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CONSTITUTIONAL DEMOCRACY AND THE RULE OF LAW

MEDITERRANEAN PERSPECTIVES

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Editor: Assoc. Prof. Dr. Demet ÇELİK ULUSOY

International Conference on "*Constitutional Democracy and the Rule of Law: Mediterranean Perspectives*"

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Assoc. Prof. Dr. Demet ÇELİK ULUSOY

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EMU Faculty of Law
International Conference on "*Constitutional Democracy and the Rule of Law: Mediterranean Perspectives*"

Special Thanks

We would like to express our gratitude,

To the members of the Organizing Committee who contributed to the realization of the Conference and

To our esteemed professors in the Scientific and Advisory Board who supported the conference and the papers accepted for the presentation by considering their academic quality,

To the EMU Printing Office especially Graphic Design Unit and Printing Operations Unit,
To the EMU Computer Center especially Web Developer Unit,
To the EMU Tourism Revolving Funds Unit,
To the EMU Transportation Affairs and
To the EMU Accounting Office

In addition, it would not have been possible to hold a Conference and publish this Book of Abstracts without the contribution of the EMU Rectorate. We would like to thank the EMU Rector, the entire team and especially the Vice Rector in charge of Academic Affairs.

Finally, we are grateful to
EMU Academic Staff Union DAÜ-SEN,
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Endless thanks to EMU Faculty of Law members Assist. Prof. Dr. Eylem Ekinci and EMU Law Club Advisor Assist. Prof. Dr. Nazime Beysan for all their support from the first moment to the last of the Conference

EMU Faculty of Law
International Conference on "*Constitutional Democracy and the Rule of Law: Mediterranean Perspectives*"

On behalf of the EMU Faculty of Law Dean's Office, Vice Dean Assoc. Prof. Dr. Arzu Alibaba's Opening Speech

Dear President of the Supreme Court, Vice President of the Parliament, dear Deputy, Rector, Vice Rector, esteemed academics, dear students, ladies and gentlemen, on behalf of the Eastern Mediterranean University (EMU) Faculty of law I would like to express my sincere gratitude and welcome you to the International Conference on "Constitutional Democracy and the Rule of Law: Mediterranean Perspectives".

It is pleasing to note that the agenda of this Conference covers a wide range of interesting topics related to all theoretical and practical aspects of constitutional democracy and the rule of law.

It is my hope that the Conference would be able to achieve its objective in providing an effective forum for academicians, researchers, practitioners and students to advance knowledge and research.

In 2015 our Faculty hosted the 3rd Turkish-Italian Constitutional Law Conference which led to the collaboration protocol between EMU and the University of Bologna (UniBo). I can proudly say that we have a joint masters program (Comparative Legal Systems) with the UniBo since 2018. I should express my gratitude to Professor Luca Mezzetti for his contributions to the Masters Program and todays event.

I hope this Conference will be the starting point of a future collaboration with the University of Jaén. It is a great honour for us to have the University of Jaén as one of the partners of the Conference and my gratitude goes to Professor Gerardo Ruiz-Rico for his contributions.

Last but not least, my deepest gratitude goes to the Rectorate of the EMU, the Advisory Board of the Conference, the Scientific Committee and members of the Organizing Committee Assist. Prof. Hakan Bilgeç, Assist. Prof. Nurcan Gündüz, especially to Assoc. Prof. Demet Çelik Ulusoy which I believe the Conference couldn't have been possible without her efforts, research assistants Eda Karasaç, Rabia Karasaç, Merve Nur Değerli and Nisa Sunca.

I would like to thank the academic staff union of our University DAÜSEN, Başel Holding, Figen Soft Company, Oza Coffee, Ekor Patisserie and Aspava Restaurant for their support.

My final gratitude goes to distinguished speakers of the Conference for their contributions.
I wish you a very productive conference with exciting and encouraging discussions and exchange of knowledge.

Assoc. Prof. Dr. Arzu Alibaba
Eastern Mediterranean University
Vice Dean - Faculty of Law
Famagusta, Turkish Republic of Northern Cyprus

EMU Faculty of Law
International Conference on "*Constitutional Democracy and the Rule of Law: Mediterranean Perspectives*"

The Published Call for Papers for the Conference

It is certain that democracy is an outcome of constitutionalism, and it is deeply based in its thoughts, inseparable from the rule of law which has to act through a legal process. The rule of law aims to limit the political power especially in the face of the rise of populism as a threat to democracy.

Rule of law are legitimizing instruments for political power and in the first place, should maintain the protection of human rights and effective supervision of the administration in a constitutional democracy. Therefore, it refers to the basis of the political system in all areas of law.

With all these views, we welcome all scholars to our International Conference, it is holding on the use of law as a tool of political strategies and the devastation of legal security, certainty and predictability.

"Constitutional Democracy and the Rule of Law: Mediterranean Perspectives" conference will be held on 1-2 June 2022 which will be hosted by the Eastern Mediterranean University, the oldest university of the Turkish Republic of Northern Cyprus. The Conference aims to bring the foremost academicians, researchers and research scholars together to share their knowledge, experiences and research results on different aspects of the Constitutional Democracy and the Rule of Law.

The Conference will be held in English. Two sessions will be in Turkish, and the remaining sessions will be in English. Simulated translation service will be provided for presentations. Details regarding deadlines and registration fee can be found from https://constitutionaldemocracy.emu.edu.tr/en

Conference sessions will largely be held face-to-face. However, there will also be hybrid sessions for those who want to present online.

EMU Faculty of Law
International Conference on "*Constitutional Democracy and the Rule of Law: Mediterranean Perspectives*"

Program of the International Conference on "*Constitutional Democracy and the Rule of Law: Mediterranean Perspectives*"

1st DAY OF THE CONFERENCE (1 June 2022) / BİRİNCİ GÜN (1 Haziran 2022)

09:00 am OPENING CEREMONY / AÇILIŞ TÖRENİ

Opening Speeches /AÇILIŞ KONUŞMALARI

1st Session*
Birinci Oturum

"Moments of Constitutional Democracy and Rule of Law in Turkey:
From Past to Future"
"*Türkiye'de Anayasal Demokrasi ve Hukukun Üstünlüğü 'An'ları: Geçmişten Geleceğe*"

Prof. Dr. Sultan Üzeltürk
Keynote Speaker and Chair of Session (Davetli Konuşmacı ve Oturum Başkanı)

09:30 am Prof. Dr. Nevin Ünal Özkorkut:
"*Hukuk Devleti Kavramı ve Türkiye'deki Gelişimi* (*The Concept of the Rule of Law and its Development in Turkey*)" Ankara University, Faculty of Law, Ankara, Turkey (Ankara Üniversitesi Hukuk Fakültesi, Ankara, Türkiye).

09:45 am Prof. Dr. Sultan Üzeltürk:
"*Türkiye Cumhuriyeti Anayasası'nın 2010-2017 Anayasa Değişikliklerinde Yargı* (*Judiciary on 2010-2017 Constitutional Amendments of Turkish Republic Constitution*)" Eastern Mediterranean University, Faculty of Law, TRNC and Yeditepe University, Faculty of Law, Turkey (Doğu Akdeniz Üniversitesi Hukuk Fakültesi, KKTC ve Yeditepe Üniversitesi Hukuk Fakültesi, İstanbul, Türkiye).

10:05 am Assoc. Prof. Dr. Demet Çelik Ulusoy:
"*Anayasal Demokrasinin Dijital Perspektifi: Türkiye'nin Dijital Anayasacılığın Eskizi* (*Digital Perspective of Constitutional Democracy: Sketch of Turkey's Digital Constitutionalism*)" Eastern Mediterranean University, Faculty of Law, TRNC (Doğu Akdeniz Üniversitesi Hukuk Fakültesi, Gazimağusa, KKTC).

10:15 am – 10:30 am Discussions (Soru-Cevap)

10:30 am Break by EKOR (Kısa Mola) (Location: Front of the Conference Hall)

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**This session will be held in Turkish and simultaneous translation will be done. (*Bu oturum Türkçe gerçekleştirilecek ve simultane çeviri yapılacaktır.)*

2nd Session
İkinci Oturum

Prof. Dr. Luca Mezzetti

Keynote Speaker and Chair of Session (Davetli Konuşmacı ve Oturum Başkanı):

10:50 am Prof. Dr. Luca Mezzetti:
"Democracy's Withering: Ten Years After Arab Springs, (*Demokrasinin Solması: Arap Baharı'ndan on Yıl Sonra*)" Alma Mater Studiorum Universita di Bologna, School of Law, Bologna/Italy (Alma Mater Studiorum Bolonya Üniversitesi, Hukuk Fakültesi, İtalya).

11:10 am Ulaş Gündüzler:
"*Ability of EU in Promoting and Safeguarding the Rule of Law in Europe,* (*AB'nin Avrupa'da Hukukun Üstünlüğünü Teşvik Etme ve Koruma Yeteneği)",* Eastern Mediterranean University, Faculty of Law, TRNC (Doğu Akdeniz Üniversitesi, Hukuk Fakültesi, KKTC).

11:25 am -11:40 am Discussions (Soru-Cevap)

11:50- 12:50 pm Lunch Break (Öğle Arası), EMU Taboldot Restaurant (Location: Next to the Faculty of Law)

13:00 pm Coffee by OZA, (Location: Front of the CL Building)

3rd Session
Üçüncü Oturum

Prof. Dr. Selin Esen

Keynote Speaker Chair of Session (Davetli Konuşmacı ve Oturum Başkanı):

14:00 pm Prof. Dr. Selin Esen:
"*Emergency Regimes and Erosion of Constitutional Democracies,* (*Olağanüstü Hal Rejimleri ve Anayasal Demokrasilerin Erozyonu*), Ankara University, Faculty of Law, Ankara/Turkey (Ankara Üniversitesi, Hukuk Fakültesi/Türkiye).

14:20 pm Dr. Francesco Biagi:
"Tunisia's Democratic Backsliding, (*Tunus'un Demokratik Geri Kayması)",* Alma Mater Studiorum Universita di Bologna, School of Law, Bologna/Italy (Alma Mater Studiorum Bolonya Üniversitesi, Hukuk Fakültesi, İtalya).

14:35 pm Dr. Francesca Polacchini
"The Presidentialization of the Italian Executive in Times of Pandemic Crisis", (*Salgın Hastalık-Kriz Zamanlarında İtalyan Yürütme Organının Başkanlığa Dönüşmesi)* Alma Mater Studiorum Universita di Bologna, School of Law, Bologna/Italy. (Online) (Alma Mater Studiorum Bolonya Üniversitesi, Hukuk Fakültesi, İtalya).

14:50-15:05 pm Discussions (Soru-Cevap)

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15:05-15:15 pm Break by EKOR (Kısa Mola) (Location: Front of the Conference Hall)

4th Session
Dördüncü Oturum

Prof. Dr. Bertil Emrah Oder

Keynote Speaker and Chair of Session **(**Davetli Konuşmacı ve Oturum Başkanı)**:**

15:30 pm Prof. Dr. Bertil Emrah Oder:
"Constitutional Backsliding(s): Trajectories, Challenges, and Responses (*Anayasal Geri Kayma(lar): Yörüngeler, Zorluklar ve Tepkiler*)*,"* Koç University, Faculty of Law, İstanbul/Turkey (Koç Üniversitesi, Hukuk Fakültesi, İstanbul/Türkiye).

15:50 pm Assist. Prof. Dr. Aydın Atılgan:
"Political Economy of Constitutions: Markets and Democracy in Turkey, (*Anayasaların Ekonomi Politiği: Türkiye'de Piyasalar ve Demokrasi*)*"* Bahçeşehir Cyprus University, School of Law, TRNC. (Bahçeşehir Kıbrıs Üniversitesi, Hukuk Fakültesi, KKTC).

16:05 pm Assoc. Prof. Dr. Caterina Drigo:
"Rule of law and migration in the European Context: a focus on the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights, (*Avrupa İnsan Hakları Sözleşmesi'ne ve Avrupa İnsan Hakları Mahkemesi içtihatları Üzerinden Avrupa Bağlamında Hukukun Üstünlüğü ve Göç*)*"* Alma Mater Studiorum Universita di Bologna, School of Law, Bologna/Italy (Alma Mater Studiorum Bolonya Üniversitesi, Hukuk Fakültesi, İtalya).

16:15-16:30 pm Discussions

16:00 pm Coffee by OZA (Location: Front of the CL Building)

END OF THE FIRST DAY
BIRINCI GÜN SONU

2nd DAY OF THE CONFERENCE (2 June 2022)
İKİNCİ GÜN (2 Haziran 2022)

1st Session*
Birinci Oturum

Prof. Dr. Ayşe Nuhoğlu

Keynote Speaker Chair of Session (Davetli Konuşmacı ve Oturum Başkanı)

10:00 am Prof. Dr. Ayşe Nuhoğlu:
*"Evaluation of the Decisions of the Turkish Constitutional Court in the Field of Criminal Law Through Tangible Norm Review of the Judiciary in the Context of the Rule of Law, (*Türk Anayasa Mahkemesi'nin Ceza Hukuku Alanında Somut Norm Denetimi Yoluyla Verdiği Kararların Hukuk Devleti Bağlamında Değerlendirilmesi)*".* Medipol University, Faculty of Law, İstanbul/ Turkey. *(*Medipol Üniversitesi Hukuk Fakültesi İstanbul/ Türkiye).

ISBN: 978-605-9595-53-7

10:20 am Assist. Prof. Dr. Nurcan Gündüz:
"*Limitation of Freedom of Expression in Turkish Republic of Northern Cyprus with Criminal Law Norms,* (*Kuzey Kıbrıs Türk Cumhuriyeti'nde İfade Özgürlüğünün Ceza Hukuku Normlarıyla Sınırlandırılması*)*,"* (*Kuzey Kıbrıs Türk Cumhuriyeti'nde İfade Özgürlüğünün Ceza Hukuku Normlarıyla Sınırlandırılması*), Eastern Mediterranean University, Faculty of Law, TRNC. (Doğu Akdeniz Üniversitesi, Hukuk Fakültesi, KKTC).

10:35-10:50 am Discussions (Soru-Cevap)

10:50-11:05 am Break by EKOR (Kısa Mola) (Location: Front of the Conference Hall)

**This session will be held in Turkish and simultaneous translation will be done. (*Bu oturum Türkçe gerçekleştirilecek ve simultane çeviri yapılacaktır.*)*

2nd Session
İkinci Oturum

Prof. Dr. Gerardo Ruiz-Rico
Keynote Speaker Chair of Session (Davetli Konuşmacı ve Oturum Başkanı)

11: 05 am Prof. Dr. Gerardo Ruiz-Rico- Prof. Dr. Juan José Ruiz:
"*Limits of Power in Spain: Constitution and (territorial) Democracy* (*İspanya'da İktidarın Sınırlanması: Anayasa ve (Bölgesel) Demokrasi*)*",* The Center for Economic and Social Justice (CESJ) and University of Jaén, Department of Public Law, Jaén/ Spain. (Ekonomik ve Sosyal Adalet Merkezi (CESJ) ve Jaén Üniversitesi Kamu Hukuku Bölümü, Jaén/ İspanya).

11:25 am Prof. Dr. Juan Montabes Pereira:
"The model of political decentralization in Spain: the development of the State of the Autonomies 1978-2022 (*İspanya'da Siyasal Yerelleşme Modeli Özerk Bölgelerin Gelişimi: 1978-2022)"* University of Granada, Department of Political Science and Administration, Spain. (Granada Üniversitesi, Siyaset Bilimi ve Yönetimi Bölümü, İspanya).

11:45 – 12: 00 pm Discussions (Soru-Cevap)

12:00 13:00 pm Lunch Break (Öğlen Arası) EMU Taboldot Restaurant (Location: Next to the Faculty of Law)

13:10 pm Coffee by OZA (Location: Front of the CL Building)

Conclusion Remarks/Open Session

"Discussion on Systems of Government"

13:30 pm Prof. Dr. Juan Montabes Pereira:
Chair and Moderator (Başkan ve Moderatör)

Participants

Prof. Dr. Ahmet Sözen,
Prof. Dr. Bertil Emrah Oder,
Prof. Dr. Luca Mezzetti,
Prof. Dr. Selin Esen

The purpose of the Open Session is to introduce of the knowledge all scholars in the Conference and to give students the chance to listen their evaluations about the topic which is forms of government. This open session will focus on concepts, problems and practical dimensions on forms of government. In this session, it is desired that all other Keynotes or Speakers contribute to the discussions. The Conference will be end with the conclusion remarks.

Katılımcılar

Prof. Dr. Ahmet Sözen,
Prof. Dr. Bertil Emrah Oder,
Prof. Dr. Luca Mezzetti,
Prof. Dr. Selin Esen

Bu açık oturumun amacı Konferansa katılan akademisyenlerin hükümet sistemlerine ilişkin güncel değerlendirmelerini öğrencilerle paylaşılmasıdır. Oturumda yer alan katılımcılar dışında Konferansa katılan tüm Konuşmacıların kademisyenlerin hükümet sistemleri üzerindeki değerlendirmelere katkı koymaları arzu edilmektedir. Son olarak kapanış değerlendirmeleriyle konferans erecektir.

