

## ***FOREWORD***

### **40<sup>th</sup> ANNIVERSARY OF THE CONSTITUTION: FROM A REACTIONARY CONSTITUTION TO RUPTURE**

Although there is some truth in the view that Turkey's constitutional and political problems are the consequences of the "*Constitution of the 12 September Coup*", this reductive and oversimplifying approach is somewhat out of date on the 40th anniversary of the Constitution.

The Constitution, which was adopted on November 7, 1982, was criticized for being a **reactionary Constitution**; because, in contrast to the 1961 Constitution, it preferred a strong executive over the judiciary and legislature, as well as restrictions and prohibitions on freedoms.

For this reason, although the initial amendments to the Constitution pursued the re-establishment of the balance between security and freedoms, several amendments spanning 30 years have not always aimed at limiting power and securing freedoms. In this respect, two main clusters of amendments have emerged that are completely at odds with each other:

–**The amendments between 1987-2004:** In terms of procedure, these amendments were the outcomes political consensus in the Grand National Assembly of Turkey. Especially the 1995 and 2001 amendments, which aimed at limiting power and consolidating freedoms, can be described as the **metamorphosis** of the 1982 Constitution on the path to democratic politics and a democratic society.

–**The amendments between 2007-2017:** In terms of procedure, these amendments were the outcomes of referendums instead of parliamentary consensus. They removed the collegial decision making with the dual executive of the rationalized parliamentary system and entrenched a personalized power enjoying all state power single-handedly.

**Where does the political and constitutional order established by the 2017 Constitutional amendment and practice fall within the spectrum of pluralist political regimes?**

Democratic regimes satisfy minimum requirements at four levels: ideological, political, institutional and economic. The environment and conditions that will enable the change of political power following the free elections should be stable.

For this, the following three rules should apply in the context of separation of powers: 1) constitutional checks and balances mechanisms, 2) the unity of the principles of duty-authority-responsibility and accountable government, and 3) an independent judiciary. However, the **constitutional configuration** that emerged following the 2017 Amendment has moved away from the minimum requirements of pluralist political regimes.

The configuration of the 2017 Constitution, which is incompatible with the requirements of **constitutional science and constitutionalism**, is a process of alienation from the Ottoman Empire-Turkish Republic constitutional developments.

**The foundations of constitutional law were based on parliament:**

–**In 1876**, the Ottoman Constitution introduced the Parliament and the Government: “*The Ministers Committee, established under the presidency of the Grand Vizier, is the decision maker of important domestic and foreign affairs*” (art. 28).

–**The 1909 Amendment** provided for a parliamentary regime with government accountable before the Assembly: “*The ministers are collectively responsible for the general policy of the Government and, individually responsible for the actions and transactions of the organizations under their retinue before the Parliament*” (art. 30).

**The Government of the Grand National Assembly established the Republic:**

–**The 1921 Constitution:** “*The Turkish State is governed by the Grand National Assembly and its government is titled as "the Government of Grand National Assembly"*”.

–**The 1923 Amendment:** “*The form of government of the Turkish State is the Republic.*”

–**1924 Constitution:** *“The Prime Minister is appointed by the President from among the members of the Assembly.” The Council of Ministers is jointly responsible for the general policy of the Government. (...)*”

–**The 1961 Constitution:** *“The council of ministers shall consist of Prime Minister and ministers. The Prime Minister promotes cooperation among the Ministries and supervises the implementation of the government's general policy. The members of the Council of Ministers are collectively responsible for the implementation of this policy.”*

–**The 1982 Constitution:** *“The council of ministers shall consist of Prime Minister and ministers. (...).The Prime Minister, as the head of the Council of Ministers, ensures cooperation between the ministries and oversees the implementation of the general policy of the government. (...)*”

**The three Constitutions of the Republic included the common denominators of the parliamentary regime:**

–The general policy of the government is determined by the Council of Ministers.

–Ministers are individually and collectively responsible to the Parliament.

–The President as the representative of the State and the Government are separate from each other.

In terms of institutional constitutional law, there is a difference in nature between the rupture caused by the 2017 Amendment and the ruptures caused by the military coups.

–**May 27, 1960 coup:** The 1961 Constitution, which reflects the common features of the Post WWII constitutionalist movement in Europe, was never implemented effectively because it was prepared under the shadow of the 27 coup, which inflicted deep wounds on Turkish democracy.

–**Memorandum of March 12, 1971:** The constitutional amendment changed the security-freedom balance in favor of the political power in a setting of martial law that suspended the legal order.

–**September 12, 1980 coup:** The Constitutional referendum, held under the control of the National Security Council, enabled Kenan Evren to become the President of the State. However, the first amendment to the Constitution was made during Evren's presidency.

