

FOREWORD

CONSTITUTIONALISM IN TURKEY: WHAT WILL BE THE IMPLICATIONS OF THE REPUBLIC'S CENTENARY?

In order to carry out such an assessment, merely recalling political-constitutional developments is insufficient, as the questioning of constitutionalism has turned into a daily concern during the centenary of the Republic.

1- The continuity and rupture of constitutionalism in Turkey

The development of constitutionalism in Turkey since the Ottoman Empire has been marked by the following five texts: The Constitution of 1876, the Constitution of 1921, the Constitution of 1924, the Constitution of 1961 and the Constitution of 1982. Two main features stand out in all these texts: continuity and rupture.

The concept of **continuity** here suggests that constitutionalism has followed a path of linear progress. Since the end of the nineteenth century, a gradual expansion and strengthening of rights and freedoms has marked each phase in the development of constitutions. This has also entailed a growing array of provisions aimed at regulating and limiting the powers of the state.

The 1876 Constitution, which was in the form of a sultanistic **Edict**, was transformed into a more democratic **Constitutional Pact** by the 1909 Constitutional amendment. While the text of 1924 regulated both state powers and citizens' rights, the 1921 Constitution focused solely on the organization of the state. It is noteworthy how the 1961 Constitution, in comparison to the 1924 text, marked a significant progression by establishing the **general mechanisms of the Rule of Law for the first time**. Such a linear advancement toward the establishment of checks and balances in the constitution, balancing political power and human rights, vividly illustrates the **continuity of constitutionalism in Turkey**.

In the context of continuity, a transition can be observed from the Reform (*Tanzimat*) period, starting in 1839, to the establishment of the

mechanisms of the Rule of Law, which were solidified by the 1961 Constitution. During this time, the rules, institutions, and traditions of a modern state were gradually put in place. This included the formation of an institutionalized state organization, which in turn facilitated the further limitation of political power and the consolidation of human rights.

The main achievements include:

- A flexible separation of powers, coupled with the independence of the judiciary.
- The establishment of a hierarchy of norms, emphasizing the supremacy of the Constitution.
- The formation of the government as a collegial body.
- The adoption of the principle of political responsibility before the National Assembly.
- The neutrality of the President.
- The exclusive competence of the National Assembly in the production of legislative norms

The Constitution of 9 November 1982 preserved the parliamentary system but shifted the balance of power by strengthening the executive branch and diminishing the status of rights and freedoms. However, subsequent amendments, starting in 1987 and continuing over the next two decades, have incrementally impacted the system of checks and balances, which is crucial for the proper guarantee of human rights.

Reflecting on the constitutional metamorphoses is essential for ensuring its **effectiveness**; the Constitution's norms must have real-world impact. These developments within constitutional law, particularly regarding freedoms, are further enriched by the democratic principle that human rights form the **normative infrastructure of democracy**. In this context, paraphrasing **two perspectives on democracy** from the early twenty-first century is particularly insightful: The first of these is the observation on the link between democracy and secularism: *“Turkey stands out as one of the few democracies in the Muslim world. By ‘democracy,’ we refer to the pluralist model established in Western Europe, which serves as an aspirational benchmark for many Turkish citizens. The crucial debate over how Islam intersects with democracy—and consequently the role of secularism—is especially pronounced in Turkey. Here, the matter is of practical concern, as opposed to the situation in many other*

Muslim countries where democracy has yet to be genuinely tested, leading to speculative discussions about the prerequisites for its realization.”¹.

The second observation is about the link between **ruptures** and **continuity**: *“The experience of democracy in Turkey has faced major problems, suffered serious setbacks and survived both. Despite these problems and setbacks - and perhaps even because of them - Turkish democracy is by far the most successful among countries with similar experiences and traditions. It can serve as a model for others. Turkish history is rich in aberrations and interruptions, which is normal in a context of great tensions and limited experience of democracy. What is remarkable and distinctive is that after each derailment, the democratic process has been put back on track and the Turkish people have been able to continue on their journey to freedom and democracy.”²*

However, the constitutional amendments enacted from 2007 to 2017, despite **ostensibly** safeguarding the principle of the **separation of powers**, have led to the **concentration and personalization of power in favor of the Head of State**. The most recent amendment in 2017, which effectively eliminated the collegial government, was characterized by the Venice Commission as *'a dangerous step backward for Turkey's democratic constitutional tradition'*³.

