman of the National Movement Party, 16 October 2016.

[2] Justice and Development Party.

2. THE *OHAL* CONTEXT AND CIRCUMSTANCES

The amendments and referendum were carried out in the *OHAL* context and circumstances, without providing the constitutional right to information and free public opinion. This period was dominated by a series of blatant unconstitutionalities.

*Violation of the secret ballot principle***:** The amendment proposal, prepared in a non-transparent manner and accompanied an increasingly intense, illegal, and brutal *OHAL* measures, was voted on in the parliament without even observing the secret ballot rule. This amendment proposal was adopted with its 18 articles**.**

*Disproportionate propaganda***:** Yes and no blocs could not compete on equal terms. Voters could not enjoy their rights to information and there was no free constitutional public opinion.

Unstamped envelopes: The Supreme Board of Elections accepted unstamped envelopes as valid and accepted the yes votes cast in those envelopes in the referendum. This decision spurred the controversy over the legitimacy of the constitutional amendment.

3. THE OBLIGATION REGARDING THE HARMONIZATION LAWS WAS VIOLATED

The *AKP-MHP* alliance, which turned the referendum into a "constitutional plebiscite" by its "survival" rhetoric failed to fulfill its constitutional obligations regarding the transitional period. The relevant article of the Constitution is as follows:

No later than six months after the promulgation of this Act, the Grand National Assembly of Turkey shall adopt the Rules of Procedure and other statutory regulations required by the amendments made by this Act…(Provisional article 21/B)

Harmonization laws were not drafted, while the electoral law was amended: Harmonization laws were not enacted for 16 months, which passed far beyond the 6-month deadline.

The provision of the Constitution regarding elections is as follows: *General election for the 27th legislative term of the Grand National Assembly of Turkey (TGNA) and the presidential election shall be held together on 3/11/2019. (Provisional article 21/B)*

During this time, instead of preparing harmonization laws, AKP-MHP alliance first amended the law on elections to lay the necessary

legal base for its alliance. Then snap elections were called. The election date, which was fixed as the 3 November 2019, in the Constitution, was changed to 24 June 2018.

Mass Purges: Mass purges continued through the *OHAL KHKs* and after the elections.

Decrees having the force of law (Kanun Hükmünde Kararname-KHK): The new constitutional configuration was developed not by laws, but by the force of hastily enacted *KHKs* and incomplete regulations.

4. TWO-FOLD CONSTITUTIONAL STRUCTURE AND *DE FACTO* PRACTICES

The “constitutional configuration” that came into effect after the June 24, 2018 elections revealed the following two-fold constitutional picture:

-Firstly, there are the provisions regarding the requirements of the ‘democratic state of law’ stipulated in the Preamble and General Principles of the Constitution, but not subject to the 2017 amendment.

-Secondly, there are the provisions of Article 101 and others which were the subject of the 2017 Constitutional Amendment. The main question here is as to whether these amendments are compatible with the principle of 'democratic state of law'.

-*De facto* situations arise from the political practice. While the President is at the center of the *de facto* situations that challenge this already problematic constitutional order, the legislature and the judiciary could not also remain within the limits of the Constitution in their transactions and decisions.

Executive: Instead of regular National Security Council meetings as regulated by the Constitution, there has been a *de facto* “security summit”. In addition, the Economic and Social Council, another institution regulated by the Constitution, has never had a meeting. These examples show that the current provisions of the Constitution are not followed.

The so-called ‘Government System of the President of the Republic’ has no equivalent in comparative constitutional law. This cannot, therefore, legitimize the anti-constitutional practices of the “Presidency and Executive via Party Leadership”. The President, who has usually carried out his party activities in his Palace, gave political statements in

the courtyard of a mosque in front of the presidential seal. He remained active even in the Covid-19 circumstances.

Legislature: Religiously inspired anti-interest argument, was the implied official justification for the legal regulations made under the name of “currency-protected deposits”. This was indeed against the prohibition of using religion in politics, and was a violation of the constitutional rights of taxpayers and the social state requirements -hence multiple violations of the Constitution.

