

CHANGING THE STATUS OF THE PRESIDENCY:  
A COMPARISON OF CONSTITUTIONAL AMENDMENTS  
IN SOUTH KOREA AND TURKEY

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## DECLARATION OF ORIGINALITY

I, Hülya Görkem Demirbulak, certify that

- I am the sole author of this thesis and that I have fully acknowledged and documented in my thesis all sources of ideas and words, including digital resources, which have been produced or published by another person or institution;
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## ABSTRACT

### Changing the Status of the Presidency:

#### A Comparison of Constitutional Amendments in South Korea and Turkey

The aim of this thesis is to plot South Korea and Turkey's journey towards a constitutional amendment by focusing on their current debates about changing the status of the presidency and to find an answer to the question of whether the intended changes to the respective countries' constitutions will bring them close to a democratic presidential system. In this context, in this study, a general framework of both countries' constitutional developments throughout history and the characteristics of their constitutions will be drawn, and the parallelisms in their constitutional histories will be highlighted. Furthermore, the ongoing debates on constitutional revision appertaining to the presidency will be handled with the main matters in question and a comparative assessment will be made within the scope of the similarities and divergences between two countries. As the fundamental legal document defining basic principles of the state, regulating its relationship with the citizens, and reflecting the nation's history, its future goals, and its view of the world, a constitution constitutes a basis to fully understand a country. For this very reason, by examining the process of South Korean and Turkish constitutional developments throughout history and the current debates on constitutional amendments, this thesis offers the opportunity to thoroughly perceive both countries' political tradition, to better interpret our modern day, and to make more to-the-point inferences about their futures.

## ÖZET

### Başkanlık Makamının Değişimi:

#### Güney Kore ve Türkiye Anayasa Değişiklikleri Karşılaştırması

Bu tezin amacı, Güney Kore ve Türkiye'nin anayasa değişikliğine doğru giden bugünkü yolculuklarını, başkanlık sistemi üzerine şekillenen güncel tartışmalara odaklanarak resmetmek ve iki ülke anayasalarında yapılması istenen değişikliklerin, söz konusu ülkeleri demokratik bir başkanlık sistemine yaklaştırıp yaklaştırmayacağı sorusuna cevap bulmaktır. Bu bağlamda bu çalışmada, iki ülkenin tarih boyunca deneyimlediği anayasal gelişmelerin ve ülke anayasalarının genel bir çerçevesi çizilecek ve anayasal tarihlerindeki paralellikler vurgulanacaktır. Ayrıca, başkanlık sistemi üzerine süregelen anayasa değişikliği tartışmaları, ana tartışma maddeleriyle ele alınacak ve iki ülke arasındaki benzerlik ve farklılıklar çerçevesinde bir karşılaştırma yapılacaktır. Devletin temel prensiplerini tayin eden, vatandaşları ile arasındaki ilişkisini düzenleyen ve bir ulusun geçmişini, geleceğe dair planlarını ve dünya görüşünü yansıtan temel hukuk metni olarak anayasa, bir ülkeyi bütün yönleri ile anlama yolunda temel teşkil etmektedir. Bu sebeple, Güney Kore ve Türkiye'nin tarih boyunca geçirdikleri anayasal gelişmelerini ve güncel anayasa değişikliği tartışmalarını inceleyerek bu tez, iki ülkenin siyasi geleneklerini daha iyi anlama, günümüzü daha doğru yorumlama ve ileriye yönelik daha isabetli tahminlerde bulunma imkanı sunmaya çalışmaktadır.

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## CHAPTER 1

### INTRODUCTION

Most comparisons made between South Korea and Turkey concentrate on their economic development experiences, and neglect the fact that the parallelisms between these two countries are not limited to the field of economy, but there are also similar patterns in historical and political terms. As both countries having started their economic development processes in the 1960s with similar industrial strategies comprising five-year development plans, South Korea and Turkey took different paths within years. South Korea became an advanced country ranking as the eleventh biggest economy in the world, whereas Turkey is still classified as a middle income country with its GDP almost half of that of South Korea.<sup>1</sup> Therefore, South Korea is often cited as a model for Turkey considering its research and development activities, high technology investments, and export-oriented policies. Nevertheless, not only South Korea's rapid economic growth namely "Miracle on the Han River"<sup>2</sup>, but also its sound journey towards democracy pushed by the South Korean people following consecutive military coups and authoritarian regimes is praiseworthy, and should be held up as an example by Turkey who similarly suffered from military interventions for a long time in the past. Today as well, a parallel political atmosphere leaps to the eye in both countries, as they both are discussing on revisions to their existing constitutions focusing on the issue of presidential system of government. However, the divergences between the ongoing processes in both countries are more remarkable than their similarities because in their current debates,

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<sup>1</sup> Worldbank, *World Development Indicators Database*.  
International Monetary Fund, *World Economic Outlook: Subdued Demand – Symptoms and Remedies*, 208 and 210.

<sup>2</sup> Sang and Yoo, "The K-Type Management: A Driving Force of Korean Prosperity."

South Korean devotion to democracy bursts into sight, whereas the intended amendments to the Constitution cause serious concerns about democracy in the Turkish case.

A constitution is the supreme legal norm of a country that defines fundamental principles and laws upon which the state is based. It determines the powers and duties of the government and guarantees certain rights to the people in that country. A constitution embraces a nation's history, implies its future goals, and shows its view of the world. In other words, a constitution reflects its nation's soul. That is why in order to better understand a nation, it is crucial to examine its constitution carefully. In common with most states in the world, the Republic of Korea and the Republic of Turkey have written constitutions that are often the products of some dramatic political change. The process by which a country adopts a constitution is closely tied to the historical and political context driving this fundamental change. Moreover, the legitimacy and longevity of a constitution are often dependent on the process by which it is initially adopted. For the very reason, by examining the process of South Korean and Turkish constitutional developments throughout history, this thesis offers the opportunity to thoroughly perceive South Korean and Turkish political tradition, and provides the chance to better interpret our modern day, and make some inferences about their futures by taking their current debates on constitutional revisions appertaining to presidency into consideration.

Today, considering the major points of the ongoing debates pertaining to constitutional revisions, calls for more democratic presidential regime are made in South Korea, while it is observed in Turkey that steps are taken towards a "Turkish-style"<sup>3</sup> presidency with a strong president of the Republic. In this sense, this study

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<sup>3</sup> Zaman, "Erdoğan's Plans for Executive Presidency Firm Up."

intends primarily to ask whether South Korea and Turkey are approaching a democratic presidential system while discussing making amendments to their current constitutions about presidency. It will also be questioned whether parliamentary forms of government are more likely to produce stable democracies than presidential ones while examining the South Korean presidency and the Turkish parliamentary system. Another question to be addressed in the following pages is whether parliamentary systems offer a better hope for democracy in nations with deep political cleavages like South Korea and Turkey. As such, it aims to examine if the existing multiparty system in South Korea poses a threat for a stable democracy. Concordantly, the thesis will also discuss if the proposed presidential system in Turkey will be able to sustain a stable democracy along with the present multiparty system. Furthermore, this study seeks to investigate whether presidential systems are prone to make the presidents be more interested in consolidating their own authorities rather than providing public goods compared to parliamentary systems. Other questions are whether the presidential system is superior to parliamentarism regarding governmental accountability and democratic representation, and if presidentialism is more likely to assure credibility of policymaking for a decisive political system and effective economy in comparison to parliamentary system. Lastly, this study will discuss whether the forthcoming constitutional amendments in both countries are instances of the concept of “abusive constitutionalism”<sup>4</sup>.

While seeking answers to these questions, this thesis will benefit from remarkable arguments made about the presidential system of government. Being at the center of the ongoing constitutional debates in both South Korea and Turkey, the presidential system has been handled by many prominent social scientists regarding

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<sup>4</sup> Abusive constitutionalism is a theorem of professor of law David Landau to describe the use of legal mechanisms of constitutional change in order to overthrow the existing democratic order and create authoritarian regimes instead. See Landau, “Abusive Constitutionalism,” 189-260.

its strengths and weaknesses, and has been mostly compared with the parliamentary system. In this context, intending to trace South Korea's and Turkey's journey to a constitutional amendment by highlighting the current debates on the presidency, this study aims to set a framework from all the following debates concerning the merits and demerits of the presidential system. Firstly, political scientist Professor Juan Linz hypothesizes in his *The Failure of Presidential Democracy* that parliamentary forms of government are more likely to produce stable democracies than presidential forms of government by courtesy of offering greater flexibility regarding legal mechanisms for possible crisis of state.<sup>5</sup> In a similar vein, based on his research on regime survivability dated 1985 in his article "A Neo-institutional Typology of Third World Politics," political scientist Professor Fred W. Riggs makes the claim that a parliamentary system of government is relatively safer than a presidential one in terms of its survival rate.<sup>6</sup> Likewise, political scientist Professor Alfred Stepan and Professor of law Cindy Skach deduce in their article "Constitutional Frameworks and Democratic Consolidation: Parliamentarianism versus Presidentialism" that the parliamentary system seems more successful than the presidential system in terms of the sustainability of the democratic regime.<sup>7</sup>

Additionally, sharing these claims, political scientist Professor Scott Mainwaring goes one step further in his "Presidentialism, Multiparty Systems, and Democracy: The Difficult Equation" arguing that the combination of a multiparty system and a presidential system is inimical to stable democracy in terms of its incapability of avoiding immobilism and intense legislative-executive conflict.<sup>8</sup> Linz backs up this assertion as well in his *Perils of Presidentialism*, contending

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<sup>5</sup> Linz, *The Failure of Presidential Democracy*, 68.

<sup>6</sup> Riggs, "A Neo-institutional Typology of Third World Politics," 219-224.

<sup>7</sup> Stepan and Skach, "Constitutional Frameworks and Democratic Consolidation: Parliamentarianism versus Presidentialism," 22.

<sup>8</sup> Mainwaring, "Presidentialism, Multiparty Systems, and Democracy: The Difficult Equation," 24.

parliamentary systems offer a better hope of preserving democracy, especially in nations with deep political cleavages and numerous political parties.<sup>9</sup> In a similar manner, in his article “Constitutional Design for Divided Societies,” political scientist Professor Arend Lijphard also argues that in countries with deep ethnic and other cleavages, a parliamentary system offers the optimal setting rather than a presidential one.<sup>10</sup>

Making a different point, political scientists Professor Matthew S. Shugart and Professor Stephan Haggard allege in their article “Institutions and Public Policy in Presidential Systems” that in the presidential system, “while the president should be interested in providing public goods at the national level as a result of his nationwide constituency, legislators’ separation from the executive typically makes them less interested in providing national policy than in parliamentary systems.”<sup>11</sup>

Besides these arguments favoring parliamentary system over presidentialism in various aspects, there are also important social scientists who question these claims, and suggest that presidential system actually provide advantages in many respects. Primarily, professors of political science Shugart and John Carey represent in their *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* that

presidentialism is inherently superior to parliamentarism on the principle of maximizing direct accountability between voters and elected officials, because the public directly elects the executive instead of a group of parliamentary elites, and an executive cannot be removed by shifting legislative coalitions in the legislature.<sup>12</sup>

Likewise, professors of economics Torsten Persson, Gerard Roland and Guido Tabellini support this idea in their *Separation of Powers and Political*

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<sup>9</sup> Linz, *Perils of Presidentialism*, 52.

<sup>10</sup> Lijphard, “Constitutional Design for Divided Societies,” 101.

<sup>11</sup> Shugart and Haggard, “Institutions and Public Policy in Presidential Systems,” 66.

<sup>12</sup> Shugart and Carey, *Presidents and Assemblies*, 44.

*Accountability* by arguing this direct control by the voters assured by the strict separation of powers in presidential systems enhances the government accountability, in which responsibilities of each branch is clearly defined, and each of them is thus held separately accountable.<sup>13</sup> Shugart and Carey underline this institutional clarity of responsibility between government branches in their aforementioned work by remarking that the separation of powers in presidential system enhances identifiability and hence improves democratic accountability and representation.<sup>14</sup>

Similarly, Haggard and Professor Mathew McCubbins claim in *Presidents, Parliaments, and Policy* that a presidential system of government is more likely to ensure credibility of policymaking, which is a key condition for effective democratic governance and thereby strong economy.<sup>15</sup> In a similar manner, professors of political science Gary Cox and McCubbins argue in their article “The Institutional Determinants of Economic Policy Outcomes” that a presidential system of government tends to provide a more decisive and resolute political system as well as a more credible economic policy by courtesy of its strict separation of powers, which enables different branches to influence public policymaking.<sup>16</sup>

Lastly, apart from these arguments comparing presidential and parliamentary systems of government, law professor David Landau’s phenomenon “abusive constitutionalism” is another matter that will be emphasized in this thesis. Signifying the use of mechanisms of constitutional change by powerful incumbent presidents and parties to erode the democratic order and to create authoritarian and semi-authoritarian regimes, Landau avers that abusive constitutionalism seems

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<sup>13</sup> Persson et al., *Separation of Powers and Political Accountability*, 8.

<sup>14</sup> Shugart and Carey, *Presidents and Assemblies*, 274-275.

<sup>15</sup> Haggard and McCubbins, *Presidents, Parliaments, and Policy*, 33.

<sup>16</sup> Cox and McCubbins, “The Institutional Determinants of Economic Policy Outcomes,” 29.

increasingly prevalent while traditional methods of democratic overthrow such as the military coup or other blatant ruptures in the constitutional order have fallen out of favor.<sup>17</sup>

Constitutions have come to characterize modern democracies in the last centuries. Various governments all over the world have made laborious journeys towards democracy by adapting modern constitutionalism, based on the rule of law and the principle of separation of powers, in place of previous law systems based on various concepts such as religion or culture. This wave of modern constitutionalism swept across East Asia as well to upstage reigning political systems of laws heavily influenced by Confucianism, which shaped the daily life, ethics, social relations, and public administration for many centuries, and laid the foundation for most of the legal systems. In East Asia region, the concept of modern constitutionalism first spread to Japan in 1889 with the Meiji Constitution, and then to Korea—the Kingdom of Joseon back then—with the famous *Gabo* Reforms of 1894<sup>18</sup>, and later to China in 1898 with the Hundred Days Reform<sup>19</sup>, which culminated in 1912 with the Provisional Constitution, the first modern constitution of the newly established Republic of China after the 1911 Chinese Revolution that toppled the 2000-year-old imperial tradition.<sup>20</sup> In the Korean case, the journey of legal reforms arguably started around the sixteenth century, but modern changes can be better traced back to 1894

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<sup>17</sup> Landau, “Abusive Constitutionalism,” 189-191.

<sup>18</sup> The *Gabo* Reform is a series of sweeping reforms in Joseon Korea between 1894 and 1896 during the reign of King Gojong under the Japanese sponsorship with the aim of founding a modern Western-style state in accordance with the West and Japan. The name “Gabo” comes from the name of the year 1894 in the sexagenary cycle, the traditional Chinese calendrical system *Ganzhi*, which is used since the second millennium BC for reckoning time in China, as well as Chinese-influenced East Asian nations such as Korea and Japan.

<sup>19</sup> In the aftermath of Chinese defeat in the Sino-Japanese War (1894-1895), the Hundred Days Reform (June 11 - September 21 1898) emerged as a reform movement in late Qing dynasty China as an imperial attempt to modernize the state and social system. Although these reforms were shortlived and could not thoroughly implemented, the idea of a constitutional reform embracing the foundation of a parliament and the establishment of a constitution was firstly found voice.

<sup>20</sup> Bozkurt, *Batı Hukukunun Türkiye’de Benimsenmesi*, 26-27.

Gao et al., *The Road to the Rule of Law in Modern China*, 20.

Kim, “Law and Custom under the Chosŏn Dynasty,” 1068.



after the *Gabo* Reforms, the first comprehensive effort at modernizing the Korean government and society.<sup>21</sup> Ideally, these reforms set the stage for other constitutional reforms and amendments that were to be put in place in the country over the next several decades. Subsequently, the Constitution of the Great Han Empire came in 1899 as a fruit of the steps taken towards establishing a modern nation state. In 1919, the Provisional Government of the Republic of Korea which was a provisional government in exile opposing the Japanese annexation of Korea in 1910 proclaimed its Constitution that provided the inspiration for the first constitution of the Republic of Korea, the Constitution of 1948, which was amended nine times until today. The ninth and last amendment came in 1987 under the title of the Constitution of 1987, which is the current constitution of the country.

In the Turkish case, the concept of modern constitutionalism was brought to the agenda when the Ottoman Empire is thought to have faltered, and subsequently fell into a decline against the rapidly rising West. With the beginning of reforms and modernization movements, constitutionalism was one of the remedies adapted from the West to save the decadent Empire in the early nineteenth century.<sup>22</sup> The process of constitutional development originates from the Charter of Alliance of 1808 (*Sened-i İttifak* in Ottoman Turkish) that paved the way for further constitutional reforms and amendments over the next decades, and even the next century.<sup>23</sup> Being considered as the first step taken towards the concept of state of law, the Charter was followed by the Edict of *Gülhane* of 1839 (or Imperial Edict of Reorganization, *Gülhane Hatt-ı Hümayunu*) and the Imperial Reform Edict of 1856 (*Islahat*

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<sup>21</sup> Kim, “Law and Custom under the Chosŏn Dynasty,” 1074.

<sup>22</sup> Bozkurt, *Batı Hukukunun Türkiye’de Benimsenmesi*, 48.

<sup>23</sup> Özbudun, *Türk Anayasa Hukuku*, 25.

Arsel, *Türk Anayasa Hukuku’nun Umumi Esasları*, 17.

Aldıkaçtı, *Anayasa Hukukumuzun Gelişmesi ve 1961 Anayasası*, 38.

Akın, *Kamu Hukuku*, 301.

*Fermanı*) that ensured the rule of law as well as constitutional rights and freedoms of the citizens. All these attempts to adopt the supremacy of the constitution, and establish a constitutional system of government culminated in the 1876 with the Ottoman Constitution (*Kanun-u Esasi*), the first constitutional text in the Ottoman history transforming the Ottoman Empire into a constitutional monarchy. Following the dissolution of the Ottoman Empire in the wake of the First World War, the newly founded Government of the Grand National Assembly promulgated the Constitution of 1921, the constitution of the new regime that abolished the old one. In 1923, the modern Turkish state, which is still in existence, was founded with its Constitution of 1924. Nonetheless, the constitutional developments in Turkey have thenceforth often been interrupted by coup d'états, and the 1924 Constitution was replaced twice, first in 1961, and then in 1982. Both being fruits of military interventions, while the Constitution of 1961 is largely known as a liberal constitution with its emphasis on fundamental rights and freedoms and the concept of social state, the Constitution of 1982, which is the current Constitution of the Republic of Turkey, has often been in the cross hairs for its anti-democratic provisions and practices.

In the nineteenth century, both the Kingdom of Joseon and the Ottoman Empire headed towards modernization in an effort to save their decadent empires and to get back their strength by keeping up with the times. Their paths were fitted with new, imported ideas, and the reform movements took place within this scope. While achieving their constitutions with their republics founded in the first half of the twentieth century, both countries went through turbulent times full of military coups, and remained suppressed by military constitutions for decades. With their significant parallelisms besides various differences in terms of constitutional development,

today, voices for constitutional amendment on presidency are raised in both countries.

Within this context, focusing on the concept of constitution, the first chapter provides more technical information in terms of law and political science by presenting the principle of rule of law, the separation of powers, and different types of political regimes and constitutions. Following, the next chapter deals with the constitutional history of Korea, discoursing the Confucian influence in Korean politics and law, the adoption of modern constitutionalism as of the *Gabo* Reforms of 1894, the Constitution of the Great Han Empire of 1899, and the Constitution of the Provisional Government of the Republic of Korea of 1919. It further handles the Constitution of 1948, and the nine amendments made on it until today. The third chapter focuses on Turkey's constitutional history beginning with the Ottoman legal system, and its further adoption of modern constitutionalism by taking the Charter of Alliance of 1808 as the starting point. It further narrates the *Tanzimat* Era (1839-1876), the Constitution of 1876, the Constitution of 1921 of the Government of the Grand National Assembly, the Constitution of 1924 of the modern Turkish Republic, the Constitution of 1961 and 1982, as well as the significant changes made to them. Based on the information provided, the fourth chapter aims to make a comparison between constitutional histories of the Republic of Korea and the Republic of Turkey by taking the Joseon dynasty and the Ottoman Empire as starting. Firstly examining the tradition of powerful sovereign throughout history in both countries, it compares their adoption of modern constitutionalism, their constitutions, their significant constitutional amendments, and their executive branch designed by their current constitutions. Dwelling upon its present 1987 Constitution, the fifth chapter gives a full picture of ongoing debates on constitutional amendment regarding the

presidency in South Korea. For this purpose, the main questions of the vast presidential powers, the imperial presidency, the presidential term of office, and the alternative systems of government in lieu of the presidency are elaborated on. In the following chapter, handling its present Constitution of 1982 in great detail, it is intended to give a clear outline on current debates on constitutional amendment regarding the presidency in Turkey. In line with this purpose, the context of the Constitutional Reform Package of 2016, and the motivations for the proposed changes are elucidated first, while governmental stability, government efficiency with strong leadership, democratic representation, the danger of one-man rule, regime change, frequent emergence of coalition governments, and economic underdevelopment are interpreted later as main matters in question. Finally, in the light of all these, the last chapter before the conclusion aims to make an analysis on the current debates on constitutional amendments appertaining to the presidency in both South Korea and Turkey within the scope of their similarities and divergences, elaborating their motivations, discourses and processes of amending their present constitutions today. In conclusion, in an effort to plot the current South Korean and Turkish journey towards a new constitution by offering an overview of the main points of their ongoing debates on constitutional amendment regarding the issue of presidency, this study is designed to make a comparative assessment of the subject matter within the scope of the questions addressed, and bring forward some proposals for a more democratic fundamental document that would befit the twenty-first-century Republic of Korea and Republic of Turkey.

## CHAPTER 2

### CONSTITUTION

A constitution is the fundamental law of the state consisting of the principles upon which the government and laws of a society are founded. Being shaped in compliance with the state's own features, a constitution sets the framework of the government's characteristics, as well as the relationship between the state and the citizens. For this reason, after providing a brief description of the concept of constitution, this chapter handles the constitution first in the sense of the principle of rule of law and the separation of powers, considering its duty of regulating the divisions of the sovereign powers, and ensuring rights and freedoms of the citizens. Later on, in parallel with distributing and limiting the functions of branches of government, the constitution's role in classifying the political regimes is elaborated. Finally, the different types of constitution such as customary and written ones; and flexible and rigid constitutions; and the concepts of primary constituent power and derived constituent power are provided in the last section.

#### 2.1 Concept of constitution

Law is a system of rules and regulations to establish and maintain the social order by guiding behavior. Since Roman Law<sup>24</sup>, the most common distinction within law has been between public law and private law. Public law is closely related to the state, and it refers to the state's superiority, unilateral will and common interests whereas in private law, there are equal relationships between individuals deriving from freedom of will and personal interests. Public law is also divided into two in itself as

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<sup>24</sup> Roman law is the legal system of ancient Rome (753 BCE-476 AD) that served as a basis for today's many modern legal systems in terms of Latin legal terminology and practices.

national law and public international law. As a national law that rules a particular country and promotes the interests of its people, constitutional law is a set of core principles or deep-rooted precedents according to which a state is governed.<sup>25</sup> Etymologically, the term “constitution” comes from the Latin word “constitutio” used for regulations and orders such as imperial enactments. The concept in today’s context has derived from the French verb “constituer”, which means constitute, compose, establish and arrange<sup>26</sup>, and in time, it has begun to be used for the documents showing governments’ fundamental structures and the status of powers within these structures. Therefore, in its modern sense, a constitution defines the establishment, the functioning and the relationship of the principal entities within the state, namely the executive, the legislature and the judiciary. It not only grants the state specific powers to exercise its authority, and determines the fundamental principles and rules of the government, but a constitution is also the main document restricting the state authority to assure the citizens’ fundamental rights and freedoms against the state.<sup>27</sup> It designs the relationship between the state and individuals by bestowing rights for its citizens and by ensuring them. Being mostly a text ratified at the time the nation comes into being, the constitution gives a state a legal status to carry out legal activities. Thence, every state has a constitution, a more comprehensive body of rules, which constitutes a source for the other laws.

While in a country, the legal system in force forms the legal order with which compliance is imperative, every rule is not at the same level, and does not have the same power. In this sense, there is a hierarchy between legal norms. By setting up the rules, which the ruling power cannot disregard, constitutions limit the state power, and thereby, constitution is considered as the most basic law of a territory from

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<sup>25</sup> Larousse, *Petit Larousse*, 246.

<sup>26</sup> Gözler, *Anayasa Hukukunun Metodolojisi*, 131-132.

<sup>27</sup> Teziç, *Anayasa Hukuku*, 8.

which all the other laws and rules are hierarchically derived. In most modern states, the constitution has supremacy over ordinary statutory law, and it also shows basic principles that future laws have to follow. In terms of the hierarchy of laws, positive law<sup>28</sup> theorist Hans Kelsen's "pure theory of law" is the most cited theory that portrays a legal system where all norms are related to each other by either being inferior or superior norms, and the validity and the bindingness of each legal norm at each level of the pyramid come from the higher norm.<sup>29</sup> As the legal norm at the top, the constitution is the source of the other laws by determining how to legislate, and like all other norms, it also needs a higher norm to provide its validity and bindingness. Kelsen assumes that this superior norm is simply the constitution made by the first monarch or the first parliament of the state history.<sup>30</sup>

In terms of its context, a modern constitution is mainly composed of six parts: Preamble, basic principles or general provisions, basic rights and freedoms, fundamental organs of the state (legislature, executive and judiciary), constitutional revision (or amendment), and miscellaneous provisions.<sup>31</sup> Briefly stated, in preambles, the fundamental philosophy or ideology of the constitution is expressed while the part of basic principles defines the form and characteristics of the state. The part of basic rights and freedoms generally comprises three categories as individual, social and economic and political rights and freedoms. Additionally, the section of fundamental organs of the state elaborates the establishment, the structure and the functioning of the three branches of government—legislative, executive and judiciary. Furthermore, every written rigid constitution regulates the principles and

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<sup>28</sup> Positive law signifies man-made law, that is laid down by a proper authority of the government to prescribe the rules and regulations for a particular community for a specific time. The concept of positive law is distinct from "natural law", which is based on universally accepted moral principles, derived not from an act of legislation but from God's law, nature or reason.

<sup>29</sup> Kelsen, *Pure Theory of Law*, 8 and 221-224.

<sup>30</sup> Kelsen, *General Theory of Law and State*, 115.

<sup>31</sup> Gözler, *Anayasa Hukukunun Genel Esasları*, 63-64.

procedure of its own amendment in the part of constitutional revision. Lastly, because each passing day, new issues enter constitutions regardless of whether it is necessary to regulate them by constitution, they find their place in miscellaneous provisions.

Throughout history, many states were ruled by special codes or written laws. The concept of the law of a state can be traced back to the ancient times. However, it was the written documents of the medieval period that inspired the modern constitutions of today's world. The Fundamental Orders, which was adopted in 1639 in the Colony of Connecticut has the features of a written constitution, and is disputatiously claimed by some as the first written constitution in the Western tradition.<sup>32</sup> From another view, the Instrument of Government adopted in 1719 in Sweden is considered as the first constitution.<sup>33</sup> Regardless of which assumption is true, it is a widely accepted argument that although the intellectual foundation of constitutionalism was laid long before that, modern constitutionalism was born with the emergence of written constitutions beginning from 1780s.

In the eighteenth century, there were attempts to constrain the state power and to assure individual rights and liberties in written documents, more specifically in written constitutions. This way, constitutions have become the sign of a limited political power without arbitrary behaviors and a wider realm of freedom. In today's context, as the status of the state's legal entity, constitution emerged as a written document first in the United States of America in 1787 when the thirteen colonies in America drifted away from England and established an independent state, the republican federal United States. The US instance was then followed by France and

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<sup>32</sup> Schechter et al., *Roots of the Republic*, 24.

<sup>33</sup> Grewe and Fabri, *Droit constitutionnel européens*, 34.



Poland in 1791.<sup>34</sup> While the Polish Constitution was short-lived and ineffective, France was the one pioneering the liberal constitutionalism movement with the new social class called bourgeoisie's fight for limiting the monarchical power to put an end to arbitrary behaviors of monarchs and the privileges of the feudal order, and to assure individual rights and freedoms. This struggle culminated with the 1789 French Revolution, and it found its expression in the 1789 Declaration of the Rights of Man and of the Citizen: "Any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no Constitution."<sup>35</sup> Eventually, it was embodied in the 1791 Constitution. These constitutional movements in the late eighteenth centuries led to a new social and political order, and it also brought the supremacy of constitution in its wake, which is one of the basic principles of the liberal worldview.

## 2.2 Rule of law and separation of powers

When it comes to modern constitutions, the perception of the classical liberal democracy can be traced back to the Age of Enlightenment, the intellectual movement that dominated Europe during the eighteenth century by highlighting individual liberty, scientific method, and religious tolerance in opposition to the absolute monarchy and the religious orthodoxy. With its emphasis on the supremacy of the constitution, the judicial review, and individual rights and freedoms, the liberal political philosophy introduced the sovereignty of law over the government and its authority within society under the name of the rule of law. In legal sense, the basis of the rule of law is formed by the principle of separation of powers that determines the

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<sup>34</sup> Blaustein, "The U.S. Constitution – America's most important export," 8. Besides this common opinion, there is another view asserting that "the first European state that promulgated a written constitution is Sweden in 1720." See Aranjo, "Sur le constitutionnalisme européen," 1551.

<sup>35</sup> *The Declaration of the Rights of Man and of the Citizen*, Art.16.

powers of each government body, and seeks to assure individual rights and freedoms against the ruling powers' arbitrary behaviors by tying them up with law through independent judiciary. Pursuant to its core principle, all powers should exist separately; hierarchy between rules is compulsory; and no act must be left unchecked.<sup>36</sup>

The idea of the separation of powers grew out of centuries-long political and philosophical debates. Although its origins can be traced back to Aristotle to the fourth century B.C.E., it was Baron de Montesquieu who formulated the separation of powers as a doctrine in the midst of the eighteenth century. According to Montesquieu, in every government, there are three sorts of powers as the legislative, executive and judicial; and individual rights depend on the balance arising from their separation. His model is based on three goals: Restricting the political power, dividing the political power into three, and forcing them to cooperate. The legislative power enacts laws, amends or abrogates them, while the executive makes peace or war, sends and accepts embassies, and provides national security against possible external threats. Lastly, the judiciary punishes criminals or settles controversies between individuals.<sup>37</sup> In his *The Spirit of the Laws*, Montesquieu does not mention the concept of separation of powers clearly, but he asserts that each power should be used by a different body by saying,

when the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative and executive.<sup>38</sup>

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<sup>36</sup> Kaboğlu, *Anayasa Hukuku Dersleri*, 140.

<sup>37</sup> Montesquieu, *The Spirit of the Laws*, 173.

<sup>38</sup> Montesquieu, *The Spirit of the Laws*, 173.

In today's liberal democratic regimes, fulfilling the most important assurance of the rule of law and the supremacy of the constitution is possible by independent and neutral judicial bodies responsible for constitutional review. Established by constitutions, constitutional courts are these legal bodies whose job is to protect the constitution by interpreting constitutional norms and supervising the constitutionality of legislative and executive acts. Constitutional court decisions are binding, and they cannot be subject to appeal anymore.

As a control mechanism between powers dividing the government's three fundamental functions among different organs to limit the political power and to assure individual rights and freedoms, the theory of the separation of powers deeply influenced the constitutional movements beginning from the late eighteenth century. It was put in practice with the 1787 United States Constitution for the first time, and was later followed by the others like the French Constitution in 1791.<sup>39</sup> In constitutional law, the separation of powers has become some sort of benchmark to classify the political regimes by predicating on the relationship between the legislative and executive branches.

### 2.3 Types of political regimes

In terms of the relationship between the legislative and executive branches, there are unity of powers and separation of powers systems, which determine the characteristics of the political regimes. In the system of unity of powers, legislative and executive prerogatives are concentrated in one hand, either in the legislative or in the executive. If the powers are united in the executive branch, the executive has the authority to make and enforce laws at the same time. Both the regimes of absolute

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<sup>39</sup> Kaboğlu, *Anayasa Hukuku Dersleri*, 142.

monarchy and dictatorship are instances for the system of unity of powers. In the absolute monarchy, the legislative, executive, and even judiciary powers are concentrated in the monarch as the only and supreme authority in the state. However, in a dictatorship, these prerogatives are in the hands of one person or one group without any efficient constitutional restriction, and this absolute power is exercised through various mechanisms to secure the rule of the same person or group.

When the powers are concentrated in the legislative branch, it constitutes the only body with the authority to enact and execute laws. This regime is called assembly government system, where a representative parliament is the single body empowered with the sovereign prerogatives, namely legislative, executive and judiciary powers in compliance with the idea of the indivisibility of sovereignty. In other words, with neither the post of the head of state nor the prime minister, the assembly is the only competent authority to exercise all legislative, executive and even judiciary powers.<sup>40</sup>

In the system of separation of powers, the legislative and executive powers are granted to different bodies. According to their level of separation, there is a rigid separation of powers where the powers are strictly separated while there is also flexible separation of powers where the powers are separated in a softer and more balanced manner.<sup>41</sup> The presidency regime embodies the rigid separation of powers system called the system of checks and balances, which enables all three branches of government to supervise each other by giving the legislative and executive authorities to two completely separate and thereby independent organs. In this system, the president is elected by the public as the sole and exclusive owner of the

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<sup>40</sup> Gözler, *Anayasa Hukukunun Genel Esasları*, 225-228.

<sup>41</sup> Gözler, *Anayasa Hukukunun Genel Esasları*, 231.

executive power; the tenures of the legislative and executive branches are fixed; and the cabinet and the president do not have any legal means to discharge each other from their office.<sup>42</sup> The latter is important in terms of the accountability of the president, as he/she is not accountable to the legislature, and therefore, cannot be brought down by the legislature through a no confidence vote. In return, the president cannot dissolve the legislature as well. Furthermore, having their legitimacy separately from people, and being therefore powerful and independent, neither the legislative nor the executive branch can meddle in each other's activities. However, this rigid separation needs to be balanced to a certain extent so that the statecraft does not become paralyzed, and the coordination between the branches regarding government issues is ensured. For this purpose, the president and the cabinet must collaborate in some matters such as appointments of public officials, ratification of international treaties, approval of the budget, passing bills, some important appointments and so forth.<sup>43</sup> Often referred to as the system of checks and balances, the presidential system can truly function only in the United States by courtesy of its own distinctive conditions such as the efficient checks and balances mechanism between branches of government, the federal balances, the two party political system without a deep ideological chasm, its loose party discipline, the deep-rooted culture of democracy and compromise, the lobbies, and American people's respect and allegiance to the Constitution.<sup>44</sup>

The flexible separation of powers, on the other hand, signifies the parliamentary system where the legislative and executive prerogatives are endowed to two different bodies that are not completely independent of each other. Often called the fusion of powers, the executive and legislative branches of government are

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<sup>42</sup> Tunçkaşık, "Başkanlık Sistemi: Teori, Pratik ve Tartışmalar," 1.

<sup>43</sup> Erdoğan, *Anayasa Hukuku*, 18.

<sup>44</sup> Tunç and Yavuz, "Avantaj ve Dezavantajlarıyla Başkanlık Sistemi," 34.

intermingled in parliamentary system in contrast with the more strict separation of powers in presidentialism. Deriving its legitimacy from the legislative, the executive function is bicephalous, as there exists a head of state and council of ministers at the same time. The head of state (mainly called king in monarchical parliamentary system chosen according to heredity, and president of the republic in republican parliamentary system through the election by the legislative function) embodies the continuity of the state, and does not take part in active politics.<sup>45</sup> Thereby, his/her authority is mostly symbolic, and this lack of venue makes him/her unaccountable to the legislative branch. In other respects, the council of ministers is also bicephalous in itself because it comprises both prime minister and ministers. As the head of the council, the prime minister is a minister as well in terms of legal status, but over time, the post has come to the fore, and become first among equals.<sup>46</sup> The council is accountable to the legislative, and it means the legislative has the authority to discharge the cabinet. However, in some parliamentary systems, the premature dissolution of the legislature by the executive branch is also possible in some circumstances. These pressure tools between branches lead them to collaborate with each other. Additionally, the same person can function in both branches, and the executive can participate in legislative actions. In a nutshell, the legislative and executive are interdependent, and there is no rigid separation of powers, but a soft division of functions between the branches.

Lastly, the term of semi-presidential system was first used by political scientist Maurice Duverger to describe a mixed model between parliamentary system and presidentialism, in which a popularly elected president of the republic endowed with significant substantive constitutional powers coexists with a prime minister and

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<sup>45</sup> Laferrière, *Manuel de droit constitutionnel*, 770-771.

<sup>46</sup> Laferrière, *Manuel de droit constitutionnel*, 796.

a cabinet responsible to the parliament.<sup>47</sup> In other words, it fuses certain features of presidentialism with those of parliamentarism.<sup>48</sup> Similar to the parliamentary system, the bicephalous executive branch consists of an unaccountable president of the republic and an accountable council of ministers to the legislative that can discharge the council through a vote of no confidence. The prototype of the system of semi-presidentialism is mostly regarded as the current French Fifth Republic that was introduced in 1958.<sup>49</sup>

## 2.4 Types of constitution

According to the classical classification, constitutions are divided into two:

Customary (or unwritten or uncoded) and written (or codified) constitutions.

Regarding customary constitutions, there are some behavior patterns, which are constantly repeated in a specific society in due course, and over time, following these patterns is accepted as a rule by that society. Deriving their power and legitimacy from this acceptance, customary constitutions are flexible, as they come into existence as a result of repeated behaviors, and can be changed in the same way. Before the emergence of the system of written constitution in the eighteenth century, almost all constitutions were customary ones. Even though the United Kingdom is shown as an instance for customary constitution today, there are also written constitutional rules in the country.<sup>50</sup>

In terms of written constitutions, the rules about the legal status of a state and about individual rights and freedoms are gathered in one or several documents.

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<sup>47</sup> Duverger, "A New Political System Model: Semi-Presidential Government," 165.

<sup>48</sup> Özbudun, *Presidentialism vs. Parliamentarism in Turkey*, 2.

<sup>49</sup> Özbudun, *Türk Anayasa Hukuku*, 352.

<sup>50</sup> In the UK, the rules about individual rights and freedoms are tied up with written laws by 1215 Magna Carta Libertatum, 1628 Petition of Right Act, 1679 Habeas Corpus Act, 1689 Bill of Rights, 1701 Act of Settlement, 1911 and 1949 Parliament Act, 1963 Peerage Act, 1968 Race Relations Act, 1969 Representation of the People Act.

Unlike customary ones, there are competent authorities for creating written constitutions, which aim to bind the authority of governors, and to determine the citizens' rights with certain rules. States with written constitutions mostly give the constitution supremacy over ordinary statute law. In our day, the constitutions do not embrace only the status of a state and individual rights, but it also introduces the government's future goals, plans, and ideological tendencies in political, economic, and social terms. For this reason, modern-day constitutions tend to become more detailed and regulatory with their comprehensive content, as well as their concern to provide political stability.

Another classification comes from the authority of making and changing the constitution. The power that establishes a constitution, and builds a state as a legal and political organization is called constituent power. The concept of constituent power is divided into two with regard to its source and its authorities: Primary constituent power and derived constituent power. The primary constituent power signifies making a constitution. Being independent from any former law, primary constituent power establishes a state, gives its legal and political status, and makes the constitution for the first time or afresh.<sup>51</sup> The primary constituent power emerges when a new state is established, or when a dissolved state in the wake of a war reappears, or when the existing constitutional order is abolished with a revolution or coup d'état. In other words, the primary constituent power shows up and installs a new legal order when there is no constitution in force, or the existing constitutional order in effect has died out.

Therewithal, there is also the derived constituent power, which signifies changing a constitution. Having the authority to change the constitution in effect, the

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<sup>51</sup> Teziç, *Anayasa Hukuku*, 178.



derived constituent power has to act within the scope of the rules of the present constitution. In terms of changing the constitution, a distinction is made between flexible and rigid constitutions according to the difficulty level. A flexible (or elastic) constitution can be changed with an ordinary law, as it is considered as an ordinary statute, rather than a higher legal status. So, there is no special procedure for modification. On the other hand, a rigid (or inelastic) constitution requires exceptional procedures to amend a constitution such as convocation of a special constituent assembly or constitutional convention—a qualified majority of legislators' votes, a referendum process, or other procedures, which make an amendment more difficult than passing a simple law.<sup>52</sup> The aim is to prevent changing the constitution easily in accordance with the political environment and conditions.

Regarding the process of revising a constitution, introducing entrenched clauses is a method frequently used by the first constituent powers, as it is mostly considered that possible amendments to the constitution are threats for the regime's stability and continuity. To that end, in order to secure the basic rules of the regime, first constituent powers tend to introduce some provisions, which make certain changes on some subjects or in some articles either more difficult or impossible for derived constituent powers. Nonetheless, the legal validity of these provisions is a question of debate. According to some, these bans have no value in legal terms since a first constituent power of a specific period cannot be superior to its succeeding ones.<sup>53</sup> Furthermore, because all the constitutional norms are determined by the same constituent power, there cannot be a hierarchy between them in legal sense.

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<sup>52</sup> Teziç, *Anayasa Hukuku*, 193-197.

<sup>53</sup> Barthélemy and Duez, *Traité de droit constitutionnel*, 231.  
Laferrière, *Manuel de droit constitutionnel*, 117.  
Burdeau, *Droit constitutionnel et institutions politiques*, 84.

Therefore, for some, these kinds of limitations are just political requests without any legal meaning or enforcement. From another perspective, there is the concept of the spirit of constitution, which reflects the constitution's political and philosophical principles, and the derived constituent power has to respect this spirit while making changes in the constitution.<sup>54</sup> More specifically, the derived constituent power is bound by the spirit of the constitution, because in case the fundamental principles of a constitution are changed, there will be a "fraud on the constitution"<sup>55</sup> destroying the whole constitutional order.<sup>56</sup>

Both the Republic of Korea and the Republic of Turkey have undergone various dramatic political changes throughout history, which have shaped their present written constitutions. The legitimacy and permanence of the constitutions depend on their process of formation that is closely bound to the historical and political framework leading to these substantial changes. To this respect, analyzing the South Korean and Turkish constitutional developments throughout history will pave the way to better interpret our modern day.

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<sup>54</sup> Gözler, *Anayasa Hukukunun Genel Teorisi*, 187-191.

<sup>55</sup> Liet-Veaux, "'La fraud à la constitution'," 116-150.

<sup>56</sup> Kubalı, *Anayasa Hukuku Dersleri*, 105.

## CHAPTER 3

### THE CONSTITUTIONAL HISTORY OF KOREA

Constitutionalism in South Korea is the result of decades-long process and determined efforts. Today as well, it is high on the country's agenda, and the current Constitution of 1987 is in the line of fire due to its defective points that need to be revised to achieve a more modern and democratic fundamental document. That is why, in order to offer a full picture of ongoing debates on constitutional amendment in the Republic of Korea, one needs first to dig into the constitutional history of the country. In this vein, this chapter intends to present the historical background of the current South Korean Constitution of 1987 to see the major events and policy changes throughout history. The chapter is mainly composed of two parts. In the first section, the Confucian tradition that dominated the Korean law through long ages is shortly narrated, and the adoption of the modern constitutionalism is later addressed by accepting the *Gabo* Reforms of 1894 as its milestone. The second part starts with the establishment of the Republic of Korea in 1948 and its Constitution of the same date. Major amendments made on this original text until today are further elaborated by highlighting those pertaining to the post of presidency in particular. Because the fifth chapter of the thesis will handle the current South Korean Constitution of 1987 in great detail, this chapter makes only a brief introduction to it.

#### 3.1 From Confucianism to modern constitutionalism

It is mostly believed that the history of constitutionalism in Korea began with the enactment of the first constitution of the Republic of Korea in 1948 after liberation, but in fact, the implementation of the concept of constitutionalism in the country had

begun long before this date. A more nationalistic historical narrative accepts the Constitution of the Provisional Government of the Republic of Korea of 1919 as the starting point of Korea's constitutional history as this constitution proclaimed the first republican form of government of Korea.<sup>57</sup> It is also a remarkable matter that the preamble of the current 1987 Constitution of the Republic of Korea declares itself as the successor of the Provisional Government's Constitution.<sup>58</sup> On the other hand, some look back even further, and accept the *Gabo* Reforms of 1894 as the origin of Korean constitutionalism with its proclamation of Korea's independence from China.<sup>59</sup> Lastly, there is another view pointing out the Constitution of the Great Han Empire of 1899 that was declared two years after the establishment of the Empire and drew an outline of the imperial system, as Korea's first modern Constitution.<sup>60</sup> Regardless of which of these historical narratives reflects the correct starting point of constitutionalism in Korea, it is a fact that all these years marked an important break with the past in terms of Korean political and legal development.

It is believed that Korean history began in 2333 BCE when Gojoseon, the first dynasty, was founded. The legal tradition of Korea can be traced back to that era as Gojoseon had its own statutory law.<sup>61</sup> Ever since then, Korean dynasties throughout history have had their own legal systems and written laws, showing the nation was not unfamiliar with the tradition of law. Still, the vast majority of these rules could be included in the scope of administrative law rather than the constitutional one, as they were not to discipline the power of the ruler, but to

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<sup>57</sup> Hahm, "Conceptualizing Korean Constitutionalism," 157.

<sup>58</sup> *Constitution of the Republic of Korea (1987)*, Preamble.

<sup>59</sup> Hahm, "Conceptualizing Korean Constitutionalism," 157.

<sup>60</sup> Kwon, "Korea Bridging the Gap between Korean Substance and Western Form," 154.

Kwon, *Constitutional Law: A Textbook*, 91.

<sup>61</sup> Korea Legislation Research Institute, *Introduction to Korean Law*, 2.

organize the administration of the government bureaucracy.<sup>62</sup> Before having fallen under the influence of modern constitutionalism in the late nineteenth century, Confucianism was dominant in the Korean law system throughout centuries following its adoption by the Kingdom of Joseon (1392-1897), the last dynasty of Korea, as the supreme guidelines for both government administration and social system.<sup>63</sup> Largely influencing the way of thinking, society, religion and governance in Korea, Confucian worldview saw the notion of law as an instrument of effective governance, rather than a device to constrain government.<sup>64</sup> With the aim of good governance, power was indivisible in the Confucian tradition. Benevolent and virtuous rulers in whom all power was concentrated were responsible for guiding the people by means of virtue and keeping them in line with propriety to bring peace and harmony to the society.<sup>65</sup> Although Confucian law did not provide any rule applied directly to the emperor to restrain his power, it also did not give a completely unconstrained sovereignty, as there were some limits on the ruling power coming from the ancient teachings of the Confucian tradition.<sup>66</sup> In accordance with the principle of the Mandate of Heaven, it was the emperor's duty to rule in an ethical and moral fashion while obeying ritual norms as the Son of the Heaven.<sup>67</sup>

With witnessing an influx of the Western culture beginning from the mid-nineteenth century, the legal system in Korea went through significant changes.

Adopting modern constitutionalism later, Korea headed towards reform movements

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<sup>62</sup> Hahm, "Conceptualizing Korean Constitutionalism," 170.

<sup>63</sup> Hahm, "Yugyojök Ip'önjuüiwa Han'gugüi Hönjöngsa" (Confucian Constitutionalism and Korean Constitutional History), 128-129.

<sup>64</sup> Ginsburg, "Confucian Constitutionalism?," 767.

<sup>65</sup> The second chapter third verse of the Analects of Confucius that is a collection of sayings and ideas attributed to Confucius and his contemporaries, and believed to have been compiled and written by Confucius' followers during 475 BCE-221 BCE, says "*Lead through policies, discipline through punishments, and the people may be restrained but without a sense of shame. Lead through virtue, discipline through the rites, and there will be a sense of shame and conscientious improvements.*" See Young, *Retracing the Roots and Ideals of Confucian Principles of Governance*.

<sup>66</sup> Ginsburg, "Confucian Constitutionalism?," 766.

<sup>67</sup> Ebrey, *The Cambridge Illustrated History of China*, 179.

in constitution such as the *Gabo* Reforms of 1894, the Constitution of the Great Han Empire of 1899, and the Constitution of the Provisional Government of the Republic of Korea of 1919. Half a century after the beginning of these reforms, the Republic of Korea was established with its first constitution in 1948, which was amended nine times until today.<sup>68</sup>

### 3.1.1 *Gabo* Reforms

Being transformed into a “hermit kingdom”<sup>69</sup> and falling behind other countries in technology and industry by delaying development and modernization in an attempt to protect the country against Western imperialism through a strict isolationist policy from the outside world, the Joseon Dynasty finally adopted an opening policy combining eastern tradition and Western science and technology as from the mid-nineteenth century onwards in order to bolster Joseon’s economic and military power, and thereby to consolidate the monarchy. Following the promotion of external trade, the idea of the implementation of the Western model in every aspect of Joseon society, including the institutional and cultural domains, began to muster up more support. With this design, the more modern and powerful Empire of Japan was taken as a role model by the supporters of the modernization reforms with its rapid modernization during its Meiji period (1868-1912) that transformed Japan from an isolated feudal society to a modern nation under the rule of Emperor Meiji through fundamental political, legal, social, economic and military reforms following the Western model. Concerning establishing a modern state in terms of law, the Meiji Constitution was promulgated in 1889, taking the Constitution of Prussia of 1850 as an example, and being inspired other Western constitutions such as the 1867

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<sup>68</sup> Technically, there has been one constitution, the Constitution of 1948, which has been repeatedly amended. Still, they are mostly treated as different constitutions.

<sup>69</sup> Griffis, *Corea, the Hermit Nation*, 125.

Austrian Constitution, the 1848 Italian Constitution, the 1845 Spanish, Belgian and Portuguese Constitutions while maintaining its traditional Japanese approach regarding the sacred Emperor.<sup>70</sup> Japan's footsteps were followed by reform-minded Koreans aiming to found a modern Western-style state in Joseon under the Japanese sponsorship, and a pro-Japanese cabinet in the Joseon government was eventually installed in 1894 when Japanese troops invaded the royal palace to force the king to declare a series of sweeping laws and regulations known as the *Gabo* Reforms.<sup>71</sup>

Regarded by some as the country's biggest reforms,<sup>72</sup> the *Gabo* Reforms represented an important step toward Korea's modernization, and their importance lay in their novelty of a completely new form and direction for the government by "overturning social and cultural traditions that had dated back centuries".<sup>73</sup> The series of fundamental changes decreed by a group of Korean government officials under Japanese coercion marked the end of Korea's old socio-political order by eliminating social distinctions of all sorts, abolishing the civil service exams confirming elite status, enacting the new principle of law opening all positions to men of talent regardless of social background, abolishing slavery in all forms, allowing widows to remarry, outlawing child marriage and increasing the marriage age, establishing a legal foundation for the society, and outlawing the torture of suspects, guilt by association and punishment of family members of criminals.<sup>74</sup> For the first time in thousands of years, the country broke off its ties with the old Chinese tributary system, used the Korean alphabet Hangeul in government documents, replaced the old Ming Chinese calendar with the Western one, taught Korean history

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<sup>70</sup> Nakamura, "Die Rezeption des deutschen Rechts in Japan," 77.

Steenstrup, "Die Rezeption des deutschen Rechts im Japan der Meiji-Zeit," 37.

Beckmann, *The Making of the Meiji Constitution*, 284.

<sup>71</sup> Connor, *The Koreas*, 184.

<sup>72</sup> Lee, "'Gabo Years' Have Many Historic Moments."

<sup>73</sup> Hwang, "Three Major Events Happened in Korea in 1894."

<sup>74</sup> Lee, "'Gabo Years' Have Many Historic Moments."

at school, adopted the Western-style education system, and established primary schools in the capital with plans to establish others throughout the country.<sup>75</sup> A cabinet-style organization with a prime minister was implemented, and new ministries were created to deal with foreign affairs, finance, justice, education, defense, agriculture, commerce and industry. The authority of the king was weakened, while the new cabinet and the prime minister were empowered. The affairs of the court were separated from the rest of the government, and a hierarchy of courts was established. The government was defined with clear separations of judicial and military functions from civil ones. A new capital and provincial police system was created. Arbitrary taxes and merchant monopolies were abolished.<sup>76</sup> The reforms of this period institutionalized a major rupture in Korean statecraft by proposing that the state's legitimacy and organization were based on systems of thought beyond Confucianism or native conventions.<sup>77</sup> The *Gabo* Reforms represented a significant effort to transform the traditional government structure of Joseon in accordance with the modern nation states of the West and Japan. Although reformulating a new state order where the royal power was almost ignored could be considered as a path toward a constitutional monarchy,<sup>78</sup> it also had a negative impact because in this way, too much power was concentrated in the hands of the Japanese-controlled cabinet, especially in a period in which national sovereignty was under fire. To that end, the *Gabo* Reforms actually paved the way for Japan to easily control and interfere in Joseon's domestic affairs.

Finally, the *Gabo* Reforms were noteworthy regarding the Korean modernization, but they were also so radical that they could not get public consensus.

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<sup>75</sup> Seth, *A History of Korea: From Antiquity to the Present*, 247.

<sup>76</sup> Seth, *A History of Korea: From Antiquity to the Present*, 247.

<sup>77</sup> Hwang, *Rationalizing Korea: The Rise of the Modern State*, 90.

<sup>78</sup> Eckert et al., *Korea: Old and New History*, 226.



Furthermore, because hundreds of reform measures were passed over a considerably short period of time of a mere one year, it was impossible both for the government and the people to internalize all these changes. The reforms were essentially set with the intent of combining Western ideas of codified laws and the existing customs in Korea, but they resulted in weakening Korea's national sovereignty, as those Western ideas were imported and implemented in the peninsula under the Japanese sponsorship. As the reforms continued, Joseon's dependence on Japan deepened, and so did Japan's intervention in each affair on the peninsula. Still, as the first comprehensive effort at restructuring the Korean government and society, the *Gabo* Reforms marked a turning point in Korea's path towards modernization. The "*Gabo* spirit"<sup>79</sup> persisted as a driving force for social and political reform later on and it shaped the subsequent emergence of modern Korea.<sup>80</sup> It was amidst such circumstances that the Great Han Empire (or Korean Empire) was born, and the *Gwangmu* Reforms were undertaken in 1897.

### 3.1.2 *Gwangmu* Reforms and the Constitution of the Great Han Empire

The period right after the *Gabo* Reforms was dominated by the activities of the Independence Club and the establishment of the Great Han Empire that brought along the *Gwangmu* Reforms from 1897 onward. Following the installment of a pro-Japanese cabinet, the widespread anger-hostility among Korean people began to call for the strengthening of the spirit of national independence, and the idea of restoring the prestige and the power of the king grew stronger. With the support of the Joseon government, a social club called the Independence Club was formed by a significant number of pro-American and pro-Russian government officials who praised Western

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<sup>79</sup> Hwang, *Rationalizing Korea: The Rise of the Modern State*, 91.

<sup>80</sup> Hwang, "Three Major Events Happened in Korea in 1894."

concepts of liberty, democracy and equality as well as modernization.<sup>81</sup> Encouraged by such popular movement, King Gojong turned back many reforms undertaken by the pro-Japanese cabinet, and he disbanded the pro-Japanese cabinet of ministers by replacing them with a moderate, pro-Russian faction. In the hope of securing Korea's independence and sovereignty, the monarchy was restored, and Gojong changed the name of the state to the Great Han Empire in 1897 with him as the emperor. A new era name *Gwangmu* ("shining and martial" in English) was declared to highlight the end of Korea's centuries-old subordination to the Qing dynasty. The *Gabo* spirit still made its presence felt in the largely reformist agenda of the government. The state adopted a new policy of "the ways of the East, the technologies of the West", which meant using the Korean traditional way as the foundation while adopting Western institutions.<sup>82</sup> As a fruit of the steps taken towards establishing a modern nation state, the Constitution of the Great Han Empire was composed of nine articles, promulgated through a special legislative bureau on August 17, 1899. While drawing the legal framework of the Empire, the new constitution also sought to strike a balance between modernization and tradition.

The Great Han Empire was meant to defend national sovereignty through strengthening the emperor's power while carrying out modernizing reforms known as the *Gwangmu* Reforms. Desiring to achieve a truly independent nation state, the emperor was entrusted with absolute authority over the army and the navy, the legislation, the administration, the appointment of officials, the treaty making, and the appointment of emissaries.<sup>83</sup> A national anthem and a royal flag were created as an assurance for the new, independent Korean state. Aiming at modernizing the Empire as a late starter in the industrial revolution, reinforcement of the national

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<sup>81</sup> Woo, *A Review of Korean History*, 76.

<sup>82</sup> Han, "60-Year History of the Republic of Korea."

<sup>83</sup> Woo, *A Review of Korean History*, 72.

defense, the nation's financial base, commerce and industry were given great emphasis. The army was built up, the factories and modern schools were erected, science and technology bases were established, transportation and communications were improved, and many industries were nationalized to keep out foreign business interests.<sup>84</sup>

In one sense, the *Gwangmu* Reforms can be regarded as having strengthened absolutism. It did not include any provisions for a legislature, any form of popular political participation, or an independent judiciary. On the other side, they also led to great advances regarding the modernization of national defense and the promotion of modern technology, industry, and education. By setting up the infrastructure, reorganizing the economy, modernizing the bureaucracy, and forming a modern military, these reforms prepared the ground for the future development in the country, beginning from the 1960s. In the meanwhile, as the escalating conflict between Japan and Russia over the control of the Korean peninsula and Manchuria culminated in the Russo-Japanese War of 1904-05, Korea was dragged into a new, tough era.

### 3.1.3 Japanese Rule and the Provisional Government of the Republic of Korea

After having come out victorious from the Russo-Japanese War in 1905, Japan seized full control of the situation on the Korean peninsula, and instituted an indirect colonial rule over Korea.<sup>85</sup> Later in 1910, Japan took the last step towards its annexation of Korea through the Korea-Japan Annexation Treaty that ended the five-hundred-year-old Kingdom of Joseon. Together with its political takeover, Japan also turned Korea's economic structure into a colonial one as a source of raw materials

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<sup>84</sup> Woo, *A Review of Korean History*, 118.

<sup>85</sup> Kim, *History of Korea*, 125.

and food, as well as a market for Japanese goods. These moves were met by a huge discontent and anger amongst Korean people, and they marked the start of their thirty-six-year struggle for independence against the Japanese.<sup>86</sup>

Inspired by the US President Woodrow Wilson's principle of national self-determination<sup>87</sup>, and the October Revolution of 1917 in Russia<sup>88</sup>, the Korean independence movement began in earnest at the end of the First World War with the March First Movement of 1919.<sup>89</sup> Although the Movement failed to bring about its stated goal of national independence due to the Japanese authorities' aggressive suppression, it still shattered Japan's strict colonial rule and served as a catalyst for the Korean people's fight for independence afterwards. In its aftermath, many independence fighters began to believe that a modern government, even a provisional one, had to be established to better prepare for eventual independence and to more effectively organize and coordinate pro-independence activities. For this purpose, from March to April of 1919, some provisional governments were established in and outside of Korea, and amongst them, the Provisional Government of the Republic of Korea in Shanghai came to the forefront by forming a legislature and an executive branch.<sup>90</sup> To this end, after a long time without any major constitutional change, a new constitution was drafted by the Provisional Government of the Republic of Korea in Shanghai on September 11, 1919. Being revised five times till 1945, and mainly affected by American and Chinese Constitutional laws, this Constitution of

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<sup>86</sup> Lee, *A New History of Korea*, 315-317.

<sup>87</sup> The principle of national self-determination referring to a community's right to freely choose its political destiny, was perceived by US President Woodrow Wilson's as his guiding strategy in the aftermath of the First World War while redrawing European and world maps to establish a new order.

<sup>88</sup> The October Revolution (also known as Bolshevik Revolution, October 25, 1917) led by Bolshevik Party leader Vladimir Lenin launched a coup d'état against Russia's Provisional Government, and ended in the establishment of the world's first and biggest Marxist government.

<sup>89</sup> Woo, *A Review of Korean History*, 127.

<sup>90</sup> The other provisional governments were Korean National Assembly in Vladivostok; the Provisional Government of Joseon in Seoul; the New Korean Government in the northern areas of Korea; and the Hanseong Provisional Government in Seoul.

the Provisional Government never took effect within Korean territory. Nonetheless, it provided the inspiration for the first constitution of the Republic of Korea in 1948, and kept reflecting its ideology till the existing Constitution of 1987.<sup>91</sup> The Provisional Government had the form of a democratic republic that featured all three branches of government. With Rhee Syngman, the first president of the later established Republic of Korea of 1948, as president, its administrative structure was a compromise between a presidential and a parliamentary system.<sup>92</sup> As a government in exile, the Provisional Government aimed to unify various independence movements and to inform the international community of the plight of Korea. However, these diplomatic efforts could not reach fruition by reason of the seemingly endless factional struggles and the ever-changing constitution. Consequently, the government remained ineffective for a long time. Furthermore, because the Provisional Government had no people or territory under its control and received no formal recognition from any foreign government or international organization, it was a “paper government”<sup>93</sup> lacking the elements of a sovereign state.

In the meanwhile, first with the Great Depression,<sup>94</sup> and then the escalation of the Second World War, Japan adopted a new industrialization policy in the Korean peninsula during the 1930s with the aim of building up a defense industry that also created new industrial areas mostly in the northern half.<sup>95</sup> To implement this policy, the Japanese began to increase military and police presence station in the peninsula with intent to destroy the independent spirit of Koreans and eradicate their identity

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<sup>91</sup> Jung, “The Evolution of Economic Constitutional Law,” 356.

<sup>92</sup> Han, “60-Year History of the Republic of Korea.”

<sup>93</sup> Han, “60-Year History of the Republic of Korea.”

<sup>94</sup> The Great Depression was the longest, deepest and most widespread economic depression of the twentieth century that started in 1929 in the US following the stock market crash in October, and lasted until the late 1930s. It had devastating effects in both rich and poor countries, especially in those dependent on heavy industry.

