A BRIEF HISTORY OF TURKISH CONSTITUTIONALISM

Introduction

Even not noticed by its own actors, each social incident represents -in some way- major phenomena mainly determined and shaped by history. Indeed, it is almost impossible to acquire a deep comprehension of any legal change without (re)viewing the past[2]. Turkey has witnessed a significant constitutional amendment in 2017. Expectedly, most of the jurists talk and write about positive law. Taking a different tack, this article will summarize the evolution of Ottoman-Turkish legal system in order to provide foreign readers with a sufficient historical background, focusing primarily on constitutional law.

Classical Era (12th – 18th centuries)

The word *Turkey* is derived from Medieval Latin, *Turchia,* which means *the land of Turks*. Since the beginning of 12th century, western sources commenced calling Anatolia and Thrace (a part of southeastern Europe) as *Turchia*, for these lands were largely inhabited by Turkic tribes coming from Central Asia[3].

Ottomans, which was one of these tribes, succeeded to construct a political unity all over the *Turchia* and conquered Constantinople in 1453. After capturing the capital of *Byzantium*, Ottoman Sultans began to perceive themselves as emperors of Rome. For this reason, they showed tolerance towards non-Muslim subjects (Greeks, Armenians, and Assyrians etc.) and let the state tradition of Eastern Rome continue[4]. Sultan was an absolute monarch. Even so, *Sadrazam* (Grand Vizier) who acted as *alter ego* of the Sultan, was holding his seal. Important decisions were being taken at *Dîvân-ı Hümâyûn* (Imperial Council), which was *de facto* cabinet of *Sadrazam**[5]***.

During the classical period (until 19th century), Ottoman law was composed of two parts: *şer'î hukuk* (Islamic law) and *örfî hukuk* (customary and secular law). As a combination of *Quran*, *hadith* and jurisprudence of Islamic scholars, *şer'î hukuk* was being applied by *Qadi*s, who had also some administrative functions. In terms of private law issues such as marriage and inheritance, non-Muslim communities had their own courts. Islamic law does not prescribe concrete rules or provisions regarding to public law, except for certain crimes and punishments. For this reason, *örfî hukuk* which consists of edicts and decrees enacted by Sultans was an independent source of law and had great significance[6].

At that times, political philosophy was a sort of mixture of Ancient Greek and Islam. So much so that, while you read a *siyasetname* such as *Âsafnâme**[7]*** and *Ahlâk-ı Alâî**[8]***, you feel like Plato or Aristoteles speaks using Islamic terminology. According to modern sense, the concept of justice necessarily includes equality. However, in classical Ottoman thought, justice was conceived as maintenance of "natural" differences and inequalities (between ruling elites and subjects, men and women, Muslims and non-Muslims), just as Plato suggests

in *The Republic**[9]***. For an Ottoman statesman, justice, which means in fact harmony and stability, was fundamental. In order to prevent chaos, compartments of society had to remain always separate[10].

***Nizam-ı Cedid* and *Tanzimat* (1792-1876)**

Geographical discoveries, renaissance and enlightenment had reversed the balance of power between Europe and rest of the world. Selim III, who was pen-friend of Louis XVI, ascended the throne in 1789. He was the first Sultan to recognize the need for change and to open up channels of communication towards the West. In this context, Selim III launched a reform program called *Nizam-ı Cedid* (New Order) mainly focusing on army and tax collection system. Permanent Ottoman embassies were also established in London, Vienna, Berlin and Paris for the first time[11].

Having assassinated by conservative opponents, Selim III could not be able to accomplish the New Order program. After a short interruption, Mahmud II, who was called by religious zealots as *Infidel Sultan**[12]***, resumed the modernization process in a more profound and determined way. During his reign, numerous reforms were made, that enabled a centralized, rational and European-style bureaucracy to emerge. Although being a Muslim, Mahmud II tried to develop an egalitarian attitude towards non-Muslim subjects[13].

In 1839, The Edict of *Tanzimat* (Reorganization) was promulgated by Abdülmecid, son and successor of Mahmud II. Through this Edict, Ottoman Empire definitely abandoned its classical conception of justice and the Sultan clearly declared that:

- Life, honor and property (civic rights) of each subject will be guaranteed.
- An equitable system of taxation will be introduced.
- All subjects will be equal before the law[14].