2- From Restoring the Rule of Law to the Personalization of Power

"The 1961 Constitution, drafted in the aftermath of the May 27, 1960 military coup, reflected a clear commitment to the philosophical basis underlying a *“democratic State based on law,”* along with its legal and social foundations. This new framework was designed to ensure 'the continuity of the secular Republic', operating within the parameters of a democratic regime bolstered by effective guarantees."

¹ François Vinot, "Armée, Laïcité et Démocratie en Turquie", CEMOTI (Cahiers d'études sur la méditerranée orientale et le monde turco-iranien), no 27/1999, p.71.

² Bernard Levis, "La démocratie en Turquie", Vie et mort des démocraties in Rabb ve Suleiman (dir.), Dalloz 2005, p.271.

³ According to the Venice Commission (the Council of Europe's Commission for Democracy through Law), "the proposed system risks an authoritarian and monocratic drift". See: Avis no 675/2017 « Sur les modifications de la Constitution adoptées le 21 janvier 2017 », CDL-AD (2017)005.

The establishment of the Constitutional Court under the 1961 Constitution was a reaction to the unconstitutional practices of previous decades and closely resembled the historical process of establishing constitutional courts as seen in the 1945 Constitution in Austria, the 1947 Constitution in Italy, and the 1949 Constitution in Germany.

From the constitutional perspective on the relationship between **the State and society**, the “*State was perceived merely as an instrument*”. The pivotal elements were individual freedom and the autonomy of society, as evidenced by the legal order grounded in human rights. “*Many even began to believe that this liberal approach was excessive for a society facing increasing polarization*”.⁴

The 1961 Constitution was revised by a military memorandum (pronunciamento) in 1971, following a military intervention, to strengthen the powers of the State and curtail the rights recognized in the Constitution.

The military coup of September 12, 1980, had completely opposite effects in terms of democracy, human rights and the rule of law when compared to the coup of May 27, 1960. Indeed, it is undeniable that the 1982 Constitution, drafted by an Advisory Council and adopted by referendum, was a regression from the previous 1961 Constitution. Therefore, the 1982 Constitution was perceived as a deviation from the **rule of law**. However, the successive constitutional amendments that started in 1987 and spread over nearly two decades were seen as the **re-establishment of the rule of law**. On the other hand, the amendments introduced in 2017, which restructured each of the branches of power and their interrelations, risk undermining the democratic rule of law, an essential element of a pluralistic political system.

Despite such a **radical rupture**, the non-amendable provisions remain untouched. In this context, Article 2 of the Constitution, which defines the qualities of the Republic, clearly reflects Turkey's political and constitutional achievements: “*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.*”

⁴ Bernard Levis, "La démocratie en Turquie" in *Vie et mort des démocraties*, p.257.

Can such a shift be seen as a result of the evolution of constitutionalism in Turkey, or as an authoritarian will imposed by elected representatives taking advantage of the exceptional circumstances of the state of emergency declared after the military coup attempt?

3- 2017 constitutional structure and implementation

The constitutional amendments adopted by referendum on April 16, 2017, which aimed to restructure the executive and profoundly change the relationship between the executive and the legislature, undermined the principle of separation of powers for three main reasons:

Delegation of most of the rule-making powers to the President through presidential decrees;

-Political unaccountability of the executive, despite the fact that all executive power is vested in the President;

-Weakening of checks and balances mechanisms, as the executive's lack of political accountability is coupled with the ineffectiveness of judicial review, as the Constitutional Court only exercises corrective (*a posteriori*) review.

