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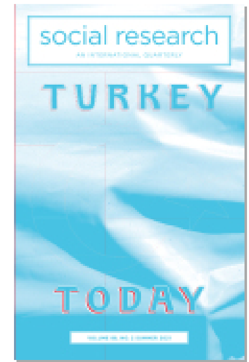

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> The tradition of the oppressed teaches us that the "state of emergency" in which we live is not the exception but the rule. We must attain to a conception of history that accords with this insight. Then we will clearly see that it is our task to bring about a real state of emergency, and this will improve our position in the struggle against fascism. One reason fascism has a chance is that, in the name of progress, its opponents treat it as a historical norm.
>
> — Benjamin [1940] 2003, 392

INTRODUCTION

The permanent state of emergency, which Walter Benjamin conceptualizes as an act and stance that will liberate the oppressed once perpetuated, is determined and administered by those who hold power. The oppressed themselves are unable to establish a permanent state of emergency as a means of their own liberation, and numerous examples from around the world illustrate the impasses created by near-permanent states of emergency imposed and manipulated by those in power. In the relevant literature, Turkey has become an iconic case study, referred to alongside Poland and Hungary (the troublesome

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members of the EU) and several Latin American countries (including Brazil, Venezuela, Bolivia, and Colombia). But the dominant terminology seems to have slightly diverged from that initially envisaged by Benjamin and centered on "populism."[1] Still, Benjamin's views about the continuity of fascism highlight a present threat that has become more pronounced in the past 20 years, the period that has undermined liberal democratic constitutionalism's main achievements and institutions that originated during the second half of the twentieth century. Hence, liberal constitutionalism is today in an existential crisis and risks becoming a mere footnote in history.

This article specifically examines Turkey, a country that has never been able to emerge as a fully functioning constitutional democracy since its foundation in 1923. While not providing a class-centric explanation of Turkey's democratic backsliding in the last 20 years, it takes into account the achievements of the class-sensitive welfare state while situating the concept of "authoritarian populism" within the current crisis of liberal constitutionalism, for this seems to have replaced the concept of fascism employed by Benjamin in his project of accurately grasping history. The struggle for rights and freedoms is not yet sufficiently dynamic for a coercion-free world—a state of affairs that may be problematized as an element of democratic backsliding. By doing so, we avoid focusing solely on contractions in civil and political rights, and thereby avoid overlooking some of the steps that threaten liberal constitutionalism and cause its visible decline.

For a constitutional lawyer, then, what is the point of examining a country emblematic of constitutional populism and systematizing its relevant norms and facts? The German author Juli Zeh makes a distinction between the directions and aims of two related terms, "why" (*warum*) and "what for" (*wozu*). The "why" question approaches the past to find the reasons, background, and incitements, and seeks to deliberate the coherencies, while the "what for" question looks at the future, is speedy and demanding, and is economic in nature (Zeh 2016, 106). Any study that seeks to explain Turkey's current political and legal conundrums must ask both questions, because the backslid-

ing of democratic institutions and the rule of law neither came about through abrupt ruptures nor has reached its ultimate stage. As Pierre Rosanvallon points out (2019, 37; 2020, 228), democracy is not static but rather is a dynamic process that keeps on writing its own history (see also Varol 2018, 339). So, for a different tomorrow, it is crucial that we holistically look at the small defeats and disruptions of the past that have led us to the present day, and that we understand them as causally related events. The political power that has singlehandedly ruled Turkey for almost 20 years has always placed its emphasis on "the battles," while the opposition parties unnecessarily occupied with "the war" have neglected smaller fronts. This divergence in emphasis and political priorities constitutes the main reason the opposition in Turkey currently suffers from a gross lack of power.

Each country's experience of authoritarianism inevitably creates an ex post normativism that is distinctly country-specific (Rosanvallon 2019, 24). Accordingly, that country's historical and sociological roots, as well as the conditions of authoritarian practice under which it has flourished, shape its country-specific terms or institutional settings. As I see it, Habermesian or Rawlsian ex ante normativism, which motivated the third wave of democratization in the 1990s, is insufficient alone to address the present decline. The legal-political crises of today cannot be overcome by relying solely on such ex ante normativist ideals. Without relapsing to Huntington's "clash of cultures" thesis, each country must awaken to the weaknesses of its own people and institutions, and develop perspectives on how to recover from its own democratic backsliding (for excellent examples of this attempt, see Halmai 2018, 2019; Sadurski 2018, 2019, 2020; and Scheppele 2018, 2019). Ernst Fraenkel ([1938] 1999) and Franz Neumann ([1944] 2009), who developed the concepts of "dual state" and "behemoth," respectively, vividly captured Germany's special experience of fascism in the 1930s by filtering out a great many facts and events.

Drawing on these great thinkers' conceptions is insufficient to today's authoritarian regimes, since such an approach would lead to erroneous reductionism and fruitless thinking. By consider-

ing country-specific facts and institutional features, the defenders of liberal constitutionalism should reconstruct today what Fraenkel and Neumann achieved with respect to Germany of the 1930s. So, it seems necessary that antiliberals' and antidemocrats' mutual learning practices are mirrored by their opponents, and in doing so, it becomes equally important that they go beyond the pure normative thinking about "the transcendental" or "the ideal case."

