Chapter XI Development of Constitutional Democracy in Turkey: Constituent Power and Constitutional Identity in the Democratizing Process

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Introduction

Turkey has a history of constitutional polity that is over a century old, and the democratizing process has been accelerated especially in the last decade during the EU accession process. Nonetheless, if modern constitutionalism refers to the restriction of the arbitrary use of state power, the rule of law, and the protection of fundamental rights, practices of Turkish constitutional institutions appear to diverge from the spirit of constitutionalism. For example, there have been efforts to ban political parties, the latest case of which was, although unsuccessful, against the ruling Justice and Development Party (JDP, 2001–). Freedom of speech is also not secured enough if the topics are related to the realm of constitutional identity.

Indeed, constitutionalism imposes restrictions on democratic majority in order to prevent it from violating fundamental rights and freedom. For this purpose, institutional arrangements such as the separation of powers, checks and balances among the separated powers, and judicial reviews were devised and became standard forms of contemporary constitutional democracy.[1] Even in the case of Turkey, the abovementioned restrictive measures have been implemented through the constitutional institutions and justified as legitimate initiatives for protecting the secularist state polity and identity from the "threat" of the JDP, which dominates the cabinet, the Presidency, and the legislature.

The JDP is a successor of the defunct Virtue Party (VP, 1997–2001), which, like its predecessor the Welfare Party (WP, 1984–98), was banned on the charge of attempting to establish an Islamic state. Even though the predecessors were outlawed as "the enemy of the state," the JDP achieved landslide victories in the 2002 and 2007 general elections by obtaining 34.3 percent and 46.6 percent votes, respectively. This was not necessarily because Islamic revival gained momentum, but

[1] Judicial review has recently become popular among new democracies according to Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003).

rather because the JDP publicly declared its firm resolve to commit itself to democratization and political liberalization as well as to make Turkey a prosperous and prominent international actor bridging the West and the East. The JDP governments established good relations with the western counterparts, and their democratizing reforms received high marks in the evaluation by the EU. The JDP identifies itself as a conservative democratic party and tries to embrace the center-right, the religious conservative, and even the center-left by defending individual rights and freedom. The prosecution of the JDP as a threat to the state was thus shocking though not entirely surprising since there has been continuing tension and rivalry between the state agencies acting as the self-appointed guardians of secularist ideology and the elected politicians with Islamic views.

The conflict between the secularists and Islamists in Turkey has been often interpreted in terms of the rise of the "Islamic threat" in a democratic political system; thus, the paradox of democratization in Muslim societies where democratization associates with itself the rise of Islamism and can result in the "hijacking" of democracy. While this view reflects a valid fear of secularists, this framework of understanding also leads to another dilemma: as long as a pro-Islamic party has the capacity to form a government, secularist state agencies would not hesitate to exercise restrictive measures against pro-Islamic forces. Unless secularists recognize pro-Islamic forces as an opponent in the democracy on equal terms, the Turkish democracy would never escape the cyclical crisis and disturbance since it seems unlikely that the JDP would dramatically lose its power in the near future. Here is the dilemma and impasse of democratization in Turkey.

In this political situation, the mechanism of constitutional democracy functions differently in Turkey. Checks and balances and judicial reviews seem to be tools used by secularists for waging an ideological war against pro-Islamic party holding the government and parliamentary majority, rather than supervising the governmental activities in light of the fundamental norms of constitutional democracy.

Here the paradox of democratization in Muslim societies intersects the more general paradox of a constitutional democracy. In Turkey, constitutions have been framed and guarded by secularists, and the democratic majority in parliament has been rejected to amend the constitutional identity even under the due process of democracy. This is a conflict between the constitutional framers and the representatives of the popular sovereignty. The paradox of constitutional democracy has been discussed in the established democracies, too. However, in the case of Turkey, circumstances such as the democratization process and the rise of Islamism add other dynamic aspect to the paradox.

In this chapter, I would like to explore the conflict between secularists and Islamists from a broader viewpoint of the paradox of a constitutional democracy in a democratizing state rather than treating it as a case unique to Turkey. Against this background, I would like to show that the dilemma on democratization faced by

Turkey is one of the fundamental problems any society may face when it attempts to democratize in an unrevolutionary way without giving up the ideal of a plural society. In the following section, I would first like to examine some theoretical arguments on the paradox of constitutional democracy, and then try to explore how it is unfolding in the specific context of the Turkish democratizing process.[2]

1. Paradox of Constitutional Democracy

1.1. Plurality of the People from the Spatial and Temporal Perspectives

Constitutionalism is generally regarded as one of the important foundations of modern democracy. Nonetheless, its relation to democracy is inherently paradoxical since it imposes restrictions on the legislature and the executive, both of which base their authority on popular sovereignty. Ideally speaking, constituent power is in the hands of the people in general, and constitutional framers are entrusted by the people to execute their duty. The sovereignty of the people is exercised by a plebiscite on the constitutional bill. In reality, however, it is of course impossible to reach a total agreement on the constitution. A society is never a monolith in terms of identity and ideology. A dominant group would cease the state power and try to permeate its identity through state institutions providing education or sanction. As Loughlin and Walker put it in a slightly ironical tone, "[c]onstitutions can undoubtedly be both initiated and sustained as hegemonic tools—as ways of representing particular interests as the public interest, national authority as universal authority, and imperial power as the only conceivable power."[3] Nevertheless, it is unrealistic to expect that all the sociopolitical groups with different ideologies will pledge allegiance to the dominant ideology.

Thus, one dimension of the paradox is that constitutional identity reflects only the identity and norms of the dominant force and fails to reflect the voices of minorities. The constitutional identity would remain ambiguous in its relation with plural identities and ideologies that exist in society.

At another dimension, since a constitution pertains to the basic structure of the state and is the most fundamental device of modern democracy, it is naturally expected to endure for a long period of time. It is often protected with stricter conditions from amendment as compared to an ordinary law. Further, there are some special clauses that disallow any alteration. This means that the people in the later

[2] In order to concentrate on the problem relating to secularism, I will not refer to the problem of Turkish nationalism, which is another important issue in terms of constitutional democracy in this article.

[3] Martin Loughlin and Neil Walker, "Introduction," in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker (Oxford: Oxford University Press, 2007), 4.

generations are bound by constitutional identity and norms that they themselves neither approved nor can amend through the ordinary process of parliamentary democracy. This is the so called "dead hand" problem.[4] Therefore, the paradoxical relation between the sovereign people and the constitutional framers is not only contemporaneous and temporal, i.e., specific to the period in which the constitution was framed, but also durable beyond generations. The constitutional identities and norms can appear as illegitimate constraints to the later generations, who are usually not bound by the other legal contracts that their ancestors entered into.

