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POLITICAL PROCESSES IN TURKEY AND THEIR CONSTITUTIONAL REFLECTIONS

Prof. Dr. Sevtap Yokuş

Democratic Progress Institute

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FOREWORD

This assessment by Turkish constitutional lawyer and human rights expert, Prof. Dr. Sevtap Yokuş, provides an overview of efforts since 1982 to democatize Turkey's Constitution. In analysing the relationship between successive reform efforts and the prevailing political climate in the country, the paper demonstrates a link between progress in transforming the Constitution and periods of democratic reform such as the EU harmonisation process in the early 2000s and the later resolution process, in particular. The author argues that the push for reform during the resolution process was spurred by widespread recognition that the Constitution at the time and the laws consistent with its essence formed the basis for the conflict.

Conversely, regression to more authoritarian models allowing for restrictions on fundamental rights and freedoms is associated with periods following coup attempts in 1980 and 2016. The paper discusses shifts in the relationship between the executive, legislature and judiciary as the result of constitutional reforms in these post-coup eras and the implications for democratic politics and the enjoyment of rights and freedoms in Turkey of recent reforms further consolidating Presidential powers, including those endowed under the state of emergency. The role of electoral legislation and system of political parties in hampering Turkey's democratic political functioning is also analysed. The author concludes that progress in democracy, the rule of law, justice and freedoms in Turkey rests on an end to the conflict and the pursuit of social peace.

This report contributes to DPI's ongoing analysis of the situation on the ground in Turkey particularly in relation to democratisation and resolution processes, taking into account different views and perspectives. It is one of a number of assessments undertaken by a diverse range of experts both in the region and internationally at a time of significant political change.

Professor Yokuş is a Law Faculty Member at Altinbas University in the Department of Constitutional Law and a member of DPI's Council of Experts. The views and opinions expressed in this assessment are those of the author and do not necessarily reflect the official position of DPI.

Kerim Yildiz
Chief Executive Officer
Democratic Progress Insitute

INTRODUCTION

The Constitution of 1982, which was drafted after the military coup of 12 September 1980 in Turkey and came into force at a time when the dire effects of the coup were still felt, is still in force with the addition of many amendments. The most essential feature of the Constitution of 1982 is that it consolidated authority while narrowing down the field of freedom and politics. This is due to the core philosophy of the Constitution. At the time when the Constitution was being drafted, those who were de facto in power because of the coup wanted an authoritarian constitution. Due to its authoritarian essence, as soon as the 1982 Constitution came into force, the need for a democratic constitution emerged. Many amendments were made in order to democratize the Constitution and to ensure that provisions would be made to enable the exercise of those freedoms it proposed. At the same time, its essence could not be completely changed and therefore, there was always a quest for getting rid of this Constitution in its entirety and drafting a brand new democratic and liberal constitution.

In terms of democratic transformation, the most important and comprehensive changes that the Constitution underwent took place during the time when Turkey's accession to the EU became a priority. The constitutional reforms of 2001 and 2004 are evidence of this.

The "resolution process" in Turkey was a period when the search for legislation aiming for societal peace at both constitutional and legal levels was at its highest. This was because there was a widespread conviction that the current Constitution and the laws consistent with its essence formed the basis for the conflict. Even though the process of transformation toward a democratic constitution and laws was slow-going and hesitant, expectations were very high.

After the termination of the "resolution process" and the coup attempt of 15 July 2016, Turkey entered a period of state of emergency in which politics regressed, and rights and freedoms could be suspended. In such a political atmosphere, the ruling power expected the Constitution to enable its own authoritarianism, as was the case when it was first drafted. The constitutional reforms of 2017 were born out of this main purpose and aimed to further consolidate the authoritarianism that was already inherent to the Constitution.

I. THE NORMATIVE FOUNDATIONS OF POLITICAL PROCESSES IN TURKEY

Despite the many changes it underwent, the Constitution has not changed in essence. With its essential features that favour authority and damage freedoms, its intensely negative effects on politics and on social dynamics have become permanent. Another aspect of the situation which has made these negative effects worse is that legislation, drafted with the political goals and intentions of the 12 September coup period when the Constitution took effect, has been passed. These laws regulate areas such as elections and political parties, which especially have the power to decisively affect political life.

A. The Constitution of 1982 Still in Effect Favours a Strong Rule

As an extension of the military coup period in which it came into force, the Constitution, especially in its first version, was very authoritarian. The Preamble contained the phrase "the sacred Turkish State", which placed the state above the individual. Later, "sacred" was amended with "sublime" but the meaning ascribed to the new adjective was the same as before.

In conjunction with a search for authority, it can be observed that in the Constitution of 1982, the power of the executive is favoured above the other powers. The 1982 Constitution widened and strengthened the authority of the President within the parliamentary system and the executive power, and increased the authority of the Prime Minister within the Council of Ministers. The anticipated regime was defined as a "rationalized parliamentary regime" which aimed for stability in the executive.[1] The evaluation of the governmental system designated by the Constitution of 1982 widely varies. Some claim that considering the powers vested in the President by the Constitution, it can be said that a dual structure of power has been established, hence the "rationalized parliamentary system with a president"; others have interpreted the relations between the legislature and the executive established by the Constitution as a "lame presidential rule".[2]

[1] Necmi Yüzbaşıoğlu, "Cumhuriyetin 75 Yılının Devletin Ana Kuruluşu Yönünden Değerlendirilmesi", Cumhuriyet'in 75. Yıl Armağanı, İstanbul Üniversitesi, İstanbul 1999, s.256.

[2] Ersel Aldabak, "57. Hükümet Dönemindeki Bazı Gelişmeler Işığında 1982 Anayasasında Cumhurbaşkanı", İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, Cilt:LX, Sayı:1-2, Yıl:2002, s.4.

That the executive branch was strengthened on a constitutional level was most clearly observed in the status of the President, which took central position with regard to the functioning of state institutions. In addition to his wide constitutional powers pertaining to the legislature, executive and the judiciary, considerable state of emergency powers were also vested in the President. As well as the President's individual actions, the statutory decrees (decrees having the force of law) passed by the Council of Ministers presided over by the President in states of emergency are outside the power of the judiciary. In ordinary times as well, the executive has "all the political and administrative tools it needs to determine the national politics of the country and to execute it". No constitution of the Turkish Republic before had increased the powers of the executive to such a degree.[3]

An example of how the Constitution favours the President before the executive, as different from a classic parliamentary system in which the head of the state has symbolic powers, is the President's power of recalling the elections to the assembly. According to Article 116 of the Constitution, "if a new Council of Ministers cannot be formed within forty-five days or fails to receive a vote of confidence, the President of the Republic, in consultation with the Speaker of the Grand National Assembly of Turkey, may decide to renew the elections". Indeed, the President exercised this power after the elections of 7 June 2015.

The power of the executive branch needs to be considered from two angles. The first of these have to do with the position of the executive in relation to the legislature and the judiciary. The second relates to the effect of the executive on civil society and individuals. The first is determined by constitutional regulations, the second mostly by legislative regulations. It is not possible to understand the political and legal reality of the situation if we look at the position of the executive in relation to the legislature and the judiciary only at a constitutional level and through statements. In order to reveal the true characteristics of the executive, it is necessary to look at the relative positions of Turkey's governmental bodies and their functions.[4]

The regulations concerning the timely functioning of the legislature in the Constitution of 1982 are due to a tendency to strengthen the executive. Even though regulations shortening

[3] İbrahim Ö. Kaboğlu, "Türkiye'de Anayasal Reformlar Üzerine", Anayasa Reformları ve Avrupa Anayasası, Türkiye Barolar Birliği İnsan Hakları Uygulama ve Araştırma Merkezi, Ankara 2002, s.58,59.

