- Araştırma Makalesi -

[H] ESTABLISHMENT OF THE REPUBLIC BY AMENDING THE CONSTITUTION: REVISITING THE THEORY OF CONSTITUTIONAL MOMENT[*]

(ANAYASAYI DEĞİŞTİREREK CUMHURİYETİN KURULMASI: ANAYASAL AN TEORİSİNİ YENİDEN ELE ALMAK)

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ABSTRACT

The foundation of the republic in 1923 is a landmark in the history of modern Turkey. Yet, the nature of the constitutional amendment which created the hundred-year-old republic received less academic attention. Establishing the Turkish Republic is the legal outcome of the only amendment to the 1921 Constitution. This article argues that the legal text adopted by the Turkish National Assembly on 29 October 1923 is a constitutional amendment and a constitutional moment. The 1923 amendment, in other words, includes a *founding* role behind the formal change. This article re-examines the 1923 amendment and answers the following question: Can a constitutional amendment provide a constitutional moment, too? The article first explains the path toward the declaration of the republic from a historical perspective. Focusing on the events after winning the War of Independence will make the rationale

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behind the 1923 amendment easier to understand. The article covers the legal nature of the 1923 amendment by exploring its enactment process. For this, the historical records and parliamentary minutes are examined to reveal the causes and consequences of the amendment. Then, the article discusses the amendment in the context of revisiting the theory of the 'constitutional moment' and questions the republic's fate by explaining Turkey's 'constitutional time' from a critical perspective. The article concludes that the crucial episode in October 1923 that gave birth to a new constitutional order opens up novel points of discussion for constitutional theory.

Keywords: Republic, Constitutional Amendment, Constitutional Moment Theory, 29 October 1923, Turkey

ÖZ

Cumhuriyetin 1923'te kurulması, modern Türkiye tarihinde bir dönüm noktasıdır. Ancak yüz yıllık cumhuriyeti kuran anayasa değişikliğinin mahiyeti akademik alanda pek ilgi görmemiştir. Türkiye Cumhuriyeti'nin kurulması, 1921 Anayasasındaki tek değişikliğin hukuksal sonucudur. Bu makale, Türkiye Büyük Millet Meclisi'nin 29 Ekim 1923'te kabul ettiği hukuksal metnin hem bir 'anayasa değişikliği' ve hem de bir 'anayasal an' olduğunu savunmaktadır. Başka bir deyişle, 1923 değişikliği, biçimsel değişikliğin arkasında bir kurucu bir rol içermektedir. Bu makale 1923 değişikliğini yeniden ele almakta ve şu soruyu yanıtlamaktadır: Anayasa değişikliği bir anayasal an da sağlayabilir mi? Makale, öncelikle cumhuriyetin ilanına giden yolu tarihsel bir perspektiften açıklamaktadır. Kurtuluş Savaşı'nın kazanılmasından sonraki olaylara odaklanmak, 1923 değişikliğinin arkasındaki mantığın anlaşılmasını kolaylaştıracaktır. Makale, 1923 değişikliğinin yürürlüğe girme sürecini inceleyerek hukuksal niteliğini ele almaktadır. Bunun için, değişikliğin nedenlerini ve sonuçlarını ortaya koyan tarihi kayıtlar ve parlamento tutanakları incelenmektedir. Daha sonra makale, Türkiye'nin 'anayasal zamanını' eleştirel bir bakış açısıyla açıklayarak cumhuriyetin kaderini sorgularken değişikliği 'anayasal an' teorisini yeniden gözden geçirme bağlamında ele almaktadır. Makale, Ekim 1923'te yeni bir anayasal düzenin doğuşuna yol açan kritik dönemin, anayasa teorisi için özgün tartışma noktaları açtığı sonucuna varmaktadır.

Anahtar Kelimeler: *Cumhuriyet, Anayasa Değişikliği, Anayasal An Teorisi, 29 Ekim 1923, Türkiye*

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Introduction

Republic is an ancient phenomenon. Yet, as a form of state, it has been a matter of law only for some centuries. Thus, today, when a state is declared a *republic*[1], the opposite of a monarchy, it's considered as "rather more cosmetic than substantive nature of the differences", given that the fundamental difference lies within the circumstance that monarchical heads of states are not popularly elected and thus democratically legitimised heads of states.[2] In this respect, the republic's foundation in Turkey on October 29, 1923, is a landmark constitutional change from a comparative perspective, given that it marked its centenary in 2023. During 2023, remarkable celebrations and ceremonies commemorated the Turkish Republic's century-old achievements. However, one recent work reminds us that the Turkish Republic's centenary is a significant milestone that includes a 'serious reflection about Turkey's accomplishments and shortcomings and how it can move forward to overcome various contemporary challenges.'[3]

This centenary is crucial for any discipline in social sciences and humanities. Thus, scholars have convened in various academic activities and produced as many academic works as possible because it is a substantial chance to discuss the past century.[4] In this regard, the declaration of the republic in 1923 is considered a historic moment in Turkey's political, social, and legal transformation not only because of the regime change but also because of the establishment of a new state in the con-

[1] For instance, recently, Barbados became a republic in 2022 by rejecting the reign of the British monarchy. https://www.bbc.com/news/world-latin-america-59470843 (accessed in October 2023).

[2] Peter Bussjaeger & Mirella Johler, 'Monarchical Constitutions', Max Planck Encyclopedia of Comparative Constitutional Law (Oxford University Press 2017).

[3] Paul Kubicek, 'Introduction: reflections on the centenary of the Republic of Turkey' (2023) 24(3-4) Turkish Studies 407.

[4] See Alp Yenen & Erik-Jan Zürcher (eds.), A Hundred Years of Republican Turkey: A History in a Hundred Fragments (Leiden University Press 2023); A. Özerdem & A. E. Öztürk (eds.), A Companion to Modern Turkey's Centennial (Edinburgh University Press 2023).

text of the Treaty of Lausanne by which the international community recognised Turkey's independence and national borders. The declaration of the Republic in Turkey is a development that proves that the independence struggle aimed at an independent state. Since the struggle carried out in Turkey was also a rebellion against colonialism from the very beginning, the monarchy was abolished immediately after the victory. In short, the declaration of the Republic in Turkey shows that the aim was to establish a new state that was democratic in domestic politics and independent in foreign policy.[5]

Establishing the republic in Turkey is the legal outcome of the only amendment to the 1921 Constitution (Teşkilat-ı Esasiye Kanunu). Yet, the nature of this 'republican amendment' received less attention in legal scholarship. Scholars acknowledge that the founding of the Republic in 1923 was one of the 'crucial steps in the formation of modern Turkey.'[6] However, although the day of the amendment, 29 October, is celebrated as 'Republic Day' (Cumhuriyet Bayramı) every year, the nature of its legal path, the only constitutional amendment to the 1921 Constitution (Law No. 364), is rarely acknowledged from a theoretical perspective.

A recent work argues that a 'failed constitutional moment' occurred in 1923. It is claimed that 'deliberation and collective decision-making' in the Spring of 1923 is 'the best example of the concept of a constitutional moment among all others' given that in this period ', the aim was to shape the basis of a new political entity'. But in late March, it is claimed, 'this picture began to change drastically, and the constitutional moment ultimately ended.'[7] This argument deserves attention.

