TURKEY'S SEARCH FOR A NEW POLITICAL SYSTEM

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PREFACE

The system debate is arguably the most pressing and consequential subject of Turkish politics. Turkey has been having a governmental system discussion for a period of time, and the next few years will appear to be in intense debate and search.

Turkish parliamentary system experience (1876-2017) often dealt with interruptions. As a result, it has not only failed to produce general satisfaction in politics and society but also has been unsuccessful in yielding economic stability. Similarly, the outcome of the last five years of the Presidential Government System (or the Presidential System with its widespread use) could not generate stability.

The parliamentary system has had a hostile place in public memory. Because it is usually associated with military coups, the weakness of civil politics, military and civil bureaucracy tutelage over elected bodies, fragile and inconsistent coalition governments. Usually, instead of dealing with the structural shortcomings of Turkish democracy, bashing the parliamentary system was a safe debate tool under the military tutelage years. The shortcut savior happened to be the presidential system. It was supposed to protect Turkish democracy from military tutelage, political instability or coalition governments. During the 1980s and 90s, strong political leaders, such as Demirel and Özal, voiced that the parliamentary system was malfunctioning, and that Turkey should move into the presidential system. However, despite such occasional political and academic disclosures, the system change did not become a serious part of the public agenda until 2014.

The most significant break in system change occurred in the Presidential elections in 2007. As the reactions to Abdullah Gül's Presidential candidacy turned into a severe political crisis over the April 27, 2007 memorandum and the decision of the Constitutional Court to block his candidacy; the AK Party has turned to change the presidential electoral system.

The constitutional amendment electing the President by the people instead of the parliament in a referendum also gave solid political capital to the President. This new election system gave the President legitimacy of representing at least 50% of the voters. Moreover, it empowered him to push the boundaries of the classical parliamentary system with the 1982 constitution and symbolic role of the President.

Erdoğan as the first president elected directly by the people, has adopted a persistent policy of switching to the presidential system. For years, the presidents elected through parliament experienced a severe political clash with the elected governments due to their constitutional powers. The new system empowered the President with two additional power dynamics: being elected by the people (Erdogan received 52 percent) and having a ruling party in the parliament. Ironically it was not only a new power surge but also paved the roads to new clashes and rifts between elected bodies.

Between 2014-2017, the anomaly caused many political crises. After the July 15 coup attempt, the deadlock was attempted to be resolved in line with the presidential system through the initiative and support of MHP leader State Bahçeli with the motto "de facto situation should be de jure." Without much public debate, the constitutional amendment, drafted in line with the preferences of the AK Party and MHP, was adopted with 51 percent support on April 17, 2017, referendum while the July 15 coup trauma was still in effect.

The presidential system, which took effect in the June 24, 2018 elections, has also produced a high dissatisfaction over its political and administrative performance since 2018. It has been criticized for the unification of powers, weakening the checks-and-balances mechanisms, eroding the political party

identities, pushing them to establish alliances, and deepening polarization. In addition, the ruling bloc, which favors the presidential system, has avoided revisions that will make the current system more operational, and further deepened the system's discomfort.

Public opinion studies show that support for the presidential system has fallen to 35 percent, and a possible referendum on the return to the parliamentary system will gather powerful support. Opposition political parties had a window of political opportunity created by dissatisfaction with the system. It helped opposition parties to develop a political strategy and rhetoric through the return to the parliamentary system. It allows many political parties with different political priorities to act together on the same goal while camouflaging the motivation to defeat Erdoğan in elections. They are currently asking to return to the parliamentary governmental system creating a political rhetoric on the axis of authoritarianism-democracy. In this framework, the system debate and the goal of restarting the parliamentary system have become the essential issue of the political struggle between the ruling and the opposition blocs.

Starting from 2021, the opposition political parties have prepared and publicly disclosed their parliamentary system proposals. This year they formed a joint working group and agreed on the basic principles, and finally presented the public "Strengthened Parliamentary System" proposal. Now six opposition parties decided to gather at the leadership level monthly—their main agenda focusing on governmental system change. It is a game-changing step in a fractured and highly polarized Turkish political atmosphere. Will the goal of returning to the parliamentary system be good enough to keep opposition parties united in the face of the ruling alliance, is questionable. However, it would be fair to argue that the parliamentary system proposal may ripen into the political alliance of opposition.

The search and discussion of the governmental system appear to be the most critical topic of politics for the next few years. Regardless of the outcome of the June 2023 elections, the system debate will be the most crucial topic of politics in the short term. If the current ruling alliance wins, they need to reform the system. If the opposition wins, they need to keep their election promise to change the system. In any scenario, Turkey is heading towards either imposing alterations or structural reform. Therefore, the system debate will settle itself as one of the top political issues in Turkey in the coming years.

Meeting this demand and preparing enhanced research on the governmental system will play an essential role in the quest for a possible change. Comprehensive research should present a comparative, global, political, and constitutional base for the debates and assist decision makers in political parties and the public in finding an enriched discussion floor.

Within the framework of this program, Ankara Institute plan to publish ten academic analyzes that will contribute to the search for systems in order to meet this end.

This study in which Volkan Aslan evaluates the judiciary branch constitutes the seventh report of the academic contribution series that made out of 10 reports.

We believe that this research project, which will continue through analysis, workshops, and public surveys, will contribute significantly to the quest for a system that progresses only through the harsh contrasts of government versus opposition parties dynamics and provides qualified academic background, common sense consultancy, and poll data.

Hatem Ete Ankara Institute, Director

INTRODUCTION

Discussions regarding the judicial branch in Turkey have always been on the agenda. Following the 2017 constitutional amendments, the frequency of these debates increased, and especially problems concerning the independence of the judiciary became more prominent. This situation brought forth studies on how to solve these problems. The prominent points made in most of the studies from a general perspective are the reforms that need to be made regarding the judiciary in general, and the high courts in particular. In this report, constitutional problems, and proposals for solutions regarding the formation and characteristics of the judicial branch are highlighted. As such, the aim is to evaluate the constitutional regulations regarding the judiciary rather than to provide a general perspective, and to contribute to the studies on the subject by making recommendations.

The report first briefly discusses the Ottoman judiciary of the classical period, and then the formation and characteristics of the judicial branch in the 1876 Constitution, the 1909 Amendments, as well as the constitutions of 1921, 1924 and 1961. Then, the formation and characteristics of the judicial branch in accordance with the 1982 Constitution are examined. In this framework, the reforms made up until 2010 are discussed in detail, whereas the changes and transformations after that year are discussed more broadly. Afterwards, the problems that emerged in the judicial system following the 2017 constitutional amendments, and the connection between these problems and the new government system are evaluated in detail. Finally, there is a discussion on how the problems identified here may be resolved; accordingly, suggestions are offered. In this framework, a dual method is employed: first, there is an evaluation of how the constitutional problems related to the judiciary can be resolved if the current government system is continued. Then, the constitutional requirements regarding the judiciary, regardless of the government system in place, are emphasized. Since most of the constitutional issues related to the judiciary are considered to be independent of the government system in place, more weight is given to this second point.

I. THE JUDICIARY IN THE OTTOMAN-TURKISH CONSTITUTIONS BEFORE 1980

A. Before the 1961 Constitution

The Ottoman Sultans had legislative, executive, judicial powers, they tended to exercise their judicial power through the qadis they appointed.

It is not possible to talk about a separation of powers in the modern sense in the classical period of the Ottoman Empire. In this respect, perhaps the most important figure of the classical period's judiciary is the qadi. Although the Ottoman Sultans had legislative, executive, judicial powers, they tended to exercise their judicial power through the qadis they appointed.[1] However, in a modern sense, the qadi is different from the judiciary as an institution. Indeed, in the classical period, we see that the qadi, as well as being a court judge, used the same powers as today's local governments, was the supervisor of those in charge of ensuring public order in the city, and also served as a notary public.[2] In addition to being an official of the central government, the qadi also fulfilled the task of building a bridge between the people in the region and the central government.[3] On the other hand, the consular courts had the authority to deal with disputes between non-Muslims who are in the country temporarily, and the religious community courts had also the authority to deal with disputes between non-Muslim residents who are subject to Ottoman rule.[4] However, apart from such exceptions, it can be said that the judicial function of the state was mainly carried out by the qadis.[5]

The main features of the qadi of the classical period are as follows: Subservience to the central government, independence from local administrators, competence for civil and financial matters in addition to judicial disputes, and having a defined and short term of office in a specific locality.[6] In this respect, it was possible for the qadis

1 Fethi GEDİKLİ, "Osmanlı Devleti'nde Kazâ", İslâm Ansiklopedisi, Vol. 25, p. 117.

2 İlber ORTAYLI, Hukuk ve İdare Adamı Olarak Osmanlı Devleti'nde Kadı, 15th edition, İstanbul, Kronik Yayıncılık, 2022, pp. 11, 43; İsmail Hakkı UZUNÇARŞILI, Osmanlı Devletinin İlmiye Teşkilâtı, Ankara, Atatürk Kültür, Dil ve Tarih Yüksek Kurumu Türk Tarih Kurumu Yayınları, 1988, p. 83. For more detailed information see: A. Refik GÜR, Osmanlı İmparatorluğu'nda Kadılık Müessesesi, Editor: M. Nihat ARYOL, 2nd edition, İstanbul, Türkiye İş Bankası Kültür Yayınları, 2017, pp. 82-87.

3 ORTAYLI, Hukuk ve İdare Adamı Olarak Osmanlı Devleti'nde Kadı, p. 13.

4 GEDİKLİ, "Osmanlı Devleti'nde Kazâ", p. 118.

5 GEDİKLİ, "Osmanlı Devleti'nde Kazâ", p 118.

6 ORTAYLI, Hukuk ve İdare Adamı Olarak Osmanlı Devleti'nde Kadı, p. 39.

to be dismissed and replaced by the Sultan.[7] Although this situation is not compatible with judicial independence and guarantees when evaluated with modern criteria, we see that certain judicial principles similar to today also applied to the Ottoman qadi of the classical period. The principle that the courts should be independent – at least theoretically – and that the trial should be public are instances in this context.[8]

Although a single judge formation was in use in the classical period of the Ottoman Empire, commercial and criminal courts were established during the Tanzimat Period, and thus multi-judge courts first emerged. High courts such as Dîvan-ı Ahkâm-ı Adliyye, Şûrâ-yı Devlet, Majlis-i Tedkîkât-ı Şer'iyye, the notary public, the prosecutor's office and attorneyship institutions also began to take their place in the judicial organization.[9] After the developments of the 19th century and the establishment of modern courts, the administrative and supervisory duties of the qadis gradually diminished, and their judicial duties became limited to the disputes remaining in the field of private law.[10] In the same period, we see that Ottoman Law gradually came under the influence of the Continental European legal system.[11] In this context, the Ottoman Constitution of 1876[12] marks a turning point in terms of the regulations it brought concerning the judiciary.

Regarding the judiciary, first of all, Article 23 of the Constitution of 1876[13] is significant. The article stipulates that no one can be compelled to go to a court other than the court to which he is legally subject. Apart from this provision, the main regulations regarding the judiciary are to be found in 11 articles (art. 81–91) under the title "Courts". In this framework, it is stated that judges cannot be dismissed except on grounds of committing crimes, and that matters such as their promotion and relocation[14] will be regulated by law (art. 81). The subsequent articles define principles and rules regarding the transparency of the proceedings, the principle of

The Ottoman Constitution of 1876 marks a turning point in terms of the regulations it brought concerning the judiciary.

7 GÜR, Osmanlı İmparatorluğu'nda Kadılık Müessesesi, p. 98.

8 See: ORTAYLI, Hukuk ve İdare Adamı Olarak Osmanlı Devleti'nde Kadı, pp. 70-71, 80-81.

9 GEDİKLİ, "Osmanlı Devleti'nde Kazâ", p. 119; ORTAYLI, Hukuk ve İdare Adamı Olarak Osmanlı Devleti'nde Kadı, pp. 13, 92.

10 ORTAYLI, Hukuk ve İdare Adamı Olarak Osmanlı Devleti'nde Kadı, pp. 15, 90-91.

11 ORTAYLI, Hukuk ve İdare Adamı Olarak Osmanlı Devleti'nde Kadı, p. 92.

12 Although constitutional movements at the local level were seen earlier in the Ottoman Empire, the first constitution adopted for the Empire in general was the Constitution of 1876, originally known as Kanun-ı Esasî, or the Basic Law. In terms of local constitutional movements, the 1838 Constitution of the Serbian Principality presents an interesting example in this context. See: Kemal GÖZLER, "İlk Osmanlı Anayasası: 1838 Sırp Knezliği Anayasası (Turski Ustav)", (Online) https://www.anayasa.gen.tr/turski-ustav.htm, Date of access: 26 September 2022.

13 The texts of Kanun-ı Esasî (Constitution of 1876), Teşkilat-ı Esasiye Kanunu (Constitution of 1921), Constitution of 1924 and Constitution of 1961 and the amendments made to these texts were accessed from the website of the Constitutional Court, as well as the book *Sened-i İttifak'tan Günümüze Türk Anayasa Metinleri* by Suna Kili and Şeref Gözübüyük. See: Suna KİLİ, Şeref GÖZÜBÜYÜK, Sened-i İttifak'tan Günümüze Türk Anayasa Metinleri, 3rd edition, İstanbul, Türkiye İş Bankası Kültür Yayınları, 2006; (Online) https://www.anayasa.gov.tr/tr/mevzuat/onceki-anayasalar, Date of access: 28 August 2022.

