

# CONSTITUTIONAL AMENDMENTS IN TURKEY 2017 AND THE PROCESS OF RESOLUTION

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For years now change to the existing constitution has occupied the political agenda in Turkey. In spite of many amendments having been made the debate on the constitution continues. While expectations of a brand new democratic constitution continue, amendments enacted were on each occasion as required by the existing political situation. In 2007, 2010 and now in 2017, the constitutional amendments proposed are mainly those prepared for actual political goals rather than democratic ones.

At the same time in Turkey, the conflict based on the Kurdish question, which has turned into a barrier to a democratic future for the country, continues. Therefore, every constitutional change necessitates an evaluation from the viewpoint of a resolution to the conflict. Since the mid-2000s representatives of broad social segments of the population have argued that a democratic, freedom-based constitution would to a great extent resolve the Kurdish question. It is true that with the question of mother tongue, common constitutional citizenship and the strengthening of local autonomy, strong momentum towards a resolution was feasible. However, such a constitution could not be drafted. The answers to the question regarding why this was not possible are extensive and exceed the dimensions of this short study. In brief, they cover a broad area, ranging from a lack of will on the part of politicians to the fact that the democratic culture is underdeveloped in Turkey on account of the social structure created by the military coup of 12 September, 1980.

The scope of this study is primarily to look at the reasons why the constitution has provided a basis for the conflict, recalling the constitutional reasons for this. Recent proposals for constitutional resolution will be provided along with the definitions of the circles that made the proposals.

The 2017 constitutional changes are far from the proposals for resolution mentioned above, having a completely different content. The possible effects of these changes on a resolution of the conflict will be discussed.

## I. THE INTENSIFYING EFFECT OF THE EXISTING CONSTITUTION ON THE PROCESS OF CONFLICT

When constitutions are examined from the viewpoint of a historical process, it will be seen that since the founding of the Republic a policy of creating a single standard type of citizen has been followed, and that legislation, first and foremost constitutions, have laid the basis for this.

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In addition to constitutions, legislation has also established a basis for this. Along with political conditions, the judicial order thus created increasingly led to a fragmented society. The political environment since the founding of the Republic, and the understanding of a single type of acceptable citizen has 'othered' those segments excluded from this. The judicial system has institutionalised this form of approach.

In this context, the constitution of 1961, as regards its institutionalising of the military-bureaucratic tutelage, played a significant role in causing social fragmentation, in spite of its emphasis on individual freedoms. The period during which the 1961 constitution was implemented was at the same time the period when the bureaucratic caste was embedded. The bureaucratic caste based on the military determined the acceptable type of citizen at an individual level, affirmed as 'modern', and developed it. The acceptable type of citizen was a Turk, Sunni, and laic, bound to the values of the Republic of Turkey and the ideology determined by Ataturk. Those who did not fit this type, first and foremost the Kurds, were seen as a threat to the regime. The constitution of 1982, which has been in force for over thirty years, was for this reason based on the principle of the protection of the state. Almost all bans based on this tenet have been developed in the context of the "indivisible integrity of the state with its country and people" and the "laic republic"<sup>2</sup>. The constitution of 1982 with its authoritarian content and reflection in practice carried social division to its highest level. On account of the bans contained in this constitution, the mentality in favour of freedoms was destroyed, and excluded segments of society fell into conflict with each other due to the intensity of these bans and denial. The constitution caused an extrajudicial order to be established in the region inhabited by the Kurds on account of the state of emergency implemented there. The content of the 1982 constitution that destroys freedoms has been debated ever since it came into force. It is a constitution prepared in order to ensure the goals of the 12 September coup. The constitution was prepared in order to comply with the laws called the 12 September laws which were drafted prior to it. It is a constitution that reflects the will of the de facto administration that emerged after the military coup. In the Preamble that establishes the mentality of the constitution, it is openly stated that the state is blessed. Although the term 'sacred Turkish state' was removed in amendments introduced in 1995, the same philosophy which the Preamble contains is in force. Furthermore, the Preamble is one of the provisions which according to article 4 of the constitution, cannot be changed, nor can a proposal be made to amend them<sup>3</sup>.

The fact that the principles contained in the Preamble are deemed amongst the fundamental tenets of the Republic and within the scope of provisions that cannot be changed according to article 2, implies that superiority has been provided to these tenets as regards the order of rules in the constitution. Also, in the Preamble, is the provision: "... these principles are to be interpreted and implemented accordingly, thus commanding respect for, and absolute loyalty." "If this obligation<sup>4</sup> to interpret all the principles and rules of the constitution, including the tenets relating to the qualities of the Republic, is taken into consideration, then the degree of narrowness regarding rights and freedoms introduced by the entirety of the constitution of 1982 is clear.

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<sup>2</sup> Since secularism is the separation of state and religion, which is the most common definition, Turkey isn't secular at all. From the early years of the republic, state and religion, namely the state preferred Sunni Islam, have been closely intertwined. All mosques are state-owned, all imams are state-employed and for decades, the Friday sermons were centrally written and distributed. In short religion is a state apparatus in Turkey and laicism has turned into a secular religion.

<sup>3</sup> Sevtap Yokuş, **Türkiye'de Çatışma Çözümünde Anayasal Arayışlar**, Seçkin Yayınları, Ankara 2013, s.9-11.

<sup>4</sup> Mustafa Koçak, "Cumhuriyetin Temel Niteliklerinin Belirlenmesinde anayasanın Başlangıcında Yer Alan İlkelerin Hukuksal Değeri", **Askeri Yüksek İdare Mahkemesi 25.Yıl Armağanı**, 1998 s.203.

While the 1982 constitution was still at the drafting stage it was loaded with an anti-democratic characteristic. The will that determined the text of the constitution was that of the National Security Council. The constitution of 1982 was the work of an unrepresentative body, and did not reflect the will of any elected body. The text of the constitution that was put to the people in a referendum and accepted in an undemocratic environment was the product of a de facto government<sup>5</sup>.

The philosophical preference of democratic constitutions is to establish a constitutional structure that is ideologically neutral and permits pluralism, this is what is expected of democratic constitutions. The philosophy of the 1982 Coup constitution and the ideology based on it has permeated all provisions, beginning with the Preamble. The main axis of the 1982 constitution consists of Atatürkism, nationalism and political etatism. The goal of this ideology was to create a single, standardised type of citizen. As an extension of this ideology, the Turkish-Islam synthesis model determined the way the principle of secularism was implemented. That is, religion was to be accepted as long as it served the main ideology.

The 1982 constitution, which was drafted after the 12 September coup, was prepared as if the state of emergency were to continue ad infinitum. The fundamental aim was for the ruling idea behind the coup to be made permanent by constitutional means. In order for this to happen all precautions were taken. In fact, legislation introduced prior to the constitution, which was safeguarded by transitional provisions, determined the judicial structure. Laws such as the State of Emergency Law, Electoral Law, Law on Political Parties, Law on Associations, Law on Public Meetings and Demonstrations, which were to determine social and political life, were introduced during the 12 September coup period. The constitution institutionalised ideologically the order that had been established by legislation and provided it with immunity.

The preambles of constitutions reflect the philosophy that dominates the content. The preamble of the 1982 constitution embodies the ideology that rules the spirit of the constitution in the following way: in the first paragraph, the words "...the founder of the Republic of Turkey..." reflect Atatürkism and the understanding of nationalism which is one of the main elements of the ideology that determines the philosophy of the constitution. Nationalism, which is one of the fundamental props of the founding ideology of the constitution is expressed as Atatürk nationalism and according to the official discourse this understanding of nationalism does not refer to any ethnic origin or race. It is also necessary to ascribe this meaning to the definition of citizen in the constitution. However, other provisions in the constitution negate this contention. For instance, in the fifth paragraph of the preamble are the words: "no activity contrary to Turkish national interests, Turkish existence ... historical and moral values of Turkishness...". It cannot be claimed that this expression has no ethnic basis. Constitutional amendments introduced in 2001 annulled provisions such as this in articles 26/3 and 28/3. Nevertheless, it is evident that the mention of Turkishness in article 42/9 has an ethnic basis. The clause in article 134 containing the word Turk is entirely based on ethnic origin. When constitutional provisions, legislation, court judgments and implementation are considered together it is apparent that the mention of Turkishness has an ethnic basis. The most blatant example of this is the law (no. 2932) that bans languages other than Turkish. The fact that this law has been repealed does not change the ethnic implication ascribed to the formulation of Turkishness. Judgments of the Constitutional Court, for instance the interpretation of

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<sup>5</sup> Bülent Tanör, *İki Anayasa 1961-1982*, Beta Yayınları, İstanbul 1986, s.100,101.