<sup>95</sup> Lee, *A New History of Korea*, 350-351.

by assimilating them into Japanese culture through some practices such as banning the use of the Korean language and changing Korean names into Japanese ones. Additionally, Japan forced Koreans to take part in the war on the front lines and also to slave away in mines, airports, munitions factories, railways, and military brothels.<sup>96</sup> Also many Korean intellectuals and political leaders were threatened and coerced to collaborate with Japan's war effort and tried to assimilate the Koreans both in political and cultural sense. As a consequence, mutual accusations and a sense of distrust amongst Koreans rooted in Japanese policies emerged as great obstacles for Korean efforts during the nation-building period after the liberation in 1945.

Under Japanese colonial rule, law was an instrument of exploitation, and it was used to justify the colonial atrocities. Western laws introduced by Japan were used as a means to advance its colonial interests, rather than to sustain social justice or to guarantee individual rights. For this reason, law became synonymous with colonial oppression and began to be considered as the antithesis of the Western concepts of equality, justice, and inalienable rights.<sup>97</sup> Likewise, violation of the imposed law was regarded by the Korean society as an indicator of patriotism by expressing their discontent with colonial rule.<sup>98</sup> In conclusion, the Japanese colonial experience fed the perception that the law only served the powerful, and thus, it played a critical role in the negative Korean attitudes towards law.<sup>99</sup> Finally, major constitutional changes came in this period when Japan lost the Second World War and eventually surrendered on August 15, 1945.<sup>100</sup>

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<sup>96</sup> Lee, *A New History of Korea*, 352-359.

<sup>97</sup> Lee, *Kŏn'guk'ŏnbŏp Ijŏnŭi Han'guk'ŏnjŏngsa* (Korean Constitutional History Before 1948), 196.

<sup>98</sup> Hahm, *Korean Jurisprudence, Politics, and Culture*, 144.

<sup>99</sup> Kim, "Korean Attitudes towards Law," 7.

Yoon, "New Developments in Korean Constitutionalism," 397.

<sup>100</sup> Kim, *History of Korea*, 186.

### 3.2 Creation of the Republic of Korea and the Constitution of 1948

The end of the Second World War witnessed Japan's surrender to the Allies<sup>101</sup> on August 15, 1945, and subsequently Korea's liberation from thirty-six-year-long Japanese rule. Nevertheless, the international political situation did not allow Koreans to realize their dream of establishing an independent democratic Korean state in the immediate aftermath of the Korean liberation because it was decided by the US, the Soviets and Great Britain during the wartime conferences at Yalta and Potsdam, and later in the Moscow Conference of 1945 to establish a unified provisional Korean government in the scope of a four-power trusteeship (the US, the USSR, Great Britain and China) over the peninsula of no more than five years.<sup>102</sup>

As the establishment of an independent government was delayed due to the issue of trusteeship, the conflicts between the right and the left in Korea was getting deeper by 1946. While two national leaders, Rhee Syngman and Kim Gu, opposed the trusteeship by demanding the immediate transition to a fully independent state, the communist leader Kim Il Sung in northern Korea supported the idea of trusteeship. In the meantime, two superpowers—the US and the USSR—could not reach an agreement over the selection of the political parties and social organizations that would involve in the prospective Korean state. Thereupon, the US decided to take the Korean question to the United Nation (UN), which resolved that a unified Korean government must be set up through a general election under its watch. In spite of the opposition of the Soviets to this idea, a general election was held on May 10, 1948 in southern Korea only, and the Republic of Korea (ROK) was established in the southern part of the thirty-eighth parallel on August 15. With the establishment

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<sup>101</sup> Aiming to stop German, Japanese and Italian aggression, the Allies of the Second World War II comprised the United States, the Soviet Union, the United Kingdom, China, France, Poland, Canada, Australia, Yugoslavia, Greece, Netherlands, Belgium, New Zealand, South Africa, Norway, Luxembourg, Czechoslovakia, Ethiopia, Mexico, Colombia, and Cuba.

<sup>102</sup> Shin, "The Decision Process of the Separation of the Korean Peninsula," 37.

of the Democratic People's Republic of Korea (DPRK) after a little while on September 9, Korea was officially divided into two halves while the US sought to establish an American-style democratic state in the south, and the Soviets pursued a Soviet-style socialist state in the north. In conclusion, the dream of creating an independent unified Korean government was therefore "shattered in the face of the ever intensifying Cold War structure created by the superpower rivalry, and the machinations of political leaders bent on grabbing power for themselves at all costs."<sup>103</sup>

The election in May 10, 1948 was the first general election in the history of Korea in which everyone over the age of twenty-one was given the right to vote. The general election was held to build the Constitutional Assembly of 198 members that formed the Constitutional Committee to make the constitution with the contributions of constitutional experts. The first Constitution of the ROK was promulgated in this way on July 17, 1948 declaring the new democratic South Korean state that inherited the spirit and legitimacy of the March First Movement of 1919, and recognizing ROK as the only legitimate government in the peninsula with a mandate to unite the whole of Korea.<sup>104</sup> In terms of separation of powers, the main disagreement appertaining to the Constitution of 1948 was about the choice between a parliamentary system and a presidential system as the form of government the Constitution would be based on.<sup>105</sup> Supporters of the parliamentary system advocated a merely symbolic presidency, a powerful cabinet led by a powerful prime minister and a cabinet-controlling National Assembly to provide political stability, as they claimed that the conflict between the executive and legislative branches would be

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<sup>103</sup> Woo, *A Review of Korean History*, 187.

<sup>104</sup> Kim, "Constitutional Law," 32.

"South Korea Adopts New Constitution."

<sup>105</sup> Kim, "Die Verfassungsentwicklung der Republik Korea 1910-1987," 171-172.



inevitable in presidentialism.<sup>106</sup> Furthermore, they assumed that a parliamentary system would be more effective in preventing autocracy. While the supporters of the parliamentary system emphasized the stability coming from the minimization of the conflict between the executive and legislative branches, the supporters of the presidential system pointed out the political stability coming from the fixed term of the presidency:

In this period of instability, a parliamentary system may bring more chaos if one of the members of the Cabinet makes a mistake... The most urgent task that we must address at this time is breaking the thirty-eighth division line and meeting the needs of the general public. Therefore, until we have resolved these problems, the presidential system will remain the only alternative that will bring stability to this nation.<sup>107</sup>

At the end of those debates, the presidential system was adopted as the form of government as a result of the efforts made by Rhee Syngman who was to be nominated president by popular acclaim, rejecting a cabinet-centered parliamentary system while favoring a presidential one similar to the American system with a strong presidency and a unicameral legislature.<sup>108</sup> As the legislative power, the unicameral National Assembly was responsible for electing the president, making laws, and formulating constitution. Concerning the executive, the State Council consisting of the president, the prime minister appointed by the president and the state councilors was the highest decision making organ. Intended to prevent the creation of a dictatorial regime by reducing the executive powers of the presidency, the Cabinet was a balancing actor in charge of checking the powers of the president.

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<sup>106</sup> Hee, "Drafting and Revision in the Founding Constitutional Law of the Republic of Korea," 170-71.

<sup>107</sup> Hee, "Drafting and Revision in the Founding Constitutional Law of the Republic of Korea," 170.

<sup>108</sup> Yoon, "Constitutional Amendment in Korea," 2.

Kim, Hakjoon, "The Influence of the American Constitution," 28-29.

Park, "Hönböpkæjōngüi Kwöllyökkujorōnjök Chaengjōmgwa Hönjōngsajik Munje" (A Study on the Ideological and Historical Issues in the Constitutional Amendment), 358.

The post-colonial period was the first true beginning of the establishment of the modern legal system. The Korean Constitution was influenced by many Western constitutions, especially by the Weimar Constitution of the German Reich of 1919<sup>109</sup> as well as the United States Constitution of 1789.<sup>110</sup> Mainly inspired by American constitutional characteristics, the Constitution of 1948 was

a single-document national constitution with a preamble of guiding principles; a list of individual rights and freedoms; constitutional assembly with authority to write a basic law legitimatizing a government structure and all other laws; a separation of powers of national government among three branches, each with a distinctive role and specific and limited prerogatives; a rigorous amendment process; and free, popular and competitive elections, decided by secret balloting by its citizens.<sup>111</sup>

Furthermore, the Constitution was inspired by the Weimar system that had introduced a bicameral presidential system, elections through universal suffrage over the age of twenty, the separation of powers, protection of basic human rights, and emphasis on social justice that largely aimed at promoting equality, education, public harmony and individual capabilities.<sup>112</sup>

In the aftermath of the end of the Japanese rule, the US and the UN implanted American values into the peninsula irrespective of the Korean people's traditions, values, and views. That is why, although the Constitution made references to Western concepts and values such as freedom, justice, equality and democracy, these concepts were so unfamiliar that they could not be fully perceived and internalized by the Korean people.<sup>113</sup> As a consequence, in the four decades following its promulgation in 1948, the original constitution was amended nine times in total (in

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<sup>109</sup> The Weimar Constitution governed Germany during the Weimar Republic from 1919 till 1933, and it also technically remained in effect during the Nazi era (1933-1945).

<sup>110</sup> Choi, "Development of Law and Legal Institutions in Korea," 90-95.

<sup>111</sup> Lawrence, "The Influence of American Constitutionalism in Asia," 114.

<sup>112</sup> Connor, *The Koreas*, 28.

Yang, "Judicial Review and Social Change in the Korean Democratizing Process," 2.

<sup>113</sup> Kim, "Korean Attitudes towards Law," 11.

Kim, "Die Verfassungsentwicklung der Republik Korea 1910-1987," 197.

1952, 1954, 1960—twice, 1969, 1972, 1980 and 1987) whereby in five instances, the Constitution was fully rewritten, and these major changes marked the beginning of new republics.<sup>114</sup>

### 3.2.1 Korean War and the first constitutional amendment

The late 1940s were chaotic for the Rhee government because it found itself virtually in a civil war with leftist guerilla resistance. Furthermore, economic difficulties exacerbated the ideological conflicts within the society, and the Rhee regime failed to instill confidence amongst South Korean people. As a result, in the general election in May 1950, Rhee's party gained only 30 out of 210 seats at the National Assembly. President Rhee's shaky status was shattered more when the US military pulled out of Korea in June 1949 leaving behind only a small contingent of military advisors.<sup>115</sup>

In spite of the ambiguous atmosphere in the south, North Korea was growing rapidly under the Kim Il-sung regime. With its ever-increasing military power and weaponry with the solid backing of the Soviet Union and China, North Korea enjoyed a remarkable military advantage over South Korea.<sup>116</sup> Relying on its well-equipped military force, and the promises of support from its two allies, North Korea launched an invasion across the thirty-eighth parallel on June 25, 1950 in an attempt to unite the country. Thus, the Korean War began, and witnessed fierce internal struggles on the peninsula as well as the Cold War tensions between the US and the Soviet Union. The ceasefire came three years later in 1953 by the US, and the

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<sup>114</sup> First Republic: Rhee Syngman (1948–60); Second Republic: Yun Posun/Jang Myeon (1960–61); Third and Fourth Republic: Park Chung-hee (1962–79) and Choi Kyu-Hwa (interim 1979–80); Fifth Republic: Chun Doo-hwan (1980–87); Sixth Republic: Roh Tae-woo (1988–92); Kim Young-sam (1993–97); Kim Dae-jung (1998–), Park Geun-hye (2013–2017), Moon Jae-in (2017–).

<sup>115</sup> Kim, *Unification Policies of South and North Korea, 1945-1991*, 81.

<sup>116</sup> Masao, "The Domestic Roots of the Korean War," 314-315.

Soviets' decisions following immeasurable damage to both Koreas with millions of casualties, totally destroyed industrial infrastructure, and residential areas. More importantly, seeds of intense mutual hostility and distrust were sown between the two Koreas, and the opportunity for reunification was thus delayed for an indefinite period of time.

During the War, President Rhee used the strong anti-communist sentiment of South Koreans to legitimize the dictatorial regime he was planning to build up.<sup>117</sup> With the declaration of martial law in 1952 that banned all political activity, passing laws was significantly simplified. In this way, the Constitution of 1948 was first amended in 1952 to make it possible for Rhee to run his presidency for a second term. The Article 53 of the Constitution, which provided for an indirect vote for the president by the National Assembly was replaced with a direct presidential election by the public. The once-unicameral National Assembly was converted into a bicameral legislature with its Upper and Lower Houses. Through the amendment, the Cabinet members would be recommended by the prime minister, and selected with the president's consent. Although some worried that the president wielded too much power against the constitution following these changes, all opposition movements were silenced by police and military force. In consequence, making use of the fear over escalating Korean War, Rhee succeeded in his constitutional revision, and he was easily reelected through popular vote in the same year with a promise to end the war and reunify Korea with the backing of the UN.<sup>118</sup>

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<sup>117</sup> Woo, *A Review of Korean History*, 203.

<sup>118</sup> Yoon, "New Developments in Korean Constitutionalism," 400.  
Yoon, "Constitutional Amendment in Korea," 3.

### 3.2.2 Second amendment and the end of the Rhee era

After his reelection, President Rhee pushed for further amendments to the constitution. This time round, he aimed at the removal of presidential terms limits from the constitution in order to secure his position. The amendment bill proposed by the ruling party passed in the Assembly in late 1954 through a procedural irregularity, and it eventually allowed Rhee to be elected for an additional two terms, and removed the post of prime minister.

Based on the new constitution, a presidential election was held in May 1956. Although Rhee was elected for a third term, the Rhee government seemed to fall from the South Korean people's grace due to its rampant corruptions, mismanagement of the economy, continued election frauds and constitutional amendments.<sup>119</sup> Increasingly unpopular, the Rhee government committed another election fraud during the fourth presidential election of March 1960, and it led to a huge popular uprising in April known as the April Revolution of which focus shifted from condemning the vote-rigging of the government to calling for the President to resign all of a sudden. When the US also got involved in the scene by urging Rhee to step down, Rhee resigned on April 26, 1960, ending his twelve-year long dictatorship.<sup>120</sup>

### 3.2.3 Consecutive amendments of the Second Republic

After President Syngman Rhee's resignation, Yun Posun came to power as the second president of the ROK following the fifth presidential election of July 1960, while the main opposition party won absolute control of the National Assembly. The new government put a new and more democratic constitution into force in 1960. The

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<sup>119</sup> Woo, *A Review of Korean History*, 211.

<sup>120</sup> Eckert, *Korea: Old and New History*, 355.

changes made were so drastic that the new government was named “the Second Republic.”<sup>121</sup> South Korea changed its presidential system into a parliamentary one where Yun served merely as a figurehead to eliminate the risk of dictatorship by presidents. As opposed to the authoritarian excesses of the Rhee regime, democracy and multiparty system were promoted while the powers of the president were vastly reduced, and the president began to be elected indirectly by the National Assembly for a single five-year term. The post of prime minister was recreated, and Jang Myeon was appointed as prime minister. Additionally, a bicameral parliament was reestablished as the Upper and Lower House. To further avert the risks of rigged elections, an Electoral Commission was constitutionalized. Moreover, the amendments addressed strengthening the safeguards of fundamental rights. Any legislative limitations of these basic human rights like martial law were removed. With the Jang Myeon government, South Korea began to enjoy an “American-style democracy with full freedom of the press and liberalization of all sectors of society.”<sup>122</sup> Again, in order to prevent further arbitrary constitutional amendments, a constitutional commission with the power of constitutional review was put into place though it never achieved its objectives due to further amendments.<sup>123</sup> A fourth constitutional revision was put in place the same year, in 1960, to accommodate a “constitutional exception to the principles prohibiting ex-post facto penalties.”<sup>124</sup> The amendment provided a special law to install special tribunal and prosecution offices for retroactive punishment of election irregularities, corruption and misappropriation of public funds, as well as the anti-democratic acts.<sup>125</sup>

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<sup>121</sup> Lee, “Bureaucratic-Mobilizational Regime: The Yushin System,” 201.

<sup>122</sup> Woo, *A Review of Korean History*, 213.

<sup>123</sup> Kim, “Constitutional Law,” 34.

<sup>124</sup> Yoon, “New Developments in Korean Constitutionalism,” 401.

*Constitution of the Republic of Korea (1960)*, Art.23.

<sup>125</sup> Chae, “Taehanmin’guk Hŏnjŏngsa I” (South Korean Constitutional History I), 44.

Although these amendments were important steps on the way to democracy and liberty, they also brought along political instability. With the moderation in government control and restrictions, public demonstrations increased its speed as every segment of the society found a chance to voice their pent-up frustrations and demands.<sup>126</sup> Furthermore, long-lost discussions about unification began to be spoken out once again. Carefully observing the political scene, the Korean military was deeply concerned with the resurfaced calls for reunification, and was not content with Jang government's insufficient efforts to deal with the issue. The new government also failed to meet the high expectations of the public, and it was plagued by internal factional struggles. Moreover, the rush in establishing a new constitution failed to accommodate different views, and there were not enough consultations for procedural justice.<sup>127</sup> Consequently, two amendments in one year of 1960 could not save the Second Republic from being toppled by the military coup, staged at Major General Park Chung-hee's command on May 16, 1961, following political turmoil.<sup>128</sup>

#### 3.2.4 Third Republic and the first rewriting of the Constitution

After having taken over the reins, the military junta dissolved the parliament and made all constitutional bodies invalid. The Park regime started the process of making a government anew, and they attached priority to ensuring economic stability and strengthening the anti-communist line by promoting the national spirit with the intent to secure its control on every aspect of life. The Constitution of the newly established military rule passed in December 1962 through a referendum garnering over 78% of

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<sup>126</sup> Woo, *A Review of Korean History*, 213

<sup>127</sup> Yoon, "New Developments in Korean Constitutionalism," 400.

<sup>128</sup> Wells, *Korea: Outline of a Civilization*, 71.

the votes.<sup>129</sup> The conflicting political forces were totally excluded from the process as all political activities were banned by military authorities; and thousands of people including politicians, labor and student leaders were arrested in the cause of being pro-communist. The new constitution restored the presidential system with the president elected by popular vote for a four-year term and a unicameral National Assembly. Additionally, it adopted a judicial review system on the US model.<sup>130</sup> Through the amendment, the Constitution included new articles that eased the press censorship and restrained right of assembly, rally, and association.<sup>131</sup> Although the new Constitution seemed to be based on the democratic principle of separation of powers, it actually gave the executive superior powers over the other branches, as the president could manipulate the legislature if the ruling party had the majority of the seats in the parliament.<sup>132</sup>

The presidential election based on the new Constitution was held that October, and retired General Park Chung-hee emerged victorious. Hereby, the Third Republic was born on December 16, 1963 with a strong military power backing under the leadership of Park as the third president of the ROK. President Park adopted economic growth as the first priority instead of reunification with the slogan “Development First, Unification Later”, which saw formulation of economic policies that encouraged foreign direct investment mainly from Japan and US.<sup>133</sup> To strengthen ties with both governments, the Park government initiated talks with

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<sup>129</sup> With the assembly already dissolved, the amendment had to be carried out by referendum.

<sup>130</sup> In the European style of judicial review, the Constitutional Court is a special court, whereas in the American style, the constitutional adjudication is conducted by general courts with no other special courts. Germany is the typical example of the former, while the US is that of the latter. See Kim, *The Spirit of Korean Law: Korean Legal History in Context*, 206.

<sup>131</sup> Chae, “Taehanmin’guk Hönjōngsa II” (South Korean Constitutional History II), 27.

<sup>132</sup> Yoon, “Constitutional Amendment in Korea,” 6.

<sup>133</sup> Heo and Horowitz, *Conflict in Asia: Korea, China-Taiwan, and India-Pakistan*, 23.



Japan on the normalization of diplomatic relations, and sent troops to Vietnam<sup>134</sup> with the design of boosting the legitimacy of the military government and financing its economy plans. Although these steps faced an outburst of anger from the people, they proved to be major turning points in terms of the South Korean economic growth, especially during the late 1960s when the economic development began to accelerate. By this way, his sound economic policies<sup>135</sup> made President Park elected into office for another term in the presidential election of May 1967.

### 3.2.5 Sixth amendment

Towards the end of his second term, the President Park commissioned the sixth amendment to the Constitution in 1969, which primarily intended to extend the presidential tenure limited to two terms, and to allow him to run for a third term on the grounds that the country needed a strong leader for the sake of national defense and economic growth. It also designated to make the impeachment of president more difficult. These proposed revisions to the constitution were deceitfully passed both in the Assembly and the national referendum, and it was seen as the official start of the Park Chung-hee dictatorship.<sup>136</sup> In spite of the huge opposition to the Park presidency and his repeated election frauds, he won the presidential election in April

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<sup>134</sup> Beginning in late 1955 and lasting for twenty years, the Vietnam War was a Cold War-era proxy war fought between North Vietnam backed by the communist allies including the PRC and Soviet Union, and the government of South Vietnam backed by the anti-communist allies notably the US.

<sup>135</sup> Park's economic strategy focused on an export-oriented economic development by importing foreign capital and technology to nurture domestic industries, using cheap labor to produce goods for export, and accumulating the capital earned from such exports. Thus, the First Five-Year Economic Development Plan was initiated in 1962, the Second in 1967-71, the Third in 1972, and the Fourth in 1977. Meanwhile, the emphasis shifted from light industry to the development of the heavy and chemical industry, transforming the Korean society into an industrial society. See The Korea Institute of Public Administration, *The Korean Government: Policies and Administration 1948-2013*, 75-129.

<sup>136</sup> Kim, *Expansion of Transitional Justice Measures*, 31.

1971 once again though the opposition occupied the majority of the seats in the parliament.<sup>137</sup>

### 3.2.6 Fourth Republic and the Yushin Constitution

With the opposition controlling the parliament, the President Park felt threatened. Therefore, he desired to make another revision in the constitution in 1972 to secure his authority. To that end, he suddenly imposed martial law, suspended the constitution, dissolved the National Assembly, and banned all political activity through a presidential emergency decree.<sup>138</sup> The absence of a parliament enabled Park to easily amend the constitution, as the amendment was put to the referendum without any open debate in the Assembly, and the Yushin (“Revitalizing” in English) Constitution was promulgated in October 1972. Additionally, fearing public reprisal, President Park also changed the electoral process from a direct popular presidency vote to an indirect process to secure his election as president. A new special electoral body called the National Conference for Unification responsible for electing the president was created whose members would be elected directly by popular vote, but the candidates were to be thoroughly screened by President Park’s regime.<sup>139</sup>

The Yushin Constitution was to strengthen the presidential authority by extending presidential term limits while allowing the president to be elected for six years without any limits on reelection. It also granted the president enormous, almost unlimited powers overriding all the three branches of government. Weakening the independence of branches, the president had authority to dissolve the Assembly, to appoint and expel all judges, and to issue extraordinary measures that could suspend constitutional provisions. Under the cover of national security, new restrictions on

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<sup>137</sup> Lee, “Bureaucratic-Mobilizational Regime: The Yushin System,” 198.

<sup>138</sup> Yoon, “Constitutional Amendment in Korea,” 8.

<sup>139</sup> Yoon, “New Developments in Korean Constitutionalism,” 402.

the fundamental human rights were introduced that directly sought to limit the activities of the opposition and avoid criticisms against the government. These changes were so sweeping that it launched the Fourth Republic.<sup>140</sup>

While this Constitution was famous for limiting democratic freedoms, giving the president almost dictatorial powers, and securing his lifelong presidency, it also led to a significant economic progression in the country. During the 1960s and 70s, the Park regime spearheaded a state-led economic development policy that identified the economy as the nation's first priority. Various forms of political repression and corruption were justified in the name of economic development. Still, the successful economic development promoted by Park instilled in the people a can-do spirit that transformed the country from a poor agrarian underdeveloped country to a dynamic industrial powerhouse.<sup>141</sup> Nevertheless, these rapid changes also brought on serious social and economic disarrays such a heavy dependence on the Japanese and US economies, an industrial imbalance caused by a conglomerate-centered economic structure, corruption occasioned by the close government-business ties, regional disparities, the gradual impoverishment of rural areas and the growth in the numbers of urban poor, and environmental degradation.<sup>142</sup> Although the Yushin system could survive a bit longer by means of the *Saemaeul* (New Village) Movement<sup>143</sup>, all these problems contributed to the rise of a fierce opposition.

What was implemented with the new constitution was introduced as “Korean-style democracy”, but in reality, it was regarded as a blatant form of dictatorship by

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<sup>140</sup> Seth, *A History of Korea: From Antiquity to the Present*, 407.

<sup>141</sup> Woo, *A Review of Korean History*, 224.

<sup>142</sup> Woo, *A Review of Korean History*, 224.

<sup>143</sup> Facing with rapid urbanization and corruption of rural economy as a result of industrialization, the Park government launched the *Saemaeul* Movement in the 1970s to raise income and living standards in rural areas. Different methods were applied such as replacing traditional houses with modern ones, paving roads, and introducing modern farming and management techniques to rural areas to build up the capabilities, and agricultural productivity of the villagers. Besides the national development, the movement also helped to keep the Yushin system in place during that time. See the Korea Institute of Public Administration, *The Korean Government: Policies and Administration 1948-2013*, 88-94.

the vast majority.<sup>144</sup> Nationwide protests began to be staged against the authoritarian rule, and the popularity of the Park regime plummeted increasingly. However, many of the pro-democracy advocates of the resistance were silenced, and President Park was thus elected to another term in office in 1978. Meanwhile, the outside world, especially the US began to harshly criticize the human rights violations committed by the Park government. Park's already fraying position was rendered even more tenuous by the impact of the second oil shock<sup>145</sup> on the South Korean economy. While massive public protests continued nationwide, President Park was assassinated on October 26, 1979 by the Director of the Korean Central Intelligence Agency (KCIA), an incident, which put an end to the Park Chung-hee era after eighteen years.

### 3.2.7 Fifth Republic and the third rewriting of the Constitution

Following Park's assassination, Prime Minister Choi Kyu-hah was elected as the fourth president of the Republic of Korea by the National Conference. However, only after six days, the newly established Choi regime was overthrown by a military coup under the leadership of Major General Chun Doo-hwan and Major General Roh Tae-woo on December 12, 1979. Disappointed at the establishment of a new military rule, South Korean people hit the streets calling for democratization and political freedom. The new military junta declared martial law in May, and banned all political activities. Still, on May 18, 1980, a massive pro-democracy student protest took place in the city of Gwangju where hundreds of people lost their lives in the military crackdown. Immediately after this incident known as the Gwangju massacre,

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<sup>144</sup> Eckert, *Korea: Old and New History*, 359.

<sup>145</sup> Following its predecessor in 1973, the second oil shock originated in the US in the wake of the Iranian Revolution of 1979 that brought about a sharp decline in oil output while global oil demand was growing apace. More than doubling the cost of oil, the crisis hit the oil-consuming regions harshly.

martial law was imposed by the military government, and Major General Chun Doo-hwan was subsequently elected as the fifth president of the Republic of Korea in September 1980. Although President Chun sought to distance himself from the authoritarian rule of the previous military government, Chun followed its footsteps by suppressing freedom of speech and dissidents under martial law. Under these circumstances, the process of drafting a new constitution—the third rewriting of the constitution—was managed by government authority under the military control, and thereby, the new political regime, referred to as the Fifth Republic, began based on this new constitution.<sup>146</sup>

After having been approved by the referendum, the Constitution of the Fifth Republic maintained the presidential system by curbing the president's powers to some extent, and introduced a single seven-year presidential term, with the president to be elected by a Presidential Electoral Commission, which replaced the National Conference for Unification.<sup>147</sup> In terms of the presidential term, the new constitution stated that any changes of the presidential term limit was possible by constitutional revision, but such a change could not apply to the president in office at that time.<sup>148</sup> Courts were empowered for judicial review, and the National Assembly was given the authority to supervise the administration. Basic human rights were emphasized by introducing significant regulations like the right to pursue happiness, the presumption of innocence, the right and inviolability of privacy, and environmental rights.<sup>149</sup>

However, being already tainted by the Gwangju massacre of 1980 in the eyes of the South Korean people, the Chun regime was never able to overcome this

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<sup>146</sup> Yoon, "Constitutional Amendment in Korea," 10.

<sup>147</sup> *Constitution of the Republic of Korea (1980)*, Art.39.

<sup>148</sup> *Constitution of the Republic of Korea (1980)*, Art. 45 and Art.129(2).

<sup>149</sup> Chae, "Taehanmin'guk Hŏnjŏngsa II" (South Korean Constitutional History II), 35.

infamy.<sup>150</sup> Moreover, as South Korea witnessed a rapid economic growth, and enhanced its reputation in the international arena, South Koreans' calls for democracy and constitutional revision were accelerated. Eventually, Chun encountered a nationwide pro-democracy mass protests against the authoritarian military government in 1987 known as the June Democracy Movement, and he was forced to concede to public demands about holding popular presidential elections, restoring political rights to the opposition, and setting up further democratic reforms that ushered the establishment of the Sixth Republic, which is the current government of South Korea. This marked a new beginning in the democratization process of South Korea where government showed a response to popular demands and protests unlike the previous regimes, and Korean people proved that political activism could bear fruitful results.<sup>151</sup>

### 3.2.8 Sixth Republic and the 1987 Constitution

As an outcome of the June Democracy Movement, the first direct presidential election in sixteen years were held in December 1987 in which Roh Tae-woo was elected as the sixth president of the Republic of Korea. After having been unanimously ratified by the National Assembly and supported by ninety-three percent in the national referendum in October 1987, the Constitution of the Sixth Republic was implemented on February 25, 1988 when Roh officially took office as president. Until that day, the assembly had been a place of the tyranny of the majority rather than a democratic forum for debate and dialogue.<sup>152</sup> The ruling parties had mostly enjoyed their majority control in the legislature while showing solid loyalty to the president, who was also the head of the ruling party. Beginning

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<sup>150</sup> Woo, *A Review of Korean History*, 234.

<sup>151</sup> Eckert, *Korea: Old and New History*, 385-386.

<sup>152</sup> Yoon, "New Developments in Korean Constitutionalism," 404-405.

from 1987, however, the political climate changed prominently. This time around, in the process of amending the constitution, the parliament witnessed major collaboration and debate between the ruling party and the opposition as well as other social and political actors such as scholars and activists for the first time in the history of Korea.<sup>153</sup> By this means, the present-day Sixth Republic of South Korea was established through these democratic developments based on the new Constitution, which was amended for the ninth and last time.

This was a significant change from the past constitutional amendments where incumbent regimes sought to make changes in the constitution to serve their own interests and to retain power through unjust means masked in facades of legality.<sup>154</sup> Furthermore, because the 1987 amendments were made in accordance with the legal procedure set by the existing constitution, it had more legitimacy than any earlier version.<sup>155</sup> Again, the revisions reinstated election by popular vote for president, and a presidential term was set to a single five-year term. The presidential authority to dissolve the parliament was removed, and the power of the National Assembly was strengthened by being given the authority to supervise the government offices in order to protect individual rights and to provide adequate checks and balances to the presidency.<sup>156</sup> In addition, the Constitutional Court was established, and the independence of the judicial branch was guaranteed. The Constitution resulted in a substantial increase of democratic rights by recognizing the right of media, press, assembly, and association.

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<sup>153</sup> Cho, "The Politics of Constitution-Making," 202.

<sup>154</sup> Shin, "Democratic Transition and Consolidation in Korean Politics," 176.

<sup>155</sup> Yoon, "Constitutional Amendment in Korea," 10.

<sup>156</sup> Yuh, "In Defense of the State: The Kabo Reforms, Education, and Legitimacy," 87.

### 3.3 Conclusion

Before adopting modern constitutionalism in the nineteenth century, Korean states had their own legal systems that were shaped mainly by their belief systems and traditions. Confucianism constituted the core of the Korean law system throughout centuries, beginning from the Kingdom of Joseon in particular. Promoting indivisibility of power, Confucianism harbored a tradition of all-powerful sovereign in Korean political spheres in which law was seen as a means for securing effective governance, rather than disciplining sovereign powers.<sup>157</sup> However, this perception changed in the nineteenth century when the West began rapidly rising. Thereupon, the Kingdom of Joseon headed for modern constitutionalism in an attempt to keep pace with the sweeping developments in the West, to prevent major powers from interfering in their domestic affairs, and eventually to save its decadent monarchy. With this purpose in mind, Korea's first initiative towards modern constitutionalism came towards the end of the century with the *Gabo* Reforms of 1894, then the Constitution of the Great Han Empire of 1899 and the Provisional Government of the Republic of Korea of 1919. Nevertheless, these attempts could not be interiorized by the public, as they all were mere top-down policies implemented by the administrators who were inspired by European practices.

With the foundation of its new Republic, Korea truly began to establish its modern legal system with the Constitution of 1948, which was amended nine times until today. After going through turbulent times full of coup d'états and authoritarian rules, South Korea finally met its current constitution in 1987 in the wake of the popular 1987 June Democracy Movement, and major collaboration between various political and social actors.<sup>158</sup> Being amended the ninth and last time, the Constitution

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<sup>157</sup> Hahm, "Conceptualizing Korean Constitutionalism," 170.

<sup>158</sup> Cho, "The Politics of Constitution-Making," 202.



of the Republic of Korea of 1987 adopted the system of presidential republic with a popularly elected president for a single five-year term, envisaging a more solid balance between branches of government with a significantly weakened president, reinforced assembly, and newly established independent Constitutional Court in compliance with a more efficient checks and balances mechanism.<sup>159</sup> Nonetheless, the pattern of powerful presidency still continues its existence, whereas the prime minister and the parliament are often criticized for being relatively ineffective compared to the president.<sup>160</sup>

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<sup>159</sup> Yuh, "In Defense of the State: The Kabo Reforms, Education, and Legitimacy," 87.

<sup>160</sup> Roh, "Crafting Constitutional Democracy," 192-193.

## CHAPTER 4

### THE CONSTITUTIONAL HISTORY OF TURKEY

Today, amending the current Constitution of 1982 is on the front burner in Turkey, and the debates focus on a transition towards a Turkish-style presidential regime. Before analyzing the calls for the introduction of a Turkish-style presidency through a constitutional revision, it is essential to gain insight about the constitutional history of the country to better perceive its constitutional development process, and to give a clearer overview of current debates regarding the presidential system. Based on this, this chapter aims to give an outline of the historical background of the present Turkish constitution to show the major changes it has undergone until today. In the Turkish history of law, the biggest turning points are regarded as the acceptance of Islam, the promulgation of the Ottoman Constitution of 1876, and the proclamation of the Republic.<sup>161</sup> Within this context, this chapter consists of two main sections. Briefly presenting Sharia that influenced the Turkish law through long ages, the first part narrates the transition into modern constitutionalism by taking the Charter of Alliance of 1808 as the starting point. It handles the *Tanzimat* era, the Ottoman Constitution of 1876, and the Constitution of 1921 with an emphasis on the Constitution of 1876, the first written constitution of the Ottoman history in particular. The second section, on the other hand, begins with the foundation of the Republic of Turkey in 1923 and its Constitution of 1924, and deals with the ensuing constitutions and significant revisions that have been made since that time in depth. Because the last constitution, the Constitution of 1982 will be elaborated in the sixth chapter in great detail, it is not dwelled upon thoroughly in this chapter.

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<sup>161</sup> Üçok et al., *Türk Hukuk Tarihi*, 3.

#### 4.1 From Sharia to modern constitutionalism

It is generally believed that Turkish history began after the eighth century BCE in Central Asia, with the majority of them historically living in today's China.<sup>162</sup>

During the pre-Islamic period, Turkish states had their own traditions and administrative practices, but they lacked systematic rules of law. After adopting Islam in the tenth century, Turkish people entered an era highly influenced by Islamic culture and law. Setting forth religious orders, Islam had another side that signified a legal system called "Sharia". Sharia is Islamic law that derived from the Quran, Islam's holy book; the *Sunnah*, the sayings, practices and teachings of the Prophet Muhammad; and *fatwas*, the rulings of Islamic scholars. Referred to as the "infallible law of God"<sup>163</sup>, Sharia is a set of regulations that covers all aspects of Muslim people's lives including daily routines, familial and religious obligations, property, and financial dealings.

The Ottoman State emerged as the new important Turkish state in 1299 that would become a symbol of Turkish-Islamic power by surviving more than six hundred years, dominating three continents.<sup>164</sup> By seizing the Caliphate with the conquest of Egypt in the early sixteenth century, the Sultan of the Ottoman Empire became an absolute ruler who must be obeyed in both political and religious terms.<sup>165</sup> In the Empire, there was no separation of powers or distinction between government bodies, as all power was concentrated in the Sultan.<sup>166</sup> As Sharia offered very general guidelines as to the legal system, and it mainly shaped the Ottoman private law, the Sultan was also endowed with the authority to introduce legislation called customary

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<sup>162</sup> Berktaş et al., *Türkiye Tarihi 1*, 140.

<sup>163</sup> Coulson, *A History of Islamic Law*, 78.

<sup>164</sup> Findley, *The Turks in World History*, 156.

Üçok et al., *Türk Hukuk Tarihi*, 47.

Ágoston and Masters, *Encyclopedia of the Ottoman Empire*, 545.

<sup>165</sup> Aldıkaçtı, *Modern Demokrasilerde ve Türkiye'de Devlet Başkanlığı*, 197.

<sup>166</sup> Okandan, *Amme Hukukumuzun Ana Hatları*, 25.

laws in the vast areas of public law comprising constitutional state law, administrative and fiscal organization, and the tax system.<sup>167</sup> In this way, the Ottoman Empire's legal system was composed of Sharia in the field of private law, and customary law in the field of public law, while the non-Muslim population were subject to their own religious principles in the matter of private law, but had to conform with customary law with respect to public law. This legal structure was maintained in this way until the nineteenth century when various reform attempts emerged in terms of the legal system to keep pace with the Empire's Western rivals.

Falling behind the rapidly rising West in terms of military, economic and technological developments, Sultan Selim III headed towards initiating a comprehensive process of reform and modernization as from the late eighteenth century in order to revive the Empire following frequent and everlasting wars, loss of strategic territories, discovery of new maritime trade routes, and nationalist movements in the Balkans that devoured the Empire. The concept of modern constitutionalism was brought onto the agenda, and it was seen as a remedy to save the decadent Empire. The process of constitutional development originates from the Charter of Alliance of 1808, and it was followed by the Edict of *Gülhane* of 1839, the Imperial Reform Edict of 1856, the Ottoman Constitution of 1876, and the Constitution of 1921. More than one hundred years after the beginning of these reforms, the Republic of Turkey was established with its Constitution of 1924. However, the constitutional developments in the newly established modern state have often been interrupted by coup d'états; and the Constitution of 1924 was replaced twice, first in 1961, and then in 1982.

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<sup>167</sup> Koç, "Early Ottoman Customary Law," 76.

#### 4.1.1 Charter of Alliance

Following the constitutional movements in the West from the second half of the eighteenth century onwards, various countries moved to monarchism with a constitution in the nineteenth century while democratic constitutionalism began to be applied in the twentieth century. With the rapid developments in the West, the Western influence on the Ottoman Empire began to be felt with some top-down policies during the peaceful Tulip Period (1718-1730), during which Western-style educational and technological reforms were carried out. This first step towards Europe was taken with the thought that the decline of the Empire was rooted in the incompetency of laws, and they therefore had to be modernized in compliance with the West to meet the requirements of the time. Another significant attempt in this direction came under Sultan Mahmud II with the Charter of Alliance in 1808 by the help of his Grand Vizier, Alemdar Mustafa Pasha.

Often compared with Magna Carta<sup>168</sup>—Latin for “Great Charter” agreed to by King John of England in 1215 recognizing the rule of law and bestowing new rights and liberties on English subjects—but mostly seen as far cry from it especially in terms of curbing the monarch’s powers,<sup>169</sup> the Charter of Alliance was a treaty signed between the central government and a number of *ayans*<sup>170</sup> to reorganize their power and relations with the central government.<sup>171</sup> Considering a powerful central

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<sup>168</sup> Professor of history İlber Ortaylı considers the Charter of Alliance as a delayed Magna Carta. See Ortaylı, *İmparatorluğun En Uzun Yüzyılı*, 18. For Professor of law Tarık Zafer Tunaya, the Charter is a kind of Ottoman-style Magna Carta. See Tunaya, *Türkiye’nin Siyasi Hayatında Batılılaşma Hareketleri*, 25.

<sup>169</sup> Mardin, *The Genesis of Young Ottoman Thought*, 148.

<sup>170</sup> In the Ottomans, agricultural land was regarded as the Sultan’s estate. These estates were given to cavalymen in return for their military services during war. With the beginning of the decline of the Empire, advancement in military technology, and continuous wars since the eighteenth century, also the Ottoman cavalry began to lose power. The center replaced cavalymen with *ayans* who were entrusted with collecting taxes in provinces. However, over time, these local military rulers became so powerful that they formed de facto local dynasties that seriously threatened the central authority. See İnalcık, *Osmanlı İmparatorluğu Klasik Çağ (1300-1600)*, 113-114.

<sup>171</sup> Kunt et al., *Türkiye Tarihi* 3, 95.

authority as the key factor of the success of further reform movements, it was sought to make a settlement with the *ayans*. Nevertheless, the Charter provided a kind of supervision on the Sultan by assuring the *ayans*' dominance in their regions, and by giving them the right to resistance against the arbitrary practices of the central authority. Even though it is mostly believed that the reform movements in the field of law began with Sultan Mahmud II, the Charter of Alliance was never truly applied. It was also short-lived, as it was seen by the Sultan as a challenge to his authority.<sup>172</sup> Still, being considered as the first step taken towards the concept of state of law by restricting the centralized power of the Sultan for the first time, the Charter was a significant document, and it is further described as the first remarkable example regarding a transition into the constitutional monarchy in the history of the Ottoman Empire simultaneously with the West.

#### 4.1.2 *Tanzimat* Era

*Tanzimat* (literally meaning “reorganization” in Ottoman Turkish) was a series of reforms promulgated in the Ottoman Empire between 1839 and 1876 under the reigns of the Sultan Abdulmecid I and Sultan Abdulaziz I. Agreed on the incapability of the old religious and military institutions concerning the needs of the Empire, these reforms aimed to bring about a fundamental change in the Ottoman state system by adopting a new modern system instead of the old theocratic one. Many of the key provisions of the *Tanzimat* reforms were prescribed first in the Edict of *Gülhane* of 1839, and then in the Imperial Reform Edict of 1856. Within this scope, in an attempt to gear down the nationalist movements, and the interventions of the European powers in Ottoman affairs, equality and more civil liberties were granted

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<sup>172</sup> Üçok et al., *Türk Hukuk Tarihi*, 267.  
Yücel and Sevim, *Türkiye Tarihi* 4, 173.

to all Ottoman subjects regardless of religion or ethnic group, and important changes concerning the Ottoman subjects' political, social, and economic lives such universal conscription; attempts at elimination of corruption; equality in education, appointment to government posts, administration of justice, taxation, and military service to all regardless of creed; establishing telegraph and post services; expanding roads, canals and rail lines; the right of disposition of property; the reward system by merit; and establishment of a central bank and modern factories, as well as further educational, institutional, social and legal reforms.<sup>173</sup> It also included the policy of Ottomanism, a "concept meant to unite all peoples living in Ottoman domains, Muslim and non-Muslim, Turkish and Greek, Armenian and Jewish, Kurd and Arab"<sup>174</sup> with the aim of integrating them more in the Ottoman society, and thereby establishing a more centralized government.

Being stuck in both internal and external crises, the Ottoman government intended through the edicts of the *Tanzimat* era to help modernize the Empire militarily and socially to win over the disaffected population, Christians in the European territories more specifically. Being fruits of the Sultan's will, and being able to be annihilated at any time, the *Tanzimat* edicts were merely royal promises rather than constitutions. Nevertheless, with the purpose of providing domestic peace and integrity, ensuring the external security, and avoiding Western countries' ever-increasing interventions in domestic affairs, both edicts were significant in the sense of constitutional rights and limiting the Sultan's authority, as it was promised to respect laws while exercising the sovereign rights, and not to touch various freedoms of the citizens. Besides enforcing the rule of law, they were to establish legal and social equality for all subjects in the Empire. However, failing to satisfy their target

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<sup>173</sup> Davison, *Essays in Ottoman and Turkish History*, 114.

<sup>174</sup> Deringil, "The Invention of Tradition as Public Image in the Late Ottoman Empire," 5.

groups, and therefore lacking their support, the edicts were never fully implemented due to the strong nationalist trend in the West, and resentment among Muslim population. Christians in the Balkans considered these attempts of consolidating the power of the centralized government as serious obstacles in their fight for autonomy, and were also encouraged by the Western powers that claimed more sovereignty for non-Muslim and non-Turkish communities within the Empire instead of the Ottomans' plans for an equal treatment for all citizens. Furthermore, these efforts met with a reaction by the Muslim population as well because they thought these changes inspired by the West would corrupt and then domineer the Islamic world.<sup>175</sup>

To some Ottoman elite educated in Europe, the key factor of the success of the Western world was its political organizations besides its technical achievements. Additionally, for them, the ensuing political instability in the Empire could be overcome only by establishing a constitutional rule that would constitute an efficient check on autocracy.<sup>176</sup> Thereupon, in 1876, Sultan Abdulhamid II installed a constitution committee composed of twenty-eight people to draft a constitution. The constitution was written by members of the Young Ottomans, a libertarian society of a group of Ottoman Turkish intellectuals who were dissatisfied with the *Tanzimat* reforms that they believed did not go far enough. In this sense, they aimed to revitalize the Empire by establishing the contemporary model of constitutional government while still preserving the Islamic principles.<sup>177</sup> In this way, the Constitution of 1876 was promulgated by the Sultan on December 23, 1876, marking the beginning of the First Constitutional Era, which signified the period of constitutional monarchy in the Ottoman Empire.

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<sup>175</sup> Davison, *Essays in Ottoman and Turkish History*, 115-116.

<sup>176</sup> Yılmaz, *Türk Anayasa Tarihi*, 41.

<sup>177</sup> Cleveland, *A History of the Modern Middle East*, 78.

Akgündüz and Öztürk, *Ottoman History: Misperceptions and Truths*, 318.

Finkel, *Osman's Dream: The Story of the Ottoman Empire*, 475.



#### 4.1.3 Constitution of 1876 and the First Constitutional Era

As the first constitution of the Ottoman Empire, the Constitution of 1876 was a fruit of serious reform efforts continuing since the *Tanzimat* era of 1839 intended to remodel the Empire pursuant to modernization.<sup>178</sup> The Constitution remained in force only for two years from 1876 to 1878, in a period known as the First Constitutional Era, which started with the establishment of constitutional monarchy following the promulgation of the Constitution of 1876, and ended with the restoration of absolute monarchy following the suspension of the Ottoman parliament and the Constitution by Sultan Abdulhamid II in 1878.

The Constitution of 1876 was highly inspired by the Armenian National Constitution of 1863, by the Belgian Constitution of 1831, and by the Prussian Constitution of 1850.<sup>179</sup> Especially the Belgian Constitution formed a model for the first Ottoman Constitution with its monarchical structure at first, but because it embraced the principle of separation of powers, the Prussian Constitution was adopted as “a more royalist version of the Belgian model”<sup>180</sup> with its emphasis on the superiority of the monarchical administration by giving the monarch greater powers and establishing an appointed upper chamber.<sup>181</sup>

Composed of twelve chapters and 119 articles, the Constitution of 1876 proposed a bicameral parliament called the General Assembly modeled after the French and Belgian cases. As the upper house of the bicameral legislature, the Senate (*Meclis-i Ayan*) was appointed by the Sultan, and the Chamber of Deputies (*Meclis-i*

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<sup>178</sup> Cleveland, *A History of the Modern Middle East*, 82

<sup>179</sup> Davison, *Reform in the Ottoman Empire*, 134.

Arsel, *Türk Anayasa Hukuku'nun Umumi Esasları*, 22.

Tanör, *Osmanlı-Türk Anayasal Gelişmeleri*, 133-134.

Teziç, *Anayasa Hukuku*, 168.

<sup>180</sup> Brown, *Constitutions in a Nonconstitutional World*, 21.

Haddad and Stowasser, *Islamic Law and the Challenges of Modernity*, 59.

<sup>181</sup> Yılmaz, *Türk Anayasa Tarihi*, 43.

Davison, *Reform in the Ottoman Empire*, 388.

Haddad and Stowasser, *Islamic Law and the Challenges of Modernity*, 59.

*Mebusan*) as the lower house was elected for four years in general election in the provinces, representing both Muslim and non-Muslim populations in the Empire. Proclaiming Ottomanism and Ottoman patriotism, it made all subjects equal under the law,<sup>182</sup> and regulated individual freedom and equal rights for all without distinction of race or creed (Articles 8-11 and 17); the judicial independence regarding civil cases (Articles 81 and 87); universal elementary education (Article 114); universal military service (Article 17); and an inviolable official budget (Article 96-99).<sup>183</sup> Although it provided significant provisions concerning improvement of the populations' living conditions, the Constitution of 1876 could not come a long way in terms of limiting the Sultan's power, as he retained his significant powers such as declaring war and making peace, appointing and dismissing ministers, approving legislation, and convening and dismissing the chamber of deputies.<sup>184</sup>

The Constitution of 1876 was declared in haste because it was aimed to prevent the Empire from falling completely into ruin, and to cease foreign interferences as immediate as possible. Nonetheless, it met with a reaction by the Muslim population, especially by the Ulama, scholars and/or authorities in the Islamic legal and religious tradition, on the grounds of abolishing the distinction of creed and granting the non-Muslim population same freedom and rights the Muslim population had.<sup>185</sup> Apart from that, some Balkan provinces were also alarmed, as they thought they could no longer be autonomous due to the new regulations.<sup>186</sup> Lastly, the Western powers considered this constitution as a last desperate attempt to save the Empire, and they therefore did not attribute much importance to it.

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<sup>182</sup> Hershlag, *Introduction to the Modern Economic History of the Middle East*, 36-37.

<sup>183</sup> For the relevant articles of the 1876 Ottoman Constitution, see Appendix A.

<sup>184</sup> Cleveland, *A History of the Modern Middle East*, 79.

<sup>185</sup> Devereux, *The First Ottoman Constitutional Period*, 45.

<sup>186</sup> Devereux, *The First Ottoman Constitutional Period*, 85.

Eventually, without any real interest in constitutionalism, Sultan Abdulhamid duly suspended the parliament on the basis of the social unrest in the Balkans, did not convene it again, and returned to absolute monarchy in 1878.<sup>187</sup>

In spite of its short life, the Ottoman Constitution of 1876 was of capital importance by reason of being the first constitutional text in the Ottoman history besides making all subjects Ottomans under the law regardless of their religion. In conformity with the modern Western system, government bodies were regulated separately as the executive, legislative and judicial branches.<sup>188</sup> A two-structured executive power with the Sultan at the top and the Sultan-appointed Cabinet was established; a bicameral legislature was formed; and the judicial power was taken from the Sultan and given to independent courts. Furthermore, the 1876 Constitution explicitly adopted the principle of representation of the people, one of the fundamental principles of representative democracy, as per Article 71 that prescribes the representative does not represent only his constituency, but the whole nation. The same principle is set forth in following the 1921, 1924, 1961 and 1982 Constitutions with similar words.<sup>189</sup> From another point of view, with the 1876 Constitution, the Sultan ceased to be the absolute and sole sovereign of the political system, and the people thus participated in the new constitutional system as a political actor.<sup>190</sup>

Consequently, although the First Constitutional Era could not live long, the legacy and influence of the Young Ottomans continued for many years, and their footsteps were followed few decades later by the Young Turks—the prominent reform-minded group consisting of Ottoman exiles, students, civil servants, and army

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<sup>187</sup> Aldıkaçtı, *Anayasa Hukukumuzun Gelişmesi ve 1961 Anayasası*, 65.

Tanör, *Osmanlı-Türk Anayasal Gelişmeleri*, 160.

<sup>188</sup> Gözler, *Türk Anayasa Hukuku*, 19-23.

<sup>189</sup> See Article 5 in the Constitution of 1921; Article 13 in the Constitution of 1924; Article 76 in the Constitution of 1961; and Article 80 in the Constitution of 1982.

<sup>190</sup> Tanör, *Osmanlı-Türk Anayasal Gelişmeleri*, 156.

officers—inciting the Young Turk Revolution in 1908, and ushering in the Second Constitutional Era.

#### 4.1.4 Second Constitutional Era and the dissolution of the Ottoman Empire

In July 1908, a rebellion against Sultan Abdulhamid II and his conservative politics known as the Young Turk Revolution was led by the Young Turks in order to restore the Constitution of 1876 and thereby replace absolute monarchy with a constitutional government. In this way, a period known as the Second Constitutional Era was launched by the Young Turks, amending the Constitution to transfer more power from the Sultan and the Sultan-selected Senate to the generally elected Chamber of Deputies.

Setting a multi-party democracy for the first time in the Empire's history, the Ottoman general election took place in late 1908, and the Young Turks' political party, the Committee of Union Progress (CUP) won the majority in the newly established Assembly.<sup>191</sup> After more than thirty years, the Senate reassembled in December 1908 with the living members from the First Constitutional Era. Instead of establishing an entirely new constitution, the new Assembly chose to make some amendments to the existing Constitution of 1876 by virtue of the fact that the chaos both inside and outside of the Empire was not favorable for making such time-consuming fundamental changes.<sup>192</sup> As the biggest group in the parliament, the CUP was the main driving force behind the reforms to modernize the Empire in terms of administration, economy, and industrialization. Adopting the parliamentary system, it was sought to reinforce the legislature in face of the executive, and with this design, a control mechanism on the executive was introduced. From then on, the

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<sup>191</sup> Akıncı and Usta, "Türkiye'de Çok Partili Hayata Geçişte Etkili Olan İç Faktörlerin Analizi," 41.

<sup>192</sup> Yılmaz, *Türk Anayasa Tarihi*, 53.

Sultan had to obtain the parliament's approval while appointing the council of ministers, and also his rights to dissolve the assembly was subject to more strict conditions. Through new regulations in fundamental rights and freedoms, freedom of communication, assembly, association, labor, trade, education, the arts, and the press were ensured.<sup>193</sup> The constitutional changes made in 1909 were regarded so many and so drastic that it was claimed to be a new constitution while making the 1876 Constitution lose its soul.<sup>194</sup>

Despite the serious conflicts with the opposition Freedom and Accord Party (or the Liberal Union, FAP)<sup>195</sup> starting from 1911, and the outbreak of the First Balkan War (1912-1913), the CUP continued its domination in the administration, and launched the rule of the so-called Three Pashas—Enver, Talat and Cemal Pasha—in 1913.<sup>196</sup> The Three Pashas pursued establishing closer relations with the German Empire that led the Empire into the First World War as part of the Central Powers in 1914.<sup>197</sup> As a bitter fruit of the power struggles between the major European states, the War resulted in the ultimate defeat of the Central Powers, and it changed the world's political order by redrawing the national borders following the collapse of the Ottoman Empire, German Empire, Austro-Hungarian Empire, and Russian Empire, and creation of numerous independent nations. The Armistice of Mudros ending the Ottoman participation was signed in October 1918, and later, the Allies sought to dismantle the Ottoman state through the Treaty of Sèvres of 1920,

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<sup>193</sup> For the revisions made in 1909 to the 1876 Constitution, see Appendix B.

<sup>194</sup> Aldıkaçtı, *Anayasa Hukukumuzun Gelişmesi ve 1961 Anayasası*, 70.

Arsel, *Türk Anayasa Hukuku'nun Umumi Esasları*, 33.

<sup>195</sup> Towards the end of 1911, the opposition gathered around the Freedom and Accord Party, which was composed of former CUP members who had a more liberal and pro-decentralization approach.

<sup>196</sup> Kuyaş, "Bâb-i Âli Baskını: 100. Yıl," 28.

<sup>197</sup> In the First World War, there were two opposing alliances, which were the Allies comprising the United Kingdom, the Russian Empire, the French Third Republic, Italy, the US, Ireland, and Japan; and the Central Powers including Germany, Austria Hungary, the Ottoman Empire and Bulgaria.

which was replaced with the Treaty of Lausanne three years later due to its severe sanctions.

#### 4.1.5 New Turkish state: Establishment of the Grand National Assembly

The year of 1908 marked the beginning of not only the Second Constitutional Era, but also the beginning of the ultimate collapse of the Ottoman Empire. Having faced too many hardships like the nationalist movements in the Balkans and the continuous social and political unrest inside, the involvement in the First World War was the final nail in the coffin of the Empire's existence. In accordance with the Armistice of Mudros, the Allies began occupying various parts of the Empire. This scene of foreign troops partitioning the country triggered the birth of national movements all over in an effort to protect the integrity of the country.<sup>198</sup> These local resistance movements sowed the seeds of the ensuing Turkish War of Independence (1919-1922) against the Allies—Greeks on the western, Armenians on the eastern, France on the southern front, and the UK and Italy in Istanbul—and the foundation of the Republic of Turkey in 1923.<sup>199</sup>

The Turkish War of Independence began when Mustafa Kemal Pasha, assigned as the inspector general for Anatolia reached Samsun on May 19, 1919, issued the Amasya Circular, and held congresses in Erzurum and Sivas with the participation of chosen delegates on the purpose of establishing a united national movement against the occupying forces, and eventually installing a parliament based on the principle of national sovereignty.<sup>200</sup> This plan was implemented on April 23, 1920 despite all detainments of the Allies when Mustafa Kemal called for a national election to establish a new parliament called the Grand National Assembly in Ankara

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<sup>198</sup> Lewis, *Modern Türkiye'nin Doğuşu*, 332.

<sup>199</sup> Tunçay et al., *Türkiye Tarihi 4: Çağdaş Türkiye 1908~1980*, 95-105.

<sup>200</sup> Yılmaz, *Türk Anayasa Tarihi*, 62.

where selected delegates from Anatolia, and the remaining members of the last Ottoman parliament gathered and formed the new Assembly.<sup>201</sup> Being appointed as the chairman of the Assembly, Mustafa Kemal was given the needed legitimacy to formalize the legal transition from the old Ottoman order into the new republican political system.<sup>202</sup> Declaring itself the legitimate government of the country, the Assembly culminated the national movement, and it officially launched diarchy in the country along with the Istanbul government Sultan Mehmed VI (Vahdettin) at the top. It was enunciated that the national sovereignty is the fundamental principle for the future of the country, and it would be represented by the National Assembly vested with both legislative and executive prerogatives.<sup>203</sup> A committee to exercise executive power would be elected from within the Assembly, while the chairman of the Assembly would also preside over this committee. Not being based on a constitution, and not embracing the principle of separation of powers, the Grand National Assembly was entrusted with an extraordinarily vast authority to be able to cope with external conflicts, gain full independence, and ensure the country's integrity without any loss of time.

Meanwhile, on August 10, 1920, the Istanbul government signed the Treaty of Sèvres, one of a series of treaties that the Central Powers signed following their defeat in the war. It was regarded as the official beginning of the Ottoman Empire's dissolution, as according to its terms, the Empire must waive its all non-Turkish territory in favor of Allies.

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<sup>201</sup> Sevig, *Türkiye Cumhuriyeti Teşkilatı Esasiye Hukuku*, 33.

<sup>202</sup> Kinross, *Atatürk: Bir Millet'in Yeniden Doğuşu*, 293.

<sup>203</sup> Atatürk, *Söylev*, 242-243.

#### 4.1.6 Constitution of 1921

The first constitution of the newly founded Government of the Grand National Assembly in the place of the Ottoman Empire was the Constitution of 1921. As a constituent assembly, the Grand National Assembly formed a committee tasked with preparing a constitutional draft. The first draft with nine articles was submitted to the Assembly in August 1921, but it was rejected on the grounds that it envisaged the Assembly legitimate only until the restoration of the Sultanate. Instead, the government program introduced by Mustafa Kemal in the parliament was used as a resource for the second draft. Consisting of twenty-four articles, the 1921 Constitution was accepted by the Assembly on January 20, 1921. Being the constitution of a transitional period, the new Constitution was so simple and short that it had multiple deficiencies. So, to bridge the gap, it fell back upon the provisions of the 1908 Constitution that did not contradict with the new legal rule.<sup>204</sup> In other words, besides the new provisions of the 1921 Constitution, the applicable articles of the 1908 Constitution remained in force as well. However, in spite of all its deficiencies, the Constitution of 1921 was called a “revolutionary constitution”<sup>205</sup> as it was the constitution of the new regime, which abolished the old one.

The Constitution of 1921 put the principle of national sovereignty right in the center, and gave the executive and legislative prerogatives to the Grand National Assembly as the “sole and real representative of the nation”.<sup>206</sup> It promoted the principle of unity of powers, and highlighted the supremacy of the legislative over the executive, outlining “the government of the Grand National Assembly exercised the executive function through ministers... The Assembly directed the ministers on

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<sup>204</sup> Atatürk, *Söylev*, 563.

<sup>205</sup> Eroğul, *Anatüzeye Giriş*, 232-233.

<sup>206</sup> *Teşkilat-ı Esasiye Kanunu (1921)*, Art.1 and Art.2.



executive affairs and changed them when necessary.”<sup>207</sup> Entitled “the Government of Grand National Assembly”<sup>208</sup>, the Turkish State was governed by the Assembly that was composed of elected members through direct biennial elections.<sup>209</sup> The head of the Assembly elected by the assembly members was the head of the council of ministers at the same time. Although there was no provision considering the judiciary in the Constitution, there were Independence Tribunals, of which members were appointed among the assembly members to prosecute those who were against the government system. In this sense, establishing the system of assembly government, the Grand National Assembly held all three powers, namely legislative, executive and judiciary authorities, in its hands.

The new Turkish state preserved Sharia provisions, and the “rights of the application of the ordinances of the sacred law” were granted to the Assembly.<sup>210</sup> Moreover, the Constitution did not clearly eliminate the Sultan’s sovereign rights, but it tacitly indicated that neither the Sultan nor the Khalifa existed.<sup>211</sup> There was no reference to either the judicial system or the rights and responsibilities of citizens in the Constitution of 1921. In terms of fundamental rights and freedoms, the Constitution only enumerated them without giving any assurance, and it did not include any economic and social rights.<sup>212</sup> Lastly, the all-powerful legislative caused fierce debates over time on the grounds that it was blocking up the executive, as the deputies started interfering in the executive sphere. This deadlock in government would later pave the way for separating the legislative and executive powers from each other.