THE LEGAL FRAMEWORK IN WHICH TURKISH CONSTITUTIONAL POPULISM FLOURISHED

The current Turkish Constitution, a rigid constitution with eternity clauses (Art.1–3), came into effect on November 9, 1982, after publication in the official gazette of the results of the referendum, which was held on November 7. The state form as a republic, which is conceived of as a democratic, laicist, and social state governed by the rule of law respecting human rights (Articles 1 and 2), builds up the core of the eternity clauses. Since its implementation, almost two-thirds of the original text has been revised by 20 constitutional amendments. The Constitution of 1982 also includes (i) a comprehensive catalogue of rights and freedoms, including social rights, which are primarily based on the catalogue of rights adopted by the European Court of Human Rights (ECtHR); (ii) a parliament tasked with the duty of primary legislation (even though its powers and functions were substantially reduced after the amendment for the so-called "state-presidential" system on April 16, 2017); (iii) a multi-party system (despite 20 cases of party prohibitions in the last 40 years, wherein the Constitutional Court unhesitatingly used its power to dissolve political parties and impose political bans on party members; (iv) as-yet free elections under the control of the judiciary (Supreme Board of Election); and (v) media that can still be considered pluralist (even though the alternative and oppositional media outlets are exposed to significant economic and political pressure from the government).

The current constitution, both in its original form and as amended in 2017, includes rules that define, regulate, and thereby

restrict the state of emergency. The relevant articles are Article 15 (derogation rule), 119 (formerly also 120, 121, and 122), and 148 par. 1 (competences of the Constitutional Court). Emergency powers can be invoked under two conditions: first, in the event of a natural disaster, a dangerous epidemic disease, or a serious economic crisis, and second, for reasons of national security and serious deterioration of public order. The state-president is given the power to declare a state of emergency in one region or nationwide for a period not exceeding six months. However, the Grand National Assembly may reduce or extend this period or lift the state of emergency once the declaration is submitted to the Parliament on the same day of its publication in the official gazette (Art. 119–new). This well-defined constitutional order highlights the significance of the "non-declaration" of a state-of-emergency regime despite the upheavals in the southeastern part of Turkey in the summer of 2015 (discussed below), since national security has served for so many years as the grounding motive for emergency regimes. As will be explained below, the "non-declaration" of 2015 was the forerunner and warning bell of the completely unconstitutional state-of-emergency regime imposed following the failed coup on July 15, 2016.[2]

Constitutionalism as an ideal and desirable situation in modern constitutional states (in which there is often a written constitution that determines and limits the use of power of state institutions) guarantees an effective system of checks and balances in line with the protection of fundamental rights and freedoms. This is what might be referred to as the normative constitutional framework in the Turkish context. But the mere existence of a written constitution is not enough to identify a political system as a liberal constitutional state. In this sense, one could easily think of a weak constitutional state in which there is a written constitution that includes the several guarantees mentioned above but lacks effective implementation and practices in certain areas. I prefer the term "constitutional populism" (Anselmi 2018, 87) to describe this deformed version of classical liberal constitutional institutions rather than "authoritarian" or "populist"[3]

constitutionalism, since the term "constitutionalism" refers to and includes (at least for the modern established democracies) a substantive value, which should not be given up so easily vis-à-vis the populist attempts.

Karl Loewenstein's classification of constitutions under three typologies—normative, nominal, and semantic—can help us recognize fluent constitutional transitions and backsliding in several countries. Degrading from a normative to a semantic constitution does not explicitly abolish the written constitution but deprives it of its moral significance. In this case,

> the constitution is fully applied and activated, but its ontological reality is nothing but the formalization of the existing location of political power for the exclusive benefit of the actual power holders in control of the enforcement machinery of the state. … Instead of serving for the limitation of political power, it has become the tool for the stabilization and perpetuation of the grip of the factual power holders on the community. The peaceable, nonrevolutionary change in the location of political power is impossible. (Loewenstein 1957, 149)

Loewenstein's definition of semantic constitution is valid in the case of Turkey in regard to the constitution itself and other legal norms. The normative concepts are mostly deprived of their substance and function through extralegal/factual interpretation of the constitution and/or other laws. Therefore, in every single case, it becomes necessary to examine whether existing norms are applied in accordance with their aim and function, which will be done following an overview of backsliding's historical cornerstones.

CORNERSTONES OF CONSTITUTIONAL BACKSLIDING SINCE 2002

Turkey's current crisis of democracy and rule of law can be better contextualized by remembering the early years of the AKP (Adalet ve

Kalkınma Partisi / Justice and Development Party) government. After the elections in November 2002, the AKP gained an absolute majority in Parliament and emerged as the first one-party government since 1991. The rhetoric of the new government, as representing all victims of the republican secular idea, the Turkish military, and the so-called tutelage democracy, found an enthusiastic reception within the EU and other Western partners of Turkey. But there were two main issues with the political support granted to the AKP after the electoral success. The first was the common rendering of Turkey's problem of democracy before 2002 as a mere conflict between civil politics and the tutelary secularist military by fully dismissing any class-based analysis and ignoring the religiously oriented or indirectly influenced fight for political leadership in Turkey. The second failure was the complete overlooking of the progressive and critical social forces that were under- or unrepresented in Parliament and excluded from public discourse.

The public support, which was based on a simplistic political scheme and disregarded every ugly fact that did not fit with the pure theory, can neither identify those who are responsible for this political crisis nor find a way out of it. So, contrary to the majority of scholars in Turkey, I do not think that the AKP was a pioneer of democratization in its first governmental period, 2002–2007, and that it only began to transform afterwards. If we consider the AKP's breakaway from the guarantees of a modern liberal constitutional state since its first period in power as embracing a tendency toward authoritarianization, it is possible to test the practices of the executive, as well as particular acts of the AKP-majority Parliament, and the continuous instrumentalization of law during the first phase of its rule.

The Constitutional Amendment for Erdoğan in December 2002 as a Gesture of Parliamentary Tradition

In the muddle of so many facts that might relate to the democratic decay of the last 20 years, it is useful to go back to the beginning of the journey and remember how the now-state-president Recep Tayyip Erdoğan got into Parliament. The first electoral victory of the

2001-grounded AKP was after the general elections held on November 3, 2002. But—and this is unusual for a parliamentary democracy—the head of the party, Mr. Erdoğan, was not able to stand for that election and thus could not become prime minister. Instead, Abdullah Gül formed the government.

