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Turkey's New System of Government: Some Observations and Considerations in Comparative-Legal Perspective

Keywords: Turkey, Turkish Constitution of 1982, Turkish constitutional order, constitutional amendments of 2017, systems of government, presidential system, parliamentary system, semi-presidential system, relations between the three main branches

Słowa kluczowe: Turcja, Konstytucja Turcji z 1992, turecki porządek konstytucyjny, poprawki do Konstytucji z 2017, system rządów; system parlamentarny; system półprezydencki, relacje między trzema głównymi władzami

Summary

On 12 December 2016, 316 deputies of the Grand National Assembly of Turkey submitted a constitutional amendment proposal which is mainly related to changing the parliamentary features of the system of government. The constitutional amendment bill was accepted by the Committee on Constitution of the Grand National Assembly of Turkey with minor changes. Hereafter, the bill was discussed and voted on in the Grand National Assembly. The Grand National Assembly passed the constitution-

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al amendment bill by 339 of 550 votes which is not enough for coming into force but holding a referendum by the President of the Republic². The constitutional amendment law was promulgated by the President of the Republic on 11 February 2017, and the referendum was held on 16 April 2017. According to the official results declared by the Supreme Electoral Council, 51.41% of the valid votes are in favour, while 48.59% voted for no. Hence, the amendments were approved and are subject to coming into force. This article aims to point out the newly-introduced Turkish system of government by comparing the legislative and executive relations of the relevant constitutional systems which in this case are presidential U.S.A., semi-presidential France and super-presidential Russia. The other purpose of the article is to remark the formation of the judiciary branch of the American, English, German and French constitutional systems for the comparison of the regarding constitutional amendment law provisions. In this respect, the article comprises of a comparative legal/constitutional research in terms of legislative-executive-judiciary relations.

Streszczenie

Nowy system rządów w Turcji: wybrane uwagi i rozważania w perspektywie prawno-porównawczej

W dniu 12 grudnia 2016 r. 316 deputowanych Wielkiego Zgromadzenia Narodowego Turcji zgłosiło wniosek dotyczący zmiany konstytucji, który był głównie związany ze zmianą parlamentarnych cech systemu rządów. Projekt ustawy zmieniającej konstytucję został zaakceptowany przez Komisję Konstytucyjną Wielkiego Zgromadzenia Narodowego Turcji z niewielkimi zmianami. Następnie projekt ustawy został poddany dyskusji i przegłosowany w Wielkim Zgromadzeniu Narodowym. Wielkie Zgromadzenie Narodowe uchwaliło projekt ustawy o zmianie konstytucji większością 339 spośród 550 głosów, co było niewystarczającą większością konieczną do wejścia w życie, i wiązało się z przeprowadzeniem referendum przez Prezydenta Republiki. Ustawa o zmianie konstytucji została ogłoszona przez Prezydenta Republiki 11 lutego 2017 r., a referendum odbyło się 16 kwietnia 2017 r. Zgodnie z oficjalnymi wynikami ogłoszonymi przez Najwyższą Radę Wyborczą, 51,41% ważnych głosów było za zmianami w konstytucji, podczas gdy 48,59% głosowało przeciw. W związku z tym poprawki zostały zatwierdzone i weszły w życie. Artykuł ten ma na celu ukazanie nowo wprowadzo-

² According to Article 175(4) of the Turkish Constitution, "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".

nego tureckiego systemu rządów poprzez porównanie stosunków między egislatywą a egekutywą w systemach konstytucyjnych: prezydenckim w Stanach Zjednoczonych Ameryki, półprezydenckim we Francji i superprezydenckim w Rosji. Innym celem artykułu jest zwrócenie uwagi na zasady powoływania członków organów władzy sądowniczej w amerykańskim, angielskim, niemieckim i francuskim systemie konstytucyjnym, w celu ich porównania z regulacjami przyjętymi w neweli konstytucyjnej. W tym zakresie artykuł zawiera porównawcze badania prawnokonstytucyjne pod kątem relacji legislatywy, egzekutywy i judykatury.

I. Introduction

The Constitution of 1982 initially prescribed a parliamentary system by providing a double-headed executive branch, consisting of, a President that is impartial and non-accountable and an accountable Council of Ministers determining the political agenda. With the constitutional amendments of 2007, the presidential election method was changed. According to the amendment, the President of the Republic is no longer to be elected by the Parliament but instead by popular vote. These amendments transformed the system of government from a parliamentary system into a presidential-parliamentary system since Turkish constitutional order had had all the elements of a parliamentary system and only lost one element while the parliamentary characteristic of the system still prevailed. The Constitutional amendments of 2017 are something different in this respect. As it is apparent from the amendments, the Turkish system of government is no longer parliamentary. It has been said that the system of government to be introduced by the constitutional amendment is a kind of a “Turkish type of presidentialism” because of its specific features. The new system of government is also called as “system of presidency of republic” instead of a presidential system due to fact that, the head of the state is still referred as president of the republic instead of merely president. It is, therefore, better to take a closer look at the amendments from a comparative legal perspective in this respect.