The GNAT (Grand National Assembly of Turkey) was not able to use its legislative power autonomously, hence it could not be useful for the deliberation processes. Rejecting almost all the investigation proposals of the democratic opposition’s parties (CHP-HDP and the IYI Party)[3], the People’s Alliance (AKP-MHP)[4] -generally filled the empty seats in the Parliament only during the voting of the laws for their benefit. Law deliberations, which are in the public interest and closely related to the future of the society mostly took place after the TV broadcasting hours. GNATs failure to exercise its legislative power and the use of executive decree powers in the legislative domain resulted in a situation what may be called the “de-legislation”. While the People’s Alliance (AKP-MHP) in the Grand National Assembly of Turkey narrowed the area of legal regulation in favor of Presidential Decrees (CBK), the latter were increasingly used for the matters that should normally be regulated by laws.

Judiciary: The independence and impartiality of the judiciary have been impaired by the constant pressure of the Executive despite the clear provisions of the Constitution to the contrary.

Overall, the Executive threatened to shut down the Constitutional Court and the local courts if they dared to resist its decisions. The highly politicalized judiciary increasingly gave political decisions instead of revealing truth and observing the law. Never in Turkish constitutional history, has the judiciary been under such control of the political will.

Erosion of the rules and degeneration of institutions took center stage. The Turkish Armed Forces’ hierarchical structure was damaged

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[3] Republican Poeple’s Party (CHP/RPP), Democratic Party of the Peoples (HDP/DPP), the Good Party (İyi Parti).

[4] Justice and Development Party(AKP/JDP) and Nationalist Movement Party(NMP)

and it saw the dismantleing of its many traditional institutions including its schools and hospitals.

There have been unrelenting efforts to turn public schools into the backyard of religious communities and sects via so-called foundations under the auspices of the Palace. Religion, which has been instrumentalized with the aim of obtaining, maintaining, and entrenching political power, was also used as a tool to shape the younger generations and impoverish the society.

5. PERMANENT AND ARBITRARY STATE-OF-EMERGENCY

De facto State of Emergency: While neglecting to take social state precautions and to fulfill medical requirements – such as compulsory vaccination –"The Presidency and Executive Through Party Leadership"(PETPL) did not hesitate to restrict freedoms in ways that could be done in a state of emergency, without declaring it (Art.15).

Permanent Impunity: None of the constitutional justifications suggested for the PETPL came true. The unconstitutional *OHAL* measures and regulations were made permanent. Thus, the link of responsibility between the crimes of the state of emergency and their possible sanctions was permanently cut. Those who took and implemented unlawful decisions and actions during the OHAL are now permanently exempted from any **legal, administrative, financial or criminal liability**.

6. DRIFT IN INTERNATIONAL POLITICS

The legal, institutional, and systemic destruction and trivialization of the gains of the Republic were mirrored in a drift in international politics.

Personal relations and preferences and short-term interests were preferred to the foreign policy that has been in place since the foundation of the Republic; and by ignoring the imperative provisions of the Constitution.

Judicial decisions: European Court (ECtHR) decisions were not implemented; the Council of Europe began infringement proceedings against Turkey.

Cases before the judiciary: Inconsistent attitudes and practices in many cases continued. Most seriously, the case of Cemal Khashoggi,

whose body was destroyed in the Consulate General of Istanbul, was sent to Saudi Arabia.

International Agreements: The withdrawal from the Istanbul Convention by a clear anti-constitutional decision amidst widespread violence against women; and the persistence of environmental looting despite the Paris Agreement, were typical signs of Government's cynicism about international law.

Anarchy in International Relations: The constitutional order was destroyed with the slogan "No to double-headed government!" But now it is even more unclear who is in charge of international relations. President? Minister of Foreign Affairs? Councils in the Palace? Presidential Spokesperson? Nobody knows.

II. 60th ANNIVERSARY OF THE CONSTITUTIONAL COURT

Decisions of the Constitutional Court are definitive and 'shall be binding on the legislative, executive, and judicial organs, on the administrative authorities, and on persons and corporate bodies'(Art.153).

The increasing workload and the ensuing delays in the decisions of the Constitutional Court frequently raise the issue of the effectiveness of constitutional judicial review. Undoubtedly, the high number of individual applications can be considered as the key factor of the increase in the number of cases. On the other hand, Presidential decrees (*CBK* for *Cumhurbaşkanlığı Kararnameleri*), as a kind of "parallel legislation", also affect the workload of the Constitutional Court's General Assembly.

