INTERACTION OF THE AKP WITH THE CONSTITUTIONAL STATE IN TURKEY: AKP'S POLITICAL JUSTICE

A THESIS SUBMITTED TO
THE GRADUATE SCHOOL OF SOCIAL SCIENCES
OF
MIDDLE EAST TECHNICAL UNIVERSITY

BY

AYŞEGÜL KARS KAYNAR

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR
THE DEGREE OF DOCTOR OF PHILOSOPHY
IN
THE DEPARTMENT OF POLITICAL SCIENCE AND PUBLIC ADMINISTRATION

AUGUST 2014

Approval of the Graduate School of Social Sciences

_____

Prof. Dr. Meliha Altunışık
Director

I certify that this thesis satisfies all the requirements as a thesis for the degree of Doctor of Philosophy.

_____

Prof. Dr. Ayşe Ayata
Head of Department

This is to certify that we have read this thesis and that in our opinion it is fully adequate, in scope and quality, as a thesis for the degree of Doctor of Philosophy.

_____

Assoc. Prof. Dr. Mehmet Okyayuz
Supervisor

Examining Committee Members

Prof. Dr. Raşit Kaya	(METU,ADM)	_____
Assoc. Prof. Dr. Mehmet Okyayuz	(METU, ADM)	_____
Assoc. Prof. Dr. Kürşad Ertuğrul	(METU,ADM)	_____
Prof. Dr. Mehmet Yetiş	(AU, SBF)	_____
Assist. Prof. Dr. Çağatay Topal	(METU, SOC)	_____

I hereby declare that all information in this document has been obtained and presented in accordance with academic rules and ethical conduct. I also declare that, as required by these rules and conduct, I have fully cited and referenced all material and results that are not original to this work.

Name, Last name : AYŞEGÜL KARS KAYNAR

Signature :

ABSTRACT

INTERACTION OF THE AKP WITH THE CONSTITUTIONAL STATE IN TURKEY: AKP'S POLITICAL JUSTICE

Kars Kaynar, Ayşegül

Ph.D., Department of Political Scince and Public Administration

Supervisor : Assoc. Prof. Dr. Mehmet Okyayuz

August 2014, 443 pages

This study examines the interaction between Justice and Development Party governments and the constitutional State in Turkey. The study demonstrates that, although Justice and Development Party stays within the formal boundaries of rule of law order and parliamentary democracy, it surpasses the substantial boundaries that constitutional state brings. In this respect, the purpose of the study is to show that, this political party surpasses the limits of executive and legislative powers, and proceeds in the direction of being a total state power. In the center of this effort, there lies political control of judiciary and its instrumentalization by political power. The most prominent example of this instrumentalization is political trials. In this framework, the study examines three political trials, namely Ergenekon Case, KCK Case, and Hopa Case. In political trials, opposition to political power is criminalized; and protection of state is equalized to protection of political power. Consequently, political trials demonstrate that judicial power *de facto* concentrates in the hands of the political power. During this examination, opinions of Carl Schmitt, both a political theorist and a jurist, are used.

Keywords: Justice and Development Party, constitutional State, political trials, political justice, Carl Schmitt

ÖZ

AKP'NİN ANAYASAL DEVLET İLE ETKİLEŞİMİ: AKP'NİN SİYASİ ADALETİ

Kars Kaynar, Ayşegül
Doktora, Siyaset Bilimi ve Kamu Yönetimi Bölümü
Tez Yöneticisi : Doç. Dr. Mehmet Okyayuz

Ağustos 2014, 443 sayfa

Bu çalışma, Adalet ve Kalkınma Partisi hükümetleri ile anayasal devlet arasındaki etkileşimi inceler. Çalışmada, Adalet ve Kalkınma Partisi'nin hukukun üstünlüğü ilkesi ve parlamenter demokrasinin biçimsel sınırları içerisinde kalmasına rağmen, anayasal devletin getirdiği sınırları aştığı gösterilmektedir. Çalışmanın amacı söz konusu partinin yasama ve yürütme iktidarlarını aşarak, bir bütün olarak devlet iktidarı olma yolunda ilerlediğini göstermektir. Bu çabanın merkezinde yargı iktidarının siyasi iktidar tarafından kontrol altına alınması ve araçsallaştırılması yer almaktadır. Yargının ve mahkemelerin siyasi iktidar tarafından araçsallaştırılmasının en göze çarpan örneği ise siyasi davalardır. Bu bağlamda çalışma Ergenekon davasını, KCK davasını ve Hopa davasını inceler. Siyasi davalar, siyasi iktidarın muhaliflerinin suçlu addedilerek cezalandırıldığı ve devleti korumanın siyasi iktidarı korumakla eş tutulduğu davalardır. Bu nedenle siyasi davalar, yargılama erkinin *de facto* siyasi iktidarın elinde toplandığını göstermektedir. Bu inceleme yapılırken, hem bir siyaset kuramcısı hem de bir hukukçu olan Carl Schmitt'in görüşlerinden yararlanılmaktadır.

Anahtar Kelimeler: Adalet ve Kalkınma Partisi, anayasal devlet, siyasi davalar, siyasi adalet, Carl Schmitt

ACKNOWLEDGMENTS

I would like to express my deepest gratitude to my supervisor Assoc. Prof. Dr. Mehmet Okyayuz for his guidance and support, my committee members Prof. Dr. Mehmet Yetiş and Assoc. Prof. Dr. Kürşad Ertuğrul for their constructive criticisms; Dr. Claudia-Y Matthes from Humboldt Universität zu Berlin for her incisive comments, and to Prof. Dr. Andrew Arato from New School for Social Research, New York, for mind opening talks and discussions.

I would also like to thank İhsan Seddar Kaynar, my partner, for sharing with me his invaluable political vision and insight without which, this study would stay as a collection of relevant data rather than a political analysis.

TABLE OF CONTENTS

LIST OF TABLES

TABLES

LIST OF ABBREVIATIONS

AKP	Adalet ve Kalkınma Partisi
ANAP	Anavatan Partisi
BDP	Barış ve Demokrasi Partisi
CHP	Cumhuriyet Halk Partisi
CMK	Ceza Muhakemeleri Kanunu
ÇYDD	Çağdaş Yaşamı Destekleme Derneği
DfL	decree in the force of law
DGM	Devlet Güvenlik Mahkemeleri
DİB	Diyanet İşleri Başkanlığı
DTP	Demokratik Toplum Partisi
ECHR	European Court of Human Rights
ESP	Ezilenlerin Sosyalist Partisi
FP	Fazilet Partisi
GCS	General Chief of the Staff
HCRA	High Council of Religious Affairs
HSYK	Hakimler ve Savcılar Yüksek Kurulu
İHL	İmam Hatip Liseleri
KCK	Koma Civaken Kurdistan
KESK	Kamu Emekçileri Sendikaları Konfederasyonu
KPD	Communist Party of Germany
MDP	Milli Düzen Partisi
MGH	Milli Görüş Hareketi
MGK	Milli Güvenlik Kurulu
MHP	Milliyetçi Hareket Partisi
MP	Member of Parliament
MSP	Milli Selamet Partisi
MÜSİAD	Mustakil Sanayici ve İşadamları Derneği

NSDAP	National Socialist German Worker's Party
ÖDP	Özgürlük ve Dayanışma Partisi
ÖYM	Özel Yetkili Mahkemeler
RP	Refah Partisi
SDP	Social Democratic Party of Germany
TCK	Türk Ceza Kanunu
THKP-C	Türkiye Halk Kurtuluş Partisi-Cephesi
TICA	Turkish International Cooperation Agency
TMSF	Tasarruf Mevduatı Sigorta Fonu
VGH	Volksgerichtshof
YARSAV	Yargıçlar ve Savcılar Birliği

CHAPTER 1

INTRODUCTION

1.1 The Argument and the Aim of the Study

Adalet ve Kalkınma Partisi (Justice and Development Party - AKP) came to power in 2002 with 34 percent of the votes, and gained 367 seats in the parliament out of 550. With such a majority of the votes and the seats, the AKP formed a single party government. On the one hand, establishment of a single party government seem to be a remedy for Turkish parliamentary democracy. After unstable and vulnerable coalition governments between 1999 and 2002, it certainly brought stability to the political system. However, it deformed parliamentary democracy as well. As parliamentary majority has been formed by a single party, legislative and executive powers have concentrated in the hands of the AKP. This being the case, government could enact whatever norm it wished to, as deputies in the parliament never voted against the government of their own party. Moreover, because of party discipline, collegial character of the government has lost its meaning. Consequently, first, the government acted as a single will. This will was that of the Prime Minister, who is the head of the AKP. Second, the majority of the parliament acted as a single man, and a single man (the Prime Minister) acted in the name of the majority.

Nevertheless, one shall wait for the next term of AKP's power to see more dramatic changes happening. It was from 2007 onwards that a series of critical developments have taken place that we still feel their effects. In June 2007 general elections, the

AKP once again gained majority of the votes and formed its second single party government. Just two months later, in August 2007, the candidate of the AKP for presidency, Abdullah Gül, was elected by the parliament as the President. As a result, both heads of the executive power of the state had been secured by the AKP. Moreover, the AKP started to prepare a new constitution to replace the existing one. On June 8, 2007, before the general elections, Prime Minister Erdoğan asked a group of constitutional law professors to prepare a draft constitution. After AKP's re-election as the government, constitutional preparations were maintained.

In March 2008, on the other hand, the Chief Public Prosecutor of the Republic prepared an indictment for the dissolution of the AKP as it was violating secular nature of the State. He asked the Constitutional Court to ban seventy one members of the AKP from politics, and the Court accepted to hear the case. In the meantime, the public suddenly turned its attention away from the parliament towards police investigations and raids. Police investigation of the first political trial of the 21st century Turkey called "Ergenekon Case" got started during January-March 2008, which affected and feared numerous people. Only after a year passed over AKP's second electoral victory in July 2007 we lived, perhaps, one of the most critical days of Turkish political history. Firstly, the first indictment of Ergenekon Case was submitted to the Specially Authorized Court in July 2008, in which recognized names of public life and high ranking members of Turkish Armed Forces were accused of forming a terror organization aiming to destroy constitutional order of the State. Secondly, in the same month, the Constitutional Court gave its final verdict on the closure case of the AKP. The Court evaluated activities of the AKP as violation of secularism and fined the ruling majority party, yet not closed it.

Actually, dramatic developments have been taking place in the third state power of judiciary for a while. Infamous *Devlet Güvenlik Mahkemeleri* (State Security Courts-DGMs) have already been abolished in 2004. In their place, *Özel Yetkili Mahkemeler*

(Specially Authorized Courts-ÖYM) were established concurrently, which have the same competences, duties and judgment procedures with only minor changes. Therefore, the DGMs had actually been renamed by the AKP as the ÖYMs. However, it was with the commencement of the Ergenekon Case that, this change in the judicial system became more apparent and significant. Again, especially after 2007-2008 the judiciary has been the main target of AKP policies. In September 2010, the Constitutional Court and the *Hakimler ve Savcılar Yüksek Kurulu* (Supreme Council of Judges and Prosecutors-HSYK) were reformed. After 2011 general elections, in which the AKP achieved to take half of the votes (49.9 percent) and formed its third single party government, in March and August 2011, in July 2012 and in April 2013, judiciary and courts were reformed four times more. Through these reforms, not only new norms were introduced; but also the organization of high and first instance courts was altered. The end result of the reforms is that, the judiciary has been made more depended to the executive power.

Legislative, executive, judicial state powers and the normative order of the rule of law, of which secularism is a part, are the principal elements of the constitutional state. Aforementioned developments that took place after 2007-2008 period, on the other hand, manifest a change in AKP's relation with not only one, but all of these elements. Accordingly, with its attempt to make a new constitution, the AKP declares that it is no longer an ordinary legislative and executive power intending to function within the constituted boundaries of the constitutional state; however, it visions to be a constituent power. Second, the decision of the Constitutional Court on AKP's closure case demonstrates that constitutional norm of secularism and hence supremacy of normative order over political power was surpassed. Hence, the AKP was allowed to rule the secular state in Turkey with its anti-secular policies. In terms of legislative power of the state, the AKP dominated the parliament. In terms of executive power, the AKP started to control the second arm of the executive; meaning, presidency. Lastly, in terms of judicial power, the courts and the justice system started to be

instrumentalized against the members of Turkish military and civil society, who were uncomfortable with AKP governments as early as 2002 and opposed it. In addition, through subsequent reforms, the judiciary more and more came under government's control.

Within this context, the dissertation examines AKP's relation with the constitutional State in Turkey. The dissertation argues that aforementioned developments that have taken place after 2007-2008 can be read as signs of a change in AKP's relation with the constitutional State. After this period, legislative, executive and judicial powers of the state (the last one is supposed to be independent and neutral) are started to be controlled by this political party; and normative boundaries that the rule of law brings to every political power are surpassed. The dissertation further argues that this situation manifests that a majoritarian political party goes beyond the limits that the constitutional state recognize for it. In this framework, the aim of the dissertation is to show that the AKP is no more a mere political power forming the government; yet, it has taken the initial steps to turn itself into a state power.

1.2 The Scope of the Study

Constitutional state has two dimensions; a power dimension and a normative dimension. Power dimension is roughly separated into two functions as legislation of laws and enforcement of laws. Legislation of laws is the duty of the parliament, whereas enforcement of laws is the duty of the council of ministers and the courts. In this respect, the argument that a political party is transformed into the state power can include both or either of the examination of these functions, and organs that execute these functions. For instance, one can concentrate on legislative function of the state and trace how the AKP dominated the parliament; how it pushed for the legislation of laws reflecting its interests and conversely, how it impeded the legislation of proposals brought to the parliament by other parties by using its numerical superiority.

However, the dissertation leaves aside the function of legislation of laws, and concentrates only on enforcement of laws in line with the conceptual and theoretical tools it uses.

Therefore, the scope of the dissertation is AKP's interference and control of the law enforcement function and the law enforcing organs of the state. In this framework, the dissertation will analyze AKP's establishment of its control over council of ministers and the courts. Remember that council of ministers is already formed and controlled by the majority political party. This leaves the control of the courts as the main area of inquiry. For this reason, the dissertation focuses on how the AKP tries to dominate judicial power of the state and interfere into the courts more deeply. However, the dissertation does not stop there. This is because, the constitutional State in Turkey is flawed in a way that is unforeseen by constitutional state theories. In Turkey, there is another state organ which has some executive competences, beside the council of ministers. This organ is semi-military *Milli Güvenlik Kurulu* (National Security Council – MGK). Under such a situation, for the AKP to control law enforcing organs, it needs to control the MGK beside the courts. Therefore, AKP's reformation of the MGK will also be included in the scope of the dissertation.

Constitutional state has a normative dimension beside three state powers of legislative, executive, and judiciary. The acceptance that there are positive legal norms over and above the state power is actually the particularity of the constitutionality of the state. This normative dimension, on the other hand, is represented by the rule of law order. Then, showing the transformation of the AKP into the state power requires us to discuss the interaction of it with the normative order of the rule of law. Either concentrated on legislation or enforcement of laws, examination of AKP's interaction with this normative order is an indispensable part of its relation with the constitutional state. This order includes a great number of norms, which may not necessarily be interrelated to one another. On the one hand, AKP's

particular interaction with all of these norms cannot be properly done in a single paper. On the other hand, absence of such a normative analysis will render the discussion superficial.

Under this circumstance, the dissertation chooses only one norm of this order to show political power's interaction with the normative dimension of the constitutional State in Turkey. This norm is secularism. Secularism is not a random choice. Before anything else, the justification of AKP's closure case was secularism. Therefore, the principle norm that AKP could not resist to come into contact was secularism. After 2008, the AKP could continue to rule the state through bypassing this norm. Secondly, Islamic orientation of the AKP and AKP's political ancestors conventionally conceived in opposition to secular character of the State. Consequently, the literature on the AKP and constitutional State is dominated by the discussion on secularism. These are why the interaction between AKP's political power and normative order of the constitutional State will be analyzed on the basis of secularism.

How can we see or realize the transformation of the AKP into the state power? How does it reveal itself? What are its symptoms? Following the theoretical discussions that take place in chapter two, the dissertation claims that political trials are one of the symptoms of this transformation. Therefore, after examining AKP's interaction both with the power dimension and the normative dimension of the constitutional State, the dissertation illustrates the transformation of the AKP into the state power by analyzing political trials. These political trials have been prosecuted in the ÖYMs on the basis of Anti-Terror Law. The most prominent of them, on the other hand, are *Ergenekon Case*, *the KCK Case*, and *Hopa Case*. For many reasons, the dissertation finds the analysis of political trials illustrative and enlightening of the relation between the AKP and the constitutional State; and the extent of the transformation of the former into the latter.

Each of these cases has a very different origin. Yet, their common point is that, it is the political opponents of the AKP who is being charged in the courts, deployed either within the state or civil society. Therefore, political trials are a phenomenon pertaining to suppression of political opposition by judicial means. In this regard, they indicate transformation of political challenges into legal problems. In the courts, alternative politics are deemed illegal and excluded from political arena. Moreover, partial, partisan, personal and discretionary aspects of politics and political power have been disguised by the values of law, such as generality, commonality, objectivity, independence, and certainty. Although soldiers, Kurds and students have been put into trial due to political reasons, they appear to be charged objectively according to certain criteria of law. Nevertheless, this transformation of politics and political values into legality and its values unravels AKP's capacity to use judiciary and the rule of law order of the constitutional state as a means to realize its own political ends: it unravels that the AKP *has become able to* criminalize its opponents as it achieves the capacity to instrumentalize state's means of judicial power. Therefore, political trials show that judiciary has been dominated by the ruling political power. Only after then, it has been used as an instrument in the hands of the AKP in its struggle against its opponents.

Secondly, even though they are political trials, and even though these political trials take place in "special" criminal courts, the AKP does not surpass the ordinary functioning of the constitutional state, the rule of law, and parliamentary democracy. Establishment of *ad hoc* or specialized courts for political opposition is not something unprecedented. In Turkey and in many other countries, we come across wide-ranging political trials during military regimes, or in times of martial law. However, they are already in conflict with the rule of law and the constitutionality of the state. The rule of law that constitutional state establishes, is a legal order where basic rights and liberties of individuals re protected by the constitution. Accordingly, state power is limited by legal norms. It means that state is under legal duty to obey the law. Hence,

it refrains from using force, making discriminatory judgments, and suspending rights and liberties. However, in times of emergency, it can use force and suspend rights and liberties. Therefore, state of emergency measures conflict with the legal duties of the state under the rule of law. Because of this conflict, these measures are deemed to last short and occur as exceptions of the rule of law. However, political trials of the AKP period do not take place in a state of emergency and do not create a state of emergency. Actually, the scope of the trials so widened in time that the number of detainees and prosecuted exceeded the number of those detained and prosecuted in the periods of military regimes and of the martial law. Yet still, these courts and trials do not refer to constitutional emergency norms and hence, do not constitute exceptions. Although establishment of specially authorized courts violates the principles of the rule of law, the AKP charges its opponents within the general constitutional norms of the rule of law; it does not suspend the rule of law; it does not cause a crisis in the functioning of the parliamentary democracy.

Lastly and more importantly, these trials reveal that opposing the AKP has been identified with opposing the state itself. Firstly it is because, AKP's opponents are charged not on the basis of opposing the governing political party, but opposing "the constitutional order of the state". Therefore, in these trials, very silently and smoothly, the AKP is replaced by and identified with the state itself. Secondly, much of this identification is related to the status of judiciary. Executive, legislative and judiciary are all state powers. However, contrary to other two, judiciary is not a parliamentary power. Parliamentary state powers are used by representatives of the people; by the parties coming through general elections. Moreover, they are concentrated in the hands of the parliamentary majority. Yet, judiciary is exclusively a state power; it is the reserved domain of state; reserved from the partisan, political powers of the parliament. Majority party in the parliament can use both legislative and executive powers; however, it cannot achieve judicial power as it is both substantially and as an organ independent from the parliament. Nevertheless, in the above cases of political

trials, we see that a power exclusively in the service of the state is convicting those who oppose a political party.

All in all, aforementioned three political trials illustrate that the AKP is no longer only a parliamentary political power; yet, it has, to some extent, turned into a state power. For that reason, they will be examined as the crux of AKP's relation with the constitutional State in Turkey.

The connection between secularism and the political trials shows itself within this general relation between political power and the constitutional state. The analysis of secularism demonstrates how the ruling party can control the normative order of the constitutional State, and how it can establish its own understanding of a norm, as the norm of the State. By the same token, political trials demonstrate AKP's control over judges and courts, and how it installs its own political interests as the interests of the State. Yet, political trials goes one step further and also highlight that the AKP becomes able to use legality and the courts as a repressive measure against third parties. Interference of politics to both courts and the normative order of the rule of law is prohibited. Both shall stay neutral and independent. However, political trials in one respect and the analysis of secularism in another respect present how the AKP has accessed to these areas which should be closed to it. Therefore, they complement each other in showing the extent of AKP's transformation into the state power.

1.3 Research Question of the Study

While showing the extent of AKP's transformation into the state power, the main point that the dissertation emphasizes is this: passing of ruling party in the parliament over its limits has taken place within the boundaries of the constitutional State in Turkey. During the last ten years of AKP rule (2002-2012) and especially after 2007-2008 period, the rule of law and the parliamentary democracy have kept functioning.

Similarly, political trials that we use to illustrate the transformation of the AKP into the state power, have taken place within the framework of the constitutional State and the rule of law. In this respect, while examining this transformation and while illustrating it by political trials, the dissertation will question the role of the constitutional State, the rule of law, and parliamentary democracy as well.

Hence, the research question of the dissertation is as follows: How come the constitutional State in Turkey allowed a political party to surpass its parliamentary limits and represent itself as the state within the boundaries of the rule of law and parliamentary democracy?

1.4 Theoretical Background, Tools and Concepts

The dissertation tries to answer its research question within the constitutional state and the rule of law discussions. Therefore, the dissertation conceives "the state" as "constitutional" state. Accordingly, constitutional state is a state that is bound by its positive law. It is a type of state, in which law is supreme over the state power. Accordingly, state power shall be exercised on the basis of pre-determined, explicit and general laws. Hence, constitutional state reflects the idea of encircling state power with a legal order and obligating rulers to this legal order[1]. Within such a state, law declares the rights and wrongs of ruling: it presupposes the proper and improper usages of state authority beforehand, and confines its exercise to proper usages by the promulgation and enforcement of positive laws.[2] In that way, state turns out to be a legal person, a subject of law. At the top of legal hierarchy, there lies the constitution. Therefore, state's subjection to law implies its subjection to the constitution. In that

[1] Erdoğan, Mustafa (2003). *Anayasal Demokrasi*. Ankara: Siyasal Kitapevi , p. 3

[2] Alexander, Larry. (2001). *Constitutionalism: Philosophical Foundations*. New York: Cambridge University Press, p.17

way, constitution declares its sovereignty over the state. The purpose is to prevent the absolutist and arbitrary usage of state power. Hence, constitutional state is a particular form of state, where constitution is the highest authority, and where law reigns, rather than the political power of the state. Thereby, constitutional state establishes "rule of law" as its regime, opposed to "rule by power".

In the philosophical and intellectual background of the constitutional state and the rule of law tradition, one can detach the development of positive understanding of law, inviolable rights and liberties of individuals, and popular sovereignty in the 17th and 18th centuries in West European states. For the sake of the discussion concerning this background, the ideas of the main thinkers of positive understanding of law, constitutionalism, and liberalism will be mentioned. They are Jean Bodin, Thomas Hobbes, John Locke, and more limitedly Jean Jacques Rousseau and Montesquieu. Throughout history, inviolable rights of individuals are named differently. They are called "individual rights and liberties", "democratic rights and liberties", "basic human rights" or "universal human rights" depending on the historical period one searches. On the one hand, political regimes and systems that protect such rights, and are dedicated to enhance them, are called "liberal". On the other hand, it is the law that takes these rights and liberties under its protection. Therefore, in constitutional states, encircling state power with a legal order means encircling state power with these rights and liberties. If we are to make a very broad and perhaps crude differentiation between form and substance, we can say that, the substance of the rule of law and constitutional state is individual rights and liberties. So, taken together with its substance, the meaning of constitutional state extends and refers to *state of rights*.

In a similar vein, supremacy of law over state power equals to supremacy of basic rights and liberties over state power. Conversely, for these rights and liberties to circumvent the state power, they need to be enacted as positive legal norms; they need to be stated in the constitution, and legally structured. Thereby, they need to be a part

of the rule of law regime. In these circumstances, whatever they are called, the dissertation does not deal with these rights and liberties in their own right; with their content and historical development. The dissertation only very roughly defines them. Nor the dissertation focuses on their relation with state power as abstract ideal values. Rather, the dissertation searches the interaction between state power and these rights and liberties, only after and to the extent of their transformation into positive laws. At that time, these rights and liberties become the normative content of laws.

Throughout the dissertation, what is meant by the term "state power" is "political power". Political power may exist out of the state, independent of it. Yet, state is conceived as the most institutionalized form of it. What is emphasized in this association of political power with the state is the distinction between rulers and ruled. Then, political power is narrowly conceived first and foremost as a relation between those who rules (and uses state power) and those who are being ruled (and does not use state power). In this regard, in the dissertation, the terms "state power" and "political power" will be used interchangeably, until an explanation will be made about their difference in the context of judiciary. Also, the difference between them will be kept limited to this specific context; to the discussion of judiciary.

Meanwhile, in a constitutional state, it is the type of the government that determines how state power is exercised. For our purposes, it is the parliamentary democratic government. Parliamentary democratic government bears importance for many respects. On the one hand, it dictates that political power of the state shall be used by the representatives of the people elected through universal suffrage. On the other hand, state power is separated between legislative, executive, and judicial powers. In the dissertation, state power refers to these three fundamental powers rather than state's administrative power. It is because; these three powers are the sovereign powers of the state; all administrative powers and authorities emanate from them. Indeed, what is meant by parliamentary democracy is first and foremost the separation

of these three powers from each other. Beside separation of powers, the other features of parliamentary democracy such as representation, party politics, and electoral system; and the question whether these features of parliamentary democracy are democratic or not, will not be problematized and will not be analyzed.

Additionally, the term "liberal democracy" is used time to time in place of "parliamentary democracy". Hence, parliamentary democracy is declared to be one of the liberal regimes. Actually, these two descriptions point to the same government type, one from the angle of its organizational form (parliament) and the other from the angle of values it defends (basic rights and liberties). Thus, calling contemporary democracies as parliamentary or liberal consists of describing the same whole from different angles; from the angle of form or substance. Therefore, when the substantial dimension of parliamentary democratic government will be underlined, the term "liberal democracy" will be used.

In the light of the research question, constitutional state and the rule of law will be criticized due to their allowance of majority political party in the parliament to dominate the constitutional state. The theoretical tools and concepts that will be used in this criticism belong to Carl Schmitt. Carl Schmitt (1888-1985), a German political philosopher and legal scholar, is best known for his political theory and his thoughts on "politics", "sovereignty" and "friend and enemy distinction". Moreover, he is known as the theorist of borderline cases, like state of exception and extraordinary situations. However, the dissertation uses Carl Schmitt's less well known legal theory and his ideas on legality, rather than his popularly known political theory and political concepts. Just as Schmitt's ideas on legality is preferred to his political theory, his concept of decisionism, his ideas on normativism and legal indeterminacy will be included; whereas his theory of sovereignty and politics will not even be mentioned.

This set of choices implies that Schmitt's ideas will not be applied to the case of the AKP one-to-one. Just the reverse; those concepts and ideas which more or less fit the case of the AKP will be selected and developed. This is understandable, giving the difficulty of making application between Schmitt's ideas which are basically on Weimar Republic (1919-1933), presidential emergency powers, and fascist National Socialist German Worker's Party (NSDAP); and AKP's parliamentary power of 2000s in Turkey. Hence, the dissertation avoids implying that Schmitt's ideas are directly applicable to the case of the AKP as a whole, or it avoids giving the impression that Schmitt anticipated majoritarian parties such as the AKP to rise to power in contemporary democracies and hence, his thoughts very well explain this power relation. Rather, it is the dissertation that construes the interaction between AKP power and the constitutional state in Turkey with the help of certain ideas of Schmitt, so that this explication belongs to the author of the dissertation, rather than to Schmitt.

At the core of Schmitt's legal theory and his ideas on normativism, there is the concept of *decision*. As widely known, decisionism in Schmitt concerns constitutive power and sovereignty. Therefore, it is a concept related to constitution of the political regime and legal order; it is a sovereign or constitutive decision, taken once and for all, independent of any norms and laws. The concept of decision that Schmitt uses while discussing judicial decisions, on the other hand, differs from this sovereign understanding of decision, which is unbounded and cannot be justified by any legal norm. Rather, it is a minor version of decisionism, which works within legal system rather than staying outside and establish it. It is a decision that enables enforcement of laws to concrete cases and hence allows legal system's daily functioning. Hence, this second and minor version of decisionism is internal to, and a part of the normative order of the rule of law.

Through this decisionist component of the normative order, he links the rule of law and the constitutional state to political power. Among other critics of constitutional state and the rule of law, this internal linkage is one of the particularities of Schmitt. According to him, the rule of law is not an order of norms imposed upon state from the outside; yet it is the outcome of the workings of political power. If the rule of law fails to function, or it functions against the basic rights and liberties, it is because parliamentary democratic politics fail to function, or it functions against the basic rights and liberties. Concisely, he implies that non-liberal politics cannot produce liberal laws and cannot enforce it liberally. Thereby, independence of law and the legal order from the political power is denied. On the contrary, the issues thought to be the concern of law are transformed into political problems; legal issues are made into political issues.

The parliamentary democratic politics, which Schmitt points out as the real problem area, is not defined by him with any liberal or democratic substance. Instead, it is defined by absolutism of majority. It means that all state power can be exercised by a party who constitutes parliamentary majority; this majority will not encounter any substantial limitation concerning rights and liberties. More importantly, this majority has the shelter of legality. Absolutist politics of the parliament ratifies that political power cannot be bound by the rule of law; on the contrary, the rule of law turns out to be a shelter ascribing legality to all kinds of actions of who captures state power. As a result, primarily parliamentary democratic politics, and only secondly constitutional state and rule of law are empty forms, which cannot be defined by a particular substance.

Hence, within the framework of Carl Schmitt's legal theory and ideas on parliamentary politics, what allowed the AKP to insert its "Islamist" policies as "secular" arrangements and charge its political opponents as "the state" is the decisionist component of the normative order of the rule of law. Through controlling

this decision, the AKP controlled the meaning of secularism and represented itself as the state. In addition, the fact that the AKP did both of them within the boundaries of the rule of law and constitutional state also shows that these institutions are only formally defined and are susceptible to any kind of politics as long as a political party achieves majority in the parliament. Then, the AKP is actually using a facility that parliamentary democracy, the rule of law and the constitutional state provide for any majority party.

1.5 Remarks on Methodology

AKP still in power and its interaction with the constitutional state is a process that still continues. This being the case, the dissertation has to set itself temporal boundaries to analyze its research question. In this regard, the dissertation is limited with the analysis of the relation between the AKP and the constitutional State in Turkey between November 2002, when the AKP came to power for the first time, and July 2012, when the 3rd judicial reform package that abolished specially authorized courts was enacted. Hence, the dissertation will be examining AKP's 10 year in power.

Most of the time, the dissertation deals with current issues which are up-to-date and which keep changing. They are still a part of "today", not a part of the "past". Hence, there has not yet much time passed over them to allow the creation of established opinions and sides. Similarly, it is difficult to find much academic discussion and analysis especially in the issue of consecutive judicial reforms and political trials. Therefore, the data about the subject matter of the dissertation is mostly collected from periodicals and journals. In addition, the opinions of commentators, columnists, or who directly involved in the developments, such as lawyers, judges, soldiers and journalists, are used. The dissertation also frequently refers to digital resources.

There is one exception to the analysis of current issues; and this exception takes place in the examination of secularism. When AKP's relation with secularism is scrutinized, the dissertation makes a historical analysis. In this part, beside examining the secular character of AKP's activities, the dissertation questions how and in which ways the State has so far been secular to respond correctly to AKP's alleged misdoings. Hence, in this part a feature of the constitutional State in Turkey is questioned as well. The purpose of this questioning is to set the basic features of secularism of the State. To do this properly, interaction of the secular state with previous political powers needs to be displayed. That's why the need for a historical analysis appears. In this respect, first, activities of *Anavatan Partisi* and Turkish Military are examined. Second, the question whether or not secularism has limited them is answered. Third, the attitude of the secular state towards them is compared with its attitude towards the AKP.

AKP's interaction with the constitutional state could be handled within a broader methodological perspective. For instance, Schmitt claims that the constitution is equivalent to the state; the state is identical with its constitution.[3] At a constitutional level, law cannot be separated out from the state: the constitution of the state is always the inner political will of it. Nevertheless, constitution means two things. First, it is a concrete collective condition of political unity of a state. It is, in other words, the principle and a status of unity and order.[4] The state would cease to exist if this constitution, more specifically this unity and order would cease to exist. In this regard, current constitution of Turkey, 1982 Constitution, designates this political unity; it designates "the indivisibility of the existence of Turkey with its state and territory" (Preamble and Article 3). It points out the date October 29, 1923, the establishment of this political unity as a nation state and as a Republic. Secondly, constitution is a particular, concrete type of this political and social order; a special type of state's

[3] Schmitt, Carl (2008). *Constitutional Theory*. Durham: Duke University Press, p. 60

[4] Schmitt, 2008, p. 59

existence. In this instance, constitution means the concrete type of supremacy and subordination that it creates in a specific time. Therefore, besides pointing out 1923, 1982 Constitution refers to September 12, 1980, when a particular type of political existence; a particular type of political unity of Turkish state "as an indivisible entity with its territory and nation" was reformulated, and a new relation of supremacy and subordination was installed.

When the AKP came to power in 2002, it interacted with this double meaning of constitutional order and political unity. On the one hand, through its relation with 1980 order, the AKP came into contact with 1923's political unity. It is mainly because; the particular type of post-1980 parliamentary politics and order would cease to exist if 1923's political unity of state as a nation state would be harmed. On the other hand, the AKP was mainly circumvented by Republic's political existence as a parliamentary democracy and nation state reformed after 1980 by the introduction of a new constitutional order. Even today's parliamentary democracy and political order are mostly shaped by 1980 political unity, and hence, refer to 1980 rather than 1923. Indeed, interaction of the AKP with both of these dimensions of state (political unity of 1923 as a nation state, and concrete existence of nation state re-established after 1980) in a combined manner would give us the complete picture of AKP's impact on constitutional state.

However, the AKP's interaction with 1923 political unity and order (which would require us to compare and contrast Mustafa Kemal Atatürk, Kenan Evren and Recep Tayyip Erdoğan in terms of their relation with constitutional order and political unity of state) will not be studied here. Rather, AKP's relation with particular politics of 1980 constitutional order of state shaped by 1982 Constitution will be dealt with. Hence, when we say "state in Turkey", it refers to the constitutional order and parliamentary politics of 1982 Constitution.

Lastly, on and off, the dissertation makes references to the Weimar Republic (1919-1933) in Germany and to the NSDAP, into which Schmitt participated as a jurist and as a partisan. It is mainly because; the Weimar Republic was also a constitutional state. Yet, it is generally understood and explained that, it dissolved and turned into a fascist state by the way of constitutional and parliamentary means. The NSDAP was a legal political party. It entered into the parliament via general elections and formed the government through fulfilling constitutional procedures. Hence, the NSDAP came to power through legal means. It ruled through legal means as well. The NSDAP abolished the separation of powers, concentrated the state power in the executive, and hence dominated the state through legality. In this respect, the way that the AKP came to power, its instrumentalization of legality, and establishment of its domination over state powers reminds us the practice of power by the NSDAP in the Weimar Republic. More specifically, however, the AKP's usage of exceptional courts and political trials as a means to suppress its political opponents shows parallels with the NSDAP. Therefore, in the context of the relation between constitutional state and ruling majority political party, domination of constitutional state by ruling party and the threat that this domination poses towards the constitutionality of the state resembles each other in Turkey and in the Weimar Republic.

However, the dissertation has no intention to make a full-fledged comparison. The purpose of references to the Weimar Republic is not to compare Nazi Party with the AKP one-to-one. Hence, the dissertation is by no way a comparative study. Actually, beside similarities, the dissertation also underlines the divergences between two experiences due to apparent historical and contextual differences. Rather, the objective of referring to Weimar and to the NSDAP experience is to show an extreme case in history. This extreme case demonstrates the limits, where a majoritarian parliamentary party can reach in a constitutional state, having legality on its side. Hence, the NSDAP stands as a borderline historical experience. On the one hand, it is an extreme case ended up with the destruction of parliamentary democracy and

constitutional state; on the other hand, it emerges out of parliamentary politics and constitutional state. Therefore, it is used in this dissertation as a reminder for us about the power that the AKP potentially has in a constitutional state; it is a reminder of what the AKP can be and can do in the future.

1.6 Organization of the Chapters

The second chapter is devoted to exposition of the theoretical background and the concepts. Firstly, what is meant by constitutional state and the rule of law will be explained in a critical perspective with the help of a dichotomy between law and political power. Both constitutional state and the rule of law may be defined in variety of ways. More precisely, for different purposes, different features of constitutional state and the rule of law may be brought to forth. The dissertation, however, defines both of these concepts with their particularity. What is the particularity of constitutional state among other states ruled by law? What is the particularity of the rule of law among other legal orders? The dissertation defines constitutional state and the rule of law with the answers these questions. Secondly, Carl Schmitt's criticism of the constitutional state and the rule of law are given place. In the first place, formalism of the constitutional state and its dependence on absolutist majority will be underlined. Then, political and power component of the rule of law and constitutional state will be unraveled. Afterwards, the basic concepts of Carl Schmitt's legal theory, decisionism and accompanied terms like "legal indeterminacy" and "political justice" will be explained. It will be underlined that while decisionism and legal indeterminacy show how political power operates in the veins of the normative order of the rule of law, political justice manifests the transformation of a majoritarian political party to the state itself.

After the second chapter on theoretical and conceptual clarification, the interaction of the AKP with the elements of the constitutional state is started to be examined. This

examination begins in the third chapter with AKP's relation with the normative order of the constitutional State in Turkey. In the framework of this interaction with normativity, secularism will be analyzed. On the one end of this interaction, there is the Islamist power of the AKP. The chapter will examine the indictment prepared by the Chief Public Prosecutor of the Republic for the closure of the AKP, and display AKP's actions and policies which are deemed Islamist. On the other end, there is the secular state. In the interaction of Islamist AKP with the secular state, secularism is supposed to limit and sanction this Islamist political power. However, this expectation is not realized. The norm of secularism approves an Islamist power to rule the secular state. To answer how it happens, the third chapter will question the secular character of the State within a historical perspective. Accordingly, Islamist features of the actions and policies of two powers, the ANAP and the Turkish Military, will be disclosed. It will be shown that secularism and the rule of law order of the constitutional State fail to respond determinately to similar Islamist policies and actions; they approve them in some cases, while sanction them in some others. In this framework, the discussion of secularism will disclose the decisionist component of the rule of law order. The third chapter ends with arguing that contradictory attitude of the secular state towards Islamist policies and actions is a source of legal indeterminacy, which undermines constitutionality of the state. This legal indeterminacy operating in the enforcement of constitutional norm of secularism makes state non-constitutional. This non-constitutional feature of state that exists beside its constitutional feature, on the other hand, gives political power partial freedom from legal norms of the rule of law.

The fourth chapter targets the power dimension of the constitutional state. It will look at AKP's relation with law enforcing organs. First, executive law enforcement will be handled, and AKP's reformation of the MGK will be stated. In this section, MGK's illegitimate status within parliament democratic regime will also be mentioned. Second, judicial law enforcement will be examined, and AKP's reformation of

judicial organs, namely, the HSYK, the Constitutional Court, and the other high courts will be given place. In this second section, Fethullah Gülen Cemaat's role in the control of courts, *Cemaatization* of judiciary, and conservative judicial culture in Turkey will also be discussed. After scrutinizing both categories of law enforcing organs, the fourth chapter will underline that the purpose of the AKP has been to bind law enforcing organs to the government, and hence establish its domination over them. The MGK has been brought under Prime Minister's control, whereas the HSYK and the high courts are made dependent to the Ministry of Justice to a large extent. The parliament, and hence the legislative power of the state, was already under the domination of the AKP. With the reformation of the law enforcing organs, on the other hand, the AKP's power within the state is enlarged; and executive and judicial powers of the state are brought under its control. However, the fourth chapter will conclude by stating that AKP's control over law enforcing state powers and respective organs is not total; establishment of AKP's control over state powers is not a completed process.

After the examination of how the AKP controlled state powers and enforcement of laws, the dissertation starts looking at instances that this domination of the ruling party over constitutional state becomes visible. In this direction, the fifth chapter analyses political trials as the manifestation of AKP's transformation into the state itself. Among the three political trials that each left its mark on Turkish political history, the dissertation gives place first to the Ergenekon case, afterwards to the KCK case, and lastly to the Hopa Case. Subsequently, common features of the political trials will be scrutinized. As mentioned before, one of the most outstanding features of them is that, it is the political opponents of the AKP who is being charged in these trials. This opposition is principally Turkish military in Ergenekon Case, Kurdish politicians and activists in KCK Case, and socialists and protestors in Hopa Case. In this direction, the dissertation underlines that political trials show instrumentalization of judicial power of the state in the hands of the AKP. The second most outstanding

feature of the political trials is criminalization of political opposition in the exceptional court (ÖYMs) within the context of the Anti-Terror Law. Therefore, the chapter will emphasize that the AKP takes its political opponents out of the general jurisdiction of the constitutional state, and exposes them to the extraordinary justice. Following the terminology of Carl Schmitt, the dissertation calls extraordinary justice of the ÖYMs and the Anti-Terror Law as *political justice*. Afterwards, the decisionist component of the political justice will be displayed.

The sixth chapter can be read as a continuation of the fifth chapter. In the light of the findings that AKP's political justice reveal, sixth chapter will dwell on the effects of AKP's domination, or the changes that this domination make on the character of the state. First, the chapter questions the degree of the transformation of the AKP into the state. Accordingly, political trials show that both of the normative and power dimensions of the state have came under the control of the ruling party to a great extent. However, the chapter says that institutional and ideological identity between the state and the ruling party has not been achieved yet. Afterwards, sixth chapter will discuss whether AKP's political justice creates state of exception and can be interpreted as Enemy Criminal Law. Later, arbitrary element of AKP's rule, and its unconstitutional nature will be emphasized. The dissertation will underline that the constitutional state and the parliamentary democracy in Turkey bears in them the potential to be transformed into their opposites, namely to an absolutist and arbitrary power. Lastly, the dissertation will highlight the continuation between the AKP and the ancient Kemalist regime. It will be shown that the AKP utilizes the very means and mechanisms of Kemalist state and thereby entrenches authoritarian understanding of Kemalist state rather than toppling it. The dissertation ends with brief concluding remarks.

CHAPTER 2

CONCEPTUAL FRAMEWORK OF THE ANALYSIS

According to Ulrich Preuss, the most succinct definition of constitution is laid down by the framers of the French *Declaration of the Rights of Man and of the Citizen* of 1789. Article 16 of the Declaration says that "[a] society in which the guarantee of rights is not assured, nor the separation of powers defined, has no constitution at all." [5] Indeed, this definition unveils the essence of constitutional states. This essence is limited government. Accordingly, the function of a constitution, as understood at the end of the 18th century in Europe, is to limit the state power through the separation of powers and the guarantee of individual rights and liberties. This essence is also shared by the rule of law order; the purpose of the rule of law regime is congruent to that of the constitutional states. After examining the English constitutional tradition, the North American version of the rule of law, the German *Rechtsstaat* tradition, and French *État de droit* experience, Danilo Zolo claims that normative and institutional structure of the rule of law is entrusted with the task of guaranteeing individual rights and curbing the natural tendency of political power to expand and act arbitrarily.[6] In this regard, constitutionalism and the rule of law are associated with each other so much so that, the discussion on one involves the other. Moreover, what we see is that

---

[5] Preuss, Ulrich K. (2013). "Constitutionalism in Fragmented Societies: The Integrative Function of Constitutions" in *Political Theory: Critical Theory and Democracy : Civil Society, Dictatorship, and Constitutionalism in Andrew Arato's Democratic Theory*. Peruzzotti, Enrique; Plot, Martín (ed). New York: Routledge, p. 42

[6] Zolo, Danilo (2007). "The Rule of Law: A Critical Reappraisal" in *The Rule of Law: History, Theory and Criticism.* Costa, Pietro; Zolo, Danilo (ed). Dordrecht: Springer, p.7

constitutional states establish the rule of law as their regimes. At the end, constitutional states come to rely on both separation of powers and the rule of law order to limit political power and avoid arbitrariness, where these limitations are tied to popular sovereignty through legislative power of the parliament.[7]

Nowadays, constitutional state and the rule of law seem to lose their distinctiveness and appeal, not because they become obsolete in 21th century and withered away; but because they become so widespread to constitute the general, common condition of politics almost all over the world. Following 18th century, the social, economic, military and political exigencies have encouraged the expansion of constitutional states throughout the world. Today, reliance upon formal constitutional embodiments and principles for state governance is nearly universal. Almost all states have constitutions and hence almost all states are in a way "constitutional".[8] There is hardly a modern state that does not have a formal constitution that establishes and defines its governmental institutions. The same also holds true for the rule of law. Mortimer Sellers reminds us that now the rule of law is nearly a universal value, endorsed by the United Nations General Assembly. The Assembly repeatedly identifies "human rights, the rule of law, and democracy" as "universal and indivisible core values and principles of the United Nations." The Universal Declaration of Human Rights, the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples Rights reiterates that human rights should be protected by the rule of law.[9]

---

[7] Schochet, Gordon J. (1979). "Introduction: Constitutionalism, Liberalism and the Study of Politics" in *Constitutionalism*. Pennock, J. Roland; Chapman, W. John (ed). New York: New York University, p.4

[8] Schochet, 1979, p. 5

[9] Sellers, Mortimer (2010). "An Introduction to the Rule of Law in Comparative Perspective" in *The Rule of Law in Comparative Perspective*. Sellers, Mortimer; Tomaszewski, Tadeusz (ed). London: Springer, p. 1

However, expansion of constitutional states and the rule of law regime have not so far caused the proliferation of limited governments and curbing of arbitrary state power. Rather, in the second half of the 19th century and early 20th century, constitutions and the rule of law system served as the instruments of state-building and rationalization of the centralized bureaucratic states. Similarly, in the mid-20th century, when the world witnessed de-colonization movements, a significant number of new states appreciated constitution making as it was associated to economic development, rather than development of human rights:[10]

> The typical constitutions of this stage are authoritarian with the aim of state-building and centralization of power. They usually did include a bill of rights, whose validity was qualified by the addition of the phrase "except by the law," and with no independent mechanism for their enforcement. Rights were thus rendered largely decorative under the bureaucratic rule of law.[11]

Hence, as Schochet underlines, persistence of authoritarian impulses continues to challenge the ideal of limited government without weakening the resort to formal, written constitutions.[12] Consequently, today under the rubric of constitutionalism and the rule of law, we can find an array of policies that includes constitutional democracies of the West Europe, former communist political systems, but especially the autocratic and/or the single-party states of Latin America, the Middle East, East Europe and Africa.

All in all, at the hearth of the idea of constitutional state, there is limited political power which shall not act arbitrarily. However, realization of constitutional states

---

[10] Arjomand, Said Amir (2007). "Constitutional Development and Political Reconstruction from Nation-building to New Constitutionalism" in *Constitutionalism and Political Reconstruction*. Arjomand, Said Amir (ed). Leiden: Brill, p. 7

[11] Arjomand, 2007, p. 7

[12] Schochet, 1979, p. 5

around the world has not always brought limited political power. This situation shows that development of constitutionalism from 18th century onwards as an idea or set of principles does not always necessarily conform to the actual development and situation of constitutional states. Hence, it may be expedient to diverge the idea or the ideal of constitutional state and the rule of law from their development or realization in different historical contexts. Here, we will examine the idea of constitutionality, constitutional state, and the rule of law, rather than the way they are realized in different states. This examination helps us to establish the principal elements or primary attributes thought necessary for any constitutional state and rule of law order. Then, very roughly, we will set "what a constitutional state and the rule of law order should be".

2.1 Development of the Idea of Constitutionalism

In general terms, development of the idea of constitutionalism started in the 17th and 18th centuries. However, the relation between law and state power is older than this. Actually, state power has always been defined with respect to the law. State, as the institutionalized political power, has developed as a legal relation from the very beginning. Indicative of this is the etymological root of the term "state". *Status* is commonly accepted as the root of the state (*etat*) and it refers to the legal structure of a certain community.[13] Accordingly, state power comprises ruling on the basis of laws (meaning a system of rules) and exercising political power with regard to laws.[14] It is also noteworthy that functions of state power are defined according to the law: law-making (legislative function) and law-enforcement (executive and judicial functions). Nevertheless, there is a hierarchy among them. Law is superior and prior to state

[13] Brancourt, Jean Pierre (2000). "Estat'lardan Devlete: Bir Sözcüğün Evrimi" in *Devlet Kuramı*. Akal, Cemal Baki (ed). Ankara: Dost Yayınları, p.178

[14] Akal, Cemal Baki (2000). "Bir Devlet Kuramı için Giriş" in *Devlet Kuramı*. Akal, Cemal Baki (ed). Ankara: Dost Yayınları, pp.14

power; and for this reason, it can limit state power. Then, concomitant with the state's law-depended rule, there comes state's legally-limited rule.

In this respect, the claims that state power shall have a legal limit; and that law rather than the arbitrary will of the ruler shall dominate state administration can be traced to the times of Ancient Greece and its philosophers Plato and Aristotle. For them, laws are essential for the structuring of the *Polis,* meaning, political order. Accordingly, good political orders are always legal orders or orders according to the law. The arbitrary command of a tyrant is detrimental to this legal order and can not be considered as law. Hence, for both, arbitrariness of the ruler and the legal order completely excludes each other.[15] Therefore, from Ancient times onward, law is seen as a protection against the potential of abuse inherited in the power to rule.[16]

Yet, what was the law, then? The idea of law that was prevalent in Ancient Greece and Middle Ages can be labeled as Natural Law and Natural Rights tradition.[17] In Ancient Greece, the law was seen something eternal and fixed, temporally and spatially. This tradition continued in the Roman Empire with the writings of Cicero and Stoics. Accordingly, *Nomos* (the basic law) was accepted as the ruler of the divine and the human things. Such a transcendental understanding of law bestowed inviolable and irrevocable rights to human beings. The state power, on the other hand, was given the duty to respect them. Similarly, in the Middle Ages, Thomas Aquinas subjected all political order and the people to the law; and developed the idea that

---

[15] Friedrich, Carl Joachim (1963). *The Philosophy of Law in Historical Perspective*. London: The University of Chicago Press, pp.14-15

[16] Tamahana, Brian (2004). *On the Rule of Law: History, Politics, Theory*. Cambridge: Cambridge University Press, p.9

[17] Gierke, Otto (2000). "Orta Çağ'da Siyasi Kurumlar: Devlet ve Hukuk" in *Devlet Kuramı*. Akal, Cemal Baki (ed). Ankara: Dost Yayınları, p.130

human beings could discover what the law was through their reason.[18] In this period, eternal law understanding was mixed with religious elements and turned into God given laws. All in all, up until the 16th century, law was not human made; it was given either by the Nature or the God.

In the 16th century, in accompany with the development of absolute states in Europe, eternal, fixed and divine law understanding is challenged. Instead, historical and man-made understanding of law is started to develop. Hence, creation of laws, meaning legislation, was emphasized.[19] In this direction, we see that 16th century thinkers conceptualized state power as legislative power. Accordingly, authority of legislation is identified as the distinguishing mark of state power. Jean Bodin is one of these eminent thinkers who examined this changing relation between law and state power in the period of absolute states. Bodin distinguishes state power from other types of powers prevalent in society, such as the power of father in family over his wife and children on the basis of former's relation with laws.[20] He thinks that making laws that commonly oblige all subjects, and ruling on the basis of laws are the distinctive characteristic of the state power. Giving such laws is the essence of sovereignty of the state. Sovereign power is legislative power; when there is no legislative power, there is no state.[21] However, Bodin frees the sovereign state from the laws it makes. Sovereignty is understood by him as an omnipotent power. Therefore, the sovereign cannot be bounded by man-made laws; if so, it is no longer sovereign. Still, Bodin did not mean leaving the administration of the state to ruler's arbitrary decisions. While freeing the sovereign from the positive laws, he subjects the sovereign to divine law of

---

[18] Friedrich, 1963, p. 44

[19] Friedrich, 1963, p. 51

[20] Bodin, Jean (1992). *On Sovereignty: Four Chapters from the Six Books of the Commonwealth*. New York: Cambridge University Press, p.51-55

[21] Friedrich, 1963, p. 57

God. Hence, whereas subjects of the sovereign are subject to sovereign's law, the sovereign is only subject to divine law.

Another prominent thinker of the period of absolute states is Thomas Hobbes. Similar to Bodin, Hobbes also thinks sovereign state as a law giver power. For Hobbes, law is the will of the state. Therefore, the only source of the law he recognizes is the will of the sovereign. Hence, law is not counsel, but the command; laws owe their legal validity to the will of the sovereign alone.[22] Hobbes agrees with Bodin that law is the command of the commonwealth and commonwealth cannot tie his own hands with positive law.[23] Therefore, he also asserts that the sovereign state itself is not subject to the civil law.[24] For him, the idea that state restricts itself with the positive law that it enacts, is nothing but absurd.

Then, in the 16th century, the understanding of law and its relation with the state is considered anew. In this period, law is understood as positive legislation. Sovereign state, on the other hand, is deemed as the creator of positive law through being the sole legislative power in society. One can say that constitutionalism of 17th and 18th centuries will flourish on the top of this positive understanding of law and legislative power of state. This development can clearly be seen in the ideas of John Locke. Locke's legal thinking is shaped by the idea of positive legislation. Similar to his antecedents, for Locke, what distinguishes state power from the other types of powers (he also gives the example of patrimonial power) is the right to make laws with penalties and to employ force in their execution.[25] Law, on the other hand, is

---

[22] Friedrich, 1963, p. 84

[23] Bodin, 1992, pp.11-13

[24] Hobbes, Thomas (1985). *Leviathan.* London: Penguin Books, pp.312-313

[25] Locke, John (1980). *Second Treatise of Government*. Macpherson, C.B. (ed). USA: Hackett Publishing Company, p.8

legislation of the parliament. In this context, law is contrasted with the prerogative of the sovereign king. Prerogative is the right of the crown, privilege of the king. It requires no authority in law through the act of the parliament. In this context Locke says that who exercises legislative power must govern according to existing laws and not according to temporary ordinances.[26]

Two novel notions come to forth in Locke's thinking, which has an immense influence in the shaping of the idea of constitutionalism. First, the state will legislate positive law; afterwards, it will abide by these laws and rule accordingly. Second, the authority of legislation is given to the parliament, rather than to the king or any other power. Hence, parliament is praised vis-à-vis absolutism of the monarchy. It is accepted as the representation of the people; the consent of the parliament is taken as the consent of the people.[27] Therefore, it represented participation and co-determination of the people. In that way, when the consent of the parliament is taken in the creation of laws, it is believed to create an order either explicitly or tacitly agreed to by all. Hence, the emphasis on the parliament and the consent of the people in Locke's ideas will gradually pave the way to popular sovereignty and inviolable rights and liberties of the individuals, which are among the important pillars of modern constitutionalism and liberal political order.[28]

In this turn to constitutionalism, Montesquieu must also be mentioned, who not only stresses on the significance of positive law vis-à-vis eternal, natural law; but also introduces the idea of separation of powers. Montesquieu thinks that law reflects the idea of justice. Accordingly, he tries to answer how law can realize it. In order to answer this question, he leaves aside natural law tradition. What he understands from

---

[26] Friedrich, 1963, p. 103

[27] Friedrich, 1963, pp. 67-68

[28] Schochet, 1979, p. 4

the concept of law is solely positive law. Then, he explains justice with positive law; and positive law within particular cultural systems.[29] There is another notion enhanced particularly in the writings of Montesquieu (beside Locke); and it is separation of powers. Separation of powers principle has become so embedded in the idea of constitutional state that it has become an inseparable part of it. At the hearth of this principle there lies the belief that concentration of power in a single hand creates absolutist and arbitrary power. Single and unchallenged state power may behave despotically. In order to block power concentration, legislation of positive laws is separated from its enforcement. Accordingly, the state separates legislative, executive, and judicial powers from each other and allocates them to different state organs; namely, to the parliament, the government, and the courts. Therefore, one of the instruments of constitutional state in limiting political power has been dividing and dispersing power within the state.

In the light of the ideas of these thinkers, one shall reconsider the meaning and the particularity of the constitutional state. Up until the development of the idea of constitutional state, throughout history, state rule has always been conceptualized in its connection with law; and state has always ruled with legal norms and rules. Similarly, law has always been seen as a barrier against the arbitrary rule of the powerful, and used to circumvent state power. Therefore, these features do not make a state constitutional. Main thinkers of constitutionalism do not seem to offer radically novel opinions for the conventional relation between the law and the state. Rather, they follow this conventional understanding. They defend that political power has a legal origin. Political power is a construction of sovereign law. The rights of individuals that precede state power and endowed by law are the principles that state shall respect and abide by. These ideas can most vividly be followed in the writings of Jean-Jacques Rousseau. In his political writings, Rousseau uses natural law and rights

[29] Friedrich, 1963, p. 105

theory as an instrument to defend that civil society and law predates the existence of state power and political organization, and hence restricts it. For instance, he claims that political order is a social *contract*.[30] In this regard, he states that social contract gives us the principles of *political* rights: the full title of his classic book *Social Contrac*t says *Social Contract or Principles of Political Right / Du Contrat Social ou Principes du Droit Politique*.

What the theorists of constitutionalism do is to reformulate traditional expectations from the law with a different terminology. In this terminology, the sovereign is no longer the state, but the people or the nation. What is protected against the arbitrary rule of the powerful, on the other hand, is natural rights and liberties of the individuals. The most prominent of these individual rights are freedom, equality, independence, property, right to life, and protection. Locke explicitly states that all public power should be used only for peace, security, and the public welfare of the people. All in all, in constitutionalism, the conventional relation between law and the state is kept, while it is reformulated on the basis of popular sovereignty and individual rights and liberties. However, apart from this reformulation, the novelty of constitutional state must be searched in the domain of positive law.

In the Middle Ages and during absolute monarchies, there had been a hierarchy between Natural Law and positive law of the state. Natural Law was supreme and bound equally the rulers and ruled. Subjects of state power, however, were additionally bound by the positive law of the state. Hence, state was restricted by Natural Law, and in turn, restricted its subjects by its positive law. Positive law was considered to be the command of the ruler, the will and an indispensable right of the political power. Hence, positive law could not bind the state. Sovereign state was under natural law; yet it was above and supreme over the positive law. Depending on

---

[30] Rousseau, Jean-Jacques (1968). *The Social Contract*. London: Penguin Books, p.59

the circumstances, rulers might even abstain from exercising positive laws.[31] In this context, the particularity of constitutional state is that state power is restricted by the positive law it enacts. The fact that positive law is above the state power and binds rulers and ruled alike, is the fundamental feature of constitutional state.[32] In that way, in the constitutional state, rulers and ruled are subject to the same law.[33] John Locke gives an excellent description of constitutional state: Everybody, even the ruler, must be bound by the same law. Therefore, absolute monarchy is inconsistent with political society or civil government, as monarch himself is unbounded by the law.[34] In sum, in constitutional state, the status of monarch and an ordinary citizen shall be the same before the law. The status of their liberty before the law is equalized.

The law that will bind the state power, on the other hand, is the will of the people; say it differently, legislative power shall be used by the people. It is an indication of the sovereignty; sovereign makes the law, and the people is accepted as the sovereign. Law has always been understood as the manifestation of the will of the sovereign; law has always been the command of the sovereign. Then, sovereign has always been the *uncommanded commander* in terms of its relation with law. Yet, subject of the sovereignty has been conceived differently in history. Sovereign was a transcendental entity in the Middle Ages. Sovereignty was associated with God and divine power. State's political power, on the other hand, bestowed by this divine sovereign; power holders were believed to be delegated by the God. However, in the period of absolute monarchies that preceded liberal thought, sovereign was the state itself. In this period,

---

[31] Gierke, 2000, p.132

[32] Sancar, Mithat (2000). *"Devlet Aklı" Kıskacında Hukuk Devleti*. İstanbul: İletişim Yayınları, pp.78-79

[33] Dyzenhaus, David (2000). "The Gordon Head of The Power: Heller and Kelsen on the Rule of Law" in *From Liberal Democracy to Fascism*. Caldwell, Peter C.; E. Scheuerman, William (ed). Boston: Humanities Press, p.45

[34] Locke, 1980, p.48

practice of state power and the principle of power (that is sovereignty) were unified in the state.[35] That's why, writing in the period of absolute monarchies, Hobbes uses "sovereignty" and "state power" in conjunction to each other and writes "sovereign power". In the writings of Bodin and Samuel von Pufendorf, who touched upon inter-state relations as well, sovereignty of state is more sharply underlined. When we come to the period of constitutionalism and liberalism, law is still the record of sovereign will. As Rousseau says laws are acts of the general will.[36] However, what liberalism newly does is to separate sovereignty and state power that was once unified in the state in the preceding period. Unification of sovereignty and state power was believed to be one of the causes of the absolutist rule of the monarch. Then, constitutionalism allocates sovereignty to an entity external to state: the people or the nation is accepted as the sovereign.

Hence, state's political power will be restricted by a sovereign standing out of the influence and control of the state. As it is the sovereign people who will make law, the will of the sovereign people will be able to limit political power of state freely, independently, without influenced by it. In that way, constitutional state establishes the relation between law and political power exogenously. Actually, restricting political power exogenously becomes a key in the constitutional state. However, legislation is organized as a political state power. In other words, legislation is not organized within sovereign people or nation who uses it, but it is organized within the state. It means that sovereign activity will take place within the state as a political power. As legislation is one of the three state powers, constitutional state actually requires that state's political power be restricted by a political power through an

[35] Mairet, Gerard (2000). "Padovalı Marsilius'dan Louis XVI'e Laik Devletin Doğuşu" in *Devlet Kuramı*. Akal, Cemal Baki (ed). Ankara: Dost Yayınları, p.226

[36] Rousseau, 1968, p.82

activity of political power from within the state's political power.[37] Hence in a constitutional state, state power claims to succeed what Hobbes, Bodin and Pufendorf think impossible: state shall bind its own hands. What Agamben calls as the paradox of sovereignty is also the paradox of political power, emanating from the fact that sovereign activity is an activity of state's political power.[38] Accordingly, political power of state is expected to act as the sovereign and make law reflecting its will. Yet immediately after legislation, it will renounce its sovereignty, act as the political power, and bow down to the law it has legislated.

Lastly, it is mentioned that in a constitutional state the difference between rulers and ruled becomes indistinct under legal order. However, this distinction is embedded in the very definition of political state power. Thus, legal order that is achieved in constitutional state denies the state power from its distinguishing mark. Hence, constitutional state seems to dissolve it. Therefore, in constitutional state, law is seen as the factor that renders political power ineffective. Objective law declares its domination over subjective political power. As state is emptied from political power, it is the law that will rule the state in constitutional state. In this case, the rule of law that constitutional state establishes does not simply mean "power is kept out of law, courts, and judiciary" as commonly used in daily language. Rather, the rule of law is an alternative governmental type developed against the domination of political power: the rule of law is the alternative of rule by power. Locke clarifies this point by associating the rule of law and rule by power with different stages of a person's life. He thinks that to live under power and rule by power is not appropriate for civilized, mature people. Living under power is only acceptable under paternal community and can only be a temporary period in a person's life due to special requirements of

---

[37] Sancar, 2000, p.44

[38] Agamben, Giorgio (2001). *Kutsal İnsan: Egemen İktidar ve Çıplak Hayat*. İstanbul: Ayrıntı Yayınları, p.25

childhood. Matured and reasonable people living in political society shall be free from any superior power and shall not be under the will or authority of other men. They shall have only the laws for their rule.[39]

Theoretically, limited political power by adherence to the rule of law is supposed to be the mark that distinguishes contemporary liberal democracies from totalitarian states, signified by excessive use of political power.[40] However, in terms of their dependence to state's political power, the difference between them blurs. It is because, constitutional state establishes a regime, the subject, the object, the instrument, and the location of which is political power of state. In a similar vein, if we are to concentrate on the internal (or organic) relation between political power and law, we see that Rousseau constructs a constitutional state in which state power has no commitment towards, and has no agreement with the sovereign nation. Similarly, in Locke's theory, apart from an ideal natural law, there is no guarantee that positive law of the state will abide by the public good. Friedrich states that Locke does not envisage any legal sanction apart from the right of revolution.[41] Ming-Sung Kuo agrees with these comments. Accordingly, limiting governmental power is only one aspect of a full-fledged concept of constitutionalism. Rather, constitutionalism is related to political power in a more complex way. Hence, a framework of analysis beyond the idea of limited government is necessary to account fully for the relationship between constitutionalism and political power.[42]

---

[39] Locke, 1980, p.17

[40] Tebbit, Mark (2005). *Philosophy of Law: An Introduction*. Oxon: Routledge, p.79

[41] Friedrich, 1963, p. 104

[42] Kuo, Ming-Sung (2010). "Reconciling Constitutionalism with Power: Towards a Constitutional Nomos of Political Ordering" in *Ratio Juris*. Vol. 23, No. 3, p. 392

This framework can only be established when the relationship between these two seemingly contradictory components of constitutional ordering is taken in a dialectical way, where one transforms into the other. However, liberalism establishes constitutional state as antimony of rule by political power. Political power and law are neatly separated from each other; and only an external relation between them is established. Hence, constitutional state never attempts to configure and conceptualize its internal dependence on, and dialectical relation with political power.

2.2 The Rule of Law Order in the Constitutional State

The concept of the rule of law does not offer a distinct understanding of state and political power than constitutionalism. Seller says that "the rule of law states" come into being with the emergence of constitutional governments. Hence, all states or societies that struggle towards the rule of law are also working towards constitutional governments.[43] Therefore, two concepts go hand in hand; the rule of law implies constitutionalism.

The rule of law is the normative structure of the constitutional state. Within this normative structure, the legal system is entrusted with the task of protecting individual rights by constraining the inclination of political power to expand, and to act arbitrarily. Therefore, it is constitutionalism's fundamental instrument to escape from arbitrary political rule and the guarantee of rights, beside the separation of powers. In the legal order of the rule of law, positive law establishes itself above the state power. It means that state's activities must be in line with positive law. Then, what are the characteristics of the rule of law of the constitutional states that distinguishes it from any other legal order?

[43] Sellers, 2010, p. 8, 4

There are some features of law which are common to every legal system; certain features are present whenever and wherever law exits.[44] For instance, legal order is always contrasted with the rule of man and subjective will. Law is always seen as a barrier before arbitrary personal power. Law is equated with reason, while man's rule with passion. Law is objective, man is subjective. Law is non-discretionary; rule of man is inconstant and uncertain. Hence, who lives under law is deemed not to be subjected to the unpredictable arbitrary will or judgment of individuals.[45] This is a part of the understanding of what is law, developed from the time of Ancient Greece and shared by the rule of law order of constitutional state. Yet, if we are to be more specific about the common features of a legal order, we have to look at preeminent legal scholars and philosophers. Among these scholars, Lon L. Fuller listed eight common features in *The Morality of Law* (1964), John M. Finnis four in *Natural Law, Natural Rights* (1980), and Joseph Raz eight in *The Authority of Law* (1979).[46]Among them, the features that these scholars agreed on, and which are relevant for our purposes are as follows: Generality of norms (that the norms are generally enforced without any discrimination), promulgation or publicity (that the public is made aware of them), predictability (that the laws are prospective, not retrospective), stability (that the norms are not frequently changed), certainty or clarity (that the formulations of norms are understandable). Accordingly, generality protects individuals against arbitrariness by assuring that like cases will be treated alike. Publicity ensures that citizens have fair notice of when and how the state will intervene. Stability helps bind

---

[44] Kramer, Matthew (2007). *Objectivity and The Rule of Law.* New York: Cambridge University Press, p.101

[45] Tamahana, 2004, p.122

[46] Marmor, Andrei (2008). "Hukuk Devleti ve Sınırları" in *Hukuk Devleti: Hukuki Bir İlke, Siyasi Bir İdeal*. Çoban, Ali Rıza; Canatan, Bilal; Küçük, Adnan (ed). Ankara: Adres Yayınları, p. 173

officials to legal norms, and clarity means that activities of those enforcing law can be held to relatively coherent standards.[47]

Yet, among them, one of the most debated features of legal order is certainty or legal determinacy. Actually, first and foremost, the rule of law promises legal certainty.[48] Accordingly, only a legal system that provides legal certainty can guide its subjects to the law. It permits those who subject to the law to plan their lives, and protect them from arbitrary use of state power. To sustain certainty and determinacy, the rule of law theory demands that, at minimum, laws shall possess sufficiently clear, unambiguous and determinate content. Determinacy of law means that they are capable of retaining a core of fixed meaning across every actual and potential enforcement to a range of different factual contexts. So that determinacy allows in adjudication subsuming similar unique facts and particular cases under general rules, having a sufficiently determinate meaning.[49] Through determinate laws, the rule of law provides equality, assure fair notice; and preserves accountability of government to citizens. In this way, state action becomes predictable, and a contribution to individual freedom can be made.[50]

These features are the fundamental characteristics of any legal order. They are always present when a legal system exists, and when a legal system functions. The rule of law is a legal order. Hence, they are also the indispensable features of the rule of law.

---

[47] Scheuerman, William E. (1999). *Carl Schmitt: The End of Law*. Maryland: Rawman and Little Publishers, p. 5

[48] Maxeiner, James R. (2010). "Some Realism about Legal Certainty in the Globalization of the Rule of Law" in *The Rule of Law in Comparative Perspective*. Sellers, Mortimer; Tomaszewski, Tadeusz (ed). London: Springer, p.43

[49] Salter, Michael G. (2012). *Carl Schmitt: Law as Politics, Ideology and Strategic Myth*. Oxon: Routledge, p.45

[50] Scheuerman, 1999, p.4

Then, compliance with these features is a vital prerequisite of the rule of law.[51] Yet, not every legal order is the rule of law. The latter goes beyond the former. Constitutional state and the rule of law introduce a new feature to formal dimension of legal order, which marks its particularity. Accordingly, in the rule of law, law is statute. It means that law is the act of the parliament; no one can enact law, but the parliament. Therefore, what the rule of law order establishes first and foremost is a *state of statutes*. Law is identified with the statute, because law is strictly required to be the will of the sovereign people. By this additional formal requisite, the rule of law says that constitutional state can only be run by the consent of the parliament, by the consent of the (representatives of) the sovereign people. Montesquieu says that although there are occasions on which it is necessary for a state to decree, fundamental law in democratic government is that people should have the sole power to enact laws.[52] Accordingly, in a legal system, there can be decrees, ordinances, etc. However, state cannot be run by them. Their power and status in the legal hierarchy is lower than law; they cannot be in the force of law.

Identification of law with statute makes laws subject to the functioning of parliamentary mechanism. This subjection also points out the other fundamental instrument of constitutionalism. As a result of the separation of powers, law making (legislative power) and law enforcement (executive and judicial powers) are separated. On the one hand, law is made by the parliament as a whole. Parliament is composed of the representatives of the people. It means that sovereign people use their sovereign legislative power via their representatives. On the other hand, law is executed by the government (council of ministers). The executive, by the way, is selected among the party or the parties that control the majority in the parliament.

---

[51] Kramer, 2007, p.14

[52] Montesquieu (1952). *The Spirit of Laws*. Hutchins, Robert Maynard (ed). London: William Benton Publisher, p.6

Then, executive is not elected by the people; but is indirectly appointed by the representatives whom the people elected to the parliament. In a word, executive state power originates from or appointed by the parliament. In turn, executive is not accountable directly to the people; but to the parliament.[53] As the government originates within the parliament, executive power is called as "parliamentary government". What is striking here is this: majority of the parliament exercises legislative power as members of the parliament. In addition, majority is elected as the government to execute laws. It means that the same majority will exercise both legislative and executive powers. Hence, legislative power and executive power is united in the hands of the governing majority. Although parliament, as the legislative power, is also a political power, because of this concentration, government is said to exercise the actual political power of state.

The second dimension of law enforcement is the judiciary that exercises the power of adjudication. This power is exercised by independent courts and judges. However, the activity of judgment and the judicial power is different from legislative and executive powers. It is because; judiciary is not a parliamentary power. Judicial power is not exercised by the representatives of the people. While government and parliament are renewed by general elections, judicial power is not affected by them. Moreover, political powers are partisan; they serve to the interests of their voters. Hence, they can only partially reflect the will of the people. On the contrary, courts are the servants of constitutional order itself. Therefore, they decide in the name of whole people; judiciary as a state power is the common judge for all. Therefore, contrary to legislative and executive powers, judicial power is not accepted as a political power. Rather, judiciary is a state power.

---

[53] Siaroff, Alan (2005). *Comparing Political Regimes: A Thematic Introduction*. Peterborough, Ont: Broadview Press, p.145

As judiciary judges in the name of all, it is supposed to be substantially independent from politics and political powers. This is called "judicial independence".[54] Judicial independence indicates independence from overt political pressure or political interference. Therefore, judiciary must be independent from executive and legislative powers. Moreover, judiciary checks the compliance of legislative and executive powers to law. Judicial organs supervise both executive and legislative organs, and ensure that these organs observe the rule of law. Hence, judiciary is a state power that supervises political powers of the state. Hence, independence of judiciary from these powers is needed. In this regard, in order to provide judicial independence, judges and courts must have job security, judges must have autonomy in regulating their internal affairs and they should not take orders and instructions from anybody.[55] Here is where a distinction between "state power" and "state's political power" can be made within the parliamentary system of constitutional state. State power is much more than political power as it also encompasses apolitical, non-partisan power of judiciary. So, even though majority holds political power, it is short of holding all state powers, or at least, it has to be.

One can realize that these two features (that the law is a statute, and that its making and enforcement are separated) which define the rule of law and distinguish it from other legal systems are both formal features. It is as if the rule of law establishes a *state of statutes* and stops there. However, the rule of law has a substantial dimension, either. It is equated with liberty, equality, and (individual/democratic/human) basic rights. Locke mentions that the rule of law is a government type that equality and freedom prevails.[56] It is also repeated in Rousseau. Rousseau states that law

---

[54] Gözler, Kemal (2011). *Anayasa Hukukunun Genel Esasları*. Bursa: Ekin Yayınları, p.223

[55] Erdoğan, 2003, p.126

[56] Locke, 1980, p.17

guarantees public good, justice, liberty, and reason.[57] It means that apart from aforementioned formal features, the rule of law is defined by a certain substance. Then, legislation must conform to certain substantial standards as well. These standards are intrinsic to the idea of law as a means of governance. Basic liberties of thought, speech, consciousness, and association are necessary constituents of the rule of law.[58] When it is defended that government is bound by rules, it is not only meant having the rules fixed and announced beforehand. Yet, rule of law is an ideal for "good government" stressing the dimension of rightness in the legal order. Therefore, what is expected from the rule of law is actually the rule of right. That's why rule of law is said to establish constitutional state as a *state of rights*. It implies that constitutional state transcends *state of statutes* and reaches *state of rights.*

Nevertheless, we must be cautious in defining the particularity of the rule of law with a certain substance. It is because; in any legal order *law* is identified with *right*, *Gesetz* with *Recht*, *loi* with *droit*, *lex* with *jus*, and *yasa* with *hukuk*. It is the idea behind the legal order that what is law is right; and *vice versa*.[59] Therefore, law has always had a moral, substantial content. For instance, beside Lon Fuller, Finnis and Raz, whom we mentioned above, also L.A. Hart underlines that law inherits a substantial dimension owing to its formal features. Fuller calls it as "inner morality" of law, whereas Raz and Finnes say "minimum morality". This inner morality of a legal order develops independent of the substance of laws. Rather, it originates from the relation that legal order has with political power. Law and legal order always deemed to restrict the arbitrary power of state, and this restriction is considered as "good" and "beneficial". This point is crystal clear in Finnes, who explains the inner morality of legal order by

---

[57] Rousseau, 1968, p.59

[58] Allan, Trevor R.S. (2003). *Constitutional Justice: A Liberal Theory of the Rule of Law*. New York: Oxford University Press, p.2

[59] Fletcher, George (1996) *Basic Concepts of Legal Thought*. New York: Oxford University Press, p.12

looking at how it limits political power. According to him, legal order has a moral goodness just because it prevents making, enforcing, executing law in ways that intended to advance only the interests of some men, and it prevents making secret and retrospective laws.[60]

The most important moral feature of law that emanates from its form is "equality before the law". It means that the law is enforced indiscriminately, and it addresses to general public, not to particular individuals. Hence, all individuals are equally bound by law. Yet, the motto "equality before the law" is contained in the formal principle of generality of laws. Generality principle dictates that state should govern by promulgated laws common for all, not by commands addressed to particular individuals. For instance, decrees that vary in particular cases are accepted as *ad hoc* decision of the ruler. They are regarded as the *subjective command* of the ruler, not as *objective laws*. Therefore, arbitrary modes of government are excluded, when the law consists of general rules that are binding all. This point is also underlined by constitutional state theorists. Rousseau utters that decrees are commands, not laws. Commands that a person individually give can never be accounted as law.[61] Similarly, for Locke, the legislative or the supreme authority cannot assume itself a power to rule by arbitrary decrees. It is bound to dispense justice and decide the rights of the subjects by promulgated, standing laws.[62] Perhaps, because of this emphasis, "equality before the law" and "generality" is attributed solely to the rule of law and constitutional state. Some claims that generality is the basic premise of constitutionalism and the ultimate meaning of the rule of law.[63] Through generality, government cannot discriminate unfairly between citizens by selective enforcement of

---

[60] Finnes, John M. (1980) *Natural Law, Natural Rights*. Oxford: Clarendon Press, p. 12

[61] Rousseau, 1968, p.59

[62] Locke, 1980, p.71

[63] Allan, 2003, p.2

general principles. Therefore, the equal dignity of citizens with its implications for fair treatment and respect for individual autonomy is provided.[64] However, contrary to this claim, generality is a formal feature of law and present in any operative legal system.[65] Therefore, it may be operative and consistent within any *state of statutes* and with many political regimes, not particularly with a *state of rights*.[66] Consequently, generality may be the basic premise of the rule of law; yet it is definitely not peculiar to it.

What has been said for generality is also valid for the other formal features of law. All in all, legal order has a substance; because, the restriction of political power is deemed something good. Among this substance are there the values such as equality, fairness, equal treatment, freedom from state coercion, and right to organize one's life freely. These formal features are connected to the nature of law as against the nature of decree or command. Thus, these substantial elements are the features of any legal order, not particularly that of the rule of law. According to Raz, if the rule of law emphasizes mainly the requirement that governmental actions should be circumscribed by general rules, it is only one of the virtues that a legal system may possess. It is an essentially formal doctrine, which shall not be confused with democracy, justice, equality, human rights, etc. Therefore, he claims, a non-democratic legal system basing on the denial of human rights, on racial segregation, sexual inequalities, and religious persecution may conform to the (formal) requirements of the rule of law better than any of the legal systems of liberal democracies.[67]

---

[64] Allan, 2003, p.31-32

[65] Kramer, 2007, p.112

[66] Tamahana, 2004, p.97

[67] Raz, Joseph (1979). *The Authority of Laws: Essays on Law and Morality*. Oxford: Clarendon Press, p.211

If the rule of law satisfies with the formal values of a legal order, legal order can be maintained whereas basic rights and liberties will be endangered. Therefore, in order to protect them, the rule of law must clearly define and encompass basic rights and liberties, independent of the formal values of any legal order. Moreover, it shall have measures and mechanisms to secure these rights and liberties seeing that legal order may function to the detriment of them. Otherwise, it cannot differentiate itself from any other legal order, and the constitutional state that it rules cannot be evaluated as a *state of rights*. Then, what sort of measures and mechanisms the rule of law has, in order to assure a particular substance? Constitutional state assumes that, the fact that sovereign people uses legislative power secures the substance of the rule of law. As the law can only be made by (the representatives of) the sovereign people, it is thought that it can never be contrary to public good, common interest, liberty and justice. The highest legal norm that people legislates, on the other hand, is the constitution. As the highest norm, there shall be no norm in the legal system contrary to the constitution. No state organ, office, and law can have power and authority which is not defined by the constitution. Say it differently, all power, authority and the validity of other norms originate from the constitution.[68] Therefore, if basic rights and liberties are stated in and protected by the constitution, it is believed that no legal rule and no state organ can violate them. Therefore, constitution, as the highest legal act of the sovereign people, is thought to be the guarantee of the substance of the rule of law.

Then, the rule of law relies on the people's legislative power and the constitution, as the supreme outcome of this power. However, for this reliance to turn into a measure, it should involve a system of legal checks and sanctions to deter any wrong doing. Otherwise, our question concerning how the substance of the rule of law be secured, will stand unanswered, yet will be postponed by bringing forth a new one: What sort of measures and mechanisms are there that assures the substance of people's

[68] Erdoğan, 2003, p.21

legislative power and hence of the constitution? Therefore, what we are looking for, are legal sanctions that deter and punish legislative power when it acts contrary to the substance of the rule of law, which actually means when they violate the rule of law.

However, who looks for a legal measure that guarantees the substance of the rule of law by checking the legislative power of the people, looks in vain. The rule of law is a legal order; yet, that legal order lacks legal measures to sustain its substance. When executive and judicial powers enforce the laws irrespective of equality, when state power ignores the rule of law, what sort of a legal provision does it face? In the constitution, it is indicated that state shall respect the basic rights and liberties. Nevertheless, legal order does not include legal sanctions that state will incur when it does not respect them. Constitutional state theorists may remind us the mechanism of judicial review and the constitutional courts as the institutions of this mechanism. The principle of judicial review indicates constitutional court's authority to examine an executive or legislative act; and to invalidate that act if it is contrary to the constitution. The principle of judicial review is applied very differently; its procedure and scope differs greatly from one country to another. However, one weakness seems to be common to all practices of this principle. If the constitutional or supreme court views the executive or legislative act contrary to constitution, it invalidates that specific act. However, it foresees no legal sanction for the executive or legal power that attempted to pass an anti-constitutional norm. In such a case, political power incurs no penalty.[69]

---

[69] Other shortcomings concerning the functioning of judicial review can only be revealed by examining the individual systems in each state. For instance, we can have a look at the Constitutional Court in Turkey. In Turkey, the Constitutional Court has the authority to examine and invalidate laws, decrees having the force of law, rules of procedure of the Turkish Grand National Assembly or specific articles or provisions thereof. However, it has no authority to take action on its own behalf. Put it differently, in case these legislations are thought contrary to the Constitution, the Court can not review them automatically. The Court needs to be authorized by either of the President of the Republic, parliamentary groups of the party in power and of the main opposition party, and a minimum of one-fifth of the total number of members of the Turkish Grand National Assembly (Article 150 of 1982 Constitution of Turkey).

Similarly, one may say that, rulers will incur certain measures like losing their public support and weakening their chance in re-elections. Even some may defend people's right of disobedience against bad or unjust state power. Yet, they are the *political, and not the legal outcomes* of state's improper administration. As the rule of law establishes a legal order as opposed to political order, what we are questioning here is whether state power is legally at liberty to abstain from following the (substance of) the rule of law.

If state is under legal *duty* to follow the law (which must be the case in a constitutional state), it cannot have legal *liberty* to abstain from following the law. A duty and a

---

If these defined persons or groups do not apply to the Court, the Constitutional Court can not review unconstitutionality of the executive or legislative acts. Secondly, Constitutional Court has the right to examine constitutional amendments only with regard to their form. Hence, if the parliament verifies a constitutional amendment contrary to basic rights and liberties of individuals, the Constitutional Court in Turkey seems to have no right to annul it as long as the procedure of constitution amendment is followed right through. Moreover, the Constitutional Court has no right to review decrees having the force of law issued during a state of emergency, martial law, or in time of war either in form or substance. Therefore in Turkey, Constitutional Court or judicial review is not a sufficient mechanism to assert legal sanctions upon legislative and/or executive powers.

The right of Constitutional Court to close political parties seems to be an exception to this rule. Accordingly, Article 68 of the Constitution says that the statutes and programs, as well as the activities of political parties shall not be in conflict with the independence of the state, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law, sovereignty of the nation, the principles of the democratic and secular republic; all of which are constitutional norms. In addition, political parties shall not aim to protect or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime; all of which are prohibited by the Constitution. After the filing of a suit by the office of the Chief Public Prosecutor of the Republic, if the Constitutional Court determines that such actions are carried out intensively by the members of a party or the situation is shared implicitly or explicitly by the grand congress, general chairmanship or the central decision-making or administrative organs of a party or by the group's general meeting or group executive board at the Turkish Grand National Assembly or when these activities are carried out in determination by the above-mentioned party organs directly; and hence when a party is decided to become the center of such actions, Constitutional Court may dissolve the party permanently (Article 69 of the Constitution). Hence, the right of party closure by the Court seems to be a robust legal sanction.

Nevertheless, the very subject matter of the dissertation is a rebuttal of this idea; the dissertation is itself a proof that Court's right to close political parties is not an exception to insufficiency of legal sanctions. It is because, the Court decided that the AKP is using its executive and legislative power unconstitutionally, yet did not close it and let it rule the state. Therefore, when discussing legal sanctions employed by the constitutional state, one shall be cautious even on the issue Court's right to close political parties acting unconstitutionally.

liberty contradict each other and can never genuinely coexist.[70] A duty, on the other hand, is marked by the sanctions it brings. In case the subjects of law do not abide by the law, they shall incur sanctions which are announced beforehand. Laws that are not accompanied by legal sanctions are not duties, but give its subjects legal liberty to abide by the law. In constitutional state, absence of legal outcomes for state's unlawful actions neutralizes its duty and provides the state with legal liberty.[71] Hence, the rule of law falls short of restricting the state power substantially, and of securing its substance. What it means having a legal liberty, on the other hand, does not mean that state will necessarily abstain from following the law. Rather, it means that state is at liberty to follow the law. State power here or there, this or that time, may or may not follow the rule of law; it is its liberty. This liberty, on the other hand, is a source of indeterminacy and arbitrariness.

Indeterminacy has other sources as well. Firstly, the rule of law is criticized as it assumes a mechanical adjudication process. Adjudication is though to be enforcing the rule in hand to the case so found. First the judge finds the law; ascertains which of the many rules in the legal system is to be enforced, or if none is applicable, reaches a rule on the basis of given materials. Second, he/she interprets the rule without going beyond the legal boundaries drawn previously also by law, determines laws meaning with respect to its intended scope.[72] Hence, it is assumed that the function of judge consists simply in interpreting a given rule. Yet, interpretation shall never be a law making. Only in this way, separation of powers principle can be protected. However, as Roscoe Pound discusses, developments in the 20th century show that the greater part of what goes by the name of interpretation is really a lawmaking process

---

[70] Kramer, 2007, p.125

[71] Kramer, 2007, p.126

[72] Pound, Roscoe (1954). *An Introduction to the Philosophy of Law*. London: Yale University Press, London, p. 48

depending on the discretion of the judge. Hence, while separation of powers, lawmaking, execution and adjudication cannot be rigidly fenced off one from the other, the meaning of the laws are open to discretionary change and hence indeterminacy.[73]

Secondly, contrary to expectations of liberal rule of law theory, contemporary legal orders decreasingly consist of precise, clear norms. Rather, legal orders are marked by proliferation of vague, open-ended legal standards like "good faith", "public interest", and "common good". Proliferation of vague, open ended laws, on the other hand, gives inadequate direction. Legal materials provide minimal guidance to those who face the task of interpreting and enforcing the law. Rather, they give judges and administrators unwarranted discretionary power to interpret law's meaning and content.[74] For instance, as Raz stays, practices violating equality and freedom can be subsumed under legal norms by discretionary reading of laws. The meaning and implementation of norms start to change according to the interests of political power. As a result, rather than legal determinacy (sufficiently fixed meaning of laws, subsuming like cases), legal indeterminacy becomes the striking feature of many arenas of legal experience.[75]

The problems of indeterminacy are more serious than may appear at first look. Legal indeterminacy means that law does not always determine the answer to a legal question.[76] Hence, the claim of the rule of law that "there is only one determinate

---

[73] Pound, 1954, p. 49-50

[74] Scheuerman, 1999, p. 21

[75] quoted in Scheuerman, 1999, p. 48

[76] Maxeiner, 2010, p. 47

answer to the legal question" becomes an overstatement.[77] In such a situation, laws cannot bind state power adequately and state is at legal liberty to execute laws. In return, this means that the rule of law does not regard state as its subject in an equal sense. In constitutional state, rulers and ruled / state and citizens are equal subjects of the rule of law. Hence, like any other citizen, the rule of law must be enforced upon state and state must be under legal duty to follow the law: this is its particularity. However, when laws are indeterminate and state is at legal liberty, the rule of law only temporarily binds rulers and ruled with the same norms and to the same extent. As a result, the rule of law and constitutional state lose their particularity. The rule of law is reduced to an undifferentiated legal order, defined by its form and formal values; and the constitutional state is reduced to *state of statutes* defined by law's formal features, rather than being a *state of rights*.

2.3 Carl Schmitt's Critique of Parliamentary Democracy and the Rule of Law

Carl Schmitt's main target is liberal constitutional theory of state which portraits a state subordinated to law.[78] Constitutional state establishes a legal order, namely, the rule of law. The idea of the rule of law is that certain norms are ruling state and society. Schmitt states that liberals have repeatedly emphasized the subordination of state authority to codified legal standards, and hence to a system of norms; or the state is simply identified with this system of norms, so that it is nothing but norms or

---

[77] Indeterminacy is a highly discussed topic within legal literature. Within these discussions, it is the "weak" understanding of indeterminacy that is stated here. Apart from that, there is also a "radical" understanding of indeterminacy (Maxeiner, 2010, p. 48). For radical indeterminacy, liberal dream of regulating power by clear general norms is already in bankruptcy. Every application and enforcement of law is willful. Rule of law, on the other hand, is a myth. It only obscures that legal materials are empty vessels into which judges and administrators engage in political and social judgment (Scheuerman, 1999, p.7-8). For more on radical indeterminacy, one shall look at the discussions within "Critical Legal Studies" or "Legal Realism".

[78] Hirst, Paul (1999). "Carl Schmitt's Decisionism" in *The Challenge of Carl Schmitt*. Mouffe, Chantal (ed) . London: Verso, p. 8

procedures.[79] However, we saw that political power of state is not bound by law, which supposedly stands outside of its will. In this case, what is its real function in a constitutional state?

Schmitt answers this question by defending that the rule of law is an instrument of political power. This answer looks too simple and crude; however, an elaborate and detailed analysis lies behind it. Schmitt does what is missing and forbidden both in the rule of law understanding and constitutional state: he establishes an internal relation between political power and law through his concept of "decision". He defends that decision is always political. What is important is that, this political decision is taken in every step of law making and law enforcement, including the judicature beside executive and legislative organs. In that way, constitutional state and the rule of law are made relative to political power of state in their substance. Moreover, his particularity is that he reverses the relation between power and law. Accordingly, it is meaningless to expect the rule of law to be rightful, coherent and just, if the political power behind it is not rightful, coherent and just.

If the rule of law does not secure a particular substance, does it mean that norms having any content can be enacted as law? The well-known response of Hans Kelsen, one of the contemporaries of Schmitt, to this question legitimizes the rule of law order of constitutional state. For William Scheuerman, Kelsen represents the *telos* of liberal legalism.[80] According to Kelsen, while searching the compatibility of a norm with the rule of law, one should not look at the content of the norm and question whether it is consistent with common good, basic rights or justice. Rather, the criterion of compatibility of a norm with the rule of law shall be the validity of this norm within

---

[79] Scheuerman, William E. (1996). "Carl Schmitt's Critique of Liberal Constitutionalism" in *The Review of Politics,* Vol. 58, No. 2, p. 301

[80] Scheuerman, 1996, p. 318

the legal system. Validity of a norm within legal system, on the other hand, is determined by looking at whether that norm is valid in accordance with a higher norm.[81] In turn, this higher norm's validity will be dependent on the existence of yet another norm. In this way, there appears a hierarchy of norms at the top of which lies the constitution. If a norm is valid in comparison to the constitution, that norm is compatible with the rule of law independent of its content.[82] Thus, Kelsen repeats, and hence legitimizes, the rationale of conventional/liberal rule of law theory.

Firstly, it can be seen from this description that, legality of a norm in the rule of law order cannot be traceable to a person or to a socio/political power, but only to a hierarchy of order, to the unity of the system of norms. It is as if norms are self-creating through the method of logical deductibility. What happens here is that, the method of law making is accepted as the source of the law.[83] The only criterion to distinguish a legal and an illegal norm is its method of making; there is no reference to the substance of norm. All in all, the laws of the rule of law cannot be defined according to a substance or to a specific right. It imposes only procedural, law making requirements; only restrictions about the form that law must take.[84] Heller, one of the legal scholars of the Weimar Republic states that the rule of law grants legal validity to any political act, and grants the title of "constitutional state" to any state. In addition, it cannot take into account the fact that power is constitutive of law. Hence, it simply makes law prey to power.[85] Consequently, as mentioned before, *state of*

---

[81] Kelsen, Hans (2008). *Pure Theory of Law*. New Jersey: The Lawbook Exchange, LTD, p.193

[82] Treviño, Javier (2009). "On Hans Kelsen, General Theory of Law and State" in *Classical Writings in Law and Society*. Treviño, Javier (ed). New Jersey: Transaction Publishers, p.238

[83] Bobbio, Norberto (2000). "Kelsen ve Hukukun Kaynakları" in *Devlet Kuramı*. Akal, Cemal Baki (ed). Ankara: Dost Yayınları, p.461

[84] Tamahana, 2004, p.94

[85] Dyzenhaus, David (2000a). "Herman Heller: Introduction" in *Weimar: A Jurisprudence of Crisis*. Jacobson, Arthur J.; Schlink, Bernhard. (ed). California: University of California Press, pp.251-253

statutes cannot surpass itself to achieve *state of rights*; it stands as a *state of statutes* without a standing, permanent, definite substance.

The criticisms of Schmitt are similar. Accordingly, the rule of law accepts a purely formal concept of law independent of content. In that way, it triggers a tautology: something is valid when it is valid and because it is valid.[86] Validity, meanwhile, unconditionally equates law with the result of a formal process of the parliament, which is called statute. So much so that, lawmaker may create what he wants in the lawmaking process; that process is always law: statute is always law.[87] When the concept of law is deprived of every substantive relation to rights, liberties or justice, any type of directive, measure, order, instruction, by virtue of the rule of law, can be deemed legal through the decision of the parliament.[88] In these circumstances, as a formal legal order, not having a substantial guarantee on its own, the rule of law has more in common with rule by law. If we read between the lines, the rule of law is just this. Liberal parliamentary democracy does not promise that there will be no encroachment of basic rights and liberties. Rather, it promises that there will be no encroachment on liberties and rights without the consent of the parliament: "A state only counts as a Rechtsstaat when intrusions into the sphere of individual freedom may be undertaken solely *on the basis of a statute*".[89]

A similar formal determination is also valid for the constitution itself. Constitution is deemed to be a security measure of the substance of the rule of law. Therefore, constitutional amendments are subject to a special procedure with qualified majority condition. By the qualified majority condition, duration and stability of the

---

[86] Schmitt, 2008, p.64

[87] Schmitt, Carl (2004). *Legality and Legitimacy*. Durham: Duke University Press, p.23

[88] Schmitt, 2004, p.21

[89] Schmitt, 2008, p.173

constitution is protected. However, constitution is treated just like another statute. As it should only be changed via legislation in the parliament, constitution becomes equivalent to a statute.[90] Hence, constitution is transformed into constitutional law; the unity of the constitution is dissolved into a series of individual constitutional laws. If constitution is a group of individual constitutional laws, the sense of the guarantee and the substantial meaning of the constitution were completely lost.[91] Thereby, constitution can be amended by changing constitutional laws one by one. Qualified majority requirement also erodes when a party or party coalition has the necessary majority at its disposal. Hence, constitutional security is disappeared within the formal procedure of constitutional change.