[5] Neşe Özden et al (ed.), Türkiye Cumhuriyeti Tarihi II: Yeni Türkiye: Türkiye Cumhuriyeti, Atatürk Araştırma Merkezi (Ankara 2023), p 143

[6] Serap Yazıcı, A Guide to Turkish Public Law and Legal Research (Update), September/October 2017, https://www.nyulawglobal.org/globalex/Turkey1.html Another work particularly published for the centenary of the republic repeats the obvious but nothing else while evaluating the hundred years of Turkish political history: 'The Turkish Republic was formally established on 29 October 1923.' Ersin Kalaycıoğlu, 'A hundred years of flux: Turkish political regimes from 1921 to 2023' (2023) 24 (3-34) Turkish Studies, 412–434.

[7] Ogan Yumlu (2024) 'Spring 1923: Turkey's failed constitutional moment', Middle Eastern Studies, May, 1–19. DOI: 10.1080/00263206.2024.2351527

Overall, the argument's political discourse is correct despite ignoring the 1923 amendment and focusing on the broader political picture. Yet, it is possible to distinguish between the role of the power struggle among the founding fathers and the legal framework they acted upon which the Turkish Republic was built.

As one recent work on the phenomenon of the 'founding moments' claims, 'there remain jurisdictions that could be mined for insights into what a founding moment entails' and 'these unstudied jurisdictions are worth studying' because they can deepen 'our understanding of founding moments.'[8] This article aims to provide such insight. Given that Turkey presents, in many respects, 'an interesting case, perhaps a unique one, for students of comparative constitutional law'[9], this article is an intellectual exercise for comparativists interested in founding moments.

This article argues that the legal text adopted by the Turkish parliament, Grand National Assembly of Turkey (TBMM), on 29 October 1923 is both a constitutional amendment and a *constitutional moment*. For this purpose, the article investigates whether and how the 1923 constitutional amendment fits (or not) Bruce Ackerman's theory of 'constitutional moments.' In particular, this paper re-examines the birth of the 1923 amendment and answer the following questions: Why did modern Turkey's founders choose to amend the existing constitution instead of making a new one? Is it possible, theoretically, for a constitutional amendment to provide the *constitutional moment* too? These are essential questions for constitutional theory because they might bring insight to the comparative understanding of the 'constitutional moment'. To seek satisfying answers, the historical facts and the legal nature of the 1923 amendment will be critically examined to reveal the *founding* role embedded in itself.

This article argues that republicanism is the determinant of Turkish constitutional identity. Put another way, republicanism lies at the heart of democratic constitutionalism in Turkey, and the 1923 constitutional

[8] Richard Albert and Menaka Guruswamy. 'Introduction: Mapping the Founding' in ed. R Albert, M Guruswamy and N Basnyat, Founding Moments in Constitutionalism (Hart Publishing 2019) 9.

[9] Ergun Özbudun, The Constitutional System of Turkey (Palgrave Macmillan 2011) 1.

amendment, as a constitutional moment, is the basis of the political legitimacy of the republic. In addition, the article also asserts that the discussion of 'constitutional time' is relevant within the scope of this article's aim. Focusing on the most special moment in Turkish constitutional history is helpful for reconsidering constitutional times from a century later.

The rest of the article proceeds as follows. Section I explains the historical path toward the declaration of the republic. Focusing on the legal developments after winning the War of Independence (Kurtuluş Savaşı) will make the rationale behind the 1923 amendment easier to understand. Section II covers the legal nature of the 1923 amendment by exploring its enactment process. For this, relevant parliamentary minutes and historical records are examined to reveal the causes and consequences of the amendment. Section III discusses the amendment in the context of the 'constitutional moment' theory to provide a novel perspective. Section IV questions the republic's fate by explaining Turkey's 'constitutional time' from a critical perspective. The article concludes that the constitutional episode of 29 October 1923 that gave birth to a new state order opens up interesting points of discussion for comparative constitutional theory and legal history beyond the Turkish context.

I. Towards Republic: The Inevitable Path

Each country has its unique narrative of constitutional development. Some landmark moments, however, could be observed in almost every instance of constitutionalisation. Looking at legal history closely is necessary in the Turkish case, given that the contemporary Turkish state's form, republicanism, results from a constitutional amendment while the real intention was to make a new constitution. Even though the birth of the republic was a matter of massive controversy among the founding fathers, the amendment was inevitable for several reasons.

In Turkish legal history, thinking about the first founding text of the republic -the 1923 amendment- has problematic aspects due to several postulates. One generally accepted position is that the 1921 Constitution is a 'soft' (flexible) constitution because it does not provide a special procedure for amending itself. The 1921 Constitution differs from all other constitutions in Ottoman-Turkish constitutionalism. A constitution is generally considered 'flexible' when there is usually no special procedure to amend the constitution. The text carries a normative status

similar to ordinary laws and can be easily changed.[10] Even though this is a technically correct argument because it labels the 1921 Constitution as 'soft'/'flexible', this assertion may suggest that the founding text falls short of being qualified as a 'genuine constitution'.[11]

Even today, the TBMM's website ignores the constitutional amendment but instead explains the proclamation of the republic as follows: 'Mustafa Kemal Pasa, ..., suggested to Parliament that a republic form of government be proclaimed. The majority of Parliament supported this proposal, and on October 29, 1923, it was proclaimed that the form of government would be republican. Mustafa Kemal Pasa became the first President, ... of the new Turkish Republic.'[12] It sounds like a myth, but it is more than that legally. This paper's fundamental motivation is to challenge this bizarre attitude towards the legal surroundings of republicanism and reveal the founding role of the 1923 constitutional amendment.

Before the republic, Turkey had a legal continuation derived from the Ottoman legacy. The Ottoman Constitution of 1876 (Kanun-u Esasi) was restored in 1909 to produce a constitutional monarchy and a consolidated single-party rule that ended the empire. Yet, from a legal perspective, the Ottoman Constitution, which lost its function by March 1920, technically was in force even after the proclamation of the republic. During the War of Independence (1920–1922), the Constitution of 1876 was not formally abolished and considered in force in matters not regulated by the revolutionary Constitution of 1921, enacted by the TBMM convened in Ankara.[13] The formal end of the 1876 Constitution came with the adoption of the Constitution of 1924.[14]

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[10] Yaniv Roznai, 'Rigid (Entrenched) / Flexible Constitutions', Max Planck Encyclopedia of Comparative Constitutional Law (Oxford University Press 2018) § 8.

[11] Mustafa Erdoğan, 'Anayasacılık ve Demokrasi Açısından 1921 Teşkilat-ı Esasiye Kanunu' (2021) 325 Toplumsal Tarih 57-62

[12] https://global.tbmm.gov.tr/history

[13] Ergun Özbudun, 'Ottoman Constitution of 1876', Max Planck Encyclopedia of Comparative Constitutional Law (Oxford University Press 2016) § 29.

[14] Article 104 of the 1924 Constitution: "The Constitutional Law of 1293 (1876) and the Articles modifying it, together with the Fundamental Law of 1337 (1921), and its supplements and modifications are abrogated." The English text of the 1924 Constitution is accessed via British and Foreign State Papers 1924 (London 1927), World Constitutions Illustrated, heinonline.org

The constitutional flow was also evident after the republic. Indeed, TBMM continued to use the parliamentary rules of the Ottoman Empire until 1927. Although the parliament adopted a constitution in 1924, it only adopted its rules of procedure three years later in 1927.[15] This is particularly important given that the 1923 constitutional amendment was enacted under previous procedural rules inherited from the Ottoman parliament's (Meclis-i Mebusan) internal regulation of 1914.