Turkishness in article 81 of the Law on Political Parties, approximates the definition of an ethnic community.

The term “the indivisible integrity of the state and its people” formulated as an extension of nationalism, and which takes on a proscriptive role as regards all fundamental rights and freedoms, accepts the people as homogeneous and far from a pluralistic structure. Such characterisations are to be found in the seventh paragraph of the preamble to the constitution, thus: “The Turkish people as a whole...”. This approach is concretised in particular in judgments of the Constitutional Court regarding the closure of political parties.

Although the 1982 Constitutional Commission stated that its criterion regarding the restriction of freedoms was the European Convention on Human Rights (ECHR), the restrictions it introduced: “disrupted the emancipatory will of the drafters of the previous constitution”<sup>6</sup>. The constitution itself has been the main source of the contradictions that have emerged with the ECHR and the jurisprudence of Convention bodies in the sphere of rights and freedoms.

The desire to impose the ideology contained in the constitution and make permanent the homogeneous society it wished to create rendered the sphere of rights and freedoms unfeasible. The ideology of “the indivisible integrity of the state, its country and people” became justification for prohibiting all rights and freedoms and article 14 clearly states that sanctions will be applied against those who perpetrate activities contrary to the provisions of the constitution. Such that, even scientific research and freedom to publish was fenced around with the sanctions in question necessitated by the fundamental ideology of the constitution.

Article 14 of the 1982 constitution aims to protect the “state”. This provision exceeds the safeguarding of the “Liberal and pluralistic democratic order,” and the fundamental aim of the militant democracy understanding is also exceeded. The protection of the state has been put before the protection of rights and freedoms. In the scope of article 14 “the aim to destroy fundamental rights and freedoms” is stated without considering whether this impinges directly on the rights of others. In this context the reality is that all activities based on views outside constitutional ideology have been banned<sup>7</sup>. Moreover, there is an obligation on lawmakers to draw up provisions and sanctions in line with the bans in the constitution without the law makers having any discretion<sup>8</sup>.

The main goal of the constitution of 1982, to protect the state from the individual, is reflected in all its articles. Consequently, the provisions regarding rights and freedoms, which form the basis of a constitutional state, are the most problematic. In addition to the restrictions and prohibitions in the constitution, and even the suspensions, the restrictions and bans in legal provisions concerning the exercise of rights and freedoms has rendered the use of rights and freedoms impossible.

In spite of the list of rights and freedoms contained in the 1982 constitution, the impossibility of utilizing them have become clear with the findings of the European Court of

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<sup>6</sup> İbrahim Ö. Kaboğlu, “Türkiye’de Anayasal Reformlar Üzerine”, ”, **Anayasa Reformları ve Avrupa Anayasası**, Türkiye Barolar Birliği İnsan Hakları Araştırma ve Uygulama Merkezi Yayını, Ankara 2002, s.57.

<sup>7</sup> Mustafa Erdoğan, **Demokrasi, Laiklik, Resmi İdeoloji**, 2.baskı, Liberte Yayınları, Ankara 2000, s.367,368.

<sup>8</sup> Necmi Yüzbaşıoğlu, **Türk Anayasa Yargısında Anayasallık Bloku**, İstanbul Üniversitesi Hukuk Fakültesi Yayını, İstanbul 1993, s.215,216.

Human Rights. In any case, the nominal efforts at improvements to legal provisions in the sphere of rights and freedoms in Turkey have only taken place as the result of international arm-twisting following these findings.

The constitution of 1982 is a constitution that was drafted in an environment of crisis, in extraordinary circumstances, and as if Turkey was to live in permanently extraordinary conditions<sup>9</sup>. The constitution's provisions relating to the extraordinary regime have also always been on the agenda, with provisions introduced alongside constitutional provisions (state of emergency decrees with the force of law) leading to the implementation of a regime that was impelled beyond the rule of law.

The prohibitions in previous system before the amendments of 2001 were of a character that contravened human rights standards. These "constitutional bans" formed the tipping point of the general regime of fundamental rights and freedoms in the 1982 constitution<sup>10</sup>.

The provisions of general restriction in article 15, which imply deviation from rights and freedoms, have a content which includes the suspension of rights and freedoms.

The state of emergency regime provision in article 15 of the 1982 constitution is of a regime purporting to be virtually independent as regards rights and freedoms and to exceed the framework of the constitution.<sup>11</sup> The restrictions on and suspension of rights and freedoms during the state of emergency were based on article 15. This was at the same time a necessity.<sup>12</sup> Article 15 also established the general framework of the state of emergency regime. However, when the constitution, of which judicial control was not possible, is considered along with subordinate provisions and, in particular, decrees with the force of law, the picture that emerges is of a regime that went beyond the boundaries of the constitution and of law.

Article 15 states: "In times of war, mobilization, martial law, or a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures derogating from the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated." The words "entirely suspended" in essence refer to a different regime. The provision regarding the suspension of rights and freedoms as a whole in this article note they may be "entirely suspended" or that "measures derogating from the guarantees may be taken." The suspension of rights or the removal of possibilities provided by rights is the most severe measure against rights guarantees<sup>13</sup>. Article 15 created the possibility for governments to intervene at the constitutional level in all rights and freedoms.

As is understood from article 15, in state of emergency regimes the guarantees of rights and freedoms enshrined in other articles will not be valid. Under such regimes article 15, which provides for the partial or entire suspension of rights and freedoms, will be implemented. In normal conditions article 13, which allows for the restriction of rights and freedoms, will be

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<sup>9</sup> İbrahim Ö. Kaboğlu, "Türkiye'de Anayasal Reformlar Üzerine,...", s.57.

<sup>10</sup> Oktay Uygun, **1982 Anayasası'nda Temel Hak ve Özgürlüklerin Genel Rejimi**, İstanbul 1992, s.192.

<sup>11</sup> Fazıl Sağlam, "1982 Anayasası'nın Temel Hak ve Özgürlükler Bakımından Getirdiği Sorunlar", **Bahri Savcı'ya Armağan**, Mülkiyeliler Birliği Vakfı Yayını, Ankara 1988, s.436.

<sup>12</sup> Yılmaz Aliefendioğlu, "Anayasa Yargısı Açısından Olağanüstü Yönetim Usülleri", **Amme İdaresi Dergisi**, C:25, S.2, Haziran 1992, s.30.

<sup>13</sup> Tekin Akıllıoğlu, "Temel Hakların Durdurulması", **Bahri Savcı'ya Armağan**, Mülkiyeliler Birliği Vakfı Yayınları 7, Ankara 1988, s.63, 64.

applied. Since in the event of article 15 being applied, article 13 could not be implemented, the constitution of 1982 contains two intertwined provisions for restriction<sup>14</sup>.

With the pressures of the accession process to the EU, and to fulfil the necessary political criteria, many legal amendments were introduced, first and foremost to the constitution. But the main aim was to do the homework that had been given, not to possess more democratic, liberal legal provisions. Hence, nearly all the changes made remained cosmetic, and could not be implemented. Actually, in order to ensure they could not be implemented numerous contradictions, vacuums and confusion were created. The implementation of positive constitutional amendments would only have been feasible by replacing the myriad contradictory legislation with the enactment of parallel legislation. Consequently, the constitution, with its anti-democratic structure and legislation that destroys freedoms, remains in force, true to its original form.

The constitution, through the state of emergency regime propelled beyond the rule of law has nurtured conflict and prepared the ground for problems beyond the law and an environment that is not conducive to resolution. The state of emergency regime became a regime pushed outside the rule of constitutional law by the constitution of 1982. Even the legality of the State of Emergency Law, itself a product of the 12 September coup, and its Decrees with the Force of Law could not be controlled by the existing constitution. The powers of the state of emergency were beyond judicial supervision. In practice as regards the exercise of these powers there was a serious lack of moderation. The ineffectiveness of domestic remedies was established by the European Court of Human Rights, when applications from the region were not rejected on the grounds that the condition of exhausting domestic remedies had not been met. The existence of widespread rights violations, first and foremost the right to life, the prohibition of torture and personal security were established by judgments of the European Court of Human Rights. Violations of human rights, just as they created an environment for conflict, also led to that conflict continuing until the present day along with the profound pain that has come with it.