[4] Lütfi Duran, Türkiye Yönetiminde Karmaşa, Çağdaş Yayınları., İstanbul 1988, s.48-50.

the law-making process and decreasing the minimum required number of meetings, for instance, seem as if they have to do with the judiciary, in fact these are regulations favouring the executive, and ensuring that the Parliament functions in a timely manner under the guidance of the executive.[5] In addition to the regulations concerning the judiciary, the Constitution defines the executive as a power as well as a responsibility; this is an example of the strengthening of the executive.[6]

One of the ways in which the executive gained powers to the detriment of the judiciary in the Constitution of 1982 period is through the regime of decrees having the force of law. Thanks to the insufficiency of political and legal control over decrees having the force of law, the executive has had the chance to gain further powers.[7] Because decrees having the force of law bestow extra powers on the executive, and because the legislature does not do anything about it, the power of the legislature is taken over.[8]

The State of Emergency Law allows the unchecked exercise of executive powers and the curtailing of the legislative and judiciary powers; and the decrees having the force of law passed in the period of the Constitution of 1982 have caused serious problems of unlawfulness. The legality of decrees having the force of law cannot be debated due to the preclusion in the Constitution; which continues to create unjust suffering up to this day.

The essential differentiation in the Constitution of 1982 regarding the limitation of rights and freedoms, that is to say the complete differentiation of state of emergency regulations from ordinary regulations, also applies to decrees having the force of law. According to the state of emergency, decrees having the force of law are exempt from the regulation inscribed in Article 91 of the Constitution.[9] Article 91 of the Constitution, which regulates decrees having the force of law, says that the fundamental rights, individual rights and duties as well as political rights and duties shall not be regulated by decrees having the force of law; however, martial law and states of emergency are the exception to this rule. Therefore, first-hand

[5] Yavuz Sabuncu, Anayasaya Giriş, 8.Bası, İmaj Yayınları., Ankara 2002, s.204.

[6] Mehmet Turhan, Hükümet Sistemleri ve 1982 Anayasası, Dicle Üniversitesi Hukuk Fakültesi Yayınları, Diyarbakır 1989, s.95.

[7] Bakır Çağlar, "İktidar Yapısında "82 Formülü" ve Karşı-Tezler", İdare Hukuku ve İlimleri Dergisi(Prof. Dr. Lütfi Duran'a Armağan), Sayı:1-3, Yıl:9, 1988, s.60.

[8] Turgut Tan, "Türk Hukukunda Kanun Hükmünde Kararname Uygulaması ve Sorunlar", Prof. Dr. Latif Çakıcı'ya Armağan, Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi, Cilt:50, No:1-2, Ocak-Haziran 1995, s.353.

[9] Fazıl Sağlam, "KHK Çıkarma Yetkisinin Sınırları uygulamanın Yaygınlaşmasından Doğabilecek Sorunlar", Anayasa yargısı 1, Anakara 1984, s.262.

regulation for the executive was created by means of decrees having the force of law on a Constitutional level.[10] The executive, embodied by the Presidency under the state of emergency, gains nearly unlimited powers through these decrees having the force of law. The state of emergency rule creates a field in which the executive exercises its powers unchecked through the power directly vested in it by the Constitution.

The judiciary's control of decrees having the force of law are blocked by a Constitutional regulation. According to Article 148/1 of the Constitution, "…decrees having the force of law issued during a state of emergency, martial law or in time of war shall not be brought before the Constitutional Court alleging their unconstitutionality as to form or substance." Due to the lack of control, in states of emergency with decrees having the force of law the executive body has unlimited determinative power in politics and administration.

As a result, using the central political power, the executive has strengthened itself in the Constitution of 1982 in comparison to the legislature and the judiciary, made itself independent of the legislature to a certain extent and got rid of the controlling powers of the judiciary, which should have been effective according to the principles of the state of law.[11]

B. The Leader-Oriented Politics Enabled by the Electoral System and the Political Parties Regime

The legislation and functioning of the political parties in Turkey make the leader the only determining agency within the party. Problems with in-party democracy curtail the effectiveness of non-leader actors in decisions to a considerable degree. The problems created by the electoral system cause this leader-oriented political functioning in the Parliament. This situation is much more evident in the case of the ruling party.

As for the electoral system, due to the 10% threshold proportional representation system, only the major political parties can get into the Parliament. The country-wide 10% threshold is a high enough proportion to make the electoral system a majoritarian one. The representation of those voters who support small political parties is considerably weakened. In terms of democratic participation in government, this problem is felt even more deeply

[10] Necmi Yüzbaşıoğlu, Türkiye'de Kanun Hükmünde Kararnameler Rejimi,Beta Yayınları., İstanbul 1996, s.176.
[11] Muzaffer Sencer, "1961 Anayasasından 1982 Anayasasına", İnsan Hakları Yıllığı, Cilt:5-6, 1983-1984, s.31.

due to the obstruction of other democratic channels. The voter is made to vote for parties that have a chance to enter the Parliament even if she does not want to vote for them, so the choice made is really no choice at all. Considering that the candidates are determined not by preliminary elections but by party headquarters, the voters' will is represented even less. The lack of in-party democracy as well as the inability of the base to contribute to the process of nominating candidates means that voters have to choose among the candidates imposed on them by the leader of the political party. In consequence, voters usually vote to elect the candidates of those parties that have a high chance of entering the Parliament; candidates who have been chosen by the party leader.[12]

The electoral system and the political parties regime in effect hamper Turkey's democratic political functioning, and there are several reasons for this. Turkey is a pluralistic country on a societal level. The deep and permanent ethnic, religious, linguistic and cultural varieties within society have created a heterogeneous structure. Due to different political demands this may be called a divided societal structure. For such a society the electoral system currently in place, which functions as a majoritarian system, creates great injustices in representation and from time to time makes it impossible for different sectors of society to be represented.

Even though concepts of representational democracy and democratic society are stipulated on a Constitutional level in Turkey, since methods such as the 10% country-wide threshold are also implemented within the system, this system cannot be made to fit with the pluralistic societal base. The problem is with reflecting the tendencies of the pluralistic society on the "level of political pluralism".[13]

Another aspect of Turkey's electoral system is that since there is no in-party democracy during the nomination of MP candidates before the elections, the leader is inordinately powerful within the party. The power of the leader is observed even before the elections when the candidates are nominated. The party leader nominates the MP candidates on his own. This means that the leader of the ruling party formed by the majority in fact determines the parliamentary majority by himself as well. In terms of the government-

[12] Sevtap Yokuş, "Türkiye'de %10 Seçim Barajına İlişkin Hukuksal ve Siyasal Tartışmalar", Hukuk ve Adalet Eleştirel Hukuk Dergisi, Yıl:4, Sayı:11, Yaz 2007, s.299, 300.

[13] İbrahim Ö. Kaboğlu, Anayasa Hukuku Dersleri (Genel Esaslar), 3.Baskı, Legal Yayınları, İstanbul 2006, s.192.

forming party with parliamentary majority, a leader also in control of the parliamentary majority is unavoidable.[14] It can be said that the inability to fully exercise the power of the legislature begins with the nomination of the MP candidates. When serving as an MP, being close to the leader is prioritized over all kinds of expertise and productivity. Structures such as the "first circle" and the "second circle" form around the leader. MPs make great concessions on their ideas and even personalities in order to be close to the leader. Authorized councils within the parties do not function, and MPs are pushed out of politics. The lack of in-party democracy is a great obstacle to the executive functions as well. A parliamentary majority made up of such MPs cannot really fulfil its function as the executive, and as a result it is impossible to control or monitor the government.[15]

Leaders in political parties often try to protect and extend their rule whereas the members tend to support rather than hinder this attempt; however, the degree to which they do this changes according to the qualities of the party in question. These qualities depend on a host of factors such as the social composition of the party, the party members' belief in democracy and party structure.[16] The effect of party leaders on MPs in Turkey can be described as a system of clientelism. This system makes the party leaders unchangeable. The party leader is the sole authority in nominating MPs, and loyalty to the leader is the most important thing. Because of this, no horizontal alliances between the MPs that may affect or guide the party leader can emerge. In consequence, political parties cannot form new perspectives on social transformation or create solutions to political problems. The limited or nonexistent interest of the MPs in social or political problems which they are expected to resolve is, for the large part, due to the leader's power to obstruct his party's MPs from doing anything.[17]

The local organizations of political parties are active only during electoral periods and therefore, they are ineffective. The personnel and programmes of political parties are invisible. Party members cannot participate in the political decision-making process. The lack of a functioning party mechanism is one of the basic reasons behind the tyranny of the

[14] Sevtap Yokuş, Türkiye'de Yürütmede Değişen Dengeler, Yetkin Yayınları, Ankara 2010, s. 127.