II. Relations Between The Legislative Branch And The Executive Branch

According to the constitutional amendment, the executive branch shall consist of one person who is the President of the Republic, chosen by a popular vote. Article 8 of the constitutional amendment law reformulates Article 104 of the Constitution of 1982 which describes the constitutional duties and powers of the President of the Republic. According to Article 8 of the constitutional amendment law, Article 104(1) is to be amended to state: "President of the Republic is the head of the state. Executive power shall belong to the President of the Republic"³. The amended Article 104(2) of the Constitution reads: "President of the Republic, in the capacity of presidency, shall represent the Republic of Turkey and the unity of the Turkish Nation; she/he shall ensure the implementation of the Constitution, and the regular and harmonious functioning of the organs of the State". The fact that only one person has the executive power resembles a presidential system for which the United States is the typical example. However, there are still ministers and newly added vice presidents making them a novelty in the Turkish constitutional system. According to the amended Article 104 (8) of the Constitution: "She/he (President of the Republic) shall appoint and dismiss the vice presidents of the republic and ministers". Additionally, amended Article 104(9) of the 1982 Constitution states: "She/he (President of the republic) shall appoint and dismiss senior government executives". Given the fact that vice president(s) are not chosen by the public together with the President and that there is no need for legislative approval of the appointees for ministers and senior government officials differentiate the proposed system of government from the American type of presidentialism. According to the American constitutional order, appointments of secretaries and principal federal officials are subject to the approval of the Senate⁴. Besides, the fact that there are still ministers

³ Bold phrases in articles or provisions stated are the phrases introduced by the constitutional amendment law.

⁴ According to the Section 2 of Article II of the United States Constitution of 1787: "He (the president) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but

in the amendment does not make the system parliamentary since the President of the Republic – not the Parliament – has the power to dismiss them.

In other words, ministers are not responsible to the Parliament but to the President of the Republic. Thus, the status of the ministers is similar to the status of secretaries in the United States. Government members which are called ministers, but are responsible to the President can also be seen in the Russian constitutional order⁵. In the Russian constitutional system, the government is also responsible to the State Duma. Yet, we can consider this responsibility as a restricted one because of the constitutional arms of the President against the State Duma in the motion of the non-confidence process⁶. By contrast, in France, as a typical example of semi-presidentialism, as a result of the fact that the government (not the President of the Republic) is accountable to the National Assembly, it can be dismissed by motion of non-confidence⁷.

The amended Article 104 of the Constitution also gives the President of the Republic power to ratify and promulgate international treaties, to hold the position of supreme military command in behalf of the Grand National

the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments". For the full text of the American Constitution see <https://www.law.cornell.edu/constitution/overview> (10.04.2017).

⁵ See J. Henderson, *The Constitution of the Russian Federation: A Contextual Analysis*, Hart Publishing 2011, p. 139. Indeed, the first two paragraphs of Article 117 the Russian Constitution of 1993 state: "The Government of the Russian Federation may offer its resignation and the President of the Russian Federation shall either accept or reject it. The President of the Russian Federation may decide on the resignation of the Government of the Russian Federation". For the full text of the Russian Constitution see https://www.constituteproject.org/constitution/Russia_2008.pdf (30.04.2017). Furthermore, according to the Article 83 (c) of the Russian Constitution, "The President of the Russian Federation shall adopt decision on the registration of the Government of the Russian Federation".

⁶ According to Article 117(3) of the Russian Constitution: "The State Duma may express no confidence in the Government of the Russian Federation. A resolution of no confidence in the Government shall be adopted by a majority of votes of the total number of deputies of the State Duma. After the State Duma has expressed no confidence in the Government of the Russian Federation, the President of the Russian Federation shall have the right to announce the resignation of the Government or to reject the decision of the State Duma. In the event that the State Duma expresses no confidence in the Government of the Russian Federation again within three months, the President of the Russian Federation shall announce the resignation of the Government or dissolve the State Duma". See note no. 5.

⁷ See Article 49 of the French Constitution of 1958.

Assembly, to declare state of emergency and to issue emergency presidential decrees, to make the opening speech of the Grand National Assembly if she/he deems necessary and to make a statement to the Grand National Assembly about domestic and foreign policy. The power to make a statement to the Parliament resembles the annual state of union procedure in the United States. In brief, executive powers and duties currently belonging to the Council of Ministers have been transferred to the President of the Republic according to the constitutional amendment. Besides, there is no more government bill, only a proposal of the members of the Parliament as a legislative initiative. In other words, the President of Republic does not have right of legislative initiative. Pursuant to Article 7 of the constitutional amendment law, the phrase: "If the President-elect is a member of a party, her/his relationship with his party shall be severed and her/his membership of the Grand National Assembly of Turkey shall cease" is removed from Article 101 of the Constitution. Therefore, the President of the Republic may henceforth maintain her/his political party membership or leadership during the term of office.

