

# An All-Powerful President without Checks and Balances



An Assessment of the New Constitutional Arrangements in Turkey  
in view of 24 June 2018 Elections



July 2018

## Introduction

In the aftermath of the 1980's military coup d'etat, the Constitution of 1982 granted the president with a wide range of powers in the state constitutional structure, which has long been a matter of debate in Turkish constitutional law. Turkey's Parliament passed yet another Constitutional Bill in January 2017 that would concentrate even more powers in the hands of the President and extend the mandate of the current President (Recep Tayyip Erdogan).<sup>1</sup> The constitutional bill came into force following its publication on 11 February 2017 in the Official Gazette and was approved by a public referendum on 16 April 2017.

The main argument of the ruling party (AKP) for the constitutional change was that the amendment would collect and unite all the executive powers in the president's office for a more effective and efficient government. The model introduced by the constitutional change lacks however the safety mechanisms of checks and balances present in other democratic presidential systems like the one in the United States. The principle of separation of the three powers (ie. the legislature, the executive and the judiciary) has long been considered to be the guarantee of individual rights and freedoms in a democratic governmental system. Gathering of even the two powers in one hand is believed to lead to arbitrariness (by Montesquieu). The new constitutional framework contains serious threats to the principle of separation of powers since it also demolishes independence of the judiciary to a great extent.

Following the constitutional amendment in 2017, the very first presidential and parliamentary election was held on 24 June 2018 by means of a snap election, which secured Erdogan the presidency and his party AKP the majority in the parliament with the support of its nationalist partner MHP (Nationalist People Party).<sup>2</sup> The complete election process which was held under an unnecessary and unjustified state of emergency has been intensively criticised as unfair to say the least. International observers have criticised the climate of violence and fear resulting from the general

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<sup>1</sup> <http://www.resmigazete.gov.tr/eskiler/2017/02/20170211-1.htm>

<sup>2</sup> <https://www.bbc.co.uk/news/world-europe-44596072>

security environment, arrests of opposition activists and parliamentarians and stifling of press freedoms, making the campaign unfair.<sup>3</sup>

This analysis elaborates in some detail on the new '*a la Turca*' presidential system introduced by the new constitutional arrangements, analysing the detrimental aspects of the new system in relation to the principle of separation of powers as well as to the prerequisites of the checks and balances of any democratic governmental system. Here, the effects of the new constitutional arrangements are discussed from the perspectives of three classical powers: the executive, the legislature and the judiciary. The concluding part also provides a summary analysis of the new presidential system in view of the results of the presidential and parliamentary election held on 24 June 2018.

## **I. Constitutional Changes in Relation to the Executive**

The constitutional amendment has abolished the prime minister's office and the Council of Ministers. The power and duty of the executive which were jointly shared by the president and the Council of Ministers under the old system rest now exclusively with the President (Article 8 of the Constitution). Article 104 of the Constitution as amended accordingly makes it clear that the prerogative of the executive rests with the President. The new Constitution provides a number of further power shifts to the president as outlined below.

### **A. Appointment of Vice-Presidents and Ministers by the President**

The President, as the sole head of the executive, has now the power to directly appoint and fire the vice-presidents and ministers (Article 104, 106). The President will appoint one or more vice-presidents as foreseen by the new Article 106 of the Constitution. In the event of vacancy of the Presidency or temporary absence of the President due to illness or trips abroad, it will be the vice-president to deputize the president and use the power of the presidency on his/her behalf (Article 106[2-3]). The most problematic dimension of this provision is its ambiguity in the quality and the quantity of the vice-

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<sup>3</sup> <https://www.theguardian.com/world/2015/nov/02/turkeys-elections-campaign-unfair-say-international-monitors>

presidents. There is no express provision in the amendment regarding the number and qualification of the vice-president(s). This area is thus left to the sole discretion of the President without allowing any room to exercise any check and control on the appointment. It should be noted that the vice-presidents are not mere consultants or assistants to the President. They are the deputies to the president, who will be acting on their behalf with all the prerogatives of the presidential office. The vice-presidents will have all the executive and legislative (issuing decrees, etc.) powers when deputized in the absence of the President or during the vacancy of the Presidency.

