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## CONSTITUTIONS AND POLITICAL SYSTEMS

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### **Drift towards authoritarianism**

In my contribution to the previous edition of this book (“Constitutions and Political System,” in *The Routledge Handbook of Modern Turkey*, 2012), I had a cautiously optimistic view of the prospects of democratic development in Turkey. Indeed, the strong military and judicial tutelarism over popularly elected powers had been somewhat limited both by the constitutional amendments of 2010 and the changing political climate in the country. The creation of the Parliamentary Constitutional Reconciliation Committee, in which the four parties represented in parliament were equally represented, following the 2011 parliamentary elections had created high hopes for the making of a fully democratic new constitution based on broad popular consensus.

Towards the end of 2012, however, developments took a diametrically opposite direction. Corruption allegations against four cabinet ministers and members of their families created a panic in the governing Justice and Development Party (AKP) and triggered a number of steps to weaken the independence of the judiciary (Özbudun, 2014a; 2015a,b; 2016; ICJ, 2016). The High Council of the Judiciary (HSYK) elections in 2014, strongly influenced by the AKP government, produced a body almost completely controlled by government supporters. Furthermore, the legislature passed a “court-packing” law on 9 February 2011 (Law No. 6110) adding 137 new members to the Court of Cassation and 61 new members to the Council of State. The court-packing practice was repeated several times in the following years. Thus, on 2 December 2014, 129 new members were added to the Court of Cassation and 49 new members to the Council of State (Law No. 6572). On 1 July 2016, this time the numbers of judges of the two high courts were drastically reduced (Law. No. 6723). On 20 November 2017, 100 new members were added to the Court of Cassation and 16 new members to the Council of State by the emergency rule decree No. 696. Needless to say, all these new appointments and discharges were made by the HSYK, now completely controlled by the government (Gözler, 2018, pp. 992–996). The final and most fateful step came with the constitutional amendment of 2017 which practically put an end to the independence of the judiciary, as will be spelled out below.

In the meantime, the work of the Parliamentary Constitutional Reconciliation Committee came to an end in 2013, chiefly because of the AKP’s strong insistence on a

presidential system of government which was rejected by the three other parties represented in the Committee. The Committee had also failed in reaching consensus on the two most divisive issues in Turkish politics, namely religion–state relations and the Kurdish problem (Özbudun, 2014b, pp. 69–78; Barın, 2014). Debates over the system of government have dominated Turkish politics since then, leading to further political polarization that reached an unprecedented dimension. While the AKP’s project came to the fruition through the 2017 constitutional amendment, the question still remains one of the most divisive issues in Turkish politics.

### **The constitutional amendment of 2017**

Although the AKP had started to advocate a presidential system of government since 2013, it lacked the parliamentary majority for a constitutional amendment. However, after the failed coup attempt of 15 July 2016, the ultra-nationalist Nationalist Movement Party (MHP) suddenly changed its position and gave its support to this project. Thus, the two parties reached the minimum constitutional amendment majority of three-fifths of the total membership of the Turkish Grand National Assembly (TGNA). The amendment proposal, prepared in close collaboration between the AKP and the MHP, was submitted to the TGNA on 16 December 2016, swiftly debated in the Constitutional Committee and the Plenary, and adopted by 339 votes against 142, that is, above the minimum required number of 330 (3/5) but subject to a mandatory referendum on 21 January 2017 (Law No. 6771). It was published in the *Official Gazette* on 11 February 2017, and was submitted to a mandatory referendum. The referendum took place on 16 April 2017, and the text was adopted by a narrow majority of 51.4 per cent. The amendment law adopted an unusual system with regard to the effective dates of the amendments. Certain amendments, such as the restructuring of the HSYK, the abolition of the two military high courts, and the abolition of the provision forbidding the president of the Republic to be a member of a political party, took effect immediately by the publication of the referendum results in the *Official Gazette*. Certain amendments were to take effect with the start of the election period for the next presidential and parliamentary elections. The third, and the most important, part would take effect with the publication of the results of such elections. In fact, these elections, normally scheduled for 3 November 2019, were anticipated. These early elections took place on 24 June 2018, and thus the entire amendment law became effective, and the AKP–MHP block maintained its majority in the TGNA.