The fact that CBKs are published without explanatory-justification notes and adopted as omnibus legislation, complicates the task of review by the Constitutional Court. Similarly, the fact that most of the laws passed by the GNAT are adopted as omnibus laws is another factor that complicates and hinders the effectiveness of the Court.

To this, one should also recall the problems regarding the "duration", "agenda", "decisions" and "respect":

As to the duration: The Constitutional Court can adjudicate on applications for annulment of laws in approximately 14-15 months; this period may be longer for the applications against the *CBKs*.

As to the agenda: It is not clear according to which criteria the Constitutional Court orders the applications for annulment of laws. For example, although it quickly decided on law no. 7247, which stipulates

the division of bar associations, it is far from clear why it delayed the decision on law no. 7393, which envisages radical changes in the election law and which sparked a debate about the democratic state of law, particularly in respect of the gerrymandering attempts of the incumbent government.

As to the decisions: The Constitutional Court decides only few cases and with delays. And even when it does made a decision, few are annulment decisions and some include “partial annulment”, a technique that provides a deadline for the parliamentary majority and the President to re-write the law in line with the decision.

As to the respect: The legislature and the executive exploit the deadline period and act only at the very end of it, and they only pay a lip service to the relevant decisions of the Constitutional Court without necessarily observing their essence.

What about an evaluation for the 10th anniversary of the individual application remedy?

The first problem is this: Individual application is accessible only for the rights enumerated in the European Convention on Human Rights (ECHR), excluding the larger rights catalogue of the Turkish Constitution.

-Secondly, although the individual application process dictates a legal reform that guarantees the right to a fair trial to be claimed in front of the courts of all levels, the Constitutional Court has become the sole judicial authority in terms of resolving human rights violations, since the necessary reform remains incomplete.

- The third problem is that the lower-level courts have not formed a habit to use the individual application decisions as binding precedents.

-The fourth problem is that some low-level courts brazenly defy the decisions of the Constitutional Court.

More generally, the occasional questioning of the Constitutional Court by politicians and especially executive representatives reveals the problem of respect for the Constitution, and in fact, is a sign of an absence of belief in the democratic state of law. This attitude also leaves its mark on the process of nominating members to the Constitutional Court. Therefore, the majority of the Constitutional Court, having no female members, is composed of judges with either no legal training or the necessary specialization.

Apart from a limited improvement with the advent of the individual application, the decisions of the Constitutional Court reflect a judicial

self-restraint and fall far short of its European counterparts when it comes the norm-control decisions and using the methods of law on freedoms and constitutional law.

Of course, the Constitutional Law Journal Special Issue, dedicated to the Constitutional Court in its 60th year, includes more detailed examinations of these matters.

Suffice here to highlight the need to redesign the Constitutional Court through a constitutional amendment to be made for the purpose of securing the democratic state of law, in order to create a more effective constitutional judicial review.

III. FOR A LAW-BASED DEMOCRATIC STATE

In the fifth year of the PETPL, all these have confirmed the legitimacy and urgency of an endeavor towards a democratic constitution. The constitutional efforts, under the name of “rationalized parliamentarism”, carried out by 6 political parties, is based on the principle of democratic state of law.

The governmental coalition (People's Alliance) made a pact for the elections in April 2022 based on the law No. 7393. In March 2018, it had preferred the amendment of election laws to the harmonization laws. The will to prevent the change of political alternation by abusing the law reveals itself here. For this reason, there is a need to look at the efforts carried out for the democratic parliamentary regime from a broad and long-term perspective. This should include non-governmental organizations and the young population.

For the defenders of the democratic rule of law, the 2023 elections have the nature of a constitutional referendum. The quest for a new constitution will determine preferences in the parliamentary and presidential elections

It is now urgent and essential to create a constitutional structure by which the state is governed by a government accountable before the Grand National Assembly of Turkey, constitutional checks-and-balances mechanisms are provided, and judicial independence is ensured. Such an endeavor for a democratic constitution will most likely become a source of inspiration on both the regional and international level.

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