Apart from its formal character, Schmitt also focuses on the complete depersonalization of the rule of law order. In the rule of law, there are neither real nor fictitious persons, there are only points of ascriptions. The basis for the validity of a norm is only a norm.[92] Hence, constitutional state seems to be governed by impersonal, general and pre-established norms unaffected by the preferences and decisions of power holders. In that way, all personal elements and elements related to power are eliminated from the state. The aspiration of the constitutional state is to repress the political element, and transform all state activity into authorities, which are defined and limited by law.[93] Hence, whoever exercises power and who governs, acts "on the basis of law" and "in the name of the law". It seems that there is no personal

[90] Schmitt, 2008, p. 69

[91] Schmitt, 2008, p.73

[92] Schmitt, Carl (1985a). *Political Theology: Four Chapters on the Concept of Sovereignty*. Cambridge: MIT, p.19

[93] Schmitt, 2008, p.93

rule, but only valid norms being enforced. Power holders do nothing other than what a valid norm permits jurisdictionally.[94]

Starting from this point onward, Schmitt aims to demonstrate the subjective, political, and power related elements that the rule of law and constitutional state rely on. In this context, the first thing Schmitt does is to relate legal order to political power. In a parliamentary democracy, lawmaking body is the parliament. Law is what has passed by the parliament; and because of the formalist dimension of the rule of law, what has passed by the parliament is legal. Lawmaking will of the parliament, however, is the parliamentary majority. Then, in parliamentary democratic governments, law is the present decision of the parliamentary majority.[95] Thereby, instead of the rule of law's "ascription to a last point of ascription" he brings "ascription to the political power of the parliamentary majority". Constitution is only one example of this relation with political power. Constitution is valid because, it derives from constitution making power and is established by the will of this constitution making power.[96] Moreover, he claims that the text of every constitution is dependent on the political and social situation of its time of origin. The reason that certain legal determinants are written into the constitution and not into a simple statute depends on political considerations and on the contingencies of party coalitions.[97]

With this change, political power, subjective will, and the element of command that the rule of law excludes and condemns are reintroduced and included within the rule of law and constitutional state. Hence, in a constitutional state, parliamentary majority rules, not norms. The the rule of law becomes the rule of the parliamentary majority.

---

[94] Schmitt, 2004, p.4

[95] Schmitt, 2004, p.39

[96] Schmitt, 2008, p.64

[97] Schmitt, 2008, p.65

However, Schmitt does not satisfy with showing that law is the decision of political power; but he goes one step further. According to Schmitt, if the rule of law is a closed order, the order does not lie in the statutes and rules, but in the political existence of the state. If the image of the constitution is a unity, the unity arises out of a pre-established, unified political will. Other than the unity of that will, there is no closed constitutional system of pure norms.[98] In a similar vein, if the rule of law is only a formal bound, it is because the politics that backs it is nothing but formal. Say it differently, if the rule of law is defined only formally, it is because the political system behind it is defined only formally. Hence, he completely relativizes law and even constitution to political power. Consequently, the discussions of the rule of law shift from the area of law to the area of political power.

Politics of parliamentary democracy, on the other hand, can best be defined by neutrality. Constitutional state, within which parliamentary democracy operates, is a neutral state in the sense that it is neutral in regard to all religions, creeds, believes, and opinions. This state and its constitution are neutral in regard to society, meaning that all options, tendencies, politics and movements have an unconditionally equal opportunity to establish a parliamentary majority. This requirement of neutrality leads to another sense of neutrality: the state apparatuses are themselves neutral instruments for the implementation of state policy.[99] For instance, parliament is viewed as a neutral organ. Voting is seen as a procedure that is indifferent toward content of any sort; it is deemed accessible to any substantive claim.[100] Thus, voting and parliament are accepted as *neutral* procedural mechanisms and a value themselves, without reference to any political content. As an extension of this, parliamentary democracy

---

[98] Schmitt, 2008, p.65

[99] Dyzenhaus, David (1997). *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*. New York: Oxford University Press, p.64

[100] Schmitt, 2004, p.27

itself is accepted to have no content, yet it is only an organizational form: democracy can be liberal, socialist, conservative; militarist or pacifist, absolutist or liberal, centralized or decentralized, progressive or reactionary without ceasing to be a democracy.[101] Hence, democratic politics in the parliament is an empty form; it is the name of a procedure.

However, Schmitt wants to show that the liberal commitment to neutrality of form is based on something material or substantive. According to Schmitt, parliamentary democracy has a politics and it quite successfully conceals its politics. What is this politics? It is the politics of getting rid of other politics. Neutrality or defending the neutrality of law, of the rule of law order and of the state is the instrument of parliamentary democracy to get rid of all other politics. They typically hide their goals behind allegedly neutral or even universal normative standards. Hence, liberal neutrality amounts to hypocrisy.[102] Through neutrality, parliamentary democracy politically dominates the opposing political forces. It would undermine all those in conflict with it and thus bring about its own kind of homogeneity.[103] Then, neutrality is a political achievement of liberal parliamentary democratic politics. Asserting neutrality of parliament is the politics of *repelling politics* from the parliament. Asserting neutrality of law is the politics of *repelling substance* from the rule of law.

Liberal parliamentary democracy, establishes parliament as the center of political power and hence politics. However, real politics does not take place in the parliament. Representatives of the people do not attend the parliament regularly. Anyway, their attendance does not change much, because parliamentary debates already have

---

[101] Schmitt, Carl (1985). *The Crisis of Parliamentary Democracy*. Massachusetts: MIT Press, p.25

[102] Bielefeldt, Heiner (1998). "Carl Schmitt's Critique of Liberalism: Systematic Reconstruction and Counter Criticism" in *Law as Politics: Carl Schmitt's Critique of Liberalism*. Dyzenhaus, David (ed). Durham: Duke University Press, p. 25

[103] Dyzenhaus, 1997, p.49

become purposeless and banal. The real politics takes place not in the open sessions of a plenum, but in committees. Political parties are working with committees, and increasingly with smaller committees, which make their decisions behind closed doors. Political parties, meanwhile, are dominated by unprofessional politics of some "personalities". Important decisions are taken in the secret meetings of faction leaders outside of the parliament.[104] Schmitt says "[t]he parties (…) do not face each other today as discussing opinions, but as social or economic power groups calculating their mutual interests and opportunities for power, and they actually agree compromises and coalitions on this basis".[105] Due to this poor state of politics, the whole system of freedom of speech, of assembly, and the press, of public meetings, parliamentary immunities and privileges is losing its rationale. Therefore, parliamentary democracy get rids of real politics and becomes a mere façade.

Starting from this point, we can catch the parliamentary democracy's own politics. Parliamentary democracy depends on majorities. Majority, or the party with 51 percent of the votes, can make law, but 49 percent cannot. Moreover, it does not only control the legislative power, majority also forms the government and exercises executive power. Therefore, executive and legislative powers fuse in the hands of parliamentary majority. 51 percent can rule the rest of 49 percent and dictate its laws. Then, parliamentary democratic politics turns into *absolutism*, provided by the parliamentary majority formation.[106] If so, the aforementioned statement of Schmitt shall be reformulated as such: parliamentary democracy can be liberal absolutism, socialist absolutism, and conservative absolutism without ceasing to be parliamentary democracy. Hence, parliamentary democracy is an empty absolutism; it is the name of a procedure.

---

[104] Schmitt, 1985, p.20

[105] Schmitt, 1985, p.6

[106] Dyzenhaus, 1997, p.60

Parliamentary democracy forms the absolutism with homogeneity. Schmitt accepts that democracy is the identity of governed and governing. Then, parliamentary democracy attempts to realize this identity. In this endeavor, parliamentary democracy creates equations. Concretely, the people are various and heterogeneous; but in the name of democracy, the whole people are equalized with a series of equations. Democracy does not only demand the identity of governed and governing. Beside the identity of rulers and ruled; the identity of subject and object of state authority, the people and their representatives in parliament, the state and the voters, and the state and the law is established.[107] In this way, people are taken as homogeneous; people are made homogeneous:

> Every actual democracy rests on the principle that not only are equals equal but unequals will not be treated equally. Democracy requires, therefore, first homogeneity and second-if the need arises-elimination or eradication of heterogeneity (…). A democracy demonstrates its political power by knowing how to refuse or keep at bay something foreign and unequal that threatens its homogeneity.[108]

Then, parliamentary democracy equates what cannot actually be equated; democracy homogenizes what actually is heterogeneous. Homogeneity of the people, like the majority, exists only in abstraction through an arithmetic-statistical calculus. 51 percent of the voters are homogeneous among each other and form the majority. Just like other elements of parliamentary democratic politics, definition of majority lacks any content; it is only a form.

To sum up, Schmitt firstly criticizes constitutional state on the grounds that it hides its, the rule of law order's, and even parliamentary democracy's real relation with

---

[107] Schmitt, 1985, p.25

[108] Schmitt, 1985, p.9

political power. Afterwards, he aims to demonstrate the working political component of them by using the concept of "decision". As Zizek mentions, normative order remains stuck in abstract formalism and it cannot bridge the gap that separates it from actual life. Then, it is "the decision" that bridges this gap.[109]

2.3.1 Decisionist component of the rule of law

Schmitt is generally known to emphasize the constitutive dimension of the decision. Accordingly, decision is able to institute a new legal, constitutional, and political order. Therefore, decision is understood as a "sovereign decision". Due to its constitutive feature, sovereign understanding of decision is associated with "exceptional" situations. When a conflictual situation or crisis occurs, reconstituting the public interest, public safety and order needs a decision. Accordingly, the exceptions of the rule of law order must be decided by the sovereign. Following this understanding George Schwab mentions that decisionism refers to two related points. First, it refers to the capacity of will, subjectivity or individual to establish order, peace, and stability from a chaotic situation. Second, it refers to that person's responsibility to safeguard the newly created stable situation. Should order, peace and stability break down, it becomes the task of this particular individual to undertake all necessary measures to reestablish order.[110]

When we look at its relation with legal order, the sovereign decision cannot be traced back to any anterior procedure, set of rights, legal structure, fundamental laws, or shortly, anything external or prior to itself. It cannot be derived from legal norms; it is

---

[109] Zizek, Slovaj (1999). "Carl Schmitt in the Age of Post-politics" in *The Challenge of Carl Schmitt*. Mouffe, Chantal (ed) . London: Verso, p. 18

[110] Schwab, George (1970). *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt Between 1921-1936*. Berlin: Duncker and Humblot, p. 45

not bounded by legal norms.[111] Therefore, the sovereign decision escapes subsumption under any rule or norm. It is because, it constitutes their origin. Norms and rules emanate from this groundless will; it signifies a new, absolute legal beginning.[112] In this sense Schmitt states, like every other order, the rule of law order of constitutional state rests on a decision, not on a norm.[113] Hence, as long as decision is defined with sovereignty, constitutive power and exception, it is not in the confines of the rule of law. Decision starts, when the rule of law stops; or, decision exists when the rule of law is not yet fully created.

This view, on the other hand, confirms the conventional liberal idea that in a constitutional state no power but the norms prevails. However, decision is not completely confined to exceptions and it is not completely external to the rule of law. Schmitt says that a decision on the exception of the rule of law implies that the regular order of the rule of law is also known. Therefore, a decision on the exception is at the same time a decision on what the rule of law order is. For that reason Schmitt says the sovereign decides the controversy by determining definitively what constitutes public order and security, by determining what the controversy has disturbed.[114] In that way, it is possible to extent the domain of decision from exception to the rule. This makes decision practical for the "normal" or ordinary functioning of constitutional state and the rule of law. It is because, he states that all norms presuppose a normal situation, and become meaningless when this normal situation ceases to exist.[115] In this

---

[111] Schmitt, 1985a, p.5-6

[112] Kalyvas, Andreas (2004). "From the Act to the Decision: Hannah Arendt and the Question of Decisionism" in *Political Theory*, Vol. 32, No. 3, p. 324

[113] Schmitt, 1985a, p.10

[114] Schmitt, 1985a, p.10

[115] Schmitt, Carl (1998). "Staatsethik und Pluralistischer Staat" in *Kampf mit Weimar*. Genf Versailles 1923-1939, Berlin: Dunker und Humblot quoted by Schwab, 1970, p.49

direction, Schmitt's concept of decision becomes equally related to ordinary, everyday politics.[116]

Ordinary functioning of the rule of law is composed of two stages. First, a norm must be translated into a positive law. Second, that law must be enforced to concrete cases. In that way, domination of law would be established over state and society. The rule of law assumes that the enforcement of legal norms is almost an automatic process following the making of laws. For instance, courts and judges are supposed to be wholly and solely dependent on norms. Hence, judge's decision in adjudication is viewed as the realization of norms of laws. It is assumed that, the existence of a general and common law will dictate a general and common judicial outcome. As Kelsen explained, under the rule of law, valid norms shall be in action from the beginning to the end of this two staged process. In such a situation, there shall not be any discussion of decision, which is defined as subjective will unbounded by laws and norms.[117]

However, Schmitt criticizes the idea that laws can enforce themselves to concrete cases automatically. As he states in *On The Three Types of Juristic Thought*, the legal idea of the rule of law cannot realize itself:

> (…) law cannot apply, administer, or enforce itself. It can neither interpret, nor define, nor sanction itself; it cannot-without ceasing to be a norm-even designate or appoint the concrete men who are supposed to interpret and administer it.[118]

---

[116] Kalyvas, Andreas (2008). *Democracy and the Politics of Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt*. New York: Cambridge University Press, p. 135

[117] Oğuz, Cem M. (2010). "Romantizm ve Carl Schmitt'de Desizyonizm Fikri" in *Günümüzde Yeni Siyasal Yaklaşımlar: Eleştiriler, Farklılıklar, Çözüm Arayışları*. Ankara: Doğu Batı, pp.80-81

[118] Schmitt, Carl (2004a). *On the Three Types of Juristic Thought*. Westport, Connecticut: Praeger, p. 51

Therefore, legal norms need a particular organization, form, and *decision* before they can be translated into reality. Hence, if the rule of law order rests on a decision it is not because of the exceptions of the rule of law; on the contrary, decision is inherent in the very functioning of it. Then, one can claim that for Schmitt, legal norms are based on decisions not only in exceptional situations, but also in the ordinary times as well. However, this decision is not the sovereign decision that constitutes and stays outside of the legality. Rather, we can identify a second, and a minor version of decision. This minor version of decision works within and actually enables the functioning of legality. So, adding up two versions of decision together, what matters for the reality of legal life, including both its constitution and functioning, is decision and who decides. Then, Schmitt says alongside the question of substance of the laws, stands the question of competence of decision making power.[119]

Actually, need for decision holds true for both the first stage of formulation of a general norm into a positive law (legislative function) and as well as for the second stage of enforcement of a positive law by the courts or administration (judicial and executive functions). Who decides the legislation of norms within the boundaries of the rule of law and parliamentary democracy? We saw that Schmitt answers this question as parliamentary majority. However, he thinks that, just like its neutrality, the motto of "majority decision" is a subterfuge in parliamentary democracy. It is meaningless to expect people to decide all together: many people having opposing or at least different beliefs and opinions cannot arrive at a decision commonly. Hence, when the parliament has to decide, it is not the majority that decides. It is just at this point that politics of parliamentary democracy steps in. Parliamentary democracy has a plain interest that parliamentary majority does not come to a decision. The process of majority determination is a suitable and desirable method to avoid and suspend

[119] Schmitt, 1985a, p.34

political decisions. Then, the decisionism that preserved to majority is not a genuine decisionism at all. Rather, it is a decision to avoid decisions.

This is the case one faces in enacting a law: transformation of a general norm into a positive law requires a decision. Yet, it is not the decision of majority. In this circumstance, Schmitt points out the role of certain persons and arbitrators, who have the cloak of neutrality. For him, who in virtue of alleged neutrality attempts to find a consensus between two antagonistic parties, has the authority to decide.[120] The arbitrator adds its weight to one or other interest group and in effect turns that interest group into the majority party. In that way, it is actually the arbitrator who takes the decision through deciding who will be the majority. Thus, Schmitt said the decision of the arbitrator is not really neutral or objective. Although it is a way of forming party political majorities, the cloak of arbitrator's neutrality conceals the power game of interest groups.[121] On the other hand, if this majority is already formed by a single party, the contribution of other parties is not needed for that party to enact laws. Then, we can think that, it will be the head of the party (who will simultaneously be the head of the government) that decides in the legislative process.

Nevertheless, the fact that laws need a decision to be realized holds true especially for the enforcement of laws to concrete cases by judicial and executive powers. The rule of law, as any legal idea, is governed by the necessity of enforcing legal norms to factual situations. Hence, law is law-enforced. Paul Bookbinder says that Schmitt's maximizing of the importance of the individual case and his minimizing of the value of normative rules is a position he sustains in all his later works.[122] Schmitt states,

---

[120] Dyzenhaus, 1997, p.76

[121] Dyzenhaus, 1997, p.77

[122] Bookbinder, Paul (1981). "Roots of Totalitarian Law: The Early Works of Carl Schmitt" in *Social Science*, Vol. 56, No. 3, p. 140

liberal conception of "automatic" legal enforcement is dominated by calculability and measurability. It supposes that all conceivable cases and situations can be *unambiguously* subsumed under a set of clear general norms.[123] Meanwhile, norms will remain unaffected by the concrete reality of the situation. Hence, liberal rule of law theory allows no element of diversion from the norm;[124] no factual event, no matter how violent or destructive it is, can destroy the validity of a general norm.[125]

However, the norm made into a positive law says nothing about how it will be enforced to concrete cases. Enforcement of a legal norm to facticity cannot be derived from the content of the general positive legal norm that is to be enforced.[126] In this regard, the legal prescription only designates how decisions should be made, not who should decide. In such a case, contrary to the assumptions of the rule of law, the second decision concerning law enforcement becomes semi- independent of the law's normative substance and receives a semi-autonomous value.[127] It means that this second decision cannot be completely derived from the law itself. On the contrary, it points to a decision that *cannot be clearly justified* by reference to the legal norm at hand; it points to "a moment of indifference in reference to the content of the law".[128] Consequently, enforcement of law to concrete cases is not an automatic subsumption that envisioned by liberal rule of law thinking. Rather, as it is operable with the

---

[123] Schmitt, Carl (2001). State, Movement, People: The Triadic Structure of the Political Unity. Draghici, Simona (ed). Corvallis: Plutarch Press, 41

[124] Korith, Stefan (2000). "The Shattering of Methods in Late Wilhelmine Germany" in *Weimar: A Jurisprudence of Crisis*. Jacobson, Arthur J.; Schlink, Bernhard. (ed). California: University of California Press, p.48

[125] Salter, 2012, p. 47

[126] Scheuerman, 1999, p. 117

[127] Schmitt, 1985a, pp. 32-33

[128] Maus, Ingeborg (1998). "The 1933 "Break" in Carl Schmitt's Theory" in *Law as Politics: Carl Schmitt's Critique of Liberalism*. Dyzenhaus, David (ed). Durham: Duke University Press, p. 201

element of decision and a moment of indifference, it is a decisionist subsumption process. On the one hand, decisionist subsumption results from the attempt to realize law in the sphere of concrete facticity".[129] On the other, if it is a moment of indifference to the content of the law, it is necessarily a moment of *relative* dependence to facticity of each case, to the economic, social, political extensions of each instance.

Then, who enforces the laws also uses the power of decision. These are executive and judicial powers in a constitutional state. Yet, the majority that forms the executive is identical with the majority that makes the law. Therefore, despite separation of powers, lawmaking will and law enforcing will in the administration overlaps due to majority absolutism. Consequently, a single decision is sufficient to operate both law making and law's administrative enforcement. However, law enforcement in judiciary, which is called adjudication, is different. It is the independent courts and judges who will enforce the law in the judiciary. Consequently, necessity of a second decision in law enforcement is rather valid for judicial power. Presence of a second decision in adjudication means that, when facing a case, judge interprets the facticity, so that he/she will decide whether it fits into a norm or not. Hence, he/she will say what, for instance, secularism or social equality is, while facing the facticity at hand. It shows that if law to be effective, it can be considered only in the concrete situation of enforcement.[130]

Therefore, the second decision in adjudication brings the discretionary interpretation of the judge. Put it differently, while decisionist subsumption operates in adjudication, it operates with the discretion of the judges. Accordingly, there are no ready-made norms before the judge to decide on. Yet, every norm depends on interpretation of

---

[129] Scheuerman, 1999, p. 31

[130] Croce, Mariano; Salvatore, Andrea (2012). *Legal Theory of Carl Schmitt*. Oxon: Routledge, p. 149

facticity. This interpretation provides the judge with a certain freedom;[131] so much so that, judicial enforcement of law is deemed quasi-legislative.[132] The most important element that allows the judge to use its discretion more or less freely is vagueness of norms. Schmitt sees that vague concepts have invaded all spheres of legal life and determined the overall picture of administration of justice, which exemplifies the dissolution of normativism.[133] Vagueness permits giving highly discretionary, situation-oriented, potentially contradictory answers and "power decisions" to a particular law case. Therefore, the same legal norm may be interpreted and enforced in distinct and inconsistent ways.[134] In such a situation, legal reasoning justifies more than just one correct answer, and law fails to determine the final outcome of the legal disputes.[135] As a result, legal indeterminacy becomes the striking feature of many areas of legal experience.

Heller states that Schmitt relativizes law completely to subjective decision and power. Ingram agrees with Heller as he claims that contingencies of particular situation of power lead to deification of power and decision in Schmitt theory.[136] However, Schmitt's position is not pure subjectivism of decision or glorification of "wild, animal power". On the contrary, he does not abandon the normative component of law.[137] In *Political Romanticism*, Schmitt criticizes the subjectivism of the romantic. The romantic prides himself on responding subjectively and spontaneously to each

---

[131] Ingram, David (2006). *Law: Key Concepts in Philosophy*. London: Continuum, p.33

[132] Salter, 2012, p. 107

[133] Schmitt, 2001, p. 49

[134] Scheuerman, 1999, p. 117

[135] Croce, 2012, p. 144

[136] Dyzenhaus, 1997, pp.163-167

[137] Maus, 1998, p. 202

situation on reacting uniquely to each occasion, which Schmitt calls "subjectified occasionalism".[138] As Schmitt explains, this subjectivism makes it impossible to distinguish between right and wrong, and hence decide. He states, a legal or a moral decision would inevitably destroy romanticism.[139] As he refuses to recognize an objective standard or a norm and make a decision, political action conflicts with the romantic; the romantic stays apolitical.[140] Put it upside down, political power and decision always entail the recognition of a norm, they are norm-bounded. Therefore, Schmitt's definition of the political seems to include both an appeal to a norm and a decision about that norm.[141]

Similarly, in *Value of the State and the Significance of the Individual*, Schmitt is against "power theories of law" that reduces legal system to nothing but a game among competing power interests and decisions. According to Schmitt, such theories obscure law's essentially normative character.[142] Hence, decision and power are not "pure power" and "pure arbitrariness"; because, law enforcement brings a legal idea into an aggregate condition through subsuming these aggregate conditions under a legal norm. Then, through subsumption of facticity under legal norm, decision and power gains a legal normative basis. By the same token, by secluding law and judgment, Schmitt does not mean abandoning any normative standard and leaving everything up to the subjectivity of the judge.[143] He says that, it is illogical to use a

---

[138] Schmitt, Carl (1986). *Political Romanticism*. Massachusetts: The MIT Press, p. 116

[139] Schmitt, 1986, p. 124

[140] Schmitt, 1986, p. 158

[141] Silber Storey, Jenna (2006). *Carl Schmitt on the Significance of the Political*. http://citation.allacademic.com, p.8

[142] Scheuerman, 1999, p. 24

[143] Schmitt, Carl (2000). "Statute and Judgment" in *Weimar: A Jurisprudence of Crisis*. Jacobson, Arthur J.; Schlink, Bernhard. (ed). California: University of California Press, p.64

formal concept of adjudication and give the judge a boundless grant of authority and to remove him from any control.[144] Hence, he does not mean that legal enforcement is *rule of judges* entrusted with competences. On the contrary, he defends statute's authority over the judge.

At that point, the relation of decision with the legal order needs be repeated in a more straightforward way. We already said, decision *cannot be clearly justified* by reference to the legal norms. Now we say that it *cannot be clearly unjustified* by reference to the legal norms, either. Therefore, decisionist subsumption is a combination of legality, and the values that decision represents; namely politics, power, and subjectivity. Actually, this double determination is a feature of the minor version of decisionism. In contrast to the sovereign, constitutive decision, the minor version of decisionism that we are dealing with, operates within the normative order of the rule of law. Therefore, it has a norm-bounded character. On the one hand, it makes legal order operable by enabling its enforcement on concrete cases. Yet, it makes subsumption process decisionist as well. The authority of making decisions, on the other hand, belongs to the judges.

All in all, decisionist subsumption that works with the discretion of the judges is a solution to the realization of laws; however it does not resolve the question of indeterminacy. By discretion-based decisionist subsumption, content and the concrete meaning of laws are enlarged by implicating new and possibly contradictory cases and interpretations of this law. Hence, legal norms get more vague. In *State, Movement, People*, Schmitt underlines that the legal process must recognize that, the identity and subjectivity of the judge does inescapably yield divergent interpretations of the "same" fundamental legal principles:

---

[144] Schmitt, 2008, p.186

> (…) standardization and interpretation of facts are bound to the situation. Montesquieu's famous sentence that the judge is "only the mouth that utters the words of the law" (…) filled with organic, biological and ethnic differences. Today, we have become more receptive, we see even the diversity of mouths, If I may say so, which utter the ostensibly same words and sentences. We hear how these same words are "pronounced" very differently.[145]

Hence, Schmitt recognizes that contrary to be a solution, decisionism in adjudication would simply exacerbate the ills of liberal legalism: by including decisionism, legal system is more indeterminate and more insecure. Moreover, in case of conflicting decisions, laws become so incalculable that, they may turn into the worst arbitrariness.[146] Therefore, what we see is that, subsumption in any case creates indeterminacy. So, to achieve legal determinacy, it is required to get rid of the concept of subsumption as a whole. Rejection of subsumption, however, is an attempt to get rid of the relation between the norm and the interpreter.[147] More clearly, it means that legal determinacy will no longer be searched in the nexus between the legal norm and the judge.[148]

In *State, Movement, People*, the problem of legal determinacy is conceptualized anew so as to focus on the relationship between individual judge and his peers.[149] In *Statute and Judgment*, he clearly declares how determinacy, how a correct legal decision, can be achieved. Accordingly, he says that "a judicial decision is correct when another judge would have decided in the same way".[150] The "other judge" was the normally-

---

[145] Schmitt, 2001, pp. 51-52

[146] Schmitt, 2001, p. 49

[147] Croce, 2012, p. 148

[148] Scheuerman, 1999, p. 22

[149] Croce, 2012, p. 148

[150] Schmitt, 2000, p. 65

trained judge. He/she was the typical product of legal training and practice. As Salter interprets, a decision is correct if the mainstream "interpretative community" recognize it as valid for all practical purposes.[151] Therefore, for him, legal determinacy and independence of judiciary can still be achieved only by means of appeal to a shared legal/ professional praxis.[152] The correct meaning, correct interpretation of law is the one that conforms with the shared values and frame of reference of judicial cultural tradition, where members of this tradition would find it broadly acceptable.[153] Or put it upside down, a judge can arrive at a decision contrary to the literal wording of a statute, and this decision still be right so long as other judges would decide the case likewise.[154] So, he suggested that only a homogenous judiciary could resolve the crisis of indeterminacy.

Hence, legal determinacy can never be adequately achieved by means of a particular set of legal statutes or doctrines; yet, it can be achieved by means of a homogenous judiciary, free of alien believes, thoughts, tendencies. Therefore, legal reform actually requires a reform of legal decision makers, rather than legal norms.[155] For instance, he states that there is only one path to legal determinacy, and it is reflected in the demand for reform of the jurists, instead of reform of the law.[156] All in all, Schmitt solves the problem of legal determinacy by the concrete order of judicial community, rather than the normative order of legality. In *State, Movement, People* Schmitt theorizes this

---

[151] Salter, 2012, p. 69

[152] Scheuerman, 1999, p. 22

[153] Salter, 2012, p. 68

[154] Bendersky, Joseph W. (2004). "Introduction: The Three Types of Juristic Thought in German Historical and Intellectual Context" in *On the Three Types of Juristic Thought*. Schmitt, Carl. Westport, Connecticut: Praeger, p. 10

[155] Scheuerman, 1999, p. 17

[156] Schmitt, 2001, p. 50

concrete order of homogeneous judiciary as a racist community, and finds the common values in judiciary in the ethnic identity of the judges:

> We not only feel but also know from the most rigorous scientific insight that all justice is the law of a certain people. It is an epistemological truth that only whoever is capable of seeing the facts accurately, of listening to statements intently, of understanding words correctly joints in the law-creating community of kith and kin in his own modest way and belongs to it existentially.[157]

Therefore, Schmitt develops an institutional solution to the indeterminacy problem of liberal legality. For some, Schmitt's institutionalism is an evidence of a momentous shift in his thoughts from decisionism to institutionalism.[158] However, Scheuerman disagrees with this opinion.[159] For him, Schmitt's institutionalism does not abandon decisionism, rather, he takes decisionism out of jurisprudence. It is because, decision becomes the decision to appoint and promote judicial community in line with *reforming jurists instead of the law.* At the end, courts are composed of real persons appointed into the system of judiciary by an appointment process:

> (…) the independent judge, subject only to the law, is not a normativistic but rather an order concept, indicating a competent authority and member of an order system of officials and authorities. That this very concrete person is the duly appointed judge, results not from rules and norms, but from a concrete judicial organization and concrete personal appointments and nominations.[160]

---

[157] Schmitt, 2001, p. 51

[158] Croce, 2012, p. 13; Croce, Mariano (2011). "Does Legal Institutionalism Rule Out Legal Pluralism? Schmitt's Institutional Theory and the Problem of the Concrete Order" in *Utrecht Law Review*, Vol.7, No. 2

[159] 1999, p. 125

[160] Schmitt, 2004a, p. 51

There are three important points that need to be clarified. First, even after the institutional turn, the authority to make judicial decisions belongs to the judge, and it depends on his/her discretion or interpretation. However, with the focus on judicial community, discretion of the judge completely loses its personal and subjective character. The decision of the judge turns into a depended variable of the decision of the political party, which holds the power of appointment; and judges become almost puppets voicing the preferences of political power. Therefore, ruling political party becomes able to control judicial decisions, which are continued to be given by the judges. Hence, by this political-institutional turn, legal determinacy simply means that legal decisions cohere as closely as possible to the needs of the power or the leader.[161] This is the answer to how it is possible to prevent state and society from always producing new interpretations and meanings of norms.

Second, homogeneity in judicial enforcement of laws through the common cultural, ethnic, or racial tie between judges also signifies a degree of homogeneity between judicial and executive decisions in the enforcement of laws. According to Schmitt, this ethnic, racial tie will bind those who enforce legal norms in executive and in judiciary together, as members of government and members of judiciary will belong to the same ethnic community. Therefore, members of government and members of judiciary will see the facts, listen the statements, and understand the words in the same way. Then, with the homogenization of the first and the second decisions of law enforcement, namely executive and judicial decisions, homogenous law enforcement within constitutional state, to an extent, will be established. It is important to note that, that homogeneity will be achieved without destroying institutional independence of judiciary from executive organ.

---

[161] Scheuerman, 1999, p. 136

Third, it is understood that, determinacy in legal order, determinate enforcement of law, is not a legal, but political achievement. Legal determinacy entails the decision of ruling political party. This political component is valid for the enforcement of laws to any and every concrete case. This time, however, political component of judicial decisions seems to dissolve within legal order and loses its particularity. There is a danger that it may become banal. At the end, all legal cases are affected by this political decision used through appointment power of the ruling party. If so, all legal cases to a degree can be called as "political judgments", "political cases" and "political decisions". However, there are some cases and hence some judicial decisions which are *more political* than the others. In this regard, other than political power's indirect involvement in judicial decisions through appointing jurists, Schmitt also talks about political power's direct intervention into judicial decisions, which changes the character of the justice system.

Schmitt says that, among all legal disputes that must be settled within the general jurisdiction of the state, political character of some of the disputed questions or the political interest in the object of dispute emerges strongly.[162] Then, due to political distinctiveness of such cases, they are handled differently. Accordingly, because of their political character, a special procedure or order is provided for these genuine legal disputes.[163] Schmitt calls this process as the actual problem of *political justice.*[164] Here in political justice, the issue is basically a legal dispute; however it is deemed politically important by the political power. Because of its political importance, a special procedure or order is provided for these legal disputes. Actually, these disputes must be decided by the courts of general jurisdiction in accordance with the generality principle of law. However, they are discriminated, taken out of the general

[162] Schmitt, 2008, p.176

[163] Schmitt, 2008, p.177

[164] Schmitt, 2008, p.176

jurisdiction, and judged within a specialized jurisdiction. Therefore, for *some cases*, a special type of justice; political justice is provided *vis-à-vis* legal justice.

In political justice, political power directly intervenes into the judicial decision by changing the jurisdiction of certain cases. Therefore, direct intervention of political power comes simultaneously with provision of special or exceptional rules and procedures of judgment. Hence, if the indirect political involvement of ruling party in judicial decisions through the appointment of judges is harming independence of judiciary and the separation of powers principle of parliamentary democracy, political justice of ruling party destroys them. Moreover, as mentioned before, judicial power is different from executive and legislative powers in that it is not a parliamentary political power, but a genuine state power. Therefore, operation of political justice transcends the boundaries of courts and judiciary, and obtains far reaching repercussions appertaining to constitutional state. It means that ruling political party has surpassed the area (the parliament, and its legislative and executive organs) reserved for itself, and get into the domain exclusively belonging to the state. By doing this, it quits being a parliamentary power and turns into a state power. Hence, when exerting political justice, ruling party no longer acts as a political party, but as the state power:

> Monopoly over the enforcement of the valid statutes confers on those in the majority the legal possession of state means of power and with it, a political power that extends far beyond that over the mere validity of norms (…) The majority is now suddenly no longer a party; it is the state itself. [165]

Therefore, political justice is the extreme case showing that legality is at the disposal of ruling political party. Once it gains the monopoly over legality, it can judge every politically important enforcement and use of the concepts of legality and illegality. It

---

[165] Schmitt, 2004, p. 31

can decide when illegality of its competitors commences.[166] It starts to determine what possibilities of action exist for its domestic opponents. It can, above all, declare their competitors illegal and thereby exclude them from politics. Hence in a constitutional state, under the rule of law, whoever controls 51 percent of the votes would be able to render the remaining 49 percent illegal.[167] However, it is no longer a political power; it is the state that decides this illegality. Then, it is not the *political opposition* that is *forbidden*, but *crimes against the state* that is *convicted*.

All in all, political justice shows the final stage of the intrusion of political power into the rule of law. It manifests that all the decisions on law and legality and hence on the rule of law is controlled by the political power. The rule of law and constitutional state introduce themselves as the opposites of rule by power. However, if the facilities that they provide for parliamentary majority will be fully followed, they turn into their opposites; they become identical with rule by power. Political justice would be one of the illustrations of this transformation of a majoritarian political party into constitutional state.

[166] Schmitt, 2004, p. 33

[167] Schmitt, 2004, p. 30

CHAPTER 3

NORMATIVE DIMENSION OF THE CONSTITUTIONAL STATE: SECULARISM OF THE AKP

In 2002 general elections, the AKP took 34 percent of the votes and gained 367 parliamentary seats out of 550. With such an electoral success, it formed the first majority government established in Turkey after 1987; which implies that the country had long been struggling with precarious coalition governments for decades.[168] Within this respect, many of the theories of parliamentary democracy may regard the coming of the AKP to power with high percentages of votes as the realization of the sovereign will of the people. However, putting aside the qualitative questions concerning what the general will is, who the people are, and what happens to minority votes; even quantitatively AKP's majority government cannot be certainly deemed as democratic or as the realization of democracy. It is because, voter turnout in 2002 general elections represented only 46.3 percent of the population. It meant that 21 percent of the eligible voters did not use their votes. Also, 3.9 percent of used votes were invalid. Moreover, 46 percent of the voters' choice was not reflected in the parliament due to 10 percent threshold. All in all, while the AKP established its government with 34 percent of the votes, 25 million votes were not represented in the parliament.[169] AKP's votes showed an ascending trend in 2007 and 2011 general elections. In 2007, it

---

[168] Tank, Pınar (2005). "Political Islam in Turkey: A State of Controlled Secularity" in *Turkish Studies*, Vol. 6, No. 1, p. 3

[169] Yavuz, Hakan (2009). *Secularism and Muslim Democracy in Turkey*. New York: Cambridge University Press, p. 80

gained 47 percent of the votes and formed its second single party government. In 2011, on the other hand, the AKP achieved to take half of the votes (49.9 percent). It constituted 60 percent of the parliamentary seats, which meant an absolute majority, an absolute domination of parliamentary politics. However, in an electoral system which firmly contains 10 percent threshold, the democratic legitimacy of the parliamentary majority would always be in doubt. 2007 and 2011 electoral successes of the AKP shall be read through these lenses.

From 2002 onwards, a rather glaring tendency can be observed in AKP's political stance: its vote share has increased side by side its oppressive attitude. Nur Bilge Criss underlines that since 2002, the AKP is not only the majority party in the parliament, but it also employs a majoritarian discourse by dwelling on the will of the majority of Turkish people.[170] The Prime Minister Recep Tayyip Erdoğan equates his personal will not only with the majority of the parliament, but also with the "will of the people". For him, the representatives of the people make decisions with a majority vote in the parliament, which is practically equal to AKP votes. Thus, AKP's decisions in the parliament represent the will of the people, and anyone who acts against the AKP, in parallel, impedes the people's will. In this way, Erdoğan declares dissidents of the AKP as the "enemies of the people".[171]

Beside the deformation of pluralist nature of democratic politics, AKP's majority governments deformed the parliamentary feature of democracy. During AKP governments, majority of the legislative was practically identical with the executive. Deputies in the legislative never vote against the government of their own party. As a result, the identity between legislative majority and executive has been established in

---

[170] Criss, Nur Bilge (2010). "Dismantling Turkey: The Will of the People?" in *Turkish Studies*, Vol. 11, No. 1, pp. 45-46

[171] Dinçşahin, Şakir (2012). "A Symptomatic Analysis of the Justice and Development Party's Populism in Turkey, 2007–2010" in *Government and Opposition*, Vol. 47, No. 4, p. 632

a short span of time. Due to this identity, the relation between them has taken the form of an "inter-party dialogue"[172]. Therefore, what AKP majority governments exemplify is the subordination of parliamentary democracy to party politics[173], at the end of which, division between legislative and executive powers has become practically obsolete. One factor in this subordination is that, dissent is not permitted and opposition is not institutionalized in the AKP[174]. Some deputies of the AKP complained that they had no function in the parliament, but to raise their hand to vote for the government's bills. One of the deputies said, the only organ they used in the parliament is their hands.[175] In addition, the AKP is organized by a top down fashion. Hakan Yavuz states that bottom up policymaking is a wishful thinking.[176] As a result, majority of the parliament acted as a single will, and a single man, Recep Tayyip Erdoğan, acted in the name of majority will. While Erdoğan has become the party,[177] he also has become the will of the parliament.

Apart from controlling legislative power in an indirect way through convergence of executive power and majority of the parliament, the AKP also made use of direct methods to grasp legislative power. One of these direct methods is issuing of *decree in the force of law* (DfL). As the name indicates, the DfL is a decree of the government; however, it has a power equal to the law of the parliament. Hence, the government is able to use legislative power and run the state by the DfL. Consequently, it can bypass

---

[172] İba, Şaban (2003). "Türkiye'de Parlamenter Rejimin İşleyişi Açısından 3 Kasım 2002 Seçimlerinin Sonuçları" in *Ankara Üniversitesi Siyasal Bilimler Fakültesi Dergisi*, Vol. 58, No. 2, p. 106

[173] Siaroff, 2005, p. 146

[174] Müjde Önal, Saime (2007). *Türkiye'de Parti İçi Demokrasi: CHP ve AKP Örneği*. Unpublished Master Thesis. Dokuz Eylül Üniversitesi, Sosyal Bilimler Anabilim Dalı, Tarih Bölümü, p. v

[175] Yavuz, 2009, p. 100. Interview on October 12, 2004. This deputy asked not to be named.

[176] Yavuz, 2009, p. 100

[177] Yavuz, 2009, p. 102

the parliament, which is contrary to the rule of law. The rule of law dictates state to be governed by law. Law, on the other hand, is identified with the statute, with the act of the parliament; because law is strictly required to be the will of the parliament. That's why in a legal system, there can be decrees or ordinances; however, state cannot be run by them. Therefore, the DfL is not an ordinary measure of the rule of law order; it should only be resorted in case of necessities. However, the AKP has utilized the DfL extensively and therefore *de facto* swept away parliament's legislative power.

On 6 April 2011, parliament passed a law which enabled the government to issue the DfL for the following 6 months without any condition. Having the legislative power on its side, the AKP issued 35 DfLs. What is more significant is that, the AKP did not make minor changes via the DfLs; on the contrary, it turned a hand to a wide administrative area. It amended and/or annulled about 500 laws and the DfLs[178] Even some ministries were closed and new ones were founded. For instance, the Ministry of Public Works and Settlement, and the Ministry of Environment and Forest were closed by the DfL No 636. With the DfL No 635, on the other hand, the Ministry of Industry and Commerce was closed and the Ministry of Science, Industry and Technology was founded[179]. Looking at this picture Ali Rıza Aydın says that parliament is deemed nonfunctional on crucial decisions through the DfLs of the AKP. Actually, throughout 2011, the parliament has almost no legislative activity.[180]

The picture is that, both legislative and executive powers are under the control of the AKP, which more than half of the people do not give their consent. Where the parliament becomes ineffective, parliamentary democratic politics in Turkey turns

---

[178] Aydın, Ali Rıza (May 2012). "AKP'li ve KHK'li Yasama Düzeninde Yaşamak", http://haber.sol.org.tr

[179] *AKP'nin KHK'leri ve TMMOB* (2011). Ankara: TMMOB Publications, p.12

[180] Aydın, 2012

into the *absolutism* created by the majority party. This absolutism is best portrayed by Mehmet Ali Kılıçbay:

> In Turkey, parties are surrendered to their leaders; parliament is surrendered to the governments; and governments to party leaders. When the tradition of granting concessions is added to this equation, it will be seen that (…) parliament is not able to go beyond creating non-dynastic monarchs.[181]

In such strategies, the AKP successfully constituted its absolutism over parliamentary decision making. Only after strictly establishing its parliamentary absolutism, the AKP was able to take a stand against and challenge constitutional State. This challenge has most severely felt during 2007-2008.

First point is that, after the general elections of June 2007, the AKP gained a parliamentary majority which was numerically sufficient to elect the President of the Republic alone (not in the first round, but in the following rounds). However, there is another issue, which is equally importantly. It is that, the AKP's relation with the Constitution of the state changed. Right after 2007 elections, the AKP started to prepare a new constitution to replace the existing one.[182] Actually, prior to the election, Prime Minister Erdoğan declared that his party would make a new constitution if it would be re-elected. After the election, he kept its promise. On June 8, 2007, Erdoğan asked a group of constitutional law professors to prepare a draft constitution. After his re-election as the new Prime Minister, constitutional

---

[181] Kılıçbay, Mehmet Ali (2000). "Ya Parlamento Demokratik Değilse! " in *Türkiye Günlüğü,* Vol. 3, No. 60,p. 22 quoted in İba, 2010, 16th footnote in p.8

[182] Gümüşçü, Şebnem; Sert, Denizli (2010). "The March 2009 Local Elections and the Inconsistent Democratic Transformation of the AKP Party in Turkey" in *Middle East Critique*, Vol. 19, No. 1, p. 62; Arslan, Zühtü (2007). *Turkey's Bid for the New Constitution.* SETA Policy Brief, No.1, p. 1

preparations were maintained in the autumn.[183] Later on, the AKP put the issue of renewing the Constitution on the back burner. Even so, these debates and the initiatives on new constitution is able to show the power of the AKP: before 2007, the AKP could only interpret and enforce the Constitution, and hence remain within the constitutional boundaries established beforehand. However, after June 2007, it achieved a power sufficient to change the constitutional boundaries of the State and set up its own ones. Hence, it could stand before the constituted power of the constitutional State as a constitutive power. Moreover, the AKP attempted to amend the Constitution on February 2008. In cooperation with *Milliyetçi Hareket Partisi* (Nationalist Action Party-MHP), it proposed the amendment of the Articles 10 and 42 of the Constitution with an aim to lift the ban on headscarves in higher education. Therefore, the confrontation between the AKP and constitutional State was explicit during 2007-2008 period; so that, Ergun Özbudun and Ömer Faruk Gençkaya call this period as "the year of constitutional wars".[184]

The AKP's constitutive power is mostly understood as a threat to constitutional State in Turkey. What has been experienced after 2002, but especially after 2007, points at an incongruity in terms of constitutional state: constitutional State in Turkey excludes AKP power. At the hearth of this understanding, lies the opposition between secularism and Islam. Turkish State is a constitutionally mandated secular state.[185] Article 2 of 1982 Constitution says that Turkey is a secular State. However, the AKP

---

[183] The committee was composed of Ergun Özbudun (chairman), Serap Yazıcı, Zühtü Arslan, Yavuz Atar, Fazıl Hüsnü Erdem, and Levent Köker. The drafting committee presented its draft to the AKP leadership on August 29, 2007, and on 14-16 September, a joint meeting between the committee members and eleven AKP ministers and parliamentarians took place in Sapanca, where some modifications were made on the draft (Hale, William; Özbudun, Ergun (2010). *Islamism, Democracy, and Liberalism in Turkey: The Case of the AKP.* New York: Routledge, p. 66)

[184] Özbudun Ergun; Gençkaya, Ömer Faruk (2010). *Türkiye'de Demokratikleşme ve Anayasa Yapımı Politikası.* İstanbul: Doğan Kitap, p. 103

[185] Warhola, James W.; B. Bezci, Egemen (2010). "Religion and State in Contemporary Turkey: Recent Developments in Laiklik" in *Journal of Church and State*, Vol. 52, Number 3, p. 437

is an avowedly Islamic-oriented political party, which had evolved from several extant Islamic parties belonging to *Milli Görüş Hareketi* (National Outlook Movement-MGH).[186] Actually, from the outset, the AKP leaders distanced their party from the Islamist stance of the MGH, and defined party's identity as "conservative democracy", and attempted to reconfigure different trends of Turkish political right. Nevertheless, the majority of the AKP leading cadres and party activists like Erdoğan, Abdullah Gül and Bülent Arınç were the former followers of Islamist MGH, who had taken top positions in the *Fazilet Partisi* (Virtue Party-FP) and in its predecessor, the *Refah Partisi* (Welfare Party-RP).[187] These parties of the MGH had already been declared as threats to the secular nature of the State. The RP was closed in January 1998 and the FP in June 2001 by the Constitutional Court of Turkey on the grounds that they became focal points of anti-secular activities. Accompanying the closure of the RP, five-year ban on the political activities of its leader Necmettin Erbakan and 5 other top policy makers was introduced.[188] Even Erdoğan was sentenced to ten month imprisonment and he was lifetime banned from politics on April 21, 1998.

With AKP governments, a party previously having such a background and a dialogue with secular State came to power; with Erdoğan's Prime Ministry, a leader having such a background and a dialogue with secular State started to rule the secular State.

---

[186] During 4th General Assembly of the AKP, held on September 30, 2012, Prime Minister Erdoğan announced that they were the followers of the MGH leader Necmettin Erbakan, beside Adnan Menderes and Turgut Özal. The last two had been referred by him after 2002 regularly; however it was the first time that Erdoğan named Erbakan and declared its relation with the MGH and Erbakan. "Başbakan'ın Konuşmasında Yeni bir Şey Yok", 30.09.2012 *Radikal*, www.radikal.com.tr

[187] Şen, Mustafa (2010). "Transformation of Turkish Islamism and the Rise of the Justice and Development Party" in *Turkish Studies*, Vol. 11, No. 1, p. 59; Yıldız, Ahmet (2008). "Problematizing the Intellectual and Political Vestiges: From "Welfare" to "Justice and Development" in *Secular and Islamic Politics in Turkey: The Making of Justice and Development Party*. Cizre, Ümit (ed). Oxon: Routledge, p. 43. For more on the connection between MGH and AKP see Atacan, Fulya (2005). "Explaining Religious Politics at the Crossroad: AKP-SP" in *Turkish Studies*, Vol. 6, No. 2, 187–199

[188] Cizre, Ümit; Çınar, Menderes (2003). "Turkey 2002: Kemalism, Islamism and Politics in the Light of the February 28 Process" in *South Atlantic Quarterly*, Vol. 102, No: 213, p. 323

On June 28, 1996, when the RP came to power and its leader Erbakan became the Prime Minister, it was understood as the power of "enemies of the State"[189], and as a grave reactionist threat to secular regime.[190] Similar comments were also made for the AKP government and Erdoğan's Prime Ministry. For many, AKP power was indicating the end of the secular state.

For those who are even a little concerned about secularism, the AKP is a masked version of the MGH. It is mostly seen that an Islamic-oriented political party ruling over State and trying to change State's secular characteristic. The AKP is accused of trying to cheat the public by pretending to be secular.[191] Groc, for instance, believes that the AKP is a good example of "secular appearance". Accordingly, the AKP pretends to be secular and this appearance is a concession that the party makes in order to be a part of national and political realities basing on ideological, political, social parameters, which are different from their own.[192] For some, under this secular appearance, the real objective of the AKP is to transform the State into an Islamic republic.[193] Hence, the AKP is seen as an attack to the fundamental principles of the Republic.[194] Yavuz claims that AKP power is a "revolution" against the State.[195] Alev Coşkun views AKP power as a "coup by way of laws" and "coup by means of

---

[189] Yavuz, Hakan (2003). *Islamic Political Identity in Turkey*. New York: Oxford University Press, p.3

[190] Çınar, Menderes (2008a). "The Justice and Development Party and the Kemalist Establishment" in *Secular and Islamic Politics in Turkey: The Making of Justice and Development Party*. Cizre, Ümit (ed). Oxon: Routledge, p.109

[191] Yıldız, 2008, p. 49

[192] Groc, Gerard (2011). "AKP, Türkiye'deki Laikliğin Derdi mi Dostu mu?" in *Tartışılan Laiklik: Fransa ve Türkiye'de İlkeler ve Algılamalar*. Akgönül, Samim (ed). İstanbul: Bilgi Üniversitesi Yayınları, p.42

[193] Behramoğlu, Ataol (2009). *Sivil Darbe*. İstanbul: Cumhuriyet Kitapları , p. 19

[194] Coşkun, Alev (2010). *Anayasayla Sivil Darbe*. İstanbul: Cumhuriyet Kitapları, p. 145

[195] Yavuz, 2009, p. 15

constitution".[196] Similarly, Ataol Behramoğlu says that the AKP itself is a "civilian coup initiative".[197] İlhan Selçuk supports this view by indicating that the AKP seized the parliament by means of an "externally supported civilian coup".[198]

These fears came to a climax during the presidential elections. Secularists believed that presidency is the last resort of the Republic, and at any cost, it shall not be delivered to an Islamist. They are, in general, worried that an Islamist president may Islamize the Constitutional Court, other judicial organs, and universities through its broad powers of appointment.[199] In this vein, Behramoğlu mentioned that civilian coup would reach its main target when it seizes presidency. If they achieved their aim, without any doubt, it would signify the end of democratic republic.[200] Alas, the nightmare of the secularists came true when Abdullah Gül, the candidate of the AKP and ex-deputy of both the RP and the FP, was elected as the President in August 2007. Thereby, for the first time since the foundation of the Republic, leaders of a single political party with an Islamic past secured Turkey's three key offices: Presidency, Prime Ministry, and Speaker of the Parliament.[201] After Presidential elections Behramoğlu declared that First Republic was over. Second Republicans had reached their aim: from then on, the Republic of Atatürk was nothing but a palaver.[202]

---

[196] Coşkun, 2010

[197] 2009

[198] "Ergenekon'un Tarihi ve Coğrafyası...", 09.01.2009 *Cumhuriyet*, www.cumhuriyet.com.tr

[199] Hale, 2010, p. 103

[200] Behramoğlu, 2009, p. 40-44

[201] Baran, Zeyno (2010). *Torn Country: Turkey between Secularism and Islamism*. Stanford: Hoover Institution Press, p.67

[202] Behramoğlu, 2009, p. 115

The worries of secularists may be seen well-grounded or exaggeration. However, what must be underlined in all those remarks is that AKP government is not an ordinary parliamentary power. Rather, its importance goes beyond parliamentary politics and reaches to the level of constitutional state. Highlighting this point, Levent Köker states that it is certainly true to argue that what Turkey has been going through since the rise of the AKP to power in 2002 is a deep political crisis that cannot be reduced to a mere crisis situation in the legal system. For that reason, the tensions and frictions that the AKP caused are not "simple" political crisis; yet they are "political-constitutional crisis".[203]

3.1 AKP's Interaction with the Constitutional Norm of Secularism

Evaluating the danger that the AKP poses for secular constitutional State, ex-Chief Public Prosecutor of the Constitutional Court, Vural Savaş, urged that AKP had to be closed down due to its anti-secular activities.[204] Shortly after his notice, the Constitutional Court took action to close the AKP; in March 2008, it was charged against secularism and constitutional State. The Chief Public Prosecutor of the Republic Abdurrahman Yalçınkaya prepared an indictment for the dissolution of the party. Prosecutor Yalçınkaya asked the Constitutional Court to bar seventy one people, including Prime Minister Erdoğan and President Gül, from politics for five years. According to the indictment of Chief Public Prosecutor, the AKP's anti-secular activities are the statements of Prime Minister Erdoğan, Speaker of the Parliament Bülent Arınç, newly elected President and ex-Foreign Minister Abdullah Gül, and other party members defending the usage of headscarf in higher education and in public sphere, the opening and proliferation of Prayer and Preacher Schools; their

---

[203] Köker, Levent (2010). "Turkey's Political-Constitutional Crisis: An Assessment of the Role of the Constitutional Court" in *Constellations,* Vol.17, No. 2, p. 329

[204] Savaş, Vural (2008). *AKP Çoktan Kapatılmalıydı*. Ankara: Bilgi Yayınları, p.9

speeches containing Islamic references or aiming to change the society in accordance with Islamic rules; and their legislative acts in these directions. Therefore, it can be inferred that these are the actions that secularism does not tolerate; these are the secular limits that Constitution puts on political power.

The speeches[205] of AKP leaders are full with glorification of Islamic education. For instance, Erdoğan frequently praised State's education of Islamic clergy and *İmam Hatip Liseleri* (Prayer and Preacher Schools-İHLs). On May 29, 2004, during a speech in Oxford University, he claimed that İHLs did not contradict with the principle of secularism. Hüseyin Çelik, ex-Minister of Education, also supported İHLs in his speech in December 2005. Actually, with the AKP's rise to power, there has been a remarkable increase in the number of İHLs students from 48.035 in 2002-2003 to 129.274 in 2007-2008.[206] The AKP did not suffice promoting Islamic education verbally; yet enhanced the legal ground of it. On April 24, 2003, prison sentence for those sending their children below 12-years-old to Quran courses were replaced with fines. In 2004, parliament reduced the sentence for running illegal Quran courses from three years to one year. On July 21, 2005, inspection of Quran courses was transferred from the Ministry of National Education to the Directorate of Religious Affairs.[207] Lastly, on April 7, 2012, the minimum age restriction for Quran courses was eliminated. Moreover, the AKP consulted to illegal actions to Islamize education in secular schools. For instance, in 2005 AKP Mayor of Gazi district (Samsun) Süleyman Kaldırım distributed a book in primary schools free of charge. The book was called *Muhtasar İlmihal: Resimli Namaz Hocası* (Concise Catechism: Illustrated Prayer Instructor). Some religious rules were explained in the book, such as "those

---

[205] Unless otherwise specified, following speeches and actions of the members of the AKP are the ones sited in the indictment of the Chief Public Prosecutor of the Republic for the closure of the party.

[206] Özcan, Faruk (2012). *4+4+4 İmam-Hatip: Tüm Tartışmaların Odağı Okul*. İstanbul: Toplumsal Yayıncılık, p. 156

[207] Özcan, 2012, p. 119

who have visual disability and are retarded in legs cannot perform prayer", "human excrement more than 3.2 gram, and combing hair and beard obstruct performing prayer". Another example is AKP Mayor of Isparta, Hasan Balaman, who distributed a book to 200 students in *Ülkü Primary School* in the city. The book glorified Said-i Nursi (the leader of Islamic Nur community) stating that Nursi was the thinker of the century with its sharp and brilliant intelligence.

In addition, party cadre took discriminatory action in favor of Islamic schools as well. In 2005, AKP Mayor of Eyüp (İstanbul), Ahmet Genç, mandated that municipal police officers that Eyüp municipality would recruit had to be İHL graduates. Apart from its local rulers, the AKP in general discriminated in favor of the İHLs. In May 2004, AKP government passed a bill to remove co-efficiency practice for the İHL graduates (which reduces the impact of their Grade Point Average in university entrance exams). However, the President vetoed the law arguing that it violated the principle of secularism. The problem is that, İHL students are educated to be prayers and preachers. They are supposed to be Islamic clergy and nothing more, because they have taken religious education. Yet, the AKP took steps to provide more employment and education opportunities to İHL graduates by removing the restrictions before them.

We can see that, praising and defending the İHLs by word or by action was regarded as an act against secularism in the case of the RP as well. For instance, in his speech on November 29, 1996, the RP deputy Şevki Yılmaz stated that all higher schools should be educated with the spirit of the İHLs. He also advocated that the RP should have opened new İHLs. On the basis of these speeches, the Constitutional Court decided that he was propagating in favor of the İHLs and accepted it as an evidence of RP's anti-secularism.

Secondly, the AKP pursued a policy to free wearing of headscarf in higher education and in public sphere. For instance, in a television program broadcasted on July 9, 2004, Erdoğan defended the liberty of headscarf in higher education. In 2005, he made a speech in Copenhagen in a meeting called *Medeniyetler Arası İttifak: Türkiye'nin Rolü* (Alliance among Civilizations: The Role of Turkey) and criticized 8 year compulsory education and headscarf ban. In November 2003, while going to EU Troika Meeting, ex-Foreign Minister Abdullah Gül claimed that headscarf ban violated the basic human rights. However, beside these statements, mainly AKP's attempt to free headscarf through legislation has raised major concerns. As mentioned before, on February 6, 2008, the AKP attempted to amend Articles 10 and 42 of the Constitution with the cooperation of the MHP. The purpose of the amendment was lifting the ban on headscarves in higher education. With the addition of the phrase "in all activities pertaining to the provision of public services", Article 10 was read after the amendment as "Organs of the state and administrative authorities are obliged to act according to the principle of equality before the law in all their transactions and in all activities pertaining to the provision of public services". Additionally, the AKP thought that endorsement of Article 42 with a new clause on the right to education ("No one can be deprived of the right to education without a reason written explicitly in the law") would reinforce the supposed amendment of Article 10.[208] However, in a case filed by *Cumhuriyet Halk Partisi* (Republican People's Party-CHP) (the main opposition party), deputies argued that these amendments violated the immutable principle of secularism and were, therefore, legally *null and void*. The Constitutional Court accepted the claims and thus turned down the amendments passed by 411 votes in a 550 member-parliament.[209]

---

[208] Köker, 2010, p. 334

[209] Köker, 2010, p. 338

Nevertheless, the AKP pushed for a second time to free headscarves in higher education. Head of Higher Education Council Yusuf Ziya Özcan released a statement on February 24, 2008 calling on rectors to allow students with headscarves on university campuses. On March 11, the Council of State, Turkey's top administrative court, annulled Özcan's circular.[210] Yet, in Open Education High School exams held in January 2008, many headscarved students were allowed to take the exam in Ankara, Erzurum, Edirne, Denizli, Konya and İzmir.

Supporting headscarf wearing in higher education and public sphere was also regarded an anti-secular act in the case of the RP as well. RP government had amended the Law No. 2547 by adding a phrase, which set wearing headscarves due to religious beliefs free. However, the Constitutional Court had repealed this clause. In addition, RP's leader Erbakan and some other prominent party members defended wearing headscarf in higher education and public offices verbally.[211] Similarly, FP leader and other party members stated that wearing headscarf in higher education and in public offices was an indispensible human right.

The third category of anti-secular activities is making religious references in public speeches, and attempting to change public life in accordance with religious rules. For instance, in 2003, Erdoğan defined Turkey as an "Islamic State" in Malaysia. While visiting Sydney (Australia), he stated that it was God who created all of us; hence there should not be discrimination among people. In addition, he criticized *European Court of Human Rights*' (ECHR) decision in favor of headscarf ban in the case of Leyla Şahin, a medical student challenging the ban. He stated that the ECHR should have asked the issue to Islamic religious scholars, *ulema* before giving its verdict. He

---

[210] Höjelid, Stefan (2010). "Headscarves, Judicial Activism, and Democracy: The 2007–8 Constitutional Crisis in Turkey" in *The European Legacy,* Vol. 15, No. 4

[211] Savaş, 2008, p.109

also said on December 6, 2005 in a conference organized by *Ulusal Avrupa Etütleri Merkezi* (National Center of European Studies) that in Turkey, it was religion which kept people together, who originally belonged to different ethnicities. It is not only Erdoğan but also some members of the cabinet who made speeches with Islamic references. In 2003, Ömer Dinçer, Undersecretary at Prime Ministry, announced that he embraced the doctrines of Fethullah Gülen and demanded replacement of the Republic with an Islamic state, governed by sharia.[212] Moreover, through legislation the AKP tried to change the social life on the basis of religious rules. For instance, Ministry of Health prepared a draft regulation on Licensing Healthcare Institutions. Article 113 of this draft allowed first degree healthcare institutions to have places for worshipping. In addition, in April 2004, the AKP proposed to amend the criminal code to criminalize adultery, and forbid consumption of alcohol in public places due to religious reasons.[213]

In terms of religious references in their public speeches and expressed desire to change public life in accordance with religious rules, Erbakan and other party members of the RP were more generous to provide examples. On January 13, 1991, in his speech in party's training seminar in Sıcak Çermik (Sivas) Erbakan said that the RP was an Islamic jihad army. He said, if someone called himself a Muslim, then, he had to be a soldier in this army; because, RP members were Muslims, and wanted Quran to dominate. He also said "sovereignty belongs to God", "praise to God, we are all for sharia", "one cannot be secular and Muslim at the same time. You will either be secularist or Muslim".[214] In addition, in 1994, he explicitly advocated restoration of sharia to replace secular law; the only question being whether this process would be

---

[212] Baran, 2010, p. 55

[213] Çınar, Menderes (2005). *Siyasal Bir Sorun Olarak İslamcılık*. Ankara: Dipnot, p. 113; Yıldız, 2008, p. 53

[214] Baran, 2010, p. 45

bloody or not. Moreover, he sought but failed to achieve gender segregated buses and prohibition of alcohol in publically owned restaurants.[215] Yet, he is rather remembered by organizing a fasting dinner for the leaders of Islamic orders at the residence of the Prime Ministry.[216] The RP was also known to demand building of a mosque to Taksim square and convention of Hagia Sophia Museum into a mosque.[217]

On the light of the evidences that demonstrated above, Chief Public Prosecutor arrived to the opinion that the AKP has tried to obliterate the principle of secularism, and change the fundamental principles of the Republic. It has aimed to realize a model for society, reference points of which being religion. The main parameters of this model are headscarf freedom and Islamic education. Firstly, AKP's discourse supports wearing headscarves in higher education and in public sphere. Secondly, it attempts to change the vocational school identity of the İHLs by removing university restrictions, and to make them the main element of secondary education by providing them social and financial support. It Islamizes the curricula in all segments of the education. The AKP also attempts to popularize Quran courses by removing the restriction on children below 12 years old. Moreover, the AKP Islamizes the state cadre as well. It emphasizes religious identity in domestic and foreign official meetings, and brings forth religious themes. It celebrates religious feasts and days over flamboyantly that shadows national feasts. All in all, the AKP abuses religion in its political activities. It ignores that in a secular system religious symbols cannot be used for political purposes. This attitude divides the society on the basis of religion and belief.[218]

---

[215] Baran, 2010, p. 42

[216] Yavuz, 2003, p. 242

[217] Yıldız, Ahmet (2003). "Politico-religious Discourse of Political Islam in Turkey: The Parties of National Outlook" in *The Muslim World*, Vol. 93, p. 195

[218] Opinion of the Chief Public Prosecutor on the AKP closure case.

On March 31, 2008, the Constitutional Court voted unanimously to hear the closure case.[219] In its final decision on July 30, 2008, the Court accepted that the AKP had become a 'center of anti-secular activities', threatening the Republican nature of the State. However, the court felt short of closing the party; instead, it fined the party and deprived it of a considerable part of its public financing.[220]

Considering the worries of secularists, and the opposition between the constitutional State and the AKP, we may draw some parallels with Turkey after 2002 (yet especially after 2007) and Weimar Republic in Germany after 1933. Very briefly, the revolution of 1918 and Weimar Constitution of 1919 had established Federal Republic of Germany. Germany became a parliamentary democracy with a strong presidency and a chancellor at the head of a bicameral parliament (the *Reichstag* as the popularly elected lower house and *Reichsrat* as the upper house representing the interests of the Lander, the states).[221] In 1933, the NSDAP of Adolf Hitler came to power with parliamentary democratic means. However, it caused to the demise of liberal parliamentary democracy and the constitutional state afterwards; meaning that only within 15 years, the constitutional system of the Weimar Republic made way for anti-democratic and anti-constitutional dictatorship of the NSDAP.

In the parliamentary elections of July 1932, the NSDAP got 37.3 percent of the votes and became the largest parliamentary party with 230 seats.[222] Facing with such a majority, on January 30, 1933, President Hinderburg appointed Hitler as the

---

[219] Yavuz, 2009, p. 261

[220] Haynes, Jeffrey (2010). "Politics, İdentity and Religious Nationalism in Turkey: from Atatürk to the AKP" in *Australian Journal of International Affairs*, Vol. 64, No. 3, p. 316

[221] Stolleis, Michael (1998). *The Law under the Swastika: Studies on Legal History in Nazi Germany*. Chicago: University of Chicago Press, p. 1

[222] Kolb, Eberhard (1996). *Was Hitler's Seizure of Power on January 30, 1933, Inevitable?*. Occasional Paper 18. Washington: German Historical Institute, p. 15

Chancellor. However, the parliament has passed the Enabling Act on March 1933 with intimidation and mass arrests of the communist deputies. According to Enabling Act, not only could laws deviate from the constitution, but such emergency legislation could not be rescinded by the parliament. The Act provided Hitler with greater emergency powers then those already provided under emergency measures defined in Article 48 of the Constitution. Hence, it amended the constitution and eliminated the separation of powers by allowing Hitler to pass laws without the consent of the parliament. So, the Enabling act put Hitler in a position that he could *legally* transform the state and the German society.[223] Then, passage of the Enabling Act may be interpreted as nothing less than a revolution that ended the Weimar Republic (1919-1933) and established the *Third Empire*, the *Third Reich* (1933-1945). All in all, the collapse of the Weimar Republic is a case of anti-democratic politics manipulating its legal authority and constitutional procedures to consolidate its control, and to destroy the constitutional order.[224] Hence, constitutional democracy seems to give itself up legally and peacefully to its enemy.[225]

Similar to the NSDAP, the AKP power can also be interpreted as a case of anti-constitutional politics coming to power by parliamentary means and aiming to destroy the very same system, once helped it to pave the way to power. Accordingly, in the case of the AKP, an Islamist majority party is threatening the constitutionally protected secular nature of the State by means of its numerical superiority in the parliament. The rule of law regime and parliamentary democracy, founded on formal or procedural standards, allow a party that is an avowed enemy of the secular State to

---

[223] Kolb,1996, p. 91

[224] McCormick, John (2004). "Identifying or Exploiting the Paradoxes of Constitutional Democracy?: An Introduction to Carl Schmitt's *Legality and Legitimacy*" in *Legality and Legitimacy*. Schmitt, Carl. Durham: Duke University Press, pp.xvi

[225] Caldwell, Peter C. (1997). *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and the Practice of Weimar Constitutionalism*. Durham: Duke University Press, p. 1

formulate and enforce law[226]. In a speech he made in 2005, ex-Chief of General Staff Hilmi Özkök succinctly pronounced that abusing the opportunities provided by democracy, the AKP intended to redefine and reinterpret key concepts such as secularism, nationalism, and the state-society relations; and it was an evidence of its Islamism.[227] Also, outgoing President Ahmet Necdet Sezer expressed his concern that a tyranny of the majority was threatening the secular democracy.[228] Perhaps, the last similarity between Weimar and Turkey is more striking: similar to President Hinderburg's delivery of power to a recognized fascist party, secular constitutional State of Turkey has kept a party in power after 2008, whose anti-secularism has been recognized by State. A state-approved *anti-secular party* is ruling *secular constitutional State* after 2008.

After coming to power in 1933, the NSDAP had done what was expected from a recognized fascist party to do, which will be mentioned in the next chapters. And while staying in power after 2008, the AKP had done what was expected from an approved Islamist party to do: many activities, which had deemed anti-secular before 2008, were one by one put into effect after 2008. The number of the İHL students almost doubled within 3 years from 129.274 in 2008-2009 to 235.639 in 2010-2011[229]. Moreover, middle sections of the İHLs were re-opened by Law No 6287, which came into force on April 11, 2012. By this law, which is popularly known as "4+4+4 Education Reform", primary and middle schools were institutionally separated within primary education. Within the framework of newly introduced 12 year compulsory education, primary education institutions were reorganized as

---

[226] McCormick, 2004, p. xv

[227] Çınar, 2008a, p. 116

[228] "Rejim Büyük Tehlike Altında", 14.04.2007 *Hürriyet*, www.hurriyet.com.tr; Dinçşahin, 2012, p. 629

[229] Özcan, 2012, p. 156

primary schools, middle schools, and Prayer and Preacher Middle Schools. In that way, middle schools of the İHLs were allowed to be re-opened after 15 years of their closure in February 28, 1997. Moreover, the number of Islamic courses was increased in all primary and middle schools curricula. While compulsory Islamic education was kept, other Islamic courses like "Quran-ı Kerim", "Life of Hz. Mohammed and Basic Religious Instructions", and "Religion, Morals, and Values" were introduced as elective courses. However, in some schools, these courses turned out to be *compulsory elective courses* as no other elective course had been offered.[230]

Secondly, headscarf was *de facto* freed in higher education without any legislative amendments. It is achieved through implementation of a different interpretation of the same laws and articles. Article 17 of the Law No 2547 on Higher Education regulates dressing on higher education. It states that dressing is free in higher education institutions provided that it complies with laws. Actually, wearing headscarf is not restricted and banned by any law in force; however, the interpretation of the Article 17 by the Constitutional Court and the Council of State forbids it. So, what happened after 2008 is that, Article 17 of the Law No 2547 is reinterpreted in such a manner that frees headscarves, and the Constitutional Court and the Council of State shut their eyes to it.

All these have achieved without making even a slight amendment in secularism as a constitutional norm; all these have achieved without causing political crisis that marked the period before July 2008. That's one of the reasons why the time period 2007 and 2008 shows that AKP's relation with the constitutional State has changed. After this period, not only legislative and executive powers of the state are started to be controlled by this political party. However, one development that is more

[230] Yükseker, Deniz; Gökşen, Fatoş; Alnıaçık, Ayşe (2012). "Eğitimin Kalitesizliğini, Sosyo-ekonomik Eşitsizlikleri ve Cinsiyet Ayrımını Derinleştirme Modeli mi? 4+4+4 Yasası" in *Birikim*, No. 284, pp. 62-63

importantly for our topic is happened: normative boundaries of secularism that the rule of law brings to every political power are surpassed. How? How come the same constitutional norm of secularism banned the opening of Prayer and Preacher Middle Schools in 2004, however allowed them in 2012? How come blatantly pro-Islamic legislative acts of the AKP could be materialized under a secular constitutional state in 2012, while the same secular constitutional state limited it before 2008? A more provocative question may also be raised: after the opening of Prayer and Preacher Middle Schools, proliferation of Islamic education, and freeing headscarves, is the State in Turkey still secular?

An explanation for this turnover comes from the literature. Most of the literature explains that what happened under AKP power is a transformation of the meaning of secularism. Hence, the relation between the State and the AKP has been dealt as a discussion on the *true* meaning of secularism. Ahmet Kuru claims that the real debate occurs between the supporters of different interpretations of secularism.[231] For instance, for him, the reason of opposition between former President Sezer and the Prime Minister Erdoğan is that, Sezer adopts exclusionary secularism, while Erdoğan embraces passive secularism.[232] Hence, contrary to obliterating secularism in total, the AKP is mostly accepted to change the meaning of secularism from "active or exclusionary" secularism to "passive or positive" secularism.[233] In a nutshell, before the AKP, Turkey embraced "active secularism", "militant secularism" or what Ioannis Grigoriadis calls, "assertive secularism", which is backed by military especially in late

[231] Kuru, Ahmet. *Reinterpretation of Secularism in Turkey: The Case of the Justice and Development Party*. www-rohan.sdsu.edu

[232] Kuru, Ahmet (2009). *Pasif ve Dışlayıcı Laiklik: ABD, Fransa ve Türkiye*. İstanbul: Bilgi Üniverstesi Yayınları, p. 171

[233] Kuru; Kuru, 2009; Akgönül, Samim (ed) (2011). *Tartışılan Laiklik: Fransa ve Türkiye'de İlkeler ve Algılamalar*. İstanbul: Bilgi Üniversitesi Yayınları

1990s.[234] Accordingly, free exercise of religion and appearance of religious motives and symbols in public sphere is not characteristic of this understanding of secularism.[235] Secularism is not minimized to the level of separation between state and religion, but required the partition of religion and social life, education, family law, and the full control of the latter by state.[236]

However, AKP governments demanded redefinition of the norm secularism. It has produced an alternative, a liberal version of secularism.[237] This liberal version is time to time called as "passive" secularism. Passive secularism implies that the state maintains neutrality toward religions and allows their public visibility.[238] In this direction, Erdoğan defines secularism as state's neutrality towards the nation's different values and beliefs without any discrimination and as the establishment of a free environment for beliefs.[239] According to Erdoğan, secularism is an "institutional attitude and approach" in terms of neutrality of state with respect to "all religions and thoughts".[240] The AKP party program depicts secularism as "an assurance of the freedom of religion and conscience" and rejects "the interpretation and distortion of

---

[234] Grigoriadis N., Ioannis. (2009). "Islam and Democratization in Turkey: Secularism and Trust in a Divided Society" in *Democratization*, Vol. 16, No. 6, p. 1196; Warhola, 2010, p. 428

[235] Warhola, 2010, p. 430

[236] Kuru, 2009, pp. 175-176

[237] Groc, 2011, p. 51; Ioannis, 2009, p. 1194

[238] Warhola, 2010, p. 428; Kuru

[239] Duran, Burhanettin (2008). "The Justice and Development Party's "New Politics": Steering Toward Conservative Democracy, A Revised Islamic Agenda or Management of New Crises?" in *Secular and Islamic Politics in Turkey: The Making of Justice and Development Party*. Cizre, Ümit (ed). Oxon: Routledge , p. 91

[240] Ertuğrul, Kürşad (2012). "AKP's Neo-Conservatism and Politics of Otherness in Europe-Turkey Relations" in *New Perspectives on Turkey*, No. 46, p. 164; Duran, 2008, p. 91. Both authors are referring to Erdoğan's "Introduction" in Akdoğan, Yalçın (2004). *AK Parti ve Muhafazakar Demokrasi*. İstanbul: Alfa

secularism as enmity against religion." The program adds that "it is also unacceptable to make use of religion for political, economic and other interests or to put pressure on people who think and live differently by using religion".[241] For sure, demanding "freedom of religion and conscience" is a way to demand freedom for headscarf. In that way, freedom for wearing headscarf in public sphere is get drawn into secularism, and even secularism is seen as a guarantee of freedom of wearing headscarf. In this framework, the tension between the State and the AKP on secularism-Islam axis seems to be a dispute and rivalry on the question of which interpretation of secularism shall be in effect. Put it differently, AKP's policies are drawn within the boundaries of secularism. Although the Chief Public Prosecutor and the Constitutional Court declared the AKP anti-secular, most of the literature is more hesitant to do that.

Nevertheless, this standpoint, meaning the battle of interpretations, is weaker than it seems. Firstly, it does not explain the whole picture; it does not explain the factual situation in total. The AKP may endorse "liberal secularism" in its policy towards headscarf; however, it shows less determination in applying the same liberal discourse in state's religious education and towards the *Diyanet İşleri Başkanlığı* (Directorate of Religious Affairs-DİB).[242] Even before the enactment of Law No 6287 in April 2012, which is mainly designed to enhance Islamic factors in primary education, the AKP diverged from passive secularism by advocating compulsory religious courses that 1982 Constitution introduced. In February 2005, the European Council issued a report which criticized compulsory religious courses. However, several AKP deputies rejected the criticisms of the Council by saying that those courses were not on Islam, but on "general information on religions and knowledge of ethics."[243] When we come

---

[241] 2000 AKP Party Program.

[242] Ioannis., 2009, p. 1203-1204

[243] "AB'ye Cevap: Din Konusu Bizim Bileceğimiz İştir", 16.02.2005 *Yeni Şafak,* www.yenisafak.com.tr, quoted in Kuru

to the issue of the DİB, anti-liberal attitude of the AKP can also very clearly be seen. Many AKP deputies have claimed that the state's coordination of religious services through the DİB has been necessary to maintain Islamic services efficiently and to avoid anarchy in Islamic communities.[244] Under AKP governments, the DİB has grown exponentially. Its budget in 2007 was 38 percent bigger than the budget of the Ministry of Interior, 2.3 times that of the Ministry of Foreign Affairs and twice that of the Ministry of Culture. In 2011, it amounted to 318 billion Turkish Liras. The number of its personnel grew from 74.000 in 2002, to 98.500 in 2012. While the number of mosques was 75.000 in 2002, it grew to 82.000 in 2011 as well.[245] As will be mentioned later, the DİB's media coverage, foreign and domestic policy activism, its discriminatory attitude towards other beliefs and especially towards *Alevilik* increased after 2002.

As a conclusion, the expanding activity of the DİB and Islamic education of state undermine the "passive" or "liberal" secular character of the AKP and the Turkish State.[246] Put it differently, the AKP supported "liberal" secularism in the issue of headscarves, while it defended "active" or "militant" secularism when it comes to state's Islamic education and the DİB. As Ahmet İnsel underlines, this hypocritical attitude points the dilemma of Islamists: on the one hand they defend freedom of education; on the other hand, they want to make Islamic education compulsory in secular state schools. Similarly, while supporting state's noninterference to religious affairs in the name of secularism, they ignore that state's or municipality's noninterference to private life is also one of the principles of secularism.[247] All in all, the judgment that the AKP defends liberal, passive version of secularism, is wrong;

---

[244] Kuru's personal interviews with AKP deputies, September 2004, Ankara, Turkey.

[245] www.diyanet.gov.tr

[246] Ioannis, 2009, p. 1204

[247] İnsel, Ahmet (2012). *Türkiye Toplumunun Bunalımı*. İstanbul: Birikim, pp.112, 115

because, it is partial. We see that the AKP equally defends anti-liberal, active secularism as well. Then, a more comprehensive conclusion in the discussion of how secularism is interpreted by the AKP can be this: AKP defends liberal, passive secularism only when it suits to its interests, which indicates a political decision independent of the norm of secularism.

Secondly, even we accept the partial truth that the AKP is supporting passive secularism against active secularism of the past; there is not much interesting and novel point to make in claiming that political powers interpret laws and norms according to their own political interests. It is because; it is a too common truth having general validity. In this second respect, "battle of interpretations" perspective is also weak, not because it is erroneous, but because it demonstrates a very elementary, ordinary relation between political power and legal norms. In addition, this perspective reduces law to power. Through interpretation of legal norms by power, it implicitly accepts "power theory of law". Accordingly, there is almost no fixed meaning of laws. Rather, meaning of laws changes according to circumstances. Thereby, as political power installs its own interpretation of laws, laws are incapable to limit political power. Hence, legal system becomes a "game" among competing power interests and interpretations. Such an approach, however, obscures law's essentially normative character. This approach completely disempowers legal norms by dissolving them within power. Hence, law becomes nothing but power. While erasing the normative power of laws, it also rules out constitutional character of the state. Alongside the normativity of laws, constitutional state is also reduced to absolute, unlimited power. However, normative character is law's particularity. Hence, saying that there is something called as "laws" or accepting that "constitutional state" is different from absolute power; requires one to keep law's essential normative character, which cannot be overruled by power. Then, normative character of laws necessities us to accept that, although interpreted differently by political powers, there *is* a norm of secularism, and there is something as

constitutional state. It means that, the AKP does not install its own understanding of secularism in a lacuna. When the AKP re-interprets secularism, it is still limited and bounded by secularism; it does not violate the rule of law and the Constitution.

In sum, "passive" or "liberal" secularism is a choice and policy of a particular political power, which is avowedly Islamist. Therefore, it *cannot be clearly justified* by reference to the legal norm of secularism at hand. However, passive secularism is an interpretation of secularism and functions within the boundaries of secular constitutional state. Hence, this choice and policy *cannot be clearly unjustified* by reference to the legal norm, either. This situation, on the other hand, shows that the issue we are dealing with is not a matter of "pure power" and "simple interpretation". It shows the *essentially norm bounded* and hence more complex relation between legal norms and political power, which takes place particularly in a constitutional state.

How it takes place? To answer this question, we have to know what sort of a secular constitutional State the AKP has faced with. Then, we have to discover first how secularism is practiced in Turkey. It means that, we have to examine the secular character of the constitutional State, which is expected to bind and limit the AKP.

3.2 Secularism of the Constitutional State

The supremacy of the Constitution has been firmly established in 1982 Constitution. Accordingly, constitution has supremacy over political power, which is divided between legislative, executive, and judiciary in a parliamentary system. Article 6 of the Constitution, which is about sovereignty, states that no sovereign power shall be exercised which does not emanate from the Constitution. Therefore, Article 6 establishes the Constitution as the ultimate source of sovereign authority. Similarly, Article 11 indicates that Constitution binds legislative, executive and judicial organs,

administrative authorities, and other institutions and individuals. While Article 6 and Article 11 establish the binding power and supremacy of the Constitution over every individual and every power, they implicitly establish supremacy of secularism over every political power as a constitutional norm. Hence, supremacy of the Constitution establishes supremacy of secularism over any political power. Moreover, secularism is among the irrevocable norms of the constitution; secular nature of the state neither can be revoked nor its amendment shall be proposed. It means that the Constitution protects secularism principle more than any other norm of the Constitution. However, the significance of secularism in 1982 Constitution is not limited to its irrevocability. Secularism is also embraced as a state ideology, or as a part of state ideology.

The most important aspect and the distinctive feature of the constitutional state is its neutrality. Under the rule of law, state must be purified from all kinds of faith, vision and ideology; it shall remain equally distant to, and stay neutral towards them in order to achieve and promote individual liberation. Then, state neither supports nor hinders any faith. The rule of law, on the other hand, is being used as an "instrument of peace" with an aim to promote the dialogue and discussion between different beliefs and opinions, preventing one of them to get stronger and lead to the destruction of others.[248] However, in Turkey, the constitutional State has an ideology.[249] Modern constitutional State of Turkey, says Henri Barkey, is first and foremost an ideological State.[250] In a sharp contrast with the meaning of being a constitutional state, 1982 Constitution orders the State not to stay neutral and take an ideological stance.[251] The ideology that the State embraces is called *Kemalizm* or *Atatürkçülük*. The Preamble of

---

[248] Selçuk, Sami (1998). *Zorba Devletten Hukukun Üstünlüğüne*. Ankara: Yeni Türkiye Yayınları, p. 18

[249] Rumpf, Christian (1994). *Türk Anayasa Hukukuna Giriş*. Ankara, p. 45

[250] Barkey, Henri J. (2010). "Turkey's Moment of Inflection" in *Survival*, Vol. 52, No. 3, p. 40

[251] Erdoğan, Mustafa (2001). *Türkiye'de Anayasalar ve Siyaset*. Ankara: Liberte Yayınları, p. 133

1982 Constitution and the part on General Principles pronounce "nationalism of Atatürk" as the single official ideology of the State.[252] Accordingly, the constitutional State of Turkey is in line with the concept of nationalism, reforms, and principles of Atatürk. Additionally, no protection by the State is accorded to an activity contrary to nationalism, principles, and reforms of Atatürk.

Secularism, as a constitutional norm, is at the hearth of this ideology. The fundamental feature of nationalism of Atatürk is that, it rejects *millet* system of Ottoman Empire. According to the millet system, the conceptualization of what a nation is made on the basis of religion. Therefore millet, or nation, was equal to *ümmet*, meaning religious community. Nationalism of Atatürk, however, separates nationhood from religious identity; hence, it constitutes a nation, a new *millet* which does not depend on religion. Consequently, nationalism of Atatürk is the construction of a secular millet. Secular millet, on the other hand, was one of the conditions of the establishment of the Republic as a nation state in 1923. Therefore, establishment of the Republic and nation state symbolizes the passage from a religious nation (ümmet) to a secular nation.[253] Due to this historical process Turkish nationalism and secularism complement each other. That's why Baskın Oran says that the main political principle of nation state in Turkey is secularism.[254] Similarly, because of the same reason, what is against secularism is against nationalism of Atatürk, the *ideology* of the *constitutional State*.[255]

---

[252] Parla, Taha (2009). *Türkiye'nin Siyasal Rejimi: 1980-1989*. İstanbul: Deniz Yayınları, p. 214

[253] Oran, Baskın (1999). *Atatürk Milliyetçiliği: Resmi İdeoloji Dışı Bir İnceleme*. Ankara: Bilgi Yayınevi, p. 198; Akgönül, Samim (2011). "Giriş" in *Tartışılan Laiklik: Fransa ve Türkiye'de İlkeler ve Algılamalar*. Akgönül, Samim (ed). İstanbul: Bilgi Üniversitesi Yayınları, p. 9; Tarhanlı, İştar B. (1993). *Müslüman Toplum "Laik" Devlet: Türkiye'de Diyanet İşleri Başkanlığı*. İstanbul: Afa Yayınları, p. 15

[254] Oran, 1999, p. 190

[255] Tanör, Bülent; Yüzbaşıoğlu, Necmi (2001a). *1982 Anayasasına Göre Türk Anayasa Hukuku*. İstanbul: Yapı Kredi Yayınları, p.78

State's embracement of a "constitutionally mandated" ideology certainly means political inhibition.[256] Democratic rights like freedom of thought, free press and art, and freedom of association, which together constitute the essence of democracy, are off and on limited by the state ideology to an extent that they are made unusable.[257] Likewise, secularism, standing at the center of this official ideology, has served as a basis of inhibiting many rights and freedoms.[258] It is the political rights that first and foremost restricted by the principle of secularism. For instance, Article 89 of the Law on Political Parties states that political parties cannot challenge the constitutional status of the DİB within general administration. Hence, criticizing a *religious* institution has been equated to criticizing *secularism*; and forbidden. Moreover, while supervising the constitutionality of political parties, the Constitutional Court used the principle of secularism as a reason to restrict freedoms and rights, rather than as a reason of their protection.[259] Contrary to common belief, not only Islamist parties of the MGH, like the RP and the FP, are closed down because of their anti-secular political acts and objectives. Beside them, leftist and Kurdish parties were also restricted on the basis of secularism. In its party program *Özgürlük ve Demokrasi Partisi* (Freedom and Democracy Party) stated that state shall not intervene to religious affairs, and religious affairs shall be left to religious communities. This clause is regarded by the Constitutional Court an assault on the DİB. The Constitutional Court claimed that party tries to do away with the duties of the DİB and in this way, bears an intention to abolish the constitutional status of the institution. Thus, the Constitutional Court decided that the party acted against the Article 89, and afterwards closed it. Therefore, in the case of Freedom and Democracy Party,

---

[256] İnsel, 2012, p.107

[257] Yazıcı, Serap (2009). *Yeni Bir Anayasa Hazırlığı ve Türkiye: Seçkincilikten Toplum Sözleşmesine*. İstanbul: Bilgi Üniversitesi Yayınları, p. 69

[258] Bockel, Alain (2001). "Laiklik ve Anayasa" in *Laiklik ve Demokrasi*. Kaboğlu, İbrahim (ed). Ankara: İmge Yayınları, p. 54

[259] Yazıcı, 2009, p. 95

demanding state's withdrawal from religious affairs has been one of the reasons of party's closure on the basis of secularism.[260]

However, apart from being a political restriction, the most problematic aspect of official ideology and hence secularism is that, it restricts the rule of law as well. 1982 Constitution states that beliefs and ideas contrary to nationalism of Atatürk are not under the protection of the rule of law. Hence in Turkish constitutional State, the rule of law is bounded by state ideology, too. Nationalism of Atatürk binds and reigns over the rule of law. Under such a condition, the constitutional State in Turkey cannot be claimed to be a state, limited and bounded by the rule of law.[261]

> In Turkey, where State has an official ideology, and law has no place as a universal value, not all citizens are equal before the law. The measure of citizens to be desirable, esteemed and respectful in their rights depends on the degree of their compliance with the secularist-Kemalist ideology.[262]

According to the theory of constitutional state, law and constitution shall be supreme over state power. State power is encircled with the constitution, and the rulers are obligated to it. However, encircling state power with a legal order means encircling state power with rights and liberties. That's why constitutional state is not only a *state of statutes* but called as a *state of rights*. Hence, while declaring the supremacy of the rule of law over state power, constitutional state actually declares the supremacy of basic rights and liberties over state power. Schmitt was critical towards such a constitutional state, asserting that in modern parliamentary democracies, *state of statutes* is hardly transforming into *state of rights*, and it is hardly able to protect basic

---

[260] Yokuş, Sevtap (2001)."Türk Anayasa Mahkemesi'nin ve Avrupa İnsan Hakları Mahkemesi'nin Siyasi Partilere Yaklaşımı" in *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, Vol. 50, No.4, p. 125

[261] Erdoğan, Mustafa (2000). *Demokrasi, Laiklik, Resmi İdeoloji*. Ankara: Liberte, p. 72

[262] Erdoğan, 2000, p. 132

rights and liberties of the citizens. Yet, what we see in Turkey is that, the primary norms that 1982 Constitution protect are not basic rights and liberties, but nationalism of Atatürk and secularism. On the one hand, the state is constitutional. On the other hand, it declares its denial of basic individual rights and liberties as primary norms. Therefore, from the beginning, the State in Turkey presents itself as a *state of statutes.*

Similarly, Schmitt features the neutrality cloak of parliamentary politics as the principle reason behind the failure of the materialization of *state of rights.* Just to remember, constitutional state is supposed to be a neutral state in the sense that it is neutral in regard to all religions, creeds, beliefs, and opinions. This state and its constitution are neutral in regard to society, meaning that all options, tendencies, politics and movements have an unconditionally equal opportunity to establish a parliamentary majority. While Schmitt criticizes the acclaimed neutral stance of the state, he underlines that contrary to its neutral and "empty" appearance, constitutional state is based on something material or substantive. This substance, this hidden politics is the politics of getting rid of other politics. Hence, Schmitt aims to show that constitutional state's stance of neutrality is far from being neutral towards different conceptions of good and politics. The situation is different in Turkey. Before claiming that "constitutional state's neutrality is actually political", before coming to this threshold, state is already *not* neutral in Turkey. In Turkey, State is avowedly already political and partial. In Schmitt's criticism, neutral constitutional state *sneakingly* excludes anti-liberal politics. In Turkey, the State, as an ideological state, *overtly* excludes whoever against nationalism of Atatürk. Hence, what is supposed to be done by neutrality, namely the task of excluding certain politics, is constitutionally executed by Kemalizm.

As a conclusion, existence of a state ideology and secularism's status within it opens constitutional State itself up for discussion. The State in Turkey is a constitutional

State; however, it is ideological, not certainly bounded by the rule of law, not neutral, and not impartial towards every belief and political position. Then, it is substantially non-constitutional. If so, it must be a *non-constitutional* constitutional State. There is no reason to ignore non-constitutional dimension of the State in Turkey and call it only as *constitutional*; no one has under any obligation to call such a state as constitutional state, as a *state of rights*, in its substantial meaning. Any preference to ignore its non-constitutional character and call as such will be a subjective decision.

Herewith, secularism's status as a part of official state ideology staves off State's constitutional character; yet does not answer what secularism means as a constitutional norm.[263] In what sense the State in Turkey is a secular non-constitutional constitutional State? Articles 24 and 14 of the Constitution explain what is meant by secularism. According to Article 14, none of the rights and freedoms embodied in the Constitution shall be exercised with the aim of endangering the existence of the democratic and secular order of the Republic. Furthermore, Article 24 states that religion cannot be exploited or abused for the purpose of basing the fundamental, social, economic, political, and legal order of the state on religious tenets. However, these articles do not provide us a clear understanding of the meaning of secularism. Therefore, it may be relevant to look at the decisions of the Constitutional Court for an accurate interpretation of it; as the Constitutional Court is the ultimate authority to decide what the constitutional norms are, and say. In January 1998, the Constitutional Court defined what secularism means in the closure case of the RP. In this case, the Court literally repeated the definition it made in November 1971, in a case on the DİB[264]. The same definition, by the way, would be repeated in the closure case of the FP in June 2001 as well. Accordingly, secularism is the

[263] The phrase "secularism as a constitutional norm" means that, secularism will not be discussed as a social phenomenon.

[264] Constitutional Court's Decision date 21.10.1971, No E1970/53, K 1971/76, p. 61-62

separation of religious and mundane authorities, but at the same time it includes segregation of social life, education, family life, economy, law, customs, and attire from religious rules. However, the Constitutional Court maintained that (because of the particularities of the historical development of the State and of Islam) secularism in Turkey requires not only the separation of state and religious authorities, but also state's supervision and control over religion. Then, what is understood from secularism by the Constitutional Court is the separation of religion from the affairs of state, society, and law[265] and hence, freeing state's actions from the influence of religious rules.[266] Beside this, it also means state intervention into religious affairs. Hence, state is closed to the infiltration of religion while religion is left open to state's involvement.

Secularism is a political principle that delineates the relationship between the state and the religions. It has two criteria. Firstly, parliament and courts are not subject to institutional religious control. Secondly, state is constitutionally neutral toward religions.[267] Therefore, neither state nor religion interfere each other. Yılmaz Aliefendioğlu, Elisabeth Özdalga, Grigoriadis Ioannis and Bülent Tanör also agree that "genuine" secularism entails the independence of both religion and state from each other.[268] Tanör points that more than state's freedom from religious rules; secularism means state and religion's mutual institutional autonomy and non-involvement of state in religious affairs. So, while religion does not intervene into

---

[265] Tanör, 2001a, p. 89

[266] Oran, 1999, p. 192

[267] Kuru, Ahmet (2008). "Secularism in Turkey: Myths and Realities" in *Insight Turkey*, Vol. 10, No. 3, p. 102

[268] Aliefendioğlu, Yılmaz (2001). "Laiklik ve Laik Devlet" in *Laiklik ve Demokrasi*. Kaboğlu, İbrahim (ed). Ankara: İmge Yayınları, p. 73; Özdalga, Elisabeth (1998). *The Veiling Issue: Official Secularism and Popular Islam in Modern Turkey*. Curzon, p. 1; Tanör, 2001a, p. 93; Ioannis., 2009, p. 1196

state affairs, state shall not assume religious services and duties as well.[269] However, the genuine secularism that Tanör and the other aforementioned authors define is not valid for Turkey. As Niyazi Berkes and Binnaz Toprak studied and explained in a historical perspective, there is no mutual independence and non-interference between the State and the religion in Turkey.[270] Secularism in Turkey is not about the separation of the State and the religion, but about submission of religion to the reason of the state.[271] Therefore, independence is one-sided and this is acknowledged by state authorities almost from the birth of the Republic.

Hence, under the norm of secularism, religious affairs are left open for State intervention. However, State's supervision over religion has taken the form of State's religious service; state has transformed religion into a State service. Accordingly, the State teaches religion to every student compulsorily in primary and secondary schools (Article 24), the State educates Islamic clergy in Prayer and Preacher Schools, the State nationalizes religion through the DİB (Article 136), and the State does all of them as requirements of secularism.

The State is teaching religion compulsorily to every child in primary and secondary schools. Actually, the name of the course is "Religious Culture and Ethics". However, in practice it is only Sunni Islam that is thought in this compulsory course. For instance, at the end of the 4th year in primary schools, children are expected to learn

---

[269] Tanör, 2001a, p. 93

[270]For the historical and political conditions that gave rise to this situation see Berkes, Niyazi (1998). *Development of Secularism in Turkey*. New York: Routledge; Toprak, Binnaz (2005). "Islam and Democracy in Turkey" in *Turkish Studies*, Vol. 6, No. 2, pp. 167-186; Toprak, Binnaz (1987). "The Religious Right" in *Turkey in Transition: New Perspectives*. C. Schick, İrvin; Tonak, Ertuğrul Ahmet. (ed). New York: Oxford University Press, pp. 218-236

[271] Çınar, Menderes; Duran, Burhanettin (2008). "The Specific Evolution of Contemporary Political İslam in Turkey and Its "Difference" " in *Secular and Islamic Politics in Turkey: The Making of Justice and Development Party*. Cizre, Ümit (ed). Oxon: Routledge , p. 22

sayings of Islam's prophet Muhammad, his life and attitudes; sections of Qur'an called "Sübhaneke" and "Fatiha"; importance of cleanness for Islam. In addition, they are expected to acquire awareness of Islamic expressions in social life, like "Bismillahirrahmanirrahim", "in the name of Compassionate and Merciful God", and "Thanks to God".[272] Faruk Bilici states that it becomes meaningless to talk about religious education; because in practice it is only Islam which is thought to children. In fact, Council of State implicitly accepted that the content of the religious course is shaped only by Islam, when it disannulled the provision of compulsory religious education for the children of non-Muslim families.[273] Yet, State's interference to religion is not limited to compulsory religious education. State also educates Islamic clergy in Prayer and Preacher Schools.

