



TURKEY'S EXPERIENCE OF LEGAL TRANSPLANTATION AND TURKISH-STYLE PRESIDENTIAL SYSTEM

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So far, much ink has been spilled about presidential system that Turkey has recently adopted. Yet, there is limited study on Turkey's legal transplantation journey. Turkey constitutes an interesting case study as it has gone through a voluntary and comprehensive transplant experience from the beginning of the country's foundation. Recently, it has held three constitutional referendums which took place in 2007, 2010, and 2017 to turn its parliamentary system into a presidential one. By doing so, it employed an eclectic method, meaning that it aimed to accumulate the strongest aspects and elements of both parliamentary and presidential models in the hands of the President. In this study, first the general characteristics of the original presidential system will be discussed. Then, the features of 'Turkish-style-presidential-system' will be examined. This is followed by a detailed analysis of current transplant's influences on Turkey's law. Finally, whether and to what extent this new system fits into the original model will be explored.

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Anahtar Kelimeler

Legal Transplantation • Referendums • Turkish-style-presidential-system' • Success or Failure • Malicious Practices

TÜRKİYE'NİN HUKUKİ NAKİL TECRÜBESİ VE TÜRK TİPİ BAŞKANLIK SİSTEMİ

Abstract

Şu ana kadar Türkiye'nin son dönemde benimsemiş olduğu başkanlık sistemi hakkında çok fazla şey yazılıp çizildi. Ancak Türkiye'nin hukuki nakil tecrübelerine ilişkin çalışmalar oldukça sınırlı düzeyde. Türk demokrasisi, kurulduğu andan itibaren gönüllü ve kapsamlı bir transplantasyon deneyiminden geçtiği için ilginç bir vaka çalışması oluşturmaktadır. 2007, 2010 ve 2017 yıllarında yapmış olduğu referandumlarla, ülke parlamenter sistemden başkanlık sistemine geçiş sağlamıştır. Bunu yaparken, bu iki sistemin en güçlü yanlarını başkanın eline bırakan eklektik bir metot benimsemiştir. Bahsi geçen meseleler irdelenirken, öncelikle orijinal başkanlık sisteminin genel karakteristiği tartışılacaktır. Sonrasında, Türk tipi başkanlık sisteminin genel özellikleri üzerinde durulacaktır. Müteakiben, Türk demokrasisinin hukuki nakil tecrübesinin Türk hukuku üzerindeki etkileri tartışılacaktır. Son olarak, benimsenen bu yeni sistemin ne ölçüde orijinal başkanlık sistemi ile uyum içerisinde olduğu hususu araştırılacaktır.

Key Words

Hukuki Nakil • Referandumlar • Türk Tipi Başkanlık Sistemi • Başarı yahut Hezimet • Hatalı Uygulamalar

INTRODUCTION

Alan Watson -known as 'founding father'¹ of this field- defines legal transplant as 'the moving of a rule or a system of law from one country to another, or from one people to another'.² Khan-Freund also defines legal transplant as 'free trade in legal ideas'.³ As it can be seen from the definitions, any legal phenomenon or idea can be the object of diffu-

¹ SIEMS Mathias, 'Malicious Legal Transplants' Legal Studies 38(1) 2018, 103.

² WATSON Alan, Legal transplants: An approach to comparative law (2nd ed. University of Georgia Press), 1993

³ KAHN-FREUND Otto, 'On Uses and Misuses of Comparative Law' 37 The Modern Law Review 1. 1974

sion.⁴ This broad approach to diffusion is acknowledged in the mainstream literature on diffusion of law.⁵ Turkey is an interesting case as it has gone through a voluntary and comprehensive transplant experience from the beginning of the country's foundation. Watson brings Turkey's successful transplant experience to the fore, arguing that 'one of the most spectacular transplants of this century, in success as well as magnitude, occurred in Turkey in 1926.'⁶ During the 1920s, transplants were adopted in almost every field of social life, including changes to the language, alphabet, dictionary, dress code, calendar, educational system, and much else.⁷