Erdoğan was not able to stand for parliamentary election due to his criminal conviction, approved by the Court of Cassation in 1998, when he was sentenced to 10 months' imprisonment under Art. 312 of the Turkish Penal Code (TPC) for "incitement to commit an offense and to racial or religious hatred." The conviction was a constitutional impediment that barred Erdoğan from seeking a parliamentary seat due to his "involvement in ideological and anarchistic activities" as phrased by Art. 76 par. 2 of the constitution in force at the time.

In the election of 2002, only two parties, the AKP and the CHP (Republican People's Party), achieved the 10 percent electoral threshold.[4] The CHP, as the main opposition party, declared its support for a constitutional amendment, with respect to unwritten parliamentary tradition, which ended up in the amendment numbered 4777, dated December 27, 2002. Only through this support could the leader of the party with the parliamentary majority to form the government become a member of Parliament. Art. 76 par. 2 was amended to cover only "persons who have been convicted of involvement in acts of terrorism" as ineligible to serve as deputy. A further provision was added to Art. 78, designed for Erdoğan's case, so that an immediate by-election could be held. In this way, Erdoğan was elected as a member of the parliament following a "tailor-made" by-election held in Siirt on March 9, 2003.

The result, which came about following a complex process that could be the subject of another article, is exemplary when considering Erdoğan's current authoritarian legalism. In a sense, the opposition party, relying on an unwritten tradition of the parliamentary system and acting with mainly prodemocratic motives, paved the way for Erdoğan's future political success by allowing the constitutional amendment to proceed. Here lies an ironic contradiction between

Erdoğan's political life and practice: while he now has a political life owing to an unwritten parliamentary tradition, his whole political practice has always been about ignoring the unwritten rules of the liberal constitutional state.

2008 Party Prohibition File

On March 14, 2008, the chief public prosecutor of the Court of Cassation filed a suit requesting the dissolution of the AKP on the ground that the party has become the focal point of antilaicist activities and hence constituted a serious threat to the constitutional order. The request was ultimately rejected by a sharply divided Constitutional Court (six for versus five against closure) on July 30, 2008. Since the required quorum for the dissolution of a political party consists of a two-thirds majority of those Constitutional Court members attending the voting session, the party narrowly escaped the prohibition. Instead, the Court ruled to deprive the AKP of half of the state aid for the coming year.

At this juncture, it is essential to emphasize that the distinction between democracy and the rule of law, which had almost lost its significance in well-established Western democracies (the awareness may return after the rise of several populist/nationalist parties in these old democracies), was disregarded in Turkey, which treated democracy and the rule of law as if they were one and the same. This confusion was due to negligence on the part of the judiciary, politicians, and legal scholars who failed to develop autonomous safeguards/measures that could maintain both principles separately at different levels of state administration and the political system. How the meanings of democracy and the rule of law could get blurred is most easily seen in the political party prohibition cases.

When the prohibition of the AKP was requested from the Constitutional Court, Western public opinion immediately reacted by claiming that such an action would be antidemocratic—that it was against the democratic will to ban a political party that had won an outright majority in the parliament and whose leader was given the

task of forming a single-party government. Leaving aside the validity of allegations raised by the chief public prosecutor regarding anti-laicist actions of the AKP, a fundamental ground for closure was altogether excluded from the public debate: militant democracy. This term, coined by Karl Loewenstein, refers to a seemingly paradoxical situation whereby a democratic polity ensures its self-preservation through antidemocratic means. According to Loewenstein (the spiritual father of political party bans through judicial decisions), every democratic system should be equipped with such extraordinary measures if it wants to preserve the core values enshrined in any liberal constitution, i.e., the fundamental rights such as freedom of speech, assembly, and press. In other words, a democracy would be utterly fragile if it lacked the means to act preemptively and in self-defense against authoritarian assaults (1937a, 423–32; 1937b). In Turkey's case, was there a democratic necessity for certain restrictive countermeasures against threats arising within the system itself? Had we come across a particular and concrete application of the principle of the democratic state being restricted by the principle of rule of law?[5]

Constitutional Amendments of 2010: Court Packing and Restructuring the Judiciary

The core aims of the constitutional amendments of 2010 were court packing (the Constitutional Court) and the radical restructuring of the judicial (self-)government (High Council of Judges and Prosecutors). As stated clearly and presciently by Andrew Arato (2010a; 2010b; 2016, 247) with a view on Turkey from abroad, Turkish liberals' enthusiasm for these amendments was ill-founded since the greater part of the amendments were actually aimed at increasing the total number of members in these institutions and thereby weakening the power of the incumbent members. In other words, the reformist, freedom-loving aspects of the amendment package were only window dressing to attract the support of Turkish liberals who were disillusioned by the false promise of rescuing the country from a tutelary democracy, from the implicit control of elected government by nonelected

actors such as military or other state elites. Moreover, the significant role of the Turkish Grand National Assembly in electing judges to the Constitutional Court by an unqualified majority vote, and the president's ability to appoint four members separately, have transformed the Court, whose number of members has been increased to 17.

The AKP-dominated High Council of Judges and Prosecutors (HCJP) has been similarly restructured. Judges of first instance courts and high judiciary lost their independence from the executive branch as a result of the elections collectively manipulated by the Ministry of Justice and the High Courts' members. The Council, which originally had five members, has been reconfigured to have 22 members and placed under the supervision of the executive branch, where it is equipped with powerful tools to indirectly interfere with the judiciary.