14 "*Judges who are appointed by the state according to the law, and whose certificate is given to them, are protected from being dismissed. However, their resignation is accepted. The education and profession of the judges, their duties, and even their dismissal upon conviction with a crime are subject to the special provisions of the law, and this law governs the qualifications of the judges and judiciary officials.*"

the independence of the courts, the principle of natural judge, occupations incompatible with judgeship, and the status of public prosecutors (art. 82–91).

Following the section titled "Courts", the Supreme Council is organized under the title "Divan-ı Âli" (art. 92–95). It was envisaged that one third of the members of the Supreme Council would be elected from the Senate of the Ottoman Empire (the second wing of the Parliament), one third from the Council of State, and one third from the Court of Appeals by drawing lots; and that in total, it would have thirty members. In this context, the duty of the Council is to try deputies, president and members of the Court of Appeals and those who committed crimes against the Sultan. We observe that the Council of State and the Court of Appeals are mentioned in the Constitution of 1876, but the regulations regarding the formation of these high courts are not stated in the Constitution. In addition, although the Council of State as it was then, *Şûrayı Devlet*, is the equivalent of today's Council of State (*Danıştay*), the jurisdiction of the Council of State at that time was much more limited compared to what it is today,[15] since cases between individuals and the administration were also placed under the jurisdiction of the general courts.[16]

Surprisingly, the Constitution of 1876 contained highly advanced provisions regarding the judiciary and the judicial process compared to the constitutions of the time it was enacted.

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Surprisingly, the Constitution of 1876 contained highly advanced provisions regarding the judiciary and the judicial process compared to the constitutions of the time it was enacted. Among the reasons for this we might note that the developments of the Tanzimat Period and the "elite position" conferred to justice in the Islamic-Ottoman Law are very important.[17] However, the judicial guarantees included in the Constitution of 1876 were largely doomed to remain ineffective, due to the Sultan's power to exile, which was regulated in Article 113.[18] There was no change in the articles regarding the judiciary following the 1909 constitutional amendments. However, the abolition of the Sultan's power to exile in Article 113 can be considered an improvement, albeit indirectly, in terms of the principles regarding the judiciary in the Constitution. However, it isn't possible to say that the provisions of the Constitution of 1876 were ever effectively applied, either before or after the 1909 amendments. In this context, we can say that the provisions regarding the judiciary and constitutional guarantees mostly remained on paper.

The 1921 Constitution, which was far from being a modern constitution and had no concerns to be so, did not contain regulations related to the judiciary. Since it was accepted that the regulations of the Constitution of 1876 were in force in matters not regulated by this constitution, in theory the judicial provisions of the 1876 Constitu-

15 Constitution of 1876, art. 85: *"Every case is heard in the court to which it belongs. Even cases between individuals and the state are adjudicated in general courts."*

16 See: (Online) https://www.danistay.gov.tr/icerik/9#:~:text=%C4%B0mparatorluk%20d%C3%B6neminde%2054%20y%C4%B1l%20g%C3%B6rev,Temmuz%201927%20tarihinde%20%C3%A7al%C4%B1%C5%9Fmaya%20ba%C5%9Flam%C4%B1%C5%9Ft%C4%B1r, Date of access: 24 August 2022.

17 Bülent TANÖR, Osmanlı-Türk Anayasal Gelişmeleri (1789-1980), İstanbul, Yapı Kredi Yayınları, 1998, p. 144.

18 TANÖR, Osmanlı-Türk Anayasal Gelişmeleri (1789-1980), p. 147.

tion were in effect. In practice, however, things were otherwise. There was an overall understanding that the judicial power belonged to the Parliament.[19] Article 2 of the 1921 Constitution stated: "*The executive power and legislative authority are manifested and concentrated in the Grand National Assembly (TGNA), which is the sole and true representative of the nation.*" However, the Assembly was not content with its legislative and executive powers, and also kept the judicial power under its responsibility. The election of the members of the "Independence Tribunals" by the Assembly from among its own members clearly demonstrates this state of affairs. Indeed, this example proves that the Assembly also saw judicial power as belonging to itself.[20] Of course, it is not possible to say that the formation and activities of these tribunals were in accordance with the judicial regulations of the Constitution of 1876. We may consider all this as a natural result of the extraordinary conditions which prevailed at that time, and of the decision to have a parliamentary government.[21] The rise to importance of the constitutional arrangements regarding the judiciary really came after the proclamation of the Republic and the subsequent 1924 Constitution (*Teşkilâtı Esasiye Kanunu*).

The first regulation regarding the judiciary in the 1924 Constitution appears in the 8th article: *"The judicial power is exercised by an independent judge on behalf of the nation, in accordance with procedure and law."* As we see, it is stated that the judicial power is to be exercised by independent courts on behalf of the Nation. The section of the Constitution devoted to the judiciary (art. 53–67) bears the title *"Kuvvei Kazaiye"*, that is, judicial power. In this respect, we might say that there is a conceptual inconsistency in the text of the Constitution.[22] However, such mistakes should be considered normal since this was the first constitution of the young Republic, adopted at a time when written constitutionalism was in its infancy.

The rise to importance of the constitutional arrangements regarding the judiciary really came after the proclamation of the Republic and the subsequent 1924 Constitution (Teşkilâtı Esasiye Kanunu).

The 1924 Constitution contains very inadequate provisions in terms of providing an independent and impartial judiciary.[23] Indeed, the Constitution left the establishment of the courts and the regulation of the status of judges entirely to the discretion of the Parliament (see especially: art. 55–56). The precarious provisions in the Constitution also manifested themselves in subordinate legislation and practice. Neither in the laws pertaining to the judges nor in practice were there any standards regarding the safeguards of the judges in the current sense.[24] In other articles of the Constitution on

19 Kemal GÖZLER, Türk Anayasa Hukuku, 4th edition, Bursa, Ekin, 2021, p. 79.

20 TANÖR, Osmanlı-Türk Anayasal Gelişmeleri (1789-1980), p. 243.

21 For detailed information, see: Ergun ÖZBUDUN, 1921 Anayasası, Ankara, Atatürk Kültür, Dil ve Tarih Yüksek Kurumu Atatürk Araştırma Merkezi, 2008, the entire book.

22 For discussion related to the topic, see: Ergun ÖZBUDUN, 1924 Anayasası, İstanbul, İstanbul Bilgi Üniversitesi Yayınları, 2012, pp. 53-55; Recai Galip OKANDAN, "20 Nisan 1340 Anayasamıza Göre «Hakkı Kazâ»", İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, Vol. 32, No. 2-4, 1966, pp. 417-428.

23 ÖZBUDUN, 1924 Anayasası, p. 55.

24 For detailed information, see: Münci KAPANİ, İcra Organı Karşısında Hâkimlerin İstiklâli, Ankara, Ankara Üniversitesi Hukuk Fakültesi Yayınları, 1956, pp. 74-78, 99-101, 103-106, 122-127, 130-134; ÖZBUDUN, 1924 Anayasası, pp. 57-58.

the subject, there are regulations on how judges cannot take on other duties (art. 57), on public proceedings (art. 58), on individuals' right to use legitimate means in courts to defend their rights (art. 59), and on how the courts cannot avoid hearing cases that fall under their jurisdictions (art. 60). Afterwards, the regulations regarding the Supreme Council (*Divanı Âli*) are listed. It was envisaged that the Council, which would adjudicate offenses related to the duties of the Ministers, the members of the Court of Appeals and the Council of State and the Chief Public Prosecutor, would consist of 11 members to be elected by the Court of Appeals from among its own members and 10 members to be elected by the Council of State from among its members. It was also stated that the Supreme Council, which consisted of 21 members, was not of a permanent nature and would be formed *"by the decision of the Grand National Assembly of Turkey if it was needed"*. There are also regulations in the Constitution regarding the functioning and decision-making of this Council.[25] Another interesting aspect of the 1924 Constitution is that the Council of State was regulated in the "Vazife-i İcraiye", that is, the section concerning the executive branch (art. 51).[26]

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Certain features in this Constitution, such as regulating the highest administrative court in the executive section, and regulations allowing the establishment of extraordinary courts, coincide with the political and ideological aims of the young Republic's administration.[27] Considering that Atatürk once said that he wanted to see the judiciary as supportive of reforms and the guardian of the revolution from the first years of the Republic onward,[28] it could not be expected that the judiciary of the period would act as a counterbalance to the legislature and the executive. Let me also point out that there was no regulation in the Constitution regarding the election and appointment of judges and prosecutors during the 1924 Constitutional period, and that the Ministry of Justice was authorized in all matters related to the promotion and personal rights of judges and prosecutors.[29] However, despite all these unfavourable circumstances, we see some kind of judicial activism in some instances. In this context, although there was no regulation in the Constitution regarding the supervision of the constitutionality of laws, the efforts to pave the way for supervision through case law, similar to the US, are remarkable. However, these exceptional attempts did not come to anything substantial. As a matter of fact, during the 1924 Constitution period, the efforts of the courts of instance to supervise constitutionality through case law failed due to the decisions of the Court

25 See: 1924 Constitution, art. 63-67.

26 According to Tanör, this is "a weakness seen in the Constitution on account of the administrative justice." See: TANÖR, Osmanlı-Türk Anayasal Gelişmeleri (1789-1980), p. 307.

27 TANÖR, Osmanlı-Türk Anayasal Gelişmeleri (1789-1980), p. 307.

28 See: TANÖR, Osmanlı-Türk Anayasal Gelişmeleri (1789-1980), pp. 307-308.

29 Abdurrahman EREN, Anayasa Hukuku Dersleri Genel Esaslar-Türk Anayasa Hukuku, 3rd edition, Ankara, Seçkin, 2021, p. 1071.

of Appeals and the Council of State.[30] The interpretation that judicial review of the constitutionality of laws was not possible considering the fact that the Constitution gave the control of the statutes to the Parliament, and not to the judges, is widely accepted.[31]

B. The Constitution of 1961

In the 1961 Constitution, the primarily noteworthy regulations regarding the judiciary are on the right to legal remedies (art. 31-32), the legality and individuality of penalties (art. 33), and the burden of proof (art. 34), which are regulated in the section on fundamental rights and duties. The section on the judicial branch, on the other hand, is mainly regulated between Articles 132 and 153. In this respect, the independence of the courts, safeguards and status of the judges, the requirement that the hearings should be open and the decisions should be justified, the establishment of the courts, the prosecutor's office and the military jurisdiction are regulated under the heading of general provisions (articles 132–138).

The 1961 Constitution reflects the search for solutions to the inadequacies of the 1924 Constitution regarding the judiciary, and the problems of implementation these inadequacies caused.[32] Further, the main motivation of the 1961 Constitution was to prevent the establishment of an authoritarian government based on the majority, by moving away from the view that gave the exercise of sovereignty only to the Grand National Assembly of Turkey.[33] The reason behind the structuring of the Parliament as two chambers may be understood within this framework. The reflection of this reasoning within the judicial branch was the establishment of the Constitutional Court.[34] Established for the first time with the 1961 Constitution, the Constitutional Court was not regulated in the section concerning the high courts.[35] It was to be formed of fifteen regular and five substitute members; four regular members would be elected by the General Assembly of the

The 1961 Constitution reflects the search for solutions to the inadequacies of the 1924 Constitution regarding the judiciary, and the problems of implementation these inadequacies caused.

30 See: Servet ARMAĞAN, Anayasa Mahkememizde Kazai Murakabe Sistemi, İstanbul, Hukuk Fakültesi Yayınları, 1967, p. 19.

31 TANÖR, Osmanlı-Türk Anayasal Gelişmeleri (1789-1980), p. 320. Although previous instances also exist, the most famous decision on this subject was the decision of the General Assembly of the Court of Appeals in 1952. Before the General Assembly made its decision, the judge of the court of instance, Refik Gür, persisted in his decision following the reversal of his decision, and argued that the provision of law that must be applied was unconstitutional. However, upon appeals against this decision, the Court of Appeals General Assembly ruled that the courts of instance could not review the constitutionality of laws. Nevertheless, the claim that the law was unconstitutional must have been taken seriously, as the TGNA changed the provision that was alleged to be unconstitutional by amending the relevant law. As can be seen, although judicial review was not accepted in the concrete case, it is noteworthy that constitutionality was achieved through cooperation of the judiciary and the legislature, albeit indirectly. See: GÖZLER, Türk Anayasa Hukuku, pp. 1197-1201; TANÖR, Osmanlı-Türk Anayasal Gelişmeleri (1789-1980), pp. 355-357.

32 TANÖR, Osmanlı-Türk Anayasal Gelişmeleri (1789-1980), p. 306.

33 Yılmaz ALİEFENDİOĞLU, Anayasa Yargısı, Ankara, Yetkin, 1997, pp. 71-72.

34 ALİEFENDİOĞLU, Anayasa Yargısı, p. 72.

35 It cannot be said that the 1961 Constitution had a conscious attitude regarding where the institutions would be regulated in the Constitution. For example, in this Constitution, the Court of Accounts was regulated in the "Executive" section, among economic and financial provisions (art. 127). We observe that the same institution is regulated in the judiciary section of the 1982 Constitution (art. 160).