The other primary subject of the amendment is about veto power of the President of the Republic. According to the abrogated Article 89 of the Turkish Constitution, the President of the Republic might send the laws that she/he deems, in whole or in part, unsuitable for promulgation, along with the justification, back to the Grand National Assembly of Turkey for reconsideration within fifteen days which is also the term for promulgation. However, the fact that a law shall be promulgated by the President of the Republic if the Grand National Assembly adopts the law which was sent back for reconsideration without any amendment means there was no veto power of the President of the Republic in a real sense. Because there is not any super or qualified majority of the members required for the adoption of the law sent back by the President of the Republic⁸. According to Article 16(C) of the amendment law, if the President of Republic sends a law back to the Grand National

⁸ As long as voting is in conformity with Article 96 of the Constitution which states: "The Grand National Assembly of Turkey shall convene with at least one-third of the total number of members for all its affairs, including elections it holds. Unless otherwise stipulated in the Constitution, the Grand National Assembly of Turkey shall take decisions by an absolute majority of those present; however, the majority for a decision can, under no circumstances, be less than one plus a quarter of the total number of members".

Assembly, a majority of the members of the Grand National Assembly is required for the adoption of the law. Put differently, according to constitutional amendment law; it is a majority of the members instead of a majority of the votes required to override a presidential veto.

Veto powers of presidents are observed in the United States as a presidential system and Russia as a super-presidential system⁹ rather than parliamentary systems like U.K., Netherlands or Germany. As a semi-presidential system, there is no veto power of the President of the Republic in France either. Similar to the abrogated provision in the Turkish Constitution, the President of the Republic may ask Parliament to reopen debate on the law or any sections thereof in France¹⁰. In the U.S. and Russia, a veto of the President can be overridden by a two-third majority of both houses of the Parliament¹¹. It is accepted in German constitutional order (not explicitly specified in the Basic Law) that, the President of the Republic shall have a right to veto legislation in case of an apparent conflict with the Constitution¹². As to the constitutional amendment law, to override a veto, unlike in France where a simple majority of the votes is enough, it would become harder to override a veto compared to the previous situation, especially considering the abstaining votes. However, different from the American and Russian constitutional orders, in which a two-third majority of the members is needed, the requirement of a majority of the members of the Parliament can still be considered as achievable.

Another notable subject in the amendment is the decree power of the President of the Republic. According to the amended Article 104(17) of the Con-

⁹ See S. Holmes, *Superpresidentialism and its Problems*, "Eastern European Constitutional Review" Fall 1993/Winter 1994, pp. 123–126.

¹⁰ See Article 10(2) of the French Constitution.

¹¹ See Article 1 § 7 of the American Constitution and Article 107(3) of the Russian Constitution.

¹² This convention is derived from the provision of Article 82 of the German Constitution which implies President to certify laws enacted in accordance with the provisions of the Basic Law. See A.W. Heringa, *Constitutions Compared: An Introduction to Comparative Constitutional Law*, Intersentia 2016, pp. 133–134; J. Kokott, M. Kaspar; *Ensuring Constitutional Efficacy*, [in:] *The Oxford Handbook of Comparative Constitutional Law*, eds. M. Rosenfeld, A. Sajó, Oxford University Press 2012, p. 803; W. Heun, *The Constitution of Germany: A Contextual Analysis*, Hart Publishing 2011, p. 109.

stitution which is set forth in Article 8 of the constitutional amendment law: “The President of the Republic may issue presidential decrees on issues regarding 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. The presidential decree shall not be issued on matters reserved exclusively for acts of parliament in the Constitution. Presidential decrees shall not be issued on subjects that are explicitly regulated by an act of Parliament. If provisions of a presidential decree and acts of parliament conflict with each other, the act of parliament shall prevail. If the Grand National Assembly enacts a law on the issue that was regulated by a presidential decree, the decree shall be void”.

The constitutional amendment law introduces presidential decrees without necessitating any delegation from the legislative branch. Above stated provision indicates that presidential decrees can be issued on executive power. In the United States, despite the Constitution of 1787 not explicitly featuring executive legislation, the fact that the Constitution indicates the executive branch to take care that the laws be faithfully executed in Section 3 of Article II, it refers presidential law-making authority to carry out her/his constitutional responsibilities¹³. The first statement of the amended Article 104(17) resembles this understanding and practice of executive law-making power which exists in the American constitutional order. However the next statements in the provision, indicating that presidential decrees cannot be issued on civil and political rights; they cannot be issued on issues reserved exclusively for acts of parliament; they cannot be issued on subjects that are already regulated by an act of parliament; in case of conflict with each other, the act of parliament shall prevail and if the Parliament enact a law on the same issue, the presidential decree shall be void may also come to mean that they can be issued in legislative field as long as they are compatible with these criteria. Otherwise, it would be quite unnecessary to specify these five criteria given the fact that Parliament, by its very nature, has no business in the executive sphere also because of the principle of separation of powers. Additionally, in

¹³ A. Sajó, *Limiting Government: An Introduction to Constitutionalism*, Central European University Press 1999, pp. 164–165.

theory, the law-making power on social and economic rights/issues inevitably may go beyond the scope of executive issues.

Among the western democracies, France has always been a remarkable example when it comes to primary (not secondary or delegated) law-making power of the executive branch. Alongside the delegated legislation, the Constitution of 1958 explicitly recognizes the law making authority of both legislative and executive branches¹⁴. Subjects indicated in article 34 of the Constitution shall be regulated by act of parliament; issues other than those shall be regulated by way of regulation from the government¹⁵. Besides, the last paragraph of Art. 34 stating that “the provisions of the present article may be further specified and completed by an Organic Act”¹⁶ giving the Parliament the competent to shape the precise boundaries of the sphere of law-making. Unlike the American and German equals, the French Constitutional Council was founded to review jurisdictional division between Parliament and Government on law making¹⁷.