Interestingly, Turkey preferred to adopt an eclectic method in its legal transplants journey: Civil code from Switzerland, Criminal Law from Italy, commercial code from Germany, parliamentary system from the UK and currently the presidential system is from the US. Harvey resorts to 'breakfast analogy'⁸ to explain such eclectic attempts. Indeed, Turkey's current law structure resembles a breakfast whose products come from different provinces of the world. The transplant journey of the country has accelerated through the European Union candidacy process. However, as Turkey has been waiting for EU membership for more than half a century, it has lost its hope to be part of the European family and turned its face to the USA. More precisely, the American presidential model has seriously influenced Turkey's politics and has started to be discussed publicly, particularly under the current government reign. This process has culminated with the adoption of a presidential system through a set of controversial referendums. Unlike what the country

⁴ TWINING William, 'Diffusion of Law: A Global Perspective' 36 *The Journal of Legal Pluralism and Unofficial Law*, 2004 21.

⁵ *Ibid.*

⁶ Watson (n 3) 114.

⁷ MENSKI Werner, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge University Press), 2006 359.

⁸ HARVEY David, 'Editorial: A Breakfast Vision' *Geographical Review*, vol.3, 1989b 1. Cited by Mathias Siems (n 2) nothing that "The coffee was from Costa Rica, the flour probably from Canada, the oranges from Spain, those in the orange juice came from Morocco and the sugar came from Barbados. The machinery from Germany, the fertiliser from the United States, the oil from Saudi Arabia..."

went through before, the recent transplant experience is not an import of codes; instead, it is a transplant of an entire system.

There is little doubt that this new model has already influenced, and will likely change, the nature and structure of Turkey's law in a negative way. Yet, more real implications and consequences of this new system will be clearly observed in the future. First and foremost, the eclectic aspect of this new model has changed the entire structure of the Turkish constitution. Turkey has held three important constitutional referendums which took place in 2007, 2010, and 2017 to turn its parliamentary system into a presidential one within the last decade. It first adopted a semi-presidential regime through 2007 referendum, which enables the citizens to vote directly for the president.⁹ Despite the positive outcome in this referendum, the ruling party managed to convince the public that this system inherently involves a risk of confrontation between the president and parliamentary majority, particularly during 'cohabitation periods.'¹⁰ Secondly, despite the fact that one of the most critical aspects of this model is seen as a strict separation of powers, Turkey has failed to divide its legislative, executive, and judiciary branch; rather, it has surprisingly further consolidated the unity of state powers in the hand of one powerful man: the president. Finally, the Turkish legal system has undergone a shift towards 'rule of political law' from 'rule of professional law,' when one applies Mattei's 'three patterns of law' to Turkey's presidential model preference.¹¹

In light of these severe implications of the country's recent attempts, this article aims to analyze recent presidential transplant experience of Turkey. It also will attempt to examine how and to what extent

⁹ GÖNENÇ Levent, 'Presidential Elements in Government: Turkey' 4 *European Constitutional Law Review*, 2008 521.

¹⁰ The period in which president and parliamentary majority come from different political parties and follow different worldviews. See *ibid.*

¹¹ MATTEI Ugo, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' 45 *The American Journal of Comparative Law*, 1997 5. Arguing that legal transplants may end up changing the equilibrium by shifting legal systems traditionally belonging to one family to another because of a significant increase in structural characteristics of a different pattern among rule of professional, political and traditional law families.

the country's law has changed. However, thoroughly examining such a complicated topic is beyond the scope of any single study. Therefore, this article focuses solely on some key legal aspects and implications of this new model. By doing so, it will first discuss the general characteristics of the presidential system. Then, the concept of 'Turkish-style-presidential-system'¹² will be examined and regarded as the main deviation from the original system. This is followed by a detailed and further analysis of current transplant's influences on Turkey's law and the main challenges to this new model. Finally, this study will determine whether and to what extent this new system can be considered 'successful' and whether it fits into the original model.