Court of Appeals, and three by the General Assembly of the Council of State from among their own presidents and members, the Chief Prosecutor and the Attorney General of the Council of State with the absolute majority of the total number of their members and by secret ballot. It was stipulated that one member would be elected by the General Assembly of the Court of Accounts from among its own chairman and members in the same way. It was also stipulated that the first house of the Parliament would elect three members, the Senate of the Republic two, and the President two members. It was also stipulated that the President would choose one of these members from among the three candidates nominated by the General Assembly of the Military Court of Appeals with the absolute majority of the total number of members and by secret ballot. In terms of substitute members, it should also be noted that the Court of Appeals would elect two substitute members, while the Council of State and each house of the Parliament would each elect one substitute member respectively. Although the 1971–1973 interim military regime did not introduce any changes in the composition of the Court, it brought changes regarding the faster election of the members by the Parliament and augmented the discretion of the Parliament on this issue. In the first version of the article, it had been regulated that the houses of the Parliament would elect the candidates by secret ballot with a two-thirds majority of the total number of each house. If this majority could not be achieved in the first two rounds of voting, then an absolute majority would be sufficient. With the 1971 amendments, it was regulated that the houses of the Parliament would elect the candidates with the absolute majority of the total number of members by secret ballot. Again, the first version of the article stated that one of the members to be elected by the Parliament had to be from among the candidates nominated by the departments of law, economics and political sciences of the universities, with three candidates to be nominated for each vacancy, and by secret ballot. By contrast, the 1971 amendments stated merely that the principles and procedures of applying for candidacy and election procedures in the elections to be held by the Parliament would be regulated by law. Thus, the authority of the universities to determine the court members was abolished from the Constitution.

Although the 1971–1973 interim military regime did not introduce any changes in the composition of the Court, it brought changes regarding the faster election of the members by the Parliament and augmented the discretion of the Parliament on this issue.

With the 1961 Constitution, the Supreme Council of Judges was also organized as a new institution. It was stipulated that the Supreme Council of Judges would initially be composed of eighteen permanent and five substitute members, six of whom were elected by the General Assembly of the Court of Appeals, and six of them by the judges from the first class and from among themselves by secret ballot. It was regulated that the first house and the second house of the Parliament would elect three members each, by secret ballot and by the absolute majority of the total number of their members, from among those who had served as judges in high courts or who fulfilled the conditions to do so. In terms of substitute members, it was envisaged that two members would be elected by the General Assembly of the Court of Appeals, and one by first-class judges, two by the first and the second house of the Parliament. Following the 1971 amendments, the Council would be composed of eleven regular and three substitute mem-

bers; and the members would be elected by the General Assembly of the Court of Appeals from among their own members by secret ballot with the absolute majority of the total number of members. It can be said that the independence of the judiciary and the judicial guarantees were ensured to a great extent on the constitutional level thanks to the Supreme Council of Judges.[36] With the 1961 Constitution, the "role of judiciary in the elections" was also constitutionalized for the first time.[37] As a matter of fact, it was regulated that the elections would be held under the general management and supervision of the judicial bodies, and in relation to that the Supreme Election Board was also regulated in the Constitution.[38] As Bülent Tanör stated, "*As may be understood from the judicial safeguards and control network brought by the Constitution, the favourite branch of the system is the judicial one. Political decision-making organs have lost, and the judicial branch has profited from this Constitution.*"[39] However, although this was the case in the first version of the Constitution, this situation started to change with the constitutional amendments made in the interim military period of 1971–1973.

In the constitutional amendments made in the 1971–1973 interim period, one of the most important "concessions wrung by the military authority from the civilian power" was the expansion of the scope of military justice to the detriment of the civilian one.[40] Another trend was the weakening of judicial review in terms of relations between the judiciary and political decision-making bodies.[41] The elimination of the possibility for small political parties to apply to the Constitutional Court, and the new restrictive rule regarding the judicial review of constitutional amendments can also be considered within this framework.[42] The paragraph added to Article 114 of the Constitution on administrative justice[43] is also noteworthy in this context.[44] In the first version of the article, the first paragraph stated, "No action or act of the administration can under any circumstances be excluded from the control of the judicial authorities." The

In the constitutional amendments made in the 1971–1973 interim period, one of the most important "concessions wrung by the military authority from the civilian power" was the expansion of the scope of military justice to the detriment of the civilian one.

36 TANÖR, Osmanlı-Türk Anayasal Gelişmeleri (1789-1980), p. 404.

37 TANÖR, Osmanlı-Türk Anayasal Gelişmeleri (1789-1980), p. 404.

38 1961 Constitution, art. 75: "*Elections shall be conducted under the control and supervision of judicial organs. To implement all procedures necessary for the fair and orderly conduct of elections from inception to completion, to review and pass final judgment on all irregularities, complaints and objections regarding election matters during and after elections, and to certify the validity of the election credentials are functions devolving upon the Supreme Election Council. The functions and powers of the Supreme Election Council and other Election Councils shall be regulated by law. The Supreme Election Council shall be composed of seven regular members and four alternates. Six of the members shall be elected by the general assembly of the Court of Appeals, and five by the general assembly of the Council of State from among their own members by secret ballot, and by an absolute majority of their plenary session. These members in turn shall elect from among themselves by secret ballot and by absolute majority, a chairman and a vice-chairman. The four alternate members of the Supreme Election Council shall be selected by lot, two from the members chosen by the Court of Appeals and two from the members chosen from the Council of State. The Chairman and Vice-Chairman of the Supreme Election Council are exempt from the drawing of lots.*"

39 TANÖR, Osmanlı-Türk Anayasal Gelişmeleri (1789-1980), pp. 404-405.

40 Bülent TANÖR, İki Anayasa 1961-1982, 4th edition, İstanbul, On İki Levha, 2012, p. 44.

41 TANÖR, İki Anayasa 1961-1982, p. 45.

42 TANÖR, İki Anayasa 1961-1982, p. 45.

43 *"Judicial power cannot be used in a way that limits the execution of the executive duty in accordance with the forms and principles set forth in the laws. Judicial decisions cannot be made as administrative acts or actions."*

44 TANÖR, İki Anayasa 1961-1982, pp. 45-46.

first paragraph was changed with the 1971 amendments and another paragraph was added. After the 1971 amendments, the first two paragraphs of Article 114 became as follows: "*Judicial remedy is open against all kinds of actions and acts of the administration. Judicial power cannot be used in a way that limits the execution of the executive duty in accordance with the forms and principles set forth in the laws. Judicial decisions in the nature of administrative actions or acts cannot be given.*" The change in this article alone summarizes the approach of the 1971–1973 interim regime to the judiciary.

The 1973 amendment to Article 136 on the establishment of courts and the 1971 amendment to Article 137 regarding the prosecution are similarly noteworthy. While it was stated in the first version of Article 136 that the establishment, duties and powers, functioning and trial procedures of the courts would be regulated by law, regulations regarding State Security Courts were added to the article with the 1973 amendments. In this context, it was stated that the State Security Courts would be composed of judges and prosecutors, as well as military judges; and that these courts were responsible for dealing with crimes committed against the integrity of State's territory and nation, the free democratic order and the Republic, the characteristics of which are specified in the Constitution, and crimes directly concern the security of the state. These courts, which were first enshrined in the Constitution with the 1973 amendments, also appeared in the 1982 Constitution, but with the 2004 constitutional amendments, the regulations regarding these courts were abolished. In 1971, another important change was made in Article 137, which regulated the prosecutor's office. The Supreme Council of Prosecutors, which was not regulated in the first version of the article, was enshrined in the 1961 Constitution following the 1971 amendments, and this Council was given the authority to decide on all personnel matters, disciplinary penalties and dismissals from the profession, except for the election of prosecutors to the membership of the Court of Appeals. Regarding its composition, it was envisaged that the Council would be formed under the chairmanship of the Minister of Justice, and be composed of the Chief Public Prosecutor, three regular and two substitute members elected by the General Assembly of the Criminal Chambers of the Court of Appeals, the General Director of Personnel Affairs and the Undersecretary of the Ministry of Justice. Although it was stated in the first version of the regulation that the decisions of the Council were final and were not subject to appeal to any other authority, this regulation was annulled by the Constitutional Court.[45]

The constitutional changes imposed by the interim military regime between 1971 and 1973 also had an impact on the regulations regarding the high courts.

The constitutional changes imposed by the interim military regime between 1971 and 1973 also had an impact on the regulations regarding the high courts. In this respect, the most striking changes were related to the term of office of the members of the high courts. In the first version of the Constitution, there was no regulation regarding the terms of office of the first president and second presidents of the Court of Appeals, the

45 AYM, E. 1977/82, K. 1977/117, T. 27/09/1977.

Chief Public Prosecutor, the president, the heads of departments and the spokesperson of the Council of State. With the 1971 amendments, it was stipulated that the term of office of those mentioned above would be four years and those whose terms expired could be re-elected. On the other hand, the amended Article 140 regulating the Council of State stipulated that the judicial review of administrative actions and acts related to military personnel would be made by the Military High Administrative Court. Thus, a distinction was also made between civil and military jurisdictions in the domain of administrative justice, and this distinction was enshrined in the Constitution. The article on the Military Court of Appeals was also interesting. Before the 1971 amendments, it had been envisaged that the members of the Military Court of Appeals and the Chief Prosecutor would be elected by the Head of State from among those individuals qualified as judges, above the age of forty and who had served as a military judge or military prosecutor for at least ten years, and among the candidates nominated by the absolute majority of the total number of members of the General Assembly of the Military Court of Appeals, with three nominations for each vacancy. With the 1971 amendments, it was envisaged that the members would be elected by the Head of State from among the first class military judges with at least the rank of colonel, nominated with the absolute majority of the total number of members of the Military Court of Appeals General Assembly, and with three nominations for each vacancy. Again, before the amendment, it had been envisaged that the Military Court of Appeals would elect its president from among its members, but with the 1971 amendments, it was regulated that the President, Chief Prosecutor, Vice President and heads of departments of the Military Court of Appeals would be appointed from among the members of the Military Court of Appeals in order of rank and seniority. Thus, the interim regime introduced a decline regarding the formation and powers of the judiciary.

With the 1971 amendments, it was regulated that the Constitutional Court would supervise the conformity of constitutional amendments to the formal requirements set forth in the Constitution (art. 147).

At the same time, it is remarkable that the provisions of the laws that had been annulled by the Constitutional Court as unconstitutional were enshrined in the Constitution by means of constitutional amendments between 1971 and 1973. As an instance of this tendency, after the Constitutional Court ruled that state aid to political parties was unconstitutional in principle and annulled the relevant regulation in the Political Parties Law,[46] state aid to political parties was regulated in Article 56 of the 1961 Constitution following the 1971 constitutional amendments.

We observe that not only the decisions but also the Constitutional Court itself was affected by the interim regime. With the 1971 amendments, it was regulated that the Constitutional Court would supervise the conformity of constitutional amendments to the formal requirements set forth in the Constitution (art. 147). Before the amendment, it had been regulated that the Court would examine the constitutionality of the

46 See: AYM, E. 1970/12, K. 1971/13, T. 02/02/1971.

laws and the Rules of Procedure of the Grand National Assembly of Turkey, and there was no regulation regarding the review of constitutional amendments. Although this regulation was introduced as a reaction to the decisions of the Constitutional Court in reviewing constitutional amendments, the new regulation did not stop the Court, as will be seen below. Another change was the limitation of the scope of those who could file an action for annulment. In the first version of Article 149, which regulated this subject, it was stated that the Head of State, political parties or their party groups which received at least ten percent of the valid votes in the last general elections or which were represented in the Grand National Assembly, and members of the houses of the parliament amounting to at least one sixth of the total membership of either House, could file an action for annulment. Following the 1971 amendments, the Head of State, political party groups in the houses of the parliament and political party groups in the Grand National Assembly, political parties which received at least ten percent of the valid votes in the last general elections, and members of the houses of the parliament amounting to at least one sixth of the total membership of either House, could file an action for annulment.[47] Moreover, the regulation that the Constitutional Court would make a decision within three months if an application for concrete norm review was made was amended to declare, "the Court will decide and announce the decision within six months". In addition, with the 1971 amendments, it was regulated that the decisions of the Constitutional Court could not be announced without a written justification.[48]

The Constitutional Court, in the decisions made before the 1971 amendments, accepted that it had the authority to review constitutional amendments in terms of both form and substance.

Despite these unfavourable developments, the greatest reaction to the interim regime of 1971–1973 came from the Constitutional Court:

- The Constitutional Court, in the decisions made before the 1971 amendments, accepted that it had the authority to review constitutional amendments in terms of both form and substance.[49] Following the 1971 amendments, the Court continued to review constitutional amendments in terms of content, based on the unamendable article[50] (art. 9) of the 1961 Constitution. According to the Court,

  > The 1961 Constitution, with its Article 9, first established a principle of irrevocability and then introduced a ban on proposals. In that case, the provision of Article 9 consists of a two-way rule regarding form, in terms of its content. Indeed, it is incompatible with this prin-

47 The provision which stipulates that the High Council of Judges, the Court of Appeals, the Council of State, the Military Court of Appeals and the universities, in areas that concern their existence and duties, can directly file an action for annulment with the Constitutional Court on the grounds that the laws or the Rules of Procedure of the Grand National Assembly of Turkey or certain articles and provisions thereof are unconstitutional, was not changed.