15:00 pm Coffee by OZA & Break by Ekor (Location: Front of the CL Building, Conference Hall)

END OF THE CONFERENCE

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ABSTRACTS

(By Order in the Conference Program)

International Conference on "*Constitutional Democracy and the Rule of Law: Mediterranean Perspectives*". 1-2 June 2022, Famagusta-North Cyprus- https://constitutionaldemocracy.emu.edu.tr/en, BOOK OF ABSTRACTS-
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The Concept of the Rule of Law and its Development in Turkey[1]

Nevin Ünal Özkorkut[2]

[2]Prof. Dr., Ankara University Faculty of Law, Ankara, Turkey.
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Abstract

The understanding of the state, which carries out all its acts and actions in line with pre-established objective and general rules rather than arbitrary and personal discourses of the ruler, has been a challenging quest since the ancient times. Two of the most prominent terms preferred to express such an ideal of state are "Rule of Law" with the Anglo-Saxon origin and "Rechtsstaat" with the German origin. The term "Rule of Law" expresses the superiority of law while the German term "Rechtsstaat" considers the state as a constituent element. The difference between Rechtsstaat and Rule of Law is not only terminological but also conceptual. Even though both are the expressions of the desire of the bourgeois liberal constitutionalism of the Enlightenment Period to limit the power of the state, they have developed in various meanings and contents depending on the intellectual, legal, political and economic cultural differences between the countries where they emerged. Today, the main purpose of both understandings of the state is to make the modern state bound by law, despite the terminological and contextual differences.

In the development process of the rule of law, two different conceptions are noted, which are the formal conception and the substantive conception based on the distinction between the positivity and fairness of law. The substantive conception indicates that the state power is bound by certain legal values while the formal conception is based on, not the goal and content of the state, but the way how they are realized. While the formal conception states that it is important to be governed by rules, rather than the content and quality of the legal rules, and considers the state as rule of law if it abides by the rules that it sets, the substantive conception pays attention to the fact that the rules carry certain values as a content and safeguard certain values especially individual freedoms (human rights). The substantive conception does not consider a norm that lacks minimum ethical content as law. The content, which is safeguarded in such a way, may change and be abused according to the political preferences. Since the formal conception measures legitimacy only through legality and this situation may lead to inconveniences, it should be strengthened by the means of certain elements. The holistic conception, in which both understandings complement the deficiencies of one another, seems to be the final and the best way to explain the rule of law for now. In this regard, it is accepted that the values such as freedom, human dignity and justice aimed by the rule of law should be provided and safeguarded by means of formal means like generality of law, separation of powers, independence of the judiciary, constitutional jurisdiction, and legality of the administration, financial accountability of the state and principle of proportionality.

[1] The Turkish version of the Abstract is on the next page

As a consequence, many definitions that attempt to explain the rule of law also reveals the main challenge to make a complete definition of this understanding. Nevertheless, the rule of law

has basic elements and some of them have their sub-elements, which make it easier to understand to explain, on which a consensus has been reached and some of them have been expressed above.

In Turkish law, the rule of law is preferred as a terminological equivalence of the concept of the state bound by law. The term was first used in the 1961 Constitution and the 1982 Constitution also included the rule of law although it mainly preferred the superiority of law. The "rule of law" had an important place in the Preamble of the 1961 Constitution, in Article 2 in which the characteristics of the Republic were listed, in Article 10 on the nature and protection of the fundamental rights and in Article 96 in which the oath-taking of the President was drawn up. In the 1982 Constitution, the rule of law was again listed among the characteristics of the Republic (art. 2) and the term was also included in Article 5 arranging the fundamental aims and duties and in Article 68 regarding the political parties. The "superiority of law" was preferred in Article 81 arranging the oath-taking of the deputies and in Article 103 arranging the oath-taking of the President. There are significant differences between the 1961 Constitution and 1982 Constitution, which include the term "rule of law" with regard to the arrangement of the fundamental elements that comprise the rule of law. The 1961 Constitution includes provisions that are closer to the ideal of the rule of law, when compared to the 1982 Constitution.

As indicated above, even though the terminological expression on a constitutional basis was first shown itself in the 1961 Constitution, it is possible to state that there have been former arrangements in the Turkish history that can be associated with the rule of law. The process, which began in the Ottoman Empire in mid-19th century partly due to the own will of the state and to a greater extent, by means of some developments evoking the rule of law because of various internal and external pressures, continued in the period of the Republic of Turkey in a more prominent manner. In this framework, especially the Tanzimat Edict of 1839 included elements – which were very important for that period and promising for the subsequent developments – in terms of the rule of law. The 1876 Constitution (Kanun-ı Esasi) is also important in the sense of containing provisions that may be associated with the elements of the rule of law, especially when it is considered together with the amendments of 1909. The 1924 Constitution (Teşkilat-ı Esasiye Law) also includes provisions pointing to the existence of the principles of the rule of law.

In conclusion, it should be indicated that the "rule of law" covers a very comprehensive field of study in terms of both the concept and historical process. However, the paper aims to make a brief explanation of the concept of the rule of law, which has only been outlined in the summary, and then to draw a general framework of the development of the rule of law in Turkey with regard to some fundamental elements particularly the separation of powers, within the framework of the constitutional provisions.

***Keywords*:** rule of law, substantive and formal conception of rule of law, Turkish constitutions, separation of powers

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Hukuk Devleti Kavramı ve Türkiye'deki Gelişimi

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Özet

Tüm eylem ve işlemlerini, yönetenin keyfi ve kişisel söylemleriyle değil, önceden konulmuş, objektif ve genel kurallar dahilinde yerine getiren devlet anlayışı, eski dönemlerden bugüne değin devam etmekte olan zorlu bir arayıştır. Böyle bir devlet idealini ifade etmek için tercih edilen farklı terimler arasında öne çıkan ikisi Anglo-Sakson kökenli "Rule of Law" ve Alman kökenli "Rechtsstaat"tır. Rule of Law, hukukun üstünlüğünü ifade etmekteyken, Alman Rechtsstaat teriminde devlet kurucu bir unsur olarak görülmektedir. Rechtsstaat ile Rule of Law arasındaki fark sadece terimsel değil, aynı zamanda kavramsaldır. Her ikisi de Aydınlanma Dönemi burjuva liberal anayasacılığının, devlet kudretini sınırlama arzusunun ifadesi olmakla birlikte, ortaya çıktıkları ülkeler arasındaki düşünsel, hukuksal, siyasal ve ekonomik kültür farklılıklarına bağlı olarak farklı anlam ve içerikte gelişmiştir. Bugün gelinen noktada terim ve içerik farklılığına rağmen her iki devlet anlayışında da temel amaç, modern devleti hukukla bağlı kılmaktır.

Hukuk devletinin gelişim sürecinde, hukukun pozitifliği ve adilliği ayrımı temelinde biçimsel hukuk devleti ve maddi hukuk devleti olmak üzere iki ayrı anlayış biçimi görülmektedir. Maddi hukuk devletinin esası, devlet gücünün belli hukuksal değerlerle bağlı bulunması iken biçimsel hukuk devletinde, devletin hedef ve içeriği değil, bunların gerçekleştirilme tarzı esas alınmaktadır. Biçimsel hukuk devletinde hukuk kurallarının içeriğinden, niteliğinden ziyade kurallarla yönetilmek önem taşımaktayken ve kendi koyduğu kurallara uyan devlet, hukuk devleti sayılmaktayken, maddi hukuk devleti anlayışında kuralların içerik olarak bazı değerleri taşımasına ve başta bireysel özgürlük (insan hakları) olmak üzere belli değerlerin korunmasına önem verilmektedir. Maddi hukuk devleti anlayışında, etik olarak asgari içeriğe sahip olmayan bir norm hukuk olarak kabul edilmemektedir. Hukuk devletinin bu şeklinde güvence altına alınan içeriklerin siyasi tercihlere göre değişmesi -ve kötüye kullanılması- mümkündür. Biçimsel hukuk devleti anlayışı da tek başına meşruiyeti salt yasallıkla ölçeceğinden ve bu durum sakıncalar doğurabileceğinden onun da belli unsurlarla kuvvetlendirilmesi gerekir. Her iki hukuk devleti anlayışının birbirinin eksik yanlarını tamamladığı bütünsel hukuk devleti ise hukuk devletini izah etmenin şimdilik nihaî ve en iyi yolu olarak görünmektedir. Bu çerçevede hukuk devletiyle hedeflenen özgürlük, insan onuru, adalet gibi değerlerin başlıca yasanın genelliği, kuvvetler ayrılığı, yargı bağımsızlığı, anayasa yargısı, idarenin yasallığı, devletin malî sorumluluğu, ölçülülük ilkesi gibi biçimsel araçlarla sağlanması ve korunması gerekliliği kabul edilmiştir.

Sonuç itibariyle hukuk devletinin ne olduğunu açıklamaya çalışan birçok tanım girişimi, bu anlayışın eksiksiz bir tanımının yapılmasındaki büyük zorluğu da ortaya koymaktadır. Bununla birlikte hukuk devletinin, onu anlamayı ve anlatmayı kolaylaştıran, üzerinde genel bir

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uzlaşıya varılmış ve yukarıda bir kısmı sayılmış olan temel unsurları ve bunların bir bölümünün de kendi alt unsurları bulunmaktadır.

Türk hukukunda hukukla bağlı devlet anlayışının terimsel karşılığı olarak hukuk devleti tercih edilmiştir. Terim ilk kez 1961 Anayasası'nda kullanılmış; 1982 Anayasası'nda da esas olarak hukuk devleti tercih edilmekle birlikte hukukun üstünlüğü ifadesine de yer verilmiştir. 1961 Anayasası'nın Başlangıç kısmında, Cumhuriyetin niteliklerinin sayıldığı 2. maddesinde, temel hakların niteliği ve korunmasına ilişkin 10. maddesinde ve Cumhurbaşkanı andının düzenlendiği 96. maddesinde "hukuk devleti", önemli bir yere konulmuştur. 1982 Anayasası'nda ise hukuk devleti yine Cumhuriyetin nitelikleri arasında sayılmış (md. 2), devletin temel amaç ve görevlerinin düzenlendiği 5. maddede ve siyasi partilere ilişkin 68. maddede de terime yer verilmiştir. Milletvekili andını düzenleyen 81. madde ile Cumhurbaşkanı andını düzenleyen 103. maddede ise "hukukun üstünlüğü" tercih edilmiştir. "Hukuk devleti" terimine yer veren 1961 ve 1982 Anayasaları arasında hukuk devletini oluşturan temel unsurların düzenlenmesi açısından önemli farklılıklar bulunmaktadır. 1961 Anayasası, hukuk devleti idealine 1982 Anayasası'na nazaran daha yakın hükümler içermektedir.

Yukarıda da belirtildiği üzere anayasal zeminde terimsel ifadesi ilk kez 1961 Anayasası'nda bulunmakla birlikte Türkiye tarihine bakıldığında bu anayasalar öncesinde de hukuk devleti ile ilişkilendirilebilecek düzenlemelerin bulunduğunu söylemek mümkündür. Osmanlı Devleti'nde, 19. yüzyıl ortalarından itibaren kısmen devletin kendi arzusu, daha büyük ölçüde de çeşitli iç ve dış kaynaklı baskılar nedeniyle hukuk devletini çağrıştıran bazı gelişmelerle başlayan süreç Türkiye Cumhuriyeti döneminde daha belirgin bir şekilde devam etmiştir. Bu çerçevede özellikle 1839 tarihli Tanzimat Fermanı, hukuk devleti açısından -o dönem için çok önemli ve sonraki gelişmeler için de umut verici- hususlar içermiştir. 1876 Anayasası (Kanun-ı Esasi) da özellikle 1909 değişiklikleriyle birlikte düşünüldüğünde hukuk devleti unsurlarıyla bağlantı kurulabilecek hükümler içermesi açısından önemlidir. 1924 Anayasası (Teşkilat-ı Esasiye Kanunu) da bazı hukuk devleti ilkelerinin varlığına işaret eden hükümler içermektedir.

Sonuç olarak belirtmek gerekir ki, "hukuk devleti" gerek kavramsal olarak, gerek tarihsel süreci açısından oldukça kapsamlı bir inceleme alanına sahiptir. Ancak Bildiride, öncelikle özet metinde sadece genel hatlarıyla belirtilmiş olan hukuk devleti kavramına ilişkin kısa bir açıklama yapılması, daha sonra da hukuk devletinin başta kuvvetler ayrılığı olmak üzere bazı temel unsurları açısından -anayasa hükümleri çerçevesinde- Türkiye'deki gelişiminin genel bir çerçevesinin çizilmesi planlanmaktadır.

***Anahtar Kelimeler*:** hukuk devleti, maddi ve şekli anlamda hukuk devleti Türk anayasaları, kuvvetler ayrılığı

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Judiciary on 2010-2017 Constitutional Amendments of Turkish Republic Constitution[4]

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Abstract

Among the Ottoman-Turkish Constitutions, the strongest steps concerning the judiciary are taken on the 1961 Constitution. 1961 Constitution, in this context, drew attention to both the regulations on judicial independence and impartiality; and the formation of the Constitutional Court and High Board of Judges (YHK), and Supreme Election Council.

The 1982 Constitution is far from being expressed as a strong constitution in terms of the judiciary. In the Constitutional construct, the judiciary is designed as a branch that the executive can feel its influence. Especially, the influence of the President in the assignment of high judges makes the assignment procedure a discrete, exceptional model. In the 1982 Constitution, the Higher Council of Judges and Prosecutors(HSYK) was quite problematic in terms of judicial independence since five members of the Council were being elected by the President among the appointed candidates, two members being the minister and the undersecretary of the Ministry of Justice, it was evaluating judges and prosecutors in the same category, it was using the Ministry of Justice's building and secretariat and inspectors of the Ministry of Justice was investigating judges.

The problem of the 1982 Constitution against the judiciary is not only the executive effect on the construct of the courts, but it also constitutes a weakness by narrowing the judiciary of the courts, limiting the duration of a lawsuit, and increasing the density of uncontrolled areas.

Judiciary in 2010 Constitutional Amendments

How can the 2010 Amendments of the 1982 Constitution be evaluated which contains major problems and deficiencies regarding the judiciary? Has it brought any solution to the above-mentioned judicial problems which are generally set forth? The 2010 Constitutional Amendment which envisaged amending 26 articles of the constitution is essentially focused on the Constitutional Court and the Higher Council of Judges and Prosecutors' formation. Although, among the Constitutional amendments, there were provisions that do not even need to be on referendum since they would be settled by common consent, such as protecting the personal data, the state protection of abused children, and the restriction of going abroad with a judge's decision. However, the focus of the 2010 Constitutional Amendment was the Constitutional Court and the Higher Council of Judges and Prosecutors. Two positive developments of these institutions, albeit limited, would be first to have the judicial remedy of the Higher Council of Judges and Prosecutors' decisions, even if it is only for the dismissal

[4] The Turkish version of the Abstract is on the next page.

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from profession decisions, and secondly, acceptance of individual application to the Constitutional Court.

On the other hand, the basis of the 2010 Constitutional Amendments can be considered as a kind of initiation to "package" the Constitutional Court and the Higher Council of Judges and Prosecutors. When we look at the changes in terms of the formation of the Constitutional Court, the abolition of the substitute membership, existing substitute members becoming permanent members, the increase of the number of members from 11 to 17, the limitation of the membership procedure to 12 years and the cancellation of the Constitutional amendment and seeking for 2/3 majority of the participants instead of 3/5 for the closure of a political party are noteworthy. As a result of the amendment, in terms of the formation of the Constitutional Court, 14 members are elected directly or indirectly by the President, and 3 members are elected by the Parliament among the candidates nominated by the Court of Accounts and Bar Presidents.

The Higher Council of Judges and Prosecutors' change of structure is even more striking. The Council's number of members has increased to 22 original and 12 substitute members from 7 original and 5 substitute members[6].

It will be revealed within the later developments that the 2010 Constitutional Amendments were not a solution to the judicial problems of the 1982 Constitution; on the contrary, it led to a construct of the structure of the Constitutional Court and the Higher Council of Judges and Prosecutors.

Judiciary in 2017 Constitutional Amendments

The main purpose of the 2017 Constitutional Amendments was not the judiciary; it was to implement the presidential system. However, it brought important changes in the field of the judiciary which is the centerline term of political regimes and constitutional democracies. The expectation from democratic constitutional amendments is to have more democratic and liberal changes and to take a step further toward the reached goals, not backwards. If the Constitutional amendments take the standards of democracy and freedom back and aim for this purpose to happen, we can then talk about abusive constitutional amendments.

The first problem of the 2017 Constitutional Amendments may be the tangible effect of the amendments which states that the judiciary should not only be independent but also impartial.

Another issue about the judiciary is to emphasize the judicial independence and the abolition of military criminal courts.

Another problem arises from the relationship between the new political regime and the judiciary. The most important amendment in 2017 is the effect of the President's new status on the appointment of judges. In this context, the issue of whether the old parliamentarian and neutral status of the President at the beginning of the 1982 Constitution would turn into when the new status of the President as a party leader was raised and the question of what motivation would the President have while using these powers gained importance.

[6] Some statements are cancelled by the Constitutional Court. E.2010/49, K.2010/87, R.G., 1.8.2010, S.27659 (Mükerrer). The decision of the Constitutional Court was held for a referendum as it was published in the Official Gazette.

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Another evaluation of this study is whether the revision of the Council of Judges and Prosecutions within the 2017 Constitutional Amendments has solved the problems which occurred during the 1982 Constitution or not.

Another title that will be assessed is the consequences of the supervision of the Presidential decrees by the Constitutional Court in terms of the effective judiciary.

In Turkish law, there are legal and constitutional regulation problems regarding the judiciary. However, far beyond that, the greatest impact on the judiciary is by the practitioners. Without a doubt, the problems arising from the practice have a great place in the lack of confidence in the judiciary index.

The point reached with the 2010 and 2017 amendments is far from solving the already problematic judicial crises of the 1982 Constitution. Moreover, these amendments preferred not to touch on the problems that were openly expressed at every opportunity. In practice, issues related to the functioning of the judiciary constitute a major problem in the implementation of Constitutional democracy. Considering the last two Constitutional amendments, it is not surprising that according to the 2021 Rule of Law index, which was created by the World Justice Project based on certain criteria Turkey is ranked 117th out of 139 countries and has also regressed over the years.