I. GENERAL FEATURES OF THE ORIGINAL PRESIDENTIAL MODEL

Although Turkey has adopted and implemented a parliamentary system throughout its 90-year history, it has struggled with coup attempts, democratic consolidation issues, and economic maladies. As Frey points out, 'Turkish politics are party politics'¹³, Turkey faced severe problems of volatility, fragmentation, polarisation, and an overall decline in the organizational strength of political parties, particularly during coalition governments periods.¹⁴ Therefore, the proponents of the presidential system have made the parliamentary model the scapegoat for all the challenges in question.¹⁵ Moreover, they believe that the presidential system is much more compatible with Turkish history and tradition be-

¹² Yeni Şafak, 'Erdogan Insists on Turkish-Style Presidential System' Yeni Şafak (February 2015). Turkish President Erdogan said that a Turkish-style presidential system can be built by picking the best features of different presidential systems in the world. "There are different presidential systems in the United States, Mexico, Cuba, Russia, and France," he said, and added that Turkey may as well adopt such a system.

¹³ FREY Frederick W, *The Turkish Political Elite* (MIT Press 1965).

¹⁴ OZBUDUN Ergun, *Contemporary Turkish Politics: Challenges to Democratic Consolidation* Lynne Rienner Publishers, 2000 17.

¹⁵ GÜLENER Serdar and MIŞ Nebi 'Constitutional Framework of Executive Presidency in Turkey' 2017 29 SETA 12.

cause the US presidency, "republican monarchy"¹⁶, reflects the main characteristics of Ottoman Empire Monarch understanding.

The idea is that because of these similarities, rather than building its own system, Turkey can adopt one that is already in place. In addition, they also rely on the idea that 'other constitutions have been built, that of England has been allowed to grow.'¹⁷ The underlying rationale behind this explanation is that, as opposed to UK's system, the US constitution and presidential system is building, not a growing product. Additionally, despite its non-growing character, the United States is seen as the longest enduring democratic presidential system in the world.¹⁸ Therefore, from this perspective, there is no reason for the failure of this new system in Turkey. These approaches prove that the proponents of the presidential model have both misunderstood and misinterpreted the transplanted system and its indispensable component; separation of power. This brings us to the concept of the 'Turkish-style presidential system' and the eclectic model preference of the political elites.

II. CHERRY-PICKING MODEL AND DEVIATIONS FROM SEPARATION OF POWERS

Transplants tend to be eclectic. They are often no more 'coherent' than those occurring in the past.¹⁹ It is therefore understandable that governments adopt and adjust a foreign model to the national form to make it more suitable for a country's needs. The literature reflects opposite views regarding transplants and their relations with the target nation's social, cultural, and economic parameters. Alan Watson, for instance, is of the view that 'legal rules are not devised for the particular

¹⁶ HORWITZ Morton J, 'Constitutional Transplants' 10 *Theoretical Inquiries in Law*, 2009 537.

¹⁷ VERNON Bogdanor, 'Should Britain Have a Written Constitution?' 78(4) *The Political Quarterly*, 2007 499.

¹⁸ CHEIBUB Jose, ELKINS Zachary and GINSBURG Tom, 'Latin American Presidentialism in Comparative and Historical Perspective' *Public Law & Legal Theory*, 2011.

¹⁹ GRAZIADEI Michele, 'Comparative Law as the Study of Transplants and Receptions' in Zimmermann Reinhard Reimann Mathias (ed), *The Oxford Handbook of Comparative Law* OUP, 2006, 454.

society in which they operate²⁰. Therefore, they can be adopted and implemented by any country. At the other end of this spectrum, Legrand argues that legal transplant is 'impossible,' claiming that law and institutions are socially connected in a meaningful way.²¹ Montesquieu supports this view by stating that it would be 'a great coincidence' if the laws of one nation actually suited another.²² However, these extreme views do not reflect the true picture because they either overestimate or disregard the impacts of the dynamics of society. Thus, it would be entirely prudent for a recipient country to change the original transplanted idea or even keep some aspects of its own system instead of a complete overhaul.