## **II. IN SEARCH OF A NEW CONSTITUTION: WHAT ARE THE PROPOSALS THAT WILL MAKE A CONTRIBUTION TO THE PROCESS OF RESOLUTION?**

In Turkey it may be said that we are faced with segments of society that have very different demands, going to extremes, on account of the divisions caused by the dimensions of the conflict around the Kurdish question. The quest for a new constitution in these circumstances resembles the making of a constitution in a divided society. Consequently, there is a need for answers to a series of questions.

The search for a new constitution in Turkey has gained momentum, particularly during the last ten years or so, and the quest for a democratic constitution aiming for social peace and to overcome all the negative aspects created by the existing constitution has garnered broad support. In accordance with this it is imperative that the prohibitive, denialist, fragmenting content of the constitution is replaced in a liberal, open-minded, holistic way. To aim for a

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<sup>14</sup> Fazıl Sağlam, “ KHK Çıkarma Yetkisinin Sınırları Uygulaması Yaygınlaşmasından Doğabilecek Sorunlar “ **Anayasa Yargısı** 1, Ankara 1984, s.262; Kemal Gözler, “Olağanüstü Hal Rejimlerinde Özgürlüklerin Sınırlandırılması Sistemi ve Olağanüstü Hal Kanun Hükmünde Kararnamelerin Hukuki Rejimi”, **Ankara Barosu Dergisi** 1990/4 Ankara, s.565.

constitution that will be politically pluralistic in parallel with the pluralist structure of society is a priority in order to ensure social peace.

The necessity of the new constitution containing new rules and institutions has revealed in principle what will be new as regards the content of the constitution. What has emerged as a problem regarding principles is the necessity for compromise in relation to issues that will be subject to constitutional innovation. First and foremost of these issues is “citizenship and the relationship between the centre and regions in administration”. The lack of compromise is making the development of joint formulations in these areas of constitutional work difficult<sup>15</sup>.

Constitution-building in conflict resolution processes is carried out parallel to debate over transfer of authority. In this process the parties may have conflicting approaches as regards the scope of authority transfer and its significance. What is important is for this debate to take place in an environment where there is no violence and for it to be carried out in a sound way. The discussions over which kind of autonomy will or will not meet requirements as regards the conditions in the country should be conducted on the basis of democratic principles.

Constitutions aim to meet the political requirements of the period in which they emerge. Therefore, every new constitution reflects the political reality of the period in which it is drafted. The search for a constitution based on freedoms was one of the main topics on the agenda in Turkey in recent years. It is therefore necessary for freedoms to be laid out as broadly as possible. Ensuring a liberal environment where all excluded and “othered” social segments can find a place and express themselves is key to the kind of constitution is required.

As a democratic structure based on freedoms is consolidated, the cause of conflict may to a great extent be removed. For instance, just as in the private sphere, the use of the mother tongue in the public sphere will be ensured, and constitutional-legal provisions allowing the use of the mother tongue as a language of tuition may create the possibility of a democratic solution to the Kurdish question<sup>16</sup>.

At the same time the politically controversial subject of an ethnically-based definition of citizenship was one of the intensively discussed topics, with proposals to resolve it on the basis of “constitutional citizenship”. In a constitutional proposal made by the Bar Association of Turkey (TBB) in 2001 the phrase “Everyone with a citizenship connection to the state is a citizen of the Republic of Turkey” was suggested<sup>17</sup>. TBB’s proposal in 2007 was formulated as follows: “The Turkish nation is comprised of citizens of the Republic of Turkey”<sup>18</sup>, a backward step in citizenship definition and a return to the definition in the existing constitution.

In the new draft constitution prepared at the request of the government there are alternative definitions of citizenship. A sub-heading of the article proposes “citizenship” instead of “Turkish citizenship”. Alternative definitions are as follows: “Everyone who has a citizenship tie to the state is a citizen of the Republic of Turkey”; “Everyone who is connected to the Republic of Turkey by the tie of citizenship is called a Turk, irrespective of religion or race”; “Citizenship is a constitutional right. Everyone who gains this status according to law is

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<sup>15</sup> 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.

<sup>16</sup> Vahap Coşkun, **Kürt Meselesinin Anayasal Boyutu**, Orion Kitabevi, Ankara 2013, s. 103.

<sup>17</sup> **Türkiye Cumhuriyeti Anayasa Önerisi**, II. Basım, Türkiye Barolar Birliği Yayınları, 2001, s.31.

<sup>18</sup> **Türkiye Cumhuriyeti Anayasa Önerisi**, 3. Baskı, Türkiye Barolar Birliği Yayınları, Kasım 2007, s.84.

a citizen of the Republic of Turkey”; “A child of a father or mother who is a citizen of the Republic of Turkey is a citizen of the Republic of Turkey.”<sup>19</sup>

In a report compiled by the Council of Experts entitled “Fundamental Principles Report for a New Constitution”, the subject of citizenship was expressed as “Constitutional citizenship” and its content was determined. According to this: “*Constitutional citizenship should be recognised: With the aim of ensuring all individuals take possession of the constitution, the right to citizenship should be recognised without any reference to ethnic identity. In this way, the perception of the constitution as a “joint identity document”, rather than merely as a social contract text, may also nourish the development of an awareness of constitutional patriotism. From the point of view of political rights, “Citizenship of the Republic of Turkey” should be envisaged as an identity that is inclusive and enabling of differences. To facilitate the way to constitutional citizenship two important characteristics should be emphasised: one is the constitutional context and the other is linguistic. The tradition of Republican constitutions, even the existing one, provides a suitable legal basis for an inclusive definition of citizenship. Since the name of the country is “Turkey”, the name of the state is “Republic of Turkey” and as these have been enshrined in the constitution as unchangeable provisions, the use of the concept “Citizenship of the Republic of Turkey” as regards connecting the person to the state, is not only a possibility but a necessity to eliminate a constitutional contradiction. As far as the use of words is concerned, the words *yurttaş* or *vatandaş* go far beyond the words *citoyen* in French or *citizen* in English, where the reductive concept evokes affiliation to a town or city. In Turkish the words *yurt* and *vatan* identify with *ülke*, meaning country: *yurt-taş*, *vatan-daş* [the suffixes *daş* and *taş* meaning fellow]. This formulation reflects an inclusive meaning overlapping with territoriality on the basis of land, not a political connection concretising a relationship between an individual and the state based on a certain ethnic origin. In this way, the tie of nationality will be based on land, not on ties of blood, and will be suitable for a modern concept of citizenship. Voluntary and equal citizenship may take on the onus of constitutional fidelity and a function that consolidates peace. As a constitutional concept citizenship is identified at the same time as an equalising function that does not discriminate as regards rights and freedoms*”<sup>20</sup>.

A study by the Turkish Association of Industrialists and Businessmen in 2011 stated that citizenship should be defined in the constitution as a right, and that a definition of citizenship based on ethnicity could not be in the constitution. In this study the subject of citizenship was discussed under the heading of identity and continued with a debate on cultural rights<sup>21</sup>.

A report by the Turkish Foundation of Economic and Social Studies in 2011, entitled “Towards Turkey’s New Constitution”, noted the following with regard to citizenship: “...In the first place, the constitution should in no way make reference to ethnic identity, but respect for all cultural differences and lifestyles should be a fundamental principle”<sup>22</sup>.

A report on the new constitution compiled by the Strategic Ideas Institute in 2011 emphasised the need to find a definition based on a legal tie free of ethnic origin appropriate to

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<sup>19</sup> Türkiye Cumhuriyeti Anayasası Önerisi, **Legal Hukuk Dergisi**, Yıl:5, Sayı:58, Ekim 2007, s.3208.

<sup>20</sup> **Özgürlükçü-Eşitlikçi-Demokratik ve Sosyal Yeni Bir Anayasa İçin Temel İlkeler**, DİSK Yayınları, İstanbul 2009, s.41.