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<sup>207</sup> *Teşkilat-ı Esasiye Kanunu (1921)*, Art.8.

<sup>208</sup> *Teşkilat-ı Esasiye Kanunu (1921)*, Art.3

<sup>209</sup> *Teşkilat-ı Esasiye Kanunu (1921)*, Art.3, 4 and 5.

<sup>210</sup> *Teşkilat-ı Esasiye Kanunu (1921)*, Art.7.

<sup>211</sup> Ağaoğlu, *Kuvayi Milliye Ruhu*, 88.

<sup>212</sup> The full text of the Turkish Constitution of 1921 is given in Appendix C.

#### 4.2 Creation of the Republic of Turkey and the Constitution of 1924

The Turkish War of Independence virtually concluded with the Armistice of Mudanya in October 1922 when the Allied forces and the Turkish side sat at the negotiating table. The negotiations officially ended with the Treaty of Lausanne in July 24, 1923, which replaced the Treaty of Sèvres, and returned a large territory in Thrace and Anatolia to Turkey. Being already a symbolic figurehead since the period of the Three Pashas without real political power, the Sultanate was officially abolished by the Grand National Assembly on November 1, 1922.

Following the conflicts in the Assembly about the characteristics of the newly established state, the First Grand National Assembly was dissolved, and was replaced by a new Assembly in April 1923, which comprised only the delegates including Mustafa Kemal and his colleagues who aimed to establish a brand new parliamentary state based on the principle of national sovereignty. The new Grand National Assembly made some amendments to the 1921 Constitution in the year 1923, among which the most significant one was the proclamation of the Republic as the new regime on October 29, 1923 in Ankara, the country's new capital, putting an end to the 623-year-old monarchical Ottoman rule.<sup>213</sup> The revision brought about the post of the president of the Republic who would be elected by the Assembly from among its members for a period equivalent to that of the parliamentary term, and eligible for reelection.<sup>214</sup> The president had to share the executive power with the council of ministers. In this direction, the Assembly chose Mustafa Kemal to serve as the first President of the Republic. Furthermore, the amendment explicitly

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<sup>213</sup> “364 Sayılı Teşkilat-ı Esasiye Kanununun Bazı Mevaddının Tavzihan Tadiline Dair Kanun,” Art.1.

<sup>214</sup> “364 Sayılı Teşkilat-ı Esasiye Kanununun Bazı Mevaddının Tavzihan Tadiline Dair Kanun,” Art.10.

emphasized that the religion of the Turkish state was Islam, and secularism was still not in the cards.<sup>215</sup>

As the Republic's first constitution, the Constitution of 1924 was ratified by the Assembly on April 20, 1924. Instead of amending the existing Constitution of 1921, it was decided to start making a new one all over again, and a constitution committee was formed for this purpose. While drafting the constitution, the committee largely benefitted from the French Constitution of 1875 and the Polish Constitution of 1919, both of which adopted the parliamentary regime and were based upon the concept of the government of the assembly.<sup>216</sup> Composed of six sections and 105 articles, the 1924 Constitution began with declaring "the Turkish state is a republic".<sup>217</sup> Like its predecessor, it also embraced the principle of unity of powers, and the concept of the government of the assembly, where both the legislative and executive powers were vested in the Assembly.<sup>218</sup> Despite adopting the unity of powers, there was a division between the legislative and executive functions, as the legislative prerogative was exercised directly by the Assembly whereas the executive authority was used by the president of the Republic together with the president-appointed council of ministers.<sup>219</sup> Nevertheless, in spite of the post of president of the Republic, the legislative was still superior over the executive because it was the Assembly who elected the president from among its members.<sup>220</sup> In terms of judiciary, the Constitution included provisions concerning the exercise of the judicial power by independent tribunals in the name of the Assembly, but it did

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<sup>215</sup> "364 Sayılı Teşkilat-ı Esasiye Kanununun Bazı Mevaddının Tavzihan Tadiline Dair Kanun," Art.2 and 7. For the significant constitutional amendments made in 1923, see Appendix D.

<sup>216</sup> Gözübüyük and Sezgin, *1924 Anayasası Hakkındaki Meclis Görüşmeleri*, 30.

Tanör, *Osmanlı-Türk Anayasal Gelişmeleri*, 223.

<sup>217</sup> *Teşkilat-ı Esasiye Kanunu (1924)*, Art.1.

<sup>218</sup> *Teşkilat-ı Esasiye Kanunu (1924)*, Art.5 and 6.

<sup>219</sup> *Teşkilat-ı Esasiye Kanunu (1924)*, Art.7.

<sup>220</sup> Aldıkaçtı, *Anayasa Hukukumuzun Gelişmesi ve 1961 Anayasası*, 90.

Gözübüyük and Sezgin, *1924 Anayasası Hakkındaki Meclis Görüşmeleri*, 120.

*Teşkilat-ı Esasiye Kanunu (1924)*, Art.31.

not regulate how the judicial independence would be assured.<sup>221</sup> With regard to the fundamental rights and freedoms, the Constitution of 1924, similar to the Constitution of 1921, simply enumerated them without providing any further explanation or assurance, and it left the matter of restricting them to the legislature's discretion. Additionally, the new constitution did not regulate any economic or social rights either. Similar to the amendment made in 1923, the Constitution of 1924 also contained the provision about Islam being the religion of the State;<sup>222</sup> however, this clause was removed through a constitutional amendment made in 1928.<sup>223</sup>

Following, another revision to the Constitution came in 1934, granting women the right to vote and be elected to parliament. The principle of universal suffrage was adopted by this way. The Constitution of 1924 was amended once again in 1937, and the Six Arrows (*Altı Ok*)<sup>224</sup> of the Republican People's Party (*Cumhuriyet Halk Partisi*, CHP) which was established by Mustafa Kemal in 1923 under the title of the People's Party (*Halk Fırkası*, renamed to the Republican People's Party, *Cumhuriyet Halk Fırkası*, CHF in 1924, then to the Republican People's Party in 1935)<sup>225</sup> were implemented in the Article 2 as the fundamental characteristics of the Turkish Republic: "Turkey is a republican, nationalist, populist, statist, secular, and revolutionary state."<sup>226</sup> Even though the Constitution of 1924 was translated into "pure Turkish"<sup>227</sup> through the constitutional revision of 1945 without making any

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<sup>221</sup> Aldıkaçtı, *Anayasa Hukukumuzun Gelişmesi ve 1961 Anayasası*, 91-92.

Gözübüyük and Sezgin, *1924 Anayasası Hakkındaki Meclis Görüşmeleri*, 121.

<sup>222</sup> *Teşkilat-ı Esasiye Kanunu (1924)*, Art.2.

<sup>223</sup> For the relevant articles of the 1924 Constitution, see Appendix E.

<sup>224</sup> The Six Arrows signify the ideology of the Republican People's Party, and embrace six principles namely republicanism, nationalism, populism, statism, secularism and revolutionism.

<sup>225</sup> The People's Party or today's Republican People's Party is a political party of which roots laid in the Association for Defense of Rights for Anatolia and Rumelia founded in the Congress of Sivas of 1919. In September 1923, the first group in the National Assembly officially declared that it would be transformed to a political party named the People's Party.

<sup>226</sup> "3115 Sayılı Teşkilat-ı Esasiye Kanununun Bazı Maddelerinin Değiştirilmesine Dair Kanun," Art.2.

<sup>227</sup> Gözler, *Anayasa Hukukunun Metodolojisi*, 32.

changes to its content, it was restored in 1952. Meanwhile, besides all these amendments made to the Constitution, President Mustafa Kemal introduced many radical reforms over the long run with the aim of “creating a modern, secular state and constructing a new identity for its citizens”<sup>228</sup> in lieu of the old, religion based Ottoman state regime. Among these wide-ranging and progressive political, economic and social reforms, there were the abolition of the Caliphate, the abolition of religious and other titles, the closure of Islamic courts, the introduction of a secular civil code and a penal code modeled after the Western examples, the unification of education, the adoption of the new Turkish alphabet, the dress code reform, the law on family names,<sup>229</sup> and so on. Thus, having undergone multiple significant changes, and remaining in force until 1960, the Constitution of 1924 was the most long-lived constitution amongst all the constitutions of Turkey, including the Constitution of 1876.

In the Republic of Turkey, the single-party period began in 1923 under the dominance of the People’s Party. Although there were some attempts to found opposition parties for sake of establishing the tradition of multiparty democracy, Turkey remained as a one-party state until the establishment of the National Development Party (*Milli Kalkınma Partisi*) in 1945 on the ground of protecting Atatürk’s reforms.<sup>230</sup> After Atatürk’s death on November 10, 1938, İsmet İnönü was elected the second president of the Republic. He also became the party leader of CHP. Henceforth, İnönü’s “National Chief”<sup>231</sup> period, which was considered as one

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<sup>228</sup> Bowering et al., *The Princeton Encyclopedia of Islamic Political Thought*, 49.

<sup>229</sup> With the Surname Law of 1934, Mustafa Kemal was granted the honorific surname “Atatürk”, which means Father of the Turks. See Mango, *Atatürk*, xxviii.

<sup>230</sup> Yücel and Ruysdael, *New Trends in Turkish Foreign Affairs*, 214.

<sup>231</sup> The delegates of CHP awarded Atatürk the title “eternal chief” while they call İnönü “national chief”.

of the most authoritarian administrations in Turkish politics, started.<sup>232</sup> In 1939, the first year of his presidency, the Second World War broke out, during which Turkey managed to follow a neutrality policy.

With the end of the war, the political landscape of the world had undergone significant changes. Authoritarian regimes like the Nazi Germany, Italy and the Empire of Japan had collapsed, and the authoritarian and totalitarian movements, which were the popular tendencies during the 1930s lost their charm. Instead, the concepts of human rights, democracy, international peace and security began to emerge as the new universal ideals. In parallel with these developments, Turkey signed the Charter of the United Nations,<sup>233</sup> and thus approached the West, especially the United States. Such changes led the country to realize the need to review the authoritarian single-party rule and to move towards democracy. So, the opposition within CHP started to raise its voice more intrepidly, and new parties began to be established one by one.<sup>234</sup> Among these, the Democrat Party (*Demokrat Parti*, DP) that was established in 1946 was the only one that left its mark over the transitional period to the multiparty system.

With the shift towards the multiparty system, Turkish political atmosphere underwent dramatic changes. First in 1947, the posts of the presidency of the Republic and party leadership were separated, and then in the 1950 election that was accepted as the first democratic election of the Turkish republican history, the Democrat Party came out victorious by winning the majority of the votes, and getting 85% of the seats in the parliament.<sup>235</sup> Herewith, the DP broke the twenty-seven-year-

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<sup>232</sup> Erdoğan, *Türkiye’de Anayasalar ve Siyaset*, 89.

<sup>233</sup> Replacing the League of Nations, the United Nations was founded in 1945 after the Second World War as an intergovernmental organization with the aim of promoting international security, peace, and cooperation. Having fifty-one member states at its establishment, the UN has today 193 members.

<sup>234</sup> Karpat, *Türk Demokrasi Tarihi*, 131.

<sup>235</sup> Lewis, *Modern Türkiye’nin Doğuşu*, 405.

long pattern of one-party state, and power was peacefully passed to the opposition for the first time in Turkish political history.<sup>236</sup> Celal Bayar was elected as the third president of the Republic in May 1950, and the DP government under the leadership of Adnan Menderes was established on the same day. Although Turkey enjoyed a libertarian, democratic atmosphere in the first years of the DP government, freedoms, especially those belonging to the press and the universities began to be restricted over time. Furthermore, even though the policies carried out by the Menderes government boosted the economy countrywide, they also disturbed the Army and public officials by ending their advantageous positions in economic, political, and social circles. The last straw came in April 1960, when the DP passed a law to form the Committee of Inquest vested with vast authorities of which ultimate cause seemed to be to shut down CHP and to eventually return to a single-party rule.<sup>237</sup> Soon after the Committee was formed, all political activities were banned and the press was censored. However, this law caused widespread public unrest, and the Committee was abolished on May 27, 1960, when the Army seized power after a coup d'état.

#### 4.2.1 The May 27 Coup and the Constitution of 1961

Following the growing hostilities between the government and the opposition, General Cemal Gürsel staged a coup on May 27, 1960 and removed President Celal Bayar, Prime Minister Adnan Menderes, and his cabinet from power, and dissolved the parliament. Being accused of high treason, corruption, mishandling of public funds, and violation of the constitution, Menderes, the Minister of Foreign Affairs Fatin Rüştü Zorlu and the Minister of Finance Hasan Polatkan were executed, and

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<sup>236</sup> Sevil, "1950 Seçimleri Beyaz Devrim Mi?"

<sup>237</sup> Akşin, *Kısa Türkiye Tarihi*, 257-259.

number of administrative staff were sentenced to prison by a joint civilian-military court.<sup>238</sup>

Rejecting dictatorship, the junta under the leadership of Cemal Gürsel called itself “National Unity Committee” (*Milli Birlik Komitesi*, MBK) aimed to bring a “fair, clean and solid democracy” to the country, and “transferring power and administration of the nation to the free choice of the people.”<sup>239</sup> It also promised to respect human rights and freedoms, and to abolish all laws contradicting with Atatürk’s reforms and principles known as Kemalism. The MBK promulgated the so-called Provisional Constitution in June 1960, and changed the 1924 Constitution’s provisions regarding the legislative and executive branches. This constitution described the main reason of the coup as the ruling Democrat Party’s violation of the Constitution, restrictions on fundamental rights and freedoms, establishment of a single-party dictatorship by eliminating the opposition, and loss of legitimacy.<sup>240</sup> Through the Constitution consisting of twenty-seven articles, the rights and prerogatives belonging to the Grand National Assembly were transferred to the National Unity Committee, and the Council of Ministers would be comprised of members selected by the Committee. As is evident from its name, the Constitution was provisional because from the very beginning of the coup, the Committee had been expressing their intention was to establish a new constitution, and to transfer the power back to civilians. To that end, the Constituent Assembly comprised of MBK and the Chamber of Deputies<sup>241</sup> was founded in order to compose a new constitution. Finally, the new constitution was proclaimed on June 20, 1961 after having won

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<sup>238</sup> *Constitution of the Republic of Turkey (1961)*, Preamble.

<sup>239</sup> “O Günlerin Fevkaladelikleri Dolayısıyla Resmi Gazete’ye Girmiyen Yayınlar,” 1636.

<sup>240</sup> Arsel, *Türk Anayasa Hukuku’nun Umumi Esasları*, 33.

<sup>241</sup> The Chamber of Deputies was not comprised of the representatives elected by the people, but of the ones who were sent by some institutions. It created a constitution committee and prepared a constitutional draft.



61.5% of votes in the referendum.<sup>242</sup> Although the Constituent Assembly had not come into existence by a popular election, and therefore, it did not represent the nation in a real sense, the Constitution of 1961 was considered democratic and legitimate, as it gained public consent by means of the referendum.

The Constitution of 1961 consisted a preamble, six chapters, and 157 articles together with twenty-two provisional clauses. Reflecting the fundamental principles of the Constitution, the concept of preamble was introduced for the first time as one of the constitutional provisions.<sup>243</sup> According to its preamble, the 1961 Constitution was based on the principles of democracy; rule of law; equality; human rights and liberties; national solidarity, independence and sovereignty; social justice, welfare and prosperity of individuals and society; and internal and external peace.

Adopting a parliamentary republic, and setting forth the principle of separation of powers for the first time, the 1961 Constitution put an end to the principle of unity of power that had come along with the 1924 Constitution. What was accepted with this new Constitution was a soft separation of powers that signifies an overlap between the legislative and executive branches while performing their functions.<sup>244</sup> In this sense, the perception of legislative superiority over the executive branch, which had been adopted in former constitutions, was abandoned. In terms of the branches of government, it created a bicameral Grand National Assembly as the legislative branch; the president of the Republic and the council of ministers as the executive branch, and independent courts as the judiciary branch. With the 1961 Constitution, a bicameral Grand National Assembly composed of the National Assembly and the Senate of the Republic was established.<sup>245</sup> The National

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<sup>242</sup> Aldıkaçtı, *Anayasa Hukukumuzun Gelişmesi ve 1961 Anayasası*, 148.

<sup>243</sup> *Constitution of the Republic of Turkey (1961)*, Art.156.

<sup>244</sup> Özbudun, *Anayasa Hukuku*, 40.

<sup>245</sup> *Constitution of the Republic of Turkey (1961)*, Art.63.

Assembly consisted of 450 deputies elected by a popular ballot, while the Senate had 165 members in total, of which 150 were to be elected by a popular ballot, and the remaining fifteen were to be appointed by the president of the Republic.<sup>246</sup> When compared with the National Assembly, the Senate involved more mature, experienced and well-educated members, and it was expected to help the state mechanisms to function properly. Nevertheless, the Senate could not play an effective role in either forming the government or helping the National Assembly to create necessary legislations or settling political disputes, and it therefore failed to satisfy the expectations.<sup>247</sup>

In terms of executive branch, the president of the Republic was elected by the Grand National Assembly from among its members for a seven-year term, and was not eligible for reelection.<sup>248</sup> As the head of the council of ministers, the prime minister was designated by the president from among the Grand National Assembly members.<sup>249</sup> On the other hand, the ministers were chosen by the prime minister, and appointed by the president.<sup>250</sup>

As another important novelty, the concepts of “state being governed by the rule of law” and “the supremacy of the constitution” got into the constitution in 1961, for the first time. Although the efforts to develop the rule of law had been continuing since the *Tanzimat* era, the 1961 Constitution regulated the essential legal conditions in detail in order to introduce the concept into the constitutional structure. The new Constitution introduced the independent Constitutional Court modeled on the European style of judicial review to “review the constitutionality of laws and the

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<sup>246</sup> *Constitution of the Republic of Turkey (1961)*, Art.67 and 70.

<sup>247</sup> Yılmaz, *Türk Anayasa Tarihi*, 195.

<sup>248</sup> *Constitution of the Republic of Turkey (1961)*, Art.95(1) and (2).

<sup>249</sup> *Constitution of the Republic of Turkey (1961)*, Art.102(2).

<sup>250</sup> *Constitution of the Republic of Turkey (1961)*, Art.102(3).

by-laws of the Turkish Grand National Assembly”<sup>251</sup>, and thus, to assure and protect individual rights and freedoms in compliance with the principle of rule of law.<sup>252</sup> As required by the principle of separation of powers, the independence of judiciary was ensured over the legislative and executive branches.

Another remarkable improvement regarding the judiciary in the 1961 Constitution was the formation of the Supreme Council of Judges, which was given the authority to make decisions on all matters of personnel related to all judges.<sup>253</sup> It was an important step to provide job security for the judiciary because this authority was taken from the hands of the Ministry of Justice, a member of the executive branch of government, and given to this relatively independent Supreme Council.

Appearing early in the provisions, fundamental rights and freedoms, and the concept of social state were the other novelties that came along with the 1961 Constitution. Attaching more importance to fundamental rights and freedoms than any other constitution in the Turkish legal history, the 1961 Constitution introduced social and economic rights and responsibilities, for the first time, and regulated them in detail as essential requirements for being a social state. It represented freedom of labor and contracts; the rights and responsibilities to engage in an occupation, trade or business; conditions for employment; the right to rest; provision of equity in wages; the right to establish trade unions; the right to bargain collectively and to conduct a strike; the right to access to medical care, as well as the state’s responsibilities to conduct development, and to safeguard social justice.<sup>254</sup>

Following the 1961 Constitution’s entry into force, a parliamentary election was held the same year, and Turkey finally returned to a civilian regime.

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<sup>251</sup> *Constitution of the Republic of Turkey (1961)*, Art.147(1).

<sup>252</sup> *Constitution of the Republic of Turkey (1961)*, Art.145-152.

<sup>253</sup> *Constitution of the Republic of Turkey (1961)*, Art.144 and Art.137.

<sup>254</sup> *Constitution of the Republic of Turkey (1961)*, Art.10-62. For the relevant articles of the Constitution of 1961, see Appendix F.

Nonetheless, the military presence was still dominant as Cemal Gürsel was elected the president of the Republic, and the remaining members of the National Security Council (*Milli Güvenlik Komitesi*, MGK) became the permanent members of the Senate of the Republic. From then on, Turkey entered uncharted waters of a highly fractured and unstable political landscape, witnessing coalition governments forming one after another until 1965 when the Justice Party (*Adalet Partisi*, AP), the successor to Democrat Party, won an absolute majority in the parliament.<sup>255</sup>

By January 1971, Turkey appeared to be in a state of chaos in the midst of an intense violence between extreme right and left. With the aim of "the formation, within the context of democratic principles, of a strong and credible government, which will neutralize the current anarchical situation and which, inspired by Atatürk's views, will implement the reformist laws envisaged by the constitution"<sup>256</sup>, and putting an end to the "anarchy, fratricidal strife, and social and economic unrest,"<sup>257</sup> the Turkish Armed Forces seized power once again on March 12, 1971, forcing the AP government under the leadership of Süleyman Demirel to resign.<sup>258</sup> The junta-appointed Prime Minister Nihat Erim built a technocratic cabinet to carry out a socio-economic reform program. Neither a democratically elected government, nor a pure military dictatorship that completely ignored the parliamentary opposition, the regime got stuck between civilian politicians and the military.<sup>259</sup> In that period of disorder, significant amendments to the then-current 1961 Constitution were accepted on September 20, 1971 with the intent of trimming the Constitution's liberal aspects, and consolidating the state authority. Through these changes, the executive branch was empowered with the authority of enacting decree laws,

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<sup>255</sup> Eroğul, "Çok Partili Düzenin Kuruluşu," 151.

<sup>256</sup> Ahmad, *The Making of Modern Turkey*, 147.

<sup>257</sup> Zürcher, *Turkey: A Modern History*, 258.

<sup>258</sup> Zürcher, *Turkey: A Modern History*, 258.

<sup>259</sup> Hale, *Turkish Politics and the Military*, 195.

equivalent to laws. Moreover, legal requirements to restrict fundamental rights and freedoms were eased, and judicial protections were weakened.<sup>260</sup>

In the wake of these constitutional amendments, Turkey still could not get rid of coalition governments accompanied by escalating violence, deepening polarization, and increasing economic depression. Failures in establishing a government one after the other nourished the growing desperation, mistrust and unrest among people. The final straw came when the parliament could not reach an agreement on selecting the president of the Republic for months. Consequently, the Turkish Army got on stage once again on September 12, 1980 to put an end to social conflicts, political violence as well as parliamentary instability.

#### 4.2.2 The 1980 Military Coup and the Constitution of 1982

The third coup d'état in the history of the Republic of Turkey was staged on September 12, 1980, headed by the Chief of General Staff, General Kenan Evren. Consequently, the Turkish Armed Forces ruled the country through the Council of National Security until popular elections were held and democracy was restored in 1983. The claimed aim of the coup was to protect the integrity of the country and the nation, to assure individual rights and freedoms, to ensure the safety of lives and property, to provide happiness and prosperity, and to restore state authority.<sup>261</sup> To that end, the MGK immediately extended the martial law throughout the country, abolished the parliament, suspended the 1961 Constitution, and banned all political parties and trade unions. The pressure on the press was immense; torture in prisons

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<sup>260</sup> The autonomy of universities were weakened (Art.120); the autonomy of the Turkish Radio and Television Corporation was raised (Art.119), rights to establish trade unions were lifted (Art.119), scholars' right to become a member of a political party were precluded (Art.120), small political parties' right to go to the Constitutional Court was lifted (Art.149), State Security Courts were established of which appointments were affected by the Cabinet (Art.136), the authority of judicial review in terms of military administrative acts was given to the Supreme Military Administrative Court (Art.140), declaration of martial law was eased (Art.124).

<sup>261</sup> Erdoğan, *Türkiye'de Anayasalar ve Siyaset*, 135.

became commonplace; the Council of Higher Education (*Yükseköğretim Kurulu*, YÖK) was founded to control the universities; and legislative and executive actions were almost completely left out of judicial review.<sup>262</sup> With the martial law and politics of fear, MGK managed to stop the violence and to restore the order within the country, in a relatively short span of time.

Members of the Junta were convinced that the 1961 Constitution was one of the main reasons that dragged the country into chaos. Therefore, considering the constitution as an important tool to overcome social, political and economic problems the country was experiencing, they were eager to put together a new constitution that would define the mechanisms to make democracy function better.<sup>263</sup> A constitutional draft prepared by the Constituent Assembly and MGK with intent to consolidate the state authority, strengthen the executive branch of government, and accentuate political stability. Being miles away from universal standards of democracy, the proposed text regulated the state-society relationships from a statist perspective; restricted fundamental rights and freedoms; and considered a strong executive branch, especially a powerful presidency, as the core of the political stability.<sup>264</sup> Receiving 91.4% of votes in what was commonly thought to be a highly undemocratic referendum,<sup>265</sup> the Constitution of 1982 was promulgated in November 1982. After being approved by the referendum, Kenan Evren was appointed president in November 1982 for a seven-year term.

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<sup>262</sup> Özbudun, *Türk Anayasa Hukuku*, 28

<sup>263</sup> Yılmaz, *Türk Anayasa Tarihi*, 183.

<sup>264</sup> Erdoğan, *Türkiye’de Anayasalar ve Siyaset*, 143.

<sup>265</sup> The high approval rate in the 1982 Referendum was seen as a tool to legitimize the Constitution, but still, it was not a democratic election with its prohibition to discuss the Constitution before the referendum; the intense, one-sided propaganda conducted by the Junta members; and two separate, different colored votes for “Yes” and “No” with almost transparent vote envelopes that showed which vote the voter would cast.

### 4.3 Conclusion

The Ottoman Empire's legal system composed of Sharia and sultanic customary law promoted the principle of indivisibility of power. Nonetheless, this tradition of all-powerful sovereign that the Ottoman legal structure had fostered in Turkish political sphere was shattered in the nineteenth century when the Empire headed for modern constitutionalism to keep in step with the rapidly rising West. Regarding as a remedy to keep major powers away from its internal affairs, and to save the decayed monarchy in this way, efforts for a modern legal system in the Ottoman Empire began with the Charter of Alliance of 1808, whereas the first written constitution was embodied later in the Constitution of 1876. Nonetheless, these were mere top-down policies inspired by European practices, and could not be therefore internalized by the society.

With the establishment of the Republic in 1923 along with the Constitution of 1924, Turkey truly began to build its modern legal system. After experiencing chaotic times full of coups, military tutelage, coalition governments and ever-changing constitutions one after another, Turkey, at long last, gave form to its current constitution in 1982. Adopting the system of parliamentary republic, and the principle of separation of powers, the Constitution of 1982 was established under martial law with the intention of empowering the president of the Republic who would be elected from among the assembly members for a single seven-year term, in order to consolidate the state authority and ensure the political stability.<sup>266</sup>

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<sup>266</sup> Erdoğan, *Türkiye'de Anayasalar ve Siyaset*, 143.

## CHAPTER 5

### COMPARATIVE CONSTITUTIONAL HISTORIES OF SOUTH KOREA AND TURKEY

The Republic of Korea and the Republic of Turkey are young republics with their relatively new constitutions. However, their current constitutions are the results of long and dedicated endeavors that can be traced back to the nineteenth century in terms of modern constitutionalism as outlined in previous chapters. With this design, this chapter aims to make a comparison between constitutional histories of the Republic of Korea and of the Republic of Turkey in the light of information provided in this study so far by taking the Joseon dynasty and the Ottoman Empire as starting. To that end, this chapter firstly examines the tradition of powerful sovereign in both countries shortly. It narrates how the Joseon and Ottoman law systems fostered the concept of strong leader throughout history, and how this perception has undergone changes after their adoption of modern constitutionalism. It also compares how and why both monarchies adopted modern constitutionalism. With the establishment of their modern states in the first half of the twentieth century, both countries promulgated their first constitutions, and these texts have undergone various changes and/or replaced many times in the course of time until our present day. In this sense, the systems of government adopted, the principles highlighted, and the concepts at the forefront in each constitution of both countries until today are further elaborated. Moreover, significant amendments made to the constitutions appertaining to the relationship between branches of government in particular are handled with their motivations, which led both countries to these changes. Lastly, this chapter presents



what kind of executive branch has been designed, and which role has been granted to the president in both South Korea and Turkey until their present constitutions.

### 5.1 Tradition of powerful sovereign and adoption of modern constitutionalism

Before falling under the influence of modern constitutionalism in the nineteenth century, both Korean and Turkish states had their own legal systems that were blended with their belief systems and traditions.<sup>267</sup> That is both nations were on familiar terms with the tradition of law. Still, a large majority of these rules were not within the scope of constitutional law, as they were not designed to limit the sovereign's authority, but to organize the administration of government bureaucracy.<sup>268</sup> Korea centered on Confucianism in its law system throughout centuries, especially, beginning from the Kingdom of Joseon, whereas the Ottoman Empire grounded on Sharia in the field of private law while customary law constituted the core of public law. However, what the Joseon and Ottoman legal systems had in common was that they both regarded the law as a tool for efficient governance, rather than restraining sovereign powers. With the objective of good governance, they both advocated indivisibility of power and an all-powerful ruler as the ultimate authority over the society. While not providing any rule applied directly to the sovereign to discipline his power, they also did not grant a completely unlimited sovereignty. In this regard, the constraints on Joseon kings were way stronger than those on Ottoman sultans, as Joseon kings had to conform to the ancient teachings of Confucian tradition, whereas the Ottoman sultans are not subject to a genuine limitation while exercising their authorities. Especially after the Ottoman Empire's seizing of the Caliphate in the early sixteenth century, the Ottoman sultans

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<sup>267</sup> Bozkurt, *Batı Hukukunun Türkiye'de Benimsenmesi*, 39-40.

Hahm, "Conceptualizing Korean Constitutionalism," 170.

<sup>268</sup> Ginsburg, "Confucian Constitutionalism?," 767.

turned into absolute rulers with whom people had to comply, in terms of both politics and religion. In Joseon on the other hand, in the case that if rulers fail to rule in an ethical and moral way while obeying Confucian norms, they would lose their right to be sovereign and get punished by the cosmos with natural disaster, famine and disorder.<sup>269</sup> Apart from that, in the Korean case, filial piety served as another restraint on the sovereign power, as the ruler had to respect the laws, institutions and policies of the former kings, while in the Ottomans, besides Sharia, there were also customary laws that endowed the sultans the power to have their own laws, institutions and policies independent of his predecessors in the field of public law.

Reeling under the rapidly rising West in the nineteenth century, both the Kingdom of Joseon and the Ottoman Empire initiated various reform attempts regarding the legal system. The concept of modern constitutionalism became a current issue, and it was considered as a remedy to save the decadent monarchies. Thus, in order to keep pace with the rapid developments in the West and to find a solution to slow down their downfalls, both the Korean and the Ottoman administrators implemented top-down policies.<sup>270</sup> Having already fallen behind the West, the Ottoman Empire headed for modern constitutionalism in the early nineteenth century. On the other hand, Korea took its first step towards the end of the century, with the idea of restructuring the government and society in compliance with the Western model. To that end, the Charter of Alliance of 1808 in the Ottoman Empire and the *Gabo* Reforms of 1894 in the Kingdom of Joseon came into existence as their first far-reaching efforts towards modernization. These moves were followed by further initiatives such as the Constitution of the Great Han Empire of 1899 bringing along the *Gwangmu* Reforms, and the Constitution of the Provisional

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<sup>269</sup> Ebrey, *The Cambridge Illustrated History of China*, 767.

<sup>270</sup> Bozkurt, *Batı Hukukunun Türkiye'de Benimsenmesi*, 35-37.

Government of the Republic of Korea in 1919 in the Korean case. Meanwhile, in the Ottoman case, there were the *Tanzimat* Reforms comprising the Edict of *Gülhane* in 1839, the Imperial Reform Edict in 1856, the 1876 Constitution, and the 1908 Constitution.

Besides modernization, one of the main reasons for adopting modern constitutionalism of both monarchies was the intention to disallow the major powers to meddle in their internal affairs.<sup>271</sup> Nevertheless, these attempts were of no use when the Japanese annexed Korea in 1910, and the Allies occupied the Ottoman territories as of late 1918. Still, these incidents nurtured the notion of the need for a modern government in order to have a more successful independence struggle, and therefore, they sowed the seeds of establishing today's republics and their constitutions.<sup>272</sup>

As a matter of fact, these reforms brought about fundamental changes in governance and society. However, they were all top-down attempts in their struggle for survival that aimed at modernization rather than meeting society's demands. Moreover, the changes were quite sweeping, and they happened in a short span of time. Consequently, they failed to be perceived and internalized by the public.

Coinciding with the establishment of their new republics, the first half of the twentieth century was the first true beginning of the founding of modern legal systems in both South Korea and Turkey. As the first constitution of the newly founded Government of the Turkish Grand National Assembly, the Constitution of 1921 adopted a parliamentary system of government along with the principle of unity of powers, and declared the supremacy of the legislature over the executive by entrusting the Assembly vast authority with both legislative and executive

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<sup>271</sup> Davison, *Essays in Ottoman and Turkish History*, 114.

<sup>272</sup> Lee, *A New History of Korea*, 361.  
Lewis, *Modern Türkiye'nin Doğuşu*, 332.

prerogatives. Later, in 1923, a number of amendments were made to the Constitution, and the Republic of Turkey was established as the new regime on October 29. The revision brought about the post of the president of the Republic of Turkey who was elected by the Assembly for four years, as an actor of the executive branch besides the Council of Ministers. In spite of this new post, as the Republic's first constitution, that is, the Constitution of 1924, preserved the principle of unity of powers, and the supremacy of the Grand National Assembly, which was still authorized with legislative and executive powers.

On the other hand, in the Korean case, as the first constitution of the new Republic, the Constitution of 1948 adopted a presidential system of government, with a president elected by the unicameral National Assembly, and a prime minister appointed by the president. With the intent to prevent the emergence of a dictatorial regime, presidential powers were reduced, and the Cabinet was introduced as a balancing actor responsible for checking the deeds of the post of presidency. The Korean War was later used as an effective means, under martial law, to empower the President by allowing him to run for a second term and to be directly elected by the public. Granting too much power to the President, the constitutional changes made in 1952 eventually transformed the President into being the sole executive actor in decision making, by allowing him to defuse the checks and balances mechanism and to suppress the opposition. The second amendment to the constitution in 1954 entrusted the President even more power to secure his position by removing presidential term limits and abolishing the post of prime minister. With these excessive prerogatives, the Constitution established, bestowed and legitimized the dictatorship, from which South Korea would suffer for the next twelve years.<sup>273</sup>

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<sup>273</sup> Lee, *A New History of Korea*, 381-382.

Following their oppressive regimes, respectively, both countries came up with more democratic constitutions in the 1960s. Rejecting parliamentary dictatorship, as a fruit of the Coup of May 27th, the Constitution of 1961 in Turkey aimed at bringing a solid democracy to the country by ensuring the rule of law along with fundamental rights and freedoms. Incorporating pluralism into the parliamentary republic and setting forth the principle of separation of powers for the first time, the Constitution abandoned the perception of the legislative superiority, in a sense.<sup>274</sup> Regarding the executive, the President of the Republic of Turkey was elected by the Assembly for a single seven-year term. Furthermore, the Constitution emphasizes the neutrality of the president, and the significance of his/her role in balancing political relationships. One of the biggest constraints on the president was the independent Constitutional Court, which was introduced as an assurance of the rule of law and the separation of powers by allowing the Constitutional Court to check the other two branches of government, the President with the Council of Ministers, and the Grand National Assembly.

Similar to Turkey, after having suffered from dictatorship for more than a decade, a new and more democratic constitution was put in place in 1960 in South Korea, and the presidential system was changed into a parliamentary one where the president served merely as a figurehead besides the reestablished post of prime minister. Presidential powers were considerably reduced and the president began to be elected indirectly by the parliament for a single five-year term, whereas the powers of the prime minister were significantly enhanced.

However, the libertarian environment in the 1960s did not last long in either country when the pro-democracy amendments resulted in political instabilities. Thus,

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<sup>274</sup> Özbudun, *Anayasa Hukuku*, 40.

in both countries, the military took the law in its own hands soon after the ensuing chaos, respectively. In South Korea, the military junta promulgated a new constitution in 1962, which restored the presidential system with the president elected by popular vote for a four-year term. The new Constitution gave the president superior powers over the other branches. It was later followed by another amendment in 1969 when the president was allowed to run for a third term, and the impeachment process of the president was further beclouded. These revisions were regarded as the official start of another protracted dictatorship period in the country.

In Turkey, on the other hand, the moves towards democracy were cut off with the military interference in 1971 following the coalition governments one after another causing political instability. Perceiving the Constitution of 1961 as the root cause of the existing political turbulence, the junta made some changes in an effort to trim the Constitution's liberal laws and to reinforce the authority of the state over the people. To that end, the executive branch was entitled to enacting decree laws; limiting fundamental rights and freedoms was made easier to implement; and the judiciary was weakened. Nevertheless, these amendments did not help Turkey to come out of the ever-repeating unsuccessful coalition governments and parliamentary instabilities.

The 70s was the period in which the power of the president reached its peak in South Korea when almost-dictatorial powers were given to the president within the scope of the Yushin Constitution of 1972.<sup>275</sup> Securing his lifelong presidency, the new constitution enabled the president to be elected for six years without any limits on re-election. Moreover, it granted the president almost unrestricted powers quashing all the three branches of government such as the authority to dissolve the

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<sup>275</sup> Woo, *A Review of Korean History*, 220-221.

assembly, to appoint one-third of the assembly members, and to issue extraordinary presidential decrees that could put constitutional provisions aside.<sup>276</sup> However, following the military coup in 1979, South Korea met a new constitution under military rule that curbed the enormous presidential powers introduced by the Yushin system, while maintaining presidency. Furthermore, the maximum possible presidential tenure was reduced to seven years without reelection. The courts and the parliament were invigorated with the authority to check the president.

When it came to the 80s, having failed to cope with unceasing coalition governments during the last decade, Turkey eventually witnessed another coup in 1980, and met its last constitution in 1982 under the martial law proclaimed by the Junta. Aiming to consolidate the state authority, and thereby to assure the political stability, the new Constitution designated a powerful president of the Republic to be elected for a single seven-year term. In a similar vein, South Korea as well experienced another military coup in 1979, however it incited nationwide pro-democracy mass protests called the 1987 June Democracy Movement that ended in the establishment of the Sixth Republic with its Constitution of 1987, current fundamental document of the country. The new Constitution reinstated election by popular vote for president, and a presidential term was set to a single five-year term. Unlike the Turkish case, the new South Korean constitution weakened the presidential authority, and created a more powerful National Assembly and judicial branch along with a more efficient checks and balances mechanism.

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<sup>276</sup> Seth, *A History of Korea: From Antiquity to the Present*, 409.

## 5.2 Conclusion

Constitutionalism in both South Korea and Turkey is the result of decades-long process and efforts. Both the Joseon and the Ottoman legal systems had the tradition of powerful sovereign that adopted the principle of unity of powers for centuries. Nevertheless, the concept of modern constitutionalism began to shatter this perception of all-powerful monarch beginning from the nineteenth century, and inspired both countries to introduce a modern legal system in an attempt to save their decadent monarchies. However, failing to receive support from their people while implementing their top-down modernization policies, both monarchies had to give way to the new modern republics established in the first half of the twentieth century in both countries. The first constitution of the Republic of Korea, the Constitution of 1948, was amended nine times until today whereby in five instances, it was fully rewritten. In Turkey, on the other hand, the Turkish Republic's first constitution, the Constitution of 1924, was followed by two entirely new ones following two military coups in 1960 and 1980, respectively. In both countries, the authority of the president has been one of the core issues of the journey to constitutionalism from the very beginning. Except for a brief period of the Second Republic (1960-1961), South Korea has always had a presidential system of government since its establishment where there have been strong executives and weak legislatures. Although the executive powers were significantly reduced with the latest Constitution of 1987, the pattern of powerful presidency has not died out, and the dominant role of the president in the political sphere often stir controversies. Turkey, on the contrary, has ever since been under a parliamentary system where there have been powerful prime ministers as the head of government, and symbolic presidents of the Republic as the head of state. Nevertheless, with the Constitution of 1982 bestowing significant



authorities upon the president, and later the constitutional amendments made in 2007 providing legitimacy based on public support, the president of the Republic has gradually drifted away from its largely ceremonial role and has become the main actor of the political sphere. Today, this de facto presidential system conflicting with the current constitution is at the center of all political debates in Turkey. Having undergone though periods until achieving their current constitutions, both South Korea and Turkey are fiercely discussing amending their fundamental documents nowadays, centering the presidential system of government and the authority of the post of president more than any other topics.

## CHAPTER 6

### DEBATES ON CONSTITUTIONAL AMENDMENTS TO CHANGE THE STATUS OF THE PRESIDENCY IN THE REPUBLIC OF KOREA

As a young republic and a newly democratized country that is gradually strengthening its position in the international arena, South Korea is going through a period in which debates on amending its current Constitution of 1987 have peaked. Although there is a consensus concerning the need for a constitutional change among different groups such as the ruling party, the opposition, the people, and the non-governmental organizations (NGO), there is a huge divergence about what should be changed and how it should be changed. Still, the issue of presidency appears at the center of these debates as it was in the past. To that end, this chapter firstly intends to deal with the existing Constitution in great detail to lay a solid foundation for the following parts about the ongoing debates in the country on constitutional amendment regarding the presidency. Subsequently, it presents current discussions about constitutional revisions by highlighting the primary controversies on the existing presidential system, and its points proposed for change. Referring to the South Korean president's extensive powers, imperial presidency, and the troubles it creates regarding the principle of separation of powers are handled at first while the presidential term of office is detailed later on as another burning question. Eventually, the last section points out the debates on alternative systems of government to the existing presidency with their merits and demerits, and their possibilities of functioning in South Korea. It is crucial to note that although former President Park Geun-hye was impeached in early March, this chapter focuses on Park's opinions and policies regarding the issue of constitutional amendment. This is

because the ultimate decision about Park's impeachment was recently made by the Constitutional Court, and the country just went through a presidential election on May 9, 2017 from which the liberal Democratic Party leader Moon Jae-in came victorious.

## 6.1 Constitution of 1987

The Sixth Republic with its Constitution of 1987 marked a significant moment for South Korean people, as they started to believe in the constitution as a means of creating political order and democracy, rather than as a means of legitimizing autocratic leaders' arbitrary use of force and consolidating their positions. Although President Roh Tae-woo possessed a certain degree of legitimacy as he was elected through a direct presidential election in 1987, he still could not be fully trusted due to his leading position in the Junta that grabbed power through a coup in 1980. For this reason, Roh was restrained in his attempts to carry out the necessary reforms during his tenure while the real push for democratization and reforms came from the opposition, which dominated the National Assembly back then.<sup>277</sup>

The Constitution of 1987 is the last constitution of the Republic of Korea, and it has remained much the same although some new bills have been added over time. There have been discussions in political circles over potential amendments to the fundamental text, but no active measures have been taken since its promulgation. It is under this constitution made almost three decades ago that the country has witnessed impressive economic growth. South Korea has also emerged as an important regional and global player, and has somehow abandoned its reunification

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<sup>277</sup> Eckert, *Korea: Old and New History*, 387.

ambitions with the North given that North Korea had deviated democratically and economically from the path of the South.<sup>278</sup>

The current Constitution of 1987 consists of a preamble, 130 articles, and six supplementary provisions. It is divided into ten chapters: General provisions, Rights and Duties of Citizens, the National Assembly, the Executive, the Courts, the Constitutional Court, the Election Managements, the Local Authorities, the Economy, and the Revisions to the Constitution. Setting forth the goals of the state and the motivation for the Constitution, its ceremonial preamble addresses various concepts as the fundamental values of the South Korean state including freedom, democracy, sovereignty of people, justice, equality, human rights, security, peaceful unification, humanitarianism, national unity, fullest development of individual capabilities, private initiative, public harmony, world peace and the common prosperity of humankind.<sup>279</sup> It also commemorates many historical incidents from which the current Constitution takes its roots, stating the people of Korea should uphold “the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919 and the democratic ideals of the April Nineteenth Uprising of 1960 against injustice.”<sup>280</sup>

The first chapter consisting of general provisions declares that South Korea is a democratic republic within its territory, the Korean peninsula and its adjacent islands.<sup>281</sup> Having sovereignty from the people, South Korea has the duty of pursuing a policy for peaceful unification on the grounds of freedom and democracy.<sup>282</sup> Having experienced military rules one after another over the last decades, the Constitution puts emphasis on maintaining the political neutrality of the

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<sup>278</sup> Irvine, *Human Rights, Constitutional Law and the Development of the English Legal System*, 121.

<sup>279</sup> *Constitution of the Republic of Korea (1987)*, Preamble.

<sup>280</sup> *Constitution of the Republic of Korea (1987)*, Preamble.

<sup>281</sup> *Constitution of the Republic of Korea (1987)*, Art.1(1) and Art.3.

<sup>282</sup> *Constitution of the Republic of Korea (1987)*, Art.1(2) and Art.4.

armed forces to prevent any possible repetition.<sup>283</sup> The Constitution also supports a free and plural political party system, but the Constitutional Court can decide to dissolve any political party if its purposes or activities are found to be contrary to the fundamental democratic order.<sup>284</sup>

Adopting presidential republic, the Constitution sets forth separation of powers and the rule of law, which provides a greater balance between the three branches of the government compared to earlier constitutions. Being highly independent from each other, there is the executive body with an elected president at the top, and the Cabinet headed by an appointed prime minister; a unicameral legislature called the National Assembly; and an independent judiciary consisting of three levels of courts, namely the Supreme Court, the High Courts, and the District Courts, in addition to the fully independent Constitutional Court and several courts of specialized jurisdiction such as the Family Court and Administrative Court.<sup>285</sup>

In terms of the executive branch, the president as the head of state is elected by “universal, equal, direct and secret ballot by the people”<sup>286</sup> who are “eligible for election to the National Assembly, and who have reached the age of forty years or more.”<sup>287</sup> Based on the first-past-the-post system, receiving the absolute majority in a single round in the presidential election, the president is elected for a single five-year term, with no additional terms being allowed.<sup>288</sup> The Constitution assigns the president to “faithfully execute the duties of the President by observing the Constitution, defending the State, pursuing the peaceful unification of the homeland,

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<sup>283</sup> *Constitution of the Republic of Korea (1987)*, Art.5(2).

<sup>284</sup> *Constitution of the Republic of Korea (1987)*, Art.8.

<sup>285</sup> The judicial system of South Korea is comprised of the Supreme Court of South Korea, the Constitutional Court of South Korea, six High Courts, 13 District Courts, and several courts of specialized jurisdiction, such as the Family Court and Administrative Court. In addition, branches of District Courts may be established, as well as Municipal Courts. See *Korea South Company Laws and Regulations Handbook*, 37; *Korea South Business Law Handbook*, 46.

<sup>286</sup> *Constitution of the Republic of Korea (1987)*, Art.67(1).

<sup>287</sup> *Constitution of the Republic of Korea (1987)*, Art.67(4).

<sup>288</sup> *Constitution of the Republic of Korea (1987)*, Art.70.

promoting the freedom and welfare of the people, and endeavoring to develop national culture.”<sup>289</sup> In case of violation of the Constitution or other acts in the performance of official duties, the president may be impeached by a majority vote of the total members of the National Assembly upon its proposal by one third or more of its total members.<sup>290</sup> However, apart from insurrection or treason, he/she cannot be charged with a criminal offense during his term of office.<sup>291</sup>

The president performs his/her executive functions through the Cabinet that is the other actor of the executive, and consists of the prime minister and the other State Council members. As the principal executive assistant to the president, the prime minister is appointed by the president with the consent of the National Assembly, and is charged with directing the executive ministries under the direction of the president.<sup>292</sup> His primary assignment is to assist the president, while he can also be authorized to act for the president in case the presidential office is vacant or the president is unable to perform his duties for any reason.<sup>293</sup> Furthermore, the prime minister is entitled to issue ordinances concerning matters within his jurisdiction under the powers delegated by Act or presidential decree, and he also countersigns the presidential acts to be executed.<sup>294</sup> Members of the State Council, on the other hand, are appointed by the president upon recommendation by the prime minister, and may be removed in the same way.<sup>295</sup> Likewise, heads of executive ministries are appointed by the president from among members of the State Council on the

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<sup>289</sup> *Constitution of the Republic of Korea (1987)*, Art.69.

<sup>290</sup> *Constitution of the Republic of Korea (1987)*, Art.65(1) and (2).

<sup>291</sup> *Constitution of the Republic of Korea (1987)*, Art.84.

<sup>292</sup> *Constitution of the Republic of Korea (1987)*, Art.86(1) and (2).

<sup>293</sup> *Constitution of the Republic of Korea (1987)*, Art.71.

<sup>294</sup> *Constitution of the Republic of Korea (1987)*, Art.86(2), Art.82 and Art.95.

<sup>295</sup> *Constitution of the Republic of Korea (1987)*, Art.87(1) and (3).

recommendation of the prime minister.<sup>296</sup> Members of the Cabinet are collectively and individually accountable only to the president.

Regarding the legislative branch, there is the unicameral National Assembly that is vested with the legislative power.<sup>297</sup> Passing the buck to the Election Act in terms of the exact number of parliament members, the Constitution sets forth 200 as the lowest limit.<sup>298</sup> At the present time, there are 299 members in the Assembly who are publicly elected by universal, equal, direct, and secret ballot for four years.<sup>299</sup>

With respect to the judiciary, the Supreme Court is the highest court of the state, which hears appeals from the decisions rendered by lower courts and martial court verdicts. However, in the matters of constitutional law, the fully independent Constitutional Court that was established in 1988 following the 1987 amendment is the highest court. Modeled on the European style of judicial review<sup>300</sup>, it is a specialized court that determines the constitutionality of laws upon the request of the courts, impeachment, and dissolution of a political party, competence disputes between state agencies and local governments, and constitutional complaints filed by individuals.<sup>301</sup> In order to fully protect fundamental rights and effectively check governmental powers, there are nine judges who serve a six-year renewable term. The president of the Constitutional Court is appointed for a six-year term by the president with the consent of the National Assembly, and may be reappointed.<sup>302</sup>

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<sup>296</sup> *Constitution of the Republic of Korea (1987)*, Art.94.

<sup>297</sup> *Constitution of the Republic of Korea (1987)*, Art.40.

<sup>298</sup> *Constitution of the Republic of Korea (1987)*, Art.41(2).

<sup>299</sup> *Constitution of the Republic of Korea (1987)*, Art.41(1) and 42.

Public Official Election Act of Korea, Art.21.

<sup>300</sup> Roughly speaking, Korea belongs to the European style of judicial review because it has a Constitutional Court as a special court apart from the other general courts. However, the adoption of many features of the US system has contributed to a mixed system. For instance, in terms of the composition, the South Korean Constitution Court inspired by the US Supreme Court with its single chamber, nine justices, and selection process of the justices. However, regarding its competence, South Korea adopted European system more than the US one. See Lim, "A Comparative Study of the Constitutional Adjudication Systems of the U.S., Germany and Korea," 124.

<sup>301</sup> *Constitution of the Republic of Korea (1987)*, Art.111 (1) and (2).

<sup>302</sup> *Constitution of the Republic of Korea (1987)*, Art.111(4) and Art.112(1).

Unlike the decisions of the Supreme Court that are limited to the case only, the decisions of the Constitutional Court have full force and effect of law.<sup>303</sup> In fact, judicial review had been a feature of the South Korean government since the first Constitution of the ROK of 1948; nevertheless, it could never be practiced actively as the judicial review system had changed whenever there had been a constitutional amendment.<sup>304</sup> Under the Constitution of the First Republic, the function of judicial review was vested in the Constitutional Committee, but it could revise only seven cases in twelve years. The Second Republic's Constitution provided for the creation of a Constitutional Court but the Court could not function due to the coup d'état in May 1961. Following that, judicial review was prescribed in the Constitution of the Third Republic as well where the American style of judicial review system was adopted with the Supreme Court designated as the "main protector of the constitution."<sup>305</sup> However, in fear of politicizing the judiciary, the Court abstained from declaring unconstitutionality of laws. The Constitutions of the Fourth and Fifth Republics granted judicial review functions to the Constitutional Committee, but still, the judicial review was weak and useless, as the Committee never assessed the constitutionality of a statute.<sup>306</sup> Therefore, the judicial review had always remained feeble and insignificant against the strong South Korean presidency.<sup>307</sup>

Following frequent changes to the constitution in four decades, the Constitutional Court was finally established in 1988, and began to actively practice its judicial review. In this way, legislative and executive actions began to be controlled as a requirement of the principle of separation of powers. So, basic human

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<sup>303</sup> Kwon, "Introduction to Korean Constitutional Law," 17.

<sup>304</sup> Yoon, "New Developments in Korean Constitutionalism," 406.  
Ginsburg, "Confucian Constitutionalism?," 779.

<sup>305</sup> Yoon, "The Constitutional Court System of Korea," 5.

<sup>306</sup> Yoon, "The Constitutional Court System of Korea," 5.

<sup>307</sup> Kim, "Constitutional Review in Korea," 30.



rights and freedoms started to be better protected. To that end, the most important contribution of the 1987 Constitution may be the establishment of the Constitutional Court as it marked a “farewell to the era of the top-down politics and an ambitious leap toward the bottom-up democracy.”<sup>308</sup> The Constitutional Court nurtured the principles of democracy and the rule of law both in political and social spheres, and contributed to altering Korean people’s perception of the Constitution and law in a good way.<sup>309</sup> With the launch of the 1987 Constitution, the Korean constitutionalism entered a new chapter by starting to realize the ideals and spirit of the constitution owing to the newly established Constitutional Court.<sup>310</sup> South Korea began its journey of a “rapid transformation from a country with a decorative constitution to a country with a working constitution”.<sup>311</sup>

Although there is no entrenchment, the 1987 Constitution as a codified constitution is still a strict constitution requiring exceptional procedures for a probable amendment to the Constitution. A proposal to amend the Constitution should be introduced either by the President or by a majority of the total members of the National Assembly.<sup>312</sup> The proposed amendments should be submitted to a national referendum within thirty days after passing in the Assembly with the approval of a two-thirds majority, and require more than half of the votes in the referendum to take effect.<sup>313</sup> As a result of the past dictatorial experiences, the Article 128(2) provides a serious provision by stating,

amendments to the Constitution for the extension of the term of office of the President or for a change allowing for the reelection of the President shall not

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<sup>308</sup> Ahn, “The Influence of American Constitutionalism on Korea,” 244.

<sup>309</sup> Lim, “Rule of Law in Korea,” 3-19.

<sup>310</sup> Yoon, “New Developments in Korean Constitutionalism,” 403-404

<sup>311</sup> Ahn, “The Influence of American Constitutionalism on Korea,” 264.

<sup>312</sup> *Constitution of the Republic of Korea (1987)*, Art.128(1).

<sup>313</sup> *Constitution of the Republic of Korea (1987)*, Art.130(2).

be effective for the President in office at the time of the proposal for such amendments to the Constitution.<sup>314</sup>

## 6.2 Park Geun-hye era

Following the inauguration of the first civilian administration since the May Coup of 1961 in 1992, South Korea made progress in numerous fields by installing cleaner and more transparent politics through a fair and honest electoral process; pushing for a more solid democracy against military dictatorship; strengthening open market economy and globalization of all sectors; and encouraging reconciliation with North Korea. Gradually increasing its popularity and influence in the global arena, South Korea met its eleventh President on February 25, 2013 when Park Geun-hye, the daughter of Park Chung-hee, came out victorious from the presidential election. President Park adopted economic prosperity, people's happiness, cultural enrichment, and establishment of foundation for peaceful unification as the four guiding principles of her administration.<sup>315</sup> Regarding the North Korean issue, Park adopted a three-stage plan for peaceful unification starting from securing peace, then realizing economic integration, and finally achieving political integration to build a prosperous Korean peninsula where all Korean people would enjoy freedom and human rights.<sup>316</sup> By early 2015, Park's popularity increasingly fell first due to the sinking of MV Sewol, the country's one of the worst maritime disasters that killed 304 people, mostly high school students on a class trip from Incheon to the Jeju Island on April 16, 2015. The Park government encountered fierce criticism for its inadequate and slow response to the issue, and massive demonstrations took place all

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<sup>314</sup> *Constitution of the Republic of Korea (1987)*, Art.128. For the relevant articles of the Constitution of 1987, see Appendix G.

<sup>315</sup> "Park Geun-hye Taet'ongnyŏng Ch'wiimsa 'Chŏnmun' Hutt'ŏboni" (Skimming Park Geun-hye's Inaugural Speech).

<sup>316</sup> Cheon, "Trust – The Underlying Philosophy of the Park Geun-Hye Administration." "North and South Korea to Hold Talks Next Week."

over the country, calling for Park and her Cabinet to resign. Subsequently, Park's business-friendly labor policies and enforcement of state-issued history textbooks in middle and high schools in the same year enkindled public discontent that resulted in further large anti-government protests demanding the President to step down.<sup>317</sup>

Also accompanied by the inner-party struggle, the general election held in April 2016 marked "Park's lame duck period started earlier than any other administration in the past,"<sup>318</sup> as her Saenuri Party (renamed to the Liberty Korea Party in February 2017) lost its majority in the National Assembly, and South Korea reached the first four-party system with two dominant parties—the Democratic Party of Korea (also known as the *Minjoo* Party) and the Saenuri Party—, one major third party (the People's Party), and one minor fourth party (the Justice Party) in twenty years.<sup>319</sup>

While the next presidential election had been scheduled for December 2017, and debates on revising the Constitution in terms of the presidency had been a hot topic on the eve of the election, the political scandal known as Choi-gate scandal centering on President Park Geun-hye and her close confidant Choi Soon-sil broke out in late October 2016. It rose to the surface that President Park was under the influence of Choi, who is the daughter of a religious cult leader Choi Tae-min.<sup>320</sup> Without holding an official government position, Choi was able to meddle in important state affairs such as personnel appointment and policy making. Furthermore, she could also access confidential documents, edit drafts of Park's speeches, and misappropriate funds from nonprofit organizations.<sup>321</sup> Meantime, two presidential senior staff members were arrested for abusing power to extort a sizeable

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<sup>317</sup> Evans, "Why South Korea Is Rewriting Its History Books."

<sup>318</sup> Kim, "Vote Defeat for South Korea's Park Raises 'Lame Duck' Prospect."

<sup>319</sup> "Che 3 tang 'Gugminuidang'e Kōnūn Kidaewa Kwaje" (The Third Party, People's Party's Expectation and Problems).

<sup>320</sup> Choi Tae-min is a pseudo-Christian leader who formed a cult called *Yongsae-gyo* (Church of Eternal Life), and acclaimed himself a *Maitreya* (Future Buddha).

<sup>321</sup> Kim, "South Korean Protesters Call for President to Step Down."

amount of money from chaebols, family-owned large business conglomerates, and helping Choi. They claimed that they simply followed President Park's orders.<sup>322</sup> The scandal fostered severe criticisms about Park's "mismanagement of national information and a heavy-handed leadership style lacking in transparency,"<sup>323</sup> and made more than one million South Korean people take to the streets for weeks to call for Park's resignation or impeachment. Having the worst approval rating in Korean history with 4%, Park's presidential powers were first suspended in December following parliament's impeachment vote, and she was eventually impeached by the Constitutional Court's unanimous decision on March 10, 2017.<sup>324</sup> Prime Minister Hwang Kyo-ahn served as acting president from December until May 9, 2017 when the country's snap presidential election took place, and the liberal Democratic Party leader Moon Jae-in came out victorious. In consequence of all these turmoils, the political landscape changed drastically as the National Assembly has become a six-party entity with the newly established Liberty Korea Party in lieu of the Saenuri Party while the Saenuri still existed with a small number of members, and the Righteous Party that was formed by twenty-nine old Saenuri lawmakers who were against Park Geun-hye.

These major developments sparked the already existing debates on constitutional amendment considering the presidency in the country. The high potentiality of abusing vast powers the South Korean president holds prompted South Korean people, especially the younger generation to question the current 1987 Constitution, and the prerogatives it grants to the president. In this way, debates on

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<sup>322</sup> "Kömch'al, Anjongböm Chŏn Chŏngch'aekchojŏngsusŏk Kin'güpch'ep'o." (Prosecution, Surprise Arrest of Ahn Jong-beom for Former Top Policy Adjustment).

<sup>323</sup> "Cult Leader's Daughter May Upend South Korea Presidency."

<sup>324</sup> The motion received 171 signatures out of 299 lawmakers, and including many of Park's own Saenuri Party, it passed with 234 out of 299 votes on December 9, a much higher ratio than the required two-thirds majority- 200 lawmakers- to impeach the incumbent president. See Jun, "South Korea's Opposition Parties Move to Impeach President Park Geun-hye." "Choi-gate: South Korean President's Approval Rating Tans at 4%."

amendments to the current Constitution regarding the presidency have escalated with different demands coming from the political parties, as well as from the South Korean people.

### 6.3 Debates on constitutional amendments

Providing a peaceful transition from decades-old military dictatorship to an elected civilian government, the current 1987 Constitution represents a major step towards full democratization. Being a fruit of a legitimate process of revision, it curtailed presidential powers, strengthened the legislative branch, and established an independent Constitutional Court to create a more democratic and human rights-based South Korea. Since the establishment of its current Constitution, South Korea has witnessed a total of seven peaceful elections, achieved a rapid economic growth and competitiveness, expanded the welfare state, and received international attention and respect. Most importantly, the constitutional system that was brought about by the Constitution of 1987 convinced South Korean people that a constitution is not a mere piece of paper legitimatizing all the actions of the ruling class, but a living document regulating the citizens' own lives.

Widely regarded as one of the most vigorous and interesting third wave democracies,<sup>325</sup> South Korea argues today that the thirty-year-old Constitution has already fulfilled its mission and should be amended, as it cannot accommodate the developments of the new era. Referred to as an impediment to national development, the untouched Constitution fails to satisfy the rapidly changing realities of the country since 1987 in parallel with steep globalization, democratization, and relatively eased tensions with North Korea.<sup>326</sup> Therefore, a proper interpretation of

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<sup>325</sup> Diamond, *Institutional Reform and Democratic Consolidation in Korea*, 1.