–There is a completely different relationship between the failed coup attempt of 15 July 2016 and the 2017 constitutional amendment. Although the post-coup Constitutions or their amendments were made under the control of the coup leaders, the 2017 constitutional amendment was carried out under the leadership of political actors, who were elected in 2015 and were decisive in suppressing the coup attempt.

## I. GAINS AND RUPTURE

Despite the mentioned ruptures and breaks, one common normative **gain** is noteworthy: *”The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble.”* (Art.2)

The gains of the rule of law coincide with the minimum requirements of constitutionalism in terms of state organization and legal structure:

–**Legislature:** The Grand National Assembly of Turkey has a primary and general authority to set rules.

–**Execution:** The executive, having the authority to implement the rules, has a dual structure and there is an impartial President representing the state and a responsible government before the Grand National Assembly of Turkey.

–**Judiciary:** The judiciary as the body to settle disputes is independent; court decisions are binding.

In our constitutional history, the experience of the **parliamentary regime** is remarkable in terms of the formation and functioning of the legislature and the executive, the processes of termination of their tenure and interdependence relations.

As the hierarchical structuring of the current legal rules, the order of the Constitution-laws-bylaws has been valid, and the constitutional judiciary has been the guarantee of compliance with the hierarchy of norms.

A minimum of **consensus** has been established based on the requirements of constitutionalism:

–**The principle of duty+authority+responsibility in executive and administration:** There is an accountable administration and government.

–**Constitutional checks and balances mechanism:** Separation of powers is not a subordinate-superior relationship, but a separation of duties, functions and powers, all three of which are subject to the rule of law.

–**The normative feature of the Constitution:** Supremacy and binding nature of the Constitution are secured by the Turkish Constitutional Court (TCC).

However, the constitutional amendment made by Law No. 6771 on January 21, 2017 and submitted to the referendum on April 16, 2017, caused a rupture from the course of Ottoman State-Turkish Republic constitutionalism, institutions, rules and values in terms of executive-legislative and judicial powers and the relationship between them:

–**The government was abolished, and the legacy of the Ottoman Empire and the Republic of Turkey was disfavored.**

–**The parliamentary regime was abolished:** The constitutional configuration, which is called as “the President-of-the-Republic Government System (PRGS)”, has largely eliminated the parliament's mechanisms of responsibility and control, such as the vote of confidence and motion of censure over the executive. However, because the minimum elements of the checks-and-balances mechanisms required for a democratic presidential system were not provided, the parliamentary regime was not replaced by a genuine presidential system. .

–**The ban on the transfer of legislative power was violated:** The President was given the power to set norms in a wide area through presidential decrees (PD).

–**Institutional guarantee of the judicial independence was removed:** The new structure of the Council of Judges and Prosecutors, the highest regulatory and supervisory body of the judiciary, placed the judiciary under the control of the executive.

–**Personalized power was exempted from accountability:** The executive was identified with one person; the legislature was brought under the control of the executive through the party presidency. In contrast, the principle of duty-authority-responsibility was not envisaged. The ministers, who are hierarchical supervisors of the ministries, which are not established as political decision makers, are responsible only to

the President of the Republic, and there is no link between them to ensure coordination or solidarity.

As a result of the 2017 constitutional amendment, three types of deficiencies have emerged that undermine the "democratic state of law" of the Republic of Turkey:

- Collegial political decision-making process (joint/collective).
- Political responsibility and accountable management.
- Checks-and-balances mechanisms.

In summary, even though compelling social needs did not make it necessary, constitutional institutions and rules, that were formed over a century, were abolished in the environment and conditions of the state of emergency, and with the abusive use of procedures.

## II. THE RUPTURE WAS CONFIRMED BY PRACTICE

The fact that the power of the executive and state administration is constitutionally assigned to one person, and the same person is the party chairman even though this does not comply with the binding rules of the Constitution, has brought the state and the executive under the dominance of the political party through its leader. Personalizing the power and partisanisation of the State brought the danger of fusion of person, party and the state.

The 2017 constitutional amendment made the status of the presidency and party membership compatible by removing the relevant provision: "*The President-elect ... shall sever his relations with his party*" (art. 101).

Nonetheless, although the repeal of the provision intended to pave the way for a President to remain or become a party member, the President's party chairmanship is still incompatible with the obligatory and prohibitive provisions of the current Constitution.

Here are a examples of provisions that seem incompatible with permitting the President to be a party member:

–***Oath of the President:*** "*I swear upon my honour and integrity...to abide by the Constitution, the rule of law, democracy...do my utmost to...perform without bias the functions that I have assumed*" (art.103).

–***Characteristics of the Republic, remain*** in the cluster of irrevocable provisions (arts 2 and 4).

