



# Constitution, presidentialism, and checks and balances: Turkey and the US

**ARTICLE IN BRIEF:** In 2011, all four parties in Turkish Parliament agreed on the necessity of a new constitution and formed a committee for drafting it. There are important issues the new constitution is expected to address, but one has emerged as the most important question in the search for a truly liberal democratic constitution: the conception and institutionalization of checks and balances between the branches of government

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During discussions on the new constitution, the ruling Justice and Development Party (AK Party) revealed its aim to empower the executive by replacing the parliamentary regime with presidentialism and authorizing the president to (a) issue decree laws, (b) dissolve Parliament, (c) appoint Cabinet members without parliamentary approval, and (d) appoint more than a third of the members of the Supreme Board of Judges and Prosecutors (HYSK) -- the body that makes the decisions about appointments to the Court of Cassation and the Council of State, promotions and appointments of judges and prosecutors, and their disciplinary issues.<sup>1</sup> Moreover, it is not certain from the AK Party's proposals whether the president can also be the leader of a party. The party's proposals are apparently designed to minimize checks on presidential power.<sup>2</sup>

The idea of empowering the executive branch is not new in Turkey; several right-wing leaders, such as Turgut Özal and Süleyman Demirel, have proposed it before. Moreover, the opposition to checks and balances is not confined to these propositions. During the single-party authoritarian rule of the Republican People's Party (CHP), the president had almost absolute authority. The prime minister became the most powerful executive during the Democratic Party (DP) rule in the 1950s. In that period, there were some checks between the executive and legislature, but there was no major institution balancing the DP, which easily gained a super-majority in Parliament due to election laws. After the military coup of 1960, the military appeared to be the main power broker in Turkish politics, with almost no serious mechanism of checks and balances. The military-drafted constitution of 1961 created the Constitutional Court, the Senate, and semi-autonomous institutions such as the State Planning Organization (DPT), to restrict the authority of elected government and Parliament. Yet this did not mean a system based on checks and balances; instead, it meant military and judicial tutelage over elected politicians.<sup>3</sup> Later, another military-drafted constitution in 1982 added new semi-autonomous institutions, such as the Higher Education Board