Turkey has adopted this practice by deciding to keep some parliamentary regime instruments that strengthen the executive branch.²³ It also rejected the adoption of some principles of the original system that guarantee check and balance between the presidency and other branches of the state. For example, although the president's appointment of a supreme court judge is subjected to the approval of the senate in the US to ensure the independence of the judiciary, Turkey has intentionally ignored this requirement. Therefore, one can claim that the new system has the strongest aspects of both parliamentary and presidential models in terms of executive power.

On the other hand, Moe and Caldwell point out that 'presidential and parliamentary systems come with their own baggage.'²⁴ However, this argument is not sound because the origin and recipient country are not expected to have the same social, economic, and cultural features

²⁰ WATSON (n 3) 96

²¹ LEGRAND Pierre, 'The Impossibility of "Legal Transplants"' 4 *Maastricht Journal of European and Comparative Law*, 1997 113.

²² MONTESQUIEU Charles de Secondat and others, *The Spirit of the Laws*, Cambridge University Press, 1989. Cited by Graziadei (n 20)

²³ FRANKENBERG Günter, 'Comparative constitutional law' in Mauro Bussani and Ugo Mattei (eds), *The Cambridge companion to comparative law*, Cambridge companions to law. Cambridge University Press, 2012.

²⁴ MOE Terry M and CALDWELL Michael, 'The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems' 150 (1) *Journal of Institutional and Therotical Economics (JITE)*, 1994, 172.

and necessities to the full extent. Therefore, this does not mean that when adopted by Turkey, presidentialism was taken as a package deal. It is understandable that there cannot be any 'transportation without transformation.'²⁵ However, the transformation should not undermine the essence and main characteristics of the original form of the system. At this point, it is prudent to examine the original constitutional and presidential structure of the US.

The executive in the US is popularly elected and does not need the confidence of the legislature to remain in office.²⁶ In addition, the president is unable to dissolve the assembly.²⁷ Further, the president lacks explicit law-making powers and has no constitutional power of executive decree. Given the standard features of the original system, one can realize that Turkey has deviated to a great extent from the original version of the presidential system in terms of the following reasons; First, the president in Turkey can issue decrees regarding its executive power. Secondly, s/he is entitled to present the budget to the assembly.²⁸ Another controversial amendment is that the president²⁹ can call the elections. These amendments can be deemed to be a major departure from the Montesquieuan conception of separated powers.³⁰ Once the Turkish president is granted with the presidential decree and bringing the budget bill to the assembly, 'executive will predominate and, in some cases, even usurp legislative authority strategically.'³¹ The power of the parliaments stems from their control over legislation, particularly budget.³² If the president is granted to propose law mainly related to budgetary is-

²⁵ SIEMS Mathias M, *Comparative law (Law in context)*, Cambridge University Press, 2014.

²⁶ KUZU Burhan, *Every Aspects of Presidential System Araştırma* vol 3, 1. baskı, Babiali Kültür Yayıncılığı, 2011.

²⁷ *Ibid*

²⁸ *Constitution of the Republic of Turkey (1982)*. Art 161

²⁹ *Ibid* Art 116

³⁰ CHEIBUB Jose, ELKINS Zachary and GINSBURG Tom, (n 19) p 21. (noting that law-making is done by the legislature and the role of the executive is to execute the laws.)

³¹ *Ibid* p 15

³² *Ibid* p 6

sues, it undermines the effectiveness of parliamentary. This is not surprising since the budget is probably the most crucial piece of legislation.³³

Initially, these concerns were also shared by the government officials, including Prof Kuzu³⁴ stating that Turkey needs to learn lessons from Latin American countries and their misleading transplantation experiences.³⁵ As these countries' constitutions, unlike the original US system, are uniquely 'inclined to empower presidents to decree laws, initiate legislative proposals, and exert powers in emergency conditions'³⁶, they enable the tyranny that has so frequently surfaced in these countries.³⁷ Thus, the severe deviations from the original form of the presidency have paved the way for the emergence of degenerated systems in very different types, such as Latin American-style presidential systems. Considering these issues, further changes and impacts on Turkey's law will be discussed in the following section.