In an effort to fulfill above-mentioned promises, *Meclis-i Vâlâ-yı Ahkâm-ı Adliye* (Supreme Council for Judicial Regulations), which is primordial of today's parliament and supreme courts, launched an intense legislative activity. Several codes (such as Penal Code, Commercial Code, Land Code and Ottoman Nationality Law) were enacted. To apply new rules, first secular tribunals (*nizamiye mahkemeleri)* were established. By this way, competence of Islamic courts was limited to only familial matters[15].

***Kanun-u Esasî* (1876-1921)**

Young Ottomans, which is a secret society composed of leading politicians dissatisfied with *Tanzimat* reforms, staged a *coup d'état* towards Abdülaziz and enthroned Abdülhamid II on condition of being a constitutional monarch. In 1876, new Sultan unwillingly signed and promulgated *Kanun-u Esasî* (Fundamental Law), the very first constitution of Turkish legal history. Although the *Fundamental Law* recognized basic rights and liberties on paper and reiterated that all Ottomans were equal before the law regardless of race and religion, it was not an actual reform since the Sultan preserved most of his prerogatives.

The text predicted a bicameral legislative organ called *Meclis-i Umumî* (General Assembly): members of *Meclis-i Mebusan* (Chamber of Deputies) were to be elected by people and members of *Heyet-i Ayan* (Chamber of Notables) were to be appointed directly by Sultan. Legislative body was permitted to make laws only if the Sultan approved them, while he could enact decrees without any restriction. Ministers were solely responsible to the Sultan. Moreover, the text gave the Sultan the right to exile anyone whom he considered dangerous to the safety of the state and to dissolve the parliament in case it was necessary. Hence, Abdülhamid II immediately used these powers with the excuse of Russo-Turkish War (1877-1878): Prime Minister Mithat Pascha, father of *Kanun-u Esasî*, was sent to exile and the constitutional monarchy was suspended[16].

Followingthirty years of autocracy, *İttihat ve Terakki Cemiyeti* (Committee of Union and Progress) led by Young Turks, rebelled against the Sultan and made a revolution in 1908[17]. The parliament reconvened. One year after, Abdülhamid II was dethroned and the constitution was revised. Above-mentioned provisions favoring the Sultan were removed from the text. Thereby, a real constitutional monarchy with multi-party democracy began. Despite lots of political turmoil caused by ongoing wars, 1909 version of *Kanun-u Esasî* remained in force until the total collapse of the Empire[18].

Constitutions of 1921 and 1924

Alongside Germany, Ottoman Empire was also defeated in First World War. Cabinet of Damat Ferit signed the Treaty of Sèvres, which was like a death warrant for Turkey. Many of the major cities such as İstanbul and İzmir were occupied by the Allies and Greeks. Mustafa Kemal Pascha, hero of Gallipoli, did not accept the situation and launched a war of independence on 19th May 1919. A new revolutionist parliament named *Türkiye Büyük Millet Meclisi* (The Grand National Assembly of Turkey – TBMM) was founded in Ankara on 23rd April 1920. After a little while, on 20th December 1921, TBMM ratified the *Teşkilat-ı Esasiye Kanunu* (Law of Fundamental Organization) to be the first constitution of newly-emerging state.

Constitution of 1921 was a relatively short text (23 articles) and did not explicitly abolished *Kanun-u Esasî*. Written as a transitional document, it did not include any provisions about the position of the Sultan at the beginning. On the other hand, it introduced a revolutionary idea: *sovereignty belongs to the nation without any reservation or condition* (article 1).

The governmental system envisaged by the Constitution of 1921 was quite similar to the *régime d'assemblée* of French National Convention (1792-1795) which relied on the absolute domination of National Assembly over executive and judiciary[19]. Ministers were to be directly appointed and dismissed by TBMM and among its members. President of TBMM chaired council of ministers as well.

Following the final victory and withdrawal of occupant forces, the Ottoman Sultanate was abolished by an ordinance of TBMM (1st November 1922). Treaty of Lausanne, which enabled New Turkey to be recognized internationally was signed on 24th July 1923. After a while, on 29th October 1923, TBMM revised article 1, 10 and 11 of the constitution. According to the amendment:

- Turkey would become a republic.
- A new position called "Presidency of the Republic" was to be created. Thereby, heads of legislative and executive were going to be separated.
- Prime minister and other ministers were to be nominated by the President of the Republic among the members of TBMM. Subsequently, TBMM was going to approve their nomination.