Two issues must be underlined at this point. First, the State only educates Sunni Islamic clergy "imam", and ignores other religions and beliefs just like what it has done in compulsory religious education. Second, the State is the monopoly in Islamic clergy education. Hence, *secular State educates Islamic clergy*, and *it is only the secular State who can educate Islamic clergy*.

Still, the biggest intervention of secular State is not religious education, but the DİB. Through the DİB, the State nationalizes Sunni Islam. The DİB is under the authority of Prime Ministry. All of its personnel are public servants, and all of its expenses are paid from the State budget. Moreover, Article 1 of the Law No 633 on the DİB obliges it to execute the functions related to Islamic beliefs, worships, and moral principles. Hence, the DİB enlightens the society only on, and works only for, Islam.

---

[272] Bilici, Faruk (2011). "Türkiye'de Devlet Okullarında Din Eğitiminin Tarihçesi, İdeolojisi ve Öğretim Programları" in *Tartışılan Laiklik: Fransa ve Türkiye'de İlkeler ve Algılamalar*. Akgönül, Samim (ed). İstanbul: Bilgi Üniversitesi Yayınları, p. 237

[273] İnsel, 2012, p.120, footnote

In this framework, it opens only Quran courses.[274] All in all, the DİB disregards religions other than Islam, and sects of Islam other than Sunni Islam. As Paul Dumont says, DİB encircles Sunni Islam as an iron curtain, and gives the other beliefs and religions of the country only the chance of mere existence.[275] *Alevi*'s come at the top of these discriminated beliefs. It is because, *Alevilik* as a belief and *Cemevi* as its sanctuary, are not even recognized by the DİB and hence by the State. For instance, the Head of the DİB Mehmet Nuri Yılmaz declared on August 2001 that Cemevi was not in the status of mosque, and any attempt to give this status would divide our national unity.[276] This general situation did not change during the AKP period. Under the AKP power, the DİB once again stated that Cemevi was not a religious sanctuary.[277] For the DİB, the only sanctuary in Islam was Mosque.[278] Moreover, Alevilik was not recognized as a distinct belief; rather it was accepted as a *formation* (!) within Islam.[279]

In terms of its budget, range of its services and number of its personnel the DİB has always been bigger than some of the Ministries of Turkey.[280] For instance, in 1990,

---

[274] Tarhanlı, 1993, p. 101

[275] Dumont, Paul (2011). "Türkiye'de Diyanet İşleri Başkanlığı" in *Tartışılan Laiklik: Fransa ve Türkiye'de İlkeler ve Algılamalar*. Akgönül, Samim (ed). İstanbul: Bilgi Üniversitesi Yayınları, p. 168

[276] Zırh, Besim Can (2012)."Yerelden Merkeze Erdoğan İktidarının İkinci On Yılında: Türkiye'de Cemevleri Sorunu" in *Birikim*, No. 284, p. 50

[277] DİB Decision date 11.01.2005, No. B.02.DİB.0.12.00.01/015-38, "Diyanet: Cemevi ibadethane değildir", 11.01.2005, www.alevihaberajansi.com

[278] Karakaya-Stump, Ayfer (August 2012) "Diyanet, Cemevleri ve Tarih Dışılık", *Radikal*, www.radikal.com.tr

[279] DİB's response to CHP Deputy Hüseyin Aygün, who demanded the opening of a Cemevi to Turkish National Grand Assembly on 07.05.2012 , "Meclis'ten Cemevi Talebine 'Camili' Savunma", www.dersimnews.com

[280] Tarhanlı, 1993, p. 103; Tank, 2005, p.5; Shankland, David (2002). "Religion," in *Turkish Transformation: New Century, New Challenges*. Beeley, Brian W. (ed). London: The Eothen Press, p.86

the budget of the DİB was 788 billion TL, whereas that of Ministry of National Education was 344 billion TL.[281] It has a broad and widespread service network with its publications and TV programs. Beside the main monthly journal *Diyanet Aylık Dergisi*, it publishes *Diyanet Avrupa, Diyanet Çocuk*, and *Diyanet İlmi* journals. This trend further strengthened under the AKP power. Since 2003, *Diyanet İlmi* became an academic journal according to the criteria of the Board of Higher Education.[282] In terms of media usage, the program called *Diyanet Time* has been online from 1978 till now. Since 2006, it has been broadcasted on 5 public TV channels for about an hour a week and called *In the Light of Islam*. The program consists of Qur'an recitations and translations. In addition, during religious months and holidays, the DİB produces religious programs for both public and private TV channels free of charge. In 2006, 40 such TV programs were produced for various TV outlets.[283]

Article 136 of the Constitution stipulates that the DİB shall exercise its duties removed from all political views and ideas. However, Turkish State uses DİB as a domestic and foreign policy instrument.[284] Article 5 of Law No 633 says that the *Directorate of Religious Affairs High Council of Religious Affairs* (HCRA) scrutinizes and evaluates different religious circles belonging to Islam, religious-social organizations, and religious-cultural formations; it shall organize advisory and scientific meetings on these matters and conduct studies both in the country and in abroad. The realization of this article in practice amounts nothing less than involvement of the DİB in politics. The DİB turns out to be an institution which

---

[281] İnsel, 2012, p.142-143

[282] Salman, Yüksel (2008). "The Publishing Activities of the PRA" in *The Muslim World*, Vol. 98, p. 317

[283] Salman, 2008, p. 318

[284] Çitak, Zana (2010). "Between 'Turkish Islam' and 'French Islam': The Role of the Diyanet in the Conseil Français du Culte Musulman" in *Journal of Ethnic and Migration Studies*, Vol. 36, No.4, p. 619

expresses its views on political issues, and has political services. The first and most obvious example of it after 1980 is the Department of Propagation of DİB. This department was established in 1981 within DİB to fight against Kurdish nationalism in Southeast Anatolia. Since then, it has organized conferences and lectures in the region regularly to inform people about the dangers of the PKK, the armed Kurdish organization.[285]

However, the DİB is most effective in the area of foreign policy. Ali Dere ve Fikret Karaman tell us the Islamic activities of the DİB in EU, Central Asia, Balkans, and Caucasus.[286] One of the most significant enterprises of the DİB is the Eurasian Islamic Council. Eurasian Islamic Council met on 23–27 October, 1995 in Ankara, with the participation of religious representatives from 20 Muslim countries of Balkans-Caucasia and Turkic Republics, and from various religious associations of Muslim communities in the Eurasian region. The objective of Eurasian Islamic Council meeting was the development of the cooperation among Turkey and Eurasian states and communities, including the regulation of student movements originating from Balkan and Central Asian countries and coming to Turkey. Not surprisingly, Eurasian Islamic Council's headquarter was in Ankara and the DİB is responsible from the execution of its secretarial services.[287] Beside Central Asia and Caucasus, the second area where the DİB is most active is Europe. Since the early 1980s, Turkish governments have demonstrated a high interest in immigrants of Turkish origin in Europe. The principal instrument in influencing and controlling the Turkish immigrants was the DİB.[288] Not only in the issue of migrants, yet the DİB is used in

---

[285] Yavuz, 2003, p. 70

[286] Dere, Ali (2008). "The PRA of Turkey: The Emergence, Evolution and Perception of its Religious Services Outside of Turkey" in *The Muslim World*, Vol. 98, pp. 291-301; Karaman, Fikret (2008). "The Status and Function of the PRA in the Turkish Republic" in *The Muslim World*, Vol. 98, p. 282-290

[287] Dere, 2008, pp. 295-296

[288] Çitak, 2010, p. 620

the framework of Turkey's bid to join EU as well. Recently, the Directorate organized two major programs on this theme: *International European Union Congress* met in May 2–7, 2000 in Istanbul and *Religion Meeting in the Year 2000 Faith and Tolerance Age* met in May 10–11, 2000 in Tarsus. Then, from June 14–18, 2000, a committee headed by the ex-Director of the DİB Mehmet Nuri Yılmaz paid a visit to Vatican and on June 16, 2000, he had a private meeting with the Pope.[289]

All in all, the DİB does not stay out of politics. On the contrary, it involves in the execution of public affairs, it intervenes into politics, it takes a role in the execution of political tasks;[290] so much so that Sunni Islam could become the morality that State embraced. The Law on Protection of Minors from Obscene Publications was amended on March 6, 1986. After the amendment the law stated that, there would be a member from the HCRA in the committee commencing under Prime Ministry and authorized to decide which publications were harmful for children under 18 years old. On the case issued against the constitutionality of the amendment on the basis of secularism, the Constitutional Court concluded on February 11, 1987 that attendance of a clergy to the committee is not against secularism.[291] The Constitutional Court stated in its decision that religion was a social fact that included moral codes.[292] Hence, while State was interested with "morality" in its administrative affairs,[293] that morality became the morality of Sunni Islam.

---

[289] Yılmaz, İhsan (2005). "State, Law, Civil Society and Islam in Contemporary Turkey" in *The Muslim World*, Vol. 95, p. 404

[290] Dumont, 2011, p. 166

[291] Constitutional Court's Decision No 1986/12 E., 1987/4 K.

[292] (Vural) Dinçkol, Bihterin (1991). *1982 Anayasası Çerçevesinde ve Anayasa Mahkemesi Kararlarında Laiklik*. İstanbul: Kazancı Kitap, p. 204

[293] Tarhanlı, 1993, p. 98

Lastly, the State gives religious verdicts, called *fetva* through the DİB. While the State does not officially recognize Islamic law and arguing for its enforcement is a criminal offense, the HCRA bases its arguments officially on Islamic legal and jurisprudential sources. This committee endeavors to produce religious verdicts to the questions put to it.[294] Actually, the HCRA have been using the word *fetva* according to its traditional meaning: "answering religious questions".[295] It is said that "Though they are not the same as the classical fetva's in form, there is no evidence that they have less influence than classical fetva's".[296]

After all, Article 136 of the Constitution stipulates that the DİB will conduct its duties within the framework of secularism. However, as can be discerned from its aforementioned functions, the DİB is not a secular institution; it serves directly for Sunni Islam. Therefore, through DİB, State infuses Islam with its own hands.[297] The issue is not limited to the DİB. In the areas of compulsory religious education and İHLs, the State is serving only for Islam as well. Bilici succinctly states that it is actually Sunni Islam what is meant by the word religion in all of the laws, in the constitution, and in other official regulations.[298] Hence, in the constitutional State in Turkey, Sunni Islam is a public service of the State.[299] This state of affairs started with the State's control of religion.[300] Due to this supervision and control, religion has

---

[294] Yılmaz, 2005, p. 391

[295] Öcal, Samil (2008). "From "the Fetwa" to "Religious Questions": Main Characteristics of Fetwas of the Diyanet" in *The Muslim World*, Vol. 98, p. 324

[296] Öcal, 2008, p. 330

[297] Tarhanlı, 1993, p. 179

[298] Bilici, 2011, p.234

[299] Nalbant, Atilla (2011). "Türk Anayasalarında Laiklik İlkesi ve Din İşlerinin Düzenlenmesi" in *Tartışılan Laiklik: Fransa ve Türkiye'de İlkeler ve Algılamalar*. Akgönül, Samim (ed). İstanbul: Bilgi Üniversitesi Yayınları, p.72

[300] Warhola, 2010, p.428

infiltrated into the State. In time, what we see is that the gap left open in religious affairs for State control and intervention worked in both ways. The infiltration of the state into religious affairs meant in time the infiltration of religion into state affairs. Tarhanlı states that the DİB has served as a gate for Islamist movements to enter the official state affairs through its "public" religious services and public religious servants.[301] Moreover, social order of state, which should not base on religious tenets according to Article 24, is Islamized as well. It is because, through fetva, the DİB provides Islamic advices to public on problems of daily social and private life.[302] Hence, while Sunni Islam has come under the control of the State, and while religion has been nationalized; State has been Islamized as well. In that way, social relations, and domestic and foreign policy of the State (supposedly secular areas which shall stay outside religion) have brought under religious influences.

Ferdinand Buisson gives insight into this transformation from nationalization of Islam to Islamization of the state in his critique of state's religious education in France:

> State's unification of religious education with the other types of education means lumping faith and reason, dogma and science together with. By doing this, state violates the rights of both parents and children, and tries to prescribe the belief of a single group among many groups making up the society, as if it was jointly adopted by. In such a situation state is meant to get prepared for the role of the Pope, or more accurately for the role of anti-Pope.[303]

In Turkey, the State also wanted to be anti-Pope. In this direction, Caliphate was abolished; the Ministry of Religion was replaced by Presidency of Religious Affairs,

---

[301] Tarhanlı, 1993, p. 135

[302] Yılmaz, 2005, p. 391

[303] Quoted in Vincent, Gilbert (2011). "Din ve Ahlak, Devlet ve Bilim: Laikliğin Kaynakları" in *Tartışılan Laiklik: Fransa ve Türkiye'de İlkeler ve Algılamalar*. Akgönül, Samim (ed). İstanbul: Bilgi Üniversitesi Yayınları, p. 23

which was made directly responsible to Prime Ministry. Religious schools were closed and religious education was unified with secular education by Law on Unification of Education on March 3, 1924. However, as early as 1948, these measures were used to enhance religious role of the State. First, on the basis of the Article 4 of Law on Unification of Education, the State started to educate Islamic clergy and opened İHL. Although it was optional, a course on Islam was introduced into the curricula of schools. Similarly, the State supported Islamic education in higher education by opening divinity faculties. Later in 1982, education of Islam was made compulsory in middle and high schools. In that way, on the one hand, Islamic education and Islamic leadership had been almost totally put under state control. On the other hand, the State, once wanted to be an *anti-Pope* transformed into the *new Pope*. Zeki Aydın's remarks illustrate this transformation. He states that contrary to the situation in France, it is not possible in Turkey to categorize schools into the ones giving religious education and the ones not. Because, he says, in theory, all the schools in Turkey (even İHL) are non-religious schools.[304] In theory, all the schools in Turkey may be non-religious. However, due to compulsory religious education, in practice, all schools are religious schools, either. In this way, *anti-papacy* and *new papacy* are transforming into each other in Turkey; the *anti-papa role of State* is its *new papa role* as well. At the end, both are materialized in, and signify the same thing: the State. Anti-papacy is secularism and state's religious education, which entails state's active involvement in religion. New papacy is religion and state's religious education, which entails state's active involvement in religion.

It is not the objective of the dissertation to discuss the merits of state's supervision of religion when it was first embraced in the initial years of the Republic. For instance, Berkes and Toprak advocate State's control of religion by claiming that it was actually

---

[304] Aydın, Mehmet Zeki (2011). "Türkiye'deki Örgün ve Yaygın Eğitimde Din Eğitimi Öğretimi" in *Tartışılan Laiklik: Fransa ve Türkiye'de İlkeler ve Algılamalar*. Akgönül, Samim (ed). İstanbul: Bilgi Üniversitesi Yayınları, p. 284

a step promoting secularism. Well, it may or may not be so. However, what is certain is that, the DİB and the Law on Unification of Education turned into a failure in terms of secularism as early as 1950s; so much so that it is nothing but indefensible after 1982. By 2012, however, it does not require much prudence to push for the DİB's dissolution, and revocation of Law on Unification of Education, which gives the state *the duty* of Islamic education. To defend them by looking at the social and political conditions of 90 years ago is nothing but can only be the expression of impotency.[305] As Tarhanlı states, no one shall perceive the current order of now 90-year-old state with the lenses of its initial establishment conditions. This has been done in 1982 Constitution and even compulsory religious education, which is explicitly incompatible with secularism, has been introduced as a measure to protect secularism.[306]

Because of this factual situation, for many, constitutional State in Turkey cannot be called secular. Aliefendioğlu says that when a state includes a religious institution in general administration, when it makes its members public servants, and when state pays all of its expenses from the state budget, it deems to embrace this religion.[307] That's why İnsel overtly states that Sunni Islam is the official religion of the State.[308] Tanör agrees with him by saying that state has a religion and a sect; this religion is Islam and this sect is Sunnilik. For him, Turkish Republic is secular in terms of the source of sovereignty. However it is theocratic in terms of state organization.[309] Latif Duran challenges the attribution of theocracy and instead claims that constitutional

---

[305] Tarhanlı, 1993, p. 169

[306] Tarhanlı, 1993, p. 169

[307] Aliefendioğlu, 2001, p. 96

[308] İnsel, 2012, p.121

[309] Tanör, Bülent (2001). "Laiklik, Cumhuriyet ve Demokrasi" in *Laiklik ve Demokrasi*. Kaboğlu, İbrahim (ed). Ankara: İmge Yayınları, p. 27

regulations on religion are not adequate to call Turkish Republic a theocratic State; however, they certainly wipe out its secular character.[310] Eventually, what is left behind after this discussion is a relatively simple question:

> I wonder, can we call a state secular, which has gone beyond supervision and become the exclusive actor of the religion? I wonder, do we have to call a state secular when it promotes religion by the means of its religious education institutions?[311]

No, we don't. No one has under any obligation to ignore Islamist features of the state and call it as secular; taking secularism either in its genuine sense or in the sense that the State and the Constitutional Court accepts. Any preference to call as such, by any version of this concept, will be a subjective decision.

Actually, in terms of the criterion that the State itself sets, constitutional State in Turkey is not secular. It is already stated that State's backing and preference of a religion is incompatible with the rule of law. The rule of law promises the individual the freedom of belief and conscience. This freedom means that individuals can choose their religion freely. When a religion is backed and protected by the state, this freedom perishes.[312] The Constitutional Court accepts that state's backing of a religion is incompatible with secularism. The decision of the Constitutional Court dating March 7, 1989[313] states that state's adoption of a certain religion is contrary to the equality of citizens before the law.[314] In RP's closure case[315] Constitutional Court

---

[310] Duran, Latif (1988). *Türkiye Yönetiminde Kargaşa*. İstanbul, p. 24 quoted in Tanör, 2001a, p. 177

[311] Aliefendioğlu, 2001, p. 123

[312] (Vural) Dinçkol, 1991, p. 72

[313] No E 1989/1, K 1989/12

[314] Aliefendioğlu, 2001, p. 74

[315] Constitutional Court Decision date 16.01.1998, No E 1998/1

repeated this point: a democratic and secular state cannot discriminate its citizens on the basis of religion and belief. In its decision on the case of repealing the Article 175 and 176 of Turkish Criminal Code concerning monotheistic religions, the Constitutional Court once again stated that secular state shall be impartial and it shall treat its citizens equally irrespective of their religious beliefs.[316] In all three of these cases, the Constitutional Court repeats that the idea of state's adoption of a religion is contrary to the equality of citizens before the law.

In conclusion, it is already commonly recognized that the *State in Turkey is not secular* in the genuine sense of the concept of secularism, which requires mutual independence of state and religion. Rather, the meaning of secularism particular to Turkey accepts one-sided independence of state from religious rules, and state control over religion. The separation of state from religion and religious rules was the single objective of secularism, and state control over religion was the conceived means for it. However, in time, state's control over religion constituted a canal for Islam's penetration into the state. It means that the single objective of secularism has been destroyed by the means of achieving this objective. Therefore, the *State in Turkey is not secular* even on the basis of this incomplete meaning of secularism. Lastly, the *State in Turkey is not secular* according to the legal verdicts of the very Court of its Constitution. All in all, the State in Turkey is in no meaningful way secular… other than the Article 2 of its Constitution.

Article 2 of 1982 Constitution remarks that the State shall be secular. It is the *duty* of the state to be secular. This duty stands unaffected by its other duties concerning Islamic education (Article 24) and Islamic enlightenment of society through the DİB (Article 136). The duty to be secular equally binds the state as its duties towards

[316] Constitutional Court Decision date 04.11.1986, No E 1986/11 K 1986/26 quoted in Aliefendioğlu, 2001, p. 104

Islam; it must be equally fulfilled.[317] Hence, the Constitution commands the State to be equally non-secular and secular; it does not command only the one, but both of them. Because of the existence of conflicting constitutional duties, the researchers neither conveniently say that "Turkish State is secular", nor "Turkish State is non-secular". Rather, most of the literature takes secularism of the State for granted. And then, they escape from the tension that the clash between anti-secular and secular constitutional norms creates, by inventing terms like "passive secularism", "negative secularism", "active secularism", "positive secularism", "militant secularism" and "exclusionary secularism".[318] For instance, Ioannis says that a genuinely secular state has no preferential links with any religion and neither promotes, nor obstructs religious belief among its citizens.[319] He continues that the Republican Turkish State fulfills neither of these conditions.[320] If neither of the conditions is fulfilled, then he has to admit that Turkish State is not secular. However, Ioannis steps back, and prefers to say that "as a result, the term 'assertive secularism' (rather than 'secularism' per se) more accurately describes the relation among state and religion in Republican Turkey".[321] In this reasoning, it becomes obvious that the term "assertive secularism" is a way to escape from calling Turkish State non-secular.

Similarly, there has to be meaningful, significant differences between terms like "active secularism" that defines period before AKP power, and "passive secularism" that allegedly defines the period under AKP power, in order for us to use them as

---

[317] Kramer, 2007, p. 125

[318] Kuru, p. 14; Kuru, 2009. What Turkish secularism means in terms of the difference between "laicism" and "secularism" see Davison, Andrew (2003). "Turkey, a "secular" State? The Challenge of Description" in *The South Atlantic Quarterly*, Vol.102, No.2/3, pp. 333-350

[319] Ioannis., 2009, p. 1196

[320] Ioannis., 2009, p. 1197

[321] Ioannis., 2009, p. 1196

explanatory variables; they have to point out meaningful, significant changes in the relation between the State and Islam. However, the State educates Islamic clergy, educates Islam in schools, and promulgates Islam by the DİB both in the period of "active secularism" and "passive secularism". Therefore, there is no structural change in State's relation with Islam while it supposedly transformed from active to passive secularism. Hence, claiming that Turkish State passed to passive secularism does not have much explanatory insight. Trying to explain the relation between secular State and the AKP with this transition is, once again, a way to escape to declare non-secular aspects of Turkish State, functioning beside its secular dimension.

When we were discussing constitutional state, we underlined that the State in Turkey is a *non-constitutional* constitutional State, because it comprises an ideology. Similarly, the State in Turkey embraces a religion, although it is secular. Then, it must be a *non-secular* secular state. It is secular in a way, yet it is equally non-secular in another way. Both of these characteristics are equally binding; both of them are equally constitutionally commanded duties. Toprak and Daver support this conclusion in an advert way by asserting that Turkish Republic is a semi-secular State.[322] Semi-secularism implies that secularism *semi*-binds and *semi*-limits state power. Semi-boundedness further implies that the state is *semi-unbounded*, *semi-unlimited* by secularism, and hence *semi-free*. Hence, claiming that Turkish State is semi-secular is equal to the claim that Turkish State is actually semi-non-secular. At the end, if we signify secularism with an “a” and non-secularism with “a¯”, Turkish State is both *a* and a^{-}. Therefore, constitutional State in Turkey is a *contradiction* in terms of secularism; it is an anomaly. The same is true for constitutional character of the State as well.

---

[322] Toprak, Binnaz; Daver, Bülent (1981). *Islam and Political Development in Turkey*. Leiden: E.J. Brill, p .47.

In such a situation, how does constitutional State limit political power? Contradictory secularism of Turkish State means that, in some cases state power may be used in anti-secular ways; these activities will not be sanctioned. However, in some other cases, anti-secular activities of political power will be charged and sanctioned. The crucial point for secularism is to know in which instances, in which cases secularism will bind political power. Ultimately, contradictory constitutionalism of Turkish State secures that both of these actions (both freeing and sanctioning anti-secular activities) will be correct normatively.

3.3 Politics of Secularism

Non-secular secular state *did* limit the AKP before July 2008; the RP in 1998; and the FP in 2001. Either, these parties were accused of violating the principle of secularism, or their specific activities deemed anti-secular and sanctioned (just like AKP's act to amend Articles 10 and 42 of the Constitution). It means that secularism normatively limited political powers that committed and/or explicitly or implicitly permitted such activities.[323] Actually, the normativity of law is exactly this. Normativity means that a particular sanction is likely to follow when a norm is violated.[324] Hence, sanctions that these parties incurred show that secularism functioned properly, and more importantly, highlights that secularism has a normative dimension: there are certain actions which overrules secularism; this break of law will not be allowed and will be punished. Nevertheless, there are cases where secularism did not function. In these cases, secularism did not normatively limited political powers and parties who committed, and/or explicitly or implicitly permitted such activities.

---

[323] Nalbant, 2011, p. 70

[324] Scheuerman, 1999, p. 77

One of these cases is *Anavatan Partisi* (Motherland Party-ANAP). The ANAP and its leader Turgut Özal are good examples, because Erdoğan makes frequent references to them. This comparison is also meaningful as Barkey states that AKP's current rise was made possible by reforms instituted by Turgut Özal after 1980 military coup.[325] Then, it may be suggestive to see how the constitutional norm of secularism, which bound the AKP and other MGH parties, did not limit the activities of Özal and the ANAP. The other case, where secularism did not limit political power, is Turkish military. The importance of military in the discussion of secularism cannot be overlooked. In general, military is seen as the guardian of secular State. It is regarded as the bulwark of the State's secular character.[326] That's why, if the AKP is the first actor of the confrontation between secular State and Islamist political power, Turkish military is the other actor of it.

3.3.1 Motherland Party

While examining the closure case of the AKP, we see the activities which are deemed anti-secular by the constitutional State. For instance, the Constitutional Court charged that AKP is a continuation of the politics of *Milli Düzen Partisi* (National Order Party-MDP), *Milli Selamet Partisi* (National Salvation Party-MSP), the RP and the FP, all of whom struggle against the achievements of the Republic. Indeed, it is mentioned that majority of the AKP's leading cadre and party activists were the former followers of the Islamist MGH, who had taken top positions in the Virtue Party and its predecessor, the Welfare Party.[327] The issue is that, the ANAP leader Özal was also a member of the MSP. Özal was the candidate of the MSP from İzmir district in

[325] Barkey, 2010, p. 40

[326] Bockel, 2001, p. 53; Warhola, 2010, p. 428

[327] Şen, 2010, p.59; Yıldız, 2008, p.43

1977 Parliamentary elections.[328] It was also Özal who made the electoral speech of the MSP in the radio.[329]

Secondly, the Constitutional Court rightly accuses the AKP that it internalized its relations with some reactionary organizations and communities, like Fethullah Gülen community. Actually, it is common knowledge that both Erbakan and Erdoğan attended the İskenderpaşa Seminary of Nakshibandi order, which had been very influential in the establishment of the MDP and the MSP.[330] The point is that, if Erdoğan and Erbakan did, so Özal. Özal and his brother Korkut Özal were both disciples of Nakshibandi Shaykh Mehmet Zahit Kotku.[331] It means that all Özal, Erbakan and Erdoğan were the disciples of the same Nakshibandi order. Besides, the inner core of Özal's administration included the leading members of the MSP and prominent disciples of Nakshibandi.[332] For instance, the Chairman of Fatih district (İstanbul) Zeki Aytaç; Ekrem Pakdemirli who served as Secretary of Treasury and Foreign Trade, Minister of Transportation, and Minister of Finance after 1989; and the ANAP Central Executive Committee member Eyüp Aşık were all disciples of Nakshibandi order.[333] Hence, ANAP also internalized its relations with some reactionary organizations and communities.

---

[328] Mumcu, Uğur (1993). *Tarikat, Siyaset, Ticaret*. İstanbul: Tekin Yayınevi, p. 60

[329] Cemal, Hasan (1989). *Özal Hikayesi*. Ankara: Bilgi Yayınevi, p. 170

[330] They were the disciples of Shaykh Mahmut Esad Coşan. Heper, Metin; Toktas, Sule (2003). "Islam, Modernity, and Democracy in Contemporary Turkey: The Case of Recep Tayyip Erdogan" in *The Muslim World*, Vol. 93, No. 2

[331] Çölaşan, Emin (1989). *Turgut Nereden Koşuyor?*. Ankara: Tekin Yayınevi , p. 28; Atacan, 2005, p. 91

[332] Yavuz, 2003, p. 75

[333] Cemal, 1989, p. 170; 184

Beside Nakshibandi order, Özal had also close ties with Fethullah Gülen, who is generally associated with the AKP.[334] It has been known that Özal was flying from Ankara to İzmir regularly to listen Gülen.[335] During Özal's power (from 1983 when he was elected as Prime Minister, to 1993 when he died as the President of the Republic), Gülen gained official protection. For instance, Özal backed heavily Gülen's purchase of Zaman newspaper.[336] It was Özal as well, who helped the initial missionary activity on the part of Gülen's schools in Central Asia at the beginning of 1990s. That's why Gülen schools display the picture of Turgut Özal in their buildings.[337] In turn, Gülen supported Özal explicitly,[338] as he did Erdoğan in 2002. Hence, if our criterion is its ties with Islamic parties of the MGH and its internal relations with Islamic communities, the ANAP and Özal provide as much evidence as the AKP. However, constitutional State and secularism did not accuse the ANAP with anti-secularism; they did not limit and sanctioned it.

AKP's attitude towards the İHLs was one of the reasons of its anti-secularism. It is mentioned how AKP attempted to change the vocational school identity of the İHLs by removing university restrictions, and to make them the main element of secondary education by providing them social and financial support, and legal basis. Nevertheless, similar improvements in the İHLs can also be seen in Özal's period. Özal increased the number of the İHLs. Within ten years (1983 to 1993) the number

---

[334] Yavuz, 2003, p. 198

[335] Turam, Berna (2007). *Between Islam and State: The Politics of Engagement*. California: Stanford University Press, p. 51

[336] Yavuz, 2003, p. 190

[337] Balcı, Bayram (2003). "Fethullah Gülen's Missionary Schools in Central Asia and their Role in the Spreading of Turkism and Islam" in *Religion, State & Society*, Vol. 31, No. 2, p. 154

[338] Ayata, Sencer (1993). "The Rise of Islamic Fundamentalism and Its Institutional Framework" in *The Political and Socioeconomic Transformation of Turkey*. Eralp, Atilla; Tunay, Muharrem; Yeşilada, Birol (ed). Westport, Connecticut: Praeger, p. 55

of Prayer and Preacher Middle Schools increased from 374 to 416; and Prayer and Preacher High Schools from 341 to 391.[339] The number of total İHL students, on the other hand, raised from 220.991 (1983-1984) to 436.569 (1993-1994).[340] However, Özal's support for Islamic education was not limited to the spread of the İHLs. With the amendment of Law No 1739 in 1983, İHL graduates were granted the right to enter universities without any departmental restriction.[341] Therefore, as early as 1989 Şaylan states that the İHLs lost its vocational school identity during ANAP governments, just like what the AKP did and accused of. Although 30.876 İHL graduates entered the university exam in 1987, only a small portion (1.5-2 percent) of them attended to Divinity Faculties. The rest have been distributed to the other branches of higher education.[342] It means that, students who have taken religious education would become lawyers, teachers, doctors, which amounts nothing less than Islamization of secular branches.

Another anti-secular action of the AKP was its Islamization of the education curricula. We saw that some AKP Mayors distributed Islamic prayer books in primary schools, which obviously violated secularism and shadowed the secular nature of education. Nevertheless, they are not the first of their kind. Similar actions had been taken in the era of the ANAP. For instance, Yavuz states that Özal pursued a policy of Islamization of the educational system.[343] In 1985, under Özal's Prime Ministry, Ministry of National Education distributed a book to all students, which stated that "man should have its meals on the ground, while sitting on the left leg, right leg

---

[339] Yavuz, 2003, p. 124

[340] Özcan, 2012, p. 155

[341] Gökmen, Yavuz (1992). *Özal Sendromu*. Ankara: V Yayınları, p. 15

[342] Şaylan, Gencay. "İmam Hatip Liseliler Geliyor", January 1989, *Cumhuriyet* quoted in Cemal, 1989, p. 167

[343] Yavuz, 2003, p. 75

bended", "eating on high desks are revolting (mekruh)", "if there are pictures of humans and animals, it is better not to come in to that place".[344] The religious and reactionary content of the books distributed by the AKP and the ANAP are similar. However, while the AKP was charged with anti-secularism, the ANAP was deemed secular.

The problem is the same in the issue of headscarf. Like Erdoğan and Erbakan, Özal attempted to free wearing of headscarf in higher education and public sphere through legislation.[345] In November 1987, the ANAP prepared a law proposal, according to which the ban on certain types of clothing at the universities was to be lifted. Law was accepted by the parliament, but vetoed by Kenan Evren.[346] In March 1989, wearing headscarf was prohibited in higher education. This time, Özal publically and harshly criticized the ban. He asserted that clothing according to the rules of religion shall not be restrained.[347] In its decision on the AKP, the Constitutional Court states that wearing headscarf in higher education and proliferation of headscarf in public sphere is against secularism. Similarly, constitutional lawyer İbrahim Kaboğlu claims that wearing headscarf in public sphere is against the rule of law.[348] Then, if secularism has a normative character, the ANAP should have been limited and sanctioned as in the cases of the AKP, the RP and the FP. However, it was left free.

Still, Özal's support of Islam cannot be restricted to the particular areas of the İHLs or headscarf. In a much broader and extensive way, Özal made Islamic symbols, expressions and rituals apparent in state affairs. Actually, Özal was the first Prime

---

[344] "Milli Eğitim Bakanlığı Tebliğler Dergileri'nde yer alanlardan Derleme" in Cemal, 1989, p. 164

[345] Gökmen, 1992, p. 15

[346] Özdalga, 1998, p. 46

[347] Cemal, 1989, p. 161

[348] Kaboğlu, İbrahim (2000). *Anayasa ve Toplum*. Ankara: İmge , p. 182

Minister to be open about his religious practices.[349] For instance, he was the first leader to make a pilgrimage. What is irritating is that he invited the media to accompany him, and after the journey, he distributed his pilgrimage pictures to media.[350] Moreover, during his Presidency, in 1991, Özal generalized Friday prayers in bureaucracy; made it public and explicit.[351] Like his brother, Yusuf Özal did the same in the State Planning Organization.[352] Besides Friday prayers, Özal introduced and institutionalized "iftar", fasting dinners during religious month Ramadan. Actually, he was the first state man who organized a fasting dinner in State Guest House for journalists.[353] Remember that Erbakan also organized a fasting dinner for the leaders of Islamic orders at the residence of the Prime Ministry and he was accused of being anti-secular for that reason. How one should interpret this ambiguity? Here, what is religious, what is an act on the basis of religious rules is organization of an fasting dinner by state authorities. Secularism, on the hand, seems to sanction the fasting dinner when it was eaten by Islamic leaders, and freed it when it was eaten by journalists, which is totally disgraceful for secularism.

Perhaps, the most important aspect of the relation between Islam and the State is favoritism. It is because, by using favoritism Islamic movements could directly make their way into the state. the AKP is infamous in terms of favoritism. During AKP power, state contracts were channeled to its supporters, many of whom belong to Nakshibandi order and Gülen network[354] However, Özal was equally infamous in

---

[349] Yavuz, 2003, p. 75

[350] Mumcu, 1993, p. 167; Çölaşan, 1989, p. 203

[351] Köker, Levent (2008). *Demokrasi, Eleştiri ve Türkiye.* Ankara: Dipnot, p. 296

[352] Cemal, 1989, p. 159

[353] Çölaşan, 1989, p. 203

[354] Baran, 2010, p. 57

terms of favoring Islamic communities in state bureaucracy. Özal actively supported Islamic networks not only by diverting greater amounts from public resources to their activities; but also by appointing their members to influential positions in the bureaucracy and politic.[355] Ayata observes unprecedented level of penetration of state institutions by neo-traditionalist Islamic groups after 1983. Such that, many official departments became vehicles for the promotion of fundamentalist ideas and interests.[356] Most striking of these appointments is the current Constitutional Court Chairman Haşim Kılıç. Kılıç, who voted against the closure of all the AKP, the RP, and the FP, was appointed to the Constitutional Court by Özal. Later on, in October 12, 2007, he became the Chairman of the Constitutional Court.[357] At that point it is important to remember that the decision on non-closure of the AKP was carried by only one vote short of the necessary seven votes.[358]

Like state top bureaucracy, favoritism in Quran courses started in the era of Özal. In 1987, there were 2700 Quran courses under the authority of the DİB. However, 1900 of them, where a total of 100.000 students were educated, belonged to Süleymancı community.[359] All in all, we concluded that AKP divides the society on the basis of religion between believers and non-believers. However, Feroz Ahmad mentions that the same judgment is also made for the ANAP. In 1984, Bülent Ulus, former premier, accused Özal of placing supporters of the former Islamist and neo-fascist parties in

---

[355] Ayata, Sencer; Güneş Ayata, Ayşe (2001). "Turkey's Mainstream Political Parties on the Centre-right and Centre-left" in *Turkey Since 1970: Politics, Economics and Society*. Lovatt, D. (ed). New York: Palgrave, p. 95

[356] Ayata, 1993, p. 64

[357] Savaş, 2008, p. 77

[358] Höjelid, 2010, p. 468

[359] Mumcu, 1993, p. 164

key positions, in some ministries, so that at the end there occurred a distinction between "those who pray and those who do not".[360]

In terms of its economic power, it is frequently mentioned that the rise of the AKP, but also the RP, was backed by *Mustakil Sanayici ve İşadamları Derneği* (Independent Industrialists and Businessmen's Association-MUSİAD), Islamic banks and Islamic capital in general.[361] Actually, rather than indirect relations, there are organic ties between the MÜSİAD, Islamic banks, and the AKP. For instance, ten MÜSİAD members were among the founding fathers of the AKP, and about 20 MÜSİAD members became AKP deputies in the 2002 elections. Şen states that the leading cadres of the AKP had close personal ties with Islamic banks as well.[362] However, behind the power of the MÜSİAD and Islamic banks, there lie the initiatives of Özal during 1980s.[363] It was Özal who removed the barriers before Islamic banking and Islamic urban and rural trade bourgeoisie like the MUSİAD.[364] During 1980s and early 1990s, they have integrated to capitalist development and become a means of its enhancement.[365] Therefore, Özal set the social and economic conditions which gave birth to the AKP

---

[360] Ahmad, Feroz (1993). *The Making of Modern Turkey*. London, Routledge, p. 194

[361] Yarar, Betül (1998). "1980'ler Türkiye'sinde Yeni Sağın Yükselişi" in *Mürekkep*, No. 10-11, p. 66

[362] Şen, 2010, p. 71-73

[363] Doğan, Ali Ekber (2009). "İslamcı Sermayenin Gelişme Dinamikleri ve 28 Şubat Süreci" in *AKP Kitabı: Bir Dönüşümün Bilançosu*. Duru, Bülent; Uzgel, İlhan (ed) İstanbul: Phoneix Kitabevi, p. 303

[364] Yarar, 1998, p. 66

[365] Şen, Serdar (1995). *Refah Partisi'nin Teori ve Pratiği: Refah Partisi, Adil Düzen ve Kapitalizm*. İstanbul: Sarmal Yayınevi, p. 33

Islamic trade bourgeoisie MÜSİAD, managed to overcome problems in finance and banking through the Islamic banking system that Özal opened.[366] Before Özal, conservatives of Turkey had been unwilling to take part in capitalist institutions and especially in banking sector; because, Islam forbids interest rate and rant acquired from interest rate. Özal, on the other hand, pioneered the establishment of interest-free private finance institutions. With giving great amounts of incentives, he brought this system to Turkey and proliferated it.[367] Hence, actually Özal opened Turkey to Islamic finance. Özal government took office on December 14, 1983. Two days later, in December 16, even before taking the support of the parliament and preparing the cabinet program, a decree has been put into force. The decree was about Saudi Finance institutions.[368] Article 13 of the decree stated that private finance institutions will be exempted from Law on Commerce, and the Law on Debt Enforcement and Bankruptcy. Hence, this decree provided the legal grounds of charitable donations to be used for religious purposes.

On August 5, 1984, with another decree of the cabinet, *Faisal Finance Company* and *Al-Baraka Türk Private Finance Company* were instituted. These companies were founded by Nurcu groups in Turkey and Saudi Finance Institutions. For instance, Korkut Özal and Eymen Topbaş (the brother of Nakshibandi Shaykh Musa Topbaş and İstanbul Party Chairman of the ANAP) founded *Al-Baraka Türk* with Al-Baraka Finance Company.[369] One of the business partners of these Saudi Companies was ANAP İzmir Party Chairman Atilla Yurtçu. Moreover, Korkut Özal was the consultant of another Islamic bank called *Islamic Development Bank*.[370] What is

---

[366] Yavuz, 2003, p. 216

[367] Şen, 1995, p. 32; Baran, 2010, p.39

[368] Cemal, 1989, p. 177

[369] Cemal, 1989, p. 178

[370] Mumcu, 1993, p. 152

striking is that, all of these financial institutions which operated according to Islamic principle forbidding interest payment were exempted from taxes by a tax reform introduced by Özal government.[371] Profiting from this tax exemption, Korkut Özal founded a charity called "Öz-Ba", the objectives of which were organizing religious ceremonies, founding small mosques (mescit), and opening Quran courses. There were other Islamic charities as well, called *Bereket Vakfı* and *Hak Yatırım*, owned by ANAP İstanbul Party Chairman Eymen Topbaş.[372] Yet, neither Korkut Özal nor Eymen Topbaş regarded anti-secular by the Constitution.

Lastly, on November 14, 1985, Özal participated to an international conference called "Islam and the West" in Paris. In the conference, he made the following speech:

> The concept of order in Islam is based on unity (tevhid). In this order, everything has a specific place and function; everything acts within the framework of concise rules, and in the form of an organic relation. In present-day conditions, what we mean by organic relations is a well-functioning free market with its free forces and basic laws. Here, rather than direct interventions, indirect incentives play a role. Even such indirect interventions are limited as much as possible. Within this framework, state retains only its authority of management and distribution. This brings us to the concept of market ... there has always been some similarities between the conceptualization of market in Islam and in the West. First of all, both are free. In Islamic market, prices are determined freely by market forces as well. However, in terms of structural barriers to the creation of monopoly and maintenance of competition, market mechanism of Islam is superior.[373]

We saw that the AKP was said to be anti-secular because, it emphasized religious identity and belongings in domestic and foreign official meetings, and brought forth

---

[371] Yavuz, 2003, p. 89

[372] Mumcu, 1993, p. 151

[373] Cemal, 1989, p. 155

religious themes. However, as exemplified above, Özal blatantly and directly emphasized religion in his speech in a foreign meeting. Moreover, when he was the Undersecretary of State Planning Organization (1966-1971), Özal overtly defended "Islamic common market"[374] and supported Islam as a factor compatible with liberal economy;[375] just like the RP and Erbakan did in defending *Adil Düzen* (Just Order).[376] Although the RP had been closed down, Özal's support of liberal economy on the basis of "tevhid" understanding of Islam was not deemed as an "attempt to change the social order of Turkey on the basis of religious rules".

These similarities open up the difference between "conservative right" or "moderate Islam" for discussion. Because, the ANAP is generally accepted as a "conservative right" party whereas the MGH parties like the RP and the AKP represent "radical Islam" or "Islamic parties". Nuray Mert accepts that center right parties are reluctant to separate religion and politics. They employ religious symbols and discourse, and used the power of influential religious communities, groups and orders just like Islamic parties.[377] Looking from the opposite vantage point (but coming to the same conclusion) Ahmet Yıldız states that, their anti-secular actions cannot make the MGH parties, like the FP an Islamist party; because, center right parties espoused similar views as well.[378] The following example clearly illustrates that actually, the difference between "moderate Islam" and "Islamic" parties are very slight: it is known that *Süleymancılar* supported both the ANAP and the RP during the end of 1980s and

---

[374] Cemal, 1989, p. 169

[375] Yarar, 1998, p. 66

[376] Şen, 1995, p. 23

[377] Mert, Nuray (2000). "The Political History of Center Right Parties: Discourses on Islam, the Nation and the People" in *Civil Society in the Grip of Nationalism: Studies on Political Culture in Contemporary Turkey*. Yerasimos, G; Vorhoff, K (ed). Orient-Institute, p. 84

[378] Yıldız, 2003, p. 199

1990s, which makes it hard to differentiate these parties according to the support coming from Islamic communities. At the beginning of 2000s, it became harder to do so. In 2002 General Elections, whereas one son of Süleymancı Sheik Süleyman Hilmi Tunahan, namely Ahmet Denizolgun was the candidate of the ANAP, the other son of the Sheik, Mehmet Denizolgun, was a candidate of the AKP.[379] Then, what can be said about the relation between the ANAP, the AKP, and Süleymancı community? What makes the AKP an anti-secular and Islamist party, and the ANAP a secular and "moderate Islamist"[380] or "reasonable"[381] party in terms of its relation with Islamic communities? Is one son of Sheik is more secular than the other?

Let us put the question in that way: we already mentioned that in its decision on Law on Protection of Minors from Obscene Publications on February 2, 1987, the Constitutional Court stated that religion is a social fact that includes moral codes.[382] Özal, on the other hand, said in his speech in Van that, the most important element that constitutes the nation is Islam.[383] Lastly, in 2005, AKP Deputy and Minister of State Mehmet Aydın uttered that religion must be seen as a social fact.[384] What is the substantial difference between these statements on Islam? What is this, that makes the first one secular, the second one conservative but secular, and the last one anti-secular and Islamist? Eventually, there is hardly any substantial difference between ANAP's and AKP's Islamist policies. As Tank claims, there has not always been a clear distinction between "acceptable" manifestations and "unacceptable" manifestations of

---

[379] Yavuz, 2003, p. 149

[380] Mert, 2000, p. 84

[381] Erdoğan, 2000, p. 243

[382] (Vural) Dinçkol, 1991, p. 204

[383] Timuroğlu, Vecihi. *12 Eylül'ün Eğitim ve Kültür politikası: Türk-İslam Sentezi*. Şahin Matbaası, p. 79

[384] 16.02.2005 *Radikal*, www.radikal.com.tr quoted in Groc, 2011, p. 50

Islam that could lead to censure.[385] However, the ANAP was not limited by secularism as the AKP. Rather, constitutional State embraced the ANAP within secularism by differentiating "moderate Islam" or "conservative right" from anti-secular "radical Islam" or simply "Islamists".

3.3.2 Turkish Military

There is another party to the discussion of secularism, importance of which cannot be overlooked. It is Turkish military. In general, military is seen as the guardian of the secular State. Article 35 of the Internal Service Act of Turkish Armed Forces says, military safeguards and defends Turkish territory and the Republic as designated by the Constitution, which is understood as defending the country against internal as well as the external threats if necessary by force. On the basis of this article, military several times intervened in civil politics in the name of protecting secularism.[386] Due to this element of force, Gülalp says secularism is imposed from above and protected in an authoritarian manner by the military.[387]

While opening the academic year of Military Academy in October 2006, General Yaşar Büyükanıt warned that Turkey's secular democracy is threatened by "Islamist fundamentalism"[388] and maintained as such: "Countries that could not create a common value system are by definition in a state of conflict. Our common value is secular and democratic Turkey within the framework of Unitarianism and Atatürkist thought. All movements that do not meet with us on this common value are the

---

[385] Tank, 2005, p. 4

[386] Warhola, 2010, p. 434

[387] Gülalp, Haldun (2003). "Whatever Happened to Secularization? The Multiple Islams in Turkey" in *South Atlantic Quarterly*, Vol. 102, No. 2/3, p. 382

[388] Savaş, 2008, p. 79

enemies of the nation and country, and must be fought against".[389] In 2007, at Turkish Embassy in Washington, Büyükanıt one more time stated that "the Republic has not faced greater dangers since 1919. Military could not allow the country to disintegrate".[390] The danger that he pointed was the AKP power.

Nevertheless, the tension between the military and the AKP accelerated during presidential elections of 2007. In April 2007, Foreign Minister Abdullah Gül was nominated by the AKP as presidential candidate. It was not only that candidate Gül was an ardent Islamist; but also his wife was wearing a headscarf. First round of presidential elections was held in April 27. Gül could take 357 of the votes while 367 was needed; leaving the election of the president to the second round. However, the CHP argued that the first round of voting in the parliament was invalid on procedural grounds (that it lacked two thirds majority for a quorum), and appealed to the Constitutional Court on April 27, 2007 to cancel the presidential elections in the parliament.[391] Very same day, the Turkish General Staff published a memorandum on its website, which was called as ''e-memorandum''. E-memorandum stated that presidency of Gül would disturb secularism.[392] The military implicitly warned that it would intervene if secularism was put at risk by the election of Gül.[393] In first of May, the Constitutional Court annulled parliament's vote for Gül.[394] On May 6, Gül withdrew his candidacy. All in all, the risk that an Islamist could became a president

---

[389] "Gata Açılışında Laiklik Uyarısı", 02.10.2001 *Radikal*, www.radikal.com.tr quoted in Cizre, 2003, p. 313

[390] Baran, 2010, p. 60

[391] Höjelid, 2010, p. 467

[392] Toktaş, Şule; Kurt, Ümit (2010). "The Turkish Military's Autonomy, AKP Rule and the EU Reform Process in the 2000s: An Assessment of the Turkish Version of Democratic Control of Armed Forces (DECAF)" in *Turkish Studies*, Vol. 11, No. 3, p. 369

[393] Höjelid, 2010, p. 467

[394] Yavuz, 2009, p. 241

let the military to intervene into politics on the grounds of secularism, and it was temporarily fruitful as this intimidation brought Gül's withdrawal.

Seeing that the parliament is not able to elect Gül as president, Erdoğan called for early general elections. In July 2007, the AKP won a landslide victory with 46.7 percent of the votes and obtained 441 of the 550 seats in the parliament. Thereby, the AKP gained a majority adequate to select the president not in the first round, but in the third round. Finally, in August 2007, Abdullah Gül was elected as the President in the first round after gaining the support of Nationalist Action Party and some Kurdish nationalist members.[395] Therefore, the AKP solved the problem created by military's resistance to Gül's presidency through what Arato calls as "majority imposition".[396]

April 27 E-memorandum of the military in many aspects resembles to military's "soft" or "post" intervention into politics on February 28, 1997. In that occasion, accession of the RP into government in 1996 had been perceived by military as an Islamic reaction, as a substantial threat to the secular character of Republic. On February 28, the MGK had issued the RP-led RP-True Path Party coalition government a list of 18 measures designed to nullify the Islamization of Turkey and fortify secular system.[397] Right after, on April 29, 1997, the head of the Internal Security and the Planning Department at the chief of the staff's office General Kenan Deniz had identified Islamic radicalism as the number one threat to national security. Soon, Erbakan had resigned and RP-True Path Party coalition government had been resolved.

---

[395] Höjelid, 2010, p. 468

[396] Arato, Andrew (2010). "The Constitutional Reform Proposal of the Turkish Government: The Return of Majority Imposition" in *Constellations*, Vol. 17, No.2, p. 345

[397] Cizre, 2003, p. 309

During February 28 Process, which was triggered and led by military, a string of drastic widely acclaimed "pro-secular" policy measures were introduced. Accordingly, all primary and secondary school curricula were altered so as to emphasize secularist history and secularist character of the Republic, and the new security threats posed by political Islam and separatist movements.[398] Eight year mandatory schooling system was introduced and the middle schools of the İHLs were closed. Children under 15 years old were prohibited to attend Quran Courses.[399] The coefficient practice was put into effect to orient graduates of the İHLs to Divinity Faculties in university exams. Appointments of university chancellors were made form staunch secularists. Teaching programs on secularism, the struggle against reactionism, and national security issues were also extended to top bureaucracy and prayer leaders. Through the MGK and the MGK General Secretary, military institutions and personnel were actively involved in administering these programs.[400] Moreover, in May 1997, under the authority of the MGK, West Working Group was founded. Its objective was to follow and collect information about religious activities, associations, foundations, professional organizations and confederations, educational institutions, student dormitories, and public officials.[401] In this direction, military identified 19 newspaper, 20 TV stations, 51 radio stations, 110 magazines, 800 schools, 1.200 student hostels, and 2500 associations as part of reactionary Islam.[402] In addition, in April 1998, Prime Ministerial Civilian Council of Follow-up was

---

[398] Cizre, 2003, p. 312

[399] Kuru, 2009, p. 194

[400] Cizre, 2003, p. 312

[401] Groc, Gerard (2001). "Milliyetçilik, Sivil Toplum ve Dinci Parti: Fazilet Partisi ve Demokratik Bir Geçiş Denemesi" in *Türkiye'de Sivil Toplum ve Milliyetçilik*. Yerasimos, Stefanos; et. al., (ed). İstanbul: İletişim, p. 97

[402] Yavuz, 2003, p. 244

founded and immediately implemented its program on the (so called by Groc) "campaign" against Islamic activities.[403]

February 28 Process had been indirectly influential on Islamic orders. In the early 1999, media launched a fierce attack on Fethullah Gülen community as being reactionary and a threat to the secular nature of the Republic. In August 2000, Chief of General Staff Kıvrıkoğlu said publically that Gülen plans to undermine the state. [404] Subsequently, Ankara State Security Court prosecutor indicted Gülen for "attempting to change the secular characteristic of the State by trying to establish a theocratic Islamic state".[405] The indictment alleged that Gülen movement was the strongest and most influential reactionary formation in the country.[406] It was formed to destroy the secular nature of the State since 1989. Since then, it wove the country with its legal and illegal networks that includes advisory boards, regional, city, neighborhood, hostel leaders. The court decided that he was guilty and sentenced him to imprisonment for up to 10 years. However, at the time of the court's decision, he had already fled to the USA.[407]

All in all, the reaction of the military to the RP government and political Islam gives the impression that military does not tolerate reactionary Islam, Islamist uprisings, or anti-secular movements. Hence, military protects secularism even by force and intervention. It results in that, military is the basic power behind secular constitutional

---

[403] Groc, 2001, p. 97

[404] Yavuz, 2003, p. 202

[405] Yavuz, 2003, p. 202

[406] Gözaydın, İştar B. (2009). "The Fethullah Gülen Movement and Politics in Turkey: A Chance for Democratization or a Trojan Horse?" in *Democratization*, Vol. 16, No. 6, p.1220

[407] Turam, 2007, p. 86. He fled to the USA in March 1999. In 2008, Turkey's Supreme Court upheld his acquittal, but he did not return.

State, at all times ready to defend it. However, one can see that this insight is not always accurate, if the relation between military and secularism or Islam is examined in a historical perspective.

Almost without exception, the military is taken as the guardian of secularism against Islamic reactionism. In line with this perception, in the morning of September 12, 1980, Military Declaration No 1 (broadcasted in the radio) mentioned the spread of reactionary and other perverted ideologies in place of Kemalizm as one of the reasons of military coup. Similarly, on September 27, 1980, Bülent Ulusu read the government program in National Security Committee, which claimed that before the coup, secularism was tried to be changed with sharia. Then, government program promised to take "severe and harsh" measures against Islamist movements, particularly towards Süleymancı order and religious dormitories. Hence, the initial declarations after the coup give the impression that military was fighting against Islamism and Islamist groups. However, this was not the case. The "severe and harsh" measures that government program pronounced had never been realized.[408] On the contrary, 1980 military coup instigated the golden age of official Islam in Turkey.[409] Despite all its rhetoric about the maintenance and further development of secularism, grand strategy of military regime (1980-1983) was to counter revolutionary left by supporting Islamic movements.[410] Therefore, military regime tolerated the development of Islamic consciousness and sometimes facilitated the development of Islamism.[411] For instance, Kalaycıoğlu ridicules that Kenan Evren (the Chief of Staff of the Armed Forces, coup leader, and afterwards, the President) started to tour the

---

[408] Tarhanlı, 1993, p. 35

[409] Dumont, 2011, p.156.

[410] Tunay, Muharrem (1993). "The Turkish New Right's Attempt at Hegemony" in *The Political and Socioeconomic Transformation of Turkey*. Eralp, Atilla; Tunay, Muharrem; Yeşilada, Birol (ed). Westport, Connecticut: Praeger, p. 20; Turam, 2007, p. 49; Yavuz, 2003, p. 69

[411] Balcı, 2003, p. 153

country in uniform, delivering sermons from Quran, acting as if he were the Grand Mufti of Ankara instead of the head of the state.[412] Indeed, Evren openly expressed that religion was the cement of the society, the source of morality and intellectual force to arm ordinary Muslims against the communist threat.[413]

What military regime did, was to fuse Sunni Islamic ideas with national goals, and to create *Turkish Islamic Synthesis*. Turkish Islamic Synthesis[414] was embraced in the National Cultural Report of the State Planning Organization.[415] This report constituted the essentials of State's education and cultural policy. Hence, Turkish Islamic Synthesis was accepted as the official view of the State by military regime[416]; and in this way, Islam was made a part of "indivisible existence of Turkey with its state and territory".[417] According to this synthesis, adoption of Islam by Turks was the best, the most rational, and the most natural choice.[418] Turks who had chosen other religions immediately lost their national culture and identity. Hence, Islam is the only religion, in which Turkish culture found its best and the most correct expression. Therefore, Islam is the precondition to be, and to remain as a Turk. Without Islam, Turkish culture would not be able to survive.[419]

---

[412] Kalaycıoğlu, Ersin (2005). "The Mystery of the Türban: Participation or Revolt?" in *Turkish Studies*, Vol. 6, No. 2, p. 234

[413] Yavuz, 2003, p. 71

[414] For more on Turkish Islamic Synthesis, see Kafesoğlu, İbrahim (1985). *Türk-İslam Sentezi*. İstanbul

[415] State Planning Organization Publications, 1983

[416] Vecihi, p. 65

[417] Köker, 2008, p. 312

[418] Güvenç, Bozkurt; et. al (1994). *Türk-İslam Sentezi*. İstanbul: Sarmal Yayınevi, p. 44

[419] Şen, 2010, p. 61

These arguments took place in the National Cultural Report of the State Planning Organization. However, they were repeated in many other occasions. For instance, High Council of Atatürk Culture, Language, and History commenced on June 20, 1986 under the chairmanship of President Kenan Evren. Prime Minister Turgut Özal, Chief of General Staff Necdet Üruğ and the MGK General Secretary were among the participants of the meeting. The final report of the meeting, which was signed and accepted by all of the participants, stated that the sources of our national culture were Turkish and Islamic cultures.[420] Furthermore, the Council decided that religion should not be put on the back burner in social life, and religion's status as the source of social morals and culture should be protected.[421] Both the National Cultural Report of the State Planning Organization and the decisions of High Council that headed by the President, former Chief of General Staff, and the leader of 1980 military coup Kenan Evren, and participated by the current Chief of General Staff of the military shows that, it was pretty much military commanders' decision to Islamize society after 1980 coup. In addition, beside Ministry of Tourism and Culture, and Ministry of National Education, the MGK was also charged with supervising the implementation of national cultural policy. Hereby, dissemination of an essentially Islamic culture became a part of State's national security policy.[422]

Clearly, national cultural policy of military regime was organized on the basis of Islam. As Şen states, in the synthesis "the dominant element is Islamism rather than nationalism".[423] Bozkurt Güvenç also defends that national cultural policy of military regime was an Islamic cultural project. The main target of this policy goes beyond synthesizing nationalism and Islam; but establishing the identity of Islam and the

[420] Güvenç, 1994, p. 63

[421] Güvenç, 1994, p. 73

[422] Güvenç, 1994, p. 80

[423] Şen, 2010, p. 62

State, hence the Islamic state.[424] Vecihi Timuroğlu support Güvenç's claims. Accordingly, National Cultural Report offered a completely Islamist state. It offered the employment of religious personal in hospitals, prisons, and factories to fulfill the religious requirements of patients, prisoners, and workers.[425] However, only ten years later, military would accuse the RP of changing the social life and secular character of the State in accordance with Islamic rules.

Nevertheless, we have an incomparably more significant official document before us which reflects Islamic tendencies of the military. This is the 1982 Constitution of the Republic. 1982 Constitution was shaped by the will of the military junta. The constitution was prepared by two committees, National Security Committee and Advisory Committee. National Security Committee was composed of the members of military junta and was the ultimate authority over constitution making. As for the Advisory Committee, it was a civilian body; however, all of its members were appointed by National Security Committee. Therefore, both of the committees reflected the will of the military, as did the constitution itself. Such a constitution which reflects the will of the military pulls Islam into public and political life under the supervision of the State.[426] The preamble of the Constitution is full with religious, sacred, spiritual expressions.[427] Nevertheless, it is the Article 24 on education that deserves special attention in terms of Islamism of the Constitution. 1982 Constitution restored mandatory Sunni Islamic education in primary schools. This article was first formulated by Advisory Council, and then approved by National Security Committee

---

[424] Güvenç, 1994, p. 52

[425] National Cultural Report, p.157 quoted in Vecihi, p. 65

[426] Parla, 2009, p. 212

[427] Parla, Taha (2007). *Türkiye'de Anayasalar: Son Değişikliklerle Genişletilmiş Yeni Baskı*. İstanbul: İletişim Yayınları, p. 36

on the ground that religion is a factor of unity, which papers over divisions in society, and therefore, must be thought by the State in schools.[428]

However, prior to the making of 1982 Constitution, in his speech on July 24, 1981 in Erzurum, Evren articulates military's desire to implement compulsory Islamic education:

> In many schools, religious education was thought by unenlightened teachers, so our children either received no religious education at all, or were left in the hands of the ignorants. For that purpose, we will put compulsory religion courses in our schools, but on the other hand, we will give merciless struggle against Quran courses that are established without consent or permission.[429]

This early speech demonstrates that, compulsory Islamic education was the will and decision of the military, independent of what Advisory Committee thought of. In a similar vein, as early as 1982, Military Court decided that "the basic law of education encourages the teaching of love of God and the prophet as a way of cultivating moral values in students and these would lead to the love of fatherland, state and family".[430] In the same direction, in 1983, newly established *Huzur Partisi* (Peace Party) demanded an education system which took notice of religious values, and which enlarged the area of religious education to include universities. Yet, *Huzur Partisi* was closed down by the Constitutional Court claiming that its education policy was anti-secular.[431] It is hard to comment on the difference between *Huzur Partisi*'s demand of state's Islamic education and military's implementation of compulsory teaching of

---

[428] Ahmad, 1993, p. 220

[429] National Security Council (1982). *12 September in Turkey: Before and After*. Ankara, p. 338

[430] Higher Military Court Decision No 1982/614 quoted in Yavuz, 2003, p. 71

[431] Constitutional Court Decision No 1983/2., Official Gazette No 15.10.1984-18546 quoted in Tanör, 2001a, p. 94

Islam in terms of secularism; and hard to point out clearly what made *Huzur Partisi* anti-secular and military secular.

It is surprising that, although military struggled against the İHLs in February 28 Process, during military regime (1980-1983) not even a İHL were disbanded or curtailed.[432] On the contrary, the number of the İHLs was increased under military rule. In 1979-1980, there were 339 High, and 339 Middle İHLs. Yet, in 1980-1983, the number of them increased to 374 and 341 respectively.[433] In addition, the number of İHL students rose from 178.013 in 1979-1980 to 220.991 in 1983-1984.[434] Another issue is Quran courses. Contrary to their discourse, during military regime and Kenan Evren's presidency (1982-1989), new Quran courses were opened and new preachers were employed.[435] The number of Quran courses and of their students was 2610 and 68.486 respectively in 1980. When we came to 1989, they escalated to 4715 and 155.403.[436] Last factor that is discussed within secularism is Divinity Faculties. For İHL graduates who wanted to get higher education in their own field, High Institutes of Islam were opened in 1959. However, in 1982 military regime transformed all High Institutes of Islam into Divinity Faculties and conjoined them to the geographically closest universities.[437]

Apart from education, perhaps the most important issue in terms of Islamization of State is its relation with Islamic orders. Once more, contrary to its discourse,

---

[432] Yavuz, 2003, p. 127

[433] Yavuz, 2003, p. 124

[434] Özcan, 2012, p. 155

[435] Yavuz, 2003, p. 69; Baran, 2010, p. 36

[436] Ahmad, 1993, p. 221

[437] Aydın, 2011, p. 292

Aliefendioğlu states that the military did not went against Islamic orders. Just the opposite, it loosened State's control on them.[438] It encouraged the mobilization of Nakshibandi and Nurcu orders during 1983 elections[439]and enhanced Süleymancı network, who as of 2003 run the most powerful student dormitory networks of Turkey.[440] It is known that Kenan Evren established close personal relations with Nurcu leader Mehmet Kırkıncı.[441] Also, military officers visited other prominent Nurcus and "convicted" them to support 1982 Constitution[442] or risk the closure of Nurcu student dormitories. Moreover, Evren was careful to conduct good relations with orders during his Presidency. For instance, Article 211 of the Law on Public Health (Umumi Hıfzısıhha Kanunu) states that burials of the dead anywhere other than those accepted as cemetery can only be made by a governmental decree. According to this article, burials to mosques or shrines require a decree by the government. In 1980, Nakshibandi Shaykh Mehmet Zahid Kotku died. Rather than an ordinary burial, the coup leaders allowed him to be buried in the garden of Süleymaniye Mosque in İstanbul by signing a governmental decree. The same treatment was repeated when leader of Cerrahi order Muzaffer Ozak died on February 15, 1985; both of the governmental decrees were signed by Kenan Evren.[443]

Among the Islamic communities that military had relations, was Gülen community. Gülen community is a widespread network. The movement's economic infrastructure consists of over 100 foundations that financially support the community's social and

---

[438] Aliefendioğlu, 2001, p. 90

[439] Yavuz, 2003, p. 69

[440] Yavuz, 2003, p. 147

[441] Yavuz, 2003, p. 70

[442] Yavuz, 2003, p. 175

[443] Mumcu, 1993, p. 59-60

educational activities around the world.[444] Gülen community has founded schools in over a dozen countries, including Bosnia, Brazil, Indonesia, and Kazakhstan. Today, there are more than 300 private high schools and seven universities affiliated with Gülen community, with 26,500 students and over 6000 teachers around the world. In Turkey alone there are over 150 private schools, including Istanbul's Fatih University.[445] However, Gülen movement did not come from nowhere. It developed gradually from mid-1980s and especially in mid-1990s.[446] More importantly, it did not develop despite the power of military and State; on the contrary, Gülen community did develop in coordination with them. It can best be seen in the case of Islamic schools of Gülen. By 1996-1997 academic year, 120 out of 376 private high schools (32 percent) belonged to Islamic foundations and associations and they enrolled about 300.00 students.[447] It means that private Islamic schools prospered in the second half of 1990s when military and State embraced "active" or "militant" secularism.

Everything aside, Gülen himself was a government employed imam.[448] Yet, he already never tried to hide his cooperation with the State.[449] In turn, the State more and more often recognized Gülen's projects. For instance, Gülen movement's central organization in Central Asia is *Kazakhstan Turkish Education Foundation*. State organizations in the same region are *Council of the Turkish Ministry of National Education* and *Turkish International Cooperation Agency* (TICA). Interestingly, these

---

[444] Yavuz, 2003, p. 192. For more on Fethullah Gülen community, see Birikim (Ekim 2012). *Cemaat-Hareket-Hizmet*, No. 282

[445] Gülay, Erol (2007). "The Gülen Phenomenon: A Neo-Sufi Challenge to Turkey's Rival Elite?" in *Critique: Critical Middle Eastern Studies*, Vol. 16, No. 1, p. 43

[446] Turam, 2007, p. 20

[447] Yavuz, 2003, p. 122

[448] Baran, 2010, p. 38

[449] Yavuz, 2003, p. 199

organizations are well aware of each other and there is no tension between them.[450] Rather, their relations have been friendly and favorable. It signifies that state officials are neither uninformed nor in denial of the Islamic Gülen schools.[451] Moreover, in a recent academic publication by TICA-funded research project, Gülen schools have been referred as "Turkish schools".[452] It means that Gülen community was allowed to represent secular State of Turkey abroad. Berna Turam analyzes Gülen community and rather than clash and conflict, she finds "engagement and cooperation between Islam and Turkish State in the dispersed sites of Gülen movement". Seeing this cooperation, she cannot hide her astonishment: "Cooperation with the State and Islam challenges the prevalent dichotomy between religion and secular State. It challenges the views that Islamic revival is an outcome of the failure of secular State".[453]

The same conclusion can be made for military establishment as well. High ranking military officials such as General Karadayı is known to visit Gülen's schools and to report positive feelings and appreciation for the successes of the schools. Gülen movement has also attracted a large group of retired military officials who have openly expressed their appreciation of the movement.[454] Moreover, on March 27, 1998, the MGK agreed that "the Fethullahists were "sincere" Muslims and that they were entitled to maintain the schools.[455] Tanıl Bora also informs that during February 28 process, Gülen movement was exalted by many secularists as being loyal to the State.[456] In turn, Gülen supported February 28 process led by military.[457]

---

[450] Turam, 2007, p. 89

[451] Turam, 2007, pp.103-104

[452] Turam, 2007, p. 105

[453] Turam, 2007, p. 105

[454] Turam, 2007, p. 86

[455] 27-28 March 1998 *Zaman*, www.zaman.com.tr quoted in Turam, 2007, p. 84

After seeing its close ties with Islamic orders and especially with Gülen movement, military's accusation of the AKP of having internal connections with Gülen community and its struggle against Gülen community during 1999-2000 seem dubious. Military is actually right in its claim; the AKP has organic, close relations with Gülen community; Gülen community is the basis of the AKP. When he was the Minister of Foreign Affairs, Abdullah Gül was known to send directives to all Turkish embassies abroad to cultivate good relations with schools of Fethullah Gülen around the world.[458] Moreover, the trial of Fethullah Gülen in May 2006 concluded with his acquittal on all charges, only with the help of changes made in related laws by AKP government.[459] Therefore, what is dubious is not military's accusation of the AKP of its connections with Gülen community, who has blatant pro-Islamic activities. What is dubious is that, during 1997-1998 Turkish military did not regard Gülen movement anti-secular and anti-statist although it was aware of its activities; however, only 2 years later, in 2000 but especially after AKP's coming to power in 2002, it accused both Gülen community and the AKP by being anti-secular and anti-statist powers.

With such a doubt in mind, one has to review February 28, 1997 decisions of the MGK, which was generally accepted as the peak instance of military's secularist role after 1980, and the best example that it protects secular character of the state by any means. February 28 decisions are composed of 18 decisions that were taken in military dominated MGK and submitted to government for implementation. Number 2 of these decisions is on religious orders and their educational activities (private dormitories, foundations, and schools). It says that "private dormitories, foundations,

---

[456] Bora, Tanıl (2008). *Türk Sağının Üç Hali: Milliyetçilik, Muhafazakârlık, İslamcılık*. İstanbul: Birikim, p. 120

[457] Çınar, 2008, p.25

[458] Criss, 2010, p. 51

[459] However, the judgment was appealed against, and it was not until June 2008 that the acquittal was finally made official. See Gözaydın, 2009, p. 1220

and schools affiliated with Islamic orders must be put under the control of relevant state authorities and eventually transferred to the Ministry of National Education". Mostly due to media coverage, this decision is launched as a deeply secular act. However, second decision of the MGK neither charges nor closes down Islamic orders or Islamic dormitories and schools. Military demands that they must be controlled by the "secular" State. As long as religious orders function under the control of State authority, they are allowed. Similarly, Number 3 of the MGK decisions says "necessary administrative and legal adjustments should be made so that Quran courses operate under the responsibility and control of the Ministry of National Education". Hence, this decision reveals that military is not against wide- spread Quran courses. Once again, Quran courses are within the domain of secularism as long as the State operates them.

Therefore, looking at February 28 decisions as a whole, Groc advocates that Islamic orders were not suppressed by military; they were taken under supervision.[460] All mosques were put under DİB control; and Islamic parties, people, and collectives were inquired.[461] For instance, the MÜSIAD was one of these associations that put under control in February 28 process. However, during 1997, number of its member corporations increased from 2100 to 2897, rather than being curtailed. Number of affiliated corporations was also increased to 4000.[462] Then, put it more correctly, February 28 is not a process of secularization of the State or society, but a process of state control and supervision. Other than this control and supervision, Quran courses, Islamic orders, divinity faculties were not closed down.

---

[460] Groc, 2001, p. 98

[461] Dumont, 2011, p. 157

[462] Doğan, 2009, p. 292

In sum, in terms of Islamization of the state and society, its intention to shape the state and society on the basis of Islamic values, its support for Islamic education, Quran courses and the İHLs, and its relation and cooperation with Islamic orders, after 1980 military did not hang behind the other actors we examined. Tank underlines this point when she says, religion has been exploited by the military as a political tool to achieve its ends.[463] Military Islamized State and society *as much as necessary* and *when it is necessary*; and it did it *in the name of secularism.* In the name of secularism, Fethullah Gülen was supported (1996-1997), and in the name of secularism, Fethullah Gülen was sanctioned (after 2000). More importantly, when it Islamized State and society, military was not deemed anti-secular like the AKP and the RP; on the contrary, it is remembered as the guardian of it.

3.4 Secular Constitutional State Reconsidered

Liberal constitutionalism and the rule of law understanding says that laws are capable of retaining a core of fixed meaning across every actual and potential enforcement of law to a range of different factual contexts. Enforcement of law *subsumes* similar cases under general rules and rejects contrary cases.[464] As such, constitutionalism renders state action predictable. Then, according to liberal understanding of legality and constitutionalism, secularism should reject military's and ANAP's support for Islamist education and orders, as it rejected it in the cases of the RP, the FP, and the AKP. However, we saw that it did not. Secularism did not limit the ANAP and the military. Depending on similar acts of supporting Islamist education and orders, the AKP is deemed Islamist and anti-secular, and although partially, sanctioned; the ANAP is deemed secular, moderate Islamist, and never sanctioned; whereas military has never been charged and always regarded as the guardian of secularism.

---

[463] Tank, 2005, p. 4

[464] Salter, 2012, p. 45; Scheuerman, 1999, p. 4

Then, are legislating on the basis of an Islamist rule (compulsory Islam education, establishment of anti-interest rate financial institutions), attempting to realize a model for society, reference points of which are Islam (Turkish-Islamic synthesis, establishment of a liberal market on the basis of *tevhid* understanding of Islam, prohibition of consumption of alcohol) and having internal connections with Islamic orders (relations with Nakshibandi and Gülen orders) secular activities? Secularism fails to give a definite answer to this question, and therefore fails to determine a definite outcome for disputes.[465] On the contrary, it has justified contradictory answers. As a result, in contrast to liberal constitutionalism, indeterminacy and unpredictability rules over Turkish constitutional State on the subject of secularism. It is indeterminate when secularism will limit and sanction state's relation with Islam, and when it will justify and legitimize it.

What all of these cases show is that, normative and legal reasoning of secularism justifies more than one (and sometimes contradictory) answers as *correct*. For instance, the answer to the question on secularism of AKP's support of headscarf is given normatively; the answer is given by interpreting facticity on the basis of secularism. Therefore, the answer is normatively correct. Yet, the answer to the question on secularism of ANAP's support of headscarf was also given normatively; the answer was also normatively correct. It basically shows that, there is more than one correct answer to the question of secularism. Therefore, it necessarily requires one to choose between at least two alternative interpretations of questions of facts and norm.[466] Secondly, it shows that it is not the norm itself that deems Özal's policy secular and AKP's anti-secular, as the norm can answer it both of the ways. These are *decisions* made normatively. It means that opposite decisions could also be made in the cases of the AKP and the ANAP, and these opposite decisions would be equally

[465] Croce, 2012, p. 144

[466] Salter, 2012, p. 107

normatively correct. Hence, non-secular activities of the AKP might have well found a sanctuary under constitutional norm of secularism and the AKP might have not been charged; and non-secular activities of the ANAP might have well sanctioned and charged on the basis of secularism. Therefore, enforcement of secularism in Turkey cannot be unambiguously justified by reference to the legal norm, but it needs the inclusion of decisionist dimension, and hence discretion.

In line with Schmitt's ideas,[467] realization of secularism in Turkey is not completely a normative achievement; it involves a decision on certain cases. That decision is not a simple, unbounded, arbitrary power. Rather, it is a norm-bounded decision. It is a decision to subsume a concrete situation under the norm of secularism, or not. Accordingly, judges interpret the facticity so that he/she decides whether it fits into secularism. Therefore, subsumption still operates. However, it is no longer normative subsumption of liberal theories of constitutionalism. Yet it is decisionist subsumption that operates in Turkish constitutional State. Decisionist subsumption is a personal, subjective *decision* of the judge to subsume *some* cases under secularism and to reject *some other*. Therefore, it does not promise subsuming similar cases and rejecting contrary ones. It actually turns the reasoning of liberal legality upside down. Only after subsuming some cases under secularism, decisionist subsumption calls them similar; and only after rejecting some other cases, it calls them contrary to secularism.

Moreover, realization of secularism through decisionist subsumption seems to have a quantitative character. Murat Sevinç commands that what makes problem in terms of secularism is not pursuing a policy in line with the İHLs, Quran courses, or freedom of headscarf; but to pursue it in a way that violates constitutional boundaries.[468]

---

[467] Schmitt, 1985a, p.10

[468] Sevinç, Murat (2009). "AKP'nin Kapatılma Davası" in *AKP Kitabı: Bir Dönüşümün Bilançosu*. Duru, Bülent; Uzgel, İlhan (ed) İstanbul: Phoneix Kitabevi, p. 277

Similarly, the Constitutional Court stated that, on occasions, certain demands or needs for religious freedom may emerge in the society. At these times, political parties may be required to formulate policies considering religious freedom;[469] which can be read as more freedom for Islam. Hence, Islamist policies of a political party may be acceptable as long as they are not *too much* Islamist to violate constitutional boundaries. Yet, when a party formulates or pursues a policy on religious freedoms, it is hard to determine when is too much or at what point this policy goes beyond the secular boundaries of the Constitution.[470] As mentioned above, Tank also claims that there is no clear distinction between "acceptable" and "unacceptable" manifestations of Islam.[471] Hence, from Sevinç's and Tank's statements we can conclude that the decision on secularism in Turkey is about "secularity of an Islamist activity", which is already a contradiction. Therefore, decision on secularism cannot be a qualitative, substantive decision on the religiosity of an action. Rather, there is a measure, a threshold that Islamic activities shall pass to be anti-secular; and decisionist subsumption is a decision whether that threshold has been passed. Consequently, decision on secularism in Turkey is a quantitative calculation.

This quantitative dimension of secularism can best be seen in the closure case of the RP. While defending that the RP has been the center of anti-secularist activities, Chief Public Prosecutor asserted that it opened "more than adequate" Divinity Faculties, "many more" İHLs "than needed", and thereby subject "millions" of our children to religious education. It implies that the İHLs and Divinity Faculties actually are not violating secularism. Until 1996, when the RP came to power, there were 931 high and middle branches of the İHLs in total.[472] However, this number increased to 1202

---

[469] Sevinç, 2009, p. 278

[470] Sevinç, 2009, p. 278

[471] Tank, 2005, p. 4

[472] Yavuz, 2003, p. 124

in 1996-1997 during RP government. Then, it means that 931 İHLs were, what was "needed" and hence secular; yet 1202 was "more than needed" and anti-secular. It further indicates that what determines the "secularism of Islamist İHL*"* is the additional 271 schools. Similarly, the state can, without violating secularism, educate Islamic clergy in the İHLs, and through Divinity Faculties it can support religious education in universities. While these acts stay secular, what violates secularism is the "excess" number of Divinity Faculties and students attending to the İHLs. When the RP came to power in 1996, there were already 495.580 students being educated in the İHLs. This number increased to 503.231 in 1996-1997.[473] It means that 495.580 students getting religious education are within the boundaries of secularism, yet 503.231 students violate this constitutional norm. It further means that while religiously educated 495 thousand student do not violate secularism and the constitution, additional 7651 student is "too much", against secularism, and violates the constitutional boundaries. The Constitutional Court does not want millions of our children to be subjected to religious education. Then, were not almost half million student who had subjected to religious education until 1996 "our" children?

The Constitutional Court clearly testifies that secularism is a matter of quantity. For the decisionist component of normative disputes we concluded that, interpretation and enforcement of secularism cannot be unambiguously justified by reference to the legal norm, but it needs the inclusion of decisionist dimension. Very similarly, interpretation and enforcement of secularism cannot be unambiguously justified by reference to the substance and meaning of secularism, but it needs the inclusion of a quantitative calculation, and hence quantitative discretion. Actually, one way of explaining and providing justification why the AKP is deemed anti-secular while the ANAP is not, is to defend that the AKP's roots, cadres, policies and activities are "more" Islamist than the ANAP. It means that, the ANAP is Islamist, and let us say,

[473] Yavuz, 2003, p. 124

its Islamism amounts to 3 units. The AKP is also Islamist, yet its Islamism amounts to 4 units. On the basis of the reaction of constitutional state and secularism to both the ANAP and the AKP, it can be inferred that 3 unit Islamism is secular, while 4 unit Islamism is anti-secular. The absence of one unit makes the ANAP's Islamism secular; the absence of one unit means that the ANAP was only "using" Islamist elements. However, this additional one unit makes AKP's Islamism anti-secular; this additional unit means that the AKP "abuses" Islamic elements and violates secularism.

Then, decisionist subsumption operates while deciding on the quantity of Islamism of the concrete case. Decisionism involved in secularism is a unit and amount calculation. It is a decision to the amount of additional unit that *makes Islam anti-secular*. So, first of all, it is a decision that additional one unit (not two or three) is enough to transform moderate Islam to radical Islam. However, still more importantly, it is a decision that this additional amount is realized. As Schmitt states, the legal idea cannot realize itself; the legal norms need a decision before they can be translated into reality.[474] In the case of the ANAP, for instance, it is decided that the margin between moderate Islam and radical Islam is large (additional amount is more than one or two units), and it is decided that the additional amount that transforms former to the latter is not realized. As mentioned before, an opposite calculation could have also be decided. It could be decided that the additional amount that transforms moderate Islam to radical Islam was small, and this amount was realized. It could be decided that the ANAP was anti-secularist and this opposite decision would be equally normatively correct in terms of secularism.

It is this decisionist subsumption that has undermined secularism in Turkey. Due to the discretion involved in decisionism, content of secularism on occasions enlarged,

[474] Schmitt, 1985a, p.28

and on other occasions narrowed down. In the RP and the FP cases, its content enlarged to regard secularism of Turkey as a world view, a way to get out of darkness of Middle Ages, and as a part of enlightenment of 18th century. It meant secularization of family relations, attire, and customs beside state, law and society. In the case of Freedom and Democracy Party, however, its content narrowed down to equate secularism with the institution of the DİB. At the end, secularism came to encompass contradictory meanings and interpretations, and justify contradictory circumstances. The example of Groc summarizes the situation. He mentions that in the history of Turkish Republic, all the formulas on *Islamic education*; from its prohibition to optional Islamic courses, and then to compulsory Islamic course, have subsumed under secularism.[475]

In conclusion, referring to Weimar Republic, Caldwell says that "pinpointing the moment the Weimar Constitution collapsed is a matter: what was the constitution that collapsed?"[476] The same question can also be raised in the case of Turkish Republic: claiming that the AKP is a challenge to secular State, or that secular State has collapsed by AKP power, is a matter. What was the secular State that collapsed? Secular state failed to give definite responses, or failed to respond in a negative way to state's structured relation with Islam. It sanctioned this relation as much as approved it. Hence, constitutional State in Turkey deserves to be called as non-secular secular state. This *non-secular* secular State or semi-secularism provides the political power with semi-freedom from secularism, depending on a decision in this direction. Therefore, how constitutional State would react to the AKP power was *not normatively* given beforehand; rather it was a decision. It implies that we cannot certainly know how secular State will react to any act of political power, without

---

[475] Groc, Gerard (2001a). "Laiklik ve Demokrasi: Yeni Bir Orta Yol Mu?" in *Laiklik ve Demokrasi*. Kaboğlu, İbrahim (ed). Ankara: İmge Yayınları, p. 232

[476] Caldwell, 1997, p. 8

knowing the actor in charge of decision. After 2007-2008 period, the AKP seems to benefit from this *legal, constitutional freedom*; from this *legal, constitutional anti-secularism* as the military and the ANAP did, through controlling the decisions on secularism. The AKP controlled secularism by controlling the decision makers on secularism. In the literature, it is generally defended that the AKP installed "passive secularism" by re-interpreting the secularism as a norm. However, AKP's was not a normative, but concrete-political achievement. It installed "passive secularism" not by re-interpreting or reforming the law, but by re-structuring judicial community, which is the subject of next chapter.

Many activities and regulations of the AKP which were considered anti-secular before 2007-2008 were one by one subsumed under secularism. With this, ills of decisionist subsumption were exacerbated. Currently, secularism contains much more contradictory cases than ever; because, the AKP has been more Islamist than any other political power before. Not only it provided *de facto* freedom for public expression of Islamic symbols including headscarf; but also for the first time in the Republican history, it introduced courses specifically on Islam's prophet and Quran to the curricula of secular schools. As a result, secularism of Turkish constitutional State has enlarged so much so that it is now subsuming an overtly Islamist political power. At the end, today no factual event, no matter how violent or destructive it is, can destroy the validity of secularism.[477] Nobody and nothing is anti-secular in Turkey. State, which makes Islamic courses compulsory, educates Islamic clergy, and propagandizes Islam is not anti-secular. The AKP, who intensifies Islamist features of the State, State's Islamist education, rituals and discourses, and hence guilty of religious separatism is not anti-secular. With the help of the literature and popular terminology, everybody is secular; either active secular or positive secular; yet at least

[477] Salter, 2012, p. 47

negative secular.[478] All in all, what stands before us is a freak. The most insolent Islamist power of Turkish political history, the AKP, stands before us as a political power limited by secular constitutional State; hence it stands before us as a freak.

[478] Types of secularism are chosen arbitrarily. Active secularism indicates exclusion of religion from public sphere as a whole. Positive secularism accepts secularism as the absolute truth. Negative secularism recognizes no official religion. Kuru, p. 14

CHAPTER 4

POWER DIMENSION OF THE CONSTITUTIONAL STATE: AKP'S CONTROL OVER EXECUTIVE AND JUDICIAL POWERS

When the AKP came to power, it did not face with a Constitutional state. It faced with a non-constitutional constitutional State and afterwards, it abused this non-constitutional dimension. The AKP enacted anti-secular legislations and it implemented anti-secular policies after 2008; yet still not sanctioned by secularism due to the partial freedom that state provides for political power. The AKP liberated itself from the rule of law by controlling the decisions on secularism. It means that, as much as reforming the norms in accord with its policies, it reformed decision makers in enforcement of laws in order to control the interpretation of laws. Who are these decision makers in enforcement of laws? As mentioned before, law enforcement is separated into two parts in a constitutional state, as executive and judicial enforcement of laws. The AKP already used executive power through council of ministers. By 2008, after the election of Abdullah Gül to Presidency, it achieved the control of both of the executive authorities. Then, for the AKP to install its own norms and interpretation of norms, it would be enough for it to control the second decision in judicial enforcement of laws through re-structuring judiciary. However, this is not the case in Turkey.

Constitutional state is supposed to establish parliamentary democratic regime. Parliamentary democracy dictates that state power shall be used by the representatives of the people elected through universal suffrage. The principle of separation of

powers, on the other hand, tells us how to use it. According to this principle, state power is separated between legislative, executive, and judicial powers. Legislative power is assigned to the parliament. Executive power is divided between the council of ministers (government) and the president. President has only a few executive powers and has no political accountability towards the parliament. The actual executive power of state is used by the council of ministers. Hence, the council of ministers is the accountable branch of the executive, which is elected within the parliament rather than being directly elected by the people. Lastly, judicial power is solely given to the service of courts. Then, in the parliamentary democratic regimes of constitutional states, no other organ can exercise sovereign power of state apart from these four. However, in Turkey there is another semi-executive organ beside the council of ministers; namely the MGK.

The MGK is a constitutional organ having some executive competences. Yet, it is not completely under the dominance of the Council of Ministers. Rather, the MGK is a semi-military body. Therefore, contrary to the theories of constitutional state and parliamentary democracy, actual executive power of the State in Turkey is not concentrated in the hands of the government; of the AKP. Rather, the government shares the control of executive power of the State with military through the MGK. Hence, what is given in a parliamentary democracy; namely, a centralized, *homogenous* executive power under the control of government in the executive enforcement of laws, is something to be established for the AKP due to the existence of the MGK. Consequently, in order to control enforcement of legal norms, first of all, the AKP should bring the executive power of the state under its control, a move which is not expected by parliamentary democratic theory. Only afterwards, control of judicial enforcement of legal norms can be dealt with.

In other respects, the AKP is in need to reduce the impact of the MGK over executive decisions or bring it under its control if it is to consolidate its power. Military had

already showed off how effective it could be in the MGK. February 28, 1997 MGK meeting, which ensued a "post-modern coup" and caused the fall of Erbakan government was still very vivid in the memories of the members of the AKP. Therefore, AKP's pursuit for unity in executive enforcement of laws, or a *homogenous* decision making in the executive power of State under its control is at the same time a power struggle between the military and the AKP over the future of Islamist government.

4.1 AKP's Relation with the Executive Power of the State

The MGK is a semi-military council. Its members involve the General Chief of the Staff, four force commanders, the President of the state, the Prime Minister, Minister of National Defense, Minister of Interior Affairs, Minister of Foreign Affairs, Deputy Prime Minister and Minister of Justice[479]. It is established as a constitutional organ with an aim to assist the Council of Ministers in formulating national security policy. Basing on this, some assert that MGK is an advisory council[480]. It is advisory, because the MGK decisions have no binding force over the Council of Ministers. The Council of Ministers is free to accept the MGK decisions. Therefore, they have no direct legal effect. In order for the MGK decisions to have legal effect, they must be issued as a notice or as a degree by the Council of Ministers. Some of the MGK decisions, on the other hand, need to be enacted by the parliament following the proposal of the Council of Ministers[481]. The wordings of the article regulating the MGK in the Constitution ratify this conclusion. According to the Article 118 of 1982 Constitution, the Council of Ministers only *evaluates* the decisions of the MGK.

---

[479] It indicates the composition of the council after 2001 Constitutional amendments.

[480] Özbudun, Ergun (2007). "Democratization Reforms in Turkey, 1993–2004" in *Turkish Studies*, Vol. 8, No. 2, p. 193

[481] Balcı, Muharrem (1998). *MGK ve Demokrasi: Hukuk, Ordu, Siyaset*. İstanbul: Yöneliş

The wording of the Constitution may be more or less clear; however, the MGK's constitutional status makes this organ controversial. In parliamentary democracies, armed forces and advisory institutions are administrative bodies. Therefore, as all other bodies of the administration, the MGK must have been organized in the Constitution under the clause of the "Administration". However, it has been given a place under the "Executive", and within the Council of Ministers. Its constitutional status let some other group of analysts to claim that executive power of the State is also exercised by the MGK beside the conventional parliamentary organs of the President and the Council of Ministers[482]. This point is voiced by Taha Parla, who claims that dual head of the executive in parliamentary democracies has become triple head in Turkish political system by the inclusion of military through the MGK.[483]

When focused on the scope and depth of the powers allocated to the MGK by laws and directives, it becomes virtually impossible to advocate that the MGK is merely an advisory body. The MGK is responsible from the formulation of national security policy. Therefore, the meaning of "national security" defines the area, in which the MGK can legitimately voice its views. The term is defined in the Article 2 of the Law of the MGK (1983) which included protection of *all* political, social, cultural, and economic interests against *any* kind of *internal and external* threats. Hence, the meaning of national security is kept too broad that, any matter might be perceived as relevant to national security.[484] Ultimately, whatever concerned the parliament or the Council of Ministers may set the agenda of the MGK as well. Within this framework,

---

[482] Kardaş, Ümit (2004). "Askeri Gücün Anayasal Bir Yargı Alanı Yaratması ve Yürütme Erkini Etkin Bir Şekilde Kullanması" in *Bir Zümre, Bir Parti: Türkiye'de Ordu*. İnsel, Ahmet; Bayramoğlu, Ali (ed). İstanbul: Birikim, p. 296

[483] Parla, 2007, p. 86

[484] Güney, Aylin; Karatekelioğlu, Petek (2005). "Turkey's EU Candidacy and Civil-Military Relations: Challenges and Prospects" in *Armed Forces & Society,* Vol. 31, No. 3, p. 446

from 1982 up to 2001, the following topics were discussed in the MGK meetings:[485] energy resources, Turkish students studying in foreign countries, health services, tourism, forest fires, party closures, Islamist capital owners, economic policies, poverty, foreign policy, TV broadcasts and their duration, TRT (Turkish Radio and Television Corporation), YÖK (the Council of Higher Education), higher education, secondary education curriculum and elective course options, public theatres, Newroz celebrations, prisons, and the GAP (South East Anatolian Project)

What is more, the MGK not only provided views on the principles of national security policy, but also on the modification and *enforcement* of it; *coordination* of activities, and on the legal and administrative measures aiming the realization of national plans and programs.[486] The duty to submit its views on the "establishment and enforcement of the national security policy" is also listed in the Article 118 of the Constitution as one of the tasks of the MGK. As national security practically included all the above mentioned subject matters, it means that the MGK also notified the enforcement of energy policy, measures against labor strikes, Newroz celebrations, higher education etc. However, providing views on the principles of national security is one thing, on the enforcement and realization of this policy is another. The latter directly falls into the realm of the "execution" of this policy. Hence, these clauses mean that the MGK is endowed with certain executive competences within constitutional State.

In addition, laws empower the MGK with some other executive authorities through the MGK Secretary General. According to the Article 13 of the Law of the MGK (1983), the Secretary General has the power to monitor and control the enforcement of the MGK decisions by responsible organs, following their approval by the Council of

---

[485] Çelik, Seydi (2008). *Osmanlı'dan Günümüze Devlet ve Asker: Askeri Bürokrasinin Sistem İçindeki Yeri*. İstanbul: Salyangoz Press, pp. 297-300; 305-327; 421-464

[486] Article 4 of the Law of the MGK (1983)

Ministers. He/she will also report the state of their enforcement to the MGK, Prime Minister, and to the President. Moreover, beside monitoring and reporting the MGK decisions which are approved by the Council of Ministers, the Secretary General is deemed capable to monitor and report the aftermath of the MGK decisions which are rejected by the Council of Ministers.[487] Hence, the Secretary General double-checks the enforcement of the MGK decisions by the Council of Ministers. Meanwhile, the Secretary General has the right to conduct joint works and cooperate with related ministries, organs and any institution with its own initiative.[488] Therefore, the Secretary General can communicate and work both with the state organs and civil institutions independently. This clause, on the other hand, gives the MGK unlimited access to civilian organs.[489]

All in all, the decisions, enforcement of which are monitored, checked, and coordinated cannot be called as mere advices; and the council which takes such decisions cannot be called merely as an advisory body. The MGK has executive powers within the constitutional State in Turkey and these powers make it something more than advisory. For this reason, it will be misleading to deem the Council of Ministers free to approve or reject MGK decisions. Consequently, there are two legs of the executive decision making system within the State; one is the Council of Ministers, and the other is the MGK[490]. Shambayati supports this claim by saying that the 1982 Constitution established a dual system of executive decision making. The exercise of political power is shared between the popularly elected civilian authorities

---

[487] Article 9 of the Law of the MGK (1983)

[488] Article 13 of the Law of the MGK (1983)

[489] Toktaş, 2010, p. 391

[490] Cizre Ümit (1997). "The Anatomy of the Turkish Military's Political Autonomy" in *Comparative Politics*, Vol. 29, No. 2, p. 33. Also see Öztürk, Metin (1993). *Ordu ve Politika*. Ankara: Gündoğan Yayınları, pp. 141-142

and the military through the MGK.[491] Within this dual system, Mümtaz Soysal asserts that MGK is the *upper-cabinet* where decisions are taken together with high ranking solders,[492] while William Hale indicates that it is a *substitute cabinet.*[493] In a similar vein, the MGK is seen as the *second cabinet*[494] empowered with laws and directives. These views reveal that the State in Turkey has a semi-military second executive. Although military is not in the government, it partly rules the State by the virtue of being established as an executive organ. Hence, Turkish military is not merely "the guardian of the system", but is an active participant in the political decision making.[495]

How can the MGK be deemed as an executive organ while its decisions were not legally binding? Orhan Aldıkaçtı (the head of the Constitutional Committee who formulated 1982 Constitution) and Tevfik Fikret Alparslan (one of the members of this Committee) answer this question in the Consultative Assembly while responding the criticisms.[496] Both assert that the MGK decisions are binding because of the composition of its civilian members.[497] In the MGK (and in no other state organ) two heads of the executive power, the President and the Prime Minister, come together. It

---

[491] Shambayati, Hootan (2004). "A Tale of Two Mayors: Courts and Politics in Iran and Turkey" in *International Journal of Middle East Studies*, Vol. 36, No. 2, p. 258

[492] Soysal, Mümtaz (1986), *Anayasanın Anlamı.* İstanbul: Gerçek Yayınları, p. 237

[493] Hale, William (1994). *Turkish Politics and the Military.* New York: Routledge, p. 173

[494] İnsel, Ahmet (1997). "MGK Hükümetleri ve Kesintisiz Darbe Rejimi" in *Birikim*, p. 15

[495] Shambayati, Hootan (2008). "Courts in Semi-Democratic/Authoritarian Regimes: The Judicialization of Turkish (and Iranian) Politics" in *Rule by Law: The Politics of Courts in Authoritarian Regimes.* Ginsburg, Tom; Mustafa, Tamir (ed). New York: Cambridge University Press, p. 289

[496] On September 12, 1980, military seized the power with a coup. In July 1981, a Constitutive Assembly was established with an aim to prepare a new constitution. Consultative Assembly was the civilian chamber of the Constitutive Assembly, the other chamber being the military who initiated the coup. Constitutional Committee, on the other hand, formed out of the Consultative Assembly.