<sup>326</sup> Kim, *Democracy and the Debate over Constitutional Amendment in South Korea*, 2.

these domestic and international changes ought to be made, and then revived in the constitutional norms to be established.

In South Korea, the concept of constitutional reform is almost as old as the country itself. The Republic of Korea was founded in 1948, and the first constitutional revision came four years later in 1952. Since that time, the Constitution was amended eight more times, and the last revision was in 1987 putting an end to military dictatorship. While every change of regime brought about an amendment to the constitution, none of these revisions—apart from the last one in 1987—were in response to popular demands, but they served the authoritarian governments to cover their unfair practices.<sup>327</sup> Calls for constitutional reform have usually come when politicians wanted to change the political rules to their advantage, and the focus of amendments has generally been about the executive, more specifically the presidential powers, the term of presidency, the method of election, and its relationship with legislation.<sup>328</sup> Today as well, more than any other aspect, the status of the presidency constitutes the focal point of the debates on constitutional amendment in South Korea.

Despite free and competitive elections regularly held at all levels of the government to choose the heads of the executive and the members of the legislative branches, doubts about the quality of the democracy introduced by the 1987 Constitution have not come to an end, as South Korean people are pretty conscious about their fundamental rights and freedoms after prolonged autocratic regimes of the past. Because the concepts of popular sovereignty featuring free and fair elections, universal adult suffrage, multiparty competition and inter-party alternation

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Pyung, “Recent Discussions on the Constitutional Law Amendment of South Korea,” 4.

<sup>327</sup> Yoon, “New Developments in Korean Constitutionalism,” 403.

<sup>328</sup> Six out of the nine constitutional amendments were either to alter the way of presidential elections or to extend the term of office. See Jeong, “Constitutional Reform Debate to Be Stalled.”

in power have been materialized, the spirit of participatory democracy has widely spread, and the perception of the rule of law has begun to take root in the society, South Korea has been vigorously calling for a shift from a mere procedural democracy to a substantive one for a while.<sup>329</sup> That is why even the civilian governments since the introduction of the 1987 that are referred to as “the governments of the people,”<sup>330</sup> comprising Roh Tae-woo, Kim Yeong-sam, Kim Dae-jung, Roh Moo-hyun, Lee Myung-bak, and Park Geun-hye administrations, could not escape from being caught in the midst of the debates on establishing a more democratic constitution.

An interesting pattern of Korean politics since 1987 is that the presidential aspirants have often raised the issue of revising the constitution as their election pledges to win public support, but they all have dropped it once they have won office.<sup>331</sup> It was not until the presidential election in 1997 when former President Kim Dae-jung triggered the debates by suggesting a constitutional revision to introduce a system similar to a run-off voting<sup>332</sup>, and another political heavyweight Kim Jong-pil supported a transition from the presidential system to a cabinet system.<sup>333</sup> Building an alliance, the two Kims were determined to revise the Constitution, but the debate was overturned when political interests radically changed. The next President Roh Moo-hyun kept the debates warm proposing the “one-point revision” based on the US model, which allows presidents to seek reelection while limiting their terms to four years. However, he was turned down by

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<sup>329</sup> Shin and Chu, “The Quality of Democracy in South Korea and Taiwan,” 6.

<sup>330</sup> Pyung, “Recent Discussions on the Constitutional Law Amendment of South Korea,” 3.

<sup>331</sup> Shim, “Constitutional and Electoral Reform in South Korea.”

<sup>332</sup> Run-off voting (also known as the two-round system) is a voting system where no candidate receives the required number of votes (usually absolute majority) in the first round, and the two candidates with the highest votes proceed to a second round, from which all others are excluded. This system is used in various countries for the election of legislative bodies and directly elected presidents.

<sup>333</sup> Yeo, “Constitutional Reform Debate Resurfaces.”

the opposition. The debate was rekindled once again by President Lee Myung-bak when he proposed a power-sharing structure between the president and the prime minister with the intent of relieving partisan battles, but his efforts came to nothing, and he was eventually accused of trying to consolidate his post-presidency power.<sup>334</sup> Former President Park Geun-hye was not an exception for this pattern either, as she endorsed revision in both the 2007 and 2012 elections, calling the 1987 Constitution outdated, and claiming that it failed to reflect political developments made since 1987.<sup>335</sup> Nevertheless, she retreated following her victory from the election, and began to express her strong opposition whenever the issue of constitutional amendment was brought to the table. However, despite her fierce opposition to a probable change to the Constitution, she then made a u-turn by bringing up the necessity of revising the basic law of the country to move with the times.

### 6.3.1 Imperial presidency and the issue of separation of powers

Separation of powers has been one of the most contentious issues of the journey to constitutionalism in South Korea. Since the establishment of the Republic in 1948, there have been strong executives and weak legislatures where authoritarian leaders have used the assemblies as a rubber stamp to realize their own political ambitions.<sup>336</sup> Merging the executive and legislative authorities under the president, the former constitutions could be easily amended in accordance with the presidents' own wishes, as ruling governments always held the majority of seats in the parliament, and restrained legislature from running on the basis of healthy debate and dialogue. Although the executive powers were reduced with the latest amendment in 1987, the authoritarian pattern of the government has not changed much as the

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<sup>334</sup> Ser, "Constitution Must Be Changed, Says Park."

<sup>335</sup> "S.Korea's Presidential Candidates Eye Constitutional Reforms."

<sup>336</sup> Yoon, "New Developments in Korean Constitutionalism," 404.



president still has vast powers often referred to as “imperial presidency”<sup>337</sup> while there are still some malfunctions in the National Assembly.

Under the Constitution of 1987, the South Korean president plays six major roles.<sup>338</sup> First of all, as the head of state, the president symbolizes and represents the entire nation both in the government system and in foreign relations.<sup>339</sup> Secondly, being the chief administrator, the president makes major decisions regarding government policies while having full power to conduct the State Council, advisory organs and executive agencies at the same time.<sup>340</sup> Among the executive agencies under the presidential control, there is the Board of Audit and Inspection of Korea, the National Intelligence Service, and the Broadcasting and Communications Commission, which are extremely important in terms of formulating and carrying out national policies. By his excessive power, the president has direct control over the state budget, the intelligence and security activities, and broadcasting and communications. Additionally, he/she is furnished with the authority to appoint public officials, along with the prime minister and heads of executive agencies.<sup>341</sup> Considering the legislature, the president cannot dissolve the National Assembly, but the parliament can hold the president ultimately accountable to the Constitution by means of an impeachment process. Thirdly, the president is also the Commander-in-Chief of the Armed Forces, having enormous power on military policy such as

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<sup>337</sup> The term “imperial presidency” was coined by historian Arthur M. Schlesinger in his book *The Imperial Presidency* dated 1973 to describe the US presidency. He criticized the then-current Richard Nixon presidency for being out of control, and shifting towards greater executive power by exceeding its constitutional limits. For South Korea, on the other hand, the term was firstly used for the Yushin system, in which President Park Chung-hee had all governing power in his hands by means of the Yushin Constitution. See Vogel and Kim, *The Park Chung Hee Era: The Transformation of South Korea*, 27.

<sup>338</sup> Kwon, “Introduction to Korean Constitutional Law,” 15-17.

<sup>339</sup> *Constitution of the Republic of Korea (1987)*, Art.66 (1).

<sup>340</sup> *Constitution of the Republic of Korea (1987)*, Art.72, 86(2) and 88(3).

<sup>341</sup> *Constitution of the Republic of Korea (1987)*, Art.78 and 86(1).

declaring war and concluding peace.<sup>342</sup> Fourth, the president is the chief diplomat and foreign policy maker who ratifies international treaties, and accredit, receive or dispatch diplomatic envoys.<sup>343</sup> Fifth, as the chief policy maker and key lawmaker, the president may propose legislative bills to the National Assembly or express his/her views to the legislature.<sup>344</sup> Finally, the president is a member of the ruling party at the same time, and he/she appoints senior officials of the executive branch following his party's recommendations.

Although all these authorities of the president are clearly specified in the Constitution, practices have shown that the president may become the source of contentious political and constitutional disputes in terms of his/her powerful role that harshly dominates the political sphere in South Korea. Relying on the principle of rigid separation of powers, presidential system requires restricting disproportionate powers of the president through the system of checks and balances, which enables all three branches of government to supervise each other by giving the legislative, executive and judiciary authorities to three completely separate and thereby independent and powerful organs. In this way, it is ensured that all these authorities are exercised in accordance with constitutional orders. Nevertheless, in South Korea, since the president plays the leading role in policy making and the relatively impotent National Assembly is divided into a self-righteous majority and a mostly ignored minority, the separation of powers doctrine has become meaningless.<sup>345</sup> The executive has vast imperial powers, and thus the power imbalance within the

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<sup>342</sup> *Constitution of the Republic of Korea (1987)*, Art.73 and 74.

<sup>343</sup> *Constitution of the Republic of Korea (1987)*, Art.73.

<sup>344</sup> *Constitution of the Republic of Korea (1987)*, Art.81 and 52.

<sup>345</sup> Chon, "The Effect of Constitutional Review," 133.

governmental structure allows massive state intervention that lays the way open for abuse of governmental power and corruption.<sup>346</sup>

Referring to the legislative branch, the concentration of power in the president grants the legislature little real power. Party politics in South Korea is marked by a personalized and regionally based party system. Firstly, because the undemocratic inner structure of the political parties has not been based on the mass of people, but was originally formed around leading political figures, around the president more specifically, they are highly personalized by the president's financial and nomination powers, and have mostly operated as their personal power base.<sup>347</sup>

As a member of the ruling party and mostly the former head of it, the president controls the party by personal appointments, and resourcing. Therefore, once the president loses, his/her party collapses right after him. When the ruling party occupies the majority of seats in the National Assembly, it means that the president has both executive and legislative powers, as he/she controls the parliament as well. Furthermore, although the legislative has the right to examine the budget and pass or reject executive proposals on the national budget, the allocation of the budget belongs to the discretionary domain of the president. In this sense, the president can reward the members of assembly by giving them a larger budget or pursuing favorable policies or punishing the hostile.<sup>348</sup> To that end, the legislature in the South Korean case has been mostly regarded as a subordinate agent of the executive branch, whereas the opposition has had a great responsibility to restrain both the ruling party and the executive.

In addition, political parties do not have a solid constituency. Their support mainly comes from the party leader's regional base, and thereby, "there is no reason

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<sup>346</sup> Rhee, *Why South Korea Needs Institutional Reform*, i.

<sup>347</sup> Lim, "Rule of Law in Korea," 13-14.

<sup>348</sup> Moon, "Why Persistent Imperial President?"

for voters to develop any feeling for party identification... the party is identified with the leader or the region of origin.”<sup>349</sup> Being called “regionalism” this phenomenon of the South Korean system originally dates back to the Three Kingdom period in which Korea was divided along regional lines with the Paekje (Cholla, southwest Korea) and the Shilla (Kyongsang, southeast Korea) fighting for control of the peninsula from which the Shilla came out victorious. However, the present-day form of southwest-southeast tensions is seen developed under Park Chung-hee’s rule from the early 1960s when he recruited people from his own region Kyongsang for public office and government positions to sustain his leadership in face of the lack of legitimacy of his administration. In this manner, he made investments only in his region, and transformed Kyongsang into “Korea’s industrial heartland”<sup>350</sup> whereas southeast Cholla was ignored. This uneven regional development and unequal distribution of income and socioeconomic infrastructure resulted in the continuity of region-based political cleavages, which are still highly entrenched in South Korean politics and the voting behavior.<sup>351</sup> Because regionalism is the main determinant of voting for South Korean people, the politicians tend to highlight regional issues, and to give political promises for the welfare of their hometowns instead of developing solid political agendas and ideologies on national basis. Thusly, the South Korean Assembly is often regarded undemocratic and weak due to its volatile political parties.<sup>352</sup>

Besides the legislature, the judicial branch as well has been regarded too weak to restrain the vast discretionary power of the executive. The Constitutional Court has maintained its relatively passive attitude in the relationship between the

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<sup>349</sup> Park, “The Fourteenth National Assembly Election in Korea,” 10-11.

<sup>350</sup> Lim, “South Korea’s Unhealthy Democracy.”

<sup>351</sup> Ha, “Impact of Democratization on Regionalism in Korea,” 109.

<sup>352</sup> Lee et al., “Chǒngch’igaehyōkkwa Hǒnbōpkaejǒng” (Political Reform and Constitutional Amendment), 7.

two representative branches although it has a vital duty in terms of controlling the state power by checks and balances, and protecting the people's basic rights and freedoms by force of the rule of law principle. However, the Court has usually chosen not to directly confront the presidents about divisive political disputes on presidential powers and separation of powers conflicts, but has preferred to facilitate the political dialogue, and the tensions derived from fractious presidential politics.<sup>353</sup> It is mainly because in South Korea, the president possesses the power to appoint justices to the Constitutional Court.<sup>354</sup> Even though the appointment calendar has been scheduled in such a way that every president can appoint justices for the period of the next presidency, it is not enough to secure the neutrality and independence of the justices because their terms are renewable, and if they are eager to be reappointed, they tend to seek conformity with the executive. It may be plausible that the Court's efforts to create a political environment avoiding direct confrontation are positive with regard to developing political tolerance, but still it is not helpful in the sense of solving the fierce political conflicts and protecting the legitimacy of the Court. Hence, despite their concerns of reappointment, it is often stressed that the Korean judiciary needs to play a more active role under the name of law by actively checking the executive and legislative branches within their realms of authority.<sup>355</sup>

As outlined previously, the deep-rooted Confucianism in South Korea that emphasizes conformity with executive authority by pledging undivided loyalty may show a traditional background about the tendency of imperial presidency in the country. In accordance with Confucian thought, king (or today president) is seen as the ultimate authority of the society, and complying with him is considered a kind of

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<sup>353</sup> Yeh, "Presidential Politics and the Judicial Facilitation," 911.

<sup>354</sup> *Constitution of the Republic of Korea (1987)*, Art.111(2).

<sup>355</sup> Lim, "Rule of Law in Korea," 13-14.

civic virtue.<sup>356</sup> In terms of the ideological foundation of imperial presidency, on the other hand, the thesis of the inherent executive power may serve as the basis for this Korean trend. Having been heavily influencing the US politics since the late eighteenth century, the theory of inherent executive power assumes that the executive power comprises particular powers that are inherently executive by its very nature, and that it requires unchecked authority to act independently. Although these inherent executive powers are not explicitly specified in the US Constitution, they are considered necessary under some circumstances to efficiently perform the duties of the office, especially in the matters related to foreign affairs, the military, and national security when quick actions are required without any interference by the legislature or the courts in the execution of power.<sup>357</sup> The theory of inherent power sort of worships presidential power by defending “when the President does it, that means that it is not illegal,”<sup>358</sup> and it asserts that the “measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation.”<sup>359</sup> Sure enough, it also brought about some concerns that the president’s inherent powers are too open-ended, allowing him/her to perform without the legislature’s checks and balances. Having been highly influenced by the American example from the beginning, the current South Korean Constitution and politics accept the inherent executive powers as well. The Constitution of 1987 sets forth emergency executive powers in Articles 76 and 77 with which the president is solely empowered without legislature’s convocation in certain circumstances. However, due to the bitter experiences of frequent abuses of emergency powers by the past administrations,

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<sup>356</sup> Moon, “Why Persistent Imperial President?”

<sup>357</sup> Martinez, “Inherent Executive Power,” 2503.

<sup>358</sup> “Excerpts from Interview with Nixon about Domestic Effects of Indochina War.”

<sup>359</sup> Lincoln et al., *Speeches and Writings, 1859-1865*, 585.

today's South Korean president is not left uncontrolled, as he/she has to immediately inform the assembly, and get its approval to make his actions take effect. Therefore, it is argued that the adoption of inherent executive powers does not always give rise to an authoritarian rule, but "the absence of meaningful legislative control of such powers and of judicial review are certainly danger signs."<sup>360</sup>

Putting aside the fact that there are serious concerns about imperial presidency and democracy, when it comes to economy, South Korean people's preferences shift drastically. South Koreans perceive democracy within the framework of economy by giving top priority to economic values such as economic development, prosperity and equality instead of political ones.<sup>361</sup> A comprehensive survey conducted from 1997 to 2011 by the Korean Democracy Barometer released that a majority of South Korean people refuse to embrace democracy unconditionally and even for almost the two-fifths (37%) of the people, the authoritarian regime might sometimes be preferable, as they think that democracy does not constitute the best method of dealing with economic problems.<sup>362</sup> The experience of the 1997 Asian Financial Crisis in particular made many people question democracy in terms of its success as a system of government and as a means of problem solving, and therefore, tendency towards authoritarianism has significantly increased as an efficient method to tackle the country's serious problems. It is an attention-grabbing point that unlike their military antecedents, civilian political leaders seem that they have not been very good heads of state in terms of economic growth, and they also got involved in various corruption scandals.<sup>363</sup> It provides a strong argument for the advocates of a strong presidency under which Korean economy has undergone a

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<sup>360</sup> Martinez, "Inherent Executive Power," 2503.

<sup>361</sup> Shin, "Mass Politics, Public Opinion, and Democracy in Korea," 47-77.

<sup>362</sup> Shin, "Mass Politics, Public Opinion, and Democracy in Korea," 53.

<sup>363</sup> Kim, "Korean Attitudes towards Law," 35.

significant development, often referred to as a “miracle” following the Korean War of 1950-53. Besides economy, security concerns as well lend impetus to the South Korean people in regard to their preference of a strong presidency. From this point of view, South Korea needs stable, solid policies under a powerful president, as it is surrounded by mighty neighboring countries that would not show mercy in case of mistake.<sup>364</sup> Nevertheless, although the results of the same poll show that South Korean people still hold positive memories of economic life under the previous authoritarian regimes, the majority with 71% still want to maintain the current system rather than rebuilding the military or civilian dictatorship.<sup>365</sup> With respect to the civilian dictatorship, three-quarters (61%) opposed the idea of having a strong leader deciding everything without a parliament and elections. The survey also introduces that South Koreans find the current political system as an incomplete democracy and rule of law where almost half of the population think that the executive tends to break rather than follow laws.<sup>366</sup> Similarly, more than three-quarters (77%) oppose the arbitrary use of power by the government, expressing that law cannot be disregarded under any circumstances.

Like her antecedents, former President Park Geun-hye had vast presidential authorities that greatly dominated the South Korean political sphere, and influenced the country’s major policies. Also, her leadership furnished with intolerance of opposing opinions and free debate within her Saenuri Party changed the Party into a “political zoo where factions constantly compete at each other’s throat.”<sup>367</sup> Due to these reasons, Park has always been in the line of fire on the grounds of her imperial presidential powers like her predecessors.

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<sup>364</sup> Lee et al., “Chŏngch’igaehyŏkkwa Hŏnbŏpkaejŏng” (Political Reform and Constitutional Amendment), 25.

<sup>365</sup> Kim, “Korea’s Democratization in the Global-Local Nexus,” 23.

<sup>366</sup> Shin and Chu, “The Quality of Democracy in South Korea and Taiwan,” 32.

<sup>367</sup> Shim, “South Korea Election Reverses Weaken Park’s Reform Drive.”



### 6.3.2 Term of the president

As described before, after having suffered from authoritarian rules through long years, the Constitution of 1987 gave the legislative National Assembly more ability to check the executive branch while reducing presidential powers to bring into balance. To that end, the presidency was restricted to a single term and shortened from seven to five years. Having one of the shortest presidential terms in the world, and the shortest in Asia,<sup>368</sup> the South Korean system is considered insufficient in achieving the promised policy goals and making sound policies due to the term limit because “too much power and too short a time lead to undesirable situations such as early lame duck and policy changes that occur too often.”<sup>369</sup> The South Korean presidents thus far have promoted major projects at the start of their terms, but they have changed their initial stance later by seeking outcomes in a short span of time, and thereby ignored long term plans such as constitutional amendment, which needs a long and devoted process. As a matter of fact, the term of office is not five years in full, but around four years, as most incumbents become lame ducks in their final year while attention is shifting to the next presidential bid. Besides, because the electoral cycles for parliamentary elections and presidential elections are not concurrent, it is very likely for the president to become a lame duck following the parliamentary election during his tenure. The lame duck syndrome accompanied by the present presidential system weakens the political efficiency, reduces presidential accountability and creates political instability.<sup>370</sup> Called “Janus-faced”<sup>371</sup>, the South

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<sup>368</sup> South Korea has one of the shortest presidential terms in the world, on a par with El Salvador, Paraguay and Vanuatu, while Guatemala and Honduras have the shortest of one four-year term each. It is the shortest term in Asia, coming behind the Philippines whose president has one six-year term. “South Korea President Wants to Amend Constitution.”

<sup>369</sup> Power, “Does the Constitution Need Changing?”

<sup>370</sup> Cho, “The Politics of Constitution-Making,” 173.

<sup>371</sup> Hoon, “The Two Tales of the Korean Presidency,” 80.

Korean presidency has “two conflicting features, imperial but imperiled.”<sup>372</sup> More clearly,

once a South Korean president becomes a lame-duck president in the latter part of his tenure, he looks imperiled, lacking the authority and political means to pursue his own policy goals. Then the president is vulnerable to criticism and law enforcement that penalized illegal and irregular behaviors committed during his early imperial years.<sup>373</sup>

Moreover, the single-term limit also erodes the popular trust in the effectiveness of the president and government, as it offers the presidents to be free of political responsibility.

Although most countries under presidency have adopted the two-term system<sup>374</sup>, in South Korea, opening a discussion for changing the five-year, single-term presidency into a four-year, two-term one and reappointing the president has become a taboo, as it is reminiscent of former authoritarian rules.<sup>375</sup> It has been seen as an attempt to overtake more power and restore an authoritarian rule by extending the office term. Former President Roh Moo-hyun revived the discussion of redesigning the system with respect to the presidential term of office in January 2007 under the name of his “one-point revision” based on the US-style four-year, two-term presidency. Still, Roh met with a fierce opposition claiming that his main intention was to expand his own tenure. He even met with harsh criticism from Park Geun-hye, the chairwoman of the Grand National Party back then, calling Roh a “bad president” for prioritizing political interest over the people’s happiness.<sup>376</sup> Even though the discussion on the presidential term has continued on and off over the years, President Park Geun-hye also brought up the issue during her election

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<sup>372</sup> Hoon, “The Two Tales of the Korean Presidency,” 63.

<sup>373</sup> Hoon, “The Two Tales of the Korean Presidency,” 79.

<sup>374</sup> At the world-wide level, more than eighty countries implement the two-term presidency system, whereas twelve countries implement the one-term presidency system.

<sup>375</sup> Young, “The Presidential System in Korea: Is It a Little Too Old?”

<sup>376</sup> Bae, “Park Calls for Constitutional Revision.”

campaign in 2012, agreeing on scrapping the single-term, five-year presidency in favor of an American-style two four-year terms in office, besides her support for a bicameral legislative system, and more clauses to enhance basic rights. However, as soon as she won the election, she stepped back, and expressed her clear opposition to the idea of revision by stressing her priority of “reviving the economy and resolving difficulties of the people in state affairs” instead of getting involved in political debates on constitutional reform.<sup>377</sup> Always emphasizing the need for carrying out economic reforms to become a leader in the world economy, and to build a path toward a new Republic of Korea, she called the debates over constitutional amendment a “black hole” overshadowing all other agendas such as more important tasks including economic challenges and security issues:

As we now need to focus on revitalizing the sluggish local economy and improving people's livelihood, the National Assembly cannot turn its attention to the constitutional amendment and other issues. It may trigger another economic black hole.<sup>378</sup>

Park also fiercely opposed the idea of power sharing between her office and that of the prime minister's on the grounds of a “possible degradation of state capability.”<sup>379</sup> By adopting such a sharp attitude towards a probable constitutional amendment, President Park had been often accused of abusing her power to discourage lawmakers from discussing constitutional reform.<sup>380</sup>

The issue of amending the country's constitution has been a hot topic in South Korea, but the calls were used to come from everyone but President Park Geun-hye. For the first time within her tenure, the President changed her first stance towards the idea of constitutional amendment in late 2016, and advocated that the

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<sup>377</sup> Bae, “Park Calls for Constitutional Revision.”

<sup>378</sup> Kang, “Park Opposes Constitutional Amendment.”

<sup>379</sup> Kang, “Presidential Office Irked by Saenuri Chief.”

<sup>380</sup> Kim, “Lawmaker Critical of Park for Constitutional Change Remarks.”

five-year, single-term presidency needed to be changed for the country's policy continuity and achievement of national tasks. She said the single five-year presidential term made it difficult "to maintain policy continuance, see results of policy and engage in unified foreign policy."<sup>381</sup> She added that constant change in government every five years complicates the security issues in terms of pressurizing North Korea through consistent policies, and the frequent policy shifts also posed an obstacle for carrying out long-term, stable business initiatives: "Constitutional amendment is essential in that policy taking at least three to four years to bear fruit cannot be pursued with the term of the President limited to five years."<sup>382</sup> Previously insisting on focusing on handling more important issues including economy and security such as North Korea's ever-growing nuclear and missile ambitions, Park changed her attitude, and began aspiring after a future-oriented constitution for the new government to be installed following the presidential election of December 2017. Thence, she declared it was the right time to push for the constitutional revision:

The opposition to constitutional amendment in the past was to prevent dictatorship but the time has changed now... the current constitution of a single, five-year-term presidency, which has been in place for thirty-years since its revision in 1987, might be appropriate for the past democratization period, but it now becomes a piece of clothing that no longer fits our body.<sup>383</sup>

Park assumed that South Korea cannot expect a bright future with the current political system where confrontation and division prevent the country from taking a step forward<sup>384</sup>:

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<sup>381</sup> Park and Kim, "South Korea's Park Proposes Multiple-Term Presidency."

<sup>382</sup> Jung, "President Park Geun-hye Mentioned Necessity of Constitutional Amendment."

<sup>383</sup> "South Korean President Offers to Revise Constitution."

Jung, "President Park Geun-hye Mentioned Necessity of Constitutional Amendment."

<sup>384</sup> "South Korean Leader Proposes Revising Constitution to Let President Serve More than One Term."

I have so far put off the talks on constitutional revision, not only to focus on national security and economic challenges, but also to prevent a further split in public sentiment... But in order to fundamentally renew the frame of state management, I have judged that it is crucial to set up a mid- and long-term system that may boost our nation into the ranks of advanced countries... I have reached the conclusion that I may no longer delay the discussions on constitutional revision, which was also one of my election pledges.<sup>385</sup>

In line with this objective, she asked the National Assembly to form a special committee to garner public opinion and start a discussion on the range and content of a possible constitutional amendment. Park's intention was to complete the revision within her term that was supposed to end in February 2018. Furthermore, it was considered that through the two-term system, it would be easier for the citizens to check the president, as it gives them the opportunity to evaluate the president's performance and to unseat him/her in the next election if he/she cannot satisfy the public.

A recent public opinion poll conducted by Realmeter and CBS in 2016 found out that 70% of South Koreans wanted the present Constitution of 1987 to be revised, and 40% said they preferred to allow two four-year terms for the presidency for a more stable implementation of long-term policies.<sup>386</sup> In another survey conducted by the JoongAng Ilbo and the Korean Political Science Association in April 2016, 74% of the people found an amendment to the current Constitution was necessary.<sup>387</sup> While a double-term presidency stood out as the most favorable governing system in the poll, the second-most popular alternative was chosen as the current single-term, five-year presidency, which is followed by the preference of a parliamentary government system. The same attitude is observable among lawmakers who are in favor of a constitutional amendment with a proportion of 250

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<sup>385</sup> Bae, "Park Calls for Constitutional Revision."

<sup>386</sup> Park and Kim, "South Korea's Park Proposes Multiple-Term Presidency."

"South Korean Leader Proposes Revising Constitution to Let President Serve More than One Term."

<sup>387</sup> Lee, "Many Would Alter Constitution - If They Could."

deputies out of the current 299-seat National Assembly, which is equivalent to 83.3% of the total.<sup>388</sup> 91.3% of the Liberty Korea Party support amending the Constitution, while the responses are 95.2% of the Democratic Party of Korea, 96.9% of the People's Party, and 75% of the Justice Party lawmakers.<sup>389</sup> Although they generally agree that the current governing system leads to "political maladies, administrative inconsistency and rifts" between the executive and legislature, the disagreement arises from the preferred governing system where more than half (62.2%) seems to favor a double-term presidency.<sup>390</sup>

Despite their support for the constitutional revision in general, and agreeing the current Constitution does not reflect today's conditions, the opposition approached Park's proposal with suspicion, and refused taking part in any discussions on constitutional change at first. Previously announcing her strong opposition to any discussion on the constitutional amendment, Park suddenly made a u-turn, and rekindled the long-lasting debate by passionately promoting a constitutional review to be accomplished in the near future. Because of this, doubting "whether she is in need of such a black hole to divert the political public's attention away,"<sup>391</sup> the opposition thought that Park's underlying intention of her calls for amendment was an attempt to create a distraction from the ongoing Choi-gate scandal. According to them, the timing was noteworthy as the proposal came as Park's approval rating had dropped to its lowest-ever level.<sup>392</sup> As stated before, President Park had had her first major nightmare in her second year in office during the Sewol incident, and she came under fierce criticism for her inadequate and slow

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<sup>388</sup> Lee, "Large Majority of S. Koreans in favor of Amending the Constitution."

<sup>389</sup> Lee, "Many Would Alter Constitution - If They Could."

<sup>390</sup> Lee, "Many Would Alter Constitution - If They Could."

Kim, "Park's Positive Role Needed for Constitutional Amendment."

<sup>391</sup> Bae, "Park Calls for Constitutional Revision."

<sup>392</sup> Choe, "Faulting Term Limit, South Korean Leader Proposes Revising Constitution."

response to the case. After that, ever-growing displeasure with her dull performance in economy, rising unemployment, widening socio-economic inequality, dogmatic leadership, and the escalating nuclear threats of North Korea considerably had weakened her leadership, and paved the way for Park to enter an early lame-duck period. The final straw had come with the surfacing of the Choi-gate scandal that later resulted in Park's impeachment.

Moreover, although Park's presidential office stated that any changes to the constitution would only apply to future presidents and that there was no possibility for her to extend her rule or to run for a second term, the opposition was still unconvinced and unsatisfied. For the opposition, it did not create a good impression when the daughter of Park Chung-hee who paved the way for his long-term dictatorial rule through the Yushin Constitution in 1972 suggested revising the current system.<sup>393</sup>

In response to these calls for a US-style two four-year terms presidential system, it was discussed that the two-term presidency would not save the political system from the lame-duck syndrome. Still, although the president might work hard to get reelected in the first four-year term, there was no guarantee that the second tenure would be free from the lame-duck problem. The two-term presidency could also give the president the space to gain populism, and to administer the state affairs in a way that could benefit his/her party and himself, and make the reelection easier for him.<sup>394</sup>

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<sup>393</sup> "Park Geun-hye Wants to Double the Presidential Term."  
Kim, "Die Verfassungsentwicklung der Republik Korea 1910-1987," 193.

<sup>394</sup> Young, "The Presidential System in Korea: Is It a Little Too Old?"

#### 6.3.2.1 Divided government issue

Historically, the South Korean presidency has been long in the unified government in which both the executive and legislative branches were controlled by the same party. This numerical strength enabled the president to push his/her policies forward at his will, fully controlling both oppositionists and the elected assembly. Since the foundation of the Republic, South Korea witnessed nineteen presidential elections among which fourteen presidents were popularly elected while the remaining five were elected indirectly by either the National Assembly or electoral colleges. Also, it has been like a tradition in the South Korean politics that whenever incumbent presidents felt they would be disadvantaged under the existing electoral system, they sought another system to guarantee their reelection. Altering the system at the president's will was pretty easy for the presidents holding strong ruling parties with an absolute majority. However, this long-standing political pattern was entirely broken down in the thirteenth National Assembly in 1988 when the presidential party lost its majority and the Assembly turned to be opposition-dominant for the first time. After this historical case where the president and thereby the ruling party lost their control in the legislative process, the phenomenon of divided government has become a political reality in the Korean presidential system from which partisan clashes and deadlocks derived. The National Assembly once again turned to be dominated by the opposition in the 1996, 2000, 2004, and most recently 2016 legislative election held in April.

Due to the disequilibrium between the intervals of the presidential elections and general parliamentary elections, the issue of divided government is highly possible in the South Korean presidential system, where the presidential elections are held every five years, whereas general parliamentary elections take place every four



years.<sup>395</sup> This situation poses an important problem which results in a political deadlock and unproductive friction between the executive and legislative branches.<sup>396</sup> Regarded as an “evil and dilemma of the presidentialism,”<sup>397</sup> divided government imposes a big burden on both the president and ruling party where the opposition is numerically in dominance in the parliament while the governing presidential party loses its grip in the legislation. To break the impasse with the opposition and make the divided government compatible with the strong South Korean presidency, some measures have been taken by the ruling party in due course such as party merge, attempt for the shift to parliamentary system of government, establishment of coalition government, attempts to steal colleagues from other parties, policy collaboration, and proposal of so-called “grand coalition” in South Korea.<sup>398</sup> Nonetheless, although it has been claimed that the profound goal of all these measures was to provide political stability, the actual aim was to secure a constant majority in the legislative process rather than tolerating the domination of the opposition.

As mentioned before, the divided government became a reality of the South Korean politics once again with the parliamentary election of April 2016, which broke the ruling conservative Saenuri Party’s seventeen-year parliamentary majority. Losing its control on the parliament for the first time since 1999, the Saenuri turned into the second most powerful and the only conservative party facing three liberal opposition parties. In the new Assembly that expanded into a four-party format from the previous bipartisan structure, the Saenuri Party had 122 seats in the 299-seat

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<sup>395</sup> *Constitution of the Republic of Korea (1987)*, Art.42.

<sup>396</sup> In the South Korean case, one of the best examples for the deadlock between the executive and legislature derived from the divided government was the presidential impeachment of Roh Moo-hyun in 2004.

<sup>397</sup> Kang, “The Survivability of Divided Government in the Korean Presidentialism,” 467.

<sup>398</sup> Kang, “The Survivability of Divided Government in the Korean Presidentialism,” 467-472.

National Assembly; the Democratic Party of Korea occupied 123; the second opposition People's Party thirty-eight; and the small opposition Justice Party, six seats. The crushing defeat in the election marked the beginning of President Park's lame duck period by weakening her authority to push her agenda in the legislature.<sup>399</sup> More than one year before the end of her term in office, the debates on Park's successor intensively began, bringing Ban Ki-mun, the former United Nations Secretary General, forward as a potential presidential candidate from the Saenuri Party even though he later expressed that he would not run for the presidency in the next election.

Although it is an indisputable fact that the wide political spectrum in the present Assembly serves for the implementation of democracy and compromise culture in the South Korean politics, the opposition's garnered strength of 167 seats can also cause various problems in terms of legislation. Therefore, it is asserted that the inefficiency, disharmony, and malfunctioning of the governance system that the existing divided government may cause can be overcome by a constitutional amendment changing single presidential term of five years into a double four-year term.<sup>400</sup> In contrast with this suggestion, some indicate that to synchronize the intervals of the presidential and parliamentary elections, an amendment to the current Constitution is not a must.

### 6.3.3 System of government

As it was mentioned before, the current South Korean presidential system has been subject to heated constitutional debates with its concentration of power in the president's hands, fixed term of office, and unsuitableness for today's society in

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<sup>399</sup> "Conservative Route Leaves South Korea's Park Geun-hye a Lame Duck."

<sup>400</sup> Ahn, *The Rule of Law in South Korea*, 3.

terms of democracy. In addition, the existing presidential system tends to make democratic politics a zero-sum game where the winner takes all just as political scientist Professor Juan Linz argues: “The control of the executive in presidential systems is in principle ‘winner take all’. It is ‘loser loses all’ for defeated presidential candidates who might end up without any public office after the election.”<sup>401</sup> This winner-takes-all system produces deadlocks or immobilism in the political domain by intensifying the existing political divisions between political parties, and these fights will continue unless the imperial presidential power is divided democratically. For this very reason, certain systems of government have been suggested to reorganize the government to achieve a democratic division of power through a constitutional amendment for a more mature and sustainable development.

In spite of the broad consensus among the South Korean people as well as the lawmakers on the need of constitutional amendment, there is a serious ambivalence about the issue of a governing system that can replace the current five-year, single-term presidency. A survey conducted amongst the lawmakers revealed that instead of a single-term, a two-term system is regarded as a much more favorable option as long as South Korea maintains the presidential system.<sup>402</sup> It is followed by the semi-presidential system in which the president and the prime minister share key state responsibilities. Lastly, parliamentary system is the third-most popular system among lawmakers in which the executive power is vested in the majority party of the legislature. Similarly, as given before, the South Korean people favor an American-style four-year, two-term presidency instead of their existing system, but unlike the

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<sup>401</sup> Linz, “Presidential or Parliamentary Democracy,” 14.  
Linz, “The Perils of Presidentialism,” 56.

<sup>402</sup> Lee, “Many Would Alter Constitution - If They Could.”

assembly members, they prefer the parliamentary system over the semi-presidential one, in case South Korea abandons its current presidential system of government.<sup>403</sup>

One of the most important points that need to be paid attention to is there is a common belief in South Korea that in case the country changes its system into a four-year, double-term presidency, it will automatically adopt the American-style presidential system. Nonetheless, this perception is too shallow to reflect the true nature of the US-style presidency, which is the only true representation of the presidential system with its principle of rigid separation of powers, and its efficient checks and balances mechanism dominating the political sphere by contrast with the current South Korean system. In South Korea, on the other hand, there is no strict separation of powers and competent checks and balances mechanism, as its Constitution allows the president to hold enormous powers by controlling both the legislature and judiciary by different means. Besides, in conformity with the US-style presidential system, in South Korea, there are further discussions on abolishing the post of prime ministry and replacing it with vice president as the second-highest position in the executive branch after the president. The vice president is considered an effective actor who can curb the president's excessive authority, and function on behalf of him where necessary. However, it is claimed by many that the perception of the vice president being able to diffuse the president's authority is a mere optimism, because the primary criterion in choosing the vice president would be his/her loyalty to the president. Therefore, it is asserted that to control the exercise of presidential power, the post of vice president would not be the best option, and the legislature and judiciary should be thus strengthened to supervise the executive instead.<sup>404</sup> Because of these, as long as the underlying mentality of the American

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<sup>403</sup> Lee, "Many Would Alter Constitution - If They Could."

<sup>404</sup> Cho, "Constitutional Reform, Not Now."

checks and balances system is omitted, the intended amendments to the Constitution would be a mere formality without any true function.

As the infrastructure for the country's political, economic and social system, the government structure should be carefully organized with regard to the power relationships between the branches of government. As an alternative to the existing South Korean presidential system, besides the four-year, double-term American system in the first place, other systems of government such as the parliamentary system and the semi-presidential system are proposed to reinforce the principle of separation of powers in the country.

#### 6.3.3.1 Semi-presidential system

In order to disperse the present-day imperial presidency, a constitutional amendment promoting a change in the South Korean political system from presidency to a semi-presidential system (or dual executive system) is on the front burner. Criticizing the current system for giving too much power to the president, an increasing number of lawmakers have brought up semi-presidentialism as an alternative in which the president would be responsible for diplomacy and defense while the prime minister, as the head of the administration, would handle domestic affairs such as the economy and public security.<sup>405</sup> Under this power-sharing model, the president will be elected by universal suffrage and be granted considerable power whereas the prime minister will be elected by the National Assembly, and be subject to their votes of confidence.<sup>406</sup> It is also averted that the alleged system would reduce the president's term from five years to four, but allow reelection.

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<sup>405</sup> Kim, "Debate Continues over Amending Constitution."

<sup>406</sup> Seo, "Altering Constitution Urged by Reps."

Duverger, "A New Political System Model: Semi-Presidential Government," 166.

Referred to as a mixture of the presidential system and parliamentary cabinet system, the semi-presidential system seems the second most preferred form of government amongst the South Korean lawmakers behind a two-term presidency while it is surprisingly the least popular one among the public.<sup>407</sup> In the National Assembly, a group called “Meeting of Lawmakers Pushing the Amendment of the Constitution” was formed in 2011 with the aim of promoting a semi-presidential system instead of presidency, and it currently includes 152 lawmakers. The number of its members is quite substantial because if forty-eight more members join, it would have two thirds of the Assembly, enough to pass a constitutional amendment.<sup>408</sup> According to its supporters, the dual executive system as the best way for power sharing is not an entirely new system of government for the South Korean political culture, because except some certain times of the First Republic, it had been always a prime minister besides the president in the country.<sup>409</sup> Thence, they argue that the present-day regime should evolve into a mixed system where a more responsible and effective prime minister balances the president’s imperial power.

However, the opposite way round, it is also argued that combining the presidential system and the parliamentary cabinet system, the dual executive government system does not comply with the South Korean political tradition, as the parliamentary cabinet system was rarely used in the country.<sup>410</sup> Furthermore, it is also claimed that a probable transition into the semi-presidential system can possibly cause gridlock in government. The semi-presidential system is regarded liable to cause the issue of dual legitimacy, as both the president and prime minister receive

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<sup>407</sup> Lee, “Many Would Alter Constitution - If They Could.”

<sup>408</sup> Seo, “Altering Constitution Urged by Reps.”

<sup>409</sup> Sung, “Hönböpkæjönggwa Kwöllyökkujö” (Revision of Constitution and Political Institutions), 142.

<sup>410</sup> Jeong, “Iwönjöngbuje Chöngbuhyöngt’æüi Kömt’o” (A Study on the Dual Executive System – A Critical Look into the Constitutional Revision for the Dual Executive System), 184.

their legitimacy from the public. The potential deadlock may become severe when the two heads of the executive branch are from opposing parties or simply disagree over state issues.<sup>411</sup> Nonetheless, the supporters for the dual-executive system look at the bright side, and assert that in a country like South Korea where there is no political compromise culture, the risk of a constitutional crisis and political instability can force government branches to compromise and cooperate, while it can also appease the prospect of extremist policies.

#### 6.3.3.2 Parliamentary system

As handled in detail before, South Korea has ever since been under a presidential system, with the exception of a brief period of time during the Second Republic until it has been interrupted by a military coup in May 1961. In the South Korean presidency, besides a strong president who is the head of state, there has always been a prime minister who functions as the head of the government under the direction and supervision of the president. Although the role of the prime minister in a presidential system is mostly envisioned to decentralize the absolute power of the president within the checks and balances mechanism to avert a possible abuse of power, the birth of the prime minister post in South Korea did not come from “a recognition for the need to curb the powers of the president, but from a simple political compromise”<sup>412</sup> that was reached between the original drafters of the 1948 Constitution supporting a parliamentary system and Rhee Syngman favoring a strong presidency.

Even though it is originally designed as the second highest central administrative agency, the prime minister in South Korea gets his powers from the

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<sup>411</sup> Bahro, “Virtues and Vices of Semi-Presidential Government,” 5.

<sup>412</sup> Roh, “Crafting Constitutional Democracy,” 191.

president as he/she is appointed by the president as outlined earlier. This being the case, the role of the prime minister is degraded into a mere assistant of the president in the conduct of state affairs including the formation of the Cabinet, recommending their dismissal, and countersigning official documents. The political philosophy and administration style of the president shaped the role of the prime minister in South Korea, and to that end, the prime minister remained relatively weak and ineffective in terms of supervising the president's powers compared to its counterparts in parliamentary systems. Moreover, in South Korean politics, he/she has been always made the scapegoat for the wrongdoings and failures of the president, and held legal and political responsibility both to the president and the assembly.<sup>413</sup>

Nowadays, there are calls for aiming for a revision of the form of government from a presidential system to parliamentary system with intent to provide a more useful device for settling the conflicts between the government and the National Assembly by giving the prime minister and legislature more powers and responsibilities. It is seen that these legislative-executive conflicts and the political instability they cause are inevitable in South Korea, as there is no essential internal and external circumstances to make the presidential system properly work like in the US: "The only nation that has succeeded with the presidential system is the United States... Nations that have adopted the American-style system cannot find solutions to the legislative-executive conflict and so easily give in to coup d'états."<sup>414</sup> Therefore, contrary to the presidential system, which is conducive to serious political discrepancies, it is claimed that the parliamentary system might develop political

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<sup>413</sup> "The average life span of each prime minister under President Syngman Rhee was just over nine months (during the first republic, there was also a vice president), under President Chun, thirteen months (seven prime ministers from 1980 to 1987), under President Roh, twelve months (five prime ministers from 1988 to 1992), and under President Kim Young Sam, ten months (six prime ministers from 1993 to 1998). The exception was under President Park whose five prime ministers lasted an average of thirty-nine months." Roh, "Crafting Constitutional Democracy," 192-193.

<sup>414</sup> Yu, *The Memoirs of the Constitutional Drafting*, 64.



stability in South Korea.<sup>415</sup> With the executive branch centered on a prime minister and a cabinet could allow for a more stable policymaking, and the settlement of the responsible politics based on the parliament can ensure greater accountability. In addition, it is argued because the government party always keeps the majority in the legislature in the parliamentary system, the issue of divided government cannot emerge in this system whereas the phenomenon is highly possible in the presidential system if there are two separate elections to be held for the presidency and the parliament. The idea of a shift to the parliamentary system is favored by people who support the unification with the North as well by claiming that the parliamentary government is more suitable for the possible unification, as it can bring mutual consent from both Koreas and merge the political powers more effectively.<sup>416</sup> Regarding parliamentary reform, the introduction of a bicameral system is also frequently proposed with the lower and upper houses to reinforce the efficiency and democratic nature of parliamentary operations.<sup>417</sup>

On the other hand, a possible shift from the single-term presidency to a parliamentary system is considered too drastic for South Korea in terms of its political tradition, as some believe that the flexibility of parliamentary systems can also produce government instability, volatility and inconsistency due to the frequent use of the so-called “deadlock-breaking devices”<sup>418</sup> such as dissolution of parliament and vote of no confidence. It is also considered that because the parliamentary system can be divisive in terms of ideology and region, it can cause more polarization. Although political scientist Professor Fred W. Riggs’ research dated 1985 on regime survivability of developing nation-states demonstrated that a

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<sup>415</sup> Lee et al., “Chōngch’igaehyōkkwa Hōnbōpkaejōng” (Political Reform and Constitutional Amendment), 8.

<sup>416</sup> Young, “The Presidential System in Korea: Is It a Little Too Old?”

<sup>417</sup> “Assembly Panel Proposes Constitutional Revision on Presidential Power.”

<sup>418</sup> Kang, “The Survivability of Divided Government in the Korean Presidentialism,” 28.

parliamentary system of government is relatively safer than a presidential one in terms of its survival rate, it also shows that political irregularities the countries face might be attributable to other factors other than the polity type such as the underdevelopment of political subsystems.<sup>419</sup> More specifically, under-institutionalization and malfunction of the constituents of democratic politics—i.e. an elected assembly, the electoral system, and the party system—can introduce political instabilities and military interventions even in parliamentary systems, as it was the case in Turkey, Bangladesh, Pakistan, Thailand and Sudan.<sup>420</sup> Apart from this, it is said that by definition, presidential system is based on the rigid principle of separation of powers while in parliamentary system, there is sort of a fusion of power. Hence, the checks and balances mechanism restricts excessive presidential powers, whereas the fusion of the legislative and executive in the parliamentary system may cause concentration of powers.<sup>421</sup> Nevertheless, because there are no checks and balances that function effectively in terms of limiting the over-proportionally powerful president in the current South Korean presidential system, the concern about the concentration of power arisen from a legislative-executive fusion is redundant. Lastly, it is underlined that the bicameral parliamentary system may cause the dual democratic legitimacy issue as well if the president and the legislature are directly elected by the people.

Finally, no matter what its focal point is, the constitutional amendment has been always a toilsome work, as it requires special procedures different from other

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<sup>419</sup> Fred W. Riggs' research dated 1985 on regime survivability of 136 developing nation-states. His survey reports that thirty out of thirty-three states adopting presidential systems, including Korea, experienced military coups, while thirteen out of forty-three under parliamentary polities were confronted with such political devastation. See Riggs, "A Neo-institutional Typology of Third World Politics."

<sup>420</sup> Riggs, "Bureaucratic Politics in Comparative Perspective," 17.

Lee, "Constitutional Choices in South Korea," 39.

Linz, *The Failure of Presidential Democracy*, 48-49.

<sup>421</sup> Lee, "Constitutional Choices in South Korea," 32.

legislature in accordance with the supremacy of constitution as mentioned before. Today, 200 out of 299 assembly members' support as the two-thirds of the Assembly is required to make an amendment to the Constitution, and to submit it to a national referendum. However, this process seems to be more laborious nowadays where calls for constitutional revision have scaled up because following the latest legislative election held in April 2016, the National Assembly became highly fragmental with its 120 lawmakers from Democratic Party, 107 members from the Liberty Korea Party, forty from the People's Party, twenty from the Righteous Party, six from the Justice Party, one from Saenuri Party, and five independent members.

#### 6.4 Conclusion

After decades of autocratic regimes, South Korea finally achieved its functioning democracy in 1987 when the sixth constitution was agreed upon after "painstaking negotiation and compromise among the major political parties in the National Assembly."<sup>422</sup> Although it considerably reduced the president's authority while strengthening the parliament, just like most new democracies with an authoritarian legacy, South Korea also sought to maintain its tradition of a strong chief executive and an ineffective legislature.<sup>423</sup> For this reason, the debates on constitutional amendment up to the present have mostly focused on the presidential system of government and the reform measures to constrain the president's excessive powers.

Having a presidential system of government with strong executives from all eternity, South Korea is discussing the concept of powerful president embellished with vast executive powers today, for creating an imperial presidency that concentrates governmental power in the presidential office, and thus weakens the

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<sup>422</sup> Savada and Shaw, *South Korea: A Country Study*, 201.

<sup>423</sup> Hoon, "The Two Tales of the Korean Presidency," 67.

legislative and judicial branches significantly. The president's powerful role that dominates the South Korean political sphere in terms of policy making, mostly causes a power imbalance within the governmental structure, and renders the separation of powers doctrine virtually meaningless.<sup>424</sup> Being greatly vulnerable to abuse of governmental power and corruption, the present presidential system in South Korea tried to be weakened with the Constitution of 1987 by introducing a five-year, single-term presidency. However, as one of the shortest presidential terms in the world, this new, highly restricted tenure of office is often considered insufficient in making sound policies, and maintaining policy continuance. Additionally, it is also criticized for leading to the lame duck syndrome that weakens the political efficiency, reduces presidential accountability, and creates political instability. Furthermore, the issue of divided government is another burning question pertaining to the current South Korean presidency. Due to the disequilibrium between the intervals of the presidential and parliamentary elections, the phenomenon of divided government is highly possible in the South Korean system, where the presidential elections are held every five years, whereas general parliamentary elections take place every four years. Bearing the blame for generating disharmony between the executive and legislative branches, and malfunctioning of the governance system, the divided government issue came into prominence following the legislative election of April 2016 most recently when former President Park Geun-hye's Saenuri Party lost its parliamentary majority for the first time since 1999, and turned into the main opposition party facing three liberal parties.<sup>425</sup> These

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<sup>424</sup> Lim, "Problems and Reform Measures in Korean Constitutional Democracy in the 21st Century," 350.

<sup>425</sup> Today, there are six parties in the National Assembly following former President Park Geun-hye's impeachment: The Democratic Party of Korea (120 members), the Liberty Korea Party (107), the People's Party (40), the Righteous Party (20), the Justice Party (6), the Saenuri Party (1), and independents (5).

being the main matters of the current debates on constitutional amendment regarding the presidency in South Korea, some suggestions were introduced by both former President Park and the opposition side with the intention of ameliorating the halting points of the existing political system. Firstly, in order to disperse the imperial presidency, and thereby to achieve a greater balance between the branches of government in conformity with the principle of separation of powers, a constitutional amendment promoting a more powerful and efficient legislature and judiciary is seen as a must. For this purpose, the American-style presidency is brought forward as the most suitable option, enabling an efficient check on the president by strictly separating three branches of government. In this vein, the existing single five-year presidential term is proposed to be changed into the US-style two four-year tenure to accomplish long-term policies, and achieve the promised policy goals while cushioning the blow of the lame duck syndrome.<sup>426</sup> Additionally, in terms of the issue of divided government, it is offered to synchronize the intervals of the presidential and parliamentary elections in an attempt to overcome political deadlocks and fruitless controversies between the executive and legislative branches. Lastly, a transition into a semi-presidential or parliamentary system is a much-discussed suggestion on the agenda in order to form a more well-balanced political sphere by creating a more powerful prime minister and parliament besides the president.

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<sup>426</sup> Park and Kim, "South Korea's Park Proposes Multiple-Term Presidency."

"South Korean President Offers to Revise Constitution."

Jung, "President Park Geun-hye Mentioned Necessity of Constitutional Amendment."

## CHAPTER 7

### DEBATES ON CONSTITUTIONAL AMENDMENTS TO CHANGE THE STATUS OF THE PRESIDENCY IN THE REPUBLIC OF TURKEY

As the latest among the constitutions that had constantly undergone changes following the military coups one after another, the Constitution of 1982 has been at the top of Turkish political agenda in recent times. Being in a state of tension due to both internal and external problems, Turkey has been witnessing heated debates on amending its current Constitution and thereby replacing the present parliamentary system with a presidency. Despite the consensus about the need for revising the country's fundamental document, both the political parties and the public are divided, with respect to the transition to a presidential system. To that end, this chapter intends to present current debates on constitutional amendments regarding the presidential system in the Republic of Turkey by pointing out the major discussions on the proposed change to the existing parliamentary system towards a presidential system. With this design, the characteristics of the present Constitution of 1982 is presented in great detail in the first place. Subsequently, shaping the existing debates on the issue, the Constitutional Reform Package prepared and submitted by the ruling Justice and Development Party in late 2016, and its context are handled. Later in the chapter, the discussions about the proposed changes and the arguments for and against them are further elaborated. On this point, the governmental stability; the strong leadership and government efficiency; and the democratic representation and political accountability are the main arguments stressed by the proponents of the presidential system, whereas the danger of one-man rule; the intention of changing the regime; frequent coalition governments; and

economic underdevelopment in presidency are the central arguments raised by the opposition.

### 7.1 Constitution of 1982

The Constitution of 1982 of the Republic of Turkey consists of a preamble and 177 articles, and it is divided into seven parts: General Principles, Fundamental Rights and Responsibilities, Fundamental Organs of the Republic, Financial and Economic Provisions, Miscellaneous Provisions, Provisional Articles, and Final Provisions. Its preamble sets forth the fundamental principles of the state and the ideological key facts of the Constitution by addressing various concepts such as the sublime and indivisible unity of the state; Atatürk's understanding of the concepts of nationalism, reforms, principles and populism; the supremacy of national sovereignty; contemporary civilization; liberal democracy; secularism; separation of powers; respect for individual rights and freedoms; social state; rule of law; equality; social justice; and internal and external peace. Additionally, it pursues the goal to give justification and legitimacy to the 1980 Coup in its paragraphs:

Following the operation carried out on 12 September 1980 by the Turkish Armed Forces in response to a call from the Turkish Nation, of which they form an inseparable part, at a time when the approach of a separatist, destructive and bloody civil war unprecedented in the Republican era threatened the integrity of the eternal Turkish Nation and Motherland and the existence of the sacred Turkish State. This Constitution was prepared by the Consultative Assembly, given its final form by the Council of National Security, both of which are legitimate representatives of the Turkish Nation, and adopted, approved and directly enacted by the Turkish Nation.<sup>427</sup>

Nevertheless, these clauses were removed with an amendment to the Constitution in 1995 in an effort to obliterate the coup's traces.

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<sup>427</sup> *Constitution of the Republic of Turkey (1982)*, Preamble.

The first part comprising the General Principles section of the Constitution declares that Turkey is a democratic, secular and social republic, which is governed by the rule of law. Belonging to the nation without any restrictions or conditions, sovereignty is exercised through the authorized organs prescribed in the Constitution. The responsibilities of the state are to

safeguard the independence and integrity of the Turkish Nation, the indivisibility of the country, the Republic and democracy, to ensure the welfare, peace and happiness of the individual and the society; to strive for the removal of political, economic, and social obstacles that restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of social state governed by rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence.<sup>428</sup>

Due to the rule of law, the supremacy and binding force of the Constitution is emphasized articulating that the “provisions of the Constitution are fundamental legal rules binding the legislative, executive and judicial organs, and administrative authorities and other institutions, and individuals. Laws shall not be contrary to the Constitution.”<sup>429</sup>

Adopting the regime of parliamentary republic, the Constitution promotes the principle of separation of powers, which “does not imply an order of precedence among the organs of the State, but refers solely to the exercising of certain state powers and discharging from responsibilities.”<sup>430</sup> Like its antecedent, the Constitution of 1982 also embraces a soft separation of powers that is claimed to lead to “a civilized cooperation and division of functions.”<sup>431</sup> In terms of the branches of government, there is the unicameral Grand National Assembly as the legislative body; the president of the Republic, and the council of ministers as the executive

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<sup>428</sup> *Constitution of the Republic of Turkey (1982)*, Art.5.

<sup>429</sup> *Constitution of the Republic of Turkey (1982)*, Art.11.

<sup>430</sup> *Constitution of the Republic of Turkey (1982)*, Preamble.

<sup>431</sup> *Constitution of the Republic of Turkey (1982)*, Preamble.



body, and an independent judiciary on behalf of the Turkish nation as the judicial body.

In terms of the legislative branch, the Constitution of 1982 follows the footsteps of its precedent the Constitution of 1961 that put an end to the concept of the Government of Grand National Assembly, and removed from the perception of legislative superiority. With 550 deputies all of whom are elected through parliamentary elections for a four-year-term,<sup>432</sup> the Constitution of 1982 restored the Assembly to be the true representative of the nation while there were a number of non-elected members in the Assembly prescribed in 1961. Furthermore, after having witnessed that the Senate of the Republic had fallen short of solving the existing problems, a unicameral parliament was reinstalled. Lastly, necessary qualifications to be eligible to run for a seat in the Assembly in parliamentary elections were further tightened.<sup>433</sup>

Considering the executive branch, like the preceding Constitution of 1961, the original text of the Constitution of 1982 prescribed that the president of the Republic shall be elected for a term of seven years by the Assembly from among its members, and was not eligible for reelection.<sup>434</sup> In compliance with the principle of neutrality that placed emphasis on the neutrality of the president of the Republic and his role in balancing political relationships, the president has to sever his/her ties with his/her party, and his/her membership of the Assembly must cease.<sup>435</sup> Regarding his/her accountability, the president of the Republic was considered non-accountable, while the prime minister and ministers of the cabinet are accountable

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<sup>432</sup> *Constitution of the Republic of Turkey (1982)*, Art.75.

<sup>433</sup> *Constitution of the Republic of Turkey (1982)*, Art.76.

<sup>434</sup> *Constitution of the Republic of Turkey (1982)*, Art.101(1) and (2).

<sup>435</sup> *Constitution of the Republic of Turkey (1982)*, Art.101(4).

for the presidential decrees under which they put their signatures.<sup>436</sup> Nonetheless, the system of government established by the Constitution of 1982 was seen as far from the classical parliamentary model, as the Constitution extended the authority of the president by endowing him/her with substantive political powers in terms of legislative, executive and judicial domains as per Articles 104 and 105.<sup>437</sup> Among them, there were significant veto powers such as refusing to sign government decrees, returning laws to parliament for reconsideration, bringing about suites for annulment of laws before the Constitutional Court, submitting constitutional amendments to referendum, appointing the judges of the Constitutional Court, certain members of the Supreme Board of Judges and Prosecutors (*Hakimler ve Savcılar Yüksek Kurulu*, HSYK), and university rectors and the members of the Council of Higher Education. Moreover, the Constitution of 1982 took a step further in 2007 by changing the election procedure of the president of the Republic. Although it was initially envisioned to elect the president only from among the members of the parliament by votes of the members of the National Assembly for a single seven-year tenure, the amendment on the Constitution in 2007 installed an election procedure based upon popular vote, in which all Turkish citizens could be a candidate for president, and introduced a term of office of five years allowing for reelection:

The president of the Republic shall be elected by the public from among the members of the Grand National Assembly of Turkey who are over forty years of age and have completed higher education, or from among Turkish citizens who fulfill these requirements and are eligible to be deputies... The president of the Republic's term of office shall be five years. A person may be elected as president of the Republic for two terms at most.<sup>438</sup>

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<sup>436</sup> *Constitution of the Republic of Turkey (1982)*, Art.105.

<sup>437</sup> Özbudun, *Presidentialism vs. Parliamentarism in Turkey*, 2.

<sup>438</sup> *Constitution of the Republic of Turkey (1982)*, Art.101(1) and (2).

According to this rearrangement, the candidate receiving the absolute majority in a presidential election would be elected as the president of the Republic for a single-term, five-year tenure. While the reelection of the president was not allowed in the first version of the Constitution, it was enabled with the 2007 amendment. In this way, “the system of government was brought one step closer to a semi-presidential system”.<sup>439</sup> Apart from that, the president may be impeached for high treason upon the proposal of at least one-third of the total number of National Assembly members, and by the decision of at least three-fourths of the total number of members.<sup>440</sup> At the final stage, the Constitutional Court, in its capacity as the Supreme Court, would try the president for offences related to his/her functions.<sup>441</sup> Lastly, in conformity with both the 1924 and 1961 Constitutions, the office of the commander-in-chief is represented by the president of the Republic in the Constitution of 1982 as well.<sup>442</sup> However, the responsibilities and authorities given to the president under this post are ceremonial and symbolic, as the de facto head of the Turkish Armed Forces is the chief of general staff, who is appointed by the president upon the suggestion of the council of ministers.

As the second actor of the executive branch, the council of ministers consists of the prime minister and the ministers. The prime minister is appointed by the president of the Republic while ministers are selected by the prime minister and appointed by the president. While appointing the prime minister, the president cannot act completely free, as he has to choose someone who is likely to obtain a vote of confidence from among deputies of the National Assembly. For this reason, in the parliamentary system, the president usually appoints the head of the party having the

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<sup>439</sup> Özbudun, *Presidentialism vs. Parliamentarism in Turkey*, 2.