Under the old Article 106 of the Constitution, it was the Speaker of the Parliament to deputize the President automatically when needed as a result of temporary absence of the president or vacancy of the presidency. The new provisions of Article 106(2-3) fundamentally differ from the old rules. The Speaker of the Parliament is a member of the parliament elected by the people through a national electoral process. He/she further holds a position of principled impartiality, as he/she in principle represents the whole of the parliament. It is evident that the vice-president(s) to be appointed by the President will not need to meet the above-mentioned qualifications. Therefore, this provision is not in line with any of the practices of the democratic presidential systems in the world. Indeed, the vice-president in the US system is for instance elected by the people along with the president through a democratic electoral process. It is through such an election system that the vice-president's position to act on behalf of the President may be democratically legitimised. Bearing in mind the extensive powers that the President has over the executive, the legislature and the judiciary, this provision can in no way be interpreted as complying with the principle of democratic legitimacy.

#### **B. Appointment of Senior State Executives and Establishment of Ministries**

The president has also the power to appoint and dismiss the senior state executives and to regulate the procedure and principles relating their appointments through presidential decrees (Article 104[9]). It appears to have been left to the presidential decrees to define the scope of '*senior state executives*' as well as the procedure and conditions of their appointment. Besides, whilst under the old Article 113 the ministries could only be established by means of enacted laws, the new Article 106 makes it

possible for the president to establish ministries through presidential decrees. This certainly gives the President a large area of manoeuvring under the pretext of restructuring the ministries, which has been quite extensively utilised by the ruling party governments for shutting down institutions that the government was not happy about. The new Article 106 now provides the president with a similar instrument to do a similar '*restructuring*' at his sole discretion. This is also another area of significant power transfer from the legislature to the President.

### **C. Declaration of the State of Emergency**

The power to declare state of emergency and martial law is another area of shift of power from the abundant Council of Ministers to the sole authority of the President (Article 119). This change removes the possibility of at least an internal discussion and a collective decision making within the Council of Ministers and the National Security Council under the old constitutional system for the declaration of an emergency (the former Articles 119-120). Whereas under the old provisions the Council of Ministers was responsible to the Parliament for restoring the national security and defence of the country, this is now transferred to the President as his sole responsibility (but not formulated as a responsibility to the parliament). Even though the presidential decrees may not normally limit the basic rights, individual rights and duties as well as political rights and duties under the new Article 104(17[2<sup>nd</sup> Sentence]), the presidential decrees promulgated under an emergency may limit all these basic, individual and political rights and freedoms (Article 119[6] as amended).

### **D. Impunity of the President from the Judicial Scrutiny**

Under the new constitutional rules, the president will have criminal liability only under practically impossible conditions (Article 105). The parliament may in principle refer the President to the Constitutional Court to face trial for the crimes that he may commit during his tenure. However, the impeachment proceedings against the President can only be initiated with the signatures of 301 deputies in the now 600-seat Parliament (Article 105). Following this, the Parliament will only be able to set up a commission of inquiry with a secret ballot of 360 deputies (3/5 majority). If the inquiry commission decides to refer the president to the Constitutional Court for trial, this could only be

achieved after the cast of another secret ballot of 400 deputies (2/3 majority) in this direction.

This system makes it practically impossible for the Parliament to impeach and unseat the President. In order to take action against the President, the Parliament needs a two-thirds (2/3) majority, and this is practically impossible if the majority in the Parliament and the President are from the same party. Even if the required two-thirds majority has been reached in the Parliament which would naturally be dominated by the President's party, it would be up to the Constitutional Court to try the President. One must note however that even in this very unlikely case, it may well be very difficult to have a neutral trial process, as 12 out of 15 members of the Constitutional Court are selected and appointed by the President himself.

#### **E. Immunity of the President from the Parliamentary Scrutiny**

In addition to this de-facto impunity from the judicial scrutiny, the President will also be immune from the parliamentary questioning before the legislative assembly. Under the new version of Article 98 of the Constitution, the Parliament will exercise such control only over the cabinet and vice-president(s) through 'Parliamentary Research', 'Parliamentary Investigation', 'General Discussion' and 'Written Question'. The vice-president(s) will have to respond to the Written Questions within 15 days. The Parliament has now no right to interpellation (no confidence vote) over the ministers and the cabinet that it used to hold under the old Article 87 of the Constitution. Even though the president is the head of the executive, he/she will not be politically responsible (*de jure*) nor be criminally held accountable (*de facto*) for his acts during his/her presidency. The provisions of Article 105 stipulating (*de jure*) political impunity and almost (*de facto*) criminal impunity shall continue to apply after the term of the presidency for the criminal conduct allegedly committed during the term of the presidency.