*–Appointment powers to independent and “impartial” judiciary organs (art. 9) and superior institutions (arts. 146 and 159).*

**–Power to “ensure”:** the duty of the President “to ensure...the regular and harmonious functioning of the organs of the State” (art 104).

Considering these and other constitutional obligations, it is difficult to reconcile the President's party chairmanship with the status of neutrality, which is indispensable for the fulfillment of these obligations.

**It will suffice to mention two problems with this:**

- With the merger of the presidency and party chairmanship statuses, the authority responsible for ensuring respect for the Constitution has become the main actor that violates the Constitution.

- The party-presidency merger, which hinders the free and equal functioning of democratic political competition, also damages the environment and conditions for the change of the political power (political change).

In summary, the abusive constitutional amendment made under the state of emergency was abused in practice as well.

### **III. THE DRIVING FORCES OF THE SEARCH FOR THE CONSTITUTION AND THE PREMISES OF THE DEMOCRATIC CONSTITUTION**

How may or should we read the 1982 Constitution on its 40<sup>th</sup> Anniversary? Undoubtedly, the "coup constitution" terminology is no longer valid in the sense of the 1980s, and the concept of "constitutional metamorphosis" that we used at the beginning of the century has been overshadowed by the 2017 constitutional configuration. For this reason, on its 40<sup>th</sup> anniversary, there is a need to interpret the Constitution in the light of the decisions of the Constitutional Court and the European Court of Human Rights as much as it is necessary to interpret the amendments *in toto*. It is also worth noting that the Republic of Turkey became a party to many international conventions on human rights, especially the UN Twin Conventions<sup>1</sup>, during the period of the 1982 Constitution.

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<sup>1</sup> International Covenant on Economic, Social and Cultural Rights. and International Covenant on Civil and Political Rights– adopted by the UN.

Therefore, liberties and constitutional gains should be used as the driving forces to reconstruct institutional constitutional law on the axis of the democratic state.

In order to put an end to the “State-of-emergency Constitution” and the “Constitutional order of a State of Emergency”, a there is now an urgent necessity for a constitutional amendment.

Turkey's search for solutions to constitutional problems should be in the light of the common denominators or minimum standards of classic constitutionalism. Undoubtedly, the dynamic understanding of the Constitution brings with it the search for solutions to new problems at the constitutional level. A modern constitution, which must be built on an understanding of human rights based on dignity, all official institutions, especially the political apparatus, must be organized and structured according to this aim. For this purpose, the checks-and-balances mechanisms in the constitutional amendment process should include multiple elements:

- Checks and balances mechanisms between the legislative, executive, and judicial powers.
- Checks and balances mechanisms among the three powers and autonomous regulatory-supervisory-expert organizations.
- Separation of duties and powers and the principle of autonomy between central and local governments.
- “Separation of powers” for the state; "the indivisible integrity of rights and freedoms" for the society.

Undoubtedly, the rules of the Constitution must also include durable solutions to the new problems facing human societies. Constitutional amendments and restorations aim to respond to this quest. States, which entered the 21st century with a quest for a constitution on a national scale, are confronted with the phenomenon of trans-national constitutionalism more and more today in the face of the problems emerging on a global scale.

From this perspective, the general theory of constitutional law is not a completed process, and the current Constitutions are constantly evolving.

*While the development of social and political structures and continuous changes in international relations are decisive, the diversity of intellectual studies and case-law interactions through constitutional in-*



*stitutions can also be seen as the driving forces of development. On the other hand, constitutional law is constantly under the influence of technological advances and has to adapt its institutions and concepts to them.*

For this reason, the constitutional right to information is more vital than ever; because the 1982 Constitution, which was cut off from the tradition of constitutionalism as a result of "abusive amendment" in its 35th year, faces the risk of "opportunistic change" in its 40th year.<sup>2</sup>

However, Turkey's constitutional agenda should be a constitutional amendment that will include the minimum requirements of a democratic state of law and a responsible executive in front of the Turkish Grand National Assembly.<sup>3</sup>

The Journal of Constitutional Law meets the readers with its 40th Anniversary file, which includes analyses made in the light of constitutionalism and constitutional science for the '**right to information on the constitutional issues and public opinion on the constitutional issues**' in the context of yesterday-today-tomorrow.

Wishing you good reading!

(İbrahim Ö. Kaboğlu/31 October 2022)

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<sup>2</sup> The constitutional amendment attempt (Justice and Development Party) to change the definition of family under the pretext of making the headscarf a constitutional guarantee is incompatible with the understanding and essence of constitutionalism.

<sup>3</sup> See "The Constitution and the Constitutional Court" (Foreword), Journal of Constitutional Law- 21.