<sup>440</sup> *Constitution of the Republic of Turkey (1982)*, Art.105(3).

<sup>441</sup> *Constitution of the Republic of Turkey (1982)*, Art.148(6).

<sup>442</sup> *Constitution of the Republic of Turkey (1982)*, Art.117.

majority in the parliament, as the prime minister. In the same way, the prime minister also needs to think carefully while choosing ministers to gain a vote of confidence from the parliament. Apart from that, besides the president, the Constitution of 1982 also strengthened the post of prime minister, as each minister becomes accountable for his/her activities to the prime minister.<sup>443</sup>

In terms of the judiciary, the Turkish judicial system is composed of three levels of courts as supreme courts, first instance courts, and district courts. Rather than one, Turkey has many supreme courts that are the “final decision-making authorities in the fields of civilian, administrative and military judiciary.”<sup>444</sup> Besides the Court of Cassation, the Council of State, the Military Court of Cassation, the High Military Administrative Court, and the Court of Jurisdictional Disputes, there is also the Constitutional Court that was established in 1961 for the first time to carry out constitutional adjudication, that is to say, checking the laws, presidential decrees, and rules of conduct of the National Assembly in terms of compliance with the Constitution.<sup>445</sup> Being an essential component of rule of law, the Constitutional Court comprises of seventeen judges who serve for twelve years, and cannot be reelected. The head of the Constitutional Court is appointed for a four-year term from among the Court members and may be reappointed.<sup>446</sup> Besides functioning as the Supreme Criminal Court to handle trials for alleged crimes related to the conduct of senior public officials, the Court also has the right to dissolve political parties in case of conduct not becoming of the Constitution.<sup>447</sup> Lastly, with the constitutional amendment introduced in 2010, citizens of the Republic of Turkey were given the

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<sup>443</sup> *Constitution of the Republic of Turkey (1982)*, Art.112(2).

<sup>444</sup> Aksel, *Turkish Judicial System*, 31.

<sup>445</sup> *Constitution of the Republic of Turkey (1982)*, Art.146-153.

<sup>446</sup> *Constitution of the Republic of Turkey (1982)*, Art.146(6).

<sup>447</sup> *Constitution of the Republic of Turkey (1982)*, Art.148(6), (7), and 149(2).

“right to individually apply to the Constitutional Court with the claim that their fundamental rights and freedoms have been violated by a public authority”.<sup>448</sup>

The Supreme Board of Judges and Prosecutors is another novelty that emerged in 1982 with the goal of creating an organ independent from the executive branch that managed of the personnel affairs of judges and prosecutors. Actually, its foundations were laid in the 1961 Constitution when the Supreme Council of Judges was established. However, the Constitution of 1982 extended the Council’s scope by including prosecutors as well as judges. Even though HSYK was founded with its independence from the executive branch in mind, in order to provide occupational assurance for judges and prosecutors, the president of the council happens to be the minister of justice, and some of its members are directly appointed by the president of the Republic.<sup>449</sup>

Moreover, the Constitution of 1982 is a strict constitution with irrevocable provisions, as Article 4 enunciates that the

provision of Article 1 regarding the form of the State being a Republic, the characteristics of the Republic in Article 2, and the provisions of Article 3 shall not be amended, nor shall their amendment be proposed.<sup>450</sup>

Furthermore, it defines a pretty complicated procedure for making an amendment to the Constitution. Accordingly, an amendment proposal should be submitted in writing by at least one-third of the total number of members of the Grand National Assembly of Turkey to be debated twice in the Plenary.<sup>451</sup> In order to be adopted, the bill for amendment needs a three-fifths majority of the total number of assembly members. The president of the Republic has the authority to return the proposed amendments to the assembly for reconsideration. According to

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<sup>448</sup> Aksel, *Turkish Judicial System*, 32.

<sup>449</sup> *Constitution of the Republic of Turkey (1982)*, Art.159.

<sup>450</sup> *Constitution of the Republic of Turkey (1982)*, Art.4.

<sup>451</sup> *Constitution of the Republic of Turkey (1982)*, Art.175(1).

the vote rate of assembly members for the re-adoption of the revised amendment, the law on the constitutional change may be directly published in the Official Gazette, as well as submitted to referendum first.<sup>452</sup> To be put into effect, the laws defining the amendment to the Constitution need to receive more than half of the valid votes in the referendum, and to be published in the Official Gazette.<sup>453</sup>

## 7.2 AKP era

After the promulgation of the Constitution of 1982, Turkey finally returned to civilian politics with the parliamentary election of November 1983. Aimed at political stability by eliminating coalition governments of the past, an election threshold of 10%, which defines the minimum share of the popular vote that a political party needs to receive to get into the parliament was introduced. Meanwhile, attempts for a rapid liberalization program and application for a full membership in the European Union came into prominence. However, on February 28, 1997, making another appearance, the Turkish Armed Forces issued a number of decisions at a National Security Council meeting, and explicitly shoved its program down the government's throat to fight against the Islamist Welfare Party (*Refah Partisi*, RP) that was accused of becoming "the focal point for anti-secular actions contrary to the Law on Political Parties and the Constitution."<sup>454</sup> Following the ultimate closing down of RP by the Constitutional Court in 1998, and its successor Virtue Party (*Fazilet Partisi*, FP) in 2001 on the same grounds, the Justice and Development Party (*Adalet ve Kalkınma Partisi*, AKP) was founded in 2001 under the leadership of Recep Tayyip Erdoğan as one of the FP's successors along with the Felicity Party.

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<sup>452</sup> *Constitution of the Republic of Turkey (1982)*, Art.175(3), (4) and (5).

<sup>453</sup> *Constitution of the Republic of Turkey (1982)*, Art.175(6). For the relevant articles of the Constitution of 1982, see Appendix H.

<sup>454</sup> Günay, "Implementing the 'February 28' Recommendations: A Scorecard," 13.

The parliamentary election held in 2002 caused drastic changes in Turkey's state of affairs when AKP gained a sweeping victory by winning a two-thirds majority of the Assembly seats, while CHP was the only opposition party that could pass the 10% popular vote threshold. Being the first party since 1991 to win a comfortable majority in the parliament, AKP began its fifteen-year-long rule from that day on, portraying astonishing performances both in parliamentary and local elections.<sup>455</sup>

Presenting itself not an Islamist, but a conservative democratic party<sup>456</sup>, AKP supported a liberal market economy and the membership of Turkey in the EU at the beginning. Nevertheless, in the course of time, its "pro-Islamic"<sup>457</sup> policies caused controversies over whether AKP respected the secular principles prescribed in the Constitution of 1982. The first big political crisis known as 367 Crisis revealed in the presidential election in 2007, when Abdullah Gül, one of the leading figures that founded AKP, was nominated for the office of the president of the Republic. Regarding the post of president of the Republic as the guardian of the country's secular system, Gül's Islamist political views brought a deadlock in the elections when the opposition parties deadlocked the election process in the parliament. Following the snap parliamentary election in July 2007, Gül was finally elected as the eleventh president of the Republic in late August 2007 as a result of the vigorous efforts made.<sup>458</sup>

Calling the deadlocked presidential election a failure of the Turkish parliamentary system, then-incumbent Prime Minister Erdoğan proposed to amend

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<sup>455</sup> AKP has won pluralities in the five most recent legislative elections in 2002, 2007, 2011, June 2015, and November 2015. Its electoral success has been mirrored in the three local elections held since the party's establishment respectively in 2004, 2009 and 2014.

<sup>456</sup> Erdoğan, *Türkiye'de Anayasalar ve Siyaset*, 236.

"AKP Explains Charter Changes, Slams Foreign Descriptions."

Taşpınar, "Turkey: The New Model?"

<sup>457</sup> "Erdoğan's Way."

<sup>458</sup> "New Turkey Presidency Row Looms."

the Constitution soon after.<sup>459</sup> The proposed constitutional reform package included electing the president by a popular vote; reducing the presidential term from seven to five years; allowing the president to be reelected for a second consecutive term; holding parliamentary elections every four years instead of five; and reducing the quorum of lawmakers needed for parliamentary decisions from 367 to 184. Although the reform package was first vetoed by the incumbent President Ahmet Necdet Sezer, it was put to the referendum in October 2007, and was accepted with 69% of the popular vote. Nevertheless, AKP's calls for amending the Constitution did not slow down. The ruling party came with a new reform package in 2010, bringing about significant amendments to the Constitution regarding the judiciary, and to the regulations on judging the military officers who were involved in the previous coups. Lacking the two-thirds majority in the parliament to make the amendments right away, AKP got the reform package pass in the referendum held in September 2010, by winning 58% of the votes.<sup>460</sup> The political polarization among people, which grew due to these referendums reached its peak in late May 2013, when nationwide protests called the *Gezi* Protests<sup>461</sup> broke out against the alleged authoritarianism of AKP, after the police used disproportionate force against peaceful demonstrators defending *Gezi* Park in Istanbul. It was a kind of milestone in terms of both internal and external affairs of Turkey because from that day on, the polarization within the society deepened dramatically, and the relationship with the EU worsened perceptibly.

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<sup>459</sup> Kotsiaros, *Turkish National Elections 2007*, 1.

<sup>460</sup> The amendments included right of individuals to appeal to the highest court, the creation of the ombudsman's office, the possibility to negotiate a nationwide labor contract, positive exceptions for female citizens, the ability of civilian courts to convict members of the military, the right of civil servants to go on strike, a privacy law, and the structure of the Constitutional Court.

<sup>461</sup> *Gezi* Protests were a wave of demonstrations in Turkey began late May 2013 in *Gezi* Park, Istanbul. Being initially a small-scale resistance against a construction plan for the Park, following the police's disproportionate use of force, and Prime Minister Erdoğan's uncompromising attitude, it grew like topsy, and turned into a widespread civil unrest against the authoritarian practices of the AKP.



In the presidential election of 2014, Recep Tayyip Erdoğan became the first president of the Republic elected by a popular vote, and subsequently, Ahmet Davutoğlu, the former Minister of Foreign Affairs, was chosen as the party leader, and thereby, the Prime Minister. In the parliamentary election in June 2015, emerging once again the party with the largest following, AKP lost its status as the majority party in the Assembly and thus the power to form a single-party government for the first time since 2002. Another important aspect of the June 2015 election was that the left-wing party called Peoples' Democratic Party (*Halkların Demokratik Partisi*, HDP), which is a pro-Kurdish party also supporting minority rights and anti-capitalism, entered the parliament after receiving enough popular votes to clear the 10% threshold. Because the election resulted in a hung parliament, and the attempts to form a coalition government within the specified time failed, President Erdoğan called for snap parliamentary election as per Article 116 of the Constitution. In the snap parliamentary election held in November 2015, AKP regained its parliamentary majority, and therefore, the election results were considered as a “massive personal victory for President Erdoğan”.<sup>462</sup> In the meantime, following the collapse of the ceasefire negotiations between the Turkish government and the Kurdistan Workers' Party (PKK)<sup>463</sup>, and the rise of the Islamic State of Iraq and Syria (ISIS or ISIL)<sup>464</sup>, Turkey entered an era full of bloody terrorist attacks and serious security concerns. Moreover, Prime Minister Davutoğlu had to step down due to policy disagreements between with President Erdoğan and

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<sup>462</sup> Calderwood, “Shock Turkish Election Result.”

<sup>463</sup> Based in Turkey and Iraq, the Kurdistan Workers' Party is a left-wing organization that was founded in 1978 by a group of Kurdish students led by Abdullah Öcalan, has been pursuing an armed struggle against the Turkish state for equal rights and self-determination for the Kurds in the country. Its ultimate goal is to establish an independent, Marxist-Leninist state in the region under the name of Kurdistan.

<sup>464</sup> Being recognized as a terrorist organization by the UN and many other individual countries, the ISIS is a Salafi jihadist militant group, which has assumed dominance in wide areas in Syria and Iraq. Proclaiming the establishment of a global Caliphate, the unrecognized proto-state is believed to overtake Al-Qaeda, and become the most influential power in that geography.

himself, especially those regarding Erdoğan's plans to amend the Constitution to enhance presidential powers and to move Turkey into a presidential regime.

Following this so-called "Palace Coup"<sup>465</sup>, Binali Yıldırım, the former Minister of Transportation, Maritime Affairs and Communication, and a more supportive bureaucrat of Erdoğan's plans, was elected the party leader in the extraordinary congress of AKP in May 2016. Thus, Yıldırım took over the Prime Minister post.

On July 15, 2016, citing an "elimination of democratic rule, a disregard for human rights, and Turkey's loss of credibility in the international arena,"<sup>466</sup> a coup d'état attempt was launched by a small group of high ranking officers within the Turkish Armed Forces, who were linked to the Islamist Fethullah Gülen movement.<sup>467</sup> After the coup attempt failed, a state of emergency was declared, and was later extended for the third time for an undetermined period of time. In the wake of the failed coup, besides a crackdown on media outlets, there have been also widespread purges, detentions and arrests of tens of thousands people including civil servants, HDP parliamentarians, journalists, soldiers, and so forth, on charges of terrorism. These moves have been criticized as a "political witch hunt"<sup>468</sup> that went far beyond the putschists and transformed into an attempt to solidify the ruling AKP's power by purging "all types of troublesome opponents"<sup>469</sup> under the cover of the state of emergency. Under these chaotic circumstances, debates on a constitutional amendment regarding a presidential republic increasingly gathered speed and nestled at the top of the agenda of Turkish politics.

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<sup>465</sup> Akın, "Davutoğlu'na Saray Darbesini MHP'ye Yargı Darbesi İzler Mi; 25 Maddede AKP Tarihi ve İhtimaller."

Kaplan, "4 Mayıs Saray Darbesi."

<sup>466</sup> "After the Failed Coup in Turkey."

<sup>467</sup> Fethullah Gülen is the leader of a rival islamist movement and formerly an ally of the ruling AKP. Işık, "27 Nisan E-muhtırası Metni ve 15 Temmuz."

<sup>468</sup> Peker, "Turkey's Recep Tayyip Erdoğan Seeks to Consolidate Power."

<sup>469</sup> "Turkey's Crackdown on Dissent Has Gone Too Far."

### 7.3 Debates on constitutional amendments

The transition to a multiparty system in 1946 in Turkey brought about a highly polarized political sphere in its wake. In the last half-century, military interventions, one after another, bore new constitutions that aroused instability rather than reducing political turbulence. Since its promulgation, the current Constitution of 1982 has been in the eye of the storm being the product of military tutelage. Mostly with the discourse of demilitarization, the Constitution has undergone eighteen major amendments until today, but still, it is still labeled tutelary and outdated.<sup>470</sup> It is also criticized for being “amended many times to the extent that it lost its essence and became full of details.”<sup>471</sup> In a similar vein, since its accession to power, the ruling Justice and Development Party has been seeking to push more amendments on the Constitution. As indicated previously, throughout the 2000s, Turkey’s efforts for the EU membership provided a common ground for fractious political parties and constituted the major motivation for AKP’s constitutional reform attempts.<sup>472</sup> Amendments made during the AKP era such as removing the ban on Kurdish language in the media and clearing the way for trying military personnel in civilian courts for their off-duty crimes were important steps in terms of individual rights and freedoms, and diminishing the military tutelage. Therefore, they satisfied both the EU and the opposition. The year 2010 witnessed other significant constitutional revisions considering the judiciary, and judging the putschists who were involved in the earlier military coups. Turkey’s EU membership application still continued to be the apparent goal for these reforms, but in reality, it was only a useful means for AKP to cement civilian authority over the military to ensure that the party’s efforts to solidify its power would not be stonewalled by military interventions in the future as

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<sup>470</sup> “Constitutional Reform: A Change Turkey’s Parties Can Believe In.”

<sup>471</sup> “Erdoğan Wants ‘Completely New Constitution’ for Turkey.”

<sup>472</sup> Talbot, “Resetting Turkey-EU Relations?,” 89.

it used to be.<sup>473</sup> Today, debates on making amendments to the current Constitution are still at the center of the Turkish politics. However, the EU membership ceased to be the main goal. Instead, the recent attempted coup in July 2016 has become a convenient justification for AKP's intended amendments to the Constitution in favor of a presidential regime, with a promise to establish a greater civilian authority over the military and to bolster national security.<sup>474</sup> The failed coup attempt created a compromising atmosphere in the political sphere, as the representatives of three parliamentary parties AKP, CHP and MHP, excluding HDP, got together to discuss the necessary constitutional changes. A commission comprising the representatives of the three aforementioned parliamentary parties was formed and entrusted with creating a draft of a constitutional reform. However, this cooperation did not last long when AKP put the issue of the presidential system at the heart of the negotiations, and the opposition left the table immediately after.

Although the Republic of Turkey has been governed under a parliamentary system since its foundation, the desire for a presidential system is not new to Turkish politics. Debates on the system of government came to the fore first in 1982 during the preparation phase of the Constitution of 1982.<sup>475</sup> However, President Turgut Özal brought up the idea of the system of presidentialism as of 1987 in earnest, and was followed by its successor President Süleyman Demirel in the 1990s.<sup>476</sup> Still, these proposals remained unfulfilled. It was Recep Tayyip Erdoğan who took concrete steps to realize the long-discussed switch to the presidential system. He brought the issue of a presidential system forward even in his earlier years as prime minister, but he began to take concrete steps only after August 2014, when he became Turkey's

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<sup>473</sup> Bechev, "The Travails of Democracy in Turkey," 17.

<sup>474</sup> Üstün, "The April 16 Referendum Is an Opportunity for Turkey."

<sup>475</sup> Tunç and Yavuz, "Avantaj ve Dezavantajlarıyla Başkanlık Sistemi," 1.

<sup>476</sup> Beceren and Kalağan, "Başkanlık ve Yarı-Başkanlık Sistemi," 175.

Miş et al., *Dünyada Başkanlık Sistemi Uygulamaları*, 12.

first president of the Republic to be elected by popular vote. Taking strength from the public support along with the AKP government backing, Erdoğan has been gradually drifting away from the largely symbolic role of president as prescribed in the Constitution towards establishing his de facto presidency. Claiming “the spirit of the constitution had changed”<sup>477</sup> as a result of the constitutional amendment in 2007 regulating that the president would be elected by public instead of the parliament, Erdoğan pushed further constitutional amendments in order to bring his powers onto a legal framework. Although all opposition parties also agreed on the need for a constitutional reform, they did not back the transition from the existing parliamentary system to presidential system, and therefore, the negotiation attempts made between them have resulted in deadlock at every turn.

During the election campaign for the parliamentary election held on June 7, 2015, the intention of a constitutional amendment towards the presidency constituted the focal point of AKP, but it ended in failure when the party could not win a comfortable majority in the parliament as mentioned before. HDP, on the other hand, attained a significant success in this election with its campaign slogan “We won’t let you become the president” intended to stop Erdoğan’s rise. With its forty deputies in the parliament, and causing AKP to miss the minimum required majority in the Assembly to pass the constitutional change on its own, HDP has become an important obstacle for the ruling party on the way to a presidential regime.<sup>478</sup> Meanwhile, President Erdoğan had a serious friction with Prime Minister Ahmet Davutoğlu who was considered to be “too lackluster a supporter of Erdoğan’s ambitions”<sup>479</sup> while doing the groundwork for constitutional reform. Following his reluctant resignation in May 2016, Davutoğlu handed his prime minister post over to

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<sup>477</sup> Bayramoğlu, “Turkey as Close as Ever to Presidential Regime.”

<sup>478</sup> “Turkey Fears Swing to the Right with Erdoğan Referendum.”

<sup>479</sup> Coşkun and Tattersall, “Turkey Shifts to Presidential System.”

Binali Yıldırım who had been criticized for serving as a rubber stamp to steer the country into a “transition period for the executive presidency.”<sup>480</sup> Realizing that the existing situation regarding the president of the Republic did not conform to the existing constitutional provisions, Prime Minister Yıldırım’s number one priority became making a constitutional change in favor of a presidential system: “The most important mission we have today is to legalize the de facto situation, to bring to an end to this confusion by changing the Constitution... The new constitution will be based on an executive presidential system.”<sup>481</sup> Moreover HDP, another obstacle on the path to a presidential regime, was dealt a massive blow when thirteen HDP deputies including the party co-leaders Selahattin Demirtaş and Figen Yüksekdağ were arrested as from early November 2016 on charges of aiding and abetting the terrorist group PKK.

AKP began to restore the support it lost in the June 2015 election soon after the failed putsch in July 2016.<sup>482</sup> Erdoğan’s powers were further consolidated following the declaration of a state of emergency that allowed him to rule the country through presidential decrees. It was the situation when the far-right Nationalist Movement Party (*Milliyetçi Hareket Partisi*, MHP) leader Devlet Bahçeli made an unexpected move, and prompted AKP to formalize the much-discussed constitutional amendment by stating

the Constitution is being violated and therefore a crime is being committed... In order to avoid any breach of the Constitution, Mr. President should abandon insisting on a de facto presidential system. If he does not abandon it, the ways and methods to legalize this de facto situation should be swiftly sought.<sup>483</sup>

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<sup>480</sup> Pamuk and Solaker, “Erdoğan Ally Takes Over as Turkish PM.”

<sup>481</sup> Pamuk and Solaker, “Erdoğan Ally Takes Over as Turkish PM.”

Coşkun and Tattersall, “Turkey Shifts to Presidential System.”

<sup>482</sup> Pitel, “Erdoğan to Pursue Ambition for Executive Presidency in Turkey.”

<sup>483</sup> “MHP Calls AKP to End Systemic Confusion.”

In this sense, asserting that his party favored preserving the present parliamentary system, Bahçeli also demonstrated his support for a possible referendum for a constitutional change to make the current de facto situation legal by a transition to the presidential system. Once passionately opposed the shift towards presidency saying “a presidential system would inevitably lead to despotism,”<sup>484</sup> MHP, as the fourth-largest party in the parliament with its thirty-nine seats, began backing AKP’s plan on the grounds of national security, and political and legal stability of the country in the wake of the failed coup attempt. Herewith, the negotiations between AKP and MHP started at a great pace, and a new political alliance emerged to transform Turkey into a president-led republic through a constitutional change within the framework of a stronger nationalist and statist attitude, especially in terms of the Kurdish issue.<sup>485</sup>

In the meantime, President Erdoğan extended the state of emergency for another three months, first in October 2016, later in January 2017, and in April most recently, thus, he “sidestepped institutions, notably the Constitutional Court.”<sup>486</sup> The support of the nationalist bloc together with the prolonged state of emergency revived the issue of a presidential system and created a favorable climate for AKP to start the endeavor for a constitutional amendment that they had been craving for a long time.

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<sup>484</sup> Zaman, “Erdoğan’s Plans for Executive Presidency Firm Up.”

<sup>485</sup> MHP’s conditions of a presidential regime are preservation of the existing constitutional provisions that define citizenship on the basis of “Turkishness”, national symbols like the flag, the language and the education language, and there should not be any formula of decentralization, like autonomy, regional administrations or enhanced powers for existing local administrations, should be ruled in the context of the Kurdish issue. All these preconditions block political avenues in the Kurdish problem, like negotiations, political settlements and peaceful initiatives.

Ali. “Turkey as Close as Ever to Presidential Regime.”

<sup>486</sup> “Turkey’s Crackdown on Dissent Has Gone Too Far.”

### 7.3.1 The Constitutional Reform Package

The ruling AKP began its endeavors at full throttle to shape the formal proposal for an amendment to the Constitution of 1982 immediately after the failed coup attempt of July 2016. As outlined earlier, as per Article 175 of the Constitution, to go to a referendum, any proposal for a constitutional change needs the support of at least a three-fifth majority of the total number of assembly members, corresponding to 330 lawmakers in the 550-seat Assembly.<sup>487</sup> If a bill is accepted by a two-third majority of the total number of parliament members (367 votes), the changes will be approved without public consultation.<sup>488</sup> Even in the possible case of attaining 367 votes in favor of its proposal, AKP asserted that they were determined to take the bill to a referendum to gain popular legitimacy. Although it was expected that all AKP deputies would vote in favor of the proposal, AKP had only 316 deputies eligible for voting, excluding the speaker of the parliament. Falling short of the required parliamentary majority to unilaterally change the constitution or at least to force a referendum, the ruling party needed to gain support of at least fourteen lawmakers from the opposition to secure a three-fifths majority for the referendum. In this regard, apart from the opposition parties CHP and HDP that are fiercely opposed the proposed amendments, AKP reached a settlement with MHP.

After months-long talks between AKP and MHP to agree upon the changes to the current constitution, the so-called “Mini Constitution Package” was finalized, and submitted to the parliament by AKP in December 2016 with 316 signatures, meaning all of its deputies had signed the bill. In compliance with the constitutional process, following the submission of the bill to the parliament on December 10, discussions on the proposed amendments began in the Parliamentary Constitution Commission in

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<sup>487</sup> *Constitution of the Republic of Turkey (1982)*, Art.175(1).

<sup>488</sup> *Constitution of the Republic of Turkey (1982)*, Art.175(5).



December 20. The Commission had forty-five days to debate and issued a report to the parliament; however, the bill was approved in a short period of nine days. Afterwards, the Package was presented at the Plenary in two gatherings starting early January. First, the General Assembly discussed and voted on each article from December 9 to 15 before the entire Package went to a parliamentary vote in the second session. Although each of these voting stages required a minimum of 330 parliamentary votes, AKP was able to pass every article with relative ease thanks to the backing of MHP, and the Constitutional Amendment Package was eventually pushed through the National Assembly with 339 approval votes. Upon President Erdoğan's approval, the referendum for amending the current Constitution of 1982 was held in April 16, 2017, and the Package was approved with 51.4% 'yes' votes amid dispute over ballots on the ground of the Supreme Electoral Council's decision allowing ballots without an official seal to be counted as valid.

The Package containing major changes to Turkey's governance initially consisted of twenty-one articles; however, the Parliamentary Constitution Commission reduced the number of articles to eighteen.<sup>489</sup> Although it seems a small number, these eighteen articles would make alteration on sixty-nine provisions in the current Constitution of 1982.<sup>490</sup> Regarding the executive branch, according to the proposed changes, the post of prime ministry, and thereby the council of ministers would be abolished, and thus, the president would become both the head of state, and the head of executive branch.<sup>491</sup> The president would be elected by popular vote and would be able to serve up to two consecutive five-year presidential terms.<sup>492</sup> Unlike the current regulation, a presidential candidate could be nominated from among the

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<sup>489</sup> Article 5 pertaining to substitute lawmakers and Article 15 referring presidential authorities on state institutions and organizations were abolished.

<sup>490</sup> Gözler, *Elveda Anayasa*, 89.

<sup>491</sup> *Turkey Law No.6771 Amending the Constitution*, Art.8 and 16.

<sup>492</sup> *Turkey Law No.6771 Amending the Constitution*, Art.7.

citizens of the Republic of Turkey if a minimum of 100,000 voters nominate him/her by signing a petition.<sup>493</sup> The president would also have the authority to appoint and dismiss vice presidents, ministers, and high-level public officials.<sup>494</sup> Vice presidents along with all the ministers could be appointed from among people not elected to act as deputies in the Grand National Assembly. The bill also allows the president to retain ties with his/her own party.<sup>495</sup> The current Constitution assures the neutrality of the president of the Republic by stating that he/she must sever connections with his/her party, and cease his/her Assembly membership once he/she assumes office.<sup>496</sup> Nevertheless, the respective article would be repealed through when the current proposal goes into effect, and thus, the president would be able to continue being a member of a political party. Furthermore, although the authority to enact legislation will be granted to lawmakers, the president would exceptionally be authorized to prepare and present the budget law, which would be enacted upon the Parliament's approval.<sup>497</sup> With the abolition of the council of ministers, the authority to issue decrees would be transferred to the president.<sup>498</sup> This authority would not be unlimited, as the president could only issue decrees related to executive power and could not regulate fundamental rights or freedoms. Also, presidential decrees could not be enacted on issues regulated by law in the constitution, and on matters that are clearly set within the law. In case that the parliament issues a law on the same topic, the presidential decree would become null and void. Additionally, the system of reciprocal dissolution between the president and the Assembly is another remarkable point among the proposed amendments. In case of a government crisis due to a

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<sup>493</sup> *Turkey Law No.6771 Amending the Constitution*, Art.7.

<sup>494</sup> *Turkey Law No.6771 Amending the Constitution*, Art.8.

<sup>495</sup> *Turkey Law No.6771 Amending the Constitution*, Art.8.

<sup>496</sup> *Constitution of the Republic of Turkey (1982)*, Art.101(4).

<sup>497</sup> *Turkey Law No.6771 Amending the Constitution*, Art.15.

<sup>498</sup> *Turkey Law No.6771 Amending the Constitution*, Art.8.

conflict between them, both the president and the parliament would be able to reciprocally dissolve each other.<sup>499</sup> They both could call snap elections, but the president could make this decision any time he/she that would like to, while the parliament needs a two-thirds majority to do the same. Such a move would automatically end both their terms, and give way to presidential and parliamentary elections together, on the same day. Lastly, the president would use the authority to declare a state of emergency from the council of ministers and would submit the state of emergency decision to the Assembly's approval.<sup>500</sup> The state of emergency in the proposed bill would correspond to the martial law that exists in the current constitution. In a state of emergency period that would not exceed six months, the president would be able to issue decrees having the force of law on matters necessitated by the state of emergency.

Regarding legislature, the proposed bill would reduce the age limit of candidacy to become a deputy from twenty-five to eighteen, and raise the number of assembly members from 550 to 600.<sup>501</sup> Furthermore, the proposed changes would allow the parliament to have the capacity to oversee the president's actions to a certain extent. In this sense, among the methods of supervision currently possessed by the Grand National Assembly, the authority of debating a motion of censure would be abolished, and calling for a parliamentary investigation would be hampered. A multi-stage investigation system would be introduced to try the president within the scope of his/her criminal liability.<sup>502</sup> In order to begin impeachment proceedings against the president, the parliament could make a proposal for investigation with a simple majority vote (301 votes); set up an

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<sup>499</sup> *Turkey Law No.6771 Amending the Constitution*, Art.11.

<sup>500</sup> *Turkey Law No.6771 Amending the Constitution*, Art.12.

<sup>501</sup> *Turkey Law No.6771 Amending the Constitution*, Art.2.

<sup>502</sup> *Turkey Law No.6771 Amending the Constitution*, Art.9.

investigation commission with a three-thirds majority of the votes (360 votes); and put the president on trial in the Supreme Court upon receiving a two-thirds majority of the votes (400 votes).<sup>503</sup> Thus, the proposal would introduce criminal liability for the holder of the office of president who is currently immune from all crimes except treason.

In terms of the judiciary, the Amendment Package adds the expression “impartiality” after the clause “independence” in Article 9 of the existing Constitution.<sup>504</sup> Also, military high courts will be abolished with the intent of providing equal practices between military and civil courts. Removing the members coming from military courts, the number of Constitutional Court members would be decreased from the current number of seventeen to fifteen.<sup>505</sup> Besides, the size of the National Security Council would also be reduced, and the gendarmerie forces would be removed from the MGK so that the dominance of civilians over the Armed Forces would be cemented.<sup>506</sup> Moreover, there would be some alterations in the structure of the Supreme Board of Judges and Prosecutors. Hereunder, with the word “supreme” removed, the new Council of Judges and Prosecutors as Turkey’s highest judiciary board would consist of thirteen members, six of whom would be directly appointed by the president while the remaining seven would be elected by parliamentary vote with three-fifth majority.<sup>507</sup>

Lastly, following the approval of the Constitutional Reform Package in the referendum, the presidential and parliamentary elections would be held together, for the first time in history, in November 2019, and the changes would go into effect the

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<sup>503</sup> *Turkey Law No.6771 Amending the Constitution*, Art.9.

<sup>504</sup> *Turkey Law No.6771 Amending the Constitution*, Art.1.

<sup>505</sup> *Turkey Law No.6771 Amending the Constitution*, Art.16(D).

<sup>506</sup> *Turkey Law No.6771 Amending the Constitution*, Art.16(B).

<sup>507</sup> *Turkey Law No.6771 Amending the Constitution*, Art.14.

same year.<sup>508</sup> Nevertheless, as per Article 18 of the Package, some of the amended provisions entered into force on the date of promulgation. To be more precise, immediately after the referendum, the formation of military courts has been banned with the exception of disciplinary courts and state of war;<sup>509</sup> the expression of “High” in the High Council of Judges and Prosecutors has been removed, and the structure of the Council has been changed from three chambers with twenty-two members into two chambers with thirteen members;<sup>510</sup> and the number of members of the Constitutional Court was reduced from seventeen to fifteen.<sup>511</sup> Moreover, until the elections of 2019, the incumbent President Erdoğan will be bestowed some additional powers through provisional articles.<sup>512</sup> As the first step of this process, as per Article 18, Erdoğan officially became the leader of AKP once again on May 21, 2017, almost three years after his resignation following the 2014 presidential election due to the principle of impartiality of the president of the Republic.

### 7.3.2 Debates on the Constitutional Reform Package

As expected, the Constitutional Reform Package prepared by a cross-party commission composed of AKP and MHP brought about debates on various issues. Although all political parties agree on the need of amending the current constitution, which still bears the stamp of its military heritage, CHP and HDP dissent whenever the issue is the transition to a presidential system. The main argument of AKP and MHP for pushing a presidential system is that a powerful leadership would provide Turkey the much-needed stability. According to them, Turkey had suffered from

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<sup>508</sup> *Turkey Law No.6771 Amending the Constitution*, Art.4.

<sup>509</sup> *Turkey Law No.6771 Amending the Constitution*, Art.13, Art.16(56), (57), and (58).

<sup>510</sup> *Turkey Law No.6771 Amending the Constitution*, Art.14 and 16(10).

<sup>511</sup> *Turkey Law No.6771 Amending the Constitution*, Art.16(35).

<sup>512</sup> *Turkey Law No.6771 Amending the Constitution*, Art.17(B). For the full text of the Constitutional Reform Package, see Appendix I.

weak governments and the chaos they had caused for many years, and an executive presidency would be able to put an end to this pattern. Most recently, the coup attempt in July 2016 formed a solid basis for their call for stability. In addition, they claim that Turkey would have a more efficient political system by virtue of a strong president, and thereby, a bigger role in the world arena.

On the other hand, the opponents, notably the opposition parties CHP and HDP argue that the amendments will grant too much power to the president of the Republic whose role has traditionally been ceremonial. For them, this concentration of power in the hands of one person would lead to an arbitrary regime that could eventually end in dictatorship. In their words, “the outcome will be a single-person administration... The outcome will be oppression.”<sup>513</sup> They consider this move as a serious threat for democracy by giving sweeping powers to the executive while weakening the legislature and the judiciary. It is also argued that these efforts do not aim for a mere system change, but a regime change that could demolish the Republic dating back 1923. Lastly, the opposition asserts that the pattern of frequent coalition government is not unique to parliamentary systems, rather it is observed pretty common in the countries with presidential regimes. Also, it is underlined that a presidential system cannot assure a strong economy, since underdeveloped economies can be often witnessed under presidency as well.

#### 7.3.2.1 Governmental stability

Having undergone numerous successive military interventions in late history, Turkish politics has been under the influence of military tutelage that caused political turbulences and economic downfalls in the country for ages. The government

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<sup>513</sup> Shaheen, “Turkey: Erdoğan Rule Could Extend until 2029 under Proposal.”

formation processes was troublesome and mostly resulted in failure. The failed coalition governments brought along disorganization and deadlock in government affairs, which led the country to frequent government reshuffles together with policy changes and power struggles. More precisely, since the shift towards the multi-party system following the one-party era, there were forty-five governments established in sixty years, and their average term of office was only sixteen months.<sup>514</sup> In these circumstances, the present parliamentary system is called “unreliable” by Prime Minister Yıldırım, as it cannot assure the citizens confidence, efficient service, solid vision, and stability.<sup>515</sup> Based on these bitter experiences, AKP put forward the discourse of stability as its primary purpose in order to boost Turkey’s politics and economy, and a powerful presidential system is presented as being vital to assure that much-needed stability.

As indicated previously, in a parliamentary system, the executive and legislative branches are intermingled, and the decisions considering governance are ideally taken as a result of the negotiations between different political groups in the parliament. That is why, in order to perform their duties properly, the political parties must be open to new ideas and making compromise. Nonetheless, in Turkey, not compromise but conflict has become a rule of political life, and this lead the country to serious political crises such as formation of coalition governments one after another in the 1990s and the 367 Crisis in the presidential election of 2007, which endangered the stability in the country as a matter of course. It is claimed that in the present parliamentary system in Turkey, the Cabinet is under the gun of the parliament, as it consistently has to seek the legislative vote of confidence. It consequently makes the governance inefficient and slow, and the concepts of snap

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<sup>514</sup> Türkiye Cumhuriyeti Başbakanlık, *Geçmiş Hükümetler*.

<sup>515</sup> “Yıldırım: Bu Anayasanın Arkasında Meclis Onay Verdiğinde 79 Milyon Vatan Evladı Olacaktır.”

election and short-lived governments often come to the fore. In the proposed presidential system, on the other hand, the government will be formed automatically as soon as the presidential election concludes. For this very reason, it alleged that the presidential system forestalls the instabilities that arise from long and complicated government formation processes the parliamentary system causes.<sup>516</sup> Additionally, it sets forth stable governance in which there are no governmental crises and authority gaps stemming from possible motion of no confidence in the formation process or dissolution of government after the formation. Based upon this, Erdoğan avert that the intended presidential system is the best way to provide the Turkey's much-needed stability that the existing parliamentary system has failed to assure, and thereby made the country pay a heavy price in the past:

The presidential system of government will guarantee the climate of confidence and stability... We need stability to overcome our economic difficulties, successfully conclude out struggle against terror, and also problems originating in out neighboring countries. When we look at the most developed countries in the world, we see that they owe their accomplishments to their stability. Since 1950s, forty-eight governments have been formed in our country. During the same period, fifteen governments have been formed in the United Kingdom and twenty-four in Germany. Seventeen presidents have served in the United States and eleven in France. In the new system, it is the people who will form the government at the polls, which will put an end to the era of coalitions, ensuring stability.<sup>517</sup>

In a similar manner, underlining the current parliamentary system have brought along instability to Turkey since the very beginning, the Minister of Justice Bekir Bozdağ asserts that the presidential system is the remedy to ensure the needed governmental stability, as the president would not need the parliament's vote of confidence to take office or carry out his/her duty:

The legislature cannot bring the president down by motion of no confidence. In the presidential system, both coming to power and overthrowing the

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<sup>516</sup> Göksu, *Başkanlık Sistemi Niçin Gerekli?*, 101.

<sup>517</sup> Presidency of the Republic of Turkey, *We Are Changing Our System of Government for Our People's Future*.



government only through popular vote... We had sixty-five governments in ninety-three years since October 29, 1923 until today. The average lifetime of our governments are approximately seventeen months. If we had had a presidential system, there would have been our twenty-fourth president today holding office in accordance with the four-year tenure. The sixty-fifth president of the Turkish Republic would thus have taken office in 2183.<sup>518</sup>

Besides, by installing a strong and efficient post of presidency, and not giving any chances to authority gap in the political sphere, the intended presidential system would avert accession to power by impolitic and undemocratic means.<sup>519</sup> In this way, it is expected that Turkey would cut loose from military tutelage, as well as foreign interventions that the country has frequently encountered under weak governments in the past.

In addition to the concentration of the executive power in one hand, the fixed term of office is another factor that is put forward by the advocates for assuring stability, and thereby for more stable plans in the long run instead of short-term, populist policies.<sup>520</sup> In this way, it will pave the way for a more solid base for Turkey's long-standing pursuit of a rapid and healthy development. In this sense, President Erdoğan puts emphasis on the significance of governmental stability that the presidential system will bring along in terms of economic development, and asserts that Turkey will reach its goals and become "one of the top ten economies in the world"<sup>521</sup>:

During one-party governments, Turkey grew by six percent on average, and during coalitions, the growth rate was four percent. With the new system of government, Turkey will have the means to attain its targeted growth, employment, export and investment rates. With diminishing political risks, it will be easier to take under control tools of economic policy, such as exchange rates, interest rates and inflation rates and the government will be able to allocate a greater share of its revenues to investments... The region as

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<sup>518</sup> "Bozdağ: Siyasi İstikrar ve Güçlü İktidar, Başkanlık Sistemin Doğal ve Zorunlu Sonucudur."

<sup>519</sup> Aslan, "Türkiye İçin Başkanlık Sistemi," 33.

<sup>520</sup> Kuzu, "Türkiye İçin Başkanlık Sistemi," 92.

<sup>521</sup> Presidency of the Republic of Turkey, *We Are Changing Our System of Government for Our People's Future*.

well as the world has entered a process of restructuring... Changing the system of government during such a critical period will give Turkey a great advantage... A stable, safe, peaceful, wealthy and powerful Turkey's word will carry much more weight in its region and the world, which will pave the way for the great powerful and prosperous Turkey we aim at.<sup>522</sup>

#### 7.3.2.2 Strong leadership and government efficiency

As elaborated before, after ruling for three terms as the prime minister, Recep Tayyip Erdoğan became Turkey's first publicly elected president of the Republic. Arguing Turkey has already "moved away from the parliamentary system towards a presidential system following the constitutional changes in 2007 and 2010,"<sup>523</sup> President Erdoğan asked the ruling AKP to amend the constitution in compliance with his de facto executive power, with which his popular mandate furnished him. Considering a powerful prime minister together with a popularly elected president of the Republic under the current constitutional parliamentary system in Turkey, President Erdoğan described this dual legitimacy in the executive branch as an "anomaly"<sup>524</sup> that had to be fixed by introducing a presidential system to forestall any probable leadership crisis stemming from competing centers of power. Although there has been no notable crisis in this regard during Erdoğan's presidency, the situation could differ in the future, in case that the president of the Republic and the prime minister adopt different political views, and do not work in harmony. For this reason, AKP has quickened its steps in recent times to put this de facto situation into a legal framework, and suggested an executive presidential system inspired by the American, French and Russian models to "eliminate tensions between the president and the prime minister".<sup>525</sup> For the ruling party, a strong leadership akin to the

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<sup>522</sup> Presidency of the Republic of Turkey, *We Are Changing Our System of Government for Our People's Future*.

<sup>523</sup> Uras, "Erdoğan's AK Party Submits Bill to Empower Presidency."

<sup>524</sup> Gürses and Coşkun, "Turkey's AKP Forms Plans for Stronger Presidency."

<sup>525</sup> Gürses and Toksabay, "Little Sign of Compromise as Turkey Seeks Constitutional Reform."

system in these countries is needed for a more solid decision making and to avoid the fragile coalition governments of the past: “There will only be strong leaderships now... parliament... is being strengthened, while the presidency, in charge of the executive branch, is being restructured to end conflicts between branches of government.”<sup>526</sup> In this sense, by centralizing the executive power in the presidential office, the proposed presidential system is presented by the incumbent government as a remedy that will put an end to the issue of dual legitimacy, and thereby prevent the probable political crises. Also, it is claimed that it will lead to a stronger executive branch that would boost the government efficiency.

Another significant advantage of the presidential system is regarded as quick decision-making process by the proponents of the presidency. In parliamentary system, the decision-making process is prone to halt frequently due to the probable disagreements between the executive and the legislative branches. Nevertheless, it is indicated that Turkey, as a rapidly developing dynamic country, needs a capable political power that makes and executes decisions quickly and smoothly in order to clear the social, political and economic hurdles.<sup>527</sup> It is discussed that the proposed presidential system offers this desired rapid process while making decisions, as the executive powers concentrates only in the presidential office. As such, because the president is the sole decision maker in the discussed system, it is claimed that the decisions to be made will also be more consistent and thereby more effective. For this reason, quick decision making provides a great advantage most especially in case of emergencies and crises. President Erdoğan criticizes the existing parliamentary system for being cumbersome and incompetent to fulfill the country’s

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<sup>526</sup> Gümrükçü and Gürses, “Turkey’s AK Party Pushes to Expand Presidential Power.”

<sup>527</sup> Gönenç, “Türkiye’de Hükümet Sistemi Değişikliği Tartışmaları,” 1.  
Tunç and Yavuz, “Avantaj ve Dezavantajlarıyla Başkanlık Sistemi,” 2.

future goals, and thereby purports Turkey needs the speed and dynamism of the presidential system:

The current system of government is not sufficient to enable us to achieve our goals, and with its nature that is open to military coups and economic crises, it even stands in our way as an obstacle. We have no choice but to change our system of government in order to make fast decisions. This is not the kind of change that can be dared for any person or anyone's desires. Such a change can be sought only for the future of the nation and the state.<sup>528</sup>

Moreover, abolishing the Cabinet and embellishing the president with the authority of appointing his/her own secretaries out of the parliament, it is asserted that the intended system projects a more effective administration by highlighting qualification rather than loyalty, as the president would choose his coworkers not only from among the politicians, but from among more competent experts out of the legislature.<sup>529</sup> Besides, the power of appointing and deposing high-ranking bureaucrats granted to the president is also presented as a positive step to improve the harmony and the efficiency in the government.

The AKP side also implies that the proposed change will compose a stronger parliament. With the abolishment of the Cabinet, the deputies will not focus on the ambition of becoming minister during the elections anymore. That is why, it is envisaged that they will concentrate only on their legislation functions so that the parliament will be more powerful and effective.<sup>530</sup> A strong assembly along with a strong president together would thereby constitute efficient governance that is considered necessary for Turkey's targeted development.

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<sup>528</sup> Presidency of the Republic of Turkey, *We Have No Choice but to Change Our System of Government in order to Make Fast Decisions*.

<sup>529</sup> Aslan, "Türkiye İçin Başkanlık Sistemi," 17.

<sup>530</sup> Yayman, *Türkiye'de Devlet Reformu ve Başkanlık Sistemi*, 299.

### 7.3.2.3 Democratic representation and accountability

Often blaming the past one-party era and the military coups for instilling a standardized secular-nationalist identity into the society, alienating the public from politics, impeding democratic representation, and inducing external dependence in terms of economy and security, Erdoğan and AKP have been taking serious steps since 2007 regarding a system change towards presidency.<sup>531</sup> With the objective to establish a more democratic political system, introducing the presidential system is seen by the supporters of the discussed shift as the most suitable solution by increasing the interaction between the government and the public, and transforming the citizens into genuine political actors.

In the present parliamentary system in Turkey, the dominant political group that forms the majority in the National Assembly can shape the Cabinet. For this reason, the executive is depended on the legislature to some extent, and although people vote for the members of parliament in the legislative elections, they cannot take part in the process of forming the Cabinet. Further to that, in case a party cannot form the majority in the parliament, voters cannot foresee which parties will form the coalition government. That being the case, it is considered the parliamentary system poses an obstacle for the representative democracy.<sup>532</sup> According to the proposed presidential system, on the other hand, the president will be directly elected by the public as the head of the executive branch, and popular sovereignty will be therefore reflected to the administration without any legislative interference. In this way, the proponents of presidency argue that the prospective change will enhance the legitimacy of the executive branch, and therefore people's faith in it. In a similar vein, because the public will know from the beginning for whom they vote, and who

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<sup>531</sup> Aslan, "Türkiye İçin Başkanlık Sistemi," 8.

<sup>532</sup> Göksu, *Başkanlık Sistemi Niçin Gerekli?*, 90-91.

will govern in case of winning the election, it is asserted that the presidential system is more democratic in terms of identifiability, as it eliminates the uncertainty the parliamentary system generates, and will therefore ensure the interaction between the government and the people in the best possible way.<sup>533</sup>

Moreover, the proponents of the presidential system aver that the presidency is a more democratic system in terms of accountability issue comparing with the parliamentary system of government, as the executive power concentrates in one hand, and thereby, identifying the responsible agent is toilless.<sup>534</sup> In the existing parliamentary system, in case the parliamentary majority is in one party's hand, the principle of each minister's responsibility to the assembly becomes nonfunctional. Thus, it is alleged the procedures that are used to be applied to exercise the parliament's supervisory power on the government officials' political and criminal liability such as censure and parliamentary investigation cease to be a way of control and accountability.<sup>535</sup> In the intended presidential system of government, on the other hand, when things do not go well, people would know whom they should call to account for. For this reason, it is claimed that the proposed system does not permit to evade responsibility or offload the blame onto someone else, as is often the case with the parliamentary system.

#### 7.3.2.4 One-man rule and the issue of separation of powers

In spite of the ruling AKP's call for a transition to the strong leadership of an executive president, and the MHP leader's backing, the opposition parties CHP and HDP with a small number of dissident MHP deputies fiercely opposed the presidential system from the beginning, and they refused to take part in the

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<sup>533</sup> Göksu, *Başkanlık Sistemi Niçin Gerekli?*, 167-168.

<sup>534</sup> Bozlağan, *Türk Tipi Başkanlık*, 57.

<sup>535</sup> Sevinç, *Türkiye'nin Anayasa İmtihanı*, 148.

negotiations for drafting the Constitutional Reform Package in this direction. In fact, as previously mentioned, both CHP and HDP have favored making amendments to the current Constitution in order to remove the traces of the military and establish a more democratic constitution. However, the proposed bill that would place the concentration of power to the president's office met with strong reaction from them on grounds that it is a "dictatorship project, an undertaking to monopolize all the state's powers."<sup>536</sup> Although the ruling AKP asserted that the amendments will strengthen Turkey's legislature and executive, and make the judiciary more independent, the opposition regards the bill as a controversial move, risking further polarization and destabilization of the country. According to them, the proposed changes expanding the president's powers would erode democracy, destroy separation of powers, and establish a one-man rule. The opposition believes that the presidential system in question is a "system uniquely designed for Erdoğan"<sup>537</sup> and intended changes in the Constitution aim only to serve his ambitions rather than the country's future. Therefore, for them, the existing debates on constitutional amendments are not about the proposed presidential system, but about a one-man rule.<sup>538</sup>

Even though it has been calling for a shift to a presidential system, what AKP wants is not to implement an American-style presidential system that is based on a strict separation of powers. The opposite way round, the designed presidential system is a Turkish-style executive presidency, which is seen as a blatant form of unity of powers by allowing the president retain his/her ties to his party.<sup>539</sup> Being a far cry from the US-style presidential system, which is the only successful example

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<sup>536</sup> Peker, "Turkey's Recep Tayyip Erdoğan Seeks to Consolidate Power."

<sup>537</sup> "Turkish Government Seeks Referendum on Presidential System."

<sup>538</sup> Zaman, "Erdoğan's Plans for Executive Presidency Firm Up."

<sup>539</sup> Gözler, *Elveda Anayasa*, 89.

of a pure presidential system that successfully practices the principle of separation of powers, the party-affiliated Turkish-style presidency is a system that does not exist in the political science literature.<sup>540</sup> By comparison with the American-style presidency, the proposed Turkish model gives the president extensive powers the US president does not have such as possessing the power to issue presidential decrees, and to appoint anyone he/she wishes, whereas the vice-president while the US president needs the confirmation of the Senate for each cabinet member as described in the previous sections. Furthermore, the Turkish president would also have the authority to appoint senior civil servants, declare a state of emergency, appoint most judges, set the budget for the country, and call for a renewal of elections. Besides, in terms of the proceedings for trying the president, compared with the current Constitution, the proposal would provide for a more arduous procedure with investigation commissions, reports, and additional times.

According to the opposition, in the proposed system, the president controls the executive and legislative branches and shapes the judiciary. In other words, it is a model based on a de facto unity of powers, with all authorities concentrated in the hands of a single person. And these sweeping powers granted to the president ties the opposition up in knots considering the country's future: "The institutions have failed... Everything is now in the hands of one man, Mr. Erdoğan, and when just one man decides on everything, there is no future for Turkey."<sup>541</sup> Nonetheless, in response to the opposition's dictatorship claims, the governing AKP argues that the president in the proposed presidential system is far less authorized than the prime minister in the parliamentary system in terms of constitutional powers: "My prime minister [Erdoğan at that time] is a lot more powerful than Obama. Obama is a poor

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<sup>540</sup> Gözler, *Elveda Anayasa*, 49-50.

<sup>541</sup> Trofimov, "Turkey's Autocratic Turn."



man.”<sup>542</sup> Therefore, if dictatorship is in question, it is suggested that it is more likely to emerge in the current parliamentary system than the proposed presidential system, because in the former, there is purely and simply a prime minister with his cabinet, and it therefore does not involve the principle of separation of powers.<sup>543</sup>

Admitting that the Reform Package also includes democratization steps such as the abolishment of military high courts and the removal of the Commander of the Gendarmerie Forces from the MGK, the opposition criticizes the proposed changes for consolidating too much power in the hands of the president. The opposition fears that the already all-powerful Erdoğan, controlling a large part of the media, the judiciary and the police will further tighten his grip through the constitutional change, which envisages no checks and balances mechanism, and will take the country to authoritarianism under him.<sup>544</sup> With respect to the articles in the bill, the regulation allowing the president to retain ties to his/her political party is one of the most controversial points that, according to the opposition, could turn into a serious threat to the impartiality of the president. As they argue, Erdoğan, if elected, would be able to resume his leadership of AKP that he had co-founded, and by this means, “he would be crowned the head of state, the head of government and the head of the ruling party.”<sup>545</sup> Considering the Turkish election system and strict disciplined political party structure, it is claimed that a party-affiliated president would appoint and control the legislature, and the proposed system would thus put an end to the separation of powers. Therefore, the opposition avers that the intended Turkish-style

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<sup>542</sup> Bayramoğlu, “Turkey as Close as Ever to Presidential Regime.”

Bekdil, “Erdoğan’s Dream: The Sultan Rules.”

“Burhan Kuzu: Erdoğan Çok Güçlü, Obama Zavalı.”

<sup>543</sup> Kuzu, “Neden Başkanlık Hükümeti,” 44.

<sup>544</sup> Gürses and Coşkun, “Turkey’s AKP Forms Plans for Stronger Presidency.”

<sup>545</sup> “Turkey Fears Swing to the Right with Erdoğan Referendum.”

presidency will generate a “*presidentialist regime with elected sultans*”<sup>546</sup> rather than a presidential regime with elected presidents.

Additionally, as previously stated, the proposal indicates that the Grand National Assembly is the authorized body to propose and make laws, but it also grants the authority to enact legislation to the president without consulting the parliament. With the abolition of the council of ministers, the presidency will become the sole post with the power to issue decrees pertaining to executive power without any control mechanism. According to the bill, a single person may issue presidential decrees on crucial matters in one day without any discussion, whereas today, enacting a law follows a consultation procedure where the opposition parties and the NGOs can express their opinions, and comments can be made on media. Through presidential decrees, the president would be able to structure the whole government, as he/she has the authority to appoint and unseat ministers. For this reason, the opposition argues that “they [cabinet members] would not be ministers, they would be secretaries.”<sup>547</sup> Besides, the constitutional changes will bestow the president the power to appoint senior bureaucrats as well. However, because the regulation does not indicate the ranks it includes, it carries the risk to open the doors for uncertainty and arbitrariness according to the opposition. The president would also establish public corporate bodies including highly important autonomous establishments such as the Energy Market Regulatory Authority (EPDK), the Social Security System (SGK), the Banking Regulation and Supervision Agency (BDDK), the Capital Markets Board (SPK), the Scientific and Technological Research Council of Turkey (TÜBİTAK), and so on. The opposition asserts that these establishments of which heads and board members would be appointed by presidential decrees

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<sup>546</sup> Türk, *Nasıl Bir Anayasa Değişikliği?*, 444.

<sup>547</sup> Gürses and Coşkun, “Turkey’s AKP Forms Plans for Stronger Presidency.”

would eventually lose their autonomies, and thereby could not give investors and citizens a sense of security. Taking into consideration all of these, it is believed that the authority of the president to issue decrees is so vast that it would eventually erode the principles of democracy and the rule of law in Turkey: "If this proposal is approved, a Turkish-style, corrupt presidential system will be put into effect. The president will be able to rule with decrees and there will be no more laws. Democracy in Turkey will come to an end."<sup>548</sup> Moreover, the president could also declare a state of emergency upon the approval of the parliament, and would be able to issue decrees having the force of law on matters necessitated by the state of emergency. But again, the limits of these necessary matters are pretty ambiguous; and it is alleged that it would destroy the system of checks and balances. Furthermore, with a government having a parliamentary majority, the president would be able to declare a state of emergency, and then rule the country with decrees to his heart's content.

Also, the bill grants the president the power of the purse that allows him/her to control the central government budget. As per Article 161 and the rest of the current Constitution, the parliament has the final say on the budget, and there can be no budget without the legislative approval. However, with the proposed bill, the power of the purse will be transferred from the assembly to the president who will have the authority to prepare the budget and submit to the parliament. In case of the disapproval of the assembly, the process will still continue, and the previous year's budget will be implemented instead of preparing a new one in line with the demands from the parliament.

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<sup>548</sup> Köylü, "Law Experts Criticize Turkey's Proposed Constitutional Amendment."

Lastly, as noted before, the bill allows the president to rule for two consecutive five-year terms. It means that Erdoğan, in case he is elected in 2019, would be able to continue to be the head of state until 2029. Nevertheless, the opposition points out that the regulation is so open ended that it technically allows the president to remain in power for his entire lifetime. As per Article 11 of the Mini Constitution Package, if the parliament makes a call for the renewal of elections during the president's second term, the president would be able to pursue candidacy for a third time. The article provides no more information on the method that would be followed in case of recurrence. In other words, to set an example, in case that the parliament decides renewing elections in the last year of the president's third term, it seems that the president could run as candidate for a fourth time. That is, in fine print and through ambiguous provisions, the bill paves the way for lifelong presidency.<sup>549</sup>

A reinforced presidency to be formed through the proposed constitutional amendments has generated discussions on the principle of separation of powers as well. It is claimed by the opposition that the president would hold full executive powers along with a significantly weakened legislative branch, and a partial judiciary. In terms of the legislature, through the bill, the parliament is thought to be strengthened in the number of seats, to 600 members from 550. However, because the president is allowed to maintain his/her links to his political party under the proposal, in case a party leader is elected as president, the parliament would inevitably be under his/her influence. Additionally, in parallel with retaining ties with the party, the presidential and parliamentary elections would be held on the same day. The opposition opines that it would also pose a problem because if the president enters the election as a party leader and leads his/her party to victory, the

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<sup>549</sup> Ataklı, "Erdoğan'a Ömür Boyu Başkanlık Yolu."

deputies that belong to the ruling party would stay loyal to the president, mainly because they had been handpicked by the president, the party leader, as deputy candidates, just before the elections, and thereby, there would be no effective legislative supervision over the president.<sup>550</sup> Even though the bill introduces criminal liability for the president, it does not ensure an efficient system of checks and balances in practice. This is because although the parliament would be granted the power to impeach the president, it is subject to a pretty laborious procedure. Furthermore, the president could be prosecuted for the crimes he/she has committed during his term of office—regardless of whether it is an actual crime outside the execution of the office or a crime within the legal execution of the duties of the office—according to this procedure even after his tenure ran out. Also, the parliament’s authorities to call for a vote of confidence would be abolished and to set up inquiry commissions would be hampered. In other words, by courtesy of the “lifetime legal shield”<sup>551</sup> what the opposition calls, the president is granted a protection against criminal and civil prosecution or litigation both during and following his term in office. Moreover, besides the presidential decrees that contradict with the legislative power belonging only to the parliament, the president would also have the authority to veto. More specifically, unless a proposed bill that the president returns to the parliament receives a two-third majority of votes, the president could, once again, use his/her veto power to block the legislation. Therefore, this specific presidential authority would effectively turn the parliament into a weak or even a non-functional organ as the opposition claims. Lastly, as outlined above, regarding the executive and legislative branches’ reciprocal ability to dissolve each other, under the proposal, the president would be able to dissolve the

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<sup>550</sup> Sevinç, *Türkiye’nin Anayasa İmtihanı*, 111-113.

<sup>551</sup> Toprak, *Çare Başkanlık Mı?*, 24.

parliament any time he/she likes, but the Assembly could decide to renew the elections only with a three-fifth majority of its total members.<sup>552</sup> Considering the lists of members of parliament are determined mostly by the party leaders due to the political structure in Turkey, the forenamed reciprocal ability of the executive and legislature is seen as a “political suicide of deputies”<sup>553</sup> because in case the parliamentarians applies their authority to renew the elections, they also end their political careers. For the very reason, even this risk would be sufficient to keep the deputies at bay. In consequence, the opposition argues that there is no way that the parliament could be significant on any matter after these changes.

In respect of the debates regarding the judiciary, although both AKP and MHP assert that the amendments emphasize the impartiality of the judiciary by clearly expressing “independent and impartial judiciary”<sup>554</sup> in the Reform Package, the opposition severely denies it, claiming that the proposed system “would finish judicial integrity and sovereignty.”<sup>555</sup> This is because according to the proposed member selection system for the Council of Judges and Prosecutors, half of its members would be appointed by the president, while the parliament would appoint the other half. Thus, there would be the risk of an administrative tutelage over the judiciary, established by the president and the parliament, which would likely be dominated by the president’s party group.

Because the president has significant authorities, it is often claimed by the opposition that the risk of turning into a dictatorship is relatively high in presidential systems.<sup>556</sup> As indicated before, in practice, the presidentialism has been successfully

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<sup>552</sup> *Turkey Law No.6771 Amending the Constitution*, Art.12.

<sup>553</sup> Toprak, *Çare Başkanlık Mı?*, 28.

<sup>554</sup> *Turkey Law No.6771 Amending the Constitution*, Art.1.

<sup>555</sup> Köylü, “Law Experts Criticize Turkey’s Proposed Constitutional Amendment.”