[15] Yakup Kepenek, "Neden Aday Olmadım?", Cumhuriyet Gazetesi, 11 Haziran 2007.

[16] Maurice Duverger, Siyasi Partiler, çeviren: Ergun Özbudun, Dördüncü Basım, Bilgi Yayınevi, Ankara 1993, s.190.

[17] İlter Turan, "Türkiye'de Parlamenter Sistemin Sorunları ve Çözüm Önerileri" Semineri, Türkiye İşveren Sendikaları Konfederasyonu 35.Yıl, Ankara 1997, s.60.

leader. The emergence of leader's tyranny cannot be explained solely by the regulation of political parties. One other reason behind the leader's tyranny is that the core staff around the leader do not adopt a democratic approach.[18]

Turkey's electoral system and the absence of in-party democracy is the real reason behind the increasing power of political party leaders. In this framework, the leader of the party with a majority in the Assembly, which also has the power to form a government on its own, becomes the only representative of the majority due to the electoral system in place. The majoritarian government, and the party leader as the only effective actor in the government cause tensions in the pluralistic structure that forms the basis of democratic society. These tensions also evolve into tendencies which govern politics. Because of these reasons, leaders choose to pursue a politics of tension; they pursue politics of conflict that may cause social fractures and polarization.

II. THE NEED FOR A LIBERAL DEMOCRATIC CONSTITUTION IN TURKEY

Despite various amendments, the Constitution of 1982 could not be entirely purged of its contents, which restricted freedoms and its essence which prioritized the state over the individual. The need for a democratic constitution remained relevant. From the beginning of the 2000s until 2015, efforts were concentrated in this direction.

A. The Regime of the Constitution Restricted, Prohibited and Suspended Rights and Freedoms

Compared to the definitions of the limits of freedoms in the Preamble of the Constitution of 1982, which contains the essence of the Constitution, it can be observed that the Constitution has serious problems regarding limitations and prohibitions. For instance, the detailed formulation of subjective evaluation contained in the fifth paragraph, "that no protection shall be accorded to an activity contrary to Turkish national interests, Turkish existence and the principle of its indivisibility with its State and territory, historical and moral values of Turkishness; the nationalism, principles, reforms and civilizationism of Atatürk and

[18] Murat Yanık, Parti İçi Demokrasi, Beta Yayınları, İstanbul 2002, s.155,156.

that sacred religious feelings shall absolutely not be involved in state affairs and politics as required by the principle of secularism" also reveal the spirit of the Constitution.

That these principles contained in the Preamble are the essential qualities of the Republic and in the nature of unchangeable provisions according to Article 2 of the Constitution means that these principles are prioritized among the restriction of the rules contained in the Constitution.[19] From this perspective, the degree of restriction inherent to the rights and freedoms posited by the spirit of the Constitution of 1982 can be understood very clearly.

Prior to the amendments made in 2001, the Constitution of 1982 used a "system of double restriction" with regard to rights and freedoms. The phrase "the reasons for general restrictions listed in this article apply to all fundamental rights and freedoms" in Article 13 of the Constitution of 1982 meant that there was a provision of general restriction for all fundamental rights and freedoms. This provision of general restriction, which existed before the amendments of 2001, violated the fundamental principle of freedom. The causes for general restriction in Article 13 cannot be objectively determined. The abundance of terms of restriction and the ambiguity of contents have expanded the political decision bodies' discretionary powers.[20] This has also meant that the judicial supervision of the body of the juduciary, which could wield its discretionary powers, is severely obstructed. The provision for general restriction and its results were in force from 1982 to 2001, highly restricting the field of rights and freedoms.

In addition to the provision for general restriction, the second manner of restriction is that each right and freedom can be restricted due to the causes of restriction contained in the provision that regulates it. Almost every constitutional provision stipulating rights and freedoms has also determined the causes for restriction suitable to the qualities of the right and freedom in question.

Article 14 of the Constitution, beyond being restrictive, is in the nature of a general prohibition. This provision, regulated under the heading "Prohibition of abuse of fundamental rights and freedoms", is a result of the conviction that the state must be

[19] Mustafa Koçak , " Cumhuriyetin Temel Niteliklerinin Belirlenmesinde anayasanın Başlangıcında Yer Alan İlkelerin Hukuksal Değeri ", Askeri Yüksek İdare Mahkemesi 25.Yıl Armağanı, 1998 s.203.

[20] Bülent Tanör, İki Anayasa 1961-1982, Beta Yayınları, İstanbul 1986, s.134-136.

protected from the individual, that is to say, the fundamental tendency that gave birth to the Constitution of 1982, like the other provisions of restriction.

The provision of Article 14, formulated within the framework of the restriction regime of the Constitution of 1982, is a "general prohibition and enforcement provision" which is there as a "third security brake" in addition to the Constitutional legislator's determination that the causes for general restriction in Article 13 and the restrictions contained in the articles for rights and freedoms are also grounds for restriction.[21]

Prior to the Constitutional amendments of 2001, Article 14 of the Constitution of 1982 listed the prohibited uses of rights and freedoms in great detail. Accordingly, "None of the rights and freedoms embodied in the Constitution shall be exercised in the form of activities aiming to violate the indivisible integrity of the State with its territory and nation, to endanger the existence of the Turkish State and the Republic, to destroy fundamental rights and freedoms, to enable the government of the State by an individual or a group, or the domination of one social class over other social classes, to create divisions of language, race, religion and sect, or to establish a state order depending in any way on these concepts and opinions." It is obvious that the terms of use labeled as abuse and accordingly prohibited in the first section of Article 14 target all fundamental rights and freedoms. The essential purpose of the article is to restrict the use of rights and freedoms, especially freedom of thought.[22] This purpose of the article is in fact contained in the justification drafted by the Consulting Council of the Constitutional Commission as the Constitution was being drafted. Accordingly, "The first section of this article prevents the abuse of rights and freedoms. The section demonstrates by means of an inventory how the rights and freedoms cannot be abused. Although the general and special restrictions contained in the previous article may prevent the abuse of rights and freedoms, under some conditions it is possible that a freedom exercised in line with legal provisions has in fact another intention behind it, and that this intention is in line with the prohibited purposes as they are listed in the section. For instance, a periodical publication in Turkey in another language than Turkish might be

[21] Tanör, İki Anayasa, ...s.135.

[22] O. Korkut Kanadoğlu, Türk ve Alman Anayasa Yargısında Anayasal Değerlerin Çatışması ve Uyumlaştırılması, Beta Yayınları, İstanbul 2000, s.27.

pursuing division, or religious publications might be aiming for sectarian divide."[23] This justification makes it clear that the article was designed to prohibit certain expressions of opinion.

In line with the general structure of the Constitution of 1982, Article 14 aims to protect the state against the individual, which was especially the case before the amendments of 2001. This provision, which surpassed the protection of the "liberal and pluralistic democratic order", also surpassed the fundamental purpose of the conception of militant democracy. The protection of the state was seen as having more priority in comparison to the protection of individual rights and freedoms. The "intention of destroying fundamental rights and freedoms" within the scope of Article 14 was predicated de facto, and without consideration for impinging on the rights of others. In this context, all activities based on opinions other than the constitutional ideology were virtually prohibited.[24]

Especially before the Constitutional amendments of 2001, the Articles 13 and 14 of the Constitution of the Turkish Republic were (and are) seen as provisions without a counterpart in the European Convention on Human Rights (ECHR).[25] The general causes of prohibition, applicable to all rights and freedoms, are listed in Article 14 of the Constitution. After the Constitutional amendments of 2001, made in accordance with EU harmonisation efforts, Article 14 of the Constitution containing the provision for general prohibition could not be likened to the provision in the ECHR (Article 17) which was said to be its equivalent, and the general prohibition remained the same.