<sup>21</sup> **Yeni Anayasanın Beş Temel Boyutu**, TÜSİAD, Mart 2011, s.27.

<sup>22</sup> **Türkiye’nin Yeni Anayasasına Doğru**, TESEV, Nisan 2011, s.13.



the general tendency in constitutions throughout the world.<sup>23</sup> Among subjects given prominence was the idea of opening up direct democratic channels instead of centralised undemocratic structures, in the context of a narrowing of centralised government and the promotion of local-regional government. Another subject addressed was the forming of the necessary conditions to enable administrations at all levels and a real transparency in function, and for legal provisions to be introduced in line with a “new” democratic constitution.

The Turkish Chambers and Exchanges Association made a proposal in the year 2000 for a “regional administration”. These administrations were to consist of more than one province and be determined by economic and geographical criteria. It was emphasised that this was obligatory in the EU accession process. In this study mention was also made of replacing administrative tutelage with “central administration and reciprocal ties and influences” based on the principle of local democracy. In this sense local administrative bodies could be removed by decision of a court. Another example of the idea of developing different competent bodies at a local level is the TÜSİAD (Turkish Industry and Business Association) report of 2006. This report mentioned provision for metropolis, sub-regions and regions as a yardstick for local government<sup>24</sup>.

In the TBB 2001 draft constitution regional administrations were proposed: “local administrations: legal entities, with the decision-making bodies elected by the people and meeting the local needs of the people in region, province, town or village.” This proposal was explained in detail. According to this, local administrations would have permission from the Council of Ministers to come together for the purpose of receiving a certain public service, and be able to go further by establishing regional administrations<sup>25</sup>.

The constitutional report compiled by the Council of Experts also referred to regional administrations with competent bodies at a local level. This proposal was explained in detail in the report with the principles and aims receiving ample space. A regional administration was defined as a democratic, decentralised competent body established only for the purpose of accelerating economic, social and cultural development, within the framework of respect for the political and territorial integrity of the country and of the authority of local administrations...”

In Turkey Spain is often cited as an example of the increasingly developing model of regional administration in Europe, with the experiences of France and Italy also examples worthy of study<sup>26</sup>.

In the 2011 TÜSİAD report regional administrations were envisaged, with regions having the authority to raise taxes in order to create their own sources of income. It was advocated that many powers should be relinquished by the centre to the local administrations. It is therefore necessary for the international conventions that empower local government to be fully implemented without reservation. Another point worthy of note in the report is the suggestion that the subject of the empowerment of local authorities should be addressed together with the issue of identity and regional representation, fair representation and means of

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<sup>23</sup> **Vesayetsiz ve Tam Demokratik Bir Türkiye İçin İnsan Onuruna Dayanan Yeni Anayasa**, Stratejik Düşünce Enstitüsü Raporu, Ankara Mayıs 2011, s.44,45.

<sup>24</sup> 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.

<sup>25</sup> **Türkiye Cumhuriyeti Anayasa Önerisi**, II. Basım, Türkiye Barolar Birliği Yayınları, 2001, s.79,80.

<sup>26</sup> **Özgürlükçü-Eşitlikçi-Demokratik ve Sosyal Yeni Bir Anayasa İçin Temel İlkeler**, DİSK Yayınları, İstanbul 2009, s.69.

political participation<sup>27</sup>.

The Turkish Foundation of Economic and Social Studies' 2011 report concerning a new constitution emphasised that the introduction of autonomy for local administrations would at the same time promote conflict resolution as regards enhanced protection for identity and cultural rights. It stated: "Local administrative bodies should be established by entirely representative democratic means and should have the power to evaluate and determine how to meet local requirements and in order to meet the costs – in addition to receiving a share of the central budget – should be able to partially levy taxes. The powers of local democratic administrations should include public works, agriculture, health and, partially, security and education services. If necessary, justice and defence services and national security services should remain under the authority of the central government, but as for education, while not replacing education at a national level, a flexible structure should be introduced that pays regard to regional requirements in education." This report demonstrates that a tendency has been developed in favour of broad autonomy for local authorities.<sup>28</sup>

In all the studies concerning preparations for a new constitution, proposals for the development of local autonomy and regional administrations have gained in importance. It should also be pointed out that the idea of regional administrations' approach towards opening democratic channels for a contemporary form of government and democratic representation, even apart from identity and cultural rights, has gained more acceptance.

The prominent points in the proposals for regional administration include momentum to be gained for democratic development by strengthening individual participation in decision-making mechanisms; speedy decision-making by councils to be established within the region; and services to be provided as soon as possible. In this way, an understanding of the possession of the administration will be promoted among the individuals. In local government in Turkey the mayor of the municipality is prominent. However, in order for there to be a democratic function the councils must be given prominence. As regional administrations will bring forth the councils, it is important that democratic government is ensured. Regional administration has developed and been adopted in Europe and is a model whereby through genuine democratic participation individuals establish their own administrations and by taking on management responsibilities territorial unity is consolidated.<sup>29</sup>

In the recent past these definitions regarding the drafting of constitutions came to the fore. Could the new constitution with the content specified be a positive beginning of a resolution of the conflict? The short reply to be given to this question is yes, as long as it is accompanied by a process of preparation involving all social segments. To ensure this in existing conditions seems rather difficult. Nevertheless, this difficulty renders the method of preparation of a new constitution as important as the content. In this context, the approach that stipulates a participatory-democratic method needs to be defined in order for compromise over a new constitution to be ensured at the highest level and for the constitution to gain the significance of a social contract with general acceptance, in the quest for a new democratic constitution.

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<sup>27</sup> **Yeni Anayasanın Beş Temel Boyutu**, s.28.

<sup>28</sup> **Türkiye'nin Yeni Anayasasına Doğru**, s.31,32.

<sup>29</sup> Sevtap Yokuş, "Türkiye'de Yerel Yönetimlerin Geliştirilmesi-Bölge Yönetimleri", **Anayasa Kurultayı, Prof. Dr. Yılmaz Aliefendioğlu'na Armağan**, Ankara Barosu İnsan Hakları Merkezi, Ankara Barosu Yayınları, Ankara 2010, s.159.

### III. THE PREPARATION PROCESS FOR THE 2017 CONSTITUTIONAL AMENDMENTS: A CRITIQUE

#### A. Democratic Legitimacy of the Constitutional Amendments

In the preparation of a democratic constitution the democratic character should start in the preparation phase. In this context, two fundamental elements that will ensure democratic input may be mentioned. The provision of full freedom of expression and, by creating the highest level of representation, basing the constitution on these two fundamental elements. In short, if the broadest political participation is not ensured, then a democratic preparation process cannot happen.

In the transition process to democracy and the preparation of a new constitution the formation method has to be democratic. Unless this is the case, even if the content envisages democratic institutions it will not be deemed a fully democratic constitution. In modern times in the making of a participatory constitution the classic methods of referendum or the election of a constituent assembly are not considered sufficient, and ensuring the active participation of the people in the preparation process is sought. Underlying this is the new content of democracy, in which new dimensions developing within the framework of participatory democracy and deliberative democracy are influential. It is assumed that participatory democracy embodies an effective deliberative democracy. In participatory democracy the people who are pacified in representative democracy are provided with an effective role in the decision-making process by the use of negotiating methods. As different segments of the people reflect their own interests in the decision-making process, they use negotiating instruments and develop their political views independently of those who represent them, making a contribution to implementation. South Africa is the most prominent example of where the participatory and negotiating dimensions in the preparation process of the constitution came to the fore<sup>30</sup>.