From this perspective, the constitutional framers are in a privileged position vis-à-vis both the people living in the same period and those in the future, who are sovereign de jure. In Maistre's words, the people "are a sovereign that cannot exercise sovereignty."[5] Thus, "the people" declared in the modern constitution is doubly fictional. On the one hand, the term "the people" can be fictional in the contemporaneous context by disregarding the diversity in a society. On the other hand, it can be fictional by imposing a fixed constitutional identity on the later generations even when new identities and interpretations are taking over the dominant position in reality. That "the people" referred to in a constitution is fictional means it is disregarding the diversity and historicity of a real constitutional identity. Even if we recognize the reality that it is impossible to weave all the different identities and ideologies into the integrated constitutional identity, and even if we must satisfy ourselves with the realistic recognition that "the people" are represented by the political majority in a democracy, we cannot ignore but rather have to try to investigate the way to reflect in the constitution the fact that people are in transformation in accordance with the development in society and resulting alteration of values. This would be especially necessary in the contemporary world, which is highly globalized.[6]

1.2. Constituent Power and Constituted Power

The temporal dimension of the paradox can be approached from another perspective. It can be reconstituted as the relationship between constituent power and the constituted power, borrowing the concepts devised by Siéyès. The former is absolutely unlimited in scope, and the latter is limited by the terms of the constitution.[7] There is a superior-inferior relationship between the two. A democratically elected

[4] See note 12 below.

[5] Quoted by Loughlin and Walker in "Introduction," 1.

[6] For one such recent effort, see Michel Rosenfeld, "Modern Constitutionalism as Interplay between Identity and Diversity," in *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives*, ed. Michel Rosenfeld (Durham and London: Duke University Press, 1994), 3–35.

government and even a democratic parliament cannot assume the former since they are bodies that are constituted by the constituent power and are to be restricted by the system that involves the separation of powers and norms such as basic rights and freedoms. This distinction, therefore, provides a very important foundation for limiting the arbitrariness of the constituted power even though it is a representative body of the popular sovereignty.

This distinction is also useful for understanding why procedural processes are required for a constitutional amendment and ordinary lawmaking. Amending a constitution even partially is an extraordinary act of intervening in the functioning of constituent power. In France, for instance, the Revision Assembly is convened and in the United States, the convocation of a convention for proposing amendments is prescribed as "the distinct and separate institutionalization of normal legislative power and the extraordinary constituent power."[8] In most of the countries where constitutional amendments are performed in a parliament, more votes are required for legislating an amendment than for normal lawmaking.

Here arises a question as to whether it is possible to exercise constituent power once a constitution—the fruit of exercising such power—has been established. If we apply the distinction between constituent power and constituted power, a constitution has to be regarded as an untouchable essence, which requires "substantive limits of constitutional reform."[9] Theoretically speaking, once constituent power is exercised and a constitution is established, another chance to exercise of the power may only occur at a time of a "revolution," or "the earthquake generated by world war," or "the proletarian revolution."[10] In reality, however, many constitutional democracies allow constitutional amendments, and this action seems to be placed somewhere between the realm of omnipotent constituent power and that of normal lawmaking through the use of constituted power. Preuss explains this as follows: "the constituent power does not fully vanish through the very act of constitution making. Nonetheless, it is domesticated; it loses its unfathomable and formless character and acquires a quasi-constituted status...What is important for the consideration of the relation between constitution and constituent power is the observation that a total and permanent exclusion of the unorganized constituent power of the people from the realm of politics tends to produce a formalism and rigidity of the constituted powers. This threatens to devalue constitutional democracy altogether."[11]

[7] Paolo Carrozza, "Constitutionalism's Post-Modern Opening," in *The Paradox of Constitutionalism* (see note 3), 174.

[8] Ulrich K. Preuss, "Constitutional Powermaking of the New Polity: Some Deliberations on the Relations between Constituent Power and the Constitution," in *Constitutionalism, Identity, Difference, and Legitimacy* (see note 6), 158.

[9] Carrozza, "Constitutionalism's Post-Modern Opening," 175.

[10] Ibid., 174.

[11] Preuss, "Constitutional Powermaking of the New Polity," 159–60.

Among constitutionalist scholars of the United States, there emerged renewed interests in this issue from the standpoint that the rule of the "dead-hand"[12] should be overcome and constituent power must be restored in the hands of the contemporary people. Ackerman is one of the prominent scholars in this effort. He makes a distinction between normal politics and constitutional politics. The former involves ordinary lawmaking process where people pursue the maximization of their private interests; on the other hand, the latter is qualitatively different from the former, wherein deliberation occurs with the active participation of all the political actors of the democracy from the viewpoint of the public interests of the nation. Constitutional politics is quite distinguished from normal politics due to the long duration of deliberation on amendment, which could last several years depending on the requirement of the nature of the argument and the test of elections.[13] According to Ackerman's argument, constituent power is exercised in constitutional politics, in which many groups with different identities and norms and constitutional institutions participate while normal politics is the arena for constituted power. Here Ackerman tried to depict the American constitutional history as "the ongoing practice of popular sovereignty" in the understanding that "we cannot sustain our constitutional tradition without unconventional innovation and democratic renewal; we cannot sustain our tradition without leaving the large space to "the [p]eople," and their ongoing effort to take control of their government."[14] Through these dialogical transactions in a wider public sphere, a constitution can overcome its rigidity and reflect the dynamism of the people as the transforming constitutional identity.

1.3. Constitutional Identity as Both Binding and Reflecting

In an age when diversity comes to be recognized as a fact that we must live and deal with by devising our philosophy and institutional arrangements, the static idea of constitutional identity appears neither realistic nor useful for the conception and analysis of political dynamism. It is especially true of the states undergoing the democratizing process where, as I will discuss below, constituent power and constitutional identity is one of the foci of power struggle.

[12] Sakaguchi Shōjirō 阪口正二郎, *Rikken shugi to minshu shugi* 立憲主義と民主主義 (Constitutionalism and democracy) (Tokyo: Nihon hyōronsha 日本評論社, 2001). Sakaguchi explored in detail about renewed arguments on the "dead hand" problem and increasing trend of anticonstitutionalism that gives priority to the people's sovereignty over fidelity to the constitution in the United States.

[13] Ibid., 83–87.

[14] Ibid., 98. Sakaguchi quotes these phrases from Bruce Ackerman and Neal Katyal, "Our Unconventional Founding," *University of Chicago Law Review* 62, no. 2 (1995): 475–573.

In established democracies, a minimal consensus, if not unanimity, has been forged for the protection of fundamental rights and freedom. Based on this fact, Rosenfeld insists that "if there is a consensus concerning certain fundamental constitutional constraints and a shared commitment to democracy, then mere legislative setbacks or even the subjection to certain unfair, yet constitutional laws should not pose a serious challenge to the legitimacy of the prevailing rule of law regime" since "it seems highly implausible that in any pluralist constitutional democracy there would be a unanimity on a sufficient core of constitutional fundamentals to directly or indirectly legitimate the rule of law all the way down."[15] In the United States, for instance, there are serious disputes on such issues as abortion and affirmative action. In Canada and Spain, there are serious disputes and even conflicts about how ethnic difference within the nation should be politically dealt with.[16] Nonetheless, in established democracies, these problems are open to public discussion, thus unfolding in the democratic discursive process in general.