48 Also, while it was stipulated in the first version of the article that the norms that were annulled would be repealed on the date of the decision, it was stipulated with the amendment that the annulled provisions would be repealed on the date the decision was published in the Official Gazette. In the first version of the article, if the Court separately decided the date on which the annulment provision would come into force, it was stipulated that this date could not exceed six months starting from the day the decision was made, but this period was changed to one year with the amendment.

49 For instance, see: AYM, E. 1970/1, K. 1970/31, T. 16/06/1970.

50 According to Article 9 of the 1961 Constitution, "*The constitutional provision re*garding the form of state as a Republic shall not be amended, nor shall its amendment be proposed."

> ciple to think that the principle of irrevocability in the article only aims at the word "Republic", that is, by stipulating the irrevocability of the word "Republic" in the Constitution, other principles and rules that make up the Republic can be changed. This is because the main purpose of the principle of irrevocability in Article 9 of the Constitution is the State system, which is indicated with the word "Republic" by specifying the basic principles and rules in the Preamble, and to which Articles 2 and 3 refer. In other words, it is not the word "Republic" that is guaranteed here by being bound to the principle of irrevocability, but the republican regime whose characteristics have been specified in the Preamble and Article 2, as shown above. In that case, by keeping the word "Republic" and changing or abolishing all or part of all these features that make up the Republic, in whatever direction, by proposing and accepting a constitutional amendment that would create another regime which is incompatible with the principles of the 1961 Constitution, it is obvious that the outcome would be contrary to the Constitution, so much so that it does not even require discussion.[51]

Therefore, despite the 1971 amendments, the Court added to the content of the Constitutional provision stating that the form of the state is the Republic (which is an unamendable provision) certain principles and rules regulated in other articles, and saw itself as authorized to annul constitutional amendments which it decreed to be in violation of said principles and rules. Even though the 1971 amendments made it so that constitutional amendments were only subject to formal review, submitting an amendment proposal in compliance with the amendment ban is also a condition of form.[52] The reaction of the 1982 Constitution maker to this jurisprudence maintained by the Court was not long in coming. As will be seen below, the 1982 Constitution would also determine separately what the content of formal review would be.

- The regulation introduced with the 1973 amendments to Article 138 of the 1961 Constitution, which stipulated that in case of war, it wouldn't be sought as a condition that the majority of the members in military courts should be judges, was also annulled by the Constitutional Court.[53]

- Again with the 1971 amendments it was regulated that no appeal could be made to other authorities against the decisions of the Supreme Council of Judges; however, this regulation was also annulled by the Constitutional Court.[54] As stated above, a similar decision was made regarding the provision that the decisions of the Supreme Council of Prosecutors were final and that no appeal could be made to any other authority against these decisions.[55]

With the 1971 amendments it was regulated that no appeal could be made to other authorities against the decisions of the Supreme Council of Judges; however, this regulation was also annulled by the Constitutional Court.

51 AYM, E. 1973/19, K. 1975/87, T. 15/04/1975.

52 For detailed information on the case-law of the Constitutional Court regarding constitutional amendments before and after the 1971 amendments, see: Erdal ONAR, 1982 Anayasasında Anayasayı Değiştirme Sorunu, Ankara, 1993, pp. 135-148; Mehmet TURHAN, "Anayasaya Aykırı Anayasa Değişiklikleri", Ankara Üniversitesi Hukuk Fakültesi Dergisi, Vol. 33, No. 1, 1976, pp. 85-94.

53 AYM, E. 1973/19, K. 1975/87, T. 15/04/1975.

54 AYM, E. 1976/43, K. 1977/4, T. 27/01/1977.

55 AYM, E. 1977/82, K. 1977/117, T. 27/09/1977.

II. THE JUDICIAL BRANCH IN THE 1982 CONSTITUTION AND THE NEW PROBLEMS BROUGHT BY THE 2017 CONSTITUTIONAL AMENDMENTS

Although the 1961 Constitution empowered the judicial branch, the 1982 Constitution represented a decline from the 1961 Constitution in this respect.[56] A number of relevant examples can be cited here: restriction of the scope of the constitutional review (reducing the processes that can be examined or restricting the scope to which they might be reviewed; reducing the number of those who can file an annulment action; and decreasing the available time period for filing an annulment action), increasing the influence of the executive in the determination and appointment of the members of the high courts, and increasing the number of acts excluded from judicial review.[57] Therefore, although the 1971 and 1973 amendments were made as ineffective as possible by the Constitutional Court, the 1982 Constitution showed its stance by inserting many provisions that had been previously annulled by the Court into the Constitution. In other words, with the 1982 Constitution, "it was the executive which profited the most, while the judiciary suffered immensely".[58] With the 2017 amendments, making the judicial branch dependent on the Head of State,[59] especially through the Council of Judges and Prosecutors, added many new problems to the already existing issues regarding the judiciary.

With the 1982 Constitution, "it was the executive which profited the most, while the judiciary suffered immensely".

Pursuant to Article 9 of the 1982 Constitution, "*Judicial power is exercised by independent and impartial courts on behalf of the Turkish Nation.*" Although there was no statement about impartiality in the first version of the article, this phrase was added to the article with the 2017 Constitutional amendments. In fact, it is not necessary for there to be an emphasis in the constitution regarding the judiciary's impartiality or independence, since these are indispensable features of the judiciary in modern liberal states. The basic principles regarding the judiciary are regulated between Articles 36 and 40 of the Constitution. In these articles, there are regulations on the right to legal remedies, the courts, the principles regarding crimes and punishments, the burden of proof and the protection of fundamental rights and freedoms.

56 TANÖR, İki Anayasa 1961-1982, p. 105.

57 TANÖR, İki Anayasa 1961-1982, s. 105-108.

58 TANÖR, İki Anayasa 1961-1982, p. 108.

59 Kemal GÖZLER, Elveda Anayasa: 16 Nisan 2017'de Oylayacağımız Anayasa Değişikliği Hakkında Eleştiriler, Bursa, Ekin Yayınları, 2017, pp. 19-22.

The main regulations regarding the judiciary are in the third section of the Constitution which regulates the fundamental organs of the Republic. The chapter titled "The Judiciary" is regulated between the articles of 138 and 160. At the beginning of the chapter, the independence of the courts, the safeguards for judges and prosecutors, the professions regarding judiciary, the transparency of hearings and the justification of decisions, and the regulations regarding the establishment of the courts are covered; then, the high courts are regulated.

A. The Constitutional Court

The Constitutional Court, the Court of Appeals, the Council of State and the Court of Jurisdictional Disputes are listed as "high courts" in the 1982 Constitution. Regulations on the Military Court of Appeals and the High Military Administrative Court (art. 156–157) were abolished with the 2017 constitutional amendments.

Prior to the 2010 constitutional amendments, it was envisaged that the Constitutional Court would be composed of eleven regular and four substitute members. The Head of State would appoint two regular and two substitute members from the Court of Appeals, two regular and one substitute members from the Council of State, one regular member from the Military Court of Appeals, one regular member from the High Military Administrative Court, and one regular member from the Court of Accounts, from among three candidates to be nominated for each vacant position, by their respective general assemblies, from among their presidents and members, and by an absolute majority of their members. It was also envisaged that the Head of State would elect one regular member from among the three candidates nominated by the Council of Higher Education, candidates who were members of the teaching staff of higher education institutions and who were not members of the Council themselves; and that he would elect three regular and one substitute members from among senior administrators and self-employed lawyers. As we see, the Grand National Assembly of Turkey (TGNA) did not have any authority in terms of nominating members in this system, and the authority of the higher judicial organs was particularly prominent. Considering the "supra-political" nature of the Head of State, who was envisaged to be elected with a high quorum by the Parliament, the lack of a role for the representative bodies in determining the members of the Constitutional Court was a point of serious criticism. At the same time, one of the most important differences was that the tenure of the members was not limited to a certain number of years. Before the 2010 amendment, in accordance with Article 147, it was regulated that the members of the Constitutional Court would retire when they reached the age of sixty-five.[60] It might be said that the regulation in question, which envisaged a rather

The Constitutional Court, the Court of Appeals, the Council of State and the Court of Jurisdictional Disputes are listed as "high courts" in the 1982 Constitution.

60 Article 147/2, which stipulates that membership of the Constitutional Court is revoked automatically if a member is convicted of a crime that requires dismissal from the profession of judge, and with the decision of the absolute majority of the plenary session of the Constitutional Court in the event that it is clearly understood that he cannot fulfil his duty on grounds of ill health, did not undergone any change.

long term of office compared to the political positions which changed hands with each election, strengthened the impartiality and independence of the Court. With the 2010 constitutional amendments, radical changes were made regarding the composition of the Court and the terms of office of the members.

Pursuant to Article 146 of the 1982 Constitution currently in effect, the Constitutional Court consists of fifteen members. In terms of determining the members, there is a process in which the influence of the Head of State is predominant, but in which other stakeholders also participate. The Grand National Assembly of Turkey elects, by secret ballot, two members from among three candidates to be nominated by and from among the president and members of the Court of Accounts, for each vacant position, and one member from among three candidates nominated by the heads of the bar associations from among self-employed lawyers. In this election to be held in the Grand National Assembly of Turkey, for each vacant position, a two-thirds majority of the total number of members shall be required for the first ballot, and an absolute majority of the total number of members shall be required for the second ballot. If an absolute majority cannot be obtained in the second ballot, a third ballot shall be held between the two candidates who have received the greatest number of votes in the second ballot; the member who receives the greatest number of votes in the third ballot shall be elected. It appears that although the participation of the opposition is important in the election of the members, the fact that the candidate with the highest number of votes is elected in case of a third round of voting makes the role of the opposition meaningless, especially in the presence of a political party that dominates the parliamentary majority. Especially if a majority of the party supporting the Head of State dominates the Parliament, the election of the members by the Parliament or the President does not make much difference in practice.

Especially if a majority of the party supporting the Head of State dominates the Parliament, the election of the members by the Parliament or the President does not make much difference in practice.

Except for the three members elected by the TGNA, twelve members are directly or indirectly determined by the Head of State. Within this framework, the Head of State appoints three members from the Court of Appeals, two members from the Council of State from among three candidates to be nominated for each vacant position, by their respective general assemblies, from among their presidents and members; three members, at least two of whom are law graduates, from among three candidates to be nominated for each vacant position by the Council of Higher Education from among members of the teaching staff who are not members of the Council, in the fields of law, economics and political sciences[61]; four members from among senior administrators, self-employed lawyers, first class judges and public prosecutors, or rapporteurs of the Constitutional Court who have worked at the position for a minimum of five years.

61 In the elections held to nominate candidates from the general assemblies of Court of Appeals, the Council of State and the Court of Accounts and the Council of Higher Education for membership of the Constitutional Court, the three candidates with the highest number of votes are deemed to have been nominated for each vacant membership. In the election to be held for the three candidates nominated by the presidents of the bar associations from among the independent lawyers, the three individuals who receive the most votes are deemed to have been nominated.

At this point, we may argue that the legislative and executive powers will have little influence, by pointing out that the term of office of the Grand National Assembly of Turkey and the Head of State is five years, while the term of office of the members of the Court is twelve years, and that the members change at different points in time. However, this situation becomes meaningless if several elections are won in a row, and in fact, the existing Court in Turkey has been formed in this way, especially since 2010.

B. Other High Courts

High courts other than the Constitutional Court, according to the Constitution, are the Court of Appeals, the Council of State and the Court of Jurisdictional Disputes. The very first thing that draws our attention in the constitutional regulations regarding the high courts in question is that no determination regarding the number of members of these courts has been made in the Constitution. While the Constitution determines from among and by whom the members of both the Court of Appeals and the Council of State will be elected, the Constitution does not determine the number of members of either of these high courts. We find it useful to emphasize this point, because the fact that the Constitution does not specify the number of members has resulted in frequent manipulation of the structure of both high courts. The number of members of the Court of Appeals and the Council of State was increased by the laws enacted in 2011 and 2014, decreased by the law enacted in 2016, and in 2017 the number of members was increased again.[62] What legitimate justification can there be for this way of tampering with high court membership numbers over such a short period of time? This issue will be readdressed further down, in the recommendations section below. In addition to the aforementioned legislative changes, some less important changes were also made in the constitutional regulations regarding both courts.

High courts other than the Constitutional Court, according to the Constitution, are the Court of Appeals, the Council of State and the Court of Jurisdictional Disputes.

Since 1982, no fundamental changes have been made to Article 154 of the 1982 Constitution, which regulates the Court of Appeals. In this regard, with the 2017 amendments, the phrase "high" in the "High Council of Judges and Prosecutors" was removed from the text of the article. In the article on the Council of State (art. 155), many more changes were made. The first version of the article stated that the Council of State was responsible for hearing cases, expressing its opinion on draft laws sent by the Prime Minister and the Council of Ministers, examining the draft statutes and concession terms and contracts, resolving administrative disputes and performing other works indicated by the law. The constitutional amendment made in 1999 regulated that the Council of State was responsible for hearing cases, giving its opinion on draft laws sent by the Prime Minister and the Council of Ministers, concession terms and contracts related to public services within two months, examining draft statutes, resolving administrative disputes and performing other works indicated by the law.

62 Gözler summarizes these changes, which he describes as "the manipulation of the number of members of the high courts as a means of dominating the high judiciary", quite succinctly. See: GÖZLER, Türk Anayasa Hukuku, pp. 1185-1189.