The process of framing the constitution in South Africa, which was ratified in 1996 and came into effect in 1997, is defined as the most participatory and democratic process in modern times. In fact, this definition is one that defines the momentum which began in the political and social conditions prior to the start of the constitution-framing process, and with this process reached a conclusion. The greatest success of the constitution process in South Africa, where discrimination was at the highest level, where there was conflict between ethnic groups and great social inequality, was that it united a society that had very different goals on account of the low level of education and differences in culture, around a democratic text based on human rights. Even more importantly, the process of framing the constitution became an instrument on the one hand for attaining a democratic structure and, on the other, for achieving social peace. The primary reason for this success in South Africa was that even in the most difficult times the parties adopted the most flexible negotiating positions. This meant that in the negotiations all parties, when necessary, were able to make concessions on matters outside questions of democracy and fundamental freedoms. The view that intensifying international pressure to end the Apartheid regime was a major factor in the constitution-framing process, that the country has achieved stability and that despite social-political problems freedoms and democracy have been obtained, does not deny the reality that there was a need for strong

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<sup>30</sup> Burak Çağ, "Katılımcı Anayasa Yapımı ve İzlanda Örneği", *Yasama Dergisi*, Sayı:25, Eylül-Aralık 2013, s.72,73,75.

political will. With this political will the process of framing the constitution in South Africa was conducted as a project to bring about social peace<sup>31</sup>.

The democratic character of a new constitution is made possible first and foremost by ensuring a social and politically pluralistic environment in the preparation process that is amenable to participation and negotiation. Participation and negotiation necessitate the provision of unconditional and unlimited freedom of expression.

The first condition for the formation of a bond of belonging between individuals and the constitution is to ensure that individuals participate in the constitution-framing process. The foundations of aspects such as “Constitutional citizenship and constitutional patriotism” may only be set down in this way. Also in this way, a contribution may be made to the development of a culture of resolving problems through discussion, a basis for compromise over the principles of the political regime and to citizens taking possession of the new constitutional text. A kind of educational process on these issues and the social-political sphere takes place.<sup>32</sup>

Although freedom of expression and association are “essential values” in the scope of rights and freedoms, they are a minimum condition for the healthy functioning of democratic processes.<sup>33</sup> The difference between democratic systems and all other systems is that citizens participate in forums at which political decisions are taken and as regards freedom of expression, they also gain the right to take on tasks. In democracies administrators are elected by the people and take decisions for the benefit of the people. As a requirement of democracy, without freedom of expression it is not possible for elections to reflect the will of the people or for people to control the decisions made by administrators.<sup>34</sup> If the desired constitution is to be a democratic, liberal and egalitarian one based on social peace, then a pre-condition for this is a peaceful background and a democratic environment to be established during the process of preparation. It is not possible to construct a democratic constitution in undemocratic conditions. Only with a guarantee of freedom of expression and association can society make a contribution to the constitution.

The principles of democracy, the rule of law, justice and rights and freedoms are the founding elements of a democratic constitution. These elements find life with peace. Circumstances that destroy peace also destroy democracy, law, justice and freedoms. The pre-condition for a democratic constitution is social peace. In discussions on the constitution in Turkey the requirements of a democratic constitution should be at the fore, instead of details of the system of government. If there is freedom of expression all the problems that may be overcome by a new constitution should be able to be discussed without restriction. Only in this way, first and foremost by seeking peaceful conditions and freedom, by creating the opportunity for debate, will the conditions be formed for the preparation of a democratic constitution. When it is considered that there has been a return to an environment of conflict and that freedom of expression has been restricted, it is evident that political conditions will render the making of a democratic constitution that will meet expectations impossible. Discussions around this subject are turning into polarising, barren debate, rather than being constructive. In response to the

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<sup>31</sup> Güven Sak-Özgün Özçer, “Güney Afrika Anayasası:”Bir ülkenin Ruhü””, Türkiye Ekonomi Politikaları Araştırma Vakfı/Değerlendirme Notu, [http://www.anayasa.org/images/stories/mtn/guney\\_afrika\\_anayasasi.pdf](http://www.anayasa.org/images/stories/mtn/guney_afrika_anayasasi.pdf), s.1,6,7.

<sup>32</sup> İbrahim Ö. Kaboğlu, **Hangi Anayasa?**, İmge Kitabevi Yayınları, Ankara 2012, s.192.

<sup>33</sup> Ergun Özbudun, **Anayasalcılık ve Demokrasi**, Bilgi Üniversitesi Yayınları, İstanbul 2015, s.50.

<sup>34</sup> Kemal Şahin, “İfade Özgürlüğü ”Hak”kı ve İktidar “Ben” ile Demokrasi Arasındaki Çelişki”, **Erzincan Üniversitesi Hukuk Fakültesi Dergisi**, C:XV, S:3-4 (2011), s. 73.

expectation of a new democratic, liberal constitution that has existed since the 1982 constitution came into force, debate on the subject of a new and amended constitution solely in the context of the system of government and presidential system serves only to make the impasse of polarisation more profound.

## **B. State of Emergency Regime Conditions**

Since 21.7.2016 there has been a state of emergency regime in the whole of Turkey. The extending of these measures has once again demonstrated the authoritarian face of the constitution. The failure of the judicial system to protect rights and freedoms, first and foremost the constitutional court that deals with individual applications, has resulted in a lack of trust in the legal system.

In past implementations the state of emergency and legislation associated with it incapacitated domestic legal remedies. The 1982 constitution created a situation of illegality by closing judicial remedies and ruling by means of decrees with the force of law that were outside judicial review.<sup>35</sup> The 1982 constitution introduced an extraordinary regime within the scope of article 15, which, from the viewpoint of rights and freedoms, was virtually independent of and exceeded the framework of the constitution.<sup>36</sup> Article 15 of the constitution corresponds to article 15 of the ECHR. Although Article 15 of the Constitution must be applied in line with the requirements of the Convention and with relevant judgments of the European Court of Human Rights, on account of certain domestic constitutional provisions and legislation, in particular the implementation of decrees with the force of law, its application challenges the rule of law<sup>37</sup>.

According to paragraph 6 of article 125 of the constitution, provisions that aim to keep the state of emergency regime outside legislative and judicial control, “The law may restrict the issuing of an order on suspension of execution of an administrative act in cases of state of emergency, martial law, mobilization and state of war, or on the grounds of national security, public order and public health”. The first paragraph of article 148, which outlines the duties of the Constitutional Court, after a provision regarding the constitutionality of decrees with the force of law has been made, states: “...However, 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.” We have thus seen a return to the past environment of lawlessness as regards legal remedies and judicial review. Constitutional amendments being carried out under the guise of changes to the system of government are taking place during exactly such a process.

The fact that constitutional amendments are being carried out while there is a state of emergency in place is seen as obstructing its democratic legitimacy from the beginning. A transparent process has not been pursued with regard to constitutional amendments as a constitutional amendment, prepared behind closed doors by unknown persons, will be put to a plebiscite. It is abundantly clear that this preparation process for constitutional amendments has not been

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<sup>35</sup> Sevtap Yokuş, *Avrupa İnsan Hakları Sözleşmesi'nin Türkiye'de Olağanüstü Hal Rejimine Etkisi*, Beta Yayınları, İstanbul 1996, s.59.

<sup>36</sup> Fazıl Sağlam, “1982 Anayasası'nın Temel Hak ve Özgürlükler Bakımından Getirdiği Sorunlar”, **Bahri Savcı'ya Armağan**, Mülkiyeliler Birliği Vakfı Yayını, Ankara 1988, s.436.

<sup>37</sup> Sevtap Yokuş, “Avrupa Birliği'ne Uyumda Siyasi Kriterler Doğrultusunda Türkiye'de Anayasal ve Yasal Dönüşüm Çabaları”, **İstanbul Üniversitesi Hukuk Fakültesi Mecmuası**, Cilt:LXI, Sayı:1-2, 2003, s.191,192.

democratic, as all freedoms, first and foremost the freedom of expression and association, have been suspended. There is no doubt that the undemocratic constitutional amendments are intended to make permanent the state of emergency regime, and will deepen the authoritarianism of the 1982 constitution.

#### IV. THE GOAL OF THE 2017 CONSTITUTIONAL AMENDMENTS

The criticisms levelled at the 1982 constitution generally relate to the government distancing itself from its fundamental duty of safeguarding the rights and freedoms of individuals. Even at the drafting stage, in addition to the lack of social consensus, there were important problems in the text, with state authority exalted and human rights pushed to the background. The constitutional amendments of 2001 and 2004 aimed to transform the restrictive constitutional regime that had been criticised since its inception in 1982 and had made it impossible to exercise freedoms.