Most observers agree that the referendum occurred in highly unequal conditions. The government freely used the state resources, while the opposition campaign was restricted by the emergency rule measures. While a sense of victory-drunkenness dominated the government supporters, a feeling of fear dominated the opponents. Debates became a matter of confidence or no-confidence for President Erdoğan, rather than focusing on the merits and disadvantages of the proposed change. Thus, in Gözler’s words, the process resembled a plebiscite as often seen in authoritarian regimes designed to consolidate the position of the incumbents rather than a real referendum (Gözler, 2017a, ch. 5). Still, despite these highly unequal conditions, the narrow victory of the government is a good indicator of the deeply divided nature of Turkish society. The amendment law No. 6771 consists of 18 articles, but it involves changes in a total of 67 articles. Some of these changes, such as the deletion of the words “prime minister” and “the Council of Ministers” in many articles, are technical in nature, but many others will have far-reaching political consequences. This chapter will concentrate on the latter, leaving aside the changes of secondary importance.<sup>1</sup>

### ***The system of government***

Clearly, the system of government designed by the 2017 amendment is not parliamentary since it lacks two sine qua non conditions of a parliamentary government: (aa) The executive has a monistic, not dualistic, structure. The executive power is vested entirely in the president. There is no prime minister or a Council of Ministers, or the requirement of a counter-signature. (bb) The president of the Republic and the ministers are not politically responsible to the legislature; there is no vote of confidence. On the other hand, it is equally clear that the system is not presidential either, since one of the fundamental characteristics of the presidential system is that the president and the legislature are elected separately for a fixed term of office, during which neither can put an end to the other's office. The current Turkish constitution departs from this rule by allowing both the president and the three-fifths majority of the legislature to end the office of the other, provided that they also subject themselves to new simultaneous joint elections (Art. 116). Of course, the weapons are not equal. While the president can dissolve the TGNA at any time on his own will, the TGNA can force the president to an early election only by the three-fifths majority of its full membership, which is very difficult to obtain in practice. The AKP leaders, becoming aware of this fundamental difference with a presidential system, finally decided to call it "the President of the Republic system of government" (*Cumhurbaşkanlığı Hükümet Sistemi*), a term which does not exist in international practice or the academic literature. As Gözler states, "this system has so far never been seen, known, or heard of. If it has to be given a name, it can be called the 'neverland system of government'" (2017a, ch.3, ref.p.72).

### ***Separation of powers: legislative-executive relations***

A democratic presidential system is based on a strict separation of the legislative and executive powers, even though both have certain checks-and-balances mechanisms to be used against the other. The advocates of the 2017 amendments claimed that the new system establishes a real system of separation of powers. This is far from the truth. In fact, the new system posits a highly strengthened president of the Republic against a much weakened parliament.<sup>2</sup> The TGNA's supervisory powers over the executive have been seriously limited with the abolition of interpellation and oral questions. Parliamentary inquiries leading to the impeachment of the president, vice presidents and ministers for official duty-related crimes, are preserved, but the qualified majorities required for each step were substantially raised. Thus, a motion for the opening of a parliamentary inquiry can be given by the absolute majority of the full membership of the TGNA (previously, one-tenth), the TGNA can decide to establish a commission of inquiry by a three-fifths (previously simple) majority, and the decision to send the person concerned to the High Court (Constitutional Court) requires the two-thirds (previously, absolute) majority of its full membership (Arts. 105 and 106). Obviously, in practice, it is extremely difficult, if not impossible, to secure such qualified majorities. Furthermore, under the amended Articles 105 and 106, the decision to send the persons concerned to the High Court does not end their office; they continue to stay in office until the decision of the High Court, again in contrast to the previous system. Another important characteristic of the 2017 amendment is the substantial enlargement of the regulatory powers of the executive, that is, the president. Under the new Article 104, the president can issue presidential decrees in all matters related to executive power. It is true that the same article puts certain limits to this power. Thus, presidential decrees cannot regulate fundamental (civil) and political rights; cannot be issued in matters clearly regulated by an existing law or prescribed by the constitution as to be regulated exclusively by law. In case of a conflict between a law and a presidential decree, the law shall take

precedence. If parliament passes a law in conflict with a previously issued presidential decree, the decree shall become null and void. Despite these limitations, however, the regulatory power of the president is still too broad, since it is difficult to define the limits of the “executive power”. Furthermore, it is explicitly stated in certain articles that the matter shall be regulated by presidential decrees. Whether this means that such areas can in no way be regulated by law is not clear. If this interpretation is adopted, it will mean an “exclusive” (reserved) regulatory area for the executive, again a fundamental departure from all previous republican constitutions that considered the regulatory powers of the executive as clearly derivative from and secondary to laws.