The 2017 constitutional amendments included an amendment to this article whereby the authority of the Council of State to express its opinion on draft laws and to examine draft statutes was removed. Considering the transformation of the government system into a presidential one, the removal of the executive branch's authority to submit a draft law to the Grand National Assembly of Turkey under the 2017 amendments, and the removal of the regulation from the Constitution, it can be claimed that the restrictions on the powers of the Council of State are normal. However, the sudden abandonment of such established practices will create problems regarding the quality of the laws and sub-norms. In addition, in the new system, the authority to express opinions on presidential decrees might have been accorded to the Council of State. Finally, there is no change in the article on the Court of Jurisdictional Disputes, other than the removal of the phrase "military" under the 2017 amendments.[63]

C. Council of Judges and Prosecutors

When it comes to constitutional issues related to the judiciary, many people think of high councils that have authority over the recruitment, appointment and personal rights of judges and prosecutors. In Turkey, the council in question is the Council of Judges and Prosecutors (HSK). Prior to the 1961 Constitution, the Minister of Justice was authorized to appoint judges and prosecutors.[64] As mentioned above, for the first time ever, the 1961 Constitution chose to regulate the Supreme Council of Judges within the Constitution. With the 1971 amendments, the Supreme Council of Prosecutors was also enshrined in the Constitution. The 1982 Constitution merged the two Councils into one. Article 59 of the 1982 Constitution, which regulates the Council, was not amended until the 2010 constitutional amendments. However, the main innovations brought about by the 2010 and 2017 amendments regarding the judiciary were mostly related to the Council of Judges and Prosecutors.

However, the main innovations brought about by the 2010 and 2017 amendments regarding the judiciary were mostly related to the Council of Judges and Prosecutors.

With the 2017 amendments, the appellation "High" was removed from the Council's name. Prior to the 2010 amendments, the Head of State would elect its members, three regular and three substitute members from the Court of Appeals, two regular and two substitute members from the Council of State, from among three candidates to be nominated for each vacancy, by the respective general assemblies of these bodies, for a period of four years, and at the end of their terms, members could be re-elected. With the 2010 constitutional amendments, an important reform was carried out in terms of the formation of the Council. Firstly, it was regulated that the Council would consist of twenty-two regular and twelve substitute members

63 1982 Constitution, art. 158: "*The Court of Jurisdictional Disputes shall be empowered to deliver final judgments in disputes between civil, criminal and administrative courts concerning their jurisdiction and judgments. The organization of the Court of Jurisdictional Disputes, the qualifications and electoral procedure of its members, and its functioning shall be regulated by law. The office of president of this Court shall be held by a member delegated by the Constitutional Court from among its own members. Decisions of the Constitutional Court shall take precedence in jurisdictional disputes between the Constitutional Court and other courts.*"

64 See: Bezar Eylem EKİNCİ, Anayasa Hukuku Açısından Yüksek Yargı Kurulları, Ankara, Turhan, 2019, pp. 286-288.

and work in three chambers. In addition, new and very detailed regulations were introduced in terms of the selection of members. Pursuant to the new regulations, it was envisaged that four regular members of the Council would be elected by the Head of State, from among academic members in the field of law in higher education institutions and lawyers, the qualifications of whom are defined by law; three regular and three substitute members would be elected by the General Assembly of the Court of Appeals from among the members of the Court of Appeals; two regular and two substitute members would be elected by the General Assembly of the Council of State from among the members of the Council of State; one regular and one substitute member would be elected by the General Assembly of the Justice Academy of Turkey from among its members; seven regular and four substitute members would be elected by judges and public prosecutors from civil and criminal jurisdiction from among judges and public prosecutors who are first class judges or prosecutors and who have not lost the qualifications required for being a first class judge or prosecutor; three regular and two substitute members would be elected by administrative judges and public prosecutors from among administrative judges and public prosecutors who are first class judges or prosecutors and who have not lost the qualifications required for being a first class judge or prosecutor – all for a period of four years.[65] It was also regulated in the article that members whose terms expired could be re-elected. What is interesting about this amendment is that although it regulated that faculty members and senior administrators working in the fields of economics and political sciences of higher education institutions could be elected, these phrases were annulled by the Constitutional Court. According to the Court,

> It might be thought that lawyers and faculty members will contribute to the work of the Council due to their direct relations with the judiciary, the fact that the problems arising from the functioning of the judiciary also affect them to a certain extent, and their knowledge on the functioning of the judiciary. However, it violates the principles of independence of the judiciary and the guarantee of judgeship, and undermines the rule of law that faculty members and senior administrators working in the fields of economics and political sciences, who are in no way related to the functioning of the judiciary or the judicial organization, and who do not possess enough knowledge, experience or interest regarding principles of judicial independence and the guarantee of judgeship, all of which are required in the functioning of the judiciary, regarding the problems of the judiciary and the judges, and the fulfilment of judicial duties, are appointed to a Council responsible for the recruitment, appointment, promotion and disciplining of judges and prosecutors. For this reason, the phrases "economics and political sciences" and "senior administrators" in the third sentence of the third paragraph of the amended Article 159 of the Constitution must be annulled.[66]

What is interesting about this amendment is that although it regulated that faculty members and senior administrators working in the fields of economics and political sciences of higher education institutions could be elected, these phrases were annulled by the Constitutional Court.

65 Pursuant to paragraph 4 of the amended article, "*Election of members to the Council shall be held within sixty days before the members' term of office expires. If a vacancy arises in the Council before the presidentially elected members' term of office expires, new members shall be elected within sixty days following such vacancy. If a vacancy arises in other memberships, remaining term of office is fulfilled by the substitute member.*"

66 AYM, E. 2010/49, K. 2010/87, T. 07/07/2010.

Therefore, the Constitutional Court annulled the regulation allowing the election of non-lawyer members to the Council, considering it contrary to the rule of law, which is one of the unamendable articles in the Constitution. In the same decision, the Constitutional Court also annulled the phrase regarding voting only for a single candidate:

> (...) According to the fifth paragraph of Article 159 of the amended Constitution, the members of the Council are directly elected by the Court of Appeals, the Council of State, the Justice Academy of Turkey, and first-class judges and public prosecutors. However, in these elections, the principle was introduced that each voter would vote for only one candidate. Accordingly, each Court of Appeals member would be able to vote for only one candidate for a total of six Council members, three of whom are regular and three substitutes, to be nominated by the General Assembly of the Court of Appeals. In this case, each Court member would be able to vote for only one of the six Council members, and his/her will not be reflected in the election of the remaining others. The same situation also applies to the election of two regular and two substitute members to be elected by the Council of State, one regular and one substitute member to be elected by the Justice Academy of Turkey, seven regular and four substitute members to be elected by the judges and public prosecutors, and three regular and two substitute members to be elected by the administrative judges and public prosecutors. Accordingly, there is no doubt that an election procedure that falls short of reflecting the will of the voters, in that it doesn't grant voters the right to vote for certain candidates, is undemocratic. It is clear that this regulation, which restricts the true representation of the will of the voters in the votes they cast, and which thus negatively affects the will of the voters, would also prevent the formation of an independent and impartial judiciary, which is the fundamental element of the rule of law. For this reason, the phrase "only for one candidate" in the first sentence of the fifth paragraph of Article 159 of the Constitution, which was amended by Article 22 of the Law No. 5982, must be annulled.[67]

According to the constitutional regulation currently in effect (art. 159), the Council is composed of thirteen members, and comprises two chambers.

Following criticism that the said changes did not prove as useful as anticipated, that they caused sectarianism and damaged the impartiality of the Council,[68] this system was completely abandoned with the 2017 amendments. At the same time, the word "High" in the title was removed, and "High Council of Judges and Prosecutors" became "Council of Judges and Prosecutors". It is not known whether this change has a reasonable justification, but it can be said with certainty that it contains a message.[69] According to the constitutional regulation currently in effect (art. 159), the Council is composed of thirteen members, and comprises two chambers. Three members of the Council are appointed from among first class judges and public prosecutors from civil and criminal jurisdiction not having lost the qualification to be reserved in the first class, and one member is appointed from among first category administrative judges and public prosecutors not having lost the qualification to be reserved in the first class, by the Head of State; three members are elected from among the members of the Court of Appeals; one member is

67 AYM, E. 2010/49, K. 2010/87, T. 07/07/2010.

68 For instance, see: Yavuz ATAR, Türk Anayasa Hukuku, 14th edition, Ankara, Seçkin, 2021, pp. 313-314.

69 No information regarding this point is given in the justification of the amendment.

elected from among the members of the Council of State and three members are elected from among teaching staff working in the field of law at higher education institutions and lawyers, whose qualifications are specified in law by the Grand National Assembly of Turkey. Among the members elected from among the teaching staff and lawyers, at least one member must be teaching staff and one member must be a lawyer. Applications for membership in the Council to be elected by the Grand National Assembly of Turkey are made to the Office of the Speaker of the Assembly. These applications are referred by the Office of the Speaker to the Joint Committee composed of the members of the Committee on the Constitution and the Committee on Justice. For each membership, the Committee nominates three candidates with a two-thirds majority of the total number of its members. In case the Committee fails to conclude the nomination of candidates in the first ballot, a three-fifths majority of the total number of its members is required in the second ballot. If the candidates also cannot be nominated in the second ballot, the procedure of nomination is concluded by drawing lots between the two candidates who received the highest number of votes for each membership. The Grand National Assembly holds separate elections by secret ballot for each membership, from among the candidates nominated by the Committee. A two-thirds majority of the total number of the members is required in the first ballot; in case the election cannot be concluded, a three-fifths majority of the total number of the members is required in the second ballot. In case the member also cannot be elected in the second ballot, the election of the members shall be concluded by drawing lots between the two candidates who received the highest number of votes. Members are elected for a term of four years, and may be re-elected once at the end of their term of office.

With the 2010 constitutional amendment, it was envisaged that it would consist of members to be elected by the Head of State, the Court of Appeals, the Council of State, the Justice Academy of Turkey and first class judges and public prosecutors.

While the Council consisted of members elected by the Head of State from among the candidates nominated by the members of the Court of Appeals and the Council of State in the first version of the Constitution; with the 2010 constitutional amendment, it was envisaged that it would consist of members to be elected by the Head of State, the Court of Appeals, the Council of State, the Justice Academy of Turkey and first class judges and public prosecutors. In this framework, by increasing the representative quality of the Council, the role of judges and prosecutors in determining the structure of the Council which makes decisions about them was also increased. However, with the 2017 constitutional amendments, this system was abolished and the authority to elect members was divided between the Head of State and the Grand National Assembly of Turkey. In this respect, the most important difference of the current system from the previous ones is that for the first time, the TGNA was also included in the election of the Council's members.[70] However, it should be noted that the structuring following the 2017 amendments is the worst, compared to the past versions, in terms of judicial independence.[71]

70 ATAR, Türk Anayasa Hukuku, p. 314.

71 Bülent TANÖR, Necmi YÜZBAŞIOĞLU, 1982 Anayasasına Göre Türk Anayasa Hukuku, 20th edition, İstanbul, Beta, 2020, p. 467.

III. CONSTITUTIONAL SOLUTIONS TO THE PROBLEMS REGARDING THE FORMATION AND CHARACTERISTICS OF THE JUDICIAL BRANCH

In his famous work *The Spirit of the Laws*, Montesquieu states that compared to the monarchy which he lived under, there was less freedom in the Italian republics, where there was no separation of powers.[72] What the famous thinker wants to emphasize here is that the separation of powers is much more important in terms of freedoms compared to the type of political regime, such as a monarchy or a republic. The same still holds true in our day. It should not be surprising in this context that western monarchies are at the top of the current democracy indexes today. The same is true for government systems. We cannot categorically say that there would be more freedom in either a presidential or a parliamentary system. Considering the function of the judiciary in terms of protecting freedoms in liberal states, the important thing is that the judiciary is independent, no matter which government system is adopted.

Considering the function of the judiciary in terms of protecting freedoms in liberal states, the important thing is that the judiciary is independent, no matter which government system is adopted.

In fact, it is for this reason that the legislative-executive relations are taken as the basis in making modern distinctions regarding government systems, and that the judiciary does not play a decisive role. However, it cannot be said that governmental systems have no effect on the judicial branch. When a government system is chosen, while determining what this system should be, the powers of the legislative and executive organs related to the judiciary are also a matter of discussion. However, since it is thought that most of the constitutional problems related to the judiciary in Turkey are not about the particular government system in place, many of the recommendations made here are independent of the nature of the government system. Nevertheless, first of all, the changes that need to be made in the constitutional arrangements regarding either the continuation of the presidential system or a return to the parliamentary system will be briefly discussed.

A. Changes to be Made if the Presidential System is Continued

Due to the extreme polarization experienced during the recent period of constitutional amendments, there were some who expressed the incorrect opinion that change in the

72 Charles de Secondat de MONTESQUIEU, De l'esprit des lois, Vol. XI, Chapter VI (*De la constitution d'Angleterre*). For the Turkish translation, see: MONTESQUIEU, Kanunların Ruhu Üzerine, Çeviren: Berna Günen, 6th edition, İstanbul, Türkiye İş Bankası Kültür Yayınları, 2021, p. 199.

government system in Turkey required changes in the distribution of powers between central and local governments – referring to the vertical separation of powers – or that certain models must be adopted in terms of the structuring of the high judiciary. Since there is a federal system of government in the United States of America, where the prototype of the presidential system is to be found, some claimed that a federal structure would also be adopted in Turkey from now on; or that a judicial body organized under a single high court, as in the United States, would be adopted within this framework. However, while a presidential system is implemented in the US, which is a federal state, a parliamentary system is implemented in another federal state, Germany. Similarly, while the structure of the judiciary is different in the US, the system of judicial separation similar to ours has been adopted in Germany.[73] Therefore, a given government system does not require a federal or unitary state structure, nor does it require the existence of a specific model in terms of structuring the judiciary. In a state where the presidential system is implemented, a federal or unitary structure may be adopted, as well as organizational separation between civil, criminal and administrative jurisdictions or unity in terms of the judicial body. The preference regarding the judiciary is related to the legal system rather than the government system.