It was therefore no surprise that the first election of the HCJP in 2011 resulted in complete approval of the slate of candidates prepared by the Ministry of Justice. This organized capture of the judiciary was also confirmed by several media reports that brought to light confessions made by former members of the HCJP, who had benefitted from the "sincere repentance" provisions in the penal code to gain amnesty after the attempted coup d'etat on July 15, 2016 (www.hurriyet.com.tr/hsyk-eski-baskanvekili-hamsiciden-2011-yilinda-40279813 [Confessions of Deputy Chairman of the HCJP Ahmet Hamsici]).

2011–2013: Constitutional Reconciliation Committee

Scheppele calls for a self-sustaining democracy, which encompasses a "substantial transnational normative consensus about the shape of a whole constitutional order" (2016, 33). But even substantial legal topics need deliberation at the national and international levels, and decisions must be made by those who are trusted and whose expertise will be accepted. Even in such a case, however, a government may transgress its own constitution. For instance, almost all international and transnational actors had viewed with approval the constitution-making process in Turkey that ran from 2011 to 2013, parallel to the

reconciliation process with the Kurdish rebels. Nevertheless, the constitution-making was itself a serious violation of the constitution then in effect, since the established amendment procedure was not followed.

Some scholars who raised this point as a controversial and critical issue of constitutional law suggested holding a separate election for a constituent assembly without any national or regional thresholds in order to form a truly representative body for the purpose of constitution-making. This method would provide a legitimate means for departing from the established constitutional procedure. In the Turkish constitution-making process, everything seemed to be open for discussion, even core constitutional principles such as laicism and equality, unlike a similar process recently held in Chile, where a much more prudent route was taken. In Chile, the process started off by specifying many pre-consensus topics that were not open to further debate. A nonexhaustive list of nonnegotiable points and values included (i) the process's aim of reinstituting peace and social justice, (ii) respect for human rights and democratic institutions, (iii) a plebiscite to be held following the convention, (iv) the permissible means to elaborate a new constitution, and (v) equal representation in the mixed constitutional convention that would comprise both representatives elected specifically for the convention and members of parliament currently in office. Furthermore, these basic substantive and procedural principles were elaborately undersigned by all parties except the Communist Party (see Correa 2020 and Ossa 2020). The mere existence of the parity principle in the Constitutional Reconciliation Committee of the National Assembly (each political party was to be represented by three delegates on the Committee regardless of their different levels of representation in Parliament) was not conducive to a broad consensus, and as a result, the process ended with no tangible outcome due to the participants' irreconcilable interests, the "red lines" of the nationalists and the Kurdish BDP, and the demands of the AKP for a presidential system (see also Arato 2010a, 2012; Arato and Tombuş 2013).

The De-constitutionalized State of Emergency in Southeast Turkey

Beginning in the summer of 2014, the government took many unconstitutional steps by not declaring a formal state of emergency in the face of the rising conflicts with the PKK. Although the Constitution exclusively empowered the Council of Ministers under the state-president as chair, it was the governors who, as the highest-ranking representatives of the executive branch in cities, declared curfew measures "until a further order was made." This application constituted an ostensible breach of the existing normative framework and an exception to Constitutional Court case law. Unprecedented in terms of duration and intensity, these declared curfews interfered with freedom of travel and residence as regulated under Article 23[6] of the Constitution, and with personal freedom and security as regulated under Article 19. As per Article 13 of the Constitution, fundamental rights and freedoms may be restricted only with a formal and statutory provision, not by such administrative acts (see Göztepe 2018).

The Constitutional Court and the ECtHR were involved in the judicial review of these curfew measures, but both judicial bodies avoided explicitly dealing with the matter of the constitutionality/legality of the curfew measures. Neither of these courts awarded compensation to victims, although they suffered extreme food shortages and illness due to the blanket curfews. (As movement was reportedly very difficult even with official permission, residents' access to food, water, and medical care were severely restricted for several months.) The Constitutional Court rejected the victims' applications,[7] and those who appealed to the ECtHR[8] were rejected by the Strasbourg Court, which only required the Turkish Government to inform the Court of certain factual information in the curfew situation and its consequences for the people concerned. It would not be incorrect to regard this period as a rehearsal of 2016's state-of-emergency regime (Göztepe 2017; see also the critical report of the Venice Commission, *Opinion on the Legal Framework Governing Curfews, Opinion No. 842/2016*, CDL-AD(2016)010 [13 June 2016]).

The Elections of June and November 2015, or, We Will Elect until the Result Satisfies the AKP or We Cannot Guarantee Public Safety!

After the elections on June 7, 2015, in which the AKP's voting rate decreased to 40.87 percent from 49.49 percent in 2011, the possibility of a two-party coalition government emerged with the external support of a third opposition party. However, this was also the first time under the 1982 Constitution that the state-president did not empower any other party leader to build a government after the failure of AKP leader Ahmet Davutoğlu's attempt to form a government. During this period, Erdoğan consciously remained in the shadows but oversaw from the background all coalition attempts made by Davutoğlu. He also prevented a possible coalition between the remaining parties in the Parliament.

The state-president then called for new elections following the 45-day waiting period, which was prescribed under the Constitution. In this way, one of the oldest rules of the parliamentary regime was quietly lifted. In the period preceding the new election in November 2015, there were bombings in many cities, wounding or killing hundreds of people. After an extraordinary election atmosphere marked by wide-scale threats to public security and safety, the AKP managed to secure 49 percent of the total votes.

Constitutional Amendment of May 2016: Exceptional Lifting of Parliamentary Immunity of Deputies, or, We Have No Time for Constitutional Guarantees!