As a natural consequence of the monistic structure of the executive, the president is empowered to appoint or dismiss the vice presidents (one or more than one), the ministers and all higher public functionaries. He also regulates the procedures for their appointment by a presidential decree (Art. 104). Thus, unlike in the American case, the legislature has no “advise and consent” role in these appointments. The president also has the power to send back a bill to parliament for reconsideration, in which case its readoption requires the absolute majority of the full membership of the TGNA (previously, a simple majority was sufficient) (Art. 89).

One of the most consequential changes in the amendment concerns the budgetary powers of the TGNA. Indeed, in all systems of government, whether parliamentary or presidential, the legislature has the final word in matters of taxation and budget, going back to the medieval principle of “no taxation without representation.” However, according to the amended Article 161, in case the president’s budget bill is not approved by the TGNA in due time, the previous year’s budget shall continue to be applied with increases according to the new re-evaluation figures. Clearly, this provision deprives the legislature of one of its most potent weapons.

All these rules favouring the president were made even more effective in practice by the simultaneous elections of the president and the legislature (Art. 77). Indeed, this rule makes it highly unlikely that an elected president will face a parliament with an unfriendly majority. The fact that the president is the leader of his party, as it is now and most likely will be also in the future, and has a strong influence on the nomination of his party’s candidates makes such a situation even more likely. Thus, the Venice Commission calls attention to this danger saying,

The proposed constitutional amendments [...] are not based on the logic of separation of powers, which is characteristic for democratic presidential systems. Presidential and parliamentary elections would be systematically held together to avoid possible conflicts between the executive and the legislative powers. Their formal separation therefore risks being meaningless in practice and the role of the weaker power, parliament, risks becoming marginal. The political accountability of the President would be limited to elections, which would take place only every five years.

*(2017, Para. 126)*

### ***The judiciary***

Whatever the system of government (presidentialism, semi-presidentialism, or parliamentary), the independence of the judiciary vis-à-vis the two political branches is an indispensable requirement of a democratic system, and the key to such independence is the security of tenure for the judges. In many European democracies this is secured by the creation of high judicial councils, a majority of which is composed of judges elected by their peers, and competent to decide on all personnel matters of judges (Venice Commission, 2007, 2010; Consultative Council of

European Judges, CCJE, 2007). Such a system was introduced in Turkey by the constitution of 1961 and maintained, despite certain important modifications, until the amendments of 2017.

The 2017 amendments completely reversed the system by creating a body (HSK; interestingly the word “High” was dropped from its title), all members of which shall be appointed by the two political branches (the president and the TGNA). Furthermore, this article was among those that immediately took effect with the announcement of the referendum results, an indication of the high priority given by the AKP government to the restructuring of the judiciary.

Under the amended Article 159, the HSK is composed of 13 members. The Minister of Justice is its president, and the undersecretary of the Ministry of Justice its ex-officio member. Four members shall be appointed by the president of the Republic. Since the minister and the undersecretary are also presidential appointees, the number of members appointed by the president amounts to six. Seven members are chosen by the TGNA with a qualified majority, that is, a two-thirds majority on the first round, and a three-fifths on the second. If such a majority is not obtained, there will be a lot taking between the two highest vote-getters. Even though such qualified majorities may, in theory, help produce a more pluralistic composition, it had no such effect in the HSK elections following the amendment, since the AKP–MHP block commanded a three-fifths majority. Thus, the present HSK is completely under the control of the government. The Venice Commission (2017, para. 119) strongly criticizes this system:

The Commission finds that the proposed composition of the CJP is extremely problematic. Almost half of its members (4+2=6 out of 13) will be appointed by the President [...] (T)he President will no more be a *pouvoir neutre*, but will be engaged in party politics: his choice of the members of the CJP will not have to be politically neutral. The remaining 7 members would be appointed by the Grand National Assembly. If the party of the President has a three-fifths majority in the Assembly, it will be able to fill all positions in the Council. If it has, as is almost guaranteed under the system of simultaneous elections, at least two-fifths of the seats, it will be able to obtain several seats, forming a majority together with the presidential appointees. That would place the independence of the judiciary in serious jeopardy, because the CJP is the main self-governing body overseeing appointment, promotion, transfer, disciplining and dismissal of judges and public prosecutors. Getting control over this body thus means getting control over judges and public prosecutors.