In a state where the presidential system is implemented, a federal or unitary structure may be adopted, as well as organizational separation between civil, criminal and administrative jurisdictions or unity in terms of the judicial body.

Diverse interpretations and designs may be brought to bear on the presidential system, which is the prototype of the system implemented in the US, as long as the president is elected by the people and does not require the support of the parliament to continue his office.[74] In this context, seeking the approval of the legislature on judicial appointments is not indispensable for the presidential system. However, in most states with the presidential system, including the US, the appointment of members of the high courts is submitted to the approval of the legislature.[75] Although it cannot be denied that the most fundamental factor that distinguishes the presidential system in the US and the presidential systems in place in South American countries is that the president is more powerful than the other bodies, and especially the parliament,[76] the approval of the legislature is indispensable for the appointment of high court members in most of the South American countries as well. In the United States, federal judges are appointed by the president, but the Senate must approve the appoint-

73 Judicial branches are generally categorized under two groups: The systems with a judicial organization affiliated to a single high court are described as united systems, while the systems with more than one high court in the judicial branch differ according to the nature of the dispute and are described as separated systems. See: EREN, Anayasa Hukuku Dersleri Genel Esaslar-Türk Anayasa Hukuku, s. 1037-1040.

74 Volkan ASLAN, Karşılaştırmalı Anayasa Hukukunda ve Türkiye'de Devlet Başkanının Kararname Yetkisi, İstanbul, On İki Levha, 2020, pp. 68-69.

75 EREN, Anayasa Hukuku Dersleri Genel Esaslar-Türk Anayasa Hukuku, p. 1069. For instance, see: The Constitution of Argentina, art. 99/4; The Constitution of Brazil, art. 101.

76 For a general overview, see: Murat AÇIL, Latin Amerika Ülkelerinde Başkanlık Sistemi, İstanbul, On İki Levha, 2018, the entire book; Serap YAZICI, Başkanlık ve Yarı-başkanlık Sistemleri: Türkiye İçin Bir Değerlendirme, 2nd edition, İstanbul, İstanbul Bilgi Üniversitesi Yayınları, 2011, pp. 19-90; Şule ÖZSOY BOYUNSUZ, Dünyada Başkanlık Sistemleri: Karşılaştırmalı Bir Analiz, Ankara, İmge Kitabevi, 2017, the entire book; Yüksel METİN, Başkanlık Sistemi: Amerika Birleşik Devletleri ile Latin Amerika Ülkelerinin Mukayesesi, Ankara, Hukuk Yayınları, 2017, the entire book.

ments.[77] Even in the case of the Supreme Court of the United States, appointments that the president seeks to make have sometimes been obstructed or blocked by the Senate.[78] Moreover, in the US, due to loose party discipline, even if the president's party is in the majority in the Senate, the Senate may not approve the president's candidate. In Turkey, on the other hand, there is no such approval requirement for appointments made by the Head of State to the high courts. In many academic works published on the subject, it is criticized that the Head of State's appointments to the high courts are not subject to parliamentary approval. It should be noted that in cases where the majority of the Parliament supports the President, as is the case today, subjecting appointments to the high courts to the approval of the Grand National Assembly of Turkey will not make any difference in practice. However, it may be functional to stipulate that the approval condition may only be met with qualified numbers.

Since political parties in Turkey are well-disciplined, it does not seem possible for a deputy who is in the same party as the Head of State, or in the alliance that supports the Head of State, to vote differently than the party.[79] As a matter of fact, in Turkey, if the Head of State has the support of the majority of the TGNA, it does not seem possible for the Parliament to reject the Head of State's actions due to strict party discipline, which is currently the case. Pursuant to our constitution, which does not seek the approval of the Grand National Assembly regarding appointments, the Head of State can make appointments directly to the high courts and the Council of Judges and Prosecutors, even if he does not have the support of the parliamentary majority. As a matter of fact, if the presidential system is to continue in Turkey, the resolution would be to require the approval of the Grand National Assembly of Turkey for the Head of State's appointments to the high judiciary, and to stipulate in the constitution that this approval can be obtained with qualified numbers. Thus, even if the support of the parliamentary majority is ensured, the opposition may also have a role to play regarding appointments to the higher judiciary, due to the inability to attain qualified numbers.

It is criticized that the Head of State's appointments to the high courts are not subject to parliamentary approval.

Turkey does not have a second parliamentary chamber, which is indispensable for federal states and which may counterbalance the first chamber if it is given power by designating it differently from the first chamber. As a matter of fact, if the executive branch has the support of the parliamentary majority, it will not make much sense to subject

77 See: GÖZLER, Elveda Anayasa: 16 Nisan 2017'de Oylayacağımız Anayasa Değişikliği Hakkında Eleştiriler, pp. 59-60.

78 For examples, see: GÖZLER, Elveda Anayasa: 16 Nisan 2017'de Oylayacağımız Anayasa Değişikliği Hakkında Eleştiriler, p. 62.

79 Considering that the Head of State has only used his veto power once since 2018, when the presidential system was first implemented, according to my findings, I think what I mean here is clear. President Erdoğan sent the "Law on the Amendment of the Digital Service Tax and Some Laws and the Decree Law No. 375", numbered 7193, which includes postponement of the installation of filters in thermal power plants, to the Presidency of the Turkish Grand National Assembly to be discussed once again. See: (Online) https://www.aa.com.tr/tr/turkiye/cumhurbaskani-erdogandan-veto-/1661662, Date of access: 10 September 2022.

the appointments to be made by the executive to the approval of the Parliament, as stated above. Since the choice of a two-chambered parliament with a different composition and powers for each is not on our constitutional agenda, the only way to balance the appointments of the head of state to the high judiciary in the current conditions would be not only to seek the approval of the Parliament, but to make this approval possible with a quorum greater than a simple majority. In this framework, the condition of approval by a two-thirds or three-fifths majority may be stipulated. Although there are similar regulations in the current constitution regarding certain officials to be elected by the TGNA, in case the quorum is not met, lower quorums are accepted in the following rounds, making the high quorum envisaged at the beginning pointless.[80] This is because there is no mechanism that will lead the parliamentary majority that cannot come to an agreement with the parliamentary minority in the first rounds. It is possible for a person who is unable to be elected by consensus in the first round to be elected in the following rounds despite the opposition of the minority. As a matter of fact, if the presidential system is to continue and the Head of State's appointments to the high judiciary and judicial councils are to be submitted for approval of the TGNA, the quorum must be kept high, and in such a way that it does not decrease in the next rounds. If the said quorum is not reached, it may be stipulated that the members of the court whose term of office has expired will continue their duties until a new one is elected.

If the presidential system is to continue and the Head of State's appointments to the high judiciary and judicial councils are to be submitted for approval of the TGNA, the quorum must be kept high, and in such a way that it does not decrease in the next rounds.

If the current government system is changed and a semi-presidential system is adopted, it is recommended to reduce the scope of appointments related to the high judiciary and to meet the above-mentioned requirements for the approval of the Grand National Assembly of Turkey, since the head of state will be elected by the people, and will have significant powers. In the case of a transition to the parliamentary system, the high number of members to be elected by the head of state to the high courts does not pose a problem in itself. In parliamentary systems, where the effective wing of the executive branch emerges from the legislature and is responsible to it,[81] the executive power is used by the prime minister and his cabinet, while the heads of state have highly symbolic powers.[82] It can be said that judiciary councils formed in a pluralistic structure and impartial heads of state are decisive in determining the membership of high courts in parliamentary systems.[83] As a matter of fact, in case of a transition to the parliamentary system, there

80 For instance, according to Paragraph 5 of Article 74 of the 1982 Constitution: "*The Chief Ombudsman shall be elected by the Grand National Assembly of Turkey for a term of four years by secret ballot. In the first two ballots, a two-thirds majority of the total number of members, and in the third ballot an absolute majority of the total number of members shall be required. If an absolute majority cannot be obtained in the third ballot, a fourth ballot shall be held between the two candidates who have received the greatest number of votes in the third ballot; the candidate who receives the greatest number of votes in the fourth ballot shall be elected.*"

81 Leon D. EPSTEIN, "Parliamentary Government", International Encyclopedia of Social Sciences, Ed. David L. Sills, C. XI, New York, The Macmillan Company & The Free Press, 1968, p. 419.

82 ASLAN, Karşılaştırmalı Anayasa Hukukunda ve Türkiye'de Devlet Başkanının Kararname Yetkisi, p. 73.

83 EREN, Anayasa Hukuku Dersleri Genel Esaslar-Türk Anayasa Hukuku, p. 1070.

can be no categorical objection to the Head of State's power to appoint members of the high courts. However, since the head of state exercises symbolic powers in parliamentary systems, the determination of most members should take place not without any restrictions, but after the filtering processes of the high courts and the Council of Judges and Prosecutors, such as the selection of specific people by the Head of State from the lists proposed by the high courts or the Council of Judges and Prosecutors.

B. Constitutional Solutions to Problems Independent of the Government System

As noted above, most of the constitutional problems related to the judiciary in Turkey existed before the changes in the government system. Today, if the presidential system is revised, or a radical decision is made to return to a semi-presidential or parliamentary system, the change in itself will not resolve many of the constitutional problems related to the judiciary. Therefore, it is necessary to discuss how the existing constitutional problems can be resolved regardless of the government system in place. In this context, the following recommendations will focus particularly on qualifications for entering the profession and guarantees of judgeship, the Constitutional Court, the High Court of Appeals, the Council of State, the Court of Accounts, the Council of Judges and Prosecutors, and the Supreme Election Council.

Today, in order to become a judge or a prosecutor, a written exam is taken, followed by an oral exam.

Equal Conditions for Entering the Profession and Safeguards for Judges: Today, in order to become a judge or a prosecutor, a written exam is taken, followed by an oral exam.[84] By and large, the public is convinced that the chances of success in these oral exams depend on personal connections, that the exams are held arbitrarily and that qualifications are not taken into account. Supporting this belief, news items recount events such as the elimination of those candidates who came first in the written exams. In such a system, the independence and impartiality of judges is damaged from the very beginning. Can a member of the judiciary, who is accepted into the profession with personal references mostly from politicians, act completely independently of the person who helped him/her, and his/her political opinion? The answer to this question is a resounding no. It would be quite unfair to claim that everyone who is accepted into the profession is accepted in this way.

84 For civil and criminal judge candidates, it is required to have graduated from a law faculty, or for those who graduated from a foreign law faculty, to take the exam for the courses that are missing according to the law faculty programmes in Turkey and to obtain a certificate of success. For administrative judge candidates, it is required to have graduated from a law faculty or to have completed a foreign law faculty and to have passed the exam for the courses that are missing according to the law faculty programmes in Turkey. For those who are to be hired from outside of law faculty graduates, whose proportion to the overall number of candidates to be hired each term should not surpass twenty percent, they must be graduates of departments of political science, administrative sciences, economics and finance whose curriculums sufficiently cover law subjects, or they must be graduates of foreign educational institutions whose equivalency is recognized by the competent authorities. As we see, the requirement to graduate from law school is not absolute for candidates for administrative judgeship. On the other hand, those with a doctorate in law are only subject to oral exam.

However, even the fact that this claim is made casts a shadow over the impartiality of admission procedures to the profession. For all these reasons, if an oral exam is to be conducted when applying to a public office, especially as a judge or a prosecutor, it would be suitable to directly regulate the fundamental principles of these exams – such as ensuring publicity and openness – in the Constitution. Such publicity can be achieved by recording the oral exams, broadcasting them live and/or making them available to the public. Thus, candidates who believe they have been wronged may use the necessary administrative and judicial remedies as required.

The profession of judge or prosecutor should not be a comfort-zone profession that bypasses "the ordeal to become a well-paid lawyer", while providing a guaranteed salary and status. It is necessary to attract successful young people who choose this profession not because of economic concerns, but because they genuinely want to serve in this way. The ever-increasing number of law faculties, and the excessive numbers of law students who graduate from them without receiving a qualified education, are unfortunately the main cause underlying this problem. Although it is not possible to make a direct constitutional regulation on this issue, the competent authorities should formulate educational plans and programmes accordingly. It should not be forgotten that all components of the judiciary influence and feed into one another: qualified law faculties train qualified lawyers, judges and prosecutors; qualified lawyers improve judges and prosecutors and the entire judiciary in general.

There are various guarantees that are generally included in the tenure of a judge: not being dismissed, not being sent to retirement, not being deprived of salary and allowances, not being appointed to administrative duties, the geographical guarantee and not being appointed to the prosecutor's category.[85] The last two of these guarantees are not available in Turkey. As Gözler points out, in a country like Turkey with rampant geographical inequality, the possibility that a judge working in a beautiful city might be assigned to an underdeveloped setting at any moment can lead to pressure on the judge.[86] Moreover, the geographical guarantee must include not only not being transferred from one city to another, but also not being assigned to a different court within the same city.[87]

In a country like Turkey with rampant geographical inequality, the possibility that a judge working in a beautiful city might be assigned to an underdeveloped setting at any moment can lead to pressure on the judge.