## **II. Constitutional Changes with Respect to the Legislature**

### **A. President's Increased Control on the Parliament**

The president will now also be a member (and most probably the chair) of his/her political party under the new Constitutional rules, while under the old rules the

president had to end his/her relationship with his/her political party (Article 105). Under the current rules, because the president is allowed to retain ties with his/her political party, this will give him/her a strong position in running his/her own party. In the Turkish political party system, this may mean that the presidential candidate would be able to decide who is going to run on his/her party's ticket in the parliamentary elections. This may well result in the President controlling the parliament and its agenda leading to the deterioration of the system of checks and balances. The President will be able to serve two consecutive five-year terms and may well continue to be the chairman of his political party at the same time.

### **B. Raising the Number of Members of Parliament**

A new constitutional provision has raised the number of deputies in the Parliament from 550 to 600 (Article 75). There appears to be no justification put forward in the reasoning of the constitutional amendment on the need to increase the number, which further strengthens the belief that this is just another populist measure for some more additional seats. Where more legislative power is shifted to the President with fewer legislative checks remaining, increasing the number of seats in the Parliament will add no substance to the power of the legislature. This constitutional amendment appears to be just another carrot of a populist nature to allocate more seats in the parliament.

### **C. Holding Simultaneous Presidential and Parliamentary Elections**

A new constitutional provision provides that the presidential and parliamentary polls will take place on the same day simultaneously every five years (Article 77). It is similarly foreseen that a renewal of elections will also be held simultaneously on the same day (Article 116). Without strengthening the internal democracy within political parties and limiting the authority of heads of parties in designating the candidates for the parliament, it would be very difficult to maintain an effective parliamentary control over the executive in practice. As the presidential and the parliamentary polls will take place simultaneously on the same day, the President or the forerunners for the presidency, who would be the chairman of the parties in most cases will dominate the list of would-be deputies.

A new constitutional provision grants the president the power to decide on the renewal of elections (Article 116). If that is the case, the presidential and parliamentary elections will be held simultaneously on the same day. This provision provides the President with a very strong tool to keep pressure on the parliament in addition to the executive power that he/she would have. The constitutional rule appears to provide the Parliament with the same power to decide on the renewal of elections but only by a vote of 3/5 out of 600 deputies (Article 116). It would be very unlikely this to be the case, both due the natural unwillingness of the deputies to shorten their terms and the difficulty of reaching such a high qualified majority in the Parliament. If this does ever happen, the presidential and parliamentary elections will be held simultaneously on the same day.

#### **D. President's Right to Veto Acts of Parliament**

A new constitutional provision grants the President enhanced veto powers over the enactment of laws in the Parliament (Article 89). To override such a presidential veto, an absolute majority in the parliament (301 out of 600 in any case) is now needed, while under the old constitutional rule, only a simple majority (125 out of 550) was required to pass the acts in this manner (the old Article 89[3]). Through this enhanced veto power, it would be impossible to enact a bill against the will of the President. Taking into account that the parliament is now dominated by the President's party (currently 293 AKP plus 49 MHP members)<sup>4</sup>, the legislative organ will become like an office under the presidency. The acts which could still pass all these processes may also be taken before the Constitutional Court for an annulment procedure, the members of which will be mostly designated by the President (see Section III below).

#### **E. President's Power to Issue Presidential Decrees**

The Parliament's mandate to grant (therefore not to grant) the government to issue governmental decrees regarding certain matters under the old constitutional rules is now abolished by the new Article 87 of the Constitution. The President can now issue

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<sup>4</sup> <https://www.takvim.com.tr/guncel/2018/06/25/24-haziran-2018-secimlerinde-hangi-parti-kac-milletvekili-cikardi-meclis-sandalye-ve-milletvekili-dagilimi>



presidential decrees without the consent of the Parliament regarding the executive matters with the same legislative power and authority as laws passed by the Parliament (Article 104). This means a significant legislative power transfer to the President who also represents the executive. Further, the presidential decrees issued during the state of emergency and war cannot be challenged before the Constitutional Court in terms of both substance and procedure (Article 148[1]). Taking into account that presidential decrees will not be subject to the parliamentary approval, the decrees issued during the state of emergency will be wholly excluded from any legislative or judicial control and scrutiny.