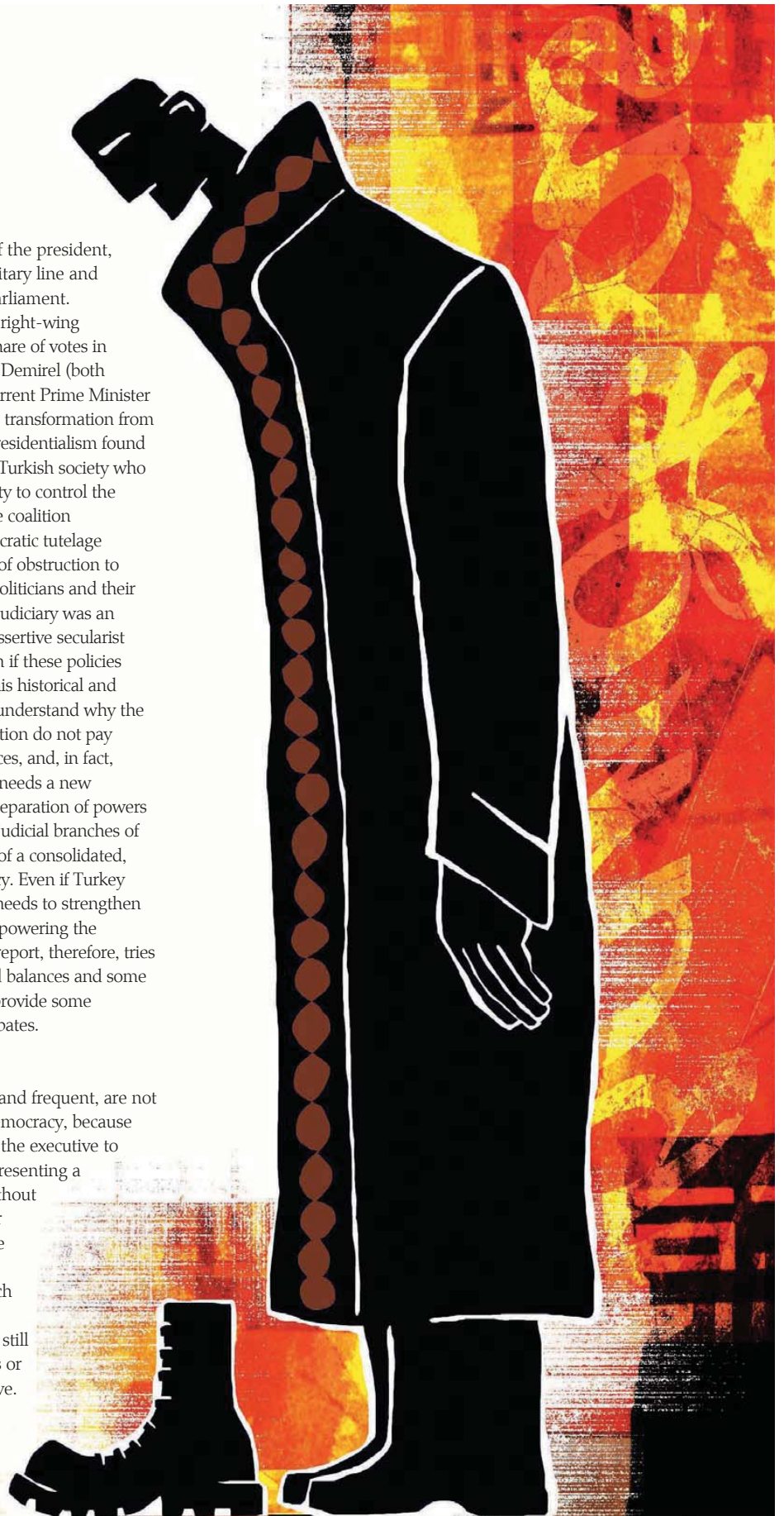
(YÖK), and strengthened the power of the president, assuming that they would tow the military line and restrict the elected government and Parliament.

In reaction to bureaucratic tutelage, right-wing politicians who received a substantial share of votes in elections -- Turgut Özal and Süleyman Demirel (both former premiers and presidents) and current Prime Minister Recep Tayyip Erdogan -- supported the transformation from parliamentary to presidential system. Presidentialism found supporters among various segments of Turkish society who (a) wanted a strong president with ability to control the military, and (b) were tired of ineffective coalition governments. The opponents of bureaucratic tutelage regarded even the judiciary as a source of obstruction to popular will. Especially for right-wing politicians and their constituencies, the ideologically driven judiciary was an authoritarian institution that imposed assertive secularist policies, such as the headscarf ban, even if these policies were against the will of the majority. This historical and perceptual background is important to understand why the AK Party's proposals for a new constitution do not pay sufficient attention to checks and balances, and, in fact, substantially deteriorates them. Turkey needs a new constitution that fosters, not weakens, separation of powers between the executive, legislature, and judicial branches of government, in order to reach the goal of a consolidated, liberal, and truly participatory democracy. Even if Turkey keeps the parliamentary regime, it still needs to strengthen checks and balances, particularly by empowering the legislature vis-à-vis the executive. This report, therefore, tries to explain the importance of checks and balances and some related concepts, using the US case to provide some comparative insights for the Turkish debates.

#### **WHY CHECKS AND BALANCES?**

Elections, even if they are free, fair and frequent, are not sufficient for a regime to be a liberal democracy, because without checks, the potential exists for the executive to become effectively an elected king, representing a "majority tyranny." In other words, without checks, elections merely reflect popular sovereignty but do not promise balance with the rights, participation and representation of minorities. Under such regimes, the elected rulers may even violate some rights of the majority and still hold power until the end of their terms or the emergence of an electoral alternative.