The provision of prohibition in Article 14 causes an even more extreme approach against freedoms than the provision of general restriction in Article 13. With the restriction, the legislator is not under any obligation with regard to the act of restricting; on the contrary, he has discretionary powers whereas with prohibitions the legislator has no discretionary powers; therefore, there is an obligation to make regulations in line with the prohibitions in the Constitutions and to include their enforcements.[26]

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[23] Mehmet Akad-Abdullah Diçkol, 1982 Anayasası Madde Gerekçeleri ve Maddelerle İlgili Anayasa Mahkemesi kararları, Alkım Yayınları, İstanbul 1998, s.83.

[24] Mustafa Erdoğan, Demokrasi, Laiklik, Resmi İdeoloji,2.baskı, Liberte Yayınları, Ankara 2000, s.367,368

[25] Bülent Tanör, Türkiye' nin İnsan Hakları Sorunu, BDS Yayınları, İstanbul 1990, s.336.

[26] Necmi Yüzbaşıoğlu, Türk Anayasa Yargısında Anayasallık Bloku, İstanbul Üniversitesi Hukuk Fakültesi Yayını, İstanbul 1993, s.215,216,217.

In addition to Article 14, the provision of general prohibition which regulates the prohibition of the abuse of rights and freedoms, the Constitution of 1982 stipulates special prohibitions of abuse for certain rights and freedoms. It is unclear why this way was chosen if the provision of general prohibition was valid for all the rights and freedoms in the Constitution. In addition, for a great number of rights and freedoms for which no prohibition of abuse can be regulated, restrictions based on causes of prohibition are prescribed; therefore, it can be said with certainty that the pattern of prohibition is tightly knit.[27] Against the fact that the prohibitions contained in Article 14 apply to all rights and freedoms, it is necessary to stress that for instance, the cause for prohibition "the indivisible integrity of the State with its territory and its nation" is valid for all rights and freedoms in the Constitution.

The system of restriction in the Constitution of 1982, especially prior to the 2001 amendments, is in the nature of a list of prohibitions that contravene human rights standards. These provisions, which can also be formulated as "Constitutional prohibitions", form the essence of the general regime of fundamental rights and freedoms in the Constitution of 1982.[28]

Within the scope of 2001's Constitutional amendments, important amendments were made to Article 13 in favour of rights and freedoms, and some of the causes for prohibition were removed from Article 14. At the same time, only a relative amelioration of the restriction and prohibition regime caused by these provisions was achieved, and the contents of the Constitution that limited rights and freedoms was not entirely transformed. Indeed, there is still a need for a Constitution that prioritizes rights and freedoms.

Article 15 of the Constitution, which is among the provisions of general prohibition, is a deviation from rights and freedoms and it prescribes that in states of emergency, rights and freedoms may be suspended. With this provision, Article 15 has made it possible for rights and freedoms to be suspended as a whole; and the opportunity for the political power to intervene in all rights and freedoms has been provided on a Constitutional level. The real meaning of this provision is "suspension", which is included under the heading of the parallel provision of Article 15 in the ECHR.

[27] Sevtap Yokuş, Avrupa İnsan Hakları Sözleşmesi'nde ve 1982 Anayasası'nda Hak ve Özgürlüklerin Kötüye Kullanımı, Yetkin Yayınları, Ankara 2002, s. 174.

[28] Oktay Uygun, 1982 Anayasası'nda Temel Hak ve Özgürlüklerin Genel Rejimi, İstanbul 1992, s.192.

The term “suspension”, occuring in the provision “due to war, mobilisation, martial law or state of emergency, provided that obligations borne out of international laws are not neglected, the exercise of fundamental rights and freedoms may be partially or fully suspended as the situation requires; or, measures in contravention of the safeguards prescribed by the Constitution may be taken” in Article 15 of the Constitution of 1982 indicates an essentially different regime. Suspension or the abolition of opportunities provided by rights is the severest measure in contravention of Constitutional safeguards.[29]

According to Article 15, then, in regimes of state of emergency, their own specific safeguards will not be valid for rights and freedoms prescribed in the other articles of the Constitution. In regimes of state of emergency, only Article 15, which prescribes the suspension of rights and freedoms will be implemented. Rights and freedoms that may be restricted according to Article 13 in ordinary times will be restricted and even suspended within the framework of Article 15 in states of emergency. The Constitution of 1982, then, includes two interlocking regimes of restriction.[30] However, none of the norms created for the state of emergency must “contravene obligations borne out of international law” and violate “the principle of proportionality” as prescribed by Article 15. However, the fact that an effective supervision of practices under the state of emergency cannot be undertaken by the judiciary because of the Constitution renders the safeguard criteria meaningless.

The state of emergency regulations of the Constitution of 1982, made possible by Article 15, when considered alongside the other articles pertaining to the state of emergency regime have the appearance of an almost independent regime exceeding the Constitutional framework in terms of rights and freedoms.[31] The suspension of rights and freedoms during the state of emergency regime is predicated on Article 15.[32] In fact, Article 15 of the Constitution of 1982 is parallel to the European Convention on Human Rights’ provision of Article 15. Since Turkey is a party to the Convention and the Convention is directly applicable, the provision of Article 15 in the Constitution of 1982 must be implemented in

[29] Tekin Akıllıoğlu, “Temel Hakların Durdurulması”, Bahri Savcı’ ya Armağan, Mülkiyeliler Birliği Vakfı Yayınları 7, Ankara 1988, s.63, 64.

[30] Fazıl Sağlam, “ KHK Çıkarma Yetkisinin Sınırları Uygulaması Yaygınlaşmasından Doğabilecek Sorunlar “ Anayasa Yargısı 1, Ankara 1984, s.262.

[31] Fazıl Sağlam, “1982 Anayasası’nın Temel Hak ve Özgürlükler Bakımından Getirdiği Sorunlar”, Bahri Savcı’ya Armağan, Mülkiyeliler Birliği Vakfı Yayını, Ankara 1988, s.436.

[32] Yılmaz Aliefendioğlu, “Anayasa Yargısı Açısından Olağanüstü Yönetim Usülleri”, Amme İdaresi Dergisi, C:25, S.2, Haziran 1992, s.30.

accordance with the provision of Article 15 of ECHR and its relevant precedents; [33] however, as determined by the European Court of Human Rights, the opposite has been the case in past implementations. Considered alongside sub-Constitutional regulations that cannot be checked by the judiciary and especially the state of emergency decrees having the force of law, this practice has given way to an unconstitutional and unlawful regime. The abuses of rights due to illegal practices have been determined by the European Court of Human Rights time and again.

B. Constitutional Pursuits for Democratization Before and Up Until the 2015 Elections

In 2015, prior to the run-up to the general elections in Turkey, efforts were concentrated on drafting a new constitution and one thing the various efforts had in common was that they aimed to clear the way for rights and freedoms. Even though there were various suggestions for formation of Constitutional bodies and their operations, it can be said that something beyond the Constitution of 1982 was envisaged aimed at more democratic governmental structures and operations. The real aim, however, was to create as much room as possible for freedoms. Part of this process proceeded parallel to the "conflict resolution" process. During this period, some supporters of resolution were voicing the opinion that the resolution process could be crowned with a "constitution of social peace". In meetings and panel discussions the democratic constitution process was even likened to the drafting of South Africa's democratic constitution. After the elections of 2015, discussions of a liberal and democratic constitution were replaced by discussions, initiated by the ruling party, of transitioning to a "presidential regime".

Turkey's quest for a democratic constitution and efforts towards a democratic constitution predate the 2000s. The first document of proposal on changing the Constitution as a whole was written in 1993. Early into 1993, political parties represented in the Grand National Assembly of Turkey drafted offers for a constitutional reform. These planned reforms, expected to be wide-ranging, became what is known as of 1995. Although these reforms were comprehensive, they were much less than what was expected, considering the political atmosphere of the time as well.