In respect to Russian constitutional order, the President, at first hand, has the power to issue decrees and orders which shall not run counter to the Constitution of the Russian Federation and the federal laws¹⁸. However, the fact that the President also has veto power that can be overridden by a two-third majority of the members of the Parliament makes things much easier for her/him to issue a decree which is compatible with law; because it is a quite rare possibility for a bill or law to be enacted by a two-third majority. Thus, fusion of a proactive power such as issuing a decree and a reactive power exemplified as veto may be excessive; as the Russian President can veto a law which is supposed to annul her/his decree¹⁹. Ultimately, in systems where executive law-making power exists, constitutional courts or constitutional review bodies play an essential role in scrutinizing on a presidential decree or an executive regulation and declaring it void in favour of act of parliament. Thereby,

¹⁴ J.S. Martinez, *Horizontal Structuring*, [in:] *The Oxford Handbook of Comparative Constitutional Law*, eds. M. Rosenfeld, A. Sajó, Oxford University Press 2012, p. 549.

¹⁵ See Articles 34 and 37 of the French Constitution.

¹⁶ See A.W. Heringa, op.cit., p. 308.

¹⁷ S. Boyron, *The Constitution of France: A Contextual Analysis*, Hart Publishing 2013, p. 151.

¹⁸ See Article 90 of the Russian Constitution.

¹⁹ J.M. Carey, M.S. Shugart, *Calling Out the Tanks or Filling Out the Forms?*, [in:] *Executive Decree Authority*, eds. J.M. Carey and M.S. Shugart, Cambridge University Press 1998, pp. 8–9.

the constitutional principles and legislative supremacy in law-making power can be upheld as required.

According to Art. 16 (B) of the constitutional amendment law which reformulates Art. 148 of the Constitution, the Turkish Constitutional Court shall examine the constitutionality of presidential decrees, in respect of both form and substance. This provision also means that the Constitutional Court shall also review if a presidential decree is incompatible with an act(s) of Parliament, translating into reviewing the legality of the decree in question. According to the constitutional amendment, presidential decrees issued during the state of emergency are not subject to an examination by the Constitutional Court. This situation was also the case in the previous constitutional provision for emergency decrees issued by the Council of Ministers under the chairmanship of the President of the Republic.

According to Article 2 of the constitutional amendment law which reformulates Article 75 of the Constitution, the only chamber of the Parliament which is the Grand National Assembly of Turkey shall consist of 600 members instead of the previous 550. Article 3 of the constitutional amendment law reformulates Article 76 of the Constitution which reduces the age of candidacy for the Parliament from twenty-five to eighteen. Article 4 of the constitutional amendment law reformulates Article 77 of the Constitution dealing with the election term. The first paragraph of the proposed Article 77 states, "Elections for the Grand National Assembly of Turkey and the President of the Republic shall be held every five years on the same day". In the United States, elections for the President and the members of the Senate and House of Representatives are held on different days. The President is elected for a four-year period, renewable once. Members of the House of Representatives are elected for two years. For the Senate, the members are elected for a six-year period, but elections are held every two years for one-third of its members. As a result of this practice, it is quite likely for the Presidency, the House of Representatives and the Senate to be operated by majorities belonging to different political parties – Democrat or Republican. In France, after the Constitutional Reform of 2000, the term of office of the President of the Republic was reduced from seven years to five years. By doing that, the President of the Republic's term of office has been matched with the term of office of the National Assembly and both elections are now taking place at around

the same time. In this way, a possibility of cohabitation is lowered as voters do tend not to choose candidates from different political parties at the elections which are held at around the same time²⁰. Regarding the constitutional amendment law, one may conclude that by holding the presidential and parliamentary elections at the same time, it is possibly lead to a President of Republic and a majority of the Grand National Assembly or the biggest political party group in the Assembly which are politically compatible with each other.

According to Article 11 of the constitutional amendment law which reformulates Article 116 of the Constitution: “By three-fifth of its members, the Grand National Assembly of Turkey may call for new elections. In this case, the election of the Grand National Assembly of Turkey and the election of the President of the Republic shall be held together.

In the case of calling for the new elections by the President of the Republic, the election of the Grand National Assembly of Turkey and the election of the President of the Republic shall be held together.

In the case of calling for the new elections by the Grand National Assembly within the second term of office of the President of the Republic, she/he may be a candidate one more time.

Powers and duties shall remain with the Parliament and the President of the Republic until the opening of the new session respectively the inauguration.

Tenure of the Parliament and the President of the Republic which are re-elected in this manner are five years as well”.

This provision of the constitutional amendment allows both the President of the Republic and the Parliament to dissolve/dismiss each other, but this dissolution/dismissal also leads to the dissolution/dismissal of the branch that pulls the trigger first. In the United States, as a result of a relatively strict separation of powers, it is not possible for the President or the Congress to dissolve/dismiss each other. In France, by possessing a feature of a parliamentary system, it is possible, but only for the President of the Republic to dissolve the Parliament, not vice versa²¹. The Russian President also has the power of dissolving the State Duma in cases and accord-

²⁰ See A.W. Heringa, *op.cit.*, pp. 203–204.