ILLUSTRATION: ZAMAN, ORHAN NALIN





There are three main sources of skepticism regarding a system based on checks and balances in Turkey. The first is concern by the powerful that any checks on their power would allow their rivals to become influential in the political system. In other words, most identity-based and ideological groups in Turkey aim to dominate the state structure entirely, rather than sharing it with others. In this regard, whenever they are in power, these groups do not design the political system to foster checks and balances. A similar logic has been in place regarding election laws. Since 1946 political parties in power have wanted to keep electoral laws that result in disproportionate representation (e.g., the simple plurality system or the 10 percent threshold), assuming that these laws would favor them in elections.

In both issues, those of election laws and checks and balances, the assumptions about domination have been proved to be wrong. Parties that enforced disproportionate representation mechanisms were disproportionately defeated by the opposition in several elections. On the issue of checks and balances, attempts by various actors (CHP, DP, and the military/judicial bureaucracy) to entirely dominate the state

structure ended up with them almost completely losing their impact on it. This historical experience shows that attempts by a political party, religious community, or any other group to dominate the Turkish state structure is likely to result in the elimination of that particular group. A system based on checks and balances between various state institutions may in fact be the best solution for ongoing wrangling among different socio-political groups. It is a much better alternative than the zero-sum game that several groups have focused on in Turkey.

A second source of skepticism is the perception that checks and balances have weakened politicians vis-à-vis bureaucratic tutelage in Turkey. The recent decline of military and judicial tutelage, however, has made this concern much less credible than it was before. Moreover, changing legal codes to further reform civil-military relations is still necessary, but this requires empowering all three branches of government (the executive in military appointments, the legislature

in scrutinizing military spending, and the civilian supreme courts in reviewing the decisions of the military courts) rather than the creation of an overly powerful executive. Furthermore, there is a major but generally neglected difference between the military's tutelage over politicians and its possibly positive role in checks and balances in Turkey. The problem of military tutelage has been the military's dictation of policies to elected politicians on a very broad range of issues, many of which were beyond its expertise. The military, however, can have some role, in a system of checks and balances, on security issues based on its knowledge and experience, while politicians would still have the last word on these issues. In short, a true understanding and implementation of checks and

balances does not weaken politicians vis-à-vis the bureaucrats, especially the military; instead, it locates both groups in their proper places.

The third and last source of skepticism is the idea that a system of checks and balances hinders effective governance. According to these skeptics, the executive is prevented from fully and quickly fulfilling effective policies by the legislature and judiciary, as well as by additional sources of checks, such as the

bureaucracy, the media, and civil society. A main problem of this perspective is its claim that the executive perfectly knows what best policies are. From a Millian perspective, the executive may be totally or partially wrong; even if it is right, checks will make its position clearer and contribute to the improvement of its policies.<sup>4</sup> Checks and balances promise a better decision-making process where policies are publicly discussed with the participation of multiple institutions.

Moreover, checks and balances increase the level of legitimacy of policies. Policies that are confirmed, at least discussed, by multiple institutions would have more legitimacy, in terms of public acceptance, than policies decided behind closed doors and implemented as *fait accompli*. If the legitimacy of policies is weak, then a change of power holders will bring immediate reversal of these policies. In short, effective governance in terms of quick decision making and swift policy implementation does not necessarily lead to, or even contradict, policy legitimacy and endurance.

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In addition to the executive branch, checks on power are also helpful for the legislature and the judiciary. The lack of judicial review in the 1950s resulted in some excessive actions of the Turkish Parliament (e.g., the foundation of the “Investigation Commissions” to scrutinize the opposition). Similarly, the lack of sufficient checks over the judiciary (e.g., Parliament had no role in judicial appointments) resulted in excessive court actions in the 1990s and 2000s, such as the closure of many political parties and the imposition of the headscarf ban.

This section has tried to address three main concerns about checks and balances in a relatively abstract manner. For a more practical analysis, the next section examines the US case, a two-century-long experience of checks and balances in a presidential system.

### THE US: CHECKS AND BALANCES IN A PRESIDENTIAL SYSTEM

The level of democracy in Turkey depends on which country it is compared with. In comparison with Arab countries, Turkey is a long-standing democracy. In comparison to some Western democracies, however, it has a long way to go in order to consolidate its democracy. Checks and balances are a major area in

which Turkish democracy can benefit from analyzing Western countries. Comparative insights from the US are particularly important, because it has a long experience with checks and balances and it is ruled by a presidential system, which is now being discussed in Turkey.