During work on the 2001 constitutional amendments EU documents and the ECHR were taken as a reference. Consideration was given in particular to documents framed by the European Union after the Helsinki Summit of 11.12.1999. The Copenhagen Criteria and Accession Partnership Document were the source of the content of the National Programme constitutional amendments of 2001<sup>38</sup>. These amendments were designed to ensure equivalence with the provisions of the ECHR. This can be observed when the amendments are examined, just as emphasis was made in the reasoning of amendments to certain articles.

In spite of the 1982 constitution going through many changes, it has not proved possible to purify the essence of a document that prioritises the state over the individual and limits freedoms.

The legitimacy of democratic political systems is to a great extent ensured by the presence of means to resolve problems that divide society as social groups consider a political system to be legitimate in proportion to that system's compliance with its values.<sup>39</sup> A democratic state is a politically liberal constitutional state. In a representative democracy a legal order equipped with freedoms may be seen as a pre-condition for a liberal constitutional state.<sup>40</sup>

Today, for democracy and democratic legitimacy, it is no longer sufficient for a government to be determined by a majority in free elections, and for the participation of the governed to be limited to casting their vote in elections. On a universal level, the rule of law, the judicial review of government actions and the safeguarding of human rights are determining elements of the definition of democracy. The participation of individuals and groups in government at every stage constitutes a complementary element of democratic governance. A democratic constitution in essence exalts freedoms against authority. One of the ways of protecting

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<sup>38</sup> İbrahim Ö. Kaboğlu, "2001 Anayasa Değişiklikleri: Ulusal-Üstü Etkiden Ulusal Tepkiye", **Anayasa Yargısı** **19**, Antalya 2002, s.107.

<sup>39</sup> S. M. Lipset, **Siyasal İnsan**, Çev: Mete Tunçay, Teori Yayınları, Ankara 1986, s.59.

<sup>40</sup> Giovanni Sartori, **Demokrasi Teorisine Geri Dönüş**, Çev: Tuncer Karamustafaoğlu, Mehmet Turhan, Yetkin Yayınları, Ankara 1996, s.419, 420.

freedoms is to ensure there are entrenched mechanisms that place checks and balances on the power of the state. The braking and balancing of the powers of the state is a sine qua non for ensuring liberal democracy.

The checking and balancing of government power is possible by means of various mechanisms. The most direct and indispensable method is the separation of powers. The independence of the judiciary is the main means of checking the government. Ensuring that the sphere of rights and freedoms at the constitutional level is broad and has guarantees constitutes another balancing dimension vis-a-vis the government. In addition to these, the growth of social opposition and pressure groups in proportion to democratic development, the democratisation of politics, and the broadening of local autonomy as a direct democratic method are other mechanisms that will balance the government.

In Turkey there are already significant impediments impeding a democratic administration. To a large extent the constitution, with its authoritarian content, is the reason for this. The fact that pressure groups that would balance the government have not been able to grow is one of the main democratic deficiencies. The electoral system and the regime of political parties impedes democratic politics, and, consequently, democratic government. The majority in parliament and the opposition, weakened by the electoral system and its parties are unable to fulfil their deliberative role. Local administrations that have been strengthened in Western democracies in order to consolidate direct governance balance central power. However, in Turkey, local government, rather than being empowered, has been weakened for various reasons, and is far from having the structures that will develop a democratic society able to balance the central power.

Turkey has returned to the narrowest definition of democracy, expressed as “the government being determined by the people” and is a long way from the “limited government” or “balanced government” of today’s democratic understanding.

The constitution of 1982 is a constitution that prioritises the executive power, reflecting an understanding that almost sanctifies authority on account of the spirit that formed as a result of the prevailing political conditions, that is, the search for power, giving executive power prominence over the other powers. The aspect of the constitution that strengthens authority emerges with the excessive power it provides the executive and, concretely, the authority it grants the President. This power makes itself doubly felt in an extraordinary period.<sup>41</sup>

The constitutional amendments on the agenda contain provisions that will consolidate the authority granted to the President by the constitution in the environment of 12 September 1980, and make permanent the extraordinary powers given to him, as the representative of the executive power, in an extraordinary period. With the constitutional amendments, authority will be deepened and the already weak balance of powers and system of checks will become even more fragile. The 2017 constitutional amendments<sup>42</sup> are, for all intents and purposes, taking all measures to enable the President to go beyond the existing broad powers as well as consolidating the power to also intrude on the legislature and the judiciary.

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<sup>41</sup> 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.

<sup>42</sup> 6771 sayılı “Türkiye Cumhuriyeti Anayasasında Değişiklik Yapılmasına Dair Kanun” Kabul Tarihi: 1.01.2017, **R.G:** 11 Şubat 2017, Sayı: 29976.

The constitutional amendments drafted on the grounds of embarking on a change in the system of government are referred to as changes that will bring in an “executive presidential system.” In the literature on constitutional law there is no such system as an “executive presidential system.” At the outset, there were some references to it as a “Turkish-style presidential regime”. However, the system of government that will emerge with the constitutional amendments bears no resemblance to a “presidential regime”. The strict separation of powers that exists in a presidential regime will not come into being through these constitutional amendments. As for the mechanisms that provide checks and balances between the powers, they will be completely disabled. The power of the President to renew elections, appoint deputy presidents and ministers, appoint high level public servants and members of the Council of Judges and Prosecutors will be unlimited, unconditional powers, not subject to any control<sup>43</sup>.

### **A. The President’s Influence on the Legislature**

Within the scope of the constitutional amendments a political basis is being established for the President to influence on the legislature. The amendment proposing to hold the Presidential elections at the same time as parliamentary elections will strengthen the majority of voters’ tendency towards the party of the President. Also, since the constitutional amendments envisage a “President who is a member of a party”, that is, the leader of a party, the inevitable result will be the party of the elected President having a majority in parliament.

A President who belongs to a party will distance the President from the present supra-party position and put him in the determining position as regards daily politics. The Presidential elections will be transformed into a race between party leaders and with media factors the contest will focus on the leaders, overshadowing the parliamentary elections and leading to the people’s preference being formed around the President<sup>44</sup>.

A parliamentary majority connected to a President who is a party member means, when one considers the electoral system and the Law on Political Parties in Turkey, a President who at every stage will have the legislature “at his fingertips”. This situation will be consolidated by the existing electoral and party system. A coalescence of state and party is a possible outcome.

The existing electoral system in Turkey constitutes problematic spheres, the most prominent of which are its obstruction of a pluralist-democratic structure, the lack of internal democracy within parties, the fact that routes to political participation are blocked and the weakness of pressure groups. When, added to these problems are the facts that civilian-military relations have not settled in a proper way and the lack of development of a democratic culture, the situation is even more complex. The implementation of a ten per cent electoral threshold was designed to ensure a small number of parties would be represented in parliament, leading to under-representation. Due to this unjust electoral system a representative structure inimical to the base of a pluralist society is in place. Consequently, the pluralist social structure has not been reflected in parliament. On occasions, despite a low proportion of the vote, high representation is achieved in parliament. In these circumstances fair representation disappears. One of the fundamental problems of the system of political parties is the lack of internal party democracy. The party leader is solely responsible for choosing deputies, which is also reflected

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<sup>43</sup> Kemal Gözler, *Elveda Anayasa*, Ekin Yaymevi, Bursa 2017, s.21.

<sup>44</sup> Demirhan Burak Çelik, Burcu Alkış, Atagün Mert Kejanlıoğlu, “Türk Tipi Başkanlık Sistemi”, *Güncel Hukuk Dergisi*, Mart 2017, s.54.



in the entirety of political life, making a democratic political life impossible. The power of party leaders to select MPs prevents the legislative majority checking the government and fulfilling its legislative function, since as the party leader selects the candidates they become beholden to him. Such political parties turn into vehicles for enacting the laws the party leader wants when they constitute a majority. The leader has a monopoly on political decision-making and determines the will of the party<sup>45</sup>.

As regards the renewal of elections, parliament is de facto powerless, as the majority envisaged in order to call a fresh election (a three-fifths majority of the total number of MPs), particularly when it is considered that the majority of the legislature will most probably be under the control of the President, then this is virtually impossible. However, when it comes to the power given to the President to renew elections, there is no condition regarding time or justification. The President will be able to exercise the power to renew elections whenever and as frequently as he wishes<sup>46</sup>.