What is the **nature of the political regime** introduced by the amendment? The parliamentary regime has been abolished and a presidential regime has been introduced. However, it is very difficult to classify this regime as it does not meet the necessary conditions in terms of **separation of powers**. A presidential regime is a regime in which the powers and the branches that hold these powers are separate and the relations between the branches are based on structural, functional, and relational independence. However, in the 2017 constitutional restructuring, the independence of the judiciary has been clearly weakened and the structural, functional, and relational independence between the executive and the legislature has not been guaranteed. In short, due to **the lack of checks and balances** necessary for a democratic rule of law, it is very difficult to categorize the new structure within the framework of democratic political regimes. This political and regulatory configuration, as already mentioned, represents a **profound rupture** (as well as a rejection of the political-constitutional inheritance) in two centuries of political and democratic evolution.

The 2017 constitutional restructuring, perceived as driven by the pursuit of **personal power**, also represents a backsliding from decades

of civic and political progress. The impetus for these amendments was the **failed coup attempt** on July 15, 2016, which saw an unsuccessful bid to disrupt the constitutional order. Despite being suppressed by the Armed Forces, security personnel, and widespread citizen resistance, the coup attempt then set the stage for the **constitutional changes of 2017**.

According to official terminology, the “President-of-the-Republic System of Government”, which lacks a clear analogue in the theory and practice of constitutional law, also fails to reflect the political reality. This discrepancy arises because the addition of political party leadership to the **already excessive concentration of executive powers in the presidential role** necessitates a new characterization.

Among the many characterizations used in the doctrine of constitutional law and political science, such as monarchy, autocracy, delegated democracy, hyper-presidency, etc., none adequately capture the unique situation where an individual simultaneously holds the position of a neutral presidency and the chairmanship of a political party. Consequently, it may be more suitable to adopt a term that encompasses this dual role: **Head of State and Executive via Party Chairmanship**. Prof. Bockel discerns two distinct subtypes within presidential systems, noting that: “absolute presidentialism”, which declines any genuine constraints on the Head of State’s authority, including adherence to the rule of law, contrasts with “moderate presidentialism”, which incorporates such limitations. Hence, while the Turkish political structure may ostensibly be characterized as moderate presidentialism according to its legal framework, in practice, it veers towards absolute presidentialism due to the dominant disposition of its leader.”⁵ Bockel’s use of “strong personality” indirectly acknowledges that the leader’s authority is amplified by keeping the presidency aligned with his political party, thereby diminishing the potential for moderation.⁶

⁵ Alain Bockel, “La réforme constitutionnelle en Turquie: la démocratie à la dérive”, *Revue française de droit constitutionnel*, 2019/3, p.664.

⁶ For another analysis. Jean Marcou, “La présidentialisation en Turquie et le devenir de l’Etat de droit”, *Liberté (s) ! En Turquie? En Méditerranée! (...)*, *Revue méditerranéenne de Droit Public*, IX, 2018, pp.200-208.

4- A Flagrant Violation of the Constitution

The issue in question is an unprecedented conflict between the Court of Cassation and the Constitutional Court, arising from the Court of Cassation's refusal to implement a judgment made by the Constitutional Court.⁷

On October 25, 2023, when the Constitutional Court ordered the release of a detained MP, the case took a very special turn. According to the Constitutional Court, the MP's "**right to vote and be elected**" and "**right to liberty and security**" had been violated. Can Atalay, who had been in prison for over a year, was charged with "attempting to overthrow the government" for his participation in the Gezi Park protests in 2013.

Shortly before the general elections in May 2023, the Supreme Electoral Council allowed Atalay to run as a candidate for the Workers' Party of Turkey (TİP) from prison. After he was elected as a representative for Hatay province, his lawyer applied for his release on the grounds that he enjoyed immunity under Article 83 of the Constitution. This request was rejected by the 3rd Criminal Chamber of the Court of Cassation on July 13, after which he appealed to the Constitutional Court.

