

# **The Importance of Constitutional Justice in Sustaining Democracy and the Role of the Turkish Constitutional Court in the Case of Türkiye**

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Constitutional Court of the Republic of Indonesia  
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**Dear Colleagues,**

I greet you all with sincerity and respect.

First of all, dear participants, I would like to express my pleasure to be here with you.

I would also like to thank Mr. Enver Osman, President of the Constitutional Court of the Republic of Indonesia, for hosting this event.

**Distinguished Participants,**

As far as democratic regimes are concerned, the fundamental reason for the existence of constitutions is to limit the powers of the State and to guarantee individual rights. This has been the primary function of constitutions since the end of the 18<sup>th</sup> century, when constitutional movements began.

It is well known that there is a strong relationship between political regimes and fundamental rights. Regimes in which rulers are not chosen through regular free elections and which do not ensure the effective political participation of minorities or different segments of society cannot effectively guarantee fundamental rights.

Democracies are based on the delegation of the power to govern to elected representatives. From the point of view of Rousseau's theory of popular sovereignty and the general will, the election of rulers gives the impression of a seemingly smooth and ideal system. However, as a sociological reality, the general will often does not express the whole of society. In a representative democracy, elections are a means for the political majority in society to dominate political authority.

The governance of the State by the will of the political majority is, of course, positive in terms of both political sociology and the science of governance. It is inconceivable to exclude the majority from governance. However, historical experience has shown that the unlimited rule of the majority can lead to the dictatorship over minorities and social groups with different political views. In other words, in a majoritarian democracy, constitutional safeguards relating to fundamental rights and independent judicial review have failed to provide sufficient restraint against the will of the majority.

For this reason, it became necessary to limit the power of the majority to govern through the fundamental rights guaranteed by the Constitution. However, in the absence of constitutional review, it is impossible for constitutional safeguards to provide real protection in practice.

In the absence of judicial review of the constitutionality of laws passed by the legislature, which is composed of representatives of the majority, it cannot be said that different segments of society can live freely and have the opportunity for political participation. Therefore, the existence of constitutional justice and constitutional courts is of paramount importance for pluralist democracies. These political science insights have led to the evolution of majoritarian democracies into *pluralist constitutional democracies*.

In today's modern democracies, the concept of a *democratic regime* refers to pluralist democracies. Indeed, the judgments of the European Court of Human Rights, a judicial body of the Council of Europe with 46 member states, often state that *pluralism* is a *sine qua non* for democracy.

In pluralist democratic regimes, the fundamental rights of the opposition and the prospect of coming to power in the future are guaranteed. In this respect, pluralist democracies must rigorously protect the principle of equality and non-discrimination, freedom of expression and freedom of association in their rules and practices towards minorities and those with different views.

The main functions of constitutional courts are to protect and pave the way for the improvement of fundamental rights, free elections and democratic political and legal institutions, such as the party system. In this way, constitutional courts make an important contribution to the protection of the rule of law, the main pillar of a pluralist democracy, and to political pluralism. In other words, constitutional courts serve the protection and sustainability of pluralist democracy.

After this brief introduction on the contribution of constitutional justice to the sustainability of democracy, I would like to mention the contribution of the Turkish Constitutional Court to the understanding of pluralist democracy.

The Republic of Türkiye is defined in Article 2 of the Turkish Constitution as “*a democratic state governed by the rule of law*”. It is also defined as a “*liberal democracy*” in the Preamble to the Constitution.

Established in 1962, the Turkish Constitutional Court is the fourth constitutional court to be established in Europe after the Second World War. In its judgments, the Court interprets the principle of the democratic state in the Constitution as a *pluralist democracy*.<sup>1</sup> In numerous

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<sup>1</sup> See the Court's judgment, no. E.2017/162, K.2018/100, 17 October 2018, §§ 34, 116.

judgments on fundamental rights, the Court has stated that the democratic regime envisaged by the Constitution is a pluralist democracy.<sup>2</sup>

The Court also defines the concept of a democratic regime as “a regime in which the rulers are chosen by the ruled through honest, free and fair elections”.<sup>3</sup> It also states in its judgments that “political parties are the *sine qua non* of democracy”.<sup>4</sup>

The adoption of the individual application to the Constitutional Court of Türkiye in 2012 has had a significant impact on the way the Court interprets and applies concepts related to the protection of fundamental rights and constitutional democracy. I would like to mention a few judgments in this regard.

According to the Court, the protection of fundamental rights and freedoms is an obligation of a democratic society. It is therefore the fundamental duty of a democratic state to protect and promote those rights and freedoms.