The 2017 constitutional amendments have undermined the fundamental role of the legislature in favour of an enhanced sphere of power for the President. The President's power to issue decrees having the force of law has been raised virtually to the level of a general principle.<sup>47</sup> The President has no need of an act of parliament in order to authorise his power to issue decrees. On examining the constitutional amendments there does not appear to be an obligation for these decrees to be presented to parliament. The scope for decrees drawn up by the President has been made quite broad. While at present the forming or removal of ministries, their duties and powers, the structure of organisations and the forming of provincial organisations all require the provision of laws, with the Law on Constitutional Amendments these matters have been passed to the authority of the President. Similar categories to be arranged by means of decrees are "omnibus laws" that deal with many different matters. The structure of the National Security Council General Secretariat and its duties are also with the amendment to be subject to Presidential decree.

Another way in which the President will intrude on the legislature concerns the power to return laws. With the constitutional amendments this power will turn into a stronger veto. At present a law that is returned to parliament can be enacted if one quarter of the total number of deputies agree. With the amendment this is being raised to a simple majority, meaning that if the President has returned a law, parliament can only enact it if a majority of the total number of MPs are in favour. In practice this will lead to the President sharing the legislative function of framing laws and also making legislation.<sup>48</sup>

The legislature's means of checking the executive have to a large extent been removed. The legislature's main means of control and of drawing public attention to the policies of the executive, the "motion of censure" and "verbal question" mechanisms have been abolished. As for the President and his deputies or ministers', for "criminal liability" to attach to their actions, a majority in parliament would need to agree, which means it has been made virtually impossible. In order for a parliamentary inquiry to be opened the agreement of a majority of

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<sup>45</sup> Sevtap Yokuş., **Türkiye'de Yürütme Erkinde Değişen Dengeler**, Yetkin Yayınları, Ankara 2010, s. 188, 189.

<sup>46</sup> Ece Göztepe, "Cumhurbaşkanlığı Sistemine Geçiş ve Anayasa Değişikliği", **Güncel Hukuk Dergisi**, Mart 2017, s.49.

<sup>47</sup> Ece Göztepe, "Cumhurbaşkanlığı Sistemine Geçiş ve Anayasa Değişikliği", ..., s.49.

<sup>48</sup> Demirhan Burak Çelik, Burcu Alkış, Atagün Mert Kejanlıoğlu, "Türk Tipi Başkanlık Sistemi", ...,s. 55.

three fifths of the total number of MPs is required, while for impeachment proceedings to be launched a majority of two thirds is needed.

Parliament has also lost its control over the budget, which was another significant means of constraint. A reduction has been made in the powers of the Parliamentary Budget Law. A proposed budget law will be submitted by the President and in the event of this bill not being discussed and approved within the allotted time then the previous year's budget will be re-evaluated, with relevant increases made. In this way, since the executive body will not be without a budget, the legislature will not be able to use the budget as a braking and controlling mechanism against the executive body, and its influence as regards the budget will disappear.

## **B. The President's Increasing Powers in the Executive**

With the constitutional amendments the President is to be endowed with the power to appoint deputy Presidents, ministers and high level bureaucrats.

When the President appoints an MP as a minister or deputy President, his or her status as an MP will end and when, in whatever way, their duty as minister or deputy President comes to an end, they will not be able to return to their MP status. This situation will create the outcome of the President having an increased sway over the person in question.<sup>49</sup>

At the present time the functions of the State Supervisory Council, the period of office and other personal affairs of members are arranged by law, but according to the proposed amendments this will be entrusted to Presidential decree. This council, which will be a council that is appointed by the President, will work entirely affiliated to the President, and only be able to take action at the request of the President. With the constitutional amendments it has also been given the power to launch an "administrative investigation". The armed forces have also been placed under the auspices of the State Supervisory Council. According to this, the Council: "... at the request of the President will carry out all manner of "administrative investigation", inquiries, investigations and inspections of all public bodies and organizations, all enterprises in which those public bodies and organizations share more than half of the capital, public professional organizations, employers' associations and labour unions at all levels, and public welfare associations and foundations."

Regarding high level administrators, the procedures and principles concerning their appointment will be regulated by Presidential decree. The constitutional amendments that envisages the appointment of high level directors by Presidential decree has created another

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<sup>49</sup> Korkut Kanadođlu-Ahmet Mert Duygun, "6771 Sayılı Anayasa Deđişikliği Hakkında Kanun'a İlişkin Deđerlendirmeler", **Güncel Hukuk Dergisi**, Mart 2017, s.60.

concealed sphere for the executive. At present, the procedures regarding appointment in the state bureaucracy begin with the State Personnel Law and numerous special laws, but the fact that it has been clearly stated this power will be assigned to Presidential decree may be for the purpose of preventing the legislature regulating in this sphere. The President will single-handedly decide who will be appointed to high level public office and what qualities will be sought for this appointment.<sup>50</sup>

This increase in Presidential powers is of an unprecedented kind in presidential systems. In the American presidential system, for instance, separate institutions participate in the state administration together. The President, presidential bureaucracy, numerous committees, Congress and the judiciary, take part in the functions in a balanced way. In addition to Congress determining important duties and powers of administrators, it is also influential in appointments.<sup>51</sup>

### **C. The President's Determining Power in the Higher Judiciary**

With the constitutional amendments a different form is to be assigned to the High Council of Judges and Prosecutors, which has a very important role concerning the formation and functions of the judiciary. According to the constitution the High Council of Judges and Prosecutors: "shall carry out the acceptance of judges and prosecutors to the profession, appointment and transfer, provisional authorisation, promotion, the distribution of professionals, take decisions regarding those who are not deemed fit to remain in the profession and the procedures regarding the imposition of punishments and suspensions. It shall reach decisions concerning the Ministry of Justice closing a court or changing a judicial locality and also fulfil other duties enshrined in the constitution and law".

With the constitutional amendments of 2017 the number of members of the High Council of Judges and Prosecutors has been reduced from the current twenty-two principal members and twelve reserve members working in three offices, to a council comprising thirteen members working in two offices with no reserve members. Following the amendment, the Justice Minister will continue the duty of Council President and the Undersecretary of the Justice Ministry will continue to be a member of the council. Four of the remaining members of the 13-person council will be appointed by the President from amongst first degree judges and prosecutors, while seven members will be elected by parliament by secret ballot in a two stage process. Parliament will elect three members from the Court of Cassation, one from the Council of State and three from amongst academic members and lawyers in law faculties. An obligation for there to be at least one academic member and at least one lawyer has been introduced. If at the first vote a two thirds majority is not achieved, a three fifths majority is to be sought at the second stage. If this is not attained, then the election of members will be carried out by drawing lots between the two candidates who receive the most votes in the second ballot.

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<sup>50</sup> Ece Göztepe, "Cumhurbaşkanlığı Sistemine Geçiş ve Anayasa Değişikliği", ..., s.50.

<sup>51</sup> Korkut Kanadoğlu-Ahmet Mert Duygun, "6771 Sayılı Anayasa Değişikliği Hakkında Kanun' a İlişkin Değerlendirmeler",..., s.60.

As a result of the constitutional amendments the President will make a form of appointment from amongst persons with the appropriate qualities, without a nomination procedure. It is evident that regarding the vote in parliament, given the ruling party's majority, the candidates to be elected will be those determined by the governing party<sup>52</sup>.

The first article of the Amendment Law adds "judicial impartiality" to article 9, which regulates the judicial power of the constitution. The membership of the Council of the Minister for Justice and his Undersecretary, which has for years been the subject of criticism as regards the independence of judges, has not been ended by this provision.

As a result, the amendments of 2010 which introduced the appointment of some members by high court bodies and first degree courts has been abandoned, with the appointment of council members assigned entirely to the legislator and executive, and within the executive to the President, who is the sole wielder of power in the executive bodies. The Justice minister, who is the president of the council, is appointed by the President, as is the Undersecretary. As for the procedure concerning the election carried out by the legislature, it is of a character to obstruct the election of candidates who treat political views in parliament equally.

The constitutional amendments will enable investigations and inquiries to be carried out regarding judges and prosecutors, to see whether they have fulfilled their duties in accordance with "laws and other regulations." By other regulations, Presidential decrees may be implied. In this way, regulation may be made by Presidential decree regarding the duties of judges and prosecutors.