Indeed, control over the HSK is the key to control over the entire judiciary, including the two high courts, since all judges of the two high courts are also appointed by the HSK. If need be, such a process can be speeded up by the frequent court-packing laws, as alluded to above. Domination over the high courts, in turn, leads to control over two other highly important constitutional bodies. One is the High Council of Elections (YSK), charged with the duty of the conduct of elections and with deciding on electoral disputes. The Council is composed of 11 members, six of whom are chosen by the Court of Cassation and five by the Council of the State. Thus, the independence and impartiality of the YSK has become a matter of deep political controversy since the constitutional referendum of April 2017, especially following the local elections of 31 March 2019. Finally, of the 15 members of the Constitutional Court, three are appointed by the president from among nominees of the Court of Cassation, and two from among the nominees of the Council of State. In addition to the four members appointed by the president at his own discretion, this amounts to a strong governmental influence over the Constitutional Court.

Under these conditions, it seems impossible to speak either of the independence of the judiciary or the separation of powers. Gözler (2017a, p.19) describes the present system of government as one of “unity of powers concentrated in the President of the Republic.” The Venice Commission (2017, para. 130) has arrived at a similar conclusion, arguing that the proposed amendments “would introduce in Turkey a presidential regime which lacks the necessary checks and balances required to safeguard against becoming an authoritarian one.” Thus, it may be concluded that the 2017 amendment was not limited to a simple change in the system of government, but it amounted to a radical “regime change” from imperfect democracy to competitive authoritarianism.

The serious deterioration of democratic standards in Turkey is also reflected in the reports of the international democracy-rating agencies. Thus, according to the Freedom House (FH) ratings, Turkey had never been among the “free” countries, but has always been a “partly free” one. In the early 2000s, an improvement was observed; thus, in 2006, Turkey’s scores rose to 3 for civil rights and 3 for political rights, namely on the border between free and partly free countries (Piano and Puddington, 2006, p. 123), and remained the same for several years. In 2012, the scores fell to 3 and 4 (Puddington, 2013, p. 51). These scores were maintained in the 2014 report, but Turkey was marked with a “downward arrow” indicating a deterioration (Freedom House, 2014, pp. 3,14,22). A more serious deterioration is seen the FH’s 2017 World Report, according to which Turkey’s political rights score fell to 4 and civil rights score to 5. Turkey was the country with greatest deterioration in the year 2016, with (-15) points (Freedom House, 2017). The most dramatic decline took place in the 2018 report of the FH, in which Turkey’s scores further fell to 5 for political rights and 6 for civil rights, thus putting Turkey into the category of “not free” countries for the first time since the start of the ratings. FH explains this decline as

due to a deeply flawed constitutional referendum that centralized power in the presidency, the mass replacement of elected mayors with government appointees, arbitrary prosecution of rights activists and other perceived enemies of the state, and continued purges of state employees, all of which have left citizens Hesitant to express their views on sensitive topics.

*(Freedom House, 2018)*

### **Competitive authoritarianism and abusive constitutionalism**

Countries that are placed in the so-called “grey zone” between full (liberal) democracies and full (closed) authoritarian regimes have attracted the attention of a large number of political scientists in recent decades. Such regimes have been termed with various adjectives, such as “semi-democracies,” “pseudo democracies,” “defective democracies,” “facade democracies,” “delegative democracies,” “hybrid regimes,” “electoral authoritarianism,” “competitive authoritarianism,” and so on (Collier and Levitsky, 1997).

The term that best fits the present Turkish political system is probably “competitive authoritarianism.”<sup>3</sup> Competitive authoritarian regimes, according to Steven Levitsky and Lucan A. Way, who coined the term,

are civilian regimes in which formal democratic institutions exist and are widely used as the primary means of gaining power, but in which incumbents’ abuse of the state places them at a significant advantage vis-à-vis their opponents. Such regimes are competitive in that opposition parties use democratic institutions to contest seriously

for power, but they are not democratic because the playing field is heavily skewed in favor of incumbents. Competition is thus real but unfair... Obviously, a degree of incumbent advantage – in the form of patronage jobs, pork-barrel spending, clientelist social policies, and privileged access to media and finance – exists in all democracies. In democracies, however, these advantages do not seriously undermine the opposition's capacity to compete. When incumbent manipulation of state institutions and resources is so excessive and one-sided that it seriously limits political competition, it is incompatible with democracy. A level playing field is implicit in most conceptualizations of democracy.