Constitution of 1921 was short, flexible and transitory. However, the process of state formation required a more detailed, rigid and permanent text. In order to meet the need, TBMM adopted a new constitution on 20th April 1924.

Constitution of 1924 preserved the principle of national sovereignty and strictly prohibited the amendment of its first article, specifying that Turkey is a republic. It clearly repealed *Kanun-u Esasî* and introduced the principle of supremacy of the constitution. Nevertheless, it did not establish a constitutional court to guard that principle. As to liberties, the text recognized only civil and political rights. Democracy was conceived in a representative and majoritarian manner.

Despite maintenance of the idea that legislative power (TBMM) should dominate executive and judiciary, the Constitution of 1924 made the governmental system closer to parliamentarism and headed to judicial independence. According to the text, prime minister and all other ministers had to be deputies. President of the Republic was to be elected by TBMM. President of the Republic had no right to dissolve the parliament. On the other hand, prime minister would be appointed by the President of the Republic while the other ministers were to be appointed by prime minister. The cabinet of prime minister would be responsible to the parliament collectively. With respect to judiciary, Constitution of 1924 declared that courts would decide on behalf of the nation and judges were to be independent from any intervention. Nevertheless, the text excluded the guarantee of a natural judge. Pursuant to French example, a Council of State was established under the executive and administrative justice was separated from judiciary. As a reflection of the *régime d'assemblée*, judges were not permitted to interpret the legislation. In case of ambiguity, TBMM was going to enact an expository statute (*tefsir kararı*).

Since the *Tanzimat*, all subjects of the Sultan were equal before the law as *Ottomans*, regardless of race or religion. Constitution of 1924 maintained the principle of equality while renaming the nation. Article 88 was as follows: *"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"**[20]**.*

Constitution of 1924 remained in force during 36 years. Through this period, the text was amended several times. The article 2 specifying that Turkey is an Islamic state was removed in 1928. Thanks to the changes of 1931 and 1934, women acquired the right to vote and stand for election. In 1937, basic principles of Kemalism including *laïcité* (secularism) were inserted into the text.

Mustafa Kemal, to whom TBMM granted the surname *Atatürk* (Father of Turks), managed to transform Turkish law in a strong and conclusive way. Under the Constitution of 1924, Islamic law was exactly abrogated and secular codes of European countries were adopted such as Civil Code from Switzerland, Penal Code from Italy, and Commercial Code from Germany. Administrative justice was re-organized by taking France as an example[21].

As stated above, Constitution of 1924 predicted a representative and majoritarian democracy, which was not appropriate for a multi-party system introduced in 1946. Hence, benefiting from the gaps of the constitution, Democratic Party government became extremely authoritarian in late 50's. On the pretext of taking the country to a more effective democracy, a junta composed of young Turkish military officers staged a *coup d'état* on 27th May 1960. Shortly afterwards, on 9th July 1961, a new constitution prepared by the Constituent Assembly entered in force through a referendum in which 63% of the voters were in favor[22].

Constitution of 1961

Being drafted by a constituent assembly and approved by popular vote, Constitution of 1961 was a first in the legal history of Turkey. It was a quite long and detailed text (157 articles and 11 transitory articles), which reflects the cautious attitude of its makers and the lessons taken from the past. The text introduced new concepts such as *social state* (welfare state), *economic and social rights* (rights of status positivus), and *rule of law* (état de droit) and defined the Republic with precision: *"The Turkish Republic is a national, democratic, secular and social state under the rule of law, based on human rights and the fundamental principles set forth in the Preamble*" (Article 2)[23].

As mentioned above, under constitutions of 1921 and 1924, national sovereignty was conceived as the domination of TBMM over executive and judiciary. Article 4 of the new constitution transformed this conception[24] specifying that: *"the nation shall exercise its sovereignty through the authorized agencies as prescribed by the principles laid forth in the Constitution**[25]**"*. Thereby, not only legislature (TBMM), but also executive (Cabinet and President of the Republic) and judiciary (independent courts) would be perceived as the authentic, direct and legitimate manifestations of national will.