The transition of 1920-1923 was a unique period that caused disagreements among scholars. While the argument that the new Turkish legislator, TBMM, was a continuation of the Meclis-i Mebusan insofar as it adopted its internal regulations' seems fair, it is equally problematic to claim that TBMM passed 'a number of additions to the Constitution that are considered the embryo of the modern Turkish Constitution, famously stating that 'sovereignty is vested in the nation without any condition.'[16] Further, it is even claimed that the 1921 Constitution is not a constitution in its own right because 'it was passed as a list of additions (merely 23 articles) which, if contradicting the Ottoman Constitution, replaced it, but left the other parts of the Ottoman Constitution in place.'[17]

This argument seems controversial for some reasons. First, the successor constitution of 1924 stipulates that the text of 1921 is its predecessor. In other words, why did the 1924 Constitution replace the constitutions of 1876 and 1921 explicitly and separately?[18] If the latter were not a constitution, the 1924 text would not have repealed the previous text regulating the constitutional order. Moreover, as one commentator reminds the so-called 'double-constitution period' (1921-1924) in which certain provisions of the 1876 Constitution, which did not contradict the 1921 Constitution, remained in force, does not necessarily mean that there was a symbiosis. On the contrary, given that only the provisions of

[15] Ellinor Morack, 'Ottoman parliamentary procedure in the Chamber of Deputies (Meclis-i Mebusan) and the Great National Assembly of Turkey (Türkiye Büyük Millet Meclisi) 1876–1923' in Planting Parliaments in Eurasia, 1850–1950 Concepts, Practices, and Mythologies (London: Routledge, 2021), 221.

[16] Morack, 234.

[17] Ibid 248.

[18] Article 104 of the 1924 Constitution, see note 14.

the 1876 Constitution, which were not in contradiction to the republican characteristic, were considered to be in force, it might be argued that there was a clear hierarchy between the 1921 Constitution and the non-contradictory provisions of the 1876 Constitution.[19]

Second, the legislative history of the 1921 Constitution demonstrates its legal nature. The Constitution was submitted to Parliament first as the executive program, but due to opposition, it was then converted into a bill that did not exist before. The bill's entire enactment process took almost four months, among hard discussions. It was not a mere 'list of additions' to the previous Ottoman constitution. Rather, it was a, 'constituent' document that rejected the legal validity of the existing constitutional order.[20]

This is a natural outcome because 'from the beginning, the TGNA was an assembly with extraordinary powers. It was, in fact, a constituent assembly.'[21] Mustafa Kemal issued a communication (İntihabat Tebliği) in March 1920 to convene 'an assembly endowed with extraordinary powers' in Ankara.[22] It should be emphasised that 'while the principal aim of this Assembly was to free the country from forces of invasion to realise Turkish independence, it was significant that it should also be occupied with constitutional matters.'[23] Thus, the 1921 Constitution was 'revolutionary' such that the enactment process did not follow the amendment procedures stipulated in the 1876 Constitution. The Assembly declared that it was the one and only representative of the Turkish people and adopted a 'new' constitution without the need to be approved

[19] Oğuzhan Bekir Keskin, 'The Meaning and Significance of the Grand National Assembly According to the Turkish Constitution of 1921' IACL-AIDC Blog (18 March 2021) https://blog-iacl-aidc.org/centenary-of-the-turkish-constitution/2021/3/18/meaning-and-significance-of-the-grand-national-assembly-according-to-the-turkish-constitution-of-1921

[20] In this respect see posts included here https://blog-iacl-aidc.org/centenary-of-the-turkish-constitution

[21] Şule Özsoy Boyunsuz, 'The Revolutionary Constitution of 1921', IACL-AIDC Blog (4 March 2021) https://blog-iacl-aidc.org/centenary-of-the-turkish-constitution/2021/3/4/the-revolutionary-constitution-of-1921

[22] Mustafa Kemal Atatürk, Nutuk [The Great Speech] (Ankara: Atatürk Araştırma Merkezi, 2023), 306

[23] Suna Kili, Turkish Constitutional Developments and Assembly Debates on the Constitutions of 1924 and 1961 (İstanbul: Robert College Research Center, 1971), 18.

by the former legal order. Therefore, the 1921 Constitution was *the* constitution 'that defied the powers of Sultan and his government'[24], under which they emanated power from the 1876 Constitution.

During its life of slightly more than three years, the 1921 Constitution was not the only legal norm that generated the constitutional order. TBMM adopted crucial laws and resolutions that transformed the legal order of the new Turkish state.[25] Therefore, the lifetime of 1921 Constitution is full of extraordinary legislative acts. Most importantly, the Ottoman sultanate was abolished in November 1922.[26] This was the legal moment when the Ottoman State disappeared, and TBMM became Turkey's only legitimate source of political power. Moreover, the abolishment of the Ottoman state was made by a resolution of TBMM, not a constitutional amendment. The whole process of the 1923 constitutional amendment, however, is quite special. Both the preparation and the enactment of the amendment are worth examining. But first of all, it is important to note how this amendment was put into the table: a government crisis.

Before the 1923 amendment, the TBMM (First Assembly) was dissolved, and a new election was held in June-July 1923. This Second Assembly was much consolidated in the sense that almost all members were selected by Mustafa Kemal (Atatürk). This might initially sound puzzling in terms of the democratic legitimacy of the 1923 amendment. Yet, the most striking argument against this claim is available in the constitution-making process of 1924. While making the 1924 Constitution, some of the powers that were envisaged to be granted to the President of the Republic in the proposal were the subject of serious debate, and some were rejected; some were accepted after being amended in TBMM. Indeed, despite Mustafa Kemal occupied the office of the Presidency at the time of debates on the draft of the 1924 Constitution, the Assembly was able to 'assert itself strongly during the debates and truck

[24] Kili, 17.

[25] e.g. Law on the Election of the Ministers (İcra Vekillerinin Sureti İntihabı Hakkında Kanun), Law no 244, 1922; The decision of the Grand National Assembly that abolished the sultanate (Türkiye Büyük Millet Meclisinin, hukuku hâkimiyet ve hükümraninin mü messili hakikisi olduğuna dair karar), No 308, 1/2 November 1922.

[26] 1-2 November 1922, No 308. The status of the caliphate was kept though only selected by the TBMM.

off or amended those articles which it believed had extended more rights than necessary to the executive branch and thus violated the principle of national sovereignty.'[27] The intervention of the Assembly is considered an indication of its jealousy towards its powers. The resistance of deputies in which heated discussions centered around the powers given to the executive can be interpreted as a sign of a relative atmosphere of debate before the single-party system was established and consolidated.[28] Thus, the Second Assembly's composition in October 1923 does not cast a shadow on the democratic legitimacy of the 1923 amendment.

In July 1923, the Treaty of Lausanne was signed after the occupiers had been defeated and Turkey had been completely liberated. At the beginning of October 1923, the occupiers left Istanbul, and the transition period ended. There was a need to change the constitution according to this new, completely independent state's needs, and Mustafa Kemal was personally engaged in considering possible solutions. It had to be a 'constitutional' one, though.

According to the 1921 Constitution, the executive organ must be directly selected and vested with power by the parliament. Moreover, the Constitution did not provide a position for the head of the state. The Speaker of the Assembly de facto carried out this role. In this order, the Assembly was the only representative of the nation in which both legislative and executive powers were concentrated. The Constitution, in other words, 'granted to the Assembly more powers than to any other branch of the government.'[29] Because all members of the executive branch were selected by parliament, it was possible to form a government despite the leadership. The executive and the deputy president of the Assembly had to be elected individually by the parliament. This method meant that anyone could be selected against Mustafa Kemal's wishes. Therefore, this system of government had a high potential for crisis.

By October 1923, Mustafa Kemal was committed to the proclamation of the republic due to the problems the government system caused. In September 1923, Mustafa Kemal, as the Speaker of the Assembly, de-

[27] Kili, 35

[28] Burak Çelik, Kurucu İktidar, Hükümet Sistemi, Vatandaşlık Ve İdarî Yapılanma Tartışması Çerçevesinde 1924 Anayasası'nın Yapım Süreci (Yetkin 2016) 135.

[29] Kili, 18

livered the inevitable fact to a foreign press in an interview: 'I would like to remind the first articles of the Turkish Constitution: sovereignty belongs unconditionally to the nation. The system of administration is based on the principle that the people personally and effectively direct their destinies. It is possible to combine these two articles in one single word: republic. In a while, the form Turkey has gone into will also be declared by law.'[30]

The republican amendment was only a matter of time. Yet, shortly before it, TBMM announced another fact to the world: Ankara is the capital of Turkey. Making Ankara the capital has a non-symbolic significance in this historical narrative. It is an implied manifesto of the new Turkish state, which rejects any connection to the former regime's geographic base, Istanbul. A bill was submitted to the Assembly on 10 October 1923 to enact a law making Ankara the capital. The bill was referred to the Commission on Constitutional Affairs. On October 13, 1923, the parliament adopted a decision approving the recommendations of the Commission, declaring that Ankara is the governmental capital of the Turkish State.[31] One should note that it was a decision of the assembly; nothing was added or amended in the constitution. The parliament, however, confirmed the expectation that a legal norm would be included in the constitution.[32]

The moment for the amendment came after a severe government crisis. The initiative for the amendment had come from Mustafa Kemal after the government led by Fethi Bey resigned on October 26. To bring a permanent solution to forming a solid government, Mustafa Kemal and a few friends gathered on the night of October 28 to move forward to a 'cabinet system' (parliamentary system of government) in which the head of the state assigns prime minister to form the government rather than a government directly selected by the parliament. They prepared a draft bill of five articles for amending the 1921 Constitution. The next

[30] Hakimiyeti Milliye, 27 Eylül 1923, Numara 926, Üçüncü Sene.

[31] TBMM Zabıt Ceridesi, Devre: II, İçtima Senesi: 1, Otuzbeşinci İçtima, 13 Teşrinievvel 1339 (1923), 665-670.

[32] The parliamentary commission report on this change decided as follows: 'our wish shall be submitted to the general assembly that the provision of the bill which stated that Ankara is the government center of State of Turkey would be included in our detailed constitution which will be adopted in the future' (Goloğlu, 296)

day (29 October), the draft was first debated in the Party meeting.[33] In this meeting, İsmet Paşa (İnönü) made the following statement: 'The western states are asking why we lack a head of state. The nation has occupied its sovereignty. Then why are you afraid of saying this with legal language?'[34] After some debates in the party meeting, this draft was submitted to the Assembly as a constitutional amendment bill. It was unanimously enacted by the Assembly on the evening of the same day, 29 October 1923. About fifteen minutes later, Mustafa Kemal was elected the President of the Republic (Cumhurbaşkanı). The first Cabinet after the amendment was formed by İsmet Paşa and Fethi Bey was elected Speaker of the Assembly.

II. Constituting Through Amendment: Process and Consequence

The constitutional commission, which evaluated the amendment bill, provided a report and read it in the Assembly. In the report, the Commission stated, 'It is appropriate to use the word republic in the constitution given the fact that where sovereignty belongs unconditionally to the nation and the system of administration is based on the principle that people personally and effectively direct their destinies, it means republic.' Immediately, the debates on the bill began in the plenary assembly. The commission chair, Yunus Nadi Bey, clarified the legal nature of the amendment: 'The bill we offer is to state the international name of the Government of the Grand National Assembly of Turkey. The government that vests the sovereignty in the nation without any condition and makes the nation govern itself is called a republic. Thus, to take our true name, we add this by a clause to the first article of our constitution in which the meaning is already included in the article.'[35]

After the sultanate was abolished, there was no room for the monarchy in the constitutional order. National sovereignty was over any ideas among the political actors, and the real concern was what would be the role of the founding leader within the new state. The opponent group in the parliament feared too much concentration of power. Renaming the

[33] Nutuk [The Great Speech], 671-677

[34] Goloğlu, 307-308

[35] TBMM Zabıt Ceridesi, 13 Teşrinievvel 1339 (1923), 91.

regime was a major concern. Thus, October 1923 cannot be considered as just a confirmation. It is the opening of the way the country will be ruled afterwards without a return ticket. It was a 'constitutional moment' of all moments in the last century.

The amendment is enacted without following either the former constitution's amendment rules or the internal rules of the Assembly.[36] Most remarkably, the voting of the amendment was not held by open vote; instead, each provision of the amendment was adopted only by hand raising. In other words, neither the names nor their votes were recorded in the minutes of the Assembly. The minutes of the Assembly only declare that the bill was accepted unanimously.

It is unfair to claim that 'the decision to turn the Ottoman State into a republic was taken in violation of both the Ottoman Constitution and the TBMM's internal rules'[37] for the following reasons. From the beginning, TBMM had a *revolutionary* nature in the sense that it adopted a new constitution by using its 'constituent power' while there was an existing constitution (Kanunu Esasi).[38] Moreover, the 1921 Constitution had been enacted by raising hands in the Assembly like ordinary legislation. No special procedure or quorum was deemed necessary at the end of debates on the Constitution in January 1921. Therefore, it is unrealistic to expect the Assembly to follow the rules to amend the legal text that it did not consider when creating. The members of the Assembly strikingly acknowledged this fact during the debates on the 1921 Constitutions. Ragıp Bey, explained the legal status of it as follows: 'If we now conclude any issue and a rule against it exists in Kanunu Esasi, the rule of Kanunu Esasi shall be null and void.' Likewise, another deputy, Mahmut Esat Bey, stated, 'The form of our parliament is a constituent assembly, and therefore it is competent to amend any article of Kanunu Esasi.'[39] Thus, the attitude of the TBMM is consistent with its previous practice.

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[36] Art 105 of the Nizamname: "In case of a bill amending the Kanun-u Esasi, the approval of the bill requires agreement of the at least two-thirds of the total members of Meclis-i Mebusan"

[37] Morack, 239.

[38] Tanör, 245.

[39] TBMM Zabıt Ceridesi, Vol 7, 137. İçtima, 24.1.1337 (1921), 366

The total amendment process in the Assembly occurred in a couple of hours. The session of the Assembly on October 29 opened at 6 pm and ended at 9 pm, according to minutes. It is assumed that the promulgation of the republic occurred around 8:30 pm in Ankara.[40] Yet the lasting effect of the amendment resonates after a century as one deputy, Vasıf Bey, explained: 'From now on, the form of this State is directly a Republic.'[41] During the debates, a deputy, Eyüp Sabri Efendi, took the floor and explained the technical point of making this amendment. He noted the debates in the press regarding the constitutional amendment and justified how TBMM was competent to adopt such an amendment:

'The press questions whether the Assembly has the power to amend the constitution or not. Gentlemen! In our tradition, national parliaments have been competent in amending both ordinary and constitutional regulations. While there is an explicit provision in Kanunu Esasi in this regard, the rules of procedure of the assembly of the Assembly (Nizamname) also include a constitutional affairs committee. If it's accepted that the assembly does not have such a power [to amend the constitution], the said provision of Kanunu Esasi, the rules of procedure, and the committee cannot exist.'[42]

Kanunu Esasi was considered to the extent that TBMM required it. In other words, during TBMM's rule, the provisions of Kanunu Esasi that were not contrary to the 1921 Constitution were considered to be in force. Because the sultanate was abolished in November 1922, no Ottoman State existed. It was only the new Turkish State that inserted into the constitution that Islam is the religion and Turkish is the language of the state. Amending the constitution in this way demonstrates the complete rejection of Kanunu Esasi. Therefore, the 1923 constitutional amendment could be seen as the most special moment of the foundation of the modern Turkish constitutionalism. Thus, it should be considered a 'constitutional moment' because it fundamentally changed the political regime and the legal order.

What is even more remarkable is that before the amendment reached the Assembly, Mustafa Kemal was concerned with designing a new constitution. It was not a secret that months before the 1923

[40] Suna Kili, Türk Devrim Tarihi (İstanbul: İş Bankası, 2006) 202

[41] TBMM Zabıt Ceridesi, 13 Teşrinievvel 1339 (1923) 91.

[42] Ibid 94.

amendment, he formed a special *ad hoc* commission to write a completely new constitution to replace the 1921 Constitution. The press was aware that he frequently met with some intellectuals at the time to discuss the new constitution. Yet we did not know the details of this work until 1998. When a reporter published Mustafa Kemal's original draft constitution in 1998, it became clear that the new state's legal foundation was ready before October 1923.[43] This explains why there are only six months between the 1923 amendment and the enactment of the 1924 Constitution. The 1923 amendment was a result of a quick solution to an unexpected political crisis. Otherwise, there is no logical way to explain why the founding fathers of modern Turkey amended the existing constitution so radically despite the fact that a new constitution was already on its way.

The 1923 constitutional amendment cannot merely be considered a solution to a political regime crisis. The postponement of the comprehensive constitutional design at the time does not weaken the claim that the 1923 amendment should be considered a 'constitutional moment'. What is unique about the amendment is that it revealed the potential to create a transformation in the constitutional order that determined the principles and institutions of the 1924 Constitution. In other words, the fact that the 'republic' was the founding regulation that formed the backbone of all subsequent constitutions is a hallmark of the 1923 'constitutional moment'.

III. Revisiting the Theory of 'Constitutional Moment'

This narrative brings an opportunity to question whether Bruce Ackerman's 'constitutional moment' theory applies to the Turkish experience of 1923. 'Constitutional moments' are points in history when 'constitutional changes are fostered by a particular mobilisation and engagement of the demos, representing a transformative expression of popular sovereignty in a conscious consent of the majority of ordinary

[43] The whole draft on which Mustafa Kemal Atatürk worked was discovered in 1998 and published on commemorating the 75th anniversary of the republic: Türkiye Cumhuriyeti İlk Anayasa Taslağı (İstanbul: Boyut Yayın Grubu, 1998). The first Article of this draft reads as follows: "Turkey is a people's state governed by the republican system."

citizens.'[44] Then, the question is: does the 1923 amendment represent a 'constitutional moment' *á la* Ackerman?

Discussing a hundred-year-old legal incident from Turkey with an American constitutional scholar's theory might initially seem odd. Yet, Ackerman is not only a domestic scholar of American constitutional law. One of his remarkable hats is that of comparative constitutionalists. Particularly, he is widely known outside the US 'for his imaginative theory of American constitutional development', namely the *constitutional moment*. His imaginary concept of *constitutional moment* derived from American history has been 'exported' to capture similar phenomena in other constitutional systems worldwide.[45] Ackerman's theory is not just a reading of history; it also contains normative elements, so an adaptation in the Turkish context would not be irrelevant.

Ackerman's writings on constitutional theory received various criticisms, though. Recently, Ackerman suggested designing a constitutional moment for the UK following Brexit in which, it is argued, he contradicts his theory of 'dualist democracy'.[46] Although his critics assert that 'his descriptive account of higher law-making is unsuccessful', they also acknowledge that he posed the right question. Moreover, it is argued that the comparative constitutional research agenda should use the concept of the constitutional moment 'to study dramatic constitutional changes in other jurisdictions. Scholars of comparative constitutionalism must identify moments of constitutional change that appear to have occurred outside normal constitutional processes for constitutional amendment.'[47] This study, in a way, can be read as a humble response to this call.

Ackerman argues that the distinctive spirit of the American constitution is found in the 'dualist democracy', as he calls it. This dualist democratic structure, he argues, includes *normal* and *higher* lawmaking. While the government performs the first daily, the People can rarely ini-

[44] Gábor Halmai, 'Is There a 'Constitutional Moment' in Israel and Hungary?' (2023) 56 (3) Israel Law Review 426.

[45] Baraggia § 8

[46] Richard Mailey, 'An American Jurist in London', 228-230

[47] Sujit Choudhry, 'Ackerman's higher lawmaking in comparative constitutional perspective: Constitutional moments as constitutional failures?' (2008) 6 (2) International Journal of Constitutional Law, 194, 228-229

tiate the latter.[48] This division seems unconvincing, if not accurate at all. Several scholars have attacked Ackerman's view from different perspectives.[49] Yet, as one commentator argued, Ackerman's narrative of 'how some moments of constitutional history are more special than others have become a normative parameter to evaluate various events in different parts of the world.'[50] In this respect, the centenary of the Turkish Republic is an opportunity to acknowledge that 29 October 1923 is, perhaps, the most special moment in the constitutional history of Turkey.

Is the 1923 amendment a 'constitutional moment' in Ackerman's sense of constitutional politics? Or can it be considered a reflection of the constitutional transformation that occurred out of procedural constitutional order? These questions are relevant to what Ackerman has suggested. Ackerman's understanding of *dualist democracy* assumes a difference between 'higher law-making', which occurs rarely and only under specific conditions, and 'ordinary law-making', which occurs daily by the government. In this context, normal politics is merely the expression of the voice of political actors who cannot claim the authority to speak with the people's voice. In contrast, constitutional politics is the expression of the people's voice, expressed in a specific moment of extraordinary popular participation. In this context, Ackerman's "constitutional moments" refer to dramatic constitutional revision and "higher law-making" that are 'essentially refoundings that tap the original transformative power of the people unchecked by existing constitutional arrangements. Ackerman believes that on extraordinary occasions — constitutional moments of higher law-making— 'people transform the constitutional order'. During "constitutional politics" periods, Ackerman argues, 'the people break through the governing institutions which or-

[48] Bruce Ackerman, We the People 1: Foundations (Harvard University Press 1991) 6-7.

[49] Among others see Michael Klarman, Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments, 44 STAN. L. REV. 759 (1992); Larry Kramer, What's a Constitution for Anyway? Of History and Theory, Bruce Ackerman and the New Deal, 46 CASE W. RES. L. REV. 885 (1996); Frank Michelman, Constitutional Fidelity/Democratic Agency, 65 FORDHAM L. REV. 1537 (1997); Mark Tushnet, Constituting We the People, 65 FORDHAM L. REV. 1557 (1997).

[50] Benvindo, J, 'The Seeds of Change: Popular Protests as Constitutional Moments (2015) 99 Marquette Law Review 364.

ganise them and transform these institutions themselves. According to this view, formal procedures of the amendment are merely imperfect cyphers of the people.[51]

According to Ackerman, in a dualist democracy, 'the constitution is more than an idea. It is an evolving historical practice, constituted by generations … as they mobilised, argued, resolved their ongoing disputes over the nation's identity and destiny.'[52] In this regard, republicanism's founding moment in Turkey is a practice of determining the nation's identity and destiny. A similar approach to constitutional moment from a republican sense is observed in French literature.[53] The French narrative, however, is not enough to conceive the unique history of the founding of the republic in Turkey built upon a war of liberation, unlike France. The Turkish 'republican moment' is, therefore, quite distinct.

Whether the constitutional amendment of 29 October 1923 can be considered 'higher law-making' is complicated. Suppose a constitutional moment is 'a means for constitutional change without passing through the formal rules for amendments but legitimised by popular endorsement'. In that case, the 1923 amendment can be considered a 'constitutional moment'. Yet, the nature of the amendment substantially differs from Ackerman's original design. On the one hand, the 1923 amendment is not an informal constitutional change in which the change occurred outside the boundaries of the formal amendment procedures. On the other hand, the amendment was drafted to change the existing constitution. The amendment was adopted like ordinary laws because the constitution included no rules for its amendment. Thus, the law was 'higher' in the material sense, but it was 'ordinary' from a formal perspective. Ackerman considers the New Deal era a constitutional moment, even though

[51] Frank, Jason. 'Introduction: Constituent Moments', in Constituent Moments: Enacting the People in Postrevolutionary America (New York: Duke University Press, 2010) 32

[52] Ackerman, p 34. Recently, it has been argued that because of the protests that lasted for months after the government introduced its plans to dismantle judicial independence in Israel, there is indeed a 'constitutional moment' in Israel, 'which can lead to entrenching basic elements of liberal democracy into new Basic Laws, or maybe even into the first written constitution of the State of Israel.' Halmai, 14.

[53] Lindseth, Peter L. 'Law, History, and Memory: "Republican Moments" and the Legitimacy of Constitutional Review in France' (Fall/Winter 1996/1997) 3 (1) Columbia Journal of European Law, 49-84.

there was no formal constitutional amendment unlike the Founding and Civil War moments. Thus, although the 1923 constitutional amendment was procedurally enacted like an ordinary law, what is important is the social consensus and the permanent transformation in the constitutional structure. The history of the amendment discussed above reveals this claim in more detail.

To examine whether the 1923 amendment is a proper *constitutional moment* that could be differentiated from other changes or transformative events that occurred during the existence of the constitutional system, one should question whether the narrative of the 1923 amendment explained above fits with the four distinct phases of 'higher law making' in the Ackermanian sense: 'signalling', 'proposal', 'mobilization of popular consent', and 'codification'.

According to Ackerman, the life cycle of a successful movement in constitutional politics -higher law-making- begins when 'it has gained sufficiently deep and broad support amongst the private citizenry to warrant admission to the higher law-making process.' Signal of higher law-making occurs, in this respect, when the people's representatives have 'extraordinary support for their initiative in the country at large.'[54] To identify the first signal, one should explain the nature of Turkish constitutionalism from a broader perspective. The history of constitutionalism in Turkey is mainly shaped by particular parameters derived from the republican movement of 1920-1923. Bülent Tanör, a leading Turkish constitutional scholar, argues that the War of Independence (Kurtuluş Savaşı) has a role in the birth of Turkey's new constitutional theses. It is important to note that *nation-building* and *democratisation* are the pillars of the pre-independence war period. Moreover, the conditions of the war accelerated the realisation of these pillars. Following the developments of the war, a new political power with a revolutionary character emerged in Anatolia.[55] This revolutionary nature of the independence war brought democratic constitutional theses. In other words, in Turkey, independence was the source of democratic constitutionalism. Particularly, the

[54] Ackerman, 266, 272

[55] Bülent Tanör, 'Lozana Giden Yıllarda Türk Anayasa Tezinin Doğuşu', 199-207.

principle of 'national sovereignty' emerged as the common motto of the national revolution.[56]

Furthermore, the 'extraordinary' nature of the process in the signalling phase, Ackerman argues, is a three-dimensional structure: depth, breadth, and decisiveness. The argument that a proposal for constitutional lawmaking should be deep and breadth is less relevant, while the 'decisiveness' of the constitutional moments requires attention in the context of this article. Ackerman claims that this dimension (decisiveness) means that constitutional politics should be 'in a position to decisively defeat all plausible alternatives in a series of pairwise comparisons.'[57] From the decisiveness perspective, the 1923 amendment is remarkable. The amendment was debated in the public long before its text arrived in the legislature. It was more of a necessity than a reform. Given that the Turkish legal system has been shaped by many other regulations since the establishment of the TBMM, the amendment was an inevitable result of the democratisation of national sovereignty. The idea of 'populism' (*halkçılık*) was ingrained in the revolutionary agenda, and the amendment confirmed it. It was a matter of sovereignty of the people in a democratic stance.

The second phase, the proposal, is more interesting in the context of the 1923 amendment. Ackerman claims that 'when a movement appropriately gains access to a credible signal, it must still define *what* it wants to propose' in the name of the people.[58] Defining the republican amendment in 1923, in this respect, presents a unique constitutional story. While the concepts of people and populism took an increasingly important place in political discourse, the draft constitution was presented to the Parliament on September 13, 1920, under the name of 'Populism Program' (*halkçılık programı*). The Program was examined by a special commission of parliament, and the report that had been prepared was discussed in the Assembly on November 18. Accordingly, the first four articles in the proposal were declared as a separate 'Assembly Declaration' *(halkçılık beyannamesi*). According to this declaration, the most crucial aim of the TBMM is to save the people of Turkey, who are under the domination and oppression of imperialism. Republicanism, therefore,

[56] Tanör, 212

[57] Ackerman, 277

[58] Ackerman, 281

initially developed through opposition to imperialism. The institutionalisation of the constitutional moment in 1923 was the result of getting rid of the domination of imperialism. In this respect, the 'Populism Declaration' can be considered a text that shaped the constitutional moment of 1923.

To ensure prosperity by eliminating the causes of the misery of the people, land, education, justice, economics, foundations, etc. Reorganising institutions according to the needs of the people and implementing the necessary social and political principles from the spirit of the nation are also among the objectives of the TBMM. The commission organised the other part of the populism program as the exact draft of the 1921 Constitution. The draft was discussed in the Assembly with strong debates, and after four months, it was adopted with compromises on Jan 20, 1921.

The third feature of the Ackermenian type of 'higher lawmaking' is that it must provide a substantial period of mobilised deliberation during which popular support for these initiatives is tested. Ackerman claims that a long period of mobilised deliberation on constitutional changes is a distinct form of American higher lawmaking. Because it takes years, not weeks, before a constitutional change is adopted in the US, he believes it makes sense to understand that formal constitutional revision does not end higher lawmaking. Moreover, Ackerman envisions a process with the following features: democratic, energetic, and multivocal.[59]

Ackerman compares the American context with other nations that have used plebiscites to consult people. In this method, Ackerman argues, they only provided a couple of months, while the American experience of deliberation usually lasts for years. This finding sounds correct but does not explain Turkey's founding moment. In this respect, the 1923 amendment is a product of long mobilised deliberation, given that the proposal and the ratification occurred only in one day. Yet, one should acknowledge the democratic and multivocal essence of the amendment process. This cannot be observed only by looking into the proposal and enactment. For a deeper understanding, one should consid-

[59] Ackerman, 285

er the whole picture of political life in 1923. The new state was being formed, and there was immense opposition.

Mustafa Kemal had lighted the fuse of the republic by talking to the foreign press in late September 1923. This was where the mobilisation began between the supporters and the opponents of the republic. Soon after the first contact with the press and explicitly referring to his intent to promulgate the republic, an intense debate among the public intellectuals emerged, reflected in the newspapers. Various opinions were delivered, and complicated arguments were exchanged before October 29. After the interview, the discussions focused on the republic. Multiple ideas and thoughts have been expressed on this subject.

The opinions published in several newspapers of that time and the minutes of the group meetings of CHP, the founding party, would reveal the extent of the debates. The core of the amendment had been debated before the amendment. One could observe the debates between the supporters of a new constitutional order and those who remained suspicious of such an idea. Notably, one anecdote from October 1923 in a newspaper criticising the constitution-making initiatives is remarkable. In October, Mustafa Kemal was meeting with some specialists about constitutional amendment. This committee had no legal status but resulted from Mustafa Kemal's initiative. They regularly met at a station building (istasyon binası) in Ankara. It was a historical building within the Ankara railway complex, which Mustafa Kemal used as his office and residence during the War of Independence. A newspaper from Istanbul commended the following: 'Will the Ankara Station Building give birth to the republic? To our knowledge, a republic is born in national parliaments, not station buildings. A station building can only produce trains at best.'[60] This hard criticism indicates a remarkable debate about the fundamental choices of the time on the way to the 1923 amendment in Turkey.

Moreover, the critics argued that it should be a constituent assembly instead of the ordinary parliament that should have decided whether Turkey should become a republic. Furthermore, even the sincere supporters of the amendment criticised the sudden enactment of the constitutional amendment. Among the intellectuals of the time, it was not a se-

[60] Tevhid-i Efkar, 19 Teşrinievvel 1339 in Faruk Alpkaya, Türkiye Cumhuriyetinin Kuruluşu (İstanbul: İletişim, 1998) 75.

cret that Mustafa Kemal and his friends were preparing a complete constitutional reform for establishing the republic. The big project, however, was eventually postponed, and a quick change occurred following the government crises explained above.

Codification is the last phase in Ackerman's theory of higher law-making. According to Ackerman, courts translate constitutional politics into constitutional law through legal codification.[61] In this regard, what happened a century ago in Ankara would at least be labelled *unique*. The republican amendment of October 29 occurred only in one day. The parliament was in session to choose the ministers, and reconciliation was far away. Yet, as Ackerman argued, the codification must occur 'before it's too late, before the moment passes.'[62]

The deputies called Mustafa Kemal to find a solution. According to his memoirs, Mustafa Kemal intended to declare the republic a day before the amendment. When he arrived in parliament, he asked his allies to prepare a bill to amend the constitution. In less than a couple of hours, the amendment bill was brought to the Assembly, and discussions lasted until the evening of the same day. After roughly eight hours in the corridors of the parliament, the new Turkish state gained a republican feature with the following shouts resonated in the walls of the Assembly: 'Long live the republic!'[63]

In Ackerman's design, the courts will do their job after codification. This is not the case in Turkey's constitutional moment, however. There was no court for such a role in the founding period. The 1921 Constitution does not regulate the judiciary at all. Making sustainable higher law-making only became possible after the establishment of the Constitutional Court in 1961. Higher law-making can only explain the American context, but it lacks any justification for other narratives of constitutionalism.

Ackerman argues that constitutional moments must occur 'in relatively compressed time frames and not over extended periods.' Yet, critics of his theory, such as Balkin and Levinson, claim that there is no need to assume that 'change occurs quickly' at the constitutional level

[61] Ackerman, 266.

[62] Ackerman, 288.

[63] Nutuk [The Great Speech], 677-686

by rejecting the idea that 'there must be constitutional "moments" spanning a relatively short period as opposed to more gradual forms of constitutional change.' Put another way, Balkin and Levinson argue that 'constitutional change can happen quickly or slowly, depending on how the forces of politics operate.'[64] The overall narrative of the 1923 constitutional change in Turkey supports this claim. On the one hand, the change was quick because the formal amendments occurred only in one day. On the other hand, the revolution drawn from the republican change covers a much larger legal landscape in which the Turkish state has transformed extensively in the last century.

IV. The Fate of the Republican Constitutionalism

A recent work from Jack Balkin argues that constitutional history can be analysed from two perspectives. Traditionally, we conceive the events that shaped the constitutional order in a linear understanding. Notably, this linear conception of history is relevant to the preferences of constitutional interpretation. Yet, Balkin argues that time moves in cycles, and these historical cycles arise 'through the interaction of political will in a particular institutional environment.' Balkin contends that the interaction of different cycles generates constitutional time, making it possible for an observer to know where she stands.[65] Then, where does the 1923 amendment stand within the 'constitutional time' of Turkey? Are there constitutional cycles of constitutional history in the republican movement in the context of the Turkish case? These questions require a comprehensive analysis. Yet, one could provide some inferences based on the historical panorama of the republican constitutionalism in Turkey.

For this, it is necessary to remember that republican constitutionalism first emerged by enacting the 1921 Constitution. Therefore, in Turkey, contrary to the implication of the republic's centenary, *republicanism* per se is older than the very concrete concept of the *republic*. In this regard, Turkish constitutional history provides a distinct typology. Historically speaking, 'constitutional government preceded constitutional

[64] J Balkin and S Levinson, 'Understanding the Constitutional Revolution' (2001) 87 Virginia Law Review, 1079.

[65] Balkin, The Cycles of Constitutional Time, 1-7.

democracy in Turkey'[66], and since the Ottoman Constitution of 1876, Turkey has had four other constitutions: 1921, 1924, 1961, and 1982. Aside from the Ottoman Constitution, it is argued that there are three models within the republican constitutional history: disharmony (*uyumsuzluk*), lethargy (*uyuşukluk*), and harmony (*uyum*).[67]

The whole story of the 1961 and 1982 Constitutions can be seen as 'constitutional disharmony' because the structure they built received an adverse reaction from a remarkable part of the society. Secondly, 'constitutional lethargy' is observed during the existence of the 1924 Constitution under both single (1924-1946) and multi-party systems (1946-1960). In this model, the Constitution did not occupy much space in public life. In that era, it was as if the Constitution was dormant, and unlike what was to come in the next six decades, there was no constitutional engineering. Lastly, 'constitutional harmony' only existed in the era of the 1921 Constitution. The first constitution of the new Turkish state was a remarkable instance of a combination of the constitution and the society. It is an intelligent normative tool that enabled the liberation struggle to be used efficiently. Therefore, the short life of the 1921 constitution emerged under the conditions of the war, which was the only period in which complete harmony existed between the constitutional construct and the dynamic political forces of the country.[68] It is this harmony that enabled the 1923 amendment without much controversy.

Bringing the idea of *constitutional time* and three models of constitutionalism, it might be possible to make a unique inference. It might be helpful to conceive the narrative of these three models of constitutionalism in a different sense from the one presented by Balkin. In other words, it is better to conceptualise these distinct periods as cycles that interact with each other at specific points. Balkin argues that the three cycles of constitutional time in the US never overlap, but they interact. In this regard, the nature of the three periods of Turkish constitutional-

[66] Ergun Özbudun (2012), 'Constitutions and Political System' in The Routledge Handbook of Modern Turkey, p 194, https://www.routledgehandbooks.com/doi/10.4324/9780203118399.ch19 Accessed on: 08 Nov 2023

[67] Bülent Tanör, 'Cumhuriyet Anayasacılığımızda Üç Model', Cumhuriyet'in 75. Yıl Armağanı (İÜHF Yayını, 1999), 213-218.

[68] Tanör, 'Cumhuriyet Anayasacılığımızda Üç Model', 213-216.

ism could be better explained if they are not treated in a linear understanding of time.

The three distinct features of constitutional transformation in Turkey are reoccurring. One could easily observe the repeat of *harmony*, *lethargy*, and *disharmony* from time to time in the last century of the Turkish Republic. Of course, it is true that nowhere, including Turkey, constitutional politics is not a deterministic phenomenon given that 'politics is not astronomy, and human affairs do not operate like clockwork.'[69] Yet, given that *constitutional time* is an imaginary concept, there is no worry while theorising about what happened in legal history. Furthermore, given that scholars even began to argue that it is time to abandon other imaginary concepts, such as the theory of 'constituent power'[70], there is no reason to refrain from claiming more about constitutional time.

Within Turkey's 'constitutional time', particular cycles are visible within the context of republicanism. Each constitution adopted since 1923 (1924, 1961, and 1982) has vested significant importance to the idea of a republic. They protected the republican nature of the state in a special provision that was unamendable.[71] Moreover, it is asserted that, in Turkish constitutional history, regular cyclical movements occur between *authoritarian* and relatively *democratic* phases where specific institutions, norms, and behaviours can be observed.[72] In this respect, one should note the two fundamental breaks of constitutionalism to understand these cycles. The first happened in 1921 when a new Turkish State was formed in a constitution, while the second was the process that began with the 2017 constitutional amendment.[73]

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[69] Balkin, 6.

[70] Sergio Verdugo, "Is it time to abandon the theory of constituent power?" International Journal of Constitutional Law 21 (2023), 14–79

[71] Article 102 of the 1924 Constitution, Article 9 of the 1961 Constitution, Article 4 of the 1982 Constitution.

[72] Şule Özsoy Boyunsuz, "Regime Cycles, Constitution Making, and the Political System Question in Ottoman and Turkish Constitutional Developments." in Failure of Popular Constitution Making in Turkey: Regressing Towards Constitutional Autocracy, ed. Felix Petersen and Zeynep Yanaşmayan (Cambridge University Press 2020), 84–85.

[73] Moreover, the 2007 and 2010 Constitutional amendments can be considered milestones that paved the way in between. While the former opened the door for a semi-

It's argued that the enactment of the 1921 Constitution cut the link between the people and the monarchy. Vesting sovereignty to the people secured national sovereignty. Yet, the 2017 constitutional amendment brought a *sui generis* system in which the legislative power was undermined while the republic's president was empowered with de facto unlimited and discretionary powers.[74] This is considered a sharp return from the progress of two centuries towards a system without checks and balances. The 1876 Constitution was a text that introduced the concepts such as constitution, election, representation, and parliament. The 2017 amendment, in this context, is considered an instance of 'abusive constitutionalism' that completely empties these concepts one hundred and fifty years later.[75]

In this regard, the 1923 amendment is not an ordinary constitutional amendment considering its role in Turkey's constitutional time. It reflects the beginning of another cycle of constitutional time, a distinct cycle that shaped the modern Turkish legal system. Put another way, it was *the* most enduring constitutional moment where the people spoke a third voice.[76] However, the cycles of Turkish constitutional time never escape the republican roots. Even if cycles create chaos in their context, the republic is not a matter of debate. The fundamental discussion concerns democracy rather than the republic.

presidential government system, the latter created control over the judiciary in the new constitutional design. Because of the former, for the first time in constitutional history, the President of the republic was elected directly by the people in 2014 despite the parliamentary legacy still being preserved in the constitution. However, the critical reform of 2010 altered the nature of the judiciary, especially by packing the Constitutional Court.

[74] For extensive elaborations on 2017 amendments see Serap Yazıcı, Constitutional Amendments of 2017: Transition to Presidentialism in Turkey, October 2017, https://www.nyulawglobal.org/globalex/2017_Turkey_Constitution_Amendments.html ; Ergun Özbudun, 'Constitutions and political systems' in The Routledge Handbook on Contemporary Turkey , ed. Jongerden, J. (Routledge 2021), 144-152.

[75] Demirhan Burak Çelik, '16 Nisan Anayasa Değişikliği: Osmanlı-Türkiye Anayasacılığının İkinci Büyük Kopuşu', Anayasa Hukuku Dergisi 6 (2017), 715-720.

[76] Ackerman, 40

Conclusion

The 'constitutional moment' concept has travelled 'far beyond the boundaries of American legal theory, to be applied, fruitfully, in a comparative perspective in different historical and geographical contexts.'[77] However, the theory has never been applied to Turkish constitutional history. In this respect, the centenary of the Turkish Republic made it possible to question the founding legal occasion of modern Turkey from this perspective.

One of the most critical problems of Ackerman's theory is 'identifying and distinguishing constitutional moments from other constitutional events which, however, do not lead to informal constitutional change.'[78] The events that led to the 1923 amendment, in this regard, imply that the only constitutional reality that lasted since the founding of modern Turkey is related to the republican character of the state. The constitutional moment of Turkey in this sense is when the republic was inserted into the state's constitutional framework as an eternal feature in 1923. The seeds of constitutionalism in Turkey did not emerge in 1923. Yet, since then, republicanism has been conceived as the ultimate destination of the constitutional state.

Contrary to popular belief, the constitutional monarchy did not gradually lead Turkey to a republic or bring it closer. At the end of the constitutional monarchy, the republic continued to have negative connotations in the parliament. The republic was founded by a new group that rose to leadership at the end of the constitutional monarchy.[79] In this regard, as one scholar argued years ago, there was a remarkable 'republican spirit' while the Second Grand National Assembly was at work, which included the period of not only the 1923 amendment but also the adoption of the 1924 Constitution. That's why it is emphasised that the members of the Second Assembly 'thought of Turkey as a republic, and they meant to keep it so.'[80] Today, modern Turkey's belief in a republic resonates with a stronger ambition to understand and preserve it. In this respect, what happened a century ago in Turkey provides a fruitful in-

[77] Baraggia § 67.

[78] Baraggia § 30.

[79] Barış Bahçeci, Türk Hukukunda II. Meşrutiyet (İstanbul: On İki Levha 2023) 308

[80] Edward C. Smith, 'Debates on the Turkish Constitution of 1924' (1958) 13 (3) AÜSBF Dergisi 13 82–105.

sight into contemporary problems of constitutional democracy worldwide.

The 1923 amendment is no doubt a unique case from the point of the boundaries of constituent authority. The traditional dichotomy between 'primary' and 'secondary' constituent power seems less visible, and the 'constitutional moment theory' fails to explain the 1923 amendment fully. This is partly because understanding constitutional politics on a linear conception of time is still dominant in constitutional theory. Thus, the centenary of the republic in Turkey demonstrates important questions to constitutional theory than only celebrating the Turkish state's existence for a hundred years. Similar examples to evaluate what happened in Turkey a century ago would pave the way for more comparative studies.

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