*(Levitsky and Way, 2010, pp. 5–6, 15)*

Thus, the authors correctly consider these regimes not as a subtype of democracy, but as a subtype of authoritarian regimes.

Levitsky and Way call attention to the disparities in access to resources, to media and to the law as factors seriously hindering the opposition's ability to compete. Thus, the incumbents may make direct partisan use of state's financial sources and its machinery. They may also “use discretionary control over credits, licenses, state contracts, and other resources to enrich themselves via party-owned enterprises, benefit crony or proxy-owned firms that then contribute money back into party coffers.” Access to media is also uneven. “In many competitive authoritarian regimes, the state controls all television and most – if not all – radio broadcasting. Although independent newspapers and magazines may circulate freely, they generally reach only a small urban elite.” Finally, and most importantly for our purposes, the judiciary is under the control of the government.

In many competitive authoritarian regimes, incumbents pack judiciaries, electoral commissions, and other nominally independent arbiters and manipulate them via blackmail, bribery, and/or intimidation. As a result, legal and other state agencies that are designed to act as referees rule systematically in favor of incumbents.

*(Levitsky and Way, 2010, pp.10–12)*

These observations would sound extremely familiar to most Turkish observers. Indeed, gross disparities appeared between the incumbents and the opposition in all three areas. With regard to access to resources, the AKP governments have created a large private sector of crony firms, mostly in the construction field, through highly profitable state contracts and cheap credits from state banks. Access to media has become extremely uneven in recent years, with the incumbents now controlling, directly or indirectly, at least 90 per cent of the written and visual media. A few remaining opposition journalists are under the serious threat of judicial investigations, arrests, imprisonments or heavy financial penalties. The 2018 Freedom House report mentions “the closure of over 160 media outlets and the imprisonment of over 150 journalists” (2018, p. 7). Finally, access to the law is clearly one-sided, as explained above. All this means that the playing field has become extremely uneven in recent years, even though the system can still be considered “competitive.” As Levitsky and Way (2010, p. 12) observe,

whereas officials in full authoritarian regimes can rest easy on the eve of elections [...] in competitive authoritarian regimes, incumbents are forced to sweat [...] Government officials fear a possible opposition victory (and must work hard to thwart it, and opposition leaders believe they have at least some chance of victory.



The narrow victories of Turkish incumbents in recent parliamentary and presidential elections, the 2017 constitutional referendum and the March 2019 local elections despite such gross inequalities, confirm this observation. The incumbents were really “forced to sweat.”

Competitive authoritarian leaders often attempt to amend or replace the constitution by methods, even though legally correct, in essence aimed at undermining democracy. Such practices are called “abusive constitutionalism” by David Landau (2013, p. 191). In his words,

abusive constitutionalism involves the use of the mechanisms – constitutional amendment and constitutional replacement – to undermine democracy [...] Powerful incumbent presidents and parties can engineer constitutional change so as to make themselves very difficult to dislodge and so as to defuse institutions such as courts that are intended to check their exercises of power. The resulting constitutions still look democratic from a distance [...] But from close up they have been substantially reworked to undermine the democratic order.

Judged by these criteria, the 2017 constitutional amendment in Turkey no doubt constitutes a prime example of abusive constitutionalism (also, Gözler, 2017a, ch.4).

In the light of a serious deterioration of democratic standards since the end of 2012, it seems impossible to be optimistic about the near future of democracy in Turkey. The term that best describes the present Turkish political system is competitive authoritarianism. Even though it has a tendency to move towards more authoritarianism and less competitiveness, there is still some room left for a meaningful competition. In other words, it has not as yet turned into a full or closed authoritarian regime. It is not clear which way the cat will jump.

## Notes

- 1 For a fuller analysis, see Özbudun (2018), chs. 15,16,17,18; Gözler (2018), chs. 15,16,17,19; Kaboğlu (2017); Serap Yazıcı (2017).
- 2 For a comprehensive comparison between the American and Turkish systems, see Gözler (2017a), pp. 56–74.
- 3 A Turkish scholar argues, however, that the present Turkish political regime is no longer competitive authoritarian, but is displaying a tendency towards full authoritarianism (Çalışkan, 2018).

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