The geographical guarantee should be stipulated at least in the field of criminal justice, and failing that, at least for judges in the heavy criminal courts. In Turkey, which is quite a large country, the geographical guarantee may come into effect after a certain level of seniority. However, in this case, it seems inevitable that being a judge in certain courts such as heavy criminal courts will become connected to a certain level of seniority. Oth-

85 GÖZLER, Türk Anayasa Hukuku, pp. 1175-1178.

86 GÖZLER, Türk Anayasa Hukuku, p. 1177. Also see: Abdulkadir YILDIZ, Yargının Tarafsızlığı, İstanbul, On İki Levha, 2020, pp. 192-195.

87 GÖZLER, Türk Anayasa Hukuku, p. 1177.

erwise, the said assurance will be meaningless. If the geographical guarantee is valid from the first appointment, then there may be a shortage of judges in some cities. The way to prevent this is to grant the geographical guarantee after a certain level of seniority and not to appoint junior judges to courts whose rulings are far-ranging, such as heavy criminal courts. For all these reasons, the geographical guarantee should be regulated in the Constitution and should not be left to the mercy of the inferior regulations.

The Constitutional Court: When we look at the formation of constitutional courts in comparative law, the following models are observed: 1 - all members are elected by the legislature; 2 - the power to elect members is shared between the legislative and executive organs; and 3 - the members are elected by the legislative, executive and judicial organs.[88] In Turkey, a model different from these is not implemented. As can be seen above the legislative, executive and judicial organs all use their authority to determine the members of the Constitutional Court. However, the main problem in determining the members in Turkey is that the judiciary is generally dependent on the executive, and the Head of State has too much influence in the determination of all the members, since the TGNA has no distinct will from that of the Head of State.[89] In addition, another problem in Turkey is that the conditions that must be fulfilled in order to be elected a member of the Constitutional Court are sometimes artificially satisfied. For this reason, it should not suffice that individuals who are to become members of the Constitutional Court hold a certain position; it should also be a prerequisite that they have spent a certain period of time in that position.[90] As a matter of fact, there have been cases where people were appointed to certain positions for a very short period, merely so that they might be elected as a member of the Constitutional Court. Some instances of such practices are as follows: one member's election to the Constitutional Court thirty days after being appointed as a senior administrator; or another member's becoming a candidate for Constitutional Court membership immediately after being elected to Court of Appeals membership, his participating in the elections in the General Assembly of the Court of Appeals and being appointed by the Head of State.[91] In order to prevent this kind of abuse, the condition of having served for a certain period of time must be sought, regardless of where individuals are coming from. Some exemplary conditions might be that members are only appointed from "among those who have worked as a senior administrator for at least ten years" or "among those who have served as a member of the Court of Appeals/Council of State for at least five years". On the other hand,, since the establishment of the Turkish Constitutional Court, the number of female members has been only five, compared to more than 120 male mem-

It should not suffice that individuals who are to become members of the Constitutional Court hold a certain position; it should also be a prerequisite that they have spent a certain period of time in that position.

88 GÖZLER, Türk Anayasa Hukuku, p. 1211.

89 It is one of the views defended in the doctrine that the rightness of giving the political authorities the power to elect members to the Constitutional Court in Turkey is questionable. See: GÖZLER, Türk Anayasa Hukuku, p. 1212.

90 GÖZLER, Türk Anayasa Hukuku, pp. 1212-1217.

91 For detailed information, see.: GÖZLER, Türk Anayasa Hukuku, pp. 1212-1217.

bers.[92] Currently, there is not a single female member of the Court. It is not acceptable for a high court that serves equality, rights and freedoms to have such a gender imbalance within itself. The introduction of a constitutional regulation on the number of male and female judges might be considered within this framework.

It should be noted that in liberal states, what legitimizes the judiciary, constitutional review, judicial councils and the like today is their role of protecting rights and freedoms and being the guardian of the constitution. In terms of democratic legitimacy, the discourse on representative necessity for the judiciary (echoing what is appropriate for the legislature and the executive) is wrong. Considering the permanent duty of those who serve in the judicial organs, the assessment of democratic legitimacy of the members of the legislature and the executive, who are temporarily appointed and whose are replaced by others if they are not elected in the next elections, cannot be the same as the judiciary. In other words, the main legitimacy of the judiciary emerges from its function: the protection of freedoms, the rule of law and democracy.[93] If the judiciary does not fulfil these functions, sooner or later it will lose its legitimacy even if all its members are elected by the people. At this point, a few words might be said on the conflict between the constitutional courts and democratic legitimacy, especially the constitutionality review. Today, it is often said, the fact that the actions of the representatives of the nation can be annulled by judges who are not elected by the people is incompatible with democracy; this is claimed especially by politicians who are not satisfied with the decisions of the high courts. However, especially after the Second World War, the inadequacy of the political authorities in protecting the constitution, and the resulting disadvantages of the situation became apparent.[94] The fact that constitutional courts, or courts of instance and high courts that perform the same function are widespread in many states, apart from certain exceptional states, demonstrates the truth of this claim. As a matter of fact, the constitutional courts also fulfil the "function of the (re)production of legitimacy" as long as they protect the rights of the individual against political authority and adopt a liberal approach.[95] In this case, the legitimacy of the Turkish Constitutional Court is directly tied to its capacity to protect and develop rights and freedoms. Considering

The main legitimacy of the judiciary emerges from its function: the protection of freedoms, the rule of law and democracy.

92 Şeref İBA, Abbas KILIÇ, Anayasa Yargısı Dersleri, 4th edition, Ankara, Turhan, 2021, p. 205.

93 Burak ÇELİK, Hâkimler ve Savcılar Yüksek Kurulu: Yapısal Açıdan Karşılaştırmalı Bir İnceleme, İstanbul, On İki Levha, 2012, pp. 148-155.

94 The debates in the German Public Law doctrine before the war about who would be the protector of the constitution are very interesting in this respect. While one of the two dominant views on this issue holds that the protector of the constitution should be the head of state, the other view places the burden on the shoulders of the constitutional court. In this respect, the famous polemic between the renowned lawyers Carl Schmitt and Hans Kelsen should also be mentioned. See: Carl SCHMITT, Der Hüter der Verfassung, Verlag Von J. G B. Mohr Paul Siebeck, Tübingen, 1931; Hans KELSEN, Wer soll der Hüter der Verfassung sein?, Berlin-Grunewald, W. Rothschild, 1931. For a contemporary Turkish study of the debate in question, see: Berke ÖZENÇ, Demokrasi ve Anayasayı Korumak: Kelsen Schmitt'e Karşı, İstanbul, İletişim, 2022, the entire book.

95 Zühtü ARSLAN, Anayasa Teorisi, Ankara, Seçkin, 2008, p. 52.

the performance of the Court in recent years, although a great contribution has been made to the protection of rights and freedoms, especially through individual application decisions, the reversal of some established jurisprudence on norm control has created very troubling consequences regarding rights and freedoms.[96] In this context, the changing case-law of the Court regarding the emergency decree laws can be cited as a striking example. In its decisions until 2016,[97] the Court accepted that the prohibition of review in the Constitution regarding the emergency decree laws is valid for decrees truly of this nature, and the Constitutional Court has the authority to determine whether the decrees are of this nature. In 2016, the Court ruled that it did not have the authority to inspect whether the emergency decrees were really of this nature, and rejected the annulment applications regarding such decrees on the grounds of lack of jurisdiction.[98] In this case , it became possible for the said decrees to be reviewed by the Constitutional Court only after they were enshrined into law.[99] The best solution, in this case, would be not to include such prohibitions in the Constitution, which are incompatible with the principle of the rule of law, and the prohibition on judicial review regarding emergency decree laws must also be changed.[100]

Considering the performance of the Court in recent years, although a great contribution has been made to the protection of rights and freedoms, especially through individual application decisions, the reversal of some established jurisprudence on norm control has created very troubling consequences regarding rights and freedoms.

Increasing the number of those who can apply to the Constitutional Court and expanding the scope of individual applications should also be evaluated within the scope of the prospective amendments to the 1982 Constitution. It should be considered within this framework that the high judiciary might trigger the constitutionality review regarding its own fields of duty, and that public legal entities might make individual applications. Although it is stated in the Constitution that "everyone" can make an individual application,[101] it is stipulated by law that public legal entities cannot make individual applications, and this limitation in terms of eligible applicants was ruled to be constitutional by the Constitutional Court.[102] The individual application mecha-

96 Generally on this subject, see: Volkan ASLAN, "The Role of Turkish Constitutional Court in the Democratization Process of Turkey: From 2002 to Present", Constitutionalism in a Plural World, Edited by Catarina Santos Botelho/ Luis Heleno Terrinha/Pedro Coutinho, Porto, 2018, pp. 139-155.

97 See: AYM, E. 1990/25, K. 1991/1, T. 10/01/1991; AYM, E. 1991/6, K. 1991/20, T. 03/07/1991; AYM, E. 2003/28, K. 2003/42, T. 22/05/2003.

98 For instance, see: AYM, E. 2016/166, K. 2016/159 T. 12/10/2016; AYM, E. 2016/167, K. 2016/160, T. 12/10/2016.

99 For detailed information on this subject, see: Volkan ASLAN, "Executive Decree Authority in Turkey Before the Constitutional Amendments of 2017: In Light of the Turkish Constitutional Court's Retreat", Annales de la Faculté de Droit d'Istanbul, No. 67, 2019, pp. 17-30.

100 Even though with the 2017 amendments, the provision that "*Except in the case of inability of the Grand National Assembly of Turkey to convene due to war or force majeure events, presidential decrees issued during the state of emergency shall be debated and decided in the Grand National Assembly of Turkey within three months. Otherwise presidential decrees issued during the state of emergency shall be annulled automatically*" was enshrined in the Constitution, the three-month period may also lead to the violation of rights and freedoms. Ideally, emergency decrees should be open to judicial review and examined in a much shorter time period than other regulations and actions.

101 See: Law No. 6216 on the Establishment and Trial Procedures of the Constitutional Court, art. 46/2.

102 AYM, E. 2011/59, K. 2012/34, T. 01/03/2012. For a detailed discussion of the subject, see: Hikmet Berk TURHAN, Anayasa Mahkemesi'ne Bireysel Başvuruda Kamu Tüzel Kişilerinin Başvuru Ehliyeti, Ankara, Seçkin, 2022, the entire book; Ömer EKMEKÇİ, H. Burak GEMALMAZ, Volkan ASLAN, H. Hilal YILMAZ, Anayasa Mahkemesine Bireysel Başvurunun Temel Esasları ve İş ve Sosyal Güvenlik Hukukuna İlişkin Kararlar, İstanbul, On İki Levha, 2022, pp. 9-11; Tolga ŞİRİN, Türkiye'de Anayasa Şikâyeti (Bireysel Başvuru): İnsan Hakları Avrupa Mahkemesi ve Almanya Uygulaması ile Mukayeseli Bir İnceleme, İstanbul, On İki Levha, 2013, pp. 227-249.

nism should be stipulated as a right that can be used by public legal entities, especially universities and local governments. This is because the rights of these entities can be violated by another public power, especially the central government.

The Court of Appeals and the Council of State: Considering that after the 2010 constitutional amendments, the number of members of the Court of Appeals and the Council of State was first decreased and then increased by ordinary law, Gözler states that there is no point in discussing the independence of the judiciary or the member election procedure of the Council of Judges and Prosecutors in a country where the number of members is manipulated in this way; and that no matter which system of government is adopted, the number of members of the high court can still be easily manipulated.[103] For these reasons, according to the author, it would be useful to determine the number of members of the high courts directly in the Constitution.[104] It is difficult not to agree with this view, albeit with sorrow. In this context, it may be preferred that the number of members of the Court of Appeals and the Council of State be determined by the Constitution. However, with the exception of constitutional amendments, the provision of higher-qualified quorums for the adoption of laws related to the high courts compared to the adoption of ordinary laws can have a similar function. Thus, when altering the number of members of the Court of Appeals and the Council of State is really necessary, instead of conducting the process by means of a combative and conflicting constitutional amendment process that may also include a referendum, it ought to be conducted by means of laws that may be accepted with qualified numbers that require the agreement of multiple parties in the Parliament. There are already such regulations in the 1982 Constitution. For example, pursuant to Article 87 of the 1982 Constitution, the Grand National Assembly of Turkey can only decide on general or special amnesty with the support of three-fifths of the total number of members. It might be similarly envisaged in the Constitution that the laws regarding the determination of the number of members of the Court of Appeals and the Council of State and other relevant issues can be adopted with qualified quorums of this sort. Even if this cannot be done, the regulation of the number of members of the Court of Appeals and the Council of State directly in the Constitution would be more appropriate than the current situation.

It would be useful to determine the number of members of the high courts directly in the Constitution.