In the days following the Constitutional Court's ruling on Atalay's release, the Istanbul 13th Appellate Criminal Court, which is in charge of the case, rejected the Constitutional Court judges' decision and sent the case to the Court of Cassation, arguing that the Constitutional Court's ruling had nothing to do with the court's decision. On November 8, the Court of Cassation not only refused to order any release, but even filed a criminal complaint against the Constitutional Court judges.

Despite the "definitive" nature of the Constitutional Court's decisions as stated in Article 153 of the Constitution, which mandates that such decisions "shall be binding on legislative, executive, and judicial organs, administrative authorities, and persons and corporate bodies,"

⁷ For a detailed discussion see İbrahim Kaboğlu, "Yargıtay Kararı ve Anayasal Yokluk Hali", 16 November 2023, <https://legal.com.tr/blog/anayasa-hukuku/yargitay-karari-ve-anayasal-yokluk-hali/>; Éric Sales, « Crise juridictionnelle majeure en Turquie autour de l'affaire Atalay », Questions Constitutionnelles (<https://questions-constitutionnelles.fr/>), décembre 2023; İlker Gökhan Şen, 'Defiance of the Turkish Constitutional Court by the Court of Cassation: Yet Another Phase in Turkey's De-Constitutionalization' IACL-AIDC Blog (14 December 2023)

the process was forcibly blocked. According to the Supreme Court, the Constitutional Court exceeded its “constitutional and legal limits,” reversed the “established case law” developed by the courts, and “plunged the legal system into chaos.” Against this decision, Mr. Atalay's lawyers have filed a second application to the Constitutional Court.

5- What Kind of Assessment for the Republic's Centenary

The attributes of the Republic, which have normative value, are stated in the context of the non-amendable provisions of the Constitution: “*respect for human rights, [...] a secular and social state based on the rule of law*”. However, the recent constitutional amendments suggest a clear deterioration of the **rule of law**. The systematic undermining of secularism, the politically driven reconfiguration of the High Council of Judges and Prosecutors, and the Constitutional Court, coupled with the autocratic shift in the political regime under the guise of a state of emergency—all to disproportionately empower the President of the Republic—stand as stark evidence of this. The Constitutional Court is the only counterweight to the authoritarian drift characterized by the last Constitutional amendment in 2017. Consequently, the **flagrant violation of the Constitution** is not only a crisis of the judiciary, but a crisis of the rule of law and even of the State.

Moreover, one must ask whether the **Head of State and Executive via Party Chairmanship** is sustainable.

The constitutional efforts led by 6 political parties under the name of “**enhanced parliamentary system**” in the run-up to the May 2023 elections focused on the democratic rule of law: A constitutional structure in which the state is governed by a government accountable to Parliament, with constitutional checks and balances and a separation of powers based on judicial independence.

Could the reign of an all-powerful leader be merely a chapter and bound to conclude? The primary sources of optimism for overcoming the current authoritarian regime lie in the democratic dynamics fostered by the political transformation begun on May 14, 1950, the enduring political and constitutional developments since the Ottoman Empire, and the milestones achieved in human rights on both European and international forums. However, the consecutive victories of the People's Alliance in the last elections, held on May 14 and May 28, 2023, have been

interpreted as reinforcing the legitimacy of the authoritarian political configuration established in 2017.⁸ In this new political configuration, the task of constitutional lawyers is to interpret the Constitution in favor of human rights as much as possible and to work to ensure that the Constitution is respected in the spirit of the rule of law based on human rights.

In light of the negative assessments surrounding the centenary of the Republic, it is important to highlight the responsibility that falls on constitutionalists and jurists, public professional organizations—including bar associations and trade unions—and civil society organizations, such as associations and foundations: We must persevere in our political efforts to address the needs of Turkish society, preserve its unique characteristics and attainments—having more or less established a democratic system through secularism in a predominantly Muslim society—and to reestablish Turkey's rule of law, ensuring it is democratic and rooted in human rights.

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⁸ Alliance between the Justice and Development Party and the Nationalist Movement Party.