III. DEVIATIONS FROM AND CHANGES ON RULE OF LAW

According to a widespread perception in Turkey, recent amendments regarding presidential system transplantation have negatively affected the entire structure of the country's law. In other words, there has been a shift towards a more politicized and polarised atmosphere from a relatively stable one. Mattei claims that there are three primary sources of social norms or incentives that influence an individual's behaviour in every single society: politics, law, and tradition.³⁸ In each legal system, where one pattern is hegemonic, the other two do not disappear but play a minor role.³⁹ Mattei prefers to use a triangle to determine

³³ Ibid p 20 noting that 'Almost half of presidential constitutions allow executive to initiate the budget bill, compared to less than one-fifth of parliamentary constitutions.'

³⁴ The Head of Constitutional Commission of the Turkish Assembly and the Ruling Justice and Development Party Member in Assembly

³⁵ KUZU (n 27). Interestingly despite his previous concerns and warnings, he then changed his position and supported the recent amendments that involve a risk to turn the country into a more authoritarian regime.

³⁶ CHEIBUB, ELKINS AND GINSBURG. (n 18) p 3

³⁷ KUZU (n 27)

³⁸ MATTEI (n 12) p 12

³⁹ Ibid p 14

and demonstrate the exact places of certain countries in terms of their closeness to, and relation with the rule of law, politics, and traditions.⁴⁰

Given Turkey's position in this pattern, it would not be fair to claim that when the parliamentary system was implemented, the rule of law was hegemonic in Turkey. However, it is true that the rule of political law has gained more strength with the adoption of the current model. For instance, the president has called a set of referendums to significantly limit the Constitutional Court's power.⁴¹ The structure and composition of the Turkish Constitutional Court have changed by increasing the number of judges from eleven to seventeen, aiming to ensure that the number of judges appointed by the president outweighs the other judges. Indeed, one can easily observe that the constitutional court with its new composition has not reached a verdict that contradicts the interests of the current ruling party and the president.⁴²

Mattei explains this situation by claiming that the pattern of the weakness of the rule of law in developing and transitional countries means that the rule of professional law cannot be considered the hegemonic pattern of social rulemaking in these legal systems.⁴³ In the pattern called the rule of political law; the legal process is often determined by political relationships rather than legal and factual truths.⁴⁴ Indeed, courts in Turkey, particularly in sensitive and critical cases, tend to make their decisions by taking into account the political interests of certain figures and incidents rather than legal facts. Hence, as the rule of political law has gained more power and has become more hegemonic, it can be inferred that Turkey has moved away from the rule of law and got closer to the political law direction in Mattei's triangle.

⁴⁰ Ibid p 44 In the original version of this diagram, Mattei does not mention any specific countries, instead he invokes to more general patterns. However, if one aims to put Turkey into this triangle, they would probably reach such a conclusion that recent transplantation has had a remarkable change on Turkey's place in this triangle.

⁴¹ URAN Peri and PAQUINO Pasquale 'The Guardian of the Turkish Constitution: A Special Court' (2015) 8 (2) *Journal and Politics and Law* 96.

⁴² For an Exceptional Verdict See, 'Turkey's Constitutional Court stands up to Erdogan' *Donia Al- Watan* (23 July 2015)

⁴³ MATTEI (n 12)

⁴⁴ Ibid

IV. SUCCESS OR FAILURE

For a transplant, there is no consensus about how to define success.⁴⁵ Moreover, scholars disagree on whether and how a legal transplant works.⁴⁶ The term 'work' is not crystal clear and depends on a 'researcher's political and theoretical orientation and motivation rather than inherent truth.'⁴⁷ Therefore, evaluation of success or failure of the presidential model in Turkey highly depends on subjective criteria. It is too soon to ascertain whether the transplanted presidential model works or fails. However, although it is too early to predict the possibility of success of the new model, there are some indicators to carry out this projection.

Some claim that the current ruling party has a secret agenda by transplanting an authoritarian regime instead of a presidential one, aiming to turn the society into a form that they can manipulate easily.⁴⁸ In addition, the opponents of the presidential system claim that the government considers this new model as a tool for retaliation against previous transplants taking place in the 1920s by the republicans who aimed to free the Turkish nations from its ancient, religious-and-tradition-based beliefs.⁴⁹ Therefore, as Siems points out, lack of 'fit' with socio-economic and other conditions can be deliberate, when the main aim is to change the society in question.⁵⁰

Another major concern of the opponents is that this transplant will be beneficial to the current ruling party with religious, traditional, and

⁴⁵ NELKEN David, 'Comparatists and Transferability' in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press) p 453 .

⁴⁶ SIEMS (n 26) p 195.

⁴⁷ ORÜCÜ Esin, 'Convergence and Divergence: Theoretical Issues' in M Antokolskaia (ed), *Convergence and Divergence of Family Law in Europe*, vol 18 Intersentia, 2007 p 26.

⁴⁸ SEIBERT Thomas, 'Turkey's Alcohol Law Renews Accusations of Erdogan's Islamist Agenda - The National' <<https://www.thenational.ae/world/europe/turkey-s-alcohol-law-renews-accusations-of-erdogan-s-islamist-agenda-1.253992>> accessed 1 April 2018

⁴⁹ SIEMS (n 26) 213

⁵⁰ *Ibid*, 197

conservative sentiments but will have a detrimental effect on leftist groups that support the republican values of the country.⁵¹ It is true that a transplant may be beneficial to a domestic group, but it can also have a detrimental effect on another one.⁵² Hence, the opponents are aware that as the presidential system brings a zero-sum game, winner-take-all, and since they have only less than thirty percent vote potential in Turkey, it is very unlikely to win an election for them even if the election is free and fair.

It is interesting that the resistance is not only against the deviations from the original system, it is also against the original presidential system itself as it requires a two-party contest in the election. In consequence, the opponents claim that this system is not only a 'failure', but also a 'malicious legal transplant'⁵³ as it encourages indirect discrimination against leftist political parties which have no chance to win the election because of their worldviews and vote potential in this country. However, it seems neither fair nor rational to claim that this system is a malicious transplant just because a political party reflecting a certain worldview will unlikely win the presidential election.

CONCLUDING REMARKS

This article has analyzed Turkey's recent presidential transplant experience by examining how and to what extent the country's law and the system have changed. It first has questioned the eclectic model of its transplant and implications and outcomes of this experience: Turkish-style Presidential System. This cherry-picked method enables the current ruling party to accumulate the strongest aspects of both parliamentary and presidential models in the president's hands. There is no doubt that the new system lacking a check and balance mechanism includes a risk of authoritarianism.

Following this, one of the most important requirements of the original presidential system, the separation of powers, has been discussed.

⁵¹ GÖNENÇ (n 10)

⁵² SIEMS (n 26) 193

⁵³ See SIEMS, 'Malicious Legal Transplants' (n 2). for malicious legal transplants such as religious, sexual and racial discrimination.

It seems that Turkey has failed to establish a system that is able to ensure and guarantee the independence and separation of the state powers. This study has also aimed to apply Mattei's triangle of the 'three patterns of law' to Turkey's presidential model preference. Though Turkey, before the presidential model, did not meet all the requirements of 'the rule of law', it has moved more away from the 'rule of law' to 'the rule of political law' since the executive has had more impact on the legislative and judiciary branches.

Finally, the 'success' threshold should not be put so high. In other words, success 'does not mean that transplants work exactly the same way in the origin and transplant country.'⁵⁴ The proponents and opponents of the system are at the end of the opposite spectrum. Opponents believe that the current system is not sustainable, contradicting the country's democratic and republican values. However, supporters claim that the parliamentary system is itself a transplant from the UK. It has led to numerous economic and political crises during almost a century history of the country. Therefore, from this point of view, this system will bring economic and political stability to Turkey. However, although some indicators exist, over time, it will become apparent which thoughts and concerns are right or wrong and whether Turkey's recent transplant attempt is considered a successful, failed, or even malicious transplant.

⁵⁴ SIEMS (n 26) 203

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