

**1st September 2023**

**Economic sustainability requires a better judiciary and civil constitution securing its sustainable independence.**

The Republic of Türkiye enters her Second Century encumbered by grave problems in her judiciary, the rule of law, meritocracy in the public sector, sustainability of governance, and the economy.

Our country, with a population surpassing 85 million in the century since the 29th of October 1923, has achieved many a great success in public services such as education, healthcare, security, transportation, and communication that simply can't be overlooked. And yet, issues with her judiciary and rule of law have become severely entangled, causing her to become an unsustainable hybrid democracy and leading to economic woes that lead into the middle-income trap such as a worsening current account deficit, external debt, high inflation,

The Republic of Türkiye, in her fight for democracy, has lived through great fractures and lurches approximately every 10 years. Improvements and regressions in governance were followed by progress and regress of the economy. It is clearer today that these fractious changes led to unsustainability not just in governance, but in the economy too; alongside social injustice, this made it even harder to find solutions to issues such as income inequality, mediocre education and innovation, high value-added manufacturing and other contemporary challenges. At present, these factors are

the cause of low productivity, a dearth of production, low value-added production, a current account deficit, the dependence on foreign debts and other external factors.

The economy and welfare are being sacrificed to politicians' unethical methods and greed. The fruits of the people's labour, hard won in periods of respite, are being wasted on incumbent politicians' election bribes.

Due to this vicious cycle that has gone hand in hand with our barren experiences of democratisation, Türkiye has been unable to enlarge her share of global trade and growing prosperity to the level she deserves. Despite Türkiye's GDP as a portion of middle-income countries rose from %2.9 in 1980 to %5-5.5 in the 2000s, it has now regressed below even the levels of the 1980s to %2.3. While GDP per capita was around 5-600 dollars in the first half of the Republic's first century, and approached 15,000 dollars in the 2010s, in the past 3 years it has regressed to around 8-10,000 dollars.

**Sustainable economic success requires a civil constitution that secures the judiciary's independence.**

Unsustainable state governance is at the root of all the Republic's fundamental issues. We may summarise the root causes for this as follows: (i) the judiciary lacks sufficient capacity to effectively fulfil its duties, and it is firmly bound to politicians in its constitution and functioning despite its independence being the cornerstone of the provision of judicial services; (ii) the inconsistent upholding of the rule of law, especially against the ruling class leading to lack of accountability of politicians and public officials; (iii) the dysfunction of the separation of powers and system of checks & balances; (iv) the concerning derogation of fair representation and with that the people's loss of their ability to resolve their issues in parliament, and submission of the people to incumbent rulers.

An effective, transparent, accountable, and fully independent judiciary is the fundamental requirement for the sustainability of state governance and the economy. In turn, the judiciary's ability to carry out its function freely, effectively, and

efficiently is dependent on its supply with the necessary resources, timely and precise enactment of necessary legal arrangements, and restraint of the executive and legislature branches' forays into the judiciary's sphere of competency.

A judiciary, even if fully independent, cannot fulfil its duty if deprived of the necessary budget and tenure guarantees. Regardless, without consideration of the root causes, such inefficacy is held up as reason for the curtailing of the judiciary's independence, and the revocation of tenure guarantees. Furthermore, by using their independence as an excuse to justify their evasion of accountability the judiciary prevents discovery of the reasons for its inefficacy and contributing to the further curtailment of its own independence.

Therefore, it must be made accountable without compromising its independence. But to hold the judiciary accountable, the resources, fiscal, human, or otherwise, must as a matter of priority be allotted to the judiciary and put out of reach of the executive and legislative branches. The exclusion of the executive and legislative branches from the judiciary, its accountability, fiscal resources, organisation, functioning, and functional independence is possible by enshrining them in a constitution.

Sustainable independence of the judiciary can be achieved only through a civil constitution that secures the limitation of the other state powers' influence over and intervention in the judiciary, strikes a balance between these powers to enable their harmonious cooperation, and ensures the people's fair representation in the governance of the state.

The judiciary, in the climate of tutelage prevailing or prevailed by the problems outlined above, has been unable to secure the independence and capacity to fulfil its role freely and effectively.

The judiciary, within which the rule of law and accountability falter, is unable to fulfil its duty as a check on the exercise of the great state apparatus by the legislature and executive, and to limit it according to the law.

To the contrary, it has become an extension of the executive in all but name; a vehicle to be used, now and then, for political purpose. The political and ruling class, benefiting from political, legal, and de facto immunity, has been corrupted by this situation.

Politics, employed for the sake of personal status and benefit, unable to foster a sustainable coalition culture, has given rise to an understanding that reduces sustainable governance to sustaining the executive. This understanding, in the name of establishing a sustainable single-party government, has compromised fair representation. It has led to the creation of artificial majorities in parliament in the name of avoiding the absolutist pre-1960 majoritarian governments' leaders, fractures, and unsustainable coalitions seen between 1961 and 1980. Parties that garnered only 35 percent of the vote were given artificially inflated presences in parliament to enable them to singlehandedly form a government, and concerns about the lopsidedness of this arrangement were assuaged by handing greater executive power to the Republic's presidency.

The 2017 amendment of the Constitution, forbidding a change of president (the executive) by any means other than the prescribed 5-yearly elections (Constitution, Article 116), and the presidential system established by it, has created its own variant of unsustainable governance. This in turn led to the economic troubles we've been experiencing since 2018.

Our country's failure to resolve her unsustainable governance despite the depth of her experience from her first century, is a consequence of constitutions and their amendments being made without receiving sufficient public discussion, without accommodating different views or addressing minority or opposing concerns, and by the foisting upon the public of solutions reached with only certain sects or beneficiaries of the climate of tutelage in mind.

The public is agreed that the 1982 Constitution, despite its many amendments, is insufficient for Türkiye. However, the attempt by the former President of the Grand National Assembly Mr. Cemil Cicek in the 2010s to create a civil constitution failed, despite wide engagement from civil society.

Sustainable governance is possible only when the rule of law and democracy provide for the fair solution of national issues on legitimate bases. To provide this, the **Better Justice Association** puts forward that what is required is a constitution that provides and secures sustainable independence of the judiciary, balances the powers of the state, and enables the fair representation and participation of all sections of society in government. To this end, the Better Justice Association, in 2021, opened to domestic and international discussion the “*A to Z of Turkish Judicial Reform*”, the product of an intensive comparative project. As part of this, constitutional principles for a judiciary that produces quality services, is transparent, completely accountable, and independent have been shared with all stakeholders and the public.

### **Methodology for the Creation of a Civil Constitution**

The work “Turkey’s Middle-Democracy Issues and How to Solve Them” penned by the President of the Better Justice Association Mehmet Gün Esq., identifies the fundamental issues faced by the country as being the judiciary, accountability, and representative justice. Additionally, it proposes comprehensive solutions among which lies the outline of a methodology for the creation of a civil constitution.

We would like to underline this: **a civil constitution cannot be foisted; it is created through social reconciliation.**

The constitution is a social contract: society’s foundational document of agreement. It sets out the shared societal values and the framework within which society can coexist, reconcile, and cooperate; in order to enable and to strengthen solidarity, it organises the state, its institutions, functioning and relations among them. The constitution contains both a society’s experience and the course plotted for its future, its manner of moving forward, and its roadmap. At the same time, constitutions clarify a country’s position and heading on the international stage.

It's difficult enough to make a standard purchase agreement between two people. First negotiation, then agreement on the main principles, and finally all the contingencies

need be thought of, reconciled, and written down to the finest detail; and following this one must consider whether the written contract correctly reflects the agreement.

Reconciling millions of people on questions of shared values, societal organisation, institutions, and their functions is the hardest way of creating a civil constitution. First and foremost, a fit and sustainable methodology that includes all segments of society and shows how a civil constitution should be made should be established to create an institutional framework and secretariat. An inclusive and comprehensive piece of legislation should be enacted to ensure the administration of all kinds of constitution-making and amending according to a methodology laid out therewith.

The methodology law should enable the participation of all mainstreams, majority, minority or marginal segments in the constitution-making process, providing for their self-expression, the consideration of their views and asks, and a response from other participants; it must seek to create agreement through debate, persuasion, and mediation.

The debates must first establish, with a view to the country in 10, 50, 100 years' time, the type of regime and future desired. The Constitution is a document that shows how such a progressive vision and the future as identified with it can be achieved. The improvements, additions, or replacements that the present situation requires must be determined accordingly.

As for the next step, academic publications, views, and debates on the particulars of what must be done to reach the future vision must be combed for areas of pre-existing agreement as well as disputed particulars; reconciliation must be sought first in the part and then in the whole of the matter. The wealth of political-cultural experience accumulated through society's progressive development and achievements must be preserved, unless forced to do otherwise. New choices must be developed for questions that defy resolution, and the method of ascertaining the public's preference must be shown.

## **The need for an impartial mediator**

The natural steps to creating (or changing) a civil constitution listed in order are: (i) building awareness of subject areas; (ii) mutual communication of views, asks, and preferences; (iii) debate, discussion, persuasion, reconciliation, and agreement; (iv) writing of the constitutional provisions; (v) agreement and codification of the complete text.

The participation of stakeholders in each of these steps and their tolerant and unprejudiced reception, in addition to enabling them to self-express, are the primary conditions that must be fulfilled if the reconciliation process is to gain trust and there is to be any societal reconciliation. But it borders on the impossible for those more powerful than or opposed to the others to foster this. In a climate bemoaned for its polarisation, in which the public seems to be split to the opposing extremes, none of the opposing sides can achieve reconciliation. There is a need for a mediator or intermediary possessing a good grasp on the issues at hand that stands unprejudiced and equidistant to the different views. The mediator must win the trust of the vast majority of society and be given the resources and authority to realise the reconciliation.

As our Republic embarks upon her second century in 2023, **The Better Justice Association** has resolved to work towards a civil constitution that will ensure sustainable independence of the judiciary, the country's fundamental problems, and especially bring about deep-rooted solutions to governance and economic issues.

Our association, to this end, alone if need be or with national and international partnerships, at events with national and international participation, will raise awareness of the civil constitution, collate civil society's views, and create a fully transparent library that will be fully accessible to everybody at all times. Within this framework:

- a) A Civil Constitution Commission will be created to work within our association under the supervision of the Board of Directors. The Commission will consist of a board of executives and a board of advisors, the latter of which

will discuss our country's fundamental matters with common sense, develop proposals, and publicise these, ultimately making suggestions to the executive board.

The Commission will accept members from the business sector, civil society organisations (CSOs), academia, media, and other relevant sectors, regardless of their membership of the Association. All those interested may apply to join.

- b) The **Economy and Law Gatherings** conducted with the Dünya and Ekonomi media outlets shelved prior to the elections will be resumed with a focus on the country's fundamental matters and questions of a civil constitution.
- c) In addition, international conferences, workshops, educational events, and others will be organised.
- d) Our Association will organise events and other miscellaneous partnerships with interested universities, CSOs, national and international think-tanks, experts, and thought leaders.
- e) Our Association will provide intellectual support to initiatives aiming to develop proposals and solutions on the fundamental structural challenges faced by our country.

We respectfully submit to the public.

**Board of Directors of the Better Justice Association**



## **Informational Background Brief**

### **On Creating a Civil Constitution Türkiye's Governance Experience in her First Century**

**1<sup>st</sup> September 2023**

Below is a brief note that the reader may still find long, despite this rendition of its content being prepared with brevity in mind. It aims to assist the constitutional debate with its telling of the general history of its development. It provides summarised information about the historical development of our country's judiciary, sustainability in governance, political structure and sensibilities as well as the fundamental challenges faced by our Republic at the end of her First century that remain as of yet unsolved.

#### **Türkiye's Struggle for an Independent Judiciary**

The judiciary is the fundamental guarantor of sustainable governance.

The judiciary is the most critical state apparatus. It is so because by holding the government to account against the law they ensure sustainable and predictable state governance, even though changes of government. Perhaps even more importantly, the judiciary strengthens or weakens societal cohesion, cooperation, and solidarity to the degree to which it realises justice in relation to society and state governance. Justice, as a public service, takes priority over healthcare and education.

An effective, independent judiciary removes the need for tutelage in governance in developing countries. An effective and independent judiciary precludes tutelage, and vice versa, tutelage does not allow for efficient and independent judiciaries.

Following the Second World War Türkiye adopted her 1961 Constitution, created the judicial institutions of the Constitutional Court and the Judicial Councils that developed in the wake of the conflict. But today, due to the regressive steps taken to diminish judges' assurances, we find ourselves faced with a situation reminiscent of the pre-1960s order; these in turn led to further regression of democracy to the many-partied majoritarian fusion of powers, and to hybrid, or in other terms, electoral autocracy.

Prior to 1960 the Minister of Justice appointed judges based on recommendations from a 9-person committee composed of the Chief Prosecutor, 4 members of the Court of Cassation, the chief administrators of the Ministry of Justice's Criminal, Legal, and Personnel Affairs departments, and the head of the judicial inspections committee. Prior to 1950 members of the Democrat Party argued that the judiciary was at the behest of the incumbent Republican People's Party (CHP), while prior to 1960 members of the CHP made the same accusations towards the sitting government. The 1961 Constitution created the Supreme Council of Judges (YHK) comprised of 12 members elected by judges, and 6 by the legislature.

And so, with the 1961 Constitution the judiciary gained its independence from the legislature and executive. Nonetheless, after 1971 during the period of co-opting during which the Court of Cassation picked the members of the supreme councils for Judges and Prosecutors, dependencies upon members of the Court of Cassation developed. Part of the judiciary became an unaccountable clique. The judiciary was then reverted to its state prior to 1960, bound to the Minister of Justice, effectively his undersecretary.

In 1971 the selection of the members of the YHK by the Court of Cassation was accepted and the Supreme Prosecutors' Council (YSK) was founded. These two judicial organisations were enjoined in 1982 under the name the Judges and Prosecutors' Supreme Council (HSYK). The HSYK became what was virtually an

extension of the Ministry of Justice as a result of the changes made in 2010 and 2017, and it was renamed the Judges' and Prosecutors Council (HSK). It was decided that 6 of its 13 members would be directly appointed by the government, while 7 would be chosen by the Grand National Assembly (TBMM) dominated by the sitting government. The HSK is today unable to take any action without the participation of the Minister of Justice who is by law a natural member and the president of the council. The admission of judges and prosecutors into the profession, and other judicial services are administrated by 150 senior officials employed by the Ministry of Justice.

The judiciary lost its struggle for independence against politicians in its entirety following 1980 and Türkiye's transition to a liberal economy, deprived of public support and constitutional protections, unable to provide suitable and quality judicial services in the face of a quickly growing economy and together with the consequences of its resistance to change.

In summary, where it should have been holding ruling politicians and the civil servants under them accountable, the judiciary ended up subject and answering to governing politicians. Politicians, never concerned with creating an independent judiciary, transformed the judiciary into a means for political ends.

The judiciary is the most important issue to remain unsolved from the Republic's First century. Despite the depth of her people's culture, desire for justice, and accumulation of knowledge and experience since 1950, the Republic of Türkiye has been unable to realise a fully independent judiciary and the unconditional rule of law, especially where concerned with politicians and public officials.

### **Unaccountable, Majoritarian Politics**

While the Republic worked to democratise, politics turned into oligarchy; the political and ruling class became an untouchable clique both in name and fact. Oligarchic politics became a profession not for serving the public, but for personal status, benefit, and acquisition of immunity. Ambitions of using the states enormous resources

according to one's whims birthed an unaccountable and populist approach to government.

Türkiye took an important step in 1950 when the first change of government by election took place. But the political system that emerged with the introduction of the multi-party political system was majoritarian from the outset. This system, which restricted representation of the electorally unsuccessful and in which the winner took all, eventually led to the 1960 fracture.

The 1961 Constitution, developing the separation of powers, created a more pluralist democracy. However, unsustainable coalitions between 1972 and 1980 led to further fractures. The 1982 Constitution created a tutelage system where any party with 30-35 percent of the vote would secure an artificial majority in parliament but shared the powers of the executive with the Presidency.

The opportunity for political parties to obtain an artificial majority in parliament without a majority of votes revitalised the majoritarian approach that dominated prior to 1960. The majoritarian approach, following the 2017 Constitutional amendments, came to envelop the state and its institutions like a poisonous vine. A system was created where the leader of the electorally victorious political party would control all the state's powers and institutions. An exemplary piece of evidence for this is the No.3 Presidential Decree which provides for the automatic dismissal of all public officials appointed by the President upon the election of his successor.

The appointment of its members along majoritarian lines, paralleling the parliament's artificial majority rendered the state institutions performing critical functions for the state such as the judiciary, the media and similar ones into little more than extensions of the ruling government. In this climate those who thought differently were entirely forced out from government; the institutions became weakened and ceased to function as main pillars and guarantors of sustainable governance.

First and foremost, the presidential system of governance where the winner takes all to the exclusion of those who voted otherwise is intrinsically majoritarian. In fact, any political leader that emerges victorious from both the elections for the executive

and legislature will have secured a double majority. The public is governed by a party representing 30-35 percent of the vote, in possession of both the executive and legislative branches, and absolute control of the state and its organs.

The HSK at the heart of the judiciary, is another example of where the majoritarian approach has taken root, despite it supposedly being a fully independent and impartial body. The HSK should be independent of the executive, legislature, and other pressure groups, an institution that fairly represents all parts of society. However, 6 of its 13 members are appointed directly by the president, and 7 by the legislature in which the president's party enjoys a majority.

Another example is the Supreme Board of Radio and Television (RTÜK) whose members are chosen according to the proportion of political parties' seats in the parliament. The public's right to receive news, freedom of thought and expression necessitate RTÜK's independence and therefore impartiality. And yet from RTÜK's perspective, that is only so on paper. RTÜK is politicised in favour of the sitting government because of the majoritarian approach by which its members are determined according to the distribution of parliamentary seats between political parties. According to a broad swath of the opposition, RTÜK is imposing the sitting government's values, restricting the opposition's voice and the public's freedom of expression.

Whether or not critical institutions like the HSK and RTÜK win the confidence of the overwhelming majority of the public depends on them fairly representing all parts of society and being impartial, accountable, and independent in law or fact. Their capture by the majority and loss of the opposing actors' harms sustainable governance. That is because institutions in the majority's chokehold exclude those who think differently, depriving themselves of the benefits of diversity of thought and leaving them goalless and acting along the lines their most senior leader draws for them. In such an instance sustainable governance will disappear even without a change of government.

As a matter of fact, despite the persistence of the government in office since 2018, from 2021 onwards the central bank under Şahap Kavcıoğlu derogated from its duty

to protect price stability, taking policy steps along the lines of the President's suggestions it catapulted inflation from around %20 to around %80, halving the liras value and the public's purchasing power.

### **Sustaining the Government instead of Sustainable Government**

Sustainable governance is dependent on many factors, among others mainly the separation of powers and system of checks and balances, the fair representation of the public in government, the balancing of the executive against other state organs and the judiciary, the independence and efficacy of the judiciary, its ability to hold the executive to account, and a strong bureaucracy against politicians.

And yet unaccountable majoritarian politics reduces and simplifies the concept of "sustainable governance", presenting instead it as "sustaining the government". This understanding also omits the role of an effective independent judiciary as the guarantor of sustainable governance. The emergence of this understanding is a result of majoritarian politicians' failure to develop a culture of working with different views and creating sustainable coalitions, which in turn plays a large role in the failure to prevent corruption.

Türkiye, with this understanding, which fails to grasp the wealth of diversity in politics and the unavailability of coalitions, has derogated greatly from fair and comprehensive representation, making grave mistakes in the design of the system, all in the name of avoiding coalitions and forming single-party governments. The Presidential Government System, prepared hastily and without due care instead of deliberation on the country's dynamics and solutions suitable to them, has dragged Türkiye into an entirely new kind of unsustainability.

The first mistake is the artificial majority in parliament given to a party representing 35 percent of the public to enable the forming of supposedly sustainable populist governments. The solution to this of redistributing some of the governments' powers to the presidency, appointed in all but name, and making them subject to it, is the

second mistake. Handing executive powers to the presidency that was supposed to be a symbolic head of state was another mistake.

As a result of these mistakes the presidency, an office secured by popular vote since 2010, evolved in 2017 into a popularly elected singular person in sole charge of the executive. Brought onto the agenda under a state of emergency and without sufficient debate, pushed through under the same conditions, this purportedly Turkish Style of Presidency put the president in complete control of the state's powers; and with that the mechanisms of checks and balances disappeared. The president's power over the legislature and judiciary meant that the judicial balance and possibilities of limitations by law also disappeared. With the capture of the three branches of government by the Presidency Türkiye has turned into an electoral autocracy, turning the clock back to before 1960.

In conclusion, the concept of sustainable government has been reduced to sustaining the sitting government, enabling the clawing to one's own party of the state's executive powers and resources, and a single political leader to drag the country in whichever direction he wishes, to that person's ability to fulfil his role between two elections.

At present there is no foreseeable constitutional path or power that can act as a check on a president that wields the state's great power without being held to account by the legislature or judiciary. Even if the president commits a criminal offence, its investigation and prosecution can only be carried out after passing the unreasonably high hurdles of securing a parliamentary absolute majority to propose its investigation, and a two-thirds qualified majority to decide to carry out the investigation. These circumstances conflict with the Constitutional principles of democratic governance and the rule of law, and they are also serious problems for sustainable governance. No less, it is well known by the public that rational decisions aligned with international orthodoxy that could be taken to address economic challenges aren't being taken because the president forbids it.

## **The Bureaucracy's Deprivation of its Ability to Ensure Sustainability**

Another chief aspect of sustainable governance; the bureaucracy ensures the permanency, stability, and foreseeability of governance. The bureaucracy provides for continuity of government between incumbents and the functioning of institutions. By refusing to carry out unlawful commands from their superiors, they possess the capacity to force them to act lawfully.

Bureaucrats cannot be unlawfully commanded. In turn, bureaucrats cannot carry out their superiors' unlawful commands. Bureaucrats are required to refuse to carry out their superiors' unlawful commands, and upon their insistence, they are required to request the command in writing. A bureaucrat cannot carry out a clearly unlawful command; they can only do so if the legality of the order is uncertain (Constitution Art. 137/I, Law No.657 11). This arrangement enables bureaucrats to force their superiors to act lawfully. To carry out a criminal command is to commit a criminal offence, and the superior who gives such a command is criminally liable.

Despite this fact, the prosecution and trial of bureaucrats for crimes committed in the course of their duties is conditional on the permission of their superiors. Bureaucrats' administrative superiors are the ones who decide whether or not the subordinate can be put before a judge. Consequently, these superiors are able to protect their subordinates from prosecution for criminal orders carried out and are able to falsely accuse and then have tried their innocent subordinates. As can be seen, especially when their other powers are considered, these superiors can commit criminal offences, and then prevent their investigation or prosecution by the judiciary. The Pamukova train disaster which claimed more than 40 lives and wasted millions of dollars of taxpayers' money is the result of such a situation.

As a result, the politicians that administrate the bureaucracy cannot be forced to act within the bounds of the law. The bureaucracy can oppose unlawful commands only with great difficulty, as the careers of its constituents could be ended at any moment by their political administrators. Indeed, quite the opposite is true considering how suitable their and their superiors' positions are for a joint foray into criminality.



## **Fundamental Constitutional Problems:**

In light of the above, the points below are the minimum that must be solved by any new civil constitution if it is to secure sustainable independence of the judiciary:

- i) The fair representation of the public in the legislature inclusive of all political stream and its participation in government
- ii) The provision of quality judicial services by a transparent, accountable judiciary, fully independent in its functions, constitution, and appearance
- iii) The balancing of state organs internally and between themselves, the establishment and employment of effective mechanisms of checks and balances
- iv) The strengthening of the independence, impartiality, and accountability of state institutions, ensuring they secure the public's confidence
- v) The realisation of equality before the law and the rule of law – especially with relation to politicians' and public officials' unconditional accountability.

It is doubtless that a new civil constitution that will influence at least Türkiye's next century can only be possible through the active participation of all parts of society and the societal debate of reciprocal proposals.

**Respectfully,  
The Better Justice Association**

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