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***Keywords*:** judiciary in the 1982 Constitution, abusive constitutionalism, 2017 Constitutional Amendments, Council of Judges and Prosecutors, politicization of the judiciary.

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Türkiye Cumhuriyeti Anayasası'nın 2010-2017 Anayasa Değişikliklerinde Yargı

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Özet

Osmanlı-Türk Anayasaları arasında yargıya ilişkin en güçlü adımlar 1961 Anayasasında atılmıştır. 1961 Anayasası bu bağlamda hem yargının bağımsızlığı ve tarafsızlığına ilişkin düzenlemeler, hem de Anayasa Mahkemesi ve Yüksek Hakimler Kurulu (YHK) ve Yüksek seçim Kurulu oluşumları ile dikkat çekmektedir.

1982 Anayasası ise yargı konusunda güçlü bir anayasa olarak ifade edilmekten uzaktır. Anayasanın kurgusunda yargı yürütmenin etkisini hissettirebileceği bir erk olarak dizayn edilmiştir. Özellikle yüksek yargıçların atanmasında Cumhurbaşkanının etkisi atama usulünü ayrık, istisnai bir model olarak ortaya çıkarmaktadır. 1982 Anayasasında HSYK beş üyesi gösterilen adaylar arasından cumhurbaşkanınca seçilen ve iki üyesi de adalet bakanı ve müsteşarı olan; hakimler ve savcıların aynı kategoride değerlendirildiği; adalet bakanlığının sekreteryasını ve binasını kullanan; ve adalet bakanlığının müfettişlerinin hakimleri soruşturduğu bir kurul olarak yargı bağımsızlığı bakımından oldukça sorunluydu.

1982 Anayasasının yargıya ilişkin sorunu sadece mahkemelerin oluşumunda yürütmenin etkisi değil, onun yanında mahkemelerin yetki alanlarının daraltılması, dava sürelerinin sınırlanması denetim dışı alanların yoğunluğu bakımından da hayli zayıf bir yapı oluşturmaktadır.

2010 Anayasa Değişikliklerinde Yargı

Yargıya ilişkin çok büyük sorunlar ve eksiklikler taşıyan 1982 Anayasasının 2010 değişiklikleri nasıl değerlendirilebilir? Yukarıda çok genel olarak sayılan yargısal sorunlara ilişkin bir çözüm getirmiş midir? 26 anayasa maddesinin değiştirilmesini öngören 2010 Anayasa değişikliği özünde Anayasa Mahkemesinin ve HSYK nun oluşumuna odaklanmıştır. Gerçi anayasa değişikliği arasında kişisel verilerin korunması, tacize uğrayan çocukların devlet korumasında olması, yurtdışına çıkışın hakim kararı ile sınırlanabilmesi gibi hemen herkesin üzerinde uzlaştığı referanduma sunulmasına gerek dahi olmayan hükümler de bulunmaktadır. Ancak 2010 değişikliklerinin odak noktası Anayasa Mahkemesi ve HSYK dır. Söz konusu kurumlar açısından sınırlı da olsa iki olumlu gelişme olarak; sadece meslekten ihraç şeklindeki HSYK kararlarına da olsa yargı yolunun açılması ve anayasa mahkemesine bireysel başvurunun kabulü olarak işaret edilebilir.

Diğer açıdan bakıldığında 2010 değişikliklerinin temeli Anayasa Mahkemesi'nin ve HSYK'nın bir tür "paketleme" girişimi olarak değerlendirilebilir. Anayasa Mahkemesinin oluşumu bakımından değişikliklere bakıldığında yedek üyeliğin kaldırılması, var olan yedek üyelerin asıl üye olması, üye sayısının 11 den 17 ye çıkarılması, üyelik sürecinin 12 yıl ile

sınırlanması ve anayasa değişikliğinin iptali ve siyasi parti kapatma davalarında 5/3 çoğunluk yerine toplantıya katılanların 2/3 çoğunluğunun aranması dikkat çekmektedir. Anayasa Mahkemesinin oluşumunda yapılan değişiklik sonucu 14 üye doğrudan veya dolaylı Cumhurbaşkanı tarafından, üç üye ise sayıştay ve baro başkanlarının göstereceği adaylar arasından TBMM ce seçilecektir.

HSYK nun yapısındaki değişiklik daha çok dikkat çekicidir. Yedi asıl, beş yedek üyeden Kurul, yirmi iki asıl, on iki yedek üyeye çıkarılmaktadır[8].

2010 Anayasa değişikliklerinin 1982 Anayasasının yargıya ilişkin sorunlarına çözüm olmadığı, aksine anayasa mahkemesi ve HSYK yapısında bir tür yapılanmaya yol açtığı sonraki gelişmelerde ortaya çıkacaktır.

2017 Anayasa Değişikliklerinde –Yargı

2017 Anayasa değişikliklerinin temel amacı yargı değildir. Cumhurbaşkanlığı hükümeti sistemini hayata geçirmektir. Ancak tüm siyasal rejimlerin ve anayasal demokrasilerin eksen kavramı olan yargı alanında da önemli değişimleri beraberinde getirmiştir. Demokratik anayasal değişimlerde beklenti daha demokratik ve özgürlükçü değişimlerin gerçekleşmesi ve bu alanda ulaşılan hedeflerin geri değil, daha ileri bir noktaya getirilmesidir. Anayasa değişiklikleri eğer demokrasi ve özgürlük standardını geriye götürüyor ve bu amacını hedefliyorsa suiistimalci (abusive) anayasa değişikliklerinden söz edilebilir.

2017 anayasa değişikliklerinin ilk sorunu yargının sadece bağımsız değil, tarafsız da olması gerektiğine ilişkin değişikliğin somut etkisinin ne olabileceği şeklinde olabilir.

Yargıya ilişkin bir diğer konu ise, yargının bağımsızlığının vurgulanması ve askeri ceza mahkemelerinin kaldırılmasına ilişkindir.

Bir başka sorun ise yeni siyasal rejim ve yargı arasındaki ilişkide ortaya çıkmaktadır. Cumhurbaşkanının yeni statüsünün özellikle yargıç atamalarındaki etkisi 2017 anayasa değişikliklerinin en önemli kısmıdır. Bu bağlamda 1982 Anayasasının işin başında parlamenter rejimin Cumhurbaşkanının nötr tarafsız kimliğine dayanarak verdiği yetkiler parti başkanı olan Cumhurbaşkanı tarafından hangi motivasyonla kullanılacaktır sorusu önem kazanmıştır.

Çalışmada yapılacak bir başka değerlendirme ise, Hakimler ve Savcılar Kurulunun 2017 anayasa değişikliği ile yeniden değiştirilmesinin 1982 Anayasasının kurula ilişkin sorunları çözüp çözmediği noktasındadır.

Çalışmanın bir başka başlığı ise, Cumhurbaşkanı kararnamelerinin anayasa mahkemesi tarafından denetlenmesi konusunun etkili yargı bakımından doğuracağı sonuçlar olacaktır.

Türk hukukunda yargı konusunda yasal ve anayasal düzenlemelerde sorunlar bulunmaktadır. Ancak bunun çok daha ötesinde yargı mekanizması üzerinde en büyük etkinin uygulama bakımından ortaya konulduğu gözlemlenebilmektedir. Yargıya güven endeksinin düşüklüğünde şüphesiz uygulamaya ilişkin sorunlar büyük bir yer tutmaktadır.

1982 Anayasasının 2010 ve 2017 değişiklikleri ile gelinen nokta 1982 Anayasasının zaten sorunlu olan yargıya ilişkin krizlerini çözmekten uzaktır. Dahası açıkça her fırsatta dile getirilen sorunlara dokunmamayı tercih etmiştir. Uygulamada ise yargının işleyişine ilişkin

[8]Bazı ifadeler Anayasa Mahkemesi tarafından iptal edilmiştir. E.2010/49, K.2010/87, R.G., 1.8.2010, S.27659 (Mükerrer). Anayaas mahkemesinin ilgili kararı resmi gazetede yayınlandığı biçimiyle referanduma gidilmiştir.

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sorunlar anayasal demokrasinin hayata geçirilmesinde büyük problem teşkil etmektedir. World Justice Project in belli kriterleri esas alarak oluşturduğu 2021 Hukukun üstünlüğü endeksinde Türkiye'nin global endekste 139 ülke arasında 117'inci sırada yer alması ve ayrıca yıllar içinde gerileme kaydetmesi özellikle son iki anayasa değişikliği dikkate alındığında şaşırtıcı değildir.

***Anahtar Kelimeler*:** 1982 Anayasasında yargı, suistimalci anayasacılık, 2017 Anayasa Değişiklikleri, Hakimler Savcılar Kurulu, yargının siyasallaşması

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The Digital Perspective of Constitutional Democracy: Turkey's Digital Constitutionalism Sketch[9]

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Abstract

The period we are living in is named as the period of the fourth industrial revolution which is also referred to as Industrial Revolution 4.0 that bonds all disciplines and transform economic and social life. It is clear that the breakthroughs that have emerged coincide with technological developments and have an impact on social relations, law and all fields of life. The industrial revolution 4.0 is the age of augmented reality (AR) accompanied by artificial intelligence (AI), which is clearly identified with digital and technological expansions. In the context of legal relations, which are offered by the digital field, disciplines such as law, health or engineering have been brought together but at the same time these associations also have entered into a relationship with the sub-disciplines of law itself (public law or private law). After all, since law is the rule that regulates social life and human relations, the necessity for the regulation of social life does not matter on which platform social life develops. In other words, social relations affect human relations, whether they are in a "virtual" or "physical" or "augmented" environment of reality, and legal rules will be desirable to regulate these relations. The current digital age has changed the framework of constitutional law or constitutionalism itself. Besides, it brought a whole new dimension to the rule of law, human rights and the principles of limiting power in constitutional democracies.

It is clear that the fundamental values of constitutional democracy are based on human dignity. In this context, the protection of fundamental rights should be among the primary objectives of the state. This is achieved by preventing the concentration of powers against individuals in a certain institution, organ or actors and ensuring that the powers are balanced by restricting them. Since the age of enlightenment, all efforts have been mainly related to the guarantee of human rights, and the situation is no different in the digital age or Industrial Revolution 4.0 In this period we are in and facing.

In this context, the development of digital technology has brought about some changes in the constitutional ecosystem. Obviously, the acknowledgment of brand-new rights, also referred to as the fourth-generation rights, will promote awareness of the process of constitutionalization of the digital space. The recognition of these rights as the fourth generation also appears to be well-matched with the industrial revolution 4.0. This transformation that digital technology and the internet have added/brought to our lives shows that the power that needs to be limited is no longer only the power of the state, but also the

[9] The Turkish version of the Abstract is on the next page.

power of powerful private actors/companies that clutch global capital, which is the ruler of digital space, and "information", which is the new "power" of our age.

In addition, the basis of constitutional democracy is considered to be constitutionalism. Constitutionalism refers to the order of values that guarantee and promote human rights with the respect to both state power and political power. In this context, constitutional regimes should also establish borders to guarantee human rights and freedoms. The concept that carries all these relations, the principles of modern constitutionalism, to the digital society is digital constitutionalism. In short, it refers to the constitutional responses developed to address the challenges, differences, and even advantages created by digital technology.

Today, the process and requirements of digital constitutionalism have made it necessary to declare digital rights. The achievements of the fourth industrial revolution are not limited to technological developments. Digital rights as emerging fourth-generation rights also need to be examined. These rights have been introduced with the technology that was brought by the industrial revolution and began to be structured among human rights as in previous revolutions.

Indeed, an important goal of constitutional democracy is to guarantee human rights. In order for these rights to be asserted in a democratic society, they must first be recognized and introduced. Human rights in the digital field are categorized in many dimensions, and many of the documents developed in this direction focus on different characteristics of digital rights. On the one hand, it is seen that while the rights such as the free use of existing rights in the digital environment are emphasized, on the other hand, new rights such as the right to be forgotten brought by technology, the right to benefit equally from the opportunities brought by the digital space, access to the internet are emphasized. In fact, it is possible to evaluate all these with two different general headings as "freedom for the digital space" and "freedom in the digital space".

In the context of the management of the digital space and digital rights, the concept of "information" or "data" occupies a central place. As a matter of fact, developments in the field of technology have been used in the protection of personal data as an environment for the emergence and development of personal data as a right that can be asserted, as well as the protection of data with technology tools. Therefore, the right to protection of personal data and developing technology have led to the development of data protection methods in information systems. In this context, the reconciliation and cooperation of law and technology is essential to guarantee digital rights. As a matter of fact, as the power of the new age, public or private actors in the management of "information" must first adopt transparent accountable policies that will ensure the control of individuals over their data. At this point, the "right to informational self-determination" of the individual draws attention as a concept that ensures the protection of personal data. It was pointed out that this right, which is also mentioned in the decisions of the European Court of Human Rights, is also guaranteed by the European Convention on Human Rights (ECHR). In its 2017 ruling, the ECHR held that Article 8 on privacy provides for a kind of informational right to self-determination. In this context, when revealing the portrait of Turkey, the situation regarding personal data should be briefly conveyed.

In this study, the role, impact and consequences of digital transformation, which changes the ecosystem of constitutionalism, on these basic principles will be mentioned. In this context, the main issue to be discussed in the study will be the concept of digital constitutionalism. The concept will be introduced on the basis of definition, discussions and focal point of the concept within the theoretical framework. In addition, it will be ensured that the principles of limiting power and protecting human rights, which are at the basis of constitutional democracy, are

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presented together with the concept of digital constitutionalism. In terms of all these transformations and new concepts that have emerged, developments should be followed, and state policy and law should be adapted to this transformation. In this context, while introducing the concept of digital constitutionalism in the study, an effort will be made to present a contemporary portrait in the context of digital constitutionalism in Turkey.

***Keywords*:** digital constitutionalism, constitutional democracy, digital rights, internet human rights, constitutionalization of the digital space

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Anayasal Demokrasinin Dijital Perspektifi: Türkiye'nin Dijital Anayasacılık Eskizi

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Özet

İçinde bulunduğumuz dönem bütün disiplinleri birleştiren, ekonomik, sosyal yaşamı başkalaştıran dördüncü endüstri devriminin yaşandığı dönem olarak ifade edilir. Ortaya çıkan atılımların teknolojik gelişmelerle örtüştüğü, bunların da sosyal ilişkilere, hukuka ve tüm alanlara etki ettiği açıktır. İçinde bulunduğumuz dijital çağ anayasacılığın da çerçevesini değiştirmiş, anayasal demokrasilerde hukukun üstünlüğüne, insan haklarına ve gücün iktidarın sınırlanmasına ilişkin ilkelere de yepyeni bir boyut kazandırmıştır.

Anayasal demokrasinin temel değerlerinin insan onuruna dayandığı açıktır. Bu bağlamda temel hakların korunması devletin birincil amaçları arasında yer almalıdır. Bu da bireyler aleyhine güçlerin belirli bir yerde, organ ya da aktör/lerde yoğunlaşmasını engellemek, güçlerin frenlenerek dengelenmesini sağlamakla gerçekleşir. Aydınlanma çağından bu yana bütün çaba, esasen insan haklarının güvence altına alınmasına ilişkin olup içinde bulunduğumuz dijital çağda da durum farklı değildir. Dijital teknolojinin gelişimi anayasal ekosistemde birtakım değişiklikler meydana getirmiştir. Elbette dördüncü kuşak haklar olarak da ifade edilen bu yepyeni hakların tanınması, dijital alanın anayasallaştırılması sürecine ilişkin farkındalık yaratacaktır. Dijital teknoloji ve internetin hayatımıza kattığı bu dönüşüm, sınırlandırılması gereken gücün artık sadece devletin değil bu alanın yöneticisi konumundaki küresel sermayeyi, çağımızın yeni "gücü" olan "bilgi"yi elinde tutan, güçlü özel aktör/şirketlerin de güçleri olduğunu göstermektedir.

Anayasal demokrasinin temeli anayasacılık olarak kabul edilir. Anayasacılık hem devlet iktidarı hem de siyasi iktidar karşısında insan haklarını güvence altına almak ve geliştirmek olan değerler düzenini ifade eder. Bu bağlamda anayasal rejimler insan hak ve özgürlüklerinin güvence altına alınması için sınırlar da oluşturmalıdır. Tüm bu ilişkileri, modern anayasacılığın ilkelerini dijital topluma taşıyan kavram dijital anayasacılıktır. Kısaca dijital teknolojinin ortaya çıkardığı güçlükleri, farklılık ve hatta avantajları zorluklarını ele almak için geliştirilen anayasal tepkileri ifade etmektedir.

Dijital anayasacılık süreci ve bu sürecin ortaya çıkardığı gerekliliklere bakıldığında, dijital hakların da bu bağlam içerisinde dile getirilmesinin zorunlu olduğu görülebilir. Nitekim Dördüncü Sanayi Devriminin kazanımları, ortaya çıkardığı faydalar sadece teknolojik gelişmelerle sınırlı değildir. Bu bağlam içerisinde yeni gelişen, hatta dördüncü kuşak haklar olarak da ifade edilebilecek dijital hakların tanıtılması, incelenmesi gerekmektedir. Esasen anayasal demokrasilerde temel hedeflerden biri de insan haklarının güvence altına alınmasıdır. Bu, demokratik toplumda hakların ileri sürülebilmesi için öncelikle tanınması, tanıtılması gerekir. Dijital alanda insan hakları birçok boyutta kategorize edilmekte, bu yönde geliştirilen

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belgelerin birçoğu dijital hakları farklı özelliklerine odaklanmaktadır. Bir yandan dijital alanın getirdiği imkanlardan eşit bir biçimde yararlanabilme, internete erişim, mevcut hakların dijital ortamda serbestçe kullanılabilmesi gibi haklar vurgulanırken diğer bir yandan da teknolojinin getirdiği unutulma hakkı, çevrimiçi olma hakkı gibi yeni hakların vurgulandığı görülmektedir. Aslında bütün bunları "dijital alan için özgürlük" ve "dijital alanda özgürlük" şeklinde iki ayrı genel başlıkla da değerlendirmek mümkündür.

Dijital alanın yönetilmesi, dijital hakların bağlamında "bilgi" veya "veri" kavramı merkezi bir yer tutar. Nitekim teknoloji alanındaki gelişmeler, kişisel verilerin korunmasının ileri sürülebilen bir hak olarak ortaya çıkıp gelişmesine ortam oluşturduğu gibi verilerin teknoloji araçlarıyla korunması yönünde de önem kazanmasına vesile olmuştur. Dolayısıyla kişisel verilerin korunması hakkı ve gelişen teknoloji, enformasyon sistemlerinde veri koruma yöntemlerinin gelişmesini sağlamıştır . Bu bağlamda hukuk ve teknolojinin uzlaşması ve iş birliği dijital hakların garanti altına alınması açısından elzemdir. Nitekim yeni çağın gücü olarak "bilgi"nin yönetiminde olan kamu ya da özel aktörlerin öncelikle kişilerin verileri üzerindeki kontrolünü sağlayacak şeffaf hesap verilebilir politikaları benimsemeleri gerekir. Bu noktada bireyin "bilgisel kendi kaderini tayin hakkı" (right to informational self-determination) kişisel verilerin korunmasını sağlayan bir kavram olarak dikkati çekmektedir. Avrupa İnsan Hakları Mahkemesi (AİHM) kararlarında da değinilen bu hakkın, Avrupa İnsan Hakları Sözleşmesi (AİHS) ile de garanti edildiğine işaret edilmiştir. AİHM 2017 tarihli kararında özel hayatın gizliliğine ilişkin md. 8'in bir tür bilgisel kendi kaderini tayin hakkı sağladığına karar vermiştir. Bu bağlamda Türkiye'nin portresi ortaya konulurken kısaca kişisel veri konusundaki durum da aktarılmalıdır.

Bu çalışmada, günümüzde anayasacılığın ekosistemini değiştiren dijital dönüşümün, hukuk devleti gibi temel ilkeler üzerindeki rolüne, etkisine ve sonuçlarına değinilecektir. Bu minvalde dijital anayasacılık kavramı çalışma açısından merkezî bir bağlamı teşkil edecektir. Dijital anayasacılığın, teorik bağlamda tanımı, gelişimi, anlama ilişkin farklı görüş ve tartışmaları üzerinden tanıtımı yapılacaktır.

Çalışma da aynı zamanda anayasal demokrasinin temelinde yer alan gücün sınırlanması ve insan haklarının korunması ilkelerinin dijital anayasacılık kavramıyla ilişkisi ortaya konularak birlikte ele alınmaları sağlanacaktır. Sonuç itibariyle içinde bulunduğumuz bütün bu dijital gelişim ve dönüşüm ortamında yeni kavramların, gelişmelerin takip edilmesi, devlet politikası ve hukuku da bu dönüşüme uyarlanması gerektiğinin altı çizilecektir. Bu bağlamda çalışmada dijital anayasacılık kavramı tanıtılırken Türkiye'de dijital anayasacılık bağlamında güncel bir portresi ortaya konulmaya gayret edilecektir.

***Anahtar Kelimeler*:** dijital anayasacılık, anayasal demokrasi, dijital haklar, internet insan hakları, dijital alanın anayasallaştırılması

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Democracy's Withering: Ten Years After Arab Springs

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Abstract

At its origin, at the end of 2010, the Arab springs had engendered a feeling of hope and an expectation of democratization in the North African and Middle Eastern region (MENA) as a whole; already at the end of 2011, only 12 months later from the outbreak of the revolts, this perspective was widely relativized by a series of factors that led to consider the complete and definitive decline of the autocracies hitherto dominant as a remote and perhaps impracticable and unattainable event, in various respects even illusory. The regimes of Syria and Bahrain intensified the repression of the revolts, in the first case thanks to the support of Iran, Russia and Hezbollah, in the second following the armed intervention of Saudi Arabia and the United Arab Emirates; in Libya and Yemen the riots were the prelude to a civil war; in Morocco, Algeria, Jordan, Kuwait, Mauritania, Oman, Sudan the protests have never reached the magnitude that characterized the riots that took place in Tunisia and Egypt, for justifications that contribute to making the phenomenon of the Arab Springs widely recessive compared to the third wave of constitutional transitions and democratic consolidation experienced by the Central and Eastern Europe systems since 1989.

Without disregarding and diminishing the relevance of other factors, we can mainly explain the attitude of Arab authoritarian regimes to repress or contain opposition movements as based on the ability to draw a warning from the experiences that represented the prototype and the paradigm of those affected by similar phenomena, and therefore to adapt to adverse circumstances and to oppose the new challenges posed to the *status quo*, thereby demonstrating sufficient resilience in a plurality of emblematic cases to guarantee the survival of the regime, even though recycled under new garments or re-proposed as a fake make-up. It is a mutant authoritarianism, defined by some scholars as recombinant authoritarianism [Heydemann S.- Leenders R., 2014, 76], which denotes the ability of regimes to rearrange and reconfigure government tools and strategies and to readjust the existing institutional structure in order to oppose or frustrate the movements of revolt that challenge the regime [Josua M. - Edel M., 2021].

The complex of Islamic countries, despite having shown tendentially positive developments compared to the past, seem to reveal resistance to a full experimentation of democratic categories [Gordon P.H., 2020; King S.J., 2020; Feldman N., 2020; Sultany N., 2020; Emiliani M., 2020]: *precarious transitions* (this is the case, among others, of Algeria and Sudan) [Grewal S., 2021], take place in cases where systems in which military governments or governments supported by the military have managed power uninterruptedly from independence to today, trying to impose order on adverse ethnic, religious or political groups, through oppression and intimidating and indiscriminate violence; *blocked transitions* (Libya, Yemen, Syria); *imperfect transitions* (Egypt); *fragile democracies*, whose fragility descends,

for example for Mali, by the underdevelopment of society and by the difficulty of civil power in carving out sectors of autonomy facing the invasion of islamism, and for Nigeria by the fragmentation into ethnic groups rooted in homogeneous territories and resilient to the uniformity imposed by the adherence to the logic of state centralism, and of *led democracies* (Bangladesh, Pakistan), which are located in a gray zone, a limbo between the authoritarian systems and those whose democratic commitment has been affirmed to varying degrees, appearing as starting up democracies only Morocco [Masoud T., 2015, 84], Tunisia (until August 2021) and Jordan, and as consolidated democracies Indonesia, Senegal and Albania [Rabi U., 2021; Esposito J. L. - Tamara Sonn T. - Voll J. O., 2015].

However, the experience of the Arab Springs did not end in the short period of 2010-2011 and the propellant of the protests and riots that characterized various systems in the North African and Middle Eastern area did not completely disappear in the following decade [Kepel G., 2021; Al-Ali Z., 2021; Boukreisa B., 2021; Massoud T. G. - Doces J. A. - Magee C., 2019].

The vitality of the repeated and lasting dissent is testified by the events that characterized the recent history of the countries that had originally experienced the Arab Springs. The cases of Morocco, Egypt, Iraq, Jordan allow us to draw a line of continuity between the Arab Springs of 2010-2011 and the earthquakes, of various magnitude, which more recently (2019-2022) hit Algeria, Sudan and Tunisia [Weipert-Fenner I., 2021].

Ten years after the advent of the Arab Springs, the balance cannot be positive, neither under a political nor an institutional profile: the adoption of a new Constitution and the establishment of a new constitutional regime in line of (presumed) discontinuity to the past, does not represent the automatic pilot of democracy [Pabst M., 2021]. Three experiences offer us paradigmatic examples [Josua M. - Edel M., 2021].

The Algerian revolution of 2019-2020, which materialized in the protests of the Hirak movement (smile), led President Boutflika to renounce his candidacy for a fifth term in the presidential elections of 2019 and to the subsequent resignation, on April 2, 2019. These events, together with the approval of a new constitutional reform, in October 2020, did not prevent the continuation of the protests during 2021 against widespread corruption, the weakness of democratic institutions, the lack of human rights protection and a economic system based on the state monopoly of natural resources and on the centralized management of the redistributive mechanisms of national wealth, still sticky and not implementing a real economic democracy [Volpi, F., 2020; Zeraoulia F., 2020].

In Sudan, the riots that broke out in December 2018 led to the coup d'état that caused the end of the thirty-year dictatorship of Al-Bashir in April 2019 and its replacement by a transitional military council. The transition agreement signed on July 5, 2019 between the TMC and the Forces of Freedom and Change (FFC), a broad political coalition of civil society groups and movements, and the subsequent signature, on August 4, 2019, of a Draft Constitutional Declaration (or Draft Constitutional Charter) which provided for an alternation to the presidency of a collegial body where the function of Head of State (the Sovereign Council, made up of 11 members, of which 5 military and 6 civilians) was attributed for 21 months to the military and the remaining 18 months to civilians, however, were thwarted by the military coup carried out in October 2021 by the Sudanese army, led by General Abdel Fattah al-Burhan. Civilian Prime Minister Abdalla Hamdok refused to declare his support for the coup and on October 25 he appealed for popular resistance; the next day he was placed under house arrest. The Sovereign Council was dissolved, the state of emergency was declared and various members of the Hamdok government and a number of pro-government supporters (ministers, members of political parties, lawyers, civil society activists, journalists, human rights defenders

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and protest leaders) were detained. Faced with internal and international resistance, al-Burhan expressed his willingness to resettle the Hamdok government on October 28, although the deposed prime minister rejected this offer, making any further dialogue conditional on the full restoration of the pre-coup system. On November 21, 2021, Hamdok and al-Burhan signed a fourteen-point agreement that resettled Hamdok to the position of prime minister and heralded the release of political prisoners. Civilian groups rejected the deal, refusing to continue power-sharing with the military. However, on January 2, 2022, Hamdok resigned again following another violent repression of protesters by the security forces. Sudan has thus returned under full control of the army and the framework of the political and constitutional transition seems to be seriously compromised and wrapped in precariousness and uncertainty, which do not allow favorable forecast in the medium-short term.

In Tunisia, where the political and institutional developments after Arab Springs - Tunisia had been their original epicenter - had led to a cautious optimism regarding the implementation of the democratic consolidation process, the events of summer 2021 have shown how such process cannot be said to be positively concluded and how the causes that triggered the Arab Springs are far from having been completely removed [Dawood Sofi M., 2019]. On July 25, 2021, in front of the violent demonstrations against the government calling for the improvement of basic social services and as a consequence of the progressive spread of the COVID-19 epidemic, the President of the Republic Saied suspended Parliament for thirty days and revoked from office Prime Minister Hichem Mechichi, lifting the immunity of parliamentarians and ordering the military to close the Parliament building. Saied's decisions caused a coup d'état, as they were adopted in violation of Article 80 of the Constitution as the procedure for declaring a state of emergency is concerned. In September 2021, the President of the Republic announced an imminent reform of the 2014 Constitution and the formation of a new government: on September 22, he issued a decree that (self-) attributed him full presidential powers including the revision of the Constitution and the change of the political regime into a presidential form of government.

The decade 2011-2021 is characterized by a double denominator [Bank A. - Busse J., 2021; SchmitterP. C. - Sika N., 2016]. The first common feature is given by the genuine and spontaneous origin and persistence of the phenomenon of popular revolts and protests. It was not an occasional, contingent or accidental phenomenon, but a protracted over time, continuous and lasting one, not ephemeral and occasional. This trait declines the connotation of illusion and hope. The second common feature is given by the problematic attempt, in various hypotheses destined for failure or unsatisfactory results, to compatibilize formal and material Constitution, to implement effective democracies in political and economic contexts not willing, not ready or not able to metabolize democratic categories. This trait declines the connotation of disenchantment and mistrust, generated by vanished utopias and unfulfilled promises. The warmth of spring was followed by the cold autumn [Maboudi T., 2022; Dunne M., 2020]. A quick withering of fragile democracies.

However, if the promises of transformation of the political, institutional and economic framework of MENA countries can be considered vanished, the legacy of the Arab Springs is not completely negative [Feldman N., 2020, 11 ff.; Roberts A., 2018]. The fundamental value of this legacy is consubstantial with the very manifestation of the uprisings and protest: the revolutions were undertaken by people *motu proprio*, on the basis of an autonomous personal or collective determination, in an attempt to free themselves from the chains of repressive regimes and outside the constraints of international powers. In this sense, the Arab Springs can be conceived, first of all, as an attempt by Arab peoples to regain possession of the course of history, marking an essential turning point, of crucial historical importance, and a fundamental

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moment of discontinuity in the long period of time in which the empires and the great powers had directed the course of Arab policies; secondly, as a factor in the transformation of the two great forces that had dominated political ideas in the Arab world during the past century, namely Arab nationalism and political Islam [Lynch M., 2021, 682 ff.]. From the first point of view, the revolts of the Arab Springs marked a profile of significant differentiation from the independence movements that arose at the beginning of the twentieth century, animated by substantially anti-colonial purposes, as well as from the anti-monarchical revolutions that took place between the twenties and seventies of the twentieth century, frequently impregnated with a significant anti-imperial ideological component. Thus, not a heterodirected phenomenon, but the product of an internal autonomy free from external impositions or influences. Secondly, the Arab Springs led to a profound reconfiguration of Arab nationalism, which was radically transformed, if not annihilated, compared to the past, at least in the experiences where the strongest impact of the revolts was recorded [N. Feldman, 2020, xiv]. The collapse of the idea of nation and national identity had emerged in Iraq after the American invasion and witnessed by the divisions and fractures that ran along the ethnic (Arab-Kurdish) and sectarian (Sunni-Shia) ridge, but it became evident until to explode in the experiences of Libya, Syria and Yemen, torn apart by civil wars, whose fractures and divisions are of ethnic, confessional, interreligious, geographical, tribal and ideological origin [Feldman N., 2020, xiv]. The Arab self-determination of Arab Springs, in other words, nullified and dismantled the myth of coherent Arab nations endowed with their own individual national identities [Feldman N., 2020, xv]. Thirdly, the events following the Arab Springs led to the transformation of political Islam, understood in a broad sense as a project that aims at establishing a constitutional order based on sharia law. In the twenty-five years before Arab Springs, political Islam in Sunni and modern version had configured through its exponents the Islamization of the political regime of Arab states through democratic and constitutional means, and an attempt was made to confer on this project concrete implementation in the Egyptian experience by the Muslim Brotherhood in the drafting and application of the 2012 Constitution, as well as by Ennhada during the Tunisian constituent process up to the political crisis of 2013-2014. The Muslim Brotherhood movement was suppressed and outlawed following the 2013 Egyptian coup; Ennhada has recycled itself as a liberal Islamic party, renouncing the foundation and substantial objective of political Islam, namely the placement of sharia at the basis of the constitutional system [Filali-Ansary A., 2016]. The failure of the Islamist parties in Egypt and Tunisia seems to have irreversibly tarnished the paradigm represented by this project for movements operating in other jurisdictions and inspired by similar objectives [Mandaville P., 2020, 421 ff.; Zhang Y. - Ge Y., 2020].

The reasons for the failure of Arab Springs can be identified with factors of recent and remote origins [Joffé G., 2022; Baraka Z. - Fakih A., 2021; Ottaway M. - Ottaway D., 2020; Shammari N. - Willoughby J., 2019; Hinnebusch R., 2018; Sakbani M., 2015]. Factors relating to recent history include the fragility of political culture and democratic awareness, in terms of poor or inadequate knowledge of the mechanisms of aggregation within civil society and their functionalization for the purposes of institutional representation, caused by decades of anesthetization or - in the worst cases - of repression and annihilation of forms of political aggregation (parties, trade unions, movements) by decades of dictatorships [Berger L., 2019]: the lack of a strong shared ideology, the hiding behind democratic rituals of the old dictatorships, which had undergone a mere facelift, "the lack of coordination of the forces that gave them life and the absence of credible and charismatic leadership capable of forging real alternatives to the autocracies they wanted to overthrow, at the same time as they fought to dismantle" [Emiliani M., 2020, 25]; the absence of parties or movements whose dimensions were able to transcend the sectarian or tribal dimension to draw on a national and plural dimension, transversal within society [Emiliani M., 2020, 26; Çarkoğlu A. - Krouwel A. -

Yıldırım K., 2019]; the absence of a bourgeoisie and a middle class capable of conveying their interests to the representative institutional levels; the tendency of the military to maintain relevant spheres of power or the resistance to gradually return them, albeit on the basis of a road map negotiated with civilian political forces [Battera F., 2021; Hanau Santini R. - Moro F. N., 2019]; the failure to reform economic systems and the failure to comply with endless, never kept promises to revise the redistributive mechanisms of national wealth [Monshipouri M. - Dunlap W., 2021]; the constant threat, potential or concrete according to the contingent local situations, that Islamic radicalism and fundamentalism is able to bring as a factor of destabilization or weakening of fragile or fragmented institutional systems [Zimmermann K., 2021; Ali H., 2020; Arian A., 2018].

As for the structural factors, reference can be made, first of all, to the atavistic fracture, to the profound divergence, which characterizes the relations between the Sunni and the Shiite component of the Islamic universe, that frequently have a political dimension, overflowing from the religious one: if historically you cannot forget the clash between the Fatimid (Shiite) dynasty of Egypt and the Mamluks (Sunnis), the affirmation of the Persian Safavids against the Sunni elites, up to the conflict that started in the twentieth century between Sunni Iraq and Shiite Iran, in the current phase the frontal opposition between Saudi Arabia and Iran represents the problematic main axis of an overall context in which this confrontation is reflected and reproduced within a constellation of local conflicts, which repeat it in a reduced but no less dangerous form, as it is capable of undermining the difficult process of democratic consolidation [Kennedy H., 2018]. The doubts about concrete prospects for full democratization and pacification of the MENA countries are going therefore to increase if we consider the double conflict that pervades *ab imis fundamentis* the area itself and the legal systems established within it, and that won't be absorbed in a short time, becoming the epicenter of the two great conflicts that cause strong convulsions in the Muslim world: the challenge for supremacy in the Sunni camp and the Sunni-Shiite confrontation [Molinari M., 2015, 21].

Further factors traditionally and substantially inherent of MENA region States, that act as obstacles to democratization processes or make them extremely sticky, can be identified on the one hand with despotism and authoritarianism and with economic underdevelopment (in States without significant natural resources) [Bottos G. et alii (ed.), 2019] or with the pathological functioning of the redistributive mechanisms of national wealth in patrimonial states rich in natural resources (*rentier States*), on the other hand [Hameed S., 2020; Abdel-Latif H. - Elgohari H. - Mohamed A., 2019].

From the first point of view, authoritarianism has its deep historical roots in the marginalization of the intellectual and bourgeois classes and in the correlative ulema-state power alliance, dating back to the 11th century; in the aftermath of colonial experiences, whose legacy has resulted in a fragile or non-existent political and institutional heritage; in the adhesion of secular regimes to authoritarian ideologies of socio-political transformation, including socialism and fascism, accompanied by the rejection of democratic categories as considered an obstacle to modernization projects imposed from above [Kuru A. T., 2019, 40]. The conservative position of the religious caste - the ulama - precludes an interpretation of Islam according to individualistic and progressive paradigms. The authority of this interpretation, founded on the rigid epistemology of the ulama, is rooted in Muslim societies and the hierarchy within the religious caste discourages younger religious experts from developing new and creative ideas, differentiating themselves from the dogmatic line drawn by the older members of the "Islamic clergy". This resulted in their preservation of the illiberal profiles and contents of Islamic legal texts, including corporal punishment, personal authoritarianism, patriarchy,

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discrimination against non-Muslims [Al-Azami U., 2022]. The convergence of these factors wasn't a fertile ground for the crystallization of the minimum requirements for the foundation and development of a democratic order: "in sum, the ulema have generally enabled authoritarianism in many Muslim countries through its alliances with authoritarian rulers and its promotion of certain medieval and anti-democratic idea. Especially if sharia is declared to be the law of the land in a country, it becomes almost impossible to challenge the ulema's authority to interpret Islam. Through their rigid epistemology, control over madrasas and equivalent institutions, societal prestige, and state support, the senior ulema have marginalized intellectuals, as well as some dissenting junior ulema" [Kuru A. T., 2019, 48].

From the second point of view, it must be noted that in a significant number of Islamic jurisdictions the autocrats in power have resorted (and still do) to the revenues deriving from the export of natural resources, in particular oil, in order to financially support their regimes [Walker C.-Aten M., 2018]. In the patrimonial states (*rentier States*), the state control over the revenues incentives the rulers to preserve their position of power and not to implement political participation of people in governance [Beblawi H. – Luciani G. (ed.), 1987, 70; Herb M., 2005, 299]: since in such experiences the autocrats do not depend financially on tax revenues, taxation is removed from the people as an instrument capable of asserting the responsibility of the rulers. On the contrary, the people depend on the allocation of rents in the form of subsidies, jobs, social services: this phenomenon of scleroticization of the distribution mechanisms creates an irrepressible and suffocating client-patron relationship between autocrats and people and induces the absence or weakening of a politically and economically independent civil society. In such contexts, the lack or weakness of political parties, the bourgeois class and civil society associations and movements makes impossible or very difficult the establishment of an authentic democracy [Ross M. L., 2001; Beblawi H. – Luciani G. (ed.), 1987; Ulfelder J., 2007; Tsui K., 2011]. The existence of low levels of socio-economic development (relevant indices are the per capita income, the level of education and health, including infant mortality and life expectancy indices), on the other hand, cannot always be explained by a tedious recourse to the damage caused by European colonization and the related exploitation [Mazaheri N. - Monroe S. L., 2019]. It is more useful, to this purposes, to consider endogenous rather than exogenous factors, and to underline once again the restraining or impeding attitude of conservatism arising from the alliance between the caste of religious power and the political establishment, which has frequently prevented or nullified the crystallization of a bourgeois middle class, free to operate in a free competition and free market system [Abdelbary I. - Benhin J., 2019] or the convinced and sincere adherence to a context of principles and values marked by tolerance, reason and freedom [Akyol M., 2021; Cadelo E., 2021]. Proof of this assumption emerges if we consider the autocratic experiences of East Asian states - some belonging to the Muslim world (in particular Indonesia and Malaysia, but the reference is generally addressed to the so-called "Asian tigers") - which have implemented economic models based on export-oriented production and not on patrimonialism (rentierism), aimed at development and expansion rather than military objectives, embracing secular ideologies and positions. Furthermore, these experiences have equipped themselves with efficient bureaucratic systems based on merit, capable of guaranteeing high performances in terms of governance quality, unobtainable in Arab autocracies, and have paid particular attention to human capital through massive investments, in particular, in the education and vocational training sector [Kuru A. T., 2019, 62].

***Keywords*:** Arap springs, MENA Region, Democracy

References

Abdel-Latif H. - Elgohari H. - Mohamed A., *Corruption, political instability and growth: evidence from the Arab Spring*, in *Topics in Middle Eastern and African Economies*, 2019, 48 ss..

Abdelbary I. - Benhin J., *From revolutions to institutions: the experience of Arab reform and economic growth*, in *Topics in Middle Eastern and African Economies*, 2019, 68 ss..

Akyol M., *Reopening Muslim Minds*, St. Martin's, 2021.

Al-Ali Z., *Arab Constitutionalism. The Coming Revolution*, CUP, 2021.

Al-Azami U., *Islam and the Arab Revolutions. The Ulama between Democracy and Autocracy*, OUP, 2022.

Ali H., *Post-*Arab *Spring: the* Arab *world between the dilemma of the nation-state and the rise of violent non-state actors (VNSAs)*, in *Asian Journal of Middle Eastern and Islamic Studies*, 2020, 68 ss..

Arian A., *Islamist movements and the Arab Spring*, in *Islam and Civilisational Renewal*, 2018, 47 ss..

Bank A. - Busse J., MENA *political science research a decade after the Arab uprisings: Facing the facts on tremulous grounds*, in *Mediterranean Politics*, 2021, 539 ss..

Baraka Z. - Fakih A., *Determinants of the Arab Spring protests in Tunisia, Egypt, and Libya: what have we learned?*, in *Social Sciences*, 2021.

Battera F., *Variations among North African Military Regimes. Algeria and Egypt Compared*, in *Contemporary Arab Affairs*, 2021, 55 ss..

Beblawi H. – Luciani G. (ed.), *The Rentier State*, Routledge, 2015.

Berger L., *Sharīʿa, Islamism and Arab support for democracy*, in *Democratization*, 2019, 309 ss..

Bottos G. et alii (ed.), *Il trono di sabbia. Stato, Nazioni e potere in Medio Oriente*, Rosenberg & Sellier, 2019.

Boukreisa B., *The Arab World. Protests, Revolutions and Choices*, in *Contemporary Arab Affairs*, 2021, 3 ss..

Cadelo E., *Il mondo chiuso. Il conflitto tra islam e modernità*, LEG, 2021.

Çarkoğlu A. - Krouwel A. - Yıldırım K., *Party competition in the Middle East: spatial competition in the post-Arab Spring era*, in British Journal of Middle Eastern Studies, 2019, 440 ss..

Dawood Sofi M., *Rethinking the Root Causes of The Tunisian Revolution and its Implications*, in *Contemporary Arab Affairs*, 2019, 41 ss..

Dunne M., *Fear and learning in the* Arab *uprisings*, in *Journal of Democracy*, 2020,182 ss..

Emiliani M., *Purgatorio arabo. Il tradimento delle rivoluzioni in Medio Oriente*, Laterza, 2020.

Esposito J. L. - Tamara Sonn T. - John O. Voll J. O., *Islam and Democracy after the Arab Spring*, OUP, 2015.

Feldman N., *The Arab Winter. A Tragedy*, Princeton University Press, 2020.

Filali-Ansary A., *Tunisia: Ennahda's New Course*, in *Journal of Democracy*, 2016, 99 ss..

Gordon P.H., *Losing the Long Game: The False Promise of Regime Change in the Middle East*, St. Martin's Press, 2020.

Grewal S., *Why Sudan Succeeded Where Algeria Failed*, in *Journal of Democracy*, 2021, 102 ss..

Hameed S., *Political Economy of Rentierism in the Middle East and Disruptions from the Digital Space*, in *Contemporary Review of the Middle East*, 2020, 54 ss..

Hanau Santini R. - Moro F. N., *Between hierarchy and heterarchy: post-Arab uprisings' civil–military relations and the Arab state,* in *Mediterranean Politics*, 2019, 137 ss..

Heydemann S.-Leenders R., *Authoritarian Learning and Counterrevolution*, in M. LYNCH (ed.), *The Arab Springs Explained*, Columbia University Press, 2014, 75 ss.

Herb M., *No representation without Taxation? Rents, Development, and Democracy*, in *Comparative Politics*, 2005, 297 ss..

Hinnebusch R., *Understanding regime divergence in the post-uprising Arab states*, in *Journal of Historical Sociology*, 2018, 39 ss..

Joffé G., *Authoritarian resilience and the absence of democratic transition: the implications of 2011,* in *Journal of Islamic Studies*, 2022, 72 ss..

Josua M. - Edel M., *The Arab uprisings and the return of repression,* in *Mediterranean Politics*, 2021, 586 ss..

Kepel G., *Il ritorno del Profeta*, Feltrinelli, 2021.

Kennedy H., *Il Califfato. Da Adamo all'Isis*, Carocci, 2018.

King S.J., *The Arab Winter. Democratic Consolidation, Civil War, and Radical Islamists*, CUP, 2020.

Kuru A. T., *Islam, Authoritarianism, and Underdevelopment*, CUP, 2019.

Lynch M., *Taking stock of MENA political science after the uprisings,* in *Mediterranean Politics*, 2021, 682 ss..

Luciani G. (ed.), *The Arab State*, Routledge, 2015.

Maboudi T., *The 'Fall' of the Arab Spring. Democracy's Challenges and Efforts to Reconstitute the Middle East*, CUP, 2022

Mandaville P., *Islam and Politics*, III ed., Routledge, 2020.

Masoud T., *Has the Door Closed on Arab Democracy?*, in *Journal of Democracy*, 2015.

Massoud T. G. - Doces J. A. - Magee C., *Protests and the Arab Spring: an empirical investigation*, in *Polity*, 2019, 429 ss..

Mazaheri N. - Monroe S. L., *No Arab bourgeoisie, no democracy? The entrepreneurial middle class and democratic attitudes since the Arab Spring*, in *Comparative Politics*, 2018, 523 ss..

Molinari M., *Il Califfato del terrore*, Rizzoli, 2015.

Monshipouri M. - Dunlap W., *Authoritarianism and the persistence of corruption since the* Arab *Spring uprisings*, in *Maghreb Review*, 2021, 23 ss..

Ottaway M. - Ottaway D., *The new* Arab *uprisings: lessons from the past*, in *Middle East Policy*, 2020, 30 ss.

Pabst M., *Arabischer Frühling ohne Sommer?*, Kohlhammer, 2021.

Rabi U., *The Return of the Past: State, Identity, and Society in the Post–Arab Spring Middle East*, Lexington Books, 2021.

Roberts A.,*The fate of the Arab Spring: ten propositions,* in *Asian Journal of Middle Eastern and Islamic Studies*, 2018, 273 ss..

Ross M. L., *Does Oil Hinder Democracy?*, in *World Politics*, 2001, 325 ss..

Ross M. L., *The Oil Curse. How Petroleum Wealth Shapes the Development of Nations*, Princeton University Press, 2012.

Sakbani M., *The spring that has not flowered: what went wrong with the Arab Spring*, in *Contemporary Arab Affairs*, 2015, 239 ss..

Schmitter P. C. - Sika N., *Democratization in the Middle East and North Africa. A More Ambidextrous Process?*, in *Mediterranean Politics*, 2016, 443 ss..

Shammari N. - Willoughby J., *Determinants of political instability across Arab Spring countries*, in *Mediterranean Politics*, 2019, 196 ss..

Sultany N., *Law and Revolution. Legitimacy and Constitutionalism After the Arab Spring*, OUP, 2020.

Tsui K., *More Oil, Less Democracy. Evidence from Worldwide Crude Oil Discoveries*, in *The Economy Journal*, 2011, 89 ss..

Ulfelder J., *Natural-Resource Wealth and the Survival of Autocracy*, in *Comparative Political Studies*, 2007, 995 ss..

Volpi, F., *Algeria: When Elections Hurt Democracy*, in *Journal of Democracy*, 2020, 152 ss

Walker C.-Aten M., *The Rise of Kleptocracy: A Challenge for Democracy*, in *Journal of Democracy*, 2018, 20 ss..

Weipert-Fenner I., *Go local, go global: Studying popular protests in the MENA post-2011*, in *Mediterranean Politics*, 2021, 563 ss..

Zhang Y. - Ge Y., *Religious affiliated political parties in the post-Arab Spring era: in retrospect and future prospects*, in *Asian Journal of Middle Eastern and Islamic Studies*, 2020, 84 ss..

Zeraoulia F., *The Memory of the Civil War in Algeria: Lessons from the Past with Reference to the Algerian Hirak*, in *Contemporary Review of the Middle East*, 2020, 25 ss..

Zimmermann K., *Al-Qaeda after the Arab Spring: a decade of expansion, losses, and evolution*, in *Current Trends in Islamist Ideology*, 2021, 5 ss..

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Ability of EU In Promoting and Safeguarding the Rule of Law In Europe

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Abstract

Article 2 of the Treaty of European Union regulates the values on which EU is founded. Those values are considered to be shared by all the member states as the basis for constructing the common European identity. That is the reason for the Treaties requiring candidate states to respect and establish institutions to promote those values in order to acquire the membership of EU. In other words, member states, while having their national values which may differ from other member states' are expected to have the values of EU and prevent contradiction between those values and the values of EU. In addition to the member states, EU is expected to respect and promote those values while exercising its powers and carrying out its international relations. Among those values, human rights, democracy and rule of law take their places. Rule of law can be considered as the most crucial one as without it, protection of the others especially from the executive branch can never be achieved. It is not surprising that Court of Justice of EU decided in its earlier case law that European Economic Community (Today EU) was a Community (Union) based on rule of law. Also, Court of Justice's interpretation of the concept "rule of law" evolved from the one involving only formal requirement to the one that involves not only formal but also substantive requirements taking into account the legal principles common to the laws of the member states. Due diligence of Court of Justice in this respect ensured the rule of law in the EU dimension. However new challenges are arising with respect to rule of law in the continent Europe. In the last decade, governments and legislatures of some member states, especially those of Hungary and Poland, enacted rules threating the rule of law in their countries. Considering that the implementation and application of EU law is not only carried out by the EU institutions but also by the member states, especially by the national independent and impartial judicial bodies, it would be fair to claim that national rules exerting pressure on the judicial institutions of the state and threating the rule of law, may affect the functioning of EU. Threat to the rule of law in the member state dimension does not only affect the rights of the state's citizens, but also the rights of the EU citizens working or residing in that member state. Also, the government not limited by the national courts enrolls in decision taking of the EU affecting the rules to be adopted and applied to all member states and EU citizens notwithstanding where they are working or residing. Also, EU is set up on mutual trust between judicial and legislative organs of the member states. Member states are required to recognize the decisions of the courts of other member states. Some member states disregarding the rule of law may lead to the non-application of EU law and finally disintegration of the European peace project. For those reasons, EU law must provide means for EU institutions to monitor and struggle against the threats to the rule of law in the member states. However Treaties provide limited means to EU institutions for that purpose. The direct instrument provided to EU institutions to deal with the risks of violations and systematic and continues breaches to the values of EU, rule of law included, is regulated

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in article 7 of the Treaty of EU. The mentioned article allows the Commission, European Parliament and member states to initiate the procedure that may result with the suspension of certain rights, including the voting right in the EU Council, of the member state when she is found to be violating seriously and persistently those values. However the relevant procedure for the suspension of rights of a member is highly demanding and requires unanimity of the member states at the last stage. Drafters of the Treaties considered that the article 7 to be used in extreme case as the last resort. Unanimity requirement is/was not the only reason preventing the EU Institutions, mainly Commission as the guardian of the Treaties, to benefit from article 7 against member states like Poland. There is not an EU definition of rule of law as well. In order to activate article 7, Commission should have been able to identify the violations of rule of law in member states. For that reason Commission adopted Rule of Law Framework. Even though the aim of the Framework is prevent the violations of rule of law by member states before those violations reach to the point where the procedure enshrined in article 7 has to be initiated, it codifies the core requirements of the rule of law taking into account of the Court of Justice's jurisprudence and allows the Commission to evaluate the member states with this respect. However the Framework itself does not lead to any sanctions to the member states. In recent years Commission, EU Council and the European Parliaments are trying to create new mechanisms that allow them to force member states to respect rule of law. Commission attempted to initiate infringement proceedings, regulated under article 258 TFEU against member states before the Court of Justice for enacting laws that are in contradiction with the rule of law. In its recent decisions, Court of Justice decided in favor of Commission giving it an efficient mean of forcing the relevant member states to comply with rule of law. Article 260 TFEU allows Commission to bring another case asking the Court of Justice to decide for a penalty payment against the member state which insisted on not complying with the decision of Court of Justice and keeping in force the laws that violate rule of law. Finally EU Council and European Parliament, two co-legislators of EU enacted a Regulation in 2020 which established a regime for protecting the EU's budget and financial interests in the case of violations of rule of law by member states. It simply regulated that respecting the rule of law is a pre-condition of benefitting EU's budget and financial sources. Therefore, where the breaches of rule of law in a member state affect or create the risk of affecting the financial interests or the management of the EU budget, member state may be restricted from benefitting EU's budget. Are those sufficient for EU to push member states to respect rule of law?

***Keywords*:** EU, rule of law, Article 7, commission, rule of law framework

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Emergency Regimes and Erosion of Constitutional Democracies

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Abstract

Constitutional democracy is constructed with a set of principles and institutions in order to ensure a limited government, such as a written constitution, decentralization of government, bicameralism, rule of law, and a catalogue of fundamental rights. Emergency regime, i.e. state of exception in which the state or nation is faced with a serious threat to its existence is as old as the emergence of the state. The concept of state of exception is formulated under various names, such as emergency, crisis, rebellion, alarm, catastrophe, siege, martial law, war, and it refers to the mechanism by which, in times of imminent danger, the government is empowered to take actions beyond its standard procedures. Nature of the state of emergency is the pressure of necessity under the condition of urgency. Executive is forced by a threat to the survival of the state and/or citizens to act faster (urgency) and/or more efficiently than legally permitted in times of normalcy. In order to accomplish this goal, an emergency regime vests legislative power and gives broader discretionary power to the executive; reduces the democratic control (checks and balances) over the executive; and restricts the fundamental rights and freedoms more broadly than normal times. State of emergency is exceptional and temporary by its nature and is a restricted "legal regime" in the constitutional democracy. Its scope and limits are defined in the constitution. Indeed, some 90% of constitutions in force today have some provisions on states of exception (Gingsburg and Huq, 58).

State of emergency is not a regime that the constitutions contain, but never implemented. Indeed, over the last forty years, most (63 percent) democracies were in a state of emergency at least once (Lührmann and Rooney, 2020:15). Hence, emergency regimes present grave risks to the constitutional democracy and rule of law, whereas a narrower set of emergency powers may present greater short-term risks of rights violations, though not always the complete end of democracy (Gingsburg and Huq, 58). Recent developments generated by the global Covid-19 pandemic have also revived this issue.

The collapse of Weimar is a well-known example of an emergency operating as a collapse of democracy to an autocratic regime. Indeed, the Reichstag fire led to the declaration of the state of emergency. Decrees of 1933 suspended rights and preempted the Parliament, and eventually concentration of power was completed (Scheppele, 2018: 571-572; Gingsburg and Huq, 59). Also in Brazil, President Getúlio Dornelles Vargas, backed by the commanders of the Armed Forces and the Catholic Church, declared a state of siege and 'war on communism' in 1935. After several extensions of the state of emergency, inventing a fake communist conspiracy, Vargas founded his dictatorship, 'Estado Novo', in 1937. (Calkins, 2011: 35; Costa Pinto, 2020: 237-238).

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An emergency regime not only generates the collapse of democracy, but may also lead to the decline of the democracy or acceleration of its decay. National crises can be used by the executive as a constitutional means to weaken democratic institutions and accumulate power. Repeated use of the state of emergency and excessive use of emergency decrees are tools that the executive uses frequently for this purpose. Most important changes to national policy are accomplished during a state of emergency and by emergency decrees rather than ordinary laws. For instance, use of emergency decrees in Argentina reached an average of 54.5 decrees per year during the presidency of Carlos Menem, 36.5 decrees per year during the two years of Fernando de la Rua's presidency, and 60 decrees per year under President Nestor Kirchner (Lührmann and Rooney, 2020: 5). Repeated use of the state of emergency was evidence of erosion of democracy in the Philippines as well. In 2001, President Gloria Macapagal-Arroyo declared a state of rebellion following protests in response to the arrest of former President Joseph Estrada, a tool she would use again in 2003, 2006, and 2009 (Lührmann and Rooney, 2020:5).

In some cases, such as Turkey (2016-2018) and Hungary (2019-2020) the distinction between the emergency and normalcy is blurred through the implementation of emergency measures. The government in Turkey abused the extraordinary situation to curtail the fundamental rights and freedoms and repress the democratic opposition through issuance of 36 emergency decree-laws and other administrative measures. During this period, a constitutional referendum was held to establish a presidential system of government with broad presidential powers, weak Parliament and crippled institutions. The Turkish case indicates that a state of emergency can have a dramatic impact on the future of the nation.In the case of Hungary, whose Prime Minister Viktor Orbán has used the fight against Covid-19 pandemic to obtain parliamentary approval for unlimited power to govern by decrees indefinitely and to impose prison sentences on journalists allegedly promoting false information related to the coronavirus. Criminalising dissent or the violation of quarantine measures represents a clear excess of emergency measures, which can quickly become accepted through the political exploitation of fear (Sheppele,2020; Parra Gomez, 2021: 385). In both cases the executive abused emergency Powers. While this abuse accelerated autocratization in Turkey, it did not amount to a fundamental transformation of the operation of the political regime and its constitutional architecture in Hungary. Also in Venezuela, the state of emergency (2015-present) with the absence of judicial and parliamentary controls due to their lack of independence has resulted in an autocratic shift within a context that was already authoritarian (Casal Hernández and Morales Antoniazzi, 2020).

If such is the case, how can abuse of the state o emergency be prevented? Two basic constitutional design principles have been proposed to limit the misuse of regime-shifting emergency powers in particular. First, the final authority to decide on whether there is an emergency should not rest with the dictator herself. Second, the duration of the emergency should be fixed. (Gingsburg and Huq, 60).

However, these are not unequivocal legal remedies to prevent abuses. Can also courts play a significant part in protecting constitutional democracy and the rule of law in times of crisis? In the absence of an explicit constitutional text, courts have developed a framework for emergency measures that in practice gives the executive branch great discretion in determining how to respond to emergencies. As Dyzenhaus notes, judicial review can only serve to make what is indeed a legal black hole into a 'grey hole' – a judicial review without a real bite, due to subject-matter or procedural limitation (Dyzenhaus, 2006). But, courts also have a potential to be a barrier to misuse of emergency situations resulted from the executive, as were the case-law of the Colombian Constitutional Court in the 1990s on declarations of the state of

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emergency and emergency decrees (Vanegas Gil, 2011: 281-283), the Turkish Constitutional Court's decisions in 1991 and 2003 on constitutional review of emergency decree-laws. On the other hand, courts can play a destructive role in defending constitutional democracy, e.g. the Venezuelan Constitutional Court's ruling in 2016 on legislative control over presidential emergency powers (Brewer-Carias, 2016: 207-2014) and the 2016 judgements of the Turkish Constitutional Court that overturned its past decisions on the constitutional review of the emergency decree-laws (Esen, 2018; Esen, 2016).

To conclude, a state of emergency may produce a constitutional moment, one where the executive can use the devices of constitutional democracy to access unrestricted powers under the veil of elimination of the "threat of internal enemy against the nation". A Constitutional regime for emergencies may not create necessary pressure toward authoritarian collapse or impairment of constitutional democracy. Unless constitutional limitations drawn for the executive and the courts play a proper role to check the legality and constitutionality of the emergency measures, emergency regimes will present a significant risk for the constitutional democracy.

***Keywords*:** exception, constitutional democracy, erosion, constitutional court, emergency decree

References

Brewer-Carias, Allan. *Dictadura judicial y Perversión del Estado de Derecho*, 2nd Ed, Editorial Juridica Venezolana Internacional, 2016.

Calkins, Derreck T. "A Military Force on a Political Mission: The Brazilian Expeditionary Force in World War II", *Electronic Theses and Dissertations*, 2011.

Casal Hernández, Jesús María and Mariela Morales Antoniazzi. "States of Emergency without Rule of Law: The Case of Venezuela", *VerfBlog*, 2020/5/22. https://verfassungsblog.de/states-of-emergency-without-rule-of-law-the-case-of-venezuela/

Costa Pinto, Antonio. "Brazil in the Era of Fascism: The "New State" of Getúlio Vargas" *in Beyond the Fascist Century* (Eds. Constantin Iordachi and Aristotle Kallis.), Palgrave Macmillian, 2020: 235-256.

Dyzenhaus, David. *The Constitution of Law. Legality in a Time of Emergency*, Cambridge University Press, 2006.

Esen, Selin. "The Constitutional Court of Turkey", in The Max Planck Encyclopedia of Comparative Constitutional Law, Oxford University Press, 2018.

Esen, Selin. "Judicial Control of Decree-Laws in Emergency Regimes-A Self-Destruction Attempt by the Turkish Constitutional Court?" Blog of the IACL-AIDC https://iacl-aidc-blog.org/2016/12/19/judicial-control-of-the-decree-laws-in-emergency- regimes-a-self-destruction-attempt-by-the-turkish-constitutional-court

Gingsburg, Tom and Aziz Z.Huq. *How to Save a Constitutional Democracy*, University of Chicago Press, 2019.

Lührmann, Anna and Bryan Rooney. *Autocratization by Decree: States of Emergency and Democratic Decline*, Working Paper Series 85, The Varieties of Democracy Institute, 2020.

Parra Gomez,David. "Crisis of the Rule of Law in Europe: The Cases of Hungary, Poland and Spain," *Athens Journal of Law* 7(3), 2021: 379-398 4

Scheppele, Kim Lane. "Orban's Emergency", *Verfassunblog*, 2020. https://verfassungsblog.de/orbans-emergency/

Scheppele, Kim Lane. "Authocratic Legalism", *University of Chicago Law Review* 85, 2018:545-583.

Vanegas Gil, Pedro Pablo. "La Constitución colombiana y los estados de excepción: veinte años después", *Revista del Estado* 27, 2011: 261-290.

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The Presidentialization of the Italian Executive in Times of Pandemic Crisis

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Abstract

Although it has been acutely represented as "the pole of attraction and synthesis of functional structures and tensions historically developed within the form of government", the President of the Italian Council of Ministers has been the subject of a limited number of constitutional studies. Also, for this reason, his figure has been qualified as "the true enigma of our form of government, even more so than the President of the Republic". The positioning of its role within the constitutional system recalls the balance between the monocratic principle and the collegial principle, both present, in perpetual strain and changing balance, within Article 95 of the Constitution, key provision of the "Constitution of powers" with reference to the executive power.

The changing face of the figure, often conditioned by the personality, charisma and authority of the person who embodies its functions, and the unstable structure of the aformentioned principles have shown all their potential during the health, economic and social emergency, which accentuated the solitary powers of the President of Council. His powers were manifested in the massive use of the dpcm (Decree of the President of Council), a monocratic act with a controversial juridical nature, which posed as the main instrument to face the unpredictability and abnormality of the pandemic crisis. The incessant regulatory activity conducted for over a year under the direction of the President of the Council of Ministers has significantly affected the form of government and leads to the following question: is this phenomenon consistent with the flexibility of constitutional rules about the form of government or, on the other hand, there is a provisional derogation justified by emergency reasons or, again, there is a fundamental change in the circuit of the political direction of a parliamentary system? In other words, how much has the delegification of the emergency impacted on the form of government?

This question presupposes two fundamental assumptions. Firstly, it assumes the link that unites sources of law and the form of government. The order of the sources of law always reflects the order of political legitimations. Consequently, uncertainty and instability of the order of sources of law are indicative of the same situation of uncertainty in the relations between the political subjects that express that order. So that any alteration and change in the order of sources is always a reflection of a confusion in the functioning of the form of government.

Secondly, the question postulates the importance of the distribution of powers within the executive to understand the real functioning of the form of government. The different nuances that the form of government can assume depend not only on the dynamics between parliament, executive and the President of the Republic, but also on how competences are distributed within

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the executive. With reference to this profile, Article 95 of the Italian Constitution entrusts the President of the Council with the function of directing general policy, maintaining the political and administrative direction, and promoting and coordinating the actions of Ministers. Therefore, implicitly, this provision confers the determination of the political direction on the Council of Ministers, in its collegiality, not on the President of the Council of Ministers. According to constitutional jurisprudence, he would be a *primus inter pares*; this means that he should not have powers of determination of the political direction, but only functions of maintaining the unity of the political direction. The "regulatory protagonism" and the strong propulsive role of the President of the Council of Ministers during the panedimic crisis lead to questioning the continuing relevance and vitality of Article 95 of the Constitution in forging intergovernmental relations. In other words, one wonders if the lived experience, which is part of a tendency to enhance the decision-making capacity of the President of the Council of ministers, has determined a gap between his effective functions and the constitutional legitimation of his powers, as provided by Article 95 of the Constitution. In this perspective, that the pandemic crisis has shown a strong centralization of powers in the hands of the President of Council. This centralization is going on in the management of the resources of the national recovery and resilience plan, that drew up an articulated geography of powers and functions largely attributable to bodies that report to the Presidency of the Council of Ministers. This plan is a document that shows the investments and the reforms that Italy has committed to undertaking in order to receive the economic resources allocated by the European Union to overcome the crisis. The governance of the Plan stabilizes an articulation of competences that focuses on the President of the Council and on structures directed and coordinated by the same. In addition, the plan confers to the President incisive functions with regard to the management and correction of the actions of implementation of the plan, including the decision to provide to commissioners in a very short time every time "the achievement of the intermediate and final objectives of the plan is jeopardized". Moreover, the President is entrusted of replacement powers in case of denial, dissent, opposition or other equivalent act with which the administrations could hinder an intervention attributable to the plan.

The articulation of powers in the plan defines a special organizational model, a sort of micro-cosmos of bodies, which have the competence to define with ample spaces of autonomy choices and directions that will condition the regulatory and administrative activity at central and peripheral level at least until 2026, thereby outlining an "emergency" political orientation within the general political orientation.

Within this context, the paper aims to develop an analysis of the normative and material (or factual) elements which have contributed over time to a repositioning of the role of the President of Council within the Italian constitutional system.

***Keywords*:** "constitution of powers", form of government, pandemic crisis, presidential decree, presidentialization of the executive.

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Tunisia's Democratic Backsliding

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Abstract

Following the "Arab spring", the only country that had largely abandoned the previous autocratic regime was Tunisia. The profoundly democratic Constitution adopted in 2014 was undoubtedly one of the most evident demonstrations of the serious process of democratization undertaken by the country. In the past few months, however, Tunisian exceptionalism has been severely questioned by a series of measures adopted by President Kaïs Saïed, including the declaration, on July 25, 2021, of the state of exception (Art. 80 Cost.), as well as the promulgation, on September 22, of Presidential Decree no. 2021-117 on the "exceptional measures". These measures have led, inter alia, to the dismissal of the Head of Government, the freezing of Parliament's activities and the suspension of the parliamentary immunity, as well as the replacement of the semi-presidential system provided for in the 2014 Constitution with a hyper-presidential regime characterized by an overconcentration of powers in the hands of the President. Furthermore, on December 13, 2021, Saïed announced that Parliament's activities will remain suspended until the next parliamentary elections, which will be held on December 17, 2022. In the meantime, Saïed – who has always harshly criticized the 2014 Constitution – also started a process of constitutional reform. Notwithstanding the fact that this process provides for the consultation of the people and requires the final text to be ratified in a popular referendum, the impression is that it is largely characterized (at least for the time being) by a "top-down" approach, i.e. a process driven and controlled directly by the President.

This paper argues that Tunisia is currently experiencing a process of democratic deterioration, and that President Saïed is following a strategy typical of other populist leaders operating in illiberal democracies. This strategy includes, first and foremost, a strong attack on representative institutions and parliamentary democracy. In the preamble to Decree no. 2021-117, for example, Saïed justified the adoption of the exceptional measures arguing that the people had been prevented from exercising sovereignty, that the functioning of public powers had been hampered, that there was a real danger within Parliament, and that the principle according to which sovereignty belongs to the people prevailed over forms and procedures. Thus, Saïed's attempt seems that of establishing a plebiscitary regime, based on the direct relationship between him and the people (rectius: his people).

Moreover, relying on the Schmittean dichotomy amicus-hostis, he depicted many political forces, including the Islamist moderate party Ennhada, as enemies of the State. Also the judiciary and the Constitutional Court soon became the targets of Saïed's attacks. Indeed, following the declaration of the state of exception, in July 2021, Saïed announced that he would preside over the office of the public prosecutor. Since then, cases accusing judges of wrongdoing have emerged, with many officials placed under house arrest. Furthermore, in February 2022, Saïed even announced his intention to dissolve the Supreme Judicial Council.

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As to the Constitutional Court, in April 2021 Saïed rejected a bill that would have reduced the number of votes required for the parliamentary election of one-third of the members of the Court, a fact that would have favored the establishment of this institution. Moreover, Decree no. 2021-117 abolished the provisional authority responsible for verifying the constitutionality of bills.

This paper also discusses the main reasons that led to this illiberal turn in Tunisia, including the serious economic and social crisis in the country (which further worsened following the COVID-19 emergency), the difficult political and institutional context (characterized by major conflicts and tensions between Saïed and the Head of Government, as well as between Saïed and the Speaker of Parliament, Rached Ghannouchi, who is also the leader of Ennhada), and the lack of a full implementation of the 2014 Constitution (one need only consider the failure to set up the Constitutional Court).

Although the situation remains fluid and uncertain, this paper argues that Tunisia seems to have all the credentials to join the club of illiberal democracies. This would be a very sad epilogue for a country that used to be considered a beacon of democracy in the Arab region.

***Keywords*:** democratic backsliding, illiberal democracy, populism, state of exception, Tunisia.

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Constitutional Backsliding(s): Trajectories, Challenges, and Responses

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Abstract

The Democracy Report 2022 of the V-Dem Institute states that there is a record number of nations autocratizing in the last 50 years including 33 countries making 36% of the world population, namely 2.8 billion people (Boese V. A. & Alizada, N. & Lundstedt M. & Morrison, K. & Natsika, N. & Sato Y. & Tai H. & Lindberg S. I., 2022). Additionally, the EU has its own challenge to be described as a European wave of autocratization that its 20% of members are autocratizing significantly. The new data and findings of the V-Dem Institute point out to the unchanged trend of attacking the democratic qualities of regimes in 2021. In fact, this has been a matter of scholarly research under different conceptualizations such as autocratization, de-democratization, democratic decline, democratic decay, or democratic backsliding in the last 15 years. Yet, the backsliding literature has considerably grown to mark gradual and complex forms of democratic decline and governing strategies of new autocrats (Levitsky & Way, 2010; Ahmed, 2014; Levitsky & Way, 2015; for previous discussions Linz J. 1978).

This submission focuses on constitutional backsliding in an era of concerns surrounding democratic degradations. It seeks to place the constitutional backsliding as a component of democratic backsliding that has subversive and disruptive implications on qualities of liberal-democratic constitutionalism based on the rule of law, democratic competition, and civic rights fostering pluralism, deliberation, and participation. Different from a generalized discussion on democratic challenges and symptomatic degradations regarding the attributes of democratic politics, the democratic backsliding represents an incremental and uncertain form of state-led degradations and captures threatening the democratic institutions, governance, conventions, and accountability (Ginsburg, 2018; Haggard & Kaufman, 2021). Instead of attacks of external actors (such as coups) and sudden collapses (Marinov & Goemans, 2014), it takes place as a process of continuous and slow erosion through the actions of the ruling elite (intraregime actors) that the regime sustains some of its core democratic qualities in formal and substantive sense regarding competitiveness and pluralism. However, it may result in the autocratic transition and reversion that an authoritarian project undermines core democratic qualities such as free and fair elections by meddling with the electoral system and manipulating the electoral monitoring bodies (Haggard & Kaufmann, 2021).

Notably, the democratic backsliding does not only include constitutional elements or constitutionalized forms of actions, but also socio-economic and socio-political strategies. The socio-economic strategies are heavily based on economic populism, crony capitalism forging alliances with some of private sector actors, and socio-economic incentives serving to the enrichment of ruling elite (Mazzuca, 2013; Svolik, 2014). The socio-political strategy of the democratic backsliding includes both suppressive and manipulative strategies that have come to the forefront as misinformation, polarization, and disrespect of counterarguments. However,

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the abusive use of constitutional pathways, institutions and the rule of law structures are not rare for effectuating or justifying the socio-economic and socio-political strategies of the democratic backsliding.

The constitutional backsliding may occur in different forms and at changing levels in line with country specific agendas. Therefore, the constitutional backsliding represents multiple forms of strategies according to the local priorities and politics. This is the reason why we should consider the constitutional backsliding in its varieties. On the other hand, the convergence of applied patterns is also to be considered for the trajectories, challenges, and responses as regards the constitutional backsliding.

The present submission focuses on critical analysis of constitutional backsliding both in its multiple forms and similarities to have a deeper understanding regarding its operation and prospects for its reversal to revive and restore liberal-democratic constitutionalism. Considering the regressive developments and their systematic implementation for a decade, three countries, namely Hungary, Poland and Turkey represent case studies within the framework of the critical analysis of the submission (Sadurski, 2019; Halmai, 2020; Oder, 2021). These cases are selected as the top three of the most autocratizing countries of the V-Dem Reports that show a stable and persistent pattern of democratic backsliding in the last 10 years. They are the countries eligible to make comparative analysis. The backsliding is an intraregime and incremental change in these countries, but competitive elements and civic resilience are still alive that an authoritarian reversal are not completed. They are the members of the Council of Europe (with an additional EU membership status of Poland and Hungary and Turkey's ties with the EU). The European boundaries, checks, and supervision on the rule of law and human rights play a role as an external pressure in these countries, but their democratic consolidation has never been achieved.

In this respect, the present submission, at first, delineates the scholarly frameworks and conceptualizations regarding democratic backsliding and its constitutional implications. Second, it tries to identify the regressive strategies of constitutional backsliding by considering the findings in comparative constitutionalism. Third, the selected countries, namely Hungary, Poland, and Turkey, will be discussed to draw attention to similarities and differences in trajectories, challenges, and responses to constitutional backsliding. These include particularly judicial capture, executive aggrandizement, and suppression of pluralism and civic society through new political strategies such as gender backlash. Hungary and Poland will be portrayed as moderate cases due to the role EU mechanisms, but Turkey as a hard case due to the limited role of the Council of the Europe that deserves special attention (Holesch & Kyriazi, 2022). Finally, the conditions of constitutional resilience and prospects of re-democratization will be also reviewed as a synthesis. The submission aims at providing insights on the complexities of constitutional backsliding to complement the theories explaining democratic degradations and determinants of re-democratizations.

***Keywords*:** Constitutional backsliding; democratic decline; rule of law; populism; polarization; autocratization; democratization

References

Ahmed A. 2014. Rethinking backsliding: insights from the historical turn in democratization studies. APSA Comp. Democratiz. Newsl. 12(3):2, 12–14.

Bernhard, M. (2021). Democratic Backsliding in Poland and Hungary. Slavic Review, 80(3), 585-607.

Boese V. A. & Alizada, N. & Lundstedt M. & Morrison, K. & Natsika, N. & Sato Y. & Tai H. & Lindberg S. I. 2022. Autocratization Changing Nature? Democracy Report 2022. Varieties of Democracy Institute (V-Dem).

Haggard, S. & Kaufman, R. (2021). Backsliding. Cambridge Elements. Poltical Economy.

Halmai, G. 2020. Rights Revolution and Counter-Revolution: Democratic Backsliding and Human Rights in Hungary. Law & Ethics of Human Rights, 14:1, 97-123.

Holesch A. & Kyriazi A. (2022). Democratic backsliding in the European Union: the role of the Hungarian-Polish coalition. East European Politics, 38:1, 1-20.

Landau D. 2013. Abusive Constitutionalism, 47 U.C. DAVISL.R. 189-260.

Ginsburg T. 2018. Democratic Backsliding and the Rule of Law. 44 Ohio Northern University Law Review. 351-369.

Levitsky S. & Way L. 2010. Competitive Authoritarianism: Hybrid Regimes and the Cold War. Cambridge, UK: Cambridge Univ. Press.

Levitsky S. & Way L. 2015. The myth of democratic recession. J. Democr. 26(1):45–58.

Oder, B.E. (2021). Turkey's Democratic Erosion: On Backsliding and the Constitution. Social Research: An International Quarterly 88(2), 473-500.

Linz J. 1978. The Breakdown of Democratic Regimes: Crisis, Breakdown, and Reequilibration. Baltimore, MD: Johns Hopkins Univ. Press

Mazzuca S. 2013. The rise of rentier populism. J. Democr. 24(2):108–22.

Marinov N & Goemans H. 2014. Coups and democracy. Br. J. Political Sci. 44(4):799–825.

Sadurski W. (2019). Poland's Constitutional Breakdown. 2019.

Svolik M. 2014. Which democracies will last? Coups, incumbent takeovers, and the dynamic of democratic consolidation. Br. J. Political Sci. 45(4):715–38.

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Political Economy of Constitutions: Markets and Democracy in Turkey

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Abstract

In general, twentieth-century approaches to law and political economy emphasized one of the two as the arbiter of the other (Britton-Purdy et al., 2020). Recent research indicates a more complicated relationship between law and economics. From such perspectives, the rule of law and democracy characterize not only a country's political regime, but also the type of capitalism that country practices (Buğra & Savaşkan, 2021). This point has had further consequences in terms of the relationship between law and power. From a political-economic standpoint, this connection demonstrates itself through three distinct forms of power, namely "constitutive power of law," "economic power," and "political power" (Britton-Purdy et al., 2020: 129). The twentieth-century neo-liberal political economy prompted a rethinking of the meaning of law through the lens of efficiency, neutrality, and anti-politics (Britton-Purdy et al., 2020). However, reading contemporary political economy through a Hayekian neo-liberal lens is insufficient, as neo-liberal markets have been subject to state intervention on an ongoing basis. This can be explained by the economy's embeddedness in social relations from a Polanyian perspective (Polanyi, 1978) as well as the concealed neo-corporatist character of contemporary global political economy (Kjaer, 2020).

On the other hand, constitutional democracies, as Thornhill illustrates, had a transnational foundation in the twentieth century, and they had an intermittent character (Thornhill, 2020). In peripheral states, this process resulted in "low intensity constitutional democratisation," which effectively undermined their sovereignty and immensely empowered their citizens (Tully, 2009). These consequences have fueled not only sovereigntist and authoritarian rhetoric in these countries, but also genuine neo-corporatist measures for economic reconstruction. In particular, contemporary illiberal regimes do not reflect economic liberalism, despite the fact that competition and welfare maximization remain central to this economic governance model (Joerges and Iverson, 2020). In early 2010s, the Economist labeled the political-economic system of newly emerging powers such as India, Brazil, and South Africa as "state capitalism" that has replaced market dynamics: "The invisible hand of the market is giving way to the visible, and often authoritarian hand of the state." Buğra, on the other hand, objects to the term "state capitalism" in the context of Turkey due to the widespread of references to state-controlled enterprises, arguing that the market-shaping roles of liberalized states are far more complex than such an identification (Buğra and Savaşkan, 2021). Apart from the role of states in market formation, as argued in Karl Polanyi's "Great Transformation," the Turkish case demonstrates that the state also determines market actors via politically supported capital accumulation processes. Another striking feature of contemporary market actors is their extreme polarization in terms of cultural and religious references. That is to say, markets play a significant role in determining Turkish politics (Buğra and Savaşkan, 2021).

The development of capitalism in modern Turkey has been marked by unique characteristics. Corporatism characterized the early stages of Turkish capitalism. Chambers of commerce and industry have played a significant role in representing interests in that regard since then, and membership in these chambers is still required in order to engage in such economic activities However, as Bugra and Savaşkan argue, corporatism did not accurately reflect the nature of Turkish economic life. Rather than that, "patronage" has been the dominant dynamic in Turkish economic relations, as informal relationships between governments and large corporations steered economic policies (Buğra and Savaşkan, 2021). In this regard, the rise of Turkish capitalism in the twentieth century was characterized by the formation of a national bourgeoisie to replace the country's non-Muslim bourgeoisie (Boratav, 2019; Buğra and Savaşkan, 2021). While Turkish entrepreneurs have gained autonomy since the 1970s as a result of their engagement with the global economic order, patronage relationships between political power and business actors have persisted.

Turkish democracy was shaped top-down within this framework by transnationalization and the state-patronage model. As prerequisites for admission to the San Francisco Conference, the Marshall Plan was adopted and the transition to multiparty democracy was committed. The parallel between the 1961 Constitution and industrialization based on import substitution is striking. The military coup of 1980 was a watershed moment in Turkish history, as it is supposed to have paved the way for neo-liberalization. The period of 2002-2013 marks the beginning of a new era in Turkish economics, with the implementation of a depoliticized macroeconomic program guided by the IMF. Apart from the austerity measures imposed by this program, Turkey benefited from the United States and Europe's "expansionary monetary policies," which directed capital flows into emerging markets. This process had far-reaching consequences. While this process produced a liberal optimist view of democratisation, economic and social rights were severely restricted (Akçay, 2021). The aftermath of the 2013 economic crisis was marked by a shift away from transnationalization and a reintroduction of economic politicization. These processes have escalated polarization in business circles between proponents of the global economy and the EU, and traditional actors that still rely on the patronage model. Religion and particularism appeared among the decisive forces over the political economy through the societal networks that rely on such forces. Furthermore, depoliticization of economics has led to the enforcement the rule of law, while politicization of economics ended up with rather authoritarian trends (Akçay, 2021).

All in all, this paper will examine the relationship and limits of the dependency between political-economy and constitutions through the case of Turkey. As stated previously, the paper will not illustrate one realm being colonized by another, but rather will shed light on the mutual relationship between two realms.

Keywords: political economy, democracy, rule of law, Polanyi, Turkey

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Rule of Law and Migration in the European Context: A Focus on the European Convention on Human Rights and the Jurisprudence of the European Court of Human Rights

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Abstract

As is well known, both the European Union and the Council of Europe highlight the close connection and relationship between the rule of law and the protection of fundamental human rights. One of the areas in which this relationship is often put in crisis is that relating to migrants. Historically human beings have always expressed the need for refuge and have always experienced exile. The history of the asylum, in fact, is a history that is intertwined with that of human beings, since the first organized societies. And there is a trace of this both in the sacred texts of many religions, and in historical documents where asylum became an expression of welcome hospitality of the kings of many eras. Over the centuries, asylum has come to acquire an institutional and legal connotation, finding expressed codification in international law during the twentieth century. So, according to art. 14 of the Universal Declaration of Human Rights, everyone has the right to seek and enjoy in other countries asylum from persecution. This provision shall be read in connection to art 13.2 UDHR, according to which everyone has the right to leave any country, including his own. A few years later, the Geneva Convention of 28 July 1951, as integrated by the Protocol of 31 January 1967, codified a vast and articulated protection in favour of those who are forced to leave their country by introducing – among others - also the principle of non-refoulment. Nowadays, the above-mentioned principle has risen under the norm of customary international law and is codified in art. 33 of the Convention. This principle prohibits returning or expelling a refugee «to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion».

However, it cannot be claimed by a migrant «whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country».

As is well known, in the European regional context, as well as in general international law, there is no obligation for States to welcome foreign citizens into their territory, without prejudice to the guarantee of free movement and residence recognized to citizens of Member States of the EU.

This means that, in principle, States are free to limit and control the entry and stay of foreigners in their territory (see articles. Art. 1, par 1, letter f), 2.3 of Protocol no. 4 to the ECHR and

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articles 78 and 79 TFEU in addition to arts. 18 and 19, par. 1, of the CFREU), and may also order their expulsion, - without prejudice to the prohibition of collective expulsions (Article 4 prot. No. 4 of the ECHR, Article 19 of the Charter) - if are met the conditions, the guarantees, and limits, set out in Articles 6, 13, 1 of protocol n. 7 to the ECHR and 19, par. 2 CFREU.

The right of asylum is recognized only by CFREU which, moreover, limits itself by recalling the rules established by the Geneva Convention of 28 July 1951 and the protocol of 31 January 1967.

The ECHR, on the other hand, does not mention it, limiting itself to art. 1, requiring the States that adhere to the Convention to recognize «everyone within their jurisdiction», and therefore also foreigners not legally residing in their territory, «the rights and freedoms defined in Section I».

Furthermore, migration issues have been the object of numerous decisions of the Strasbourg Court, as well as significant decisions of the Luxembourg Court. Indeed, in Europe, both the ECtHR and the CJEU, have played a decisive role in expanding the protection of migrants, especially in relation to expulsions.

This paper intends to retrace the main stages of this jurisprudence highlighting which dystonic practices adopted by States (not respecting the rule of law principle) have been censured.

The Strasbourg Court has consistently affirmed the fundamentality of the rule of law, intended as a concept inherent in all articles of the ECHR. Hence, in the field of migration, the ECtHR protects and enforces the fundamental and substantive human rights of migrants (in particular, but not only, refugees and asylum seekers) by relying on procedural rule of law safeguards, such as proportionality, non-discrimination, and equal application of the law, the principles of legality and legal certainty, the availability of effective remedies in the country, the right to a fair trial and repatriation procedures, and the principle that any exercise of power should be subject to review by the courts.

All the above-mentioned elements apply to the different aspects and stages of the migration process. Accordingly, the ECtHR has contributed to an increasing judicialization of protection duties at the supra-national level, which has also had a significant impact on the EU asylum and migration policy.

The ECtHR, in fact, has interpreted the conventional provisions in order to identify the limits to the expulsion of migrants, asylum seekers, and non-asylum seekers, to give details of their rights, and to verify that the national implementation of European Union law was respectful of the conventional provisions. Migration issues have determined a huge case law from the Strasbourg Court. Such case law provides a basis for the interpretation of the meaning and scope of the (corresponding) rights set out in the CFREU.

While each of the courts has read and applied the rights of refugees, asylum seekers, and economic migrants from the perspective of the respective system and instruments, a progressive "dialogue" between the courts has also taken place and has resulted, at least to a certain extent in the alignment of the protection granted.

Due to the limited time available here, I will focus on a single profile, which is the one relating to the "detention" of migrants waiting to be expelled to a third country or to receive the examination of their request for international protection, deepening some cases that have recently been an opportunity for discussion between the ECHR and the CJEU: ECHR *Ilias and*

Ahmed v. Hungary [GC], 21.11.2019; CJEU C-924/19 *PPU* and C-925/19 PPU, *FMS and others* [GC] of 14.05.2020.

***Keywords*:** asylum, migration, detention of aliens, ECHR

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Evaluation of the Decisions of the Turkish Constitutional Court in the Field of Criminal Law Through Tangible Norm Review of the Judiciary in the Context of the Rule of Law

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Abstract

As well as for ensuring the principle of the rule of law, it is inevitable for ensuring the separation of powers and *Rechtstaat* in the means of Continental European law, the legislative and administrative authority to be subject to judicial review by all means. One can observe that, especially in certain situations, legislature can rule out the fundamental freedoms and thus oppressive governance attitude can be established by the legislature, through the laws. From this point of view, it can be admitted that, *being a state of law* is not sufficient to protect and guarantee fundamental freedoms. In order to do that, one must make sure that the legislature is to be subject to judicial review. Accordingly, there is a need for rules that both the executive and the legislature must comply with. Thus, all authority mechanisms of a state will be restricted and monitored. In the contemporary world, the rules that guarantee fundamental rights and freedoms and determine the establishment, assessments and powers of all authorities within a state and limitations and restrictions with regard to that subjects are all constitutional rules.

Rules regarding the legislature being subject to judicial review were stated in Articles 148 and the following of the Turkish Constitution. One of the judicial review tools that is used for monitoring the legislative is tangible norm review of the Constitutional Court.

Article 152 of the Turkish Constitution is as follows: "*If a court hearing a case finds that the law or the presidential decree to be applied is unconstitutional, or if convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, it shall postpone the consideration of the case until the Constitutional Court decides on the issue."*

If the Constitutional Court decides that the legal rule under their scrutiny does not consist a breach of constitutional rules, in terms of it's content, in a case that comes before the Constitutional Court - through tangible or intangible norm review - it gives the verdict to reject the case. If the Constitutional Court has given a decision of rejection on the merits in this way, it should be stated in its judgment that the relevant norm does not contain a breach of constitution and the objection is rejected.

The Constitutional Court determines whether there is any breach of constitutional rules by taking into account the alleged claim, the norm alleged to be a breach, the relevant Constitutional provision and the whole Constitution, while making a substantive examination and in the verdict decision will be explained in the conclusion part.

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According to the paragraph, 153/2 of the Constitution; "*(As amended on April 16, 2017; Act No. 6771) In the course of annulling the whole, or a provision, of laws or presidential decrees, the Constitutional Court shall not act as a lawmaker and pass judgment leading to new implementation."*

The Constitutional Court can annul all of the legal instrument (i.e. code) as a whole, all articles, or it can be decided to annul only some articles, or even to annul sentences or words in the article. On the other hand, if the application was made about only certain article or part of the law and the annulment of this specific part results in the non-implementation of the law as a whole, the Constitutional Court may also decide to annul the whole document by explaining this situation in the given verdict. The annulment of a sentence or a word in a certain provision that is claimed to be unlawful, may also have the same result and lead to the inability to apply this part. Here, the Constitutional Court may decide to annul the entire article. However, this cancellation must not be in a way that will lead to a new practice to be developed.

The implementation of the verdicts of the Constitutional Court does not mean that legal reasoning in which the Court justified it's decisions can be applied and accepted as a part of a code. Namely, the Constitutional Court cannot take the place of the legislature. The only power that the Constitutional Court holds is to annul a positive rule which in question and if they rule out this provision, it can not be applied anymore.

In the light of this information, when the Turkish Constitutional Court's decision dated 26.01.2022 Number 2021/48, Verdict 2022/7 and is evaluated; In this very case, the article 308/A of the Turkish Criminal Procedure Code (CPC) which is numbered 5271 was examined in terms of appliance to constitutional rules through tangible norm review and it was concluded that the article was partially adverse to the article 36 of the Constitution. Article 308A of the CPC regulates the power to appeal of the regional court of appeals' attorney generals' office and it is stipulated that the regional court of appeals prosecutor's office can object to the chamber that made the decision, ex officio or upon request, within thirty days from the date the decision was given to it, against the final decisions of the criminal chambers of the regional court of appeal. Pursuant to this rule, the attorney general's office can use this power of objection in favor of the accused (convict) or against them.

While examining Article 308/A of the CPC, the Constitutional Court states, "*The power to revive criminal proceedings should be exercised to the maximum extent possible, in a way that influences a fair balance between the interests of individuals and the need to ensure the effectiveness of the criminal justice system. Since the given rule does not limit the use of the appeal remedy for a specific reason, it is understood that the regional court of appeals attorney generals' office can use this power for reasons that cannot be seen within the scope of the exceptions to the principle of not being tried or punished more than once for the same act. Therefore, the objectionable rule does not comply with the principle of not being tried or punished more than once for the same act"* and continued, "*Even if a new trial is made after a finalized decision against the accused, despite the absence of the above-mentioned exceptions, is against the principle of not being tried or punished more than once for the same act, such a situation does not arise in terms of objections to be made in favor of the accused. For this reason, it was concluded that the rule was a breach of the constitution only in terms of "appeals against the accused*".

Additionally, "*In this respect, there is a possibility that a decision will be made against the accused upon the objection of the District Court of Appeals Attorney General's Office. Therefore, it is of great importance that the accused be informed of the objection, in order to be able to make defenses against the allegations in the content of the objection. Otherwise, it*

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is clear that the defendant will be deprived of the opportunity to express an opinion against the allegations and will fall into a weak and disadvantaged position before the aforementioned authority." hence, the Court stated that it was against the principle of equality of arms, which is a part of the right to a fair trial regulated in Article 36 of the Turkish Constitution.

As a consequence of aforementioned arguments, the Constitutional Court decided to annul the first sentence in Article 308/A, Criminal Procedure Code in regard to "*appeals against the accused*" and decided to reject the request for the stay of enforcement of this very sentence, due to the postponement of the entry into force of the annulment provision anonymously.

As a result, although any paragraph, word or sentence in regard to wording of CPC art. 308/A was annulled, but the wording of the statement was changed in a way that it can pave the way of a new practice in the field of appeals. No appeals can be filed against the accused (convict), but an appeal can be filed in favor of the accused (convict). In this case, the verdict of the Constitutional Court, changed application conditions for CPC 308/A and thus it has become a regulation which is against the will of the legislature. Here, the will of the legislator is to take this extraordinary legal remedy in favor of or against the accused (convict) instead of limiting it.

The Constitutional Court found Article 308/A of the CPC as a noncompliance to the Constitution – article 36 - on two grounds; Firstly by terms of the principle of *ne bis in idem*, the principle of no more than one trial, and the second by the terms of the principle of equality of arms. It is indisputable that the illegality which was indicated with regard to the principle of equality of arms is an appropriate one. However, in this case, the Constitutional Court should have decided to annul Article 308/A totally, and thus the legislator should have rearranged the wording of the law in question.

***Keywords*:** rule of law, the constitutional court, intangible judicial review, criminal procedure code.

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Limitation of Freedom of Expression in Turkish Republic Of Northern Cyprus With Criminal Law Norms

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Abstract

According to the Constitution, the Turkish Republic of Northern Cyprus (TRNC) is a state based on the rule of law, among other basic principles. Freedom of expression, which is the main subject of this study, is included in the Constitution as freedom of thought, speech and expression. The main aim of this study is to make an assessment in regard to some criminal acts which that are defined within the basic penal laws of the TRNC while setting the limits of freedom of expression in terms of criminal law.

Before all else, the first section of the Constitution which states that the TRNC is a state based on the rule of law(art.1) and Article 11, which is about the limitation of fundamental rights and freedoms, will be briefly discussed. Then, the rights of the accused (art. 18) and freedom of thought, speech and expression (art. 24) will be briefly explained. Since the main aim of this study is to evaluate certain crimes, among them are, malicious secret alliance and publications with malicious intent (art. 47), definition of malicious intent and goodwill (art. 48), defamation of foreign princes (art. m.68) they will be discussed in detail. We will mention the articles (m.194-195) libel and defamatory material and the other laws regarding this issue.

Before all else, we must keep in mind that the Criminal Code, which was obtained by the translation of Chapter 154 Criminal Code of the colonial period, is far from meeting today's requirements in this regard, as in many other issues. Since the Turkish terminology of criminal law and criminal law theory in Turkish language were ignored while the translation was being made, serious problems arose both in general and in this subject. Although the provisions regulating especially malicious publications were amended in 2007 with the Law No. 41/2007, this change can only be considered as a step towards modernization. There is much more to be done in this regard.

Secondly, it is not possible to say that the principle of accuracy, which is an important element of the principle of legality, is followed properly while enacting the Criminal Code. This creates uncertainty. It creates difficulties in distinguishing what is legitimate or not in terms of criminal law. Although the Anglo-Saxon system is a system that keeps the discretion of the judge wide and understands the legality different than the Continental European law, this kind of "*grey area*" uncertainty is not acceptable since it will create vagueness in terms of limiting fundamental rights and freedoms and penalizing individuals. Considering that even the meaning of defamation is not clear, the magnitude of the problem is more clearly understood. A statement that forms the core of a crime should be clearer and more understandable.

Normally, in TRNC criminal procedure law one should not obliged to file a complaint against the accused: criminal inquiry begins *ex officio*. On the other hand, there is a procedural

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requirement created within the practice of law itself which obliges the victim to file a complaint against the accused. When one thinks about the burden of proof – beyond reasonable doubt – of prosecution in criminal proceedings, this requirement seems understandable and applicable. Unfortunately, it causes some problems regarding issues of criminal procedure law. These issue and related problems will also be discussed within our paper.

As a result of incertainties about limiting the freedom of expression with criminal law, freedom of expression issue is discussed at length in cases that have a wide reflection in public. The issue is discussed at length both in the public and in the legal community - before it is concluded - and it occupies a serious place on the agenda. At this point, in some cases, the implicit reproaches of the courts that the criticisms leveled are abrasive also raises concerns about a situation that does not exist in the society. This is the phenomenon of the politicization of the judiciary. This issue will also be addressed in the study.

These crimes, defined in the laws but not defined properly, actually paves the way for the political power to interrupt more. Political authorities' point of view is the determining factor while setting the criteria for limiting freedom of expression. According to their attitude, the scope of criminalization of thought, speech and expression narrows or expands. This results in the political elite's approach to the subject being decisive in terms of the limits of individuals' fundamental rights and freedoms.

Consequently, first of all, with this study, a concrete evaluation will be made of the limitation of freedom of expression - which is called freedom of thought, speech and expression in the TRNC law - with criminal law. While doing this, we will take into account the fact that the TRNC should be considered as a state respectful to the rule of law and thus limitation of fundamental rights and freedoms should be assesed accordingly. We are planning to suggest possible solutions for aforementioned problems with this paper.

***Keywords*:** freedom of thought, freedom of speech, freedom of expression, criminalization, limitations.

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Limits of Power in Spain: Constitution and (Territorial) Democracy

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Abstract

The highest expression of the Rule of Law is the written Constitution, that is, the higher legal act, an uncrossable boundary and a binding rule, not only for political power, but also for Judiciary and all citizens. There are two set of rules in every Constitution (including the Spanish one), some are formal and procedural, others impose content-based restrictions. Despite the formal rules being important for the rule of law, it is the rules of substantive content that impose the strongest limits on the content of decisions of power and, in particular, chief among these limits, is the respect for fundamental rights. These two types of rules allow to know of whether there is a true Constitution as set out in article 16 of the Declaration of the Rights of Man and of the Citizen. The Spanish Constitution is one of the few European constitutions that not only allow several judicial remedies for violation of fundamental rights before judges, but above all recognizes appeals of individuals before the Constitutional Court, including foreigners.

Nevertheless, there are points of criticism. One of the typical dilemmas of any democratic rule of law has recently arisen, consisting of trying to impose an alleged democratic will in a part of the territory against a majority, ignoring constitutional revision procedures (Catalonia's secession attempt). In fact, democracy and rule of law are intertwined concepts, but the idea that democracy stand above the law is not acceptable, such a claim it is a purely populist argument. Indeed, one of arguments that favour representative government over direct democracy is that the former is responsible, when direct democracy, because "sovereign", is irresponsible, although popular. A similar problem arises in other States, in which the use of referendums to legitimize constitutional reforms may sometimes ignore democratic representation and the procedures themselves. In addition, no public official should enjoy immunity, including the Head of State, that it is why in Spain many scholars have proposed a restrictive interpretation over a broad, more literal interpretation, regarding the Monarch's special immunity.

The consolidation of the rule of law in Spain has taken place with the creation of a territorial model based on autonomy and decentralization. The democratic principle thus adopts a second dimension that is projected onto the territorial organization of the State. From this perspective, democracy is also understood as a political system, in which diversity (linguistic, cultural, and even legal), coexists with mutual respect of distribution of powers.

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One of the major principles is Nation's indissoluble unity, enshrined in article 2 of Constitution, but simultaneously the same Constitution recognizes and guarantees also the right to self-government of the nationalities and regions, and solidarity among them all. Nowadays, after several decades of construction of the so-called State of Autonomies, the territorial organization of the Spanish State can be homologated to a –typical or traditional-, federal state, especially from the point of view of the level of political and administrative decentralization.

The constitutional framework of the regional (autonomous) State in Spain has a high level of ambiguity (indetermination) in the definition of the content and limits of the territorial autonomy, that is of real self-government of Regions). Spanish Constitution has carried out a wide remission to the "organic legislator" and the Statutes of Autonomy of respective Autonomous Community. This kind of effective "deregulation" (the lack of a precise regulation in the articles of the constitutional text) and this legal opening, promoted by the same Constitution is, surely, the origin of a permanent dynamic of conflicts between central and regional political powers. It blocks the definitive consolidation of the territorial system, and probably it is also the origin of the "secession process" during the last years demanding the independence of Catalonia.

***Keywords*:** normative constitutions, democracy under rule of law, populisms, constitutional limits to separatism

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The Model of Political Decentralization in Spain: The Development of The *State of the Autonomies* 1978-2022

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Abstract

In Spain, starting with the 1978 Constitution, there was a political transformation from dictatorship to democracy through a political process of peaceful transition without precedent in Spanish and comparative politics. A model that has made it possible to provide a flexible response to some of the historical challenges of territorial structure that have conditioned the Spanish constitutional history since the 19th century. A model that has made it possible to provide a flexible response to some of the historical challenges of territorial structure that have conditioned the Spanish constitutional history since the 19th century.

The evolution of the State of the autonomies has not been linear nor was exactly the predetermined by the Constitution. It has been the result of laws and rulings of the Constitutional Court, of political pacts such as the autonomous ones of 1981 and 1992, of results elections in the Autonomous Communities and in the State, and also of a change of public opinion, of popular reason, about the State autonomous.

The result of this process is that Spain, which forty years ago was one of the most centralist states in Europe, it is today one of the most decentralized.

Simultaneously, Spain developed a change in the territorial organization of the State, much slower than political change, but with a transformative intensity as profound as political reform. The consolidation of the State of Autonomies is one of the elements most prominent in the process of change and institutional modernization and in the democratic development of Spain.

This transformation both in the structure of the political system and in the model of territorial organization of the State has no comparable precedents in contemporary comparative politics. As Hooghe, Marks and Schakel (2010, 2019) have shown us in a comparative study of 42 countries, the Spanish experience is one of the most unique and special of all these cases. In this work we analyze this unique experience. This author takes the "regions" as the unit of analysis, understood as as possessing three basic properties:

a) Be a continuous and delimited territory,

b) Being intermediate administrations between the State and the local level, and

c) Have some kind of political authority.

The authors then define two dimensions of decentralization, measuring each according to qualitative criteria.

The first dimension is self-government or self-rule. this dimension assesses the degree to which a regional government can exercise authority independent of interference from the central power. The authors measure self-governance by assessing four elements: depth institutional, policy field, taxation and representation (you can consult each one at the end of this text).

The second dimension is shared governance or shared-rule. Namely, the degree to which the regions participate in decision-making at the national; the extent to which they form the political will of the central power.

Shared governance is measured by assessing four elements: capacity, legislative, executive control, fiscal control and constitutional reform.

We could establish four phases or stages in the evolution of the State of Autonomies in Spain:

I) A first phase (1979-1983) in which approved the 17 Statutes of Autonomy and began the decentralization process, which was challenged by the *coup d'état* of 1981 and led by the Autonomous Agreements of 1981 and the LOAPA, and culminated in the judgment of the Constitutional Court of 1983 in which the principles of the autonomic process.

II) A second phase (1983-1992) in which the model with numerous transfers and ended with the Agreements Autonomous of 1992.

III) A third phase (1993-2002) of implementation of the agreements from the previous phase (major transfers of education and health), within the political framework of the European Union and the single currency, in which an attempt was made to close the model, but that in the face of growing dissatisfaction in the communities autonomous (mainly Basque and Catalan), opened a period of reflection on the model as a whole.

IV) A fourth phase which, started with the Basque proposal of a new Political Statute and the reform of the Statute of Catalonia (October 2002), generalized a process of change in all autonomies starting a new wave of statutes in various Autonomous Communities (Community Valenciana and Catalonia in 2006; Balearic Islands, Andalusia, Aragon and Castilla y León in 2007).

V) After the judgment of the TC of June 28, 2010 on the Statute of Catalonia of 2006. Four years after filing the appeal for unconstitutionality filed by the Popular Party on July 31, 2006 on 114 of the 223 articles of the 2006 Statute of Autonomy of Catalonia, endorsed by the Catalans in the referendum held on June 18, 2006.

The Constitutional Court, by eight votes against two, declared 14 articles unconstitutional and subject to the interpretation of the court another 27 (by six votes against four). In addition, the The court considered that "they lack legal effectiveness" the references made in the preamble of the Statute to Catalonia as a nation and to the national reality of Catalonia. The President of the Court María Emilia Casas acted as rapporteur.

The full text of the ruling and the five private votes that accompany it were made known on 9

July 2010, one day before the celebration in Barcelona of the demonstration against to the sentence under the sentence "Som una Nación. Nosaltres decidim"

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After this process in 2017, on the occasion of the Referundum carried out without the required constitutional requirements, the Government would declare after approval by the Senate the "State of Exception that led to the suspension of autonomy in Catalonia. This would culminate in the holding of regional elections of that year in Catalonia that would mark a new stage in Spanish territorial policy.

***Keywords**:* political transition to democracy, territorial descentralization, multilevel democracy, political parties.

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