²¹ As Article 12(1) of the French Constitution follows, “The President of the Republic may, after consultations with the Prime Minister and the presidents of the chambers, declare the dissolution of the National Assembly”. See A.W. Heringa, *op.cit.*, p. 304.

ing to the rules provided by the Constitution²². According to the constitutional amendment law, the President of the Republic or at least 360 of the 600 members of the Parliament can decide to call for new elections. There are no conditions attached to exercising the power of calling for new elections, both for the President of the Republic and the Parliament. The President of the Republic can be elected for two terms at most. However, if the Parliament decides to call for new elections within the President of the Republic's second term, she/he can be a candidate one more time for the upcoming presidential election. Once she/he is chosen again as a President of the Republic, she/he may hold the office for five years.

According to the previous Article 105 of the Constitution, the President of the Republic can be tried for high treason. Abrogated article 105(3) of the Constitution follows: "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". The amended Article 105(1) which is subject to a reformulation by Article 9 of the constitutional amendment law states that: "An Investigation may be requested against the President of the Republic on the ground of committing a crime through a motion tabled by at least majority of the total number of members of the Grand National Assembly of Turkey. The Assembly shall debate and decide on this request within one month at the latest and may decide to launch an investigation by the three-fifths of the total number of members through secret ballot".

According to the Article stated above, the decision to try the President of the Republic before the Supreme Criminal Tribunal which in this case is the Constitutional Court shall be taken by a secret ballot by the two-third majority of the members of the Parliament. While under an investigation, the President of the Republic cannot call for new elections. The President of the Republic shall be removed from office if convicted of offenses which are an impediment to be elected for the presidential office.

According to Article 15 of the constitutional amendment law reformulating Article 161 of the Constitution, the power to debate and adopt the budget bills prepared by the executive remains unchanged. The amendment prescribes that:

²² See Article 84(b) of the Russian Constitution.

“The President of the Republic shall submit the budget bill to the Grand National Assembly of Turkey at least before seventy-five days from the beginning of the fiscal year. The budget bill is to be adopted by the Committee on a Budget of the Parliament within fifty-five days and shall thereafter be debated and adopted by the Plenary before the beginning of the fiscal year. If the budget bill does not enter into force until this time, the temporary budget bill shall be enacted. If the temporary budget bill cannot be enacted, the budget of the previous fiscal year shall come into force in accordance with re-appraisal rate until the adoption of the annual budget bill”.

This means that, if the Parliament does not adopt the budget of President of the Republic, she/he shall implement the revaluated version of the budget of the previous year.

III. Relations Between The Legislative-Executive Branches and The Judicial Branch

Relations between the legislative-executive branches which are predominantly driven by political motives and the judiciary branch are signified by the selection, appointment, management and supervision of the judiciary. In this context, another significant subject of the constitutional amendment law is the structure of the Council of Judges and Prosecutors²³. According to Article 14 of the constitutional amendment law which reformulates Article 159 of the Constitution, the Council of Judges and Prosecutors²⁴ shall consist of

²³ According to Article 159(8) of the Turkish Constitution: “The Council shall make the proceedings regarding the admission of judges and public prosecutors of civil and administrative courts into the profession, appointment, transfer to other posts, the delegation of temporary powers, promotion, and promotion to the first category, decision concerning those whose continuation in the profession is found to be unsuitable, the imposition of disciplinary penalties and removal from office; it shall take final decisions on proposals by the Ministry of Justice concerning the abolition of a court, or changes in the territorial jurisdiction of a court; it shall also exercise the other functions given to it by the Constitution and laws”.

²⁴ The Constitutional Amendment Law has also changed the name of the Council since the word “high” was removed from its name. In other words, The Council is not hereafter called as “High Council of Judges and Prosecutors” instead it is called as “Council of Judges and Prosecutors”.

thirteen members and operates as two chambers. The president of the Council is the Minister of Justice and the Undersecretary to the Ministry of Justice is an ex-officio member of the Council as they were according to the abrogated constitutional provision. Pursuant to the constitutional amendment law, *the President of the Republic shall appoint*: Three of the members from among the first category of civil judges and public prosecutors; one of the members from among the first category of administrative judges and public prosecutors; *The Grand National Assembly of Turkey shall appoint by secret ballot*: Three of the members from among the members of the High Court of Appeals; one of the members from among the members of the Council of State; three of the members from among law professors and lawyers meeting the requirements designated by law. With regard to the selection by the Grand National Assembly, a two-third majority of the members of the Parliament is required to appoint a member to the Council. If this majority cannot be obtained in the first ballot, the second ballot shall be held in which a three-fifth majority of the members is required for appointing a member to the Council. If this majority cannot be obtained in the second ballot, a member is chosen by lot from among the two candidates who receive the greatest number of votes. In brief, the President of the Republic appoints four and the Grand National Assembly appoints seven of the members of the Council. The remaining two members are the Minister of Justice who is also president of the Council and the Undersecretary of the Ministry of Justice. The members are appointed for a four-year term, and they can be appointed once again²⁵.