Constitution of 1961 established a parliamentary system, in which TBMM was redesigned as a bicameral legislature: National Assembly (*Millet Meclisi*) and Senate of the Republic (*Cumhuriyet Senatosu*). All deputies of National Assembly and the majority of the Senate

were to be elected by general ballot. Fifteen senators were to be appointed by the President of the Republic. Former presidents and Committee of National Unity[26] members were *ex officio* senators. President of the Republic, who was head of the state having only symbolic functions and politically impartial, would be elected by TBMM. Prime minister was to be appointed by the President of the Republic. Ministers, who did not have to be members of the parliament, were to be nominated by the prime minister. The Cabinet (prime minister and ministers) would be responsible both individually and collectively to the parliament (TBMM)[27].

Judiciary gained a great significance thanks to the Constitution of 1961. For the first time, a constitutional court was established to exercise the judicial review of legislative acts. By this way, the supremacy of the constitution was guaranteed. In order to enforce the independence of judiciary, Supreme Council of Judges was founded. Moreover, security of tenure of judges was explicitly recognized. Article 112 and 114 precisely declared principles of legality and liability of administration and predicted that all acts and procedures of administration were subject to judicial review. Supreme Election Board composed of independent high-ranked judges was established to provide the safety of elections[28].

Makers of the constitution projected a pluralist democracy. In this regard, some of the administrative bodies having possibility to influence the public opinion such as TRT (Turkish Radio and Television) and universities were given functional autonomy[29]. Nevertheless, because of the non-stop political and economic crisis fed by the Cold War, the Constitution of 1961 was not be able to bring neither pluralist democracy nor stability. Once again, Turkish Armed Forces intervened and took the power in 12th September 1980[30].

Constitution of 1982

Under the Constitution of 1961, it was quite difficult to restrict fundamental rights and freedoms. Besides, complexity of parliamentary procedure created instability and caused the state mechanism to slow down. Generals who staged the coup of 1980 considered that there must be a less libertarian constitution enabling more powerful governments to emerge. That was –to put it simply- the rationale behind the Constitution of 1982, which is technically current constitution of Turkey[31].

Unlike the previous one, the military played a far greater role in the preparation of the new constitution[32]. Members of the constituent assembly were directly appointed by National Security Council (*Millî Güvenlik Konseyi* – official name of the coup plotters). On 7th November 1982, the text was approved through a referendum by %91.37 of the voters and entered in force. By the same referendum, Kenan Evren, the chairman of the National Security Council, was elected as the President of the Republic. The transitional period that was envisaged by the new constitution terminated in 1987 and Turkey returned to a normal democracy.

Having 177 articles (3 of them are non-amendable), Constitution of 1982 is a more detailed and rigid text compared to its antecedents. It has simplified parliamentary procedures through introducing a unicameral legislature and reducing some of the quorum requirements. Makers of the Constitution of 1982 has projected a less participatory democracy and a depoliticized society, while preserving the main principles and basic schema of the 1961 such as social state, rule of law, equality, secularism, supremacy of constitution, separation of jurisdictions, independence of judges, legality and liability of administration[33].

Constitution of 1982 is still in force, despite of the fact that it has been amended nearly twenty times. These amendments have concerned almost 3/4 of the articles. With respect to fundamental rights, especially through the amendments of 2001, guarantees of the Constitution of 1961 have been reacquired on paper. Nevertheless, as to the system of government, an opposite route has been taken. At first, the Constitution of 1982 predicted a parliamentary regime with a strong president, who was to be elected by TBMM[34]. By the referendum held in 2007, it was approved that the President of the Republic would be elected directly by popular vote. This amendment transformed the system into a *de facto semi-presidentialism.* At the end, through the referendum of 2017, Turkey has headed to a *hyper-presidentialism* which lets the President of the Republic dominate both the legislative and the judiciary[35].

Conclusion

In spite of temporary interruptions, last two centuries of Turkey represents a gradual and continuous progression from pre-modernity to modernity in terms of both legal institutions and the perception of justice. Through introducing revolutionary concepts and meeting the needs of *realpolitik*, constitutions of 1876, 1921, 1924, 1961 and 1982 played a pioneering role in that transformation. In order not to be misled by the comments confined to only recent developments, a foreign reader must take into account the historical evolution as a whole and should have in mind that Turkish people has a long experience of freedom and democracy.

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