However, in most of the countries that are still undergoing democratization, constitutional identity is the major focus of disputes among conflicting forces. Furthermore, in order for a polity to be consolidated and be functional, the existence of a collective identity is necessary. In this sense, a constitution has a function to constitute not only the structure of power and authority but also the people in a certain way.[17] Yet, the constitution has to remain flexible so as to accommodate the different identities among the people and reflect the transforming balance between the long-standing dominant values and newly rising ones in order to retain its validity and legitimacy in the eyes of the existing people. Denying the right to exercise constituent power once a constitution has been established leaves only one option, a revolution, for those who do not agree with the constitutional identity and polity. In order to identify a more moderate and gradual way for democratization, a gradual and repeated exercise of constituent power would be required even if there are objections that such a power cannot be regarded as an omnipotent constituent power. Further, in this gradual process, dialectic communications are exchanged, which would eventually lead to a formation of a more democratic and difference-sensitive constitution and identity.

From this perspective, it appears quite useful to apply the dynamic understanding of constituent power and constitutional identity at least in the case of democratizing states. As Jacobson elaborates, constitutional identity "emerges dialogically and represents a mix of political aspirations and commitments that is expressive of a nation's past, as well as the determination of those within the soci-

[15] Michel Rosenfeld, "The Rule of Law and the Legitimacy of Constitutional Democracy," *Southern California Law Review* 74 (2001): 1315.
[16] Ibid., 1315–16.
[17] Preuss, "Constitutional Powermaking of the New Polity," 148.

ety who seek, in some ways, to transcend that past. It is changeable but resistant to its own destruction, and it may manifest itself differently in different settings."[18] In a society where consensus on a constitutional identity has not been forged, the mere introduction of constitutional polity does not ensure the stable functioning of democracy. A constitutional identity imposed by the dominant group is bound to be challenged by other identities, and as democratization advances moderately, a kind of "constitutional politics" can emerge anywhere in the constitutional structures since they are originally designed as an instrument to consolidate and embody constitutional identity and state power, along with a discursive realm of democracy extending from the parliament to the public sphere and civil society.

2. Limit of Constitutional Democracy in Turkey

2.1. Democratic Legitimacy of the Exercised Constituent Power

After the declaration of the republican state system in 1923, Turkey has thrice witnessed constitutional enactment, in 1924, 1961, and 1982. However, none of them is a fruit of the democratic process. The 1961 and 1982 constitutions were made under the rule of the junta. In comparison to these, the 1924 constitution is relatively democratic since it was stipulated by a parliament that was convened after an election. However, establishing a democratic polity was not the priority of secularist leaders, who were in haste for consolidating their dominance. The 1923 election, which was conducted for electing members of a parliament which was at the same time to function as the constituent assembly, turned out to be exclusive to the dominant group. As a result, the constituent assembly was under one-party rule.

In the process of framing the 1961 and 1982 constitutions, de facto constituent power was exercised by the military governments. The 1961 Constituent Assembly was formed comprising the military National Unity Committee and the civilian Representative Assembly, whose members consisted of the ex-parliamentary members other than the outlawed Democrat Party (DP), nominees of political parties, and representatives of major civil society organizations as well as civilians selected by the National Unity Committee.[19] The 1982 Constituent Assembly was composed of the military Council of National Security and the civilian Consultative Assembly consisting of those appointed by the Council of National Security after all.[20]

[18] Gary Jeffrey Jacobson, "Constitutional Identity," *The Review of Politics* 68 (2006): 363.
[19] Ergun Özbudun, *Türk Anayasa Hukuku* (Turkish constitutional law) (Ankara: Yetkin Basımevi, 1990), 15–16, 36.
[20] Ibid., 34.

Plebiscite was an instrument of achieving the democratic legitimacy of a new constitution completed under the military rule. The process followed while framing the 1961 constitution appears to have been more democratic than that of the 1982 constitution, since it was decided that if the draft was rejected in the plebiscite then the civilian parliament elected by the democratic election would restart the process of framing the constitution. In the case of the 1982 constitution, however, there was no provision for such an event. Özbudun assumes that this uncertainty in the case of the rejection of the 1982 draft could have led the electorate to think about the possibility that the military regime would last until the proclamation of a new constitution, and this assumption might result in an overwhelming majority voting for "yes."[21] In the process of conducting a plebiscite, free discussion on the draft was not allowed for the 1982 draft, whereas in the case of the 1961 plebiscite, participation of the politicians and civil society representatives gave the process more democratic appearance than the 1982 plebiscite. Although both constitutions were eventually approved in the plebiscite, and the political process under each constitution rapidly became more plural and competitive in terms of election system and party politics, one should remember the fact that the constituent power exercised in the process of framing both constitutions cannot be regarded as being exercised by the people and also that the democratic legitimacy is quite ambiguous.

2.2. Constitutional Identity and Constitutional Structure

With regard to the political regime, a plural parliamentary system was introduced in 1946. Since then, there have been two coups, in 1960 and 1980, both of which resulted in the establishment of military governments and the promulgation of new constitutions under their rule. This is to say, there have been seemingly critical ruptures in the political setup that raised serious doubts regarding the survival of the polity. Nonetheless, constitutional identity in each period was mostly consistent.

The 1924 constitution declared a republican regime, and both amending and proposing amendments to this provision was prohibited by the constitution. However, with regard to the relation between religion and politics, the original constitution could not reflect the will of the leaders of the new state, who were strongly espoused western and secular ideas. Immediately after the period characterized by tremendous efforts to eviscerate the sultanate regime by resisting to strong oppositions, eventually leading to a regime change, the 1924 constitution prescribed popular sovereignty but still could not declare a secular state. Secularization of jurispru-

[21] Ibid., 37. The 1982 plebiscite turned out to be 91.4 percent in favor of the draft as compared to 61.5 percent in the 1961 plebiscite. The participating ratios were 81.1 percent in 1961 and 91.3 percent in 1982.

dence and education were to be completed afterward and to be reflected accordingly in the constitution, for example, by abolishing the state religion clause. These reforms could be carried out only under the one-party rule of the Republican People's Party (RPP). It was only in 1937 that the constitution could declare the Turkish state as secular (*laik*). Transition to a plural democracy had to be deferred until the fundamental tenets of the new regime were incorporated in the constitution, the associated institutional structuring was completed, and major oppositions to the new regime were swept away. In this sense, the true identity of the 1924 constitution was realized in 1937, which was a republican polity with secular nation and state institutions, sustaining its unity by way of Turkish nationalism.

The 1961 constitution was drawn up under the rule of the military government. The aim of the coup was to oust the DP from the political scene, which replaced the RPP in the 1950 election and had been intensifying arbitrary rule by utilizing its overwhelming majority in the parliament. DP's appeal to the religious sentiments among conservative electorates and its sabotage against the mobilizing activities of the RPP drove the military to a coercive resort. The military had held the self-perception of being the follower of the secular-minded charismatic leaders of the early days of the Republic, whose will was inherited by the RPP.

In the 1960 coup, the military criticized the tyranny of the majoritarian democracy and tried to legitimize the intervention by proclaiming a new constitution ensuring extensive basic rights and liberty without reservation. The freedom of civil society was also strengthened in order to promote the formation of civil society organizations. For this reason, it is often said that this was the most liberal constitution in Turkish constitutional history. However, it should be noted that the constitutional framers also intended to curtail the conservative political forces that were dominant in the society in general. Those who threaten the constitutional identity and polity must be deterred in one way or the other, and the necessary devices were to be arranged in the subsequent amendments.

As a measure to protect constitutional identity, military interventions were repeated and became a familiar element of "Turkish democracy." From the military's perspective, democracy is permissible as far as the secularist constitutional identity is upheld. When we look at the 1971 amendment made under the military pressure and the 1982 constitution as the products of another military regime, it becomes quite clear that the military interventions were consistent in protecting the 1924 constitutional identity.

The 1971 amendments were executed under the strong pressure by the military, which compelled the government to either accept the amendments or surrender the government to the military.[22] The social turmoil and parliamentary impo-

[22] Bülent Tanör, *Osmanlı-Türk Anayasa Gelişmeleri (1789–1980)* (The Ottoman Turkish constitutional development) (Istanbul: Yapı Kredi Yayınları, 1997), 413.

tence in dealing with the problem drove the military to give this warning. Among others, the amendment of Article 11 is symbolic in terms of the military's intention to protect the constitutional identity rather than to simply handle social disorder. The original article forbade infringements "upon the essence of any right or liberty not even when it is applied for the purpose of upholding public interest, morals and order, social justice as well as national security."[23] However, in 1971, the article was amended in a way that the entire clause was dominated by the tone of reservation:

> Basic rights and freedoms shall only be restricted by law in conformity with the letter and spirit of the Constitution with a view to safeguarding the integrity of the State with its territory and people, the Republic, national security, public order, or for the special reasons designated in the other articles of the Constitution.
> The law shall not infringe upon the essence of rights and liberties.
> None of the rights and liberties embodied in the Constitution can be exercised with the intention of destroying human rights and liberties, or the indivisible integrity of the Turkish State with its territory and people, the Republic, the nature of which is prescribed in the Constitution, through the recourse to differences of language, race, class, religion or sect.

Along with Article 11, the basic rights and freedoms in such areas as freedoms of the press, communication media, and associational life were also to be restricted under the banner of protecting the constitutional identity and polity.[24]

As Özbudun points out, these restrictive amendments were a precursor to the 1982 constitution established under another military regime after the 1980 coup.[25] Before the military takeover, the Turkish society had been in severe disorder. Against the background of the economic collapse and radicalization of religio-ethnic and ideological confrontations, terror prevailed in society. Nevertheless, the legislature was fragmented as political parties strengthened their confrontational attitude toward each other, and failed to forge a minimum stability and cooperation necessary for implementing effective policies for restoring economic stability and social order. The military government declared its determination in protecting the undivided integrity of the country and restoring social order.[26]

In the 1982 constitution, restrictions were almost invariably added to the claus-

[23] For the English translation of the 1961 constitution, the following website was consulted: http://www.anayasa.gen.tr/1961constitution-text.pdf.
[24] Tanör, *Osmanlı-Türk Anayasa Gelişmeleri*, 417.
[25] Özbudun, *Türk Anayasa Hukuku*, 27.
[26] Ibid., 31–32.

es that stipulated basic rights and freedoms. In addition, provisions prohibiting amendments were extended further as compared to the previous constitutions. As mentioned earlier, both the 1924 and 1961 constitutions prohibited the amendment of and even proposing amendments to Article 1, which stipulated a republican polity. In the 1982 constitution, Articles 2 and 3 were added on the prohibitive list. Article 2 read:

> The Republic of Turkey is a democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble.[27]

In Article 3, the indivisible integrity of the territory and nation is declared. The protected articles would be regarded as reflecting the very essence of the Turkish constitutional identity. In fact, similar provisions were also present in the same articles in the 1961 constitution, although they were not included in the forbidden list. This fact reveals the intensified fear of the constitutional framers about the consolidation of the constitutional identity and polity.

Although the intention to protect the integrity of the country appears to reflect the increasing significance of the principle of secularism against the background of intensified conflicts formulated over the left-right and ethnic divides at the end of the 1970s, it does not mean secularism is a less important element of the constitutional identity. The secularism principle appeared in articles that prohibit the abuse of fundamental rights and freedoms (Article 14) and which regulate the political party (Article 68) as a set with democracy and republican polity as an uncompromised foundation of the constitutional identity and polity. It would be adequate to consider that the secularism principle is implicit in phrases such as "basic tenets of the republic."

Along with these restrictive provisions, institutional arrangements also reflect the aim to counterbalance the parliamentary majority. Under the 1961 constitution, the parliament was transformed from a unicameral to bicameral system, and the Senate consists of 150 publicly elected members and 15 appointees by the president, as well as members of the junta as life members. The Constitutional Court was established in order to investigate the constitutionality of laws. Shambayati indicates the military's intention that empowering the judiciary would effectively secure the constitutional identity from the infringement by the democratic majority without involving the military into the daily politics.[28] The president, political par-

[27] The English translation of the 1982 constitution in this chapter was taken from the official web site of the directorate general of press and information pertaining to the office of the prime minister [minister http://www.byegm.gov.tr/mevzuat/anayasa/anayasa-ing.htm].

ties in the parliament, and one-sixth of the members of houses were vested with the authority to send a petition to the court for abstract review. The Constitutional Court was also empowered to judge whether claims and activities of a political party are contrary to the constitutional identity. When these were found to be contrary, the court had the power to close the party. Except for the party closure and the military delegates in Senate, these devices are a familiar set of checks and balances against the dominant group in the legislature and the executive.

The 1961 constitution is rather ambiguous with regard to its liberal and democratic nature due to the introduction of the National Security Council (NSC). The military secured a legitimate manner of intervening in the formal political process through this institution. The NSC is convened by the president and discusses the domestic and international security issues in order to guide government policy.[29] The authority of an NSC resolution was raised from just an advice to the government in the 1961 constitution to a guideline which needed to be dealt with and reflected in the government's policy as a matter of the highest priority in the 1982 constitution. In addition, numerically speaking, the military members exceeded the civilians at an ordinary meeting.[30] Thus, the military was to have a strong voice in the highest arena of policy framing even on the domestic issue which includes the problems relating to constitutional identity.[31]

In the 1973 constitutional amendment, the State Security Court, consisting of both civil and military judges, was established in order to deal with cases relating with constitutional identity, which could fall under the category of political crime as well as cases of destructive activities against public order and society.

The institutional structure of the 1982 constitution followed that of the 1961

[28] Hootan Shambayati, "The Guardian of the Regime: The Turkish Constitutional Court in Comparative Perspective," in *Constitutional Politics in the Middle East: With Special Reference to Turkey, Iraq, Iran and Afghanistan*, ed. S. A. Arjomand (Oxford and Portland: Hart Publishing, 2008), 103. As Shambayati mentions, Ginsburg (*Judicial Review in New Democracies*) shows that regimes that are undergoing the process of democratization have come to introduce the judicial review system not as a device for protecting fundamental rights and liberties per se but rather as a preparation by the dominant power prior to democratization in the event that the oppositional force would assume power. The judicial review was considered by the ruling party before democratization to be an effective tool to constrain the arbitrariness of the new ruling party and assure the minimum rights and freedom of the ex-ruling force under the new regime.

[29] For the historical background and structure of the NSC as well as the political intervention of the military, see Gareth Jenkins, *Context and Circumstance: The Turkish Military and Politics*, Adelphi Paper 337 (London: The International Institute for Strategic Studies, 2001).

[30] In the democratizing reform since the end of the 1990s, the numerical balance was reformed in a way that civilians surpass the military members.

[31] Ümit Cizre-Sakallıoğlu, "The Anatomy of the Turkish Military's Political Autonomy," *Comparative Politics* 29, no. 2 (1997): 158–59.

constitution in general with some changes with a reflection on the defects of the previous one. The NSC's authority was increased, as mentioned above. Although for a limited duration, the Presidential Council was set up by the members of the junta in order to supervise the initial period of civilian democracy for six years. One of its roles was to examine laws passed in the parliament, which pertained to the fundamental rights, freedoms, and duties; the principle of secularism; and national integrity.

While the senate was abolished in order to simplify the legislative process, the authority of the president to check the legislature was strengthened instead.[32] The president had the power to send back a bill to parliament for reconsideration, and if parliament passed the bill again with the exact same content, the president had the right to refer it to the Constitutional Court for a judgment on the conformity of the bill to the constitution. If the bill pertains to the constitutional amendment, the president can return it to the parliament once, and when the same bill is sent to him (or her) the second time, he (or she) can refer it to a referendum. The president also has the power to refer to the Constitutional Court on the conformity of the amendment to the procedural rule provided in the constitution.

The autonomy vested in the Radio and Television Administration and the universities under the 1961 constitution was also divested. Furthermore, the Higher Education Council was established in order to check if education and academic research were implemented in harmony with the constitutional identity, and to dominate personnel administration at the universities. The president, along with the political appointees of the executive, authorizes the personnel administration of these institutions.

2.3. The "Dead Hand" in Turkey: Personified and Institutionalized

It is understood that the "dead hand" has been well institutionalized in the Turkish constitutional structure. Among others, the Constitutional Court and the military have been the representative bodies of the "dead hand." In comparison with the prominent action of the military, although often deviating from the constitutional framework, the Constitutional Court's practices are also debatable. To begin with, there are some studies insisting that the Constitutional Court has been regarding itself as a sharer of the power to exercise the popular sovereignty. The 1961 con-

[32] For details on the power of the president in the 1982 constitution, see Ergun Özbudun, "The Status of the President of the Republic under the Turkish Constitution of 1982: Presidentialism or Parliamentarism?" in *State, Democracy and the Military: Turkey in the 1980s*, ed. Metin Heper and Ahmet Evin (Berlin and New York: Walter de Gruyter, 1988), 37–45.

stitution prescribed this type of distribution of powers, whereby the parliament ceased to be the sole representative of the popular sovereignty and lost the superiority over other organs of the separated power.[33]

The practice of the court, too, reflects the understanding. Since the amendment in 1971, the Turkish constitutions allowed the court to review a constitutional amendment only from the procedural viewpoint. Nonetheless, the court has in fact reviewed constitutional amendments in terms of content. According to Özbudun, the Constitutional Court explained the rationale as follows: the constitutional article that is protected both from amendment and proposal for amendment aims at protecting not only the term "republican" in the article but also the republican regime composed of the principles articulated in the preamble and other articles as the fundamental tenets of the state. The Constitutional Court explains that as far as the amendment concerns these principles, the court has the authority to review the case as a matter of procedural conformity.[34] Based on this rationale, the court has empowered itself with a huge realm of jurisdiction concerning the review of constitutional amendments.

Further, it is worth noting that a new key term was introduced in the preambles of the 1961 and 1982 constitutions. It is Atatürk, the name of the charismatic leader of the republic, who has been considered as a kind of taboo in the official history and education.[35] His name was referred as "the immortal leader and the unrivalled hero" and the pronoun "him" ("o" in Turkish) was written in a capital letters in the 1982 constitution. His name was accompanied by the elements of constitutional identity. This means that in Turkey, the "dead hand" belongs to Atatürk.

By personifying the constituent power and by proclaiming it as inviolable, the constitutional framers tried to oppress the oppositional force in his name and to emphasize the legitimacy of the unelected constitutional institutions insisting on the exclusive authority to understand, interpret, and represent the constitutional identity in the name of Atatürk. The frequent visits by secularist leaders at Atatürk's mausoleum as the goal of demonstrations against the rise of Islamism can be understood in this context, too. By this act, however, they are exhibiting an undemocratic understanding of sovereignty.

[33] Shambayati, "The Guardian of the Regime," 101.

[34] Özbudun, *Türk Anayasa Hukuku*, 131–39.

[35] Law No. 5816 (Law on crimes committed against Atatürk) was enacted in 1951, which forbade insulting his memory and damaging his statute or portrait. This law was used to persecute any criticism against him and his policies and even an expression of not feeling sympathy to him. As a result, this law became an effective tool to oppress freedom of speech and thoughts criticizing secularist and assimilationist Turkish nationalist polity.

3. Democratizing Process and Constitutional Politics

3.1. Conflicts over the Constitutional Identity in Terms with Secularism

In the 1990s, with the rise of Islamic movements in different spheres of society such as business, journalism, education, and charity, a political party, the WP also increased its support. The WP criticized the official understanding of secularism as oppressing the religious freedoms, thereby failing to constitute a true secular polity in which religions should enjoy freedom and be protected from the state intervention. The party defended itself stating that the official understanding of secularism should give way to the WP's understanding of it.

The WP became the first party in parliament in the 1995 election and formed a coalition government for a year. The WP led government tried to promote the relationship with the Islamic world in foreign policy and insisted more on liberty in religious practices and educations. It was also often reported in mass media that the party leaders expressed their animosity toward Atatürk at the party meetings, in the context of opposing the secularizing reforms in his period. Some politicians from the party defended the "sharia" as an ideal system without elaborating in detail. All these statements clearly indicated how much the party was opposed to the constitutional identity and polity. A year later, the military took the initiative by directly providing briefings to members of the higher courts, the presidents of universities, and journalists, and also by utilizing the NSC as a place to declare the Islamic movements as a threat to the polity. A suit was filed for the closure of the WP and the Constitutional Court decided to outlaw the party. The same happened to its successor, the VP. At all schools including universities and state institutions, students and employees were prohibited from wearing a headscarf. For secularists, a headscarf had been a symbol of the rise of Islamism and therefore a symbol of the threat to the constitutional identity and state polity. The ban drove many women out of education and workplaces. Headscarf was listed among the evidences at the judgment to close the WP and the VP, too. The WP was found guilty of expressing support for movements demanding the freedom to wear a headscarf, and the refusal to uncover the headscarf worn by a deputy from the VP at the parliament was raised as a reason for the party closure.[36] The oppression of the freedom of speech and thought were supported likewise. Many journalists were charged at the State Security Court for expressing opinions in defense of an Islamic state and for criticizing "Atatürk's reforms." Against the background of the rise of Islamic move-

[36] For a study on the conflict between the WP and secularist state institutions, see Sawae Fumiko, *Gendai Toruko no minshu seiji to Isurāmu* 現代トルコの民主政治とイスラーム (Democracy and Islam in modern Turkey) (Kyoto: Nakanishiya shuppan ナカニシヤ出版, 2005).

ments, especially pro-Islamic parties, the problem of the secularist constitutional identity and polity became a pressing issue in order to accelerate democratization and liberalization.

3.2. Dialectic Constitutional Politics in Democratizing Process

While the tension between secularists and Islamic movements was intensified, an entirely new balance of powers is emerging in the 21st century. As the democratizing reforms aimed at the EU accession have advanced, institutional arrangements under the 1982 constitution have been dramatically democratized. The EU has strongly pressured Turkey to demilitarize the political process although its attitude toward the ban of the two parties was not so much in favor of the parties. However, the EU was very clear on the point that the military's political presence should be decreased in democracy. Under the guidance of the EU, the State Security Court was abolished and military membership in the Council of Higher Education and Radio and Television Supreme Council were withdrawn. The NSC, which has embodied the military's guardianship over the Turkish regime and its hegemony over a publicly elected government, has been restructured into a civilian-dominated organization. More than these constitutional reforms, an awareness has permeated among the public that political process based on the restrictive practices and military pressure should be rejected at all costs if Turkey expects to be recognized by the western democracies as an equal and fully-fledged civilized member. The guardianship of the military has, at least outwardly, become sluggish willy-nilly.

Under these circumstances, the JDP was established as a successor of the VP at least in terms of the main leaders' profile. However, it denied any tie with the previous parties and emphasized its commitment to a secular polity as an uncompromised measure to achieve a pluralistic democracy. With regard to foreign policy, it declared its decisiveness to promote the EU accession process and relationship with the U.S. The JDP recorded landslide victories in 2002 and 2007 general elections, which enabled the party to maintain both parliamentary majority and a one-party cabinet. The JDP's majority in the parliament has been overwhelming to the extent that the JDP gained 363 seats out of 550 in 2002 election and 341 seats in 2007, which is just below 367, the number of votes required for a constitutional amendment and the election of the president, but well above 330, the number of votes required for a constitutional amendment which has to be referred to a plebiscite.

Under the circumstances, the tension between the government and the constitutional agencies, which are self-appointed guardians of the constitution and constitutional identity, has been elevated. The military could not play an apparent role any longer, but President Sezer, the ex-president of the Constitutional Court, resist-

ed the JDP government by exercising a veto against both legislative activity, though mostly ordinary laws, and personnel administration of the political appointee in bureaucracy.[37] However, his term expired in 2007, which means that the JDP-dominated parliament would elect the next president, and that the president could no longer be expected to function as the guardian of the constitutional identity against the legislature. The JDP's candidate was the then foreign minister Abdullah Gül, the MP from the defunct WP period. The only opposition party in parliament, the secularist RPP, boycotted the election, and secularist civil society organizations arranged demonstrations in the major cities for protesting against the JDP's candidate. Even the military declared their strong objection. Procedurally speaking, the new president Gül was to be elected in the third voting with 275 votes of simple majority even if he was unable to obtain 367 votes at the first two votings. However, President Sezer and the RPP appealed to the Constitutional Court by insisting that the quorum of the first voting was 367 and the first voting was not (and would never be as long as the RPP boycotted it) valid. Until then, the general understanding of the quorum for the presidential election was one-third of the total seats in accordance with Article 96, since there is no specification of quorum in Article 102, which prescribes the procedure of the presidential election. However, the Constitutional Court agreed with the plaintiff,[38] and the JDP realized its inability to elect its candidate and decided to call a general election. In a setback to the guardians of the constitutional identity, the JDP won another five-year term and the presidential seat for a seven-year term with the help of a newly elected third party, the Nationalist Movement Party (NMP).

[37] According to an article in a newspaper, the then president Sezer rejected half of the political appointees by the cabinet, which amounted to 6,650 during the first three years of the AKP government [Şükrü Küçükşahin, "Dinçer'in de Veto Kriterleri Var" (Dinçer also has his criteria of veto), *Hürriyet* (Istanbul Daily), 24 Apr. 2006, http://hurarsiv.hurriyet.com.tr/goster/haber.aspx?id=4304254&tarih=2006-04-24 (accessed 30 Sep. 2008)]. He returned 34 bills for reconsideration in the first year of the AKP government, which surpassed 8 in the previous year under a leftist government [Özdemir İnce, "Cumhurbaşkanı Sezer" (The President Sezer), *Hürriyet* (Istanbul Daily), 8 June 2005, http://webarsiv.hurriyet.com.tr/2005/06/08/654819.asp (accessed 30 Sep. 2008)]. For a study on the conflict in relation with the EU accession process, see Sawae Fumiko, "Toruko no EU kamei kaikaku katei to naisei rikigaku" トルコの EU 加盟改革過程と内政力学 (EU accession process and dynamism of domestic politics in Turkey), *Chūtō Kenkyū* 中東研究 (Journal of Middle Eastern studies) 494 (2006): 43–55.

[38] The court recognized in a decision that "without doubt, the fact that two-thirds of the attendance specified in the first paragraph of the Article 102 has never been regarded and demanded as the quorum for the presidential election until now, and that this application has never been appealed to the Constitutional Court, does not lead to a conclusion that the past practices were obedient to the constitution" [Anayasa Mahkemesi Kararı, Esas Sayısı 2007/45, Karar Sayısı 2007/54, Karar Günü 2007/5/1].

What was more crucial for the constitutional identity is that the JDP has won the election with the manifesto in which one of the top issues was an overall revision of the constitution. The leader of the JDP, Tayyip Erdoğan, had asked a group of constitutional professors with secular and liberal orientations to prepare a draft proposal of a new constitution, and it was submitted to the party in the end of August.[39] In the beginning, the JDP was planning to release the party's official draft to the public by the middle of September after modifying the abovementioned draft in the inner party discussion, and with a very optimistic hope, in retrospect, was to enact a new constitution in the ordinary parliament in the beginning of the 2008. However, the release was repeatedly delayed by arguments against it, most of which were driven by a sense of fear and caution.

The JDP has expressed its intention to innovate a "civil constitution," which denotes both the removal of all the military's imprint on the previous constitutions that appear as restrictive and authoritarian legal and structural devices, and exercise the democratic constituent power for the first time in the republican constitutional history. However, this invoked a fear among secularists that the liberalization of the constitution would result in the breakdown of the secularist constitutional identity. A statement by a JDP deputy with a background of a constitutional professor just after the 2007 election was crucial in this regard. He expressed his belief that a new constitution should not include any reference to Atatürk nor base itself on Kemalism, an oppressive ideology named and sacralized under his name.[40]

Indeed, it included innovative elements in comparison with the existing constitutional identity. As explained in the commentary section of the draft proposal, one of the main foci of this proposal was to reverse the state-centered approach and to return to the right- and liberty-centered approach in which the protection of the polity and undivided integrity would lose the priority over these values. These appeared in the article prescribing the fundamental aims and duties of the state (Article 4). According to the proposal, the state exists "for the protection of and removal of all obstacles to protecting honor, rights and freedoms of individuals, and for providing conditions necessary for developing the people as a material and spiritual existence by means of ensuring security and welfare." Similarly, other articles pertaining to the basic rights and freedoms declare their protection without reservation. Further, the abuse of constitutional articles for restricting them was forbid-

[39] The schedule is written in the opening note of the draft published in *Radikal*, an Istanbul daily. For details, see *Radikal* (Istanbul Daily), "İşte Anayasa Taslağın Tam Metni" (Here is the complete document of the draft proposal for a constitution), pt. 1, 12 Sep. 2007, http://www.radikal.com.tr/haber.php?haberno=232696 (accessed 30 Sep. 2008).

[40] Ersan Atar, "'Anayasada Atatürk İlke ve İnkılaplarına Gerek Yok'" (There is no need to mention Atatürk's principles and reforms in the constitution), *Sabah* (Istanbul Daily), 27 July 2007, http://arsiv.sabah.com.tr/2007/07/27/haber,54CA8340A78B4EC5BD8B14EE64A8BA9A.html (accessed 30 Sep. 2008).

den, while an option is provided in order to restrict the abuse of the rights and freedoms, which threatens the undivided integrity of the state and the nation as well as the state polity, although it is defined as a democratic and secular republic based on human rights (Article 13).

Concerning the institutional structures for maintaining the constitutional identity under the 1982 constitution, the demotion of the NSC to the consultative body for the cabinet is proposed as an option. Regarding the judicial review of the constitutional amendment, the competence of the Constitutional Court is clearly restricted to the procedural investigation (Article 114). The power of the president to return a constitutional amendment for reconsideration was removed.

There is a notable arrangement introduced in the realm of educational rights. Due to strong demands from the JDP, the proposal provides two options in order to avoid the ban on headscarves in universities. In one option, it reads "nobody is deprived of the right for higher education due to one's clothes" and the other option reads "clothes are free in higher educational institutions" (Article 45). The headscarf ban has been one of the hidden agenda for the JDP since many supporters of the party and many wives of the deputies have been affected by the ban. After the JDP came to the power, wives of the members of the cabinet wearing headscarves were avoided in the official ceremonies and parties held by the military and the judiciary and even at an a place of protocol where accompanying one's wife has been a custom. The headscarf issue is so sensitive a matter for secularists and thus so risky an issue for the JDP since it can lead the party to another closure that the JDP could not tackle it until the government could consolidate the extensive public support based on the reliance on the good performance of the economy and democratization. However, with the stable economic growth and the advancement in the EU accession process, the JDP is set to settle the issue.

However, the published draft did not propose a thorough revision. The reference to Atatürk remains even though the manner of reference seems rather different. His name appears in the preamble in the context of explaining the orientation of the constitution from a historical perspective, and in the Article 2 where "Atatürk's nationalism" is listed as the character of the republic. Özbudun, a prominent constitutional professor in Turkey and the leader of the team working on the draft proposal, explains his intention in the commentary section of the draft proposal that his name helps to distinguish the nationalist claim as the way of national integration from those with a racist tone.[41] In addition, the prohibition of amendments to the first three articles is retained with some change in the verbiage.[42] The draft proposal evoked strong opposition not only from the constitutional institutions with a stronghold on constitutional identity but also from the civil society. The reasons for the opposition were diverse. Some accused the proposal as aiming at destructing the existing constituent identity and polity. Others expressed, in contrast, their anxiety that the proposal failed to entirely remove the earlier restrictive

nature. Another kind of criticism was about the procedure followed by the JDP. The JDP was accused of trying to monopolize the most important process of drafting a proposal and to impose the result without adequate consulting with other parties and organizations in the civil society. The JDP was also criticized for not officially clarifying the schedule and not taking necessary steps towards the enactment of the new constitution. Such attitude of the JDP was regarded as excluding public and democratic participation in the process of framing the constitution. As a columnist of a newspaper pointed out, if the JDP made the procedure open at official bases at least with regard to what kind of basic ideas were to be followed and where and how the arguments were to be made and be reflected into the final official draft, a more constructive process could be followed.[43]

In any event, the JDP failed to declare the party's official draft constitution and temporarily abandoned the initiation of the official procedure to a new constitution. However, with the help of the third and fourth parties in the parliament, the JDP succeeded to pass a bill for amending the incumbent constitutional Articles 10 and 42 in order to lift the headscarf ban. The former article is about the equality under the law, and the latter about the right and duty for education. The bill added to Article 10 the responsibility of the state organs and bureaucratic offices to provide benefit of any kind of public service in accordance with the principle of equality under the law. It also added to Article 42 the sentences that "nobody is deprived of the right for higher education due to a reason which is not clearly described in law," and that "the restriction of exercising this right is stipulated by law."[44] In con-

[41] *Radikal* (Istanbul Daily), "İşte Anayasa Taslağın Tam Metni" (Here is the complete document of the draft proposal to a constitution), pt. 4, 12 Sep. 2007, http://www.radikal.com.tr/haber.php?haberno=232699 (accessed 30 Sep. 2008).

[42] I would like to note that I have no intention to underestimate the effort to care for the minorities' linguistic right by changing the phrase from "the state language" to "the official language" in Article 3.

[43] İsmet Berkan, "'Sivil Anayasa' mı Dediniz?" (Did you say "civil constitution"?), *Radikal* (Istanbul Daily), 4 Sep. 2007, http://www.radikal.com.tr/haber.php?haberno=231938 (accessed 30 Sep. 2008). The JDP might depend too much on the prominence and secular profile of the professors drawing the proposal. While Özbudun insists that in a democracy, there is no need to convene the constituent assembly other than the ordinary parliament as it must have represented a sufficient diversity of opinions and identities of the people. It is easily expected that the overwhelming majority of the JDP in parliament could evoke strong reaction against such attempt. This seems to show that the constitutional politics is not sufficiently mature to regard that the condition is achieved for the democratic and consensual exercise of constituent power. For the arguments by Ergun Özbudun, see "Sivil Anayasa Tartışmaları Eleştiriler ve Cevaplar" (Arguments on a civil constitution, criticisms, and responses), pt. 1, *Zaman* (Istanbul Daily), 4 Sep. 2007, and the opposing claim from the ex-chief persecutor Kanadoğlu, *Hürriyet* (Istanbul Daily), "Kanadoğlu'ndan Müthiş bir İddia Daha" (One more amazing insistence from Kanadoğlu), 13 Sep. 2007.

[44] Law No. 5735. Date of ratification 9 Feb. 2008.

trast to the abovementioned draft proposal for the new constitution, this bill aims at lifting the headscarf ban indirectly by way of extending the sphere of the rights in more general term. If one does not pay attention to the context in which the JDP tried to accomplish the amendment, there appears to be no basis to oppose the amendment from the perspective of defending constitutional democracy. Nevertheless, the RPP brought the amendment to the Constitutional Court. It insisted that the amendment violated the constitutional prohibition of amending certain articles prescribing basic tenets of the constitution. Although the amended articles are not included in protected articles, according to the RPP's claim, the amendment aimed at violating the secularism principle which is prescribed in the protected articles. The RPP insisted that this is not a review by content but the review by procedure since it violates the prohibition of amendment.[45] It is clear that the RPP resort to the reasoning utilized by the Constitutional Court in the 1970s as mentioned above. The Constitutional Court, too, decided to void the amendment on the same grounds.[46]

In this regard, there is one more event that the Constitutional Court is involved with. A suit was filed against the JDP by the chief prosecutor in the court as a threat to the polity. The chief prosecutor started his preparation for the indictment just after the leader of the JDP declared his will to submit the bill of constitutional amendment for lifting the headscarf ban to the parliament. Among the evidence, the amendment was listed as well as the attempt to enact a new constitution and others, most of which consisted of the address of the party leaders, which was regarded by the chief prosecutor as the declaration of the JDP's will to abolish the secular republic and establish an Islamic state.[47] The court rejected the demand for disbanding the JDP with the votes 5 to 7, but declared it guilty by way of ordering it to return half of the annual party subsidy.

The two charges relating to the JDP triggered blatant criticism against the judiciary, too. The suit against the JDP by chief prosecutor was disgraced as a "Google indictment" since it is reported that he collected most of the evidences by means of Google search. The Constitutional Court was also the object of criticism especially for its decision invalidating the constitutional amendments. The court was criticized as constituting "the judiocracy" in Turkey thereby attempting to take over the sovereignty from the people.[48] Many writers in the major papers insisted that the court violated the constitution, which restricts the jurisprudence only to judging the validity of voting in legislature.

[45] For an unofficial version of the bill of indictment by the RPP, see *Tüm Gazeteler*, "Yasak Dilekçesinin Tam Metni" (The complete document of the prohibitive indictment), 2008, http://www.tumgazeteler.com.?a=2595085 (accessed 29 Sep. 2008).

[46] Anayasa Mahkemesi Kararı, Esas Sayısı 2008/16, Karar Sayısı 2008/116, Karar Günü 2008/6/5.

[47] Yargıtay Cumhuriyet Başsavcılığı, "İddianame," SP. Hz. 2008/01, Dava Tarihi 2008/3/14.

If we look at the effort both to amend constitutional articles and to enact a new constitution from a perspective of the general democratizing process, there have been sincere approaches from different political forces toward this aim. For example, TÜSİAD, the association of major industries, known for its secular political preference, submitted its draft proposal of a new constitution in as early as 1992. The proposal was more radical than the draft proposal for the JDP, to the extent that it rejected any reference to Atatürk's reforms and Atatürk's nationalism based on the reasoning that the state's official ideology should not exist in a liberal democracy. It also insisted that since the nation is the rightful holder of the constituent power, the prohibition of constitutional amendment should be limited only to the republican clause, and the nation and its representatives should be provided with a wider range of decision.[49] The leading figure of the team of drafting the TÜSİAD's proposal is currently famous for his harsh criticism of the draft proposal of the JDP and the JDP per se, from the standpoint of protecting secularist constitutional identity and polity.

The RPP has also insisted on replacing the entire constitution with a new one under a totally civilian initiative, although it is said that it has recently withdrawn the new constitution from the agenda after the JDP's attempt became public.

It might be also meaningful to note that despite the overwhelming majority in legislature and holding the critical post of the presidency, the JDP is so careful not to evoke negative reactions from secularists that the innovative characteristics of the draft proposal for the JDP was more limited than was previously assumed. Furthermore, the JDP has tried to define the state's relation to religion in a secular manner by trying to ensure the neutrality of the public space by limiting the state interference into the religious practices. This approach is different from the secularist way of definition, which seeks to ensure that public spaces remain religion-neutral by excluding anything indicating religious beliefs.

The combination of all these apprehensions, aggressions, criticisms, and reflections in constitutional politics seems to show the conscious and unconscious dialogical processes are at least in agreement with regard to the orientation toward a new constitution with democratic, liberal, and secular foundation, in one way or another. However, there is no assurance that the dialogical process achieves a minimum consensus necessary for a stable democratic constitutional identity and constitutional institutionalization as a condition for a feasible democracy.

It is interesting to note again in this process the institutionalized, restrictive

[48] See for example, Neşe Düzel, "Doç. Dr. Serap Yazıcı: Bu, Yargıçlar Devleti Kurulması Süreci" (Associate Professor Serep Yazıcı: This is a process of forming the judiocracy), *Taraf* (Istanbul Daily), 26 May 2008, http://www.taraf.com.tr/Detay.asp?yazar=7&yz=735 (accessed 30 Sep. 2008).

[49] Murat Aydın, "İşte Teziç'in Anayasası" (Here is a draft constitution by Teziç), *Zaman* (Istanbul Daily), 22 Sep. 2007.

"dead hands" plays important roles: sometimes, it balances the opposing opinions while at most times, it deters opposing identities. Without its coercive power, the JDP might have rushed into a constitutional revision without adequate public argument. At the same time, such coercive and arbitral performance of the institutionalized "dead hand" surely decreasing in authority. It is reflected in the widening tendency to oppose the military's intervention into daily politics and apparent criticisms of the judiciary even regarding the cases where the constitutional identity is at stake.

The constitutional politics in the democratizing state might involve all the institutions, associations, and individuals in the related spheres at the equal status. They are all risking the loss of authority and power by participating in the process. Only after going through such a harsh process can conditions be cleared for declaring the democratic exercise of constituent power in Turkey.

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