[33] Mümtaz Soysal, 100 Soruda Anayasanın Anlamı, 8.Baskı, Gerçek Yayınevi, İstanbul 1990, s.201.

During the 2001 constitutional reform efforts the European Convention on Human Rights was the fundamental reference point, and European Union's documents were also taken into account. The Copenhagen Criteria, the Accession Partnership Document and the National Programme informed the contents of the amendments.[34] The aim was to establish parallels to the provisions of the European Convention of Human Rights.

The 2001 Constitutional Reform was the widest-ranging and most comprehensive in terms of clearing the way for rights and freedoms; in the period following it, discussions and efforts for completely changing the Constitution picked up pace. To this end, for instance, the Union of Chambers and Commodity Exchanges of Turkey (TOBB) prepared a draft of their Constitutional propositions in 2000, the Turkish Bar Association in 2001, and by the goverment's demand, the Science Board in 2007. A report prepared by the Turkish Industrialists' and Businessmen's Association (TÜSİAD) and published in March 2011 was among the studies demonstrating how necessary a new constitution was. This study, which conducted its argument from five perspectives, gained mixed reactions from various sectors of Turkish society. It gained an important place among the discussions in that it opened up to debate some views that were hitherto too extreme for Turkey. Turkish Economic and Social Studies Foundation's (TESEV) report on the making of a new constitution followed TÜSİAD's study. The Institute For Strategic Thinking published its report "A New Constitution Based on Human Dignity" in May 2011. In 2012, a detailed working report on the new constitution prepared by the Constitutional Law Research Association was presented to the Parliament's Constitution Conciliation Commission.

Different suggestions were made regarding the method of drafting a new constitution. A prominent idea among these was that with the 10% election threshold and a Parliament which was in fact formed on deficient representation, it was difficult to create a new constitution towards which people from all sectors of society would feel ownership. To create a new constitution without widespread participation would mean to create a constitution for the ruling party, or even the leader of the ruling party. If a constitution was drafted without widespread participation and contribution, it would not be possible to call it a social contract. Therefore, the method of drafting the new constitution was as important

[34] İbrahim Ö. Kaboğlu, "2001 Anayasa Değişiklikleri: Ulusal-Üstü Etkiden Ulusal Tepkiye", Anayasa Yargısı 19, Antalya 2002, s.107.

as its contents. In order to ensure the highest level of compromise possible, so that the Constitution could genuinely be a social contract, a democratic-participatory method had to be determined. Different suggestions were formulated. For instance, a report published in 2009 titled "Fundamental Principles for a New Liberal-Egalitarian-Democratic and Social Constitution" suggested a constituent assembly.[35] Other reports from different circles also made similar suggestions.[36]

During the preparations for the new constitution, another factor in terms of method that had to be taken into consideration was the removal of legislation that obstructed the full exercise of freedoms. A series of laws obstructing the free discussion of a new constitution as well as the freedom of expression and assembly looked as if they had to be reformed. The Political Parties and Electoral Act was among the first that needed to be amended.

It was felt that in determining the method for a new, democratic constitution, making use of other countries' similar experiences would be useful. A new constitution would mean a new beginning towards social peace; at the same time, measures that would ensure that the new constitution would be discussed in a peaceful manner were necessary, and it was believed that a democratic constitution would only be created in a democratic setting and using democratic tools.

In terms of social peace, one of the things expected from the new constitution was the abolition of an ethnic definition of citizenship, which had long been a subject of political conflict. The draft for a new constitution, prepared in 2007 by the government's demand, included an alternative definition of citizenship. The title line was recommended as saying "citizenship" instead of "Turkish citizenship".[37] The "Fundamental Principles for a New Constitution" report prepared by the Council of Constitutional Experts phrased citizenship as "Constitutional citizenship" and determined its definition accordingly. According to the report "Constitutional citizenship must be recognized: The aim is for all citizens to feel ownership of the Constitution, and the right to citizenship must be recognized without referencing any ethnic attachment. In this way the Constitution can be perceived not only as a document of social contract but also as a "common identity card"; and constitutional

[35] Özgürlükçü-Eşitlikçi-Demokratik ve Sosyal Yeni Bir Anayasa İçin Temel İlkeler, DİSK Yayınları, İstanbul 2009, s.97, 98.

[36] Yeni Anayasanın Beş Temel Boyutu, TÜSİAD, Mart 2011.

[37] Türkiye Cumhuriyeti Anayasası Önerisi, Legal Hukuk Dergisi, Yıl:5, Sayı:58, Ekim 2007, s.3208.

patriotism may flourish as a result. In terms of political rights, "*Turkish Republic citizenship*" must be designed as an inclusive identity that acknowledges differences…".[38] TÜSİAD's 2011 report on the Constitution states that citizenship must be recognized as a right in the Constitution and that an ethnicity-based definition of citizenship cannot be part of the Constitution. This report looked at citizenship under the heading of identity and discussed cultural rights in conjunction with the subject.[39] TESEV's 2011 report, "Making of a New Constitution in Turkey" says: "… the Constitution should not refer to ethnic identities in any way, but it should hold respect to all cultural differences and life styles as a fundamental principle."[40] The 2011 report of the Institute for Strategic Thinking on the new Constitution also underlines the need to provide a new definition of citizenship devoid of any references to ethnicity, per the general tendency in constitutions over the world, a definition that is based on the legal relationship with the state.[41]

In the search for a new constitution, one suggestion that was widely discussed was that the central administration should be downsized and supplemented by local governments, and that non-democratic central structures should be replaced by local-regional governments. Similarly, preparing the ground for organizing the administration on every level, establishing full transparency in its operation and making "new" legal arrangements to this end starting with the Constitution were seen as necessities.

In a proposal dated 2000, TOBB mentions "regional administration". Regional administrations made up of several provinces would be created according to economic and geographic criteria. The report stresses that this is imperative in the EU harmonisation process. Another study looking at developing different units on the level of local administrations is TÜSİAD's 2006 report. In this report, three units for local administration are defined: metropolis, sub-region and region.[42] The Turkish Bar Association's 2001 Constitution draft suggests local administrations and explains the suggestion in detail in the article's preamble: "local administrations are public legal entities answering the common

[38] Özgürlükçü-Eşitlikçi-Demokratik ve Sosyal Yeni Bir Anayasa İçin Temel İlkeler, …, s.41.

[39] Yeni Anayasanın Beş Temel Boyutu, TÜSİAD, Mart 2011, s.27.

[40] Türkiye'nin Yeni Anayasasına Doğru, TESEV, Nisan 2011, s.13.

[41] Vesayetsiz ve Tam Demokratik Bir Türkiye İçin İnsan Onuruna Dayanan Yeni Anayasa, Stratejik Düşünce Enstitüsü Raporu, Ankara Mayıs 2011, s.44,45.

[42] Sultan Tahmazoğlu Üzeltürk, "Anayasa Önerilerinde Yasama Yürütme İlişkileri-Ayrışmalar ve Ortak Noktalar", Anayasa Kurultayı, Prof. Dr. Yılmaz Aliefendioğlu'na Armağan, Ankara Barosu İnsan Hakları Merkezi, Ankara Barosu Yayınları, Ankara 2010, s.81,82.

and local needs of the population of the region, province, county or village; and their decision-making bodies are elected by the public."[43] In the 2009 report of the Council of Constitutional Experts, regional administrations were also suggested as a model of local administration. The principles and intended benefits of this administrative division were comprehensively explained in the report. The report says: "Regional administration is a democratic unit of decentralization within the framework of the state's territorial and political unity and the powers of local units; one that is formed solely with the aim of adding momentum to the region's economic, social and cultural development."[44] TÜSİAD's 2011 report also prescribes local administrations. It talks about granting tax-collecting authorization to regions in order to enable them to create their own source of revenue. It also suggests that a number of central powers should be devolved to local administrations. From this point of view, international conventions empowering local administrations must be implemented in their entirety and without any reservations. An important point in the TÜSİAD report is that the authorization of local administrations is discussed in conjunction with the subjects of identity, regional representation, fair representation and methods of political participation.[45] In its 2011 report on the new constitution, TESEV claims that granting autonomy to local administrations will also resolve problems of identity and cultural rights. "Divisions of local administration must be formed entirely through means of democratic representation; they must have the right to decide on local needs and ways of fulfilling these needs; they must be able to impose a partial tax that will supplement a fairer share from the central budget in order to cover their expenses. Local administrations must have the power of decision over public works, services of agriculture, health and partially over the police and education services. To put it another way, the central government must retain services of justice and defence as well as the national police service; as for education, it should not be replaced at the national level, but it should be flexible enough to admit regional varieties that correspond to specific needs," says this report, favouring widescale autonomy for local administrations.[46]

[43] Türkiye Cumhuriyeti Anayasa Önerisi, II. Basım, Türkiye Barolar Birliği Yayınları, 2001, s.79,80.
[44] Özgürlükçü-Eşitlikçi-Demokratik ve Sosyal Yeni Bir Anayasa İçin Temel İlkeler, …, s.69.
[45] Yeni Anayasanın Beş Temel Boyutu, s.28.
[46] Türkiye'nin Yeni Anayasasına Doğru, s.31,32.