[497] Alparslan Tevfik Fikret (1982) (Consultative Assembly, convention 142, 03.09.1982, session 2) *Danışma Meclisi Tutanak Dergisi* (Consultative Assembly Journal of Official Reports) Period I, 9, p. 496

means that although executive power of the state is separated within the parliament, it is united within the MGK. Hence, the MGK decisions are regarded as the decisions taken by the executive powers of the state in unity. In short, the MGK decisions gains executive character, as who sign them have executive powers.[498] The President has limited executive powers and no political accountability. However, the Prime Minister and the ministers have full executive power and they are politically accountable to the parliament. Within this perspective, the MGK decisions also become binding, as the Prime Minister and the ministers bear political accountability for their enforcement.[499] Political accountability that arises from the enforcement of the MGK decisions, on the other hand, falls on to the Prime Minister; because, he is the head of the Council of Ministers, and responsible from the execution of the general policy of the cabinet.[500] Therefore, if the Council of Ministers does not adapt the decisions of the MGK, the cabinet may fall by a parliamentary investigation. In that way, the MGK decisions bind the Council of Ministers politically, not legally. Put it otherwise, the Council of Ministers bears political (not legal) responsibility to approve the MGK decisions.

The essential function that civilians have in the MGK shall not mean that it is a civilian council. Just the opposite: the MGK is a military council mainly because of the relative autonomy of military members from civilian authorities. Aylin Güney and Petek Karatekelioğlu bring two issues pertaining to the problem of parliamentary control over Turkish military to fore.[501] First one is the status of the General Chief of the Staff (GCS). According to the parliamentary democratic criterion of the civilian control over the military, the GCS must have been depended and accountable to the

---

[498] Aldıkaçtı, Orhan (1982) (Consultative Assembly, convention 151,15.09.1982, session 1) *Danışma Meclisi Tutanak Dergisi* (Consultative Assembly Journal of Official Reports) Period I, 10, p. 368

[499] Alparslan, *Danışma Meclisi Tutanak Dergisi,* p. 495

[500] Alparslan, *Danışma Meclisi Tutanak Dergisi,* p. 496

[501] Güney, 2005, p. 444

Minister of National Defense. However, the GCS is made responsible directly to the Prime Minister. Hence, the Minister of National Defense had no power over the GCS. It means that the status of the GCS before the Prime Minister is equal to that of a minister; that of a *member* of the Council of Ministers. In addition, the military is institutionally autonomous in determining promotions, appointments (including the appointment of the GCS and the force commanders), the defense policy, weapons systems, production and procurement of arms, intelligence gathering and internal security.[502] Secondly, military is financially autonomous. How military spends its budget is out of the supervision of the parliament. Thirdly, military enjoy judicial autonomy, too. Military is subject to the Military Court of Cassation and the High Military Administrative Court of Appeals. The decisions of these courts are final for criminal and administrative cases respectively. It shows that there lies in Turkey an autonomous military jurisdiction parallel to the civilian jurisdiction. Considering all these, one can say that military members of the MGK confront civilian members as autonomous forces-with-arms.

Besides, the legal requisite (after 1983) of appointing the MGK Secretary General among high ranking serving soldiers, increases the military character of this Council. Furthermore, serving and retired members of the military dominate the MGK Undersecretariat. Undersecretariat has approximately 400 members of staff who are responsible for drawing up briefing documents and background papers.[503] Therefore, the military is effectively able to dictate what was discussed in the MGK through the Secretary General, working groups, briefings etc.[504]

---

[502] Cizre, 1997, p. 159

[503] Jenkins, Gareth (2007). "Continuity and Change: Prospects for Civil–Military Relations in Turkey" in *International Affairs,* Vol. 83, No. 2, p. 343

[504] Hale, 1994, p. 163

Looking at this picture, it is commonly accepted that MGK is a *military* semi-executive body. The MGK is the medium through which military intervenes into the state administration[505] and seek to establish a permanent voice in the internal and foreign policies of the Council of Ministers.[506] Similarly, Cizre says the MGK was the essential platform used by the military to establish its hegemony in politics, and to express its political preferences.[507] It is because members of the Council of Ministers and the soldiers do not discuss or exchange views in the MGK meetings. Actually, both military and civilian members of the MGK obey the chain of command: the ministers do not contradict the opinions of the Prime Minister and the force commanders never contradict the GCS.[508] What happens in the meetings is that, military members deliver their views unilaterally and declare the necessary measures to be taken. Therefore, military issues warnings to the Prime Minister and the ministers in the MGK. On the other hand, warnings of the military are followed to an extent that (with only a few exceptions) the Council of Ministers is in a position to execute the decisions of the military directly.[509] Hence, what İnsel calls as the "uninterrupted coup"[510] is nothing but the regular functioning of the MGK.

Within this framework, there is one point needs to be clarified in terms of the constitutional State and parliamentary democracy in Turkey. The MGK is a semi-

---

[505] Toktaş and Kurt, 2010, p. 401

[506] Hale, 2010, p. 81; Akça, İsmet (2006). "Ordu, Devlet ve Sınıflar: 27 Mayıs 1960 Darbesi Üzerinden Alternatif Bir Okuma Denemesi" in *Türkiye'de Ordu, Devlet ve Güvenlik Siyaseti.* Balta Paker, Evren; Akça, İsmet. (ed). İstanbul: Bilgi Üniversitesi Yayınları, p. 351

[507] Cizre, Ümit (1999). *Muktedirlerin Siyaseti: Merkez Sağ-Ordu-İslamcılık.* İstanbul: İletişim Yayınları, p. 69

[508] Jenkins, Gareth (2001). *Context and Circumstance: The Turkish Military and Politics.* Adelphi Paper 337, New York: IISS, p. 51; Özdemir, Hikmet (1989). *Rejim ve Asker,* İstanbul: Afa Yayınları, p. 104; Balcı, 1998, p. 84

[509] Çelik, 2008, p. 251

[510] İnsel, 1997

executive military organ. Hence, it is anti-parliamentary democratic; yet it exists within a parliamentary democracy. The MGK's power is illegitimate according to the substantial understanding of constitutionality, or according to *state of rights*. However, what is significant is that, it enjoys its illegitimate power through being a constitutional organ. There is no explanation for the power and status of the MGK in a parliamentary democracy other than the fact that it is endowed with this power and status by the Constitution itself. As a result, contradictory nature of constitutional State in Turkey reveals itself once again at this juncture. We have in Turkey a non-constitutional Constitutional state not only because it is ideological and biased; but also because it establishes a *non-parliamentary democratic* parliamentary democracy.

While discussing the rule of law, it is stated that, actually there is no guarantee of the substance of the laws. There is no legal sanction for the state when laws irrespective of basic rights and liberties are enacted. Rather, state is at legal liberty to legislate illiberal laws. As Schmitt puts it, even an illiberal law will be valid when it is valid and because it is valid. This is what we have in the case of the MGK: MGK is a substantially unconstitutional, anti-parliamentary democratic power. However, it is legal, because it is legal/constitutional, and there is no legal mechanism to sanction the unconstitutional, anti-democratic substance of constitutional norms. İbrahim Kaboğlu states that legality is required; because, without it, the rule of law cannot be installed. However, it is insufficient; because by legality only a *state of statutes* can be installed.[511] In the case of the MGK, the State in Turkey is evidently nothing more than a *state of statutes*.

[511] Kaboğlu, 2000, p.32

4.1.1 AKP's reformation of the MGK

The AKP made a series of legal reforms in order to curve the power of the MGK. It amended the law of the MGK in July 2003.[512] Accordingly, the MGK no longer *provides views,* but makes *advisory decisions* on issues pertaining to the determination, establishment, and enforcement of the national security policy; and provides its views with a view to ensuring the necessary coordination.[513] The other changes concern the MGK Secretary General. AKP's reforms divert the Secretary General from most of its executive powers and limit it essentially to secretarial duties. Accordingly, the provision which empowers the Secretary General to follow up the enforcement of the recommendations made by the MGK is amended.[514] The amended Article 13 now only states that the Secretary General conducts the secretariat services of the MGK, and carries out the duties given by the MGK and the relevant laws. In addition, Article 19 which gives the Secretary General the right of access to the documents of civilian public agencies or legal persons is abolished together with Article 9, which deems him/her capable of monitoring and reporting the aftermath of the MGK decisions rejected by the Council of Ministers.[515] In addition, the Prime Minister is given the authority to empower one of the deputy Prime Ministers to submit the MGK's *advisory decision*s and opinions to the Council of Ministers. This duty was formerly belonged to the Secretary General as well. From 2003 onwards, it is the deputy Prime Minister who secures the coordination and the enforcement of the MGK decisions in case they are approved by the Council of Ministers.[516]

---

[512] It was made by the Law no 4963, which was the Seventh EU harmonization package.

[513] Article 24 of the Law no 4963 amends Article 4 of the Law of the MGK (1983).

[514] Article 26 of the Law no 4963 amends Article 13 of the Law of the MGK (1983).

[515] Article 35 of the Law no 4963 abolishes Article 9 and Article 19 of the Law of the MGK (1983).

[516] Amended Article 4 of the Law of the MGK (1983).

In addition, the provision requiring the appointment of the Secretary General from among high ranking officers is amended. The amended Law of the MGK states that the Prime Minister proposes the nomination of the Secretary General, who henceforth can be a civilian. Accordingly, in August 2004 Yiğit Alpagon (a retired ambassador) was appointed as the first civilian MGK Secretary General. Also, secrecy clause on the Secretariat's activities is abolished. Accordingly, the regulation on the functions of the Secretariat shall be published in the Official Gazette.[517] Lastly, with an aim to keep the MGK away from politics, the frequency of the MGK meetings was reduced from once in a month to once in two months.[518]

The reformation of the MGK is coupled with some limitations of the autonomy of the military. In 2003, the Court of Accounts was authorized to supervise the accounts and transactions of the armed forces including the state properties, on the request of the Parliament. This reform was also confirmed by the Constitutional amendment of 2004, which amended the Article 160 that excluded the armed forces from the review of the Court of Accounts. Hence, at least theoretically, financial autonomy of military vis-à-vis civilian authorities is ended. Secondly, the AKP limits the jurisdiction of military courts by amending the Constitution in 2010. By amending Article 145, "offences committed in the military places" are removed from the jurisdiction of military courts. By 2010, military courts and military disciplinary courts have only jurisdiction to try military personnel for military offences connected to military services and duties. In addition, 1982 Constitution states that non-military personnel will be charged in military courts for military crimes and crimes committed in military places against military personal. This clause was repealed in 2010 as well. Accordingly, non-military personnel will not be tried in military courts, except war times. Again, in 1982 Constitution, military courts were in charge in times of war and

[517] Article 28 of the Law no 4963

[518] Article 25 of the Law no 4963

in times of martial law. By 2010 amendments, military courts are in charge only in times of war. Moreover, cases regarding crimes against the security of the state, constitutional order, and its functioning will be heard before the civil courts in any event. Therefore, the scope of military justice is narrowed both spatially and temporarily.

Additionally, Article 145 states that the organization of military judicial organs, their functions, matters related to the status of military judges, relations between military judges acting as military prosecutors and the office of commander under which they serve, are regulated by law in accordance with the principles of the independence of courts and the security of tenure of judges and *with the requirements of military service*. Similarly, Article 156 of the Constitution stated that the organization, the functioning of the Military High Court of Appeals, and disciplinary and personnel matters relating to the status of its members is regulated by law in accordance with the principles of the independence of the courts and the security of tenure of judges and *with the requirements of military service*. By 2010 amendments of Article 145 and Article 156, "requirements of military service" ceases to be a condition of the organization and functioning of military judicial organs, and Military High Court of Appeals.

Other amendments that the AKP made to limit military's judicial autonomy concern the judicial review of military decisions. By the amendment of Article 125 in 2010, the decisions of the Supreme Military Council in respect to all kinds of leaving, except its operations of promotion and retirement due to absence of position, is subject to judicial review. Secondly, Provisional Article 15 of 1982 Constitution is amended. Provisional Article 15 states that no allegation of criminal, financial or legal responsibility shall be made, nor shall an application be filed with a court for this purpose in respect of any decisions or measures whatsoever taken by the Council of National Security which will have exercised legislative and executive power on behalf

of the Turkish Nation from September 12, 1980 to the date of the formation of the Bureau of the Turkish Grand National Assembly. 2010 amendments repeal this article. With this repeal, military staff who conducted September 12, 1980 Coup can eventually be put on trial.

Leaving the weaknesses and strengths of these reforms aside, the reforms have indisputably achieved one thing: they brought the MGK under the control of Prime Minister Erdoğan to a great extent. Firstly, it is the prime minister who proposes the nomination of the MGK Secretary General. Secretary General, on the other hand, can still carry out national security investigations through the authorization of the civilian wing of the MGK, which practically means the Prime Minister. Hence, Secretary General is successfully come under Prime Minister's control in all aspects. Secondly, some of the competences of Secretary General are taken from him and given to deputy Prime Minister, whom the Prime Minister empowers. In addition, certain special funds that had been allocated to the MGK are transferred to the exclusive control of the Prime Minister.[519] In terms of the autonomy of the military, the GCS is still responsible to the Prime Minister. Interestingly, financial autonomy of military is also subordinated to Prime Minister as well. It is because, for the Court of Accounts to function, the Prime Minister shall lie down the relevant regulations. This step has not been taken yet[520] and waits for the decision of Prime Minister Erdoğan. All in all, the Council of Ministers has already been under the dominance of Prime Minister; the Council of Ministers has already been "Prime Minister's cabinet". After these reforms, the MGK too has come under Prime Minister's influence. Therefore, it can be said that a considerable degree of control have been established over the MGK.

---

[519] Bilgiç,Tuba Ünlü (2009). "The Military and Europeanization Reforms in Turkey" in *Middle Eastern Studies,* Vol. 45, No. 5, p. 805

[520] Misrahi, Frederic (2004). "The EU and the Civil Democratic Control of Armed Forces: An Analysis of Recent Developments in Turkey" in *Perspectives,* Vol. 22, p. 25

4.1.2 The executive power under AKP's control

Most of the time, Prime Minister's control over the MGK is celebrated as the democratization and civilianization of the political regime in Turkey. It is advocated that the power of the MGK decisions over the Prime Minister and the Council of Ministers is undermined.[521] The role of the MGK in the Turkish political regime is said to be converted into an advisory body.[522] Cizre also points out that the MGK doesn't have an effective influence over national policy any more.[523] This view intimates that military tutelage is over and the MGK is no longer a problem for Turkish democracy. Basing on these limitations that the AKP brought, İnsel advocates that the AKP government created a possibility of exit from authoritarian regime established after the military coup of September 12, 1980.[524] Looking at its relation with military, some analysts even claim that the AKP governments amount to a revolution in Turkish political life.[525] These commands imply that control of executive organs of state is sufficient to sustain a single, homogeneous decision in executive enforcement of laws. According to this view, the MGK and the Council of Ministers are united under the leadership of Prime Minister Erdoğan, so that they act as one and the same will. Hence, the MGK is believed to have transformed into the inorganic arm of civilian politics. In that way, both the AKP and the above cited commentators no

---

[521] Yazıcı, Serap (2009a). *Demokratikleşme Sürecinde Türkiye*. İstanbul: Bilgi Üniversitesi Yayınları, pp. 15-16

[522] Michaud-Emin, Linda (2007). "The Restructuring of the Military High Command in the Seventh Harmonization Package and its Ramifications for Civil–Military Relations in Turkey" in *Turkish Studies*, Vol.8, No.1, p. 28

[523] Cizre, Ümit (2008). "Justice and Development Party and the Military: Reacting the Past After Reforming It?" in *Secular and Islamic Politics in Turkey: The Making of the Justice and Development Party*. Cizre, Ümit (ed). London and New York: Routledge, p. 137

[524] İnsel, Ahmet (2003). "The AKP and Normalizing Democracy in Turkey", in *The South Atlantic Quarterly*, Vol. 102, No. 2/3, p. 293

[525] Yavuz, 2009, p. 15

longer expect any disagreement, fraction, and dispute in the enforcement of legal norms by the executive, let alone a second post-modern coup. Perhaps more importantly, the AKP and commentators as well, see no harm in the maintenance of the MGK under these conditions.

However, these commands are superficial. Contrary to above commands, neither the role of the MGK converted into an advisory body; nor its power decreased or it became a civilian body. Firstly, it is misleading to claim that the MGK is no longer a military body. It is commonly believed that what gives the MGK its military character is the numerical superiority of the soldiers in voting; because, Article 7 of the Law of the MGK (1983) stipulates that MGK takes its decisions by the majority of votes. Contrary to this common belief, issues are never put to the vote; no voting takes place in the MGK. Rather, decisions are taken through a process in which parties persuade each other and arrive at a "consensus".[526] The members of the MGK discuss the items on the meeting agenda and the president formulates a statement on which they all agree.[527] Afterwards, he asks if there is any objection, which rarely exists. For instance, between 1993 and 2000, when Süleyman Demirel was the President, there had been no objections in any of the MGK meetings.[528] As no voting takes place, the numerical composition of the MGK is almost irrelevant.[529] It is remarkable that, then GCS Hüseyin Kıvrıkoğlu stated that the decisions of the MGK were reached through consensus; therefore, even if the number of civilian members were increased to 100, it would not make any difference.[530] Ultimately, civilianization reforms of the AKP

---

[526] Coşkun, Orhan (2000). *Milli Güvenlik Kurulu ve Milli Güvenlik Kurulu Sekreterliği*, Unpublished PhD Thesis. Ankara: Hacettepe Üniversitesi, p. 223

[527] Jenkins, 2007, p. 343

[528] Çelik, 2008, p. 251

[529] Jenkins, 2001, p. 51

[530] 25.07.2000 *Milliyet*, www.milliyet.com.tr quoted in Bilgiç, 2009, p. 811

mean only a numerical change from "uniforms" to "suits"; however, it does not mark the end of the military character of the MGK.[531]

Secondly, there has been little change in the autonomy of the armed forces after reforms. First of all, the GCS is still responsible to the Prime Minister and hence, confronts him in the MGK in the status of a minister. Secondly, not all the decisions of the Supreme Military Council, but only a limited portion of it is put under judicial control;[532] which shows the selective attitude of the AKP towards military power. Thirdly, although the Court of Accounts was authorized in this direction, judicial supervision of the defense expenditures is still practically obsolete. Moreover, the budget of the Ministry of National Defense includes extra-budgetary funds. These funds are problematic because they are not subject to normal budgetary procedures. Therefore, they fall out of full parliamentary control.[533] Then, after the reforms of the AKP, military members of the MGK continue to confront the civilian half of the MGK as semi-independent forces-with-arms.

Apart from this military character, the MGK continues to have a right to voice its opinions on the *necessary* conditions with regard to the formulation, *establishment* and *enforcement* of the national security policy.[534] Therefore, the MGK reserves its executive competences both in the Constitution and in the law after amendments. No matter whether it "provides its views" or "advices", the MGK cannot be an advisory council as long as it reserves such powers pertaining to the execution of the above mentioned policies. Additionally, enforcement of the MGK decisions is still being followed up. Hence, the Council of Ministers is not yet free to accept the MGK

---

[531] Michaud-Emin, 2007, p.32

[532] Akça, 2010, p. 3

[533] Bilgiç,2009, p. 806

[534] Amended Article 118 of 1982 Constitution, and amended Article 4 of the Law of the MGK (1983).

decisions. The MGK can access to the documents of any civilian public agency or legal person, and work with them independently, either. Therefore, Kardaş states that in practice, there is no difference in the role and functions of the MGK after reforms.[535] The only change is that these powers are given to the Prime Minister's control.

Besides, there has been no revision in the definition of the term "national security". The definition of national security and hence the scope of the MGK decisions still includes "all political, social, cultural and economic interests" and "any kind of internal and external threats".[536] Within this respect, the topics discussed in the MGK meetings during the AKP governments (2002-2008) includes capital punishment, representation of Alevi citizens, missionary activities, GAP, Newroz celebrations, TV broadcasts, Turkey-EU relations, separatist terrorism, early general elections in Northern Cyprus, health services, corruption, economic policies, national strategy of science and technology, energy policy, higher education, internal migration and foreign policy.[537] The scope of the MGK agenda shows that the MGK still involves in daily politics of Turkey.

Contrary to the belief that the MGK come to an end, actually the AKP's reforms strengthened its status in the decision making. Membership of the Minister of Justice and Deputy Prime Minister to the MGK means that presence of the Council of Ministers is entrenched in the MGK. Hence, the MGK decisions are more and more becoming the decisions of the Council of Ministers. Consequently, their binding force and the political accountability that they reveal enhances as well. In contrast to the claims that the MGK's historical role has ended and it transformed into an advisory

---

[535] Kardaş, 2004, p. 304

[536] Amended Article 2 of the Law of the MGK (1983)

[537] Çelik, 2008, pp. 297-300; 305-327; 421-464

body, reforms approve its status as the second executive organ of the State in Turkey. Increasingly, political discussions are being made in the MGK with the invitation of other concerned ministers and persons. Kurdish problem was one of these points that never dropped from the agenda of the MGK, even after the reforms.

For instance, in December 2010, Selahattin Demirtaş, the leader of the Kurdish *Barış ve Demokrasi Partisi* (Peace and Democracy Party-BDP) stated that bilingualism is going to be promulgated in the Kurdish Southeast. President Abdullah Gül responded somehow positively by saying that although Turkish will remain the sole official language, "all the languages spoken by our citizens are our languages". However, the General Staff posted a memorandum on its website, announcing its deep concern that the founding ideology and principles of the Republic (which are the unitary state and the nation state) were being jeopardized by the introduction of bilingualism, and reiterated that the military remains committed to preservation of the Republic as it was originally conceived. In the MGK meeting on December 29, 2010, although chaired by President Gül, the MGK accepted the basic views of the General Staff and stated that no attempt to challenge Turkish nationalism of the State was going to be tolerated, solemnly underlining the allegiance to "one flag, one nation, one fatherland and one state".[538] Secondly, in the February 2012 meeting of the MGK, it is known that political lawsuit of the KCK (acclaimed urban establishment of the PKK) and legal investigations concerning the KCK were discussed. Hence, the MGK meetings and the preceding decisions on Kurdish politics show that Kurdish issue is managed by AKP government and military jointly. It also shows that Kurdish policy of the government is adjusted vis-à-vis the attitude of the military while military has adjusted itself vis-à-vis provably perdurable power of the AKP, and to new conditions.

[538] Karaveli, Halil M. (2011). "Seeking to Redesign Turkey, The AKP Resurrects State Tutelage" in *Turkey Analyst*, Vol. 4, No. 1, www.silkroadstudies.org

Another example to policy adjustment is the issue of education. In the aforementioned February 2012 meeting of the MGK, Minister of National Education, Undersecretary of National Intelligence Organization, Undersecretary of Ministry of Foreign Affairs and Undersecretary of Prime Ministry are invited all. Hence, the MGK meeting went beyond its usual members (and its purpose stated in the legal texts). There, education policy of the government and the improvement of education in the South East and East of Turkey are discussed beside other issues. Right after the MGK meeting, Minister of National Education announced that the government has revised its reform proposal concerning compulsory education system, which can be read as a direct result of the interference of military on education policy of the government.[539] All in all, what we see in the issue of the MGK is a convergence and cooperation between erstwhile foes; namely the AKP and the military, rather than a complete expulse of the latter from politics.[540]

Therefore, one must be cautious towards the claims of the AKP. The AKP asserts that military has defeated and executive power of the state has concentrated in its hands; military has been excluded from politics and it no longer has executive competences. Hence, the AKP's claims imply that *homogeneous* will formation under its control has been completed in the execution of legal norms through the civilianization of the MGK. However, the AKP does the opposite of what it says: it incorporates military to daily political decisions, and more importantly, it normalizes this incorporation. Dynamism of the MGK meetings proves that the MGK still actively involves in daily politics. It also signifies that the friction between military and civilian wills is still visible. As a result, *homogeneity* has not been achieved, and there still are two

---

[539] "Köşk'ten 4+4+4 Açıklaması", 28.02.2012 *Sabah,* www.sabah.com.tr. However, the president and a deputy prime minister denied that education reform proposal was discussed in the MGK.

[540] Karaveli, Halil M. (2008). "Turkish Military and Islamists: A Grand Reconciliation?" in *Turkey Analyst,* www.silkroadstudies.org; Karaveli, Halil M. (2009). "A Growing Convergence of Perceptions: The Turkish Military and the AKP " in *Turkey Analyst,* Vol. 2, No. 17, www.silkroadstudies.org

separate wills in the executive. In present state, rather than *homogeneity*, we can talk about cooperation or reconciliation between the AKP and the military.[541] Consequently, what the AKP actually does is to accommodate military's political role through creating cooperation. What is the MGK today? The MGK is the semi-military cabinet of the Prime Minister. What happens once in two months in the MGK meetings is that, the Prime Minister Erdoğan convenes the second and semi-military cabinet, discusses anything about the politics of Turkey, and secures the enforcement of its decisions afterwards.

One point must be underlined. Although *homogeneity* has not been achieved, the achieved cooperation so far has proved enough to run the executive power of the state in accord, as a single body and as a single will. The reasons of this cooperation include both intimidation and consent. First, the AKP secured the acquiescence of military through a series of indictments and trials. For instance, Ergenekon trial was launched in June 2007 against members of military and its investigation has resulted in over 300 detentions and 194 suspects being charged with membership of "Ergenekon terrorist organization".[542] Apart from this, allegations like *Kafes Planı* (Cage Plan) published in the media in November 2009 and resulted in mass arrests of retired or serving military members. The same is also true for *Balyoz* (Sledgehammer) Case that began in 2010. Therefore, the real means that made the army acquiesce to Islamic politics of the AKP are trials and arrests. If military's political power within state is *truly* restricted, and if it is truly put under some control of the AKP, these have been done *not* in the MGK, but in the *civilian courts.* Only in company with military's judicial subordination, can the cooperation among the AKP and the military in the MGK meetings be understood.

---

[541] Karaveli, 2009

[542] Jenkins, Gareth (2009). "Defense Against Documents: The Turkish Military's Rearguard Action" in *Turkey Analyst*, Vol. 2, No. 21, www.silkroadstudies.org

In turn, the AKP acknowledged military as its partner and acquiesced to its semi-autonomy both from the government and the rule of law. Accordingly, the AKP shuts its eyes to military's wrong doings. Hence, military continues to violate the rule of law. For example, the retired general Altay Tokat confessed to having someone throw a bomb near a housing complex of prosecutors and judges in Southeastern Anatolia in July 2006, in order to "get them in line". In September 2006, Military Prosecutor of the Chief of General Staff opened a case against him on "making statements without authorization". Yet, the Military Prosecutor's Office decided not to press charges. Similarly, Administrative Court acquitted Tokat on October 31, 2006 by stating that "all components of the crime were not present."[543] A second case has been opened against Tokat about throwing bombs. However, he was once again acquitted on November 15, 2007 by Prosecutor's Office of 2nd Criminal Court of First Instance of İstanbul due to lack of evidence.[544] In another example, a specialized sergeant took random shots at a demonstrating crowd in Siirt and killed a passerby. In its decision of March 13, 2009, the Court of Appeal acquitted the sergeant based on the 'special conditions' in the region.[545]

The most recent example, however, is what is commonly known as "Uludere Massacre". In this event, a group of 40 Kurdish villagers of Turkish nationality crossing Iraqi border were fired by Turkish military's jets on December 28, 2011, mistaken as PKK militants. 34 of them were killed. It was announced as a mistake; however, no military member held responsible and charged for this mistake. The General Chief of Staff, the Ministry of National Defense and the National Intelligence

---

[543] Coşkun, Vahap (2010a). "Turkey's Illiberal Judiciary: Cases and Decisions" in *Insight Turkey*, Vol. 12, No. 4, p. 64

[544] Oran, Baskın (October 2007) "Altay Tokat Paşa Olayının Şimdiki Öyküsü", *Radikal*, www.radikal.com.tr

[545] Coşkun, 2010a, p. 63

Service did not provide the asked documents and did not respond to inquiries. Therefore, no investigation has been finalized within a year.[546] Moreover, the Prime Minister Erdoğan defended military by saying that "our Armed Forces took the necessary step. That region is a terror region".[547] Military's unaccountable stance is an overt violation of the rule of law. However, Erdoğan's support of military's violation of the rule of law is tragic. It means that the AKP keeps military out of the rule of law; the AKP permits military's arbitrary power of its own volition.

Setting aside its reasons, there are important implications of the cooperation between military and the AKP. Firstly, the MGK is an anti-parliamentary, anti-democratic military organ. The MGK has no parliamentary democratic or constitutional legitimacy; it only enjoys legality. Hence, it shall be abolished all together. However, the AKP satisfies with putting the MGK under the command of the Prime Minister. By subordinating an anti-parliamentary democratic military semi-executive power to civilian Prime Minister, the AKP tries to cover one of the fundamental problems of constitutional State in Turkey. Rather than abolishing anti-parliamentary democratic laws and bodies, it changes the individuals who head these bodies and enforce these laws. However, putting the MGK under the control of the civilians or letting civilians to decide in it does not make the MGK more democratic or does not make it function more democratically. It only makes the MGK an anti-parliamentary democratic organ functioning anti-parliamentary democratically in the hands of the civilians. By doing so, the AKP exacerbates *state of statutes* character of the State in Turkey.

In addition, accommodation of military power changes the character of AKP's power. Besides controlling the parliament, the AKP is now using an anti-parliamentary

---

[546] "HRW: Uludere'de Adalet Gecikiyor", 2712.2012 *BBC*, www.bbc.uk/turkce

[547] "Military Took Needed Steps in Uludere: Turkish PM", 23.05.2012 *Hürriyet*, www.hurriyetdailynews.com

democratic organ. Existence of the MGK also means that AKP can have the full exercise of executive power of the State *necessarily* through being an anti-democratic power. Put it differently, in the presence of a military organ having sovereign competences, the AKP can exercise full control of the executive power of state only by becoming an anti-parliamentary democratic power. Hence, in the case of the AKP power, we have a semi-anti-parliamentary democratic politics before us.

Consequently, during its governments, the AKP could achieve cooperation or reconciliation with military in executive decision making. A complete *homogeneity* under its control in executive enforcement of laws has not been achieved yet. It is mainly because, the MGK still exists. It still is a military body having a degree of autonomy from the government; it still has executive competences; and it still enjoys both *de jure* and *de facto* immunity from the rule of law. As mentioned before, democratic way to achieve this *homogeneity* is to abolish the MGK. However, the AKP rejected to take this democratic step and preferred to take the advantage of this anti-democratic body. Nevertheless, there is another way of creating *homogeneity* between the government and the MGK. This second way involves military's raising of soldiers whose ideals are in line with the AKP or political Islam. If the soldiers accept Islamic ideals, the military and the AKP will be able to create a single culture, single mentality and understanding. In that way, an Islamic party like the AKP and the military will behave identical before social forces and occurrences, and arrive at same decisions, although they will remain institutionally separated. Then, *homogeneity* in decision making in the executive power of state will be installed (in the presence of the MGK) when military and Islamic party will be bound by the common tie of Islam. The AKP has taken the first step to realize this second way of *homogeneity*, too. Remember that with the amendment of Article 125 of the Constitution in 2010, the decisions of the Supreme Military Council are made subject to judicial review (except its operations of promotion and retirement due to absence of position). This is a step to avert the dismissals of soldiers due to their "Islamic reactionary activities". Hence,

it can be deemed as the beginning of Islamization of the military. However, it needs a considerable time to see the fruits of this change.

4.2 AKP's Relation with the Judicial Power of the State

Neither legislation nor executive, but the judiciary has been the focal point of AKP's reforms within the state. Judicial power of the state has undergone reformation four times within only two years through what is commonly known as "judicial reform packages". The first judicial reform was made on March 31, 2011 by Law No 6217, which was an omnibus bill. By this omnibus bill, 16 laws in total were amended including Turkish Criminal Code, Code of Criminal Procedure and Law of Military Service. Second judicial reform was made on August 26, 2011 this time by a decree No 650. As seen, both of the two reforms are not made by regular statutes. In other to bypass parliamentary opposition, the methods of omnibus bill and decree, which is a direct will and decision of the executive power declining any parliamentary intervention, are preferred. Third judicial reform, by the way, came on July 2, 2012 by Law No 6352. Lastly, fourth judicial reform was made by Law No 6459 on April 2013. Through these packages, the AKP enacts new norms especially concerning criminal justice. Hence, it dictates jurists what they should enforce and entrenches its justice system. In that way, that's to say, by using its absolutist executive power in the government and majoritarian legislative power in the parliament, the AKP attempts to control adjudication.

However, AKP's legal reforms do not content with enacting new norms; more importantly, the AKP reforms those whom enforce or those whom decide on the meaning of these norms in the judiciary. Seeing how the same norms could be enforced differently in different circumstances, the AKP puts utmost importance to adjudication. Actually, the AKP attempts to control judicial enforcement of legal norms by re-structuring judicial community through the appointment of prosecutors

and judges in line with its world view.[548] On the one hand, while judges come under the control of the AKP, interpretation of laws in general, beside secularism, come under its control, too. On the other hand, the strategy of the AKP to reform who enforces legal norms rather than (or beside) norms themselves implies that it chooses to abuse non-constitutional dimension of constitutional State. Through this choice, the AKP gains the opportunity to bring judicature under its control without abolishing parliamentary principle of independence of judiciary, and falling into illegality.

The AKP is for long aware of how critical are the judiciary and adjudication. However, it has got its eyes on high courts. It is mainly because, the Constitutional Court, the Court of Cassation (which is mainly responsible for the review of criminal cases) and the Council of State (which handles appeals related to administrative cases) are overtly opposing to the AKP especially on legislations pertaining wearing headscarf in public sector and universities. Yet, the incident of İlhan Cihaner in 2007 showed that not only high courts, but also first instance courts (and actually adjudication in its pure form) can be critical for AKP's rule. In 2007, İlhan Cihaner was appointed as the Public Prosecutor of Erzincan. He began targeting the activities of Islamic communities in the province, such as *İsmailağa* and Fethullah Gülen community. During the course of his investigation, Cihaner uncovered evidence that members of these communities were involved in a number of criminal activities, such as running illegal Quran courses and fixing state contracts. The Ministry of Justice attempted to persuade Cihaner to drop his investigation. When he refused to do so, he was stripped of his powers and the case was transferred to Osman Şanal, the Public Prosecutor of Erzurum. However, the HSYK retaliated AKP's move. Reacting to Cihaner's dismissal, the HSYK removed Osman Şanal and three other public

[548] Jenkins, Gareth (2010). "Turkey's Constitutional Amendments: One Step Forward, Two Steps Back? " in *Turkey Analyst*, Vol. 3, No. 6, www.silkroadstudies.org

prosecutors from their posts, whom were perceived of being sympathetic to the AKP. They were stripped all of their powers, too.

İlhan Cihaner case and retaliation of the HSYK was a turning point for the AKP. It reminded the AKP of the importance of controlling judges and prosecutors working even in the first instance courts. Afterwards, the AKP took steps to retaliate back the HSYK, and control it through making this Council more dependent on the government.

4.2.1 AKP's reformation of the HSYK

The basic objective of the rule of law is to prevent arbitrary power of the State. With this aim, state power is subjected to, and limited by the law. Yet, the rule of law does not operate automatically. Just like the relation between norms and their enforcement, the rule of law is realized when enforced by a concrete power. Within this framework, it is the duty of judiciary to check whether state power acts in accordance with the rule of law; it is the judiciary that controls the activities of all legislative, executive and administrative organs. Hence, it is the judiciary that realizes the rule of law. Article 138 of 1982 Constitution stresses this duty of the judiciary by stating that legislative and executive organs and the administration shall comply with court decisions. However, for judiciary to execute its supervision adequately, it should be independent from all of the organs that it supervises. On the one hand, independence of judiciary expresses the independence of judges. Muharrem Özen expresses that actually, "independence" is not the feature of the office, but of the subject.[549] In this direction, Article 138 underlines that judges (and not the courts) shall be independent in the discharge of their duties. On the other hand, it is mainly the executive organs, against

[549] Özen, Muharrem (2009). "Yargı Bağımsızlığını Sağlamaya Yönelik Güvenceler ve Bağımsızlığı Zedeleyen Düzenleme ve Uygulamalar" in *Norm Koyma ve Hüküm Verme.* Kırca, Çiğdem; Uygur, Gülriz; Akın, Levent (ed.) Ankara: Ankara Üniversitesi Yayınları No. 279, pp.278-279

whom the independence of judiciary is tried to be protected.[550] In combination of these two factors, independence of judiciary first and foremost means the independence of judges from the government and the president. This independence is provided by certain security measures. For instance, no organ, authority, office or individual may give orders, recommendations, or instructions to judges relating to the exercise of judicial power (Article 138). In addition, judges and prosecutors shall not be dismissed or retired before the age prescribed by the Constitution; nor shall they be deprived of their salaries, allowances or other rights relating to their status (Article 139). Hence assignments, reassignments and salaries of the judges, which are called security tenure of the judges, are not left to the discretion of the executive power as a measure to provide independence of judiciary.[551]

The HSYK is the responsible body from the security tenure of the judges. It also regulates appointments, promotions, personal affairs of judges and prosecutors, and disciplinary procedures in the judicial system. Therefore, for independence of the judiciary to be sustained within the parameters of security tenure of the judges that the Constitution envisions, the HSYK shall be completely independent of the executive powers. Contradictorily, the same Constitution that defines and demands independence of judiciary and provides security tenure of judges, binds the HSYK to the executive power of the state through making it considerably dependent to the Ministry of Justice; so much so that, judges and prosecutors cannot be said independent in any manner before the coming of the AKP to power.

---

[550] Beder, Bülent; Altundiş, Mehmet (2009). "Yasama ve Yürütme Fonksiyonlarının Yargı Bağımsızlığına Müdahalesi" in *Yasama Dergisi*, No: 13, p. 96

[551] Bilir, Faruk (2012). "Demokratik Meşruluk, Yargı Bağımsızlığı ve Yargı Tarafsızlığı Bağlamında Yargı Organının Yeniden Yapılanması" in *Demokratik Anayasa: Görüşler ve Öneriler*. Göktepe, Ece; Çelebi, Aykut (ed.). İstanbul: Metis Yayınları, pp. 372-373

According to Article 159 of the Constitution, the Minister of Justice is the chairman of the HSYK meetings and the Undersecretary of the Minister of Justice is the ex-officio member of the Council. Therefore, the agenda of the HSYK is to a great extent determined by the Ministry of Justice. In addition, the right of supervision of the Council belongs to the Ministry as well. Accordingly, supervision of judges and prosecutors with regard to performance of their duties, investigation into whether they have committed offences in connection with or in the course of their duties, whether their behavior and attitude are in conformity with their status and duties are made by judiciary inspectors *with the permission* of the Ministry of Justice. Moreover, Minister of justice has veto power over any disciplinary proceeding against a judge or a prosecutor.[552] Apart from these, the HSYK does not have secretariat of its own to run its administrative affairs. The secretariat of ministry of justice does this job for the HSYK. Neither the HSYK has an independent budget. Financial sources of the Council are at the discretion of the Ministry.[553] Even so, the dependence of Council to executive is not restricted to these direct linkages to the government. Through the appointment of members of the Council (other than minister of justice and its undersecretary) by the President, the HSYK thoroughly comes under the domination of executive power of the State.

Institutional dependence of judges and prosecutors to executive power is coupled with ambiguous norms. For instance, Article 68 of the Law of Judges and Prosecutors regulates the promotions of judges and prosecutors. According to this article, impression of bribery or corruption is a cause of displacement *even if the evidence has not been obtained*. In addition, Article 69 of the same law states that, even though it does not constitute a criminal offense and does not require conviction, the action

---

[552] Jenkins, Gareth (2010a). "Changing of the Guard: Judicial Reforms Reinforce Concerns About the AKP's Increasing Authoritarianism" in *Turkey Analyst*, Vol. 3, No. 19, www.silkroadstudies.org

[553] *Anayasa Reformu Aracılığı ile Türkiye'nin Denge ve Denetleme Sisteminin Güçlendirilmesi* (February 2012). İstanbul Politika Merkezi, p. 28, www.ipc.sabanciuniv.edu.tr

which necessitates the enforcement of disciplinary penalty may be liable to dismissal *if it is seen* debasing the honor and dignity of the profession. It can be seen from the above examples that, articles regulating the profession of judges and prosecutors are ambiguous and capable to give way to discretionary decisions. Therefore, they put pressure on judges and prosecutors not to adjudge contrary to the interests of the government.

Institutional dependence of the HSYK to executive power of the state, yet especially to the government, and ambiguity of the norms regulating the profession and carriers of judges and prosecutors show that as of 2002, independence of judiciary in Turkey was a deception. Therefore, it was not so much work for the AKP to influence the HSYK or increase the dependence of the Council to its government. Once again, the AKP did not need to violate constitutional State. As it was already a non-constitutional constitutional State, it was sufficient for it to use non-constitutional dimension of it. In terms of dependence of judiciary to the executive, the AKP can justly be charged only by increasing and strengthening this dependence.

In this regard, the AKP amended the Law of Judges and Prosecutors in December 2007. According to the former regulation, prospective judges and prosecutors attended to an interview after a written exam. This interview, on the other hand, was conducted by the HSYK. After the amendment of 2007, the duty to make interview is assigned to the Ministry of Justice. It means that after the amendment of the AKP, the decision who will be judges and prosecutors belongs to the government through the Ministry of Justice.[554] In that way, the procedure of entering the profession started to hinder the independence of judiciary from the very beginning.

---

[554] Basa, Necdet (2012). "Yargı Bağımsızlığı, Uluslararası Bazı Belgeler ve Örnekler" in *Ankara Barosu Uluslararası Hukuk Kurultayı*. Kocaoğlu, Sinan (ed.). Ankara Barosu, pp. 18-19

However, it was the Constitutional amendments of September 12, 2010 that completely transformed the HSYK[555]. According to former regulation, the HSYK comprised of the Minister of Justice, the Undersecretary of the Ministry of Justice, 5 regular and 5 substitute members. Members of the Council were appointed by the President from among candidates nominated by the Court of Cassation and the Council of State. 2010 amendments, on the other hand, increase the number of members of the HSYK to 22 regular and 12 substitute members. Accordingly, the President elects 4 regular members from among practicing lawyers and university professors in the fields of law. 3 regular and 3 substitute members are elected by the Court of Cassation from among the Board of Court of Cassation. 2 regular and 2 substitute members are elected by the Council of State from among the Board of Council of State. 1 regular and 1 substitute member are elected by the Justice Academy from among its own members. 7 regular and 4 substitute members are elected by juridical judges and public prosecutors from among juridical judges and public prosecutors of the first degree. 3 regular and 2 substitute members are elected by administrative judges and public prosecutors from among administrative judges and public prosecutors of the first degree.

At the first glance, 2010 judicial reform of the AKP seems to distribute the competence of determining HSYK membership among variety of state institutions. Hence, it seems to break the monopoly of the President over HSYK membership. However, this is an illusion. The new arrangements do not decrease the power of the President on the HSYK. Rather, what they do is to add new members who will be elected by other institutions beside those appointed by the president. More

[555] The Constitutional amendments have been realized with the new Law on the HSYK No. 6087 that was accepted on December 2010.

importantly, 2010 amendments grant the President an absolute freedom in appointing 4 members; a kind of freedom which may lapse into arbitrary power.[556]

Secondly, the position and the status of the Minister of Justice and the Undersecretary of the Ministry of Justice do not change in the amendment. Hence, the Minister is still the chairman of the HSYK and has veto power, and the undersecretary is still the ex-officio member of the HSYK. In addition to these competences of the Ministry, supervision of judges and prosecutors is made bounded absolutely to the Ministry of Justice by the 2010 judicial reform of the AKP. Before the amendment, the Minister of Justice might request the investigation or inquiry of judges and prosecutors to be conducted by another judge or public prosecutor who is senior to the judge or public prosecutor to be investigated (Article 144 of the Constitution). Hence, there was not an absolute overlap between investigation of judges and prosecutors and the ministry. However, with 2010 Constitutional amendments, inquiry and investigations will only be made by inspectors of Ministry of Justice. So, even this minor laxity of 1982 Constitution is not permitted by the AKP; and the HSYK is completely bounded to the Ministry in terms of the investigation of judges and prosecutors. Therefore, 2010 judicial reform of the AKP does not ameliorate the dependence of judiciary to executive. On the contrary, the influence of both the government and the President over judiciary enhances;[557] so much so that, for Köksal Bayraktar, this reform bears the danger of abolishing the independence of judiciary all together.[558]

---

[556] Kumkumoğlu, Kemal; Kumkumoğlu, Ahmet Kemal (2010). "HSYK'nın 1961 ve 1982 Anayasaları'ndaki Durumu" in *2010 Anayasa Değişiklikleri Çerçevesinde Yargı Bağımsızlığı*. Öztürk, Bahri; İlkiz, Fikret; Kocasakal, Ümit (ed). Ankara: Seçkin Yayıncılık, p.107

[557] Kumkumoğlu, 2010, p. 108

[558] Bayraktar, Köksal (2010). "Genel Değerlendirme" in *2010 Anayasa Değişiklikleri Çerçevesinde Yargı Bağımsızlığı*. Bahri Öztürk; İlkiz, Fikret; Kocasakal, Ümit (ed.). Ankara: Seçkin Yayıncılık, p.160

Additionally, Constitutional amendments of 2010 change the heading of the Article 144. While it was originally "Supervision of Judges and Public Prosecutors", the AKP amended it as "Supervision of Justice Services". The term "justice services" is also used in the article in place of "judges". This change reflects the outlook of the AKP to the judiciary. Judges and prosecutors are no longer seen as the executors of a sovereign state power, like members of the government, the president, and deputies. They, and the judicial state power in total, are scaled down to a branch of "public service" depending on the policies of the government, just like health service, education service, and telecommunication service. Actually, 1982 Constitution had already reduced judiciary almost to an administrative organ. In that respect, 2010 amendments of the AKP strengthened this stance.

Another novelty of 2010 judicial reform concerns the judicial overview of the decisions of the HSYK. Before the amendment, there was no recourse to any judicial remedy against the decisions of the HSYK. This provision, however, was against the supremacy of the rule of law and should have been amended or repealed. 2010 amendments, on the other hand, made Council's decisions regarding the prohibition of the pursuit of the profession subject to judicial review. It is for sure a positive development; however, it is partial. What needs to be done underlined is that, all decisions of the HSYK shall be subject to judicial review.[559] Therefore, 2010 judicial reform does not completely repeal this restriction of the Constitution; but only brings an exception.

Last point concerns the election process of HSYK members. When the reform is analyzed in detail, it can be seen that election process is designed by the AKP in such a way that, majority gets everything while minority has no chance of representation in

[559] Kumkumoğlu, 2010, p. 108

the HSYK.[560] Moreover, Provisional Article 19 which is added to the Constitution by 2010 amendments states that members of the Council will be determined according to the new regulation within 30 days after the promulgation of Constitutional reforms. The point is that, this provision could be regulated by law, yet it was made a Constitutional norm by the AKP. Remember that 2010 amendments are voted in the referendum as a whole. It means that a single vote of "yes" or "no" was given to all amendments without looking at the content of each separately. Then, putting such a norm among the others eased the task of the AKP in the enforcement of such new regulations. Otherwise, this single law concerning the timetable of selection of HSYK members should have been brought to the parliament and got its approval. It also means that this law could have been referred to the Constitutional Court by opposition parties even it was accepted by the parliament.[561] However, making such a regulation a Constitutional norm was safer for the AKP. In that way, the AKP by-passed the parliament, and parliamentary opposition was disposed.

Once again, in the original text of the Amending Act No 5982 of 2010, it was stated that "each member has a single vote" in the nomination of the candidates to the HSYK. This clause was repealed by the Constitutional Court on July 2010. Nevertheless, what was its meaning? What the AKP intended? It is not surprising that not everyone can agree on the same person in the elections. When the election involves more than one round, voters have the chance to see whether their candidate can win. If not, they gravitate toward their second preference. Thus, elected person may not be everyone's first choice, yet he/she will have taken the approval of majority at the end. Hence, the election will reflect the majority opinion. However, according to 2010 amendments, election involves only one round. It means that election will not

---

[560] *Türkiye 2011 Yılı İlerleme Raporu* (October 2011). Avrupa Komisyonu, Brüksel, SEC 1201, p. 84

[561] Akartürk, Ekrem Ali (2010). "Son Anayasa Değişiklileri ve Siyasi Partilerin Kapatılması" in *2010 Anayasa Değişiklikleri Çerçevesinde Yargı Bağımsızlığı*. Öztürk, Bahri; İlkiz, Fikret; Kocasakal, Ümit (ed.). Ankara: Seçkin Yayıncılık, p.82

be conducted separately for each proposed candidate. Within this framework, it was stated that each member has a single vote. The limitation for each voter to vote only once would be a disadvantage; because, it would allow the selection of a candidate who was supported by a minority. A candidate, for instance, gaining only 10 percent of the votes would be appointed by the President.[562] Therefore, the objective of the clause was to hinder the representation of majority will in the selection of the candidates for the HSYK.[563]

Reformed HSYK held its first election on October 17, 2010. A total of 207 judges and prosecutors put themselves forward as candidates for election as one of the ten full and six reserve members of the HSYK. However, in the weeks leading up to the vote, the Ministry of Justice heavily intervened to elections. The Ministry distributed a list of its 16 preferred candidates. Bureaucrats of the Ministry visited courthouses and organized meetings; hence, they propagated in favor of these preferred candidates throughout the country.[564] When the election was held, 16 seats were completely filled by the Ministry's 16 preferred candidates. Among these 16 candidates, there were İbrahim Okur, Celal Avar and Harun Kodalak. İbrahim Okur was the Deputy Undersecretary of the Ministry of Justice, who has been one of the driving forces behind Ergenekon investigation. Celal Avar was who brought criminal charges against the administrators of a website about atheism, demanding lengthy prison sentences on the grounds that the website was denigrating "religious values". Harun Kodalak was the prosecutor appointed to oversee *Deniz Feneri* investigation, which (despite the

---

[562] Akça, İsmet (2010). "AKP, Anayasa Değişikliği Referandumu ve Sol: "Yetmez Ama Evet"in Açmazları" in *Mesele*, Vol. 45, p. 4

[563] Taner, Fahri Gökçen (2010). "Cumhurbaşkanı Tarafından Anayasa Mahkemesi'ne Atanmak Üzere Yargıtay ve Danıştay Genel Kurulları Tarafından Teklif Edilecek Adayların Seçim Usulünde Yapılmak İstenilen Değişiklik" in *2010 Anayasa Değişiklikleri Çerçevesinde Yargı Bağımsızlığı*. Öztürk, Bahri; İlkiz, Fikret; Kocasakal, Ümit (ed.). Ankara: Seçkin Yayıncılık, p.76

[564] *Referandumdan Sonra HSYK: HSYK'nın Yeni Yapısı ve İşleyişine Dair Yuvarlak Masa Toplantısı* (September 2012). TESEV Yayınları: İstanbul, p. 18

irrefutable evidence of wrongdoing by individuals close to the AKP leadership) characterized by procrastination and inertia. The other members of the HSYK were appointed by the President Abdullah Gül on October 22, 2010. All four of the appointed members were known personally loyal to him. Two were from Gül's home town of Kayseri. For instance, Ali Aydın was the head of the Kayseri Bar Association and the former deputy head of the Islamic human rights association *MazlumDer*.[565]

After the reformation, judges and prosecutors of political cases were one by one unseated by the HSYK. Judge Oktay Kuban, who released 19 people during the investigation process of Sledgehammer Case including retired General Çetin Doğan and retired lieutenant General Engin Alan, was unseated in January 2011. The judge of Ergenekon Case Köksal Şengün, who voted in favor of the release of detainees, and lodged statements of opposition to the decisions of other judges, was unseated in July 2011. Deputy Chief Public Prosecutor of Deniz Feneri investigation, Nuri Yiğit, was unseated by the HSYK in August 2011. Specially Authorized Prosecutor of the KCK case Sadrettin Sarıkaya, who called five officers of National Intelligence Organization including Undersecretary Hakan Fidan to testify, and then issued a warrant for their arrest when they did not attend, was unseated in February 2012. Prosecutor of Ergenekon Case Cihan Kansız, Prosecutor of Balyoz Case Savaş Kırbaş, Judge of Hrant Dink Case Rüstem Eryılmaz were unseated in June 2012. Judge of the KCK case being ruled in Diyarbakır, Menderes Yılmaz, and the Judge of "Football Match-fixing" Case Mehmet Berk were unseated. In total, by June 2012 Decree of the HSYK, 2.335 judges and prosecutors were unseated.[566]

What happened to Osman Şanal? Remember that he and three other prosecutors had been stripped of all their powers by the old HSYK as a reaction to AKP's direct

---

[565] Jenkins, 2010a

[566] "Şike Savcısının Özel Yetkileri Alındı", 13.07.2012 *Milliyet*, www.milliyet.com.tr

interference to judiciary. However, in April 2011, reformed HSYK reinstated these four prosecutors. Moreover, Osman Şanal was assigned as a Specially Authorized Prosecutor; hence he is, in a way, promoted. The world view of Şanal and the way that he enforces the rule of law revealed itself very soon. Advocate Canan Arın, a women's rights activist, criticized child marriages and gave the examples of prophet of Islam and the President Abdullah Gül in one of her speeches, who married with her wife while she was only 14. Very soon, she was accused of "insulting religion" and "defaming the President". It was Osman Şanal, who sued Arın and wanted her imprisonment for five years.[567]

While concluding, the AKP argued that reformation of the HSYK would strengthen its political independence. However, the immediate functioning of the HSYK indicates that AKP's reforms did not make the Council politically independent and did not increase its accountability.[568] Rather, it turned out to be the opposite. What the AKP did by the reforms was to change the political/ideological inclination of the HSYK by changing the personal composition of it. With these changes, judges and prosecutors whose views cohere with AKP's general policy were appointed: the HSYK unseated those whom were in clash with the AKP, and reseated those whom were in line with it. Therefore, judicial reform of the AKP was an attempt to pack the courts with its own appointees.[569] As the case of Arın shows, in the hand of *new* jurists, *old* Constitutional norm of "freedom of opinion and speech" and the rule of law are stated to be enforced in line with AKP's general policy.

---

[567] "Peygamber ve Cumhurbaşkanı'na Hakaret Davası Başladı", 12.12.2012 *Radikal*, www.radikal.com.tr

[568] Dubay, Carolyn A. (Fall 2010). "The 2010 Reforms to Turkey's Constitutional Court: A Rule of Law Review" in *International Judicial Monitor*, www.judicialmonitor.org

[569] Jenkins, Gareth (2011). "From Politicization to Monopolization? The AKP's New Judicial Reforms" in *Turkey Analyst*, Vol. 4, No. 3, www.silkroadstudies.org

4.2.2 AKP's reformation of the high courts

If we should single out an institution within state extremely significant for the AKP, this would be the Constitutional Court. It is not only because it came close to outlaw the AKP, but also it continuously tried to block AKP's legislative power. Perhaps, best known cases were "367" decision of the Constitutional Court in April 2007 and headscarf case of 2008. In its "367" decision, the Constitutional Court interpreted Article 102 of the Constitution and decided to suspend the execution of presidential elections, which was proceeding in the direction of Gül's victory. In this decision, the Constitutional Court used its authority over parliamentary decisions, which actually were not subject to constitutional review. In its "headscarf" decision, however, the Constitutional Court nullified the amendment of Constitutional Articles 10 and 42, which were made with an aim to lift the ban on wearing headscarves in higher education. In this decision, on the other hand, the Constitutional Court examined the constitutional amendments in respect of their substance, where it was permitted to do so only with regard to their form. Therefore, in both of these decisions, the Constitutional Court is said to exceed its authority.[570]

However, other than these specific cases, the Constitutional Court actively involved in parliamentary politics during AKP governments as well. When we look at the statistics, we see a sharp increase in the number of referrals to the Constitutional Court after AKP's coming to power in November 2002. Accordingly, between 1984 and 2002, the Court received an average of 14 new cases per year. Yet, between 2002 and 2009, this number increased to 24 when the Court received 170 new cases for review. The Constitutional Court annulled 68 per cent of the AKP's legislative agenda in this period. Nevertheless, the number of referrals increased dramatically in AKP's second

[570] See Özbudun, Ergun (2007a). "Türk Anayasa Mahkemesinin Yargısal Aktivizmi ve Siyasal Elitlerin Tepkisi" in *Ankara Üniversitesi Siyasal Bilimler Fakültesi Dergisi*, Vol. 62, No. 3, p. 266 and Yazıcı, 2009, p.199

term of power after July 2007. The opposition sent more than a quarter of the acts of the parliament to the Constitutional Court.[571] All in all, there were substantial reasons for the AKP's reformation of the Constitutional Court.

In September 2010 Constitutional amendments, the AKP succeeded to change the Constitutional Court fundamentally.[572] Fahri Gökçen Taner goes as far as to say that the only thing left unchanged was the name of the Court.[573] Through the amendment of Article 146 and 147 of the Constitution, the composition of the Constitutional Court and the election process of its members were thoroughly transformed. Accordingly, the number of Constitutional Court members was increased from 11 to 17 and substitute membership (which was 4 originally) was repealed.

In the former text of 1982 Constitution, there were 15 members of the Court and all of them were appointed by the President either among the candidates nominated by the high courts (Court of Cassation, Council of State, Military Court of Cassation, the Supreme Military Administrative Court, Court of Accounts), or among the candidates nominated by the Council of Higher Education, or on his own discretion among lawyers and top executives. In 2010 amendments of Article 146, appointment of the members seems to be distributed between the President and the parliament, at least at the first sight. Accordingly, the president elect 4 members of the Constitutional Court on his own discretion among senior administrative officers, lawyers, judges, and public prosecutors of the first degree, and reporting judges of the Constitutional Court. Three constitutional judges shall be elected by the parliament; 2 Court members from among the candidates nominated by the Court of Accounts, and one member from

---

[571] Shambayati, Hootan; Sütçü, Güliz (2012). "The Turkish Constitutional Court and the Justice and Development Party (2002–09)" in *Middle Eastern Studies*, Vol. 48, No. 1, pp. 113, 114

[572] Constitutional amendments were enforced by the Law on the Institution and Proceedings of Constitutional Court approved by the parliament on March 30, 2011

[573] Taner, 2010, p.73

among the candidates nominated by the presidents of bar associations. There are left 10 members of the Court. How will the rest of the Court members be elected? The rest 10 is also elected by the President indirectly. Accordingly, the president elects the other constitutional judges from among the three candidates nominated by the following institutions in a complete freedom: the Court of Cassation (3 Court members), the Council of State (2 Court members), the Military Court of Cassation (1 Court member), the Supreme Military Administrative Court (1 Court member), and the Council of Higher Education (3 Court members).

Firstly, AKP's reform of the Constitutional Court does not give the high courts (Court of Cassation and Council of State) the right to select their nominees for the Constitutional Court. Instead, the President selects in their name. Therefore, the majority will of these institutions is ignored.[574] Secondly, it can immediately be noticed that in the 1982 regulation, the President elected 11 regular members (and 4 substitute members). After the reform of the AKP, however, the President determines 14 regular members of the Court out of 17. Thereby, it practically increases the influence of the President on the Constitutional Court. As a result, 2010 reform of the AKP do not distribute the power of determining Constitutional Court members between the President and the parliament. It gives a say to the parliament on the Constitutional Court by adding 3 members elected by the parliament beside those elected by the President. Hence, what it actually does is to increase the number of Court membership. Moreover, the influence of the parliament on the final formation of the Constitutional Court is kept weak in terms of both the number of candidates that parliament offers and of the determination of actual members.[575]

---

[574] Güzel, Ali (2010). "2010 Anayasa Değişikliğinin Yargı Bağımsızlığı ile İlişkileri ve Etkileri, Anayasa Mahkemesi'nin Yapısı ve Üyelerinin Seçimi" in *2010 Anayasa Değişiklikleri Çerçevesinde Yargı Bağımsızlığı*. Öztürk, Bahri; İlkiz, Fikret; Kocasakal, Ümit (ed.). Ankara: Seçkin Yayıncılık, p. 34

[575] *Türkiye 2011 Yılı İlerleme Raporu*, p. 84

Second, the Court of Cassation, the Council of State, the Military Court of Cassation, the Supreme Military Administrative Court, and the Council of Higher Education nominated candidates to the Court under the former regulation of 1982 Constitution. Yet, the process of nomination for any institution named above was neither stated in the Constitution, nor in the laws regulating these institutions. Rather, nomination process was a part of internal affairs of these institutions. Most generally, nomination of the candidates to the Constitutional Court by these institutions was executed by analogy to the selection process of the President of these institutions.[576] However, 2010 Constitutional amendments regulate the nomination process of Council of State and of bar associations in detail in Article 146 and in the Provisional Article 18, which can also be done by laws. For Taner, the aim of this addition is to guarantee the election of 14 members by the President in a complete disregard of the preferences of these institutions.[577]

Within this context, one more point must also be underlined. The presidents of bar associations get the right to nominate candidates to the Court for the first time in 2010. It is significant that, the nomination of the candidates for the Court is left to individual decisions of the presidents of the bars. Accordingly, president of each bar has equal vote. Yet, bars don't have equal number of members and hence, actually presidents do not have equal representative value. When nomination is left to the presidents with equal weight of vote, the will of the bars which have more members is adversely reflected in the nomination process. However, there is another institution which allows proportional representation of its members. It is the Union of Turkish Bar Associations. Therefore, Taner warns that, nomination of the candidates to the Court should have been left to the Board of Union of Turkish Bar Associations, if the

[576] Taner, 2010, p. 74

[577] Taner, 2010, p. 75

will of the majority was respected.[578] However, the preference of the AKP in respect to the will of judicial organs and institutions is in opposite direction. With the amendments of 2010, decision on the membership to the Court is concentrated in the hands of the presidents. Although it dignifies majority will in the parliament, the AKP trivializes it in other state institutions.[579]

After AKP's 2010 reforms, there occurred a dramatic shift in the activism of the Court. Mainly, it is silenced. For instance, the Court is silenced to *4+4+4 Education Reform* of the AKP, which opened the middle sections of the İHLs and which increased the number of Islamic courses in all primary and middle schools curricula. The main opposition party in the parliament, the CHP, referred the Law No 6287 to the Court for its nullification with regard to its form. However, the Court rejected the case in May 2012. The CHP referred the Law to the Court for a second time; this time in respect to its substance. However, the Court rejected it for a second time in September 2012. It means that the Court deemed teaching of Islamic courses in primary and middle schools such as "Quran-ı Kerim" and "Life of Hz. Mohammed and Basic Religious Instructions" as elective courses, compatible with secularism. Looking at its previous decisions, it is easy to conclude that the Court could judge in the opposite direction for anti-secularism of the law. However, it decided not to do so, although secularism as a Constitutional norm remained unchanged. Therefore, the change of persons who enforce laws in the Constitutional Court proved enough to change the meaning and the enforcement of this Constitutional norm.

When we come to the other high courts, the reason of reforming the Court of Cassation and the Council of State was announced as to accelerate the appealing system. It is because, appealing system was thought to be the main reason for the

---

[578] Taner, 2010, p. 77

[579] Taner, 2010, p. 76

longevity of the time taken to complete judicial processes. A statement released by the Ministry of Justice claimed that the judicial system was overloaded, so much so that nearly 20.000 cases had to be dropped in 2010 just because they could not be concluded within the time limits set by the laws. The Ministry predicted that, unless reforms were enforced, 25.000 more cases would have to be dropped in 2011, rising to 32.000 in 2012, 42.000 in 2013 and 55.000 in 2014. The Ministry maintained that the main bottleneck in the justice system was the appealing process, noting that there were 1.831.419 cases waiting to be heard by the appealing courts in 2010, up from 1.091.392 at the end of 2006.[580]

In this respect, the Law on the Amendment of Certain Laws No 6110, which reformed the Court of Cassation and the Council of State, was accepted on February 9, 2011. The Law expanded both Court of Cassation and the Council of State. The number of members of the Court of Cassation increased from 250 to 387, and number of chambers in the Court of Cassation increased from 32 to 38. While the number of members of the Council of State rose from 95 to 156, number of chambers in the Council of State increased from 13 to 15. In addition, all decisions of the Court of Cassation and the Council of State are made subject to review of the Constitutional Court. First of all, the way that the Court of Cassation and the Council of State reformed needs attention. Provisions regarding the reconfiguration of these high courts were passed as an omnibus bill. It shows that if these provisions were presented to the parliament singularly, it might cause a lot of objection and criticism. In order to bypass objections and criticisms, the AKP hided these provisions inside an omnibus bill. Yet, for a more specific analysis of AKP's reforms, the provisions of the Law No 6110 amending the Court of Cassation will be examined.

[580] Jenkins, 2011

Article 8 of the Law No 6110 is claimed to be contrary to the Constitution. The reforms give the Board of Chairs the right to regulate the work sharing between chambers of the Court of Cassation. Accordingly, the Board of Chairs will prepare the work sharing draft resolution between chambers. This draft will be presented to the approval of Grand General Assembly. Grand General Assembly may approve the draft without any amendment or may amend it. The Assembly decides with absolute majority. Yet, in case of equilibrium, vote of the Chief of the Assembly will be decisive. Hence, according to the reforms of the AKP, it is basically the Grand General Assembly that regulates the internal affairs of the Court of Cassation. However, Article 154 of the Constitution says that institution and functioning of the Court of Cassation are regulated by law. Therefore, Article 8 of the Law No 6110 violates Article 154 of the Constitution. In addition, the provision concerning the vote of the Chief of the Assembly is contrary to the rule of law. In total, AKP's reforms leave the functioning of Chambers thoroughly to the decision of Assembly majority, and even to the decision of the Chief of the Assembly. [581]

Similarly, Law No 6110 states that statutory duties of Civil and Criminal Chambers will be executed by Board of Chairs and Grand General Assembly. However, it is against the principle of "legal judge". According to this principle (which is regulated by Article 37 of the Constitution) the location of the court in which an offense or a conflict will be charged, is determined by law before the offense or conflict occurs. Put it upside down, the principle of legal judge does not allow the allocation of judges and courts after the commitment of crime. Yet, reforms of the AKP once again leave it to the decision of the Board of Chairs and the Grand General Assembly. Moreover, Provisional Article 1 of the Law No 6110 says that in case of any change of the Chambers, court files of one chamber are directly transferred to the other related

[581] *Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun Tasarısı ile İlgili Yargıtay Başkanlığı'nın Görüşü*, www.yargitay.gov.tr

Chamber in their existing state. This provision runs contrary to "legal judge" and "law security" principles of the rule of law as well. Lastly, Provisional Article 2 states that provisions of Law No 6110 reforming the Court of Cassation apply to present cases and to tentative verdicts. Hence, it allows legislative power to intervene into judicial power. Therefore, it is contrary to Article 138 of the Constitution, which states that no questions shall be asked, debates held, or statements made in the Legislative Assembly relating to the exercise of judicial power concerning a pending case. Provisional Article 2 also states that these provisions may apply even to finalized trials if submitted for revision of decision within two weeks after the inurement of the law. Consequently, after these reforms, the AKP can intervene into pending cases, or even into finalized ones.

Before the reformation of the Court of Cassation and the Council of State, on January 31, 2011 twenty-four bar associations issued a joint statement denouncing the reforms as politically motivated. On February 4, 2011, the members of the bar association in Izmir staged a one-day strike to protest proposed changes. They claimed that proposed reforms of the the Court of Cassation and the Council of State would allow the government to pack both bodies with its own supporters.[582] The verdicts of the Court of Cassation after AKP's reforms justify the arguments of protestors. The effect of the reformation on criminal justice can best be seen in the case of "Sivas Massacre". "Sivas Massacre" refers to the events of July 2, 1993 which resulted in the killing of (mostly Alevi) 37 people, when a group of Sunni Islamists set fire to the hotel where they stayed. The final hearing of this trial was held on March 13, 2012. Accordingly, 11th High Criminal Court of Ankara decided to drop Sivas Massacre trial by enforcing the statute of limitation in line with the prosecutor's demand. With this decision, five defendants got away from any punishment. The Prime Minister Erdoğan shortly commented on the decision of the court and showed his appreciation by saying

[582] Jenkins, 2011

"congratulations".[583] The plaintiff lawyers had applied to the Court of Cassation demanding to handle the Sivas Massacre as a crime against humanity, in case of which the statute of limitation could not be enforced. The Court of Cassation, on the other hand, gave its decision in September 2012 and rejected the demand of plaintiff lawyers. It decided that burning of 37 people could not be regarded as a crime against humanity and approved the verdict of High Criminal Court. In this way, the case of Sivas Massacre had been closed.

The effect of AKP's reformation on administrative justice is striking, too. This effect is most vivid in the cases concerning wearing headscarf. As stated before, wearing headscarf in higher education is not banned by law under 1982 Constitution. Yet, this restriction depends on the interpretation of laws by the Council of State. Knowing this, the AKP changed judges who interpret laws in the Council of State. After this change, the Council is silenced before wearing headscarves in higher education. Hence, wearing headscarf is *de facto* freed in universities without any legislative amendment. Beside higher education, in its verdict in January 2013, the Council of State saw no offence in wearing headscarf during the exams of Open Education Faculty.[584] In addition, in its verdict on January 24, 2013, the Council approved that advocates can perform their duty while wearing headscarf.[585] All of these decisions contradict with Council's former stance; and all of these decisions are taken without any change in the legal norms, let alone Constitutional norm of secularism. As in the case of the Constitutional Court, the change of persons who enforce laws in high courts proved enough to bring the meaning and enforcement of Constitutional norms in line with the AKP.

---

[583] "Başbakan Erdoğan'dan Sivas Davası Yorumu", 13.03.2012 *Hürriyet*, www.hurriyet.com.tr

[584] "Danıştay'ın Başörtüsü Kararı Benim İçin de Emsal Olsun", 15.01.2013 *Zaman*, zaman.com.tr

[585] "Türban Adliyede", 25.01.2013 *Milliyet*, www.milliyet.com.tr

4.2.3 The judicial power under *Cemaat*'s control

Judiciary in Turkey was neither independent nor neutral before AKP governments; and it neither became independent nor neutral with AKP governments. As can be seen from the reformation of the HSYK and the high courts, the AKP did not make dramatic changes in the functioning of judicial organs. Rather, it altered the appointment and electoral processes to high courts and to the HSYK. Through changing these processes, judicial community is made more depended to the politics of the government. İlkiz asserts that the AKP amended the Constitution with an aim to bound judicial power thoroughly to the government.[586] Then, 1982 regime's characteristic of dependence of judicial power to the executive power is deepened by AKP reforms; the power of executive over judiciary is increased.[587] Yet, what is more interesting is AKP's strategy of binding judiciary to the executive. Carolyn Dubay says that AKP's strategy in high courts is reminiscent of the American experience of 1930s. Accordingly, the Supreme Court had struck down a number of legislative enactments made by the President Franklin Roosevelt. President Roosevelt reacted by packing the Court through increasing the number of judges on the Court. In this way, he achieved to shift the balance of votes in his favor.[588] We see that the AKP did the same; it shifted the balance in the courts through increasing the number of seats. The AKP created a majority in the high courts loyal to itself not by expulsing opposing elements; but through appointing additional, loyal members to itself.

---

[586] İlkiz, Fikret (2010). "Anayasa Değişikliği ve Anayasa Mahkemesi" in *2010 Anayasa Değişiklikleri Çerçevesinde Yargı Bağımsızlığı*. Öztürk, Bahri; İlkiz, Fikret; Kocasakal, Ümit (ed). Ankara: Seçkin Yayıncılık, p. 46

[587] Akartürk, 2010, p. 82

[588] Dubay, 2010

These "loyal members" belong to *Cemaat*, meaning Fettullah Gülen community.[589] The judicial reforms of the AKP dispossess the defenders of official ideology of the state, known as Kemalists, of the control of judiciary. The AKP gives this control to the hands of Cemaat through increasing the number of the seats.[590] After AKP's reforms, the dominant power in all the HSYK, commissions of justice, and the ÖYMs is Cemaat; it is the new real power in judiciary. Therefore, it seems that a new status quo is established in the judiciary through *Cemaatisation*. This new status quo bases on an accord with Kemalist remains within the judiciary.

However, the AKP did not achieve this accord within judiciary, and between judiciary and government after 2007 through one-by-one appointment of Cemaat members to the courts. Put it in other way, creating a judiciary controlled by the AKP through Cemaatisation did not come solely as a result of appointing new members. Gareth Jenkins states that when the AKP returned to power in July 2007, the lower echelons of judiciary have already been dominated by supporters of the government.[591] It means that even before AKP's move to Cemaatize the judiciary, judges and prosecutors of first instance courts in provinces almost automatically, and of their own will became the supports of the AKP. So, beside political appointments, there occurred a more or less automatic accord, a more or less automatic cooperation between the AKP and the judiciary. Rather than appointment of Cemaat members or persons close to Cemaat, this is the main reason behind AKP's establishment of its control over judiciary within a relatively short span of time. It is the culture of judiciary in Turkey that eased this cooperation. Dominant culture of judiciary secured

---

[589] Ertekin, Orhan Gazi (February 2013). "Biri Bizi Bu Cemaatin Yargısından Kurtarmalı", www.t24.com.tr

[590] Özsu, Faruk (March 2012). "Sermayeden Yargıya Babacan Ayar", *Radikal*, www.radikal.com.tr

[591] Jenkins, 2011

the cooperation between the jurists and the AKP government, as it had secured this cooperation with any other government before the AKP.

Long before the AKP's coming to power, judiciary in Turkey has a statist, biased, authoritarian and conservative culture. This can best be seen in the case of the Constitutional Court. Serap Yazıcı, Ergun Özbudun and Vahap Coşkun claim that even before its reformation in 2010, the Constitutional Court was already conservative, ideological, and authoritarian. What it defended and protected was the state itself; its interests and its ideology. The Constitutional Court interpreted laws with an authoritarian mentality. It used its authority to supervise the constitutionality of laws and decrees with an intention of limiting individual rights and freedoms.[592] This is especially true in party closure cases. Court's decisions on party closure cases based on values such as "protection of the state" and "guarding the interests of the state" and not on freedom of thought and speech.[593] In this regard, from 1982 onwards, the Constitutional Court has outlawed 19 political parties. Hence, it promoted a repressive and conservative culture. So that, Yazıcı says, the Constitutional Court created an ideology-centric paradigm.

What has been said for the Constitutional Court, to a large extent, can also be repeated for judiciary as a whole. A study based on 50 in-depth interviews with judges and prosecutors in Turkey reveals that many of them espouse views that prioritize the security of the state over democracy and civil liberties.[594] Hence, judiciary in Turkey is in general has an illiberal and conservative culture. Rather than promoting individual rights and freedoms, judiciary takes advocating certain values as its

---

[592] Yazıcı, 2009, p. 197; Özbudun, 2007a, p. 264

[593] Coşkun, 2010a, p. 54

[594] Tezcür, Güneş Murat (2009). "Judicial Activism in Perilous Times: The Turkish Case" in *Law & Society Review*, Vo. 43, No. 2, pp. 307-308

mission. These are protection of state interests and state's ideological precepts. It defends and favors state before individual; it defends and favors state's values and ideology before values and ideologies of other politics. It acts as to smash political diversity, and individual rights and liberties before the state.[595] It means that most often, jurists do not see themselves as executors of a sovereign power; they do not regard themselves equal and above political power. On the contrary, they act as state's civil servants. Fazıl Hüsnü Erdem says, although the Constitution states that the judiciary exercises its power in the name of the nation (Article 9), judges exercise their authority "in the name of the state" instead.[596] Faruk Özsu underlines the same point when he indicates that judiciary is subject to political power, and judges consider themselves as the coercive apparatus of the state.[597] They regard any kind of differentiation (ideological, ethnic, and cultural) from state power or even a small deviation from the average, as a threat. Hence, they interpret laws and norms to the detriment of rights and liberties; and as a weapon to punish individuals, and to protect power.

Nevertheless, this comment needs to be adjusted and clarified. It is because, the statement that judiciary protects state's values and official state ideology implies that judiciary advocates Kemalism, or it is Kemalist as a whole. Yet if it was so, jurists of first instance courts in the provinces should have stood out against AKP power, as the jurists of high courts and the HSYK did in the first period of AKP government. In that case, it would have been much harder and time consuming for the AKP to impose its influence over judiciary. However, there was no such resistance; opposition from

---

[595] Erdoğan, 2001, p. 172; Arslan, Zühtü (2007a). "Reluctantly Sailing Towards Political Liberalism: Political Role of the Judiciary in Turkey" in Halliday, Terence C.; Karpik, Lucien; Feeley, Malcom M. (ed.). *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Liberalism*. Oxford and Portland Oregon: Hart Publishing, p. 197 quoted in Yazıcı, 2009, p. 198

[596] Erdem, Fazıl Hüsnü (2005). "Türkiye'de "İdeolojik Devlet" Gölgesinde Yargı ve Bağımsızlığı Sorunu" in *Demokrasi Platformu*, Vol. 1, No. 2, p.57

[597] Özsu, Faruk (October 2006). "Yargıcın 301'le İmtihanı", *Radikal*, www.radikal.com.tr

judiciary to AKP power came only from the high courts and the HSYK, and for only a limited period of time. First, it signifies that Kemalist ideology and Kemalist jurists, who consistently defend Kemalism are rather concentrated in the high courts. Actually, Kemalism was not powerful in the first instance courts and it was not that widespread in the provinces.[598] Consequently, the view that judiciary is intellectual and political, and that it consciously and consistently advocates certain values and official ideology of the state, is not true. A conscious and consistent advocacy of official ideology, at the very most, pertains to central judicial establishment. Second, it shows that judiciary in Turkey is not a single block. All judiciary shares a statist, conservative, and authoritarian culture. Yet, the meaning of these concepts differs in provinces and in the center. For most of the judiciary, the meaning of statism is not complicated with the addition of Kemalism. Conversely, it is notably simple, and it means political power. Hence, what most of the jurists actually protect and advocate is political power; the government of the moment. Similarly, conservatism signifies conservation of that political power. For authoritarianism, it implies the way how the relations between *any* political power and judiciary go.

For judges, government is their benefactor; it is who gives them their jobs and substance. Therefore, they strictly own the values of government, no matter who is it and what it defends.[599] For that reason, judiciary does not have intellectual, political, and hence developed preferences; it does not have ideals. Judiciary in Turkey is simply and crudely power-hungry. There are social and economic reasons lying behind this culture. Accordingly, judges generally come from poor families of provinces. They do not get much from university life; they concentrate on studying. Mostly, they develop community like relationships with students coming from similar backgrounds. They become judges in a relatively young age. In their professions, they

---

[598] Özsu, Faruk (January 2011). "İşler Değişti", *Radikal*, www.radikal.com.tr

[599] Özsu, Faruk (September 2011). "Müsterih Olun, Yargı Değişmedi", *Radikal*, www.radikal.com.tr

socialize almost only with their colleagues, district governors or police chiefs. At the end, judges in Turkey dislike society and politics. They develop a bureaucratic, anti-intellectual, provincial, and lumpen culture, very similar to the culture of ordinary, conservative layman in the street.[600] Özsu names the typical judge as "mediocre judge", in whom the power-hungry judicial culture embodies.[601] From the point of view of a mediocre judge, society is full with cunning and greedy people, who demand unduly more and more form the state.[602]

As a result, the problem of judicial culture is not that it is political and ideologically Kemalist. Just the opposite. Judiciary in general is indifferent towards political power; it obeys any of them. That's why Özsu says, it cowered not only once, but before all kinds of dictatorships.[603] This culture explains how majority of the judiciary started to support the AKP government even before its judicial reforms. Therefore, the substantive element which provides the pass-through between the AKP and judiciary; the key to understand how the AKP could extend its control over judiciary swiftly, is this conservative and power-hungry judicial culture that creates mediocre judge. The fact of AKP governments; the fact that the AKP is in the government and it survives in the government is a sufficient reason for mediocre judge to go easy on the AKP.

All in all, the AKP appointed Cemaat members to judiciary and changed the dominant cadre in judiciary from Kemalists to Cemaat. However, what changed actually in the judiciary after AKP reforms are only its masters.[604] Apart from this change of the masters, the principle problem; the illiberal, unintellectual, power-hungry judicial

---

[600] Özsu, March 2012

[601] Özsu, September 2011

[602] Özsu, September 2011

[603] Özsu, Faruk (March 2013). "Eyvah, Yine Yargı Reformu!", *Radikal*, www.radikal.com.tr

[604] Özsu, January 2011

culture, which is the reason of acquiesce of judiciary to AKP government *en masse*, has continued.[605] As a result of this continuation, authoritarianism and conservatism in judiciary continued during AKP period as well. In the past, there were complaints about the verdicts of judges and indictments of prosecutors, who were feeling the pressure of ideological HSYK under the mastership of Kemalists. Today, the same ideological pressure is imposed on judges and prosecutors from an opposite direction under the mastership of Cemaat. In the past, no one has had any chance of accusing a minister or relative of a minister, let alone the Prime Minister. Today, still no one has any chance of accusing, that time an AKP minister or relative of an AKP minister, let alone the Prime Minister, too.[606]

Indeed, today criticizing the Prime Minister even by art and humor is almost forbidden. Within 4 years (2004-2008), Prime Minister Erdoğan opened five cases against comic papers and caricaturists. Yet after 2008, Erdoğan's harsh stance against criticisms heightened. For instance, a comic paper called "Leman" satirized Erdoğan on its cover. Erdoğan sued the paper and caricaturist Mehmet Çağçağ was fined to pay four thousand Turkish Liras. [607] In another case, newspaper *Hürriyet* published a column on October 28, 2010 entitled "We have not been as critical as we should". The article criticized the government's policies on the construction of the Hydroelectric Power Plants in the eastern Black Sea region. Erdoğan filed a lawsuit against the newspaper and its editor-in-chief Oktay Ekşi on the grounds that it was an "attack on Erdoğan's personal rights and moral personality". After the opening of lawsuit, Ekşi issued a short note of apology and resigned as chief editor. Thirdly, Michael Dickinson, a British collage artist and a faculty member of Yeditepe University

---

[605] *Referandumdan Sonra HSYK: HSYK'nın Yeni Yapısı ve İşleyişine Dair Yuvarlak Masa Toplantısı* (September 2012). TESEV Yayınları: İstanbul, p. 20

[606] Özsu, January 2011

[607] Özocak; Gürkan (2011). "Türkiye'de Siyasi İktidarin Mizahla İmtihani: İfade Özgürlüğü ve Karikatür" in *Türkiye Barolar Birliği Dergisi*, Vol. 94, p. 289

(Istanbul) detained due to depicting Erdoğan as the pet dog of former US President Geroge W. Bush in one of his collages. On March 9, 2010, the 2nd Criminal Court of Peace of İstanbul ruled that Dickinson disregarded Erdoğan's "pride and dignity". He received a prison sentence of 425 days which was converted into monetary fine of € 3,900.[608]

Then, AKP governs judiciary in an authoritative, suppressive way through this old, deep-seated power-hungry and conservative culture, more than by means of Cemaat members. Even so, the new and old judiciary under the masterships of Kemalists and Cemaat, both ruling through power-hungry judicial culture, are not identical. The pressure and intimidation that the new HSYK of Cemaat poses on judges and prosecutors, is far more effective and frightening than the old HSYK of Kemalists. It is because; in the past, the pressure on judges and prosecutors was coming from the Ministry, ideological influence of which was relatively weak in first instance courts. Consequently, judges and prosecutors of different opinion had an opportunity to hide themselves from ministry's ideological pressure. However, Cemaat is extensively organized in provinces. Therefore, it is everywhere. As a result, today, any and every court and courthouse in the provinces acts as a pressure center.[609] According to Özsu, in the hands of Kemalists, judiciary was authoritarian; however, under the mastership of Cemaat it is both authoritarian and totalitarian.[610]

Due to this totalitarian stance, has a complete *homogeneity* in the judiciary been achieved under the mastership of Cemaat? Can we claim that the first decision of enforcement of laws in the executive and the second decision of enforcement of laws in judiciary are *homogenized*? Does the AKP bring judicial decisions at large under its

---

[608] Önderoğlu, Erol (May 2011). "BIA 2010 Annual Media Monitoring Report", www.bianet.org

[609] Özsu, January 2011

[610] Özsu, Faruk (May 2011). "Ciddiyet İlanının Tam Zamanı", *Radikal*, www.radikal.com.tr

control? As stated before, an accord within judiciary is established through Cemaatisation with the help of above mentioned judicial culture. However, this accord does not count to fully fledged *homogeneity* mainly because of two reasons. Firstly, the same power-hungry judicial culture that helped the AKP to subordinate judiciary is an obstacle before the formation of a common political and intellectual unity. It is because; indifference towards political interests that characterizes this culture creates inconsistency and flexibility of ideals in time, depending on the shifts in power balances; and therefore a great insecurity for a long lasting idealist compromise. This break in the ideals may occur within Cemaat, or between Cemaat and the AKP as well. Hence, rather than a guarantee of control and *homogeneity*, judicial culture is also a source of diversity.

Secondly, even today judiciary is not consisted only of Cemaat.[611] In the past, judiciary was not *homogeneous*, and it was not consisted only of Kemalists. Similarly, today, judiciary is not *homogeneous*; there is not one single will effective within it. Kemalists of the old order did not evaporate with the consolidation of AKP power after 2007. They are not expulsed from judiciary; yet, incorporated into new judiciary under the mastership of Cemaat. The position of *Yargıçlar ve Savcılar Birliği* (Association of Judges and Prosecutors-YARSAV)[612] after AKP reforms can provide a good example to see this duality. The YARSAV is known to advocate the official ideology of state and represent Kemalists in judiciary. From the beginning of AKP's power in 2002, it tried to block the AKP both directly and indirectly through its stance on politically important cases. For instance, it defended "367" decision of the Constitutional Court in Presidential elections, Court's headscarf decision, and AKP's closure by the Court. Moreover, it tried to repeal appointment of new judges and prosecutors. Then, for a complete *homogenization* of the judiciary, Kemalist elements

[611] Özsu, March 2012

[612] Yargıçlar ve Savcılar Birliği (YARSAV)

like the YARSAV should have been eradicated. However, Cemaatisation of judiciary did not mean the end of the YARSAV and Kemalists. Rather, they were incorporated into new Cemaat-dominated judiciary. For instance, 20 members of the YARSAV were elected to the reformed HSYK. Yet, more important point is that, these 20 candidates of the YARSAV acted as a block with the rest of 140 Cemaat affiliated candidates, showing the new consensus between Kemalists and Cemaat. [613] Therefore, in the present state, rather than any full *homogeneity* between government and judicial decisions; and within judiciary, we can talk about cooperation or acquiescence.

In fact, on occasions, cooperation that achieved within judiciary collapses and discrepancy between Cemaat-dominated judiciary and AKP government becomes evident. Examples to discrepancy between judiciary and AKP government (which may be interpreted as breaks between Cemaat and the AKP) come from high courts. Accordingly, the Court of Cassation, the Council of State, and the Constitutional Court did not share a *homogeneous* view with the government as late as 2011. Before their reformation, the President of the Court of Cassation Hasan Gerçeker and the President of the Council of State Mustafa Birden opposed to the President of the Constitutional Court Hasim Kılıç (who expresses the views of the government) on the need to reform high courts to speed up the appealing process.[614] However, even after the reformation of the Court of Cassation and the Council of State, a common, unitary political view could not be established between high courts. This time, new President of Court of Cassation Ali Alkan criticized the reform package of the government, which proposes the unification of two appealing courts.[615] Although these cleavages were displeasing, one case considering National Intelligence Service caused nothing

---

[613] Özsu, Faruk (December 2011). "Yeni HSYK ve YARSAV Düeti", *Radikal*, www.radikal.com.tr

[614] "Top Turkish Judges Clash over Judicial Law", 16.02.2011 *Journal of Turkish Weekly*, Political Science Complete

[615] "Yargıtayın "Tek Çatı" İtirazı", 21.02.2013 *Radikal*, www.radikal.com

less than a crisis between reformed and supposedly controlled judiciary and the AKP government. On February 7, 2012 Specially Authorized Prosecutor of the KCK case Sadrettin Sarıkaya wanted to summon Undersecretary of National Intelligence Organization Hakan Fidan and three other top officials. The prosecutor accused them of being involved in meetings conducted secretly between the AKP and some senior PKK leaders between 2009 and 2011 in Oslo. However, none of the summoned names showed up to testify. Then, the Prosecutor's office issued an arrest warrant for them on February 9, 2012.

The investigation of the Prosecutor offended the AKP; in fact, it caused the biggest crisis between the government and the judiciary after 2007. It is mainly because, the meetings reportedly happened at Erdoğan's personal command, and Fidan was personally representing Erdoğan according to the records that were later leaked on the internet.[616] Hence, in contrast to the expectations of a compatible relation, judiciary tried to sabotage AKP's policies. Consequently, the case of Hakan Fidan is another example to occasionally manifested discrepancy between Cemaat-dominated judiciary and the government, which further indicates that the relation between the executive and the judiciary cannot yet be characterized as *homogeneity.*

Perhaps more importantly, the way that this case has resolved is telling in terms of the meaning of the rule of law and the constitutional State in Turkey. Rather than obeying the warrant of the Persecutor, President Erdoğan amended the law which gives the Prosecutor to investigate National Intelligence officers, in order to prevent Fidan's arrest. Accordingly, Article 26 of the Law of the National Intelligence Organization No 2937 was amended within ten days (on February 20, 2012); and investigations or legal actions against intelligence officials on charges of crime are bounded to the

[616]"Investigation of Turkish Intelligence head won't proceed, says prosecutor", 22.03.2013 Hürriyet, *www.hurriyetdailynews.com*

special written permission of the Prime Minister. Under these new legal conditions; first, warrant of intelligence officials was repealed. Later, İstanbul Public Prosecutors' Office sought special permission from Prime Ministry Erdoğan to allow officials to be summoned. As expectedly, Erdoğan finally notified on March 22, 2013 that the permission was not granted to go ahead with the criminal proceedings. As a result, the case is not pursued further.

In the case of Hakan Fidan, it was AKP's Kurdish policy that was inspected. In that respect, freedom of Hakan Fidan from judicial inspection means freedom of AKP's certain policies from judicial inspection. This situation violates everything about the rule of law and the constitutional State, according to which legislation, executive and administration shall directly and unconditionally be under the supervision of the judiciary. However, in this case, National Intelligence Organization officers obtain conditional freedom from the rule of law depending on the permission of the executive. Hence, supremacy of the rule of law, binding all, is replaced by supremacy of executive, freeing a few. Last but not least, the case of Hakan Fidan reveals the relation between law and politics. We see that the rule of law order is thoroughly instrumentalized in the hands of political power; it has turned into nothing more than a formal procedure of the functioning of bureaucracy. The rule of law becomes "rule by law" and *state of statutes* status of the State in Turkey is shamelessly embraced. It becomes obvious that in this *state of statutes*, rather than objective and general laws, subjective political power rules the state.

After this long interlude, let us conclude our remarks on *homogenization* of judiciary through Cemaatization. Judicial reforms of the AKP could not *homogenize* judiciary and bring judicial decisions fully in line with the politics of the government yet. Nevertheless, there occurred cooperation through acquiescence. The underlying factor in the establishment of this cooperation and acquiescence, however, is not only Cemaatization of the judiciary, but power-hungry judicial culture. Owing to this

culture, an accord, a new status quo, has been established in the judiciary; this time under the mastership of the Cemaat.

4.3 AKP's Control over the Constitutional State Reconsidered

In his comment on Article 301 of Turkish Criminal Code, which makes it illegal to insult Turkey, the Turkish ethnicity, or Turkish government institutions, Deputy First President of the Court of Cassation Osman Şirin states that in thought crimes, the effect of legal text is 5 percent; and discretion of the judge will be effective as much as 95 percent.[617] This comment highlights that the real issue at stake in the judicial enforcement of legal norms is interpretation of norms by jurists rather than the norms *per se*. Judge Orhan Gazi Ertekin, on the other hand, comments on the expected amelioration of criminal legislation by Third and Fourth judicial reform packages of the AKP; especially their effect on Ahmet Şık and Nedim Şener, two journalists being tried on the grounds of aiding an armed terrorist organization. He indicates that amendment of criminal legislation will not mean much for them; because, the plight of these two journalists already does not originate from criminal legislations. The real problem there, is not legislation; yet enforcement of legislation and judicial perspective in an anti-democratic manner.[618] Similarly Serhat Sinan Kocaoğlu underlines that the main problem of judiciary in Turkey is neither the HSYK nor the high courts. How good the legal norms be, primarily the jurists who enforce these legal norms shall be qualified.[619]

---

[617] "301 Sorununu TBMM Değil, Yargıçlar Çözer", 29.12.2007 *Radikal*, www.radikal.com.tr

[618] Ertekin, Orhan Gazi (January 2012). "Yargıda Reform değil, Operasyon Yapılıyor", *Birgün*, www.birgun.net

[619] Kocaoğlu, Serhat Sinan (2011) "Türkiye Cumhuriyeti Yargı Sisteminin Temel Sorunu:"Hâkim (ve Savcı) Niteliği" ve Bu Hususta Eklektik Bir Çözüm Önerisi" in *Ankara Barosu Dergisi*, Vol. 3, p. 22

All above comments indicate the significance of enforcement of legal norms in the constitutional State rather than their legislation; a point already examined in detail while discussing secularism. The reason of this imbalance is that, instead of normative subsumption of liberal constitutionalism, decisionist subsumption operates in non-constitutional constitutional State in Turkey. In that way, Erdoğan's public pronouncements can affect how existing laws are enforced even though only a few of them lead to changes in laws.[620] And in that way, non-constitutional constitutional State in Turkey gives freedom from the rule of law to those who can control decisions in enforcement of laws, without going beyond the (formal) boundaries of the constitutional State. Accordingly, the AKP made the MGK dependent to the Prime Minister in executive enforcement of laws. In adjudication, the AKP made the HSYK dependent to the government. Afterwards, it appointed new jurists to courts from among those whom close to its political views, and especially from within a certain religious community. It shows that through restructuring of decision makers and jurists, the AKP sustained a high degree of control of law enforcement both in the executive and judiciary. This is in line with what has been foreseen by Schmitt for a ruling party to set its control over legality: restructuring judicial community, rather than reforming laws, would give the ruling party the control of legal norms and hence legality.

However, there are significant consequences of AKP's control. The norm-bounded decision concerning the meaning of legal norms; as to what they exclude and subsume, still takes place in the courts. Say it differently; "decision" involved in the decisionist subsumption still belongs to the judge. However, there appears another decision effective in; and actually more critical than the decision of the judge. This decision concerns the appointments and promotions of the judges themselves. The

[620] Jenkins, Gareth (2012). "Erdoğan's Volatile Authoritarianism: Tactical Ploy or Strategic Vision?" in *Turkey Analyst*, Vol. 5, No. 23, www.silkroadstudies.org

executive organ exerts its influence over the courts and the decision of the judges through choosing who will give judicial decisions. Therefore, decisions in judicial enforcement of laws are announced in the courts by the judges; yet they seem to be determined by the government to a large extent. Consequently, they are political, as well as legal decisions. By the same token, the problems regarding legality, judiciary, and courts in Turkey are not completely legal, but also political problems; they are political issues as well.

Nevertheless, in the comments of Osman Şirin and Orhan Gazi Ertekin one point calls our attention: In our case, enforcement of Article 301 of Turkish Criminal Code depends on the discretion of judges up to 95 percent. Yet, jurists and their discretion differ in every single enforcement of this norm to each concrete case. However, the norm that makes insulting Turkishness a crime is more or less enforced coherently in the legal system. This situation shows that, although jurists who interpret this norm differ in every single concrete case, they all conceive the norm in the same way; they all get the same meaning from the norm. Hence, a norm which almost thoroughly left to the subjective, individual decision of who enforces the law has been enforced determinately, in a unitary, *homogeneous* way without causing legal controversy. Consequently, in the legal system a kind of legal determinism has been achieved in the case of insulting Turkishness under the conditions of decisionist subsumption. This is what can be called as *homogeneous* enforcement of legal norms.