<sup>556</sup> Kuzu, *Her Yönü ile Başkanlık Sistemi*, 14.  
Gözler, *Anayasa Hukukuna Giriş*, 97-98.

performed only in the US whereas in other countries, it has been observed that the system has paved the way for autocratic rules. Referring to a research about the continuity of democracy from 1959 to 1989, the opposition points out that among twenty-five countries, there are only four cases—Colombia, Costa Rica, United States, and Venezuela—which are governed under presidency, and managed to retain a democratic regime uninterruptedly for thirty years.<sup>557</sup> In a similar vein, in another research examining fifty-three countries that practiced democratic regime for at least one year between the years of 1973 and 1989, it is observed that 18% of the countries governed under parliamentary system and 40% of the countries governed under the presidency have experienced military intervention at least once.<sup>558</sup> In the same research, 61% of the countries under parliamentarism could sustain their democratic regimes for at least ten years, whereas the ratio is 20% in the countries under the presidential system.<sup>559</sup> These researches conclude that the only underlying reason of the coups is not the system of government, and the cultural and socio-economic structure of a country is a more important determinant for providing the stability in democracy. However, taking all these empirical data into consideration, the opposition asserts that the parliamentary system seems more successful than the presidential system in terms of the sustainability of the democratic regime. Moreover, it is emphasized there is no country among developed parliamentary democracies heading toward the presidential system. Quoting references to some Sub-Saharan African countries such as Malawi, Ghana and Zimbabwe, the opposition points out the countries having experienced this shift ended up in dictatorial administrations where an empire of fear has been established, and the

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<sup>557</sup> Eighteen countries under parliamentarian system, two countries—France and Finland—under semi presidentialism, and one country, Switzerland, has its own unique system. See Mainwaring, “Presidentialism, Multiparty Systems, and Democracy: The Difficult Equation,” 8.

<sup>558</sup> Stephan, “Presidentialism and Parliamentarism in Comparative Perspective,” 125.

<sup>559</sup> Stephan, “Presidentialism and Parliamentarism in Comparative Perspective,” 124.

opposition in those countries has been silenced through jailing or murders during that reign of terror.<sup>560</sup>

The proposed executive presidential system is named as a “constitutional dictatorship” by the main opposition party CHP’s leader Kemal Kılıçdaroğlu who summed up the opposition’s concerns about the Constitutional Reform Package:

If it is enacted, we would create a dictatorship with the new constitution. We would create a dictator who touches everything and cannot be touched. Second, Turkey would be pulled away from a democratic regime and would be directed toward an authoritarian regime. Third, no citizen would have the security of property, life or the rule of law; everything would be delivered into the hands of a dictator. Fourth, there would be no power to supervise the administration; tyranny would prevail. Fifth, a person would become the government, the parliament, and the court; the legislative, executive and judiciary would be convened in one hand. Sixth, an unauthorized, incapable and symbolic parliament would emerge. Seventh, we would bury the Parliament in a grave and consign democracy to history.<sup>561</sup>

As mentioned many times, given the fact that the presidency could truly function only in the United States by courtesy of its own distinctive conditions, the opposition defends that no one can guarantee that Turkey will not diverge to an authoritarian rule in case of its transition into the party-affiliated Turkish-style presidency. This is because the experience of the presidential system is unfamiliar to Turkey, and to its deep-seated political culture and institutions arising from its agelong parliamentary experience since the Ottoman constitutional period. For this reason, it is suggested that Turkey is supposed to benefit from this experience and choose to ameliorate the halting points of its current parliamentary system instead of abandoning it.<sup>562</sup>

Last but not least, regarding the referendum held on April 16, 2017, the opposition claims that Erdoğan played the referendum card not to confer with the

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<sup>560</sup> Erem, “Parlamente Sistemden Başkanlık Sistemine Geçen Ülkeler Neler Yaşadı?”

<sup>561</sup> “Gov’t-led Charter Changes Bring Constitutional Dictatorship: CHP.”

<sup>562</sup> Topukçu, *The Processes and the Principles of Constitutional Design in Turkey*, 16.



public, but to legitimize his individual ambition to install his one-man rule. In this vein, the April voting is called “plebiscite” rather than “referendum” by the opponents of the presidency on the grounds that while voting, Turkish people were obliged to vote yes or no without being able to change the proposed draft, and therefore, there was no decision-making, but a mere voting for already-made decisions.<sup>563</sup> Furthermore, the political campaign before the voting was dominated by the active participation of President Erdoğan and the AKP government to shape the public opinion in line with their requests.<sup>564</sup> Due to these reasons, the opposition claims the April voting to be unfree and undemocratic, and it thusly harmed the popular sovereignty. As such, it is asserted that the shift towards a presidential system starting from April 2017 will likely engender a “plebiscitarian dictatorship”, in which Erdoğan got legitimacy for his all-powerful presidency based on the majority votes he received.<sup>565</sup>

#### 7.3.2.5 Regime change

As referred to earlier, in the current Constitution of 1982, there is already a tendency to empower the executive branch to the disadvantage of the legislature. As one of the actors of the executive besides the council of ministers, the powers and duties of the president of the Republic are mainly enumerated in Article 104. Through other various provisions, the Constitution entrusts the president many duties on important matters such as appointing the prime minister and accepting his/her resignation<sup>566</sup>; deciding to renew parliamentary elections for the Grand National Assembly<sup>567</sup>;

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<sup>563</sup> Batur, *99 Soruda Neden ve Nasıl Çağdaş Bir Anayasa*, 65.

<sup>564</sup> Fabre, *Principes républicains de droit constitutionnel*, 233.

<sup>565</sup> Belge, “Hükümet ve ‘Tek Adam’.”

<sup>566</sup> *Constitution of the Republic of Turkey (1982)*, Art.109.

<sup>567</sup> *Constitution of the Republic of Turkey (1982)*, Art.116.

appointing fourteen out of the seventeen members of the Constitutional Court<sup>568</sup>; submitting a constitutional amendment to a referendum<sup>569</sup>; applying for annulment action regarding the unconstitutionality of laws, decrees and procedural rules of the assembly directly to the Constitutional Court<sup>570</sup>; and appointing a number of high judges, the members of the Council of Higher Education, presidents of universities, the members of the State Supervisory Council<sup>571</sup>, and the like. Nevertheless, as a rule, the president is unaccountable, as his/her authorities are largely symbolic and ceremonial. A good part of his powers derives not from his title of the head of the executive branch, but because he is the head of state.<sup>572</sup> Moreover, the president may use his power to dissolve the parliament not at his sole discretion, but only in exceptional cases<sup>573</sup>; and in a state of emergency, he is not the single authority to make decisions, as he must share this authority with the council of ministers.<sup>574</sup> Additionally, the president is so unauthorized that while the cabinet as a whole is accountable to the parliament, and each of its ministers is individually accountable to the prime minister, there is no provision implying the accountability of the council of ministers to the president of the Republic. Lastly, the Constitution does not bestow much role on the president in terms of foreign relations and security policies.

Consequently, in consideration of all the authorities and limitations that the Constitution of 1982 brings, it can be deduced that Turkey has a “weakened parliamentarism”<sup>575</sup> that signifies a parliamentary system with a more active president of the Republic compared with classical parliamentarism, as the president is endowed with powers that are considerably beyond the role of the head of state in

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<sup>568</sup> *Constitution of the Republic of Turkey (1982)*, Art.146(3).

<sup>569</sup> *Constitution of the Republic of Turkey (1982)*, Art.175(5).

<sup>570</sup> *Constitution of the Republic of Turkey (1982)*, Art.150(1).

<sup>571</sup> *Constitution of the Republic of Turkey (1982)*, Art.140(2)(b) and (c).

<sup>572</sup> Özbudun, *Türk Anayasa Hukuku*, 357.

<sup>573</sup> *Constitution of the Republic of Turkey (1982)*, Art.116(2).

<sup>574</sup> *Constitution of the Republic of Turkey (1982)*, Art.120.

<sup>575</sup> Özbudun, *Türk Anayasa Hukuku*, 358.

classical parliamentary regime. Nevertheless, as previously stated, with the amendments to the Constitution of 1982 that were made in 2007, the president of the Republic started to be elected by a popular vote, and thereby, the government system moved towards a semi-presidential system, to some extent. Still, it took until 2014 for the president of the Republic to become the main actor of the system when Recep Tayyip Erdoğan was publicly elected for the post, and initiated the drive for constitutional change to a presidential system at full throttle.

“We will release our new constitution within the framework of building the ‘New Turkey’,”<sup>576</sup> said President Erdoğan, emphasizing that amending the Constitution in favor of presidential system would create a “new Turkey”. Claiming that Erdoğan considered himself as “the re-founder of the Turkish Republic or as the founder of a new, decidedly different republic than the one that its first President Kemal Atatürk had envisioned,”<sup>577</sup> CHP lashed out at his statement, arguing that Erdoğan’s intention was to change the first four irrevocable provisions of the existing Constitution, which clearly express that “the State of Turkey is a Republic”<sup>578</sup> and “the Republic of Turkey is a democratic, secular and social state governed by the rule of law.”<sup>579</sup> Expressing its determination to “fight against this charter which would demolish the Republic,”<sup>580</sup> CHP thus avowed they would “not get involved in a debate on the regime or allow any discussions on the founding principles,”<sup>581</sup> and they precluded any negotiations on a shift to a presidential system. Indeed, CHP often states that it is ready to fix the failures of the existing democratic parliamentary system, and to purge coup traces from the Constitution. However, they regard the

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<sup>576</sup> Sarioğlu, “New Turkish Constitution Talks Collapse.”

<sup>577</sup> Kaya, “Without Constitutional Amendment.”

<sup>578</sup> *Constitution of the Republic of Turkey (1982)*, Art.1.

<sup>579</sup> *Constitution of the Republic of Turkey (1982)*, Art.2

<sup>580</sup> “Charter Draft Discussions Commences with Transparency Debates.”

<sup>581</sup> Sarioğlu, “New Turkish Constitution Talks Collapse.”

ruling AKP's efforts as not a simple system change, but rather a regime change that would eradicate the country's "140-year parliamentary system tradition"<sup>582</sup>:

A regime is by definition 'the way a state is governed.' It is a country's administrative system. There are halting points that can be fixed. But today, it is proposed to change the whole system in favor of one person... If you move away from an impartial president of the Republic towards a presidential system that allows the president to keep his/her ties to a political party, you would be changing the regime, not the system.<sup>583</sup>

The main opposition party argues that the planned shift towards a presidential system is not a US-style presidential system where the president cannot influence the legislature, and the judiciary is fully independent. The opposite way round, it is proposed to create a post of president of the Republic of Turkey who is fully authorized on the bureaucracy, and can directly influence both his party and the assembly. In other words, it is considered that Turkey would take its course towards unity of powers. Highlighting its mediatory role, the opposition asserts that the post of the president of the Republic in a parliamentary system is impartial and is responsible to arbitrate in case of a disharmony between the branches of the government. Nevertheless, with the proposed bill, this impartiality would be demolished by retaining party membership. To sum up, in the light of these, CHP states that it is not a mere system change, but a regime change, as the ruling party is trying to reshape the relationship between the executive and the legislature.

Apart from that, it is often discussed the intended transition into the party-affiliated Turkish-style presidency would bring along significant changes appertaining to the present political party system in the country by leading to a two-party legislative branch similar to the US, and therefore the destruction of minor

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<sup>582</sup> "Turkey to Submit Erdogan Powers Bill to Parliament."

<sup>583</sup> "Kılıçdaroğlu: Yapılan Bir Rejim Değişikliğidir Sistem Değil."

"Yapılan Bir Rejim Değişikliğidir."

Kaçar and Turan, "Kılıçdaroğlu: Darbe ile Mücadeleye Evet, Karşı Darbeye Hayır."

parties including HDP and MHP.<sup>584</sup> As evidence, the fine adjustment made to Article 150 of the current Constitution of 1982 concluding the application for annulment action to the Constitutional Court has been cited. According to the new regulation, the expression of “parliamentary groups of the ruling party or parties and of the main opposition party and Turkish Grand National Assembly” was replaced with “two political party groups possessing the highest number of members in the Turkish Grand National Assembly.”<sup>585</sup> Although the ruling side has made statements favoring this issue, and purported that two-party system might assure a more stable democracy than the existing multi-party system in Turkey, the opposition argues that it would erode democracy.<sup>586</sup>

#### 7.3.2.6 Instability and frequent coalition governments in presidential system

The existing parliamentary system is often considered by the proponents of a presidential system as prone to crises and deadlocks, and thereby, it is consistently accused by President Erdoğan and the AKP of bringing about instability to Turkey with its frequent coalition governments.<sup>587</sup> However, according to the opposition, governmental instability, inefficacy, and impasse are not intrinsic to a parliamentary government, as in many countries, parliamentary governments work efficiently with single-party governments or reasonably harmonious coalition governments as it is the case in some Western democracies such as Germany, Iceland, Netherlands, Denmark, Sweden, and Liechtenstein, which are socially and economically highly developed.<sup>588</sup> Turkey as well has had stable and effective single-party governments

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<sup>584</sup> Toker, “‘İki Partili Sistem’ ve MHP.”

<sup>585</sup> *Turkey Law No.6771 Amending the Constitution*, Art.16/B(24).

<sup>586</sup> “Siyasette ‘İki Partili Sistem’ Tartışması.”

“Burhan Kuzu Açıkladı: Başkanlıkta İki Parti Olacak... MHP, AKP’ye Mi Katılıyor?”

<sup>587</sup> Özbudun, *Presidentialism vs. Parliamentarism in Turkey*, 4.

<sup>588</sup> Toprak, *Çare Başkanlık Mı?*, 70-72.

between 1965-71, 1983-1991, and since 2002.<sup>589</sup> Nevertheless, the debates on making amendments to the current Constitution on behalf of a transition to a presidential system has escalated recently in Turkey that, for some, has been experiencing one of its most stable periods in terms of politics because the same party, AKP, has been in power for three terms, and the same person, Recep Tayyip Erdoğan, who served as prime minister is now the president of the Republic.<sup>590</sup>

The presidential system of government is a system, which is pretty toilsome to install and perform properly. It does not incorporate any mechanisms to avoid deadlocks that the parliamentary system contains such as the vote of censure and the authority to dissolve the parliament. If the presidential system is established democratically, it may often lead to deadlocks. Due to the rigid separation of powers, each decision to be made is subject to the mechanism of checks and balances, and in case the presidency and the legislative majority are controlled by opposing parties, it may cause impasses, which cannot be solved by any means in presidential system because of the fixed term of office. On the other hand, if the presidential system is installed undemocratically without any checks and balances mechanism, it may generate an all-powerful president, and eventually authoritarian regimes and instability, which have been the exact case in some countries in Africa, Central Asia, and Latin America.<sup>591</sup> With significant authorities bestowed upon the president such as dissolving the parliament and issuing decrees without any checks and balances mechanism, the proposed Constitutional Package in Turkey is considered to bring along an undemocratic presidential system in which an authoritarian regime with an

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<sup>589</sup> Özbudun, *Presidentialism vs. Parliamentarism in Turkey*, 4.

<sup>590</sup> Türk, *Nasıl Bir Anayasa Değişikliği?*, 421.

<sup>591</sup> Toprak, *Çare Başkanlık Mı?*, 65.

all-powerful president would emerge, and the polarization and the instability in the country would climb up.<sup>592</sup>

Moreover, contrary to what is believed, the opposition points out that coalition governments are rather frequent in presidential democracies. According to a research analyzing the parliamentary, semi-presidential and presidential systems between the years of 1946 and 2002, 40% of this time period witnessed coalition governments in the countries that are governed under the presidency.<sup>593</sup> Sixty-nine of 123 executives (equivalent to 56%) that established in eight South American presidential systems between 1958 and 1995 had coalition governments.<sup>594</sup> These rates have been scaling up in the recent times. According to another statistic, over the past twenty years in South America, 76% of this time period experienced coalition governments.<sup>595</sup> In Brasil, for instance, there have been nineteen coalition governments between 1988 and 2010, and the average lifetime of each was about one year.<sup>596</sup> Besides, the phenomenon of minority government, in which no party command a majority of seats in the parliament, appears more common in presidential systems compared to parliamentary ones as the results show. 51% of presidential systems experience minority governments, while the ratio is 49% in parliamentary cases.<sup>597</sup> This pattern is noteworthy because the presence of minority government may easily lead to the formation of coalition governments, just as the mentioned study reveals that 62% of the presidential systems with minority governments have coalition governments.<sup>598</sup>

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<sup>592</sup> Kuzu, *Her Yönü ile Başkanlık Sistemi*, 162.

<sup>593</sup> Cheibub, *Presidentialism, Parliamentarism and Democracy*, 68-69.

<sup>594</sup> These countries are Argentina, Bolivia, Brasil, Chile, Ecuador, Peru, Uruguay, and Venezuela. See Chasquetti, "Multipartidismo y Coaliciones en América Latina: Evaluando la Difícil Combinación," 358-359.

<sup>595</sup> Toprak, *Çare Başkanlık Mı?*, 69.

<sup>596</sup> Toprak, *Çare Başkanlık Mı?*, 69.

<sup>597</sup> Cheibub, *Presidentialism, Parliamentarism and Democracy*, 68-69.

<sup>598</sup> Cheibub, *Presidentialism, Parliamentarism and Democracy*, 68-69.

Furthermore, the opposition implies that the number of effective political parties, being in line for the election victory is another factor that gives rise to coalition governments.<sup>599</sup> With a low election threshold, a great amount of political parties can get into parliament, and thereby as the number of active parties increases, the possibility of forming a coalition government rises correspondingly. Therefore, the main condition that leads to the emergence of coalitions is not the form of government, but the ideological polarization, the lack of political compromise culture, and many odds-on favorite political parties.

To conclude, the opposition renders that not the parliamentary system, but the polarized social structure and the political sphere with a weak culture of compromise are responsible for the political instabilities, and therefore crises and deadlocks.<sup>600</sup> For this reason, it is seen as an unrealistic approach to allege that these knotty problems can be overcome by a mere change of system of government.

Additionally, the opposition underlines that governmental stability and political stability do not have the same meaning because political stability is a more comprehensive concept, envisaging the sustainability of the political system in a determined and stable manner. Thus, in a country where the government is stable, it is possible to fail in providing the political stability. In this sense, the years of 1950-60s in Turkey are given as an instance by the opposition for a stable government with an instable political atmosphere.<sup>601</sup> It is also highlighted that providing a stable democracy depends on the country's socio-cultural structure rather than its system of government. According to the opposition, countries such as the United Kingdom, Germany and Italy set good examples for applying parliamentary government and provide stability at the same time by courtesy of their highly-developed democracy

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<sup>599</sup> Kanadoğlu et al., *Türkiye'de Başkanlık Sistemi Tartışmaları*, 105.

<sup>600</sup> Kanadoğlu et al., *Türkiye'de Başkanlık Sistemi Tartışmaları*, 89-90.

<sup>601</sup> Tunç and Yavuz, "Avantaj ve Dezavantajlarıyla Başkanlık Sistemi," 15.



culture.<sup>602</sup> That is to say, if there is a deep-rooted democracy culture in a country, the preferred system of government will not have a significant effect on the stability of democracy.

#### 7.3.2.7 Economic underdevelopment in presidential system

While Erdoğan and AKP argue that the proposed presidential system will bring along an economic development with stable and long-term economic plans by assuring stability in Turkey, the opposition defends that a transition into the system of presidency does not end up a developed economy in any case. Adducing seven African countries—Burundi, Ghana, Malawi, Niger, Sierra Leona, Sudan and Zimbabwe—who have shifted from a parliamentary system towards a presidency, it is underlined that these countries governed under a presidential system are nine times poorer than Turkey having parliamentarism.<sup>603</sup> In the same vein, Mozambic, Sierra Leona, Guinea, Burundi, Eritrea and the Central African Republic governed under the presidential system, and Mali, Burkina Faso, Chad and Nigeria having semi-presidentialism are cited as the last ten countries in the Human Development Index<sup>604</sup> with intent to certify that the system of presidency does not assure economic development for certain.<sup>605</sup> Having per capita income of approximately from 323 to 724 US dollars, even the richest one among these countries is nearly ten times poorer than Turkey.<sup>606</sup> Additionally, it is also a striking point referred by the opposition that among developed democratic countries, there is no country that has shifted from a parliamentary system towards presidency.

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<sup>602</sup> Tunç and Yavuz, “Avantaj ve Dezavantajlarıyla Başkanlık Sistemi,” 27.

<sup>603</sup> Toprak, *Çare Başkanlık Mı?*, 132.

<sup>604</sup> Being published by the United Nations Development Programme, the Human Development Index is a statistic, which ranks countries according to life expectancy, education, and per capita income indicators.

<sup>605</sup> United Nations Development Programme, *Human Development Report 2016*, 200-201.

<sup>606</sup> United Nations Development Programme, *Human Development Report 2016*, 198-201.

When examining the OECD countries, which are classified as the most developed countries in the world in terms of democracy and per capita income, only four countries out of thirty-five—the United States, South Korea, Chile and Mexico—have a presidential system of government. The average of their per capita income is 26,439 US dollars, whereas the average of the other thirty-one countries is 38,97 US dollars.<sup>607</sup> Based on this, even among the most developed and the richest countries, the ones governed under presidency appear relatively poorer. In the light of all these, the opposition concludes that the presidential system does not develop the economy decisively.

Besides all these data, the opposition also underlines the current uncertainty in the political landscape may bring forth an economic recession in Turkey who has been already dealing with a declining economy, diminishing investments, highly volatile exchange rates, consistently increasing unemployment, and its non-autonomous Central Bank being frequently exposed to political pressure recently. This is because in a system with a president holding too much power, quick and unilateral decisions may be made without thoroughly calculating and taking other economic actors' opinions, and the possibility of making a mistake regarding the economy is thence way higher compared to a system that has a negotiation environment surrounded by checks and balances mechanism. Furthermore, the highly tense relationship with the European Union is another matter disquieting the opposition side. Although it is a well-known fact that Turkey's EU full membership is not realistic in the immediate future, the opposition is in favor of continuing the membership process actively for the sake of Turkish economy as well as democracy and state of law. This is because Europe is the biggest investment and trade partner

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<sup>607</sup> OECD, *OECD Factbook 2015-2016*, 31.

of Turkey, as during the past fifteen years, 75% of the foreign capital investments made in Turkey came from Europe, and nearly half of the Turkish trade is conducted with European countries.<sup>608</sup> As such, sources of finance and credit are also provided from Europe, as the big infrastructure projects carried out under the AKP government such as bridges, hospitals, airports, power plants and so on have been largely funded by European sources.<sup>609</sup> Nonetheless, this close relationship has been deteriorated recently because of the proposed Turkish-style presidency. Having already expressed their disapproval, the EU countries assert that with the designed change, Turkey is drifting away from the principles of the rule of law and legal protection, and fundamental rights and freedoms.<sup>610</sup>

As mentioned before, the Constitutional Reform Package received enough votes in the Assembly and it went to the referendum on April 16, 2017 in which the public, as the key actor in determining the country's political system, voted 'yes' for a shift from the current parliamentary system towards a Turkish-style presidential system. In the polls appertaining to this issue, it had been observed that almost three quarters of the public thinks Turkey needs a new constitution.<sup>611</sup> The most enthusiastic group is among the AKP voters with 84.8% supporting a possible constitutional change. They are followed by HDP voters with 74.5%, MHP with 71.1%, and lastly CHP with 56.7%.<sup>612</sup> Nevertheless, when it comes to amending the Constitution in favor of a presidential system, the rates and preferences differ. Surveys conducted until July 15, 2016 showed that the majority of the public had not approved of the proposed presidential model while also accepting that an elected

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<sup>608</sup> European Commission, *European Union, Trade in Goods with Turkey*, 8.

<sup>609</sup> Toprak, *Çare Başkanlık Mı?*, 227-228.

<sup>610</sup> Coşkun and Tattersall, "Turkey Shifts to Presidential System."

<sup>611</sup> The opinion poll was conducted by the Turkish Andy-Ar Social Research Center with 1516 participants in November 15-17 in twenty-six cities.

<sup>612</sup> "Dört Vatandaşın Üçü 'Yeni Anayasa Gerekli' Diyor."

president of the Republic and a prime minister would likely to cause dual legitimacy.<sup>613</sup> However, this attitude drastically changed following the failed coup attempt in July 2016 that raised trust and sympathy towards Erdoğan, while triggering the idea that a more effective fight against terrorism and undemocratic interventions could be possible with the proposed system change. A survey conducted in November 2016 presented that since June 2016, the yes vote rose from 37.4% to 45.7% while the no vote declined from 42.5% to 41.6%, and the share of undecided dropped from 20.1% to 12.7%.<sup>614</sup> In short, the support for Erdoğan's executive presidency gradually grew, and recent opinion polls before the referendum largely showed that Erdoğan would get enough 'yes' votes to secure a victory from the referendum. Indeed, the April referendum ended up in victory of the 'yes' side with the ratio of 51,4%, while 'no' votes stalled at 48,6%. According to the results, almost all AKP voters—nine out of ten—who voted for AKP in the general election of November 2015 said “yes” whereas the contribution of MHP voters to 'yes' votes seems lower than expected with the ratio of 5%, equivalent to one-third of the total MHP voters.<sup>615</sup> Regarding the 'no' votes, the naysayers are predominantly CHP voters—43% of the 'no' votes came from CHP voters—while 60% of MHP voters and 93% of HDP voters seem to have voted 'no' as well as small number of AKP voters.<sup>616</sup> In other words, the 'yes' bloc is more defined whereas the 'no' bloc is more heterogenous containing different political views. Another significant outcome is the 'no' votes mostly surpassed 'yes' in big cities like Istanbul and Ankara of which AKP metropolitan municipalities have been in charge for years. In terms of the motivation for their choices, 44.8% of the 'yes' voters chose to say “yes” since

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<sup>613</sup> Özer, “Son Anket Sonuçları: Müzakereye ‘Evet’, Başkanlığa ‘Hayır’.”

<sup>614</sup> “‘Başkanlık’ İçin Seçmen Ne Diyor.”

Peker, “Turkey’s Recep Tayyip Erdoğan Seeks to Consolidate Power.”

<sup>615</sup> KONDA, *Nisan’17 Barometresi*, 50.

<sup>616</sup> KONDA, *Nisan’17 Barometresi*, 5.

Erdoğan favored presidency, while 55.2% alleged that the parliamentary system did not fit Turkey. 69.1% among those opposing the proposed presidential system asserted that a parliamentary system was more applicable for Turkey, while 39.9% expressed that they were not against a system change, but Erdoğan's probable presidency. Moreover, 42.3% of those surveyed remarked that they were informed of the proposed presidential system, while 31.5% said they had a limited knowledge, and 19.6% had no idea at all.<sup>617</sup>

What is pretty remarkable in the poll results is although the constitutional amendment in question is about introducing a presidential system to Turkey, the public has identified the issue of presidency with President Erdoğan. In other words, a major part of the voters thinks about Erdoğan's position while making up their minds on the issue, as if they have forgotten (or have not fully understood) that it is essentially a process of changing the existing political system through a constitutional amendment. This being the case, the support for a presidential system grew in parallel with the rise of Erdoğan's popularity. Especially, in the wake of the failed putsch in July 2016, lots of people who are not AKP voters, also accepted Erdoğan's leadership in face of threats that the country had been facing. Therefore, the referendum had been also considered as a referendum on Erdoğan's rule. According to many, after passing the Assembly, the amendments were approved in the April referendum owing to Erdoğan's popularity ranging from 50% to 55%.<sup>618</sup> It should also be kept in mind that, since 2002, Erdoğan has won all nine elections and both referendums that he participated in. On the other hand, the sweeping crackdown

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<sup>617</sup> “‘Başkanlık’ İçin Seçmen Ne Diyor”.

<sup>618</sup> Peker, “Turkey Faces Crossroads over Constitution.”

following the failed coup attempt constituted another important factor for this widespread support, as the voices of dissidents had been silenced one by one.<sup>619</sup>

To sum up, today, Turkey is going through a critical period, as it has been discussing the proposed constitutional amendments to concentrate power in the presidential office at a time when the nation is extremely polarized, especially about whether President Erdoğan is a force for stability or chaos.<sup>620</sup> Acting as both the president of the Republic of Turkey and the chairperson of the ruling AKP at the same time, Erdoğan established his de facto presidency starting from 2014, and asked AKP to fix this mismatch by exchanging his currently ceremonial authorities with executive powers through an amendment to the current Constitution of 1982. Described as a “breathtaking departure from European values,”<sup>621</sup> the eighteen-article Constitutional Reform Package will take Turkey away from its current parliamentary system and introduce an executive presidency. As the opposition avers, the concentration of power in the hands of the president proposed by the bill is considered as a move aiming to

pool power in one person at a dangerous level and pave the way for an authoritarian regime... This text gives one person the state's whole executive power, some legislative powers through decrees and judicial powers- through appointments.<sup>622</sup>

In spite of its all shortcomings, the opposition is against renouncing the century-old parliamentary system, and it calls for a probable shift towards a presidential system a “sacrifice to the ambitions of one person.”<sup>623</sup> In any case, it is admitted by both proponents and opponents that arbitrariness will be created through the proposed Reform Package, however it is not at all clear how this arbitrary status

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<sup>619</sup> Srivastava, “Erdoğan Bent on Greater Powers as Turkey Grapples with Challenges.”

<sup>620</sup> Peker, “Turkey Faces Crossroads over Constitution.”

<sup>621</sup> Coşkun and Tattersall, “Turkey Shifts to Presidential System.”

<sup>622</sup> Uras, “Erdoğan’s AK Party Submits Bill to Empower Presidency.”

<sup>623</sup> Gürses and Coşkun, “Turkey’s Ruling Party Is Pushing for a Stronger Presidency.”

will be handled. The ruling AKP argues that it would lead to a more democratic regime while the opposition expects the exact opposite. Lastly, with its approval in the referendum, it is discussed that the controversial bill would threaten to further exacerbate existing political and social cleavages.

#### 7.4 Conclusion

Turkey has always had a parliamentary system with powerful prime ministers as the head of government, and symbolic presidents of the Republic as the head of state. However, the constitutional amendments made in 2007 changed the power balances in the political sphere by allowing the president of the Republic to be elected by a public vote. From that day forward, the post of president of the Republic ceased to be ceremonial, and the government system moved towards a semi-presidential system, to some extent.<sup>624</sup> The issue of dual legitimacy between popularly elected president of the Republic and powerful prime minister sparked heated debates, and Recep Tayyip Erdoğan initiated the drive for constitutional change to a presidential system at full throttle as soon as he got publicly elected for the post of president of the Republic in 2014. Making the president of the Republic the main actor of the Turkish political system, President Erdoğan asked the ruling AKP to amend the current Constitution of 1982 to put his de facto executive powers into a legal framework by introducing a presidential system. Blaming the existing parliamentary system for engendering the failed coalition governments of the past, and the deadlock in government affairs they have caused due to frequent policy changes and severe power struggles, President Erdoğan and AKP promote a powerful presidential system, which is claimed to ensure the country's much-needed political and

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<sup>624</sup> Özbudun, *Presidentialism vs. Parliamentarism in Turkey*, 2.

economic stability, as well as a much bigger role in the world arena under a strong leadership along with a more democratic and accountable representation. For this reason, the Constitutional Amendment Package composed of eighteen articles was brought forward by AKP in late 2016 to introduce the party-affiliated Turkish-style presidential system. The proposed changes stirred serious controversies from the very beginning because of the radical changes to Turkey's governance such as creating the post of president with extensive authorities as both the head of state and the head of executive branch, and abolishing the post of prime minister and thereby the council of ministers. Being a far cry from the American-style presidential system, the designed Turkish-style executive presidency is harshly criticized by the opposition for posing a grave threat for the principle of democracy and separation of powers by bestowing sweeping powers on the president while overriding the legislature and the judiciary without envisaging any checks and balances mechanism. According to the opposition, it is a dictatorship project uniquely designed for Erdoğan to concentrate all the state's powers in his hands, and paves the way for his lifelong presidency through ambiguous regulations.<sup>625</sup> Also, it is underlined that a presidential system cannot assure governmental stability and a strong economy, as coalition governments and underdeveloped economies can be witnessed frequently under presidency as well. While these discussions kept going, owing to the abrupt collaboration with MHP following the failed coup attempt in July 2016, AKP could constitute the necessary majority in the Assembly to take the proposal to the referendum that was held on April 16, 2017 in which the 'yes' bloc won 51,4% of the total votes.

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<sup>625</sup> "Gov't-led Charter Changes Bring Constitutional Dictatorship: CHP." Ataklı, "Erdoğan'a Ömür Boyu Başkanlık Yolu."



## CHAPTER 8

### A COMPARISON OF THE DEBATES ON CHANGING THE PRESIDENCY IN SOUTH KOREA AND TURKEY

In this thesis, a general knowledge about the concept of constitution and its significance; the constitutional histories of both South Korea and Turkey; the characteristics of their present constitutions; and the current debates on constitutional amendment about the presidency in both countries were presented thus far. Based on this background provided, this chapter aims to make an analysis of the ongoing constitutional debates appertaining to the presidential system in both South Korea and Turkey within the scope of their similarities and divergences, elaborating their motivations, discourses and processes of constitution amending more particularly.

#### 8.1 Current debates on the presidency: Similarities and divergences

As previously explained, having failed to cope with unceasing coalition governments during the 70s, Turkey witnessed another coup in 1980. Preserving the parliamentary republic, the current Constitution of the Republic of Turkey was established in 1982 under martial law with the purpose of consolidating the state authority and strengthening the executive branch. Believing that a powerful president of the Republic was the key for providing the much-needed political stability, the Constitution of 1982 tended to increase the powers of the president to the disadvantage of the legislative branch.<sup>626</sup> Thus, the president was entrusted with authority in various important matters such as the appointment and resignation of the prime minister, the early renewal of parliamentary elections, the appointment of the

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<sup>626</sup> Özbudun, *Türk Anayasa Hukuku*, 63.

Constitutional Court judges, and so on. Still, the remaining presidential authorities were designed to be largely symbolic and ceremonial, whereas the prime minister and the cabinet were the main policy makers and executors. Besides, even though its first version prescribed that the president of the Republic would be elected from among the parliament members by votes of the Grand National Assembly for a single seven-year term, the Constitution underwent some changes in 2007 to allow the president to be elected by popular vote for a five-year term, with the possibility of being elected up to two terms. This amendment stirred up the problem of dual legitimacy, as both the president and the prime minister are publicly elected. It also induced a vagueness regarding the system of government because it was seen that the characteristics of the parliamentary system were fading away, while a shift towards semi-presidentialism was going ahead.<sup>627</sup> Besides these, the Constitutional Court was designed as the most significant body with respect to the checks and balances mechanism on the president. Impeachment of the president was also possible on the proposal of the parliament and by the decision of the Constitutional Court in its capacity to act as the Supreme Court, in case of high treason.

The present-day Constitution of the Republic of Korea, on the other hand, came in 1987 with a relatively weaker president compared with the earlier constitutions. Maintaining the presidential republic and the principle of separation of powers, the new constitution provided a greater balance between the three branches of government than its antecedents.<sup>628</sup> It reinstated presidential elections by direct popular vote while limiting the presidential term to a single, five-year tenure. The presidential powers were remarkably reduced to the advantage of the legislature and the cabinet. Presidential powers were restricted while the parliament was empowered

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<sup>627</sup> Özbudun, *Presidentialism vs. Parliamentarism in Turkey*, 2.

<sup>628</sup> Yoon, "Constitutional Amendment in Korea," 10.

with the authority to provide adequate checks and balances to the presidency. Nonetheless, the pattern of a strong president still continues, whereas the prime minister has a relatively weak and ineffective role in the political sphere, because functioning as the president's assistant, the prime minister is tied to the president's direction and supervision.<sup>629</sup> Furthermore, compared to Turkey, the fully independent Constitutional Court was established relatively late—twenty-six years later than Turkey—as the biggest assurance to protect fundamental rights and to effectively check on executive actions.<sup>630</sup> As is the case with Turkey, another constraint on the presidential power was the possibility of impeachment that would be applied by the Assembly and by the Constitutional Court in its capacity as the Supreme Court, in case of violation of the Constitution, insurrection or treason.

Although debates on a constitutional amendment recently increased in both countries, they have actually never dropped off of politicians' radar. Today, as well, the topic of revising the existing constitutions is pretty popular, as diverse groups such as political parties, the people, and the NGOs are aligned with the understanding that the current constitutions are outdated, and thus, they need to be amended to keep pace with the rapid developments of the present day.<sup>631</sup> What the two countries have in common in their political sphere is that the authority of the president has been one of the core issues of these debates, however, what should be changed has always constituted an unresolvable disagreement. Nowadays, in a state of chaos, both Turkey and South Korea are discussing the issue of constitutional amendments appertaining to the presidency. Turkey has been going through hard times both at home and abroad in the midst of widespread terrorism, tensions with the EU, an economic downturn, and a highly polarized society with the de facto

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<sup>629</sup> Roh, "Crafting Constitutional Democracy," 192-193.

<sup>630</sup> Lim, "Rule of Law in Korea," 12.

<sup>631</sup> Lee, "Many Would Alter Constitution - If They Could."

concentration of power in the presidential office as the first item on its agenda.<sup>632</sup>

South Korea, on the other hand, found itself in the middle of a political crisis in late 2016 following the Choi-gate scandal, which ended in former President Park Geun-hye's impeachment, and snap presidential election in early May. With its newly elected President Moon, the country has been disputing over a probable revision to the existing presidential system, which is likely to happen in the near future.

In South Korea, although all political parties admitted that the present 1987 Constitution does not reflect today's conditions and offer their support to revise it, the opposition refused taking part in any discussions on the matter. It was because they approached former President Park's proposal for amending the Constitution with suspicion, as they thought she was trying to distract from the ongoing political scandals.<sup>633</sup> In a similar vein, in Turkey, all parties agreed on the need for a constitutional reform, yet the opposition did not backed a transition from the existing parliamentary system to a presidential system, at first. Citing that there were more urgent issues to be amended in the Constitution, the opposition parties had not compromised with the ruling AKP on granting vast authorities to the president. Nevertheless, the failed coup attempt in July 2016 changed the political atmosphere in the country to some extent, as it created an abrupt coalition between AKP and MHP on the push for a presidential system, whereas other two opposition parties, CHP and HDP, took a firm stand against it.

No matter what the essential motivation is, considering the main topics of the debates, it seems that South Korea tends towards a more democratic presidential system. As it has been mentioned earlier, the major complications of the South Korean presidency are seen as the imperial presidency, the single five-year

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<sup>632</sup> Toprak, *Çare Başkanlık Mı?*, 7.

<sup>633</sup> Bae, "Park Calls for Constitutional Revision."

presidential tenure, the lame duck syndrome, and the issue of divided government, which weakens political efficiency, reduces presidential accountability and creates political instability. More than any other topic, the post of presidency is criticized for establishing an imperial presidency by exercising too much power, and causing an unaccountable executive branch that leads to irresponsible and unstable politics. Therefore, dissolving these imperial authorities, and thereby reinforcing the principle of separation of powers are regarded as the number one priority for the probable revision to the Constitution. To that end, transition into a double-term, four-year American-style presidency is the most preferred option where a strict separation between branches of governments enables a more efficient check on the president.<sup>634</sup> With the same design of checking the president, another favorable proposal is the transition into a power-sharing model such as a semi-presidential or parliamentary system where the legislature and judiciary are furnished with more powers and responsibilities to the disadvantage of the president.<sup>635</sup> Based on this, while the current debates on a constitutional amendment in South Korea perpetually focus on the issue of presidency, they try to design a more democratic regime of government where there exists a more democratic separation of powers between the branches of government, and a president with diminished powers is thus more efficiently checked and balanced by the legislature and the judiciary.

Turkey, on the other hand, is often criticized by the opposition for heading for a dictatorship where the president shapes and controls all branches of government without any mechanism for checks and balances.<sup>636</sup> The country is nowadays discussing the idea of abandoning its constitutional parliamentary system to introduce a party-affiliated Turkish-style presidency, which has met with widespread

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<sup>634</sup> Park and Kim, "South Korea's Park Proposes Multiple-Term Presidency."

<sup>635</sup> Lee, "Many Would Alter Constitution - If They Could."

<sup>636</sup> "Gov't-led Charter Changes Bring Constitutional Dictatorship: CHP."

reactions, right from the start. Leaving the largely symbolic role of the president of the Republic, the proposed amendment to the existing Constitution designates to grant sweeping authorities to the president while almost infinitely weakening the parliament and the judiciary.<sup>637</sup> As stated previously, allowing the president to retain ties to his political party, the proposed changes are regarded to cause an arbitrary regime that may pose a grave threat for democracy, and erode the principle of separation of powers. The long and short of it, Turkey put the presidency in the center of its constitutional debates, but unlike South Korea, it seems the country does not tend towards a more democratic regime, but a presidential regime where all powers are concentrated in the presidential office without a practical mechanism for checks and balances while incapacitating the legislature and the judiciary. The emerging system is frequently referred to as an “obvious form of unity of powers”<sup>638</sup> in which all powers would be concentrated in the hands of a party-affiliated, partial in other saying, president who can hold office for his entire lifetime through ambiguous regulations.

Strikingly, the party-affiliated presidency at the core of the ongoing debates in Turkey has various similarities with the Yushin Constitution of 1972 of South Korea. Firstly, in terms of their preparation process, before the preparation of the Yushin Constitution, South Korea had a divided government that was threatening President Park Chung-hee’s status. Similarly, the current debates on the presidency in Turkey gathered momentum when the opposition, HDP more specifically, gained strength in the parliament following the June 2015 parliamentary election, and distressed both President Erdoğan and the ruling AKP. Feeling threatened, President Park applied martial law to suppress dissents to easily implement his desired changes

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<sup>637</sup> Köylü, “Law Experts Criticize Turkey’s Proposed Constitutional Amendment.”

<sup>638</sup> Gözler, *Elveda Anayasa*, 89.

back in 1972, while President Erdoğan declared a state of emergency with the same intention following the failed putsch of July 2016, and thereby accelerated the process of preparing the bill to be proposed. Before having promulgated the Yushin Constitution, President Park dissolved the Assembly to clear his way so that he could put the bill to a referendum without any open debate. In a similar manner, the Constitutional Amendment Package of 2016 of Turkey was written by a limited number of people in AKP, as it completely left out the two biggest opposition parties CHP, and HDP. As such, the proposed bill was put to the referendum in April 16, 2017 without any decent open debate both in the parliament and within the society under the state of emergency. Like the Yushin Constitution, AKP's proposal is also to strengthen the presidential authority by endowing him vast, almost unlimited powers overriding all the three branches of government. Weakening the independence of the branches, both constitutions designate a president who would have the authority to dissolve the legislature, to shape the judiciary branch, and to take extraordinary steps that could suspend constitutional provisions without being subjected to a checks and balances. Both Park and Erdoğan used the discourse of national security as a means to gain public support, and to legitimize the process while limiting democratic freedoms, giving the president almost dictatorial powers, and clearing the way for their lifelong presidency. As stated previously, the Yushin Constitution was introduced as Korean-style democracy, but indeed, it was mostly considered as a mere dictatorship.<sup>639</sup> Today, the proposed system in Turkey is termed as Turkish-style presidency, which is also regarded by a considerably large percentage of the population, as a blatant form of authoritarianism.<sup>640</sup> Nonetheless, the Yushin period under President Park is often considered Janus-faced, as while

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<sup>639</sup> Eckert, *Korea: Old and New History*, 359.

<sup>640</sup> Gürses and Coşkun, "Turkey's AKP Forms Plans for Stronger Presidency."

legitimizing the authoritarian government, it also carried out development reforms to transform the country into a self-sufficient economic power based on the heavy industry.<sup>641</sup> Still, in the Turkish case, the one and only goal of the constitutional amendment seems to create an all-powerful president without promoting such a solid reform policy or making a new economic promise.

Apart from all these, comparing the proposed Turkish-style presidential system with the existing presidency in South Korea, remarkable parallelisms between two systems attract the attention. First of all, both systems designate a president who maintains links with his/her party. According to the intended party-affiliated presidential system in Turkey, the president will be the head of the executive branch of the government and the chairperson of his/her party at the same time, while the South Korean president, in case of his/her election, ceases to be the chairman of his/her party, but sustains his party membership. Still, due to the strict-disciplined inner party structure, the South Korean president cannot keep his distance with the legislature thoroughly, and often meddles in party affairs and members although he/she ceases to take part in the party administration. Therefore, a genuine impartiality of the president is out of the question in both countries. Besides, both presidents have emergency executive powers that allow them to solely issue decrees without legislature's convocation in certain circumstances.<sup>642</sup> Moreover, in both systems, there are weak legislatures, which can be easily controlled in case the presidential party has the majority in the assembly. Also, the required procedures for the impeachment of the president are similar in both countries, as both their processes begin with a motion for the impeachment that shall be proposed by a simple majority of the total members of the National Assembly, and approved by a

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<sup>641</sup> Lee, *Developmental Dictatorship and the Park Chung-Hee Era*, vii.

<sup>642</sup> *Constitution of the Republic of Korea (1982)*, Art.76.  
*Turkey Law No.6771 Amending the Constitution*, Art.12.



two-thirds majority of the total members of the Assembly at the last stage to put the president on trial in the Supreme Court. Nevertheless, along with these similarities, there are significant distinctions between the two given systems. Firstly, there exist various efficient check mechanisms on the president in South Korea like the council of ministers as the second actor of the executive, whereas the proposed presidential system in Turkey abolishes the post of prime minister and thereby the cabinet. Furthermore, the South Korean president is limited to a five-year term without reelection, when in fact the Turkish-style presidency technically paves the way for the president's lifetime administration. Moreover, while the South Korean system grants the president no power to dissolve the parliament, the Turkish president will be able to renew the parliamentary elections at will. Also, there exists a relatively independent judiciary in South Korea when compared to the Turkish judiciary, which can be brought under the president's control through the non-merit based judiciary appointments of the president.

In terms of the discourses being applied while prompting the constitutional revision about the presidency, both countries have a similar pattern. In both South Korea and Turkey, economy, national security, political stability, and effectiveness and significance in the world arena are the most frequently used arguments to legitimize the desired changes to the Constitutions. In the South Korean case, while calling for constitutional amendment about presidency, former President Park Geun-hye based her arguments on the points of making long-term and sound policies, and providing their continuity and stability.<sup>643</sup> Setting forth the economy as one of her strongest references, Park asserted that the new system that would come along the new constitution would boost South Korea into the ranks of advanced countries, and

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<sup>643</sup> Park and Kim, "South Korea's Park Proposes Multiple-Term Presidency."

make the country become a leader in world economy through long-term, stable business initiatives.<sup>644</sup> The issue of national security is another favorite discourse of hers, as she indicated a probable constitutional change regarding the presidency would help South Korea in terms of pressurizing North Korea with consistent policies.<sup>645</sup> Additionally, the issue of a divided government has also often been put forward as a source of political instability and ineffectiveness, and it has been argued that the friction it causes between the legislative and executive branches can be overcome by a strong presidency. President Erdoğan and his side, on the other hand, have been prompting the idea of Turkey's need for a strong leader for the sake of national security, economic growth and political stability. A strong leadership accompanied by a probable transition into the presidential system is regarded as the remedy for the disorganization and deadlock in government affairs arising from coalition governments from which Turkey has suffered for many years.<sup>646</sup> Failed coalitions led the country to political turbulence and economic downfalls while frequent policy changes and power struggles have imbued the politicians with the perception of Turkey's need for a strong leadership. In this sense, today, Erdoğan's favorite discourse is the need for a powerful president for the sake of political stability to avoid the fragile coalition governments of the past, and thereby, to pursue more solid and stable policies. Furthermore, it is often purported that today's dual democratic legitimacy rooted in the direct popular election of both the president and the legislature may give rise to further political instability, and the concept of a powerful president should therefore be supported. It is also claimed that Turkey would have a more efficient political and economic system by virtue of a strong

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<sup>644</sup> Bae, "Park Calls for Constitutional Revision."

<sup>645</sup> Jung, "President Park Geun-hye Mentioned Necessity of Constitutional Amendment."

<sup>646</sup> Gümrükçü and Gürses, "Turkey's AK Party Pushes to Expand Presidential Power."

president, and thus, attain a bigger role in the world arena.<sup>647</sup> Moreover, the issue of national security has been addressed since the very beginning of the debates regarding the constitutional revision, but it gathered pace especially in the wake of the July 2016 failed coup attempt. As such, it has become the number one argument for MHP to support the ruling AKP's presidency proposal.

As it is depicted before, both South Korea and Turkey have made laborious journeys until they established their current constitutions, yet it is important to note that excluding the 1987 Constitution of the ROK, none of these changes to constitutions reflected popular demands. Rather, they served the dominant political power's own interests. This is because, historically, in both countries, whenever the ruling power wanted to change the political rules to its advantage, the existing constitution was amended concordantly. However, this pattern is still continuing, as the debates in South Korea have been seen as a tool to divert attention from former President Park Geun-hye and the ongoing political scandals she had been involved in, whereas in the Turkish case, the current discussions have been exacerbated by President Erdoğan and AKP to change the system of government from parliamentary system to presidency in their favor.

Since its establishment in 1948, South Korea has been witnessing strong executives and weak legislatures where the assembly had been used as a rubber stamp to realize all-powerful presidents' own political ambitions.<sup>648</sup> In this manner, the previous constitutions could be revised with ease in compliance with the presidents' wishes. Even though the Constitution of 1987 trimmed the executive powers considerably, the president still had vast powers, and was able to keep steering the political sphere by controlling both the executive and legislative

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<sup>647</sup> Presidency of the Republic of Turkey, *We Are Changing Our System of Government for Our People's Future*.

<sup>648</sup> Yoon, "New Developments in Korean Constitutionalism," 404.

branches thanks to the numerical strength of his/her party in the parliament that enabled him to easily push his policies forward at his will. Former President Park Geun-hye, too, benefited from this opportunity when she shut her ears to other demands coming from the public and some other political actors such as politicians, scholars, NGOs and so forth. The supporters for the constitutional amendment addressed that neither the presidency nor the security policies towards North Korea are the main problems of the country, but they emphasized the need for a constitutional revision by prioritizing the points of improvement of the quality of lives and the distribution of power to achieve a better social and economic justice.<sup>649</sup> According to their claims, “progress in political democracy that was acquired following 1987 had failed to spill over to socioeconomic democracy, and instead, wealth and privilege have concentrated in the few upper echelons of society.”<sup>650</sup> This being the main demand of the supporters, it is considered this imbalance and injustice the present system causes in both social and economical terms will transform the South Korean society into a hierarchical one that would greatly jeopardize the democracy and peace in the country.<sup>651</sup>

To make the current democracy more stable and sustainable, the new amendment needs to focus on social justice such as economic democracy and social rights... One of most dangerous factors in Korean society is the polarization of the poor and the rich. Without fair distribution of welfare, Korean democracy will suffer the risks of dictatorship as seen in Nazi Germany.<sup>652</sup>

Another core problem of the South Korean system is seen as regionalism that engenders uneven regional development and unequal distribution of income along with region-based political cleavages, which have a high impact upon South Korean

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<sup>649</sup> Cho, “After 70 Years of Turbulent Transition.”

<sup>650</sup> Cho, “After 70 Years of Turbulent Transition.”

<sup>651</sup> Park, Hōnbōp T’ansaengŭi Chōngch’isa (Political History and Birth of Korean Constitution), 414.

<sup>652</sup> Power, “Does the Constitution Need Changing?”

politics and voting behavior.<sup>653</sup> Instead of developing any solid and encompassing political agenda, the politicians tend to offer political programs for their respective hometowns and thereby ignore the other regions during and following their election campaigns. In this way, South Korean people's voting behavior takes shape according to regionalism, and this pattern continues as a vicious circle. For this reason, many Koreans believe that regionalism is the main obstacle on the way to political development, and it needs to be eliminated with the utmost urgency in compliance with the principles of democracy, equality, and meritocracy. Besides the probable regulations to be made in the Constitution to overcome the issue of regionalism, "combined with cronyism, nepotism, factionalism, and corruption,"<sup>654</sup> it is remarked that South Korean people play a big role in bringing harmony between the regions, and achieving a more democratic political environment, because they as voters need to focus on policies and the quality of the politicians rather than their regional factors.

Additionally, without a revision regarding the judicial authority, it seems impossible to generate an effective constitutional amendment. As outlined earlier, the judiciary is the most important assurance of the principles of the separation of powers and the rule of law as one of the three branches of government by checking the other state powers, and protecting the citizens' fundamental rights and freedoms. However, it is a frequently encountered claim that the separation of powers doctrine has gradually become meaningless in South Korea on the grounds that the political power has concentrated on the executive branch because the president is mostly the leader of majority party, and can therefore control both the executive and the parliament. For this reason, the hierarchical and undemocratic inner structure of

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<sup>653</sup> Ha, "Impact of Democratization on Regionalism in Korea," 109.

<sup>654</sup> Huer, "Curse of Korea's Regionalism."

political parties throws the representative democracy into crisis, as the decision making process depends on the party leader's (mostly the president's) already-made decisions rather than the congressmen's own will.<sup>655</sup> In these premises, the active role of the judicial branch has become more needed in the country to check the execution of power by the executive. Nevertheless, South Korean people often complain about the passive judiciary that has consistently abstained from checking the legality of government activities and legislative processes with respect to the constitution due to the judges' personal worries in terms of their positions.<sup>656</sup> Therefore, they have a little faith in the judicial branch and its decisions. To gain public trust, it is a must to install a strong, active and unbiased judiciary that will inspect, evaluate, and judge all government officials regardless of position if necessary. With the intent of invigorating the South Korean Constitutional Court, it is suggested to secure the pluralism of the constitutional judges by opening its doors for a wide participation of scholars, human rights activists, and so forth.<sup>657</sup> Moreover, because the president has the authority to exercise emergency powers, it is also proposed to bring some regulations such as proactive consultation and post clearance examination in an attempt to empower the Constitutional Court in face of the president.<sup>658</sup>

Nevertheless, former President Park Geun-hye disregarded all these public demands at first and halted the debates on the idea of amending the constitution on the grounds that it would cause an economic black hole. However, the circumstances began changing when her Saenuri Party lost its majority in the parliament in the

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<sup>655</sup> Lim, "Problems and Reform Measures in Korean Constitutional Democracy in the 21st Century," 350.

<sup>656</sup> Lee et al., "Chŏngch'igaehyŏkkwa Hŏnbŏpkaejŏng" (Political Reform and Constitutional Amendment), 95.

<sup>657</sup> Sung, "Hŏnbŏpkaejŏnggwa Kwŏllyŏkkujo" (Revision of Constitution and Political Institutions), 144.

<sup>658</sup> Sung, "Hŏnbŏpkaejŏnggwa Kwŏllyŏkkujo" (Revision of Constitution and Political Institutions), 144.

April 2016 election, and the Choi-gate scandal broke out later on. Abruptly, Park started calling the Assembly to revise the 1987 Constitution, indicating that the existing presidential tenure was inadequate for making solid, long-term policies, and it needed to be changed into a five-year, two-term system for the sake of the country's future. In this way, on the strength of her dominant role in the policy space, leaving people's will aside once again, Park kindled the debates on constitutional amendment not regarding the issue of regionalism, the socioeconomic justice or the powerful judicial branch, but the presidency in order to avail herself by distracting the politicians and public from the spreading scandal.

In Turkey, on the other hand, all four constitutions—the Constitutions of 1921, 1924, 1961, and 1982—were either drafted under extraordinary circumstances or by authoritarian regimes, and therefore, they reflected the ruling political power's interests rather than the public's needs. Being made to order for the military junta in 1982, the current Constitution has always been a hot issue that has often been addressed for amendment by many circles including political parties, think tanks, business organizations, NGOs and so on. Among the matters in question, above all, obliteration of military traces has been regarded as the number one priority of a possible constitutional change. In this sense, the proposed bill takes a positive step in terms of establishing a civil constitution by abolishing military high courts, and thereby removing their members from the Constitutional Court. Being criticized for its inadequacy in meeting the country's needs and challenges, the present-day Constitution of 1982 has been predominantly regarded ideological and authoritarian by putting the interests of the state over the individual's, and thus, constituting an hindrance to achieving greater democracy.<sup>659</sup> For this reason, at the center of public

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<sup>659</sup> Barkey and Kadioğlu, "The Turkish Constitution and the Kurdish Question."

demands, there has been enhancing of individual rights and freedoms while removing the traces of the military tutelage.

Another much discussed issue has been the status of the Kurdish people in the Constitution, as the Turkish Kurds have consistently argued that the existing Constitution does not allow them to become “full-fledged citizens of the Republic”<sup>660</sup> due to its undemocratic and alienating nature that defines citizenship based on Turkish ethnicity, and bans education in their mother tongue Kurdish.<sup>661</sup> The description of the citizenship in the Constitution has often been in the eye of the storm for highlighting the ethnicity and religion, and thereby creating a standard type of citizen who was Turkish and Muslim.<sup>662</sup> In this way, in order to reflect Turkey’s multicultural and multinational character, instead of the term “Turkish”, it has been offered to use “people of the Republic of Turkey” or “citizens of the Republic of Turkey” as it was the case in the Constitution of 1921. Apart from this, the Turkish Kurds have also demanded to moderate the state’s centralized character, and to bestow larger authorities to local administrations.

Moreover, not a part of the Constitution, but appertaining to the present system, the election threshold of 10% has been one of the burning questions since its introduction with the Law on Parliamentary Elections in 1983. Having the highest threshold in the world and being thus called “the world’s most unfair election system,”<sup>663</sup> the present Turkish system has been consistently criticized for posing a huge obstacle for democratic representation in the political sphere, and failing to fulfill the people’s desires. For this reason, it is suggested that the threshold of 10% needs to be reduced to a more plausible level such as 5%, as is the case in many

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<sup>660</sup> Barkey and Kadioğlu, “The Turkish Constitution and the Kurdish Question.”

<sup>661</sup> Kirişçi, “Disaggregating Turkish Citizenship and Immigration Practices,” 1.

<sup>662</sup> Taciroğlu, *Özgürlükçü Demokratik Anayasa Çalışması*, 96.

<sup>663</sup> Daan and Lyons, “The World’s Most Unfair Election System.”



European countries like Germany, Poland, Belgium, Hungary and Czechia in order to provide an election system that truly complies with the principles of fairness in representation and governmental stability.<sup>664</sup> In this way, a low election threshold would strengthen the bond between the electors and electees, and thereby serve for a more participatory and democratic constitution where all opinions can be expressed and heard. Thus, it would cement social peace and the citizens' sense of belonging while reducing unrests and polarizations. A low threshold would also bring about dynamism to the political sphere, and increase competition as well as quality.

The independence of the judicial branch has always been a hot topic in Turkey from of old, as the justices could never carry out their functions completely fairly and effectively because of the undue pressure by the executive and other political interests. As a consequence, today, the already weakened judiciary appears "ill-equipped to provide a check on excessive executive power through proper judicial review of its laws and actions."<sup>665</sup> With the aim of enshrining the principle of separation of powers, and thereby establishing judicial independence, it is propounded first and foremost to keep the Supreme Board of Judges and Prosecutors (or renamed as the Board of Judges and Prosecutors), the governing body of the judiciary, from executive influence.

Nonetheless, as is the case with South Korea, relying on his dominant role in the political sphere and his vast public support, President Erdoğan disregarded all these demands, and conducted the discussions on constitutional revision from the very beginning, not regarding the issue of removing military traces, the definition of citizenship, the high election threshold or the partial judiciary, but focusing only on

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<sup>664</sup> Toprak, *Çare Başkanlık Mı?*, 77.

<sup>665</sup> International Commission of Jurists, "Turkey: The Judicial System in Peril," 22.

the shift from the existing parliamentary system towards a Turkish-style presidency in order to establish an all-powerful leadership.

## 8.2 Conclusion

Today, both South Korea and Turkey are going through turbulent times, nevertheless, they both are discussing amending their present constitutions in terms of presidential system of government as a priority. Just as their constitutional histories, their debates appertaining to the constitutional revisions on presidency have various similarities and divergences. Firstly, the proposed Turkish-style presidential system and the Yushin Constitution of 1972 of South Korea that is largely regarded as a blatant form of Park Chung-hee's dictatorship, share significant similarities in terms of their preparation processes, objectives, and discourses. However, the intended Turkish-style presidency lacks a solid reform plan or a new economic promise as the Yushin period under President Park did. The impartiality of the president in the current South Korean system and in the proposed Turkish presidency, on the other hand, is another common controversial point in both countries due to the party membership of the president and the strict-disciplined inner party structure. Still, the distinctions between the existing systems of these two countries are also noteworthy. In terms of the checks and balances mechanism, in South Korea, there exist the council of ministers as an efficient check mechanism on the president, whereas the Turkish-style presidency abolishes the post of prime minister and the cabinet, making the president the sole actor of the executive branch. Moreover, the South Korean presidential system grants the president a five-year term without reelection whereas the Turkish-style presidential system is criticized for paving the way for lifelong presidency. Regarding the discourses applied while

steering the debates on constitutional amendment about the presidency, strong economy, national security, political stability, and effectiveness in the world arena are the most commonly used arguments in both countries to rationalize the aimed changes to the constitution. Furthermore, the ongoing debates on constitutional amendment in both countries do not reflect popular demands, but they serve the prevailing political power's self interests. In South Korea, not the presidency, but a better socioeconomic justice, the issue of regionalism, an active and unbiased judicial branch are highlighted as the main problems that are needed to be revised through a constitutional change, whereas in Turkey, the obliteration of military traces from the Constitution, the status of the Kurdish people in the Constitution, the election threshold of 10%, and an independent judiciary are pointed out as the number one priorities.

## CHAPTER 9

### CONCLUSION

Both South Korea and Turkey have made vigorous efforts until they established their current constitutions, and during their journeys to constitutionalism, the authority of the president has always been one of the core issues. Recently, both countries have found themselves right in the middle of a state of chaos. South Korea has been busy with managing a political crisis since late 2016 following the outbreak of the Choi-gate scandal that resulted in former President Park Geun-hye's impeachment in March, and the snap presidential election in May 2017. Turkey, on the other hand, has a tough time abroad and at home due to the deterioration in relations with the European Union, the widespread terrorism, an economic recession, and a highly polarized society. Still, under these conditions, the issue of constitutional revision is being discussed nowadays in both countries with a focus on the presidency.