The imperative of the Constitution containing new rules and institutions meant that what would be new in the Constitution in terms of principles was revealed. Following the revelation of these principles, there were some difficulties in reaching an accord over the new subject matter. Foremost among the contentious headings was "citizenship and the relationship between the center and periphery in government". It was therefore necessary to develop a formula to be able to deal with these matters.[47]

Asking for a new constitution meant asking for a state of law in which there is truly freedom, equality, democracy and peace. For this reason, all drafts, reports and opinion pieces pertaining to the new constitution had in their title some variation of the words "liberal, democratic, egalitarian" and so on. The chief expectation from the new constitution was the establishment of social peace. Preparatory efforts for the new constitution, which went on for years, made the fundamental principles and expectations clear. These principles correspond to the universal principles of a democratic constitution. As such, Turkey's common expectations from a democratic constitution can be listed as follows. First of all, a democratic constitution must see all people from all sectors of society as equal citizens, and it must protect social and political pluralism. Rights and freedoms must be determined on the basis of universal principles, and they should be secured. Measures must be taken to protect the rule of law as well as the independence and impartialty of the judiciary. Political rule must be balanced by means of sharing authority, and the democratic process must be ensured through the principle of "limited rule", which is the definition of democracy. Centralized authorities must be shared with local governments and there must be transparency in administration.[48]

In 2011, all parties in the Parliament dispatched three members each to the "Constitution Conciliation Commission" in order to draft the new constitution and preparations for a new constitution thus began within the Parliament; meanwhile, discussions on the method and contents of a new constitution had been going on with the participation of various civil society organizations. However, a compromise on the fundamentals of the new constitution

[47] İbrahim Kaboğlu, "Anayasa Kurultayı. Anlamı ve Amacı", Anayasa Kurultayı, Prof. Dr. Yılmaz Aliefendioğlu'na Armağan, Ankara Barosu İnsan Hakları Merkezi, Ankara Barosu Yayınları, Ankara 2010, s.15.

[48] Sevtap Yokuş, "yeni Anayasa Arayışında İçerikle İlgili Öncelikler Nelerdir?", Türkiye'nin Anayasa Gündemi, Derleyen: İbrahim Ö. Kaboğlu, Anayasa Hukuku Araştırmaları Derneği, İletişim Yayınları, İstanbul 2016, s. 240,241.

could not be reached. Instead of drafting a new constitution that would stop discrimination and "otherization" with the aim of social peace, one that would turn the current Constitution's spirit upside down, the current Constitution was revised and a consensus was reached on 60 articles that were not contentious to begin with. The attempt to draft a new constitution in its entirety failed and it could not be completed. Members of the parties in the Parliament came together one last time in 10 February 2016[49] to to try and work on the Constitution, but only two meetings took place and on 17 February 2016, this project came to an end, particularly due to disagreements over the "presidential regime".[50]

III. FROM ATTEMPTS AT DEMOCRATISATION TO AUTHORITARIANISM

The search for a liberal-democratic constitution and partial amendments to the Constitution in this direction had reduced the Constitution's authoritarianism to some extent. With the state of emergency regime announced in 2016, the authoritarian aspect of the Constitution reared its head once again. The Constitution was amended with a stress on the "strong state", which was a reflection of the ruling power's preference for authoritarianism enabled by the Constitution instead of a liberal Constitution.

A. 2017 Constitutional Reforms: The Presidential Regime

The search for a new constitution that would enable freedoms, limit the ruling powers in favour of freedoms and balance it with democratic methods continued until the constitutional reforms of 2017 when the aims of a democratic liberal constitution were abandoned; instead, authority was consolidated to the detriment of freedoms, control mechanisms were removed and political power was concentrated in one hand. In this way, the order established by the 12 September 1980 Coup, which favoured authoritarian rule instead of freedoms, emphasized the state's importance and restricted individual freedoms, returned.

[49] http://t24.com.tr/haber/tbmm-baskani-avara-kasnak-dedi-anayasa-uzlasma-komisyonu-dagildi-iste-o-tutanaga-yansiyan-konusmalar,328554

[50] http://t24.com.tr/haber/tbmm-baskani-avara-kasnak-dedi-anayasa-uzlasma-komisyonu-dagildi-iste-o-tutanaga-yansiyan-konusmalar,328554

Turkey has been in a state of emergency since 21 July 2016. The extension of the nation-wide state of emergency killed the hopes for a new and democratic constitutional order which were kept alive despite everything. The state of emergency rule suspended freedoms and once again it underlined the Constitution's authoritarian aspect.[51] Constitutional reforms, which were claimed to be changes to the governmental system, were made during this period. The state of emergency rule meant that there was a decline in terms of democratic principles and freedoms, and hopes for a democratic constitution had already disappeared; constitutional reforms made in such a state of affairs, and with the state of emergency still in effect, created even bigger problems in terms of democratic legitimacy even at the preliminary stage. There was no public preparation process for the constitutional reforms. A constitutional reform was drafted, how or by whom unknown, and it was put to referendum. During the referendum, there was controversy over the unsealed votes, and the integrity of the referendum was questioned. The main opposition party applied to the Supreme Electoral Council to demand the disqualification of unsealed votes, but the Council decreed that unsealed votes were also valid.

Constitutional reforms carried out in conditions of state of emergency indicate that all considerations of a democratic constitution have been abandoned. It is obvious that with all freedoms that would enable participation in the process suspended (chief among them freedom of expression and assembly), drafting a constitutional reform in a state of emergency regime is not democratic.

The Constitution of 1982 aimed for stability and almost consecrated authority; as such, it placed too much strength in the executive branch to the detriment of other powers. This pro-authority stance is most obvious when the excessive powers it bestows on the executive and particularly to the President are considered.[52] Constitutional reforms of 2017 contain regulations that make the state of emergency powers of the President permanent, as well as his executive powers; thus, the authority gained by the Constitution in the 12 September period will be further consolidated. The system of checks and balances, already precarious, will be further endangered by these constitutional reforms. On the basis of 2017

[51] Sevtap Yokuş, Avrupa İnsan Hakları Sözleşmesi'nin Türkiye'de Olağanüstü Hal Rejimi Pratiği ve Anayasa Şikayetine Etkisi, Seçkin Yayınları, Ankara 2017, Önsözden.
[52] Sevtap Yokuş "1982 Anayasası'nda Yürütme Erkinin Ağırlığı", Maltepe Üniversitesi Hukuk Fakültesi Dergisi (Prof. Dr. Ayferi Göze'ye Armağan), Maltepe Üniversitesi Yayınları, 2004/1-2, İstanbul, s.239-255.

constitutional reforms,[53] the President now controls the executive single-handedly as well as being in a position to easily influence the legislature and the judiciary; all these in addition to his already extensive powers. It is clear that these constitutional reforms, undemocratic in content, will further consolidate the authoritarian bent of the Constitution of 1982 especially with regard to making the state of emergency regime powers of the President permanent; together with problems of judiciary independence, they will be the cause of even greater problems in terms of undemocratic practices.