#### **F. No Right to Confidence Vote for the Parliament**

The ministers as well as the vice presidents will be appointed without the approval (confidence vote) of the Parliament. The new Article 87 has abolished the powers of the parliament to scrutinise the ministers and hold the government accountable. The parliamentary control over the government is practically lifted from all aspects. The power of the member of parliaments (by 1/5 vote) to call on the Parliamentary Assembly to convene under the old Article 93 is also abolished. Hence, the parliament will not be able to convene even in most urgent situations during the course of parliamentary breaks unless the President calls the meeting. This is a serious setback from the centuries-old evolution of the parliamentary democracy and democratic involvement.

#### **G. Abolishing Parliamentary Control on Fiscal Budget**

The parliamentary authority regarding the law on fiscal budget is abolished by changes in Article 87 and 161 of the Constitution. The president will now prepare and propose the fiscal budget to the parliament 75 days prior to the new fiscal year (Article 161[3]). If the budget is not put into effect on time, a temporary budget will then be proposed (Article 161[4]). If the temporary budget is not approved, the previous year's budget will be used with an increment on the basis of revaluation ratio. The members of the parliament cannot file amending proposals for increasing or decreasing public expenditures (Article 161[5]). The new constitutional rules limit the parliamentary role in the preparation of the fiscal budget to a very formalistic involvement in the form of

approval or disapproval. The parliament will not have any constructive debate as to the preparation and negotiation of the budget which will be out of the parliamentary control. It is the president who will have the sole power to prepare and implement the budget even if not approved by the parliament which would not be the case in a parliament dominated by the president's political party.

### **III. Amendments Relating to the Judiciary**

#### **A. Abolishing Military Courts**

The new Article 142 of the Constitution has abolished the military courts (Military Supreme Administrative Court and Military Court of Cassation). Article 142 further expressly prohibits the establishment of military courts except disciplinary courts save for those which may be set up to try crimes committed by soldiers under a state of war.

#### **B. Restructuring the Constitutional Court**

The new Article 146 reduces the number of members of the Constitutional Court from 17 to 15. The decrease in the number of the court membership is due to the abolishment of 'Military Supreme Administrative Court' and 'Military Court of Cassation', not a significant one from a constitutional law point of view.

The more alarming aspect of the change in relation to the constitutional court is the procedure regarding the recruitment of the members of the Constitutional Court. They will be designated as follows (Article 146): Five (5) members will be selected by the President from among the candidates designated by the Court of Cassation and Council of State. Three (3) members of the Constitutional Court will be selected by the Parliament which would be normally dominated by the political party chaired by the President. Three (3) members will be selected by the President again from among the candidates designated by the Board of Higher Education (YOK) comprising of members who are selected and appointed by the President. The remaining four (4) members will be directly appointed by the President from among certain listed professions by the Constitution.

Eventually, almost all the members of the Court will be selected and appointed by the President. Not only in Turkey but also in any country even in those which have an established and well-functioning practice of the rule of law, it would be over-ambitious to expect the Constitutional Court to effectively and impartially revise the constitutionality of the laws adapted by the Parliament dominated by the President's party. The Constitutional Court with this composition cannot also be perceived to be impartial and independent when prosecuting the President in its capacity as the Supreme Court.

### **C. New Designation of the Members of the Council of Judges and Prosecutors**

The 'High Council of Judges and Prosecutors', as it was named under the old Article 159 of the Constitution, is now renamed as the 'Council of Judges and Prosecutors'. Though not having a direct legal and technical effect, this change is worth noting as it shows the political and mental background of the whole constitutional amendment package. The new constitutional provisions dramatically change the composition of the 'Council of Judges and Prosecutors'. The "High Council of Judges and Public Prosecutors" was in fact restructured in 2010 not that long ago through a constitutional amendment accepted in a public referendum with 58 % of the votes cast. That amendment was also initiated and fully supported by the AKP government of the time.