In the United States, federal judges are appointed by the President on advice and consent of the Senate. As to the state judges, it is the state itself to determine the appointment procedure of judges²⁶. In this respect, the most common way is the election of judges by popular vote for a specific term²⁷. In France, since the Constitutional Reform of 2008, the President of the Republic and the Minister of Justice are no longer members of the High Council of the Judiciary. The President of the Republic, the President of the National Assembly and the President of the Senate shall each appoint two qualified,

²⁵ See Article 14 of the constitutional amendment law.

²⁶ A.W. Heringa, op.cit., p. 230.

²⁷ A. Sajó, op.cit., p. 220; M. Tushnet, *The Constitution of the United States of America*, Hart Publishing 2015, p. 123; J.S. Martinez, op.cit., p. 568.

prominent citizens who are neither member of the Parliament, of the Judiciary nor of the administration for each section of the Council. However, since the Constitutional Reform of 1993, the judicial members of the Council are elected by their peers²⁸. In Germany, the federal supreme judges shall be chosen together by the competent Federal Minister and a committee for the selection of judges consisting of the competent Land ministers and an equal number of members elected by the Bundestag²⁹. In the United Kingdom, the appointment procedure of judges was changed after the Constitutional Reform Act of 2005. According to this Act, Lord Chancellor and the Queen are still a part of the appointment process, but symbolically. However, it is now a non-departmental independent public body sponsored by the Ministry of Justice called Judicial Appointment Commission which is dominant in judicial appointments. Twelve of the members of the Commission are appointed through open competition, and remaining three members are appointed by Judges' Council or Tribunal Judges' Council³⁰.

As to the structure of the Constitutional Court, it has remained almost the same apart from the removal of members coming from the High Military Court of Appeals and the High Military Administrative Court. Besides, the constitutional amendment law prescribes abolishing the military courts except for the disciplinary courts³¹. According to the amendment, the Turkish Constitutional Court consists of fifteen members instead of previously seventeen. In the light of the constitutional amendment law:

“The Grand National Assembly of Turkey shall elect by secret ballot, two members from among three candidates are to be nominated by and from among

²⁸ Boyron, op.cit., p. 147; See M.A. Rogoff, *French Constitutional Law: Cases and Materials*, Carolina Academic Press 2014, pp. 136–137.

²⁹ See Article 95(2) of the German Constitution of 1949.

³⁰ See *The Judicial Appointments Commission Regulations 2013*, No. 2191, 2013, http://www.legislation.gov.uk/ukxi/2013/2191/pdfs/ukxi_20132191_en.pdf (19.01.2017).

³¹ According to Article 13 of the constitutional amendment law which adds a second paragraph to Article 142 of the Constitution of 1982, “Military courts cannot be established except disciplinary courts. However, military courts can be established to try military offenses committed by military personnel while in office during the state of war”. Additionally, Article 17 (E) of the constitutional amendment law states as “Military Court of Cassation, High Military Administrative Court and military courts shall be abolished as from the date of entry into force of this Law”.

the president and members of the Court of Accounts, for each vacant position; one member from among three candidates nominated by the heads of the bar associations from among self-employed lawyers. In this election to be held in the Grand National Assembly of Turkey, for each vacant position, a two-third majority of the members shall be required for the first ballot, and a majority of the 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 the High Court of Appeals and two members from the Council of State, 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 professors 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 Court³².

In brief, the President of the Republic appoints twelve and the Grand National Assembly appoints three of the members of the Constitutional Court. While four members are appointed by the President of the Republic directly, the remaining eight is also appointed by her/him from among candidates nominated by competent assemblies of the appellate courts and the Council of Higher Education.

In the United States, members of the Supreme Court are appointed by the President on advice and consent of the Senate. In Germany, half of the members of the Federal Constitutional Court are elected by a two-third majority of the votes cast and at least the majority of the votes of the members of the Bundestag; and the remaining half by a two-third majority of the votes of the Bundesrat³³. In France, three members of the Constitutional Council shall be

³² See Article 16 (D) of the constitutional amendment law and Article 146(2) of the Turkish Constitution.

³³ See § 6 (1) and § 7 of the Act on the Federal Constitutional Court (Bundesverfassungsgerichtsgesetz – BVerfGG).

appointed by the President of the Republic, three by the President of the National Assembly and three by the President of the Senate³⁴. Furthermore, the described process which emanates from Article 56 of the French Constitution is additionally subject to the last paragraph of Article 13 of the French Constitution. The latter which has been introduced by the Constitutional Reform of 2008 states that, “the President of the Republic may not proceed with an appointment when the added negative votes in each committee (established within the National Assembly and the Senate) represents at least three-fifths of votes cast in the two committees”³⁵.

Turkish Constitutional Court plays a significant role in Turkish constitutional order. The Court has power to examine the constitutionality of acts of Parliament and thereafter presidential decrees in respect of both form and substance and to decide on individual applications made by persons and private entities. One may emphasize that the current selection method of the Constitutional Court judges is based on a symbolic President of Republic just like it supposed to be in a parliamentary system. However, the amendments of 2017 have substantially changed the constitutional and political role of the President of the Republic. She/he henceforth has the executive power and be able to be a member or leader of a political party. In addition, the President of the Republic has hereafter power to primarily issue decrees which are in the scope of the Constitutional Court’s jurisdiction. Taking into consideration these facts, it may be suggested to modify the selection method of the Constitutional Court judges. In this context, the role of the Grand National Assembly may be increased, and a two-third or three-fifth majority of the members of the Parliament may be preferred for the election process.