These constitutional reforms, supposedly drafted for a change in the government system, are in fact reforms for a "Presidential system". However, no such thing as a "Presidential system", in the sense that it is used in Turkish ("*Cumhurbaşkanlığı sistemi*") is to be found in the literature of constitutional law. At first it was called by some as the "Turkish style presidential system". However, this new governmental system has no similarity to a "presidential regime" proper ("*Başkanlık rejimi*"). For one thing, the strict separation of powers that is at the core of a proper presidential regime is not prescribed by the constitutional reforms. The checks and balances between the powers will be entirely abolished. The President will have the power to renew the elections, to appoint vice presidents and ministers as well as high-ranking government executives and to appoint members to the Board of Judges and Prosecutors; these powers are not subject to any checks, they are unlimited and unconditional.[54]

On the subject of renewing the elections, the Parliament will de facto lose its power. The prescribed majority necessary for the Parliament to renew the elections (a three out of fıve majority among all members) is virtually impossible, especially considering that there is a high chance that the executive majority will be controlled by the President. There are no conditions of time or cause attached to the President's power of renewing the eletions. The President will be able to exercise his power of renewing the elections as often as he likes.[55]

By means of "Presidency plus membership in a party", the President's status as being above the parties has been undermined, and now he is in a position to determine daily politics.

[53] 6771 sayılı "Türkiye Cumhuriyeti Anayasasında Değişiklik Yapılmasına Dair Kanun" Kabul Tarihi: 1.01.2017, R.G: 11 Şubat 2017, Sayı: 29976.

[54] Kemal Gözler, Elveda Anayasa, Ekin Yayınevi, Bursa 2017, s.21.

[55] Ece Göztepe, "Cumhurbaşkanlığı Sistemine Geçiş ve Anayasa Değişikliği", Güncel Hukuk Dergisi, Mart 2017, s.49.

Because the presidential elections will take place at the same time as the parliamentary elections, the parliamentary elections will be overshadowed, and in terms of leaders, the people will have a limited choice in the elections.[56]

A constitutional foundation to the President's controlling the executive majority has been established. Because the presidential elections will take place at the same time as the parliamentary elections, most of the voters will tend towards the President's party. Since the constitutional reforms hold that the President can be member of a party, that is to say, that he can lead his party, it will be inevitable that the elected President's party will gain majority in the Parliament. Considered in conjunction with Turkey's political system and its Political Parties Act, a parliamentary majority bound to the President will mean a president in control of the legislature.

With the constitutional reforms of 2017, the principle of the legislature's primacy has been weakened to benefit the President. The President's power to issue decrees has almost been raised to the level of a general regulatory principle. [57] No parliamentary authorization act is needed for a presidential decree. Looking at the constitutional reforms, there seems to be no obligation for these decrees to be presented to the Parliament, either. Areas that can be regulated by presidential decrees are quite extensive. The establishment and abolition of ministries, their powers and responsibilities, their organizational structure and the establishment of their central and provincial organizations are topics that must be regulated by law; however, the constitutional reforms hold that these will be regulated by presidential decrees. Similar categories that can be regulated by presidential decrees have been haphazardly included in the omnibus bill, thus creating very extensive areas of regulation. The organization and duties of the General Secretariat of the National Security Council, hitherto regulated by laws, will be regulated by Presidential decrees following these reforms.

The checks of the legislature over the executive have been removed for the large part. Mechanisms of motion of no-confidence and oral questions, an essential way[58] for the legislature to monitor the executive's policies and to draw public attention to them, have

[56] Demirhan Burak Çelik, Burcu Alkış, Atagün Mert Kejanlıoğlu, "Türk Tipi Başkanlık Sistemi", Güncel Hukuk Dergisi, Mart 2017, s.54.
[57] Ece Göztepe, "Cumhurbaşkanlığı Sistemine Geçiş ve Anayasa Değişikliği", …, s.49.
[58] Süheyl Batum, "Demokrasi Dışı Bir Anayasa Değişikliği", Güncel Hukuk Dergisi, Mart 2017, s.38.

been removed. As for the "criminal liability" of the President, Vice Presidents or Ministers, the parliamentary majority required to pursue this legislative avenue makes it a near impossibility. The majority required to hold a parliamentary enquiry is three fifths of all the members; to refer it to the Supreme Court, two thirds of all members are needed.

Another important monitoring tool the Parliament has against the executive, its authority over the budget, is also gone. The Parliament's powers related to the Budget Law have been restricted. If the Budget Law Proposal presented by the President is not discussed and brought into effect by the Parliament in time, the previous year's budget will be increased in proportion to the rate of valuation. Thus the executive branch will never be without a budget and the legislature will not be able to use the budget as a brake or check against the executive; it will have no influence over the budget in facing the President.

The President has the power to appoint his vice presidents, ministers and high ranking bureaucrats on his own. When the President appoints an MP as a minister or vice president, that person's MP status will be terminated, and after his/her duty as a vice president or minister is fulfilled through any means, s/he will not be able to serve in her former MP position again. This means that the President will have even more control on these vice presidents and ministers who will not be able to serve as MPs again.[59]

The constitutional reforms of 2017 have terminated the search for a liberal and democratic constitution which has been demanded by the society and promised by the political parties in electoral periods since the Constitution of 1982 took effect.[60]

The constitutional reforms have not aimed for any known democratic system of government, and they do not resemble any democratic system of government either. The system of government prescribed by the constitutional reforms conforms neither to a presidential system in which there is a strict division of powers both in formation and functioning, nor to a parliamentary regime which operates on mechanisms of checks and balances, and in which the legislature effectively checks the executive. With the constitutional reforms, the President now has the de facto power to determine the legislature, to share the function of legislation and to renew legislation if he likes. He single-

[59] Korkut Kanadoğlu-Ahmet Mert Duygun, "6771 Sayılı Anayasa Değişikliği Hakkında Kanun'a İlişkin Değerlendirmeler", Güncel Hukuk Dergisi, Mart 2017, s.60.
[60] Sevtap Yokuş, "Özgürlükçü Demokratik Anayasa Arayışının Sonu", Güncel Hukuk Dergisi, Mart 2017, s. 40, 41.

handedly controls the executive, and can make the bureaucratic appointments on his own. Beyond changes to the system of government, the constitutional reforms of 2017 essentially aim for a series of regulations which will provide the President with extraordinary powers. With these new powers, the political leader's control over the legislative, executive and judiciary branches has profoundly increased. After years of searching for a democratic and liberal constitution, these constitutional reforms have paved the way for an even more authoritarian constitution.

B. The Cessation of Conflict as the Prerequisite for Democratic Constitutional Order in Turkey

The military coup of 12 September 1980 essentially aimed for an apolitical society. The coup intended to put an end to democratic politics and it succeeded in realizing this intention. Not for a limited time, either; for all the precautions to keep society away from politics were taken permanently. At the same time, everything was made to ensure an authoritarian rule and a centralized strong ruling power. The seeds to the current conditions of Turkey were sown back then. For years now in Turkey, from time to time, in conjunction with the intensity of conflicts, democracy is sometimes left behind as authoritarian rule makes itself noticeably felt. For society, this has become an ordinary thing. Because the societal opposition in favour of democracy is very weak, it cannot stop these occasional deviations from democracy.[61] This absence of demand for democratic politics and the ease with which authoritarian rule takes over is the result of 12 September period's political aims and the constitutional order established in line with those aims.

The state of emergency regime in Turkey following the 12 September military coup extended over years and it gave priority to security. As conflict deepened in the region where the state of emergency regime was upheld, lawfulness disappeared. This is because the state of emergency regime created an uncontrolled, unchecked area that extended over a long period of time. As law disappeared, the conflicts became more entrenched. Where even the most fundamental principles of law were not upheld, it would have been absurd for democratic values to be respected. The foundations of the problems still experienced today

[61] The Constitutional and legal causes of the weakness of Turkey's societal opposition is the subject of another discussion.

were largely laid back then. The massive abuses of human rights were determined by the rulings of the European Court of Human Rights. In terms of the amount of these rulings, Turkey was a top country in human rights abuses.