The new constitutional arrangement is in complete contrast to the amendment accepted by a vast majority of the people (58 %) in 2010. The number of members in the Council has been reduced to 13 from 22 (Article 159). The designation of these 13 members will be as follows: Four (4) members will be directly selected by the President from among senior judges. Seven (7) members will be appointed by the Parliament. The remaining two (2) members will be the Minister of Justice and the Undersecretary of the Ministry of Justice. The constitutional arrangement leaves no space for any self-representation from among the judiciary through a direct election which was the case under the previous constitutional rules. The reason for this dramatic shift in the designation of the members of the Judicial Council appears to be the ruling party's belief that it has effective control over the Parliament and other institutions which will nominate the candidates (the Court of Cassation, the Council of State and the Board of Higher Education)

The new constitutional arrangement nevertheless deprives of the great majority of fellow judges and prosecutors of first instance courts from contributing to the designation of the members of the Judicial Council. The reason for this avoidance may be the fear that ordinary members of the judiciary are not still considered to be sufficiently under control. Taking into account the President's role in appointing the Minister of Justice and the Undersecretary, it is clear that six members of the Judicial Council will be designated and appointed by the President who will also be a member (and most probably the head of) his/her political party. The selection method for the Parliament of the remaining seven members will enable the selection of these members by means of a simple majority vote in the final round. Considering the equation in the parliament amongst the political parties, it would be highly difficult to talk about the independence and impartiality of the judiciary from the executive. The President has a broad and direct authority over the formation and designation of the members of the Council of Judges and Prosecutors (HSK). Where the President, alongside his/her power over the parliament as the chairman (most probably) of the ruling party, has such influential position over the appointment of the members of the Judicial Council, it appears that the Judicial Council will end up with being another judicial bureaucratic tool under the president's control.

### **Conclusion**

The new constitutional arrangement abolishes the prime minister's office and the cabinet and makes the President as the sole head of the executive. The president directly appoints the vice presidents and ministers and prepare and implement the budget. The President also appoints all high-ranking executives in the state structure. The President has the power to issue presidential decrees which will be excluded from the parliamentary control. The president has further the mandate to declare state of emergency which may restrict basic rights and individual freedoms, unconstitutionality of which cannot be challenged before the constitutional court. Responsibility for restoring the national security and preparation of the armed forces for defence of the country also rest with the President. The president has the power to dismiss ministers and demolishes the Parliament. Despite all these powers, the

President enjoys de-facto impunity from the judicial control and also de jure immunity from the parliamentary scrutiny.

The president retains ties with his/her political party which will provide a strong position in running his/her own party. This will result in the President controlling the parliament leading to the deterioration of the system of checks and balances. The power to renew elections will provide the President with a further strong tool to keep pressure on the parliament. Through the enhanced veto power, it would be impossible to enact a law against the will of the President, bearing in mind that the parliament will be dominated by the President's party. The shift of legislative power to the President significantly reduces the legislature's functioning. The parliamentary role in the preparation of the fiscal budget has been limited to a very formalistic control. The president will prepare and implement the budget which would not be effectively controlled by the mere involvement of the parliament.

Almost practically all the members of the Constitutional Court will be selected and appointed by the President, which would make it difficult for the Constitutional Court to act independently of the President. The President also has a broad authority over the formation of the Council of Judges and Prosecutors (HSK) directly and indirectly through the parliamentary majority. The constitution leaves no space for any self-representation from among the judiciary through a direct election. It would be impossible to talk about the independence and impartiality of the judiciary from the executive in the newly formulated constitution.

To conclude, the new constitution grants the president a whole set of executive powers and shifts large legislative powers from the legislature to the executive and gives extensive authority to the executive over the formation of judicial institutions in return for almost no checks and balances. While all the parliamentary control over the executive is eradicated, all the avenues for the executive to control the Parliament are widely opened. The presidency has been transformed from a relatively confined role to a nearly all-powerful position assuming all the governmental powers: the head of government, the head of state and the head of the ruling party. The new constitutional framework transfers the powers traditionally held by the national assembly to the presidency rendering the former a largely advisory body. Last but not least, the President is the most dominant actor in designing the judiciary by means of designation

of critical positions in the judiciary, which would further jeopardise the separation of powers and abolish any remains of independence of the judiciary.