South Korea has been recently passing through a period of uncertainty, in which all decision-making bodies were waiting for the result of the snap presidential election following former President Park Geun-hye's impeachment. This being the case, the debates on constitutional amendment that were used to be steered by the President became the first item on the agenda of the opposition who cites the Choi-gate scandal and Park's involvement in it as evidence for the need for weakening the post of president while strengthening the legislature and judiciary in return. In this way, the objectors to the president's vast powers have grasped the great opportunity to blow the lid off the inconveniences of the imperial presidency, and to push a constitutional revision in order to introduce a more democratic separation of powers between the branches of government. As South Korea regained a genuine elected

president, Moon Jae-in, short while ago, a referendum on a probable amendment to the existing Constitution of 1987 will likely to be held next year with the purpose of “limiting excessive presidential authority, empower local governments and reform the election system.”<sup>666</sup> So, even though calls for constitutional revision in terms of imperial presidency has been discussed for decades, owing to a widespread popular support enraged following the political turmoil, South Korea has never been this close to alter its Constitution in compliance with a more democratic presidential system of government where the authorities of the president will be restrained by a more powerful legislature and an efficient judiciary. Although a shift towards the parliamentary system or semi-presidentialism are also broadly discussed, rather than introducing a brand-new system with its unfamiliar institutions to the country, and thereby fully amending the present Constitution, the current presidential system, which South Koreans know well due to their long experience, will likely be maintained.<sup>667</sup> Accordingly, in order to ease the weaknesses of the current South Korean presidential system, and to provide a well-functioning checks and balances mechanism, it is suggested to decentralize the presidential power on behalf of the legislature. Meanwhile, adopting a more active post of prime minister is considered to be also useful in terms of breaking the potential deadlocks between the president and the parliament through its consensual role. Also, regarding the presidential term of office, newly elected President Moon promotes the US-style four-year, two-term presidency instead of the existing five-year, single-term presidency to “enable a long-term governance plan with accountability and stability.”<sup>668</sup>

In Turkey, on the other hand, the heatedly debated constitutional amendment regarding the transition into a presidential system passed the referendum in April

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<sup>666</sup> Choi, “Referendum on Constitutional Revision May Take Place Next Year.”

<sup>667</sup> Jeong, “Hönböpkajöng Nonüi” (The Discussion about Constitutional Amendment), 50.

<sup>668</sup> Choi, “Referendum on Constitutional Revision May Take Place Next Year.”

2017, and the country is getting ready for abandoning its present parliamentary system to adopt a party-affiliated Turkish-style presidency with the presidential and legislative elections that will be held together in 2019. This shift towards the presidential system has been supported by Erdoğan and AKP for creating a more stable and efficient government under a powerful president assuring representative and accountable democracy, whereas it is seen by the opposition as the end of democracy and the potential beginning of an authoritarian period where all state powers concentrate in one person, as well as an economic recession and alienation from the EU and its principles. Another worrisome point addressed by the opposition is the deepening polarization within the society due to the politicians' factious discourses during the referendum campaign, as the President Erdoğan besides several AKP members including Prime Minister Yıldırım and Cabinet ministers have expressed many times that saying 'no' in the referendum is what terrorists and coup plotters would do.<sup>669</sup> Therefore, the already existing social polarization in Turkey is expected to deepen much further, seriously threatening the domestic peace and the culture of living together.

#### 9.1 Presidentialism versus parliamentarism: South Korean and Turkish cases

The presidential and parliamentary systems of government have always been one of the most debated issues in the field of comparative politics. The main strengths of the presidentialism are explained as strong leadership and stable policies, rare coalition governments, decentralized decision-making mechanism in compliance with checks and balances, a more democratic representation with a publicly elected president by direct ballot, whereas the parliamentary system offers various problem-solving

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<sup>669</sup> "Erdoğan: Hayırcılarla Terör Aynı Safta!"

"Erdoğan'dan 'Hayır' Diyenlere 'Terörist'ten Sonra 'Darbeci' Sopası."

"Binali Yıldırım Bildiğiniz Gibi..."

mechanisms for political crises between the government and the legislature, and a more democratic and compromising political atmosphere by allowing the opposition for playing an active role in politics.<sup>670</sup> Remembering Linz, Riggs, Stepan and Skach's claims among the discussions predicating that parliamentary system of government is more likely to produce stable democracies than presidential one, when considered the South Korean and Turkish cases, it may be deduced that establishing democracy and sustaining it do not depend on the political system chosen, but the goodness of fit between the logic of the preferred system of government and the respective country's own socio-political culture. As outlined before, since the establishment of their republics, South Korea has been governed under a presidential system, whereas Turkey has always had a parliamentary form of government. They both experienced military coups and other undemocratic interventions one after another during the second half of the twentieth century regardless of their political systems. Based on this, what is more important than the system of government adopted in a country is perceiving the underlying logic of that political system and blending it with the country's longstanding socio-political culture for sustainability of a stable democracy.

Another claim made by Linz and Lijphard represents that parliamentary systems offer a better hope for democracy in nations with deep political or other cleavages. Again, having different systems of government, both South Korea and Turkey are nations with deep cleavages and problematic democracies. As elaborated in the previous pages, South Korea has been suffering from the issue of region-based political cleavages called regionalism for many years, which implied unbalanced regional development, unequal distribution of income and socioeconomic

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<sup>670</sup> Gözler, *Anayasa Hukukunun Genel Esasları*, 239-240 and 248-250.

infrastructure.<sup>671</sup> Turkey, on the other hand, has ethnic cleavages along with political cleavages, which are observed to grow more serious by leaps, conducting toward deep polarization within the society. Nonetheless, looking at the South Korean and Turkish cases today, it is crystal clear that South Korea being governed under presidency has been taking firmer steps toward democracy than Turkey having a parliamentary system. This is because democracy also depends on other factors than the system of government such as economic development, educational level of citizens, and free and fair elections.

In a similar vein, also Mainwaring's argument enouncing that a multiparty system and a presidential system is inimical to stable democracy cannot be backed by the South Korean and Turkish cases. Having both presidency and multiparty system, South Korea experienced military interventions and governments as from 1960s until 1980s. However, none of these ruptures arose from the presidential system's incapability of avoiding intense legislative-executive conflicts and political deadlocks. Today, there are six political parties in the South Korean parliament, and the country is closer to a democratic constitution with a well-balanced power distribution between branches of government than ever before. Therefore, it can be clearly seen that the existing multiparty system in the country does not pose a threat for a stable democracy. The opposite way round, it set favorable environment for unveiling the Choi-gate scandal and deposing former President Park, and lent impetus to the debates on amending the Constitution in a more democratic manner. In the Turkish case, on the other hand, it has been asked if the proposed presidential system will be able to sustain a stable democracy along with a multiparty system. As explained above, there are discussions about the possibility of transforming into a

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<sup>671</sup> Ha, "Impact of Democratization on Regionalism in Korea," 109.



two-party legislative branch similar to the US, and the destruction of minor parties along with the Turkish-style presidency to make the system function much better. Nevertheless, as long as the strict-disciplined inner party structure remains unchanged, reducing the number of political parties will not likely help to achieve a genuine democracy in the country. For this reason, a multiparty system does not necessarily jeopardize democracy in presidential systems while a limited number of political parties are not certainly an assurance for a stable democracy either.

The South Korean and Turkish cases can be cited for Shugart, Carey, Persson, Roland, and Tabellini's claim saying that presidential system is superior to parliamentarism regarding governmental accountability and democratic representation as a consequence of the clarity of responsibility between branches of government. In Turkey, President Erdoğan and AKP's number one argument for a shift towards presidency has been the issue of dual legitimacy in the current parliamentary system, stemming from a powerful prime minister together with a popularly elected president of the Republic. According to them, this situation may lead the country to political crises that would establish slow, unstable, and inefficient governance in which the identification of the responsible agent for worsening conditions is toilsome.<sup>672</sup> Additionally, although people vote for the deputies in the legislative elections, they cannot take part directly in the process of forming the Cabinet in the present parliamentary system in Turkey. This is because the executive is depended on the legislature to some extent, in need of the parliament's vote of confidence to take office and carry out its duty. In South Korea, on the other hand, when things did not go well by early 2015, South Korean people called former President Park Geun-hye to account for her dull performance in economy, growing

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<sup>672</sup> "Parliamentary System 'Cannot Keep Pace' with Turkey's Growth: PM Yıldırım."

unemployment, deepening socio-economic inequality, dogmatic leadership, and ineffective security policies against North Korea's escalating nuclear threats.<sup>673</sup> Having already entered an early lame-duck period, the surfacing of the Choi-gate scandal was the final straw resulting in Park's impeachment in March 2017 as a result of South Korean people's determined efforts. This being the case, it seems the South Korean presidential system functions more efficiently than the Turkish presidency by virtue of creating a more accountable politics. Furthermore, by introducing a direct election of the president by the public, and a fixed term of office without any legislative interference, the South Korean presidency establishes a more democratic political system comparing with the Turkish parliamentary system. Increasing the interaction between the government and the public, the South Korean presidential system offers a more democratic representation in which the citizens emerge as important political actors as it has been observed lately and clearly.

Within the frame of Haggard, McCubbins, and Cox's argument defending a presidential system is more likely to assure credibility of policymaking for a decisive political system and effective economy by courtesy of its strict separation of powers in comparison to parliamentary system, it can be noticed that the proponents of the presidential system in Turkey agree with this claim by describing the present parliamentary system as unreliable, as it cannot assure stable politics, solid vision, and powerful economy.<sup>674</sup> According to them, the governmental stability the presidential system would bring along by means of the concentration of executive powers only in the presidential office and the fixed term of office, would offer more stable plans in the long run, and therefore, a more solid base for Turkey to install a steadier and quicker decision making mechanism needed for a rapid and healthy

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<sup>673</sup> Choe, "Faulting Term Limit, South Korean Leader Proposes Revising Constitution."

<sup>674</sup> "Yıldırım: Bu Anayasanın Arkasında Meclis Onay Verdiginde 79 Milyon Vatan Evladı Olacaktır."

economic development. Nonetheless, it should be noted that the proposed system of government is not a model of pure US-style presidency that promotes the principle of strict separation of powers as Haggard, McCubbins, and Cox remark, but a party-affiliated Turkish-style presidency which bestows extensive powers upon the president of the Republic.

South Korean presidential system, on the other hand, which is often criticized for creating an imperial presidency, has been regarded from of old as a tool for economic success. Park Chung-hee era from 1963 to 1979 in particular is the most remarkable example for this perception by achieving industrialization and high rapid growth in a short span of time under his authoritarian leadership.<sup>675</sup> So, again not promoting a strict separation of powers, South Korea has been transformed from a poor agrarian country into a self-sufficient economic power based on the heavy industry under the leadership of all-powerful presidents by virtue of quick and solid decision making mechanism. That is to say, Haggard, McCubbins, and Cox's argument can be verified by neither the Turkish nor the South Korean case, as they both do not foster a strict separation of powers that is inherent in the pure presidential system of government.

Finally, regarding Landau's phenomenon of abusive constitutionalism, the South Korean case cannot be handled, as there is no concrete draft, but only discussions about probable amendments to the current Constitution. Still, the forthcoming revisions to be made in the Turkish Constitution may be analyzed within the context of abusive constitutionalism. The proposal of constitutional amendments is so comprehensive that even though it contains eighteen articles in total, it makes alteration on sixty-nine provisions in the present Constitution of

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<sup>675</sup> Lee, *Developmental Dictatorship and the Park Chung-Hee Era*, vii.

1982.<sup>676</sup> Bringing along democratic changes appertaining to the independence of courts and the age of candidacy, the discussions about the prospective revision focus mainly on the shift of the system of government from the existing parliamentary system to the Turkish-style party-affiliated presidency. Therefore, it is claimed by the opposition that the proposed democratic clauses are sham to cover the final cause of these revisions, which are to redesign the Board of Judges and Prosecutors and to reset the criminal liability of the politicians who have held office since 2002.<sup>677</sup> As referred many times, as a fundamental document regulating the organization of a government and the rights and freedoms of the citizens, a constitution needs to be amended for the purpose of restricting the governmental authority, protecting the citizens' rights and freedoms against the government more acutely, and in this way, making the government function more efficiently. Nevertheless, intended changes are often criticized for not seeking these goals, but only empowering Erdoğan and prolonging his term of office, and they are therefore shown as an example of abusive constitutionalism. Using the constitutional tools for amending the current Constitution of 1982, and following the required procedure step by step, it is asserted that the incumbent President Erdoğan and AKP has been trying to

engineer constitutional change so as to make themselves very difficult to dislodge and so as to defuse institutions such as courts that are intended to check their exercises as power. The resulting constitutions still look democratic from a distance and contain many elements that are no different from those found in liberal democratic constitutions. But from close up, they have been substantially reworked to undermine the democratic order... The resulting regimes continue to have elections and are not fully authoritarian, but they are significantly less democratic than they were previously.<sup>678</sup>

Consequently, each system of government has its strengths and weaknesses.

The presidential system appears with its strengths in the United States owing to the

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<sup>676</sup> Gözler, *Elveda Anayasa*, 89.

<sup>677</sup> Gözler, *Elveda Anayasa*, 91-97.

<sup>678</sup> Landau, "Abusive Constitutionalism," 191.

country's own distinctive conditions such as the efficient checks and balances mechanism between branches of government, the federal balances, the two party political system without a deep ideological chasm, the loose party discipline, the deep-rooted culture of democracy and compromise, and the lobbies, whereas its disadvantages come to the forefront in Latin America and Africa. The parliamentary system, on the other hand, can effectively function in the greater part of the EU countries by courtesy of their deep-seated culture of democracy and compromise, as well as their highly-developed economy and education system, while its weaknesses are on the front burner in some countries lacking these features such as India and Iraq.<sup>679</sup> Nowadays, South Korea discusses ameliorating the flawed parts of its existing presidential system that created an imperial presidency by bestowing extensive powers upon the president. In this sense, the US-style presidency is held up as an example for its democratic and efficient governance. Turkey, in other respects, is heading towards a Turkish-style presidency in the near future on the grounds that the existing parliamentary system creates the issue of dual legitimacy, making Turkey lose time and energy both in political and economic spheres.<sup>680</sup> This being the case, whether the weakness or the strengths of the presidential system will become prominent, would depend on both South Korea and Turkey's choices, as well as their own political, social and economic conditions.

## 9.2 Presidency in South Korea and Turkey: Towards democracy or not?

The current debates in both South Korea and Turkey on constitutional amendments regarding the presidency are steered not by the public, but mainly by the ruling political power. In South Korea, former President Park Geun-hye was the one that

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<sup>679</sup> Tunç and Yavuz, "Avantaj ve Dezavantajlarıyla Başkanlık Sistemi," 34.

<sup>680</sup> "Parliamentary System 'Cannot Keep Pace' with Turkey's Growth: PM Yıldırım."

rekindled the long-lasting debate by passionately promoting a constitutional review to be accomplished in the near future, whereas in Turkey, President Recep Tayyip Erdoğan and ruling AKP have been the driving force in the process. Historically in the Korean case, since the establishment of the Republic in 1948, the Constitution was amended nine times, but except for the last revision in 1987, none of them was a fruit of popular demands. The changes to the constitutions were mostly made to serve the strong presidents when they wanted to shape the legal and political rules in compliance with their own political ambitions. The process was relatively effortless because the majority of seats in the parliament were always formed of the president's party. Despite the diminished executive powers in the Constitution of 1987, the president is still pretty influential, as he/she is the main actor guiding the process of constitutional revision. As previously explained in detail, before being elected in the 2012 election, former President Park had raised the issue of amending the Constitution as one of her pledges in her election campaign to win public support. Calling the Constitution of 1987 outdated, Park bolstered a change into an American-style four-year, two-term presidency, besides a bicameral legislative system and more clauses to enhance fundamental rights and freedoms. Nevertheless, once she won office, she stepped back, and showed her clear opposition to the idea of constitutional amendment at every turn by emphasizing her priority of carrying out economic reforms and stern security policies instead of getting involved in such political debates that might trigger a "black hole".<sup>681</sup> By taking such a firm stance, Park stonewalled the process of a probable constitutional revision, and discouraged lawmakers from freely discussing the matter. However, she suddenly made a u-turn in the midst of 2016, and reignited the debates on revising the present 1987

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<sup>681</sup> Kang, "Park Opposes Constitutional Amendment."

Constitution. Changing her initial sharp attitude, Park asked the National Assembly to start discussions over a probable constitutional amendment that would change the presidential tenure into two four-year terms for the good of policy continuity, and establish a future-oriented constitution till early 2018. As is seen, the process of constitutional review was commenced, lent impetus, and shaped not by the people, but by the President as in the past. The timing of calling for a constitutional revision is also noteworthy, as the proposal came when former President Park's and her Saenuri Party's approval ratings plumbed the depths with the outcrop of the Choi-gate scandal in 2016 accompanied with a widespread resentment towards her ineffective economic, social and security policies. Considering all these, rather than meeting public demands, reawakening the issue of constitutional amendment seemed to intend to divert attention away the ongoing Choi-gate scandal, as well as to relieve the public distrust, and eventually to save the former President Park's already weakened leadership. Neither the popular demands such as economic democracy and fundamental rights and freedoms, nor other existing political problems such as regionalism or passive judiciary found place in Park's proposal pertaining to amending the current Constitution. Instead, her calls for constitutional revision focused only on the executive branch, and its authorities.

In a similar vein, in Turkey, none of the constitutional amendments until today was a response to public demands. The groups holding the political power in their hands have mostly bent the constitutional provisions to their advantage, and therefore, the issue of revising the constitution has been always a hot topic for the ruling parties to secure their positions.<sup>682</sup> Due to similar reasons, since its accession to power in 2002, AKP and its leaders have consistently sought a large-scale

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<sup>682</sup> Aslan, "Türkiye İçin Başkanlık Sistemi," 42.

constitutional revision to cement their authorities. As described earlier, first in 2007, then in 2010, the AKP government realized two important changes in the existing Constitution of 1982 with popular support. However, steps towards a more radical amendment have fully accelerated in 2014 when Recep Tayyip Erdoğan became Turkey's first president of the Republic to be elected by popular vote after ruling for three terms as Prime Minister. Taking strength from the public support, Erdoğan began gradually wandering away from the largely symbolic role of president, and passionately calling for further constitutional amendments for a shift towards a presidential system. He asked the ruling AKP to revise the Constitution in compliance with his de facto executive powers. The failed putsch in July 2016 stood President Erdoğan in good stead in terms of constituting a highly solid basis for garnering the legitimacy while declaring a state of emergency that allowed him to rule the country through presidential decrees. The attempted coup also boosted both public and political support he needed to speed up the process. Upon Erdoğan's request, in late 2016, AKP drafted and proposed the eighteen-article Constitutional Amendment Package in great haste to introduce the party-affiliated Turkish-style presidential system as immediate as possible. The intended changes have been in the line of fire for granting too much power to the president of the Republic, and allowing him to sweep all branches of government. Additionally, this concentration of all authorities in the hands of a single person without any checks and balances mechanism is criticized harshly for laying the way open for an arbitrary regime that may eventually end in dictatorship.<sup>683</sup> Still, the Amendment Package also includes positive steps considering democratization by abolishing military high courts and removing the Commander of the Gendarmerie Forces from the MGK. However, it

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<sup>683</sup> Kalaycıoğlu, "Başkanlık Sistemi: Türkiye'nin Diktatörlük Tehdidiyle Sınavı," 24-26.



does not change the fact that the proposed revisions center only on the governance system, and do not provide any genuine provision appertaining to the description of citizenship, the high election threshold, the biased judiciary or fundamental rights and freedoms, which appear as the main problematical points of the current Constitution. According to the opposition, shutting its ears to public demands, the ruling political power targets through the envisaged changes only to furnish the president of the Republic with excessive authorities, but nothing more. In this sense, considering its preparation process and its content, it is argued that the proposed constitutional amendments in Turkey saliently serves the ruling political power's, in other words Erdoğan's individual aspiration rather than the people's demands.<sup>684</sup> This being the case, being criticized by the opposition at every turn for intending to establish a one-man rule, the plan for a shift towards a presidential system is regarded to be uniquely designed for Erdoğan.

In the light of all these, in contrast to Professor Shugart and Haggard's argument claiming that presidential systems are more likely to make the presidents be more interested in consolidating their own authorities rather than providing public goods at the national level compared to parliamentary systems, it gives the impression that South Korea is heading for a more democratic presidential system nowadays in conformity with the public's demands. While discussing a probable amendment to the existing Constitution of 1987, more than any other subjects, the issue of imperial presidency is condemned for inducing irresponsible and unstable politics, as well as harming the principle of separation of powers and democracy in the country. To that end, dissolving these imperial powers is considered as the number one priority for the prospective revision. By this way, South Korea aims to

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<sup>684</sup> "Turkish Government Seeks Referendum on Presidential System."

achieve a system that assures a more democratic separation of powers between the branches of government to check and balance the president in a more efficient manner. As a young Republic, South Korea achieved both industrialization and democratization in a considerably short span of time. With the aim of performing high rapid growth at short notice, the concept of all-powerful presidency was accepted essential and favorable in the past. However, as an advanced country now, what South Korea needs today is not a strong president, but rational democracy with a rational constitution. With an astonishing high level in educational attainment,<sup>685</sup> South Korean people are pretty conscious about their fundamental rights and freedoms as well as their civil rights, and they often question the quality of democracy introduced by the existing Constitution, although it was a fruit of their vigorous endeavors for a more democratic and free fundamental text in the year of 1987. In this manner, thanks to their rapidly rising social awareness and politicization, following the latest political turmoil in particular, even though current debates on constitutional amendment was first sparked by the former President Park in her own favor, South Korean people seem to be capable enough to orient the process henceforth. The concepts of popular sovereignty, participatory democracy, human dignity, and rule of law took root in the society in the past years, and as a result, the ruling political power faces now a society that is resolutely calling for a shift from a mere procedural democracy to a substantive one, without accepting any imposition.

In Turkey, on the other hand, as all parties agree, a civil and democratic constitution both in the process of creation and in content is needed. Regarding its content, a new constitution should serve to solve the country's urgent issues and to

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<sup>685</sup> 45% of 25-64 year-old Korean adults, and 69% of 25-34 year-olds attained tertiary education. The OECD average for 25-64 year-old education is 35%. The share of the tertiary-educated 69% is the highest among OECD countries. See OECD, *Education at a Glance 2016: OECD Indicators – Korea*.

raise its democratic standards to a much higher level. As such, considering the process of creating it, a new constitution should be shaped in compliance with people's efforts. However, the recent debate on a shift towards a presidential system seems to be largely "artificial and inconsequential"<sup>686</sup> because it is neither one of the urgent problems, nor a fruit of the public's involvement. The intended amendment to the current Constitution of 1982 envisages an all-powerful post of president that according to the opposition, carries the risk to erode the principle of separation of powers, and menace democracy. With the design of abandoning the present parliamentary system, and introducing a party-affiliated Turkish-style presidency, it is claimed that proposed changes may generate de facto unity of powers, in which the president embodies all three branches of government without being subjected to any checks and balances mechanism. As explained previously, the system of presidency can function most effectively in countries in which democracy is rooted, balancing institutions are founded, the principle of rule of law is cherished, and political and civilian opposition are mighty. Nevertheless, it is argued that in Turkey, the system of presidency cannot work properly unless democracy becomes dully established, and the principles of rule of law and separation of powers take root. Therefore, a transition into a presidential system is considered as being prone to bring about political dysfunction with more corruption and illegalities to the country, while it may also cause a more unfavorable investment climate, lower economic growth and correspondingly lower per capita income, high inflation, insufficient social relief, and more unfair distribution of income.<sup>687</sup> Taking into account all of these, Turkey, in contrast to South Korea, seems to be under the risk of moving away from democracy by heading towards a Turkish-style presidential system, which may

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<sup>686</sup> Özbudun, *Presidentialism vs. Parliamentarism in Turkey*, 4.

<sup>687</sup> Özkan, "Başkanlık Rejimi ve Ekonomi."

be liable to transform into a dictatorial regime in case there is no genuine separation of powers between branches of government.<sup>688</sup>

A strong president in the presidential system is often considered as a peril to fundamental rights and freedoms, and therefore to a stable democracy, especially in the countries, in which there is no deep-seated culture of democracy and compromise. But in fact, a powerful executive branch is necessary to improve the citizens' socio-economic status, which is a prerequisite of fulfilling their fundamental rights and freedoms, and thereby a healthy democracy. In this respect, the solution should not be to weaken the president, but to discipline his/her executive power, and thusly to avert the potential menaces to democracy. With this design, the separation of powers doctrine needs to be performed, and the judiciary should be empowered so that it can balance the executive branch.<sup>689</sup> Already having a polarized and multipartite social structure where the political compromise culture is underdeveloped, and ideological segregations are sharp, both South Korea and Turkey need an unbiased, suprapartisan president as the best formula to balance the political power, arbitrate the political disagreements, and achieve integration between antagonisms while establishing a strong but disciplined executive branch respecting the citizens' fundamental rights and freedoms and assuring a stable democracy.

### 9.3 Time for a social contract

Taking all the discussions on the subject matter into consideration, South Korea and Turkey must primarily focus on establishing democratic and participatory constitutions for the sake of their futures. Framing the state's realm of authority, and

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<sup>688</sup> Türk, *Nasıl Bir Anayasa Değişikliği?*, 77.

<sup>689</sup> Kuzu, "Neden Başkanlık Hükümeti," 42-43.

assuring individual rights and freedoms, a democratic constitution is a social contract composed of superior provisions of law, on which all the social segments come to an agreement.<sup>690</sup> Since the constitution is the fundamental and supreme document that regulates the relationship between the state and the society, and forms a basis for the other legal rules, all individuals must be included in the process of amending the constitution. For this purpose, the necessary reconciliation must be settled first between the political parties in the parliament. Therefore, despite the highly fragmented and polarized political atmosphere, both South Korean and Turkish political parties need to leave their uncompromising attitude aside, and have to cooperate while revising their most important legal document. Furthermore, as democratic republics, both South Korea and Turkey need to admit the fact that not the prevailing political power, but the people should be the driving force in this process. To this respect, a social consensus on the prospective constitutional changes must be created by settling a free discussion platform for different political, social and economic actors. This is because, a constitution, which is not established by the participation and contribution of all the segments of society is doomed to be undemocratic, controversial, ineffective, and shortlived, as it would fail to reflect the public's demands, desires and expectations in any case.<sup>691</sup> Today, in both countries, there has been indeed only one dominant political power in the process of amending the constitution, and all institutions, rules and legal remedies are thusly conformed to this sole authority's worldview and desires. However, if the constitutional revision process ensures active, effective and free participation, discussion, and contribution of all social and political powers, the emerging constitutions will be established in a democratic manner, and all these groups' choices, requests, thoughts and remedies

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<sup>690</sup> Göze, *Siyasal Düşünceler ve Yönetimler*, 202.

<sup>691</sup> Jeong, "U-ri Sahoeüi Saeroun Yoguwa 87 Nyön Hönböbüi Mirae" (The Future of the 87 Constitution, Considered in the Light of the Present Social Requirements in South Korea), 16.

can find their ways into the fundamental document. In this way, both South Korea and Turkey could break their patterns of ever-changing, volatile constitutions, and achieve a long-lasting constitution that would be internalized by all people.

Considering their constitutions, before the presidency, it seems there are more urgent issues in both countries that need to be amended. As elaborated before, the social and economic imbalance and injustice, the issue of regionalism, and the passive judiciary are considered as the main problems of the current Constitution of 1987 of the Republic of Korea that need to be prioritized while making amendments. In the Turkish case, among the matters in question, above all, obliteration of military traces, and thereby achieving greater democracy has been regarded as the number one priority of a probable constitutional change. Besides, the description of the citizenship in the Constitution, the extremely high election threshold of 10%, and the dependent judiciary are the most controversial points that are often been pointed out for constitutional revision.

In a similar vein, both South Korea and Turkey are often in the line of fire on the grounds that they have rough edges regarding democracy, the principle of state of law, and fundamental rights and freedoms. Therefore, their essential objective today should be realizing a constitution reform that will enrich these sore points. In this way, the intended changes to the constitutions must reflect the necessities of the twenty-first century, and assure human rights and freedoms that are prescribed in the international and supranational law documents. The revised constitutions need to protect the weak from the strong, and in this sense, they should give priority to ensuring the citizens' rights and freedoms by abandoning the perception of state's superiority, and thereby restricting the state authority. In order to achieve a democratic system based on a publicly accepted constitution, the probable

amendments to the constitutions must clearly identify and assure their citizens' rights and freedoms, notably freedom of thought, freedom of expression, freedom of assembly, freedom of organization, freedom of the press, right to establish trade unions, right to collective bargaining, right to strike, and environmental rights that both countries seem to fail to satisfy.<sup>692</sup> Also, both in South Korea and Turkey, there is no transparency between the government and the citizens, whereas transparency is essential for a responsible democratic political system to check the executive power endowed by the people.<sup>693</sup> That is why, the intended constitutional amendments should also ensure an open communication and information exchange between the government and the public so that the people can keep informed about government policies and activities, and know how the power they grant is used by the authorities.

It is surely beyond doubt that frequent revision of the constitution is not good for the nation's credibility. However, overthinking about making some changes to the constitution, and thereby stalemating the process also impairs the fundamental document's validity. A constitution reflects the spirit of the age. Nevertheless, because both current South Korean and Turkish Constitutions were established in the 1980s, calls for constitutional amendment in both countries are amplifying with each passing day, demanding a modern constitution that can move with the times, and gain the consent of all segments of society. Revising the supreme law document is arduous but crucial, as it gives a nation its characteristics, and sets its future goals. To that end, in the process of constitutional amendment, a free platform of dialogue involving all political, social, economic actors needs to be established, and cooperation between them should be provided. In this sense, a shift from the

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<sup>692</sup> Jae, "Hönböpkæjönggwa Kibon'gwön" (A Study on the Revision of Constitutional Articles for Fundamental Rights), 198.

<sup>693</sup> Baek, "Chöngbosahoesö Hyöonhaenghönböbui Han'gyewahönböpkæjöngan Yön-gu" (A Study of the Amendment of Constitution related to the Information Society), 93.

majoritarian democracy towards the pluralistic democracy must be realized in every aspect in both countries in order to achieve a full-scale freedom, democracy, and state of law. The most urgent issues to be revised in the constitution must be meticulously identified by mutual consent, and the process should not be carried out in a hurry, but built on a solid basis. This is the best possible way to create a long-lived, democratic and legitimate fundamental document esteemed and interiorized by each segment of society. For this reason, the new constitutions to be made in both South Korea and Turkey should be pluralistic, protective, and respectful to political, cultural, ethnical, and religious varieties, and they need to be unifying in conformity with the universal values such as democracy, the rule of law, and human rights. Today, both South Korea and Turkey are going through a transitional period, which is dynamic and full of surprises. In which direction this process will evolve, and to what kind of outcomes it will lead, should be carefully watched and analyzed for further researches on the subject matter.



## APPENDIX A

### RELEVANT ARTICLES OF THE OTTOMAN CONSTITUTION OF 1876

Sultan, “Supreme Caliph”

Art. 3 - The Ottoman sovereignty, which includes in the person of the Sovereign the Supreme Caliphate of Islam, belongs to the eldest Prince of the House of Osman, in accordance with the rules established ab antiquo.

Art. 4 - His Majesty the Sultan, under the title of “Supreme Caliph,” is the protector of the Muslim religion. He is the sovereign and emperor of all the Ottomans.

Art. 5 - His Majesty the Sultan is irresponsible; his person is sacred.

Art. 6 - The liberty of the members of the Imperial Ottoman Dynasty, their property, real and personal, and their civil list during their lifetime, are under the guarantee of all.

Sovereign Rights of the Sultan

Art. 7 - Among the sovereign rights of His Majesty the Sultan are the following prerogatives: He makes and cancels the appointments of ministers; he confers the grades, functions and insignia of his orders, and confers investiture on the chiefs of the privileged provinces, according to forms determined by the privileges granted them; he has the coining of money; his name is pronounced in the mosques during public prayer; he concludes treaties with the powers; he declares war and makes peace; he commands both land and sea forces; he directs military movements; he carries out the provisions of the Sharia, and of the other laws; he sees to the administration of public measures; he respites or commutes sentences pronounced by the criminal courts; he summons and prorogues the General Assembly; he dissolves, if he deems it necessary, the Chamber of Deputies, provided he directs the election of the new members.

Public Rights of the Ottomans

Art. 8 - All subjects of the empire are called Ottomans, without distinction whatever faith they profess; the status of an Ottoman is acquired and lost according to conditions specified by law.

Art. 9 - Every Ottoman enjoys personal liberty on condition of non-interfering with the liberty of others.

Art. 10 - Personal liberty is wholly inviolable. No one can suffer punishment, under any pretext whatsoever, except in cases determined by law, and according to the forms prescribed by it.

Art. 11 - Islam is the state religion. But, while maintaining this principle, the state will protect the free exercise of faiths professed in the Empire, and uphold the religious privileges granted to various bodies, on condition of public order and morality not being interfered with.

Art. 15 - Education is free. Every Ottoman can attend public or private instructions on condition of conforming to the law.

Art. 17 - All Ottomans are equal in the eyes of the law. They have the same rights, and owe the same duties towards their country, without prejudice to religion.

Art. 19 - All Ottomans are admitted to public offices, according to their fitness, merit, and ability.

Art 21 - Property, real and personal, of lawful title, is guaranteed.

#### Ministers of the Crown

Art. 27 - His Majesty may appoint as Grand Vizier and Shaykh al-Islam whomsoever he confides in, and thinks right to nominate to those posts. The other ministers are appointed by imperial decree.

Art. 28 - The Council of Ministers meets under the presidency of the Grand Vizier. All weighty state affairs, whether domestic or foreign, come within the competency of the Council of Ministers. Those of their measures, which must be submitted for the approval of His Majesty, are made law by imperial decree.

#### The General Assembly

Art. 42 - The General Assembly is composed of two chambers: the Chamber of Notables or Senate, and the Chamber of Deputies.

Art 46 - All the members of the General Assembly shall take an oath of fidelity to His Majesty the Sultan and to the country, shall bind themselves to observe the Constitution, to perform the duties entrusted to them, and to abstain from all acts opposed to those duties.

Art. 53 - The initiative of bringing forward a bill or altering an existing law lies with the Ministry.

The Senate and Chamber of Deputies may also originate a new law, or the modification of an existing one, with reference to matters within their own province. In the latter case, the demand is submitted by the Grand Vizier to His Majesty the Sultan, and, if occasion requires, the Council of State is empowered by an imperial decree to prepare the proposed project of law, aided by information and details from the proper quarter.

#### Senate

Art. 60 - The President and members of the Senate are nominated directly by His Majesty the Sultan. The number of senators cannot exceed a third of the members of the Chamber of Deputies.

Art. 64 - The Senate examines the bills or budget transmitted to it by the Chamber of Deputies... Bills adopted by the Senate are invested with its approval, and are transmitted to the Grand Vizier.

The Senate examines the petitions presented to it; transmits to the Grand Vizier such as it thinks deserving of reference, accompanying them with its observations.

#### Chamber of Deputies

Art. 69 - General elections of deputies are held every four years. The commission of every deputy lasts only four years, but he is re-eligible.

Art. 71 - Every member of the Chamber of deputies represents the whole body of Ottomans, and not exclusively the circumscription which has elected him.

Art. 80 - The Chamber of deputies discusses the bills submitted to it.

It adopts, amends, or rejects the provisions affecting finance or the Constitution.

It examines in detail the general expenditure of the State comprised in the Budget, and settles the amount with the Ministers.

It likewise determines, in accord with the Ministers, the nature, amount, and mode of assessment and collection of the receipts destined to meet the expenditure.

#### The Law Courts

Art 81 - The judges nominated in conformity with the special law on this subject and furnished with the patent of investiture are irremovable, but they can resign.

The promotion of judges, their displacement, superannuation, and revocation, in case of judicial condemnation, are subject to the provisions of the same law.

That law fixes the conditions and qualities requisite for exercising the functions of judge or the other functions of a judicial order.

Art. 86 - No interference is to be attempted with the tribunals.

Art. 87 - Affairs touching the Sharia are tried by the tribunals of the Sharia. The judgment of civil affairs appertains to the civil tribunals.

#### High Court of Justice

Art. 92 - The High Court is formed of thirty members, of whom ten are Senators, ten Councilors of State, and ten chosen among the presidents and members of the Court of Cassation and Court of Appeal.

Its functions consist in trying the ministers, the president, and the members of the Court of Cassation, and all other persons accused of treason or attempts against the safety of the State.

#### Finance

Art. 96 - Taxes to the profit of the State can only be established, assessed, or collected in virtue of a law.

Art. 97 - The Budget is the law which contains the estimates of the receipts and expenses of the State. Taxes to the profit of the State are governed by that law as to their assessment, their distribution, and collection.

Art. 98 - The examination and the vote by the General Assembly of the budget bill is carried through article by article. The tabular statements to be annexed, comprising the details of the receipts and expenditure, are to be divided into sections, chapters, and articles, according to the model defined by the regulations. These tables are voted by chapters.

Art. 99 - The Bill of the budget is submitted to the Chamber of Deputies immediately after the opening of the session, in order to make its execution possible from the commencement of the year to which it applies.

#### Various Provisions

Art. 114 - Primary education will be obligatory on all Ottomans.

Art. 115 - No provision of the constitution can, under any pretext whatsoever, be suspended or neglected.

Art. 116 - In case of duly proved necessity, the Constitution may be modified in some of its provisions. This modification is subordinated to the following conditions: Every proposal of modification, whether presented by the Minister or by either of the two Chambers, must be, in the first instance, submitted to the deliberations of the Chamber of Deputies.

If the proposition is approved by two-thirds of the members of the Chamber it shall be forwarded to the Senate.

In case the Senate also adopts the proposed modification by a two-thirds majority, it shall be submitted for the sanction of His Majesty the Sultan.

If it is sanctioned by imperial decree, it shall have force of law.

Articles of the Constitution, which it is proposed to modify, remain in force, until the modification, after having been voted by the Chambers, shall have been sanctioned by imperial decree.

## APPENDIX B

### RELEVANT REVISED ARTICLES OF THE OTTOMAN CONSTITUTION OF 1876 IN 1909

Art. 3 - The Imperial Ottoman sovereignty, which carries with it the Supreme Caliphate of Islam, falls to the eldest Prince of the House of Osman, according to the rule established *ab antiquo*. On his accession the Sultan shall swear before Parliament, or if Parliament is not sitting, at its first meeting, to respect the visions of the Şeriat (canon law) and the Constitution, and to be loyal to the country and the nation.

Art. 7 - Among the sacred prerogatives of the Sultan are the following:  
The mention of his name in prayers; the minting of money; the granting of high public offices and titles, according to the law *ad hoc*; the conferring of orders; the selection and appointment of the Grand Vizier and the Şeyhülislam; the confirmation in their offices of the members of the Cabinet formed and proposed by the Grand Vizier, and, if need arise, the dismissal and replacement of Ministers according to established practice; the approval of putting into force of general laws; the drawing up of regulations concerning the workings of Government departments and the method of administering the laws; the initiative in all kinds of legislation; the maintenance and execution of the canon and civil laws; the appointment of persons to the privileged provinces according to the terms of their privileges; the command of the military and naval forces; the declaration of war and the making of peace; the reduction and remission of sentences passed by penal Courts; the granting of a general amnesty with the approval of Parliament; the opening and closing of the parliamentary sessions; the summoning of Parliament before its time in extraordinary circumstances; the dissolution of the Chamber of Deputies if necessary, with the consent of the Senate, on condition that elections take place and the Chamber assembles within three months; and the conclusion of Treaties in general. Only, the consent of Parliament is required for the conclusion of Treaties which concern peace, commerce, the abandonment or annexation of territory, or the fundamental or personal rights of Ottoman subjects, or which involve expenditure on the part of the State. In case of a change of Cabinet while Parliament is not sitting, the responsibility arising out of the change rests upon the new Cabinet.

Art. 27 - Just as His Imperial Majesty the Sultan entrusts the posts of Grand Vizier and Şeyhülislam to men in whom he has confidence, so the other Ministers, who are approved and proposed by the Grand Vizier entrusted with the formation of the Cabinet, are confirmed in their offices by imperial decree.

Art. 28 - The Council of Ministers shall meet under the presidency of the Grand Vizier. It shall deal with affairs of importance, both home and foreign. Such of its decisions as need the imperial assent shall be put into force by imperial decree.

Art. 30 - Ministers shall be responsible to the Chamber of Deputies collectively for the general policy of the Government and personally for the affairs of their respective departments. Decisions which need the imperial sanction shall only become valid if signed by the Grand Vizier and the Minister concerned, who thus accept responsibility, and countersigned by the Sultan. Decisions arrived at by the Council of Ministers shall bear the signatures of all the Ministers, and in cases where the imperial assent is necessary, these signatures shall be headed by that of His Imperial Majesty the Sultan.

Art. 44 - If need arises His Imperial Majesty the Sultan may open Parliament before the specified time, either on his own initiative or on application from an absolute majority of the members. He may also prolong the session either in virtue of a decision of Parliament or on his own initiative.

Art. 54 - Bills become law after being examined and accepted by the Chamber of Deputies and the senate, and sanctioned by imperial decree. Bills submitted for the imperial sanction must either receive that sanction within two months or be returned for re-examination. If a bill sent back to be discussed again is to be accepted, it must be voted by a two-thirds majority. Bills, which are voted urgent, must either be sanctioned or be returned within ten days.

Art. 120 - Ottomans enjoy the right of assembly, on the condition that they obey the law on the subject.

The societies are forbidden which aim at injuring the territorial integrity of the Ottoman Empire, changing the form of the Constitution or of the government, acting contrary to the provisions of the Constitution, or bringing about a separation between the various Ottoman elements, or which are contrary to public morals.

The formation of secret societies in general is also forbidden.

## APPENDIX C

### THE TURKISH CONSTITUTION OF 1921

Art. 1 - Sovereignty is vested in the nation without condition. Governmental system is based on the principle of self-determination and government by people.

Art. 2 - Executive power and legislative responsibility is exercised by and concentrated in the hands of the Grand National Assembly which is the sole and real representative of the nation.

Art. 3 - The Turkish State is governed by the Grand National Assembly and its government is titled as “the Government of Grand National Assembly.”

Art. 4 - The Grand National Assembly is composed of members who are elected by people of the provinces.

Art. 5 - Elections to the Grand National Assembly are held every two year. Duration of membership is limited to two years but reelection of a member is possible. The former assembly remains in office until the new assembly convenes. When holding a new election seemed to be impossible legislative period can be extended only one year. Each member of the Grand National Assembly is not only representative of the province by which s/he is elected but of the whole nation.

Art. 6 - General Assembly of the Grand National Assembly convenes of its own accord on the first day of November.

Art. 7 - The basic rights of the application of the ordinances of the sacred law; the promulgation, amendment, and abrogation of all laws; the concluding of treaties and peace; the promulgation of the defence of the fatherland (i.e., the declaration of war) belong to the Grand National Assembly. The preparation of laws and regulations will be guided by juridical and religious provisions, which best conform to the *modus operandi* of the people and the needs of the times, as well as established customs. The functions and responsibilities of the Council of Ministers shall be fixed by a special law.

Art. 8 - The government of the Grand National Assembly exercises the executive function through ministers who were elected according to its special law. The Grand National Assembly directs the ministers on executive affairs and changes them when necessary.

Art. 9 - The Head of the Grand National Assembly who was elected by the General Assembly is the head of the GNA for one electoral period. With this status, he is

entitled to sign on behalf of the Assembly and to approve the decisions of the Council of Ministers. The Council of Ministers elects one member from among themselves as the head of the Council of Ministers. However, the Head of the GNA is natural head of the Council of Ministers.



APPENDIX D

SIGNIFICANT AMENDMENTS MADE IN 1923

TO THE CONSTITUTION OF 1921

Art. 1 - Sovereignty is vested in the nation without condition. Governmental system is based on the principle of self-determination and government by people. The form of government of the Turkish State is a Republic.

Art. 2 - The religion of the Turkish State is Islam; the official language is Turkish.

Art. 4 - The Turkish State is governed by the Grand National Assembly. The Assembly exercises the executive function through ministers.

Art. 10 - The President of the Republic of Turkey is elected by the Assembly from among its members for a period equivalent to that of the parliamentary term. The President exercises his functions until the election of a new President of the Republic. He is eligible for re-election.

Art. 11 - The President of the Republic of Turkey is the head of the State. In this capacity, he presides over the Assembly and the Council of Commissioners in case of necessity.

Art. 12 - The President of the Council [of Commissioners] is designated by the President of the Republic from among the deputies. The other commissioners [members of the Cabinet] are likewise chosen from among the deputies by the President of the Council, who, after obtaining the approval of the President of the Republic, presents the list of the members of the Council to the Grand National Assembly.

## APPENDIX E

### RELEVANT ARTICLES OF THE TURKISH CONSTITUTION OF 1924

#### Section I Fundamental Provisions

Art. 1 - The Turkish State is a Republic.

Art. 2 - The religion of the Turkish State is Islam; the official language is Turkish; the seat of government is Ankara.

Art. 3 - Sovereignty belongs without restriction to the nation.

Art. 4 - The Grand National Assembly of Turkey is the sole lawful representative of the nation, and exercises sovereignty in the name of the nation.

Art. 5 - The legislative and executive powers are vested and centered in the Grand National Assembly which concentrates these two powers in itself.

Art. 6 - The Grand National Assembly of Turkey exercises the legislative power directly.

Art. 7 - The Assembly exercises the executive power through the intermediary of the President of the Republic, whom it elects, and through a Cabinet chosen by him. The Assembly controls the acts of the government and may at any time withdraw power from it.

Art. 8 - The judicial power is exercised in the name of the Assembly by independent tribunals constituted in accordance with the law.

#### Section II The Legislative Power

Art. 9 - The Grand National Assembly is composed of members elected by the nation in conformity with the electoral law.

Art. 13 - Legislative elections take place every four years. Members whose terms have expired are eligible for re-election.

Each deputy represents not only the constituency which has elected him, but the whole nation.

Art. 15 - Initiation of legislation rests with the members of the Assembly and the Cabinet.

Art. 20 - The Grand National Assembly includes among its powers the right of interpellation and of conducting investigations and parliamentary inquiries.

Art. 26 - The Grand National Assembly itself executes the holy law; makes; amends; interprets and abrogates laws; concludes conventions and treaties of peace with other states; declares war; examines and ratifies laws drafted by the Commission on the Budget; coins money; accepts or rejects all contracts or concessions involving financial responsibility; decrees partial or general amnesty; mitigates sentences and grants pardons; expedites judicial investigations and penalties; executes definitive sentences of capital punishment handed down by the courts.

## Section II The Executive Power

Art. 31 - The President of the Republic of Turkey is elected by the Assembly from among its members for a period equivalent to that of the parliamentary term. The President exercises his functions until the election of a new President of the Republic. He is eligible for re-election.

Art. 32 - The President of the Republic is the head of the State; in this capacity, he presides over the Assembly on ceremonial occasions and in case of necessity over the Council of Commissioners.

Art. 35 - The President of the Republic shall promulgate in ten days of its enactment any law voted by the Assembly.

The President of the Republic must return within ten days any law which he does not consider worthy of promulgation, together with a statement of his reasons, for consideration by the Assembly; amendments to the constitution and legislation concerning the Budget are not subject to the President's suspensive veto.

The President is obliged to promulgate any law which is enacted by majority vote of the Assembly after reconsideration.

Art. 36 - In November of each year, the President of the Republic delivers, or causes to be read by the President of the Council an address concerning the activities of the government during the past year and the recommendations of the government for the year to come.

Art. 37 - The President of the Republic designates the diplomatic representatives of the Republic of Turkey in foreign countries and receives those from foreign states.

Art. 39 - All decrees promulgated by the President of the Republic shall be signed by the President of the Council and by the Commissioner within whose jurisdiction the measure lies.

Art. 40 - Supreme command of the army is vested in the Grand National Assembly, which is represented by the President of the Republic.

Art. 41 - The President of the Republic is responsible to the Grand National Assembly of Turkey only in case of high treason. The responsibility for all decrees promulgated by the President of the Republic, according to Article 39, devolves upon the head of the Cabinet and the responsible ministers whose signatures are affixed to the decrees. In case charges other than high treason are preferred against the President of the Republic, Article 17 of the Constitution, concerning legislative immunities, shall be applied.

Art. 44 - The President of the Council [of Commissioners] is designated by the President of the Republic from among the deputies. The other commissioners [members of the Cabinet] are likewise chosen from among the deputies by the President of the Council, who, after obtaining the approval of the President of the Republic, presents the list of the members of the Council to the Grand National Assembly. The Government must within a week present its program to the Assembly and request a vote of confidence.

Art. 45 - The commissioners, headed by their president, constitute the "Council of Executive Commissioners".

Art. 46 - The members of the Council of Executive Commissioners are collectively responsible for the general policies of the government. Each member, individually, is likewise responsible within the scope of his authority for the general character of his policy and for the actions of his subordinates.

Art. 51 - There shall be established a Council of State which shall be called upon to decide administrative controversies and to give its advice on contracts, concessions and proposed laws drafted and presented by the Government, and to perform specific duties which may be determined by law.

Art. 52 - With the advice of the Council of State, the Council of Commissioners shall promulgate regulations for the administration and execution of the law, provided that such regulations shall not contain new clauses.

## Section IV The Judicial Power

Art. 54 - Judges are independent in the conduct of trials and in the rendering of their judgments. They shall be protected from any sort of intervention and are subject only to the law. Neither the legislative nor executive power may modify, alter, or delay execution of decisions of the courts.

Art. 61 - A High Court shall be constituted, the jurisdiction of which shall include the trial of members of the Cabinet, members of the Council of State, the Attorney General, and members of the Court of Appeals in all questions pertaining to the performance of their duties.

Art. 65 - The decisions of the High Court are subject neither to appeal nor to annulment.

Art. 67 - The High Court is constituted when necessary by the Grand National Assembly of Turkey.

## Section V Public Law of the Turks

Art. 68 - All citizens of Turkey are endowed at birth with liberty and full right to the enjoyment thereof. Liberty consists in the right to live and enjoy life without offense or injury to others. The only limitations on liberty—which is one of the neutral rights of all—are those imposed in the interest of the rights and liberties of others. Such limitations on personal liberty shall be defined only in strict accordance with the law.

Art. 69 - All Turks are equal before the law and are obliged to respect the law. All privileges of whatever description claimed by groups, classes, families and individuals are abolished and forbidden.

Art. 70 - Inviolability of person; freedom of conscience; of thought, of speech, of press; freedom of travel and of contract; freedom of labor; freedom of private property, of assembly, of association; freedom of incorporation, are among the natural rights of Turks.

Art. 71 - The life, the property, the honor, and the home of each and all are inviolable.

Art. 80 - Subject to the supervision and control of the State, education in all its forms is free on condition that it conforms to the law.

Art. 88 - The name Turk, as a political term, shall be understood to include all citizens of the Turkish Republic, without distinction of, or reference to, race or religion.

#### Amendments to the Constitution

Art. 102 – Amendments to or modifications of this Constitution may be made only upon the following conditions: The proposal to amend must be signed by at least one-third of the total number of deputies. The proposed amendment must be thereafter discussed by the Assembly and adopted by vote of two-thirds of the total number of deputies.

No proposal to alter or amend Article I of the Constitution, specifying that the form of government is a Republic, shall be entertained.

## APPENDIX F

### RELEVANT ARTICLES OF THE CONSTITUTION OF THE REPUBLIC OF TURKEY OF 1961

#### Preamble

Having enjoyed freedom, and fought for her rights and liberties throughout her history, and having achieved the Revolution of May 27, 1960 by exercising her right to resist the oppression of a political power which had deteriorated into a state of illegitimacy through behavior and actions contrary to the rule of law and the Constitution, the Turkish Nation, prompted and inspired by the spirit of Turkish nationalism, which unites all individuals, be it in fate, pride or distress, in a common bond as an indivisible whole around national consciousness and aspirations, and which has as its aim always to exalt our nation in a spirit of national unity as a respected member of the community of the world of nations enjoying equal rights and privileges;

With full dedication to the principle of “peace at home, peace in the world”, and with full dedication to the spirit of national independence, and sovereignty to the reforms of Atatürk;

Guided by the desire to establish a democratic rule of law based on juridical and social foundations, which will ensure and guarantee human rights and liberties, national solidarity, social justice, and the welfare and prosperity of the individual and society;

Now therefore, the Turkish Nation hereby enacts and proclaims this Constitution drafted by the Constituent Assembly of the Turkish Republic, and entrusts it to the vigilance of her sons and daughters who are devoted to the concepts of freedom, justice and integrity, with the conviction that its basic guarantee lies in the hearts and minds of her citizens.

#### Part One

##### General Principles

Art. 1 - The Turkish State is a Republic.

Art. 2 - The Turkish Republic is a nationalistic, democratic, secular and social State governed by the rule of law, based on human rights and the fundamental tenets set forth in the preamble.

Art. 3 - The Turkish State is an indivisible whole comprising its territory and people. Its official language is Turkish. Its capital is the city of Ankara.

Art. 4 - Sovereignty is vested in the nation without reservation and condition. The nation shall exercise its sovereignty through the authorized agencies as prescribed by the principles laid forth in the Constitution. The right to exercise such sovereignty shall not be delegated to any one person, group or class. No person or agency shall exercise any state authority, which does not derive its origin from the Constitution.

Art. 5 - Legislative power is vested in the Grand National Assembly. This power shall not be delegated.

Art. 6 - The executive function shall be carried out by the President of the Republic and the Council of Ministers within the framework of law.

Art. 7 - Judicial power shall be exercised by independent courts on behalf of the Turkish nation.

Art. 8 - Laws shall not be in conflict with the Constitution. The provisions of the Constitution shall be the fundamental legal principles binding the legislative, executive and judicial organs, administrative authorities and individuals.

Art. 9 - The provision of the Constitution establishing the form of the state as a republic shall not be amended nor shall any motion therefore be made.

## Part Two Fundamental rights and duties

Art. 10 – Every individual is entitled, in virtue of his existence as a human being to fundamental rights and freedoms, which cannot be usurped, transferred or relinquished.

The State shall remove all political, economic, and social obstacles that restrict the fundamental rights and freedoms of the individual in such a way as to be irreconcilable with the principles embodied in the rule of law, individual well-being and social justice. The State prepares the conditions required for the development of the individual's material and spiritual existence.

Art. 12 – All individuals are equal before the law irrespective of language, race, sex, political opinion, philosophical views, or religion or religious sect.

Art. 14 - Every individual shall enjoy the right to seek to improve himself materially and spiritually, and have the benefit of personal freedom.

The immunities and freedoms enjoyed by the individual shall not be restricted except in cases explicitly prescribed by law, and in conformance with judgements duly passed by a court.



Art. 54 - Every individual who is bound to the Turkish State by ties of citizenship is a Turk.

Art. 56 - ... Whether in power or in opposition political parties are indispensable entities of democratic political life.

Art. 57 – The statutes, programs and activities of political parties shall conform to the principles of a democratic and secular republic, based on human rights and liberties, and to the fundamental principle of the State's territorial and national integrity. Parties failing to conform to these provisions shall be permanently dissolved.

...

Actions in law involving the dissolution of political parties shall be heard at the Constitutional Court, and the verdict to dissolve them shall be rendered only by this Court.

### Part Three The Basic Organization of the Republic

#### Section One Legislative Power

Art. 63 - The Grand National Assembly of Turkey is composed of the National Assembly and the Senate of the Republic.

Art. 64 - The Grand National Assembly is empowered to enact, amend and repeal laws, to debate and adopt the bills on the State budget and final accounts, to pass resolutions in regard to minting currency, proclaiming pardons and amnesties, and to the carrying out of definitive death sentences passed by courts.

Art. 65 - The ratification of treaties negotiated with foreign states and international organizations in behalf of the Turkish Republic is dependent upon approval of the Turkish Grand National Assembly and such ratification can be finalized only through the enactment of a law by the Turkish Grand National Assembly.

Art. 67 - The National Assembly is composed of 450 deputies elected by direct general ballot.

Art. 69 - Elections to the National Assembly shall be held every four years.

Art. 70 - The Senate of the Republic is composed of 150 members elected by general ballot, and 15 members appointed by the President of the Republic.

Art. 72 - Every Turk who has completed his fortieth year, and received a higher education, and who is eligible to be elected a deputy, may be elected to the Senate of the Republic.

Members appointed by the President shall be selected from among people distinguished for their services in various fields and shall have completed their fortieth year. At least ten of such members shall be appointed from among persons who are not members of any political party.

Art. 73 – The term of office of Senate members is six years. Members completing their term of office are eligible for re-election.

Art. 76 - Members of the Grand National Assembly represent neither their constituencies nor their constituents, but the nation as a whole.

Art. 88 - Questions, general debates, parliamentary investigations and parliamentary inquiries fall under the jurisdiction of both legislative bodies.

Art. 89 - The power of interpellation is vested exclusively in the National Assembly.

Art. 91 - The Council of Ministers and the members of the Turkish Grand National Assembly are entitled to initiate legislation.

## Section Two Executive Power

### A) The President of the Republic

Art. 95 - The President of the Turkish Republic shall be elected for a term of seven years from among its those members of the Turkish Grand National Assembly who have completed their fortieth years and received higher education; election shall be by secret ballot, and by a two thirds majority of the plenary session.

The President is not eligible for re-election.

The President shall dissociate himself from his party, and his status as a regular member of the Grand National Assembly shall be terminated.

Art. 97 - The President of the Republic is the head of the State. In this capacity, he shall represent the Turkish Republic and the integrity of the Turkish Nation.

The President of the Republic shall preside over the Council of Ministers whenever he deems it necessary, shall dispatch representatives of the Turkish State to foreign states, shall receive the representatives of foreign states, shall ratify and promulgate international conventions and treaties and may commute or pardon on grounds of chronic illness, infirmity or old age the sentences of convicted individuals.

Art. 98 - The President of the Republic shall not be accountable for his actions connected with his duties.

All decrees emanating from the President of the Republic shall be signed by the Prime Minister, and the relevant Ministers. The Prime Minister and the Minister concerned shall be responsible for the enforcement of these decrees.

Art. 99 - The President of the Republic may be impeached for high treason upon the proposal of one third of the plenary session of the Turkish Grand National Assembly, and conviction of high treason shall require the vote of at least a two-thirds majority of the joint plenary session of both legislative bodies.

#### B) The Council of Ministers

Art. 102 - The Council of Ministers shall consist of the Prime Minister and the ministers.

The Prime Minister shall be designated by the President of the Republic from among the members of the Turkish Grand National Assembly.

The Ministers shall be nominated by the Prime Minister, and appointed by the President of the Republic from among the members of the Turkish Grand National Assembly, or from among those qualified for election as deputies.

Art. 105 - As head of the Council of Ministers, the Prime Minister promotes cooperation among the Ministries, and supervises the implementation of the government's general policy. The members of the Council of Ministers are jointly and equally responsible for the manner in which this policy is implemented. Each Minister shall be further responsible for the operations in his field of authority and for the acts and activities of his subordinates.

Art. 107 - The Council of Ministers may draw up regulations governing the mode of enforcement of laws, provided that these are not in conflict with existing legislation and have been considered by the Council of Ministers.

Regulations shall be signed by the President of the Republic, and promulgated in the same manner as laws.

Art. 110 - The office of the Commander-in-Chief is integrated in spirit in the Turkish Grand National Assembly and is represented by the President of the Republic.

### Section Three The Judiciary

#### A) General Provisions

Art. 132 - Judges shall be independent in the discharge of their duties. They shall pass judgment in accordance with the Constitution, law, justice and their personal convictions.

No organ, office, agency or individual may give orders or instructions to courts or judges in connection with the discharge of their judicial duty, send them circulars, or make recommendations or suggestions.

No questions may be raised, debates held, or statements issued in legislative bodies in connection with the discharge of judicial power concerning a case on trial. Legislative, executive organs, and the administration are under obligation to comply with ruling of the courts.

#### D) The Constitutional Court

Art. 145 - The Constitutional Court consists of fifteen regular and five alternate members.

Art. 147 - The Constitutional Court shall review the constitutionality of laws and the by-laws of the Turkish Grand National Assembly.

The Constitutional Court shall try as a High Council, the President of the Republic, the members of the Council of Ministers; the Chairman and members of the Court of Cassation; the Council of State; the Military Court of Cassation; the Supreme Council of Judges and the Court of Accounts, the Chief Prosecutor of the Republic, the Chief Attorney, the Chief Prosecutor of the Military Court of Cassation, as well as its own members for offenses connected with their duties; and it discharges such other duties as prescribed by the Constitution.

Art. 152 - The rulings of the Constitutional Court are final. The laws and by-laws or their provisions which have been invalidated by the Constitutional Court for unconstitutionality, shall become void from the date of the decision.

...

The decisions of the Constitutional Court shall be published immediately in the Official Gazette, and shall be binding on the legislative, executive, and judicial organs of the State, as well as on the administration, real and corporate persons.

### Part Six Final Provisions

Art. 155 - Proposals for the amendment of the Constitution may be submitted in writing by at least one-third majority of the plenary session of the Turkish Grand National Assembly, but may not be debated with urgency. An amendment proposal shall be adopted by a two-thirds majority vote of the plenary session of each legislative body.

APPENDIX G

RELEVANT ARTICLES OF THE CONSTITUTION

OF THE REPUBLIC OF KOREA OF 1987

Preamble

We, the people of Korea, proud of a resplendent history and traditions dating from time immemorial, upholding the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919 and the democratic ideals of the April Nineteenth Uprising of 1960 against injustice, having assumed the mission of democratic reform and peaceful unification of our homeland and having determined to consolidate national unity with justice, humanitarianism and brotherly love, and To destroy all social vices and injustice, and To afford equal opportunities to every person and provide for the fullest development of individual capabilities in all fields, including political, economic, social and cultural life by further strengthening the basic free and democratic order conducive to private initiative and public harmony, and To help each discharge those duties and responsibilities concomitant to freedoms and rights, and To elevate the quality of life for all citizens and contribute to lasting world peace and the common prosperity of mankind and thereby to ensure security, liberty and happiness for ourselves and our posterity forever, Do hereby amend, through national referendum following a resolution by the National Assembly, the Constitution, ordained and established on the Twelfth Day of July anno Domini Nineteen hundred and forty-eight, and amended eight times subsequently. Oct. 29, 1987

CHAPTER I

General Provisions

Article 1- [Democracy]

- (1) The Republic of Korea shall be a democratic republic.
- (2) The sovereignty of the Republic of Korea shall reside in the people, and all state authority shall emanate from the people.