Those who are skeptical about comparative analyses generally depict Turkey as unique or exceptional. This, however, can be claimed for any country, because each country has its own peculiar characteristics. In fact, the Turkish political system has been open to international influence, especially from Western countries, since the foundation of the republic. The American political experience is not immune to foreign influence either. Two key terms for the US political system, which are generally used interchangeably -- “separation of powers” and “checks and balances” -- were in fact coined by the 18th century French philosopher Montesquieu. Similarly, an important quote about checks and balances that Americans have frequently used -- “power tends to corrupt, and absolute power corrupts absolutely” -- belongs to the 19th century English scholar Lord Acton. Another British philosopher, John Locke, inspired the idea of limited government among the American founding fathers.<sup>5</sup>

It took over a century for American democracy to reach universal suffrage -- by slowly awarding voting

Turkey's current parliamentary system may be changed in favor of a presidential one.

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PHOTO: ZAMAN,  
ALI ÜNAL



rights to the poor, to women and to African-Americans. Yet the founding fathers were aware of the fact that free, fair and frequent elections with universal suffrage were not sufficient for a liberal democracy, because they could lead to a “majority tyranny.” On this particular issue, the well-known framer was James Madison, who titled his 1778 Federalist Paper (no. 51) “The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments.” Madison stressed the importance of the concept by noting that (a) human nature requires a system of control, and (b) popular sovereignty is not enough to control elected leaders; thus, institutional control is necessary: “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government that is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed, and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government, but experience has taught mankind the necessity of auxiliary precautions.”

Currently, checks and balances is a major principle in the relationship between the three branches of the US federal government.<sup>6</sup> Congress is bicameral; the existence of the Senate and House of Representatives is an internal mechanism of restricting the power of the legislature. A major constraint over Congress’ legislative authority is the president’s veto power. Both houses have to reach the very difficult two-thirds vote threshold in order to bypass a presidential veto. Federal courts, especially the Supreme Court, also limit Congress by applying constitutional review, striking down laws they find unconstitutional.

On the other hand, Congress has three main mechanisms of control over the executive. First, it can remove the president, the vice-president, and federal civil servants from their offices. The House of Representatives has the authority to impeach (indict) and the Senate has the authority to try them. Second, the Senate has approval authority over presidential nominations, including cabinet members and ambassadors. Third, Congress can revise or even totally

reject the president’s budget proposals and international treaties signed by the president. Similarly, Congress imposes checks over the judiciary by its ability to remove federal judges from their posts and through the Senate approval process for federal judges nominated by the president.

The president and the judiciary also have check and balance mechanisms between them. The president nominates federal judges, including members of the Supreme Court. In exchange, federal courts have the authority to strike down executive acts or decrees by defining them as contradictory to the Constitution or statutes. The checks and balances between three branches of government at the federal level are also reflected in the relations between these branches in

American states. Moreover, there is a certain level of division and balance of power in the US between the federal government and the states.

If Turkey moves to a presidential regime, the checks and balances in the US should be examined in order to benefit from the longest presidential experience in the world.<sup>7</sup> The “a la Turca” presidentialism discussed in the media as the “AK Party’s proposals” empowers the president at the expense of Parliament and the judiciary. Unlike

the US system, the proposals authorize the president to issue decree laws and dissolve Parliament. While they also provide Parliament with the authority to remove the president, the Turkish Parliament, unlike its US counterpart, would lack impeachment power, so the ousted president could run again for another term, even during his/her second term. The proposals do not give Parliament any authority to remove Cabinet members or civil servants. They allow the president to appoint all Cabinet ministers and more than a third of the members of the HSYK without any parliamentary approval. Moreover, the proposals include the abolition of the Council of State without clarifying how the new “Supreme Court of Appeals” would check and balance the executive.

Even if Turkey keeps the current parliamentary regime, checks and balances still need to be empowered in Turkish politics. The main problem in Turkey is the dependence of the legislature on the executive. That is where the major reform of the

### **THE ‘A LA TURCA’ PRESIDENTIALISM DISCUSSED IN THE MEDIA EMPOWERS THE PRESIDENT AT THE EXPENSE OF PARLIAMENT AND THE JUDICIARY**





political system should start, by reforming election laws and the law governing political parties. The basis of this problem is the lack of democracy within Turkish political parties. The party presidents and their close circles prepare the lists of candidates for parliamentary and municipal elections. There are two main procedures that maintain democratic designation of candidate lists in the US. The first is the principle of choosing candidates in a participatory and transparent manner by either caucuses (election by party members in party meetings) or primaries (election by party supporters, even if they are non-members, through secret ballot). The second is the single-member district, plurality voting system in the US that makes the personality of the candidate very important, so that party leadership cannot simply add their favorite names to a long list of candidates.

In comparison to Turkey, democracy in the US is much more participatory. Elections for the House of Representatives are held every two years and the presidential elections occur every four years. Only senators are elected for six years, but since a third of Senate seats go to elections in rotation, part of the Senate is elected every two years. Following the 2007 Turkish constitutional amendments, the frequency of parliamentary elections was increased from five to four

years, and the presidential term from seven to five. The AK Party is now trying to return the period of parliamentary elections to five years again.

In addition to frequency, the number of elections also shows that US democracy is much more participatory than Turkish democracy. In the US, state-level referendums are a common route to legislation; the 50 states have diverse methods (e.g., initiation by legislatures or by individuals) of letting popular votes make laws. In California, for example, there were 990 direct initiatives from 1912 to 2002.<sup>8</sup> In contrast, referendum is a rarely used method in Turkey; it has happened only six times in Turkish history. Several positions appointed by government in Turkey were also filled by popular vote in the US. Governors in all states, Supreme Court members in about half the states, attorneys general and even district attorneys in the overwhelming majority of states are all elected. There are over 3,000 sheriffs in the US, who are generally the top law enforcement officers in counties (similar to commanders of gendarmerie in Turkey); all of them -- except in two states -- are popularly elected.<sup>9</sup>

The purpose of this essay is not to suggest that Turkey clone or copy-paste the US. This paper does not overly romanticize US democracy as a perfect system, either. Turkey needs to develop its own

**Premier Recep Tayyip Erdoğan is known to be keen on a presidential system more similar to that of the US.**

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authentic system based on its own dynamics, and US democracy has several problems. Yet on the issue of checks and balances there are several important things Turkey can learn from the US experience. In-party elections to determine candidate lists is a major aspect of US democracy that Turkey needs to take as a model to democratize its party systems and the relations between the legislature and the executive. In fact the problem of leader-centric party hierarchy in Turkey has been linked to a broader social problem, as the next section explores.

#### **PARTICIPATION, DIFFERENTIATION, AND MERITOCRACY**

Leader-centrism is a common problem in not only political parties but also religious communities and several other socio-political groups in Turkey. This has impeded the promotion of critical thinking and toleration of diversity. The first step in solving this broad problem is to reform the Political Parties Law to decrease the role of party leader and minimize hierarchical authority in Turkish political parties. One way of doing so is to make in-party elections compulsory in the determination of candidate lists. A reform of election laws by moving toward the single-member district, and introduction of a plurality voting system could also increase the importance of individual candidates while decreasing the role of party leadership. The decentralization of political parties, at least in the long run, may lead to further in-group democratization of other social and political groups. That will lead Turkey to a more participatory democracy. This process will also affect decentralization of government bureaucracy. An important point for this reform process is to avoid new regional hierarchies (e.g., in Southeast Anatolia) while minimizing the impact of central leadership. Decentralization of government should mean the empowerment of local administrations at city, county and even neighborhood levels, rather than creating new regional centers and hierarchies of administration.