During the early 2000s there were hopes that democratic politics and a democratic consciousness would flourish. A series of developments regarding constitutional reform and transformation, which also took place in conjunction with the EU harmonisation process gave much hope to those in anticipation of more democracy. Even though there was a desire to overcome problems of democracy and law by fulfilling the political criteria imposed by the EU in the early 2000s, since a permanent, peace-oriented transformation had not taken place in society and in political structures, all these attempts at adopting the principles of Western democracies failed, as current events also demonstrate. The fragile structure of democracy in Turkey, which includes the weakness of its democratic culture and calls for a sociological analysis, is the foremost obstacle in front of a strong, democratic transformation. The conflict situation also prevents potential attempts at democratisation from taking place.[62] The first step that needs to be taken in order to ensure the progress of democracy and the implementation of the rule of law is to cease the conflict.

Instead of a new liberal-democratic constitution, which has been awaited since 1993, especially during the 2000s with the hope that it would contribute to social peace and get rid of the authoritarian Constitution of 1982, also known as the Coup Constitution, the constitutional reforms of 2017 have completely upset the checks and balances inherent to a democracy, consolidated authority and have not met the expectations for a new constitution at all; all these indicate that without a foundation of peace, there can be no freedom and democracy.

Moving away from peace diminishes the chance for political problems to be solved through peaceful or political means. The rule of law is eliminated, regulations that are unlawful at a constitutional level are enacted. A typical example of this is the constitutional amendment towards lifting immunities, which is obviously in contravention of even the Constitution

[62] Sevtap Yokuş, Türkiye'de Çatışma Çözümünde Anayasal Arayışlar, Seçkin Yayınları, Ankara 2013, s.251.

currently in effect.[63] Indeed, lifting immunities and detaining the MPs on trial has had destructive effects on the democratic social order.

Lately, the authoritarianism that feeds on conflict has had very harmful effects on the democratic order which preserves rights and freedoms in Turkey. Rights and freedoms are ignored, and a security-oriented governmentality prevails. The democratic way of thinking which holds that security is necessary in order to protect freedoms, that security and freedom are directly and not inversely proportional, is being lost. As the idea of peace recedes further and further, democratic principles and the law is lost, and conflicts become even more entrenched.

Law is much more vital in periods of state of emergency regime, and state of emergency regimes are not unlawful regimes. Political powers do not have the right to do whatever they want to do in states of emergency. The legality of a state of emergency regime depends on its being partial, temporary, measured and also, checked by the judiciary.[64]

Under the conditions created by the current Constitution and legal regulations, it is inevitable for Turkey's state of emergency regime to devolve into unlawfulness. This is because the regulations in question obstruct judicial checks, which is the essential way of bringing state of emergency regimes under the control of the law.[65] As judicial checks are obstructed and unchecked areas extend, as the principle of proportionality is violated, the state of emergency regime can quickly turn into a collection of unlawful practices. The extension of the state of emergency regime creates permanent victimisation as unchecked practices abound. State of emergency decrees having the force of law cannot be checked by the judiciary according to the Constitution; also, these decrees exceed the bounds of state of emergency regime-related subjects. The political power chooses to govern over an extensive area by means of decrees having the force of law.

The legislature's role in times of state of emergency, when the law has almost disappeared, is even more important. The attitude of the Constitutional Court, whose primary function is

[63] 20.5.2016 tarih ve 6718 sayılı "Türkiye Cumhuriyeti Anayasasında Değişiklik Yapılmasına Dair Kanun", R.G. 08 Haziran 2016, S: 29736.

[64] Münci Kapani, Kamu Hürriyetleri, Ankara Üniversitesi Hukuk Fakültesi Yayınları, 6. Bası, Ankara 1981, s.189-192.

[65] Sevtap Yokuş, Avrupaİnsan Hakları Sözleşmesi'nin Türkiye'de Olağanüstü Hal Rejimi Pratiği ve Anayasa Şikayetine Etkisi, Seçkin Yayınları, Ankara 2017, s. 274.

to ensure compliance with laws and to uphold the rule of law, is crucial for the state of emergency regime. However, in Turkey, the Constitutional Court completely withdraws itself, citing judicial obstacles in constitutional provisions as the cause.

Influenced by the political atmosphere of the time, the Constitutional Court examined the 2008 Constitutional amendments in terms of substance and annulled them despite the fact that the Constitution cannot be examined in terms of substance; the Court did this because it attached a higher importance to the principle of secularism in Article 2 of the Constitution.[66] With its rulings since the announcement of the state of emergency regime, the Constitutional Court has shown that it grounds itself on the current political conditions of the country instead of rule of law.

Another instance which shows that the Constitutional Court is very much influenced by the political situation is its attitude towards the appeals of the arrested MPs. Whereas the Constitutional Court protected freedoms in cases of similar appeals prior to the announcement of the state of emergency, during this state of emergency it has shown that it is acting in accordance with the spirit of the period. The personal appeals of MPs who were arrested after the lifting of immunities were kept waiting before the Constitutional Court for almost a year. However, in previous times, appeals of MPs on the same subject and in similar situations were positively answered as quickly as within three days.[67]

As the security-oriented policies of the ruling power became decisive, the judiciary no longer served social peace on the basis of the protection of rights and freedoms. The Constitutional Court was expected to return to its function of protecting rights and freedoms; however, its rulings on personal appeals has supported the popular opinion that it will not contribute to the active protection of freedoms or to democratic progress.[68] When courts, and especially the Constitutional Court do not play a role in the establishment of democracy and social peace through the law, the political power obtains a monopoly over the will for peace and as a result, belief in the rule of law is even more diminished.

[66] Anayasa Mahkemesi, Esas: 2008/16, Karar: 2008/116, Karar Tarihi: 05.6.2008, R.G. 22 Ekim 2008, S: 27032.

[67] Benan Molu-Ramazan Demir, "AİHM Kararları, AYM'nin Yükümlülüğü ve Tutuklu Milletvekilleri", Güncel Hukuk, Ekim 2017, s.22,23.

[68] Mehmet Girasun ve Ömer Elçi, Başvuru No: 2015/15266, 11.09.2015; Nafise Ekici, Başvuru No: 2016/5993, 05.04.2016.

It is not known whether a strong pro-peace political will is going to be formed soon in Turkey or not; however, there is no doubt that attempts at returning to democratic values, which include the rule of law, can only be effective in conjunction with the pursuit of social peace.

CONCLUSION

Especially since the beginning of the 2000s, there has been a search in Turkey for a democratic-liberal-egalitarian constitution of social peace. Preparing a background of peace and democracy was seen as the minimum requirement for such a constitution to be prepared. It was thought that a democratic constitution could not be created under undemocratic conditions, and all social sectors working on this issue agreed on this. Society's participation in the constitution could only be possible through the implementation of freedoms of expression and assembly.

As the conflict resurged, all steps taken to ensure social peace became ineffective, including the search for a new liberal and democratic constitution. First the "resolution process", a source of hope for the majority of the population, was suspended. Then, the concerns created by the failed coup attempt made the political power consolidate its authoritarian stance. The announcement of a state of emergency and its extensions, constitutional amendments under conditions of state of emergency and the provisions further centralizing constitutional powers all made this undemocratic governmentality even more obvious. Cross-border conflicts destroyed the hope for democracy; as democratic values were abandoned, the conflicts intensified. Added to these was a heavily nationalist political discourse. In brief, the hope for peace moved even farther into the horizon.

The principles of democracy, rule of law, justice and rights and freedoms are the founding principles of a democratic constitution. These principles can only come alive through peace. Conditions that are harmful to peace also destroy democracy, the rule of law, justice and freedoms. The Constitution as the supreme norm, regulations that will ensure social order and problems concerning all of society can only be discussed on a platform free of conflict. Only through an environment free of conflict can healthy results be acquired. These universal principles are even more important for Turkey in the face of this most recent political process.