The Court of Accounts: Although it is debatable whether the Court of Accounts is a court or not, we see that this institution is regulated within the "Judiciary" section of the 1982 Constitution. There is no rule in the Constitution regarding the formation of the Court of Accounts; it is stated that the matter shall be regulated by law. Rather than its formation, the duties and powers of the Court of Accounts are briefly

103 GÖZLER, Türk Anayasa Hukuku, pp. 1185-1189.
104 GÖZLER, Türk Anayasa Hukuku, p. 1189.

mentioned in the Constitution (art. 160). The main problem with this institution which performs financial auditing is that there are obstacles to holding responsible those concerned in case the accounts do not match. However, behind these obstacles are other existing problems related to the independence of the judiciary, and it does not seem possible to fix them by making constitutional regulations regarding the Court of Accounts. Nevertheless, the formation of the Court of Accounts may be directly regulated by the Constitution, similar to the high courts.

The Council of Judges and Prosecutors: Today, in many countries, political organs such as the legislature and the executive are generally authorized in election of the members of the high courts. The common practice in determining the judges and prosecutors working in lower courts is to leave this task to the judicial councils.[105] The most ideal situation for high judicial councils in order to assure their independence against the political organs is that the majority or all of the members are composed of judges, who are elected by the judges.[106] However, if necessary qualifications are not taken into account in entering the profession, and if entry to the profession continues to be realized through personal references, even if such a method as outlined here is adopted in Turkey, it would not be able to make the judiciary independent. At the same time, the fact that the chairman of the Council is the Minister of Justice, and the undersecretary of the Ministry of Justice is a natural member of the Council is a problem which has remained since the 1982 Constitution came into force, and which has been frequently criticized. However, it should be noted that the membership of the Minister of Justice to the Council, in itself, does not endanger the independence of the judiciary; and similarly, the fact alone that the minister is part of the Council would not mean that the Council does not have democratic legitimacy.[107] In this respect, the important thing is the minister's powers regarding the Council and his role in the system.[108] However, it is also argued in the doctrine that the election of the members of the Council of Judges and Prosecutors by the Court of Appeals and the Council of State instead of the political authorities may be a more appropriate method in terms of ensuring the independence of the judiciary.[109] It would be much more appropriate to establish separate councils for judges and prosecutors, no matter how their members are determined. It is not appropriate for the same council to be in charge of the personal rights of two professional groups in different positions.[110] In Turkey, during the era of the 1961 Constitution, the

The most ideal situation for high judicial councils in order to assure their independence against the political organs is that the majority or all of the members are composed of judges, who are elected by the judges.

105 EREN, Anayasa Hukuku Dersleri Genel Esaslar-Türk Anayasa Hukuku, s. 1068. Also see.: Levent Gönenç, Dünyada ve Türkiye'de Yüksek Yargı Kurulları, TEPAV Anayasa Çalışma Metinleri, 2011, (Online) https://www.tepav.org.tr/upload/files/1299852383-2.Dunyada_ve_Turkiye_de_Yuksek_Yargi_Kurullari.pdf, Date of access: 11 September 2022.

106 Ergun ÖZBUDUN, Anayasalcılık ve Demokrasi, İstanbul, İstanbul Bilgi Üniversitesi Yayınları, 2015, p. 65.

107 ÇELİK, Hâkimler ve Savcılar Yüksek Kurulu: Yapısal Açıdan Karşılaştırmalı Bir İnceleme, p. 224.

108 ÇELİK, Hâkimler ve Savcılar Yüksek Kurulu: Yapısal Açıdan Karşılaştırmalı Bir İnceleme, p. 225.

109 GÖZLER, Türk Anayasa Hukuku, p. 1183.

110 TANÖR, YÜZBAŞIOĞLU, 1982 Anayasasına Göre Türk Anayasa Hukuku, p. 468. Also see: Erdoğan TEZİÇ, Anayasa Hukuku, 25th edition, İstanbul, Beta, 2021, pp. 481-482.

judges and prosecutors' councils were separate, while with the 1982 Constitution, a single council was authorized for the two professional groups. In this framework, it would be appropriate to return to the practice of separate councils, which was in place before 1982, and to enshrine the rules regarding this distinction in the Constitution.

The principle of independence of courts requires that a court be independent not only from the legislative or executive branch, but also from other judicial institutions and the environment.[111] At this point, it is necessary to mention the powers of the Council of Judges and Prosecutors over the courts, judges and prosecutors; and the decisions it has made. Prior to the 2010 constitutional amendments, it was stipulated that no appeal could be made to the judicial authorities against the decisions of the Council of Judges and Prosecutors. Pursuant to Article 159 of the 1982 Constitution, which is currently in effect, no appeal can be made to the judicial authorities against the decisions of the Council of Judges and Prosecutors, other than those related to the penalty of dismissal from the profession. Although judicial review has been enabled against decisions regarding dismissal, it is still not possible to submit to judicial review such actions as disciplinary punishment, transfer to another place or procedures related to promotion. In a democratic state of law, such limitations on judicial review are unacceptable. Judicial review of the other decisions of the Council of Judges and Prosecutors should also be made possible by amending the Constitution. Moreover, this is not only a requirement of the rule of law, but also of Turkey's international obligations. The European Court of Human Rights has also considered in its decision that the inability to apply to a judicial body against disciplinary punishment imposed by the Council of Judges and Prosecutors is a violation of the right of access to a court.[112]

The principle of independence of courts requires that a court be independent not only from the legislative or executive branch, but also from other judicial institutions and the environment.

The Supreme Election Council: According to Article 79 of the 1982 Constitution, to implement all procedures necessary to the fair and orderly conduct of elections from inception to completion, to review and pass final judgment on all irregularities, complaints and objections regarding election matters during and after elections, and to certify the validity of election credentials are functions devolving upon the Supreme Election Council. No appeal can be made to any other authority regarding the Council's decisions. The article also stipulates that the Council consists of seven regular and four substitute members, and that six of the members are elected by the General Assembly of the Court of Appeals and five by the General Assembly of the Council of State from among their members, by the absolute majority of the total number of members and by secret ballot. Although it is not a problem that the Supreme Election Council is composed of high court members, the problems related to

111 See: ATAR, Türk Anayasa Hukuku, pp. 310-312; GÖZLER, Türk Anayasa Hukuku, pp. 1171-1174; YILDIZ, Yargının Tarafsızlığı, pp. 116-153. Also see: Sibel İNCEOĞLU, Yargı Bağımsızlığı ve Yargıya Güven Ekseninde Yargıcın Davranış İlkeleri, İstanbul, Beta, 2008, pp. 15-33.

112 See: Case of Eminağaoğlu v. Turkey, 76521/12, Judgment, Court (Second Section), 09/03/2021.

the formation of the high courts, where the members are determined, directly affect the Supreme Election Council. In this framework, there is no need to amend the constitutional arrangement regarding the formation of the Supreme Election Council, if the constitutional problems regarding the Court of Appeals and the Council of State are resolved. However, the constitutional provision stating that no appeal can be made to any other authority against the decisions of the Supreme Election Council, which is at the very top of the electoral judiciary, must be amended.

That no appeal can be made to any authority regarding the decisions of the Supreme Election Council is a legal disaster, considering the current mechanisms in place. Even though it is possible in our legal system to make an individual application to the Constitutional Court regarding the decisions of the district election councils, which are final and not subject to the Supreme Election Council's review, it is not possible to do so regarding decisions of the Supreme Election Council itself:

The constitutional provision stating that no appeal can be made to any other authority against the decisions of the Supreme Election Council, which is at the very top of the electoral judiciary, must be amended.

It has been accepted that the President of the District Election Council carries out a judicial activity and has the independence and impartiality of a judge in terms of his duty to examine complaints and objections related to electoral issues and to make final decisions. For this reason, it has been concluded that the Presidency of the District Election Council is one of the organs designated as a "seat of jurisdiction" in Article 36 of the Constitution; organs which are outside the courts within the classical judicial organization but which carry out judicial activities in terms of their duty to examine complaints and objections related to election issues and to make final decisions.[113]

Although it was claimed by the applicant that the Supreme Election Council was a judicial seat and made decisions of a judicial nature, it cannot be said that the discussion of whether the Supreme Election Council is a judicial seat or whether its decisions have a judicial nature contributes to the solution of the problem of whether the Constitutional Court has the authority to examine the decisions of the Supreme Election Council in answer to individual applications. The status of the Supreme Election Council and the legal nature of its decisions have no importance or relevance in resolving the issue of whether these decisions can be the subject of individual application. The main issue that needs to be discussed is, even if it is accepted that the Supreme Election Council is a judicial seat, and its decisions are judicial decisions, whether the decisions of the Supreme Election Council can be examined by the Constitutional Court through individual application, considering the last sentence of the second paragraph of Article 79 of the Constitution. In the clarification of this issue, one must consider the aforementioned provision of the Constitution

113 İsmail *Taşpınar Başvurusu*, B. No: 2013/3912, 6/2/2014, § 48.

which stipulates that "No appeal can be made to any other authority against the decisions of the Supreme Election Council," and the phrase in Article 132 of the Law No. 298, which says, "The decision of the Council is final. No authority or legal remedy may be applied against it." It is understood that the expression "authority" in the aforementioned provisions refers to all administrative and judicial places or authorities to which an application might be made, and the Constitutional Court is also included among these. Accordingly, in light of the aforementioned provisions, it is not possible for the decisions of the Supreme Election Council to be the subject of an individual application before the Constitutional Court.[114]

However, individual application rests on the basis of application against the decisions of the highest authority in a judicial branch, with certain exceptions. As such, the applications are filtered as they make their way to the Constitutional Court, and the swamping of the Court under too many applications is prevented; it is also an outcome of the situation where individual applications are rare and exceptional. The situation in Turkey in terms of election jurisdiction is the opposite, and as such, constitutes an absolute legal freak. On the other hand, considering the highly controversial decisions of the Supreme Election Council in the recent period, it is more important than ever to subject the decisions of this council to examination.

Considering the highly controversial decisions of the Supreme Election Council in the recent period, it is more important than ever to subject the decisions of this council to examination.

114 *Atila Sertel Başvurusu* [GK], B. No: 2015/6723, 14/7/2015, § 40. Similarly: *Oğuz Oyan Başvurusu* [GK], B. No: 2015/8818, 14/7/2015; *Vatan Partisi Başvurusu*, B. No: 2015/8764, 18/11/2015; *Turgut Yenilmez Başvurusu*, B. No: 2015/6402, 19/11/2015.

CONCLUSION

Today, the judge is not just the mouthpiece of the law as Montesquieu once said (*la bouche qui prononce les paroles de la loi*),[115] or a passive practitioner; instead, the judge is a much more influential actor compared to in the past, one who adapts the norms to new circumstances, and even redesigns them as conditions necessitate.[116] This role of judges shows the importance of the judiciary today, along with its other components. Due to its importance, the purpose of regulating the basic principles and rules of the judiciary by constitutional means, or by laws which may be changed with more qualified numbers than ordinary laws, is that the said principles and rules cannot be changed as desired with a simple majority. The stability of the constitutional rules regarding the judiciary in a country ensures the stability of the judiciary, and people's belief in justice increases accordingly.

Although the judiciary has the same importance in Turkey, it has become an organ whose rules are frequently manipulated and especially targeted with the constitutional amendments in recent years. Most of the problems in Turkey regarding the judiciary are not new. However, the recent amendments to the Constitution and laws have increased the existing problems instead of resolving them. In order to resolve these problems, a good starting point would be to amend the constitutional articles related to the judiciary. However, such an initiative can only be considered as a beginning. This report will have achieved its purpose if it makes even the slightest contribution to such a start.

115 MONTESQUIEU, De l'esprit des lois, Livre XI, Chapitre VI (*De la constitution d'Angleterre*). In the Turkish translation, the expression "mouths expressing the necessity of the law" is used. See: MONTESQUIEU, Kanunların Ruhu Üzerine, p. 207.

116 Bertil Emrah ODER, Anayasa Yargısında Yorum Yöntemleri: Hukuksal Yöntembilime Dayalı Karşılaştırmalı Bir Araştırma, İstanbul, Beta, 2010, p. 1; ÖZBUDUN, Anayasalcılık ve Demokrasi, p. 67.

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TURKEY'S SEARCH FOR A NEW POLITICAL SYSTEM

08

JUDICIAL BRANCH IN TURKEY: ISSUES AND SOLUTIONS

The system debate is arguably the most pressing and consequential subject of Turkish politics. Turkey has been having a governmental system discussion for a period of time, and the next few years will appear to be in intense debate and search.

Turkish parliamentary system experience (1876-2017) often dealt with interruptions. As a result, it has not only failed to produce general satisfaction in politics and society but also has been unsuccessful in yielding economic stability. Similarly, the outcome of the last five years of the Presidential Government System (or the Presidential System with its widespread use) could not generate stability.

The search and discussion of the governmental system appear to be the most critical topic of politics for the next few years. Regardless of the outcome of the June 2023 elections, the system debate will be the most crucial topic of politics in the short term.

Meeting this demand and preparing enhanced research on the governmental system will play an essential role in the quest for a possible change.

Comprehensive research should present a comparative, global, political, and constitutional base for the debates and assist decision makers in political parties and the public in finding an enriched discussion floor.

Within the framework of this program, Ankara Institute plan to publish ten academic analyzes that will contribute to the search for systems over the next year in order to meet this end.

The research plans to conduct two workshops with the participation of stakeholders that we predict will contribute to the system discussion and hold a detailed public opinion survey.

This study in which Volkan Aslan evaluates the judiciary branch constitutes the eighth report of the academic contribution series that made out of 10 reports.