Article 2- [Nationality]

- (1) Nationality in the Republic of Korea shall be prescribed by Act. (2) It shall be the duty of the State to protect citizens residing abroad as prescribed by Act.

Article 3- [Territory]

The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands.

Article 4- [Unification, Peace]

The Republic of Korea shall seek unification and shall formulate and carry out a policy of peaceful unification based on the principles of freedom and democracy.

Article 5- [War, Armed Forces]

(1) The Republic of Korea shall endeavor to maintain international peace and shall renounce all aggressive wars.

(2) The Armed Forces shall be charged with the sacred mission of national security and the defense of the land and their political neutrality shall be maintained.

Article 6- [Treaties, Foreigners]

(1) Treaties duly concluded and promulgated under the Constitution and the generally recognized rule of international law shall have the same effect as the domestic laws of the Republic of Korea.

(2) The status of aliens shall be guaranteed as prescribed by international law and treaties.

Article 7 [Public Officials]

(1) All public officials shall be servants of the entire people and shall be responsible to the people.

(2) The status and political impartiality of public officials shall be guaranteed as prescribed by Act.

Article 8- [Political Parties]

(1) The establishment of political parties shall be free, and the plural party system shall be guaranteed.

(2) Political parties shall be democratic in their objectives, organization, and activities, and shall have the necessary organizational arrangements for the people to participate in the formation of the political will.

(3) Political parties shall enjoy the protection of the State and may be provided with operational funds by the State under the conditions as prescribed by Act. (4) If the purposes or activities of a political party are contrary to the fundamental democratic order, the Government may bring an action against it in the Constitutional Court for its dissolution, and the political party shall be dissolved in accordance with the decision of the Constitutional Court.

Article 9- [Culture]

The State shall strive to sustain and develop the cultural heritage and to enhance national culture.

## CHAPTER II

### Rights and Duties of the Citizens

#### Article 10- [Dignity, Pursuit of Happiness]

All citizens shall be assured of human worth and dignity and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals.

#### Article 11- [Equality]

(1) All citizens shall be equal before the law, and there shall be no discrimination in political, economic, social, or cultural life on account of sex, religion, or social status.

(2) No privileged caste shall be recognized or ever established in any form.

(3) The awarding of decorations or distinctions of honor in any form shall be effective only for recipients, and no privileges ensue therefrom.

#### Article 12- [Personal Liberty, Personal Integrity]

(1) All citizens shall enjoy personal liberty. No person shall be arrested, detained, searched, seized, or interrogated except as provided by Act. No person shall be punished, placed under preventive restrictions, or subject to involuntary labor except as provided by Act and through lawful procedures.

## CHAPTER III

### The National Assembly

#### Article 40- [Parliament]

(1) The legislative power shall be vested in the National Assembly.

#### Article 41- [Election]

(1) The National Assembly shall be composed of members elected by universal, equal, direct, and secret ballot by the citizens.

(2) The number of members of the National Assembly shall be determined by Act, but the number shall not be less than 200.

#### Article 42- [Term]

The term of office of members of the National Assembly shall be four years.

#### Article 52- [Initiative]

Bills may be introduced by members of the National Assembly or by the Executive.

#### Article 53- [Passing Bills]

(1) Each bill passed by the National Assembly shall be sent to the Executive, and the President shall promulgate it within fifteen days.

(2) In case of objection to the bill, the President may, within the period referred to in

paragraph (1), return it to the National Assembly with written explanation of his objection, and request it be reconsidered.

(3) The President shall not request the National Assembly to reconsider the bill in part, or with proposed amendments.

(4) In case there is a request for reconsideration of a bill, the National Assembly shall reconsider it, and if the National Assembly repasses the bill in the original form with the attendance of more than one half of the total members, and with a concurrent vote of two-thirds or more of the members present, it shall become Act.

(5) If the President does not promulgate the bill, or does not request the National Assembly to reconsider it within the period referred to in paragraph (1), it shall become Act.

#### Article 54- [Budget]

The National Assembly shall deliberate and decides upon the national budget bill.

#### Article 60- [Consent to Treaties]

(1) The National Assembly shall have the right to consent to the conclusion and ratification of treaties pertaining to mutual assistance or mutual security; treaties concerning important international organizations; treaties of friendship, trade and navigation; treaties pertaining to any restriction in sovereignty; peace treaties; treaties which will burden the State or people with an important financial obligation; or treaties related to legislative matters.

(2) The National Assembly shall also have the right to consent to the declaration of war, the dispatch of armed forces to foreign states, and the stationing of alien forces in the territory of the Republic of Korea.

#### Article 61- [Investigations]

(1) The National Assembly may inspect affairs of state or investigate specific matters of state affairs, and may demand the production of documents directly related thereto, the appearance of a witness in person and the furnishing of testimony or statements of opinion.

#### Article 63- [Recommendation for Removal]

(1) The National Assembly may pass a recommendation for the removal of the Prime Minister or a State Council member from office.

#### Article 65- [Impeachment]

(1) In case the President, the Prime Minister, members of the State Council, heads of Executive Ministries, justices of the Constitutional Court, judges, members of the National Election Commission, the Chairman and members of the Board of Audit and Inspection, and other public officials designated by Act have violated the Constitution or other Acts in the performance of official duties, the National Assembly may pass motions for their impeachment.

(2) A motion for impeachment prescribed in paragraph (1) may be proposed by one-



third or more of the total members of the National Assembly, and shall require a concurrent vote of a majority of the total members of the National Assembly for passage: *Provided*, That a motion for the impeachment of the President shall be proposed by a majority of the total members of the National Assembly and approved by two-thirds or more of the total members of the National Assembly.

(3) Any person against whom a motion for impeachment has been passed shall be suspended from exercising his power until the impeachment has been adjudicated.

(4) A decision on impeachment shall not extend further than removal from public office: *Provided*, That it shall not exempt the person impeached from civil or criminal liability.

## CHAPTER IV The Executive

### Section 1. The President

#### Article 66- [Head of State]

(1) The President shall be the Head of State and represent the State vis-a-vis foreign states.

(2) The President shall have the responsibility and duty to safeguard the independence, territorial integrity and continuity of the State and the Constitution.

(3) The President shall have the duty to pursue sincerely the peaceful unification of the homeland.

(4) Executive power shall be vested in the Executive Branch headed by the President.

#### Article 67- [Election]

(1) The President shall be elected by universal, equal, direct, and secret ballot by the people.

(2) In case two or more persons receive the same largest number of votes in the election as referred to in paragraph (1), the person who receives the largest number of votes in an open session of the National Assembly attended by a majority of the total members of the National Assembly shall be elected.

(3) If and when there is only one presidential candidate, he shall not be elected President unless he receives at least one third of the total eligible votes.

(4) Citizens who are eligible for election to the National Assembly, and who have reached the age of forty years or more on the date of the presidential election, shall be eligible to be elected to the presidency.

(5) Matters pertaining to presidential elections shall be determined by Act.

#### Article 68- [Succession]

(1) The successor to the incumbent President shall be elected seventy to forty days before his term expires.

(2) In case a vacancy occurs in the office of the President or the President-elect dies, or is disqualified by a court ruling or for any other reason, a successor shall be elected within sixty days.

#### Article 69- [Oath]

The President, at the time of his inauguration, shall take the following oath: "I do solemnly swear before the people that I will faithfully execute the duties of the President by observing the Constitution, defending the State, pursuing the peaceful unification of the homeland, promoting the freedom and welfare of the people, and endeavoring to develop national culture."

#### Article 70- [Term]

The term of office of the President shall be five years, and the President shall not be reelected.

#### Article 72- [Referendum on Policy]

The President may submit important policies relating to diplomacy, national defense, unification and other matters relating to the national destiny to a national referendum if he deems it necessary.

#### Article 73- [Treaties, Foreign Affairs]

The President shall conclude and ratify treaties; accredit, receive or dispatch diplomatic envoys; and declare war and conclude peace.

#### Article 74- [Armed Forces]

(1) The President shall be Commander-in-Chief of the Armed Forces under the conditions as prescribed by the Constitution and Act.

(2) The organization and formation of the Armed Forces shall be determined by Act.

#### Article 75- [Decrees]

The President may issue presidential decrees concerning matters delegated to him by Act with the scope specifically defined and also matters necessary to enforce Acts.

#### Article 76- [Emergency Powers]

(1) In time of internal turmoil, external menace, natural calamity or a grave financial or economic crisis, the President may take in respect to them the minimum necessary financial and economic actions or issue orders having the effect of Act, only when it is required to take urgent measures for the maintenance of national security or public peace and order, and there is no time to await the convocation of the National Assembly.

(2) In case of major hostilities affecting national security, the President may issue orders having the effect of Act, only when it is required to preserve the integrity of the nation, and it is impossible to convene the National Assembly.

(3) In case actions are taken or orders are issued under paragraphs (1) and (2), the

President shall promptly notify it to the National Assembly and obtain its approval.

(4) In case no approval is obtained, the actions or orders shall lose effect forthwith. In such case, the Acts which were amended or abolished by the orders in question shall automatically regain their original effect at the moment the orders fail to obtain approval.

(5) The President shall, without delay, put on public notice developments under paragraphs (3) and (4).

#### Article 77

(1) When it is required to cope with a military necessity or to maintain the public safety and order by mobilization of the military forces in time of war, armed conflict or similar national emergency, the President may proclaim martial law under the conditions as prescribed by Act.

(2) Martial law shall be of two types: extraordinary martial law and precautionary martial law.

(3) Under extraordinary martial law, special measures may be taken with respect to the necessity for warrants, freedom of speech, the press, assembly and association, or the powers of the Executive and the Judiciary under the conditions as prescribed by Act.

(4) When the President has proclaimed martial law, he shall notify it to the National Assembly without delay.

(5) When the National Assembly requests the lifting of martial law with the concurrent vote of a majority of the total members of the National Assembly, the President shall comply.

#### Article 78

The President shall appoint and dismiss public officials under the conditions as prescribed by the Constitution and Act.

#### Article 79

(1) The President may grant amnesty, commutation and restoration of rights under the conditions as prescribed by Act.

(2) The President shall receive the consent of the National Assembly in granting a general amnesty.

(3) Matters pertaining to amnesty, commutation and restoration of rights shall be determined by Act.

Article 80- The President shall award decorations and other honors under the conditions as prescribed by Act.

Article 81- The President may attend and address the National Assembly or express his views by written message.

Article 82- The acts of the President under law shall be executed in writing, and such documents shall be countersigned by the Prime Minister and the members of the State Council concerned. The same shall apply to military affairs.

Article 83- The President shall not concurrently hold the office of Prime Minister, a member of the State Council, the head of any Executive Ministry, nor other public or private posts as prescribed by Act.

Article 84- The President shall not be charged with a criminal offense during his tenure of office except for insurrection or treason.

Article 85- Matters pertaining to the status and courteous treatment of former Presidents shall be determined by Act.

## Section 2. The Executive Branch

### Subsection 1 - The Prime Minister and Members of the State Council

Article 86- [Prime Minister]

(1) The Prime Minister shall be appointed by the President with the consent of the National Assembly.

(2) The Prime Minister shall assist the President and shall direct the Executive Ministries under order of the President.

(3) No member of the military shall be appointed Prime Minister unless he is retired from active duty.

Article 87- [Members of State Council]

(1) The members of the State Council shall be appointed by the President on the recommendation of the Prime Minister.

(2) The Members of the State Council shall assist the President in the conduct of State affairs and, as constituents of the State Council, shall deliberate on State affairs.

(3) The Prime Minister may recommend to the President the removal of a member of the State Council from office.

(4) No member of the military shall be appointed a member of the State Council unless he is retired from active duty.

## CHAPTER VI.

### The Constitutional Court

Article 111- [Competence, Appointment]

(1) The Constitutional Court shall have jurisdiction over the following matters:

1. The constitutionality of a law upon the request of the courts;
2. Impeachment;
3. Dissolution of a political party;
4. Competence disputes between State agencies, between State agencies and local

governments, and between local governments; and 5. Constitutional complaint as prescribed by Act.

(2) The Constitutional Court shall be composed of nine Justices qualified to be court judges, and they shall be appointed by the President.

(3) Among the Justices referred to in paragraph (2), three shall be appointed from persons selected by the National Assembly, and three appointed from persons nominated by the Chief Justice of the Supreme Court.

(4) The president of the Constitutional Court shall be appointed by the President from among the Justices with the consent of the National Assembly.

#### Article 112- [Term, Incompatibility]

(1) The term of office of the Justices of the Constitutional Court shall be six years and they may be reappointed under the conditions as prescribed by Act.

(2) The Justices of the Constitutional Court shall not join any political party, nor shall they participate in political activities.

(3) No Justice of the Constitutional Court shall be expelled from office except by impeachment or a sentence of imprisonment without prison labor or heavier punishment.

#### Article 113- [Majority, Internal Regulations]

(1) When the Constitutional Court makes a decision of the constitutionality of a law, a decision of impeachment, a decision of dissolution of a political party or an affirmative decision regarding the constitutional complaint, the concurrence of six Justices or more shall be required.

(2) The Constitutional Court may establish regulations relating to its proceedings and internal discipline and regulations on administrative matters within the limits of Act.

(3) The organization, function and other necessary matters of the Constitutional Court shall be determined by Act.

### CHAPTER X

#### Amendments to the Constitution

#### Article 128- [Initiative]

(1) A proposal to amend the Constitution shall be introduced either by a majority of the total members of the National Assembly or by the President.

(2) Amendments to the Constitution for the extension of the term of office of the President or for a change allowing for the reelection of the President shall not be effective for the President in office at the time of the proposal for such amendments to the Constitution.

Article 129- [Publication] Proposed amendments to the Constitution shall be put before the public by the President for twenty days or more.

Article 130- [Majority, Referendum]

(1) The National Assembly shall decide upon the proposed amendments within sixty days of the public announcement, and passage by the National Assembly shall require the concurrent vote of two thirds or more of the total members of the National Assembly.

(2) The proposed amendments to the Constitution shall be submitted to a national referendum not later than thirty days after passage by the National Assembly, and shall be determined by more than one half of all votes cast by more than one half of voters eligible to vote in elections for members of the National Assembly.

(3) When the proposed amendments to the Constitution receive the concurrence prescribed in paragraph (2), the amendments to the Constitution shall be finalized, and the President shall promulgate it without delay.

APPENDIX H

RELEVANT ARTICLES OF THE CONSTITUTION

OF THE REPUBLIC OF TURKEY OF 1982

Preamble

Affirming the eternal existence of the Turkish Motherland and Nation and the indivisible unity of the Sublime Turkish State, this Constitution, in line with the concept of nationalism introduced by the founder of the Republic of Turkey, Atatürk, the immortal leader and the unrivalled hero, and his reforms and principles; Determining to attain the everlasting existence, prosperity, material and spiritual well-being of the Republic of Turkey, and the standards of contemporary civilization as an honourable member with equal rights of the family of world nations; The absolute supremacy of the will of the nation, the fact that sovereignty is vested fully and unconditionally in the Turkish Nation and that no individual or body empowered to exercise this sovereignty in the name of the nation shall deviate from the liberal democracy indicated in the Constitution and the legal system instituted according to its requirements,

The separation of powers, which does not imply an order of precedence among the organs of the State, but refers solely to the exercising of certain state powers and discharging of duties, and is limited to a civilized cooperation and division of functions; and the fact that only the Constitution and the laws have the supremacy; (As amended on October 3, 2001; Act No. 4709) That no protection shall be accorded to an activity contrary to Turkish national interests, Turkish existence and the principle of its indivisibility with its State and territory, historical and moral values of Turkishness; the nationalism, principles, reforms and civilizationism of Atatürk and that sacred religious feelings shall absolutely not be involved in state affairs and politics as required by the principle of secularism;

That every Turkish citizen has an innate right and power, to lead an honourable life and to improve his/her material and spiritual well-being under the aegis of national culture, civilization, and the rule of law, through the exercise of the fundamental rights and freedoms set forth in this Constitution, in conformity with the requirements of equality and social justice;

That all Turkish citizens are united in national honour and pride, in national joy and grief, in their rights and duties regarding national existence, in blessings and in burdens, and in every manifestation of national life, and that they have the right to demand a peaceful life based on absolute respect for one another's rights and freedoms, mutual love and fellowship, and the desire for and belief in "Peace at home; peace in the world";

With these ideas, beliefs, and resolutions to be interpreted and implemented accordingly, thus commanding respect for, and absolute loyalty to, its letter and spirit;

Has been entrusted by the Turkish nation to the democracy-loving Turkish sons' and daughters' love for the motherland and nation.

## Part One General Principles

Art. 1 - The State of Turkey is a Republic.

Art. 2 - The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble.

Art. 3 - The State of Turkey, with its territory and nation, is an indivisible entity. Its language is Turkish.

Its flag, the form of which is prescribed by the relevant law, is composed of a white crescent and star on a red background.

Its national anthem is the "Independence March." Its capital is Ankara.

Art. 4 - The provision of Article 1 regarding the form of the State being a Republic, the characteristics of the Republic in Article 2, and the provisions of Article 3 shall not be amended, nor shall their amendment be proposed.

### V. Fundamental aims and duties of the State

Art. 5 - The fundamental aims and duties of the State are to safeguard the independence and integrity of the Turkish Nation, the indivisibility of the country, the Republic and democracy, to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence.

Art. 6 - Sovereignty belongs to the Nation without any restriction or condition.

The Turkish Nation shall exercise its sovereignty through the authorized organs, as prescribed by the principles set forth in the Constitution.

The exercise of sovereignty shall not be delegated by any means to any individual, group or class. No person or organ shall exercise any state authority that does not emanate from the Constitution.



Art. 7 - Legislative power is vested in the Grand National Assembly of Turkey on behalf of Turkish Nation. This power shall not be delegated.

Art. 8 - Executive power and function shall be exercised and carried out by the President of the Republic and the Council of Ministers in conformity with the Constitution and laws.

Art. 9 - Judicial power shall be exercised by independent courts on behalf of the Turkish Nation.

Art. 10 - Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds.

...

No privilege shall be granted to any individual, family, group or class.

Art. 11 - The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals.

Laws shall not be contrary to the Constitution.

## Part Two Fundamental Rights and Duties

Art. 12 - Everyone possesses inherent fundamental rights and freedoms, which are inviolable and inalienable.

Art. 13 - Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence.

These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality.

Art. 14 - None of the rights and freedoms embodied in the Constitution shall be exercised in the form of activities aiming to violate the indivisible integrity of the State with its territory and nation, and to endanger the existence of the democratic and secular order of the Republic based on human rights.

No provision of this Constitution shall be interpreted in a manner that enables the State or individuals to destroy the fundamental rights and freedoms recognized by the Constitution or to stage an activity with the aim of restricting them more extensively than stated in the Constitution.

Art. 15 - In times of war, mobilization, martial law, or a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures derogating the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated.

Even under the circumstances indicated in the first paragraph, the individual's right to life, the integrity of his/her corporeal and spiritual existence shall be inviolable except where death occurs through acts in conformity with law of war; no one shall be compelled to reveal his/her religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties shall not be made retroactive; nor shall anyone be held guilty until so proven by a court ruling.

### Part Three Fundamental Organs of the Republic

#### Chapter One Legislative Power

Art. 75 - The Grand National Assembly of Turkey shall be composed of five hundred and fifty deputies elected by universal suffrage.

Art. 76 - Every Turk over the age of twenty-five is eligible to be a deputy.

Art. 77 - Elections for the Grand National Assembly of Turkey shall be held every four years.

Art. 80 - Members of the Grand National Assembly of Turkey shall not represent their own constituencies or constituents, but the nation as a whole.

Art. 87 - The duties and powers of the Grand National Assembly of Turkey are to enact, amend, and repeal laws; to scrutinize the Council of Ministers and the ministers; to authorize the Council of Ministers; to issue decrees having the force of law on certain matters; to debate and adopt the budget bills and final accounts bills; to decide to issue currency and declare war; to approve the ratification of international treaties, to decide with the majority of three-fifths of the Grand National Assembly of Turkey to proclaim amnesty and pardon; and to exercise the powers and carry out the duties envisaged in the other articles of the Constitution.

Art. 88 - The Council of Ministers and deputies are empowered to introduce bills.

Art. 90 - The ratification of treaties concluded with foreign states and international organizations on behalf of the Republic of Turkey shall be subject to adoption by the Grand National Assembly of Turkey by a law approving the ratification.

Art. 91 - The Grand National Assembly of Turkey may empower the Council of Ministers to issue decrees having the force of law. However, with the exception of martial law and states of emergency, the fundamental rights, individual rights and duties included in the first and second chapters and the political rights and duties listed in the fourth chapter of the second part of the Constitution, shall not be regulated by decrees having the force of law.

Art. 98 - The Grand National Assembly of Turkey shall exercise its supervisory power by means of question, parliamentary inquiry, general debate, censure and parliamentary investigations.

## Chapter Two The Executive Power

### I. President of the Republic

Art. 101 - (As amended on October 21, 2007; Act No. 5678) The President of the Republic shall be elected by the public from among the members of the Grand National Assembly of Turkey who are over forty years of age and have completed higher education, or from among Turkish citizens who fulfil these requirements and are eligible to be deputies.

The President of the Republic's term of office shall be five years. A person may be elected as President of the Republic for two terms at most.

Nomination of a candidate for the Presidency from among the members of the Grand National Assembly of Turkey or from outside of the Assembly shall require a written proposal of twenty deputies. Furthermore, political parties with more than ten percent of the valid votes in sum in the latest parliamentary elections may nominate a joint candidate.

If the President-elect is a member of a party, his/her relationship with his party shall be severed and his/her membership of the Grand National Assembly of Turkey shall cease.

Art. 102 - (As amended on October 21, 2007; Act No. 5678) The election of the President of the Republic shall be concluded within sixty days before the term of office of the incumbent President of the Republic expires; or within sixty days after the presidency falls vacant for any reason.

In presidential elections conducted by universal suffrage, the candidate who receives the absolute majority of the valid votes shall be elected President of the Republic. If this majority cannot be obtained in the first ballot, the second ballot shall be held on the second Sunday following this ballot. The two candidates who receive the greatest number of votes in first ballot run for the second ballot, and the candidate who receives majority of valid votes shall be elected President of the Republic.

If one of the candidates who gains the right to run for the second ballot dies or loses his/her eligibility, the second ballot shall be conducted by substituting the vacant candidacy in conformity with the ranking in the first ballot. If only one candidate remains for the second ballot, this ballot shall be conducted as a referendum. If the

candidate receives the majority of the valid votes, he/she shall be elected President of the Republic.

The term of office of the incumbent President of the Republic shall continue until the President-elect takes the office.

Art. 104 - The President of the Republic is the head of the State. In this capacity, he/she shall represent the Republic of Turkey and the unity of the Turkish Nation; he/she shall ensure the implementation of the Constitution, and the regular and harmonious functioning of the organs of the State.

To this end, the duties he/she shall perform, and the powers he/ she shall exercise, in accordance with the conditions stipulated in the relevant articles of the Constitution are as follows:

a) Those relating to legislation:

To deliver, if he/she deems it necessary, the opening speech of the Grand National Assembly of Turkey on the first day of the legislative year,

To summon the Grand National Assembly of Turkey, when necessary,

To promulgate laws,

To send laws back to the Grand National Assembly of Turkey to be reconsidered,

To submit to referendum, if he/she deems it necessary, laws regarding amendment to the Constitution.

To appeal to the Constitutional Court for the annulment part of whole or certain provisions of laws, decrees having the force of law and the Rules of Procedure of the Grand National Assembly of Turkey on the grounds that they are unconstitutional in form or in content,

To decide to renew elections for the Grand National Assembly of Turkey.

b) Those relating the executive:

To appoint the Prime Minister and to accept his/her resignation,

To appoint and dismiss ministers on the proposal of the Prime Minister,

To preside over the Council of Ministers or to call the Council of Ministers to meet under his/her chairpersonship whenever he/she deems it necessary,

To accredit representatives of the Turkish State to foreign states and to receive the representatives of foreign states appointed to the Republic of Turkey,

To ratify and promulgate international treaties,

To represent the Office of Commander-in-Chief of the Turkish Armed Forces on behalf of the Grand National Assembly of Turkey,

To decide on the use of the Turkish Armed Forces, To appoint the Chief of the General Staff, To call the National Security Council to meet, To preside over the National Security Council,

To proclaim martial law or state of emergency, and to issue decrees having the force of law, by the decisions of the Council of Ministers under his/her chairpersonship,

To sign decrees,

To remit or commute the sentences imposed on certain individuals, on grounds of chronic illness, disability or old age,

To appoint the members and the chairperson of the State Supervisory Council,  
To instruct the State Supervisory Council to carry out inquiries, investigations and inspections,  
To appoint the members of the Council of Higher Education, To appoint president of universities.

c) Those relating to the judiciary:

To appoint the members of the Constitutional Court, one- fourth of the members of the Council of State, the Chief Public Prosecutor and the Deputy Chief Public Prosecutor of the High Court of Appeals, the members of the High Military Court of Appeals, the members of High Military Administrative Court and the members of the High Council of Judges and Prosecutors.

The President of the Republic shall also exercise powers of election and appointment, and perform the other duties conferred on him/her by the Constitution and laws.

Art. 105 - All presidential decrees, except those which the President of the Republic is empowered to enact individually without the signatures of the Prime Minister and the minister concerned in accordance with the provisions of the Constitution and other laws, shall be signed by the Prime Minister and the ministers concerned; the Prime Minister and the minister concerned shall be accountable for these decrees. No appeal shall be made to any judicial authority, including the Constitutional Court, against the decisions and orders signed by the President of the Republic on his/her own initiative.

The President of the Republic may be impeached for high treason on the proposal of at least one-third of the total number of members of the Grand National Assembly of Turkey, and by the decision of at least three-fourths of the total number of members.

Art. 107 - The establishment, the principles of organization and functioning, and the personnel appointment proceedings of General Secretariat of the Presidency shall be regulated by presidential decrees.

## II. Council of Ministers

Art. 109 - The Council of Ministers shall consist of the Prime Minister and the ministers.

The Prime Minister shall be appointed by the President of the Republic from among the members of the Grand National Assembly of Turkey.

The ministers shall be nominated by the Prime Minister and appointed by the President of the Republic, from among the members of the Grand National Assembly of Turkey, or from among those eligible to be elected as deputies; and they can be dismissed, by the President of the Republic, upon the proposal of the Prime Minister when deemed necessary.

Art. 112 - The Prime Minister, as chairperson of the Council of Ministers, shall ensure cooperation among the ministries, and supervise the implementation of the government's general policy. The Council of Ministers has collective responsibility for the implementation of this policy.

Each minister shall be responsible to the Prime Minister, for the conduct of affairs under his/her jurisdiction, and for the acts and activities of his/her subordinates.

The Prime Minister shall ensure that the ministers exercise their functions in accordance with the Constitution and the laws and shall take corrective measures to this end.

Art. 115 - The Council of Ministers may issue regulations indicating the implementation of laws or designating matters ordered by law, as long as they do not conflict with laws, and are examined by the Council of State.

Regulations shall be signed by the President of the Republic and promulgated in the same manner as laws.

Art. 116 - In cases where the Council of Ministers fails to receive a vote of confidence under Article 110 or falls by a vote of no-confidence under Article 99 or 111, if a new Council of Ministers cannot be formed within forty-five days or fails to receive a vote of confidence, the President of the Republic, in consultation with the Speaker of the Grand National Assembly of Turkey, may decide to renew the elections.

If a new Council of Ministers cannot be formed within forty-five days of the resignation of the Prime Minister without being defeated by a vote of no-confidence or also within forty-five days of elections for the Bureau of the newly elected Grand National Assembly of Turkey, the President of the Republic may likewise, in consultation with the Speaker of the Grand National Assembly of Turkey, decide to renew the elections.

Art. 117 - The Office of Commander-in-Chief is inseparable from the spiritual existence of the Grand National Assembly of Turkey and is represented by the President of the Republic.

The Council of Ministers shall be responsible to the Grand National Assembly of Turkey for national security and for the preparation of the armed forces for the defence of the country.

The Chief of the General Staff is the commander of the armed forces, and in time of war, exercises the duties of Commander-in- Chief on behalf of the President of the Republic.

Art. 119 - In the event of natural disaster, dangerous epidemic diseases or a serious economic crisis, the Council of Ministers meeting under the chairpersonship of the President of the Republic may declare a state of emergency in one or more regions or throughout the country for a period not exceeding six months.

Art. 120 - In the event of serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms, or serious deterioration of public order because of acts of violence, the Council of Ministers, meeting under the chairpersonship of the President of the Republic, after consultation with the National Security Council, may declare a state of emergency in one or more regions or throughout the country for a period not exceeding six months.

Art. 121 - In the event of a declaration of a state of emergency... this decision shall be published in the Official Gazette and shall be immediately submitted to the Grand National Assembly of Turkey for approval... The Assembly may alter the duration of the state of emergency, may extend the period for a maximum of four months each time at the request of the Council of Ministers, or may lift the state of emergency... During the state of emergency, the Council of Ministers, meeting under the chairpersonship of the President of the Republic, may issue decrees having the force of law on matters necessitated by the state of emergency.

Art. 122 - The Council of Ministers, under the chairpersonship of the President of the Republic, after consultation with the National Security Council, may declare martial law in one or more regions or throughout the country for a period not exceeding six months in the event of widespread acts of violence which are aimed at the destruction of the free democratic order or the fundamental rights and freedoms embodied in the Constitution and more dangerous than the cases necessitating a state of emergency; or in the event of war, the emergence of a situation necessitating war, an uprising, or the spread of violent and strong rebellious actions against the motherland and the Republic, or widespread acts of violence of internal or external origin threatening the indivisibility of the country and the nation. This decision shall be published immediately in the Official Gazette, and shall be submitted for approval to the Grand National Assembly of Turkey, on the same day.

...

During the period of martial law, the Council of Ministers, meeting under the chairpersonship of the President of the Republic, may issue decrees having the force of law on matters necessitated by the state of martial law.

Extension of the period of martial law, for a maximum of four months each time, shall require a decision by the Grand National Assembly of Turkey. In the event of state of war, the limit of four months does not apply.

### Chapter Three Judicial Power

#### I. General Provisions

Art. 138 - Judges shall be independent in the discharge of their duties; they shall give judgment in accordance with the Constitution, laws, and their personal conviction conforming with the law.

No organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, or make recommendations or suggestions.

## II. Higher Courts

### A. Constitutional Court

Art. 146 - The Constitutional Court shall be composed of seventeen members.

The Grand National Assembly of Turkey shall elect, 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, two-thirds majority of the total number of members shall be required for the first ballot, and absolute majority of 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.

The President of the Republic shall appoint three members from High Court of Appeals, two members from Council of State, one member from the High Military Court of Appeals, and one member from the High Military Administrative Court 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 being 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; four members from among high level executives, self-employed lawyers, first category judges and public prosecutors or rapporteurs of the Constitutional Court.

In the elections to be held in the respective general assemblies of the High Court of Appeals, Council of State, High Military Court of Appeals, High Military Administrative Court, the Court of Accounts and the Council of Higher Education for nominating candidates for membership of the Constitutional Court, three persons obtaining the greatest number of votes shall be considered to be nominated for each vacant position. In the elections to be held for the three candidates nominated by the heads of bar associations from among self-employed lawyers, three persons obtaining the greatest number of votes shall be considered to be nominated.

To qualify for appointments as members of the Constitutional Court, members of the teaching staff shall be required to possess the title of professor or associate professor; lawyers shall be required to have practiced as a lawyer for at least twenty years; high level executives shall be required to have completed higher education and to have worked for at least twenty years in public service, and first category judges and public prosecutors with at least twenty years of work experience including their period of candidacy, provided that they all shall be over the age of forty-five.



The Constitutional Court shall elect a president and two deputy presidents from among its members for a term of four years by secret ballot and by an absolute majority of the total number of its members. Those whose term of office ends may be re-elected.

The members of the Constitutional Court shall not assume other official and private duties, apart from their fundamental duties.

## Part Seven Final Provisions

Art. 175 - Amendment to the Constitution shall be proposed in writing by at least one-third of the total number of members of the Grand National Assembly of Turkey. Bills to amend the Constitution shall be debated twice in the Plenary. The adoption of a bill for an amendment shall require a three-fifths majority of the total number of members of the Assembly by secret ballot.

The consideration and adoption of bills for the amendments to the Constitution shall be subject to the provisions governing the consideration and adoption of laws, with the exception of the conditions set forth in this Article.

The President of the Republic may send back the laws on the amendments to the Constitution to the Grand National Assembly of Turkey for reconsideration. If the Assembly readopts, by a two-thirds majority of the total number of members, the law sent back by the President of the Republic without any amendment, the President of the Republic may submit the law to referendum.

If a law on the amendment to the Constitution is adopted by a three-fifths or less than two-thirds majority of the total number of members of the Assembly and is not sent back by the President of the Republic to the Assembly for reconsideration, it shall be published in the Official Gazette and be submitted to referendum.

A law on the Constitutional amendment adopted by a two-thirds majority of the total number of members of the Grand National Assembly of Turkey directly or upon the sending back of the law by the President of the Republic or its articles deemed necessary may be submitted to a referendum by the President of the Republic. A law on the amendment to the Constitution or the related articles that are not submitted to referendum shall be published in the Official Gazette.

Entry into force of the laws on the amendment to the Constitution submitted to referendum shall require the affirmative vote of more than half of the valid votes cast.

The Grand National Assembly of Turkey, in adopting the law on the Constitutional amendment shall also decide on which provisions shall be submitted to referendum together and which shall be submitted individually, in case the law is submitted to referendum.

Every measure including fines shall be taken by law to secure participation in referenda, general elections, by-elections and local elections.

## APPENDIX I

### LAW NO. 6771 AMENDING THE CONSTITUTION

Art. 1 - "The clause "and impartial" has been added after the clause "independent" in Article 9 of the Constitution of Republic of Turkey dated 7/11/1982 numbered 2709."

Art. 2 - "The clause "five hundred and fifty" has been replaced by the clause "six hundred" under Article 75 of the Law No. 2709."

Art. 3- "The clause "twenty-five" has been replaced by "eighteen" in the first paragraph of Article 76 of the Law No. 2709 and the clause "who have not performed compulsory military service" has been replaced by the clause "who are in relation with their military services" in the second paragraph of the same article."

Art. 4- Article 77 of the Law No. 2709 and its title have been amended as follows:  
"Art. 77- Elections for the Turkish Grand National Assembly and the Presidency shall be held on the same day in every five years.

- A deputy whose term of office expires is eligible for re-election.
- If the simple majority is not obtained in the first round of Presidential elections, a second round of voting is held according to procedure stated in Article 101."

Art. 5- Article 87 of the Law No. 2709 has been amended as follows:  
"Art. 87- The duties and powers of the Turkish Grand National Assembly are to enact, amend, and repeal laws; to debate and adopt the proposals of budget and final accounts; to decide to issue currency and declare war; to approve the ratification of international treaties, to decide with the majority of three-fifths of the Turkish Grand National Assembly to proclaim amnesty and pardon; and to exercise the powers and carry out the duties envisaged in the other articles of the Constitution."

Art. 6 - Art. 98 of the Law No. 2709 has been amended as follows and its title has been removed from the text.

"Art. 98 - The Turkish Grand National Assembly shall exercise its powers of acquiring information and supervision by means of parliamentary inquiry, general debate, parliamentary investigations and written question.

A parliamentary inquiry is an examination conducted to obtain information on a specific subject.

A general debate is the consideration of a specific subject relating to the community and the activities of the State at the Plenary of the Turkish Grand National Assembly.

A parliamentary investigation is an investigation about the Vice-Presidents and the Ministers conducted according to the fifth, sixth, seventh paragraphs of Article 106.

A written question is a request for information addressed to the Vice-Presidents or

Ministers by deputies to be answered in writing within fifteen days at the latest. The form of presentation, content, and scope of the motions and procedures of inquiry shall be regulated by the Rules of Procedure."

Art. 7- Article 101 of the Law No. 2709 and its title have been amended as follows:

"Art. 101- The President of the Republic shall be elected directly by the public from among Turkish citizens who are eligible to be deputies, who are over forty years of age and who have completed higher education. The President of the Republic's term of office shall be five years. A person may be elected as President of the Republic for two terms at most.

Political party groups, political parties which have received more than five percent of the valid votes in sum alone or jointly in the latest parliamentary elections, or a hundred thousand electorates may nominate a candidate for Presidency.

If a deputy is elected as President, his/her membership of the Turkish Grand National Assembly shall cease.

In presidential elections conducted by universal suffrage, the candidate who receives the absolute majority of the valid votes shall be elected President of the Republic. If this majority cannot be obtained in the first ballot, the second ballot shall be held on the second Sunday following this ballot. The first two top rated candidates in first ballot shall run for the second, and the candidate who receives the majority of valid votes shall be elected President of the Republic.

If one of the candidates who entitled the right to run for the second ballot is unable to participate in the election for any reason whatsoever, the second ballot shall be conducted by substituting the vacant candidacy in conformity with the ordering constituted in the first ballot. Where only one candidate remains for the second ballot, this ballot shall be conducted as a referendum. Should the candidate receive the majority of the valid votes, he/she shall be elected the President of the Republic. If that candidate cannot receive the majority of the valid votes in election, only presidential election is renewed.

The term of office of the incumbent President of the Republic shall continue until the President-elect takes the office.

Other procedures and principles concerning presidential elections shall be regulated by law."

Art. 8- Article 104 of the Law No. 2709 has been amended as follows:

" Art. 104 - The President of the Republic is the head of the State. Executive power belongs to the President.

In this capacity, he/she shall represent the Republic of Turkey and the unity of the Turkish Nation; he/she shall ensure the implementation of the Constitution, and the regular and harmonious functioning of the organs of the State.

If he/she deems it necessary, delivers the opening speech of the Turkish Grand National Assembly the first day of the legislative year.

He/she gives message to the Assembly about domestic and foreign policy of the country. He/she promulgates laws.

He/she returns laws for reconsideration to the Turkish Grand National Assembly.  
He/she lodges an action for annulment with the Constitutional Court for the whole or certain provisions of enacted laws, the Rules of Procedure of the Turkish Grand National Assembly on the grounds that they are unconstitutional in form or in content.

He/she appoints and dismisses Vice-Presidents and ministers.

He/she appoints and dismisses high level State officials, and regulates the procedures and principles relating to the appointment of these, by presidential decrees.

He/she accredits representatives of the Turkish State to foreign states and receives the representatives of foreign states appointed to the Republic of Turkey.

He/she ratifies and promulgates international treaties.

He/she holds a referendum, if he/she deems it necessary, for the laws regarding amendment to the Constitution.

He/she determines the national security policies and takes the necessary measures.

He/she represents the Office of Commander-in-Chief of the Turkish Armed Forces on behalf of the Turkish Grand National Assembly.

He/she decides on the use of the Turkish Armed Forces.

He/she revokes or commutes the sentences imposed on individuals, on grounds of chronic illness, disability and old age.

The President may issue presidential decrees on matters relating to the executive power. The fundamental rights, individual rights and duties included in the first and second chapters, and the political rights and duties listed in the fourth chapter of the second part of the Constitution, shall not be regulated by presidential decrees.

No presidential decrees shall be granted on matters to be regulated specifically by law embodied in the Constitution.

No presidential decrees shall be granted on matters explicitly regulated by law. In case of a conflict between presidential decrees and the laws due to differences in provisions on the same matter, the provisions of law shall prevail. In case the Turkish Grand National Assembly introduces a law on the same matter, the presidential decree shall become null and void.

The President may issue by-laws in order to ensure the implementation of laws providing that they are not contrary to these laws and regulations. Decrees and by-laws shall come into force on the day of their publication in the Official Gazette unless a date later than publication is determined.

The President of the Republic shall also exercise powers of election and appointment, and perform the other duties conferred on him/her by the Constitution and laws."

Art. 9 - Article 105 of the Law No. 2709 and its title have been amended as follows:

"Art. 105 - [Parliamentary] Investigation may be requested claiming that the President commits a crime through a motion tabled by an absolute majority of the total number of members of the Turkish Grand National Assembly . The Assembly shall debate this request within one month at the latest and may decide to open an investigation through a three-fifths majority in secret ballot.

Where a decision to launch an investigation is made, the investigation shall be conducted by a committee of fifteen members, chosen by lot, for each political party in the Assembly, separately from among three times candidates nominated for each seat reserved to party groups in proportion to their number of seats. The committee shall submit its report on the result of the investigation to the Assembly within two months. In case the investigation is not completed within the time allotted, the committee shall be granted a further and final period of one month. Following its submission to the Office of the Speaker, the report shall be distributed within ten days and debated in the Plenary within ten days after its distribution. The Turkish Grand National Assembly may decide to refer the case before the Supreme Court with two-thirds majority of the total number of members through secret ballot. Supreme Court trial shall be concluded in three months, if the investigation is not completed within the time allotted, a further three months shall be granted for once, trial shall absolutely be completed within that time.

The President in respect of whom an investigation has been initiated cannot decide to hold elections.

The term of office of the President, who is convicted in the Supreme Court by a crime that prevents from being elected, shall cease.

The alleged offences committed during the term of office shall be subject to the provisions of this article also after the term of office expires."

Art. 10- Article 106 of the Law No. 2709 and its title have been amended as follows:

" Art. - After being elected, the President may appoint one or more Vice- Presidents. In case the office of the President falls vacant for any reason, the election of the President shall be held in forty five days. Until a new one is elected, by the Vice-President shall act as president and he/she shall exercise the powers of the President. If the general election is to be held in a year or less, the election of the Turkish Grand National Assembly shall be renewed together with the election of the President. If the general election is to be held in over one year, the President [newly] elected shall continue to serve until the election date of the Turkish Grand National Assembly. For the President who is completing that remaining period, this time-frame is not counted as the term of office. Both elections are held together at the date of the general elections of the Turkish Grand National Assembly.

In the event of a temporary absence of the President of the Republic on account of illness and travel abroad, the Vice-President shall serve as Acting President of the Republic and exercise the powers of the President of the Republic.

Vice-Presidents and ministers shall be appointed from among those eligible to be elected as deputies and dismissed by the President of the Republic from among those eligible to be elected as deputies. Vice-Presidents and ministers shall take their oaths before the Turkish Grand National Assembly, as written in Article 81. If members of the Turkish Grand National Assembly are appointed as Vice-Presidents or ministers, their parliamentary membership shall cease.

Vice-Presidents and ministers shall be accountable to the President. [Parliamentary] Investigation alleging that they committed a task-related crime may be requested

against the Vice-Presidents and ministers through a motion tabled by an absolute majority of the total number of members of the Turkish Grand National Assembly. The Assembly shall debate on this request within one month at the latest and may decide to open an investigation with a three-fifths majority in secret ballot. Where a decision to launch an investigation is made, the investigation shall be conducted by a committee of fifteen members, chosen by lot, for each political party in the Assembly, separately from among three times candidates nominated for each seat reserved to party groups in proportion to their number of seats. The committee shall submit its report on the result of the investigation to the Office of the Speaker within two months. In case the investigation is not completed within the time allotted, the committee shall be granted a further and final period of one month."

Art. 11- Article 116 of the Law No. 2709 has been amended together with its title as follows.

" Art. 116 - The Grand National Assembly may decide to renew elections with a three-fifths majority of the total number of members. In this case, general election of the Grand National Assembly and presidential elections shall be held together. In the case of that the President decides to renew the elections, general election of the Grand National Assembly and presidential elections shall be held together. Where the renewal of the elections is decided by the Grand National Assembly during the second term of the President, he/she may run [for the presidency] once more.

The powers of the Assembly and the President of the Republic of which the renewal of elections is decided together, shall continue until these organs take the offices. The terms of offices of the Assembly and the President elected in this manner shall also be five years."

Art. 12- Article 119 of the Law No. 2709 has been amended together with its title as follows and its side-titles have been removed from the text.

"Art. 119 - The President of the Republic may declare state of emergency in one or more regions or throughout the country for a period not exceeding six months in the event of war, the emergence of a situation necessitating war, mobilization, uprising, strong and actual attempt against homeland and Republic, widespread acts of violence of internal or external origin threatening the indivisibility of the country and the nation, emergence of widespread acts of violence which are aimed at the destruction of the constitutional order or the fundamental rights and freedoms, severely destruction of public order due to act of violence, and emergence of natural disaster, dangerous pandemic disease or severe economic crises.

The decision of declaration of state of emergency shall be published on the issuing day in the Official Gazette, and submitted to the Turkish Grand National Assembly for approval, on the same day.

If the Turkish Grand National Assembly is not in session, it shall be immediately announced for assembly. The Turkish Grand National Assembly may, when it deems necessary, reduce or extend the period of state of emergency, or lift it.

The Turkish Grand National Assembly may extend the period of state of emergency for a maximum of four months each time upon President's request. In the event of state of war, the limit of four months does not apply.

The financial, material and labour obligations which are to be imposed on citizens in the event of the declaration of state of emergency and the manner how fundamental rights and freedoms shall be restricted or suspended temporarily in line with the principles of Article 15, which provision shall be applied, and how the procedures shall be exercised sided, shall be regulated by the Act on State of Emergency.

During the state of emergency, the President of the Republic, may issue presidential decrees on the matters necessitated by the state of emergency without the limitation set forth in the second sentence of the seventeenth paragraph of Article 104. These decrees having the force of law shall be published in the Official Gazette, and shall be submitted to the Turkish Grand National Assembly on the same day for approval. Save for the situations that the Turkish Grand National Assembly may not meet due to war and force majeure; presidential decrees issued during the state of emergency shall be debated and concluded in the Turkish Grand National Assembly within three month. Otherwise, the Presidential decree issued in the state of emergency shall ex officio cease to have effect".

Art. 13- The following paragraph has been added to Article 142 of the Law No. 2709.

"No military courts shall be formed other than disciplinary courts. However, in state of war, military courts shall be formed with jurisdiction to try offences committed by military personnel related to their duties."

Art. 14- "The title of article 159 of the Law No. 2709 and the expression "High" in the first and ninth paragraphs have been removed from the text; second, third, fourth and fifth paragraphs have been amended as follows; the expression "regular" in sixth paragraph has been removed from the text; the expression "laws, regulations, bylaws and circulars" in the ninth paragraph has been amended as "laws and other legislation".

The Council of Judges and Prosecutors shall be composed of thirteen members; shall comprise two chambers.

The President of the Council is the Minister of Justice. The Undersecretary to the Ministry of Justice shall be an ex-officio member of the Council. By the President of the Republic, three members of the Council shall be selected among judges and public prosecutors, who are first category judges and who have not lost the qualifications required for being a first category judge, in ordinary justice and one member among administrative judges and public prosecutors who are first category judges and who have not lost the qualifications required for being a first category judge; by the Turkish Grand National Assembly, three members shall be selected from among members of the Court of Cassation, one member shall be selected from among members of the Council of State and three members, the qualifications of whom are defined by law, from among academic members in the field of law of high

education institution and lawyers. Among the members elected from academic member and lawyers, at least one shall be academic member and one shall be a lawyer.

The applications for the memberships to be selected by the Turkish Grand National Assembly shall be made to the Office of the Speaker of the Assembly. The Office of the Speaker conveys the applications to the Joint Committee composed of members of the Committee on Justice and Committee on Constitution. The Committee shall elect three candidates for each vacancy with a two-thirds majority of total number of members. If the procedure of electing candidates cannot be concluded in the first round, a three-fifth majority of total number of members shall be required in the second round. If the candidates cannot be elected in this round as well, the procedure of electing candidates shall be completed by choosing a candidate by lot, for each membership among the two candidates who have received the highest number of votes. Turkish Grand National Assembly shall hold a secret ballot selection for the candidates the Committee has identified. In the first round a two-thirds majority of total number of members shall be required; in case the election cannot be concluded in this round, in the second round a three-fifth majority of total number of members shall be required. Where the member cannot be selected in the second round as well, the selection shall be completed by choosing a candidate by lot among the two candidates who have received the highest number of votes.

Members shall be selected for a four year term. Members may be re-elected, at the end of their term of office.

Selection of members to the Council shall be held within thirty days before the expiry of the term of office of the members. In case of vacancies for members selected to the Council prior to the expiry of the term of office, new members shall be appointed within thirty days following the vacancy."

Art. 15- Article 161 of the Law No. 2709 has been amended together with its title as follows.

" Art. 161 - The expenditure of the State and of public corporations, other than state economic enterprises, shall be determined by annual budgets.

The beginning of the fiscal year and the preparation, implementation, and control of the central government budget and special periods and procedures for investments, or for business and services expected to last more than one year shall be defined by law. No provisions other than those pertaining to the budget shall be included in the Budget Act.

The President shall submit central government budget bill to the Turkish Grand National Assembly at least seventy-five days prior to the beginning of the fiscal year. The budget bill shall be examined by the Committee on Budget. The budget bill adopted by the Committee on Budget within fifty-five days shall thereafter be debated and concluded by the Plenary before the beginning of the fiscal year. In cases the budget law cannot put into force in time, a provisional budget shall be adopted. Where provisional budget cannot adopted then the budget of the previous year increased by the revaluation rate shall be applied.



Members of the Turkish Grand National Assembly shall express their opinions, in the Plenary, on public administrations' budgets during the debates of each budget; they shall not make proposals that entail an increase in expenditure or a decrease in revenue.

In the Plenary, public administrations' budgets and motions for amendments shall be read out and voted without debate. The appropriation granted by the central government budget shall indicate the limit of expenditure allowed. No provision shall be included in the budget to the effect that the limit of expenditure may be exceeded by a Presidential Decree.

In motions of amendment entailing an increase in appropriations under the budget of the current fiscal year, and, in bills entailing financial burden in the budgets of the current or following fiscal year, the financial resources to meet the stated expenditure shall be indicated.

Central government final accounts bills shall be submitted to the Turkish Grand National Assembly by the President within six months at the latest after the end of the relevant fiscal year. The Court of Accounts shall submit its statement of general conformity to the Assembly within seventy-five days of the submission of the final accounts bill to which it is related.

The submission of the final accounts bills and the statement of general conformity to the Turkish Grand National Assembly shall not preclude the auditing and trial of the accounts for the relevant fiscal year that have not been concluded by the Court of Accounts, and shall not mean that a final decision has been taken on these accounts. Final accounts bills shall be debated and decided in conjunction with the budget bill of the new fiscal year."

Art. 16- Pursuant to the bill:

"A)

1. "and Council of Ministers" under Article 8;
2. "martial law" under the first paragraph of Article 15,
3. under the fourth paragraph of Article 17 and,
4. under the fifth paragraph of Article 19;
5. "Council of Ministers and" under the first paragraph of Article 88 and "draft law and" under the second paragraph;
6. "directly or upon the motion of the Council of Ministers" under the third paragraph of Article 93;
7. " The acts of the President of the Republic in his/her own competence, and the decisions of the Supreme Military Council are outside the scope of judicial review. Nonetheless," under the second paragraph of Article 125 and "martial law" under the sixth paragraph;
8. "Martial law" under the first paragraph of Article 148, "High Military Court of Appeals, High Military Administrative Court, and "high" under the sixth paragraph, "General Commander of the Gendarmerie" under the seventh paragraph;
9. "government bill or" under the fourth paragraph of Article 153;

10. "High" under the second paragraph of Article 154,
  11. "Government bills submitted by the Prime Minister and the Council of Ministers" and "examine draft regulations" under the second paragraph of Article 155, "high" under the third paragraph are removed from the Articles.
- B)
12. "by the Council of Ministers" under the fourth paragraph of Article 73 is replaced with "by the President of the Republic";
  13. The heading of Article 78, "D. Deferment of elections for the Turkish Grand National Assembly and by-elections";
  14. "Council of Ministers" under the second paragraph of Article 117 is replaced with "President of the Republic";
  15. " Prime Minister, the Chief of the General Staff, deputy prime ministers" under the first paragraph of Article 118 is replaced with "Vice-Presidents", " the commanders of the Land, Naval and Air Forces and the General Commander of the Gendarmerie" is replaced with "Chief of General Staff, the commanders of the Land, Naval and Air Forces", "to the Council of Minister" under the third paragraph is replaced with "to the President of the Republic", "by the Council of Ministers" is replaced by "by the President of the Republic", "Prime Minister" under the fourth paragraph is replaced with "Vice-Presidents", "of the Prime Minister" under the fifth paragraph is replaced with " of the Vice-President", "by the law" under the sixth paragraph is replaced with "by the Presidential decree";
  16. "only by law, or by the authority expressly granted by law" under the third paragraph of Article 123 is replaced with " by law or Presidential Decree";
  17. "Prime Ministry" under the first paragraph of Article 124 is replaced with "President" and "the regulations" is replaced with "the Presidential Decrees";
  18. "Council of Ministers" under the sixth paragraph of Article 127 is replaced with "President";
  19. "by the Council of Ministers" under the second paragraph of Article 131 is replaced with "by";
  20. "to the Office of the Prime Minister" under the first paragraph of Article 134 is replaced with "to the Minister to be authorized by the President";
  21. "Regulation" under the first paragraph of Article 137 is replaced with "Presidential Decree";
  22. " of the decrees having the force of law" under the first paragraph of Article 148 is replaced with "of the Presidential Decrees", "Members of the Council of Ministers" under the sixth paragraph is replaced with "Vice-Presidents and Ministers";
  23. "twelve" under the first paragraph of Article 149 is replaced with "ten";
  24. "of the decrees having the force of law" under Article 150 is replaced with "of the Presidential Decrees" and " parliamentary groups of the ruling party or parties and of the main opposition party and Turkish Grand National Assembly" is replaced with "two political party groups possessing the highest number of members in the Turkish Grand National Assembly and";
  25. "decree having the force of law" under Article 151 and,

- 26. under the third paragraph of Article 153 is replaced with "Presidential Decree";
- 27. "decree having the force of law" under the first paragraph of Article 152 and
- 28. second paragraph of Article 153 is replaced with "Presidential Decree"
- 29. "civil, administrative, and military" under the first paragraph of Article 158 is replaced with "civil and administrative";
- 30. "the government" under the fourth paragraph of Article 166 is replaced with "President";
- 31. "Council of Ministers" under the second paragraph of Article 167 is replaced with "President".

C)

- 32. Under the third paragraph of Article 89, "by the absolute majority of the total number of members" is added after the phrase "the law sent back" and,
- 33. "appointed by the President" is added at the beginning of the third paragraph of Article 117.

D)

- 34. "administrative investigation" is added before "examination" under the first paragraph of Article 108, "Armed Forces and" under the second paragraph is removed from the Article, "the members and the Chairperson from among the members ... appointed ... from among those with the qualifications set forth in the law" under the third paragraph is replaced with "Chairperson and members", "by law" under the fourth paragraph is replaced with "by Presidential Decree".

E)

- 35. "seventeen" under the first paragraph of Article 146 is replaced with "fifteen", one member from the High Military Court of Appeals, and one member from the High Military Administrative Court" under the third paragraph and "High Military Court of Appeals, High Military Administrative Court" under the fourth paragraph are removed from the Article.

F)

- 36. Second sentence of the second paragraph of Article 82,
- 37. Second paragraph of Article 96,
- 38. Fourth and fifth paragraphs of Article 117,
- 39. Second sentence of the third paragraph of Article 127,
- 40. Last sentence of the first paragraph of Article 150,
- 41. Article 91 regarding the power to issue Decree having the force of law,
- 42. Article 99 regarding the censure,
- 43. Article 100 regarding the Parliamentary Investigation,
- 44. Article 102 regarding the Presidential Election,
- 45. Article 107 regarding the General Secretariat of the President of the Republic,
- 46. Article 109 regarding the formation of the Council of Ministers,
- 47. Article 110 regarding taking office and vote of confidence (Council of Ministers),
- 48. Article 111 regarding the vote of confidence while in office (Council of Ministers),

49. Article 112 regarding functions and political responsibilities (Council of Ministers),
50. Article 113 regarding the establishment of Ministries and Ministers,
51. Article 114 regarding the Provisional Council of Ministers during elections,
52. Article 115 regarding Regulations,
53. Article 120 regarding Declaration of state of emergency because of widespread acts of violence and serious deterioration of public order,
54. Article 121 regarding the States of emergency,
55. Article 122 regarding martial law, mobilization and declaration of war,
56. Article 145 regarding military justice,
57. Article 156 regarding High Military Court of Appeals,
58. Article 157 regarding High Military Administrative Court,
59. Article 162 regarding the debate on the budget,
60. Article 163 regarding Principles governing budgetary amendments,
61. Article 164 regarding final accounts are abrogated"

Art. 17 - The following provisional article is added to the Law No. 2709.

"Provisional Article 21-

A) 27th Legislative Term Parliamentary elections to the Turkish Grand National Assembly and Presidential election shall both take place on 3/11/2019. The members of the Turkish Grand National Assembly and President continue to hold office until the date of the elections. In the event that the Assembly decides to call an election, 27th Legislative Term Parliamentary elections and Presidential election take place on the same day.

B) Within six months at the latest from the date of promulgation of this Law, the Turkish Grand National Assembly organizes other legal regulations and amendments to the Rules of Procedure of the Assembly as required by the amendments brought by this Law. Amendments which are stated to be made by the Presidential decree, will be brought by the President within six months at the latest from the date of his/her taking office.

C) According to the amendment made to Article 159 of the Constitution, election of members to the High Council of Judges and Prosecutors shall be held within thirty days at the latest and they shall take office on the working day following the fortieth day after the date of entry into force of this Law. The applications for the memberships shall be made to the Office of the Speaker of the Assembly within five days as of the entry into force of this Article. The Office of the Speaker conveys the applications to the Joint Committee composed of members of the Committee on Justice and Committee on Constitution. The Committee shall elect three candidates for each vacancy with a two-thirds majority of total number of members within ten days. If the procedure of electing candidates cannot be concluded in the first round and two-thirds majority cannot be obtained, second and third round elections are held; in these rounds, the candidate acquiring the three-fifths majority of the total number of votes is elected. If the candidates cannot be elected in this round as well, the procedure of electing candidates shall be completed by choosing a candidate by

lots among twice the number of candidates who have received the highest number of votes in the third round. Plenary of the Turkish Grand National Assembly concludes the elections within fifteen days in accordance with the same procedures and principles. The present members of High Council of Judges and Prosecutors shall hold office until the date on which the new members take office and take actions pursuant to the provisions in the Law in force. New members shall exercise their duties in accordance with the provisions of the existing Law which are not unconstitutional until an amendment is brought to the relevant Law. Among those whose memberships were expired and were not re-elected to the High Council of Judges and Prosecutors, the ones selected among judges and prosecutors of civil judiciary shall be appointed as members of High Court of Appeals upon their requests and the ones selected among judges and prosecutors of administrative judiciary shall be appointed as members of Council of State by the High Council of Judges and Prosecutors; the ones elected among academicians and lawyers shall be appointed as members of Council of State by the President. During such elections and appointments, whether there is enough vacancy in cadres is not considered. Instead, enough vacancies are added to the cadres in High Court of Appeals and Council of State for the number of elected and appointed members.

D) Memberships of those who are elected as members of Constitutional Court from the High Military Court of Appeals and High Military Administrative Court, exist until their memberships are expired for any reason.

E) As of the date of entry into force of this Law, High Military Court of Appeals, High Military Administrative Court and military courts are abrogated. Within four months as of the entry into force of this Law; in accordance with their choices and acquired rights, Heads, Chief Prosecutors, Second Heads and members as well as other military judges (excluding reserve officers) from the category of military judges in High Military Court of Appeals and High Military Administrative Court; a) may be appointed as judges or prosecutors of civil or administrative judiciary by the High Council of Judges and Prosecutors.

b) As regards their salaries, additional payments, allowance, judicial allowance, additional allowance, financial and social rights and aids along with their other rights, judges and prosecutors of civil or administrative judiciary shall be appointed in their existing categories, to cadres of legal service under the Ministry or Presidency of General Staff, by the Ministry of National Defense and as regards the rights and obligations other than those stated above, they shall be appointed, provided that the legislation provisions on the date of entry into force of this Law continue to apply. The procedures and principles regarding the compensation to be paid to those who are entitled to pension and will retire from their office on their own accord before the retirement on the age margin, shall be regulated by law. Of the files examined in the annulled military judicial authorities, those at the stage of examination of legal remedy shall be submitted to High Court of Appeals or Council of State where relevant, other files shall be submitted to the civil or administrative judicial authorities with jurisdiction and competence, where relevant, within four months."

F) Decree Laws, regulations, guidelines issued by the Prime Ministry or Council of Ministers as well as other regulatory acts which are in force on the date of entry into force of this Law shall be valid unless annulled. Articles 152 and 153 continue to apply as regards Decree Laws in force.

G) Powers granted to the Prime Ministry and Council of Ministers through the laws or other legislations shall be exercised by the President until an amendment is made to the relevant legislation.

H) Last paragraph of Article 67 of the Constitution shall not apply regarding the first mutual Parliamentary and Presidential elections which will be held following the date of entry into force of this law. "

Art. 18 - By virtue of this Law;

"a) Amendments made to the Articles 8, 15, 17, 19, 73, 82, 87, 88, 89, 91, 93, 96, 98, 99, 100, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113 and repealed second and third paragraphs of Article 114, amendments made to Articles 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125 and amendment to the last paragraph of Article 127; amendments to Articles 131, 134, 137 and amendment to the first paragraph of Article 148 and amendment to "members of Council of Ministers" under the sixth paragraph, amendments to second paragraphs of Articles 150, 151, 152, 153, 155 and amendments to Articles 161, 162, 163, 164, 166 and 167, paragraphs (F) and (G) of the Provisional Article 21 in the Constitution shall enter into force on the date when the President takes office, following the mutual elections to Turkish Grand National Assembly and Presidency,

b) Amendments to Articles 75, 77, 101 and 102 of the Constitution shall enter into force on the date at the beginning of the calendar concerning the first elections to the Turkish Grand National Assembly and Presidential elections,

c) Other amended provisions with the annulled last paragraph of Article 101 as follows "If the President-elect is a member of a party, his/her relationship with his party shall be severed" shall enter into force on the date of promulgation, and referenda shall be held on the above-mentioned Articles."

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