The question for any political power and for the AKP is just this: judicial enforcement of norms in line with AKP's interests once in a while is not noteworthy; as it may be an outcome of coincidence. The norms left to the mercy of decisionist subsumption are in time being undermined. Their content are occasionally enlarged and narrowed down; so that they come to encompass contradictory meanings and interpretations. Yet, legal norms shall be interpreted determinately in line with AKP's politics without causing contradiction and complication if AKP's rule will be secured at least for a

period of time. Then, the issue at stake is not criminalization and trial of Ahmet Şık and Nedim Şener on the grounds of aiding an armed terror organization for only once, and by only specific jurists. The issue at stake is criminalization and trial of Şık, Şener, or any other person alike on the same grounds by *any* jurist and by *any* court. At the same time, the issue at stake is preventing the repetition of Hakan Fidan case *never again*. Hence, *homogeneity* requires that every jurist shall interpret the criminal code in the same way; every jurist shall understand the same thing from what it means "aiding" an organization and what constitutes "terrorism". In that way, *homogeneity* will provide constant and coherent enforcement of legal norms by judiciary in line with AKP's politics.

Then, *homogeneity* in judicial enforcement of laws goes one step beyond occasional, case by case control; and strengthens the political control by promising lasting judicial security to ruling party. First, it does not only refer to a more or less achieved unity between judiciary and executive, or a unity between judicial and executive enforcement of laws; but also a unity within the judiciary. Second, *homogeneity* through Cemaat establishes a link between executive and judiciary from outside of the state. Cemaat belongs to civil society; it is a civil power. Hence, *homogeneity* through Cemaat unites state powers of executive and judiciary via civil society. Once government binds judiciary to its executive power through civil society, judiciary's dependence to executive power within the state loses its critical importance. Say it differently, once state powers are united through civil society, separation of powers within the state can be sustained without harming the cooperation between judicial and executive decisions. Hence, both cooperation between judicial and executive enforcement of laws and separation of powers principle can be maintained with *homogeneity* through Cemaat. This is the main point where *homogeneity* goes beyond the control of state powers by the ruling party. Control of judiciary by the ruling party may violate the independence of judiciary and hence constitutional state. Whereas, *homogeneity* through Cemaat can wipe independence of judicial decisions out without

violating independence of judiciary and constitutional state. In that way, the second decision in judicial law enforcement is protected and independence of judiciary becomes something deserved by the government.

Within this framework, the AKP's move to Cemaatize the judiciary puts judiciary under its control; however, it is an attempt to achieve this *homogeneity* between judiciary and the government, and within the judiciary as well. When jurists participate into a religiously determined community, they will share the same religious values and world views, and hence will interpret and understand legal norms in the same way. Therefore, they will give the same decision while enforcing legal norms, which will bring a unity to judicial law enforcement, otherwise dispersed through subjective, individual decisions of jurists. Consequently, first, determinacy in judicial enforcement of legal norms under the conditions of decisionist subsumption entails *homogenization* of judicial community. Secondly, due to the *homogeneity* within judiciary, a Cemaat member jurist can even arrive at a decision contrary to the literal wording of law; because, this decision still will be right as Cemaatized judicial community can decide the case likewise. In that way, the AKP frees itself from the rule of law and legal justice. Moreover, Cemaatization pertains to the relation between the government and the judiciary as well. It brings a unity to executive and judiciary powers of the state, as the government and the judiciary are interlinked with each other by the common tie of Cemaat. Both are characterized by the same belonging; both are characterized by sharing same values. Therefore, although they are still institutionally separated, the government and judiciary are united by means of membership to the same religious community.

At that point, looking at Weimar experience may be instructive. Actually, it is possible to draw some parallels between *homogenization* of the judiciary in Germany under Nazi power, and in Turkey under the power of the AKP. Contrary to expectations, Hitler did not restructure judicial community extensively. The Nazi

regime initially took over laws, courts and the judges of the Weimar Republic *en block*.[621] Most legal officials continued their careers after Nazi takeover.[622] Continuity was preserved especially at the top of the judicial pyramid.[623] It was not to say that there was no changes in the legal personnel after Nazi take over. Jewish judges and lawyers were dismissed in the first months of 1933.[624] A number of other legal officials were sent into early retirement or moved to other posts. In addition, the Law for the Restoration of the Professional Civil Service was introduced on April 7, 1933, which allowed the government to dismiss judges for any reason.[625] Still, rather than judges and prosecutors, civil servants and bureaucracy of the Ministry of Justice were moved or retired and overall number of dismissed officials was low .[626]

Hence, the Nazi legal apparatus operated largely in the hands of the same officials who had been in charge in Weimar. The case of Franz Gürtner is telling in this regard. Gürtner started to serve as Minister of Justice in Bavaria in 1922. He was appointed as Reich Minister of Justice on June 2, 1932 by Chancellor von Papen. When Hitler became Chancellor on January 30, 1933, he kept his job. Actually, he was the Reich Minister of Justice for the most of Hitler reign. He was only conservative before 1933; he had not been a Nazi supporter.[627] Yet after 1933, he cooperated with the Nazis in

---

[621] Stolleis, 1998, p.2

[622] Wachsmann, Nikolaus (2004). *Hitler's Prisons: Legal Terror in Nazi Germany*. New Haven: Yale University Press, p.73

[623] Koch, Hanns-Joachim Wolfgang (1997). *In The Name of The Volk: Political Justice in Hitler's Germany*. London: Macmillan Publishers, p. 17

[624] Stolleis, 1998, p.2

[625] Pereira, Antony W. (2008). "Of Judges and Generals: Security Courts under Authoritarian Regimes in Argentina, Brazil, and Chile" in *Rule by Law: The Politics of Courts in Authoritarian Regimes*. Ginsburg, Tom; Mustafa, Tamir (ed). New York: Cambridge University Press, p. 40

[626] Wachsmann, 2004, p.73; Bendersky, Joseph W. (2007). *A Concise History of Nazi Germany*. Maryland: Rowman and Littlefield Publishers, p. 108

[627] Wachsmann, 2004, p.71-72

consolidation of the National Socialist regime with ease. For instance, on February 27, 1933 the Reichstag building in Berlin was on fire. The Nazis blamed the Communist Party of Germany (KPD). Marinus van der Lubbe, a former communist, was caught by the police as the instigator of the fire. Beside him, Ernst Torgler (leader of the KPD), Georgi Dimitrov (the head of the Western European Office of the Commintern) and Blagoi Popov and Vasil Tanev (two associates of Georgi Dimitrov) also charged. All but van der Lubbe was acquitted. Meanwhile, Lubbe could only be sentenced to imprisonment in a penitentiary according to the laws. Hitler considered the punishment insufficient. He declared in a cabinet meeting on March 7, 1933 that it was vital that Lubbe be executed.[628] Consequently, a new law was enacted on March 29, 1933 concerning the Sentence and the Execution of the Death Penalty. The new law enforced retroactively to all capital crimes committed between January 31, 1933 and February 28, 1933. In this way, van der Lubbe was sentenced to death.[629] The main point of the story is that, it was Franz Gürtner who prepared the new law on-demand of Hitler and who remained silent on its retroactive enforcement, which was a breach of the basic principle of legality, *nulla poena sine lege* (no punishment without law). On the contrary, Gürtner justified the law (known as "lex van der Lubbe") as vital for the successful fight against international terrorism.

Not only Gürtner, yet a large majority of the old jurists cooperated with the Nazi regime. Law to Restore the Professional Civil Service (April 1933) and Law against Disproportionally High Number of Jews Attending High Schools (September 1935) were discriminatory measures against Jews.[630] Political enemies were sent to concentration camps; the mass killing of political rivals and others in June 1934 went

---

[628] Wachsmann, 2004, p.72

[629] Koch, 1997, p.43

[630] Stolleis, 1998, p.14

unpunished. In 1935, *nulla poena sine lege* was completely abolished.[631] The prohibition against the use of analogy in criminal justice was abolished; alternative punishments were permitted; and the range and severity of punishment was expanded. The rights of defending lawyers were curtailed; the appeal process of trials was shortened; special courts were introduced; and the powers of the police and *Gestapo* were broadened. All these changes were violating the substance of the Constitution and all were enforced in part in the form of laws. However, judiciary did not take action against any of these illiberal, unconstitutional laws. Even there were no protests within judiciary when Jewish jurists were removed.[632]

All in all, in Germany during Hitler's power, traditional judiciary was Nazified without important changes in the personnel. It means that unity and *homogeneity* among judiciary and Nazi government, which was required for jurists to "see the facts in the right way, listen the statements rightly, and understand the words correctly" could be sustained without appointing Nazi jurists. Instead, Nazification of the judiciary achieved owing to acquiesce and cooperation of jurists. On the one hand, traditional jurists recognized the realities of Nazi power and acquiescent in important changes in law. They salvaged as much of the old system as possible; and in turn the old system and the old jurists kept in tack. On the other hand, their acquiescence meant that, traditional judges were then bounded by the enforcement of new Nazi laws, which violated the legal rights Germans had previously enjoyed. Consequently, the same judges of the liberal Republic were then assisting the Nazification of German state and society by ruling in accordance with Nazi laws.[633]

---

[631] Wachsmann, 2004, p.73

[632] Koch, 1997, p. ix

[633] Bendersky, 2007, p. 108

Moreover, similar to judiciary in Turkey, the acquiescence and cooperation of jurists with Nazis may be related to their socio-economic background. Nikolaus Wachsmann informs us that great majority of the German judges, prosecutors, and other senior legal officials belong to middle class; they are national conservative and anti-republican. During their service in Weimar Republic, they had kept their distance from the state. Therefore, they welcomed the revival of nationalism, authoritarianism, and militarism in the Nazi regime. Professional organizations of legal officials quickly dissolved themselves in 1933, with individual members joining the association of *National Socialist German Jurists*. In addition, support for the regime was reflected in the rush to join the Nazi party. By 1938, more than half the German judges and prosecutors were members of the NSDAP.[634]

As will be detailed in the following chapter, in Weimar there emerged a national socialist legal system next to traditional legal system, as well. In early 1933, Nazi's established special courts to handle political crimes. Besides, in 1934 the Nazi's *Volksgerichtshof* (People's Court-VGH) was founded to try cases of treason and crimes against the state. Both of these special courts were set up outside the operations of Constitution; because, Article 105 of the Constitution outlawed special courts. So, they were established thoroughly illegally in terms of Constitutional state. The interaction between them, however, was not static. In the area of civil law, Nazi legal system could merely influence the traditional system. Yet, in criminal law, Nazi courts suspended traditional system altogether. For instance, political crimes altogether removed from the jurisdiction of regular courts and handled by special courts. Nevertheless, in the long run, the Nazi legal system and the pressure it put on the traditional system, did lead to substantial Nazification of traditional law.

[634] Wachsmann, 2004, p.71

Only for these special courts of Nazis, we can talk about *homogenization* of judiciary through appointment of Nazi jurists. That's because, the appointments of all the judges to the VGHs were made by the Ministry of Justice. The VGH judges were hand-picked for their devotion to National Socialism and their expertise in espionage.[635] Ministry of justice also appointed a permanent deputy for the president of the VGH.[636] As a result, the VGHs were directly created as the judicial arm of the NSDAP in order to further the aims of National Socialism. It means that an individual prosecuted for treason after 1934 would have been certain to be judged by a man, who was appointed directly and expressly due to his loyalty to the Nazis. Therefore, there can be no discussion for the independence of jurists of the VGHs.[637]

However, special courts do not constitute a good example for us to see the interaction of a majority power with liberal constitutional state. It is because, when we turn our face from traditional legal system of the Weimar Republic to special court system of the Nazi's, we step into an area already out of the independence of judiciary, already saliently political, and already unconstitutional.[638] In such a circumstance, we shall shift our focus to traditional legal system of the Weimar Republic once again, in order to notice how the NSDAP influenced independent judiciary. In this area, however,

---

[635] Pereira, 2008, p. 40

[636] Koch, 1997, p. 46

[637] Koch, 1997, p. 4

[638] The relation between constitutional state, legality and the VGHs is not straight forward. Michael Stolleis claims that the VGHs were essentially revolutionary tribunals, a quasi-legal instrument of the Nazi regime (1998, p.2). Therefore, it has severed its connection with justice, legality, and the constitutional norms. Wachsmann, on the other hand, advocates the contrary. Accordingly, the VGHs were not revolutionary tribunals. Therefore, the command that they were not a true part of justice system, is not true. It is because; leading posts of the VGHs were reserved for professional judges, who were hand-picked by the Ministry of Justice. Most of the judges of the VGHs, on the other hand, joined the NSDAP only after 1933 (2004, p. 117). In fact, the discussion is crucial. According to the accepted position, the VGHs will either thoroughly be excluded from legal justice system, which will reveal the burden on the shoulders of the latter; or be recognized as a part of it, in case of which legality of constitutional system will be accused of absorbing such an unjust exercise. In such an occasion of dispute, however, the issue cannot be handled here further in detail.

unitary, common enforcement of law in line with the NSDAP's interests was sustained through general, common acquiescence of the jurists. Put it in another way, control by the ruling party and common acquiescence of jurists proved enough for Nazification of legality and functioning of fascism. Hence, at that point, Nazi rule in Germany exemplifies the capacity and power of common acquiescence and cooperation of jurists with the ruling party.

One can arrive at a similar conclusion for today's AKP in Turkey. Accordingly, the AKP could not yet secure *homogeneity* within judicial enforcement of laws; and between judiciary and executive through Cemaat. However, AKP's control of legislative, judicial and executive powers of state has more or less achieved. This control, by the way, depends on cooperation or acquiescence among opposing wills within state institutions. What matters for us is that, this achieved cooperation vis-à-vis unconsummated *homogeneity* is not a political failure. Weimar example shows that Nazification had as well experienced in the judiciary through acquiescence. Therefore, political consequences of acquiescence and *homogeneity* are similar in practice. Akin to Nazi's arbitrary power, the AKP on and off acts arbitrarily by exploiting this achieved cooperation on the basis of acquiescence; surpasses parliamentary regime and constitutional state. As a result, those who show this acquiescence today in Turkey, shall regard themselves no less than a member of Cemaat.

What can be done with the achieved level of control over constitutional state? More specifically, what can be done with the judicial power made depended to the government? Criminalization and suppression of political opposition through courts, that is the subject of the next chapter, is one of the possible answers.

CHAPTER 5

POLITICS OF COURTS AND AKP'S POLITICAL JUSTICE

In the period 2007-2008, all dimensions of constitutional state were in a process of change. In June 2007 general elections, a new legislative power was elected. With the formation of second AKP government and election of Abdullah Gül to Presidency, both organs of the executive power of the state determined anew. A new constitution was attempted to be written; the old one was attempted to be amended. At about the same times, an unusual activism in the judicial power of the state could also be observed. This activism was not only, but to a large extent related to the political trials commenced after 2007, which are popularly known as Ergenekon case, the KCK case, and Hopa case. Principally because of these trials, courts and judiciary have become one of the key actors of political life in Turkey after 2007. Devrim Aydın argues that today, political parties both in and outside of the parliament develop their political stances and policies towards social and political problems depending on prosecutors' indictments or decisions of courts.[639] Therefore, it is useful to examine them in a more detailed way; interpret them in a larger context of Turkish political life.; and locate them in their right place within constitutional State in Turkey.

[639] Aydın, Devrim (2012) in *Ankara Barosu Uluslararası Hukuk Kurultayı Cilt II*. Kocaoğlu, Sinan (ed). Ankara: Ankara Barosu Başkanlığı, p.375

5.1 Ergenekon Case

The beginning of Ergenekon trials goes back to the spring 2007. In March 2007, a magazine called *Nokta* published what it claimed to be excerpts of the diary of retired Admiral Özden Örnek. The diaries included information about two coup plots against the AKP government, named *Sarıkız* and *Ayışığı*. Coup plots were allegedly organized in 2004 by two high-ranking former generals, Şener Eruygur and Hurşit Tolon. Shortly after diary's publication, Örnek claimed that the documents were forgeries. The police raided the offices of Nokta, and the magazine had to suspend its publication.[640] However, the following developments turned the situation upside down. In June 2007, 27 hand grenades were discovered in a house in Ümraniye, İstanbul. In addition, in police raids in June, a retired soldier from Special Forces Command, a retired lieutenant, 2 retired sergeants and the head of the *Kuvvai Milliye Derneği* (National Forces Association) were arrested.[641] This was followed by a series of nationwide police raids during January-March 2008, when numerous people were taken into custody, interrogated, and arrested. Ergenekon trial, being prosecuted in the 13th High Criminal Court of İstanbul, started as such.

The striking feature of Ergenekon case (as in other political trials mentioned below) is unending, disturbing and frightening police raids. On January 21, 2008, 27 people were arrested by police in İstanbul and İzmir. They ranged from retired military personnel like Land Forces Colonel Fikri Karadağ, retired Brigadier General Veli Küçük, and retired Lieutenant Mehmet Zekeriya Öztürk; to lawyer Kemal Kerinçsiz and the author of newspaper *Akşam,* Güler Kömürcü. On March 21, 2008, police staged pre-dawn raids on nearly 20 workplaces and private homes in Istanbul and

---

[640] Grigoriadis, Ioannis N.; Özer, Irmak (2010). "Mutations of Turkish Nationalism: From Neo-Nationalism to the Ergenekon Affair" in *Middle East Policy*, Vol. 17, No. 4, p.109

[641] Jenkins, Gareth (2009a). *Between Fact and Fantasy: Turkey's Ergenekon Investigation*. Silk Road Paper, p.37

Ankara, and detained a dozen suspected. Those taken into custody included the former rector of Istanbul University, Kemal Alemdaroğlu; the chairman of *İşçi Partisi* (Worker's Party), Doğu Perinçek; and the editor of newspaper *Cumhuriyet,* İlhan Selçuk. On July 1, 2008, 21 people (academics, politicians, journalists, lawyers, businessmen, and high-ranking retired military officials) were detained by police in İstanbul, Ankara and Trabzon. 12 were subsequently arrested, who included Şener Eruygur and Hurşit Tolon; the head of the Ankara Chamber of Commerce, Sinan Aygün; and Ankara representative of Cumhuriyet, Mustafa Balbay. They were charged with forming an illegal organization to provoke a series of incidents, which would pave the way for a military coup.[642]

On July 14, 2008 first indictment submitted to the court. It is noteworthy that the indictment came more than a year after the operation got started and people kept under pre-trial arrest. The indictment charged 86 suspects. Among the allegations were "membership to a terrorist group", "attempting to overthrow the government by using violence and coercion", "inciting the people to an armed rebellion against the government" and "inciting the people to hatred and enmity".[643] Defendants were alleged to increase the pressure against AKP government by murdering the Catholic priest Andrea Santoro in Trabzon in February 2006, bombing the offices of Cumhuriyet in May 2006, murdering one judge in an attack against the Council of State in May 2006.[644] After the acceptance of indictment by the court, police raids gathered pace. On September 18, 2008 early in the morning, police detained 25 more suspected members of Ergenekon, including journalist Tuncay Özkan. 16 of them were subsequently arrested. In January, 2009, during simultaneous dawn raids across

---

[642] Jenkins, 2009a, p.41, 47; Toktaş, 2010

[643] Jenkins, 2009a, p.50; Balcı, Ali; Jacoby, Tim (2012). "Guest Editors' Introduction: Debating the Ergenekon Counter-Terrorism Investigation in Turkey" in *Middle East Critique*, Vol. 21, No. 2, p.138

[644] Grigoriadis, 2010, p.110

country, a total of 70 people were taken into custody, 35 of them were arrested, including a Full General, a Major General, three retired Generals, and former head of the Higher Education Council, Kemal Gürüz.[645]

On March 8, 2009, the second indictment was presented to the court. Second indictment included similar allegations to the first; and accused another 56 suspects of membership to Ergenekon terror organization. The allegations based on two coup plots published in magazine Nokta, Ayışığı and Sarıkız; and two additional coup plots discovered during police investigations, namely *Yakamoz* and *Eldiven*. During the prosecution process of the second indictment, on April 13, 2009 police detained 39 alleged members of Ergenekon in early morning raids on 83 different places across Turkey. The detainees were mostly former university rectors, academics and members of NGOs; including the rector of Başkent University, Mehmet Haberal; the former rector of İnönü University, Fatih Hilmioğlu; the former rector of Giresun University, Metin Öztürk; the former rector of Ondokuz Mayıs University, Ferit Bernay; the former rector of Uludağ University, Mustafa Yurtkuran; and retired academic Erol Manisalı.[646] Also, police detained Türkan Saylan, the head of *Çağdaş Yaşamı Destekleme Derneği* (Association for the Support of Contemporary Living-ÇYDD) and taken her into custody. The police proceeded with tracking down nearly 15.000 girls attending schools with Association's scholarship, and investigated them for their potential involvement in terrorist activities.[647]

On July 19, 2009 the third indictment was prepared, which charged 52 more suspects. Thereby, the total number of people accused of being a member of Ergenekon terror

---

[645] Jenkins, 2009a, p.36; Karaveli, Halil M. (2009a). "Turkey Divided over The Meaning of the Ergenekon Conspiracy" in *Turkey Analyst*, www.silkroadstudies.org

[646] Balcı, 2012, p.138; Jenkins, 2009a, p.66,76

[647] Baran, 2010, p.81

organization reached to 194. The indictment claimed that the accused members of Ergenekon belonged to a vast, centrally-controlled organization. This organization was not only trying to topple the AKP government by provoking a military coup; but also responsible for numerous acts of political violence in Turkey over the last 20 years (including controlling militant leftists, Kurdish nationalists and Islamist groups).[648] During investigations, many new documents have emerged, revealing new military plots such as *Kafes Eylem Planı* (Cage Action Plan) and *İrtica ile Mücadele Eylem Planı* (Action Plan to Fight Religious Fundamentalism). Very similar to the initial two coup plots, public informed about these last two coup plans by the publications of newspaper *Taraf*.

On November 19, 2009, *Taraf* published details of an operation called Kafes Planı. Kafes Planı was allegedly prepared by high-ranking members of Turkish navy. The organization was reportedly planning to assassinate members of non-Muslim communities and blame the murders on the AKP.[649] A separate indictment was prepared for Kafes Planı. It was accepted by the court on March 19, 2010 and charged 33 suspects. Documents concerning İrtica ile Mücadele Eylem Planı, on the other hand, were published by Taraf on June 12, 2009. It is alleged that plan included black propaganda, conspiracy and attrition actions against the AKP and Gülen Cemaat. The indictment of İrtica ile Mücadele Eylem Planı was accepted by the 13nd High Criminal Court of İstanbul on April 29, 2010.

Meanwhile, during police investigations new armament was discovered in Poyrazköy, İstanbul on April 21, 2009. The indictment for Poyrazköy armaments was accepted on

---

[648] Jenkins, Gareth (2009b). "Third Ergenekon Indictment Reinforces Concerns about Turkish Judicial System" in *Turkey Analyst*, Vol. 2, No. 17, www.silkroadstudies.org

[649] Jenkins, Gareth (2009c). "Defense against Documents: the Turkish Military's Rearguard Action" in *Turkey Analyst*, Vol. 2, No. 21, www.silkroadstudies.org

January 27, 2010 by the 12nd High Criminal Court of İstanbul, which charges 85 suspects.

Another important case of Ergenekon terror organization is *Balyoz* (Sledgehammer) trial. The beginning of Balyoz trial once again brings the dubious newspaper Taraf forth. In January 2010, an unknown person submitted a suitcase to Mehmet Baransu, an author of Taraf, full with documents, tapes, and CDs. One of those CDs allegedly included Balyoz Coup Plan. It is asserted that Balyoz Coup Plan was prepared by a junta leaded by Çetin Doğan, Commander of the First Army. Accordingly, *Oraj* action plan in air force and *Suga* action plan in naval forces against opponents, *Döküm* action plan against religious communities, *Sakal* action plan against non-muslim community leaders, *Tırpan* action plan against anti-coup academics and *Testere* action plan against anti-coup liberals were prepared. During investigations, 40 people were arrested in February 2010; 20 military officers, including former heads of the air force and navy, have been detained. The indictment of the Balyoz Coup Plan was sent to the court on July 6, 2010. According to the indictment, the plan envisaged to destabilize state by staging a series of terrorist attacks, and provoking Greece to shoot down a Turkish airplane. These would provide the army with a pretext to perform a coup and remove the AKP from power.[650]

At the beginning, 196 suspects were charged with involvement in Balyoz Coup Plan.[651] Yet, the number has increased since August 2011. Lately, the total number of accused in the trial is 365. What is interesting in the Balyoz trial is that, the court accepted in the indictment that plan had never been put into action. The General Chief

---

[650] Ananicz, Szymon, (September 2012). "Turkey: The Sentence in the Balyoz case", http://www.osw.waw.pl/

[651] Jenkins, Gareth (2010b). "The Devil in the Detail: Turkey's Ergenekon Investigation Enters a Fourth Year" in *Turkey Analyst*, Vol. 3, No. 13, www.silkroadstudies.org

of Staff resisted it; so the coup went nowhere.[652] Therefore, even if we accept that there is a coup plan called Balyoz prepared by soldiers, soldiers decided not to implement it. Hence, in Balyoz case, the *intention* of soldiers to topple government is charged. Balyoz case proceeded relatively quickly. On September 21, 2012, the court brought in its verdict. Accordingly, 330 out of 365 defendants have been found guilty. The court sentenced 325 members of the military (including 89 generals and admirals, 24 of whom are in active service) to imprisonment between 13 and 20 years.[653] The appealing process continues.

Lastly, the indictment of *Andıç* (Internet Memorandum) case, another allegation related to Ergenekon organization, was accepted in July 2011. In this trial 22 suspects were charged, one of whom is the 26th General Chief of the Staff, İlker Başbuğ. He was arrested on January 6, 2012 and accused of "directing an armed terror group" and "attempting to overthrow the government".

All these police raids, investigations, indictments and interrelated trials are mentioned at length with an aim to show how detailed and elaborate the Ergenekon case is. Firstly, the accusation of "membership to a terror group" and "attempting to overthrow the government" implies that suspects of Ergenekon case are charged within the scope of Anti-Terror Law in the ÖYMs, rather than on the basis of *Türk Ceza Kanunu* (Turkish Criminal Code-TCK) in regular criminal courts. Secondly, Ergenekon investigation, which was started in summer 2007, has not been finalized within 5 years. Just because of its scope and length, it deserves to surpass the boundaries of courts, and be deemed as a social and political phenomenon. Then, one may wonder the meaning of this trial. At the heart of the Ergenekon case, there lies the allegation about planning a military coup against the AKP government. As this

---

[652] Kitfield, James (April 2011). "Exorcising Turkey's Demons", *National Journal*

[653] Ananicz, Szymon, September 2012

allegation shows, Ergenekon investigation centers on Turkish military. Therefore, in the initial stages of the investigation, not ordinary citizens; but mostly members of the military were feared to be judged. Nevertheless, public at large was anxious. Dawn raids of police and pre-trial arrests of numerous members of military made the public suspect that Ergenekon trial, to a certain extent, may be unlawful. Sadly, this belief was verified by the appearance of indictments. It is mainly because; indictments were apparently inadequate in showing concrete evidence for accused crimes, and relating evidences with the defendants. Therefore, as prosecutions and trials continued; pre-trial arrests and interrogations of Ergenekon case proved to be a means of punishing military, rather than a fair and just trial.

The influence of this attack to the military was felt strongly in civil society. Throughout the case, the military is defamed in media which is interpreted as "touching" the untouchable Turkish military for the first time.[654] No doubt, questioning military's actions and statute within the State is a prerequisite for the development of parliamentary democracy and the rule of law. However, what we see in Ergenekon case is that, military is unlawfully judged. In addition, an investigation basing on "attempting to organize military coup against the government" spread out to society and included NGOs and a considerable number of journalists. At the end, investigations and arrests reached so many individuals known to be in opposition to the government that public opinion about Ergenekon case has changed. It is now widely shared that the trials is not actually about struggling with unlawful organizations within military; but with secular civil society and secular opposition as a whole. Today, the Ergenekon case is presented as suppression of pro-secular critics and individuals who oppose the AKP.[655] Indictments of the courts are an instrument

---

[654] Karaveli, 2009a; Grigoriadis, 2010, p.109,111; Balcı, 2012, p.139

[655] Balcı, 2012, p.138; Eligür, Banu (2010). *The Mobilization of Political Islam in Turkey*. Cambridge: Cambridge University Press, pp.266-267; Baran, 2010

used to delegitimize and ultimately silence secular opposition. Consequently, the objective of the Ergenekon case is not only to decrease the power of military; yet to eliminate secular opposition.[656]

Ergenekon case is not over. Yet, it already brought results. One of the most striking consequences of Ergenekon investigation has been the creation of a society of fear; a society full with people who fears criticizing the AKP. Indeed, this fear is well grounded. For instance, private telephone conversations of opponents of the AKP were leaked to the media. Hence, many ordinary people are now wary of talking openly about the government on the telephone.[657] Nevertheless, detention of prominent secular AKP critics along with possible real criminals is the basic reason of this fear.[658] It implied that anyone who is critical of the AKP can be associated with real criminals and arrested. As a result, currently there is a widespread perception that being in opposition to AKP rule and to the Islamization of society is equal to being a coup-plotter.[659]

5.2 KCK Case

The second large, nationwide and exhausting political trial that started after 2008 is the KCK case. "KCK" is an abbreviation used for "Koma Civaken Kurdistan", which means *Group of Communities in Kurdistan*. As the name "Kurdistan" indicates, the KCK investigations and trials are exclusively about Kurdish issue and Kurdish politics. The first police raid in the KCK case came on April 14, 2009 and included 13

---

[656] Çağaptay, Soner (February 2010). "What's Really behind Turkey's Coup Arrests?" in *Foreign Policy*, www.foreignpolicy.com; Balcı, 2012, p.139

[657] Jenkins, 2010b

[658] Eligür, 2010, p. 273; Balcı, 2012, p.138

[659] Karaveli, 2009a

different cities, principally in eastern regions of Turkey. In Diyarbakır, two executives of *Demokratik Toplum Partisi* (Democratic Society Party-DTP-Kurdish oriented party established before the BDP) and 51 other suspects were arrested. The prosecutor filed a lawsuit for 52 suspects on May 28, 2009 in the 6th High Criminal Court of Diyarbakır.[660] At the beginning, accusation of party members was unexpected for many. Yet, when the scope of investigation and prosecution became clear in time, it shocked everyone.

In September 2009, 10 suspects were arrested including the head of Diyarbakır Municipality Provincial Council, 3 Deputy Mayors, and assistant secretary general of Diyarbakır Metropolitan Municipality. On December, 24 2009, during the police raids in Van, Van provincial accountant of the BDP, branch chairman of *Mezopotamya Yakınlarını Kaybedenlerle Yardımlaşma ve Dayanışma Derneği* (Mesopotamia Association for Assistance and Solidarity with Relatives of Disappeared Persons), 4 members of the BDP Party Council, and 10 BDP members were taken into custody. Out of 17 suspects, 14 were arrested. Police raids were so intense and impetuous that only 8 months after the beginning of the KCK investigation, over 2.200 people had been taken into custody and interrogated; and about 10 cases had been opened in different cities.[661]

The indictment of the KCK main trial was submitted to the court in June 2010 and accepted by the 6th High Criminal Court of Diyarbakır on October 18, 2010. It shows that suspects waited the beginning of the trial for 18 months under pre-trial arrest. Under this condition, the main trial of the KCK case started in Diyarbakır and charged 151 suspects, 103 of whom were under pre-trial arrest. Among the defendants, there were 28 executives of the DTP, 12 mayors of the BDP including Metropolitan Mayor

---

[660] "52 DTP'li için İlk İddianame Hazırlandı", 28.05.2012, www.bianet.org

[661] "Tutuklu 104 "KCK" Şüphelisinin Dosyası AİHM'de", 17.05.2010, www.bianet.org

of Diyarbakır, Osman Baydemir; 2 heads of the BDP Diyarbakır provincial council, 2 aldermen, and Diyarbakır branch chairman of Human Rights Associations. In time, the number of defendants increased to 152.

The indictment of the KCK Diyarbakır main trial incriminated the defendants by "violating the unity and indivisible integrity of the state with its territory", "being a member of armed terrorist organization", "heading an armed terrorist organization", and "aiding and abetting a terrorist organization". Therefore, the KCK suspects are charged within the scope on Anti-Terror Law in the ÖYMs. According to the indictment, Kurdish armed movement PKK reorganized and renamed itself as the KCK. Therefore, the KCK is allegedly the same organization with the PKK. Only difference is that, the KCK is the main umbrella structure, mostly organized in cities. Hence, it is generally referred as the "urban establishment of the PKK". Consequently, the indictment names the terror organization as the "PKK/KCK". Moreover, it adds "TM" abbreviation to it; like, "PKK/KCK-TM". "TM" means "Turkey Assembly", which implies that the KCK operates and establishes assemblies in other countries as well. It is claimed in the indictment that the KCK aims to establish an independent Kurdistan. This requires the formation of a single state encompassing certain regions of 4 different countries; namely, Iraq, Iran, Syria, and Turkey. In this direction, the PKK/KCK-TM's first goal is to form an autonomous structure within Turkey.[662]

The KCK case bears violations of the rule of law. For instance, pre-trial arrest is a denial of freedom and obviously not less than a pre-emptive punishment for the suspects. Nevertheless, the most obvious violation of the rule of law in the KCK case is denial of speech in mother language. In the first hearing of Diyarbakır main trial in the 6th High Criminal Court, the defendants stated their will to make their statements

[662] İlkiz, Fikret (July 2012). "11 bin 679 sayfalık KCK iddianamelerinin özeti ne?", *interview by Hazal Özvarış*, www.t24.com.tr

in their mother language, which was Kurdish. However, the court refused this claim. The court justified its decision by indicating defendants' police statements, which were in Turkish. When the defendants insisted in giving their statements in the court in Kurdish, the court wrote about Kurdish to minutes that defendants spoke in "an unknown language". The issue got tense and lawyers applied to a higher court on November 8, 2010 demanding the defendants' right to make statements in their mother language. Two days later, the higher court refused the demand of the lawyers with the same justification. In the 15th hearing of the trial, the court did not permit the defendants to make their statements in Kurdish again. Yet this time, chief judge wrote to minutes, the defendants wanted to defense themselves in a language "thought to be Kurdish". In the 21st hearing of the trial on April 19, 2011, however, lawyers, number of whom was as high as 100, declared their recuse and left the hearing room, as the court did not allow their making statements in Kurdish once more. In addition, in the hearing on August 10, 2011, the court muted the microphone when Diyarbakır branch chairman of the Human Rights Associations spoke in Kurdish.[663]

The other KCK trial in Diyarbakır was sued in the 5th High Criminal Court. In this second trial in Diyarbakır, 22 suspects were charged, 10 of whom were under pre-trial arrest. Gülser Yıldırım, a member of parliament (MP) elected from Mardin was also charged in this trial. The defendants were incriminated as "being a member of armed terror organization" due to conducting activities in Democratic Urban Assembly of Mardin. Indictment of this trial alleges that foundation and functions of the Urban Assembly relied on the PKK/KCK-TM charter. According to the indictment, urban assemblies are grass root organizations of the PKK/KCK-TM structure. Meanwhile, another city where the KCK investigations and trials centered is Van. In the first KCK trial in Van, 17 suspects were charged in the 3th High Criminal Court, 14 of whom

[663] "KCK Davasında Kürtçe'ye Geçit Yok",10.11.2010, www.bianet.org; ""Bilinmeyen Dil"den, "Kürtçe Olduğu Düşünülen Dil"e", 13.01.2011, www.bianet.org; "Savcı KCK Davasının Başka İlde Sürmesini İstedi", 10.08.2011, www.bianet.org

were under pre-trial arrest. The first hearing of the trial took place on November 2, 2010. On the other hand, the indictment of the second KCK trial in Van was accepted in April 21, 2011. 15 suspects (arrested in Hakkari in 2010) were charged in this trial. The indictment of the second KCK trial in Van claimed that disciplinary board of Democratic Urban Assembly of Hakkari acted as "people's court".[664]

The KCK investigations intensified before June 12, 2011 general elections. Prior to June 12, the AKP started to pursue a very aggressive policy towards the BDP;[665] so much so that, almost half of the detentions and arrests in KCK case have occurred since April 2011. Between April 25-29, 2011, only in four days, 60 people were taken into custody in different cities, including BDP executives; and majority of them were arrested. The immediate result of police raids and investigations was that many Kurds, number of whom exceeded 2.000, were made incapable to vote in the elections. However, under any circumstances, election results made the AKP's nightmare came true. In 2011 general elections, the BDP supported the independent candidates of Labor, Democracy and Freedom Bloc (also included some leftist parties' candidates), and this bloc realized an unprecedented success. The bloc received 6.58 percent of national votes and garnered 36 seats in the parliament. Moreover, in southeast regions, the bloc beat the AKP. The AKP received 37 percent of the votes cast in 12 provinces of southeast region, while the bloc received 50.8 percent. Then, by and large the AKP could be the winner of the general elections; however, the party lost votes in the southeast.[666]

---

[664] "KCK Davasında Bir Tahliye", 13.04.2011, www.bianet.org; "Kürtçe Savunma Talebi KCK İddianamesine Girdi", 21.04.2011, www.bianet.org

[665] Jenkins, Gareth (2011a). "The Latest KCK Arrests: One Step Closer to Breaking Point" in *Turkey Analyst*, Vol. 4, No. 21, www.silkroadstudies.org

[666] Satana, 2012, p.176

The victory of the BDP came with a price. The KCK investigations became nationwide after the elections. Up until September 2011, nearly all of the detentions in the KCK case took place in predominantly Kurdish southeast cities of Turkey. However after then, there has been a rise in the number of arrests in the west of the country. On September 23, 2011 during police raids in İzmir, 34 people were taken into custody and afterwards 30 of them were arrested. Among the arrested, there were BDP district chairman, members of the BDP Party Council, 1 party provincial executive, 8 party district executives, and a member of party central executive committee. On October 4, 2011, 92 people were taken into custody; 14 district chairmen, 12 provincial executives, 7 members of party council and almost all of the former provincial executives of the BDP were among them. The very same day, 31 people in Diyarbakır, 20 people in Gaziantep, and 2 people in Ankara and Hakkari were taken into custody. Thereby, between August-September 2011, 908 people in total had been taken into custody.[667] Only in November 2011, 270 people were taken into custody during police operations in Mersin, Gaziantep, Bitlis, Diyarbakır, Aydın, Muğla, Şanlıurfa, Mardin, and Ankara. During police operations in Istanbul on October 31, 2011, 47 people were taken into custody. Professor Büşra Ersanlı, a respected academic from Marmara University, and Ragıp Zarakolu, a prominent publisher and human rights activist were among them. Both Ersanlı and Zarakolu were subsequently arrested.

Beside the KCK main trial in Diyarbakır, the most salient of the KCK trials is the one which takes place in İstanbul. The KCK trial opened in the 15th High Criminal Court of İstanbul is known as KCK İstanbul main trial. In this trial, 205 suspects are charged; 140 of them are under pre-trial arrest. The indictment of the KCK İstanbul main trial asserts that the latest strategy of the PKK/KCK is defined as to protect

[667] Tahaoğlu, Çiçek "İstanbul'da 92 Kişi Gözaltında", 04.10.2011, www.bianet.org; "KCK Operasyonu: 137 Gözaltı", 04.10.2011, www.bianet.org

Kurdish existence and provide Kurdish freedom. This strategy relies on social construction, and has both armed and political dimensions. Yet, most importantly, it depends on democratic autonomy. According to the indictment, the PKK/KCK accelerated its political activities, mass demonstrations, and acts of violence. This is allegedly a matter of life or death for the organization. With an objective to increase PKK's political activities, regenerate policies, and educate people in line with the PKK/KCK's ideology, and thereby construct a new society, *Political Academies* were founded in many cities.

Political Academies allegedly functioned as training centers of the organization. Accordingly, the content of the training given in Academies was similar to what the PKK provided to its militia in mountain camps. It is further claimed that through Academies and various cultural associations, the PKK/KCK reached to "innocent" people. Afterwards, these innocent people were indoctrinated, and some of them were sent to rural areas. Some, however, were tasked in urban establishment of the organization.[668] There are two points to be made. Firstly, through Political Academies, the PKK/KCK is directly associated with the BDP. It is stated in the indictment that PKK/KCK-TM's provincial executive meetings have taken place in the BDP buildings, and BDP's cadre who administer the organization has participated to the meetings in Istanbul. It is also claimed that Academies were opened under BDP's legal personality and functioned as the training camps of terror organization. Therefore, there is allegedly an organizational tie and unity of purpose between the BDP and the PKK/KCK. Due to this tie, prosecutor of the trial pronounces referring the BDP to Chief Public Prosecutor of the Republic for consideration of party's legal status; implying the likelihood of its closure.[669]

---

[668] İlkiz, July 2012

[669] İlkiz, Fikret."KCK Davaları ve Yargı", www.tr.boell.org, p.45

Hence, the KCK case may lead to the closure of the BDP. This constitutes a constant threat directed against the party. Similarly, parts of the indictment concerning the BDP imply that the main target of the KCK case is the BDP itself. This is the most irritating and contentious point of the case: it is the Kurdish politicians and even representatives of the people who are readily made an object of police harassment, and being charged. Up until November 2011, 10 mayors, 8 deputy mayors, 2 vice mayors, 2 former vice mayors, 2 former mayors and 29 aldermen of the BDP are under arrest. Actually, some of the activities given a place in the indictment are closely related to usage of rights and freedoms; like, freedom of speech and association; right to organize labor unions, hold meetings and demonstrations; right to vote, to be elected and to engage in political activity. Therefore, as Human Rights Watch has noted, KCK investigations and arrests seemed less aimed at addressing terror than at attacking legal pro-Kurdish political organizations.[670]

In terms of the numbers; number of trials or number of who interrogated, taken into custody, arrested, and accused, the KCK is the largest case of the three political cases. It is nothing but massive. From April 14, 2009 when the KCK investigation began, up until November 2011, nearly 8,000 people have been detained on charges of membership to KCK organization, of whom almost 4,000 have been arrested.[671] These numbers increased even more after autumn 2011, when the AKP experienced electoral defeat in the southeast. After this date, the KCK investigations started to center on pro-Kurdish newspapers, journalists and academics more than the BDP members. For instance, on November 3, 2011, police conducted operations in Mersin, Erzurum, Bingöl, Diyarbakır and Antalya. Journal *Özgür Gündem* was raided. 2 authors of the

[670] Gunter, Michael M. (2013). "The Kurdish Spring" in *Third World Quarterly*, Vol. 34, No. 3, pp. 443-444

[671] Jenkins, 2011a

journal and 70 lawyers; in total 100 people were taken into custody.[672] Arrested lawyers were accused of conveying Abdullah Öcalan's (leader of the PKK, who is imprisoned in İmralı prison) messages to PKK's military quarters in Qandil.

For lawyers and journalists, separate indictments were prepared. Therefore, beside İstanbul main trial, two more cases are presented to the courts in İstanbul. The second KCK trial in İstanbul is known as "trial of journalists" and it charges 44 suspects. Its indictment was prepared on April 12, 2012. The third KCK trial in İstanbul, on the other hand, started in the 16th High Criminal Court on July 16, 2012. It charges 50 suspects. 36 of them were under pre-trial arrest and 46 of them were lawyers. So, the third KCK trial in İstanbul is known as "trial of lawyers". In the indictment of this trial, which was accepted by the court on April 3, 2012, suspects were accused of forming a "committee of the leadership" (Önderlik Komitesi). During the hearings of the trial, the indictment only summarized to the defendants, which was unlawful. In addition, the demand of the defendants to make their statements in Kurdish was refused.

All in all, while the KCK case progressed and spread to the west of the country, we see that investigations are both enlarged and intensified. Simultaneously, the pressure on the BDP and the civil society is increased. Michael Gunter commands that accusation of "membership of a terror organization" extended in the KCK case to those who share the PKK's stated goal of greater rights and liberties for Turkey's Kurds. For instance, Büşra Ersanlı is incriminated in the indictment of the KCK main trial in İstanbul as being the head of the terror organization due to her participation to and giving lectures in Political Academies.[673] Hence, mere "association" is deemed

---

[672] "KCK'de Şimdi de Avukatlar Gözaltında", 22.11.2011, www.bianet.org

[673] "KCK İddianamesi Açıklandı: Ersanlı'nın KCK Yöneticisi Olduğu İddia Ediliyor", 19.03.2012, www.bianet.org

enough to be counted as a "terrorist". As a result, although some of those charged with membership of the KCK are PKK activists and sympathizers, many others appear guilty of nothing more than advocating greater Kurdish cultural and language rights.[674] Accusation of human rights activists, lawyers, academics, and journalists, on the other hand, has changed public perception of the KCK case. It made the public think that the AKP is using the KCK investigation as an instrument not only to crush Kurdish opposition, but also to criminalize any supporter of Kurdish politics fall outside of its party. Hence, the KCK arrests started to be perceived as a 'war on dissent' rather than a 'war on terror'.[675]

The KCK investigation and detentions continued in 2012. On June 26, 2012, 58 people were taken into custody in Ankara, all of whom were members of *Kamu Emekçileri Sendikaları Konfederasyonu* (Confederation of Public Workers Unions-KESK). Beside those mentioned above, new cases were presented to the courts in Adana, Erzurum, and İzmir. In conclusion, from April 2009 when KCK investigation started, up until July 2012, 113 cases were presented to the courts all over Turkey. In total, 2.146 people were charged in these trials; 992 of them are under pre-trial arrest. 274 of the charged are BDP members, even MPs.[676] The trials continue.

5.3 Hopa Case

Hopa case concerns a protest in a small district in Black Sea region, which turned into an *incident*. On May 31, 2011, the Prime Minister Erdoğan held a public meeting in Hopa, a district of Artvin at the coast of Black Sea. The meeting of the Prime Minister, however, was protested by the people. The demonstrators protested AKP's

[674] Jenkins, 2011a

[675] Gunter, 2013, p. 444

[676] İlkiz, p.43

policy of tea quotas (exclusively farmed in the region), construction of hydroelectric power plants and consequent destruction of nature in the region. The police did not allow the protest, and attacked the demonstrators. A retired school teacher, Metin Lokumcu, affected by the piper gas that the police used extensively to defuse the crowd. Lokumcu died at the scene of the protest after a heart attack. In the clash between the police and the demonstrators, one of the guards of the Prime Minister was also hurt. At the time of the incident, tens of demonstrators were taken into custody. Many of them were arrested afterwards. The developments got extraordinary after that moment.

The police raided the homes of demonstrators at night in May 31, and early in the morning. During the raids, approximately 60 people were taken into custody. Suspects, on the other hand, were waiting their turn to be interrogated by the prosecutor. Yet unexpectedly, 31 suspects were taken by police to Erzurum at 5 am in order to be interrogated by Specially Authorized Prosecutor.[677] After then, 16 out of 31 suspects were arrested and consigned to the 2nd High Criminal Court to be charged within the scope of Anti-Terror Law. Prosecutor *nolpros* the indictment against 9 people. It meant that they were referred back to the regular courts in Hopa. The rest 7 suspects, however, accused of "propagating an armed terror organization". This is what made Hopa case a political trial. Ordinary people demonstrating against ruling party's policies are made propagators of terrorism; and an ordinary dispute between the police and demonstrators is removed from the domain of regular courts and introduced to *specially* authorized courts.

The indictment for 7 suspects was accepted by the 4th High Criminal Court on August 24, 2011. The indictment asserts that the protest in Hopa on May 31 was organized by socialist illegal organizations. The suspects, on the other hand, conducted terrorist

[677] "Hopa Davası Başladı", 04.06. 2011, www.sendika.org

activities and propagated terror organizations. The indictment shows the following evidences to testify suspects' attributed crimes: covering faces during the event in order to hide identity, chanting *Gündoğdu Mach* (a socialist march) and *Dev-Genç March* (march of the now-extinct Revolutionary Youth), holding posters with "fist with star" figure on it[678] and written "Lokumcu will live in our Revolutionary Path", shouting slogans "all of us is from Hopa, all of us is bandit",[679] hanging banners to walls, and raising left fist up. Relying on these evidences, the indictment accused the suspects with propagating illegal *Türkiye Halk Kurtuluş Partisi-Cephesi* (Turkey People's Liberation Party Front -THKP-C).[680] However, such an organization did not exist at the time of the incidents.

9 suspects, who were referred back to the regular courts in Hopa, were released; 5 of them on October 24, 2011 and the rest on November 4, 2011. As for the arrested 7 charged in the high criminal court, the accusations were severe. Yet, the indictment was full with errors. For instance, the indictment first asserted that demonstration was organized by illegal organizations. Right after this, it stated that demonstrators were members of *Özgürlük ve Dayanışma Partisi* (Freedom and Solidarity Party-ÖDP), *Ezilenlerin Sosyalist Partisi* (Socialist Party of Oppressed-ESP) and *Halk Evleri* (People's Houses). However, all the ÖDP, the ESP and Halk Evleri are legal organizations. In addition, the indictment included almost no concrete evidence. In the basis of common slogans and chants, legal organizations of the ÖDP, the ESP and Halk Evleri are tried to be associated with an illegal organization. Therefore, it was not a surprise for many that, in the first hearing of the trial on September 14, 2011, the

---

[678] This is the symbol of *Devrimci Genç* (Revolutionary Youth) and *Devrimci Yol* (Revolutionary Path) organizations. Devrimci Yol is one of the groups appeared after the dissolution of the THKP-C. None of the three exists today.

[679] Bandit was the name attributed to demonstrators by the Prime Minister Erdoğan.

[680] Söylemez, Ayça."Hopalılara "Olmayan Örgütün Propagandasından" Dava", 25.08.2011, www.bianet.org

4th High Criminal Court decided lack of jurisdiction. It meant that 7 suspects were acquitted from the allegation of propagating a terror organization.[681]

However, it was not the end. 10 months after the incident, on April 12, 2012, a second indictment for the demonstrators was prepared. This time, the trial was seen in the regular courts. In the scope of this second indictment, 51 suspects were charged in the Criminal Court of First Instance of Hopa on the basis of opposing the Law No 2911 on Meetings and Demonstration Marches, obstructing the police, and damaging public property. In the 65 pages long second indictment, the guard of the Prime Minister, one superintendent, and a number of police officers were identified as victims. The indictment stated that the ÖDP, the ESP and Halk Evleri called the people to protest the AKP's policies of environment, water and especially tea farming. As a result of this call, almost 300 people gathered. Some of the demonstrators wanted to hang posters related to hydroelectric power plants and tea quotas; written "children of the Black sea protect its water and tea" on them. Yet allegedly, these posters irritated the Prime Minister and the AKP members in the meeting.[682] For that reason, the police intervened to demonstrators. The demonstrators, on the other hand, alleged to respond back to police by throwing stones. In the subsequent events, the indictment claims that some police officers were harmed, police autos were damaged by these stones, and the AKP district building were attacked. Moreover, the indictment appraised "stone" as a kind of weapon, and demanded half percent penalty increase for the suspects.

One may realize that in the indictment, telling of factual situation is mixed with persecutor's personal opinion. The demonstrators held some posters; but that these posters "irritated" the Prime Minister is the evaluation of the prosecutor. Moreover,

---

[681] Details of Hopa case were complied from *www.bianet.org* and *www.sendika.org*

[682] "Taşı silah sayan Hopa savcısı terfi etti", 16.05.2012, wwww.haber.sol.org.tr; "Hopa Davası 14 Ocak'ta", 12.01.2013, www.yurtgazetesi.com.tr

inclusion of personal opinion blurs the causal explanation of judgment. What is deemed illegal by the court in the second Hopa trial; holding posters or irritating the Prime Minister? Additionally, appearance of disturbance of the Prime Minister as an element of causal explanation harms impartiality of the court. It is because; one party of the trial is already defended in the indictment of the prosecutor. Yet, there are other reasons to doubt about the impartiality of the court in Hopa trial. For instance, unlawfully, the political backgrounds of the suspects were investigated by the police. The suspects' participation to May Day gatherings and their support of worker unions years ago were scrutinized, and covertly presented to the prosecutor as "wrong doings" of the suspects. Such acts of the court, besides its appreciation of stone as a kind of weapon equal to the arms used by police, destroyed any hope for impartiality of the court, and a just trial. Rather, it created an impression that the court already had a decision about the suspects before the start of the trial; and just following the procedures to announce it.

Meanwhile, a third indictment was prepared, charging 9 suspects for harming the guard of the Prime Minister. Later on, the second and the third trials were united and made into a single trial charging 60 suspects on the basis of opposing the Law No 2911.

On the other side, Hopa incidents in 31 May triggered nationwide protests at the very same day. In Pazar district of Rize, another city in the Black sea region, a press statement was issued. Due to this press statement, some months later, 22 people were charged on the basis of opposing the Law No. 2911 on Meetings and Demonstration Marches. The first hearing of Pazar trial took place in December 2012. Similarly, 24 people, who protested Hopa incidents and the death of Lokumcu, were charged in Hatay on the same grounds. Hopa incidents were also protested in İzmir in 31 May. Due to this protest, 15 people were investigated on August 18, 2011, approximately

2.5 months after the protest.[683] In İstanbul, two protestors were taken into custody in May 31 and later on, charged on the basis of opposing the Law No 2911 and damaging public property. A second protest was organized in İstanbul on June 1, 2011. The demonstrators marched towards AKP's office of provincial head and issued a press statement. 16 people were taken into custody at the time of the protest. Yet later, police raided the homes of demonstrators and took 16 more into custody. 28 people in total were charged on the basis of opposing the Law No 2911 and damaging public property.

Nevertheless, the largest of the protests took place in Ankara. Hearing the death of Lokumcu, protests were organized in Ankara on May 31. 54 people were taken into custody at the scene of the events; 22 of them were arrested. The indictment for the suspects, on the other hand, prepared by the office of Specially Authorized Prosecutor of Ankara in 4.5 months and presented to the 11th High Criminal Court of Ankara on September 30, 2011. Accordingly, 28 suspects were charged within the scope of Anti-Terror Law, Article 5. They are incriminated by being a member of an armed terror organization, propagating an armed terror organization; and also intentional injury, damaging public property, opposing the Law No 2911, and obstructing the police. Similar to Hopa trial of the Hopa case, the indictment of Ankara trial incriminates Halk Evleri by conducting actions under the guidance of terror organization. It also alleged that the suspects were members of the THKP-C.[684] Meanwhile, the following evidences were showed for suspects' alleged membership to a terror organization and propagation of it: throwing eggs, university course books which "aim to spread leftist ideas", flagstaff found in the scene of incidents, a broken umbrella written "Ankara Chamber of Medicine" on it, legal journal named *Feminist Politics*, and a banner concerning transportation price raise. In addition, some of the suspects had their hair

[683] Karaca, Ekin. ""İmamın Ordusu Sloganı Attın mı?" Soruşturması", 18.08.2011, www.bianet.org

[684] "Ankara'nın Hopa Davası Başladı", 19.06.2012, www.sendika.org

cut after the protest in Ankara. This was interpreted by the court as an act to disguise themselves; and presented as another evidence of suspect's committing the alleged crimes. Interestingly, prosecution of the "hair-cut event" continued after the acceptance of the indictment. Accordingly, hair of one of the defendants under arrest, Ozan Gündoğdu, was being cut in the prison. To cheer him up, 5 of his friends had their hair cut, too. They took pictures and sent it to Gündoğdu. 10 days later, 3 of them were arrested. The prosecutor asserted that the three had their hair cut in order to hide their identity as well. [685]

The first hearing of the Ankara trial took place on December 9, 2012 and all the suspects under arrest were released. The trial continues in the 11th High Criminal Court of Ankara.

A second trial was presented to the court on December 15, 2011 in Ankara for those who participated to protests. It charged 48 suspects; 3 of whom were lawyers. They were charged in regular criminal courts on the basis of opposing the Law No 2911 on Meetings and Demonstration Marches. The evidences against the suspects involved shouting the slogan "revolt, revolution, freedom", wearing *puşi* (a kind of scarf associated in Turkey with Kurds), and wearing hood. The lawyers are, on the other hand, separately accused of insulting police officers.[686] At its anniversary on May 31, 2012, Hopa incidents were commemorated and protested in Ankara. Subsequently, police interrogated 50 suspects including the heads of the KESK and Halk Evleri. The indictment for these 50 suspects was prepared on July 26, 2012. Consequently, a third trial had been opened in Ankara. Carrying a black wreath written "AKP the killer", holding a poster written "we will call the AKP to account for the deaths and cruelty", and marching towards AKP's office of provincial head were shown as evidences of

[685] Söylemez, Ayça. "40 Yıllık Sanık: "THKP-C Ayağa Kalk!"", 07.12.2011, www.bianet.org

[686] Söylemez, Ayça. "Ankara'da İkinci Hopa Davası" , 16.12.2011, www.bianet.org

alleged crimes.[687] On October 19, 2012, on the other hand, the second and the third trials were united; and hence, there appeared a single trial with 98 suspects, charged on the basis of opposing the Law No 2911 on Meetings and Demonstration Marches.

The evidences that the courts shows in all Ankara trials of Hopa case are more than inadequate. Some of them are ridiculous. Accusations and the evidences create the feeling that they are specifically made up with an aim to charge the suspects. Time to time, this is exactly the case. For instance, books acclaimed to aim spreading leftist ideas in the indictment accepted by the 11th High Criminal Court of Ankara, were either belong to Karl Marx, V. I. Lenin, Mahir Çayan, Deniz Gezmiş or İbrahim Kaypakkaya,[688] or they were books and leaflets written about them or having images and pictures of them. In fact, some of the books were university course books. Yet, more importantly, all of them were legal. However, in order to indicate that the books and leaflets are *inconvenient*, the police covertly presented to prosecutor the confiscation verdict on them adjudicated in 1970s; an act which is thoroughly out of law.[689] The trials continue.

5.4 Common Features of the Political Trials

In all of the three cases, the scope of the investigation is broad; trial process takes many years; trials spread countrywide; and hundreds or thousands of people are charged. All of them are closely watched by the public; and all of them create anxiety and fear in the public. Therefore, they differ from other criminal trials, and achieve historical importance for Turkish political life. For sure, proceedings and contents of

---

[687] Benli, Mesut Hasan. "Kısa Metraj Hopa İddianamesi" 27.07.2012 *Radikal*, www.radikal.com.tr; "Sorularla Ankara-Hopa Davası", 7.12.2011, www.sendika.org

[688] The last three are leaders of revolutionary movements in Turkey in 1970s

[689] Söylemez, Ayça. "40 Yıllık Sanık: "THKP-C Ayağa Kalk!"", 07.12.2011, www.bianet.org

the three cases are different from each other in many respects. Yet, they share common features as well. For instance, at the beginning, investigation processes of all are started on the grounds of membership to, or propagation of an armed terror organization. However, most importantly, all are overseen in the ÖYMs. Therefore, characteristics of the ÖYMs shall be examined more closely in order to understand the political significance of these trials.

5.4.1 Specially authorized courts and Anti-Terror Law

The ÖYMs are high criminal courts. They are introduced with the new *Ceza Muhakemeleri Kanunu* (Turkish Code of Criminal Procedure-CMK) No 5271; prepared and proposed by the AKP government in June 2004. Articles 250-252 of the new CMK establish high criminal courts, which have special authorities. According to Article 250 of the CMK, trials launched against crimes defined in Articles 302-339 of the TCK No 5237 will not be conducted in regular courts, but be assigned to assize courts whose judicial district is to be determined by the HSYK at the proposal of the Ministry of Justice. In other words, defendants charged by named crimes will be judged by exceptional courts, be formed by the government via the Ministry. The first question comes to mind is, who is to be charged in the ÖYMs. Majority of the crimes, defined in Article 302-339 of the TCK, and assigned to the ÖYMs, fall into the scope of Anti-Terror Law No 3713. Accordingly, Articles 302, 307, 309, 311-315, 320 and the first paragraph of Article 310 of the TCK are defined as terror crimes in Article 3 of Anti-Terror Law. Putting upside down, all of the terrorist crimes are regulated by Article 250 of the CMK, and are overseen by the ÖYMs. Indeed, this is the main legal connection between three political cases examined above and the ÖYMs. Consequently, our analysis of the ÖYMs shall include Anti-Terror Law first of all.

Terror is defined as any kind of act aiming to change the characteristics of the state and its political, legal, social, secular and economic order; impair the integrity of the

state with its country and nation; endanger the existence of the state; weaken or destroy or seize the state authority; eliminate the basic rights and freedoms and damage the internal and external security of the state, public order or general health of the country. Additionally, in order to achieve these goals, using any of the methods of extortion, intimidation, discouragement, menace and threat by force and violence by a person or persons belonging to an organization is named as terror (Article 1 of the Anti-Terror Law). The text of the article is long and complicated; so that, what is really deemed as terror crime is blurred. Whether they are the objectives of the acts or the usage of force and violence to achieve these objectives is deemed crime, is unclear. Therefore, it would be more helpful to look at which crimes are perceptibly named as terror crimes.

Accordingly, impairing the integrity of the state with its country and nation (Article 302 of the TCK); partially or totally damaging the facilities and material of armed forces, and agreeing to the benefit of enemy armed forces (Article 307 of the TCK); attempting to destroy, change or block the functioning of order envisioned by the Constitution by force and violence (Article 309 of the TCK); assassinating or attempting to assassinate the President (first paragraph of Article 310 of the TCK); attempting to destroy or partially or totally block the functioning of legislative organ or by force and violence (Article 311 of the TCK); attempting to destroy or partially or totally block the functioning of executive organ or by force and violence (Article 312 of the TCK); provoking people to armed rebellion against government (Article 313 of the TCK); setting up and directing armed organization with an aim to commit crimes against the security of the state and constitutional order (Article 314 of the TCK); supplying arms to above mentioned armed organizations knowing their aims (Article 315 of the TCK); and joining the army of foreign states without the permission of government (Article 320 of the TCK) are terror crimes according to Article 3 of Anti-Terror Law.

All of the crimes that named in Article 3 of Anti-Terror Law are defined in the TCK as "Crimes against the State and Nation". They target state power; either of existence of it, its internal or external security, constitutional order, and functioning of the constitutional order (which means the functioning of legislative, executive or judicial organs). In addition, their purpose is to oppose, change or undermine state power. Therefore, it will be appropriate to call them as "crimes against the state".[690] In the same vein, respected jurists Çetin Özek, Haluk İnanıcı and Köksal Bayraktar underline that crimes against the state are actually political crimes.[691] Their targeting state power and their purpose of changing or opposing it are sufficient reasons to give them a political nature.[692] Similarly, according to Uğur Uzer, there are certain actions directly political by their nature; the action itself is political without any further factor attached to it.[693] Crimes named in Article 3 of Anti-Terror Law are such actions. Consequently, terrorist crimes are actually and substantially political crimes. However, in legislations, there is no reference to their political nature. If so, why are political crimes not named as *political crimes* but *terrorism*? Why are *political purposes* of opposing, changing or undermining state power made *terrorist purposes*, and why are *opponents* made *terrorists*?

Actually, crimes against the state were directly named as political crimes, or say it differently; political crimes were named in legislations as *political crimes* up until 1991. In 1991, however, ANAP government of Turgut Özal enacted Anti-Terror Law.

---

[690] Özek, Çetin (1967). *Siyasi İktidar Düzeni ve Fonksiyonları Aleyhine Cürümler*. İstanbul: İstanbul Üniversitesi Yayınları No: 1251, p. 9

[691] İnanıcı, Haluk (2011). "Örfi İdare Yargısından Yeni Devlet Güvenlik Mahkemelerine Sanık Hakları" in *Parçalanmış Adalet: Türkiye'de Ceza Yargısı*. İnanıcı, Haluk (ed). İstanbul: İletişim Yayınları, p.35; Bayraktar, Köksal (1982). *Siyasal Suç*. İstanbul: İstanbul Üniversitesi Yayınları No 2997, p.102; Özek, 1967, pp. 9, 415

[692] Aydın, Devrim (2006). "Terör Eylemlerinin Siyasal Suç Açısından Değerlendirilmesi" in *Uluslararası Hukuk ve Politika*, Vol. 2, No.7, p.8

[693] Uzer, Uğur (1984). "Ceza Hukukumuzda 'Siyasal Suç' "in *Ankara Barosu Dergisi*, No. 6, p. 881

With Anti-Terror Law, articles regulating political crimes; namely, Articles 140, 141, 142 and 163 of the old TCK were removed from the scope of the TCK and placed within Anti-Terror Law. In this wise, the concept of political crime is wiped out from legislations, so to speak.[694] All political crimes are renamed as terrorism and all political criminals, regardless of their political beliefs, are deemed terrorists.

In the meantime, terror crimes are not limited with those mentioned above. Article 4 of the Anti-Terror Law names approximately 50 Articles of the TCK.[695] They include migrant smuggling, human trafficking, intentional killing, instigation to commit suicide, intentional injury, torture, threat, blackmail, force, deprivation of liberty, prevention of education and training, prevention of political rights, prevention of freedom of belief, thought and opinion, violation of domicile, prevention of business and labor, prevention of trade union rights, qualified theft, plunder, and damaging property.[696] Article 4 states that these crimes are considered as terrorist crimes if they are committed for terror purposes described in Article 1. Therefore, first, the purpose of the crime is decided on; and then, the crimes defined in Article 4 are regarded as terrorist crimes. In the absence of terror purposes, these are ordinary crimes.

Thereby, we see that actions named in Article 3 of Anti-Terror Law are deemed crimes due to their target and purpose; these purposes are themselves criminalized. Yet very similarly, actions named in Article 4 of Anti-Terror Law are deemed terror crimes looking at their purposes as well. Under such a circumstance, the question

---

[694] İnanıcı, 2011, p. 35

[695] Articles 79, 80, 81, 82, 84, 86, 87, 96, 106, 107, 108, 109, 112, 113, 114, 115, 116, 117, 118, 142, 148, 149, 151, 152, 170, 172, 173, 174, 185, 188, 199, 200, 202, 204, 210, 213, 214, 215, 223, 224, 243, 244, 265, 294, 300, 316, 317, 318, 319 and the second paragraph of Article 310 of the TCK, Law No 6136, paragraph four and five of Article 110 of Law No 6831, Article 68 of Law No 2863, those crimes that punished with imprisonment in Law No 4926.

[696] Agtaş, Özkan (2012). "Ceza Yasasının Gölgesinde Siyaset" in *Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi*, Vol. 67, No 4, p.19

what is really deemed as terror crime can be more clearly answered. Although usage of force and violence is named in the Articles of the TCK that fall into the scope of Anti-Terror Law, the TCK and Anti-Terror Law punishes political purposes as terrorism. Put it differently, purpose of an action is enough to be evaluated as terrorism irrespective of the usage of force and violence.[697]

Article 7, on the other hand, concerns terror organizations. Accordingly, the persons who set up, direct or be a member of *terror* organizations with purposes covered by Article 1, will be charged as setting up, directing and being a member of *armed* organizations. Moreover, committing a crime on behalf of the organization, propagating or praising the organization, participating its demonstrations and marches, wearing and carrying symbols, images and signs of the organization *without* being a member of that group will also be charged in the scope of Article 7. At this juncture, one point must be clarified. Substantially, covering face and shouting slogans are not crimes. However, if committed in the demonstrations or marches of a terror organization, these acts will be appraised as terrorist crimes.[698] Additionally, Article 220 of the TCK also regulates organized crimes. According to this article, a person, who commits a crime on behalf of the organization without being a member of organization, will also be charged as a member of organization. In addition, who knowingly and willingly assists an organization although not being in the hierarchical structure of it, will be charged as a member the organization.

All in all, the scopes of Article 4 and Article 7 of Anti-Terror Law and mentioned Articles of the TCK are very broad and ambiguous. These legal norms adopt very loose definitions of "terror", "membership" and "organization". In that way, not only

---

[697] Aydın, Oya (2012a). "Hukuk Devleti Nerede Biter, Polis Devleti Nerede Başlar?" in *Birikim*, No.273, p.27

[698] Aydın, 2012a, p. 27

armed militants, but also those active on the margins of proscribed organization or even activists having no meaningful relation with proscribed organization may be included; regardless of whether or not they are directly involved in the planning or execution of acts of violence.[699] Perhaps more problematic of all is the clause on being charged as a member of organization without being a member of it.[700] As a matter of fact, a crime cannot be defined in this way. If a person is not a member of an organization, that person cannot be charged on the basis of legislation defining membership to an organization as crime; because he is already admitted by the court not-guilty. No matter how erroneous this clause is, it is widely enforced. Still there is another reason for the broadness of the legal norm terrorism and terror organization. When looked closely, we see that the crimes defined in the Article 250 of the CMK charge not only acts, but also attempts. It means that, *attempting* to commit a political/terror crime is deemed enough to commit a crime, without necessarily take action. Additionally, encouraging and instigation of a crime is regulated separately, and regarded as independent crimes; even though the crime is not realized. Within this legal framework, any activity may be regarded as terror and organized crime depending on the discretion of jurists.

In sum, opposing, changing or undermining state power; or shortly, being political opponent of the state is regarded as terrorism and charged in the ÖYMs. However, due to ambiguous, erroneous and broad legislations, any action may be a terrorist act; anyone who is disliked may be charged by being a member of terror organization; and anyone may be made a potential criminal. Today, gathering of three persons together is literally deemed a terror organization.[701] The KCK case provides many examples to

---

[699] Jenkins, 2011a

[700] Karaca, Ekin. "Hopa'nın Artçı Gözaltıları", 16.06.2011, www.bianet.org

[701] Tanrıkulu, Sezgin (2010). "Özel Yetkili Mahkemelerin İşleyişi ve Uygulama" in *Özel Yetkili Mahkemeler (CMK m. 250)*. Ankara: Türkiye Barolar Birliği Yayınları No.191, p. 60

the broad enforcement of the norm terrorism, which reaches to the borders of arbitrariness.

For instance, Gurbet Çakar was the former editor-in-chief of the magazine *Renge Heviya Jine*. The 6th High Criminal Court of Diyarbakır convicted him to imprisonment of three years on charges of "membership to an illegal organization and committing crime on behalf of the organization" and "spreading propaganda of the PKK"; because; he called Abdullah Öcalan as "the leader of the Kurdish people" and published photographs of Öcalan and PKK militants. Fatih Taş, on the other hand, is the owner of *Aram* Publishing. He is tried on charges of "spreading PKK propaganda" on the basis of Article 7 of Anti-Terror Law due to publishing a book named *Footpath: Memories of a Guerrilla*. Similarly, Ozan Kılınç was the editor-in-chief of the Kurdish newspaper *Azadiya Welat*. He was charged of "making propaganda of the PKK" and sentenced to 21 years and three months imprisonment on February 9, 2010 on the grounds of news and articles published in twelve different issues of the newspaper. In sum, fifty-one journalist and distributors of Kurdish media are accused during KCK trials of "following news", "writing books" and "criticizing the government". It means that they were being accused because of ordinary journalism activities. According to *Reporters without Borders*, Anti-Terror Law is arbitrarily used to convict and censor journalists who report about the Kurdish question and certain political figures.[702]

At times, a mere expression of opinion is charged within the scope of terrorism in KCK case. For instance, lawyer Şiar Rişvanoğlu is being charged on the basis of Article 220 of the TCK at the 6th High Criminal Court of Diyarbakır on the grounds of his thoughts voiced in different television programs, one of them being on *Roj TV* (a

[702] Önderoğlu, May 2011

Kurdish television channel).[703] Similarly, Leyla Zana (the MP of the BDP) was sentenced to prison on May 24, 2012 for "spreading propaganda on behalf of the PKK". The charges concerned nine speeches she had made over the years, during which she had argued for recognition of the Kurdish identity, called Öcalan as a Kurdish leader, and urged the reopening of peace negotiations between the State and the PKK.[704] In addition, a former MP Mahmut Alınak sentenced to jail for 14 months and 17 days by the Criminal Court of First Instance of Kağızman (Kars) due to a speech he delivered. It is because, he started his speech with the Kurdish words "Bı-raemin, xuşkemin, xerhatin, serçeva hatin" (Welcome my dear brothers and sisters) and finished with "Bijî azadî" (long live freedom). Allegedly the speech also contained an insult to the Prime Minister and thus was reason for an additional punishment.[705]

Accusation of Ragip Zarakolu provides the last example to how the provisions of Anti-Terror Law are bended by the courts to cover acts, evidently not-crimes. Ragip Zarakolu has been a key figure in human rights advocacy in Turkey for decades and he already has suffered from political repression under former governments. He is now tried in the 15th High Criminal Court of İstanbul. In the indictment it is stated that, even though his act of giving lectures seems humane and harmless, this act caters for personnel and logistic needs of the terror organization.[706] It can be realized that, the court admits that Zarakolu's act is not a crime; it is harmless. That his act cares the needs of the organization is the opinion of the prosecutor and the court. Therefore, Zarakolu is being charged for intentions attributed to his act rather than his act itself.

---

[703] Önderoğlu, May 2011

[704] Gunter, 2013, p.443

[705] Önderoğlu, May 2011

[706] "KCK İddianamesi Kabul Edildi: Suçları: Ders Vermek!", 03.04.2012, www.bianet.org

The second question concerning the ÖYMs is how opposition is being charged, which is as crucial as who is being charged. The ÖYMs have exceptional judgment rules. Prosecutors and defendants of the ÖYMs are given exceptional rights. The criminal procedure for regular judgments is defined by the CMK. However, the ÖYMs stay out of it in many respects. What are these exceptional judgment provisions of the ÖYMs? First, Article 91 of the CMK states that, the time frame to keep a person in custody cannot exceed 24 hours starting from the moment of apprehension. However, it is 48 hours for the ÖYMs (Article 251 of the CMK). Similarly, in the case of collective crimes, the time frame for custody is at most 4 days. Yet, the 4-day time period provided in the Article 91 may be extended to 7 days for a person apprehended in areas where emergency rule declared (Article 251). Secondly, the CMK Article 102 limits the term of arrest with two years in tasks covered by high criminal courts. If extended, such extension cannot exceed three years in total. However, the period of arrest can be implemented as twice as much concerning the crimes overseen by the ÖYMs (Article 252 of the CMK).

Third, according to Article 251 of the CMK, investigations of cases covered by the ÖYMs are carried out by public prosecutors of the Republic. In cases where it is necessary for the investigation, public prosecutor of the Republic may go to the crime scene and place, where evidences are found, and conduct the investigation there. If the crime has been committed outside the place where the court is located, prosecutor may ask the public prosecutor of the Republic of the place to conduct the investigation. On the one hand, this provision allows the prosecutors of the ÖYMs to conduct investigations out of their jurisdiction. This enlarges the authority of the ÖYMs in terms of place. On the other hand, specially authorized prosecutor's request from the prosecutor of the place creates a hierarchical relation between prosecutors of the ÖYMs and those of other courts.[707]

[707] Aydın, 2012, p.350

In addition, Article 95 of the CMK states that a relative or a person designated by the person arrested or taken into custody shall be notified without delay. However, in the ÖYMs, if the purpose of investigation is endangered, the person arrested or taken into custody may be allowed to contact with only one relative (Article 10 of Anti-Terror Law). Next, in regular courts, the examination of the content of the case file by the defense counsel and his obtaining copies of the relevant documents can be restricted if it has the possibility to endanger the purpose of the investigation. However, the examination and obtaining copies of official records, court expert reports containing the statement of the suspect or the defendant, and official records concerning other judicial procedures in which the said people are authorized to be present at, cannot be restricted (Article 153 of the CMK). But, no document may be obtained by the defense counsel in the ÖYMs, if it has the possibility to endanger the purpose of the investigation, which eliminates defense counsel's authority to examine the case file (Article 10 of the Anti-Terror Law).

Moreover, Article 149 of the CMK says that, the suspect or the defendant can utilize the help of one or more lawyers in every phase of the investigation and trial. During statement taking in the investigation phase, meanwhile, maximum of three lawyers can be present. In contrast, the suspect under custody can utilize the help of only one lawyer and suspect's contact with his lawyer may be restricted with 24 hours in investigation and prosecution processes of crimes assigned to the ÖYMs (Article 10 of Anti-Terror Law).[708] Additionally, Article 154 of the CMK allows suspect or the defendant to meet with the defense counsel any time without any requirement, in surroundings where the conversation cannot be overheard by others. The exchange of letters between them is not subject to inspection. These rights are also eliminated in the ÖYMs. The Article 10 of Anti-Terror Law states that if lawyer's mediation to communication between defendant and proscribed organization is suspected, judge

[708] Aydın, 2012, p.369

may decide to the presence of an official in the meetings. Also, the exchange of letters between them can be inspected; or judge may restrict this exchange partially or totally.

As seen, the ÖYMs stay out of the CMK. Articles 250-252 of the CMK bring exceptions to regular criminal judgment procedure. Therefore, the ÖYMs have exceptional judgments and may be called as exceptional courts. Besides, the ÖYMs constitute exceptions to the CMK to the detriment of defendants. On the one hand, it strengthens prosecutors; on the other hand, it deprives suspects and defendants of some of their regular rights; or rights that they have in other courts. Therefore, what is *exceptional* and troublesome about the judgment of the ÖYMs is the restriction of defense;[709] the judgment of the ÖYMs is unjust as powers of prosecution and the defense are unequal.[710] Meantime, some of the provisions do not necessarily limit the defense. They indicate a possibility, and enable the court in this direction. However, what we see in all of the three cases and actually almost all the trials conducted in the ÖYMs is that, any opportunity to limit defense is benefitted by the ÖYM jurists without any hesitation. As a result, in almost all trials overseen by the ÖYMs, time period of custody is extended; the exchange of letters between defendant and his lawyer is inspected; secrecy measure for the case files is extensively utilized; defense counsel's right to examine case file is restricted; even defendant's record of statement is not given to defense counsel. As no time period for secrecy measure is defined in legislations, it generally last some months. Therefore, defense counsel can see the evidences against the defendant for the first time in the hearing phase.[711]

---

[709] İnanıcı, 2011, p. 50

[710] Ertekin, Orhan Gazi (March 2011). "Terörle Mücadele Kanunu'na Göre Gazetecilik Yapmak Suç*!" interview by Ayça Söylemez*, www.bianet.org

[711] Aydın, 2012, p.367-368

So, not only legislations restrict defense in the ÖYMs; but also jurists take hostile and insulting stance against defense as well. The most striking example of this hostile stance is court's rejection of defendant's making their statements in Kurdish in the KCK case. The defendants are Kurdish and hence, their mother language is Kurdish. The court, however, did not allow them make their statements in Kurdish. Moreover, the court defined Kurdish as "an unknown language", which is degrading. Actually, defendants could be let to make their statements in Kurdish through a translator. Article 202 of the CMK says, if the defendant does not know sufficient Turkish to explain his plight, during the hearings, the essential points of the prosecution and defense shall be interpreted by an interpreter to be appointed by the court. However, as Züleyha Kılıç highlights, the court does not ask the defendants; yet by itself rules whether the defendant knows sufficient Turkish to explain his plight or not. Jurists are not linguistics, though; they shall have no authority about that. [712]

Meanwhile, in Diyarbakır main trial of the KCK case, defendants decided not to attend hearings to protest court's rejection of making statements in Kurdish. Yet, they are brought to the hearing on January 19, 2011 by force. The court, on the other hand, decided to bring defendants to the following hearings in groups. However, defense counsel objected to court's decision. Lawyers advocated that the stance of the court hampers doing their profession. Afterwards, they left the court room and decided not to participate following hearings. The court applied to Diyarbakır Bar Association and demanded the assignment of new lawyers. Yet, Association slowed down the process of assignment. At this stage, the court made a denunciation against defense counsel and Association, accusing both of them of blocking the trial. [713]

---

[712] Kılıç, Züleyha (October 2010). "Yargıçlar Kürtçeyi Görmezden Geldi, Türkçeyi Dayattı" *interview by Semra Pelek*, www.bianet.org

[713] "KCK Sanıkları "Gruplar Halinde" Duruşmalara Alınacak", 03.02.2011, www.bianet.org; "KCK Davası Ertelendi, Savunma Avukatlarına Suç Duyurusu", 3.8.2011, www.bianet.org

All in all, one must take enforcement of legal norms in the ÖYMs into account beside legal norms themselves while analyzing political trials. Only in some steps of the criminal procedure, the ÖYMs are subject to exceptional provisions of Articles 250-252; for the rest, they shall enforce the CMK. However what we see is that, the ÖYMs do not follow the regular criminal procedural rules of the CMK where they have to. In that way, the ÖYMs witness exceptional and restrictive enforcement of the CMK. The first example to exceptional enforcement of regular rules is the extent of pre-trial arrests and excessively lengthy pre-trial arrest periods.[714] In trials that have a large number of defendants, preparation of indictments take nine to ten months; even worse, the first hearing may take place two years after the start of investigation process.[715] In that case, waiting trial under arrest without knowing what you are accused of dissipates person's freedom and is a human rights violation.

Article 19 of the Constitution says, arrest ban can be used for individuals against whom there is strong evidence of having committed a crime and solely for the purposes of preventing escape, or preventing the destruction or alteration of evidence. In other cases, slighter restrictive measures that intervene less into basic human rights and freedoms of individuals shall be preferred; more severe measures shall be avoided. In this direction, Article 109 of the CMK defines judicial control and states that, judicial control can be enforceable to the cases which the law envisions an arrest ban. The purposes of judicial control are same with arrest ban. Therefore, in the presence of alternative and slighter measures, arrest ban shall be employed only and only in exceptional cases.[716] Unfortunately, exceptional practice of arrest becomes

---

[714] Balcı, 2012, p.139

[715] Kanar, Ercan (2011). "Özel Yetkili Ağır Ceza Mahkemeleri'nce Üretilen Hukuk" in *Parçalanmış Adalet: Türkiye'de Ceza Yargısı*. İnanıcı, Haluk (ed). İstanbul: İletişim Yayınları, p.115

[716] Soyer Güleç, Sesim (2012). "Tutuklamaya İlişkin Temel Sorunlar ve Avrupa İnsan Hakları Mahkemesinin Güncel Kararları Çerçevesinde Adli Kontrol Konusunda Bazı Tespit ve Değerlendirmeler" in *Türkiye Barolar Birliği Dergisi*, No. 98, pp. 26-27

almost a rule in political trials overseen in the ÖYMs.[717] There are 30 defendants under arrest for more than 10 years, and there are over 100 defendants under arrest between 5 to 10 years waiting for the final verdict of the ÖYMs.[718]

However, the general picture is worse than this. Accordingly, the number of detainees in Turkey has increased after the implementation of new TCK in 2004; so much so that, it has verged on the number of prisoners.[719]

Table 1: Number of detainees between 2001 and 2010 in Turkey

	Number of detainees	Ratio of number of detainees to all imprisoned	Percentage of change (1986 is taken as 100)
2001	28.068	50.5	150
2002	25.203	43.0	134
2003	31.776	49.8	169
2004	33.020	48.0	176
2008	56.820	60.2	302
2009	60.606	51.8	322
2010	59.365	49.7	316

Source: Yücel, 2010, p. 294

More disturbing is that, many of the arrests are later identified as unjust.[720] Jurist Adem Sözüer, who participated to the preparation of new TCK and CMK states that

[717] Soyer Güleç, 2012, p. 40

[718] Kanar, 2011, p. 109

[719] Yücel, Mustafa T. (2010). "Tutuklama Paradoksu" in *Türkiye Barolar Birliği Dergisi*, No. 91, p. 293

[720] Soyer Güleç, 2012, p. 45

99 percent of the arrests are unjust.[721] Even there are persons in KCK case arrested by mistake due to name similarity, yet still not been released after the recognition of the mistake.[722] Therefore, implementation of arrest ban especially in political trials make many people believe that it is not used by courts as a protection measure; yet rather as a punitive measure.[723]

Moreover, Article 101 of the CMK urges that justification of the arrest ban shall definitely be mentioned in arrest requests at the stage of either investigation or prosecution. In addition, legal and actual reasons explaining the insufficiency of the judicial control shall be included in the explanation as well. Contrary to law, justification of the arrest is not stated, and no explanation is made in arrestment decisions. Only, the text of the law is repeated and stereotype expressions such as "due to evidences at hand" or "considering suspect's possibility of escape" are used.[724] Stereotype expressions are not justifications. Inclusion of such expressions in the arrestment decisions justifies that the rule of law order and obeying laws is transformed into stereotype formalities for executors of legal norms themselves. [725]

Second, conduct of the investigations displays a repeated disregard of due process.[726] According to Article 145 of the CMK, the person to be interrogated is summoned via a writ, in which the reason for interrogation is clearly stated. Unless he/she does not

---

[721] Sözüer, Adem (February 2013). "Tutuklamaların Yüzde 99'u Hukuksuz, Hukuk Zehirlendi ve Zayıflatıldı!", www.t24.com.tr

[722] Tanrıkulu, 2010, p. 62

[723] Aşık, Özgür (2012). "Legal Reforms in Turkey: Ambitious and Controversial" in *Turkish Policy Quarterly*, Vol. 11, No. 1, p. 151; Soyer Güleç, 2012, p.40; Kanar, 2011, p. 108

[724] Soyer Güleç, 2012, p. 46

[725] Sözüer, February 2013

[726] Jenkins, 2011a

answer the summons, he/she shall be seized by force. The time frame of seizing by force is not defined in laws; it may be any time of the day. Yet, there shall be adequate reasons justifying seizing by force and its timing.[727] In three of the political cases in the ÖYMs, the suspects or the accused are often seized by force. Moreover, seizing by force is enforced in weird times of the days. So that, pre-dawn raids at homes of suspects became routine.[728] For instance, in Ergenekon case, İlhan Selçuk's home was raided at 4.30 am, allegedly to prevent him from fleeing. However, he was 83 years old and had a police guard stationed permanently outside his home, following death threats from extreme Islamists.[729] Similarly in Ergenekon case, three retired generals and Kemal Gürüz were hurried off from their homes by the police at wee hours.[730] In Hopa case, on the other hand, demonstrators' homes were raided at night and early in the morning on May 31, 2011. 31 suspects, who were taken into custody at that day in Hopa, were fled to Erzurum at 5 am without informing their lawyers and without giving any justification.[731] In this way, seizing by force turns out to be a means of oppression in the ÖYMs. [732]

Third, trials in the ÖYMs have extraordinarily long indictments. For instance, first indictment of Ergenekon case was 2,455 pages long, with an additional 441 files of evidence. Second indictment of Ergenekon case was 1,909 pages long, with 248 additional files of evidence. Third indictment, on the other hand, was totaling 1,454 pages.[733] The indictment of the KCK main trial in Diyarbakır, meanwhile, is a record

---

[727] Aydın, 2012, p.356

[728] Balcı, 2012, p.139

[729] Jenkins, 2009a, pp.47-48

[730] Karaveli, 2009a

[731] "Hopa davası başladı", 04.06.2011, sendika.org

[732] Aydın, 2012, p.356

[733] Jenkins, 2009b

of 7.578 pages. The indictment could be summarized to 900 pages and read out in the court. The indictment of the KCK main trial in İstanbul is 2.400 pages long with an additional 150 files of evidence. The indictment of İstanbul KCK trial known as "trial of lawyers" was totaling 892 pages, while that of İstanbul KCK trial known as "trial of journalists" was 800 pages. In sum, indictments of Diyarbakır main trial and three İstanbul trials of the KCK case totaled as long as 11.679 pages,[734] which is not possible for anyone to read and comprehend what KCK organization is. Actually, it is not possible for anyone to read and comprehend any of the indictments of Ergenekon and KCK trials mentioned above. This being the case, the court generally resorts to summarizing indictments. However, summarizing the indictment in court or reading it partially is unlawful and a reason for appeal.

Additionally, the indictment shall include evidences both for and against the suspects. Yet, indictments of trials conducted in the ÖYMs do not give place evidences in favor of the suspects. Instead, they are kept in Property and Evidence Office. Conversely, all the evidences against them; all telephone wiretaps and text massages, even though they are irrelevant for the case, are included in the indictments.[735] Actually, this constitutes the main reason of the length of the indictments. When this last point is taken into consideration, extraordinary lengthy indictments of the trials overseen in the ÖYMs lose their innocence. They cease to be accidental or out of necessity. On the contrary, they are purposefully exaggerated by quasi-evidences against the suspects. First, this situation circumscribes defense counsel's ability to defense the suspect. It is not possible for defense counsel to read and learn the crime, the suspect is being charged; establish causation; memorize the indictment; and conduct the defense. Therefore, the purpose of preparing long indictments is exactly to make them hard for anyone to read and comprehend. Second, long indictments create a negative

---

[734] İlkiz, p. 44

[735] Aydın, 2012, p.369-370

impression for the suspect, implying that suspect is a violent criminal conducted pages-long crimes. Therefore, it is a means to mislead the reader against the suspect.

Another commonly encountered practice of the ÖYMs is unification of the trials. For instance, in Ergenekon case, trial about attacking Court of Cassation, in which 9 defendants are charged; trial about attacking Cumhuriyet conducted in the 12th High Criminal Court of İstanbul having 7 defendants, and trial about assassination attempt to Greek Orthodox Patriarch I. Bartholomeos are united with first Ergenekon trial. In addition, 3 more trials are united with second Ergenekon trial. Trial about assassination attempt to admirals charging 19 defendants, Kafes Planı trial charging 33 defendants, 2 more trials charging 12 defendants in total, and trial charging 8 heads of the ÇYDD and *Çağdaş Eğitim Vakfı* (Association for Contemporary Education) are all united with Poyrazköy trial. Andıç trial and İrtica ile Mücadele Eylem Planı trial are united as well. Ultimately, on April 27, 2012, first and second Ergenekon trials are united. According to current situation, Ergenekon case is a single giant trial composed of unification of 22 indictments. It charges 287 defendants, 65 of whom are under pre-trail arrest. Total of indictments is 17.000 pages long with additional 51 case files. Case files include 120 million documents, 100.000 telephone wiretaps, statements of 1360 persons, and statements of 153 secret witnesses.[736]

There have been trial unifications in Hopa case as well. On March 13, 2012, Ankara trial of Hopa case, conducted by the 24th Criminal Court of First Instance of Ankara charging 28 defendants, united with a second case. On October 19, 2012, however, this trial was united with the third trial opened in Ankara on June 26, 2010. At the end, there appeared a single case in Ankara charging 98 defendants. All in all, unification of trials adds new suspects and defendants to present ones, and makes

[736] Bayraktar, Köksal (2013). "Olağandışı Yargılama Anlayışı ve Toplumun Adalet Arayışı" in *Güncel Hukuk*, Vol. 5, No. 113, p. 27

already long indictments even longer. In that way, the trials become more complicated and trial processes lengthen out.[737]

Fourth point considers the quality of indictments. The indictments of all three political trials are characterized by inadequacy of evidence, simplistic irrationalities, absurdities and inherent contradictions.[738] There are errors made in the indictments. In Hopa case, the THKP-C and Devrimci Yol organizations, to which defendants are accused of being a member in the indictment of the 4th High Criminal Court of Erzurum, are extinct for more than 30 years.[739] Halk Evleri is identified as illegal; however, it is actually a legal association. Beside errors, indictments show inadequate evidence to prove their allegations. For instance, the courts in Hopa case relied upon chanting marches, hanging posters, shouting slogans, flagstaffs, banners, and course books to prove "terrorist" activities of the suspects; which is nothing but embarrassing.

Interestingly, many trials of Ergenekon case started with an anonymous warning and maintained by statements of secret witnesses and interception of communication.[740] Similarly, first Ergenekon trial started with a box sent to a prosecutor from an anonymous informant full of letters, documents, and wiretaps claiming to contain evidence of coup plots or assassination plans by military members. After 2009, we see that same kind of boxes were started to be sent to pro-AKP Taraf and its author Mehmet Baransu.[741] Once again, most of the evidence on the existence of Ergenekon

---

[737] Ertekin, Orhan Gazi (December 2012). "Adaletin İmkansızlığıyla Karşı Karşıyayız" *interview by Ekin Karaca,* www.bianet.org

[738] Jenkins, 2010b; Jenkins, 2011a

[739] "Olmayan Örgüt Davası Başlıyor", 14.09.2011, www.bianet.org

[740] Aydın, 2012, p.376

[741] Jenkins, 2010b

organization came from a single source: a former journalist called Tuncay Güney. The indictment relied almost exclusively on the statements by Güney after he was arrested in March 2001, and documents seized during raids on the defendants' homes.[742] However, he is manifestly an unreliable, dubious person; and an acclaimed member of National Intelligence Organization.

In the same vein, first indictment of Ergenekon case claimed that Ergenekon was the "deep state", and it had been responsible for many bloody operations in the last 20 years. It allegedly attempted to provoke a serious crisis and chaos with an aim to hinder country's development.[743] However, there is no convincing evidence in the indictment that Ergenekon organization exists, much less how it was financed and organized.[744] In addition, the indictment admitted that there was no evidence linking Ergenekon to the murders of priest Andrea Santoro, judge in Court of Cassations, and three Christian missionaries in Malatya. However, it still asserts that as they were clearly provocations, it was likely that the organization was responsible.[745] Therefore, the prosecutor appreciates his own opinion as evidence.

As Jenkins indicates, the indictments of Ergenekon appeared to project onto a collection of disparate events and individuals. Quotations from documents and wiretaps were mostly given without any context, and embedded in prosecutor's own comments. Isolated phrases are given place, which contain nothing of substance.[746] Most important documents of coup plans in Ergenekon case are the diary allegedly written by retired Admiral Özden Örnek and three power point presentations allegedly

[742] Jenkins, 2009a, p.57

[743] Jenkins, 2009a, p.56

[744] Jenkins, 2010b

[745] Jenkins, 2009a, p.50

[746] Jenkins, 2009a, p.56

recovered from a computer belonging to retired General Şener Eruygur. However, Jenkins underlines that none of the documents contains any references to an organization or joint action with persons accused of membership of Ergenekon. For instance, the proof of Yalçın Küçük's membership of Ergenekon includes the fact that he participated in a panel discussion where Erol Mütercimler, who was also accused of being a member of Ergenekon in the second indictment, was present. Nevertheless, the indictment also notes that there were 12 people on the panel. Yet, none of the other 10 has been charged with membership to Ergenekon.[747]

> Indictments seek to prove not individual criminal activity by the accused but membership of a criminal organization. This is done primarily by trying to prove that the accused were in contact with, or held political views similar to, other alleged members of organization; with the implication that this proves that the individual concerned was a member of the organization. Actually, none of those charged has confessed to being a member of organization; nor is there any reference to belonging to the organization in any of the wiretaps or documents seized from the homes and workplaces of the accused.[748]

A similar situation also holds true for KCK case. There is no concrete evidence for academicians, authors and translators, who give lectures in Political Academies, showing that they committed a crime. Rather, court employs prosecutor's personal opinion that training in Political Academies has similarities with political training that PKK provided in former years to its members in its camps. In the indictment of İstanbul main trial of the KCK case, charges against Ersanlı and Zarakolu appear to be mainly based on their attendance at conferences organized by the BDP. In the same vein, translator Ayşe Berktay's attendance to a meeting allegedly organized by Istanbul Women Branch of the PKK-KCK/TM, and presence of Abdullah Öcalan's picture in the meeting room are shown in the indictment as evidences against Berktay.

---

[747] Jenkins, 2009b

[748] Jenkins, 2009b

Basing on these evidences, the prosecutor expresses his own opinion that as she sat on the same table with the organizers of the meeting, she must be one of the organizers.[749]

Fifth, the fabrication or distortion of evidence is widespread in political trials conducted in the ÖYMs. For instance, in Ergenekon case, an evidence file allegedly recovered from the office of one of the defendants in early summer 2008, included documents which were not written until the winter of 2008.[750] However, the case of Mehmet Ali Çelebi is known better. Mehmet Ali Çelebi was a helicopter pilot charged in Ergenekon case. He was arrested in September 2008. The prosecutor had accused Çelebi of keeping phone numbers of members of the *Hizb ut-Tahrir* terror organization on his cell phone. However, report from Telecommunications Directorate had proved that 139 telephone numbers belonging to the members of the Hizb ut-Tahrir terror organization had been uploaded to Çelebi's cell phone all together in one minute in Istanbul Police Directorate on the day Çelebi handed his cell phone to the police officers.[751] This is an unashamed act of fabrication of evidence by the police against the suspect; and it is a crime.[752]

Meanwhile, Balyoz trial almost thoroughly relies on shady evidences. The main evidence of Balyoz trial is records in a single CD. Police forensic reports claimed that Balyoz Coup Plan had been burned to a CD in March 2003, after which no amendments or additions had been made. However, the alleged coup plan included hundreds of errors and anachronisms, including references to events in 2004, 2005,

---

[749] "KCK İddianamesi Kabul Edildi: Suçları: Ders Vermek!", 03.04.2012, www.bianet.org

[750] Jenkins, 2010b

[751] "Ergenekon Coup Plot Case Convict Lieutenant Çelebi Sent to Prison", 15.08.2013, www.hurriyetdailynews.com

[752] İnanıcı, Haluk (2012). "Türkiye'de Polis, İktidar ve İnsan Hakları" in *Birikim*, No.273, p. 18

2006, 2007, and 2008. In addition, some of the institutions named in Balyoz Coup Plan of March 2003 are not existed at that time under the names appeared in the documents. For instance, in a document named "Ally Elements", the NGOs having good relations with the military are named, including the ÇYDD, *Atatürkçü Düşünce Derneği* (Atatürkist Thought Association), and *Türkiye Gençlik Birliği* (Turkey Youth Union). However, Türkiye Gençlik Birliği was established in 2006 under this name. Similarly, *Liberal European Association* is listed in a document named "Associations to be closed". Yet, the Association took this name in April 2006; up until that time, it was called *Free Democrats Association*. When such errors are traced, it appears that the CD must have been produced in 2009, not in 2003 as police claims.[753]

Sixth, most of the trials overseen by the ÖYMs rely on secondary evidences. According to Article 135 of the CMK, in case of no other means to obtain evidence; identification, interception, recording or evaluating the signal information of a suspect or accused via telecommunication can be resorted. Similarly, Article 134 of the CMK says that in case of no other means exist for obtaining evidence, the computer, computer programs and logs used by the suspect can be searched; computer records be copied and decoded. Monitoring with technical tools, on the other hand, regulated in Article 140 of the CMK. Accordingly, in case there are no other means to gather evidence, activities of the suspect or the accused in public areas and his/her workplace can be monitored with technical tools, audio or visual records can be taken. Then, identification and interception of communication, searching computers, and monitoring with technical tools are secondary evidences; for all of them, there must be no other possibility to obtain primary evidences.