In other words, the State must refrain from arbitrary interference with the exercise of rights and freedoms and must take the measures necessary for the effective exercise of these rights and freedoms, including specific measures to protect individuals against interference by others.<sup>5</sup>

In a case concerning the right to hold meetings and demonstration marches, the Court stressed that this right guarantees the emergence, protection and dissemination of different opinions, which are essential for the development of pluralist democracies.<sup>6</sup>

Similar judgments by the Court have stated that the protection of freedom of expression and assembly is crucial to the development of democracies. According to the Court, freedom of expression must be protected, with the exception of racism, hate speech and incitement to terrorism. In this way, social and political pluralism is underpinned by the free and peaceful expression of all views. Therefore, democracy cannot exist where freedom of expression is not properly protected.<sup>7</sup>

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<sup>2</sup> See *Çağrı Yılmaz*, no. 2017/34463, 13 February 2020, § 31. See also *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, §§ 33-35; *Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, §§ 42, 43; *Tansel Çölaşan*, no. 2014/6128, 7 July 2015, §§ 35-38.

<sup>3</sup> See the Court’s judgment, no. E.1970/22, K.1971/20, 18 February 1971.

<sup>4</sup> See the Court’s judgment, no. E.1997/1, K.1998/1, 16 January 1998 (Dissolution of the Welfare Party/Refah Partisi).

<sup>5</sup> See the Court’s judgment, no. E.2017/21, K.2020/77, 24 December 2020, § 45.

<sup>6</sup> *Ferhat Üstündağ*, no. 2014/15428, 17 July 2018, § 40; *Dilan Ögüz Canan* [Plenary], no. 2014/20411, 30/11/2017, § 36.

<sup>7</sup> See the Court’s judgment, no. E.2017/162, K.2018/100, 17 October 2018, § 112.

According to the Court, in order to be *compatible with* the requirements of a democratic social order, an interference with fundamental rights and freedoms must meet a compelling social need and be proportionate.<sup>8</sup>

The role of the Constitutional Court in the improvement and development of democracy can also be seen in its judgments on the right to be elected and to engage in political activity. From the Court's point of view, these political rights are among the indispensable elements of a pluralist and participatory democracy.<sup>9</sup>

With regard to the right to elect and to be elected, the Court is more sensitive to the protection of the freedom of expression of members of parliament. In this respect, the Court has stated that members of parliament enjoy greater constitutional protection through the institution of parliamentary immunity, as they represent the opinions, demands and interests of the electorate in the political arena.<sup>10</sup>

The Court ruled that the provision of the Rules of Procedure of the Grand National Assembly of Türkiye, which provides for disciplinary sanctions against members of parliament whose statements are contrary to the administrative structure of the Republic as defined in the Constitution, is unconstitutional. In this judgment, the Court pointed out that in a democratic state, members of parliament in particular must be free to defend any opinion in a peaceful manner, even if it is contrary to the majority opinion.<sup>11</sup>

In two important recent judgments, the Court found that the applicants, who were members of parliament, had had their right to elect and to be elected violated by their arrest and subsequent conviction, notwithstanding their parliamentary immunity.<sup>12</sup>

### **Esteemed Participants,**

Although there are debates about the legitimacy of constitutionality review from the perspective of majoritarianism, the pluralistic nature of constitutional democracies is generally accepted. As a result, constitutional justice and constitutional courts have become indispensable to pluralist democracies.

The Turkish Constitutional Court also contributes to the development of Turkish democracy through its judgments and interpretations within the constitutional system, which reflect the pluralist democratic approach.

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<sup>8</sup> *Tayfun Cengiz*, no. 2013/8463, 18 September 2014, § 56; *Tansel Çölaşan*, no. 2014/6128, 7 July 2015, § 51; *Dilan Ögüz Canan*, §§ 33, 56; *Ferhat Üstündağ*, § 48.

<sup>9</sup> See the Court's judgment, no. E.2002/38, K.2002/89, 8 October 2002; *Mustafa Hamarat*, no. 2015/19496, 17 January 2019, § 45.

<sup>10</sup> See the Court's judgment, no. E.2017/162, K.2018/100, 17 October 2018, § 113.

<sup>11</sup> See the Court's judgment, no. E.2017/162, K.2018/100, 17 October 2018, § 116.

<sup>12</sup> See *Kadri Enis Berberoğlu (2)* [Plenary], no. 2018/30030, 17 September 2020; *Ömer Faruk Gergerlioğlu* [Plenary], no. 2019/10634, 1 July 2021.

Thank you for your attention.