Since the Council of Ministers will not be within the scope of the constitutional amendments the duty of examining draft bills and regulations prepared by the Prime Minister and the cabinet has been taken away from the Council of State. Decrees having the force of law and regulations promulgated by the executive will be replaced by Presidential decree and the President's power to arrange regulations is set forth. In this way, some of the regulatory procedures for which the opinion of the Council of State was obligatory have been removed.

As regards the make-up of the Constitutional Court, the number of members has been reduced from seventeen to fifteen. Memberships that have elapsed will be replaced by the President selecting from candidates determined by the relevant bodies. This reduction in members will result in a higher proportion of members directly chosen by the President. The composition of membership will thus be predominately members selected directly by the President.

## **V. POSSIBLE CONSEQUENCES OF THE 2017 CONSTITUTIONAL AMENDMENTS FOR THE PROCESS OF RESOLUTION**

The 2017 constitutional amendments have terminated the search for a liberal democratic constitution that since the 1982 constitution came into force has been demanded by the social

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<sup>52</sup> Fazıl Sağlam, "Hakimler ve Savcılar (Yüksek) Kurulu'nun Konumu", *Güncel Hukuk Dergisi*, Mart 2017, s.43.

base and promised by political parties during election campaigns.<sup>53</sup> It is apparent that from the point of view of the government there is no need to get rid of the authoritarian content of the 1982 constitution, and that with the constitutional amendments an even more authoritarian tendency has emerged. The most concrete indicator of this situation is the increasing power of the political leader over the legislative, executive and judicial bodies.

From the viewpoint of the government system the constitutional amendments have not been directed at any democratic government system and do not resemble any of these systems. The form of government that emerges with the constitutional amendments is not one that complies with a presidential system with a strict separation of powers as regards both formation and function, nor does it conform to a parliamentary system which works with mechanisms of checks and balances and has a constraining effect on the executive. The constitutional amendments endow the President with the means to determine a de facto legislative majority, share the legislative function and to renew the legislature when he or she wishes. The President may single-handedly determine the executive and carry out appointments. None of these characteristics are to be found in any kind of presidential system. From the perspective of the executive, for elections to not be tied to the legislature and for there to be no council of ministers formed from the legislature and responsible to it are characteristics that cannot be seen in any parliamentary system.

Above and beyond the changes in the government system, the constitutional amendments of 2017 essentially embody a series of provisions that endow the President with phenomenal powers.

In the event of these amendments passing in the referendum of 16 April 2017, they will seriously consolidate the strong position of the President, whose constitutional dimension as a political leader is controversial, and the reverberations both domestically and internationally, will be significant. The goal is, after all, the development of a strong leadership at home and in the global arena. A much stronger leadership in comparison to the past will lead to a reopening of the debate regarding a resolution to the conflict in the context of the Kurdish question in Turkey, which is said to have been frozen for a long while.

In the event of a “yes” vote in the plebiscite a dilemma in the form of “strong leadership and a distancing from democratic orientation” will be encountered.

The question of sustainability as regards the process of resolution in undemocratic conditions should also be discussed.

In the scope of the work of the Democratic Progress Institute (DPI)<sup>54</sup>, one of the headings in lessons learned from country experiences is “strong leadership in the process of resolution”. It is evident that strong leadership plays a virtually determining role in conflict resolution.

It is clear that the 2017 constitutional amendments will bring about a strong leadership endowed with broad powers over the legislature, executive and judiciary. Here it is necessary to establish which changes in provisions will serve a strong leadership.

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<sup>53</sup> Sevtap Yokuş, “Özgürlükçü Demokratik Anayasa Arayışının Sonu”, **Güncel Hukuk Dergisi**, Mart 2017, s. 40, 41.

<sup>54</sup> Democratic Progress Institute, Karşılaştırmalı çalışmalar kapsamında, Kuzey İrlanda, Filipinler, Kolombiya deneyimleri üzerine yaptığı incelemeler ve çıkarılan dersler bağlamında, bakınız: Konuyla ilgili DPI yayınları.

As a result of a broadening of powers relating to the legislature, it may be said that compared to the previous period, in a possible process of resolution the necessary legislation or amendments could be carried out much more easily. However, in the existing situation that was already easy for the ruling party, as it did not have a requirement for a qualified majority in order to pass laws.

For the President to be able to implement general regulatory procedures single-handedly through decrees is a significant power gain, but as regards legitimacy the importance of provisions relating to the process of resolution being discussed and accepted by parliament will be retained.

Beyond the legislature, the broadening of the President's powers will have the result of increasing his influence as regards the process of resolution.

We should not overlook the possibility that the conditions of a strong leadership, the distancing of the government from democratisation and the concretising of this situation in the constitutional dimension may create different effects in Turkey, and that this may turn into a disadvantage as regards the process of resolution.

From the point of view of the effects of the conundrum of "Strong leadership-democratic functioning", the will of the leader regarding a resolution will be key and of vital importance.

From the past until the present day, as can be seen from the discussion above, the Kurdish question and conflict resolution has been directly linked to Turkey's democratic development and the idea that general democratic development would make a positive contribution to conflict resolution was to the fore, i.e, the growth of democracy in Turkey would accelerate the resolution of conflict.

The concerns that with the 2017 constitutional amendments democratic principles will be abandoned, that the sphere of freedoms will be narrowed and that democratic conventions will vanish is a just fear. In that case, in the event of a "yes" vote in the referendum, it will be inevitable that new dynamics come to the fore in conflict resolution. The approach of a resolution developing in proportion with democratic development will be replaced by approaches beyond democracy and law. The elements whose roles may become more determinant will be elements such as the wider international political conjuncture, the balance of forces and possibilities for bargaining.

The optimum possibility after the 2017 amendments would be for the leader with enhanced powers to demonstrate his intention to find a solution. This would at the same time ensure a return on a different basis and with a different orientation to the democratic principles it lost some time ago. At the same time, it would be the beginning of a building of international relations that have broken down. Such a return would establish a path for the healthier progress of the process of resolution. However, this possibility is the one that has the least chance of materialising, given the present situation and developments beyond Turkey's borders.

In the event of a "no" result in the referendum, as a rule the current situation could be expected to continue. If this possibility were to be realised two sub-possibilities would come onto the agenda. These are that the process of resolution could be reactivated and used as a

means to give prominence to the function of leadership, or, that the process of resolution could be left in its suspended state.

When the process of resolution is evaluated in its current state along with prevailing conditions, the view that the determining role of the international conjuncture will become more prominent and be on the agenda for a longer time seems realistic.

## **CONCLUSION**

In Turkey the current constitution aimed to put in place an order that had existed since the founding of the Republic, based on “othering”, in an authoritarian and expansive way. For this reason, the sphere of rights and freedoms was kept particularly narrow.

During the accession process to join the European Union, in particular, tendencies towards democratisation emerged in Turkey as the result of external dynamics, ensuring amendments to the constitution. The amendments of 2001 and 2004, aiming for compliance with the ECHR, led to a partial broadening of the sphere of rights and freedoms.

In parallel to constitutional democratisation, many “democratic openings” materialised in Turkey, and in the Kurdish question, which has had much more profound dimensions and the “process of resolution” was launched.

One of the most fundamental criticisms levelled at the process of resolution was the failure of the process to establish constitutional and legal guarantees.

During a period when the process of resolution has been suspended, a new package of constitutional amendments is being put to a popular vote by the President. In essence, the amendments of 2017 have a content that aims to deepen the authoritarianism existing in the spirit of the current constitution. In the scope of the amendments a section of legislative powers is being transferred to the President. The powers of appointment available to the President have been broadened. Executive powers have been concentrated in the President’s hands.

With the acceptance of the 2017 constitutional amendments as a result of the referendum, and with most of the amendments coming into force at the time of the Presidential and General Elections that are to be held at the same time, it may be said that a new period will be embarked upon in the process of resolution. When global experiences are taken into consideration, the realisation of this possibility for Turkey with a strengthened leader will give

vital importance to the issue of whether a will for a resolution has formed and what is the degree of decisiveness as regards a quest for a resolution. This possibility will also produce a peculiar situation of “creating the opportunity for the advancing of the process of resolution in undemocratic conditions”. These issues will also in a possible new period constitute the points of discussion regarding a new process of resolution.