IV. Conclusion

The institutional relations between the legislative and executive branches are decisive for the characterisation of a system of government. In the core of parliamentarism, executive power is exercised by the Council of Ministers that

³⁴ See Article 56 of the French Constitution of 1958.

³⁵ See A.W. Heringa, *op.cit.*, p. 304.

has the confidence of the legislative branch. Should this confidence be withdrawn, the Prime Minister loses competence to govern and must either advise the head of state (monarch or president) to call for a new general election or must resign³⁶. In other words, in parliamentary systems, governments must be composed by a political party or parties that alone or together possess more than 50% of legislative seats³⁷. There is a collective executive branch politically accountable to a popular elected legislative branch and this accountability is expressed through a vote of confidence or a motion of non-confidence by the legislative branch³⁸. Hereunder, one may conclude that the system of government introduced by the constitutional amendment law is not one of a parliamentary government.

As to the presidential system, executive and legislative branches have their own competences, and the executive branch is not accountable to legislative branch³⁹. In the United States, as an archetype of presidentialism, the level of institutional separation of powers is high. Executive and legislative branches are independent from each other in their formation as they both are elected by the people; the President cannot dissolve Congress, and similarly, the Congress cannot dismiss the President, except by impeachment⁴⁰. In presidential systems, a directly elected president who serves a fixed term is not only the head of state but also the head of government⁴¹. Principally, in presidential systems, executive power is vested in one person⁴². There is also the semi-presidential system; France is the characteristic example, with both a directly elected President who is not accountable to the Parliament and a Prime

³⁶ A.W. Bradley, C. Pinelli, *Parliamentarism*, [in:] *The Oxford Handbook of Comparative Constitutional Law*, eds., M. Rosenfeld, A. Sajó, Oxford University Press 2012, p. 651.

³⁷ J.A. Cheibub, F. Limongi, *Legislative-Executive Relations*, [in:] *Comparative Constitutional Law*, eds. T. Ginsburg, R. Dixon, Edward Elgar Publishing 2011, p. 212.

³⁸ D. Baranger, C. Murray, *Systems of Government*, [in:] *Routledge Handbook of Constitutional Law*, eds. M. Tushnet, T. Fleiner and C. Saunders, Routledge 2013, pp. 76–77.

³⁹ A.W. Heringa, op.cit., p. 26.

⁴⁰ A. Sajó, op.cit., p. 78.

⁴¹ J.A. Cheibub, Z. Elkins, T. Ginsburg, *Latin American Presidentialism in Comparative and Historical Perspective*, *Texas Law Review* 2011, 89, p. 1707.

⁴² P. Dann, *The Gubernative in Presidential and Parliamentary Systems: Comparing Organizational Structures of Federal Governments in the USA and Germany*, 66 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2006, p. 1.

Minister who himself and whose cabinet are both accountable to the Parliament, sharing the executive power together⁴³.

Concerning relations between the legislative and executive branches, one may describe the system of government introduced by the constitutional amendment law as a presidential system. This is because the executive power shall consist of a popularly elected person who is at the same time head of state and head of government and not politically responsible to the legislative branch. However, the fact that, senior appointments of the President of Republic are not subject to legislative approval, a veto of the President of Republic can be overridden by a majority of the members of the Parliament instead of two-thirds of its members, primary (not subordinate or delegated) decree or rule-making power of the President of Republic, the Parliament and the President of the Republic may dissolve/dismiss each other and presidential and legislative elections are held together differentiates the introduced system of government from the American type of presidentialism. On the other hand, the fact that the President of Republic cannot submit bills (except the budget bill), the veto of the President can be overridden by a majority of the members of the Parliament instead of two-thirds of its members and the narrower scope of primary presidential decree power differentiates the presidential character of the system from the Russian type of super-presidentialism. The provisions on veto power of the President of Republic and having the elections on the same day resemble the French constitutional system. Having said that, in France, a veto of the President of the Republic can be overridden by a majority of votes instead of a majority of the members. Furthermore, French presidential and parliamentary elections are held not at the same time but almost at the same time⁴⁴. Moreover, there is not any provision in the French Constitution determining the exact period between presidential and parliamentary elections. The primary decree or rule-making power of the executive branch introduced by the constitutional amendment law is a feature found in French and Russian constitutional systems. Besides, the expression of the constitu-

⁴³ See A.W. Heringa, *op.cit.*, pp. 28–29.