Leader-centrism in Turkish socio-political life is directly linked to the lack of differentiation of various spheres of life (e.g., politics, economics, religion, the judiciary, the military, the media, academia, sports,

arts). As there is no clear differentiation between these areas, political or religious leaders may claim authority over various spheres with limited expertise. The leader-centric supporters overvalue whatever their leaders say about any sphere and the result is the emergence of personal cults. However, the more a society develops a complex socioeconomic life, the more it has to move toward differentiation. Modern leaders differ from medieval philosophers who wrote and taught about almost all spheres of life. In modern life, division of labor is crucial; without it efficiency and quality are hard to obtain in any one sphere. Each sphere has its own criteria to evaluate success and failure (politics, popular representation; economics, profit; religion, love of God; the judiciary, justice; the military, maintaining security, the media, dissemination of information, academia, scientific inquiry; sports, fair play and winning; and arts, human creativity).<sup>10</sup>

Differentiation is the basis of a truly meritocratic system wherein individual success depends on education and expertise, rather than nepotistic relations between members of the same party, religious community, ethnic group, geographical area, etc. Favoritism is also directly linked to the above-

#### **TURKEY NEEDS A SYSTEM IN WHICH INDIVIDUALS WOULD GAIN STATUS BASED ON THEIR OWN MERITS RATHER THAN THE GROUPS WITH WHICH THEY ARE AFFILIATED**

mentioned problem of various groups' obsession with the idea of taking over state power. In this regard, Turkey needs a meritocratic system in which individuals would gain status based on their own merits -- hard work, education and job experience -- rather than the groups with which they are affiliated. This will spread a sense of fairness and equal opportunity into society, promote trust and social capital, and increase efficiency of organizations. Such a meritocratic system will end the disease of favoring group members even if they are not qualified for the position. In a meritocratic system, different identity groups and ideological communities will feel safe from fears of discrimination, purges or vengeance. The lack of fear will lead different groups to better embrace the ideas of consensus and coalition building. Once group survival is not considered under threat, in-group criticism and skepticism can increase by letting members think about the possibility that other groups may be right in their criticisms or alternative policy

plans. In such a system, institutions, rather than identity groups or ideological coalitions, would gain importance, and checks and balances between institutions would be appreciated.

A virtuous circle of participatory management, differentiation, and meritocracy can replace the vicious circle of leader-centrism, mixture of spheres, and favoritism in Turkey. Such a virtuous circle will be crucial to develop checks and balances in Turkish politics.


### CONCLUSION

A major issue that will shape most of the articles in a new Turkish constitution is the relationship between the three branches of government. Despite its importance for a democratic policy, some important actors in Turkish politics have opposed a system of checks and balances. This paper has argued that a new constitution will make Turkey more democratic if it promotes checks and balances between the executive, legislature, and judiciary.

Checks and balances require a certain understanding of consensus building, while several groups in Turkey focus on monopolizing power. Moreover, skeptics perceive checks and balances in Turkey as a pillar of bureaucratic tutelage over elected politicians, or an obstruction to “effective governance”. This essay, by contrast, has stressed that checks and balances are a way of (a) providing basic rights and freedoms to all groups, (b) truly ending bureaucratic tutelage, and (c) maintaining policy correctness, legitimacy, and endurance.

While reforming checks and balances in Turkish politics, it is useful to examine the US, where the idea that government’s power should be limited and its branches should control each other, has been very powerful since its founding. In addition to the checks and balances between the president, Congress and the judiciary, the US political system has several other features to avoid “majority tyranny,” such as a high level of political participation through elections for many executive, legislative, municipal, and even judicial offices. The main insight from the US case for Turkey is that the presidential system itself is not a problem for democracies as long as checks and balances contain the power of the president.

The current parliamentary system in Turkey paradoxically minimizes the power of Parliament vis-à-vis the executive. The independence of

parliamentarians from their party leaders is a must for them to flourish as individuals and for Parliament to play an independent role. The current situation can be summarized as a trinity of leader-centrism, “mixture of spheres” and favoritism. In order to reach a true system of checks and balances in its political structure, Turkey should fight against these problems and try to replace them with participation, differentiation and meritocracy. The first step toward such a substantial transformation will be reforming the laws governing elections and political parties to create truly participatory and democratic procedures for designating candidate lists in parliamentary and municipal elections. 

## ENDNOTES

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