---

[753] Rodrik, Dani; Doğan, Pınar (2010). *Balyoz: Bir Darbe Kurgusunun Belgeleri ve Gerçekler*. İstanbul: Destek Yayınevi, pp. 24,27,10

However, the ÖYMs appeal them primarily. Activities of the suspects or the defendants are monitored without fulfilling legal condition of existence of strong suspicion reasons and absence of other means to gather evidence. Indeed, the decision to monitor with technical tools, audio or visual records became a routine for the ÖYMs. They are given so easefully and inattentively that one judge is reportedly signed a decision to monitor himself.[754] In another case, it came to light that a chief judge in the ÖYM, who oversees a case on a criminal organization, was being monitored due to membership to the same criminal organization.[755] Moreover, secondary evidence is unlawfully used. Article 134 of the CMK on search in computers says that in case of failure to access to hidden information or decode the password to reach the computer programs, it might be possible to seize the tools and equipment. However, after decoding and taking of necessary copies, the seized devices shall be returned without further delay. Yet in practice, seized devices are not returned to suspects of defendants. Additionally, the Article urges that in the seizure of computer, the entire data in the system shall be backed-up, and if requested, a copy of backup shall be given to the suspect or his/her representative. Contrary to this legal provision, data is not backed-up and a copy is not given to the legal representatives of the suspects or defendants.[756] Additionally, contrary to Article 140 of the CMK, persons other than the suspect or defendant is monitored and recorded, and sometimes this information is leaked to the media.

There is another secondary evidence category. It is secret witness practice. Secret witness is a person whose identity is not revealed, and who does not need to testify in the hearings. The reason behind secret witness practice is to protect the witness from serious threats that might emerge due to revelation of his/her identity. However, in

---

[754] İlkiz, p.45

[755] Aydın, 2012, p.361-362

[756] Aydın, 2012, p.364

trials overseen by the ÖYMs, this practice is abused. Accordingly, only 10 case files involve as much as 38 secret witnesses. There are 5 secret witnesses only in İstanbul main trial of the KCK case.[757] Moreover, many of the secret witnesses are suspects or plaintiffs in the same case file. For instance, in Ergenekon case, a public prosecutor of Republic (Bayram Bozkurt) testified against another public prosecutor of Republic (İlhan Cihaner) as a secret witness with a code name *Efe,* and claimed that Ergenekon organization attempted to kill him by putting ticks into his car.[758] In the KCK case overseen by the 3th High Criminal Court of Van, however, secret witness testified that Urban Assemblies of the PKK/KCK are used as People's Courts. In People's Courts, on the other hand, suspects gave their statements in Turkish and minutes of the court were written in Turkish. Relying on his/her testimony, the 3th High Criminal Court rejected defendants' demand to give their statements in court in Kurdish.[759]

Last, and perhaps more disturbing of all, was how media was used in these political trials. Article 160 of the CMK obliges the prosecutor to protect the rights of the suspects. The principle of confidentiality of the investigation is accepted mainly with the intention of procuring presumption of innocence. However, frequently, transcripts of wiretaps were published in pro-AKP and pro-Cemaat newspapers and websites.[760] While the defendant's record of statement is not even given to defense counsel due to decision of confidentiality over the case file in the scope of Anti-Terror Law, pro-AKP media could reach the case file and evaluate the evidences on screens.[761] In some investigations, on the other hand, pro-AKP and pro-Cemaat media by numbers and

---

[757] "KCK İddianamesi Kabul Edildi: Suçları: Ders Vermek!", 03.04.2012, www.bianet.org

[758] Bayraktar, Köksal (2011). *Hukukun Üstünlüğü*. İstanbul: Der Yayınları, p. 255

[759] "Kürtçe Savunma Talebi KCK İddianamesine Girdi", 21.04.2011, www.bianet.org

[760] Jenkins, 2009a, p.48

[761] Aktan, Hamdi Yaver (2010a) in *4. Yılında CMK ve Uygulamaları*. İstanbul: İstanbul Barosu Yayınları, p.19

names declared how many people will be taken into custody, and who among them will be arrested. Media is used as a means to manipulate public opinion, too.[762] For instance, state public broadcaster *TRT* announced the first hearing of Diyarbakır main trial of the KCK case as: "the trial of whom ensanguined Turkey has begun".[763] Similarly, pro-AKP and pro-Cemaat newspaper Zaman called 151 suspects taken into custody in the KCK investigations on October 4, 2011 as "members of terror organization".[764]

In the same vein, media organs controlled by Cemaat repeatedly misrepresented investigation findings. For instance, in Ergenekon case, two of the grenades found in Ümraniye were German manufacture, seven were standard NATO issue, and 18 had been manufactured by the Turkish state-owned *Makina ve Kimya Endüstrisi Kurumu* (Mechanical and Chemical Industry Corporation). Reports in the pro-Cemaat media, and generally in all of the media claimed that the "serial numbers" of the grenades, used in the attack on Cumhuriyet, matched with Corporation manufactured grenades found in Ümraniye, as if they had all originated in the same crate. However, this is misleading. The numbers on Corporation manufactured grenades and fuses indicate the type and the very approximate date of manufacture. But the numbers are not sequential. Therefore, the numbers neither proved nor disproved that the owners of the grenades discovered in Ümraniye and of those used in the attacks on Cumhuriyet were one and the same.[765]

---

[762] Balcı, 2012, p.139; Jenkins, 2010b

[763] Avcı, Bekir. "KCK Davasının Yargıcı TRT", 30.10.2010, www.bianet.org

[764] Arhan, Faruk. "KCK Operasyonu ve Zaman'ın Empati Cinayeti!", 05.10.2011, www.bianet.org

[765] Jenkins, 2009a, p.40

In sum, Tuğrul Kutoğlu says that, unlawful practices in the ÖYMs cannot be explained only by the existence of norms establishing these courts.[766] The ÖYMs are exceptional courts; however, what makes the ÖYMs exceptional is restrictive and hostile enforcement of legal norms, as much as legal norms restricting the rights of defendant and the defense counsel. Therefore, not only they bestow the defendant exceptionally restrictive rights; but also, they enforce both regular and exceptional rights exceptionally. The first exception is legal; yet the second exception overrules legality. Therefore, exceptional judgment of the ÖYMs is a combination of legality and illegality. In this direction, Aydın comments that the ÖYMs are wars declared against political opposition;[767] they are tools used to repress, intimidate and liquidate political opposition.[768]

In virtue of criticisms, the ÖYMs are abolished on July 2, 2012 by Law No 6352, or what is popularly known as "third judicial reform package". Law No 6352 abolished Articles 250-252 of the CMK. However, problems related to exceptional judgment did not end with this amendment. First, a provisional article was added to Law No 6352 concerning trials already being overseen by the ÖYMs. According to Provisional Article 2 of the Law No 6352, trials being conducted by the ÖYMs will continue to be overseen by the ÖYMs until the final verdict. Hence, Ergenekon, KCK, and Hopa cases are preserved within the domain of the ÖYMs until they are finalized.[769] This is, by the way, another exception recognized for these cases. Although Law No 6352 abolishes ÖYMs, it makes an exception for Hopa, KCK and Ergenekon cases; and

---

[766] Katoğlu, Tuğrul (2010). "Özel Yetkili Mahkemelerde Özel Usuller" in *Özel Yetkili Mahkemeler (CMK m. 250)*. Ankara: Türkiye Barolar Birliği Yayınları No.191, p.55; Şen, Ersan (2010a). in *4. Yılında CMK ve Uygulamaları*. İstanbul: İstanbul Barosu Yayınları, p. 52

[767] Aydın, 2012, p.340

[768] Ertekin, Orhan Gazi (December 2012). "Adaletin İmkansızlığıyla Karşı Karşıyayız" *interview by Ekin Karaca*, www.bianet.org; Tanrıkulu, 2010, p. 58

[769] Agtaş, 2012, p. 17

does not abolish ÖYMs for them. Evidently, on July 2, 2012, exceptional judgment and exceptional rights are re-established by Law No 6352 *for only these cases.*[770] According to Cemil Ozansü, it is an overt acceptation that these criminal cases are more than judicial matters. They are political issues; and "normalization" is not possible until the end of political processes of which they are a part. [771]

More importantly, in lieu of the ÖYMs, Regional High Criminal Courts are established by the same law. While Article 105 of the Law No 6352 abolishes Articles 250-252 of the CMK, Article 75 amends Article 10 of Anti-Terror Law. With this change, exceptional judgment procedures and rights that constitute the substance of these articles are transferred into Article 10 of Anti-Terror Law.[772] Therefore, in the third judicial package of the AKP, exceptional judgment procedures and rights are re-approved and re-established under a single article in Anti-Terror Law. Hence, it will not be wrong to say that the ÖYMs that regulated in the CMK are substantially replaced by Regional High Criminal Courts that regulated in the Anti-Terror Law.[773] In that way, the CMK is cleaned off from all exceptional judgment procedures and rights. After July 2012, the CMK represents the regular procedure of criminal judgment in Turkey, without any exception. In contrast, Anti-Terror Law represents the exceptional criminal judgment procedures and rights in Turkey. Consequently, after 2012, duality in criminal judgment in constitutional State in Turkey is crystallized. There are two criminal justice systems in the constitutional State in Turkey. Some people are subject to regular criminal justice of the CMK, yet some other to exceptional criminal justice of the Anti-Terror Law.

---

[770] İlkiz, Fikret (September 2012) "Adaletiniz Kaç Kilometre Uzakta?", www.bianet.org

[771] Ozansü, Cemil (September 20102). "Siyasi Davalara, Adalet Penceresinden Bakmak Anlamsız", *interview by Ekin Karaca*, www.bianet.org

[772] "3.Yargı Paketi", 01.08. 2012, www.ankarastrateji.org

[773] Agtaş, 2012, p. 17

Law No 6352 made other changes in the Anti-Terror Law as well. Accordingly, Article 2 of the Anti-Terror Law is amended. Before amendment, article says that persons, who are not members of a terror organization, but commit a crime in the name of it, are also deemed to be terrorists and shall be subject to the same punishment as members of organization. After the amendment, the article repeats that persons, who are not members of a terror organization, but commit a crime in the name of it, are deemed to be terrorists. Yet, it leaves the issue of his/her punishment to the discretion of the judge.[774] On the other hand, an addition is made to Article 10 of Anti-Terror Law. Accordingly, children are excluded from the jurisdiction of Regional High Criminal Courts; including their exceptional investigation and prosecution processes.

In addition, after the amendment, the verdicts of Regional High Criminal Courts concerning terror organizations charged in the scope of Article 10 of Anti-Terror Law will be reviewed by specially assigned judges in case of objection. However, ongoing cases will be exempted from this rule. Moreover, penalty of monitoring public areas, violating confidentiality of communication, and unlawfully disclosing communication is increased in the CMK. The scope of judicial control is enlarged against arrest ban, and condition of demonstrating concrete evidence and concrete facts is added to Article 101 of the CMK. Article 220 of the TCK is also amended. After the amendment the article still says that persons, who are not members of an organization, but commit a crime in the name of it, will also be charged as being a member of organization. Yet, their penalty for membership to the organization may be reduced by half. Similarly, the article still says that who knowingly and willingly assists an organization although not being in the hierarchical structure of it, will be charged as a member the organization as well. Yet, their penalty for membership to the

[774] "3.Yargı Paketi", 01.08. 2012, www.ankarastrateji.org

organization may be reduced two third depending on the kind of assistance.[775] However, knowing that the essential problem of criminal justice is enforcement of legal norms, the effect of these legal amendments is contentious.

5.4.2 Police's role and authority in the courts

Meanwhile, rules of the CMK that enforced unlawfully generally concerns practices of arrest, pre-detention, seizure by force, gathering evidence or monitoring with technical tools. These practices are parts of investigation process and fall into police's area of responsibility. Actually, one of the most serious problems of the ÖYMs is extremism and even arbitrariness of police in law enforcement. Remember that Articles 250-252 of the CMK and Anti-Terror Law give the police extraordinary authorities. Once the suspect and the crime is classified by the police as an organized crime, legal decisions of wire-tapping and searching can more easily be obtained; period of detention and arrest be prolonged. This being the case, police tries to get every crime within the confines of CMK 250-252 or Anti-Terror Law; it defines everyone as a member of a criminal organization.[776] For this purpose, terms like "organization", "terror", "violence and threat" are too broadly interpreted. By this way, writing articles, making speeches and singing songs are evaluated as sings of membership to a terror organization.[777]

For instance, singer Cevdet Bağca was sentenced to imprisonment of ten months for saying "Do not forget Kazım Koyuncu, Ahmet Kaya, Ozan Serhat and Delila. Do not forget Uğur Kaymaz" in a concert performed in Siirt on September, 29 2009. This

---

[775] "3.Yargı Paketi", 01.08. 2012, www.ankarastrateji.org

[776] İnanıcı, 2012, p. 18

[777] Çetin, Süleyman (2012) in *Ankara Barosu Uluslararası Hukuk Kurultayı Cilt II*. Kocaoğlu, Sinan (ed). Ankara: Ankara Barosu Başkanlığı, p. 376

speech was interpreted by the police as "sympathizing for an illegal organization and spreading propaganda about a member of the organization". The official police report stated that Bağca praised Kazım Koyuncu and Ahmet Kaya, two persons who allegedly sympathized with the PKK organization, and spread propaganda for the terror organization.[778] In this case, there are two points to be underlined. The point that legal texts and some legal terms are interpreted broadly has already been mentioned above. However, here, it is the police, not the jurists, who broadly interprets laws and legal terms and gives a decision about the suspects. Secondly, if there is a crime committed by expression of thought like speech or writing, it is a crime of insult. Therefore, it is an ordinary crime that falls into the jurisdiction of regular courts. However, such crimes are associated by *police* with illegal organizations via out of whole cloth evidences and arguments. Consequently, ordinary crimes are made organized and political crimes by the police.

Moreover, in Ergenekon, KCK and Hopa cases, police goes as far as to produce evidence to charge suspects in the scope of Anti-Terror Law. Apart from the examples we mentioned before, police uses a particular method called "illegal dictionary" to explain the meaning of talks obtained through wire-tapping. By this method, police ascribes special meanings to talks, and produces evidence in favor of organizational membership. Put it more clearly, police produces quasi-evidence through its discretion.[779] For example, inhabitants of Sason borough of Batman started to be wire-tapped on the basis of police's suspicion of their "aiding terror organization members". The average age of the suspects was 50 and all talks that wire-tapped were in Kurdish. In one of these talks, a woman called another woman and asked "our chickens got sick, how about yours?". Police interpreted this conversation with illegal dictionary and claimed that "chicken" means "member of terror organization". Hence two

[778] Önderoğlu, May 2011

[779] İnanıcı, 2012, p. 22 ; Kanar, 2011, p. 111

women were acclaimed to talk about the health of terrorists.[780] In another example, the conversation between two defendants was interpreted as such: “wedding” means “action”; “hospital” means “arrest”, “doctor” means “advocate”, "meeting in the park" means "meeting in the demonstration", and "I bought gift" means "material is provided".[781] Similarly, Büşra Ersanlı is wire-tapped by police. In one of her speech, she asked the other person "are you in a meeting, I hear noise?”. Police interpreted this talk as a sign that she is following up terror organization's meetings.[782] In this way, police can investigate any crime and action it desires within the scope of terror organizations.[783]

A second issue in the production of evidence by police concerns secret witnesses. For instance, in KCK case, secret witnesses went into operation in a stereotype, tailor-made fashion immediately after suspects were taken into custody. Moreover, in the investigation processes of all three of the political trials, secret witness was heard only by the police, not by the jurists. Arrest decisions were given by the prosecutors according to minutes of secret witnesses that only police listens. Even in the prosecution process, arrestment periods were prolonged by the prosecutor on the basis of police minutes, without himself/herself listening secret witnesses.[784]

When looked at investigation process as a whole, there is a wide consensus that authority of investigation practically exercised by police rather than the prosecutor.[785]

---

[780] Tanrıkulu, 2010, p. 63

[781] Kanar, 2011, p. 112

[782] “KCK İddianamesi Kabul Edildi: Suçları: Ders Vermek!”, 03.04.2012, www.bianet.org

[783] İnanıcı, 2012, p. 21

[784] Kanar, 2011, pp. 114-115

[785] Aydın, 2012, p. 366; Bora, Tanıl (2012). “Diyarbakır Barosu Başkanı Avukat Mehmet Emin Akar ile Söyleşi: ‘Bizim Buralarda…’ Hukuk?” in *Birikim*, No.273, p. 65; Çetin, 2012, p. 376; Kanar, 2011, p. 115; Şen, 2010a, p. 32

Ersan Şen gives an example. According to a police statement, police received a denunciation at 8.10 am. The police record was stated to be prepared at 8.15 am, within only 5 minutes. The prosecutor was stated to give its decision on the need for investigation at 8.30 am. Hence, police has travelled from Ankara Directorate of Security to Ankara Courthouse, found the prosecutor on duty; the prosecutor read the statement; and all of these happed within 15 minutes according to police statement. The prosecutor on duty decided to allow wire-tapping depending on minutes prepared from previous monitoring. However, as Şen underlines, there is no apparent (legal) monitoring that prosecutor mentions. As the prosecutor did not read the minutes, he/she never realizes it.[786] All in all, this example shows that the police prepare the minutes, and the prosecutor only sings them, just to make the procedure look legally correct. Another example is related to journalist Ahmet Şık. For the arrest of Ahmet Şık, the prosecutor of the ÖYMs, Zekeriya Öz, said as such: "the police gave us the list and we made the arrestments accordingly". It means that, prosecutors acted upon the police file.[787] Hence, the judicial decision about the suspect is already given by the police; the decision of prosecutor is actually the decision of the police. [788]

In sum, the police do the investigation; the prosecutors accept police's interpretation, and give this interpretation a place in the indictment. Judges, on the other hand, look into prosecutor's indictments, and content with them.[789] In the first place, police records are transformed into indictments by prosecutors. Indeed, police reports are transmitted to prosecutor's indictments through cut-copy-paste method so recklessly and brazenly that mistakes are inevitable.[790] For instance, in the first indictment of

---

[786] Şen 2010a, pp. 36-37

[787] İnanıcı, 2012, p. 22; Agtaş, 2012, p. 21

[788] Çetin, 2012, p. 376

[789] Bora, 2012, p. 65

[790] Aydın, 2012, p. 376

Ergenekon case, the indictment says "As a result of the works carried out by our Branch Directorate (...)". This phrase is originally written in the police report. Yet the prosecutor mistakenly repeats it in the indictment.[791] In the second place, indictments are transformed into court decisions by judges. As such, professional autonomy between judges, prosecutors, and the police is completely destroyed in favor of the police. In the ÖYMs, these offices turned into a single authority.[792] So much so that, lawyer Selçuk Kozağaçlı ridicules that in Turkey offices of magistracy and prosecution have become nothing more than waste of time and money. Following the foot steps of what actually is going on in the trials; police records may directly be accepted as court decision.[793] In conclusion, it is actually the police, not the jurists, who interprets legal norms and decides on the existence of a criminal organization and terror crime.[794]

This situation makes police force a part and parcel of the adjudication process of political trials. Today, adjudication in the ÖYMs is partly a police activity. Perhaps, the deeper meaning of "specially authorized" courts is hidden in the "special authority" of the police. Actually, the emphasis on police is not unjustified when looked at AKP's policy and attitude towards police force. Accordingly, there are two main tasks of the police. One is aimed at prevention of crime defined as ensuring safety and security of society. The other one is judicial police task, which involves carrying out criminal investigations. The new TCK of December 2004 No 5271 abolished police's *ex officio* right to conduct preliminary investigation. Hence, judicial

---

[791] Kocasakal, Ümit (2013)."Özel Görevli Mahkemeler" in *Hukukun Evrensel İlkeleri ve Özel Görevli Mahkemeler*. İstanbul: İstanbul Barosu Yayınları, p. 23

[792] Aydın, 2012, p. 376

[793] quoted in Özsu, Faruk (January 2013). "Balyoz: 'Yeni Yargı'nın Çöküşü", *Radikal*, www.radikal.com.tr

[794] Aydın, 2012a, p. 27; Kürkçü, Ertuğrul (June 2011). "Polis Fezlekesi Yargı Kararı Haline Geliyor" *interview by Şahin Artan*, www.bianet.org

police is put under the service of prosecutor's office.[795] The aim of this regulation is to establish prosecutor's control over judicial police. Yet, this does not match with AKP's desire. In this regard, on January 5, 2006 the Ministry of Justice issued a circular letter No 98 called Duties, Powers, and Responsibilities of Judicial Police and Secrecy of Investigation. In this circular letter, Minister of Justice Cemil Çiçek preached at judges and prosecutors about not to restrict police's powers depending on new TCK. [796] The result is exactly how Cemil Çiçek and the government wanted to be.

In point of fact, there was no much need to issue such a circular letter. Prosecutor's office's control over judicial police already doomed to remain on paper. It is because, although judicial police is under the service of prosecutor's office, it is not depended to the Ministry of Justice. Judicial police is depended on Directorate of Security and thereby Ministry of Internal Affairs. Accordingly, personal affairs of judicial police like appointments and promotions are at the disposal of chief of police,[797] who is appointed by the government. In conclusion, judicial police is under the control of the government. Government has the possibility to open investigation to anyone it desires through its control of judicial police; it can intervene into the investigation stage of any trial. Say it differently; judicial police cannot conduct any serious political operation without the consent of the government.[798] While the AKP hands over the exceptional justice of the ÖYMs to the police, it actually handles justice itself. All in all, problems attributed to political trials are more related to executive power, not to judicial power.

---

[795] İnanıcı, 2012, p. 15

[796] Aydın, 2012a, p. 25

[797] İnanıcı, Haluk (2011a). "Giriş" in *Parçalanmış Adalet: Türkiye'de Ceza Yargısı*. İnanıcı, Haluk (ed). İstanbul: İletişim Yayınları, p. 12

[798] İnanıcı, 2012, pp. 21,15

Indeed, AKP governments empowered police force in every aspect.[799] Both spatially and substantially authority of police is enlarged and that of gendarme decreased. In boroughs, police departments were established. The duty to fight against terrorism is handed over to police. Police is given back the authority to acquire and use heavy weapon; an authority which was taken back in 28 February process.[800] Immediately afterwards, the Law on Powers and Duties of the Police has amended in June 2007. With this amendment, either the existing powers of the police considering stop and search, gather personal data, use firearms are enlarged, or police is endowed with new powers. One of these changes concerns the authority to stop a person. Stopping a person is not an individual, independent authority; it is a dependent consequence of usage of another authority which may restrict personal freedoms. For instance, police may stop a person in case his/her detention or arrest is required by the court or the law. Hence in the absence of circumstances requiring the usage of police's authority of detention and arrest, police's authority of stopping a person disappears.[801] However, Article 4 of the amended Law on Powers and Duties of the Police gives the police the authority of stopping a person depending on his/her experience and his/her impression gained from the immediate situation. Hence, stopping a person becomes an independent police authority and left to the discretion of any police officer.

Additionally, stopping a person, as a matter of course, includes searching that person. After the amendment, the Law leaves the authority of searching a person to the discretion of police officers as well. [802] However, Article 20 of the Constitution says that unless there exists a decision duly passed by a judge on the grounds of national

---

[799] Aydın, 2012a, p. 24

[800] Aydın, 2012a, p. 25

[801] Altıparmak, Kerem; Aytaç, Ahmet Murat; Karahanoğulları, Onur; Hançer, Türkan; Aydın, Devrim (2007). "Polis Vazife ve Salahiyet Kanununda Değişiklik: Durdurma, Kimlik Sorma, Arama, Parmak İzi Alınması, Silah Kullanma" in *Hukuk ve Adalet: Eleştirel Hukuk Dergisi*, No. 11, p. 122

[802] Aydın, 2012a, p. 25

security, public order, prevention of crime commitment, protection of public health and public morals, or protection of the rights and freedoms of others, or unless there exists a written order of an agency authorized by law in cases where delay is prejudicial on the above-mentioned grounds, neither the person nor the private papers, nor belongings, of an individual shall be searched, nor shall they be seized. In this case, police's authority to stop and search a person is indeed an actual and arbitrary measure out of any judicial supervision.[803]

Another change concerning the authority of police is about the use of firearms. After the amendment of the Law on Powers and Duties of the Police, the authority of police to use firearms is enlarged unconstitutionally. Accordingly, police may use firearms against a person or a group who attempts to attack the police, regardless of the type of armament and heaviness of the attack. Moreover, the police is given the authority to shoot at terrorists after making announcement for their surrender. Similarly, obligation to notify identity is introduced with the amendment. In case the identity is not displaced, the police can make arrestment. Lastly, police may take the footprints of almost everyone and record them depending on the amended law.[804] Hence, the amendments made in the Law on Powers and Duties of the Police in 2007 are violating constitutional rights in many respects. The implicit intention that infected the amendments is to free police and administrative power in the person of the police, from the restrictions of the rule of law. Truly, police goes beyond the rule of law in its acts; and replaces the rule of law with its own discretion. Here, what the rule is in police actions is not determined by the rule of law, but purely by the power of police or administration.[805]

---

[803] Altıparmak, 2007, p. 125; Agtaş, 2012, p. 20

[804] Aydın, 2012a, pp. 26-27

[805] Agtaş, 2012, p. 20

5.5 Political Justice and its Implications for AKP Power

Political trials seem to be legal issues; they take part in the courts that are independent from politics and the political power; they seem to concern only the judicial power of the state. However, this view is misleading; they are directly related to the ruling political party, to the AKP. When we look at closely, it will be seen that in all three of the cases, it is the political opposition to the AKP who is being charged in the courts. This opposition is principally Turkish military in Ergenekon case, Kurdish politicians and activists in the KCK case, and socialists and protestors in Hopa case.

It has been touched upon that the military reacted against AKP governments. The confrontation between the AKP and the military was in deed contentious up until 2008. Moreover, military's anti-parliamentary democratic power in the MGK; and the fact that, from time to time, the military used this anti-parliamentary democratic power to the detriment of civilian governments, has also been discussed. All of these made the military AKP's most troublesome and strong adversary. In this regard, Ergenekon case is a part of AKP's struggle with its adversary; the AKP tries to gain political leverage over the military though Ergenekon case. Therefore, what is at stake in the Ergenekon case is actually a political issue. Up until now, the AKP seems to succeed its objective as well. For instance, in August 2010, the Supreme Military Council met over a series of new appointments within Turkish military. Traditionally, governments do not interfere in promotions and transfers within the military. However, this time AKP government felt the strength to veto the promotion of eleven high-ranking generals due to their alleged connections to Balyoz coup plan. Moreover, it thwarted military's plan to appoint Hasan Iğsız as the head of Land Forces for the same reason. Therefore, the AKP showed that by 2010, it would interfere to the appointment or promotion of military officers, and that the last word belongs to it.

In the KCK case, it is the executives and members of the DTP or the BDP who are principally and mostly interrogated, taken into custody, arrested, and charged. In this direction, by the anniversary of the KCK investigation in April 2010, 1.483 BDP members in total have been arrested.[806] Therefore, the target of the KCK case is explicitly Kurdish politicians; some of the defendants are even elected representatives of the people (mayors and the MP of the BDP). However, they are now being incriminated by membership to an illegal organization. The BDP is a party that cannot pass 10 percent threshold in general elections and enter the parliament. As a result, it opts backing independent candidates, to whom election threshold rule do not apply. Hence, in general elections, the BDP is far from competing and beating the AKP. However, the AKP and the BDP have competed against one another in the southeastern cities, where harbor significant Kurdish population. In the last local elections held in 2009, the BDP increased the number of municipalities under its control to 99.[807] This made the BDP a significant political rival of the AKP in southeast Turkey. Within this competitive political environment, the AKP has used a discourse of Islamic brotherhood and religious commonality as a way of increasing its influence over Kurdish population in southeastern cities. However, repressive measures have also been used. The KCK investigations and pre-trial arrests is one of these repressive measures used against Kurdish politicians in order to get them out of AKP's way or bring them in line with AKP's policy preferences, one of them which is Kurdish Opening.

Hopa case, however, is different from the other two; because, the target is not a particular group or organization. In contrast to two other cases, before the start of the incidents, there was no identifiable group to be checked and investigated by the

---

[806]"Tutuklu 104 "KCK" Şüphelisinin Dosyası AİHM'de", 17.05.2010, www.bianet.org

[807] Satana, Nil S. (2012). "The Kurdish Issue in June 2011 Elections: Continuity or Change in Turkey's Democratization?" in *Turkish Studies*, Vol. 13, No. 2, p.176

police. Therefore, the target of Hopa case is *whoever was there at that moment* protesting the AKP; mostly but not necessarily, socialists. Under this condition Hopa case charges socialist parties, its members, and whoever acted with them without being a member. There is no question of socialist parties being competitors of the AKP in elections; their vote rates are negligible. If Hopa incident did not take place, there was no apparent intention or policy of the AKP to struggle with socialist parties, as well. It would not be wrong to say that, the need to struggle against socialists suddenly appeared with Hopa incident.

What made Hopa protest an incident? First of all, police used a lot of piper gas against demonstrators, whose number was not more than 300; so much so that, one of the demonstrators lost his life due to piper gas. The report of *Türk Tabipler Birliği* (Turkish Medical Association) proves the casual relation between exposure to piper gas and Lokumcu's death after a heart attack.[808] Therefore, mainly as a result of police violence, a casual and isolated protest turned into an incident. Secondly, police did not question whether the protest was a break of law or not. Rather, it acted with an objective to prevent demonstrators "irritating" AKP members and the Prime Minister Erdoğan. Hence, police of the constitutional State tried to protect the political interests of the AKP at any coast. This interest impacted the trial as well. Although the causal relation between Lokumcu's death and the piper gas is approved by medical doctors, in the indictment police was regarded as "victim". The demonstrators, who allegedly responded the piper gas of the police by throwing stones, on the other hand, were accused of propagating armed terror organization. In this way, the court silently changes the victim and the offender. The reason of this change in the court and disproportionate police violence is the same; it is to protect the AKP and the Prime Minister Erdoğan against any kind of opposition movements.

---

[808] Türk Tabipleri Birliği (2012). *Hopa Raporu.* Ankara: Türk Tabipleri Birliği Yayınları

All in all, in these three political trials, it is the AKP's political opponents who are being charged. The AKP intimidates and represses political opposition by charging them in the courts. Hence, judiciary and courts are used as political instruments of the AKP to dispose political opposition. This is in line with what Tom Ginsburg say about the social role of the courts. According to Ginsburg, courts in general function as an effective instrument of social control. As a part of this social control, they may specifically be used to intimidate, harass or even eliminate opponents, which make them an apparatus of repression.[809] They can demobilize popular oppositional movements efficiently; reduce the need to exercise force, and garner legitimacy for the regime showing that it "plays fair" in dealing with opponents; create positive image for its regime, and negative ones for the opposition.[810]

Similarly, Ozansü comments that in political trials, political power and political opposition come face to face. These two poles continue to struggle in court houses. Therefore in political trials, court rooms are actually political arenas.[811] This view especially holds true for the KCK and Ergenekon cases. The dialogue and negotiations between the AKP and the military, or the AKP and the Kurdish movement did not finalize with the start of the trial processes. On the contrary, courts are means of the AKP used to increase its bargaining power in these negotiations. Therefore, the battle between political power and opposition in the parliament, administrative offices, and in civil society is simultaneously joined by the battle in the courts.[812] In this regard, Ergenekon case shall be considered as a part of the broad relation between the AKP, the MGK and the Turkish Armed Forces. While the military is perceived as a threat to

---

[809] Ginsburg, Tom (2010). "The Politics of Courts in Democratization" in *Global Perspectives on the Rule of Law*. Heckman, James J.; Nedson, Robert L.; Cobatingan, Lee (ed). Oxon: Routledge, p.177

[810] Pereira, 2008, p. 55

[811] Ozansü, September 2012

[812] Kirchheimer, Otto (1961). *Political Justice: The Use of Legal Procedures for Political Ends*. Princeton, New Jersey: Princeton University Press, p.4

AKP's political power and charged in Ergenekon case, Ergenekon case intervenes into the relation between the AKP and the military, and transforms the perception of threat. Similarly, the KCK case is a part of AKP's Kurdish policy. It is a determinant taken into consideration in the dialog between the AKP, the PKK, and the BDP; it is a factor of current Kurdish peace process. In Hopa case, however, the objective is not bargaining or establishing dialogue with the political counterpart. Rather, the objective is to wipe out social opposition and protests in total. As Otto Kirchheimer[813] says, the courts are used to *eliminate* a political foe of the regime in Hopa case, more than being a part of negotiation process.

Implications of this situation are many. First, political trials manifest that judicial power of the state and the courts are used as instruments for political ends. Issues involved in the political trials are substantially political. Consequently, it would be fair to solve these problems politically; meaning, by political actors in political organs. However, these problems excluded from the realm of politics and left to the apolitical power of judiciary. In that way, political problems have become judicial cases. This feature that political trials unravel is specifically called as "judicialization of politics" in the literature. Judicialization of politics means, transformation of social and political problems into judicial cases and being settled in the courts by jurists. By this way, problems which shall be discussed and settled in the parliament or in other political organs confront us as legal problems. Therefore, judicialization of politics changes the decision making actor of social and political problems; political organs of the parliament delegate this authority to the courts. Hence, jurists are making decisions that were principally reserved for majoritarian institutions.[814]

---

[813] Kirchheimer, 1961, p.6

[814] Mustafa, Tamir; Ginsburg, Tom (2008). "Introduction: Function of Courts in Authoritarian Politics" in *Rule by Law: The Politics of Courts in Authoritarian Regimes*. Ginsburg, Tom; Mustafa, Tamir (ed). New York: Cambridge University Press, p.2

Yet, practical delegation of parliamentary authority to judicial actors in judicialization of politics does not restrict or undermine politics. Just the opposite. This practical delegation means continuation of politics by other means; means other than political organs. That being the case, judicialization of politics actually means expansion of politics to a point to absorb judicial actors. This expansion is best described by Kirchheimer. According to him, judicialization of politics refers to the enlargement of the area of political action by enlisting the services of the courts on behalf of political goals. This process uncovers how politics uses the juridical forms, devices, symbols and mechanisms of justice, to promote and consolidate its power and defeat its enemies.[815] Ran Hirschl agrees with him. Hirschl argues that constitutionalization and the related expansion of judicial power are primarily political, not judicial phenomena. In other words, political choices and political interests are key factors in understanding judicialization of politics.[816]

Indeed, practical delegation of decision making authority to judicial actors is itself a policy. Accordingly, governments often delegate decision making authority to judicial institutions, primarily and simply to avoid divisive and politically costly issues. Through this delegation, they will no longer be held accountable.[817] It reveals that, contentious political issues are purposely and voluntarily referred to the judiciary. Therefore, judicialization of politics first and foremost reflects a preference; it is a choice made by political power between resolution procedures of the parliament and the judiciary.

---

[815] Ressel, James (2009). *Political Justice: A brief outline of Kirchheimer's sense of Political Justice.* Derived from the below personal web page of the author: www.academia.edu/181179/POLITICAL_JUSTICE_A_brief_outline_of_Kirchheimers_sense_of_Political_Justice

[816] Hirschl, Ran (2004). *Towards Juristocracy*: *The Origins and Consequences of the New Constitutionalism*. Cambridge, MA: Harvard University Press, p.469

[817] Mustafa, 2008, p.10

While political and social issues are handled by courts, judiciary is more and more drawn into the political realm. This process transforms judicial institutions into important political actors.[818] After analyzing the United States of America, Martin Shapiro says the core of political jurisprudence is a vision of courts as political agencies, and judges as political actors. Hence, any given court can be seen as a part of the institutional structure of the government, basically similar to other agencies.[819] What Shapiro states for the USA can also be repeated for Turkey under AKP governments: courts are governing institutions in Turkey. It means that courts are likely to reflect politics of AKP government. This should not be mistaken by seeing courts as pure agents of AKP's politics and its immediate policy preferences. However, it is to recognize that political power's policies are supported by courts for them to be sustainable. [820]

Nevertheless, for political power to delegate decision making authority to judicial institutions and claim unaccountability, courts must be seen independent from the politics of the government.[821] As Kirchheimer mentions, process of judicialization of politics must be subject to the control of a third agency, which does not take orders from the government, is committed to the enforcement of established set of norms, and is exposed to a modicum of public criticism.[822] Hence, presentation of political issues as judicial cases in the public eye assumes that the judiciary enjoys some level of independence *vis-à-vis* political actors.[823] Courts shall continue to provide formally

---

[818] Höjelid, 2010, p.469

[819] Shapiro, Martin; Sweet, Alec Stone (2002). *On Law, Politics, and Judicialization*. New York: Oxford University Press, p.21

[820] Ginsburg, 2010, p.175

[821] Mustafa, 2008, p.13

[822] Kirchheimer, 1961, p.120

[823] Shambayati, 2004, p. 254

neutral venues; judges shall continue to be seen as neutral servants of the law. Only by asserting that they are apolitical and independent, judicial decisions can claim legitimacy.[824] Then, political power requires that neutrality, independence, and apolitical character of judiciary are sustained as for it to be held unaccountable.

Second, reference of political issues to courts implies the close relation between political power and the judiciary. For political power to delegate its power to the judiciary, it must trust the decisions of the judiciary to a large extent. Hence, political power must have already influenced or controlled the judiciary;[825] judiciary must have already been politicized before judicialization of politics takes place. In this direction, political power impacts the courts through controlling their composition or contracting the size of high courts. In addition, political power manipulates the jurists' career incentives.[826] This is exactly what we see in above examples. When the AKP preferred to refer either small or large problems to judiciary and intimidate social and political actors by charging them in the courts, it capitalized on its strength to manipulate judicial system.[827] Therefore, at the center of political trails, there lies AKP's self-confidence concerning its control of jurists and courts.

In this respect, political trials that reflect the possibility of referring political issues to the decision of the courts become the illustrations of AKP's control over the judiciary, which is discussed in Chapter 4. Therefore, they elucidate the points we brought out in the previous chapter. On the one hand, they illustrate that judicial decisions or judicial enforcement of laws come in line with the policies of the government; with the end

---

[824] Ginsburg, 2010, p. 178; Shapiro, 2002, p.3

[825] Akbaş, Kasım (2012). "Yeni Hukuk Düzeni ve Sermayenin Doğrudan Egemenliği" in *Birikim*, No. 275, p. 16

[826] Ginsburg, p. 176

[827] Baran, 2010, p.78

result that judicial and executive enforcement of laws are harmonized or *homogenized to a great extent* within constitutional state, which dictates their separation.

On the other hand, this *homogenization* between judicial and executive decisions that political trials require is realized through Cemaatization. It is noteworthy that Faruk Özsu says, judiciary is Cemaatized; yet Cemaat especially get organized in the ÖYMs. The degree of control over ÖYM's through reform of the judges is so intense that the ÖYMs are "cleaned up" from all non-Cemaat members, even being religious-conservative.[828] *Cemaatization* means that, the degree of homogenization among the law enforcing organs of the state is achieved without abolishing institutional independence of judiciary and courts. In this case, political trials illustrate the first and the indirect political involvement of the AKP in judicial decisions through the appointment of judges. They unravel how this indirect political involvement in judicial decisions works; they tell us why packing of the courts with Cemaat members is for. Accordingly, the norm-bounded decisions in these political trials will still be judicial decisions; they will be announced by the judges in the courts. However, as both Kirchheimer and Ozansü comment, court decisions will not be authentic; they will confirm the results reached elsewhere.[829]

However, the discussion of political trials and its meaning for AKP power within constitutional state does not exhaust here. Political trials indicate that judiciary is politicized, and politics is judicialized under AKP rule. Therefore, it seems that legality and politics are converged. Legal order is subsumed under politics as a whole, and itself become politics. In such a context, if courts are government agencies and

---

[828] Özsu, Faruk (July 2012). "Yargı ve Entelektüeller", *Radikal*, www.radikal.com.tr;
Ertekin, Orhan Gazi (February 2013a). "Cemaat Ordu Gibi", *Cumhuriyet*, www.cumhuriyet.com.tr

[829] Kirchheimer, 1961, p.4; Ozansü, September 2012

judges are part of the system,[830] all judiciary, all judges, all courts, and all cases are affected. Under such a circumstance, all trials are political trials; from traffic accidents to tax fraud and theft. However, still to call a traffic accident a political trial sounds weird and actually, would rob that phrase of its meaning. Hence, to an extent, all trials are political; yet, some are *more* political than the others. Let us clear the contrast and the particularity of the political trials by two examples.

The first example is AKP's relation with *Doğan Media Group*. Doğan Media Group (owned by Aydın Doğan) is Turkey's largest media holding company. It owns half of Turkey's print and broadcast media market share and it has partnership with *CNN International* for a news channel called *CNN Türk*. Doğan Group has always been one of the epitomes of mainstream media; it is unusual for one of its publications or channels to sympathize political opposition even a little. However, due to Prime Minister Erdoğan's intervention to media market, the relation between government and Doğan Group became tense. In April 2007, a newspaper called *Sabah* and a television channel called *ATV* (together belong to Turkey's second largest media group) declared bankruptcy. Government's *Tasarruf Mevduatı Sigorta Fonu* (Savings and Deposit Insurance Fund-TMSF) seized their control. Afterwards, it tendered them for a contract. Prime Minister wanted this newspaper and TV channel to be sold to *Çalık Group*; because, the manager of Çalık Group was Erdoğan's son in law, Berat Albayrak. In this direction, Erdoğan reportedly intervened into the sale of Sabah and ATV, and forced the withdrawal of all other competing bidders. As a result, the TMSF declared that Doğan Group was not permitted to join the tender. Subsequently, ownership of Sabah and ATV transferred to Çalık Group.

[830] Ressel, 2009

In pursuit of this transaction, not only Sabah and ATV's coverage shifted from neutral to pro-government,[831] but also Doğan Group turned its back to government. Its newspapers started to cover scandals of the AKP extensively. Perhaps, the most striking of them was what is known as "Deniz Feneri scandal". On September 17, 2008, a court in Frankfurt (Germany) convicted three Turkish executives of German-registered Islamic charity *Deniz Feneri* of embezzling 16.9 million Euros between 2002 and 2007. The three, one of whom was Mehmet Gürhan, pleaded guilty and explained how the money had been illegally diverted to businesses in Turkey owned by people associated with the AKP, including several close friends of Prime Minister Erdoğan.[832] Hürriyet (one of the leading newspapers of Doğan Media) reported that Erdoğan's name was indirectly implicated in Deniz Feneri scandal and persons close to him directly accused of wrongdoing.[833] For instance, in 2008 the court accused Zahid Akman (President of Radio and Television Supreme Council) of transferring tens of millions of Euros between Deniz Feneri's offices in Germany and pro-AKP television channel *Kanal 7* in Turkey. Prime Minister Erdoğan, on the other hand, insisted that he had no information and did not even know Mehmet Gürhan. However, the photographs of the two men sitting and talking together were revealed soon after in Doğan Media.[834] Another scandal of the AKP covered by Doğan Media is about AKP Deputy Chairman Şaban Dişli. Dişli was accused of taking 1 million Dollars bribery in exchange for facilitating a change in an İstanbul zoning permit. Doğan Medya covered this scandal extensively and Dişli resigned as a result of this

Seeing Doğan Group's hostile stance towards its power, Prime Minister Erdoğan challenged Doğan Media politically. He accused Aydın Doğan of conducting a

---

[831] Baran, 2010, p.76

[832] Jenkins, 2009a, pp.63-64

[833] Baran, 2010, p.77

[834] Jenkins, 2011

systematic defamation campaign against him; and he advised everybody to boycott Doğan's newspapers. Yet afterwards, he preferred to transfer the issue to judiciary. Accordingly, Doğan Holding was subjected to tax auditing for almost a year and accused of tax evasion. In February 2009, the court condemned the group a tax penalty of 408 million Dollars. In August 2009, the second penalty came that worth 2.5 billion Dollars for allegedly unpaid taxes.[835] Doğan Holding filed a lawsuit against tax debts. However, the court only partially remitted the penalty. Lastly, Doğan Holding paid approximately 250 million Dollars to government in September 2012 and wrote of its debt.[836]

The second example concerns members of parliament under arrest. In June 12, 2011 general elections, 6 candidates supported by the BDP, 2 candidates supported by the CHP, and 2 candidates supported by the MHP were in prison. They were elected as MPs; however, they were not released after their election. It was because; they were accused of conducting "crimes against constitutional order and te state". The MPs under arrest filed a lawsuit for their release. In fact, there is no legal norm directly enforceable to the concrete situation of the MPs under arrest. Nevertheless, there are two legislations concerning them. According to the CMK, if the judge decides that there is no possibility of their escape; then, MPs could be released. On the other hand, Article 83 of the Constitution states that MPs being accused of conducting a crime before or after their election cannot be arrested or judged unless there is an act of the parliament. Yet, Article 14 of the Constitution brings an exception to Article 83; it excludes any activity violating the integrity of the state with its territory and nation and endangering the existence of the democratic and secular order of the state. Still,

---

[835] Baran, 2010, p.77

[836] "Doğan Grubu Maliye'ye Borcunu 18 Ay Erken Kapattı", 30.09.2012 *Radikal*, www.radikal.com.tr

Article 14 does not specify the crimes fall into its scope.[837] Consequently, the issue of MPs under arrest is left to the discretion of the jurists; either on the basis of the CMK or Constitutional articles.

However, this discussion of criminal rules shall not blur the picture on MPs under arrest. The affair of MPs is a political problem; not a judicial one. These persons are elected by the people as their representatives. Therefore, they should take their seats in the parliament. Parliamentary democracy should and could find a way through consultation and negotiation among political parties for their release. For instance, parliament might enact a new regulation or make an amendment in the existing ones to free them. Hence, this affair should be solved by politicians in the parliament rather than by jurists in the courts. Actually, a step in this direction was taken by opposition parties. Three opposition parties in the parliament met on April 26, 2012. They negotiated, and proposed the amendment of Article 100 of the CMK to free MPs under arrest. However, the AKP refused this proposal.[838] With this move, the AKP actually manifested that it rejects to solve the affair of MPs under arrest by political means in the parliament. Rather, the AKP preferred this affair to be regarded as a judicial case, delegated to the courts, and solved by the discretion of the jurists. As late as June 2012, the MPs are still under arrest.

The issues involved in these two trials are also political; they also exemplify transformation of political issues into judicial problems. Hence, they are a part of judicialization of politics. However, neither of them is called as political trial. Indeed, there are more to political trials then judicialization of politics. As Kirchheimer mentions, a genuine political trial is recognized by its feature of perception of a direct

---

[837] Göktaş, Kemal (June 2011) "Hapisteki 9 Vekil Meclis'e Nasıl Girecek?",*Vatan*, www.haber.gazetevatan.com

[838] "AKP Tutuklu Vekillerin Tutukluluk Halinin Devamına Karar Verdi", 15.05.2012, www.bianet.org

threat to established political power.[839] In this direction, targeting political power with an aim to oppose, change or undermine it, is the distinguishing mark of political trials.

Legal regulation in Turkey justifies Kirchheimer's point. Let us remember that the purpose of political crimes or terror crimes is defined in the law as to change the characteristics of the state, damage its unity, endanger its existence, weaken or destroy or seize its authority, eliminate fundamental rights and freedoms, or damage the internal and external security. Hence, terror crimes target the state. They target either of its existence of the state, its internal or external security, constitutional order; or functioning of legislative, executive or judicial organs (which means the functioning of constitutional order). Therefore, their real character is being crimes against the state. This is exactly why Doğan Media trial and the case of MPs under arrest, or a divorce case is not called as a political trial, even though their subject matter may be political; yet Ergenekon, KCK and Hopa cases are called so: their (allegedly) targeting of state power and their purpose of changing or opposing it.

Their purpose reveals that political trials are overseen in criminal courts; hence they are criminal trials. Consequently, trial of political opposition takes the form of criminal justice. It means that rights and freedoms of the suspects may be restricted via arrest ban or imprisonment,[840] which is not the case in other types of trials. Still more importantly, through being charged in criminal courts, political power regularly claims that opponent's attack, criticism or protest is purely criminal and therefore subject to juridical processes.[841] In this way, political dimension of the political opposition is disguised; rather it is thoroughly criminalized. It is the same in three

---

[839] Ressel, 2009

[840] Karakehya, Hakan (2007). "Ceza Muhakemesinin Amacı" in *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası*, Vol.115, No. 2, p. 122

[841] Ressel, 2009

political cases that the AKP charged its opponents. The AKP transforms political issues into judicial cases, declares its political opponents criminals, excludes them from politics, and makes them illegal.

Still more, in political trials political opposition is not only transformed into a crime; yet concurrently it is labeled as terrorism, and political opponents as terrorists.[842] Thereby, political opposition is turned into an "evil organism".[843] In this way, opposition is discredited; which is a gain for the AKP on its own right. Moreover, today anyone can be deemed as terrorist due to broad enforcement of terror legislations.[844] Journalism, working as a lawyer, performing art; in short, criticizing government in any way can be brought into the scope of terror crime.[845] To a considerable extent, the AKP is responsible from terrorization of opposition; because, it revised Anti-Terror Law in 2006 and enlarged its scope. After then, we see that AKP's judiciary and justice system generalized terrorism discourse and practice to every corner of the country.[846] As a result, assimilation of political opposition through criminal procedures and anti-terror discourse has become the dominant factor of AKP's general policy, and main tool in its political rule.[847] So much so that, at the end, "terrorism" and the category of "terror crime" became banal.[848]

---

[842] Ertekin, January 2012; Akbaş, 2012, p.16

[843] Ertekin, Orhan Gazi (March 2011a) "Türkiye'nin İkinci Anayasası Terörle Mücadele Kanunu", *interview by Ayça Söylemez*, www.bianet.org

[844] Ertekin, March 2011

[845] Demirbaş, Timur (2012). "Özel Yetkili Ağir Ceza Mahkemelerinin Görevine Giren Suçlarda Ceza Muhakemesi ve Sorunları" in *Ankara Barosu Uluslararası Hukuk Kurultayı Cilt II*. Kocaoğlu, Sinan (ed). Ankara: Ankara Barosu Başkanlığı, p. 377

[846] Özsu, January 2013

[847] Ertekin, Orhan Gazi (November 2011). "İddianameler Çağı", www.sendika.org

[848] Demirbaş, 2012

However, the most significant feature of political trials is subjection of political opposition to exceptional judgment rules and rights. Political opposition, by virtue of being charged in the ÖYMs, is removed from the regular jurisdiction of the state and subjected to exceptional judgment rules. Political opponents are deprived of some of their basic human rights and freedoms. Hence, constitutional rights and freedoms that every citizen enjoys are not given to political opposition. Therefore, through charging them by exceptional judgment rules and rights, political opponents are not treated as citizens or even as persons.[849] They are regarded as exceptions to constitutional rights and freedoms, legal order, and citizenship. While everyone is subject to regular legal order and legal justice, for political opposition exceptional legal order and an exceptional justice system operates. This exceptional justice system is called *political justice* by Carl Schmitt. Political justice, on the other hand, is the distinguishing mark of the political trials we examine.

Hakan Karakeyha explains that before Enlightenment era of 18th century, the purpose of criminal proceeding was to restore authority and order in society. In this regard, no distinction was made between suspect and the criminal. Suspect's culpability was accepted in advance, and the objective of the criminal proceeding was just to establish it. This view, on the other hand, has changed with the Enlightenment.[850] The purpose of modern criminal proceeding is finding out material reality, not punishing the suspect. In this context, prosecutor (prosecution), lawyer (defense), and the judge are equal.[851] Further, it aims to propound material reality without damaging basic human rights of the suspect. Therefore, state's interference into the basic rights of suspects

[849] Ertekin, January 2012

[850] Karakehya, 2007, p. 124

[851] İnanıcı, 2011, p. 17

always adheres to the principle of proportionality.[852] The suspect, meanwhile, is accepted innocent until the final verdict of the court (presumption of innocence). However, in political justice, political opponents are already punished by the exceptional criminal proceeding of the ÖYM before the verdict of the court. Presumption of innocence is infringed and political opposition is declared guilty in advance. All in all, the purpose of the modern criminal proceeding, which is stated as finding out material reality, shifts in the punishment of political opposition, no matter how. Consequently, political justice is a comeback to criminal proceeding of the Middle Ages.

Let us look at political trials more closely to see how political justice operates. To illustrate this point, we will look at only Hopa case. However, other two cases may be reconsidered and examined in the same light as well.

On May 31, 2011 in Hopa, people used one of their usual citizenship rights. They used their right of meeting and demonstration. According to Article 34 of the Constitution, everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission. Therefore, the call of the socialist parties that day; and gathering of people to protest the AKP and the Prime Minister was legal. Indeed, Hopa incident was clearly and solely a protest of AKP's policies towards Black sea region. Within this framework, there was nothing extraordinary and urgent. It is usual and almost a regular activity for socialist parties to protest political power's policies. Hence, at the beginning, Hopa protest was as casual and isolated as possible. Think of that the legal boundaries were transgressed and protestors violated the law while using their legal right. In such a situation, they shall be charged on the basis of opposing Law No 2911 on Meetings and Demonstration Marches. The case, then, shall be overseen in regular courts and by regular public prosecutors. However,

[852] Karakehya, 2007, pp. 124-125; İnanıcı, 2011, p. 16

in Hopa case, using a legal right and being a socialist or protestor is criminalized through being charged on the basis on Anti-Terror Law.

What is particularly unacceptable in Hopa case is exactly this: its reference to the ÖYMs, and charging the suspects in the scope of Anti-Terror Law.[853] In that way, legal rights, and legal organizations of the ÖDP, the SDP and Halk Evleri are made illegal (on the basis of inadequate and fictitious evidence); an ordinary incident and protest is made extraordinary; an ordinary crime is made a political crime; an ordinary judgment is made an extraordinary judgment; and legal justice is replaced by political justice. As a result, the office of prosecution, police unit of the investigation, judgment procedure, and the court of the proceeding are all changed. One may say that in September 2011, the Specially Authorized Court decided lack of jurisdiction for the 7 suspects and acquitted them. However, the problem is still there; because, trial process was itself a punishment for them as some are kept under pre-trial arrest for months for nothing. Second, attempt to sue demonstrators within the domain of Anti-Terror Law was a menace to all people. It implied that anyone who protests may be accused of being a member of, or propagating a terror organization; and be exposed to same *special* treatment.

Replacement of Hopa trial from regular jurisdiction of the state into the exceptional jurisdiction of the state; this shift constitutes the nitty-gritty of the issue of political justice. As Kirchheimer says, it is evident that police and prosecutor cannot run after every instance and every one that could be worked up into a case and criminalized.[854] Neither can everybody be deemed terrorist, nor can everyone be charged in exceptional courts. Hence, among other protests or events, only in *this occasion* and

---

[853] Söylemez, Ayça."Polis Devleti Olduk, İşkence ve Kötü Muamele Arttı", 06.06.2011, www.bianet.org

[854] Kirchheimer, 1961, p.118

for *these persons*, police and prosecutors re-examine what was actually a routine action, consider it in a new light, and turn it into an organized terrorist action.[855] For instance, why were military members involved in the preparation of April 27, 2007 e-memorandum, which caused Abdullah Gül's withdrawal from presidential elections, not charged in exceptional courts; while those involved in a hypothetic Balyoz coup were? Why was effective and functional Gülen Cemaat dominating media, having secret relations within state institutions and military establishment not evaluated as a terror organization; but non-functional THKP-C did? Actually, formers can be evaluated as crime as much as the latters; formers can be evaluated as terror organizations as much as the latters. Legislations concerning terrorism and terror organizations are as broad as to realize this. Yet, only latters are judged in the exceptional courts, and formers are freed. Then, the problem involved in political justice is re-examination of a specific demonstration among countless demonstrations, issues, and problems; and relegation of it to exceptional courts by this re-examination.

Within this framework, the core of the political justice is who is to be deemed terrorist. Who is to be charged in the exceptional courts rather than regular ones? Who is to constitute exception to constitutional rights? Put it in a different way, the basic question of political justice in Turkey is *who decides on the exception?*[856] Legal thinking cannot explain such a selective enforcement of legal norms to concrete situations; because, it accepts generality. Moreover, legal thinking cannot decide which concrete case to subsume and which one to exclude from regular jurisdiction of the state. Consequently, first, political justice requires a decision, which is unbounded by legal norms. Hence, political justice functions with the decision of the political power on a concrete case and on a genuine legal dispute; it functions with the direct

---

[855] Kirchheimer, 1961, p.118

[856] The phrase "the sovereign is who decides on the exception" is the well known definition of the sovereign power Schmitt makes in *Political Theology: Four Chapters on the Concept of Sovereignty*. This is just a play on words to remind the reader of this famous definition of Schmitt.

intervention of political power to judicial decisions. Second, political power directly intervenes into judicial decisions by changing the jurisdiction of certain cases. Therefore, direct intervention of political power comes simultaneously with provision of exceptional judgment. If we are to compare, legal justice operates with decisionist subsumption of the jurists to subsume a concrete situation under regular criminal norms. Political justice, however, operates with the direct political involvement of the ruling power into judicial decisions to subsume a concrete situation under exceptional criminal norms.

All in all, while discussing instrumentalization of judiciary and courts we already saw that political trials unravel first and indirect political involvement of AKP in judicial decisions through the appointment of judges, which *homogenizes* judicial enforcement of laws with AKP's policies to a high degree. In the framework of political justice, on the other hand, this time political trials display the second and direct political involvement of ruling political party in judicial decisions. Due to this direct political decision, political justice is always the justice of the ruling political power. In this respect, suspects of Ergenekon, the KCK and Hopa cases are exposed specifically to *AKP's* political justice. The same exceptional judgment procedures and rights can operate quite differently; the same exceptional courts can charge even the same fractions of the state and society very differently with a different decision of even the same political power.

Indirect political involvement of ruling party in judicial decisions is contrary to, and harms independence of judiciary and the separation of powers principle of parliamentary democracy. However, this indirect involvement is regulated by laws. It means that it enjoys the shelter of legality. Say it differently, indirect political involvement to the judicial enforcement of laws is envisaged by the rule of law. However, direct involvement of political power in judicial decisions in political justice is not regulated by laws; it is not envisaged and protected by the rule of law.

That's why it destroys separation of powers principle of parliamentary democracy and the rule of law order of the constitutional state. This direct political decision is independent of the legal norms. In contrast, it is dependent to the political interests of the ruling power. Therefore, this direct political decision is nothing but the arbitrary power of the ruling party; in our case, of the AKP. In this regard, political trials uncover; and are examples of the arbitrary power of the AKP functioning in the constitutional State in Turkey.

The AKP is not alone in its practice of political trials. The examples of political trials can be found in many other countries; they are more widespread than it is first thought. One of the most well known examples of them is the trials of the Nazi rule. Similar to the AKP, the NSDAP also used courts and judiciary to entrench its power and repress its political opposition. Actually, political trials constitute the area where the AKP rule in Turkey and the Nazi rule in the Third Reich most closely resemble each other. Just like the division of society in Turkey between citizens and terrorists on the basis of Anti-Terror Law, we see that at the center of NSDAP's practice of courts, there lies the division of society into friends and foes; between "national comrades" and "community aliens" or "common criminals" by the Nazi regime.[857] This division, on the other hand, was also made legally. After the Decree of the Reich President for the Defense against Malicious Attacks against the Government of the National Uprising inured in March 1933 by the Ministry of Justice, any person found guilty of making or passing on a statement which might cause serious damage to the welfare or reputation of the government, and the parties and the organizations behind it, could be sentenced to prison or penitentiary. This Decree was replaced on December 20, 1934 by the Law against Malicious Attacks on State and Party. This law extended previous regulations and included private comments even if they were

[857] Wachsmann, 2004, p.68

not statements of a factual nature.[858] In addition, Law against Dangerous Habitual Criminals, and Habitual Criminal Law of November 24, 1933 introduced stricter punishment for certain offenders.

The main target of Nazi's courts was its political opponents.[859] In particular, Hitler and his supporters were driven by the hatred of leftists and leftwing parties, namely *Social Democratic Party of Germany* (SPD) but especially the KPD. Many of the German citizens brought before the courts were communists, trade unionists, and social democrats.[860] In some judicial districts, almost all suspects charged of treason and high treason between 1933-1939 involved communists. Additionally, political opponents were described as racial threats. For instance, Jews were not only seen as a racial danger, but were described as political enemies of the Nazis beside communists and social democrats. Therefore, there was a considerable overlap in Nazi thinking between criminal, racial, and political categories; often merging into one.[861]

More significantly, just like the case in Turkey under AKP rule, the Nazis used exceptional courts to charge its political opponents. Beside criminal law, special courts were used to persecute and intimidate political opponents of the regime.[862] Article 102 of the Weimar Constitution stated that, judges were independent and subject only to the law. Moreover, ordinary jurisdiction was exercised by the Reich and the state courts; and extraordinary courts were inadmissible (Article 103). Accordingly, nobody might be deprived of his ordinary judge (Article 105). Despite these clear provisions of the Constitution, Hitler set up special courts on March 21,

---

[858] Wachsmann, 2004, p.114

[859] Stolleis, 1998, p.19

[860] Koch, 1997, p.5

[861] Wachsmann, 2004, p.112

[862] Stolleis, 1998, p.19

1933. In each judicial district, one special court was established. Only summary justice was executed in special courts. It means that basic legal principles, such as the right of the defendant to present evidence and to appeal were thrown out. Although judges of special courts were selected by legal authorities rather than directly by the NSDAP, no doubt they were chosen for their political reliability. Additionally, the great majority of them belonged to the NSDAP.

In pre-Second World War years, defendants tried in special courts mostly for criticizing or grumbling about Nazi leadership or about economic and social conditions of Germany.[863] Those who were convicted generally received prison sentences of less than one year. Thus, sentences were often not very long, but they were frequent. Nikolaus Wachsmann states that in the second half of 1930s, Nazi Germany was overflowing with political prisoners. In the end of June 1935, there were 14.963 convicted political prisoners held in penal institutions, with another 7.972 in pre-trial arrest. Between 1936 and 1937, around 14.100 political offenders were held in penal institutions every day, with another 5.800 individuals waiting trial, most of whom were communists.[864] Conviction rates for political opposition dropped significantly only after 1937. Accordingly, the number of political prisoners fell by more than 35 percent in 1937 compared to previous year. While 23.000 people were charged by the end of June 1935, the number fell to 11.265 by the end of December 1938. It is mainly because, by this date, much of the active left wing resistance had already been destroyed while others were intimidated.[865]

The most infamous of the special courts was the VGHs. They were established on April 1934 to see political offences of treason and high treason. It shows that just like

---

[863] Wachsmann, 2004, p.114

[864] 2004, p.113

[865] Wachsmann, 2004, p.118

the situation in Turkey under AKP rule, opposing Nazi rule was charged as opposing the state itself; opposition to NSDAP was transformed into treason. On the one hand, new or national socialist legislation for treason and high treason was enacted. A decree drafted by the Ministry of Justice on February 28, 1933 had introduced stricter sentences for treason. Law on April 24, 1934 allowed even more severe penalties for it and defined treason more extensively. For instance, in Article 81 of the Criminal Code, high treason had been defined as an action attempting to change the constitution or the territory of one of the federal states.[866] After the new law, high treason was regarded not just as an attack on the constitution or territory or the states; but on rulers and the entire community.[867] On the other hand, national socialist legislation was eagerly and widely enforced by German judges to crack down on the enemies of the Nazi regime. In this way, the crimes appearing before the VGHs ranged from the most serious to the apparently trivial; from assassination attempts on Hitler to listening to foreign radio broadcasts and telling political jokes. To give a few examples, a world-famous pianist was sentenced to death for criticizing National Socialism, and a doctor received the same penalty for voicing doubts about German's victory in the Second World War.[868]

In the eve of the Second World War, usage of special courts, the VGHs, and criminal justice even intensified. On September 1939, Simplification Decree for judiciary was issued. The decree stated that, if and when a chief prosecutor felt that public security and order was endangered, the case could be brought before special courts, including the VGHs.[869] It simply meant that any individual could be criminalized and any crime

---

[866] Koch, 1997, p. 51

[867] Wachsmann, 2004, p.116

[868] Koch, 1997, p. 5-6

[869] Gellately, Robert (2001). *Backing Hitler: Consent and Coercion in Nazi Germany*. Oxford: Oxford University Press, p.48

could be politicized by the jurists. This is exactly what had happened. In December 1938, the number of the VGHs prisoners under pre-trial arrest was 1.230. This number had risen to 4128 in April 1943. When the VGHs were founded in 1934, the number of sessions amounted to 57. Yet, by 1943, this had risen to 1258.[870]

Table 2: Number of cases overseen by the VGHs after 1939

	Number of indictments	*Hochverrat* (high treason) (punishable with death)	*Landesverrat* (ordinary or lesser Treason)	Other offences
1939	341	151	189	1
1940	598	381	214	3
1941	690	376	308	6
1942	1044	692	377	15
1943	1327	830	494	3
1944	2120	1859	256	5

Source: Koch, 1997, p. 131

Additionally, political criminals were treated harshly. In the judgments of the VGHs, one of three penalties was expected: death, imprisonment, or forced labor. In this regard, between 1937 and 1944, the VGHs pronounced the following sentences:

[870] Koch, 1997, p. 132

Table 3: Distribution of sentences approved by the VGHs

Year	Number of Accused	Death Penalty	Imprisonment	Forced Labor			Life
				Hard Labor 10-15 year	Hard Labor 5-10 year	Hard Labor Under 5 year	
1937	618	32	99	76	115	101	31
1938	614	17	106	56	111	91	29
1939	470	36	131	46	100	89	22
1940	1096	53	188	69	233	414	50
1941	1237	102	143	187	388	266	74
1942	2572	1192	183	363	405	191	79
1943	3338	1662	259	266	586	300	24
1944	4379	2079	331	114	756	504	15

Source: Koch, 1997, p. 132

All in all, fascist regime of the NSDAP utilized courts in Germany to control society and repress its opponents. As Hanns-Joachim Wolfgang Koch says, an important portion of the courts became a virtual arm of the Nazi state and its instrument of terror.[871] Therefore, when talked about Nazi terror in Germany, one shall always remember that first and foremost it was a legal terror. The numbers show that the intensity of this terror scaled up and got more brutal in line with the needs of the political power. However, what is important for us is the parallels among AKP's and Nazi's instrumentalization of courts. First of all, both the NSDAP and the AKP use courts and criminal law as an instrument to consolidate its political power vis-à-vis

[871] Koch, 1997, p. 40

political opposition. Second, in both, repressive measures enjoy legality; they have the form of laws, decrees, and courts. Third, both Nazis and the AKP exclude its political opponents from the general jurisdiction and general rights of the state; and charge them in special courts. All in all, both the AKP and the NSDAP exercise political justice. In effect, the point that the AKP resembles to the NSDAP in its exercise of courts and political justice is itself a finding. It is a startling finding, though. Punishment of opposition in exceptional courts may be inured in the case of the NSDAP, as the NSDAP rule is accepted as a fascist regime, and its practice of courts is called as *legal terror*. The AKP, on the other hand, utilizes similar means for similar ends. However, the fact that the AKP exercises political justice in a parliamentary democratic system blurs the picture. Perhaps, looking at its substance, what is experienced in Turkey under AKP rule may also be recognized as a kind of legal terror.

CHAPTER 6

CHARACTER OF THE STATE UNDER AKP RULE

AKP's political justice brings to light more than one area where political power infiltrates into the constitutional state. They reveal the decisionist component of the rule of law. Relying on this decisionism, the ruling party controls judicial enforcement of laws. Moreover, we see that this decisionism is a source of arbitrariness within a constitutional state. In addition, arbitrary power of the AKP galvanizes a second criminal jurisdiction. All of these findings (decisionism of the rule of law, arbitrary power of the ruling party, and the second jurisdiction of the constitutional state) appertain to the relation between the AKP and the constitutional State in Turkey; all of these factors that political justice uncovers have significant effects on the constitutional character of the State.

6.1 Political Justice and Party-State Identity

The confrontation of the AKP with the constitutional State in Turkey has been first analyzed in the discussion of the norm secularism. We come across with the decisionist component of the rule of law firstly in this normative discussion. Accordingly, the analysis of secularism shows the normative effects of decisionism. Due to decisionism, constitutional State in Turkey is a non-constitutional constitutional state and unable to limit the political power of the AKP. Political justice exemplifies the second confrontation between the AKP and the constitutional State. This second confrontation concerns AKP's interaction with the judicial organs, the

courts. In this respect, political justice reveals how decisionism is operationalized in the courts. Whereas the analysis of secularism shows the inability of the constitutional State to limit political power, or AKP's liberty from the restrains of normative order of the rule of law, political justice goes one step further. It manifests AKP's capacity to instrumentalize the courts and the rule of law order to enhance its political ends: due to decisionism, we see that the AKP has become capable of using judicial organs as a repressive means against third parties.

As they illustrate that the AKP achieved such a capacity vis-à-vis other political parties, organizations, or individuals; political justice is an extreme case showing that the rule of law order and the judicial power of the constitutional State are at the disposal of the ruling political party to a great extent. On the one hand, in political justice, the border line between legality and illegality blurs; what/who is legal and what/who is illegal is started to be determined by the political power itself. Depending on the threat perception of the AKP, what was legal before, may be referred to the courts and charged as a crime, and declared illegal today; and what is legal there, may be declared illegal here by the AKP. On the other hand, the capacity to instrumentalize legality requires *homogenization* of judicial and executive decisions to a degree that allows delegation of decision making power on political issues to judges. This requirement implies executive power's control over judicial power of the state. Yet, we mentioned about the specialty of judicial power. The judiciary is exclusively a power of the constitutional state, which shall stay apolitical and neutral. Courts are the reserved domain of the constitutional state; reserved from the partisan, political powers. Parties in the parliament can use legislative and executive powers; yet, no political party is allowed to use the judicial power of the state. However, AKP's instrumentalization of legality and the courts show that ruling political party has surpassed the area reserved for it; and get into the domain exclusively belonging to the constitutional state.

Moreover, the role of the police force in the judicial decisions of political trials opens up another discussion. The conclusion that it is actually the police, not the jurists who interprets legal norms and decides in the ÖYMs means a lot. Accordingly, if the police is the main actor in the ÖYMs who gives decisions, political trials shall equally entail cooperation between police force and executive power of the state. In that case, *homogenization* of judicial enforcement of laws must necessarily include *homogenization* of the police force. This point brings forth the relation between Cemaat and the government once again; this time within the framework of Cemaatization of police force. It is publically known that for a long time Cemaat members have been in control of the police force in Turkey. They fix appointments and promotions, conduct illegal wiretaps, run black propaganda campaigns, blackmail, fabricate evidence and forge documents.[872] AKP's sympathizers in the police persecute and intimidate AKP's political opponents and perceived critics.[873] According to Jenkins, it is the members of the Cemaat, both in the police and the judicial system who primarily drive political trials like Ergenekon.[874] All in all, Cemaatization of police force becomes a part and parcel of *homogenization* of judicial enforcement of laws in constitutional State in Turkey.

Consequently, for political justice to function smoothly all judicial and executive powers of the state, and related administrative units such as police force must work in conformity and harmony. This conformity, on the other hand, requires maximum coordination between separated state powers and administrative units of the state. Put it in other way, for the exercise of political justice, all forces and authorities participating to the enforcement of laws shall be controlled; and their decisions shall

---

[872] Jenkins, Gareth (2010c). "Turkey's New 'Deep State': A Movement without a Mover" in *Turkey Analyst*, Vol. 3, No. 15, www.silkroadstudies.org

[873] Jenkins, 2010a

[874] Jenkins, 2010c

be *homogenized* as much as possible with the decisions of the executive power. In the light of this point, political trials can no longer be seen as isolated, purely legal or criminal occurrences taking place within the domain of "independent" judiciary. On the contrary, they shall be evaluated as a part of AKP's endeavor to entrench its absolutist power.

Firstly, beside executive power of the government, legislative power of the parliament is *de facto* used by the AKP by virtue of being majority party. When control over judiciary (and other institutions and authorities taking part in the enforcement of laws) is added, it means that all sovereign state powers are practically concentrated in the hands of the ruling party. This, on the other hand, intermittently laps into absolutist power, and contradicts the main objective of constitutional state. Second, instrumentalization of the courts indicates that the AKP practically puts away separation of powers. Judicial power that checks and controls the executive power of state is defused or inactivated. After then, parliamentary character of democracy exists only in form. Third, political justice indicates that powers and organs of the constitutional state are used to suppress or eliminate third parties both within the state and civil society, who oppose the AKP. Then, political justice emerges as both an illustration and an instrument of establishment of AKP’s absolutist power.

All in all, political justice manifests transformation of the ruling party into the state itself proportional to the degree of concentration of powers in its hands. Actually, this transformation is realized in political justice in an other respect as well. In political justice, AKP charges its political opponents; however, it charges its opponents within the category of "crimes against the state". In this vein, in exceptional courts, it is no longer *political opposition* that is *punished*, but *crimes against state* that is *convicted*. Then, opposing the AKP is represented as a threat to state and public; a legal reaction to ruling party is transformed into a reaction against the state. Put it upside down, the AKP presents itself as the state. Hence in political trials ruling party no longer *acts* as

a political party, but as the state itself. In this regard, Kemal Göktaş says that it is possible to read this process both as a means and a manifestation of AKP's becoming a total power.[875]

Germany under the NSDAP rule gives a good example for such a total power, or the transformation of a political party into the state itself. Actually, the Third Reich is describes as a partisan state or simply, *Nazi state*. Accordingly, in Third Reich, no distinction was made between the state and the party. Neither in legislation nor in administration was it possible to distinguish the activities of the state and the party:

> (…) an attempt to find the exact legal distinction between the state and the party would be futile. State and party are increasingly becoming identical, the dual organizational form is maintained merely for historical and social reasons.[876]

One can say that the first step of this transformation was establishment of Nazi domination over state powers. Accordingly, Hitler brought all state powers into his control.[877] Remarkably, he used legal means to achieve this control. According to Law to Remedy the Distress of People and Reich or what is commonly known as the Enabling Act of March 23, 1933, the government was entitled to enact laws. Laws enacted by the Reich government should be issued by the Chancellor and announced in the Reich Gazette. Therefore, Reichstag had no authority over them. Moreover, laws enacted by the government could deviate from the Constitution as long as they do not affect the legislative bodies of the Reichstag and the Reichsrat. Before the Enabling Act, Article 48 of the Constitution was already giving the executive power

---

[875] Göktaş, Kemal (2012). "Yeni Yargı: Kurumsallaşma ve Pratik" in *Birikim*, No. 275, p. 18

[876] Fraenkel, Ernst (2006). *The Dual State: A Contribution to the Theory of Dictatorship*. Clark, New Jersey: The Lawbook Exchange, p. xv

[877] Manuel, Roger. *Polis Devleti (Gestapo).* İstanbul: Büyük Dağıtım Yayınevi, p. 3; Chapman, Brian (1970). *Police State*. New York, Praeger, p. 54

to enact legislations. However, it was not an absolute right. The parliament, Reichstag, had the authority to rescind any emergency decree.[878] Yet, the Enabling Act gave an absolute right to the government. It merely meant that the Enabling Act amended the Constitution and eliminated the separation of powers. On August 2, 1934, however, President Hindenburg died. Afterwards, Hitler announced that the office of the presidency would be combined with that of the chancellor. Hence, he would be the sole head of the state and the army. In that way, by August 1934, Hitler concentrated all state powers in his hands.

Transformation of ruling party into the state in the Third Reich was not limited to the control of legislative, executive, and judicial state powers. Step by step, intermediary powers and controls between the party and the state were abolished, and the state was subordinated to the party both ideologically and institutionally. In this direction, provision of the identity between state and the ruling party required a series of legal arrangements. A law named *Guarantees for the Unity of the Party and the State* enacted by the parliament on December 1, 1933. According to this law, some party institutions were given state powers. For instance, depending on this law, a Reich Press Leader was appointed by party order on January 19, 1934; and he ousted the editor-in-chief of a newspaper, although this man was under irrevocable contract until 1940. The point is that, the position of Press Leader was a party function. Yet, a party function was endowed with certain governmental functions and authorities through the Law of December 1933.[879] Afterwards, all political parties except the NSDAP were outlawed. On June 22, 1933, the SPD was officially dissolved. Within a week, all remaining parties dissolved themselves, leaving the NSDAP with a monopoly on political power. On July 14, 1933, the rise of new political organizations was

[878] Bendersky, 2007, p.66

[879] Fraenkel, 2006, p. 8

prohibited.[880] Law of December 20, 1934 made public criticism of the government and of the Nazi party a crime.[881]

Another area of institutional subordination of the state to the party concerns police force. Accordingly, the state police force was absorbed within party's private security forces of the SS and the SA.[882] Hitler organized a paramilitary force in Nazi party bound by personal loyalty to him and entirely depended upon him as party leader, named *Sturmabteilung* (SA). Further units of the same kind were recruited from party's most active and loyal supporters and formed into protection squads, *Schutzstaffeln* (SS).[883] Hence, both the SA and the SS were party's private security forces. In June 1936, German police apparatus was centralized by a decree and at the same time, police was now yoked to the SS.[884] In a short period of time, SS leader Heinrich Himmler rise to top of German police. By April 1934, Himmler was already in charge of the political police and on June 17, 1936, he was appointed by Hitler as the Chief of German police.[885] Anti-Jewish pogrom of November 1938; and extermination policy that came to be known as *Final Solution* and mainly started in June 1942, were carried out largely by SA and the SS respectively.[886]

---

[880] Bendersky, 2007, pp.94-95; Stackelberg, Roderick (2007). *The Routledge Companion to Nazi Germany*. New York: Routledge, p. 119

[881] Gellately, Robert (2001). *Backing Hitler: Consent and Coercion in Nazi Germany*. Oxford: Oxford University Press, p. 48

[882] Chapman, 1970, p. 68

[883] Chapman, 1970, p. 75

[884] Chapman, 1970, p. 68

[885] Wachsmann, 2004, p. 169

[886] Pereira, 2008, p. 39; Wachsmann, 2004, p. 170

Perhaps more remarkable for the institutional identification of the ruling party and the state, in January 1937, a new civil service law required all bureaucrats to be members of the NSDAP.[887] Lastly, until 1939, Hitler used two official titles of *Führer* and *Chancellor* to designate the duality between party leadership and the head of the government. However, by that time, he was exclusively referred to the Führer, reflecting the dominant role that the party had come to play in state affairs.[888]

What has been experienced in Turkey concerning the identity between the AKP and the state differs from the picture that the Third Reich displays. Accordingly, separation of powers is not legally abolished; the office of presidency is not combined with that of prime ministry, and the institutional identity between party and the state is not established. Moreover, we mentioned in Chapter 4 that homogenization of judicial and executive powers within the respective organs, and between these organs and the government is not completed yet. Hence, the degree of identity between the AKP and the constitutional State in Turkey is not at this stage of the identity between Nazi Party and the state in Germany. However, these differences do not trivialize our objective behind giving the example of the Third Reich. As indicated at the beginning, the objective of telling the experience of the Weimar Republic and its giving way to the Third Reich already is not making a comparison. Rather, the Third Reich is an extreme case showing how unlimited the power of a majoritarian ruling party in a constitutional state can be. It also exemplifies the consequences of the concentration of powers and instrumentalization of the rule of law. In the case of constitutional State in Turkey, the AKP principally has the same means and powers as of the NSDAP. Therefore, developments in the Third Reich may not be corresponding with those in Turkey hundred percent, or may not be descriptive of AKP's position *today*. However, it is definitely helpful in providing a vision for the power that AKP holds potentially,

---

[887] Stolleis, 1998, p. 13

[888] Stackelberg, 2007, p. 123

and the status it can reach *in the future*. Hence, the main reason of referring to Weimar and Nazi experience in this occasion is that, this experience stands as a future possibility for the State in Turkey.

As a matter of fact, this future possibility is in making. Just like the NSDAP, the AKP is attempting to put away two-headed structure of the executive power in parliamentary democracy, and unite presidential and prime ministerial powers. The AKP members like Deputy Prime Minister Bekir Bozdağ, or the Prime Minister Erdoğan himself many times reiterated their dislike of separation of power principle and the idea of limited government. For instance, Prime Minister Erdoğan blatantly complained that separation of powers "comes and stands before you as an obstacle; it says "your play ground is this" "; thereby, he claimed he was not able to accomplish the tasks he wishes to.[889] In this regard, the AKP pushes for the replacement of parliamentary democracy with presidentialism.

Right after the general elections in June, a Constitutional Conciliation Commission was formed in October 2011 formally at the initiation of the Speaker of the Grand National Assembly. The objective of the Commission was to draft a more democratic constitution in place of 1982 Constitution that was made under military tutelage. Four political parties in the parliament (the AKP, the CHP, the MHP, and the BDP) were participating to the Commission based on equal representation of three members each. The rules of discussion and decision making of the Commission were formulated as such: all decisions would have to be made by agreement of all four parties, meaning at least two members of each; commencement of the Commission meetings requires at least one member from each party; the Commission would be dissolved if any one party ceased to participate; there would be technical committees of experts, each of which would solicit input from civil and political organizations; a draft would have to

[889] *Hürriyet*, 18.12. 2012, hürriyet.com.tr

be presented by the end of December 2012; it would be presented to the parliament's standing Constitutional Committee and then to the parliament, with neither having the power to amend the text unless with full consensus of all four parties; and lastly, the final approval would have to be under one of the present constitution's amendment rules.[890]

There have been a variety of disagreements between parties in the Commission, like concerning the definition of citizenship and secularism; or on sexual orientation, the equality principle on education and in the mother language. However, the biggest barrier came with the proposal of the AKP to shift the regime of the state from parliamentary to presidential government.[891] According to AKP's proposal, the president will be the sole power to decide on the abolishment of the parliament; signing of international treaties; state budget; usage of armed forces; appointment of senior public administrators and ambassadors; selection of the Chief Public Prosecutor of the Republic, all of the university rectors and half of the members of the Constitutional Court, the Council of State, and the HSYK.[892] Apart from concentrating executive power of the state in its hands, the president will also have certain legislative authorities. For instance, *when the need arises*, the president will be able to decree by his/her own, on issues concerning the execution of *general state policies*; a very general and ambiguous definition that seems to give the president an unlimited legislative power. Even, the establishment, abolishment, and the delineation of the duties and authorities of the ministries will be done only by presidential decrees. The president will have the power to veto laws as well. To do it, it will be

---

[890] Arato, Andrew; Tombus, Ertuğ (2013). "Learning from Success, Learning from Failure: South Africa, Hungary, Turkey and Egypt" in *Philosophy and Social Criticism*, Vol. 39, No. 4-5, p. 431

[891] Arato, 2013, p. 433

[892] Full text of AKP's proposal on presidential system presented to the Constitutional Conciliation Commission derived from www.ismetberkan.blogspot.com/2012/11/ak-parti-baskanlk-sistemi-onerisi-tam.html

enough for her/him to apply to the Constitutional Court; an institution that half of its members already determined by the president.

Behind the proposal of the AKP, there lies its desire to concentrate all executive and legislative powers of the state in a single hand. Therefore, the proposal of shifting to presidentialism is an attempt to to establish single man's rule[893] and thereby, get rid of the limited government practice that *stands before* the Prime Minister Erdoğan. Moreover, presidentialism of the AKP constitutes a government which is out of supervision.[894] In parliamentary system, the government is accountable to the parliament, as it originates within it. Therefore, it needs parliament's vote of confidence. However, in presidential system, the president will be directly elected by the people. In such a case, he/she will not be accountable to the parliament and will not require parliament's vote of confidence.[895] Furthermore, democratic legitimacy of the parliament and the president will be equalized, as both will be elected by the people directly. Hence, the president will not need the parliament to rule in any way; or put it differently, the parliament will loose its legitimacy to supervise the activities of the president. In this context, in the AKP's proposal, the president has no accountability to the parliament, and the mechanism of interpellation is abolished. This gives the parliament no possibility of removing the government either by vote of non-confidence or by interpellation.[896] Consequently, with the proposal of presidential government, the AKP actually proposes the establishment of an absolutist, monarchic power.

---

[893] Alpay, Şahin (February 2013). "AKP'nin Başkanlık Sistemi Önerisi Reddedilmeli", www.t24.com.tr

[894] Sevinç, Murat (February 2013). "Anayasacılığımızda Dip Noktası", *Radikal İki*, www.radikal.com.tr

[895] Aksoy, Onur (February 2013). "Başkanlık Sistemi, İmralı Süreci ve Cemaat", www.sendika.org

[896] Hoşgör, Şebnem (November 2012). "AKP'nin Önerisinde Bakın Neler Var?", *Vatan*, www.haber.gazetevatan.com

Currently, AKP's proposal of presidentialism is clouding the discussions in the Constitutional Conciliation Commission. The other parties, at least the CHP and the MHP, oppose it, which weakens the likelihood of its acceptance by the Commission. However, the AKP is intimidating that if the Commission fails to come to a consensus, it can introduce party's own constitutional draft to the parliament.[897] In such a case, the AKP can offer its own constitutional draft to the referendum if it can persuade 5 to 6 MPs of the other parties, such as those of the BDP.[898] Such an intimidation may or may not be materialized; it is something that the time will show. However, what is crucially important in AKP's proposal of presidentialism is that, it manifests AKP's objectives, desires and the things it can do when it has the chance and possibility. In this regard, this proposal also justifies why we should learn and keep in mind the story of the Weimar Republic and its giving way to the Third Reich.

6.2 State of Exception and Enemy Criminal Law

The most obtrusive feature of AKP's political justice is deprivation of political opposition of its constitutional rights. Political opposition is taken out of the general jurisdiction of the State and the rule of law; and is charged by exceptional judgment rights and procedures. In that way, the existence of exceptional courts, rights, and judgment procedures divide judicial system of Turkey. On the one hand, there is legal justice, courts of general jurisdiction that enforce general judgment procedures, and constitutional rights. On the other hand, there is political justice, the ÖYMs that operate with exceptional judgment procedures, and violation of constitutional rights.[899] After third judicial reform package of June 2012, the first is represented by

---

[897] Arato, 2013, p. 433

[898] Ergin, Sedat (October 2012). "Erdoğan'ın En Zor Kararı Yaklaşıyor", *Hürriyet*, www.hurriyet.com.tr

[899] İnanıcı, 2011, p. 56

the CMK, while the second by Anti-Terror Law. Similarly, society is divided into two on the basis of its relation with the constitutional State. A part of it enjoys basic constitutional rights and freedoms, subject to regular jurisdiction of the State and therefore called as "citizen". The other part (whom are they exactly will be determined by political power), however, are called as "terrorists", subject to restriction of rights, and charged in exceptional courts on the basis of exceptional judgment procedures.[900] These two systems of rights and judgment systems, and statuses of individuals, continue to live side by side within the constitutional State in Turkey.

The division of judicial system into two between friends (citizens) and foes (terrorist) reminds us the theory of *Enemy Criminal Law* developed by Günter Jakobs. According to Jakobs, state gives different rights to those defined as "citizen" and those defined as "enemy". Correspondingly, they are subject to *Citizen Criminal Law* and Enemy Criminal Law, respectively. Citizen Criminal Law is preventive; its objective is to prevent the crimes before being happened.[901] The requirement for one's assessment as "citizen", on the other hand, is his/her faith to legal system and acceptance of validity of the normative order. Under these conditions, interaction and dialogue between the individual and the state can be possible via penal sanction. Within the confines of this interaction and dialogue, criminal is perceived as a person. On the contrary, enemy is not covered by preventive law.[902] It is because; enemy could not meet the minimum basic cognitive requirement to be assessed as citizen. Therefore, enemy is regarded to turn his/her back to legal order. Hence, enemy

---

[900] Ertekin, March 2011a

[901] Rosenau, Henning (2008)."Jakobs'un Düşman Ceza Hukuku Kavramı; Hukukun Düşmanı" in *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, Vol. 57, No.4, p.393

[902] Rosenau, 2008, pp. 393-394

actively opposes the legal order; and is a rival of it.[903] For this reason, his/her interaction and dialogue with the state has ceased. In this case, the enemy cannot be an object of usual, general criminal law.

The enemy loses his/her civil rights. In other words, those individuals who are denied of the legal order of the state are also denied of their basic rights.[904] In this context, the enemy is not treated as a person.[905] The people who are removed from personality are thereby "unpersons". For this reason, the state does not give them the usual rights of accused; does not care about their private lives.[906] Presumption of innocence does not apply to the enemy;[907] instead, they are exposed to "presumption of criminality", according to which the principle of *in dubio pro reo* (when doubts remain, accused is favored) is abandoned. Hereafter, state will benefit from any doubt about the innocence of the accused. Enemy is a source of threat in the eyes of the state; state fights against the enemy.[908] Therefore, the objective of the Enemy Criminal Law is the elimination of this threat with the least damage and with the most appropriate method. [909] Hence, punishment of the enemy is not necessarily directed to his/her concrete action at the very moment. Rather, it is oriented to prevent his/her future actions.[910]

---

[903] Jakobs, Günther (2008). "Yurttaş Ceza Hukuku ve Düşman Ceza Hukuku" in Ünver, Yener (ed). *Terör ve Düşman Ceza Hukuku*. Ankara: Seçkin Yayınları, p. 497

[904] Kanar, 2011, p. 66

[905] Jakobs, Günther (2008a). "Düşman Ceza Hukuku?-Hukukiliğin Şartlarına Dair Bir İnceleme" in Ünver, Yener (ed). *Terör ve Düşman Ceza Hukuku*. Ankara: Seçkin Yayınları, p. 517; Kanar, 2011, p. 66

[906] Rosenau, 2008, p. 393

[907] Ökçesiz, Hayrettin (2008). " 'Düşman Ceza Hukuku' Düşüncesinin Eleştirisi" in *Terör ve Düşman Ceza Hukuku*. Ünver, Yener (ed). Ankara: Seçkin Yayınları, p. 555

[908] Kanar, 2011, pp. 72,66; Rosenau, 2008, p. 394

[909] Ökçesiz, 2008, p.554; Jakobs, 2008, p. 505

[910] Jakobs, 2008, p. 498

As Sinn underlines, there are four signs of Enemy Criminal Law. As the objective of elimination of a future threat reveals, the first sign is enforcement of punishment before concrete action takes place. For instance, within Enemy Criminal Law, intention to commit a crime or planning a crime is itself punished even if the crime does not take place.[911] Second, the punishment is disproportionate to the crime, and is not reduced. The relation between intention to commit murder and committing murder may actually be weak; however, intention is punished equivalent to committing murder. Third, the right of having defense counsel is restricted or denied to the defendant. Lastly, Enemy Criminal Law is no longer a code for criminal actions; rather, it is a code for warfare. As mentioned above, state declares those, who have not showed their faith to legal order, as enemy. Afterwards, it mounts attack against them to protect itself.[912] Meanwhile, as Hayrettin Ökçesiz states, the incident that led the raise of such a code of warfare is organized crime and especially terrorist crimes.[913] That's why Enemy Criminal Law is used against "terrorists" in particular. [914]

When looked at these signs, we can draw some parallels between Jakobs' theory of Enemy Criminal Law and special judgment rights and procedures of the ÖYMs in Turkey. Perhaps, the first striking similarity is the name of the law for the prevention of terrorist crimes. The literal name of Anti-Terror Law No 3713 in Turkish is "Warfare against Terror". Secondly, the acts of inciting, provocation, and attempting to commit terror crimes covered by Anti-Terror Law are considered as independent crimes. Similarly, those who are not members of a terror organization, but participate

---

[911] Sinn, Arndt (2008). "Modern Suç Kovuşturması-Düşman Ceza Hukuku Yolunda mı?" in *Terör ve Düşman Ceza Hukuku*. Ünver, Yener (ed). Ankara: Seçkin Yayınları, p. 613

[912] Arnold, Jörg (2008). "Beş Tezde Düşman Ceza Hukukunun Gelişim Süreçleri" in *Terör ve Düşman Ceza Hukuku*. Ünver, Yener (ed). Ankara: Seçkin Yayınları, pp. 530, 528

[913] Ökçesiz, Hayrettin (2008a). " 'Düşman Ceza Hukuku' Düşüncesine Eleştirel Bir Bakış-II" in *Terör ve Düşman Ceza Hukuku*. Ünver, Yener (ed). Ankara: Seçkin Yayınları, p. 561

[914] Jakobs, 2008a, p. 524

to a meeting with organization members or commit a crime in the name of organization, are disproportionately subjected to the same punishment as members of organization. Moreover, the rights of the defendants charged in the scope of Anti-Terror Law in the ÖYMs are restrained; the meeting of defendants with defense counsel is restricted. In this context, Ercan Kanar claims that Anti-Terror Law and the ÖYMs fall into the category of Enemy Criminal Law. Again, according to Haluk İnanıcı, the ÖYMs are reflecting Enemy Criminal Law that Jakobs developed. [915]

However, one shall be careful while designating Anti-Terror Law and the ÖYMs as a part of Enemy Criminal Law. It is mainly because; the issue who the enemy is shall be answered or at least discussed beside the analysis of exceptional judgment procedures and rights. Hence, it will be accurate to call Anti-Terror Law and the ÖYMs as parts of Enemy Criminal Law as long as the definition of enemy made by Jakobs resembles to definition of political criminal or terrorist that is made in Anti-Terror Law and enforced by the ÖYMs.

Jacobs defines the enemy as who turns his/her back to the rule of law as a whole, and who is always ready to commit crimes. However, as Henning Rosenau mentions, the category of enemy as such does not exist in reality. In real world, people do not always oppose laws and legal order; or not absolutely and totally. When compared with daily social practice, the idea that some people continuously and determinately turn their back on every piece and aspect of legal order becomes hard to understand.[916] For instance, a mafia member can potentially be more dangerous than an average citizen in terms of criminal law. Yet, it does not mean that a mafia member denies the legitimacy of legal order as a whole. He/she may well act in accordance with the norms of civil law. Therefore, he/she cannot be said aiming to overthrow state's legal

[915] Kanar, 2011, p. 67

[916] Rosenau, 2008, pp. 398, 399

order. Actually, Jakobs also admits the difficulty of finding his concept of enemy in real world. He states that definitions of Enemy Criminal Law and Citizen Criminal Law are ideal types. They cannot be encountered in real life in their pure form. Then, what is materialized is always intermediate forms.[917] Hence, what we concern here is not two isolated criminal law systems opposing each other. On the contrary, these two systems are two poles of the same whole.[918] In that way, if we follow Rosenau's criticism and Jakobs' self-clarification, we need to recognize that there is no "enemy" in the real world at beck and call to be judged by Enemy Criminal Law. Therefore, the question, who the enemy is, still waits to be answered.

Alejandro Aponte thinks about who the enemy is, in the context of Colombia. According to him, who will be subjected to which criminal law involves a decision. Consequently, the answer of "who the enemy is" always has a designed character. Therefore, enemy is a designed enemy. There is always an *ex-ante* evaluation of the enemy and the hostility. It is because, enemy is defined not just for its concrete actions; but rather, for it is evaluated as so. When the enemy is known to exist as a designated enemy, basing on a decision, its connection with politics and political conditions reveals itself. Then, determination of who the enemy is, and the decision on how he/she be treated and cured, is primarily a political decision. This brings indeterminacy, ambiguity and arbitrariness to the definition of enemy as a norm. For this reason, today's enemy is not precisely the same with tomorrow's enemy.[919] All in all, Aponte's response leads to such a conclusion: Enemy Criminal Law cannot tell us and determine who the enemy is. In other words, a legal norm, even be it

---

[917] Jakobs, 2008a, p. 517

[918] Jakobs, 2008, p. 489

[919] Aponte, Alejandro (2008). "Savaş ve Politika-Günlük Yaşamdaki Politik Aleyhtar Ceza Hukuku" in *Terör ve Düşman Ceza Hukuku*. Ünver, Yener (ed). Ankara: Seçkin Yayınları, pp. 575-576

discriminatory Enemy Criminal Law, cannot decide on its object. This is again a political decision independent of the norm.