⁴⁴ For example the first round of the French presidential election was held on 23 April 2017 and the second round took place on 7 May 2017. As to the French legislative elections for the National Assembly, the first round was held on 11 June 2017 and the second round took place on 18 June 2017.

tional amendment law regarding presidential decrees is closer to the relevant provisions in the Russian Constitution⁴⁵. However, the decree power of the President of the Republic, introduced by the constitutional amendment law, seems to be more restricted comparing with the decree power of the Russian President; since the Turkish President of the Republic cannot issue, decrees on civil and political rights, except in times of a state of emergency. Additionally, the provision that allows the President of Republic to dissolve the Parliament and to call for new general elections is one of the typical features of the parliamentary and semi-presidential systems. However, there are two distinctive features; firstly, the circumstance that the Parliament also has the power to dismiss the President of the Republic by a qualified majority of its members and secondly, once the President of Republic or the Grand National Assembly of Turkey dissolved/dismissed each other, they also dissolve/dismiss themselves. These provisions provide the President of Republic or a three-fifth majority of the Parliament the power to dissolve/dismiss each other and to call for new elections for both in case they do not tend to stand their policies anymore and they predict that political conjuncture is on their side for the probable upcoming elections. The dismissal mechanism of the President of Republic is unlikely to be considered as a kind of vote of confidence provision. Because it is three-fifths of the Parliament required instead of a majority of its members to dismiss the President of Republic and this dismissal shall also lead to a renewal of the parliamentary elections. It rather seems like a mechanism to be activated in case of constitutional or political deadlocks between the President of Republic and the Parliament.

In the preamble to the constitutional amendment bill, unstable coalition governments in Turkish political history within the practice of the parliamentary system were pointed out and a need for a system which ensures stable governments was emphasized. Within this context, one may conclude that the system of government introduced by the constitutional amendment law

⁴⁵ According to Article 90 of the Russian Constitution: "The President of the Russian Federation shall issue decrees and orders.

The decrees and orders of the President of the Russian Federation shall be obligatory for fulfilment in the whole territory of the Russian Federation.

Decrees and orders of the President of the Russian Federation shall not run counter to the Constitution of the Russian Federation and the federal laws". See note no. 5.

is one which ensures a stable government since there is no more possibility of coalition governments. The constitutional amendment law also provides for a strong executive branch with substantial powers. Article 67 (6) of the Turkish Constitution reads: “The electoral laws shall be drawn up so as to reconcile the principles of fair representation and stability of governance”. Within this context, the 10% country-wide electoral threshold⁴⁶ which is the highest among the member states of the European Council for political parties prescribed by Article 33 of the Parliamentary Elections Code (Law No: 2839) may be revised and reduced, even be abrogated since the stability of governance purpose of the provision seems to be achieved by virtue of the constitutional amendment law. In other words, excessive fragmentation in the Parliament shall not affect the stability in the government according to the constitutional amendment law. One may propose to reduce the electoral threshold from 10% to at least low levels for achieving the purpose of reconciling principles of fair representation and stability of governance. In this way, the Parliament may reflect the fair representation and pluralism while the executive may refer to the stability of governance. Besides, in a case of political deadlock in the legislative process, the executive can use the instrument of renewing the elections.

In the system of government introduced by the constitutional amendment law, the Turkish Constitutional Court plays an important role from the point of the principle of check and balances since the Court has the power to review the constitutionality of laws and presidential decrees. In this regard, one may suggest, by preserving the role of the President of the Republic on the selection process, shifting the dominance of her/him on the selection of the Constitutional Court judges to the qualified majority of the Grand National Assembly. Alternatively, the qualified majority of the Parliament can be preferred for the selection of the Constitutional Court judges. With these proposed options, the democratic legitimacy of the composition of the Court is maintained, and the Court would be composed by a high level of parliamentary/democratic participation.

In conclusion, the fact that the executive power shall consist of a popularly elected person who is at the same time head of state and head of government and not politically responsible to the legislative branch refer to a presi-

⁴⁶ As of 1 October 2017.

dential system. Besides, the provisions allow the President of the Republic and the qualified majority of the Parliament renewing the presidential and parliamentary elections are features evoke a parliamentary system. As is shown above, the introduced system of government also has some differences from American type of presidentialism, French type of semi-presidentialism and Russian type of super-presidentialism. Ultimately, it may be indicated that the introduced system of government in Turkey has the core elements of a presidential system, but it also has some features resembling a parliamentary or semi-presidential system.

Finally, among the provisions of the constitutional amendment law pointed out above, provisions allows the President of Republic to be a political party member, reorganising the structure of the Council of Judges and Prosecutors and the Constitutional Court⁴⁷ as well as abolishing the military courts already came into force according to the amendment law. The other amendments pointed out herein are going to come into force either on the date of presidential inauguration after the next parliamentary and presidential elections that are held together or on the starting date of the parliamentary and presidential elections calendar which both means autumn 2019 unless the Grand National Assembly decides to hold an early election⁴⁸.

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⁴⁷ Having said that, according to the Provisional Article 21 (D) of the Turkish Constitution states which was added by the Article 17 of the constitutional amendment law “The members of the Constitutional Court chosen from the High Military Court of Appeals and the High Military Administrative Court shall remain in their office until their office are terminated for any reason”.

⁴⁸ According to Provisional Article 21 (A) of the Turkish Constitution which was added by the Article 17 of the constitutional amendment law: “Parliamentary elections for the 27th legislative term and presidential elections shall be held together on 03.11.2019. Until this date, the members of the Grand National Assembly of Turkey and the President of the Republic shall continue in office. In case of an election being called for by the (Grand National) Assembly, the parliamentary elections for the 27th legislative term and presidential elections shall be held together”.

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