Pursuant to Article 83 of the Turkish Constitution, parliamentary immunities shall be lifted only by a parliamentary decision "for each single member" of the Parliament. It means that for each single deputy, an investigation dossier should be submitted to the Parliamentary Assembly for a separate decision. But with the constitutional amendment passed on May 20, 2016 (Act No. 6718), which inserted the new "Provisional Article 20," an exceptional procedure for lifting the parliamentary immunities of deputies was implemented.[9] The plan of

the parliamentary majority—the AKP and MHP (*Milliyetçi Hareket Partisi*/Nationalist Movement Party)—was, at first instance, to enable investigations and prosecutions against notable deputies of the Kurdish Party HDP (*Halkların Demokratik Partisi*/Democratic People's Party) as soon as possible.

The main opposition party, the CHP, declared that this amendment was contrary to the Constitution, yet it also stated that it would not file an annulment action before the Constitutional Court. This was a consequential decision because the Constitution specified only three groups of eligible applicants that could file for an annulment action: (i) the state-president (Erdoğan), (ii) the two parliamentary groups having the greatest number of members in the National Assembly (AKP and CHP), and (iii) one-fifth of the total MPs. Hence the CHP was the only party that was politically well-placed and legally eligible to file this action, since attaining one fifth of the MPs was impossible without the CHP's support. The shortsighted assumption of the CHP was that this amendment would only affect the situation of the Kurdish party HDP's MPs, and that its own deputies would be discharged by the courts if any accusations were made. However, the CHP realized its folly shortly afterwards, as its own MPs were also jailed based on the legal framework adopted by the amendment. Now, the tables were turned against all opposition parties[10] without exception.

The Attempted Coup of July 15, 2016: The Storm of State-of-Emergency Decrees and Abandonment of Prevailing Case Law

While Turkey had lived under occasional states of emergency since 1978, the Constitutional Court set an influential precedent in 1991 that served as a meaningful and effective safeguard against the executive's abuse of emergency powers. Through bold reasoning, the Court had succeeded in establishing its own jurisdiction over executive acts adopted during a state of emergency, despite clear language in the Constitution (Art. 148 par. 1–2) proscribing such scrutiny. On July 19, 2016, however, the state of emergency opened a new era marked by unlawfulness and unaccountability on an unprecedented scale, even

in Turkish legal history. The emergency decrees packaged several legislative and executive transactions into a single executive act and thus rendered ordinary legal remedies meaningless in the face of a permissive Constitutional Court that refused to follow its own influential precedent. Consequently, about 140,000 public servants, judges, and prosecutors were dismissed, deprived not only of their positions but also many of their civil rights.[11] Once again, both the Constitutional Court and the ECtHR declared the applicants' complaints inadmissible and held that all applicants needed to apply first to the State of Emergency Commission at the national level. The commission was an understaffed, ineffective body established following a recommendation from the Council of Europe in January 2017 (for State of Emergency Decree No. 685, see Official Gazette, January 23, 2017, https://www.resmigazete.gov.tr/eskiler/2017/01/20170123-4.htm).

In addition to this, all the exceptional measures adopted during the state of emergency were integrated into the Code of Criminal Procedural and Anti-Terror Law, along with other important laws by means of Law 7145, which came into force on July 31, 2018. As a result, the state of emergency was lifted in appearance only, and in practice was embedded and integrated into the maintained legal order.

The most striking issues in the state of emergency stemmed from the criminal investigations against almost all new members of the HCJP and the high judiciary, and their dismissal from public service on the grounds that they were affiliated with the Gülen movement. A dramatic instance was the dismissal and arrest of two members of the Constitutional Court, Erdal Tercan and Alparslan Altan, without compliance with the procedural guarantees under Article 146 of the Constitution. The only legal evidence considered "lawful" was the "general knowledge in social circles," which contained ambiguous sources and content about these two judges. Altan, one of the two judges and former deputy president of the Constitutional Court, was sentenced to 11 years in prison on March 6, 2019. After this development, it was only a rhetorical question as to whether a judge of any court could now make a decision in an independent and

objective manner without fearing sanction and intervention from the executive. If these two judges of the Constitutional Court were unconstitutionally and unanimously dismissed from public service despite all constitutional and legal guarantees, who could feel free and secure in serving in public on any domain or issue?

Constitutional Amendments of 2017, or, Last Nail in the Coffin of the Rule of Law?

The last constitutional amendments, passed by a referendum on April 16, 2017 (Act No. 6771, *Official Gazette* of February 11, 2017), gave final shape to the Turkish political structure in terms of its shift from a parliamentary to a presidential regime à la Turca, so-called state-presidentialism, which I prefer to call "absolutist presidentialism." Under this governmental system, the powers conferred to the executive branch are concentrated in the hands of one person. The distinctive feature of the Turkish version, however, is the absence of any real separation of powers and institutionalized checks and balances. Hence, the amendments' goal was only to institutionalize and legalize the excessive power concentration. Furthermore, the package also included simultaneous parliamentary and presidential elections to guarantee a supportive parliamentary majority for the president, who is eligible to be both a party member and party leader. To sum up, the constitutional amendment of 2017 has been tailored to serve the circumstances and political interests of the president, Erdoğan.

The judiciary was also restructured in an explicitly executive-oriented model, whereby the former High Council of Judges and Prosecutors (HCJP) was subordinated to the political institutions of the state-president and the Parliament. The Council itself also underwent significant changes—while the 2010 constitutional amendments (Act No. 5982, Official Gazette of 13 May 2010) were claimed to be "democratization of the judiciary," the clear intention of the 2017 amendments was the subordination and absolute control of the judiciary to and by the executive.

Even after the 2010 amendments, two-thirds of HCJP members were elected by votes of the apex and first-instance court members. However, it later came out that in the 2011 and 2014 elections, all elected candidates on the government's wish list were designated without exception. The Ministry of Justice supported these candidates by all possible administrative means, promoting them among judges and prosecutors who were eligible to vote, through distributing the whole candidate list of its preference. After the attempted coup d'etat on July 15, 2016, it was claimed that almost two-thirds of the members of the judiciary served the Gülen movement; they were dismissed with the help of the 32 state-of-emergency decrees.

Under Article 159, as reorganized by the 2017 amendments, the Council lost its status as a "High" Council and became known only as the Council of Judges and Prosecutors (CJP/*Hâkimler ve Savcılar Kurulu).* It is composed of 13 members. The president of the Council is the minister of justice; the undersecretary to the Ministry of Justice serves as an ex-officio member of the Council. The state president appoints four members among first category, one administrative and three civil judges and public prosecutors; the Grand National Assembly elects three members from the High Court of Appeals, one from the Council of State and three from teaching staff working in the field of law at higher education institutions and lawyers, whose qualification is specified as law. Applications for the membership of the Council to be elected by the Grand National Assembly are made to the Office of the Speaker of the Assembly. There is no application procedure for members to be elected by the president, so he/she can make use of his/her own political preferences without restriction.

Let us consider a related phenomenon: the instrumentalization of constitutional referenda, which are ideologically sanctified in Turkish politics as the supposedly direct expression of the sovereign will. Referenda are the most suitable tools for serving the interests of populist governments, since the most radical state-structuring measures can be legitimated in this way. During the rule of the AKP, constitutional referenda were held in 2007, 2010, and 2017. When

the content of these constitution-amending texts is evaluated, it is not difficult to conclude that Turkey's putative sovereign could not possibly have any informed opinion about the full implications of its decision. Hence, the decision expected from the putative sovereign will was an impossible one. Contrary to the criteria that the Venice Commission[12] developed about the proper textual content/question of constitutional referenda, Turkish voters were compelled to make a "take it or leave it" choice regarding an amendment package that had no intrinsic unity. This was because several unrelated matters were packed into a single text (along with norms strengthening political power) and then put to the vote. These votes, where people had no options other than yes or no, fulfilled democratic legitimacy on the surface but not in spirit. As Mudde and Kaltwasser put it, the populist AKP government emphasized popular participation in all referenda but closed down public contestation (2017, 82).

The last constitutional amendment, accepted in the referendum on April 16, 2017, under state-of-emergency conditions, was designed considering and to some extent assuming the presidency of Erdoğan. As partly explained above, the amendment's main objective was to swap the parliamentary system with a presidential one in Turkish style, which contained no effective checks and balances. Allowing the president to remain affiliated with a political party was a radical break from the former constitutions, because the role of president had traditionally been understood to be a neutral, impartial figure above day-to-day politics. Furthermore, the appointment procedure for the top judicial positions was completely redesigned in a way that gave the executive branch full control. Accordingly, the president was empowered to appoint an excessive proportion of high judicial posts without seeking the approval of the parliament or any other body. The shy and slightly anxious critics of the amendment warned about the possibility that someone other than Erdoğan could be the next president. In such a case, the whole governing structure would collapse because the amendment was based on the assumption that the parliamentary majority would follow the ideological line of

the president. Those who drafted the constitutional amendment appear to have been so sure about the results of the next presidential and general elections, which will supposedly be held in the summer of 2023, that they did not bother to envisage any mechanism to solve a potential systemic crisis.

Last, but not least: Do elections still matter? In a country like Turkey, where the media is under the effective control of the government and there is a lack of democratic political culture sustained by public participation, elections and polls have inevitably become the sole and almost sacred device by which people can express their opinions and preferences. Public trust in elections was perhaps the last strong tenet of Turkish democracy, but it suffered a terminal blow with the Supreme Board of Election's questionable decision following the 2017 referendum and the subsequent change of electoral law. In defiance of the explicit provision in the law, the Supreme Board of Election deemed unsealed voting ballots valid during the constitutional referendum of April 16, 2017. The move shattered already-shaken voter confidence in the sanctity of the poll and the ballot box, and altogether destroyed election integrity. Following this ad hoc decision of the board, the Parliament also changed the Law on Elections No. 298 by introducing a controversial portable ballot box procedure that is highly prone to manipulation (e.g., in order to obtain the "required" number of votes). This final move eradicated any remaining confidence in election security, which is an indispensable source of democratic legitimacy, even to autocrats.

Vanberg states that "establishing and maintaining judicial independence requires that political actors with the ability to attack or undermine judicial autonomy do not find it in their interest to do so" (2008, 116). This statement brings us to the next crucial question: What leads political actors to do so, and at which point do they cease to regard it as in their interest to respect or protect judicial independence? Since judicial bodies are dependent on other institutions, especially the executive branch, for the full implementation of their decisions, the problem can be defined as a "survival strat-

egy" of a public institution. But is it an institution or a person/judge who decides? Despite the claim of institutionalism that law is neither norm nor command but an institution (Loughlin 2017, 109), judges' decisions are "a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive as feasible to do" (Gibson 1983, 9). In other words, "courts do not make decisions; *judges do*, even if they are much influenced by their courts" (Gibson 2008, 523).

As has been shown, in short, the situation of democracy and the rule of law in Turkey currently oversteps the rational limits of the judicial margin of appreciation in deciding on the compromises of its independence. Arbitrariness and political suitability become the main criteria for many judicial cases. Even though Turkey is referred to, alongside EU member states Hungary and Poland, as one of the most well-known cases of authoritarianization and "elective authoritarianism," I think Turkey is no longer an easily comparable case even in this field, mainly because the two other EU member states mentioned are still part of a community with effective legal safeguards, whereas Turkey has increasingly fallen out of the EU's orbit. At best, the relationship can be described as a strategic partnership whereby the two parties remember each other only when faced with hardcore international issues, such as the Syrian refugee crisis. Consider the international arrangements the two parties entered into in recent history. Through these purely pragmatic deals, Turkey has presented itself as a safe third country for hosting Syrian refugees; the EU funds this while postponing the worsening of the refugee crisis at home.

Therefore, we should make a careful distinction between the authoritarianization of the politics and the usurpation of public law in Hungary and Poland, and the situation in Turkey. In these problematic member states, the parties (i.e., EU institutions as well as each member state) have the opportunity of engaging in a more direct and effective legal dialogue at the European level and can make use of economic sanctions to influence internal discussions. In the case of Turkey, the instruments of international pressure (such as sanctions,

appeal to the Parliamentary Assembly of the Council of Europe or the progress reports of the European Parliament) are only soft tools with minimum effect. The core difference between Turkey and the other two lies in the substantially different legal frameworks that surround these countries. Clearly put, the EU's existence makes it more likely for Poland and Hungary to overcome their democratic crises and find a way to reestablish a political life in tune with the principle of the rule of law; the legal and political framework of the EU still serves as a necessary and meaningful constraint on politics. In this regard, Turkey stands outside these limiting structures, and the yearly progress reports of the EU or the warning reports of the Venice Commission do not have any force on Turkish political culture. The Strasbourg Court (the ECtHR) has been so reluctant to decide on consequential cases (such as curfew measures in southeastern parts of Turkey in 2015 or the state-of-emergency cases) that it has killed the last hope of a legal realignment of Turkish politics through international legal means.

STRUCTURAL CHANGES VERSUS PERSONAL RESPONSIBILITY

A final pivotal question is how a single person in the public service or in public effective duties should act if the institutional framework has fundamentally declined. "Person" as the founding term of political and legal institutions leads us to the question of what constitutes justice in the institutional sense. Direk (2017) states that justice always has an ethical dimension, and she distinguishes three dimensions of justice: judicial, public, and personal. The interrelation between judicial and public justice is the reaction of civil society's critical response to the judicial acts of justice. She further states, "public justice can force institutional justice to function when it is not functioning well because of political interference and manipulation. But what if public justice too is obstructed, for instance in a totalitarian regime, which intimidates the public debate?" Then, "personal justice" is left alone (Direk 2017, 264). This term is closely related to personal responsibility in that both are core virtues. "In times of dictatorship, with the

political usurpation of power, the blurring of the difference between executive and judicial powers can corrupt the justice of the law and along with it, the possibility of personal justice" (271). Based on Ricoeur's (1990) book, *Oneself as Another*, Direk sees the possibility of justice mediated by personal moral values rather than by institutions (2017, 271) in times of institutional occupation and overlapping by the government. In that sense, personal justice requires a hermeneutic effort and addresses the interaction between law and politics.

Direk's conceptual contribution resonates with a claim by Arendt ([1964] 2003) about the moral responsibility of the individual under a dictatorship, which in turn leans indirectly on Max Weber's famous article "The Profession and Vocation of Politics" and raises his question of responsibility in the context of democratic/societal crisis. Weber distinguishes between the role and function of so-called political officials (*Verwaltungsbeamte*) and politicians, seeing it as the responsibility of officials to carry out any instruction given by their superior, even if the instruction does not correspond to their own convictions, while politicians should take personal responsibility for what they do without the possibility of refusing or delegating it to others (Weber 2018, 330). In the context of our core question of how to resist and transform an authoritarian regime, one should specify the function of the judiciary regarding the difference between personal responsibility and the upholding of the whole state apparatus against ethical self-responsiveness. Even though judges and prosecutors cannot be classified as politicians in the Weberian sense, it is also clear that they are not political officials executing the instructions of a superior.

Arendt's emphasis on personal responsibility and critical thinking is pertinent to all antidemocratic, authoritarian, or totalitarian regimes ([1964] 2003). Her analysis of the Nazis' immoral and unethical behavior and attitudes is premised on a distinctively Socratic belief (or, let's say, decision) that it is better to suffer than to do wrong. This philosophical position seems to be at the center of moral controversy again, at least in the judicial and political systems ruled by authoritarian majorities. Of course, historical and intercountry comparisons

often lead to imperfect generalizations since facts and intentions vary across time and space. However, there is a core choice to be made that remains the same for all people living in times of massive violation of rights: whether to resist or stay silent when faced with gross unlawfulness and coercion.

Can the reasoning "if I had not done it, somebody else could and would have anyway" be a plausible moral excuse for violating rights and instrumentalizing the law for the sake of political power? In the existing legal and political system of Turkey, the principles of legal, political, or economic responsibility are no longer applied in accordance with the rule of law. Because the methods of rule-making and the system's administration completely disregard the assurances of legal positivism and the formal rule of law, legal accountability is no longer on the table as a meaningful restraint on public action. The only remaining factor that can serve as a possible restraint is how public officials (including judges, prosecutors, and all other people with public duties) consider their personal or moral responsibilities while carrying out their daily duties. This is because the moral choices faced at the personal level are what actually determine whether the system is effective or disrupted. Once such an individual point of view is adopted, one can see a possibility for the rule of law to survive, albeit locally and in a limited manner. Otherwise, as Arendt puts it, "the acceptance of lesser evils is consciously used in conditioning government officials as well as the population at large to the acceptance of evil as such" ([1964] 2003, 36–37).

In a time of fear and gloom, hope can still be found in the political gestures of individuals and collectives, such as when former Vice President Mike Pence attended the inauguration of President-Elect Joe Biden while skipping the farewell event organized for Donald Trump (the outgoing president); the tireless efforts by the Turkish Medical Association to inform public authorities about scientifically required precautions against the pandemic; and the actions of such journalists as Kadri Gürsel and Ahmet Şık, who persist in informing and educating Turkish citizens by uncovering and reporting on wrongs regardless of external pressure and continuous threats of imprisonment.

CONCLUSION

The terms, institutions, and procedures in constitutional states have undergone crucial changes over time even if their names have remained the same. What many established democracies like the United States, new democracies of the 1990s like Poland and Hungary, or perpetually limping democracies like Turkey (at the edge of Europe since the 1950s) have undergone in the last decade shows the threat that blind faith poses to seemingly stable democracies under the rule of law.

The crucial functions of almost all formal state and civil society institutions in Turkey are currently hollowed out. Even though free elections are still held, it is impossible to talk about a real political contest since there is no independent judicial review; thus, "free" elections are only allowed to the extent that they guarantee an outcome that satisfies the executive will. Despite the multitude of media corporations, most of them are under financial pressure, and we only hear one dominant voice that echoes throughout. The executive does not directly ban media corporations; however, a significant amount of compensatory damage imposed on these outlets through defamation rulings has led to their financial hardship. For example, comics had always been a symbol of extraparliamentary opposition in Turkish political life, but most of them had to stop their publications (and finally closed down one by one) due to defamation lawsuits for damages as well as de facto assaults of AKP members. In spite of the normative guarantee of judicial independence, members of judicial organs are deprived of independence in the practical sense because of constant pressure sustained through disciplinary measures of the Council of Judges and Prosecutors, an institution controlled and supervised by the executive.

The primary question is to what extent an authoritarian leader can maintain absolute power without the support of other state institutions and actors. Can institutions and persons in office resist by using the authority within the normative borders set by the constitution? In other words, what instruments does an authoritarian figure have at their disposal in the fight against state institutions that will

limit their power within the boundaries of the rule of law? In my opinion, reestablishing the formality of the normative constitutional state looks like the only feasible option against an authoritarian leader who maintains power through the obedience of institutions and people. It is an open-ended question whether or not actors exist to assert such a position after almost two decades of AKP rule, but there is yet a horizon for change so long as we can imagine the following hopeful scenario: one day, an authoritarian leader gave an order and nobody followed it.

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NOTES

1. But see Finchelstein (2019), who explains the historical itinerary of fascism to populism, and its genealogy, which puts populism in its historical context as the reformulation of fascism.
2. A state of emergency was not officially declared during the COVID-19 pandemic in the country even though the constitutional requirements for such a declaration were clearly satisfied in the face of the emergent health crisis. Instead, the government put into effect executive acts even more unlawful than the ones imposed after the attempted coup of July 15, 2016: fundamental rights and freedoms were restricted not by the president, the authorized office for such restrictions as part of its emergency powers, but instead by the ministers through lower-level instruments such as ordinances and circulars published on ministry websites. The fall from the rule of law into total chaos is perfectly represented in the large number of ordinances not published in the official gazette and these exceptional rules' indeterminate content. Considering the imposed sanctions' arbitrariness and irrationality, one can easily regard the post-COVID response as an

intensified and nationalized form of the “de facto states of emergency” of 2015, undeclared but forcefully applied in southeastern Turkey.

3. “Populist constitutionalism refers to a particular type of institutional reform strategy undertaken by parties in power” (Chambers 2019, 1118). See also Blokker (2019, 113).
4. It is worth noting that because of Turkey’s notoriously high 10 percent electoral threshold, which only two political parties were able to achieve, almost half the voters’ political preferences were not represented in that parliament.
5. After the rejection of dissolution of the AKP, the Kurdish party *Demokratik Toplum Partisi* (DTP) was prohibited by the Constitutional Court on December 11, 2009. In January 2021, calls began to be heard within the AKP and its informal nationalist partner MHP for prohibiting the successor Kurdish party HDP. Solidarity with parties under the threat of dissolution seems not to be a principle idea for the AKP as a defender of an “advanced democracy.”
6. Art. 23: (1) Freedom of residence may be restricted by law for the purpose of preventing crimes, promoting social and economic development, achieving sound and orderly urbanization, and protecting public property.
   (2) Freedom of movement may be restricted by law for the purpose of investigation and prosecution of an offence and prevention of crimes.
7. Application No. 2015/15266 (11.9.2015); 2015/19545 (22.12.2015); 2015/19907 (26.12.2015); 2015/20218 (31.12.2015); 2016/43 (8.1.2016); 2015/20376 (20.1.2016); 2016/1652 (29.1.2016); 2016/1905 (3.2.2016); 2016/2602 (12.2.2016); 2016/3349 (24.2.2016); 2016/3646 (29.2.2016); 2016/3475 (29.2.2016); 2016/5993 (5.4.2016); 2016/9400 (23.5.2016).
8. Among others, Yavuzel and Others v. Turkey, Application No. 5317/16; Irmak v. Turkey, Application No. 5628/16; Karaduman and Çiçek v. Turkey, Application No. 6758/16.
9. “The deputies about whom a file concerning the lifting of parliamentary immunity has been submitted, by the date of adoption of this article … shall be exempt, with respect to such file, from the first sentence of the second paragraph of Article 83 of the Constitution” (Provisional Article 20).

10. Kadri Enis Berberoğlu's case as a CHP deputy is the most famous example. See his three constitutional complaints cases: Application No. 2017/27793, 2018/30030, and 2020/32949.
11. For a third-year report of the State of Emergency Regime, see Mağdurlar İçin Adalet Topluluğu, *3. Yılında OHAL'in Toplumsal Maliyetleri* (June 2020).
12. The Venice Commission (with its official name "The European Commission for Democracy through Law") is an advisory body of the Council of Europe on constitutional matters. For detailed information, see www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN. See also Venice Commission, Guidelines on the Holding of Referendum, Study No. 371/2006, CDL-AD(2006)027rev. (Nov. 8, 2006). All referenda practices in Turkey seem to be in opposition to the guidelines.

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