The point that definition of enemy in Enemy Criminal Law is a political decision, bring this category of Jacobs, Anti-Terror Law and the ÖYMs close to each other. Put another way, judgments in the ÖYMs on the basis of Anti-Terror Law can be said to illustrate an exercise of Enemy Criminal Law of Jakobs only with the admission that enemy that punished by Enemy Criminal Law is a political decision. With this admission, the concept of political justice and the category of Enemy Criminal Law seem to refer to the same process of judgment in the ÖYMs, which occurs on the basis of political decision. In this regard, Enemy Criminal Law seems to come to light as political justice; or Enemy Criminal Law seems to be a particular form of political justice. Hence, political justice comprises Jakobs' Enemy Criminal Law category rather than the opposite. To call the ÖYMs and Anti-Terror Law as Enemy Criminal Law has such an interaction with the concept of political justice that we choose to use.

On the other hand, Jakobs says that Enemy Criminal Law is used in exceptional circumstances. Accordingly, Enemy Criminal Law shall not be thought of as an arbitrary attitude or a bunch of rules oriented to unlimited annihilation of the enemy. [920] On the contrary, Enemy Criminal Law is used in a constitutional state ruled by the rule of law intentionally and with utmost care. It is an *ultima ratio* resorted only exceptionally. Therefore, it is an exceptional law; its exercise does not constitute continuity. [921] In the same direction, Hayrettin Ökçesiz associates Enemy Criminal Law with state of emergency, one of those exceptional situations. He analyzes Enemy Criminal Law within the context of state of emergency and in this way, frequently refers to Article 15 and Article 120 of 1982 Constitution that regulate state of

[920] Jakobs, 2008, p. 490

[921] Jakobs, 2008a, p. 519

emergency.[922] Finally, Aponte also reminds us that in practice Enemy Criminal Law is enforced as state of emergency criminal law. [923]

When looked at the character of the ÖYMs, emphasis on exceptional periods and state of emergency seems meaningful for Turkey as well. As a matter of fact, the ÖYMs are exceptional courts. At first glance, they may be confused with high criminal courts specialized in political crimes. However, they are not specialized courts.[924] Specialized courts are defined as courts that focus on one type of crime and criminal, like traffic courts, labor courts, and cadaster courts. The aim of establishing specialized courts is to provide division of labor among courts on certain disputes, arising among individuals or professionals. In such a division of labor, judges of specialized courts are considered specialists in the fields of the law that fall within court's jurisdiction. Perhaps more importantly, specialized courts are subject to general judgment procedures. It means that, specialized courts in criminal law shall operate according to the CMK.[925] However, the ÖYMs function on the basis of TCK Article 250-252 or Anti-Terror Law Article 10 after June 2012, both of which bring exceptions to the CMK. To underline once again, the ÖYMs go out of the jurisdiction of general criminal law and general criminal procedural law; and enforce an exceptional criminal and procedural law that deny both defendant and defense counsel of their usual rights.[926] Therefore, the ÖYMs cannot be deemed as special courts.

---

[922] Ökçesiz, 2008a, p. 565

[923] Aponte, 2008, p. 577

[924] Yurtcan, Erdener (April 2011). "5190 sayılı Ceza Muhakemeleri Usulü Kanununda Değişiklik Yapılması ve Devlet Güvenlik Mahkemelerinin Kaldırılması Hakkında Kanun'a İlişkin Rapor", www.yeniyaklasimlar.org

[925] Aydın, 2012, p. 346

[926] Yurtcan, April 2011

Rather, the exception that their judgment constitutes shall be called "extraordinary judgment". All in all, it will be accurate to call the ÖYMs as extraordinary courts.[927]

Hence, the ÖYMs are not only exceptional; yet more accurately, extraordinary courts. In this case, such exceptional and extraordinary courts shall not arise in "normal" or "usual" periods of parliamentary democracy and constitutional state. Indeed, exceptional courts generally emerge in times of social unrest, when the coercion of political power is felt on society more deeply. In addition, they are used only temporarily. *Independence Courts*, *Courts Martial*, and *Yassıada Courts* are examples of extraordinary courts appeared in extraordinary times in the history of Turkey.[928] However, the same cannot be said for the ÖYMs. Firstly, the AKP did not declare state of emergency or consult emergency regulations in any way. Hence, it exercises political justice and uses extraordinary means without declaring state of emergency. Second, the ÖYMs are embedded in the CMK or Anti-Terror Law.[929] In other words, extraordinary criminal judgment regime is integrated into general criminal judgment procedures. As such, operation of general or "usual" criminal law automatically operates extraordinary, exceptional criminal law. In such a circumstance, extraordinary law is no longer an occasional occurrence. On the contrary, it is made regular. Society is regularly under extraordinary judgment regime. Moreover, Özkan Agtaş comments that, the ÖYMs and extraordinary rights are step by step becoming primary; and general/usual laws and courts are becoming secondary. Therefore, gradually, general law or the rule of law is subrogated to exceptional rights and procedures.[930]

---

[927] Aydın, 2012, pp. 347, 349; Agtaş, 2012, p. 17; Tanrıkulu, 2010, p. 58

[928] Aydın, 2012, p. 345

[929] Yurtcan, April 2011

[930] Agtaş, 2012, p. 16

How shall one interpret the continuous presence of extraordinary law and courts in ordinary times in Turkey? Does it create an extraordinary state? In other saying, is constitutional State in Turkey under state of exception, though partially or implicitly? Aponte gives an affirmative response to the last question. According to him, presence of state of exception does not necessarily require the legal promulgation of state of emergency regulations or martial law. For instance, he claims that presence of exceptional rules like the ones concerning terrorism also creates state of exception.[931] However, adoption of Aponte's views for Turkey is problematic. If the presence of extraordinary law and courts is deemed sufficient to create state of exception, without promulgation of state of exception legally, it means that constitutional State in Turkey is under state of exception for 30 years. It is because; extraordinary courts and laws exist for 30 years since 1982. Article 143 of 1982 Constitution established the DGMs (that will be handled below). These courts were progenitors of the ÖYMs, as they were also exceptional courts. The DGMs were abolished in 2004; however, the ÖYMs were established in place of them on the same day. Hence, constitutional State has never regained normalcy after 1980; it has existed *as* a state of exception.

However, presence of extraordinary laws, courts and judgment procedures does not make the period we live in an extraordinary state as a whole. In order to determine a "state", we have to look at the situation and functioning of at least the other two powers of constitutional State. Article 15 of the Constitution says that in times of war, mobilization, martial law, or state of emergency, the exercise of fundamental rights and freedoms can be partially or entirely suspended. Hence, in a state of exception, constitutional rights may not be exercised in full or in a competent way. On the other hand, legislative and executive organs work exceptionally, either. Legislative organ delegates some of its competences to executive organ. Article 119 of the Constitution says that in the event of natural disaster, dangerous epidemic diseases or a serious

[931] Aponte, 2008, p. 575

economic crisis, the Council of Ministers, meeting under the chairmanship of the President of the Republic, can declare state of emergency. Similarly, in the event of serious indications of widespread acts of violence aimed at the destruction of constitutional, democratic order, the Council of Ministers, meeting under the chairmanship of the President of the Republic, after consultation with the MGK can declare state of emergency (Article 120). This rule is the same in the declaration of martial law (Article 122). Hence, the parliament is put aside in the decision to declare state of emergency. Rather, state of emergency is mainly the decision of the executive (assisted by the president and the MGK).

By the same token, Article 121 states that, in the event of a declaration of state of emergency under the provisions of Articles 119 and 120 of the Constitution, this decision shall be published in the Official Gazette and shall be submitted immediately to the parliament for approval. Similarly, during the state of emergency, the Council of Ministers meeting under the chairmanship of the President may issue decrees having the force of law. These decrees shall be published in the Official Gazette, and shall be submitted to the parliament for approval. The same is valid for the period of martial law. In that way, regular order of legislation is put upside down in a state of emergency. First, the decision of executive is published in the Official Gazette and then approval of the parliament is asked; which is exactly the opposite in ordinary functioning of parliamentary democracy.

Lastly, Constitutional Court's functions are also curtailed in times of state of emergency. According to Article 148, the Constitutional Court shall examine the constitutionality, in respect of both form and substance, of laws, decrees in the force of law, and the rules of procedure of the parliament. However, it makes an exception for state of emergency. Accordingly, no action shall be brought before the Constitutional Court alleging unconstitutionality as to the form or substance of decrees in the force of law issued during a state of emergency, martial law or in time

of war. Therefore, Constitutional Court and consequently the rule of law has no jurisdiction over the decrees in the force of law issued during the state of emergency. All in all, in a state of emergency, functions of all state organs; of the parliament, of the Council of Ministers, and the courts are redefined and re-regulated. Parliament and the judiciary lose some of their competences; on the contrary, executive gets more powerful. However, it is not the Council of Ministers yet the President who is extraordinarily empowered in a state of emergency.

What we see today is that, constitutional State in Turkey continues its normal functioning as a parliamentary democracy from the point of legislative and executive powers. Constitutional rights remain unchanged; executive organs work seamlessly in a complete and regular manner; legislative organ works seamlessly in a complete and regular manner. Indeed, judiciary also works seamlessly in a complete and regular manner. While judiciary works seamlessly in a complete and regular manner, it operates the ÖYMs. Then, we live in a normal, ordinary state in spite of the presence of extraordinary courts, laws, rights. Haluk İnanıcı, who evaluates this duality states that state of exception is being normalized through various legal methods.[932] Hence he says that the ÖYMs exist as a "normal exception" or "an exception that is not an exception". In any way, Inanıcı's comment reveals a contradiction. The ÖYMs are called as "an exception" and as "not an exception". However, they cannot be both of them simultaneously. In this respect, although İnanıcı underlines that exceptional courts operate in a normal-usual period, his command is insufficient in shedding light to the situation of the ÖYMs.

The ÖYMs are extraordinary courts. Yet, they do not constitute an exceptional, extraordinary state for constitutional state and liberal parliamentary democracy. Extraordinary regulations of the TCK 250-252 and Anti-Terror Law Article 10 are

[932] İnanıcı, 2011, p.52

ordinary parts of the regular law and constitutional State in Turkey. Therefore, something that is defined as "usual or normal exception" just like in the case of İnanıcı's commends, loses its exceptional character. Exception melts in usual. In such a situation, longevity of exceptional courts and judgment procedures cannot bear to be named "exceptional". Nothing less can be said about for a fact that exists for 30 years. Therefore, means of AKP's political justice, namely the ÖYMs and exceptional rights, are usual or normal means for liberal parliamentary democracy and constitutional State in Turkey. Hence, any criticism of AKP's political justice shall be directed to liberal parliamentary democracy and constitutional State in the first place. Thinking the otherwise, and calling the ÖYMs and extraordinary rights as exceptions, takes constitutional state and parliamentary democracy out of criticism, and idealizes them. Therefore, rather than turning a blind eye to a fact that exists for 30 years and acquit constitutional State and parliamentary democracy, one shall accept that State in Turkey is at most a non-constitutional constitutional state or only a *state of statutes*.

Presence/absence of state of exception is not a nuance. It determines the relation of political power with the constitutional state and the rule of law order at present. In this respect, destruction of constitutional state of Weimar by the rise of the Nazis to power might be classified as an exception to constitutional state and parliamentary democracy; because, the Nazis ruled the state in a state of emergency.

In the first two months of his chancellorship, Hitler invoked Article 48 of the Constitution, which regulated state of emergency. Under Article 48, President assumed the right to take measures necessary for the restoration or security and order; intervene, if need be, with the assistance of the armed forces. In this context, on February 28, 1933, an emergency decree basing on Article 48 of the Constitution was issued. The decree was called Order of the Reich President for the Protection of People and State and issued after the fire in the parliament on February 27, 1933, due to which communists was blamed. Accordingly, fundamental rights of citizens

provided in Article 114 (that protects *habeas corpus* and individual liberty), Article 115 (that protects individual's private dwellings), Article 117 (that protects privacy of correspondence, of mail, telegraphs and telephone), Article 118 (that protects freedom of opinion, and expression freely in word, writing, print, image or otherwise), Article 123 (that protects freedom to assemble peacefully and unarmed), Article 124 (that protects right to form clubs or societies) and Article 153 (that protects private property) were suspended by Nazi government until further notice. Hence, a permanent state of emergency was introduced. This state provided the legal basis for subsequent institutional and judicial changes, and restriction of basic rights and freedoms. Under permanent state of emergency warrants for house searches, orders for confiscations as well as restrictions on property, also became permissible. Following the decree, the press was placed under close censorship. Radio was monopolized by Nazis and broadcasts of Hitler's speeches became mandatory. While Nazi publications and meetings were not affected, communist campaigns were almost completely disrupted by governmental measures. Moreover, the KPD leaders and members were arrested and political functions of the SPD were disturbed.[933]

All in all, it seems that destruction of the Weimar Republic came as a result of non-functioning of parliamentary organs and constitutional rights due to state of emergency legislation. Consequently, Nazi power is considered as a *failure* of constitutionalism and liberal parliamentary democracy. On the other hand, in Turkey, constitutional State is not destroyed or it is not transformed into another form of state. However, constitutional and parliamentary democratic characters of it are practically disabled. What is interesting is that, it happened within the confines of constitutional rights and rules under *state of normalcy*. Therefore, practical obstruction of constitutional State and parliamentary democracy is not a result of non-functioning of liberal parliamentary organs and constitutional rights, which would be the case in state

[933] Bendersky, 2007, p.89; Stackelberg, 2007, p.118

of emergency. Hence it is not a failure of these institutions. On the contrary, AKP's absolutist rule, arbitrary power and political justice come as a result of full-functioning of parliamentary organs and constitutional rights. Therefore, AKP power can only be called as the *triumph* of constitutional State and liberal, majoritarian parliamentary democracy.

6.3 Unconstitutionality of AKP Rule and its Arbitrary Power

One of the underlying assumptions of every liberal parliamentary system is that the party in power should not deny any other party the right to acquire power. Schmitt called this as the principle of "equal chance".[934] Accordingly, parliamentary democracy values each person's political will equally and it respects equally every political belief, every political opinion. This is a direct consequence of neutrality of constitutional state and parliamentary politics. In the context of neutrality, democratic rule means political equality and liberty. Hence, no political power can claim absolute validity for its political beliefs, its political programs, and its political ideals. Values that upheld by specific political parties can only be relative. Therefore, democratic *state of rights* accepts that all conceivable opinions, tendencies and movements have equal chance to achieve majority.[935] With Kelsen's words, in parliamentary democracy, the minority may at any time itself become a majority.[936] Hence, constitutional state must give all political convictions the same chance to compete freely for majority vote. For our purposes, it means that constitutionally sanctioned protection is granted with some consistency to the political foe of the established order.[937]

---

[934] Schwab, 1970, p. 94

[935] Schmitt, 2004, p.28

[936] Kelsen, 2000a, p.108

[937] Kirchheimer, 1961, p. 6

However, contrary to equal chance understanding of constitutional state, the AKP removes constitutional protection that is granted to political opposition. It restricts the rights of opponent politics and punishes opponents in exceptional courts; a process which is already called as AKP's political justice. Kircheimer underlines that, to combat with political opposition, the trail is not a necessary means; there are other means of disposing political adversary. For instance, through administrative procedures, such a regime may dispose its foes. However, if a constitutional government wants the death or imprisonment of adversary, it must utilize the agency of courts.[938] This is what the AKP does. The AKP kills its opponents *politically* by charging them in the courts. The AKP declares them illegal and draws them out of politics. The trial of political opposition loses any political dimension and becomes a legal, purely criminal case. In sum, AKP's political justice is a violation of constitutionality of the State. Actually, both the means that the AKP uses to exercise political justice, namely the ÖYMs, Articles 250-252 of the CMK, or Anti-Terror Law, and the presence of such a policy or attitude towards political opposition, separately interferes on constitutionality of the State.

Looking at the practice of political justice, some authors claim that AKP rule is getting more authoritarian. Actually, the practice of establishing special courts and hence creating fragmented judicial systems are ascribed to authoritarian regimes in general. Accordingly, politically sensitive cases are channeled into auxiliary institutions like special courts, and repression is therefore routinized and domesticated especially in authoritarian regimes.[939] Likewise, what have been said by Ginsburg and Tamir Mustafa about judicialization of politics in Chapter 5 is actually true for authoritarian regimes. In authoritarian regimes, the courts are used to establish social control and sideline political opponents; bolster regime's claim to legal legitimacy;

---

[938] Kirchheimer, 1961, pp. 95-96

[939] Mustafa, 2008, p. 17

strengthen administrative compliance within the state's own bureaucratic machinery; and solve coordination problems among competing factions within the regime.[940] This is to say that, political justice is a common feature of authoritarian regimes.

Actually, the discussion on AKP's authoritarianism is increasing by leaps and bounds. The signs of AKP's authoritarianism can be traced in the amendments made in criminal justice. As İnanıcı underlines, criminal law and criminal procedural law is closely related with political power. Providing some legal norms with criminal protection automatically means punishing those who do not obey these legal norms. Hence, criminal law is an area that political power shows its will. The effects of a change in political power are primarily reflected in criminal law and criminal procedural law.[941] In this framework, we see that the AKP changed criminal justice system. It changed or amended 16 laws and ordinances only in 2005.[942] In 2006, it amended Anti-Terror law; in 2007, it changed Law on Powers and Duties of the Police. As Aydın says, these changes are manifestations of authoritarianism.[943] However, especially after AKP's victory in June 2011 general election, the AKP got more authoritarian. Prime Minister Erdoğan's confidence increased, his rhetoric became more confrontational and AKP's policies got more authoritarian. It is now commonly known that decisions in the government are only made by him. Thereby, government policies are shaped by his personal preferences. Jenkins also adds that the media came under increasing pressure and journalists began to self-censor for fear of loosing their jobs or imprisonment.[944]

---

[940] Mustafa, 2008, p. 4

[941] İnanıcı, 2011a, p. 8

[942] Bayraktar, 2011, p. 108

[943] Aydın, 2012a, p. 25

[944] Jenkins, 2012

This comment on the nature of political regime is not wrong; depending on the outcomes that political justice reveal AKP rule can be interpreted as an authoritarian regime. However, it is an incomplete and insufficient conclusion for our purposes. What we question here is not the nature of political regime, but the nature of the state. Therefore, we focus on the relation between the ruling party and elements of the constitutionality of the state, namely the rule of law order and the three sovereign state powers. The discussion of authoritarianism, however, says not much about the statuses of these elements of the state under AKP rule, and their relation with the ruling party. A political power may implement authoritarian policies without necessarily controlling the rule of law order or without packing the courts and judicial power of the state. In such a circumstance, it would be more fruitful to follow a path (other than authoritarianism) that the discussion of political justice highlights loud and clear about the relation between the ruling party and the constitutionality of the state.

The ÖYMs and Anti-Terror Law that the AKP instrumentalizes in political justice eliminate most of the basic rights and freedoms of individuals that 1982 Constitution promises to protect. Great many a people cannot benefit from the catalogue of rights that 1982 Constitution provides, due to Anti-Terror Law.[945] In addition, due to Anti-Terror Law, rights and freedoms of 1982 Constitution are not able to restrict state power. Hence, when AKP's political justice exercised, 1982 Constitution stays silent. Consequently, as their exercise becomes widespread, the area within the constitutional State where AKP power is not restricted by constitutional rights also broadens. At the end, the area where the activities of government are not restricted by the basic rights of 1982 Constitution so broadened that Anti-Terror Law has come to constitute the second system of individual rights and freedoms; the second constitution for Turkey.[946] That 1982 Constitution is a matter is widely claimed for a long time.

[945] Ertekin, January 2012

[946] Ertekin, March 2011a

However, today's problems in social and political life are much more related to the absence of 1982 Constitution, rather than its presence. This situation renders any constitutional amendment in favor of basic rights and freedoms meaningless. No matter how liberal and democratic the constitution is, some people (who they are, is not definitely known; and whose number is in increase) will not be able to enjoy these constitutional rights and freedoms, and state power will not be able to be restricted as long as Anti-Terror Law and the ÖYMs exist. [947]

As a result, 1982 Constitution is valid and 1982 Constitution is invalid simultaneously. While examining secularism as a constitutional norm, we already encountered with a dual and contradictory situation in terms of constitutionality. This situation confronts us here once again. Accordingly, the State in Turkey is a constitutional State; however, it is only partially constitutional. Partially, it is not bounded by the rule of law, not neutral, and not impartial towards every religion, political belief, or political position. Consequently, the State in Turkey is partially non-constitutional as well. Thereby, what we have in Turkey is a non-constitutional constitutional State. Meanwhile, under such a non-constitutional constitutional State, political power is able to pass into the domain where it is not restricted with 1982 Constitution *by its own decision*. The discussion on political justice indicates that political power is in legal liberty to obey 1982 Constitution. It may choose to comply with the Constitution at times it wishes; and infringe it at times it chooses to enforce political justice. Then, there is a measure of *arbitrariness* that rules the State.

Arbitrariness means independence from the normative order of the rule of law. The political power is independent of the legal norms; and instead, it is able to thoroughly depend on its subjective, political will and interests. Therefore, arbitrariness signifies liberty before the law. Political power may will to follow the rule of law or may will

[947] Ertekin, March 2011a

not to; or it may find a way in between; it is its will and liberty. In this regard, beside the operation of political justice with a direct political decision, the historical development of exceptional courts constitutes a good example to the arbitrary power of the AKP. The AKP abolished the DGMs in June 2004 with the new CMK. Yet, it re-established exceptional courts as ÖYMs in the same regulation. Eight years later, in July 2012, it abolished the ÖYMs. However, it re-established them, this time under the name of Regional High Criminal Courts. Moreover, it kept ÖYMs functioning only for pending trials; an act that legal reasoning can not explain.

Then, within 8 years, parallel with the requirements of its political interests, considerations and motivations, the AKP did whatever can be done with the exceptional courts: it abolished them, established them, and reformed them. Hence, the AKP seems to be at liberty to do what ever action it sees politically plausible or necessary to do. For that reason, the fundamental factor in the relation between exceptional courts and the AKP; and hence in the issue of political justice, is not authoritarianism, but arbitrariness. Arbitrariness brings unpredictability to the rule of law order of the constitutional state; and wipes legal security out. In this unpredictable and insecure environment, at any time political allies may turn into foes; what is deemed good and right may start to be regarded as bad and wrong. Therefore, arbitrariness does not mean that AKP power is necessarily authoritarian, cruel, and non-constitutional. Rather, it acts unconstitutionally, despotic and authoritarian towards some people and for some time; for another time, it may act constitutionally, liberal and merciful. Then, arbitrariness means that being authoritarian is at the disposal of the AKP. Hence, one day, the AKP may abolish Regional High Criminal Courts as well, showing its unconstraint arbitrary power rather than its liberal, democratic attitude.

On that account, arbitrariness does not only mean the evaluation of Halk Evleri as a terror organization and its reference to the ÖYMs.[948] On the one hand, Halk Evleri is criminalized and drawn into illegal zone. On the other hand, *Türk İntikam Tugayı* (Turkish Revenge Brigade) who claimed responsibility for an armed attack in 1998 to Akın Birdal (then Turkish Human Rights Association President); threatened another Human Rights Association President (Eren Keskin) with death in 2005; threatened *Agos* newspaper with bombing; threatened Prof. Baskın Oran, an academic studying human rights and rights of minorities with death since 2008 is not recognized as a terror organization by the 12th High Criminal Court of Ankara; and the trial of Oran is referred from High Criminal Court to Criminal Court of Peace.[949] In this case, jurists were reluctant to charge a nationalist armed organization as a criminal organization, no matter the evidence at hand.

Or, in the case of Hrant Dink (editorial director of Agos, who was murdered in January 2006) Yasin Hayal and Erhan Tuncel were charged as the instigators. While Hayal was proven guilty as charged due to injuring the clergyman of Santa Maria Church in Trabzon in 2001 with malice prepense; and bombing a branch of *McDonald's* in October 2004 with Erhan Tuncel and causing the injury of 6 people, the 14th High Criminal Court of İstanbul decided on January 17, 2012 that murder of Dink was not an organized crime and discharged Erhan Tuncel. Justification of decision was lack of evidence concerning the presence of an organization.[950] On the surface, the issue in this last example seems to concern ignorance of jurists. Yet in detail, it is a matter of police, rather than the jurists. The police, who had no difficulty in finding and even producing evidence in relation to terror organizations in

---

[948] Aydın, 2012a, p. 27

[949] "Türk İntikam Tugayı Dışında Herşey Örgüt", 23.07.2012, *Milliyet*, www.milliyet.com.tr

[950] Çetin, Fethiye (2013). "Tebliğname, Örgüt ve Söylemi" in *Güncel Hukuk*, Vol. 2, No. 110, p. 58; Göktaş, 2012, p. 22

Ergenekon, the KCK and Hopa cases did not want Hayal and Tuncel to be charged as a part of organization and could not reach adequate evidence in the murder of Dink.

Examples on the arbitrariness can be increased. On February 25, 2008, following the launch of a cross border operation into Iraq by the Turkish Armed Forces, the DTP organized a demonstration. At the end of the demonstration, the DTP Diyarbakır Mayor Osman Baydemir said:

> This problem cannot be solved through operations and deaths. No police, no soldier, no guerilla should lose their lives. Let us live in brotherhood, unity, and cooperation with dignity. Enough is enough. By killing, neither Kurdish people nor Turkish people will run out. If you respect this people, stop the war. If a guerilla loses his life, if a soldier loses his life, there will be hundreds to take their place.[951]

Because of his speech, Baydemir was prosecuted. In fact, the court in charge could evaluate this speech as a part of freedom of thought and speech, in case of which the prosecution would be abated. However, the court decided that he was propagating on behalf of the PKK and its leader Abdullah Öcalan during the organized march and the meeting, and hence sentenced him 10 months in prison.[952] Meantime, on October 11, 2008, Işın Erşen wrote and article at *Bolu Express* Newspaper titled "Turk, here is your enemy." Erşen said that five DTP parliamentarians, mayors, and administrators should be killed for each soldier killed in a PKK attack. She made the following call upon Turks, who call themselves "patriots": "To clean up 3-5 microbes, we will say, 'from now on, one from us, five from you, okay? or do we continue?' Patriots capable of saying this will surely emerge".[953]

---

[951] Coşkun, 2010a, p. 60

[952] Coşkun, 2010a, pp. 60-61

[953] Coşkun, 2010a, p. 61

Işın Erşen was prosecuted for this article. However, this time, both the Prosecutor's Office and the High Criminal Court of Bolu considered the commentary within the bounds of freedom of thought and found it appropriate according to the law. Coşkun says that commentary of Erşen is full of insults, targeting, defaming, and incitement to violence; and it should not be protected by the freedom of thought or freedom of expression principles under normal conditions. Yet, the judiciary left this crime unpunished by deciding that, this call to violence was appropriate according to the law.[954]

Let's look at another occasion. Bünyamin Adanalı and Ünal Osmanağaoğlu had each been sentenced to aggravated life imprisonment seven times, due to the killing of seven members of Türkiye İşçi Partisi (Turkey Workers' Party) in 1978, which is popularly called "Bahçelievler Massacre". Their trial, however, lasted 34 years. After the acceptance of third judicial package on July 11, 2012, the 3rd Criminal Court of Ankara decided to release them considering their long trial period. Another prisoner, Tahir Canan, was also in a similar situation. Canan was first sentenced to 36 years imprisonment in 1979, on the charge of committing a politically motivated murder. Authorities conditionally released Canan in 1991 but again sentenced him to 12.5 years in 1993 on the charge of "being a member of a terrorist organization". Despite a court decision to annul his 12.5 year sentence and all other relevant consequences, Canan still served for a total of 31 years in prison. The third judicial package of July 2012 affected him as well. However, no progress has come about for him. Canan's lawyer Yıldız Koluaçık said that, it was unacceptable for him to have spent 31 years behind bars while officials released the perpetrators of the Bahçelievler Massacre who were proven to be guilty as charged.[955]

---

[954] Coşkun, 2010a, p. 62

[955] Karaca, Ekin "Court Rules to Release Two Perpetrators of 1978 Massacre", 11.07.2012, www.bianet.org

The element of arbitrariness in the AKP rule means a lot for the relation between political power and the constitutional state. It is because; arbitrary power is the opposite of constitutionality and the rule of law order. As stated in Chapter 2, the basic purpose of the constitutionalism and the rule of law is defined as to avoid arbitrariness. Arbitrary power is thought to be excluded when the rule of law that consists of general, universal, and certain rules are in force; and when state power is separated into three sovereign powers. However what we see is that, the AKP is able to concentrate supposedly separated state powers in its hands, and exercise arbitrary power through instrumentalizing the rule of law order. Say it differently; the AKP enjoys arbitrariness by means of laws. Hence, the arbitrary power of the AKP that political justice unravels indicates that not only constitutional state and the rule of law order is unsuccessful in eradicating the arbitrariness of power; but also they co-exist with their opposites. This co-existence, on the other hand, is a matter of life and death for the constitutionality of the state. As in the case of the Weimar Republic under the NSDAP rule, the constitutional state may all together be transformed into its opposite. When it comes to the constitutional State in Turkey, the AKP's practice of power for the last ten years is not promising for the entrenchment of constitutionality. Yet, the future developments will show us the fate of the constitutionality of the state.

6.4 Ancient Regime and AKP Rule

The AKP reproduces state as non-constitutional constitutional state with its arbitrary power. However, neither non-constitutional dimension of the constitutional state nor arbitrary power of the ruling party, judicialization of politics or political justice is the invention of AKP governments. For instance, transformation of judicial institutions into governing institutions is not introduced in Turkey by the AKP. Turkey's judiciary has been one of the pillars of the ruling order since the establishment of the Republic. Derya Bayır explains how Turkish judiciary intervened into Kurdish issue and became a part of this problem. Accordingly, judiciary supported the claim that "Kurds are

Turks" for many years. This line of thinking was especially defended in the Martial Court judgments up to 1990s.[956] In addition, settlement of headscarf problem since 1982 by the decisions of the Council of State and the Constitutional Court; and the Constitutional Court's outlawing different political parties of Islamist, Kurdish, or communist origin in order to preserve the secular regime and the unity of the Turkish nation are typical examples of judicialization of politics. More recently, the Constitutional Court's annulment of presidential elections in April 2007 on the grounds that it lacked two thirds majority for a quorum is also a part of judicialization of politics.[957] In sum, especially when focused on the activism of the high courts, judiciary in Turkey has always been a political actor, and it continues to be so under AKP governments.

More severely, Anti-Terror Law was enacted in 1991 and since then, there existed a second constitution in Turkey for political opposition.[958] In addition, the ÖYMs are a continuation of infamous DGMs. The DGMs were established by Law No 2845 issued in June 16, 1983, depending on Article 143 of 1982 Constitution. The DGMs were also exceptional courts in charge of political crimes and crimes against the state. As mentioned in Chapter 5, after the enactment of Anti-Terror Law, political crimes and crimes against the state were renamed as "terror crimes". Hence, after 1991, the DGMs were charged to oversee terror crimes. The DGMs were abolished in 2004 by Law No 5190; however, the ÖYMs were established in their place through an amendment made in the CMK, Articles 250-252.

---

[956] (2013). "Representation of the Kurds by the Turkish Judiciary" in *Human Rights Quarterly*, Vol. 35, p.121

[957] Höjelid, 2010, p.469

[958] Ertekin, March 2011a

Jurisdiction of the DGMs was almost the same with the ÖYMs, except for a few crimes.[959] Similarly, judgment procedure of the DGMs was not much different from that of the ÖYMs; even it was more severe than the ÖYMs. Just to give a few examples, according to Article 128 of the old CMK No 1412 (issued on April 4, 1929), the time frame for a person to appear before a judge could not exceed 24 hours. However, it was 48 hours for individual crimes and maximum 15 days for organized crimes in the DGMs (Article 16 of the DGM Law No. 2845). Investigation process and detentions were secret in the DGMs. Therefore, defense counsel and the families of the suspects were not informed on the case file. In addition, the suspects were not allowed to see his/her lawyers before giving their statement. If the judge ruled that defense counsel or the defendants disturbed the court, they could be expelled from hearings temporarily or permanently.[960] Summarizing the indictment in court and reading it partially; and speedy execution of trials were adopted in principle. Concerning the other rights of defense counsel and the defendants, such as their communication, were also parallel to the restrictions identified in Anti-Terror Law today. Consequently, Human Rights Association reported in 1998 that the DGMs were used as a tool to punish political opposition.[961]

Problems emerged in the area of enforcement of laws in the DGMs were similar to the ÖYMs in kind; yet they were far greater than what was experienced in there. For instance, defense counsel was mistreated. Contrary to prosecutor's permission and laws, defendants were not allowed to meet with defense counsel. Very commonly, defense counsel in DGM trials was seen by judges and prosecutors of the courts and the police, as people defending terrorist groups. As one Chief Prosecutor of the DGM

---

[959] Tanrıkulu, 2010, p. 57; Katoğlu, 2010, pp. 46-47

[960] Katoğlu, 2010, pp. 43-44

[961] Lawyers Committee for Human Rights (1999). *Reformun Önündeki Engeller: Türkiye'de İstisnai Mahkemeler, Polisin Dokunulmazlığı ve İnsan Hakları Savunucularına Yönelik Baskılar*. İstanbul: Belge Yayınları, p. 66

Cevdet Volkan commented, they were suspected to work for the PKK; the only difficulty was to prove it.[962] Very similar to the ÖYMs, police was using the authority to bring an issue to the court, rather than the prosecutor; it was the police, who decided to refer a case to the DGMs rather than regular courts. Moreover, in order to keep the suspects in detention longer, police was recording the date of their capture as a later time than the correct date. Torture was allowed as a means of questioning, and suspects were forced to confession.[963]

All in all, AKP's practice of political justice is not new. Political justice, meaning the use of exceptional courts to fight with political opposition, is actually a conventional tool of the State in Turkey. The ÖYMs were a continuation of the DGMs; the DGMs have only changed their name in 2004; and exceptional courts were re-established as the ÖYMs.[964] Hence, the tools of AKP's arbitrary power and political justice are inherited from *ancient regime*. This continuation between ancient regime and the state under the AKP rule is really striking. The AKP seems to take over conventional institutions of Kemalist State being ruled under military tutelage. İnsel commands that the AKP is using the same tools of Kemalist State to make interventions in reverse direction. However, while doing this, it is strengthening the authoritarian, non-constitutional institutions of Kemalist order more and more. [965]

The relation between the AKP power and the State under Kemalist ideology that AKP took over in 2002 shall be questioned more deeply. While some commentators interpret AKP power as a break in the history of constitutional State, some other

---

[962] Lawyers Committee for Human Rights, 1999, pp. 55-56

[963] Lawyers Committee for Human Rights, 1999, pp. 40, 58, 60

[964] Yurtcan, April 2011; İnanıcı, 2011a, pp. 11-12; Söylemez, Ayça "Üç Yeni Özel Yetkili Ağır Ceza: 'Kapatılması Gerekirken Yenilerini Açıyorlar' ", 18.07.2011, www.bianet.org

[965] İnsel, 2012, p. 139

focuses on the continuation between them. According to Menderes Çınar, the AKP symbolizes a break in the state tradition in Turkey; it implies improvement and regeneration. Çınar says that AKP power sides with changing the bureaucratic, *Jacobenist*, and statist structure of the State; it inclines restricting state power more. Hence, it aims to re-structure state institutionally. In this respect, the AKP is reformist and democratic for him.[966] According to Pınar Bedirhanoğlu, however, it will be inaccurate to evaluate AKP governments as a break in Turkish political life. Rather, AKP's practice of political power is on the way to reproduce repressive and authoritarian state structure in an Islamist, conservative fashion. In this respect, it exemplifies a continuation rather than a break with state tradition in Turkey.[967]

İnsel discusses this continuity in the context of secularism. Accordingly, today, institutions of Kemalist secular statism are now occupied by Islamist conservatives. Islamist movements are employing statist rationality and statist institutions that Kemalism imposed on society for many years. On the one hand, statism of ancient regime is now working for Islamist conservatism with ease. On the other hand, what has been done by Kemalist state over the years is now being done by Islamist AKP through the same institutions and methods; yet this time for opposite aims. Islamist conservatism seems to find in Kemalist institutions the aura desired for intervening to society. All in all, Islamist conservatism emerges as authoritarian and as statist as Kemalist state. In this respect, İnsel expected AKP power to be the most devoted defender of the Law on Unification of Education (1924) in the following years.[968] His expectation is well realized. In the last ten years of its power, the AKP did not make a single move to abolish state's monopoly on religious education, and "liberate" it from

---

[966] Çınar, 2005, p. 13

[967] Bedirhanoğlu, Pınar (2009). "Türkiye'de Neoliberal Otoriter Devletin AKP'li Yüzü" in *AKP Kitabı: Bir Dönüşümün Bilançosu*. Duru, Bülent; Uzgel, İlhan (ed) İstanbul: Phoneix Kitabevi, p. 41

[968] İnsel, 2012, pp. 136-137

state restrictions. On the contrary, AKP's education policy, especially 4+4+4 Education Reform (2012) strengthened the tendency of unification and advancement of religious and secular education in the hands of the State. A similar situation is also true for the DİB. Instead of limiting DİB's active role within the State in the name of restricting state's interference in religious affairs and providing religious freedom, under AKP governments the DİB has grown exponentially in the number of its personnel, its budget and its political role.

Likewise, when looked at the developments in legislative, executive and judicial powers of the State between 2002 and 2012, we see continuation between ancient regime and AKP power, more than a break. While discussing executive and judicial powers of the state, it is underlined that the AKP uses the same instruments of ancient Kemalist regime. For instance, anti-parliamentary democratic power of the AKP that emanates from the MGK indicates that the AKP does not envision a comprehensive departure from the authoritarian military heritage of Kemalist constitutional State.[969] Halil Karaveli states that the AKP come to make use of the instruments of the same statist powers that it had traditionally combated before. Indeed, the AKP has displayed that it does not shy away from employing state powers in order to bend societal forces to its own will.[970] Similarly, rather than abolishing it, İsmet Akça claims that AKP adjusts status quo with an aim to strengthen it.[971] In terms of judicial power, AKP took a statist stand vis-à-vis judiciary as well. AKP's reforms of judicial organs put them more under the control of executive power instead of increasing their independence. In addition, the AKP sufficed with changing the political/ideological inclination of high courts rather than solving their acute problems. As a result of this continuation,

---

[969] Karaveli, Halil M. (2010). "After Military Tutelage: What will the Emerging Turkey Look Like?" in Turkey *Analyst*, Vol. 3, No. 22, *www.silkroadstudies.org*

[970] Karaveli, 2009

[971] Akça, 2010, p. 7

authoritarianism, partisanship and conservatism in judiciary continued during AKP period as well.

All in all, the AKP power is a more powerful and Islamist version of ancient Kemalist regime. In this regard, Ziya Öniş claims that while "old Turkey" of the Kemalist era displayed significant democratic deficits, the "new Turkey" under AKP power has not necessarily become more democratic in total. More explicitly, in its later phase, AKP power turned into a kind of "civilian tutelage" that has replaced "military tutelage" of the previous era. For him, what we seem to be witnessing is a kind of limited or majoritarian understanding of democracy with new elements of exclusion built into the parliamentary democratic system.[972]

A similar and equally striking continuity between new regime and ancient regime, which is the case in the AKP, can also be seen between Weimar Republic and Third Reich. Apart from creating its own administrative tools, Nazis used *traditional* administrative tools of previous governments.[973] Emergency rule was one of them. Indeed, ruling state with emergency legislation was not the invention of Hitler. Starting from the first President of Weimar Republic (Friedrich Ebert) to the last (Paul von Hinderburg), Article 48 of the Constitution had been invoked on numerous occasions.[974] In the short history of the Weimar Republic, this article was used as much as 250 times.[975] Ebert had invoked Article 48 during the early years of political and economic turmoil, especially during 1929 economic depression. Hinderburg, on the other hand, made full use of this constitutional possibility, as parliament was not

---

[972] Öniş, Ziya (2013). "Sharing Power: Turkey's Democratization Challenge in the Age of the AKP Hegemony" in *Insight Turkey*, Vol. 15, No. 2, p. 107

[973] Pereira, 2008, p. 41

[974] Kolb,1996, p. 14

[975] Bendersky, 2007, p.67

able to build majority coalitions after 1930.[976] Due to political turmoil caused by difficulty in forming durable governments, after spring 1930, a kind of presidential system was born in the Weimar Republic. Under this system, a new government would be formed consisting of a chancellor and cabinet ministers, depending on the confidence of the president, rather than the parliament. It meant that government would rely on the authority and the consent of the president and ignore parliamentary balance of power.[977] Nevertheless, introduction of the system did not mean legal changes; it only meant a more extensive use of those constitutional powers already available to the president under Article 48. First, Heinrich Brüning (Spring 1932) received authorization from President Hindenburg under Article 48 to create a government, independent of the confidence of the parliament, and ruled by presidential degree. His successors, Franz von Papen (June to December 1932) and General Kurt von Schleicher (December 1932 to January 1933) ruled in the same way.[978]

Hitler did the same. What he has done was actually to rule in the same way as the others did. Only, he brought a more authoritarian and repressive content to emergency decrees. Consequently, until the day Nazis came to power, separation of powers and the rule of law principles had already fallen into disuse. They had already been *de facto* replaced by the *rule of emergency degree*, and legislative authority had already been *de facto* delivered to executive organ. With Enabling Act of March 24, 1933, Hitler did nothing more than giving a *de jure* existence to what had been practiced in reality; and hence, abolished separation of powers legally.

---

[976] Kolb,1996, p. 14

[977] Bendersky, 2007, p. 66; Kolb,1996, p. 15

[978] Stackelberg, 2007, p. 113

Parallels between the Republic and the Third Reich are observed in judiciary as well. Moshe Zimmermann says that, where the book of laws concerned, Nazi revolution is not radical. There is much continuity leading from the Weimar Republic to the Third Reich.[979] Accordingly, the statutory law that was in force during the Weimar Republic was in principle taken over by Nazis *en bloc* and continued to be valid unless it was superseded by Nazi legislation. In the later years of Nazi rule, as the regime's output of law continued, the ratio of traditional law to Nazi law was reversed and changed.[980] Yet still, in the transformation from the Weimar Republic to the Third Reich, the Nazi legislation was not necessarily the most important factor. Rather, it was the interpretation of laws that changed the previous state of the law. Both during 1930s and early 1940s, interpreting the traditional law according to the maxims of racist (*völkisch)* thinking, needs of people's community (*Volkgemeinschaft*), and of *völkisch natural law* proved a superior approach to legislating new laws; because, it was faster and more flexible.[981] Duty of judges, on the other hand, was to invoke the *spirit*, rather than the letter of the laws. Nazis stressed that they were ultimately answerable to the national community, not to abstract legal principles. The only guideline for judges was the welfare of the German people and the will of the German community. That this will was in reality noting more than the will of the Nazi leaders or more precisely Hitler's own, was not seen as a contradiction. After all, the will of the *Führer* was regarded as the embodiment of the will of the people.[982]

Similarly, the political trials of the VGHs were also shaped by the politics of the Weimar Republic rather than the Third Reich. Neither the legal basis nor the legal

---

[979] (1998). "Foreword" in Stolleis, Michael. *The Law under the Swastika: Studies on Legal History in Nazi Germany*. Chicago: University of Chicago Press, p. viii

[980] Stolleis, 1998, pp. 7-8

[981] Stolleis, 1998, p. 15

[982] Wachsmann, 2004, p. 69

procedure of the VGHs in the Third Reich differed significantly from treason trials of the Republic. The prohibition of the right of appeal in treason trials was promulgated in 1922, eleven years before the Nazis took power. In addition, the interpretations of the spirit rather than the letter of the law that favored by Nazi regime, was prevalent among German jurists since at least the late nineteenth century.[983] All in all, Pereira says that Nazi legality was a distorted and intensified version of existing tendencies within the law rather than an entirely new creation.[984]

All in all, both the NSDAP rule in Germany and the AKP rule in Turkey can be regarded as continuations of the regimes before them. Besides creating their own tools, both utilized the mechanisms and policies they inherited from their ancient regimes. This continuity shows that, criticizing Nazi fascism and as well as the AKP rule is not possible without criticizing the state establishment. The AKP is authoritarian and *non-constitutional;* yet the State before the AKP was not less authoritarian than AKP rule; it was not less *non-constitutional* than today. The basic explanation of why Kemalist state institutions comfortably cooperated with Islamist conservative cadre and served Islamist conservative purposes is this: ancient regime was not secular and democratic [985]

Still, we can identify a break between the AKP rule and Kemalist state. When compared with ancient regime, it is possible to talk about a change in the ideology of the State. In the State under AKP rule, Atatürk's visibility in the sight of state disappeared. Atatürk's pictures, statutes, sayings, and other symbols associated with him no longer used or no longer extolled officially. Official holidays that imply his superiority and glory no longer celebrated ostentatiously. In sum, he is covered up.

---

[983] Pereira, 2008, p. 40

[984] Pereira, 2008, p. 41

[985] İnsel, 2012, p. 137

Consequently, the State under the AKP power does not deploy Kemalist ideology; it is put aside in the state practice. On the one hand, the point that Kemalist ideology is not practiced by AKP governments, does not herald the end of ideological state. Existence of political justice and Cemaatization of judiciary and police force indicate the continuation of ideological state that is partial, biased, and not behaving equally to its citizens. Compatible with the ideological state, the AKP makes its political beliefs superior and excludes other political opinions. The State under AKP rule, accords no protection to an activity contrary to Islamist conservatism. Therefore, the state under AKP rule still acts ideologically. As a result, all the criticisms raised for ideological state of ancient regime is also valid for the State under AKP rule: as long as beliefs and opinions contrary to Islamist conservatism are not under the protection of constitutional State, it means that the rule of law is bounded by Islamist conservatism. As long as Islamist conservatism binds and reigns over the rule of law, however, the State in Turkey cannot be claimed to be a constitutional state.

On the other hand, Kemalism is not replaced by Islamist conservatism as the new official ideology of the State. The Preamble of 1982 Constitution and the part on General Principles still pronounce that "nationalism of Atatürk" is the single official ideology of the State.[986] Accordingly, no protection by the State is accorded to an activity contrary to nationalism, principles, and reforms of Atatürk. Hence, abandoning Kemalist ideology is not realized through legal regulations. However, it is done by directives and circulars; meaning that, state practice and attitude is changed through administrative means completely under the control of executive power. Through changing the enforcement of laws, which are already ambiguous and biased, Kemalist ideology is made ineffective. Consequently, contrary to Kemalism, Islamist conservatism is not the *official* ideology of the State. In fact, Islamist conservatism may not be an ideology of the State in any way. Rather, it is a state practice; and its

[986] Parla, 2009, p. 214

practice is a gift of control of state powers by the ruling party. As of today, nothing more elaborate can be said about Islamist conservatism as a state ideology. Yet perhaps, the issue is just this current situation of Islamist conservatism. Islamist conservatism is being practiced by the secular constitutional State as if it is state ideology, while Kemalism still legally in force. Kemalist ideology has posed itself as the opposite and archenemy of Islamism for 30 years. Yet today, it is impotent in the face of an Islamist political power.

CHAPTER 7

CONCLUSION

The objective of the constitutional state is the establishment of limited government, and elimination of arbitrary power. To keep its promise, it separates state power into three among legislative, judicial, and executive functions; which is also the constitutive element of parliamentary democracy. Afterwards, it allocates each of them to different organs, namely to the parliament, the courts, and the council of ministers. In addition, it establishes a normative order over and above these state powers called the rule of law, and obliges all state powers to obey and follow this order. In that way, in a constitutional state, legal norms are made superior; on the contrary, political power is encircled, confined, and minimized: the rule of law overrides, limits, and controls political power. Hence, constitutional state insistently claims being ruled by the norms of the rule of law; not by the political power. For this purpose, judiciary and the courts are kept neutral and made independent from the politics of the parliament in order to check whether executive and legislative organs abide by the requirements of the rule of law. Moreover, constitutional state ascribes a substance to the legal norms of the rule of law. This substance that the constitutional state values and obliges political power to comply is individual rights and liberties. Then, we can say that constitutional state limits political power with individual rights and liberties. In that sense, constitutional state is a *state of rights*.

Nevertheless, constitutional state hardly realizes its promise of limited government and elimination of arbitrary power. First of all, legal norms are materialized in the form of statutes. In the absence of adequate measures to determine a particular substance, a statute is what is enacted in the parliament by majority party or parties. Hence, any substance may reach to the status of legality by virtue of being accepted by parliamentary majority as a statute. In such a case, the rule of law is unable to guarantee a liberal, rightful, egalitarian substance for legal norms. Moreover, the same majority that has the competence to enact laws in the parliament also forms the council of ministers and exercises executive power. Therefore, political power involves in both of the stages of legislation and executive enforcement of legal norms. In addition, political power has the capacity to control judiciary and the court, which shall actually be independent and neutral. Ruling political party can impact the courts through controlling appointments and assignments of the jurists; and effect judicial decisions by manipulating jurists' wages and career incentives. In that way, besides having the authority in executive law enforcement, ruling political party can control judicial enforcement of laws. Consequently, checks and balances system of constitutional state breaks down, and subordination of political power to the rule of law order remains in theory.

Under this circumstance, state power that parliamentary democracy and the constitutional state neatly separate, concentrates in the hands of the ruling political party. Following the ideas of Carl Schmitt, the dissertation claims that the basic reason behind this power concentration and the failure of the constitutional state is the formalism of parliamentary democracy and the rule of law itself. On the one hand, parliamentary democracy and the rule of law order depend on political power both in the legislation and enforcement of legal norms. On the other hand, political power is equated to absolutist majority in the parliament. This absolutism lacks any determinate content. Politics of majority party will give this absolutism its color. Laws may have a liberal substance and may be enforced in a liberal way if the majority

party is liberal. Conversely, they may have a conservative substance and may be enforced in a conservative way when the ruling party is conservative. Hence, parliamentary democracy and the rule of law are first and foremost formal mechanisms; formalism marks their functions. Therefore, constitutional state is actually constructed as a *state of statutes,* while its promise of *state of rights* is left to sporadic occurrences.

In this case, the rule of law, which shall purportedly be superior and limit political power, is given to the hands of political power; legality is reduced to the decision and the will of the majority party in the parliament. As a result, political power achieves the potential to transform the rule of law into a governing instrument in its hands. This potential is detrimental for the constitutional character of the state. When the rule of law is instrumentalized by ruling party, subordination of political power to, and restriction of it by legal norms is not realized fully. This is the basic point that Schmitt underlines: no matter how much it claims the otherwise, political power is not bounded by legal norms. In a constitutional state, political power is time to time restricted by the rule of law, and time to time it is freed from it. Hence, constitutional state entitles partial legal freedom to political power in the issue of obeying the rule of law. This situation creates indeterminacy in the relation of political power with the rule of law order. More importantly, it is the basic source of arbitrary rule that pop ups and becomes visible in a constitutional state.

The dissertation explicates how indeterminacy, that marks the relation between the rule of law and the political power, and arbitrary rule function within constitutional state with Schmitt's legal theory and his concept of decision. According to him, the backbone of the constitutional state and the rule of law order is not general legal norms *per se*; yet how they are enforced. This makes enforcement of laws, and the organs that enforce laws, namely the council of ministers and the judiciary more important then legislation and the parliament. In such a situation, while analyzing the

constitutional state, one shall concentrate on how legal norms are enforced. In the issue of enforcement of laws, Schmitt advocates that the rule of law order is not made up solely of legal norms. Every norm requires a decision to be enforced to concrete cases. Therefore, he introduces an external element, decision, to the normative order of the rule of law. Accordingly, functioning of the rule of law in a constitutional state depends on the decision of who enforces laws, which is not anticipated, and totally excluded by liberal understanding of the rule of law. This decision lies at the heart of the normative order that constitutional state establishes. First, the same norm which is supposedly be general and bind everyone equally, may be enforced differently to different concrete situations depending on the decision. Second, through controlling the decision, the political power may control the normative order of the rule of law.

As mentioned above, majority party in the parliament forms the council of ministers and holds the authority of executive enforcement of laws. Hence, the decision involved in the executive enforcement of laws already belongs to the ruling party. However, it is the jurists in the courts, who are responsible from the judicial enforcement of laws; judicial decisions are formulated by judges and prosecutors, who are independent from parliamentary majoritarian powers. Then, ruling party shall have no authority over judicial enforcement of laws, and over the decision of the jurists. However, Schmitt claims that, the fact that judicial enforcement of laws depends on the decision of independent jurists does not save judiciary from the influence of political power. These jurists are real persons appointed to their posts through administrative mechanisms. Therefore, rather than changing legal norms, through controlling who will be appointed as judges and prosecutors or who will give judicial decisions, majoritarian political party has the chance to control judicial enforcement of laws. Under such a circumstance, ruling political party will be controlling both of the decisions involved in the enforcement of laws, and hence, the rule of law order of the state. When the ruling party concentrates state power is its hands, frees itself from the normative boundaries of the rule of law, and obtains the possibility of arbitrary

rule, it means that the constitutional state falls prey to the ruling party; it means that the ruling political party transforms itself into the state through controlling both state powers and the normative order of the rule of law.

The threat that majority ruling party poses to constitutional state, originating from formalism and demonstrating itself as indeterminacy, decisionism and/or arbitrary power, is an inner weakness of all constitutional states. This inner weakness can also be seen in the constitutional State in Turkey. The dissertation asserts that, the picture that constitutional State in Turkey exhibits under AKP governments especially after 2007-2008 period reveal the elements of transformation of the AKP into the state power. The dissertation illustrates the interaction between the AKP and the normative order of the rule of law on the basis of secularism. Constitutional State in Turkey is a secular State. This norm is accepted by the Article 2 of the 1982 Constitution. However, there are well grounded reasons to claim that AKP governments violated this legal norm. The dissertation discusses that AKP leaders by their speeches; and legislative, executive and administrative activities dignified Islam, supported Islamic institutions and organizations disproportionately. These activities of the AKP called the attention of the Constitutional Court in 2007. The Court found the AKP violating secularism of the State and fined the party. Still, it did not close the party as in the cases of the RP and the FP; which raised doubts about the reliability of the normative order of the constitutional State.

After a historical analysis, it is seen that in the past, the leaders of the ANAP and Turkish Armed Forces also made similar speeches and conducted similar activities; yet their actions were not deemed against secularism and they were not sanctioned as well. It means that, legal norm of secularism restricted and charged some parties and powers at some times; yet freed some other on the basis of similar activities and developments at other times. Then, the rule of law did not function and did not limit state power coherently in the case of secularism. The dissertation underlines that this

situation reveals the decisionist component of the rule of law. Due to the decision involved in the enforcement of this norm, secularism failed to produce definite outcomes. It occasionally and partially limited state power; and occasionally legal order freed it. At the end, the meaning of secularism became so vague that it came to justify and absorb pro-Islamist regulations of the AKP. Therefore, it is indeterminate when secularism and hence legal norms will limit and sanction state power today and in the future.

Indeterminacy and legal freedom of political power infringes constitutional state. This anti-constitutional feature exists side by side by other constitutional features. Attaching equal importance to both of these factors, the dissertation calls the State in Turkey as non-constitutional constitutional state. However, the analysis of constitutional State in Turkey reveals other non-constitutional dimensions of the State in Turkey that are particular to it. In this respect, the most important aspect of constitutional state is neutrality. Under the rule of law, the state shall be neutral towards all kinds of religions, political beliefs and ideologies. Even neutrality is accused of contributing to formalism of the constitutional state as it makes the state an empty form excluding any substance. However, constitutional State in Turkey embraces an official state ideology called *Kemalism* or *Atatürkism*. Accordingly, it gives no protection to any activity contrary to nationalism, principles, and reforms of Atatürk. Hence, the State in Turkey is an ideological state, which contradicts its constitutional character.

The second dimension of the interaction of the AKP with the constitutional state concerns state powers. In the light of decisionism, the dissertation claims that the AKP attempts to control enforcement of laws through controlling decision makers both in the executive and judicial organs. Accordingly, the AKP bounded judicial power of the state to the Ministry of Justice and to the President. In that way, it attempted to re-structure legal community through the appointment of judges and prosecutors in line

with its world view. Whose world view was in line with the AKP? It was mainly the members of Islamic cemaats; chief among them was Fettullah Gülen Cemaat. Indeed, the strongest tie between judicial power of the state and the government became Gülen Cemaat. In time, while judges come under the control of the AKP through cemaatization, interpretation and judicial enforcement of laws come under its control as well. Especially after 2008, legislations and directives which free wearing headscarves in public domain and higher education and enlarge Islamic public schools were deemed secular activities by the high courts. Hence, changing those who enforce laws in judiciary proved enough to change the meaning of legal norms.

Still, AKP's reformation of law enforcing organs of the state is not restricted to judicial power. The AKP reformed the MGK as well. The MGK is a semi-military organ having certain executive competences. Therefore, it is already against parliamentary democracy and constitutional state. What was expected from the AKP was to abolish such a military organ completely. However, the AKP chose to bring it under Prime Minister's control, and keep it. The MGK's constitutional status, legal competences, military character and political role are not changed during AKP governments. Only and only, it is made depended to the Prime Minister. Therefore, the AKP bounded the MGK to the government and secured identical enforcement of legal norms in the executive. It means that the AKP preferred to use a semi-military executive organ, instead of abolishing it. At that point, the AKP can be said to overrule parliamentary democracy and exercise an anti-parliamentary democratic power.

Then, does the AKP *homogenize* executive and judicial decisions in the enforcement of laws? The dissertation puts emphasis that although the AKP reformed both judicial and executive organs of the state to make enforcement of laws in line with its party politics, neither judiciary nor executive power is completely under the control of the AKP. Moreover, the control of the AKP over legislative and judicial powers of the

state is only a practical achievement; there is no legal regulation giving legislative and judicial authority to the ruling party. Therefore, a complete *homogeneity* between AKP's party politics and enforcement of legality within constitutional state is not yet achieved. Instead of *homogeneity*, we can talk about a high degree of cooperation and harmony between different state powers. Nevertheless, when law enforcing state powers practically concentrated in the hands of the AKP, restrictions that the rule of law poses on it become nothing but nonsense. Legality, on the other hand, becomes an instrument of its rule. Therefore, what we see especially after 2007-2008 period is that, this practical cooperation among law enforcing organs is proved sufficient to put separation of powers away, operate state powers as one and a single will, and establish AKP's absolutist power within constitutional State ruled by the rule of law.

In a constitutional state, political parties are elected to the parliament in general elections by universal suffrage. They form governments, and use legislative and executive powers of the state. Parties that rule according to the rule of law, give way to other parties and other majorities in subsequent general elections. This is roughly the political regime of the constitutional states. However, with the practical concentration of state powers in the hands of the AKP and transformation of legality into a measure of governance, the AKP has become more than a political party for the constitutional State in Turkey. The AKP went beyond being a parliamentary partisan political power and has taken steps towards becoming a state power. The dissertation asserts that political trials are both a means; and one of the best illustrations of this transformation of a political party in a state power.

In political trials, the AKP charges its opponents. Starting in 2007, in Ergenekon Case military state power has been charged. In 2009, in the KCK Case Kurdish opposition has been convicted. Staring in 2011, in Hopa Case, socialists and simply those who protested the AKP have been put onto trial. In this respect, the AKP declares its political opponents illegal and fight against them, while backed by the rule of law.

Therefore, political trials manifest that the AKP reached a point within constitutional state, where it can instrumentalize legality and the courts, and use them against third parties. In political trials, on the one hand, opposition is charged on the basis of Anti-Terror Law and hence opponents deemed terrorists. In that way, political opposition is criminalized, driven out of politics, and humiliated. On the other hand, they are charged in the ÖYMs, exceptional courts, and given exceptional rights. These exceptional rights deprive suspects and defendants of their regular citizenship rights. Hence, the AKP divided the society between two: who stays loyal to its rule and deserves their constitutional rights; and those who opposes it and deprived of their constitutional rights. This process, main elements of which are Anti-Terror Law and the ÖYMs, can be named as AKP's political justice.

There are important repercussions of AKP's political justice. First and foremost, in political justice, the AKP charges its opponents within the category of "crimes against the state". Hence, in the exercise of political justice, the AKP no longer acts as a political party, but presents itself as the state. In that respect, political trials and political justice manifests the transformation of ruling political party to state power. Second, political justice is a second set of rules and rights beside the rights that 1982 Constitution define and protect; it exists beside the legal justice of the 1982 Constitution. Therefore, while political justice functions, the system of justice and rights that 1982 Constitution brings is suspended. Then, 1982 Constitution does not bind and limit the AKP when it activates Anti-Terror Law and the ÖYMs; the AKP goes beyond the constitution in the execution of political justice. The dissertation highlights that the freedom from constitutional limitations points arbitrary power of the AKP. Lastly, AKP's political justice is to a high extent police justice. In exceptional courts, police records are first transformed into prosecutors' indictments, and then into court decisions. Therefore, it is actually the police, not the jurists, who interpret legal norms. In addition, police force is allowed to go beyond the rule of law and act according its own discretion.

If a political party, by virtue of being majority in the parliament can exercise executive and legislative powers and meanwhile can control judicial power of the state; if separation of powers is practically obsolete; if a political party exercises a special justice system involving exceptional rights and rules with an aim to suppress and eliminate its political opponents; if the rule of law order has no authority over it and even transformed into a governing instrument, can we still claim to be living in a constitutional state? Due to inherent formalism of the constitutional State in Turkey, the answer of the dissertation is affirmative. First of all, the principle of separation of powers still has legal validity; it is not normatively put away. As mentioned, concentration of power is realized practically rather than as a norm. Secondly, there is no legal change made in the basic constitutional norms concerning individual rights and liberties. These rights and liberties are only practically made nonfunctional. Thirdly, the AKP uses exceptional and extraordinary courts; however, it exercises no exceptional and extraordinary constitutional rights. Nor the State in Turkey is in state of emergency. Exceptional courts and rights are embedded in the regular criminal norms of the State. Therefore, their practice does not constitute an exception for constitutional State and political power. Hence, absolutist rule of the AKP occurs within and as a part of constitutionality of the State in Turkey. Consequently, absolutist and Islamist rule of the AKP can be seen as the realization of inherent defects of non-constitutional constitutional State and of the potentials of political power in such a state.

This point reveals the continuity between previous *Kemalist* regime before the AKP and the AKP rule as well. Perhaps, the most interesting outcome of the analysis of the relation between constitutional State in Turkey and the AKP governments is this: the AKP cannot be fully blamed for the ills of the constitutional State in Turkey. Neither non-constitutional constitutional state, nor arbitrary rule of political power, or the political justice is the invention of the AKP. Anti-Terror Law, exceptional courts, the MGK, the DİB, dependence of judiciary to the President and Ministry of Justice are

the tools of AKP's arbitrary rule. However, they are actually the conventional tools of the State in Turkey. The AKP takes over the tools of the previous regime and uses them to make interventions to society in line with its own political interests. Therefore, criticizing the AKP rule is not possible without criticizing previous *Kemalist* regime and formalism of parliamentary democracy and constitutional State in general.

At the end, the relation between political power and legal norms, two poles that constitutional state establishes as opposed to each other, seems to have been reversed. The normative order of the rule of law is surpassed and dominated by political power, while just the opposite is expected by the theory. The outcome is a series of contradictions: secularism of constitutional State is Islamist. Parliamentary democratic power of the AKP is anti-parliamentary democratic. Normal practice of judiciary is exceptional. Ordinary relation between ruling power and political opposition is extraordinary. Constitutional state is non-constitutional. If this picture is absurd, there is one thing more absurd than it: neither of the anti-parliamentary democratic and non-constitutional features of the political power is able to refute constitutional character of the State. Rather, all of them are absorbed in it. AKP's rule may be authoritarian or liberal; arbitrary or constitutional, and even militarist or pacifist; yet it does not change the character of the State in Turkey. It is still constitutional State governed by parliamentary democracy. When considered together with ancient regime, a political power may even be Kemalist or Islamist conservative without ceasing parliamentary democracy and constitutional state.

In this respect, the stage that parliamentary democracy and constitutional State in Turkey reached under AKP rule verifies Schmitt's arguments. Accordingly, constitutional State in Turkey and democratic politics in the parliament are empty forms; they are only the name of a procedure. Substantial ingredient of them changes depending on a change in political power, while the rule of law order provides almost

no guarantee and protection. Then, the State in Turkey shall not be defined with a substantial element; *state of statutes* is the only real character of it. This point alters our perception of the rule of law as well. If it is dependent on political power, for the rule of law to be rightful, democratic and liberal, political power behind it shall be rightful, democratic and liberal. Hence, any hope embedded to the rule of law within a constitutional state shall better be redirected to political power. A liberal and just power rules in a liberal and just way; a non-liberal and unjust power rules in a non-liberal and unjust way, regardless of the presence of the rule of law and the constitution.

In Germany, during 1930s, a Republic is destroyed and a kingdom is established under Nazi rule through legal means. Looking at back, it can be realized that modern-day thinkers and scientists are frequently asking a single question: when did the political and legal system in Germany reach the point of no return and become totally a new one? Is it emergency regulation of February 28, 1933? Enabling Act of March 1933? Or, was it only later in February 1936, with the laws establishing the authority of secret police? Or perhaps the point was never reached. The political and legal system of Third Reich may be more of a variation of the previous system, rather than a break with it.[987] This question cannot be clearly answered. In this regard, Zimmermann says that:

> If there is a lesson to be learned from this bizarre story of continuity, it is not how to find a sophisticated way to differentiate between "just" and "unjust" within the heritage of an evil regime. Rather, the lesson is that we must monitor the signs of evil and fight them before the evil regime is able to take power.[988]

---

[987] Zimmermann, 1998, p. viii

[988] 1998, p. xiii

Can not be a better lesson for Turkey as well. In order to avoid looking at back and trying to calculate the point of no return for the Republic in Turkey, it is necessary to figure out and struggle against unjust and anti-democratic features of today's constitutional State and parliamentary politics.

REFERENCES

Agamben, Giorgio (2001). *Kutsal İnsan: Egemen İktidar ve Çıplak Hayat*. İstanbul: Ayrıntı Yayınları

Agtaş, Özkan (2012). "Ceza Yasasının Gölgesinde Siyaset" in *Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi*, Vol. 67, No 4, pp. 1-23

Ahmad, Feroz (1993). *The Making of Modern Turkey*. London, Routledge

Akal, Cemal Baki (2000). "Bir Devlet Kuramı için Giriş" in *Devlet Kuramı*. Akal, Cemal Baki (ed). Ankara: Dost Yayınları, pp. 13-33

Akartürk, Ekrem Ali (2010). "Son Anayasa Değişiklileri ve Siyasi Partilerin Kapatılması" in *2010 Anayasa Değişiklikleri Çerçevesinde Yargı Bağımsızlığı*. Öztürk, Bahri; İlkiz, Fikret; Kocasakal, Ümit (ed). Ankara: Seçkin Yayıncılık, pp. 79-95

Akbaş, Kasım (2012). "Yeni Hukuk Düzeni ve Sermayenin Doğrudan Egemenliği" in *Birikim*, No. 275

Akça, İsmet (2006). "Ordu, Devlet ve Sınıflar: 27 Mayıs 1960 Darbesi Üzerinden Alternatif Bir Okuma Denemesi" in *Türkiye'de Ordu, Devlet ve Güvenlik Siyaseti*. Balta Paker, Evren; Akça, İsmet (ed). İstanbul: Bilgi Üniversitesi Yayınları

Akça, İsmet (2010). "AKP, Anayasa Değişikliği Referandumu ve Sol: "Yetmez Ama Evet"in Açmazları" in *Mesele*, Vol. 45, p. 4

Akgönül, Samim (2011). "Giriş" in *Tartışılan Laiklik: Fransa ve Türkiye'de İlkeler ve Algılamalar*. Akgönül, Samim (ed). İstanbul: Bilgi Üniversitesi Yayınları, pp. 1-21

Aktan, Hamdi Yaver (2010a) in *4. Yılında CMK ve Uygulamaları*. İstanbul: İstanbul Barosu Yayınları

Alexander, Larry (2001). *Constitutionalism: Philosophical Foundations*. New York: Cambridge University Press

Aliefendioğlu, Yılmaz (2001). "Laiklik ve Laik Devlet" in *Laiklik ve Demokrasi*. Kaboğlu, İbrahim (ed). Ankara: İmge Yayınları, pp. 73-128

Allan, Trevor R. S. (2003). *Constitutional Justice: A Liberal Theory of the Rule of Law*. New York: Oxford University Press

Altıparmak, Kerem; Aytaç, Ahmet Murat; Karahanoğulları, Onur; Hançer, Türkan; Aydın, Devrim (2007). "Polis Vazife ve Salahiyet Kanununda Değişiklik: Durdurma, Kimlik Sorma, Arama, Parmak İzi Alınması, Silah Kullanma" in *Hukuk ve Adalet: Eleştirel Hukuk Dergisi*, No. 11, pp. 117-140

Aponte, Alejandro (2008). "Savaş ve Politika-Günlük Yaşamdaki Politik Aleyhtar Ceza Hukuku" in *Terör ve Düşman Ceza Hukuku*. Ünver, Yener (ed). Ankara: Seçkin Yayınları, pp. 571-585

Arato, Andrew (2010). "The Constitutional Reform Proposal of the Turkish Government: The Return of Majority Imposition" in *Constellations*, Vol. 17, No.2, pp. 345-350

Arato, Andrew; Tombus, Ertuğ (2013). "Learning from Success, Learning from Failure: South Africa, Hungary, Turkey and Egypt" in *Philosophy and Social Criticism*, Vol. 39, No. 4-5, pp. 427-441

Arjomand, Said Amir (2007). "Constitutional Development and Political Reconstruction from Nation-building to New Constitutionalism" in *Constitutionalism and Political Reconstruction*. Arjomand, Said Amir (ed). Leiden: Brill, p. 3-47

Arnold, Jörg (2008). "Beş Tezde Düşman Ceza Hukukunun Gelişim Süreçleri" in *Terör ve Düşman Ceza Hukuku*. Ünver, Yener (ed). Ankara: Seçkin Yayınları, pp. 527-553

Arslan, Zühtü (2007). *Turkey's Bid for the New Constitution*. SETA Policy Brief, No. 1

Aşık, Özgür (2012). "Legal Reforms in Turkey: Ambitious and Controversial" in *Turkish Policy Quarterly*, Vol. 11, No. 1, pp. 145-153

Atacan, Fulya (2005). "Explaining Religious Politics at the Crossroad: AKP-SP" in *Turkish Studies*, Vol. 6, No. 2, pp. 187-199

Ayata, Sencer (1993). "The Rise of Islamic Fundamentalism and Its Institutional Framework" in *The Political and Socioeconomic Transformation of Turkey*. Eralp, Atilla; Tunay, Muharrem; Yeşilada, Birol (ed). Westport, Connecticut: Praeger

Ayata, Sencer; Güneş Ayata, Ayşe (2001). "Turkey's Mainstream Political Parties on the Centre-right and Centre-left" in *Turkey Since 1970: Politics, Economics and Society*. Lovatt, D. (ed). New York: Palgrave, pp. 91-110

Aydın, Devrim (2006). "Terör Eylemlerinin Siyasal Suç Açısından Değerlendirilmesi" in *Uluslararası Hukuk ve Politika*, Vol. 2, No. 7

Aydın, Devrim (2012) in *Ankara Barosu Uluslararası Hukuk Kurultayı Cilt II*. Kocaoğlu, Sinan (ed). Ankara: Ankara Barosu Başkanlığı, pp. 336-377

Aydın, Mehmet Zeki (2011). "Türkiye'deki Örgün ve Yaygın Eğitimde Din Eğitimi Öğretimi" in *Tartışılan Laiklik: Fransa ve Türkiye'de İlkeler ve Algılamalar*. Akgönül, Samim (ed). İstanbul: Bilgi Üniversitesi Yayınları, pp. 283-297

Aydın, Oya (2012a). "Hukuk Devleti Nerede Biter, Polis Devleti Nerede Başlar?" in *Birikim*, No.273

Balcı, Ali; Jacoby, Tim (2012). "Guest Editors' Introduction: Debating the Ergenekon Counter-Terrorism Investigation in Turkey" in *Middle East Critique*, Vol. 21, No. 2, pp. 137-144

Balcı, Muharrem (1998). *MGK ve Demokrasi: Hukuk, Ordu, Siyaset*. İstanbul: Yöneliş

Balcı, Bayram (2003). "Fethullah Gülen's Missionary Schools in Central Asia and their Role in the Spreading of Turkism and Islam" in *Religion, State and Society*, Vol. 31, No. 2, pp. 151-177

Baran, Zeyno (2010). *Torn Country: Turkey between Secularism and Islamism*. Stanford: Hoover Institution Press

Barkey, Henri J. (2010). "Turkey's Moment of Inflection" in *Survival*, Vol. 52, No. 3, pp. 39-50

Basa, Necdet (2012)."Yargı Bağımsızlığı, Uluslararası Bazı Belgeler ve Örnekler" in *Ankara Barosu Uluslararası Hukuk Kurultayı*. Kocaoğlu, Sinan (ed.). Ankara Barosu, pp. 8-28

Bayır, Derya (2013). "Representation of the Kurds by the Turkish Judiciary" in *Human Rights Quarterly*, Vol. 35, pp. 116-142

Bayraktar, Köksal (1982). *Siyasal Suç*. İstanbul: İstanbul Üniversitesi Yayınları No 2997

Bayraktar, Köksal (2010). "Genel Değerlendirme" in *2010 Anayasa Değişiklikleri Çerçevesinde Yargı Bağımsızlığı*. Bahri Öztürk; İlkiz, Fikret; Kocasakal, Ümit (ed.). Ankara: Seçkin Yayıncılık, pp. 159-160

Bayraktar, Köksal (2011). *Hukukun Üstünlüğü*. İstanbul: Der Yayınları

Bayraktar, Köksal (2013). "Olağandışı Yargılama Anlayışı ve Toplumun Adalet Arayışı" in *Güncel Hukuk,* Vol. 5, No. 113

Beder, Bülent; Altundiş, Mehmet (2009). "Yasama ve Yürütme Fonksiyonlarının Yargı Bağımsızlığına Müdahalesi" in *Yasama Dergisi*, No: 13

Bedirhanoğlu, Pınar (2009). "Türkiye'de Neoliberal Otoriter Devletin AKP'li Yüzü" in *AKP Kitabı: Bir Dönüşümün Bilançosu*. Duru, Bülent; Uzgel, İlhan (ed). İstanbul: Phoneix Kitabevi

Behramoğlu, Ataol (2009). *Sivil Darbe*. İstanbul: Cumhuriyet Kitapları

Bendersky, Joseph W. (2004). "Introduction: The Three Types of Juristic Thought in German Historical and Intellectual Context" in *On the Three Types of Juristic Thought*. Schmitt, Carl. Westport, Connecticut: Praeger, pp. 1-43

Bendersky, Joseph W. (2007). *A Concise History of Nazi Germany*. Maryland: Rowman and Littlefield Publishers

Berkes, Niyazi (1998). *Development of Secularism in Turkey*. New York: Routledge

Bielefeldt, Heiner (1998). "Carl Schmitt's Critique of Liberalism: Systematic Reconstruction and Counter Criticism" in *Law as Politics: Carl Schmitt's Critique of Liberalism*. Dyzenhaus, David (ed). Durham: Duke University Press, pp. 23-37

Bilgiç, Tuba Ünlü (2009). "The Military and Europeanization Reforms in Turkey" in *Middle Eastern Studies,* Vol. 45, No. 5

Bilici, Faruk (2011). "Türkiye'de Devlet Okullarında Din Eğitiminin Tarihçesi, İdeolojisi ve Öğretim Programları" in *Tartışılan Laiklik: Fransa ve Türkiye'de İlkeler ve Algılamalar*. Akgönül, Samim (ed). İstanbul: Bilgi Üniversitesi Yayınları, pp. 227-247

Bilir, Faruk (2012). "Demokratik Meşruluk, Yargı Bağımsızlığı ve Yargı Tarafsızlığı Bağlamında Yargı Organının Yeniden Yapılanması" in *Demokratik Anayasa: Görüşler ve Öneriler*. Göktepe, Ece; Çelebi, Aykut (ed.). İstanbul: Metis Yayınları

Bobbio, Norberto (2000). "Kelsen ve Hukukun Kaynakları" in *Devlet Kuramı*. Akal, Cemal Baki (ed). Ankara: Dost Yayınları, pp. 459-473

Bockel, Alain (2001). "Laiklik ve Anayasa" in *Laiklik ve Demokrasi*. Kaboğlu, İbrahim (ed). Ankara: İmge Yayınları, pp. 49-58

Bodin, Jean (1992). *On Sovereignty: Four Chapters from The Six Books of The Commonwealth*. New York: Cambridge University Press

Bookbinder, Paul (1981). "Roots of Totalitarian Law: The Early Works of Carl Schmitt" in *Social Science*, Vol. 56, No. 3, pp. 133-145

Bora, Tanıl (2008). *Türk Sağının Üç Hali: Milliyetçilik, Muhafazakârlık, İslamcılık*. İstanbul: Birikim

Bora, Tanıl (2012). "Diyarbakır Barosu Başkanı Avukat Mehmet Emin Akar ile Söyleşi: 'Bizim Buralarda…' Hukuk?" in *Birikim*, No.273

Brancourt, Jean Pierre (2000). "Estat'lardan Devlete: Bir Sözcüğün Evrimi" in *Devlet Kuramı*. Akal, Cemal Baki (ed). Ankara: Dost Yayınları, pp. 177-193

Caldwell, Peter C. (1997). *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and the Practice of Weimar Constitutionalism*. Durham: Duke University Press

Cemal, Hasan (1989). *Özal Hikayesi*. Ankara: Bilgi Yayınevi

Chapman, Brian (1970). *Police State*. New York, Praeger

Cizre Ümit (1997). "The Anatomy of the Turkish Military's Political Autonomy" in *Comparative Politics,* Vol. 29, No. 2

Cizre, Ümit (1999). *Muktedirlerin Siyaseti: Merkez Sağ-Ordu-İslamcılık.* İstanbul: İletişim Yayınları

Cizre, Ümit (2008). "Justice and Development Party and the Military: Reacting the Past After Reforming It?" in *Secular and Islamic Politics in Turkey: The Making of the Justice and Development Party*. Cizre, Ümit (ed). London and New York: Routledge

Cizre, Ümit; Çınar, Menderes (2003). "Turkey 2002: Kemalism, Islamism and Politics in the Light of the February 28 Process" in *South Atlantic Quarterly,* Vol. 102, No. 213, pp. 309-332

Coşkun, Alev (2010). *Anayasayla Sivil Darbe*. İstanbul: Cumhuriyet Kitapları

Coşkun, Orhan (2000). *Milli Güvenlik Kurulu ve Milli Güvenlik Kurulu Sekreterliği*, Unpublished PhD Thesis. Ankara: Hacettepe Üniversitesi

Coşkun, Vahap (2010a). "Turkey's Illiberal Judiciary: Cases and Decisions" in *Insight Turkey,* Vol. 12, No. 4, pp. 43-67

Criss, Nur Bilge (2010). "Dismantling Turkey: The Will of the People?" in *Turkish Studies,* Vol. 11, No. 1, pp. 45-58

Croce, Mariano (2011). "Does Legal Institutionalism Rule Out Legal Pluralism? Schmitt's Institutional Theory and the Problem of the Concrete Order" in *Utrecht Law Review,* Vol.7, No. 2

Croce, Mariano; Salvatore, Andrea (2012). *Legal Theory of Carl Schmitt*. Oxon: Routledge

Çelik, Seydi (2008). *Osmanlı'dan Günümüze Devlet ve Asker: Askeri Bürokrasinin Sistem İçindeki Yeri.* İstanbul: Salyangoz Press

Çetin, Fethiye (2013). "Tebliğname, Örgüt ve Söylemi" in *Güncel Hukuk,* Vol. 2, No. 110

Çetin, Süleyman (2012) in *Ankara Barosu Uluslararası Hukuk Kurultayı Cilt II*. Kocaoğlu, Sinan (ed). Ankara: Ankara Barosu Başkanlığı, pp. 259-268

Çınar, Menderes (2005). *Siyasal Bir Sorun Olarak İslamcılık*. Ankara: Dipnot

Çınar, Menderes; Duran, Burhanettin (2008). "The Specific Evolution of Contemporary Political İslam in Turkey and Its "Difference" " in *Secular and Islamic Politics in Turkey: The Making of Justice and Development Party*. Cizre, Ümit (ed.). Oxon: Routledge , pp. 17-41

Çınar, Menderes (2008a). "The Justice and Development Party and the Kemalist Establishment" in *Secular and Islamic Politics in Turkey: The Making of Justice and Development Party*. Cizre, Ümit (ed.). Oxon: Routledge, pp. 109-132

Çitak, Zana (2010). "Between 'Turkish Islam' and 'French Islam': The Role of the Diyanet in the Conseil Français du Culte Musulman" in *Journal of Ethnic and Migration Studies*, Vol. 36, No.4, pp. 619-634

Çölaşan, Emin (1989). *Turgut Nereden Koşuyor?.* Ankara: Tekin Yayınevi

Danışma Meclisi Tutanak Dergisi (Consultative Assembly Journal of Official R

eports) Period I, 9

Danışma Meclisi Tutanak Dergisi (Consultative Assembly Journal of Official Reports) Period I, 10

Davison, Andrew (2003). "Turkey, a "secular" State? The Challenge of Description" in *The South Atlantic Quarterly,* Vol. 102, No. 2/3, pp. 333-350

Demirbaş, Timur (2012). "Özel Yetkili Ağir Ceza Mahkemelerinin Görevine Giren Suçlarda Ceza Muhakemesi ve Sorunları" in *Ankara Barosu Uluslararası Hukuk Kurultayı Cilt II*. Kocaoğlu, Sinan (ed). Ankara: Ankara Barosu Başkanlığı, pp. 377-393

Dere, Ali (2008). "The PRA of Turkey: The Emergence, Evolution and Perception of its Religious Services Outside of Turkey" in *The Muslim World*, Vol. 98, pp. 291-301

Dinçşahin, Şakir (2012). "A Symptomatic Analysis of the Justice and Development Party's Populism in Turkey, 2007–2010" in *Government and Opposition*, Vol. 47, No. 4, pp. 618–640

Doğan, Ali Ekber (2009). "İslamcı Sermayenin Gelişme Dinamikleri ve 28 Şubat Süreci" in *AKP Kitabı: Bir Dönüşümün Bilançosu*. Duru, Bülent; Uzgel, İlhan (ed). İstanbul: Phoneix Kitabevi, pp. 283-304

Dumont, Paul (2011). "Türkiye'de Diyanet İşleri Başkanlığı" in *Tartışılan Laiklik: Fransa ve Türkiye'de İlkeler ve Algılamalar*. Akgönül, Samim (ed). İstanbul: Bilgi Üniversitesi Yayınları, pp.153-169

Duran, Burhanettin (2008). "The Justice and Development Party's "New Politics": Steering Toward Conservative Democracy, A Revised Islamic Agenda or Management of New Crises?" in *Secular and Islamic Politics in Turkey: The Making of Justice and Development Party*. Cizre, Ümit (ed). Oxon: Routledge, pp. 80-107

Dyzenhaus, David (1997). *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*. New York: Oxford University Press

Dyzenhaus, David (2000). "The Gordon Head of The Power: Heller and Kelsen on the Rule of Law" in *From Liberal Democracy to Fascism*. Caldwell, Peter C.; E. Scheuerman, William (ed). Boston: Humanities Press, pp.20-47

Dyzenhaus, David (2000a). "Herman Heller: Introduction" in *Weimar: A Jurisprudence of Crisis*. Jacobson, Arthur J.; Schlink, Bernhard. (ed). California: University of California Press, pp. 249-279

Eligür, Banu (2010). *The Mobilization of Political Islam in Turkey*. Cambridge: Cambridge University Press

Erdem, Fazıl Hüsnü (2005). "Türkiye'de "İdeolojik Devlet" Gölgesinde Yargı ve Bağımsızlığı Sorunu" in *Demokrasi Platformu*, Vol. 1, No. 2

Erdoğan, Mustafa (2000). *Demokrasi, Laiklik, Resmi İdeoloji*. Ankara: Liberte

Erdoğan, Mustafa (2001). *Türkiye'de Anayasalar ve Siyaset*. Ankara: Liberte Yayınları

Erdoğan, Mustafa (2003). *Anayasal Demokrasi*. Ankara: Siyasal Kitapevi

Ertuğrul, Kürşad (2012). "AKP's Neo-Conservatism and Politics of Otherness in Europe-Turkey Relations" in *New Perspectives on Turkey*, No. 46, pp. 157-186

Finnes, John M. (1980) *Natural Law, Natural Rights*. Oxford: Clarendon Press

Fletcher, George (1996) *Basic Concepts of Legal Thought*. New York: Oxford University Press

Fraenkel, Ernst (2006). *The Dual State: A Contribution to the Theory of Dictatorship*. Clark, New Jersey: The Lawbook Exchange, LTD

Friedrich, Carl Joachim (1963). *The Philosophy of Law in Historical Perspective*. London: The University of Chicago Press

Gellately, Robert (2001). *Backing Hitler: Consent and Coercion in Nazi Germany*. Oxford: Oxford University Press

Gierke, Otto (2000). "Orta Çağ'da Siyasi Kurumlar: Devlet ve Hukuk" in *Devlet Kuramı*. Akal, Cemal Baki (ed). Ankara: Dost Yayınları, pp.129-141

Ginsburg, Tom (2010). "The Politics of Courts in Democratization" in *Global Perspectives on the Rule of Law*. Heckman, James J.; Nedson, Robert L.; Cobatingan, Lee (ed). Oxon: Routledge, pp: 175-191

Gökmen, Yavuz (1992). *Özal Sendromu*. Ankara: V Yayınları

Göktaş, Kemal (2012). "Yeni Yargı: Kurumsallaşma ve Pratik" in *Birikim*, No. 275

Gözaydın, İştar B. (2009). "The Fethullah Gülen Movement and Politics in Turkey: A Chance for Democratization or a Trojan Horse?" in *Democratization*, Vol. 16, No. 6, pp. 1214–1236

Gözler, Kemal (2011). *Anayasa Hukukunun Genel Esasları*. Bursa: Ekin Yayınları

Grigoriadis, Ioannis N. (2009). "Islam and Democratization in Turkey: Secularism and Trust in a Divided Society" in *Democratization*, Vol. 16, No. 6, pp. 1194–1213

Grigoriadis, Ioannis N.; Özer, Irmak (2010). "Mutations of Turkish Nationalism: From Neo-Nationalism to the Ergenekon Affair" in *Middle East Policy*, Vol. 17, No. 4, pp. 101-113

Groc, Gerard (2001). "Milliyetçilik, Sivil Toplum ve Dinci Parti: Fazilet Partisi ve Demokratik Bir Geçiş Denemesi" in *Türkiye'de Sivil Toplum ve Milliyetçilik*. Yerasimos, Stefanos; et. al., (ed). İstanbul: İletişim

Groc, Gerard (2001a). "Laiklik ve Demokrasi: Yeni Bir Orta Yol Mu?" in *Laiklik ve Demokrasi*. Kaboğlu, İbrahim (ed). Ankara: İmge Yayınları, pp. 221-236

Groc, Gerard (2011). "AKP, Türkiye'deki Laikliğin Derdi mi Dostu mu?" in *Tartışılan Laiklik: Fransa ve Türkiye'de İlkeler ve Algılamalar*. Akgönül, Samim (ed). İstanbul: Bilgi Üniversitesi Yayınları, pp. 41-63

Gunter, Michael M. (2013). "The Kurdish Spring" in *Third World Quarterly*, Vol. 34, No. 3, pp. 441-457

Gülalp, Haldun (2003). "Whatever Happened to Secularization? The Multiple Islams in Turkey" in *South Atlantic Quarterly*, Vol. 102, No. 2/3, pp. 381-395

Gülay, Erol (2007). "The Gülen Phenomenon: A Neo-Sufi Challenge to Turkey's Rival Elite?" in *Critique: Critical Middle Eastern Studies*, Vol. 16, No. 1, pp. 37-61

Gümüşçü, Şebnem; Sert, Denizli (2010). "The March 2009 Local Elections and the Inconsistent Democratic Transformation of the AKP Party in Turkey" in *Middle East Critique*, Vol. 19, No. 1, pp. 55-70

Güney, Aylin; Karatekelioğlu, Petek (2005). "Turkey's EU Candidacy and Civil-Military Relations: Challenges and Prospects" in *Armed Forces & Society*, Vol. 31, No. 3

Güvenç, Bozkurt; et. al (1994). *Türk-İslam Sentezi*. İstanbul: Sarmal Yayınevi

Güzel, Ali (2010). "2010 Anayasa Değişikliğinin Yargı Bağımsızlığı ile İlişkileri ve Etkileri, Anayasa Mahkemesi'nin Yapısı ve Üyelerinin Seçimi" in *2010 Anayasa Değişiklikleri Çerçevesinde Yargı Bağımsızlığı*. Öztürk, Bahri; İlkiz, Fikret; Kocasakal, Ümit (ed.). Ankara: Seçkin Yayıncılık

Hale, William (1994). *Turkish Politics and the Military.* New York: Routledge

Hale, William; Özbudun, Ergun (2010). *Islamism, Democracy, and Liberalism in Turkey: The Case of the AKP.* New York: Routledge

Haynes, Jeffrey (2010). "Politics, Identity and Religious Nationalism in Turkey: From Atatürk to the AKP" in *Australian Journal of International Affairs*, Vol. 64, No. 3, pp. 312-327

Heper, Metin; Toktas, Sule (2003). "Islam, Modernity, and Democracy in Contemporary Turkey: The Case of Recep Tayyip Erdogan" in *The Muslim World*, Vol. 93, No. 2

Hirschl, Ran (2004). *Towards Juristocracy*: *The Origins and Consequences of the New Constitutionalism*. Cambridge, MA: Harvard University Press

Hirst, Paul (1999). "Carl Schmitt's Decisionism" in *The Challenge of Carl Schmitt*. Mouffe, Chantal (ed). London: Verso, pp. 7-18

Hobbes, Thomas (1985). *Leviathan*. London: Penguin Books

Höjelid, Stefan (2010). "Headscarves, Judicial Activism, and Democracy: The 2007–8 Constitutional Crisis in Turkey" in *The European Legacy*, Vol. 15, No. 4, pp. 467-482

Ingram, David (2006). *Law: Key Concepts in Philosophy*. London: Continuum

İba, Şaban (2003). "Türkiye'de Parlamenter Rejimin İşleyişi Açısından 3 Kasım 2002 Seçimlerinin Sonuçları" in *Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi*, Vol. 58, No. 2, pp. 97-116

İlkiz, Fikret (2010). "Anayasa Değişikliği ve Anayasa Mahkemesi" in *2010 Anayasa Değişiklikleri Çerçevesinde Yargı Bağımsızlığı*. Öztürk, Bahri; İlkiz, Fikret; Kocasakal, Ümit (ed). Ankara: Seçkin Yayıncılık

İnanıcı, Haluk (2011). "Örfi İdare Yargısından Yeni Devlet Güvenlik Mahkemelerine Sanık Hakları" in *Parçalanmış Adalet: Türkiye'de Ceza Yargısı*. İnanıcı, Haluk (ed). İstanbul: İletişim Yayınları, pp. 13-65

İnanıcı, Haluk (2011a). "Giriş" in *Parçalanmış Adalet: Türkiye'de Ceza Yargısı*. İnanıcı, Haluk (ed). İstanbul: İletişim Yayınları, pp.7-13

İnanıcı, Haluk (2012). "Türkiye'de Polis, İktidar ve İnsan Hakları" in *Birikim*, No.273

İnsel, Ahmet (1997). "MGK Hükümetleri ve Kesintisiz Darbe Rejimi" in *Birikim*

İnsel, Ahmet (2003). "The AKP and Normalizing Democracy in Turkey", in *The South Atlantic Quarterly*, Vol. 102, No. 2/3

İnsel, Ahmet (2012). *Türkiye Toplumunun Bunalımı*. İstanbul: Birikim

Jakobs, Günther (2008). "Yurttaş Ceza Hukuku ve Düşman Ceza Hukuku" in Ünver, Yener (ed). *Terör ve Düşman Ceza Hukuku*. Ankara: Seçkin Yayınları, pp. 489-507

Jakobs, Günther (2008a). "Düşman Ceza Hukuku?-Hukukiliğin Şartlarına Dair Bir İnceleme" in Ünver, Yener (ed). *Terör ve Düşman Ceza Hukuku*. Ankara: Seçkin Yayınları, pp. 507-527

Jenkins, Gareth (2001). *Context and Circumstance: The Turkish Military and Politics*. Adelphi Paper 337, New York: IISS

Jenkins, Gareth (2007). "Continuity and Change: Prospects for Civil–Military Relations in Turkey" in *International Affairs*, Vol. 83, No. 2

Jenkins, Gareth (2009a). *Between Fact and Fantasy: Turkey's Ergenekon Investigation*. Silk Road Paper

Kaboğlu, İbrahim (2000). *Anayasa ve Toplum*. Ankara: İmge

Kafesoğlu, İbrahim (1985). *Türk-İslam Sentezi*. İstanbul

Kalaycıoğlu, Ersin (2005). "The Mystery of the Türban: Participation or Revolt?" in *Turkish Studies*, Vol. 6, No. 2, pp. 233–251

Kalyvas, Andreas (2004). "From the Act to the Decision: Hannah Arendt and the Question of Decisionism" in *Political Theory*, Vol. 32, No. 3, pp. 320-346

Kalyvas, Andreas (2008). *Democracy and the Politics of Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt*. New York: Cambridge University Press

Kanar, Ercan (2011). "Özel Yetkili Ağır Ceza Mahkemeleri'nce Üretilen Hukuk" in *Parçalanmış Adalet: Türkiye'de Ceza Yargısı*. İnanıcı, Haluk (ed). İstanbul: İletişim Yayınları, pp.65-129

Karakehya, Hakan (2007). "Ceza Muhakemesinin Amacı" in *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası*, Vol.115, No. 2, pp. 121-142

Karaman, Fikret (2008). "The Status and Function of the PRA in the Turkish Republic" in *The Muslim World*, Vol. 98, p. 282-290

Kardaş, Ümit (2004). "Askeri Gücün Anayasal Bir Yargı Alanı Yaratması ve Yürütme Erkini Etkin Bir Şekilde Kullanması" in *Bir Zümre, Bir Parti: Türkiye'de Ordu*. Ahmet İnsel, Ahmet; Bayramoğlu, Ali (ed). İstanbul: Birikim

Katoğlu, Tuğrul (2010). "Özel Yetkili Mahkemelerde Özel Usuller" in *Özel Yetkili Mahkemeler (CMK m. 250)*. Ankara: Türkiye Barolar Birliği Yayınları No.191, pp. 39-57

Kelsen, Hans (2008). *Pure Theory of Law*. New Jersey: The Lawbook Exchange, LTD

Kirchheimer, Otto (1961). *Political Justice: The Use of Legal Procedures for Political Ends*. Princeton, New Jersey: Princeton University Press

Kitfield, James (April 2011). "Exorcising Turkey's Demons", *National Journal*

Kocaoğlu, Serhat Sinan (2011). "Türkiye Cumhuriyeti Yargı Sisteminin Temel Sorunu: 'Hâkim (ve Savcı) Niteliği' ve Bu Hususta Eklektik Bir Çözüm Önerisi" in *Ankara Barosu Dergisi*, Vol.3, pp. 15-84

Kocasakal, Ümit (2013)."Özel Görevli Mahkemeler" in *Hukukun Evrensel İlkeleri ve Özel Görevli Mahkemeler*. İstanbul: İstanbul Barosu Yayınları, pp. 17-29

Koch, Hanns-Joachim Wolfgang. (1997). *In The Name of the Volk: Political Justice in Hitler's Germany*. London: Macmillan Publishers

Kolb, Eberhard (1996). *Was Hitler's Seizure of Power on January 30, 1933, Inevitable?*. Occasional Paper 18. Washington: German Historical Institute

Korith, Stefan (2000). "The Shattering of Methods in Late Wilhelmine Germany" in *Weimar: A Jurisprudence of Crisis*. Jacobson, Arthur J.; Schlink, Bernhard. (ed). California: University of California Press, pp. 41-67

Köker, Levent (2008). *Demokrasi, Eleştiri ve Türkiye*. Ankara: Dipnot

Köker, Levent (2010). "Turkey's Political-Constitutional Crisis: An Assessment of the Role of the Constitutional Court" in *Constellations*, Vol.17, No. 2, pp. 328-344

Kramer, Matthew (2007). *Objectivity and the Rule of Law*. New York: Cambridge University Press

Kumkumoğlu, Kemal; Kumkumoğlu, Ahmet Kemal (2010). "HSYK'nın 1961 ve 1982 Anayasaları'ndaki Durumu" in *2010 Anayasa Değişiklikleri Çerçevesinde Yargı Bağımsızlığı*. Öztürk, Bahri; İlkiz, Fikret; Kocasakal, Ümit (ed). Ankara: Seçkin Yayıncılık, pp. 105- 113

Kuo, Ming-Sung (2010). "Reconciling Constitutionalism with Power: Towards a Constitutional Nomos of Political Ordering" in *Ratio Juris*, Vol. 23, No. 3, pp. 390–410

Kuru, Ahmet (2008). "Secularism in Turkey: Myths and Realities" in *Insight Turkey*, Vol. 10, No. 3, pp. 101-110

Kuru, Ahmet (2009). *Pasif ve Dışlayıcı Laiklik: ABD, Fransa ve Türkiye*. İstanbul: Bilgi Üniverstesi Yayınları

Lawyers Committee for Human Rights (1999). *Reformun Önündeki Engeller: Türkiye'de İstisnai Mahkemeler, Polisin Dokunulmazlığı ve İnsan Hakları Savunucularına Yönelik Baskılar*. İstanbul: Belge Yayınları

Locke, John (1980). *Second Treatise of Government*. Macpherson, C.B. (ed.). USA: Hackett Publishing Company

Mairet, Gerard (2000). "Padovalı Marsilius'dan Louis XVI'e Laik Devletin Doğuşu" in *Devlet Kuramı*. Akal, Cemal Baki (ed). Ankara: Dost Yayınları, pp. 215-245

Manuel, Roger. *Polis Devleti (Gestapo)*. İstanbul: Büyük Dağıtım Yayınevi

Marmor, Andrei (2008). "Hukuk Devleti ve Sınırları" in *Hukuk Devleti: Hukuki Bir İlke, Siyasi Bir İdeal*. Çoban, Ali Rıza; Canatan, Bilal; Küçük, Adnan (ed). Ankara: Adres Yayınları, pp. 169-211

Maus, Ingeborg (1998). "The 1933 "Break" in Carl Schmitt's Theory" in *Law as Politics: Carl Schmitt's Critique of Liberalism*. Dyzenhaus, David (ed). Durham: Duke University Press, pp. 196-217

Maxeiner, James R. (2010). "Some Realism about Legal Certainty in the Globalization of the Rule of Law" in *The Rule of Law in Comparative Perspective*. Sellers, Mortimer; Tomaszewski, Tadeusz (ed). London: Springer, pp. 41-57

McCormick, John (2004). "Identifying or Exploiting the Paradoxes of Constitutional Democracy?: An Introduction to Carl Schmitt's *Legality and Legitimacy*" in *Legality and Legitimacy*. Schmitt, Carl. Durham: Duke University Press, pp. xiii-xl

Mert, Nuray (2000). "The Political History of Center Right Parties: Discourses on Islam, the Nation and the People" in *Civil Society in the Grip of Nationalism: Studies on Political Culture in Contemporary Turkey*. Yerasimos, G; Vorhoff, K (ed). Orient-Institute, pp. 49-97

Michaud-Emin, Linda (2007). "The Restructuring of the Military High Command in the Seventh Harmonization Package and its Ramifications for Civil–Military Relations in Turkey" in *Turkish Studies*, Vol.8, No.1

Misrahi, Frederic (2004). "The EU and the Civil Democratic Control of Armed Forces: An Analysis of Recent Developments in Turkey" in *Perspectives*, Vol. 22

Montesquieu (1952). *The Spirit of Laws*. Hutchins, Robert Maynard (ed). London: William Benton Publisher

Mumcu, Uğur (1993). *Tarikat, Siyaset, Ticaret*. İstanbul: Tekin Yayınevi

Mustafa, Tamir; Ginsburg, Tom (2008). "Introduction: Function of Courts in Authoritarian Politics" in *Rule by Law: The Politics of Courts in Authoritarian Regimes*. Ginsburg, Tom; Mustafa, Tamir (ed). New York: Cambridge University Press, pp.1-23

Müjde Önal, Saime (2007). *Türkiye'de Parti İçi Demokrasi: CHP ve AKP Örneği*. Unpublished Master Thesis. Dokuz Eylül Üniversitesi, Sosyal Bilimler Anabilim Dalı, Tarih Bölümü

Nalbant, Atilla (2011). "Türk Anayasalarında Laiklik İlkesi ve Din İşlerinin Düzenlenmesi" in *Tartışılan Laiklik: Fransa ve Türkiye'de İlkeler ve Algılamalar*. Akgönül, Samim (ed). İstanbul: Bilgi Üniversitesi Yayınları, pp. 65-75

National Security Council (1982). *12 September in Turkey: Before and After*. Ankara

Oğuz, Cem M. (2010). "Romantizm ve Carl Schmitt'de Desizyonizm Fikri" in *Günümüzde Yeni Siyasal Yaklaşımlar: Eleştiriler, Farklılıklar, Çözüm Arayışları*. Ankara: Doğu Batı, pp.49-92

Oran, Baskın (1999). *Atatürk Milliyetçiliği: Resmi İdeoloji Dışı Bir İnceleme*. Ankara: Bilgi Yayınevi

Öcal, Samil (2008). "From "the Fetwa" to "Religious Questions": Main Characteristics of Fetwas of the Diyanet" in *The Muslim World*, Vol. 98, pp. 324-334

Ökçesiz, Hayrettin (2008). " 'Düşman Ceza Hukuku' Düşüncesinin Eleştirisi" in *Terör ve Düşman Ceza Hukuku*. Ünver, Yener (ed). Ankara: Seçkin Yayınları, pp. 553-561

Ökçesiz, Hayrettin (2008a). " 'Düşman Ceza Hukuku' Düşüncesine Eleştirel Bir Bakış-II" in *Terör ve Düşman Ceza Hukuku*. Ünver, Yener (ed). Ankara: Seçkin Yayınları, pp. 561-571

Öniş, Ziya (2013). "Sharing Power: Turkey's Democratization Challenge in the Age of the AKP Hegemony" in *Insight Turkey*, Vol. 15, No. 2, pp. 103-122

Özbudun, Ergun (2007). "Democratization Reforms in Turkey, 1993–2004" in *Turkish Studies*, Vol. 8, No. 2

Özbudun, Ergun (2007a). "Türk Anayasa Mahkemesinin Yargısal Aktivizmi ve Siyasal Elitlerin Tepkisi" in *Ankara Üniversitesi Siyasal Bilimler Fakültesi Dergisi*, Vol. 62, No. 3, pp. 257-268

Özbudun, Ergun; Gençkaya, Ömer Faruk (2010). *Türkiye'de Demokratikleşme ve Anayasa Yapımı Politikası.* İstanbul: Doğan Kitap

Özcan, Faruk (2012). *4+4+4 İmam-Hatip: Tüm Tartışmaların Odağı Okul*. İstanbul: Toplumsal Yayıncılık

Özdalga, Elisabeth (1998). *The Veiling Issue: Official Secularism and Popular Islam in Modern Turkey*. Curzon

Özdemir, Hikmet (1989). *Rejim ve Asker,* İstanbul: Afa Yayınları

Özek, Çetin (1967). *Siyasi İktidar Düzeni ve Fonksiyonları Aleyhine Cürümler*. İstanbul: İstanbul Üniversitesi Yayınları No: 1251

Özen, Muharrem (2009). "Yargı Bağımsızlığını Sağlamaya Yönelik Güvenceler ve Bağımsızlığı Zedeleyen Düzenleme ve Uygulamalar" in *Norm Koyma ve Hüküm Verme.* Kırca, Çiğdem; Uygur, Gülriz; Akın, Levent (ed). Ankara: Ankara Üniversitesi Yayınları No. 279

Özocak; Gürkan (2011). "Türkiye'de Siyasi İktidarin Mizahla İmtihani: İfade Özgürlüğü ve Karikatür" in *Türkiye Barolar Birliği Dergisi*, Vol. 94, pp: 259-294

Öztürk, Metin (1993). *Ordu ve Politika.* Ankara: Gündoğan Yayınları

Parla, Taha (2007). *Türkiye'de Anayasalar: Son Değişikliklerle Genişletilmiş Yeni Baskı*. İstanbul: İletişim Yayınları

Parla, Taha (2009). *Türkiye'nin Siyasal Rejimi: 1980-1989*. İstanbul: Deniz Yayınları

Pereira, Antony W. (2008). "Of Judges and Generals: Security Courts under Authoritarian Regimes in Argentina, Brazil, and Chile" in *Rule by Law: The Politics of Courts in Authoritarian Regimes*. Ginsburg, Tom; Mustafa, Tamir (ed). New York: Cambridge University Press, pp. 23-58

Pound, Roscoe (1954). *An Introduction to the Philosophy of Law.* London: Yale University Press, London

Preuss, Ulrich K. (2013). "Constitutionalism in Fragmented Societies: The Integrative Function of Constitutions" in *Political Theory: Critical Theory and Democracy : Civil Society, Dictatorship, and Constitutionalism in Andrew Arato's Democratic Theory*. Peruzzotti, Enrique; Plot, Martín (ed). New York: Routledge, pp. 41-56

Raz, Joseph (1979). *The Authority of Laws: Essays on Law and Morality*. Oxford: Clarendon Press

Referandumdan Sonra HSYK: HSYK'nın Yeni Yapısı ve İşleyişine Dair Yuvarlak Masa Toplantısı (September 2012). TESEV Yayınları: İstanbul

Rodrik, Dani; Doğan, Pınar (2010). *Balyoz: Bir Darbe Kurgusunun Belgeleri ve Gerçekler*. İstanbul: Destek Yayınevi

Rosenau, Henning (2008).“Jakobs’un Düşman Ceza Hukuku Kavramı; Hukukun Düşmanı” in *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, Vol. 57, No.4, pp. 391-402

Rousseau, Jean-Jacques (1968). *The Social Contract*. London: Penguin Books

Rumpf, Christian (1994). *Türk Anayasa Hukukuna Giriş*. Ankara

Salman, Yüksel (2008). “The Publishing Activities of the PRA” in *The Muslim World*, Vol. 98, pp. 313-323

Salter, Michael G. (2012). *Carl Schmitt: Law as Politics, Ideology and Strategic Myth*. Oxon: Routledge

Sancar, Mithat (2000). *“Devlet Aklı” Kıskacında Hukuk Devleti*. İstanbul: İletişim Yayınları

Savaş, Vural (2008). *AKP Çoktan Kapatılmalıydı*. Ankara: Bilgi

Satana, Nil S. (2012). “The Kurdish Issue in June 2011 Elections: Continuity or Change in Turkey’s Democratization?” in *Turkish Studies*, Vol. 13, No. 2, pp. 169-189

Scheuerman, William E. (1996). “Carl Schmitt’s Critique of Liberal Constitutionalism” in *The Review of Politics*, Vol. 58, No. 2, pp. 299-322

Scheuerman, William E. (1999). *Carl Schmitt: The End of Law*. Maryland: Rawman and Little Publishers

Schmitt, Carl (1985). *The Crisis of Parliamentary Democracy*. Massachusetts: MIT Press

Schmitt, Carl (1985a). *Political Theology: Four Chapters on the Concept of Sovereignty*. Cambridge: MIT Press

Schmitt, Carl (1986). *Political Romanticism*. Massachusetts: The MIT Press

Schmitt, Carl (2000). "Statute and Judgment" in *Weimar: A Jurisprudence of Crisis*. Jacobson, Arthur J.; Schlink, Bernhard. (ed). California: University of California Press, pp. 63-65

Schmitt, Carl (2000a). "Liberal Rule of Law" in *Weimar: A Jurisprudence of Crisis*. Jacobson, Arthur J.; Schlink, Bernhard. (ed). California: University of California Press, pp. 294-300

Schmitt, Carl (2001). *State, Movement, People: The Triadic Structure of the Political Unity*. Draghici, Simona (ed). Corvallis: Plutarch Press

Schmitt, Carl (2004). *Legality and Legitimacy*. Durham: Duke University Press

Schmitt, Carl (2004a). *On the Three Types of Juristic Thought*. Westport, Connecticut: Praeger

Schmitt, Carl (2008). *Constitutional Theory*. Durham: Duke University Press

Schochet, Gordon J. (1979). "Introduction: Constitutionalism, Liberalism and the Study of Politics" in *Constitutionalism*. Pennock, J. Roland; Chapman, W. John (ed). New York: New York University, p. 1-19

Schwab, George (1970). *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt Between 1921-1936*. Berlin: Duncker and Humblot

Selçuk, Sami (1998). *Zorba Devletten Hukukun Üstünlüğüne*. Ankara: Yeni Türkiye Yayınları

Sellers, Mortimer (2010). "An Introduction to the Rule of Law in Comparative Perspective" in *The Rule of Law in Comparative Perspective*. Sellers, Mortimer; Tomaszewski, Tadeusz (ed). London: Springer, p. 1-11

Sevinç, Murat (2009). "AKP'nin Kapatılma Davası" in *AKP Kitabı: Bir Dönüşümün Bilançosu*. Duru, Bülent; Uzgel, İlhan (ed.) İstanbul: Phoneix Kitabevi, pp. 264-279

Sevinç, Murat (December 2012). "Kürt Sorunu ve Anayasa" in *Birgün Kitap: Anayasaların Gölgesi*. No. 116, pp. 12-14

Shambayati, Hootan (2004). "A Tale of Two Mayors: Courts and Politics in Iran and Turkey" in *International Journal of Middle East Studies*, Vol. 36, No. 2, pp. 252–275

Shambayati, Hootan (2008). "Courts in Semi-Democratic/Authoritarian Regimes: The Judicialization of Turkish (and Iranian) Politics" in *Rule by Law: The Politics of Courts in Authoritarian Regimes*. Ginsburg, Tom; Mustafa, Tamir (ed). New York: Cambridge University Press, pp. 283-304

Shambayati, Hootan; Sütçü, Güliz (2012). "The Turkish Constitutional Court and the Justice and Development Party (2002–09)" in *Middle Eastern Studies*, Vol. 48, No. 1, pp. 107–123

Shankland, David (2002). "Religion," in *Turkish Transformation: New Century, New Challenges*. Beeley, Brian W. (ed). London: The Eothen Press

Shapiro, Martin; Sweet, Alec Stone (2002). *On Law, Politics, and Judicialization*. New York: Oxford University Press

Siaroff, Alan (2005). *Comparing Political Regimes: A Thematic Introduction*. Peterborough, Ont: Broadview Press

Sinn, Arndt (2008). "Modern Suç Kovuşturması-Düşman Ceza Hukuku Yolunda mı?" in *Terör ve Düşman Ceza Hukuku*. Ünver, Yener (ed). Ankara: Seçkin Yayınları, pp. 611- 633

Soyer Güleç, Sesim (2012). "Tutuklamaya İlişkin Temel Sorunlar ve Avrupa İnsan Hakları Mahkemesinin Güncel Kararları Çerçevesinde Adli Kontrol Konusunda Bazı Tespit ve Değerlendirmeler" in *Türkiye Barolar Birliği Dergisi*, No. 98, pp. 25-74

Soysal, Mümtaz (1986). *Anayasanın Anlamı.* İstanbul: Gerçek Yayınları

Stackelberg, Roderick (2007). *The Routledge Companion to Nazi Germany*. New York: Routledge

Stolleis, Michael (1998). *The Law under the Swastika: Studies on Legal History in Nazi Germany*. Chicago: University of Chicago Press

Şen, Serdar (1995). *Refah Partisi'nin Teori ve Pratiği: Refah Partisi, Adil Düzen ve Kapitalizm*. İstanbul: Sarmal Yayınevi

Şen, Mustafa (2010). "Transformation of Turkish Islamism and the Rise of the Justice and Development Party" in *Turkish Studies*, Vol. 11, No. 1, pp. 59-84

Şen, Ersan (2010a). in *4. Yılında CMK ve Uygulamaları*. İstanbul: İstanbul Barosu Yayınları

Tamahana, Brian (2004). *On the Rule of Law: History, Politics, Theory*. Cambridge: Cambridge University Press

Taner, Fahri Gökçen (2010). "Cumhurbaşkanı Tarafından Anayasa Mahkemesi'ne Atanmak Üzere Yargıtay ve Danıştay Genel Kurulları Tarafından Teklif Edilecek Adayların Seçim Usulünde Yapılmak İstenilen Değişiklik" in *2010 Anayasa Değişiklikleri Çerçevesinde Yargı Bağımsızlığı*. Öztürk, Bahri; İlkiz, Fikret; Kocasakal, Ümit (ed.). Ankara: Seçkin Yayıncılık, pp. 73-78

Tank, Pınar (2005). "Political Islam in Turkey: A State of Controlled Secularity" in *Turkish Studies*, Vol. 6, No. 1, pp. 3-19

Tanör, Bülent (2001). "Laiklik, Cumhuriyet ve Demokrasi" in *Laiklik ve Demokrasi*. Kaboğlu, İbrahim (ed). Ankara: İmge Yayınları, pp. 23-34

Tanör, Bülent; Yüzbaşıoğlu, Necmi (2001a). *1982 Anayasasına Göre Türk Anayasa Hukuku*. İstanbul: Yapı Kredi Yayınları

Tanrıkulu, Sezgin (2010). "Özel Yetkili Mahkemelerin İşleyişi ve Uygulama" in *Özel Yetkili Mahkemeler (CMK m. 250)*. Ankara: Türkiye Barolar Birliği Yayınları No.191, pp.57-81

Tarhanlı, İştar B. (1993). *Müslüman Toplum "Laik" Devlet: Türkiye'de Diyanet İşleri Başkanlığı*. İstanbul: Afa Yayınları

Tebbit, Mark (2005). *Philosophy of Law: An Introduction*. Oxon: Routledge

Tezcür, Güneş Murat (2009). "Judicial Activism in Perilous Times: The Turkish Case" in *Law and Society Review,* Vo. 43, No. 2, pp. 305-336

Timuroğlu, Vecihi. *12 Eylül'ün Eğitim ve Kültür politikası: Türk-İslam Sentezi*. Şahin Matbaası

Toktaş, Şule; Kurt, Ümit (2010). "The Turkish Military's Autonomy, JDP Rule and the EU Reform Process in the 2000s: An Assessment of the Turkish Version of Democratic Control of Armed Forces (DECAF)" in *Turkish Studies,* Vol. 11, No. 3

Toprak, Binnaz; Daver, Bülent (1981). *Islam and Political Development in Turkey*. Leiden: E.J. Brill

Toprak, Binnaz (1987). "The Religious Right" in *Turkey in Transition: New Perspectives*. C. Schick, İrvin; Tonak, Ertuğrul Ahmet. (ed). New York: Oxford University Press, pp. 218-236

Toprak, Binnaz (2005). "Islam and Democracy in Turkey" in *Turkish Studies,* Vol. 6, No. 2, pp. 167-186

Treviño, Javier (2009). "On Hans Kelsen, General Theory of Law and State" in *Classical Writings in Law and Society*. Treviño, Javier (ed). New Jersey: Transaction Publishers, pp.231-247

Tunay, Muharrem (1993). "The Turkish New Right's Attempt at Hegemony" in *The Political and Socioeconomic Transformation of Turkey*. Eralp, Atilla; Tunay, Muharrem; Yeşilada, Birol (ed). Westport, Connecticut: Praeger, pp. 11-30

Turam, Berna (2007). *Between Islam and State: The Politics of Engagement*. California: Stanford University Press

Türkiye 2011 Yılı İlerleme Raporu (October 2011). Avrupa Komisyonu, Brüksel, SEC 1201

Türk Tabipleri Birliği (2012). *Hopa Raporu*. Ankara: Türk Tabipleri Birliği Yayınları
Uzer, Uğur (1984). "Ceza Hukukumuzda 'Siyasal Suç' "in *Ankara Barosu Dergisi*, No. 6, pp. 881-886

Vincent, Gilbert (2011). "Din ve Ahlak, Devlet ve Bilim: Laikliğin Kaynakları" in *Tartışılan Laiklik: Fransa ve Türkiye'de İlkeler ve Algılamalar*. Akgönül, Samim (ed). İstanbul: Bilgi Üniversitesi Yayınları, pp. 23-41

(Vural) Dinçkol, Bihterin (1991). *1982 Anayasası Çerçevesinde ve Anayasa Mahkemesi Kararlarında Laiklik*. İstanbul: Kazancı Kitap

Wachsmann, Nikolaus (2004). *Hitler's Prisons: Legal Terror in Nazi Germany*. New Haven: Yale University Press

Warhola, James W.; B. Bezci, Egemen (2010). "Religion and State in Contemporary Turkey: Recent Developments in Laiklik" in *Journal of Church and State*, Vol. 52, Number 3, pp. 427-454

Yarar, Betül (1998). "1980'ler Türkiye'sinde Yeni Sağın Yükselişi" in *Mürekkep*, No. 10-11, pp. 49-69

Yavuz, Hakan (2003). *Islamic Political Identity in Turkey*. New York: Oxford University Press

Yavuz, Hakan (2009). *Secularism and Muslim Democracy in Turkey*. New York: Cambridge University Press

Yazıcı, Serap (2009). *Yeni Bir Anayasa Hazırlığı ve Türkiye: Seçkincilikten Toplum Sözleşmesine*. İstanbul: Bilgi Üniversitesi Yayınları

Yazıcı, Serap (2009a). *Demokratikleşme Sürecinde Türkiye*. İstanbul: Bilgi Üniversitesi Yayınları

Yıldız, Ahmet (2003). "Politico-religious Discourse of Political Islam in Turkey: The Parties of National Outlook" in *The Muslim World*, Vol. 93, pp. 187-209

Yıldız, Ahmet (2008). "Problematizing the Intellectual and Political Vestiges: From "Welfare" to "Justice and Development" in *Secular and Islamic Politics in Turkey: The Making of Justice and Development Party*. Cizre, Ümit (ed.). Oxon: Routledge, pp. 41-62

Yılmaz, İhsan (2005). "State, Law, Civil Society and Islam in Contemporary Turkey" in *The Muslim World*, Vol. 95, pp. 385-411

Yokuş, Sevtap (2001)."Türk Anayasa Mahkemesi'nin ve Avrupa İnsan Hakları Mahkemesi'nin Siyasi Partilere Yaklaşımı" in *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, Vol. 50, No.04, pp. 107-128

Yücel, Mustafa T. (2010). "Tutuklama Paradoksu" in *Türkiye Barolar Birliği Dergisi*, No. 91, pp. 291-299

Yükseker, Deniz; Gökşen, Fatoş; Alnıaçık, Ayşe (2012). "Eğitimin Kalitesizliğini, Sosyo-ekonomik Eşitsizlikleri ve Cinsiyet Ayrımını Derinleştirme Modeli mi? 4+4+4 Yasası" in *Birikim*, No. 284, pp. 48-56

Zırh, Besim Can (2012).“Yerelden Merkeze Erdoğan İktidarının İkinci On Yılında: Türkiye’de Cemevleri Sorunu” in *Birikim*, No. 284, pp. 48-56

Zimmermann, Moshe (1998). “Foreword” in *The Law under the Swastika: Studies on Legal History in Nazi Germany*. Stolleis, Michael. Chicago: University of Chicago Press

Zizek, Slovaj (1999). “Carl Schmitt in the Age of Post-politics” in *The Challenge of Carl Schmitt*. Mouffe, Chantal (ed). London: Verso, pp. 18-38

Zolo, Danilo (2007). “The Rule of Law: A Critical Reappraisal” in *The Rule of Law: History, Theory and Criticism*. Costa, Pietro; Zolo, Danilo (ed). Dordrecht: Springer, p. 3-73

Web Sources

AKP’nin KHK’leri ve TMMOB (2011). Ankara: TMMOB Publications. Last date accessed: 06.12.2012

Ak Parti Başkanlık Sistemi Önerisi, Tam Metin, www.ismetberkan.blogspot.com/2012/11/ak-parti-baskanlk-sistemi-onerisi-tam.html. Last date accessed: 18.02.2013

Aksoy, Onur (February 2013). “Başkanlık Sistemi, İmralı Süreci ve Cemaat”, www.sendika.org. Last date accessed: 17.07.2013

Alpay, Şahin (February 2013). “AKP'nin Başkanlık Sistemi Önerisi Reddedilmeli”, www.t24.com.tr. Last date accessed: 17.07.2013

Ananicz, Szymon, (September 2012). “Turkey: The Sentence in the Balyoz case”, www.osw.waw.pl/. Last date accessed: 23.12.2012

Anayasa Reformu Aracılığı ile Türkiye'nin Denge ve Denetleme Sisteminin Güçlendirilmesi, (February 2012). İstanbul Politika Merkezi, www.ipc.sabanciuniv.edu.tr. Last date accessed: 09.05.2012

Aydın, Ali Rıza (May 2012). "AKP'li ve KHK'li Yasama Düzeninde Yaşamak", www.haber.sol.org.tr. Last date accessed: 28.07.2012

Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun Tasarısı ile İlgili Yargıtay Başkanlığı'nın Görüşü, www.yargitay.gov.tr. Last date accessed: 14. 11. 2013

Çağaptay, Soner (Ferbruary 2010). "What's Really behind Turkey's Coup Arrests?" in *Foreign Policy*, www.foreignpolicy.com. Last date accessed: 10.03.2012

Çalışkan, Koray (January 2013). "Türkiye Cumhuriyeti Polis Devleti", *Radikal*, www.radikal.com.tr . Last date accessed: 19.08.2013

Dubay, Carolyn A. (Fall 2010). "The 2010 Reforms to Turkey's Constitutional Court: A Rule of Law Review" in *International Judicial Monitor*, www.judicialmonitor.org. Last date accessed: 03.01.2011

Ergin, Sedat (October 2012). "Erdoğan'ın En Zor Kararı Yaklaşıyor", *Hürriyet*, www.hurriyet.com.tr. Last date accessed: 12.06.2013

Ertekin, Orhan Gazi (March 2011). "Terörle Mücadele Kanunu'na Göre Gazetecilik Yapmak Suç*!" interview by Ayça Söylemez*, www.bianet.org. Last date accessed: 20.01.2012

Ertekin, Orhan Gazi (March 2011a) "Türkiye'nin İkinci Anayasası Terörle Mücadele Kanunu", *interview by Ayça Söylemez*, www.bianet.org. Last date accessed: 20.01.2012

Ertekin, Orhan Gazi (November 2011). "İddianameler Çağı", www.sendika.org . Last date accessed: 20.01.2012

Ertekin, Orhan Gazi (January 2012). "Yargıda Reform değil, Operasyon Yapılıyor", *Birgün*, www.birgun.net. Last date accessed: 25.01.2012

Ertekin, Orhan Gazi (December 2012). "Adaletin İmkansızlığıyla Karşı Karşıyayız" *interview by Ekin Karaca*, www.bianet.org. Last date accessed: 18.04.2013

Ertekin, Orhan Gazi (February 2013). "Biri Bizi Bu Cemaatin Yargısından Kurtarmalı", www.t24.com.tr. Last date accessed: 18.04.2013

Ertekin, Orhan Gazi (February 2013a). "Cemaat Ordu Gibi", *Cumhuriyet*, www.cumhuriyet.com.tr. Last date accessed: 18.04.2013

Göktaş, Kemal (June 2011). "Hapisteki 9 Vekil Meclis'e Nasıl Girecek?", *Vatan*, www.haber.gazetevatan.com . Last date accessed: 23. 06.2013

Hoşgör, Şebnem (November 2012). "AKP'nin Önerisinde Bakın Neler Var?", *Vatan*, www.haber.gazetevatan.com. Last date accessed: 05.01.2013

İlkiz, Fikret."KCK Davaları ve Yargı", pp.41-45, www.tr.boell.org. Last date accessed: 23.06.2013

İlkiz, Fikret (July 2012). "11 bin 679 sayfalık KCK iddianamelerinin özeti ne?", *interview by Hazal Özvarış*, www.t24.com.tr. Last date accessed: 23. 06.2013

İlkiz, Fikret (September 2012) "Adaletiniz Kaç Kilometre Uzakta?", www.bianet.org. Last date accessed: 23. 06.2013

Jenkins, Gareth (2009). "Defense Against Documents: The Turkish Military's Rearguard Action" in *Turkey Analyst*, Vol. 2, No. 21, www.silkroadstudies.org. Last date accessed: 14.10.2010

Jenkins, Gareth (2009b). "Third Ergenekon Indictment Reinforces Concerns about Turkish Judicial System" in *Turkey Analyst*, Vol. 2, No. 17, www.silkroadstudies.org. Last date accessed: 14.10.2010

Jenkins, Gareth (2009c). "Defense against Documents: the Turkish Military's Rearguard Action" in *Turkey Analyst*, Vol. 2, No. 21, www.silkroadstudies.org. Last date accessed: 14.10.2010

Jenkins, Gareth (2010). "Turkey's Constitutional Amendments: One Step Forward, Two Steps Back?" in *Turkey Analyst*, Vol. 3, No. 6, www.silkroadstudies.org. Last date accessed: 14.10.2010

Jenkins, Gareth (2010a). "Changing of the Guard: Judicial Reforms Reinforce Concerns about the AKP's Increasing Authoritarianism" in *Turkey Analyst*, Vol. 3, No. 19, www.silkroadstudies.org. Last date accessed: 14.10.2010

Jenkins, Gareth (2010b). "The Devil in the Detail: Turkey's Ergenekon Investigation Enters a Fourth Year" in *Turkey Analyst*, Vol. 3, No. 13, www.silkroadstudies.org. Last date accessed: 14.10.2010

Jenkins, Gareth (2010c). "Turkey's New 'Deep State': A Movement without a Mover" in *Turkey Analyst*, Vol. 3, No. 15, www.silkroadstudies.org. Last date accessed: 14.10.2010

Jenkins, Gareth (2011). "From Politicization to Monopolization? The AKP's New Judicial Reforms" in *Turkey Analyst*, Vol. 4, No. 3, www.silkroadstudies.org. Last date accessed: 22.05.2011

Jenkins, Gareth (2011a). "The Latest KCK Arrests: One Step Closer to Breaking Point" in *Turkey Analyst*, Vol. 4, No. 21, www.silkroadstudies.org. Last date accessed: 22.05.2011

Jenkins, Gareth (2012). "Erdoğan's Volatile Authoritarianism: Tactical Ploy or Strategic Vision?" in *Turkey Analyst*, Vol. 5, No. 23, www.silkroadstudies.org. Last date accessed: 15.06.2013

Karakaya-Stump, Ayfer (August 2012). "Diyanet, Cemevleri ve Tarih Dışılık", *Radikal*, www.radikal.com.tr. Last date accessed: 20.12.2012

Karaveli, Halil M. (2008). "Turkish Military and Islamists: A Grand Reconciliation?" in *Turkey Analyst*, www.silkroadstudies.org. Last date accessed: 06.09.2010

Karaveli, Halil M. (2009). "A Growing Convergence of Perceptions: The Turkish Military and the AKP" in *Turkey Analyst*, Vol. 2, No. 17, www.silkroadstudies.org. Last date accessed: 06.09.2010

Karaveli, Halil M. (2009a). "Turkey Divided over the Meaning of the Ergenekon Conspiracy" in *Turkey Analyst*, www.silkroadstudies.org. Last date accessed: 06.09.2010

Karaveli, Halil M. (2010). "After Military Tutelage: What will the Emerging Turkey Look Like?" in *Turkey Analyst*, Vol. 3, No. 22, www.silkroadstudies.org. Last date accessed: 06.09.2010

Karaveli, Halil M. (2011). "Seeking to Redesign Turkey, The AKP Resurrects State Tutelage" in *Turkey Analyst*, Vol. 4, No. 1, www.silkroadstudies.org. Last date accessed: 06.09.2010

Kuru, Ahmet. *Reinterpretation of Secularism in Turkey: The Case of the Justice and Development Party*, www-rohan.sdsu.edu. Last date accessed: 16.07.2014

Kürkçü, Ertuğrul (June 2011). "Polis Fezlekesi Yargı Kararı Haline Geliyor" *interview by Şahin Artan*, www.bianet.org. Last date accessed:11.03.2014

Oran, Baskın (October 2007) "Altay Tokat Paşa Olayının Şimdiki Öyküsü", *Radikal*, www.radikal.com.tr. Last date accessed: 18.10.2011

Ozansü, Cemil (September 2012). "Siyasi Davalara, Adalet Penceresinden Bakmak Anlamsız", *interview by Ekin Karaca*, www.bianet.org. Last date accessed: 20.12.2013

Önderoğlu, Erol (May 2011). "BIA 2010 Annual Media Monitoring Report", www.bianet.org. Last date accessed:16.07.2013

Özsu, Faruk (October 2006). "Yargıcın 301'le İmtihanı", *Radikal*, www.radikal.com.tr Last date accessed: 24.03.2013

Özsu, Faruk (January 2011). "İşler Değişti", *Radikal*, www.radikal.com.tr. Last date accessed: 24.03.2013

Özsu, Faruk (May 2011). "Ciddiyet İlanının Tam Zamanı", *Radikal*, www.radikal.com.tr . Last date accessed: 24.03.2013

Özsu, Faruk (September 2011). "Müsterih Olun, Yargı Değişmedi", *Radikal*, www.radikal.com.tr . Last date accessed: 24.03.2013

Özsu, Faruk (December 2011). "Yeni HSYK ve YARSAV Düeti", *Radikal*, www.radikal.com.tr . Last date accessed: 24.03.2013

Özsu, Faruk (March 2012). "Sermayeden Yargıya Babacan Ayar", *Radikal*, www.radikal.com.tr. Last date accessed: 24.03.2013

Özsu, Faruk (July 2012). "Yargı ve Entelektüeller", *Radikal*, www.radikal.com.tr. Last date accessed: 24.03.2013

Özsu, Faruk (January 2013). "Balyoz: 'Yeni Yargı'nın Çöküşü", *Radikal*, www.radikal.com.tr . Last date accessed: 24.03.2013

Özsu, Faruk (March 2013). "Eyvah, Yine Yargı Reformu!", *Radikal*, www.radikal.com.tr . Last date accessed: 24.03.2013

Ressel, James (2009). *Political Justice: A brief outline of Kirchheimer's sense of Political Justice.* Derived from www.academia.edu/181179/POLITICAL_JUSTICE_A_brief_outline_of_Kirchheimers_sense_of_Political_Justice . Last date accessed: 05.11.2010

Sevinç, Murat (February 2013). "Anayasacılığımızda Dip Noktası", *Radikal İki*, www.radikal.com.tr. Last date accessed:10.07.2013

Silber Storey, Jenna (2006). *Carl Schmitt on the Significance of the Political*. www.citation.allacademic.com . Last date accessed: 12.07.2010

Sözüer, Adem (February 2013). "Tutuklamaların Yüzde 99'u Hukuksuz, Hukuk Zehirlendi ve Zayıflatıldı!", www.t24.com.tr . Last date accessed: 10.07.2013

Yurtcan, Erdener (April 2011). "5190 sayılı Ceza Muhakemeleri Usulü Kanununda Değişiklik Yapılması ve Devlet Güvenlik Mahkemelerinin Kaldırılması Hakkında Kanun'a İlişkin Rapor", www.yeniyaklasimlar.org. Last date accessed:10.07.2013

News (sorted according to date)

"Meclis'ten Cemevi Talebine 'Camili' Savunma", www.dersimnews.com. Last date accessed: 15.06.2012

"Diyanet: Cemevi ibadethane değildir", 11.01.2005, www.alevihaberajansi.com . Last date accessed: 15.06.2012

"Rejim Büyük Tehlike Altında", 14.04.2007 *Hürriyet*, www.hurriyet.com.tr. Last date accessed: 27.09.2011

"301 Sorununu TBMM Değil, Yargıçlar Çözer", 29.12.2007 *Radikal*, www.radikal.com.tr . Last date accessed: 17.02.2012

Selçuk, İlhan "Ergenekon'un Tarihi ve Coğrafyası...", 09.01.2009 *Cumhuriyet*, www.cumhuriyet.com.tr . Last date accessed: 17.02.2012

"Tutuklu 104 "KCK" Şüphelisinin Dosyası AİHM'de", 17.05.2010, www.bianet.org. Last date accessed: 09.06.2013
Avcı, Bekir "KCK Davasının Yargıcı TRT", 30.10.2010, www.bianet.org . Last date accessed: 09.06.2013

Kılıç, Züleyha (October 2010). "Yargıçlar Kürtçeyi Görmezden Geldi, Türkçeyi Dayattı" *interview by Semra Pelek*, www.bianet.org . Last date accessed: 09.06.2013

“KCK Davasında Kürtçe'ye Geçit Yok”,10.11.2010, www.bianet.org . Last date accessed: 09.06.2013

“"Bilinmeyen Dil"den, "Kürtçe Olduğu Düşünülen Dil"e”, 13.01.2011, www.bianet.org . Last date accessed: 09.06.2013

“KCK Sanıkları "Gruplar Halinde" Duruşmalara Alınacak”, 03.02.2011, www.bianet.org. Last date accessed: 09.06.2013

“Top Turkish Judges Clash over Judicial Law”, 16.02.2011, *Journal of Turkish Weekly,* Political Science Complete. Last date accessed: 18.08.2012

“KCK İddianamesi Kabul Edildi: Suçları: Ders Vermek!”, 03.04.2012, www.bianet.org . Last date accessed: 09.06.2013

“KCK Davasında Bir Tahliye”, 13.04.2011, www.bianet.org . Last date accessed: 09.06.2013

“Kürtçe Savunma Talebi KCK İddianamesine Girdi”, 21.04.2011, www.bianet.org . Last date accessed: 09.06.2013

“Hopa Davası Başladı”, 04.06. 2011, www.sendika.org . Last date accessed: 18.09.2012

Söylemez, Ayça ”Polis Devleti Olduk, İşkence ve Kötü Muamele Arttı”, 06.06.2011, www.bianet.org . Last date accessed: 02.07.2013

Karaca, Ekin “Hopa'nın Artçı Gözaltıları”, 16.06.2011, www.bianet.org. Last date accessed: 18.09.2012

Söylemez, Ayça “Üç Yeni Özel Yetkili Ağır Ceza: ‘Kapatılması Gerekirken Yenilerini Açıyorlar’ ”, 18.07.2011, www.bianet.org . Last date accessed: 02.07.2013

Söylemez, Ayça “Hopalılara "Olmayan Örgütün Propagandasından" Dava”, 25.08.2011, www.bianet.org. Last date accessed: 18.09.2012

“Ankara’nın Hopa Davası Başladı”, 19.06.2012, www.sendika.org . Last date accessed: 18.09.2012

Benli, Mesut Hasan. “Kısa Metraj Hopa İddianamesi” 27.07.2012 *Radikal,* www.radikal.com.tr . Last date accessed: 18.09.2012

“KCK Davası Ertelendi, Savunma Avukatlarına Suç Duyurusu”, 03.08.2011, www.bianet.org . Last date accessed: 09.06.2013

“Savcı KCK Davasının Başka İlde Sürmesini İstedi”, 10.08.2011, www.bianet.org . Last date accessed: 09.06.2013

Karaca, Ekin “ ‘İmamın Ordusu Sloganı Attın mı?’ Soruşturması”, 18.08.2011, www.bianet.org . Last date accessed: 18.09.2012

Söylemez, Ayça “Hopalılara ‘Olmayan Örgütün Propagandasından’ Dava”, 25.08.2011, www.bianet.org . Last date accessed: 18.09.2012

“Olmayan Örgüt Davası Başlıyor”, 14.09.2011, www.bianet.org . Last date accessed: 18.09.2012

“KCK Operasyonu: 137 Gözaltı”, 04.10.2011, www.bianet.org . Last date accessed: 09.06.2013

Tahaoğlu, Çiçek “İstanbul'da 92 Kişi Gözaltında”, 04.10.2011, www.bianet.org . Last date accessed: 09.06.2013

Arhan, Faruk “KCK Operasyonu ve Zaman'ın Empati Cinayeti!”, 05.10.2011, www.bianet.org . Last date accessed: 09.06.2013

"KCK'de Şimdi de Avukatlar Gözaltında", 22.11.2011, www.bianet.org . Last date accessed: 09.06.2013

"Sorularla Ankara-Hopa Davası", 07.12.2011, www.sendika.org . Last date accessed: 18.09.2012

Söylemez, Ayça "40 Yıllık Sanık: 'THKP-C Ayağa Kalk!' ", 07.12.2011, www.bianet.org. Last date accessed: 18.09.2012

Söylemez, Ayça "Ankara'da İkinci Hopa Davası", 16.12.2011, www.bianet.org. Last date accessed: 18.09.2012

"Köşk'ten 4+4+4 Açıklaması", 28.02.2012 *Sabah*, www.sabah.com.tr. Last date accessed: 13.05.2013

"KCK İddianamesi Açıklandı: Ersanlı'nın KCK Yöneticisi Olduğu İddia Ediliyor", 19.03.2012, www.bianet.org. Last date accessed: 09.06.2013

"AKP Tutuklu Vekillerin Tutukluluk Halinin Devamına Karar Verdi", 15.05.2012, www.bianet.org. Last date accessed: 09.06.2013

"Taşı silah sayan Hopa savcısı terfi etti", 16.05.2012, wwww.haber.sol.org.tr. Last date accessed: 18.09.2012

"Military Took Needed Steps in Uludere: Turkish PM", 23.05.2012 *Hürriyet*, www.hurriyetdailynews.com. Last date accessed: 23.11.2012

"52 DTP'li için İlk İddianame Hazırlandı", 28.05.2012, www.bianet.org. Last date accessed: 09.06.2013

Karaca, Ekin "Court Rules to Release Two Perpetrators of 1978 Massacre", 11.07.2012, www.bianet.org. Last date accessed: 23.11.2012

"Şike Savcısının Özel Yetkileri Alındı", 13.07.2012 *Milliyet,* www.milliyet.com.tr. Last date accessed: 23.11.2012

"Türk İntikam Tugayı Dışında Herşey Örgüt", 23.07.2012, *Milliyet,* www.milliyet.com.tr. Last date accessed: 23.11.2012

"3.Yargı Paketi", 01.08.2012, www.ankarastrateji.org. Last date accessed:.12.05.2013

"Başbakan'ın Konuşmasında Yeni bir Şey Yok", 30.09.2012 *Radikal,* www.radikal.com.tr. Last date accessed: 04.10.2013

"Doğan Grubu Maliye'ye Borcunu 18 Ay Erken Kapattı", 30.09.2012 *Radikal,* www.radikal.com.tr. Last date accessed: 17.08.2013

"Peygamber ve Cumhurbaşkanı'na Hakaret Davası Başladı", 12.12.2012 *Radikal,* www.radikal.com.tr. Last date accessed: 12.05.2013

"HRW: Uludere'de Adalet Gecikiyor", 27.12.2012 *BBC,* www.bbc.uk/turkce. . Last date accessed: 12.05.2013

"Hopa Davası 14 Ocak'ta", 12.01.2013, www.yurtgazetesi.com.tr. Last date accessed: 19.10.2013

"Danıştay'ın Başörtüsü Kararı Benim İçin de Emsal Olsun", 15.01.2013 *Zaman,* www.zaman.com.tr. Last date accessed:.11.09.2013

"Türban Adliyede", 25.01.2013 *Milliyet,* www.milliyet.com.tr. Last date accessed: 11.09.2013

"Yargıtayın "Tek Çatı" İtirazı", 21.02.2013 *Radikal,* www.radikal.com. Last date accessed: 08.04.2013

"Başbakan Erdoğan'dan Sivas Davası Yorumu", 13.03.2012 *Hürriyet*, www.hurriyet.com.tr . Last date accessed:21.10.2013

"Investigation of Turkish Intelligence head won't proceed, says prosecutor", 22.03.2013 *Hürriyet*, www.hurriyetdailynews.com. Last date accessed: 15.06.2013

"Ergenekon Coup Plot Case Convict Lieutenant Çelebi Sent to Prison", 15.08.2013, www.hurriyetdailynews.com . Last date accessed: 23.10.2013

APPENDICES

A. TURKISH SUMMARY

Bu çalışma, Adalet ve Kalkınma Partisi (AKP) hükümetleri ile anayasal devlet arasındaki karşılıklı etkileşimi incelemektedir. Çalışma, 2007-2008 yıllarında meydana gelen siyasi gelişmelerin bu siyasi partinin devlet ile kurduğu ilişkide bir değişime işaret ettiğini savunmaktadır. Bu tarihten sonra anayasal devletin yasal olarak parlamentoda çoğunluğu ele geçiren partinin kullanımına sunduğu yasama ve yürütme erkleri yanında, tarafsız ve bağımsız olması gereken yargı erkinin de hükümet eden siyasi parti tarafından kontrol edilmeye başlandığı belirtilmektedir. Ayrıca, sadece anayasal devletin iktidara dair unsurunun değil, hukukun üstünlüğü ilke ve düzeninin normatif sınırlarının da aşıldığı dile getirilmektedir. Böylelikle, parlamentoda sayısal üstünlüğe sahip olan bir parti, bu sayısal üstünlüğü maharetiyle anayasal devletin kendisine tanıdığı sınırların ötesine geçebilmiştir. Bu bağlamda çalışmanın iddiası, bahsedilen tarihler sonrasında AKP'nin sadece hükümet eden bir siyasi parti ya da bir siyasi iktidar olarak kalmadığı; bu sınırları aşarak kendisini bir devlet iktidarına dönüştürme yolunda ilerlemeye başladığıdır.

Çalışmada ilk olarak 2007-2008 döneminde meydana gelen ve tezin iddiası açısından önemli görülen siyasi olaylar anlatılmaktadır. AKP, 2002 yılında yapılan genel seçimlerde oyların yüzde 34'ünü almış ve 550 kişilik parlamentoda 367 sandalyeye sahip olmuştur. Oyların çoğunluğunu alan parti, hükümeti kurmakla da görevlendirilmiştir. İlk bakışta, tek parti hükümetinin Türkiye'nin çalkantılı parlamenter demokrasisi için bir çözüm olduğu düşünülebilir. Nihayetinde 1999-2002 yılları arasında kurulan ve yıkılan zayıf koalisyon hükümetleri sonrasında AKP'nin

tek parti hükümetinin siyasi hayata istikrar getirdiği açıktır. Ancak, daha fazla istikrar her zaman daha fazla demokrasi demek değildir. Nitekim bu çoğunluk tek parti hükümetinin parlamenter demokrasiye zarar verdiği yönleri de olmuştur. Mesela, yasama ve yürütme erkleri tek elde toplanmıştır. Yasama erkini kullanan milletvekillerinin çoğunluğu ile yürütme erkini kullanan milletvekilleri aynı partiye mensup oldukları için, hükümet dilediği normu yasalaştırabilmiştir. Parti ve hükümet arasındaki uyuma bakacak olursak; hükümet tek bir irade gibi hareket etmeye başlamıştır. Dahası, parlamentonun çoğunluğu da tek bir irade gibi hareket etmeye başlamıştır. Dolayısıyla tek parti hükümeti döneminde parlamento tek bir irade gibi, tek bir irade de parlamento adına hareket etmiştir. Bu irade hükümet eden partinin genel başkanı olan Başbakan Recep Tayyip Erdoğan'ın iradesidir.

Ancak, parlamenter demokrasi ve anayasal devlette meydana gelen ve etkilerini hala hissedebildiğimiz değişiklikleri gözlemleyebileceğimiz en belirgin dönem, 2007 sonrasıdır. Haziran 2007'de gerçekleşen genel seçimlerde AKP bir kere daha oyların çoğunluğunu almış ve ikinci tek parti hükümetini kurmuştur. Sadece iki ay sonra, Ağustos 2007'de ise AKP'nin cumhurbaşkanı adayı olan, o dönemin Dış İşleri Bakanı Abdullah Gül, parlamento tarafından Cumhurbaşkanı seçilmiştir. Böylece Ağustos 2007 itibari ile AKP, yürütmenin her iki başında da etkili olmaya başlamıştır. Dahası, AKP bu dönemde yeni bir anayasa yapma hazırlıklarına da girişmiştir. 8 Haziran 2007'de Başbakan Erdoğan, bir grup anayasa hukukçusunu yeni bir anayasa taslağı hazırlamaları için görevlendirdi. Genel seçimler akabinde yeni anayasa hazırlıkları devam etti.

2008'in Mart ayında ise Cumhuriyet Başsavcısı Abdurrahman Yalçınkaya, devletin laik niteliğini ihlal ettiği iddiası ile AKP'nin kapatılması talebiyle bir iddianame hazırladı. Bu doğrultuda Yalçınkaya, Anayasa Mahkemesi'nden, aralarında Başbakan Erdoğan ve Cumhurbaşkanı Gül'ün de bulunduğu 71 kişiye siyasi yasak getirilmesini talep etti. Anayasa Mahkemesi iddianameyi kabul etti. Bu esnada, kamuoyunun gözü

aniden başka bir gelişmeye çevrildi. Ocak 2008'den beri sürmekte olan ve çok sayıda kişiyi etkileyen, 21.yy Türkiye'sinin ilk siyasi davası olan Ergenekon davasının polis soruşturmaları Mart ayında hız kazandı. Öyle ki, AKP'nin Temmuz 2007'de ikinci kez hükümet kurmasının ardından daha bir sene henüz geçmişti ki, Türk siyasi tarihinin en kritik günleri yaşanmaktaydı. İlk olarak, Temmuz 2008'de kamuoyunun tanıdığı kimi isimlerin ve yüksek rütbeli askerlerin anayasal düzeni yıkmak maksadıyla bir terör örgütü kurmakla suçlandıkları Ergenekon davasının ilk iddianamesi özel yetkili mahkemeye sunuldu. İkincisi, yine Temmuz 2008'de Anayasa Mahkemesi, AKP'nin kapatılması davasıyla ilgili kararını verdi. Mahkeme, AKP'nin kimi eylemlerini laiklik ilkesine aykırı buldu. Ancak, partiyi kapatmak yerine sadece para cezasına çarptırdı.

Aslında Anayasa Mahkemesi'nin AKP'nin kapatma davası ile ilgili kararını ya da Ergenekon davasının başlamasını beklemeden, çok daha öncesinde, devletin üç erkinden biri olan yargıda önemli gelişmeler meydana gelmekteydi. 2004 yılında, Devlet Güvenlik Mahkemeleri lağvedildi. Ancak yerlerine, hemen hemen aynı yetki ve görevlerle Özel Yetkili Mahkemeler (ÖYM) kuruldu. Esasa bakılacak olursa bu değişiklik ile AKP sadece, Devlet Güvenlik Mahkemelerinin ismini, ÖYM olarak değiştirmiş oldu. İşte yıllar öncesinde yapılmış olan bu değişiklik, Ergenekon dava sürecinin başlaması ile birlikte gün yüzüne çıkmış ve dikkat çeker hale gelmiş oldu. Yargıda yaşanan değişim, özellikle 2007-2008 yıllarından sonra daha da hızlandı. Eylül 2010'da Anayasa Mahkemesi ve Hâkimler ve Savcılar Yüksek Kurulu (HSYK) reform geçirdi. AKP'nin oyların yüzde 49,9'unu aldığı ve üçüncü tek parti hükümetini kurduğu 2011 genel seçimleri sonrasında, Mart 2011'de, Ağustos 2011'de, Temmuz 2012'de ve Nisan 2013'de olmak üzere yargı erki ve mahkemeler dört kez reform yaşadı. Bu reformlarla sadece yeni normlar getirilmekle kalınmadı; aynı zamanda ilk derece mahkemeleri ve yüksek mahkemelerin örgütlenme biçimleri de değiştirildi. Bu reformların sonucu ise yargı erkinin yürütme erkine daha bağımlı hale gelmesi olmuştur.

Devlet erkleri olan yasama, yürütme ve yargı ile hukukun üstünlüğü ilkesinin oluşturduğu normatif düzen, anayasal devletin asli unsurlarıdır. 2007-2008 yıllarında meydana gelen ve yukarıda anlatılan gelişmeler hükümet eden parti AKP'nin anayasal devletin bu unsurlarının sadece biri ile değil; bütün hepsi ile kurduğu ilişkide değişim yaşandığının işaretleridir. Bu bağlamda, yeni bir anayasa yapma hazırlıklarına girişerek AKP, kendisinin anayasal devletin çizdiği kurulu sınırlar içerisinde, yalnız yasama ve yürütme erklerini kullanan sıradan bir siyasi iktidar olmadığını; kurucu bir iktidar olma hedef ve hayaline sahip olduğunu belli etmektedir. İkincisi, Anayasa Mahkemesi'nin bir yandan AKP'nin eylemlerini laikliğe aykırı bulduğu ve AKP'yi laikliğe karşı eylemlerin odağı olarak kabul ettiği; bir yandan ise partiyi kapatmayarak iktidarda kalmasına izin verdiği kararı, anayasal bir norm olan laikliğin ve dolayısıyla hukukun üstünlüğünün getirdiği normatif düzenin siyasi iktidar karşısındaki üstünlüğünün yıkıldığını; hukukun üstünlüğü ilkesinin getirdiği sınırlamaların aşıldığını göstermektedir. Yasama erkine gelince AKP, parlamentoyu egemenliği altına aldı. Yürütme erkine bakacak olursak ise AKP, yürütmenin ikinci başı olan cumhurbaşkanlığını etkilemeye başladı. Son olarak, yargı erkinde, mahkemeler ve adalet sistemi, daha 2002'den itibaren AKP hükümetinden memnun olmayan Türk Silahlı Kuvvetleri ve kimi sivil toplum örgütlerine karşı bir silah olarak kullanılmak üzere araçsallaştırılmaya başlandı. Dahası, art arda yapılan yargı reformları ile yargı erki giderek daha fazla hükümetin kontrolüne geçti.

İşte bu gelişmelerin ışığında çalışma, hem AKP'yi hem de anayasal devleti bir arada incelemektedir. Öncelikle anayasal devletten ne anlaşıldığını açıklamak gereklidir. Çalışma, anayasal devleti iki boyuta ayırır. Bu boyutlar iktidar boyutu ve normatif boyuttur. İktidar boyutunu kendi içinde ikiye ayırabiliriz. Bunlar yasama (yasa yapımı) ve yasaların uygulanmasıdır (yürütme ve yargı). Yasama parlamentonun görevidir. Yasaların uygulanması ise bakanlar kurulu ve mahkemelerin görevidir. Bu bağlamda çalışmanın iddiası olan iktidar olan partinin devlet iktidarına dönüşümü, bu her iki boyutun birinin ya da her ikisinin birden incelenmesini kapsayabilir. Mesela,

devletin sadece yasama işlevi üzerinde yoğunlaşılabilir ve AKP'nin kendi siyasetini yansıyan yasaları çıkarmak için nasıl parlamentoyu baskı altına aldığı; sayısal üstünlüğünü kullanarak parlamentodaki diğer partilerden gelen yasa önerilerini nasıl engellediği incelenebilir. Bu çalışmada ise yasama faaliyeti incelenmeyecek; yasaların nasıl uygulamaya konulduğuna bakılacaktır.

Bu doğrultuda çalışmanın kapsamı, AKP ile devletin yasaları uygulamakla görevlendirdiği organlar arasındaki ilişki; daha doğrusu, AKP'nin bu organları nasıl kontrolü altına aldığıdır. Hatırlayacak olursak yasaları uygulamakla görevli olan organlardan bakanlar kurulu hali hazırda ve yasal olarak çoğunluk ve iktidar partisi tarafından belirlenmekte ve kullanılmaktadır. Bu durumda sorunsallaştırılacak o temel alan olarak geriye sadece mahkemeler kalıyor. Bu durumda çalışma AKP'nin yargı erkini nasıl egemenliği altına aldığına ve nasıl mahkemelere müdahale ettiğine yoğunlaşmaktadır. Yine de Türkiye örneğinde bakanlar kurlunun ve dolayısıyla yürütme erkinin, hali hazırda iktidar olan çoğunluk partisinin elinde bulunduğu ve onun kullanımına hazır olduğu fikrinde peşin hükümlü olmamak gereklidir. Zira Türkiye, anayasal devlet kuramcıları tarafından öngörülmeyen bir özelliğe sahiptir. Türkiye'de yürütme yetkisini kullanan bakanlar kurulu yanında başka bir organ daha vardır; bu organ yarı askeri Milli Güvenlik Kurulu'dur. Durum böyle olunca AKP'nin yasaları uygulayan organları kontrolü altına alabilmesi, mahkemelerin yanı sıra ancak ve ancak Milli Güvenlik Kurulu'nu da denetleyebilmesi ile mümkün olabilir. Bu nedenle çalışma, Milli Güvenlik Kurulu'nun geçirdiği dönüşüme de yer vermektedir.

Anayasal devletin üç devlet erki dışında normatif bir boyutu olduğu söylendi. Hatta üç devlet erkinden üstün olan ve bu erklerin üzerinde duran pozitif normatif bir düzenin mevcudiyeti anayasal devletin ayırt edici özelliklerindendir. Bu normatif düzen, hukukun üstünlüğü ilkesinin kurduğu yasal düzendir. O halde, AKP'nin bir devlet iktidarına dönüştüğünü gösterme çabası, zaruri olarak hükümet eden partinin bu normatif düzen ile kurduğu etkileşimi de içermelidir. AKP'nin normatif düzen ile

ilişkisinin incelenmesi, anayasal düzen ile ilişkisinin zaruri bir parçasıdır. Ancak hukukun üstünlüğü düzeni içerisinde, sayısı yüzleri bulan ve bazıları birbirleri ile ilgisiz normlar yer alır. Bu normların hepsinin aynı çalışmada incelenmesi düşünülemez. Bu durumda, çalışma, bu normlar topluluğu arasından sadece bir normu seçmekte ve siyasi iktidarın bu norm ile etkileşimini incelemektedir. Bu norm laikliktir.

Laiklik normunun seçilmesi elbette rastgele bir tercih olmamıştır. Her şeyden önce AKP'ye karşı açılan kapatma davasının gerekçesi laikliktir. Bu sebeple laiklik, AKP'nin istese de istemese de etkileşime girmekten kaçamadığı bir normdur. Temmuz 2008 sonrasında AKP'nin hükümette kalabilmesinin koşulu, bu normun getirdiği sınırlamaların aşılmış olmasıdır. İkincisi, AKP'nin İslami eğilimi ve AKP'nin kurucu unsurlarının İslami geçmişi, bu partinin anayasal devletin laiklik normuna karşı bir tehdit olarak algılanmasına neden olmuştur. Bu nedenle AKP ile ilgili literatür, laiklik tartışmalarının egemenliği altındadır. Hal böyle olunca anayasal devletin kurduğu normatif düzen ile AKP arasındaki etkileşim incelenirken laiklik normu baz alınacaktır.

Anayasal devletin her iki boyutu ile siyasi iktidar arasındaki etkileşimin incelenmesi, şu soruyu da beraberinde getirir: çalışmanın iddia ettiği gibi siyasi iktidarın, devletin yasaları uygulamakla görevlendirdiği organları etkisi ve kontrolü altına alarak kendisini siyasi iktidardan bir devlet iktidarına dönüştürdüğünün izlerini nasıl takip edebiliriz? Acaba bu dönüşümün göstergeleri nelerdir? Çalışma, siyasi davaların bu dönüşümün birer göstergesi olduğunu söylemektedir. Bu doğrultuda da AKP'nin anayasal devletin boyutları ile etkileşiminin analizinden sonra, bahsi geçen dönüşümün örnekleri olarak siyasi davaların analizine geçilmektedir. Siyasi davalar Terörle Mücadele Kanunu çerçevesinde ÖYM'lerde görülmektedirler. En önemlileri Ergenekon, KCK ve Hopa davalarıdır. Birçok nedenden ötürü siyasi davaların analizi AKP ile anayasal devlet arasındaki ilişkiyi aydınlığa kavuşturması açısından

yararlıdır; bilhassa bir siyasi partinin hangi durumlarda ve nasıl kendisini devlet iktidarı olarak sunabildiğini görebilme açısından.

Ergenekon, KCK ve Hopa davalarının her biri bir biriyle kıyaslanamayacak kadar farklı toplumsal ve siyasal kökenlere sahiptir. Ancak ortak noktaları, bu davalar kapsamında mahkemelerde yargılananların, ister devlet ister sivil toplum içine konuşlanmış olsun, AKP'nin muhalifleri olduğudur. Bu nedenle siyasi davalar, siyasi muhalefetin yargısal araçlarla bastırılmalarına dair bir olgudur. Bu bağlamda, siyasi mücadelelerin yasal sorunlara dönüştürülmesini işaret ederler. Mahkeme salonlarında, iktidarda bulunana alternatif siyasetler yasa dışı addedilir ve siyasi alanın dışına, hukuk alanının içine atılırlar. Siyasetin ve siyasi iktidarın partizan, kişisel, taraflı, kısmi niteliklerinin üstü; genellik, ortaklık, nesnellik, bağımsızlık ve kesinlik gibi hukukun nitelikleri ile örtülür. Örnek verecek olursak, askerler, Kürtler ve öğrenciler siyasi nedenlerden ötürü mahkeme karşısına çıkarılmış olmalarına rağmen, kimi yasal hükümler doğrultusunda nesnel bir şekilde yargılanıyor gibi görünürler. Siyasetin ve siyasetin değerlerinin hukuka ve hukukun değerlerine dönüşümü; anayasal devlet içerisinde AKP'nin, yargıyı ve hukukun üstünlüğü düzenini kendi siyasi çıkarlarını gerçekleştirmek için bir araç olarak kullanabilme gücünü göstermektedir. Bu siyaset ve hukuk arasındaki bu dönüşüm, AKP'nin kendi muhaliflerine suçlu muamelesi yapma gücüne; yani, devletin yargı erkinin organlarını araçsallaştırma gücüne eriştiğini açığa çıkarmaktadır. Başka bir değişle, incelenen üç siyasi davanın bize gösterdiği şey, yargı erkinin siyasi iktidar tarafından egemenlik altına alındığıdır.

İkincisi, mevzu bahis olan dava süreçleri olmasına ve bu dava süreçleri "özel" ceza mahkemelerinde devam etmesine rağmen AKP, anayasal devletin, parlamenter demokrasinin ve de hukukun üstünlüğü ilkesinin sıradan işleyişini bozmuş sayılmaz. Siyasi muhalefet için özelleşmiş ya da *ad hoc* mahkemelerin kurulmasına kimi ülke ve dönemlerde rastlamak mümkündür. Türkiye ve başka ülkelerde de askeri rejimler ve sıkıyönetim dönemlerinde geniş çaplı siyasi davalara rastlanmaktadır. Ancak bu

dönemlerde kurulan özel mahkemeler ve görülen siyasi davalar hali hazırda anayasallık ve hukukun üstünlüğü ilkeleri ile çatışma halindedir. Anayasal devletin benimsediği hukukun üstünlüğü ilkesi, temel insan hak ve özgürlüklerinin anayasa tarafından korunduğu bir düzen kurar. Bu düzene göre, devlet iktidarı yasal normlar ile sınırlanmıştır. Devlet, yasalara uymak zorundadır; ki bu yasal düzenin en tepesinde de anayasa vardır. Bu doğrultuda devlet, ayrımcılık yapmaz, hak ve özgürlükleri ihlal etmez. Ancak, olağanüstü hallerde zor kullanabilir ve hak ve özgürlükleri askıya alabilir. Bu nedenle olağanüstü hal tedbirleri hukukun üstünlüğünün egemen kılındığı devletin yasal görevleri ile çatışır. Bu çatışma nedeniyledir ki olağanüstü hal tedbirlerinin kısa süreli ve geçici olduğu ve de hukukun üstünlüğü ilkesinin istisnası olarak meydana geldiği kabul edilir. Ancak, AKP yönetimi altında gerçekleşen siyasi davalar, olağanüstü hal dönemlerinde meydana gelmemiştir ve olağanüstü hal de yaratmazlar. Bu davaların kapsamları zaman içinde o kadar genişlemiştir ki, bu davalarda gözaltına alınan ve yargılananların sayısı, askeri rejim ve sıkıyönetim dönemlerinde yargılananların sayısını geçmiştir. Yine de bu mahkemeler olağanüstü hal normlarına göndermede bulunmazlar ve istisna yaratmazlar. Evet, özel yetkili mahkemeler hukukun üstünlüğü ilkesini ihlal etmektedir; ancak AKP siyasi muhaliflerini özel yetkili mahkemelerde anayasal devletin ve hukukun üstünlüğü ilkesinin dâhilinde yargılamaktadır; bunu yaparken hukukun üstünlüğünü askıya almamakta, parlamenter demokrasinin işleyişinde bir krize neden olmamaktadır.

Son olarak, bu davalar AKP'ye muhalefet etmenin devlete muhalefet etmek olarak addedildiğini ortaya çıkarmaktadır. Bunun ilk sebebi şudur: AKP'nin muhalifleri, hükümet eden siyasi partiye muhalif olma gerekçesiyle değil, devletin anayasal düzenine muhalefet etme iddiası temelinde yargılanmaktadırlar. Bu nedenle siyasi davalarda AKP, sessiz sedasız, devlet yerine geçmekte; devlet ile özdeşleşmektedir. Dahası, bu özdeşleşmenin büyük bir kısmı yargının statüsü ile ilgilidir. Yasama, yürütme ve yargının hepsi de devlet erkleridir. Ancak, diğer ikisinin aksine yargı, parlamenter bir erk değildir. Parlamenter erkler halkın tayin ettiği temsilciler; genel

seçimler aracılığı ile parlamentoya gelen partiler tarafından kullanılır. Buna mukabil, yargı münhasıran devlete ait bir erktir; partizan siyasi güçlerin elinden alınmış ve devlete mahsus tutulmuştur. Parlamentodaki siyasi partiler yasama ve yürütme erklerini kullanabilseler de, yargı gücüne sahip değillerdir. Yargı yasal ve organel olarak parlamentodan bağımsızdır. İşte siyasi davalar, münhasıran devletin hizmetine verilmiş olan bir gücün belli bir siyasi partinin muhaliflerini cezalandırdığı örneklerdir.

Kısacası, bahsi geçen üç siyasi dava AKP'nin artık sadece bir parlamenter siyasi güç olmadığını; en azından bir dereceye kadar bir devlet iktidarına dönüştüğünü işaret etmektedir. Bu nedenle de siyasi davalar AKP ile anayasal devlet arasındaki etkileşimin can alıcı noktası olarak değerlendirilmektedir.

Laiklik tartışması ile siyasi davalara dair tartışma arasındaki ilişki de kendini bu minvalde gösterir. Laiklik normunun incelenmesi, anayasal devletin normatif düzeninin nasıl yahut hangi yollardan hükümet eden partinin kontrolüne geçebileceğini ve bu partinin siyasi normlarını nasıl anayasal devletin nesnel ve tarafsız normları olarak yerleştirebileceğini göstermektedir. Benzer bir şekilde siyasi davalar da AKP'nin hâkimler ve mahkemeler üzerindeki kontrolünü, kendi siyasi çıkarlarını nasıl devletin çıkarları olarak yerleştirdiğini göstermektedir. Yine de siyasi davalar bir adım daha öteye giderler: Siyasi davalar AKP'nin yasal düzeni ve mahkemeleri üçüncü kişilere karşı bir baskı aracı olarak kullanabildiğini gösterirler. Siyasi iktidarın hem mahkemelere hem de hukukun üstünlüğü ilkesinin normatif düzenine müdahalesi yasaklanmıştır. Her ikisi de tarafsız ve bağımsız olarak kalmalıdır. Ancak laiklik tartışması bir taraftan, siyasi davalar ise diğer taraftan AKP'nin bu alanlara nasıl müdahale ettiğini örneklendirir. Bu nedenle bu iki tartışma AKP'nin devlet iktidarına dönüşümünün farklı yönlerini serimlemeleri açısından birbirlerini tamamlarlar.

AKP'nin devlet iktidarına dönüşümünü ya da ne derece dönüştüğünü tartışırken çalışmanın bilhassa vurgulamak istediği husus şudur: Parlamentodaki bir siyasi partinin kendisine tanınan sınırları aşması, anayasal devletin sınırları dâhilinde gerçekleşmiştir. AKP'nin ilk hükümetini kurduğu 2002'den başlayarak son on yıl içerisinde, ancak özellikle 2007-2008 döneminde hukukun üstünlüğü düzeni ve parlamenter demokrasi işleyişlerine devam etmişlerdir. Bahsedildiği gibi siyasi davalar da anayasal devlet ve hukukun üstünlüğü düzeni içerisinde meydana gelmişlerdir. O halde, AKP'nin devlet iktidarına dönüşümü süreci bir bütün olarak anayasal devlet ve parlamenter demokrasiye rağmen değil; bu kurumların dâhilinde olmuştur. Bu bağlamda çalışma, anayasal devlet, hukukun üstünlüğü ve parlamenter demokrasiyi de eleştirel bir gözle değerlendirmektedir. Böyle olunca, çalışmanın sorduğu soru şudur: Anayasal devlet bir siyasi partinin parlamenter sınırları geçerek kendisini devlet iktidarı olarak sunmasına hukukun üstünlüğü ilkesi dâhilinde nasıl müsaade etmiştir?

Bu soruyu yanıtlayabilmek için siyasi gelişmeleri anlamak kadar, anayasal devlet ve hukukun üstünlüğünden ne anlaşıldığının da belirlenmesi ve sorgulanması gereklidir. Bu bağlamda çalışma bu kavramları da tanımlamaktadır. Buna göre anayasal devlet, pozitif hukuk ile bağlı devlettir; anayasal devlet, hukukun devlet iktidarından daha üstün olduğu devlettir. Anayasal devlette devlet iktidarı önceden belirlenmiş, açık ve genel yasalar temelinde kullanılır. Bu nedenle anayasal devlet, devlet iktidarının yasal düzen ile çevrelendiği ve yöneticilerin yasal düzene uymak zorunda bırakıldıkları bir sistemdir. Bu sistemde devletin nasıl yönetileceğini yasa söyler; iyi yönetimin neleri içerdiği ve neleri dışarda bıraktığı daha evvelden belirlenmiştir. Bu şekilde devlet, yasaya tabi bir hukuk tüzel kişisine dönüşmüştür. Yasalar hiyerarşisinin tepesinde ise anayasa vardır. Böyle olunca devlet iktidarının yasal düzene tabiiyeti, anayasaya tabiiyetini gerektirir. Bu şekilde anayasal devlet, anayasanın devlet üzerinde egemenliğini ilan ettiği devlettir. Amaç, mutlak, kişisel ve keyfi idarenin engellenmesidir. Anayasal devlette hüküm süren siyasi iktidar ya da bir siyasi parti

değil, yasalardır. Bu nedenle anayasal devlet iktidarın yönetimi yerine yasaların yönetimini kurar.

Anayasal devlet ve hukukun üstünlüğü geleneğinin felsefi ve entelektüel arka planına bakılacak olursa, 17. ve 18. yy'larda Batı Avrupa'da pozitif yasa anlayışının, vazgeçilmez insan hak ve özgürlüklerinin ve halk egemenliğinin gelişiminin olduğu görülebilir. Bu arka planı anlamak adına çalışma, pozitif yasa anlayışının, anayasacılığın ve liberalizmin gelişiminde rol oynamış önemli düşünürlere yer vermiştir. Bu düşünürler Jean Bodin, Thomas Hobbes, John Locke ve daha sınırlı olmak üzere Jean Jacques Rousseau ve Montesquieu'dur. Tarih boyunca bireylerin vazgeçilemez hakları farklı farklı adlandırılmıştır. Değişen dönemlerde "bireysel hak ve özgürlükler", "demokratik haklar", "temel insan hakları" ya da "evrensel hak ve özgürlükler" denmiştir. Bir yandan bu hak ve özgürlükleri koruma altına alan ve geliştirmeyi hedefleyen rejimlere "liberal" denmektedir. Öte yandan, bu hak ve özgürlükleri koruması altına alan asıl unsur hukuktur. Bu nedenledir ki anayasal devlette siyasi iktidarı yasal düzenle sınırlamak demek, siyasi iktidarı bu hak ve özgürlüklerle sınırlamak demektir. Eğer öz ve biçim arasında kaba ve genel bir ayrım yapacak olursak, anayasal devletin ve hukukun üstünlüğünün kurduğu yasal düzenin içeriğinin bu hak ve özgürlükler olduğunu söyleyebiliriz.

Bu durumda, işin öze dair kısmını da hesaba katacak olursak, anayasal devletin anlamını "hak ve özgürlükler devleti" olarak düzeltmek yerinde olacaktır. Benzer şekilde, hukukun üstünlüğü ilkesinde üstün olan asıl olgu, temel insan hak ve özgürlükleri olacaktır. Karşılığında, bu hak ve özgürlüklerin devlet iktidarını aşıp onu bağlayabilmesi için, pozitif yasal normlar olarak kabulleri; anayasada yer bulmaları gerekir. Yani, hukukun üstünlüğünün kurduğu yasal düzenin bir parçası olmaları gerekir. Bu koşullar altında, çalışma (hangi ad ile anılırlarsa anılsınlar) bu hak ve özgürlüklerle, bu hak ve özgürlüklerin içeriği ve tarihsel gelişimleriyle kendi başlarına ilgilenmez. Bu hak ve özgürlükleri son derece basit ve üstünkörü bir şekilde betimler.

Soyut değerler ve ilkeler olarak kaldıkları müddetçe bu hak ve özgürlüklerin anayasal devlet ile ilişkilerini de incelemez. Çalışma, devlet ile bu hak ve özgürlükler arasındaki ilişkiyle, ancak ve ancak bu hak ve özgürlüklerin birer pozitif norma dönüştüğü derecede ilgilenmektedir. Bu durumda hak ve özgürlükler, pozitif yasaların normatif içerikleri olurlar.

Çalışma boyunca devlet iktidarı ve siyasi iktidar kavramlarına sıklıkla rast gelinir. Bu iki kavram eş anlamlı olarak kullanılmışlardır. Siyasi iktidar, devlet dışında ve devletten bağımsız bir şekilde de bulunabilir. Ancak devlet, siyasi iktidarın en kurumsallaşmış biçimi olarak düşünülmüştür. Siyasi iktidarın devlet ile özdeş görülmesi noktasında vurgulanmak istenen olgu, yönetenler ile yöneticiler arasındaki ayrımdır. Bu bağlamda siyasi iktidar, devlet iktidarını kullanan ve dolayısıyla yönetenler ile devlet iktidarına sahip olmayan ve dolayısıyla yönetilenler arasındaki ayrımın işaret ettiği dar ve temel anlamıyla kullanılmıştır. İşte bu nedenle devlet iktidarı ile siyasi iktidar birbirleri yerine kullanılmıştır. Bu durumun bir istisnası vardır; o da devletin yargı erkidir. Yargı bir devlet iktidarı olmasına rağmen siyasi bir iktidar değildir. Yine de, bu iki kavram arasında yapılan ayrışmanın sadece yargı tartışması ile sınırlı olduğunu unutmamak gerekir.

Öte yandan anayasal devlette devlet iktidarının nasıl kullanılacağını tayin eden şey, hükümet biçimidir. Konumuz açısından bu hükümet biçimi parlamenter demokrasidir. Parlamenter demokratik hükümet yapısı siyasi iktidarın genel oylama ile halk tarafından seçilen temsilciler aracılığı ile kullanılmasını emreder. Bir yandan da devlet iktidarını yasama, yürütme ve yargı arasında üçe ayıran erkler ayrımı ilkesini benimser. Bu üç erk, egemenliğin kullanımına yönelik devlet güçleridir; idari yetki ve güçler bu egemen erklerden kaynaklarını alırlar. Bu nedenle çalışma, devlet iktidarı kavramını kullanırken bu üç erke gönderme yapar. Çalışma erkler ayrımı dışında; temsil, siyasi parti mekanizması, seçim sistemleri gibi parlamenter demokrasinin diğer

özellik ve unsurlarını sorunsallaştırmaz ve değinmez. Parlamenter demokrasinin bu unsur ve özelliklerinin ne derece demokratik olduğu tartışılmaz.

Ek olarak, sık olmamakla birlikte zaman zaman parlamenter demokrasi kavramı yerine liberal demokrasi denmektedir. Bu değişiklik ile parlamenter demokrasinin liberal rejim türlerinden biri olduğu kabul edilmiştir. Aslına bakılacak olursa her iki kavramsallaştırma da aynı olguyu anlatır; ilki bu olguyu örgütlenme boyutuna (parlamenter) göre anlatır; ikincisi ise savunduğu ilke ve değerlere göre (temel hak ve özgürlükler). Böyle olunca günümüz demokrasilerini parlamenter ya da liberal olarak tanımlamak, aynı olguyu farklı yönleriyle tarif etmek olarak değerlendirilmiştir.

Çalışmanın sorduğu soru çerçevesinde anayasal devlet ve hukukun üstünlüğü düzeni, parlamentoda sayısal üstünlüğü kazanmış olan bir partinin anayasal devleti egemenliği altına almasına müsaade ettikleri için eleştirilmişlerdir. Bu eleştiri yapılırken faydalanılan kavramlar ve araçlar Carl Schmitt'e aittir. Schmitt (1888-1985), oldukça tanınan bir Alman siyaset kuramcısı ve hukukçudur. Schmitt değince akla genel olarak siyaset kuramı ve "siyasal", "egemenlik", "dost-düşman ayrımı" ya da "istisna hali" gibi kavramlar gelmektedir. Ancak bu çalışmada Schmitt'in siyasi kuramı yerine daha az bilinen hukuk kuramından ve hukuk üzerine düşüncelerinden yararlanılmıştır. Bu doğrultuda da siyasal ve egemenliğe dair kavram ve görüşlerine hiç değinilmezken; kararcılık kavramına, normativizm ve yasal belirlenimcilik üzerine düşüncelerine yer verilmiştir.

Bu tercih, Schmitt'in düşüncelerinin birebir AKP örneğine uygulanmayacağını da göstermektedir. Tam tersi, Schmitt'in düşünceleri ve kavramları arasından AKP ve Türkiye örneğini açıklamaya uygun olanlar seçilmiş ve geliştirilmiştir. Schmitt'in düşüncelerini Weimar Cumhuriyeti (1919-1933), başkanlık sistemi ve başkanın olağanüstü hal yetkileri ile faşist Nasyonel Sosyalist Alman İşçi Partisi (NSDAP) üzerine geliştirdiği hatırlanacak olunursa durum daha da netleşir. Bu doğrultuda

çalışma, Schmitt'in düşüncelerinin birebir AKP ve Türkiye'ye uygulanmadığının altını çizer. AKP ve anayasal devlet arasındaki ilişkiyi Schmitt'in düşünceleri aracılığıyla kuran ve açıklayan, bu çalışmanın yazarıdır.

Schmitt'in hukuk kuramının ve normativizm ile ilgili görüşlerinin merkezinde, karar kavramı yer almaktadır. Bilindiği üzere Schmitt'in kararcılık kavramı, kurucu iktidar ve egemenlik ile ilgilidir. Bu nedenle kararcılık asli olarak siyasi rejim ve yasal düzenin kuruluşuna dair bir kavramdır. Karar, bir kez alınan, her türlü norm ve yasadan bağımsız; egemen ve kurucu bir niteliğe sahiptir. Ancak yargı kararlarını tartışırken Schmitt'in kullandığı anlamıyla karar, yasal normlarla sınırlanmayan ve yasal normlar ile meşrulaştırılamayacak olan "egemen karar" anlayışından ayrılır. Buradaki karar, ikincil bir kararcılık anlayışıdır. Bu ikincil anlayışta karar, yasal sistemin içinde işler. Bu ikincil karar, yasaların somut olaylara uygulanmasını ve dolayısıyla yasal düzenin işleyişini sağlar. Bu nedenle bu ikincil karar hukukun üstünlüğünün normatif düzenine içkin ve onun bir parçasıdır.

Normatif düzene dâhil olan bu karar ile Schmitt, hukukun üstünlüğünün kurduğu yasal düzen ve anayasal devleti siyasi iktidara bağlar. Anayasal devleti ve hukukun üstünlüğünü eleştiren diğer düşünürlerdense, kurmuş olduğu bu bağ, Schmitt'in özgüllüğünü oluşturur. Schmitt'e göre hukukun üstünlüğü düzeni, hiç de iddia edildiği gibi devlet iktidarına yukarıdan dayatılan bir normatif sınırlama değildir. Daha ziyade, siyasi iktidarın işleyişinin bir neticesidir. Eğer hukukun üstünlüğü düzeni işlemiyorsa ya da temel hak ve özgürlükler aleyhine işliyorsa bunun nedeni parlamenter demokratik siyasetin işlememesi ya da temel hak ve özgürlükler aleyhine işliyor olmasıdır. Kısaca Schmitt, liberal olmayan bir siyasi iktidarların ve siyasetlerin, liberal hukuk üretemeyeceklerini ya da hukuku liberal bir şekilde uygulayamayacaklarını ima eder. Görüleceği üzere Schmitt, hukuk ve yasal düzenin siyasi iktidardan bağımsızlığını reddetmektedir. Tersine, mütemadiyen hukukun konusu olduğu düşünülen meselelerin, siyasi sorunlar olduğu vurgulanmıştır.

Bu doğrultuda asıl sorunsallaştırılması gereken alan, parlamenter demokratik siyasettir. Bu siyaset, Schmitt'e göre, yine iddia edilenin aksine liberal ve demokratik bir içeriğe sahip değildir. Tam tersi, parlamenter demokratik siyaset çoğunluğun mutlakıyetine dayanır. Bu da demek oluyor ki bütün devlet iktidarı parlamentoda çoğunluğu elinde tutan parti tarafından kullanılabilir; bu çoğunluk hak ve özgürlüklere yönelik içeriksel herhangi bir sınırlama ile karşılaşmayacaktır. Daha önemlisi, bu çoğunluk yasallığın koruyucu kalkanına sahip olacaktır. Parlamentonun mutlakıyetçi siyaseti siyasi iktidarın hukukun üstünlüğü ile sınırlanmadığını kabul eder; dahası, hukukun üstünlüğü düzeni, siyasi iktidarın tüm eylem ve faaliyetlerine yasallık atfeden bir kalkana dönüşür. Neticede de, ilk olarak parlamenter demokrasi ve ancak ardından anayasal devlet ve hukukun üstünlüğü düzeni içi boş biçimsel kurumlardır; bu kurumlar Schmitt'e göre herhangi bir norm ile tanımlanamazlar.

Schmitt'in hukuk kuramı ve parlamenter demokrasi ile ilgili düşünceleri çerçevesinde AKP'nin öz olarak İslamcı olan siyaset ve faaliyetlerini laik düzenlemeler olarak sunabilmesinin ve kendisine muhalefet edenleri "devlet" sıfatı ile yargılayabilmesinin ardında, hukukun üstünlüğü düzenine içsel olan, karar vardır. Bu kararı kontrolü altına alarak AKP, hem laikliğin anlamını ve yorumunu kontrol edebilmiş hem de kendisini devlet olarak sunabilmiştir. Dahası, AKP'nin bütün bunları anayasal devlet ve hukukun üstünlüğü düzeninin sınırları dâhilinde yapabilmesi, bu kurumların sadece biçimsel olarak tanımlanmalarından ötürüdür. Bu durumda bu kurumlar, parlamentoda sayısal üstünlüğü ele geçiren bütün partilerin siyasetleri karşısında donanımsız, savunmasızlardır. O halde AKP, parlamenter demokrasi, anayasal devlet ve hukukun üstünlüğü düzeninin bütün çoğunluk partilerine tanıdığı bir imkânı kullanmaktadır.

Çalışma zaman zaman Almanya'da kurulmuş olan Weimar Cumhuriyeti ve NSDAP'ye göndermelerde bulunmaktadır; daha doğrusu bu Cumhuriyetin hikâyesini anlatmaktadır. Weimar Cumhuriyeti de bir anayasal devletti. Ancak literatürde sıklıkla vurgulandığı üzere, anayasal ve parlamenter araçlar ve mekanizmalar kullanılarak

yıkılmış ve faşist bir devlete dönüşmüştür. Faşizm ideolojisini benimseyen NSDAP, yasal bir partiydi. Genel seçimleri kazanarak parlamentoya girmiş ve anayasal prosedürleri takip ederek hükümeti kurmuştur. Kısaca söyleyecek olursak NSDAP yasal yollardan iktidara gelmiştir. Aynı zamanda yasal araç ve mekanizmalarla da yönetmiştir. NSDAP, yasal yollarla erkler ayrımını lağvetmiş, tüm devlet iktidarını yürütmenin elinde toplamış ve devleti yasal yollarla egemenliği altına almıştır.

Bu bağlamda AKP'nin iktidara gelişi, yasal düzeni araçsallaştırması ve devlet içinde egemenliğini kurması akıllara Weimar Cumhuriyeti ve NSDAP örneğini getirmektedir. Ancak bu iki örnek arasındaki asıl benzerlik, siyasi davalar ve özel yetkili mahkemelerin kullanılması yolu ile siyasi muhalefetin baskı altına alınması ya da tamamen yok edilmesi noktasında açığa çıkar. Bu nedenle, iktidarda bulunan çoğunluk partisi ile anayasal devlet arasındaki ilişki bağlamında, anayasal devletin iktidar partisi tarafından kontrol altına alınması ve bu kontrolün anayasallık ve hukukun üstünlüğü düzenine bir tehdit oluşturması açısından Türkiye ile Weimar birbirlerine benzerler. Bu benzerlik önemlidir. Ancak, bu karşılaştırmalı bir çalışma değildir. Çalışma, iki örnek arasında tam bir karşılaştırma yapmaktan kaçınır. Hatta yeri geldikçe benzerliler kadar farklılıkların da olduğu noktalar açıklanmıştır. Bu çerçevede AKP ve Türkiye bağlamında çalışılırken Weimar ve NSDAP örneğinin verilmesinin amacı, tarihte yaşanmış olan ve bir uç nokta teşkil eden bu deneyimi hatırlatmaktır. Bu uç örnek bize, yasallığı arkasına almış ve ondan destek bulan bir çoğunluk partisinin anayasal da olsa devlet erklerini kullanarak neler yapabileceğini göstermektedir. Öte yandan NSDAP yönetiminde Weimar'ın sonu, yıkılmak olmuştur. O halde, NSDAP hem yasallığı ve parlamenter demokrasiyi kullanarak iktidara gelmiş; hem de ardından yasallığı araçsallaştırmış ve parlamenter demokrasiyi yıkmıştır. Bu nedenle Weimar Cumhuriyeti'nin hikâyesi bize AKP'nin anayasa devlet içinde sahip olduğu potansiyel gücü, ileride bir çoğunluk partisinin yapabileceklerini göstermesi açısından da önemlidir.

AKP hala iktidardadır. Bu durumda AKP'nin anayasal devlet ile etkileşimi hala devam etmektedir. Hal böyle olunca çalışma kendisine zamansal bir sınır getirmek zorunda kalmıştır. Bu bağlamda çalışma, AKP'nin iktidara geldiği 2002 senesi ile ÖYM'leri kaldıran üçüncü yargı reformu paketinin yasalaştığı Temmuz 2012 tarihleri arasındaki on yılı incelemektedir. Konu gereği çalışma, çoğunlukla değişen, evrilen güncel meseleleri incelemektedir. Başka bir değişle çalışmanın konusu "tarih" değil, "bugün" dür. Siyasi ve yargısal gelişmelerin, olayların üzerinden fazla zaman geçmemiş; siyasi gelişmelerin etkileri netleşmemiş ve konuyla ilgili taraflar, görüşler henüz yerleşik bir hal almamıştır. Yine bu nedenden ötürü inceleme konusuyla ilgili, bilhassa art arda yapılan yargı reformları ve siyasi davalar ile ilgili, doyucu akademik tartışmaya, analize rastlamak zordur. Bu nedenle çalışma konusu ile ilgili verilerin kaynağı daha ziyade süreli yayınlar, gazete ve dergilerdir. Ek olarak, yorumcuların ve köşe yazarlarının görüşlerinden yahut avukatlar, savcılar, gazeteciler askerler gibi gelişmelere birebir şahit ya da müdahil olan kişilerin aktardıklarından yararlanılmıştır.

Çalışma, güncel meselelerin analizi dışına sadece bir örnekte çıkar. Bu istisna, laiklik normunun analizinde kendisini gösterir. AKP'nin laiklik normu ile olan ilişkisi irdelenirken çalışma tarihsel bir analiz yapmaktadır. Bu bölümde incelenen sadece AKP'nin laik niteliği değildir. Bunun yanında çalışma, devletin ne derece laik olduğunu da sorgulamaktadır: Acaba devlet, AKP karşısında ne derece laik bir tavır ve tutum almıştır? Devlet ne derece laik bir kurumdur? O halde bu bölümde asıl sorgulanan devlettir. Bu sorgulama ile anayasal devletin laiklik niteliğinin temel unsurları serimlenmeye çalışılmaktadır. Bu nedenle tarihsel bir analize gerek duyulmuştur. Bu tarihsel analizde ilk olarak Anavatan Partisi ve Türk Silahlı Kuvvetlerinin faaliyetleri incelenmiştir. Ardında da, laiklik normunun ne derece bu güçleri sınırladığı sorusu sorulmuş ve yanıtlanmıştır. Son olarak, laiklik normunun bu güçlerin eylemleri karşısında takındığı tavır, AKP karşısında takınılan tavır ile karşılaştırılmıştır.

Bahsedilmesi gereken son konu, çalışmanın anayasal devlet karşısında takındığı metodolojik perspektiftir. AKP'nin anayasal devlet ile etkileşimi geniş bir metodolojik perspektifte ele alınabilir. Bu konu için bir kere daha Schmitt'in görüşlerinden faydalanabiliriz. Schmitt, anayasanın devletle özdeş olduğunu; anayasanın devlete eş olduğunu belirtmektedir. Anayasal bir düzlemde yasa, devletten koparılamaz. Anayasa, devletin iradesidir. Yine de anayasanın iki anlamı vardır. Bunlardan ilkine göre anayasa, devletin siyasi birliğinin koşuludur. Başka bir anlatımla anayasa, siyasi birliğin ve düzenin yasası ve ilkesidir. Eğer bu anayasa ya da bu birlik ve düzen ortadan kalkarsa, devlet de ortadan kalkar. Bu bağlamda ve bu anlamıyla ele alınacak olunursa, Türkiye Cumhuriyeti'nin yürürlükte olan anayasası olan 1982 Anayasası, Başlangıç bölümünde değinildiği üzere, devletin milleti ve toprağı ile bölünmez bütünlüğünü simgelemektedir. Aynı zamanda, bu siyasi birliğin bir cumhuriyet ve bir ulus devlet olarak kurulduğu 29 Ekim 1923 tarihini işaret etmektedir. İkinci anlamına göre ise anayasa, bu siyasi ve toplumsal düzenin somut ve özgül bir biçimini ya da devletin varlığının özel bir biçimini anlatır. Bu ikinci anlamıyla da anayasa, tarihin belirli bir anında yaratılan somut üstünlük ve itaat ilişkisini betimlemektedir. Bu açıdan bakılacak olursa da 1982 Anayasası, 12 Eylül 1980'i işaret etmektedir. Bu tarihte özgül bir siyasi birlik; devletin milleti ve toprağı ile bölünmez bütünlüğünün özgül bir biçimi kurulmuş; üstünlük ve itaat ilişkisi yeniden belirlenmiştir.

AKP iktidara geldiği zaman, anayasanın bu iki anlamı ile birden etkileşime girmiştir. 1982 Anayasası ile kurduğu ilişkiyle aynı zamanda, 1923'de kurulan siyasi birlik ve düzenle de karşı karşıya gelmiştir. 1923'de bir ulus devlet olarak kurulan siyasi birlik zarar görürse, 1980 sonrasında şekillenen parlamenter siyaset ve düzenin özgül biçimi de olduğu haliyle kalamayacaktır. Ancak AKP'yi asıl sınırlayan olgu, 1980 sonrasında yeni bir anayasanın getirilmesiyle şekillenen Cumhuriyet'in parlamenter demokrasi olarak somut ve özgül siyasi varlığıdır. Günümüz parlamenter demokrasisi ve siyasi birliği 1923 kadar, hatta ondan daha fazla, 1980 sonrası oluşan özgül siyasi birlik

tarafından şekillendirilmiştir. Aslına bakılacak olursa, AKP'nin anayasal devlet ile etkileşiminin tam bir fotoğrafını çekebilmek için, bu partinin anayasanın her iki anlamıyla birden olan ilişkisine bakmak gereklidir; hem ulus devlet olarak kurulan 1923 siyasi birliğine göndermede bulunan anlamıyla hem de 1980 askeri darbesi sonrası yeniden şekillenen ve belki de yeniden kurulan somut siyasi birlik ve üstünlük ve itaat ilişkileri anlamıyla. Ancak bu ikili inceleme Mustafa Kemal Atatürk, Kenan Evren ve Recep Tayyip Erdoğan'ın anayasal düzen ve siyasi birlik ile kurdukları ilişkilerin ayrı ayrı incelenip karşılaştırılmalarını gerektirir. Bu ise çalışmanın kapsamını aşmaktadır. Bu nedenle, AKP'nin 1923'de kurulan siyasi birlik ve düzen ile etkileşimi incelenmemiştir. Çalışma, AKP'nin 1980 sonrasında kurulan somut özgül siyasi birlik ve düzenle ilişkine odaklanmıştır. Anayasal devlet dendiğinde anlatılmaya çalışılan, 1982 Anayasası'nın getirdiği sınırlar dâhilinde işleyen parlamenter demokrasi ve anayasal düzendir. Yine de anayasanın bu ikili anlamını akılda tutmak faydalı olacaktır.

B. CURRICULUM VITAE

PERSONAL INFORMATION

Surname, Name: Kars Kaynar, Ayşegül
Nationality: Turkish (TC)
Date and Place of Birth: 14 June 1980, Ankara
Marital Status: Married
Phone: +90 541 830 23 22
email: aysegul.kars@gmail.com

EDUCATION

Degree	Institution	Year of Graduation
MS	City University of London, Telecommunication Studies	2009
MS	Ankara University, Political Science	2005
BS	METU, International Relations	2003
High School	İncirli High School, Ankara	1998

WORK EXPERIENCE

Year	Place	Enrollment
2007 to Present,	Middle East Technical University, Department of Political Science and Public Administration	Research Assistant
2006-2007	Public Workers Union Confederation, Communication Worker's Union	Specialist
2005-2006	"The World" Newspaper	Reporter

FOREIGN LANGUAGES

Advance English, beginner level German, intermediate Ottoman

CONFERENCES

New School University, Student Collective of Turkey, Public Lecture; paper presented *Political Justice: Political Trials and Their Implications for the Constitutional State in Turkey*, 2 April 2014, New School, New York

Turkish Political Science Association, XI. Post-Graduate Students Conference; paper presented *Politics of Anti-Terror Law and Political Justice of Justice and Development Party*, 9 November 2013, METU, Ankara

International Conference on New Media and Interactivity, paper presented *Democracy and New Broadcasting System: A Problematic Discussion*, 28-30 April 2010, Marmara University, İstanbul

Turkish Social Scientists Association (TSBD) 11th National Social Science Congress, paper presented *Telecommunication Market in Turkey: Competition in Voice Telephony*, 19 December 2009, METU, Ankara

Gazi University, 1st Congress of Science and the Its Critics, paper presented *The Scientific character of Social Sciences: The Divergence of Philosophy and Science*, 8-9 May 2008, Gazi University Ankara

Turkish Social Scientists Association (TSBD) 10th National Social Science Congress, paper presented *Circulation of Capital: Movement of Capital in Space*, 28-30 November 2007, METU, Ankara

Center on Class Studies in Turkey Symposium, paper presented *Spaces of Capital: Migrant Workers in metropolises as underclass*, 19-20 May 2007, TÜSAM, İstanbul

PUBLICATIONS

Kars Kaynar A. (2014). "Carl Schmitt, Judicial Decisions and the Boundaries of Political Power within Constitutional State" in *Kampfplatz Journal*, No. 5

Kars Kaynar A. (2013). "Anti-Terror Law and the Unlawfulness of the Crimes Against the State" in Toplum ve Bilim, No. 128

AWARDS

Jean Monnet Scholarship for a year master study, 2008-2009

HOBBIES AND INTERESTS

Literature, sports

C. TEZ FOTOKOPİSİ İZİN FORMU

ENSTİTÜ

Fen Bilimleri Enstitüsü	
Sosyal Bilimler Enstitüsü	x
Uygulamalı Matematik Enstitüsü	
Enformatik Enstitüsü	
Deniz Bilimleri Enstitüsü	

YAZARIN

Soyadı : Kars Kaynar
Adı : Ayşegül
Bölümü : Siyaset Bilimi ve Kamu Yönetimi

TEZİN ADI (İngilizce) : INTERACTION OF THE AKP WITH THE CONSTITUTIONAL STATE IN TURKEY: AKP'S POLITICAL JUSTICE

TEZİN TÜRÜ : Yüksek Lisans [ ] Doktora [x]

1. Tezimin tamamından kaynak gösterilmek şartıyla fotokopi alınabilir. [x]
2. Tezimin içindekiler sayfası, özet, indeks sayfalarından ve/veya bir bölümünden kaynak gösterilmek şartıyla fotokopi alınabilir. [ ]
3. Tezimden bir bir (1) yıl süreyle fotokopi alınamaz. [ ]

TEZİN KÜTÜPHANEYE TESLİM TARİHİ: