POLITICAL THEORETICAL READING OF CONSTITUTION MAKING AND CONSTITUTIONAL CHANGE PROCESSES IN TURKEY IN THE FRAMEWORK OF SCHMITTôS AND HABERMASôS THEORIES

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ABSTRACT

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This thesis engages in a political theoretical reading of constitution making and constitutional change processes in Turkey within the framework of Carl Schmittôs and Jürgen Habermasôs theories. The first theoretical part of the thesis expounds on the theories of Schmitt and Habermas regarding the legitimacy of constitution making/reforming processes in relation to three subjects, namely the conceptualization of constituent power and its democratic potentials, the conceptualization of the act and text of constitution, and legitimacy of judicial review. The second part of the thesis elucidates changing conceptions of the constitution and constitutional legitimacy in Turkey from the perspective of the framers of constitutions since the early Republican period on the basis of the theoretical frameworks presented in the first part. In this respect, the constitutional debates on the formation of 1921, 1924, 1961 and 1982 constitutions, and 1923, 1937, 1971, 1995 and 2010 amendments in relevant Assemblies are examined in order to understand how the authors of the constitutions, particularly the members of the Constitutional Committees and generally the members of the parliaments, conceive the constitution, the practice of constitution making and constitutional change and how they justify their practice.

Keywords: Constitution, Constitutional Legitimacy, Constitutions of Turkey.

ÖZ

SİYASET KURAMI IŞIĞINDA TÜRKİYE'DE ANAYASA YAPIMI VE DEĞİŞİKLİĞİ SÜREÇLERİ: SCHMITT VE HABERMAS'IN KURAMLARININ BİR UYARLAMASI

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Bu çalışma, siyaset kuramı çerçevesinde Türkiye'de anayasa yapımı ve değişikliği süreçlerini Carl Schmitt ve Jürgen Habermas'ın kuramları çerçevesinde incelemiştir. Tezin birinci bölümünde, Schmitt ve Habermas'ın kuramları; anayasa yapımı ve değişikliği süreçlerinin meşruiyeti, kurucu iktidar kavramsallaştırması ve bu kavramın demokratik potansiyeli; kurucu bir eylem ve metin olarak anayasa kavramsallaştırması ve anayasa yargısının meşruiyeti konularıyla ilintili olarak açımlanmıştır. Tezin ikinci bölümünde, birinci bölümde sunulan kuramsal çerçeve temelinde, Türkiye'de anayasa yapıcılarının erken cumhuriyet döneminden günümüze kadar değişen anayasa ve anayasal meşruiyet kavrayışlarına odaklanılmıştır. Bu bağlamda, anayasa yapıcılarının, Anayasa Komisyonu üyeleri başta olmak üzere genel olarak (kurucu ya da olağan) meclis üyelerinin, anayasayı nasıl kavradıklarını ve anayasa yapımı ile değişikliklerinin meşruiyetini hangi temeller üzerine kurduklarını anlamak amacıyla 1921, 1924, 1961 ve 1982 Anayasalarının yapım süreçleri ile 1923, 1937, 1971, 1995 ve 2010 anayasa değişiklikleri sırasında geçen meclis tartışmaları incelenmiştir.

Anahtar Kelimeler: Anayasa, Anayasal Meşruiyet, Türkiye'de Anayasalar.

To My Family

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LIST OF ABBREVIATIONS

AKP	Justice and Development Party *(Adalet ve Kalkınma Partisi)*
ANAP	Mother Land Party *(Anavatan Partisi)*
AP	Justice Party *(Adalet Partisi)*
BDP	Peace and Democracy Party *(Barış ve Demokrasi Partisi)*
CHP	Republican People's Party *(Cumhuriyet Halk Partisi)*
CKMP	Republican Peasant Nation Party *(Cumhuriyetçi Köylü Millet Partisi)*
DP	Democrat Party *(Democrat Parti)*
DSP	Democratic Left Party *(Demokratik Sol Parti)*
DYP	True Path Party *(Doğru Yol Partisi)*
MGP	National Faith Party *(Milli Güven Partisi)*
MHP	Nationalist Movement Party *(Milliyetçi Hareket Partisi)*
NUC	National Unity Committee *(Milli Birlik Komitesi)*
NSC	National Security Council *(Milli Güvenlik Konseyi)*
RP	Welfare Party *(Refah Partisi)*
SHP	Social Democratic People's Party *(Sosyal Demokrat Halkçı Parti)*
TGNA	Turkish Grand National Assembly

CHAPTER 1

INTRODUCTION

Turkey has been long living in a period of constitutional crisis. Not alone the nature of the relations between the state organs, i.e. the legislature, the executive and the judiciary, or the scope of duties and powers of the constitutional court stipulated in 1982 constitution form a major source of controversy, but the legitimacy of the constitution itself and the constitutional principles have always been at the center of severe criticisms both within public and political spheres. The constitution of 1982 has been amended for several times since its promulgation. Particularly throughout the beginning of the millennium, numerous progressive changes have been made in order to harmonize with European Union legislation. We are witnessing nowadays, nevertheless, persistent attempts of politicians to write a new constitution. And the debate is of crucial significance since it includes one of the most fundamental aspects of constitutional democracy, a possible change in the future form of government of the Republic.

Indeed, Turkish polity is distinctive in the sense that the constitution and constitutional legitimacy always remain contested issues at the top of the political agenda, at least for the last sixty years. Since the establishment of the Republic in 1923, we witness the introduction of three constitutions (1924, 1961 and 1982 constitutions), two of which immediately after military interventions, and numerous constitutional amendments. If we set aside the periods in which genuine requirements occur for constitutional change, it seems that there has also developed in time a habit of mind which associates every social, economic or political turmoil with constitutional crisis. Interestingly enough, the making of a new constitution has been considered as a key to resolve the confronted problems and to found a new social order. I think that such distinctive experience and emergence of such habit of mind in Turkish context is substantially related to the conception of the constitution

and constitutional legitimacy by the dominant political actors and framers of constitutions in different periods.

Through the questioning of this peculiar characteristic of Turkish polity, I aim, in this thesis, to engage in a political theoretical reading of constitution making and constitutional change processes in Turkey within the framework of Carl Schmittôs and Jürgen Habermasôs theories. I concentrate on the constitutional debates in relevant Assemblies in order to elucidate changing conceptions of the constitution and constitutional legitimacy from the perspective of the framers of constitutions since the early Republican period. I examine, on the basis of parliamentary minutes, how the authors of the constitutions, particularly the members of the Constitutional Committees and generally the members of the parliaments, conceive the constitution, the practice of constitution making and constitutional change and how they justify their practice. I believe that Schmitt and Habermas provide us with two substantially different conceptualizations of constitution and constitutional legitimacy, and are valuable in this sense to decipher and compare the continuities and ruptures in the criterion of constitutional legitimacy throughout the constitutional debates in Turkey.

The legitimacy of constitution making and constitutional reform processes in contemporary polities is highly debated in recent decades in political theory as well. In fact, some legal and political traditions do not deal with the problem of legitimacy, and instead concentrate on the issues concerning legality. However, in this thesis, I will take the old fashioned questioning of legitimacy seriously and elaborate on it since I consider it as a persisting problem for political theory. I think that the controversy concerning legitimacy begins where the main premises of liberal constitutionalism and its dominant legal paradigm, legal positivism fail to explicate the legitimacy of the historically first constitution laying down the procedures for legal change in a polity. It seems that both traditions are based on the assumption that there exists an external relationship between the law and the political, considering the two spheres of social life as distinct phenomena. A critical analysis of the historical evolution of the principle of constitutional government clearly unfolds this tendency.

Throughout the history of political and legal philosophy, the law has always been perceived as a criterion for the evaluation of legitimacy of political action. Beginning from the classical period, most visibly in the considerations of Platonôs *Nomoi*, to Kantôs conceptualization of civic republicanism in the eighteenth century, law is considered as a standard established in light of right reason in order to evaluate the exercise of state power in terms of right (Arendt, 2007a). Particularly in the eighteenth century political philosophy, as a reaction to the absolutist regimes, the law is viewed as a safeguard against arbitrary government. This tendency to view the law as an external element to the political seems to create no categorical controversy in the philosophy of the middle ages and natural law. When the validity of law is perceived to be based on the will of divine authority or a transcendental source like nature, the law could easily have been considered as a guarantee against arbitrary rule. The controversy arises when the idea of secularization begins to colonize the transcendental or metaphysical considerations of political and legal philosophy and results in a change of paradigm towards immanency. In other words, when the law, as does the political, is conceived to be based ontologically on human convention, or as a product of modern state, it becomes problematic how it can be the objective criterion for legitimate government. In conjunction with this, the legal and political philosophy should provide both critical and justificatory outlook to the legitimacy of legality.

In order to come to terms with the problem of objectivity and bestow the legal order with scientific quality, legal positivism appeals to a rigid isolation of law from other domains of life such as morality, politics, ideology and philosophy. According to standard legal positivist perspective, the legal system of modern societies comprises positive laws issued and enforced by authorized bodies in line with the pre-established law making procedures usually embodied in the text of constitution. The systematized hierarchy of legal norms is considered to be the basis of rationality and validity of law. In this respect, a legal norm takes its authority from a higher layer of law, and this attribution lasts until the constitution. The legal system in a sense involves the principle of its own operation. The general and abstract laws detached

from historical and social phenomena are viewed as a guarantee of impartiality and predictability. Indeed, the main premises of liberal constitutionalism, namely the principle of *the rule of law* and *separation of powers* might be seen as the embodiment of the theoretical premises of legal positivism. Only if the legal order is acknowledged as an autonomous sphere detached from the political, social or ideological concerns, the idea of limited government can gain cogency. However, the autonomous conceptualization of the legal sphere tends to avoid the historical fact that the positive law is a product of modern state. In other words, positive law has developed upon already established actual force of states, i.e. institutionalized coercive power.

Nevertheless, when the nature of the relationship between the law and the political is conceptualized in external terms as in the case of legal positivism and its crystallization in the theory and practice of constitutional government, we are confronted with an array of problems concerning legitimacy.

The first problem is related in broad sense to the legitimacy of legality. For legal positivism, the constitution as the supreme law of the land constitutes the source of validity of other norms within the legal order. If this is the case, in the absence of a pre-established legal order or in the absolute point of legal disorder, what constitutes the source of authority of the historically first constitution? Legal positivism avoids this question. Moreover, the constitution is considered above all as a legal text embodying the fundamental rules and procedures specifying the proper relations between different organs of the state. However, the conceptualization of constitution as a legal text is partial since it touches upon only one aspect of the fundamental act of constituting a political community in general sense. The idea of constitution as a legal text focuses only on the product of the act of constituting and thus conceals the originary event of decision, the deliberate will of constitutional framers that has been exercised on the form of political existence of the community. In this respect, the moment of decision of a sovereign authority to decide upon the norm and exception, or in other words the moment of the political is concealed. As the law and

particularly the constitution is detached from historical and sociological facts and contents and considered in a universal, ahistorical form, the material basis of the constitution in terms of its being a product of the power struggles between contending social forces at the moment of the founding is also concealed.

Similarly, this conceptualization is not able to account for the legitimacy of the specific rules and procedures contained in the constitutional text concerning who are entitled to make amendments on the existing constitution. It is obvious that the pre-determination of the competent bodies and the procedures through which the existing constitution can be changed is inconsistent with democratic self-government, at least for the consequent generations who are not directly participated in the process. This understanding takes the constitution as a static text and exhausts the power struggles of different social forces in a society from the beginning. The fixation, in other words, consumes all forms of political action and limits the sphere of the political. In light of these considerations, it becomes evident that there is a need to critically rethink the political status of the constitution in order to bridge the gap between the concept and social reality. Such analysis should take into consideration the source of objectivity and normative bindingness of the historically first constitution as well as the status of inalterable provisions of a constitution in a democratic regime. This is needed, once again, if we would make sense of old-fashioned questioning concerning legitimacy.

The second problem is concerned with the modern constitutionalismôs dichotomous conceptualization of the notions ñconstituent powerò and ñconstituted powersò in order to confront the problem of legitimacy of the political power. In this conceptualization, the ópeopleô or the ónationô as the constituent power is conceived as the basis of justification for the constituted powers of the modern state, namely, its legislative, executive and judicial organs. However, in the current state of affairs, this dualist conceptualization can be challenged in three respects. First, the analytical force of notion of constituent power is opaque since it is not clear which social forces form the constituent power. When it refers to óa peopleô, the concept assumes the

people as a homogeneous collective entity thus seemingly avoids social differentiations and cleavages. Second, it is questionable to still appeal to the notion of ‘constituent power’ as the originary source of constitutional form since it is dissolved within the principle of representation in the practice of today’s representative democracies (Negri, 1999). And third, if the constituent power is the source of authority of the constitutional form, what constitutes the source of legitimacy of the constituent power in the last instance? It is obvious that there is still a need to reexamine the theoretical consistency of the concept of ‘constituent power’ and its theoretical potentials for providing democratic legitimacy to constituted order and particularly for the constitution-making and constitution reforming processes in parliamentary democracies. Apart form the considerations of liberal constitutionalism and public law, how we can construct the relationship between the notions ‘constituent power’ and ‘constituted powers’ and who will be the subject and the bearer of the constituent power are questions waiting for resolution.

The third problem is related to the legitimacy of judicial review processes in a constitutional democracy. Constitutional judicial review refers to a process in which the laws and constitutional amendments are reviewed by a supreme court in order to evaluate their compatibility with the provisions of the constitution. While in some countries, a constitutional court separate from the regular judiciary is entitled with this power, in some other countries it is assigned to the entire court system (Heringa and Kiiver, 2007). The basic idea behind the constitutional judicial review is the concern to protect the individual rights and liberties against the misuse of the executive power as well as the legislative power (Özbudun, 2008). Indeed, for liberal constitutionalism, the judicial review forms a significant component of the realization of the rule of law in a democratic polity. And this consideration stems from the assumption of the law and the political being as two distinct spheres of life. However, this conceptualization cannot account for the contemporary debate concerning the political aspect of the decisions of the constitutional court and the perception of these decisions as an illegitimate intervention into the political sphere. Moreover, the character of the decisions of the constitutional court concerning the

interpretation of constitutional provisions is substantially debated. In this respect, a conceptual reformulation is needed in order to explain the legitimacy of the direct intervention of the decisions of the court to reformulate the political sphere in the form of repeals of constitutional amendments, party closures, prohibition of certain individuals from engaging into politics and committing the opponents of the political regime into prison.

As it is obvious, the discussion on the problem of legitimacy of a constitution requires elaborating at the same time on related subjects, namely the theoretical and practical adequacy of the notion of constituent power for providing a democratic basis, the legal and political status of the constitution and the legitimacy of the constitutional review process. In light of these considerations, in this thesis I will discuss the problem of legitimacy of constitution making and constitutional reform processes in contemporary constitutional democracies with specific reference to Turkish political experience beginning from its first constitution in 1921 in relation with these three relevant subjects. For this purpose, in the first theoretical part of the thesis, I will expound on the conceptualization of legitimacy of constitution making and constitutional reform processes in the legal and political theories of Carl Schmitt and Jürgen Habermas. I will investigate how Schmitt and Habermas formulate the legitimacy of a constitution and conceptualize its specific requirements. In this respect, ***ñ****What is the theoretical potential of the notion of* ***á****constituent power****ô*** *to come to terms with the problem of legitimacy of the constitution?****ò***, ***ñ****What is the political status of the Constitution****ò***, ***ñ****How can the democratic legitimacy of constitution-making, constitution-reforming processes be ensured?****ò*** and ***ñ****How can we make sense of constitutional review?****ò*** will be the main themes that will be examined throughout the theories of the above mentioned theorists. The preference for the theoretical frameworks of Schmitt and Habermas to examine the subject matter of the thesis is largely dependent on the comprehensiveness of their theories to deal with the issues discussed concerning contemporary constitutional democracies.

In fact, contrary to the considerations of liberal constitutionalism and legal positivism, the relationship between the law and political is multifaceted as well as complex. Nevertheless, it is still possible to state that positive law in modern constitutional democracies oscillates between the two extremes of pure instrumentality and *indisponibility* (Habermas, 1986). As an instrument of political power, the law may easily degenerate into a source of mere coercive force and arbitrary rule. On the contrary, once endowed with certain qualities, the law may function as an integrative force in todayôs pluralistic societies as well as a source of legitimacy for democratic government (Habermas, 1996). For the theoretical endeavor striving to illuminate this janus-based relationship between the law and political, the constitutional theory of Schmitt and the procedural democracy of Habermas provide valuable considerations. Schmittôs and Habermasôs theories are foreshadows of this complex relation between law and the political and each endeavors to come to terms with it in very different ways.

For the normative approach of liberal constitutionalism cannot account for the empirical cases in which the actions of the political power transgress the law, and in fact construct the norm on the basis of exception, Schmittôs theory of sovereignty is indispensable to illustrate the political aspect of the modern state and the constitution. Schmitt, overwhelmingly contesting the premises of the nineteenth century liberal legal and political theory, criticizes the depolitization of various spheres of social life and immobilization of the state. He develops his theoretical framework mainly to indicate the inconsistencies in legal positivist thought and liberal tradition. He severely criticizes legal positivismôs understanding of the legal order independent from personalist element and of legal idea independent from social and historical phenomena. In Schmittôs conceptualization, the constitutional decision of the constituent power forms the basis of the legal system. The constitution is not understood in purely legal terms. On the contrary, it is a political decision binding the future of the community by determining the type and form of its concrete political existence. Moreover, the constitution is not a formal concept as emphasized by the rule formalism of liberal constitutionalism. It is rather material in the sense

that it embodies the deliberate decision in favor of certain ideologies, values and preferences. According to Schmitt, even liberal constitutionalistôs discretion in favor of the sovereignty of the rules is a result of a deliberate decision. In fact, contrary to the premises of liberal constitutionalism and legal positivism which result in juridification and limitation of the political, Schmittôs theory of sovereignty stresses the primacy of the political over law and emphasizes the will of the sovereign to make final decisions concerning the norm and exception. Emphasizing the norm creating power of political decision of the sovereign, Schmitt conceptualizes the political as constitutive of all spheres of life and most significantly of the law. In other words, Schmitt constitutes legitimacy on the basis of the political rather than the legality principle, and the constitution making process gains legitimacy because of its political character. In this respect, his perspective seems to have the strength of explaining the social reality of modern states and societies in more adequate terms. Contrary to the purely normative attitude of liberal constitutionalism and legal positivism toward political action, Schmitt adopts a realist approach and brings facticity to the center of political and legal life by drawing attention to the significance of state of exception. In this framework, in order to be fully acquainted with Schmittôs considerations on the subject matter, I will analyze the whole corpus of his works including *Constitutional Theory*, *The Concept of the Political*, *Political Theology*, *Legality and Legitimacy*, *The Crisis of Parliamentary Democracy*, *On the Three Types of Juristic Thought* and *The Leviathan in the State Theory of Thomas Hobbes*.

Contrary to Schmittôs approach reducing the moment of law to the political, Habermasôs procedural democracy is a normative and sociological search for the reformulation of a delicate balance between the law and the political. Acknowledging the significance of the function of law for the realization of a rational society, Habermas (1996) tries to solve the tension between normativity and facticity. For Habermas, the legitimacy of legality neither stems from the formal characteristics of positive law as legal formalism claims, nor from the hierarchical structure of laws as legal positivism argues. In contrast, Habermas argues that

positive laws can be legitimately justified on the basis of practical discourses institutionalized by means of legal procedures. Legal norms subjected to discursive political opinion and will formation processes gain legitimacy as the addresses of law conceive themselves as the authors of these laws. As a result, in discourse theory, neither the law is dissolved into pure facticity and become a pure instrument of politics as in the case of Schmittôs theory, nor the laws and the politics limited by laws are conceived as external elements as in the case of liberal constitutionalism. Habermas, in this way, tries to establish an internal relationship between democracy and constitutionalism in order to deal with the problem of democratic legitimacy. More significantly, in Habermasôs theory, the constitutional text loses its static character and becomes a dynamic one responsive to the demands of different social forces. Through the informal and formal democratic discursive areas legally institutionalized, the subjects of law find the possibility of influencing political decisions concerning public matters. Accordingly, we can state that Habermas achieves to a certain extent to keep the constituent power continuing to operate within the framework of constituted powers.

Moreover, Habermasôs conception of the constitution as a future oriented open text enables the consequent generations to improve and transform the system of rights enshrined in the founding event through democratic will formation processes. Accordingly, the acts of constitution-making and constitution-reforming are theoretically legitimized in reference to the procedures that are followed in the practice of constitution making. However, despite its powerful formulations, Habermasôs work suffers from a number of weaknesses. Firstly, his theory cannot escape from an óinfinite regressô since the constitutional essentials and democratic procedure follow a cyclical pattern (Michelman, 1996a). According to Habermasôs *co-originality* thesis, the system of rights, namely the fundamental rights and liberties of citizens and the political participation rights required for the principle of discourse, is simultaneously determined in a hypothetically constructed original position in which a number of persons enter into a constitution-making practice. As it is impossible to locate the founding event in a specific historical period of time, the

democratic legitimacy of the historically first constitution becomes problematic. Secondly, Habermas seems to ignore the fact that it is nearly impossible to achieve consensus on issues related particularly to justice and constitutional essentials in the pluralistic conditions of modern societies (Bohman, 1994). In this respect, his ideal of unanimous agreement on such critical matters seems to be not complying with the pluralistic reality of modern societies. In this framework, in order to fully keep track of the changes in the theoretical framework of Habermas, his works *Legitimation Crisis*, *The Theory of Communicative Action*, ñ*Law and Morality***ò**, *The Philosophical Discourse of Modernity*, *Moral Consciousness and Communicative Action*, *Inclusion of the Other* and *Between Facts and Norms: Contributions to a Critical and Discursive Reformulation of Theory of Democracy* are among the texts that will be explored. In fact, *Between Facts and Norms* comprises Habermasôs most comprehensive and systematic analysis of procedural democracy. In this respect a special consideration will be attached to this work.

The constitution, in fact, is something more than a legal text. It stands at the intersection of the law and the political and where the two realms intertwine with each other (Göztepe, 2012: 388). As it is seen, in Schmittôs conceptualization, the constitution is not merely a neutral legal form defining the relations between different state organs but more significantly a political decision constituting the political community on the basis of enemy-friend distinction. The constitutional decision binds the future of the community by determining the type and form of its concrete political existence. In this respect, in Schmitt, the constitution making is conceived as the act of a deliberate will fixing the power struggles in a society once and for all. In Habermas, on the contrary, the constitution becomes a dynamic text socially constructed through intersubjective communication processes. The act of constitution making is perceived as a platform of social interaction and consensus. In this respect, in Habermasôs conceptualization, the act of constitution making is conceived in more democratic terms at the expense of the concealment of the moment of the political.

As it is obvious, the theoretical frames drawn by the two theorists respectively have the strength of presenting different perspectives on the subject matter. Since their premises have both exclusive and complementary aspects, I believe that examination of their theories will provide us with a comprehensive perspective on the problem of legitimacy and other closely related subjects.

After investigating the conceptualizations of the two mentioned theorists in the thesis, I will concentrate on the changing conceptions of constitution and constitutional legitimacy in Turkey throughout different constitutional moments since the early republican period by reference to Schmittôs and Habermasôs theories. In this framework, in the second part of the thesis, I will concentrate on the constitutional debates in the Turkish Grand National Assembly during the making of 1921, 1924, 1961 and 1982 Constitutions and 1923, 1937, 1971, 1995 and 2010 constitutional amendments for understanding the perception of the parliamentary representatives about the concept of constitution and its legitimacy.[1] I will try to interpret, on the basis of the parliamentary minutes, how the framers of the constitutions, particularly the members of the Constitutional Committees and generally the members of the parliaments, conceive the constitution, the practice of constitution making and constitutional change and how they justify their practice. I will furthermore question whether they problematize the democratic legitimacy of the constitutions and their authority to make new constitutions, or not. In such endeavour, I will benefit mainly from the conceptual tools developed by Schmitt and Habermas but also from a number of political theorists such as Rawls, Michelman and Arendt in order to deepen the constitutional debates and to provide a political theoretical reading of the constitutional developments in Turkey.

In Turkey, the legitimacy of the 1924 Constitution has been put into question on the basis of its enactment in a parliament devoid of any social and political opposition

[1] The quotations (the quoted statements of members of Assemblies) from the parliamentary minutes are translated by the author. However, the original statements are also provided in the footnotes in order to be loyal to the speakersô own words.

(Parla, 2007; Özbudun & Gençkaya, 2010). Moreover, legitimacy of 1961 and 1982 constitutions is highly debated since they were written under the tutelage of the military after the 1960 and 1980 *coup d'etat*s. Apart from these, since the adoption of 1982 Constitution, there have been made numerous amendments in the 1982 Constitution, some of which are very comprehensive and substantial in essence and some of which are minor in scope and significance. The major amendments that had implications on the organization of the state and on the perception of democracy and fundamental rights and liberties are mainly the constitutional amendments made in 1995, 2001, 2004, 2007 and 2010. In addition, Turkey engaged in a new constitution making process with the initiative of the Presidency of Turkish Grand National Assembly (TGNA) in October 2011. The Constitution Conciliation Commission, which comprises equal number of representatives from the political parties represented in the parliament, is established to write a new constitution. The Parliament decided to form the Constitution Conciliation Commission by drawing inspiration from the success of the conciliation committees established during the comprehensive constitutional changes in 1995 and 2001 (TESEV Report, 2012a). And a clear and participatory road map for the operation of the Commission is determined from the outset. However, though there was a large public consensus on the need to write a new and democratic constitution, there immediately emerged in the public a number of critical debates concerning the legality and legitimacy of the process adopted. In this respect, the legal and political competence of the parliament to write a totally new constitution has come under question.[2] Besides, the unanimity rule required in the Commission to come to a conclusion is questioned in terms of its sustainability. In the end, the Commission is dissolved as the parties could not agree upon the constitutional essentials. We again witness the introduction of a new process of constitution making in the Assembly nowadays, and this implies that the constitution and constitution making still remains a contested issue in Turkish context.

[2] As a legal positivist, Gözler (2012) states that for an entirely new constitution to be written, first of all the 1982 constitution must be abrogated. The current Parliament, as part of the constituted powers established by the 1982 Constitution, cannot abrogate the *raison d'etre* of its own existence. In this respect, the Parliament does not have legal and political competence to write a new constitution.

A careful study of the current literature on the constitutions and constitutional history of Turkey shows that the constitutional developments have usually been studied through a legal analysis of constitutional texts or in the framework of the contextual political and social developments accompanying constitutional periods. There is abundance of studies conducted by legal and political scholars on the texts of constitutions and their individual provisions.[3] In addition, the constitutional history of Turkey has been studied by a variety of political scientists in relation to the political developments of their period.[4] I think such legal and political approaches are significant for providing data about the development of constitutional democracy of Turkey. Yet I do not think that they present a complete analysis until they are supplemented by a careful examination of the thoughts and considerations of the framers of constitutions. I believe that the political culture of a society -the ways in which democracy is understood, state society relations are conceptualized and the relations between the legislative, executive and judiciary bodies are perceived by the dominant political actors- is often the determinant factor in the constitution making and constitutional change processes. Hence, an exhaustive analysis regarding the changing dynamics of understanding legitimacy of Turkish constitutions should take into account critically the dominant intellectual perspective shared by the founding

[3] The following studies might be considered in this framework: Teziç, Erdoğan. (2013). Anayasa Hukuku, 16th ed., Beta Yayınları, İstanbul. Tanör, Bülent & Yüzbaşıoğlu, Necmi. (2013). 1982 Anayasasına Göre Türk Anayasa Hukuku, 13th ed., Beta Yayınları, İstanbul. Özbudun, Ergun. (2008b). Türk Anayasa Hukuku, 9th ed., Yetkin Yayınları, Ankara. Özbudun. (2012). 1924 Anayasası, İstanbul Bilgi Üniversitesi Yayınları, İstanbul. Özbudun. (2008a). 1921 Anayasası, Atatürk Kültür, Dil ve Tarih Yüksek Kurumu, Atatürk Araştırma Merkezi, Ankara. Parla, Taha. (2007). Türkiye'de Anayasalar, İletişim Yayınları, İstanbul. Among these, Özbudun mentions in his studies (2012) and (2008a), the constitutional debates in the first and second Turkish Grand National Assemblies. However, he does not engage in a detailed analysis about how the framers of constitutions perceive the constitution and its democratic legitimacy.

[4] Tanör, Bülent. (2012). *Osmanlı-Türk Anayasal Gelişmeleri (1789-1980)*, YKY Yayınları, İstanbul. Özbudun, Ergun. (2011). *The Constitutional System of Turkey: 1876 to the Present*, New York: Palgrave Macmillan. Özbudun, Ergun & Gençkaya, Ömer Faruk. (2010). *Türkiye'de Demokratikleşme ve Anayasa Yapımı Politikası*, Doğan Kitap. Özbudun. (2009). *Türkiye'nin Anayasa Krizi (2007-2009)*, Liberte Yayınları, Ankara.

fathers and authors of consequent constitutions. The minutes of parliamentary meetings are considerably significant in this respect for being the manifestation of the dominant political culture and mentality and more specifically of the intellectual perspectives and the comprehensive doctrines shared by the founding fathers and the authors of successive constitutions.

From this viewpoint, I basically aim in the second part of the thesis to engage in a hermeneutical interpretation of the constitutional debates included in the parliamentary minutes of the Turkish Grand National Assembly and relevant Constituent Assemblies in order to derive, if possible, a political theoretical reading of the constitutions and their making processes.[5] From a complete body of parliamentary minutes, I will concentrate on the parts related to the major questions of this thesis and interpret the data within the framework of the entire statements included in the parliamentary debates by reference to the political and legal theories of Habermas and Schmitt. Moreover, I will elaborate on each constitutional period as an individual event in itself and examine the parliamentary discussions with only

[5] I think that the hermeneutical method of Gadamer is more relevant in the examination of the self-understanding of the framers of constitutions in different periods throughout the parliamentary minutes. In his *Truth and Method*, Gadamer explains the circular nature of interpretation by referring to Heideggerôs description of the ñhermeneutic circleò (or the circle of interpretation) (Gadamer, 2004: 268-273). Here, let me briefly delineate some aspects of the hermeneutic circle presented by Gadamer. In *Truth and Method*, Gadamer states that ña person who is trying to understand a text is always projecting. He projects a meaning for the text as a whole as soon as some initial meaning emerges in the text. Again, the initial meaning emerges only because he is reading the text with particular expectations in regard to a certain meaning. Working out this fore-projection, which is constantly revised in terms of what emerges as he penetrates into the meaning, is understanding what is thereò (Gadamer, 2004: 269). What Gadamer aims to imply with this critical phrase is that every interpreter brings some assumptions and prejudices beforehand reading a text. Therefore, the practice of understanding and interpretation requires the interpreter to be aware of his/her own prejudices and assumptions from the moment he/she starts reading a text. And the practice of understanding and interpretation refers to a constant process of projection in which the interpreter reads the text repeatedly, revises his fore-projections (sometimes rival ones) and comes up with a unity of meaning in the end. In the following chapters of the book, Gadamer presents a deeper explanation of the idea of hermeneutical circle. He states that ñthe task of understanding is concerned above all with the meaning of the text itselfò (Gadamer, 2004: 365). Hence, he draws attention to two horizons of meaning, the original horizon of the author and first readers, and the contemporary horizon. Consequently, he emphasizes the constitutive role of the interaction or fusion between these two horizons in the practice of understanding. According to this, in understanding and interpreting a text, ñthe issue is not about finding the truth the author wrote about, but realizing the truth it has for the reader, how it becomes alive for the interpreterò (Regan, 2012: 292).

slightly touching upon the contextual socio-political developments. In this way, I will try to shed light on the changing dynamics upon which the authors of constitutions in Turkey strive to ground the legitimacy of constitutions.

In this analysis, the theoretical categories employed by Schmitt and Habermas will provide main analytical tools not only to analyze the constitution making/amending processes in Turkey but also to understand how the dominant actors perceive constitution, democracy and democratic legitimacy. The analysis will also reveal the continuities and ruptures in their perception. Thus the thesis will clarify how the dominant political and social actors in Turkey conceive the relationship between constituent power of the people and the constituted powers, how they define the ópeopleô, which institutions they think represent the people, which institutions stand for the enforcement of the constituent power of the people (is it the parliament; is it the government and the executive; is it the bureaucracy in its entirety or is it a branch of the bureaucracy such as the military or the constitutional court?) and how they view the issue of constitutional review.

For this purpose, in the first theoretical part of the thesis, I will engage in a comparative analysis of the legal and political theories of Carl Schmitt (Chapter 2) and Jürgen Habermas (Chapter 3) regarding the problem of legitimacy of constitution making/reforming processes in relation to three subjects as indicated above, namely the conceptualization of óconstituent powerô and its democratic potentials, the conceptualization of the act and text of óconstitutionô, and of the ójudicial reviewô process. I will mainly engage in a textual interpretative analysis of their theoretical works, including their published books and articles. In this way, I will try to derive some analytical answers to the above mentioned questions and evaluate their theoretical and practical implications. The works and contributions of the figures will be analyzed in a cross-cutting way: where relevant, their ideas will be taken in a direct comparison with each other and the issues will be dealt as if the theorists are in a dialogue. In this way, I will try to deepen the theoretical debate about the issue and discuss the strengths and inconsistencies in the thoughts of the two authors.

Afterwards, I will engage in a critical evaluation of the changing conceptions of constitution and constitutional legitimacy in Turkey on the basis of the theoretical frameworks presented in the first part of the thesis. In this evaluation, the minutes of Parliamentary meetings, including the National Assembly, Senate of the Republic, Constituent Assembly, Assembly of Representatives, Committee of National Unity, National Security Council and the Advisory Council, will be the main tools of investigation. The thesis will mainly focus on the parliamentary debates on the formation of 1921 and 1924 constitutions, and 1923 and 1937 constitutional amendments (Chapter 4), the Constitution of 1961 (Chapter 5), the constitutional amendment of 1971 (Chapter 6), the Constitution of 1982 (Chapter 7) and the constitutional amendments made in 1995 and 2010, those which are comprehensive and substantial in essence (Chapter 8). The thesis will end with a conclusion part (Chapter 9).

CHAPTER 2

SCHMITTôS CONSTITUTIONAL THEORY: PSEUDO-DEMOCRATIC LEGITIMACY OF CONSTITUTION-MAKING PRACTICES IN MODERN DEMOCRACIES

Schmitt, one of the most prominent and controversial political and legal theorists of the twentieth century, conceived the modern constitution consisting of two components, namely the *bourgeois Rechtsstaat* component composed of the principles of *rule of law* and *separation of powers* together with *basic rights and liberties*, and the *political component*, composed of fundamental political decisions pertaining to the concrete type and form of the state (Schmitt, 2008: 55). According to him, however, the identification of the entire constitution with the *bourgeois Rechtsstaat* component as it has been the case in liberal constitutional theory has resulted in the ignorance of the political aspect of the constitution. Moreover, this tendency has ultimately culminated in the concealment of the concept of sovereignty. As a result the sovereign acts of certain authorities could not be correctly developed (Schmitt, 2008: 53). In fact, Schmitt is very critical of identification of the constitution in line with the ideal conceptualization of constitution in liberal constitutionalism and legal positivism (Schmitt, 2008: 89-93). He contends that in liberal constitutionalism, the constitution is idealized as a social contract, and directly associated with a written codification of legal rules embodying a system of guarantees of bourgeois freedom and the separation of powers. The specific feature of this conceptualization is that the state power is viewed as a necessary evil that has to be limited by laws and that the citizens should be protected from. According to Schmitt, ñ[t]he aspiration of the *bourgeois Rechtsstaat*, however, is to repress the political, to limit all expressions of state life through a series of normative frameworks, and to transform all state activity into *competences*, which are jurisdictions that are precisely defined and, in principle, *limited*ò (Schmitt, 2008: 93). For Schmitt, this ignorance is one of the major reasons lying behind the unresolved problems of constitutional theory, for instance the issue of how to fulfill constitutional gaps or the so-called ópublic law stopsô arguments in

liberal constitutionalism.[6] Due to the fact that a constitution comprises mostly abstract rules it cannot set regulations for resolving all concrete constitutional problems. In such cases, the provisions of the constitution remain insufficient and the unprecedented concrete case in hand would be left undecided. In this regard, for Schmitt, the distinction between the two components of the constitution and the recognition of its political aspect is a *sine quo non* for a systematic analysis of the modern constitution. It is on the basis of this distinction that the nature of the modern constitution can be understood and its political aspect concealed by the formal understanding of constitution brought into light. Schmittôs arguments developed in his major work *Constitutional Theory* might be seen as a major endeavor to bring back the political aspect to the center of constitutional theory. Indeed, his most well-known category of the political, ñeither/or decision between friend and enemyò is the fundamental principle of his constitutional theory. Moreover, most of his arguments concerning constitutional theory has been formed within the parameters set by the factual reality of German politics during the *Weimar Republic* at the time of his writing. In this framework, he directed far reaching criticisms against the principle of legality of liberal constitutionalism and its parliamentary politics.

In this chapter, I will elaborate on Schmittôs constitutional theory in connection with his theory of sovereignty and democracy within the framework of the major questions which guide the problematic of this thesis.[7] I will focus on his

[6] When the premises of legal positivism are rigidly adopted, the literal meaning of the provisions of the constitution takes precedence in the resolution of constitutional problems. Schmitt draws attention to the problems when the literal meaning of the constitutional provisions provides no solution for the concrete case at hand.

[7] In *Constitutional Theory*, Schmitt treats constitutional theory as a separate branch of the theory of public law, thus he does not deal directly with the topics i.e. sovereignty which are usually examined within general state theory. Nonetheless, as most of the arguments developed in *Constitutional Theory* have their theoretical origins in his earlier works on sovereignty, dictatorship and democracy, I think it necessary to establish linkages with his earlier works in several cases for the consistency of my argument. See also Renato Cristi, 1998a; Peter Caldwell, 1997; and William Scheuerman, 1996. Cristi draws attention to the connection between Schmittôs constitutional theory and theory of sovereignty presented in *Political Theology*, and highlights Schmittôs employment of the notion of constitution-making power in *Constitutional Theory* as a surrogate for sovereignty (Cristi, 1998a: 116). For him, Schmittôs considerations on the notion of constitution-making power basically make reference to his conceptualization of the sovereign. Similarly, Caldwell examines Schmittôs works *Dictatorship*,

conceptualization of the constitution and legitimacy of constitution-making practices in modern democracies. In order to provide a complete analysis of Schmittôs conception of the constitution, I will substantially draw upon his major work, *Constitutional Theory*. In addition, I will refer to his other works *Political Theology*, *Legality and Legitimacy* and *On the Three Types of Juristic Thought* where I deem it necessary for an exact understanding of Schmittôs considerations on certain points that are relevant to my research.

In this framework, I will firstly focus on Schmittôs conceptualization of the constitution. I will expound his positive conception of the constitution in its relation with absolute and relative conceptualizations. Then I will discuss the distinction between the constitution and the constitutional law. Crucial in this respect is that the distinction lays the basis of a natural borderline between legitimate constitution-making and constitutional change practices. Afterwards, I will briefly explain Schmittôs considerations on the modern liberal constitution. A further step will be elaborating on the origin of the constitution as it is conceptualized in Schmittôs writings. To present a complete analysis of the origin of the constitution, I will present one of his key concepts, constitution-making power. Then, I will concentrate on the legitimacy of the constitution, the democratic procedures for constitution-making in modern states and the legitimacy of constitutional change. Lastly, I will explain and discuss Schmittôs considerations on the legitimacy of constitutional review.

Political Theology and *Constitutional Theory* in conjunction with each other (Caldwell, 1997: 98-105). Caldwell states that in *Dictatorship (*1921), Schmitt engages in a historical analysis of the emergence of modern written constitutions thus Schmittôs theory of dictatorship is above all related to ñthe problem of the foundations of a constitutional systemò (Caldwell, 1997: 100). Moreover, the concept of dictatorship developed in this work forms the cornerstone of Schmittôs theory of sovereignty which he would systematically elaborate in *Political Theology*, published only one year after the former.

2.1 Concept of the Constitution

In *Constitutional Theory*, Schmitt refers to various conceptions of constitution endorsed by different traditions in political and legal theory (Schmitt, 2008: 59-75). These include mainly the absolute and relative concepts of constitution. The rationale behind these explications seems to be Schmittôs intention to differentiate his own definition, the positive concept of constitution from the previous ones, and to associate it with the existential distinction between friend and enemy.

In this framework, the word constitution is used to denote firstly ñthe complete *condition of political unity* and *order*,ò secondly ña *closed system of norms*, not a concrete existing unity but a *reflective* or *ideal* one,ò and thirdly ñindividual constitutional lawò (Schmitt, 2008: 59). Schmitt designates the first two definitions under the rubric of absolute conceptions of the constitution. Despite the internal variants within this definition, the distinguishing aspect of an absolute conception is that it treats the constitution as a (real or reflective) whole. The third designation refers, on the other hand, to the relative (formal) concept of the constitution, which conceives the constitution identical with the individual constitutional laws. In this sense, the constitution no longer denotes an entirety or unified order; rather it corresponds to a multitude of individual statutory provisions formally equal to each other.

The classification of absolute and relative concepts of the constitution is crucial to delineate Schmittôs own conceptualization of the constitution which is the constitution in the positive sense. Indeed, only after a detailed and complementary analysis of these conceptions, it becomes possible to comprehend his positive conception of the constitution as the ñcomplete decision over the type and form of the political unity.ò In this respect, I will firstly explain absolute and relative concepts of the constitution and then I will elaborate on Schmittôs positive concept of the constitution.

2.1.1 Absolute Concept of the Constitution

According to Schmitt, the word constitution denotes an absolute meaning in two senses, in *real* and *reflective* terms. In *real* terms, the constitution can imply the ñconcrete manner of existence of a political unity or stateò (Schmitt, 2008: 59). In this respect, the constitution in the absolute sense refers to the concrete political unity and order of an individual state. Thus the state is *itself* a constitution (Schmitt, 2008: 60).[8] The state and constitution become synonyms of a political unity as they originate along with each other. In this respect, the constitution as a *status of unity and order* existing in concrete terms is not conceived in normative terms as a closed system of legal norms regulating the organization of the state. It signals more like the soul, concrete life and individual existence of a state. ñIf the constitution is eliminated, the state is as well; if a new constitution is founded, a new state arisesò (Schmitt, 2008: 60).

The constitution in absolute sense can also refer to a ñspecial form of rule, which is part of every state and not detachable from its political existenceò (Schmitt, 2008: 60). Therefore, the constitution implies a óspecial type of political and social orderô or the óform in which the state exist,ô i.e. monarchy, aristocracy or democracy. Thirdly, the constitution in absolute sense can be used to point out the dynamic formation and continuous emergence of a political unity (Schmitt, 2008: 61). In this conceptualization, the state is conceived not as a static entity, but rather as a becoming, something continuously evolving. Consequently, the realist conceptions of the constitution in absolute sense treat the state in its entirety and as an *actually*

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[8] The conceptualization of the constitution as the political unity and social order of a state can be traced back to the Greek political philosophy. Regarding this, Schmitt elaborates on Aristotleôs conceptualization of the constitution in his work *Politics*. ñAccording to Aristotle, the state (´ ɞəɚŰŮɑŬ) is an order (ŰŸɝɘɠ) of the naturally occurring association of human beings of a city (´ ʈəɚɘɠ) or area. The order involves governance in the state and how it is organized. By the virtue of this order, there is a ruler (əɛɟ ɢɞɠ). However, a component of this order is its living goal (Űɹəɞɠ), which is contained in the actually existing property of the concrete political formation (*Politics*, bk. IV, chap. I, 5) (Schmitt, 2008: 60).

existing entity. The word state or political unity does not denote a theoretical abstraction or metaphysical construction understood in normative terms.

In *reflective* or *ideal terms* on the other hand, the constitution in absolute sense can refer to ñ*fundamental legal regulation*,ò ña unified, closed *system* of higher and ultimate *norms* (constitution equals norm of norms)ò (Schmitt, 2008: 62). In this regard, the constitution is not conceived as an actual existing condition or a dynamic becoming. It is rather understood in normative terms, as an imperative or command, which ñinvolves the entire normative framework of state life in general, the basic law in the sense of a closed unity, and of the ólaw of lawsô (Schmitt, 2008: 62). For Schmitt, the normative approach to state and constitution is unacceptable since it does not adequately confront the problem of the material basis of the constitution, and the state. Moreover, he finds it insufficient since it tends to analyze state and constitution, which are in fact existential phenomena in isolation from historical and social considerations.

Here, Schmitt refers particularly to Kelsenôs state theory in which the state is identified with the legal order, and basic norm in the end as an ultimate reference point for the validity of all state life. In fact, in his writings during *Weimar Republic*, Schmitt has engaged in a continuous struggle with the legal positivism and normativist understanding of law. Kelsen, being one of the prominent figures of these camps, became one of Schmittôs main targets in this respect. The central tenet of Schmittôs critique of Kelsenôs normativism concerns the basis of validity of the legal norm and order. Recall that Kelsen has tried to solve the problem regarding the empirical basis of the legal order with the theoretical formulation of basic law (Caldwell, 1997: 105). According to Kelsen, the hierarchical structure of the legal system constitutes the main principle for lawôs validity (Kelsen, 2005: 193-199). In this context, the validity of a certain legal norm rests on its conformity to the superior norm in the hierarchical structure of the legal order, and this system of ascriptions lasts till the constitution as the highest law of the land. Moreover, Kelsen ties the validity of the constitution in the last instance to the basic norm. What is

problematical from Schmittôs perspective is that Kelsenôs basic norm is only a logical presupposition that confers an unquestionable legitimacy to the historically first constitution of a state (Kelsen, 2005: 199). It is the logical starting point of a formal procedure that entitles the historically first constitution as the basis of positive lawôs validity. In other words, the state, constitution and legal order in its entirety gain an objective basis only if the constitution is considered in parallel with the logical presupposition of this basic norm. Moreover, in Kelsenôs analysis the legal order turns out to be a closed system of norms operating in itself (Dyzenhaus, 1994: 10). In this respect, Schmitt has repeatedly contended that Kelsenôs theory failed to adequately confront the problem of origin of the entire legal system including the constitution in force since it resorted in the last instance to a transcendental-logical presupposition.[9] Contrary to this abstract and metaphysical conceptualization, Schmitt has highlighted the empirical basis of the state and constitutional order. In fact, his positive concept of constitution forms the focal point in this respect.

In sum, it might be said that absolute concepts of the constitution both in its realist and normative variants treat the constitution as a unified whole, and identify it with the entire state. Schmitt seems to endorse this common denominator when developing his own conceptualization of the constitution. Yet, he remains very critical of tendencies like that of Kelsenôs which ignores the facticity of state authority and its legal order. In the following, I will elaborate on relative conceptualization of constitution which Schmitt severely criticizes as well. Only after this, his formulation will come to light with all its clarity.

2.1.2 Relative (Formal) Concept of the Constitution

In contrast to absolute understanding of the constitution as a unified whole, relative conceptualization of the constitution defines the constitution in terms of *individual*

[9] Regarding this debate also see Andreas Kalyvas, 2006. According to Kalyvas, the metaphysical nature of the basic norm makes it an extra-legal and meta-political category, and as a result the problem concerning the origin of the legal order cannot be explained by Kelsenôs theory (Kalyvas, 2006: 574).

constitutional law. The constitution is dissolved into a multitude of independent individual constitutional laws, formally equated with each other and thus relativized (Schmitt, 2008: 67). According to Schmitt, this tendency to equate the entire constitution with its individual provisions is overwhelmingly apparent in statutory positivism which has been by far the dominant idea in German legal thought during the *Imperial Constitution* of 1871. In fact, throughout his works *Constitutional Theory, Legality and Legitimacy* and *The Crisis of Parliamentary Democracy*, Schmitt makes a very critical reading of this legal doctrine. According to Paul Laband, the prominent legal theorist of this tradition, the legal system is composed of merely the constitution and correspondingly produced statutes. Thus the legal order is a closed and logically coherent system involving merely the statutes issued by the parliament. This implies above all that the other sources of law i.e. common law or law of nature no longer constitute part of the legal system, and every statute that the parliament issued is equated with law even if it is not just. Moreover, Laband avoids attaching the constitution any special authority (Caldwell, 1997: 4). Thus the constitution as a whole does not have a separate and higher authority then the other norms in the legal system. It is in this framework that Schmitt has directed his sharpest arrows of criticism to the leading representatives of statutory positivism, namely Richard Thoma (1874-1957) and Gerhard Anschütz (1867-1948) during the *Weimar Republic* (Caldwell, 1997: 8). Schmitt has confronted these theorists most of all about the concept of law and legitimate extent of constitutional change. [10]

According to Schmitt, this approach which ignores the higher and special authority that the constitution has in its entirety over its individual provisions paves the way for two results. First, the substance of the constitution is eliminated and it begins to be defined in terms of its secondary, formal characteristics. The constitution is reduced to a neutral text embodying formal rules and procedures designating the organization of the state. Moreover, its validity is tied with its formal characteristics: particularly the written form and the existence of procedures designating its change

[10] See for more, Schmitt 1985b and 2004a.

and promulgation (Schmitt, 2008: 68). In this regard, the linkage between the substance of the constitution and its individual provisions vanishes and the constitution as a whole becomes easily subject to change through a predetermined formal procedure. Second, since the individual constitutional laws become equal in formal terms, there is no longer a distinction made between fundamental provisions related to the concrete form and type of state and the secondary provisions concerning the organization of the state.

Schmitt conceives relative concept of the constitution as a result of a long-lasting historical development which culminated in the erosion of absolute understanding of the constitution. He states that ñthe demand for a ówritten constitutionôhas ultimately led the constitution being treated like a statuteò that is approved and can be changed only by parliament (Schmitt, 2008: 69). In addition to this belief in parliament as the sole source of positive law, the duration and stability of the constitution is thought to be guaranteed on the basis of qualified amendment measure that ties constitutional changes to a special formal procedure. However, according to Schmitt, in the presence of such a measure, the duration and stability of the constitution is not guaranteed but on the contrary it is reduced since the entire constitution is made open to change at any time the parliamentary majorities are determined to make changes in the system (Schmitt, 2008: 72). The fact that the constitution can be changed in line with this procedure might even result in a fundamental change in the state order. For this reason, Schmitt approaches with suspicion towards the guarantee that the qualified amendment measure is believed to provide and denies the legislature of an authority to change the entire constitution since for him it is only allowed to act within the framework of the constitution. The parliamentary majorities cannot make fundamental changes in the constitutional order since this would eliminate the political and legal basis of the legislature.

Furthermore, Schmitt draws attention to the dangers of strict adoption of the *principle of legality* endorsed by statutory positivism and its heirs legal positivism. As long as the parliament is acknowledged as the sole source of legitimate law, the

dominant party that has the power to direct parliamentary work would also set the parameters of legality. This *supra-legal premium* of the dominant party in the parliament to change even the most fundamental aspects of the regime is in fact unacceptable from Schmittôs standpoint (Schmitt, 2004a: 27-36).[11] In this respect, according to him the doctrine of liberal democracy could only sustain a political unity under an unconditional belief to parliamentary institution.[12]

It is principally for this purpose that Schmitt insists on the superiority of the constitution as a whole to individual constitutional laws. The content of the constitution is specific and distinctive not because of its qualified alterability, but because of its fundamental significance (Schmitt, 2008: 73). For him the acts of writing a constitution and promulgating it in line with certain procedures are not the definitive elements of constitution. The essence of the constitution resides in this sense in something fundamental and all-encompassing. The distinctiveness of the constitution originates from its being the disposition of the political unity over its own concrete existence. In other words, the constitution, as something distinct from constitutional law, reflects the fundamental political decisions concerning the substance of the political unity. In this respect, the constitution is not exhaustive with the principle of rule of law, *bourgeois Rechtsstaat* rights and liberties and the principle of separation of powers as it is endorsed by liberal constitutionalism. These principles are certainly political decisions concerning the fundamentals of the

[11] In *Legitimacy and Legality* Schmitt provides a comprehensive critical analysis of parliamentary politics, the principle of legality and liberal doctrine of equal chance to achieve political power. Accordingly he also mentions *supra-legal premium* or *political premium on the legal possession of power*, implying in specific terms the power of the majority party or the coalition party to set the parameters of legality and legitimacy and to declare the opposition party or its organizations illegal (Schmitt, 2004: 49-50).

[12] In parliamentary democracies peopleôs will is identified with the majority will in the parliamentary institution. As a consequence, the parliament is acknowledged as the sole source of legitimate laws. However, Schmitt draws attention to certain weaknesses of the parliament by questioning mainly the belief in the rationality and openness of parliamentary discussions. Indeed, for him, the parliament has been transformed into an ante-chamber where private interests of social and economic power groups are discussed behind closed doors (Schmitt, 1985b: 5-7).

constitutional order. They are mostly determined as a result of the political struggles and balances of power between the critical actors in specific historical and social circumstances. In this sense, they are contingent and temporary depending upon the demands and requests of these actors. From Schmittôs viewpoint, their dependence upon the will of these actors prevents the immediate identification of these principles with the constitution.

For Schmitt, the unity of the constitution does neither derive from the systematic and written codification of individual constitutional laws, nor from their normative perfectness. ñIt lies, rather, in a political *will* external to these norms, which first makes all these norms into constitutional laws. And as the unified foundation of these norms, this political will itself generates its own unityò (Schmitt, 2008: 70).[13]

After explicating Schmittôs criticisms on the relative conceptualization of the constitution particularly in the theories of statutory positivism and legal positivism, now let me focus on Schmittôs distinctive conceptualization of the constitution; in his terms the positive concept of constitution. In fact, he develops his entire constitutional theory in a consistent manner with the theoretical foundation of positive concept of constitution.

[13] Schmitt is also critical of the argument of liberal constitutionalism about the *sovereignty of the constitution*. According to Schmitt, a legal norm cannot generate itself. The origin of the legal norm does not reside in its normative correctness but results from the authoritative command of a sovereign authority. In this regard, Schmitt embraces Hobbesôs dictum ñ*Auctoritas, non veritas facit legem*ò (Schwab, 1985: xiii). See Schmitt, 1985a. Moreover, the application of the legal norm to a particular case requires an ultimate moment of discretion. Here it is critical to draw attention to a change in Schmittôs attitude towards decisionism. In *Political Theology*, to the extent that Schmitt argues that the decision of the sovereign stems from nothingness, he seems to embrace *pure decisionism* in line with his reading of Hobbes. However, in his work *On the Three Types of Juristic Thought*, where he introduces for the first time his concrete-order thinking in legal theory, he also talks about *order-decision* related to the *Roman Catholic dogma of the infallibility of a Papal decision*. Here Schmitt takes great pains to distinguish *pure decision* from *order-decision* (Schmitt, 2004b: 60). In this regard, the sovereign, like the Papal authority, does not make a decision out of nothingness to create a new order but decides within the parameters set by the concrete orders of the state.

2.1.3 The Positive Concept of the Constitution

For Schmitt, the constitution in the positive sense refers to the *fundamental political decision by the bearer of constitution-making power over the type and form of the concrete existence of the political unity*.

> The constitution in the positive sense originates from an act of the constitution-making power. The act of establishing a constitution as such involves not separate sets of norms. Instead, it determines the entirety of the political unity in regard to its peculiar form of existence through a single instance of decision. This act constitutes the form and type of the political unity, the existence of which is presupposed. It is not the case that the political unity arises during the ócestablishment of a constitutionô (Schmitt, 2008: 75).

In this respect, the positive concept of constitution denotes the moment of decision by the constitution-making power. This moment of decision is the founding act of the political unity. However, it is not the foundation of the state. The state as the political unity of a people does not first come into existence through this act of constitution-making power. It is rather that the political existence of a people and the existential will of this people is the constitutive source of the state in political and public law terms. Therefore, the foundation of the state resides in the common will of a people in its desire to live together in social order and security.[14] In this regard, the constitution in the positive sense is something qualitatively different from a *social contract*. ñThe people must be present and presupposed as political unity, if it is to be the subject of a constitution-making power. On the contrary the constructions of a social, societal, or state contract serve first to found the political unity of the people in general. The social contract, consequently, is already presupposed in the theory of the constitution-making power of the people when one considers its construction necessary at allò (Schmitt, 2008: 112). Therefore, in Schmittôs conceptualization the state synonymous with the political unity precedes the constitution in the positive

[14] Schmitt also distinguishes the constitution in positive sense from a *constitutional contract* or *constitutional agreement*, which ñpresupposes at least *two* parties that already exist and will continue to exist, and each of which contains internally a subject of a constitution-making powerò (Schmitt, 2008: 113). In this framework, according to him, constitutional contract refers to a *federal contract* in which already existing states agree to form a federal state as in the case of American constitution.

sense.[15] It exists before it gives itself a constitution through the bearer of the constitution-making power (Schmitt, 2008: 76).[16]

> The constitution, therefore, is nothing absolute insofar as it did not originate on its own. It is also not valid by virtue of its normative correctness or on the basis of its systematic completeness. The constitution does not establish itself. It is, rather, given to a concrete political unity. é The constitution is valid by virtue of the existing political will of that which establishes it. Every type of legal norm, even constitutional law, presupposes that such a *will* already exists (Schmitt, 2008: 76).

On the other hand, the constitution as the fundamental political decision of the constitution-making power extends beyond the relative understandings of the constitution. In this conceptualization, the constitution refers most of all to the distinct manifestation of a specific preference for the concrete form of existence of the state. Thus it is not something neutral and formal as it is emphasized by the rule formalism of liberal constitutionalism. It is rather material in the sense that it embodies the deliberate decision in favor of certain ideologies, values and preferences (Dessauer, 1946: 18). Moreover, in Schmitt, ñpolitical concept of the constitution precedes its legal notion, both chronologically and conceptually: prior to

[15] Contrary to Schmittôs own assertions about the priority of the political unity to the constitution, Dyzenhaus argues that in Schmittôs theory there is virtual identity between the people, state, and constitution. ñA constitution is no more than the more or less formalized expression of a particular state, and the state itself is no more than the institutionalized expression of the political collectivity of the people, an entity that is óexistentially presentô in the special senseé ò (Dyzenhaus, 1997: 51-52). A similar argument is also raised by Kennedy: ñé he [Schmitt] identifies the constitution as óan inclusive decision about the type and form of political unity,ô and further, the state is this unityò (Kennedy, 2004: 130). I believe that this controversy results from the reflexive character of Schmittôs conceptualization of the political unity (Lindahl, 2007: 9-24). Schmitt explains the establishment of the political unity (or state) on the basis of a people expressing a common will to unify against a common enemy. This political unity, whose presence is assumed, thereafter acts on the concrete form of its existence in the form a conscious decision. Regarding the issue, Lindahl explains this process as a *collective self-constitution* which means ñconstitution both by and of a collective selfò (Lindahl, 2007: 10). Collective self-constitution involves reflexivity in the sense that ñcollective intentionality in a common act reviews itself both as a subject of the act and object that have a preference over the actò (Lindahl, 2007: 16).

[16] Here, in order to support his argument, Schmitt cites the founding practices of the United States of America in 1775 and Czechoslovakia in 1919, and the fundamental social transformations that took place in France in 1789 and Russia in 1918 (Schmitt, 2008: 76). For him, examination of these examples makes explicit that the constitution does not always found new states.

ôhavingô a legal constitution, a state is a constitution, a statusò (Lindahl, 2007: 13). It is an expression of the constitution-making power laying out how it identifies *itself* as a unity against its enemies, in which form it wants to construct *itself* in its concrete existence, and thus how it wants to see *itself*.

Having said that, the critical question is what constitutes the content of this decision. In fact, Schmitt gives concrete examples from the preamble and main text of the *Weimar Constitution* in order to designate the content of this vital decision (Schmitt, 2008: 78). In this regard, the decision for democracy; the decision for republic or monarchy; the decision for parliamentary form of government or the decision for separation of powers and fundamental rights and liberties; or the decision for rule of law are all considered as fundamental political decisions that form the substance of the constitution.[17] According to Schmitt, these decisions cannot be considered as simply constitutional law or fundamental constitutional principles. Indeed ñ[t]hese fundamental political decisions, when properly understood, are the defining and genuinely positive element for a positive jurisprudenceò (Schmitt, 2008; 78). These decisions thus lay the basis for the legal order and principally superior to statutes. Therefore, the principle of rule of law or the liberal rights and liberties are not themselves the constitutive elements of a constitution. Schmitt conceives that the substance of constitution is not exhaustive with these principles. They might be present or not, and this depends upon the will of founding fathers acting as the bearer of constitution making power. This conception as it is obvious is a radical diversion from liberal understanding of constitution which identifies the constitution with these principles conceived as universally valid.

[17] Apart from this, the constitution may also embody *dilatory formal compromises* which refer to temporary decisions reached on a controversial political issue by the political actors at the time of writing the constitution (Schmitt, 2008: 83). On the basis of the French and German experiences on the formulation of constitutional laws respectively in 1875 and 1919, Schmitt contends that even if a genuine substantive compromise cannot be reached in the beginning, the people as the subject of constitution-making power can decide on the issue whenever it wills.

The positive concept of the constitution in fact constitutes the central tenet of Schmittôs constitutional theory. It is substantially significant since it sheds light on how Schmitt formulates the empirical basis of the constitutional order. The constitution in this sense is not a norm or idea. It is factual to the extent that it is posited by a determinate concrete will. In addition to its distinctive qualifications, Schmitt also seems to endorse some elements of absolute concept of constitution. In this sense, positive conception also refers to the *status* of being a state. Moreover, to the extent that the constitution is the fundamental political decision over the type and form of the concrete existence of a political unity, the constitution is conceived as a unified whole. In the following, in order to further clarify Schmittôs positive concept of constitution, I will discuss the distinction he makes between the constitution and constitutional law.

2.1.4 Distinction Between the Constitution and Constitutional Law

From the positive concept of constitution, stems the fundamental distinction for the constitutional theory of Schmitt: the distinction between the constitution and constitutional law. As it is indicated in the previous section, the constitution as the fundamental political decision forms the basis of the constitutional order. Hence the constitution in the positive sense sets the framework for the written constitution and constitutional law in general. The written constitution signifies nothing but the further formulation and execution of the *unmediated will* of the people about the fundamental political decision.

> The distinction between constitution and constitutional law, however, is only possible because the essence of the constitution is not contained in a statute or in a norm. Prior to the establishment of any norm, there is a fundamental *political decision by the bearer of the constitution-making power*. In a democracy, more specifically, this is a decision by the people; in a genuine monarchy, it is a decision by the monarch (Schmitt, 2008: 77).

Therefore, the validity of constitutional law or a statute depends upon the constitution in the positive sense. Moreover, for the fundamental political decisions

set the framework of the entire state life, the constitutional provisions in which they are crystallized cannot be considered formally equal with other provisions.[18] Consequently, there emerges even a hierarchy between the individual constitutional laws since they are not equal in substantive terms. While some are political and thus inviolable, the others are only formal and procedural.[19]

The distinction between the constitution and constitutional law also becomes visible in a state of exception. Indeed, the state of exception is a borderline to distinguish the genuine political decisions contained in the constitution and the secondary provisions. According to Schmitt, the authority commissioned by the sovereign, i.e. the people in democracies, to act on a state of exception has the competence to suspend and/or transgress the individual constitutional laws temporarily in order to bring normalcy to the situation. The competent authority thus can take measures violating certain individual constitutional laws. ñAll of this does not impinge on the fundamental political decisions and the substance of the constitution. It stands precisely in the service of this constitutionôs preservation and creationò (Schmitt, 2008: 80). Regarding this issue of protecting the constitution, Schmitt also maintains that the competent authority can violate the basic rights and liberties contained in the constitution in order to tackle with a state of emergency. However, since the preference for the basic rights also constitutes a fundamental political decision of the subject of constitution-making power, he cannot completely abolish these rights (Schmitt, 2008: 81).

In light of these considerations, it becomes obvious that Schmittôs account of constitution has certain metaphysical elements. This is mostly because constitution comes prior to the written text of constitution and determines the entire framework of the constitutional order. The decision of the political unity over itself creates some

[18] I will explain Schmittôs political concept of law in the following section.

[19] In fact, the distinction between the constitution and constitutional law even creates implications upon the boundaries of legitimate constitution-making and constitutional change. I will deal with this matter in the section entitled ñDemocratic Legitimacy of the Constitution.ò

kind of a *spirit* or *aura* that the entire constitutional order including the written constitution has to conform. As it will be seen in the following sections of this chapter, this conception has implications over legitimate constitution making and constitutional reform practices. In general, Schmittôs conceptualization signifies a distinctive position when compared to modern constitutions generally forged in line with liberal constitutionalist paradigm. In the following section, I will focus on Schmittôs analysis of modern constitutions. This will illustrate the contrast between the two accounts in more clear terms.

2.1.5 The Modern Constitution

Schmitt asserts that the constitutions of modern states consist of two components: 1) the *bourgeois Rechtsstaat* component composed of the principles of *rule of law* and *separation of powers* together with *basic rights and liberties*, and 2) the *political component*, composed of fundamental political decisions pertaining to the concrete type and form of the state (Schmitt, 2008: 55). For him, the distinction between these two components is a *sine quo non* for a systematic analysis of the modern constitution. In fact, he seems to make this distinction in order to bring the political aspect of the constitution to the fore. As it became obvious in the previous parts, Schmittôs positive conception of constitution is an attempt to reveal that the constitution is not a mere legal text, consisting universal principles endorsed by liberal political theory. The constitution is not an impersonal norm standing aloof from its authors. It is a decision posited by a concrete will at the moment of establishment. Thus it reflects some value preferences and the dominant ideology prevailing at that time. Nevertheless, he also detects the tendency of liberal constitutional theory to identify the constitution with liberal democratic values and present it as a universal and impersonal norm. It is in this respect that he begins his analysis of modern written constitutions by making this distinction from the outset.

Schmitt traces back the historical origins of the modern written constitutions to the *French Revolution* of 1789.[20] For him, the practice of French Revolution paved the way for two theoretical formulations critical for the development of constitutional theory in the following centuries. It is only within the French Revolutionary theory that the people is first assumed as a political entity capable of forming its unity and acting collectively. Thus the idea of ópopular sovereigntyô developed in Rousseauôs *Social Contract* and the nation as the constituting power in Sieyèsôs *What is the Third Estate?* formed the two essential pillars for the theoretical formulation of the constitution-making power of the people. Secondly, it is in relation with the practice of French Revolution that the principles of *bourgeois Rechtsstaat* constitution, particularly, the principle of rule of law and separation of powers developed (Schmitt, 2008: 102). The modern constitution, in this sense, involves a decision for the bourgeois freedom, particularly individual freedom, private property, contractual liberty and so on (Schmitt, 2008: 169). Moreover, the ideal of bourgeois freedom gives licence to two principles of the modern *Rechtsstaat* constitution (Schmitt, 2008: 170). First is the *principle of distribution* in which the freedom of the individual is assumed to be prior to the state and unlimited, while the stateôs interference into this area is principally limited. The principle of distribution yields to the liberal conceptualization of *basic rights* and *liberties*. Second is the *organizational principle*, according to which the limited power of the state is further divided in three competences, namely legislation, execution and judiciary, thus the so-called separation of powers between three branches of the state. In this regard, for Schmitt, the basic rights and separation of powers constitute together the ñessential content of the *Rechtsstaat* component of modern constitutionò (Schmitt, 2008: 170).

As it will be more clear in the following sections, Schmittôs attempt to demarcate the theoretical boundary between the constitution he identifies and the modern

[20] For Schmitt, contrary to conventional acknowledgment, the English *Magna Carta* of 15 June 1215 cannot be conceived as a constitution in the modern sense, since neither political unity nor a political decision over the concrete existence of this unity exists (Schmitt, 2008: 98). After all, it was only an agreement between the king and feudal aristocracy on the limitation of legal jurisdiction and identification of the privileges of both sides.

Rechtsstaat constitution composed of liberal principles helps to ground his ideal of a powerful executive which has the discretion to intervene in a state of exception in which he considers the existence of the state as a political unity is endangered by an external or internal threat. In this respect, he adopts an opposite direction of liberal constitutionalist movements that strived to limit the arbitrary execution of state power and defend the rights and liberties of the individual throughout the eighteenth and nineteenth centuries. Schmittôs formulation is cogent for revealing the side by side development of modern written constitutions and the liberal principles of rule of law, separation of powers and rights and liberties of the individual. His approach manifests that this combination is the result of a historical development in which liberal values become ideologically dominant. Moreover, this viewpoint reveals that the association of liberal democratic values with the constitution is contingent and dependent upon the will of constitutional authors acting as the bearer of constitution-making power. However, all these come with a price: to the extent that Schmitt relativizes liberal democratic principles and equates them with values based on arbitrary preferences, he makes them insignificant. This creates an obstacle in front of individual and social emancipation and prioritizes the existence of state authority.

Critical in this respect is Schmittôs demarcation between the formal concept of law embraced by liberal constitutional theory and the political concept of law that he endorses (Schmitt, 2008: 184-192). Contrary to the formal concept of law which denotes most of all the general and abstract statutes issued in line with predetermined procedures by authorized offices, the political concept of law ñresults from the political form of existence of the state and out of the concrete manner of the formation of the organization of ruleò (Schmitt, 2008: 187). Therefore, while the former refers to a norm, the latter makes reference to the ñ*concrete will* and *command* and an act of sovereignty.ò In fact, Schmittôs insistence upon the *concrete will* as the determinant of law is substantially significant to manifest the deviation of his considerations from liberal concept of law as the embodiment of *pure will*. Recall that liberal concept of law as a general and abstract rule derives its theoretical origin from Kantôs idea of right as the product of *pure will*. In this conception, law has to be

formal to provide equality and justice and thus to be legitimate. It has to stand aloof from value preferences, intensions and beliefs of the self-legislating individual since they are all considered as heteronomy. Indeed, the law has to provide a general maxim to regulate behaviour. In contrast with this, for Schmitt, the concept of law does not denote an impersonal rule; it is the nature of law that it is forged with value preferences of the legislating authority from the outset. In this respect, the penetration of value preferences or the political in Schmittôs terms into law is not limited to the constitution; it extends even to single statutes.

Besides that, according to Schmitt, the perception that acknowledges only the statutes issued by the parliament as valid law has culminated in parliamentary absolutism instead of sovereignty of law and paved the way for the parliamentôs extension of power. Regarding the subject, Schmitt states that;

> The offices authorized for legislating should be directly prevented from establishing, in place of the rule of a norm, their own rule enabling them to no longer distinguish any given individual commands, measures, and orders from ôstatutesô. A merely formal concept of law, such as that law is anything the lawmaking bodies ordain via the legislative process, would transform the rule of law into an absolutism of legislative offices, and any distinction of legislation, administration, and adjudication would be eliminated (Schmitt, 2008:191).

In sum, his approach might be seen as a direct attack upon the premises of liberal constitutional theory which emphasize the normative understanding of state and law, and the concomitant identification of the bourgeois component of modern constitution with the entire constitution. It is in this context that Schmitt emphasizes the significance of the political component of the modern constitution and strives to bring back the political aspect to the centre of constitutional theory. Let me now focus on his views concerning the origin of the constitution.

2.2 Origin of the Constitution

As it is explained in the previous section, Schmittôs conception of the constitution as ôthe fundamental political decision over the form and type of concrete existence of a

political unityô is immediately distinguished from the conventional connotation of the constitution in liberal constitutionalism. The constitution becomes the determining decision of an arbitrary will in sharp contrast to an impersonal and imperative norm of norms. Moreover, the political unity of the people precedes the act of constitution-making in real terms. ñWhat is not present politically also cannot consciously decide. Political existence was presupposed in this fundamental process, in which a people acts consciously in a political manner, and the act through which the people provide themselves a constitution is to be distinguished from the constituting of the stateò (Schmitt, 2008: 102). In this respect, Schmitt conceives for instance a people united in a war of liberation as already forming a political unity and a state. The people collectively acting against the invaders make at the same time, however, the fundamental decision about their concrete existence. The people acting together self-reflexively decide on its form of existence.[21]

In connection with this formulation, Schmitt explains the origin of the constitution in terms of the authority or person who makes this decision, or in his terms the *constitution-making power*. ñA *constitution arises either through one-sided political decision of the subject of the constitution-making power or through reciprocal agreement of several such subjects***ò** (Schmitt, 2008: 97). Thus he constructs the foundation of a state on the basis of the arbitrary will, and the concomitant political decision of the constitution-making power, the authority that has the omnipotence to act on the concrete existence of political unity.[22] For him, ñ[i]nside every political unity, there can only be one bearer of the constitution-making powerò (Schmitt, 2008: 105). In this respect, he makes a distinction between two constitution-making powers. It is ñeither the prince promulgating a constitution on the basis of the monarchical principle from the plenitude of his state power, or the constitution is

[21] Regarding this matter of self-reflexivity, see foot note numbered 15.

[22] In this context, it is significant to underline the close theoretical resemblance between Sieyèsôs concept of *pouvoir constituant* and Schmittôs concept of constitution-making power in *Constitutional Theory*. I will explicate and discuss this resemblance in more detail in the coming section entitled Constitution-Making Power and Constitutional Order.

based on the act of the peopleôs constitution making power, which is the democratic principleò (Schmitt, 2008: 105).

Before analyzing the subject of the constitution-making power in more detail, I conceive it critical to elaborate a little bit on Schmittôs considerations about the foundation of law as they are essentially related to the origin of the constitution. I think that only after the relation between the law and political is taken into consideration that Schmittôs conceptualization of the origin of constitution can be understood.

In *Political Theology*, Schmitt provides critical insights about the origin of law and legal order in general, along with his systematic analysis of the theory of sovereignty.[23] He states that every legal order involves two elements of the juristic, namely the norm and decision.[24] However, it is the decision, not norm that constitutes the basis of the legal order: ñAfter all, every legal order is based on a decision, and also the concept of the legal order, which is applied as something self-evident, contains within it the contrast of two distinct elements of the juristic ï norm and decision. Like every other order, the legal order rests on a decision and not on a normò (Schmitt, 1985a: 10). In fact, the basis of the legal order becomes most obvious particularly in a state of exception in which the sovereign authorityôs relation with the law or the extent of his dependence on law comes into light. In a state of exception, the sovereign has unlimited authority to suspend the existing laws, and take the necessary measures in order to bring normalcy to the situation. Schmitt states that in state of exception the law recedes while the state remains (Schmitt,

[23] In *Political Theology*, Schmitt defines the sovereign as ñhe who decides on the exceptionò (Schmitt, 1985a: 5). Hence the sovereign becomes most visible in a state of exception, a situation in which the public order and security, in other words the existence of state is substantially jeopardized.

[24] In his later work *On the Three Types of Juristic Thought* (1934), Schmitt adds a third aspect to norm and decision, namely the concrete order, as the foundation of law. Here I based my argument on Schmittôs formulations in *Constitutional Theory* in connection with his considerations in *Political Theology*. I think that it is more proper to take the two works together, and not to discuss his later formulations in *On the Three Types of Juristic Thought* in this context since they do not have a direct correspondence in his constitutional theory.

1985a: 12). More importantly, the two elements of the juristic, namely the norm and decision, splits from each other. While in a normal situation the moment of decision is minimum; in a state of exception it is the norm that recedes to a minimum.[25] Schmitt maintains that ñ[t]he existence of the state is undoubted proof of its superiority over the validity of the legal norm. The decision frees itself from all normative ties and becomes in the true sense absolute. The state suspends the law in the exception on the basis of its right of self-preservation, as one would sayò (Schmitt, 1985a: 12). It is critical that in analysing the concept of law Schmitt embarks upon a vicious idea such as the ówill of the stateô and prioritizes the interest of state. This idea yields the primacy of the state over the legal order and the individual and paves the way for unlimited power for state authority.

In line with this, the unity of the legal order depends on an external political will. By emphasizing the constitutive force of the ówillô of sovereign authority, Schmitt brings the *personalistic* and *decisionistic* element to the center of legal jurisprudence and constitutional theory. In this framework, Schmitt also questions the nature of the legal norm. He examines the legal norm in its connection with historical, social and political phenomena. The legal norm involves a legal idea, which necessitates the existence of a concrete person (or judge) every time of its realization (Schmitt, 1985a: 30). The legal norms do not apply to the concrete situation at hand on their own. Their application to a particular situation requires a moment of decision, a distinctive determination of an individual person. In this respect, the determining factor is not the norm itself but the reference point which identifies the norm and the normative validity (Schmitt, 1985a: 31). In this way, his critical viewpoint and even aggressive outlook to the arguments on the ósovereignty of the constitutionô or the normative understanding of the constitution also become clear.

[25] In fact, Schmitt states ñé the norm is destroyed in the exceptionò (Schmitt, 1985a: 12). However, as he distinguishes the state of exception from chaos or anarchy where the entire order is destroyed, I think it is more proper to say that the norm recedes to a minimum in state of exception. This is supported also with Schmittôs own statement that in a state of exception, ñorder in the juristic sense still prevails even if it is not of the ordinary kindò (Schmitt, 1985a: 12).

2.3 Constitution-Making Power and Constitutional Order

Schmitt formulates the constitution-making power as ñ*the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence*ò (Schmitt, 2008: 125). Therefore he argues that even the liberal democratic constitutional order is based on a dictatorial decision of the sovereign figure (Scheuerman, 1996: 309). And in order to support his claim he benefits from the theory and practice of French Revolution. Moreover, he radically reinterprets Sieyèsôs elaborations regarding the nation as the *pouvoir constituent* in *What is the Third Estate?* [26] Indeed, Schmitt uses the term óconstitution-making powerô as a synonym for Sieyèsôs concept of *pouvoir constituant.* Even Schmittôs claims regarding the priority of political unity to the constitution derives its origins from Sieyès. In fact, Sieyèsôs work is one of the first political essays involving the theoretical formulation of a *supreme instituting power* (Kalyvas, 2005: 226).

Constitution-making power denotes the omnipotent powerful authority that decides on the concrete existence of a political unity. In other words, it is the origin of the state. In Schmittôs conception, the constitution-making power is not a theoretical abstraction; it is rather a concrete political will which stems from an existing political being. Schmittôs distinction between the constitution and constitutional law also becomes intelligible in this context. The constitution as the fundamental political

[26] In this work, Sieyés resorts to a logical construction regarding the origins of the state in order to explain the originative power of the nation. In this respect, the *common will* of a people to establish a political unity and to act in *unity of will* constitutes the essential condition for the establishment of a state. At this point appears Sieyèsôs fundamental distinction between the nationôs will óprior to everythingô and óorigin of everything,ô and the constitution laying out the necessary rules and procedures for the establishment and functioning of the state organs. This distinction can be assumed as the primary formulation of modern constitutionalismôs dichotomous conceptualization of the notions óconstituent powerô and óconstituted powers.ô For Sieyes, the conceptualization provided a legitimate basis for the post-revolutionary constitution and government institutions in France in the eighteenth century (Kalyvas, 2005). Kalyvas states that as a reaction to the omnipotent powers of the absolutist monarchy and the privileged orders of the ancient regime, Sieyes considered this conceptual separation significant in order to transfer the absolute sovereignty of the monarch to the nation as well as to protect individual rights of citizens. In this respect, constituent power, the power to produce constitutional norms and to set the limits of state power, is situated within the ónationô.

decision reflecting the will of the constituent power is prior to all legal regulations including the constitutional law and statutes issued by the legislative authority. The constitutional law is only an enabling legislation that puts into effect these fundamental political decisions of the constitution-making power (Schmitt, 2008:125). The comprehensive decision in this sense is the source and condition of the constitutional law.

At this point, Schmittôs formulation of the relation between the constitution-making power as the origin of the state, and the authorities or state organs established in line with the conscious decision of this power (in other words the constituted powers) comes to light. For Schmitt, the constitution-making power can never be exhausted, absorbed or consumed once the constitution is issued (Schmitt, 2008: 125). ñThe political decision, which essentially means the constitution, cannot have a reciprocal effect on its subject and eliminate its political existence. The political will remains alongside and above the constitutionò (Schmitt, 2008: 125-126).[27] Thus the constitution-making power remains always present and latent, above and parallel to the constitutional order. It is unified and indivisible, and in this sense it can never be delegated and alienated. In addition, constitution-making power always exists with a *constitutional minimum*. As it will be indicated in the following sections, Schmitt constructs an identity between the constitution-making power and the *constitutional minimum*. In this formulation, as long as the people continue to live together as a political unity, the *constitutional minimum* is not affected by statutory violations of constitutional laws, revolution, and *coup dôétats* (Schmitt, 2008: 140). Schmitt simply thinks that in these cases the origin of the constitution is not changed. Yet the problem arises when we think of a violent civil war. It is doubtful even in such a case in which some part of society does not want to live as the citizens of a certain state that the constitutional minimum will remain. In fact, Schmitt does not provide us with an adequate answer for this case.

[27]Among the contemporary political theorists, Negri endorses the originary and unlimited quality of the constitution-making power, and draws attention to its democratic potentials against the principle of parliamentary representation (Negri, 1999: 1-25). See also Kalyvas, 2005.

The constitution-making power reactivates itself through the fundamental political decision most of all, in cases of constitutional disputes, constitutional gaps, and states of exception necessitating the reconsideration of the fundamental decision (Schmitt, 2008: 126). A constitutional dispute related to the fundamental political decision can only be resolved through the will of the constitution-making power. The constitutional gaps can only be decided by the subject of constitution-making power (Schmitt, 2008: 126).[28] And in emergency situations, if the measures taken to deal with the situation would have an impact on the fundamental political decision, this could only be decided by the subject of constitution-making power. Nevertheless, the state organs established upon the fundamental decision of the constitution-making power, namely the legislative, executive and judiciary institutions, have to remain within the framework set by this power.

2.3.1 Subject of Constitution-Making Power

In *Constitutional Theory*, Schmitt expresses the people and the monarch as the two subjects of constitution making-power. Yet, he also draws attention to the qualitative distinction between them. He states that the democratic-theory of constitution-making power of the people cannot be applied to hereditary monarchy in the same sense since the ñdynasty cannot be considered, as can the people or nation, the origin of all political lifeò (Schmitt, 2008: 129). Corresponding to the *pouvoir constituant* of the people, the monarchy exercises *commissarial dictatorship*, the powers of which derive from the *pouvior constitué*. In this respect, he endorses Sieyèsôs

[28] Schmitt makes a distinction between constitutional gaps, and differences of opinion in the interpretation of constitutional law. In this regard, constitutional gap refers to undecided political issues related to concrete existence of the state, whereas the latter refers to lack of clarity and differences of opinion in the interpretation of constitutional laws. This distinction is significant to the extent that it determines the framework of the judicial competence of the constitutional court. I will explain this issue in the last section of this on-going chapter, entitled ñDemocratic Legitimacy of Judicial Review.ò

ñdemocratic theory of the peopleôs constitution-making powerò and sets limit to the constituted powers.[29]

Historically in monarchical states, ñthe king as the bearer of constitution-making power reached the fundamental political decision that constituted the constitutionò (Schmitt, 2008: 104). The constitution in this sense was a statute issued by the king. In democratic regimes, on the other hand, the people or the nation in clearer terms, is the sole constitution-making power. The nation is the originary source of all constituted powers of the state, thus the entire constitutional order. ñThe people, the nation, remains the origin of all political action, the source of all power, which expresses itself in continually new forms, producing from itself these ever renewing forms and organizationò (Schmitt, 2008: 128). In other words, the nation is a *formless formative capacity* that ñcan change its forms and give itself continually new forms of political existenceò (Schmitt, 2008: 129). In the following, I will focus on Schmittôs conception of people as the source of constitutional order in more detail and try to discuss the way in which he formulates the notion of ópeople.ô

2.3.2 People as Constitution-Making Power in Modern Democracies

The constitution-making power of the people cannot be regulated by a previously established legal procedure. As it is the origin of the constitutional order and remains above and along with the constituted powers, it can take affect any time it wills (Schmitt, 2008: 128). To the extent that Schmitt considers the people as a *formless formative capacity*, and its sovereign decision as an absolute beginning, he seems to endow the people with a divine quality (Delacroix, 2005: 40-42).[30] Nonetheless, in

[29] However, Schmitt criticizes Sieyès for articulating his democratic theory of peopleôs constitution-making power to the ñantidemocratic theory of the representation of the peopleôs will through the constitution-making National Assemblyò in his writings during the *French Revolution* of 1789 (Schmitt, 2008: 128).

[30] Delacroix argues that along with the parallel conceptualization of Godôs *potestas constituens* and constitution-making power of the people, the ñdivine competence is purely ótransferredô to the people without any further qualificationò (Delacroix, 2005: 42). In this respect, Delacroix points out

Constitutional Theory he makes certain observations about the nature of the people as a subject of politics.

Before anything else, the people are not a stable and organized organ (Schmitt, 2008: 131). Particularly in conditions of modern mass democracies, the people cannot act like a magistrate thus engage in the regular execution of daily state activities. Nonetheless, the people is the sole authority to decide on the fundamental political issues concerning the type and form of the state in extraordinary circumstances. In this respect, Schmitt acknowledges the inherent right of the people to decide on fundamental political problems. However, because of its disorganized and temporary character, he asserts that the people can express its opinion only through *acclamation*-peopleôs expressing its will through declaration of its consent or disapproval. In ancient Greek city states, democratic rule is interlinked with citizens gathering in the agora and making their decisions concerning a certain common good explicit. According to Schmitt, in modern democratic states the ñacclamation, which is a natural and necessary life expression of every people, has changed its external formò and has turned into the form of *public opinion* (Schmitt, 2008: 131). ñThere is no democracy and no state without public opinion, as there is no state without acclamation. Public opinion arises and exists in an óunorganizedô form. Precisely like acclamation, it would be deprived of its nature if it became a type of official functionò (Schmitt, 2008: 275). Hence public opinion cannot be expressed in legal and official terms. The people cannot *advise*, *deliberate* or *discuss*. Due to its disorganized character, the people ñcannot set norms, but can only sanction norms by consenting to a draft set of norms laid before themò (Schmitt, 2004a: 89). Similarly they cannot pose a question. The people can only *acclaim*, *elect* and *say yes or no to a precisely formulated question posed from above* (Schmitt, 2008: 303). Indeed for Schmitt, only fundamental political questions should be asked to the people. The

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Schmittôs inability to construct an answer for the origins of a legal system that ñtruly relies on human activity.ò

issues requiring technical knowledge and special expertise, instead, should be resolved by the experts of the subject (Schmitt, 2008: 304).

ñThe peopleôs constitution-making will always expresses itself only in a fundamental yes or no and thereby reaches the political decision that constitutes the content of the constitutionò (Schmitt, 2008: 132). And he adds that these types of expressions are rare in times of peace and security. ñThat no special will is perceivably expressed simply signifies the enduring consent to the existing constitution. In critical times, the no that directs itself *against* an existing constitution can be clear and decisive only as a negation, while the positive will is not as secureò (Schmitt, 2008: 132).

From these considerations, it becomes certain that Schmitt invokes on people as a last resort for resolving fundamental political problems concerning the life of community. The appeal to the people constitutes a significant component of his formulation of democratic legitimacy. Yet his reflections cannot escape from the fate of populist theories of democracy and state. They remain close to elitist and technocratic understandings of democracy. In sum, Schmitt interprets peopleôs capacity to involve in the government of the state activities, most of all legislation, in notably shallow terms.

In the following, I will expound Schmittôs formulation of legitimacy which is in fact closely interlinked with his considerations upon the people as the constitution-making power.

2.4 Legitimacy of the Constitution

In Schmittôs conceptualization, the validity of a constitution does not lie on the justice of the norm on which it is based. ñIt is based on a political decision concerning the type and form of its own being, which stems from its political being. In contrast to any dependence on a normative or abstract justice, the word ówillô denotes the essentially existential character of this ground of validityò (Schmitt,

2008: 125). In this respect, the legitimacy of the constitution derives from the fundamental political decision of the constitution-making power. ñA constitution is legitimate not only as a factual condition. It is also recognized as a just order, when the power and authority of the constitution making power, on whose decision it rests, is acknowledgedò (Schmitt, 2008: 136). The existential decision itself does not require any further ethical or juristic justification.[31] The validity of the decision is self-evident because the political unity at issue exists. It is in the framework of the ñright to self-preservation or to maintain itself in its existence, integrity, security and constitutionò that the decision, whatever its content is justified (Schmitt, 2008: 76). In general, Schmitt talks about two types of constitutional legitimacy depending upon the bearer of constitution-making power. Historically a constitution issued by the monarch has dynastic legitimacy in line with the principle of monarchy. On the other hand, in modern democratic states, the democratic legitimacy of the constitution is based on the principle of constitution-making power of the people. In fact, this dual classification is consistent with Schmittôs entire approach since he thinks of a constitution as a disposition of a political unity over itself. In this respect, he seems to be only interested with domestic sources of constitution making power, and neglecting from the outset a third or external source of constitution-making power such as cosmopolitan agencies or international institutions. Yet as he deepens his argument in later stages, he provides us with tools even to evaluate the legitimacy of a constitution made by an external actor.

In this framework, the democratic legitimacy of the entire constitutional order originates from the inherent legitimacy of the constitution as the fundamental

[31] In *Constitutional Theory*, Schmitt seems to completely endorse *pure decisionism* in explaining the origins and legitimacy of the constitutional order. See Scheuerman, 1996; and Delacroix, 2005. Nonetheless, a deliberate articulation of Schmittôs views on the origins and legitimacy of the constitution with his later thoughts in *On the Three Types of Juristic Thought* enables us to witness a shift towards *moderate decisionism*. In concrete or institutional thinking, the state is no longer assumed as a *pure sovereign decision* but as ñthe institution of institutions, in whose order numerous other, in themselves autonomous, institutions find their protection and their orderò (Schmitt, 2004b: 88). In this respect, it is no longer the *pure decision coming out of nothingness* but the *order-decision* that comes out of the concrete orders, the supra-personal relations that are inscribed in and forged out of them would set the constitutional order.

political decision of the people. Thus it is the logical presupposition of the ófundamental political decision of the peopleô that forms the basis of the democratic legitimacy of constitutional law.[32] According to Schmitt, the *tacit consent* of people is the cardinal signal for democratic legitimacy in practical terms (Schmitt, 2008: 139).[33] In this context, the participation in the public life established by the constitution in question, or participation in elections are the most elementary signs of a peopleôs tacit consent. Therefore, every kind of constitution, whatever procedure is adopted in its preparation and legislation, has democratic legitimacy provided that it is based on the idea of peopleôs constitution-making power. It is sufficient that this idea is expressed in the preamble or text of the written constitution, and that no serious social resistance emerges in time against the constitutional order in question.
Regarding constitutional legitimacy, Schmitt generally mentions two major cases that have to be distinguished from each other: 1) *constitutional elimination* including the elimination of the existing constitution by a revolution, coup dôétat, or statutory violations of constitutional laws, and 2) *constitutional annihilation* (Schmitt, 2008: 140-148). In case of a *constitutional elimination*, what is issue is the abolition of the existing constitution by a coup dôétat or a revolution, or its statutory violation, but preserving at the same time the underlying constitution-making power (Schmitt, 2008: 147). According to Schmitt, in such kind of circumstances the constitutional order has still democratic legitimacy because there always exists a *constitutional minimum* along with the constitution-making power (Schmitt, 2008: 141). In this sense he thinks that the legitimacy gap caused by constitutional violations, i.e. the violations of constitutional laws through statutes, revolutions and *coup dôétats* can be compensated by the consent of the people.

It is true that if a constitution is eliminated by a revolution or *coup dôétat*, or if a constitutional law is violated by a statute this is unconstitutional, since no

[32] Thus, in Schmitt the *decision* of the people as the constitution-making power replaces the *basic norm* in Kelsenôs *Pure Theory of Law*. See also Scheuerman, 1996.

[33] In this regard, Schmitt endorses sociological legitimacy of the constitution. See also Wolin, 1990.

constitution or constitutional law sets forth the path for its own violation or elimination. However, these unconstitutional acts can be bestowed with democratic legitimacy afterwards, if the people ñactivate its constitution-making power anew in response to the new conditionò thus if the principle of constitution-making power of the people is acknowledged subsequently in the preamble or text of constitution, and the social order established by them meets with no serious resistance (Schmitt, 2008: 141). In such cases, Schmitt also mentions the usefulness of referendum or plebiscite for providing democratic legitimacy for the new order.

In line with his considerations in *Constitutional Theory*, Schmitt conceived the *Enabling Act* adopted by Hitler Government in 24 March 1933 as a *provisional constitution* that laid the basis of a new constitutional beginning (Cristi, 1998a: 20-40). According to him, the *Enabling Act* was a revolutionary act signifying the reactivation of the constituent power of the people. It was a new constitutional beginning since it extended beyond the Weimar Constitution and assigned the Hitler Cabinet as a legislative organ along with the *Reichstag* thus made substantial changes in the initial fundamental political decision of the people. Schmitt considered this act as democratically legitimate since it was adopted by a parliament elected by the people. Moreover, as it was promulgated in line with the procedures defined in the Weimar Constitution, he considered the act legally valid as well.

On the contrary what occurs in case of a *constitutional annihilation* is abolition of the fundamental political decisions that form the substance of the constitution and thus a change in the subject of constitution-making power. The result is the elimination of the previous political unity, and establishment of a new one. In this case, since the democratic principle is no longer acknowledged, the new constitutional act would be *democratically illegitimate*. The striking point is that Schmitt considers the people to be the sovereign in general whichever state form is adopted, whether monarchy, aristocracy or democracy. In this respect, for him even a monarchical state has democratic legitimacy since it is based on the constitution-making power of the people as the ultimate sovereign (Schmitt, 2008: 143).

Moreover, as it is obvious, the principle of legality does not constitute a compulsory requirement of legitimacy from Schmittôs standpoint. In this respect, even a constitution established in total disregard of the existing constitutional laws can be conferred with democratic legitimacy if the democratic principle is recognized in rhetoric (Schmitt, 2008: 136). I will discuss this point more deeply in the following chapters of this thesis as it will deliver an awkward interpretation of violent breaks of the constitutional order through *coup dôétats* or civil wars.

Moreover, Schmitt states that ñ[w]hen a state rests on a *national foundation*, and when the people has a conscious will to political existence on the basis of this national unity, it is always possible to treat this will as the definitive ground of every state constitution. A subsequent construction of the peopleôs constitution-making power is easy to find hereò (Schmitt, 2008:143, *emphasis is mine*). In line with this viewpoint, a peopleôs support in a war of liberation or in an armed struggle against a foreign invader can also be taken as a signal of peopleôs consent on the prospective constitutional order yet to be established. In fact, this point will be relevant in making sense of the parliamentary minutes of first Turkish Grand National Assembly.

As mentioned above, in cases of statutory violations or suspension of constitutional laws, Schmitt resorts to plebiscitary-democratic legitimization of governmental acts (Schmitt, 2004a: 90). This is especially the case where the constitutional law can be transgressed or suspended upon the decision of the competent authority acting as the direct representative of the people in a state of exception. The distinctive position of the competent authority to act in these kinds of situations is designated as ócommissarial dictatorshipô or *Ratione Necessitatis* as he terms it in his later work *Legality and Legitimacy*.[34] In general, Schmitt sees in these kinds of activities no

[34] In *Dictatorship*, Schmitt makes a conceptual distinction between *commissarial* and *sovereign dictatorship*. In commissarial dictatorship, the dictator is defined as the one who has the right to suspend the existing laws and to take necessary measures to restore the ónormalô situation on the basis of his commission granted by the sovereign authority, in this case the people. The sovereign dictatorship, on the other hand, is defined as an authority that has unlimited power to create the appropriate conditions for a new constitution to be brought about (Schwab, 1989: 30-37). During his

harm in terms of democratic principle of legitimacy. Because according to him, in a homogeneous democracy, where there is a perfect identification between the ruler and the ruled, the competent authority would act under the strict commission of the people in order to protect the constitution.[35] Regarding this issue, he states that;

> The temporary setting aside of individual or of all constitutional provisions is often imprecisely designated as the putting out of force or suspension of the óconstitution.ô The constitution in the actual sense, the fundamental political decisions over a peopleôs form of existence, obviously cannot be set aside temporarily, but certainly the general constitutional norms established for their execution can be precisely when it is in the interest of the preservation of these political decisions (Schmitt, 2008: 156).

In such circumstances, the illegal acts of the governmental authority could be offset through the constitution-making power of the people, reactivated in a óreferendum.ô For Schmitt, referendum or popular decision is the direct means of the plebiscitary expression of will when the fundamental political decision is at issue. In referendum,

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Weimar writings, Schmitt usually advocated the emergency powers of the *Reich* President evolving from the Article 48 of the Weimar Constitution, and designated them legitimate in line with his conception of commissarial dictatorship. On the other hand, he used the concept of sovereign dictatorship to account for the democratic and legitimate character of the constitution-making practices of French National Assembly in 1791 and the constitution-making assembly of Germany between November 1918 and February 1919. See Schmitt, 2008: 109-111. Besides, in *Legality and Legitimacy*, Schmitt conceptualizes the authority of the president to make laws in extraordinary circumstances as *Ratione Necessitatis* (Schmitt, 2004a: 67-83). Here the popularly elected president appears as an *extraordinary lawgiver*, or a legitimate source of laws along with the parliament and people.

[35] Indeed, Schmitt goes further to establish a linkage between a strong democracy based on a complete identification between the ruler and ruled and substantive equality, and dictatorship (Schmitt, 2008: 255-265). In a democracy, the state power and government is immanent to the people. Thus peopleôs *will* cannot be represented by any authority. ñIn a pure democracy, there is only the self identity of the genuinely present people, which is not a type of representation. What is meant by the word óidentityô is the existential quality of the political unity of the people in contrast to any normative, schematic, or fictional types of equality. On the whole and in every detail of its political existence, democracy presupposes a people whose members are similar to one another and who have the will to political existenceò (Schmitt, 2008: 264). Here it is significant to demarcate the distinction between Schmittôs substantive concept of equality and general human equality emphasized by liberal theory. For Schmitt, the substantive concept of equality is political to the extent that it embodies a qualitative distinction between the self and the other, or friend and enemy (Schmitt, 2008: 258). This equality can be based on any factor depending on historical and social circumstances such as physical and moral qualities, i.e. *arête*, equal birth or power as in ancient Greek polis or *virtù* as is the case in Rousseauôs republic. Yet it always signifies *the quality of belonging to a particular people* which is demarcated from an indefinite equality of being a member of humanity (Schmitt, 2008: 258).

people in all its disunity reach a decision that is superior to any constituted state organ. In this process, it is not that the peopleôs becoming an extension of the legislative body but with all ñtheir extraordinariness as well as their superior statusò their forming ñ*ratione supremitatis* from their characteristic as sovereignò (Schmitt, 2004a: 60).[36] Schmitt underlines plebiscitary legitimacy as the ñsingle type of state justification that may be generally acknowledged as valid todayò (Schmitt, 2004a: 90). Indeed he acknowledges the plebiscitary-democratic legitimacy as the single valid source of state legitimacy in modern mass democracies.[37]

After discussing Schmittôs considerations on the legitimacy of constitution, I will discuss in the following the democratic legitimacy of constitution making in Schmittôs constitutional theory.

2.4.1 Democratic Legitimacy of Constitution-Making

Consistent with his conceptualization of constitutional legitimacy, Schmitt also elaborates on different procedures of constitution-making in modern states (Schmitt, 2008: 132-135). In this respect, he describes the following four procedures of constitution-making as truly democratic. In other words, for him these models are all related to democratic beginnings.

Constitution-Making National Assembly or Constituent Assembly

A constitution-making assembly elected in line with the democratic principles of general and equal right to vote can be commissioned for the sole purpose of establishing a new constitution (Schmitt, 2008: 132). In democratic states, the people

[36] In *Legality and Legitimacy*, Schmitt designates the legal competence of the people to act like an extra-ordinary lawgiver as *Ratione Supremitatis* (Schmitt, 2004a: 59-66). In a referendum process, people become a legitimate source of valid law, which is supreme to all constituted powers of the state, including the parliament and president.

[37] In fact, Schmittôs discussion about plebiscitary-democratic legitimacy lays the ground for his preference for an authoritarian, total state. ñPlebiscitary legitimacy requires a government or some authoritarian organ in which one can have confidence that it will pose the correct question in the proper way and not misuse the great power that lies in the posing of the question. That is a very significant and rare type of authorityò (Schmitt, 2004a: 90).

as the subject of constitution-making power can delegate some part of its sovereign authority to the constituent assembly to make a new constitution. Similarly, after a revolutionary elimination of pre-existing constitutional laws, such an assembly can be convened and empowered to take the necessary measures until the promulgation of a new constitution (Schmitt, 2008: 109). The distinctive position of the constituent assembly is best designated as *sovereign dictatorship*.[38] The constituent assembly in this sense is neither the subject nor bearer of constitution-making power; it is rather the delegate of the people. However, in its exercise of the constitution-making power of the people, the constituent assembly is unbounded with any of the pre-existing constitutional laws provided that it acts within the framework of the fundamental political decisions of the people.

Moreover for Schmitt, the democratic election of this constituent assembly does not constitute an indispensable condition of democratic legitimacy. Indeed, he considers the democratic selection of the members of the constituent assembly as a formal requirement (Schmitt, 2008: 134). In this respect, it is sufficient that the people as the constitution-making power is acknowledged as an idea in the preamble or text of the written constitution.[39]

Constitution-Making by Ordinary Legislative Body

In Schmittôs conceptualization, a democratically elected national assembly can also be specially commissioned for ñthe formulation and legislating of constitutional provisions, drafting the text of constitutional laws and passing themò (Schmitt, 2008:

[38] For sovereign dictatorship, see the footnote numbered 34.

[39] In this respect, Schmitt assesses the exceptional or special cases in which the constituent assembly is not elected in line with general and equal vote truly democratic as well. The French constituent National Assembly for instance came about the constitution of the third estate itself as the constitution-making assembly out of the commissioned representatives of the three estates (nobility, clergy and bourgeoisie) (Schmitt, 2008: 134). In addition, the constitution of *Czecho-Slovakia* of 29 February 1920 was not concluded by a national assembly composed of democratically selected representatives. ñIt was selected by an assembly that was comprised only of party delegates from the Czech and Slovak parties. Of the 13.6 million inhabitants of this state, almost 5 million, or all non-Slovak inhabitants, in particular the German portions of the people were not presentedò (Schmitt, 2008: 135).

132). The constitutional laws drafted by the parliament enter into force upon the majority vote of parliamentary representatives without getting any further approval of the people, i.e. through a referendum. In such a case, the people are considered to have already consented on the text of constitution once they participated in parliamentary elections.

Constitution-Making by a Convention followed by a Popular Referendum

In this process, the text of constitutional laws drafted by the convention, ñan elected body entrusted exclusively with the drafting of constitutional legislation,ò enters into force after their validation through a referendum or other direct or indirect procedures of confirmation by the citizens (Schmitt, 2008: 132).[40]

Constitution-Making of an Indeterminate Origin followed by General Popular Vote (plebiscite)

In *Constitutional Theory*, Schmitt also mentions the cases in which a constitution drafted by a strong government is presented to the general vote of people (Schmitt, 2008: 134).[41] Schmitt states that in cases where the ónoô vote would probably result in disorder and insecurity, the people could overwhelmingly say óyesô to the new constitution in order to avoid such kind of a situation. Even in these circumstances, and in cases in which there are clear signs that the election process is distorted or manipulated, Schmitt asserts that the plebiscite corresponds to the democratic theory of constitution-making power of the people (Schmitt, 2008: 134). [42]

[40] Here Schmitt cites the examples of *French National Convention* of 1792 and the constitutional convention of the U.S. of 1787. In the U.S. the federal constitution is initially drafted by the constitutional convention and then presented to the Congress. And the federal constitution entered into force after its approval in each of the thirteen states through special ratifying conventions (Schmitt, 2008: 133).

[41] He mainly refers to the Napoleonic plebiscites: particularly the consular constitution of the Year VIII, 1799; the Senatus-Consult of the Year XII, 1804; plebiscite on the óActe Additionelô during the Hundred Days of 1815; the plebiscite of 14 December 1851, and finally the plebiscite of 21/22 November 1852 (Schmitt, 2008: 134).

[42] Though Schmitt explicitly discusses only the constitutions made by strong executives, he talks about generally the constitutions of an indeterminate origin. On the basis of his remarks, in this sense, it would not be wrong to draw the same conclusion for the constitutions made after *coup dô etat* and

2.4.2 Democratic Legitimacy of Constitutional Change through Parliamentary Legislation

In Schmittôs theory, the distinction between the constitution and constitutional law serves as a precursor for the determination of the natural boundaries of constitutional change through parliamentary legislation. In this respect, Schmitt asserts that while the constitutional laws can be changed by legislation in line with the procedures defined for constitutional change in the written constitution, ñthe constitution as a whole cannot be changed in this wayò (Schmitt, 2008: 79). He warns that ñ[t]hat the óconstitutionô can be changed should not be taken to mean that the fundamental political decisions that constitute the substance of the constitution can be eliminated at any time by parliament and be replaced through some other decisionò (Schmitt, 2008: 79). The authority for constitutional amendment defined in the existing constitution does not entitle the parliament with a constitution-making power analogous to the peopleôs. Rather it only endows the parliament with a *constitutional power* to make necessary *changes, additions, extensions* and *deletions* in the constitutional provisions ñunder the presupposition that the identity and continuity of the constitution as an entirety is preservedò (Schmitt, 2008: 150). In this respect, the boundaries of constitutional amendment through parliamentary legislation could not extend beyond the fundamental political decisions, and only pertains to the formal provisions related to the functioning of state organs.[43] Indeed, constitutional amendment or change is *qualitatively* different from constitutional *annihilation*, or constitutional elimination (Schmitt, 2008: 150-156).[44]

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the constitutions made and imposed by foreign powers. In such a case, even a constitution made after a *coup dôetat* by a non-democratically elected body or by a foreign powerful authority would have democratic legitimacy after its approval through a plebiscite.

[43] According to Schmitt, even if the wording of the constitutional provisions allows certain authorities to make an entire change in the constitution, the scope of this allowance must not be extended beyond the fundamental political decisions (Schmitt, 2008: 152). Here, Schmittôs inimical viewpoint towards the principle of legality endorsed by liberal constitutionalism and its dominant legal doctrine legal positivism becomes once more obvious. In addition, Schmittôs standpoint remains in opposition to classical liberal arguments advocating óparliamentary supremacy.ô

[44] From Schmittôs standpoint, the parliamentary institution as part of the constituted powers does not have the legal and political competence to change the constitutional order that enables its existence, or

Similarly, the *constitutional power* to change the constitution does not include the establishment of a new constitution. Here lies the basis of the distinction between a *constituent assembly* and an *ordinary parliament*. If an ordinary parliament is endowed with such capacity, this would pave the way for a temporary parliamentary majority to change the substance of the constitutional order, and indefinitely tie the will of the subsequent parliaments until they reach qualified majority. Hence from Schmittôs standpoint, ñconstitution ó*making*ô and constitutional ó*change*ô (more accurately, revision of individual constitutional provisions) are *qualitatively* different, because in the first instance the word óconstitutionô denotes the constitution as complete, total decision, while in the other instance it denotes only the individual constitutional *law*ò (Schmitt, 2008: 80). In this regard, the fundamental political decisions can only be altered by the subject of the constitution-making power, thus in a democracy by the people themselves.

Additionally, since these decisions set the framework for the ñentire state lifeò, the constitutional provisions in which they are crystallized cannot be considered formally equal with the secondary provisions. Moreover, since these decisions define the entire spirit of the constitution and ñsoul of the stateò, the constitutional provisions in which they are reflected cannot be changed in line with the formal procedures identified in the same constitution for constitutional change.[45] Therefore, in Schmittôs viewpoint, there is even a hierarchy between the individual constitutional laws since they are not equal to each other in substantive terms. While some are political and thus inviolable or violable only by annihilation of constitution, the others are only formal and procedural. This lays the groundwork for the possibility of presence of inalterable constitutional provisions in a constitution.

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in other words to make a change in the fundamental political decision of the constitution-making power. However, again in line with Schmittôs conceptualization, even such an unconstitutional and illegitimate change can be subsequently corrected through a referendum or can be considered legitimate if no substantial social opposition emerges in time. In this respect, the change of the constitution through parliamentary legislation as long as the underlying constitution-making power is preserved can also be considered democratically legitimate.

[45] This inference is in accord with Schmittôs political concept of law. See Schmitt, 2008: 187.

After reviewing Schmittôs considerations on the democratic legitimacy of constitution making and constitution change processes, I will discuss in the following Schmittôs attitude towards constitutional review. In political regimes where a separate constitutional court is established, the constitutional judges usually engage in interpretation of constitutional provisions in order to arrive at a decision. This means that in some hard cases in which the provisions of the constitution are not directly applied to the case at hand, constitutional judges consider the concrete case in light of the entire spirit of the constitution and principles of law universally adopted. This interpretation process usually results in the creation of new law. Hence, constitutional review emerges as an additional source of constitutional law. This is what makes constitutional review a focal point for the discussion of legitimacy. It is in this respect that the examination of Schmittôs views on the subject will provide us with a wider perspective.

2.4.3 Democratic Legitimacy of Constitutional Review

In *Constitutional Theory*, Schmitt critically questions the scope of competence of the constitutional court to decide over all disputes about the interpretation and application of constitutional law (Schmitt, 2008: 163-164). And he draws attention to the ambiguity of trying to separate legal issues from political questions. More precisely, Schmitt openly objects the distinctive position of the constitutional court to decide on all disputes of constitutional interpretation. He acknowledges the necessity to establish a special constitutional organ in order to examine the compatibility of a new statute or decree with the provisions of the constitution. However, for him, this special organ could only render resolutions about the formal or secondary provisions of the constitution. In line with his peculiar conception of constitution, he maintains that the constitutional court deciding over the substantive value judgements in the constitution would overreach its judicial competence to decide on formal issues and step into the borders of the political. In this framework, ñThe type of law court that decides all disputes of constitutional interpretation would, in fact, be a high political institution. This is because it also ï and above all- would have to decide these doubts

and differences of opinion, which result from the peculiarities of the dilatory formal compromises, and it would actually reach the substantive decision that was postponed through the compromiseò (Schmitt, 2008: 164). This is unacceptable for him since the decision over fundamental political issues falls solely within the competence of the constitution-making power of the people. Moreover, such a political institution would bring the politicization of judicial and undermining of the prestige of the entire judiciary.

In this framework, Schmitt advocates political supervision over the constitution on the basis of the historical experience of French *Sénat Conservateur*. He demands the establishment of a political organ ñsuch as ósenateô in the style of the Napoleonic constitutions,ò which according to him would decide with more integrity over constitutional disputes (Schmitt, 2008: 164). In French case, the Senate Consul engaged in political supervision, while the constitutional court focused on procedural issues and supervised the implementation of the wording of the constitution (Teziç, 2013: 211). Schmitt seems to embrace the idea of Senate Consul as the protector of the constitution since he thought that this Senate would easily avoid from implementing universally recognized principles of law whenever the óstate interestô is in danger. Whenever there emerges a case which endangers the survival of the state, he thought this political organ would outreach the general principles of law and decide in favour of the state.

In the *Guardian of Constitution* (1931), Schmitt presents comprehensive arguments about the position of the constitutional court in deciding on constitutional disputes. Highly affected by the uneven political conditions of Weimar Germany at that time, Schmitt argues for the protection of the substance of the constitution against temporary and unstable parliamentary majorities.[46] At this point, his considerations on the political premium of the dominant party in parliament become highly relevant.

[46] Substantial political fragmentation in the parliament and the fragmented judicial system of federal Weimar state, See for more details, Caldwell, 1997: 109-115.

As it is indicated previously, he thinks that the majority party in the parliament would intrinsically have political and legal power to direct the state organs, and easily set the parameters of legality. This constitutes from his viewpoint a substantial threat against the stability and durability of the constitution. In line with this, he sees it more adequate to entrust the authority to protect the substance of the constitution to the popularly elected president (Caldwell, 1997: 114). For him, only the president could present the unity of the peopleôs *will* and give expression to this *will*. The president, situated above all the political parties in the parliament and acting on the basis of his plebiscitary legitimacy, would be the highly political but also neutral third party to decide on the fundamental political issues. The president does not act in competition with the other state organs but rather maintains the order, regulates and mediates as an arbitrator (Dyzenhaus, 1997: 76). ñThe arbitratorôs decision works, that is, not by finding the consensus, but by adding its weight to one side in order to effect to make that side into the majority partyò (Dyzenhaus, 1997: 76). However, the independence of the president from the party politics does not imply complete autonomy in political matters; rather he is bound with the framework of the constitution in the positive sense.

Schmittôs work published two years later *State, Movement, People* (1933) also encompasses comprehensive arguments about the function of constitutional court. This time Schmitt argues that constitutional court deciding over constitutional disputes signifies nothing but the relativization of the idea of ópolitical leadershipô under the influence of legal normativism (Schmitt, 1004b: 43-46). He rejects constitutional supervision on the political provisions of the constitution on the basis of two reasons. First, it turns out to be an organ for the political supervision of the government. Second, the idea of constitutional court to decide over constitutional disputes relies on the ñtendency to place on an equal footing the subject and the object of supervisionò (Schmitt, 2004b: 45). Thus it leads to the equalization of the *Enemy of the State and People* with the *comrades of the State and People*.

Eventually, these considerations draw the framework of Schmittôs outlook towards the democratic legitimacy of constitutional review. Schmitt is thus critical of constitutional courtôs engagement in cases where fundamental political decisions are at issue. In these cases, it is not the court but a Senate Consul as in the case of French constitution would bring democratically legitimate resolutions.

2.5 Concluding Remarks: Pseudo-Democratic Legitimacy of Constitution-Making and Constitutional Change in Schmittôs Theory

In light of these demarcations, it becomes obvious that in Schmittôs constitutional theory, the parameters of democratic legitimacy of the constitution are determined by the theoretical formulation of the constitution-making power of the people. The assumption of peopleôs *common will* to live together in a social order and security guaranteed by the state authority becomes the generating force of all legality and legitimacy of the constitutional order. The instance of founding coincides with the collective formation of political identity against the existential threat of another public entity. The inherent legality and legitimacy of the constitution making power, thus, is explained in terms of the ñwill for self-preservation or fear of death in a violent life and death struggle caused by disorder**ò**.

In this formulation, the peopleôs *will* has a direct correspondence in the empirical realm. In fact, the constitution-making power of the people gives way to the deliberate will of the dominant political actors at the moment of constitution-making. The theory unfolds that in reality it is the *might* thus not right that sets the parameters of the entire constitutional order as long as this might can establish itself in the form of a constitution. In this sense, the idea of the constitution-making power of the people does not go beyond a logical assumption. On the contrary, I think it helps to conceal the violent act of founding. Schmittôs theory therefore brings back the originary event of decision upon the norm and exception, and thus the moment of the political to the centre of the act of constitution-making. It is in fact the deliberate will

of the framers of the constitution that determines the concrete form and type of the political community.

As a result, the law in general and the constitution in particular finds its genuine location in the socio-historical reality. The material basis of the constitution in terms of its being a product of the power struggles between contending social forces at the moment of the founding reveals itself behind the veil of the ñdemocratic theory of constitution-making power of the peopleò. The constitution becomes inextricably tied to the power balances at the moment of the founding. Even the boundaries of parliamentary constitutional change are determined by the substantial political decisions made at the beginning. As the political component of the constitution is fixed at the beginning, power struggles among different social forces are exhausted from the beginning. The fixation, on the other hand, lasts until a new social and political upheavel, in the form of a *coup dôétat*, democratic revolution or civil war, occurs. In this respect, from Schmittôs standpoint there is nothing more normal than a constitution embodying inalterable provisions.

In connection with this conceptualization, the constitution comes to signify the specific preference for the concrete form of existence of the state. Hence the constitution is not neutral, formal or value-free as it is emphasized by the doctrine of liberal constitutionalism. It is not impartial or impersonal conceived as the product of a pure will. The constitution is rather material in the sense that it embodies the concrete (substantial) decision in favor of certain ideologies, values and preferences. It is an expression of the constitution-making power laying out how it identifies *itself* as a unity against its enemies, in which form it wants to construct *itself* in its concrete existence, and thus how it wants to see *itself*.

In sociological terms, on the other hand, Schmitt conceptualizes democratic legitimacy of the constitution in terms of the explicit or implicit consent of the people. The constitution-making power of the people theoretically acknowledged at the outset turns out to be a transcendental presupposition that lacks any human

quality. As a result, any constitution established by the concrete will of powerful political figures is conceived democratically legitimate. It is sufficient that the new constitution establishes an order. In these terms, in Schmittôs constitutional theory, the validity of the constitutional order is based on pure facticity. The concrete order established by the constitution demarcates the friends and enemies of the state. Therefore the constitution implies not everyoneôs unity such as humanity, but it denotes the unity of some positioned against the unity of others.

Furthermore, even at times where the constitution-making power of the people can be activated in a truly democratic manner, it becomes drowned in a formal expression of óyesô or ónoô to the questions posed by the governmental authorities. Thus it never evolves in the form of a direct democratic or participatory form. The role of the people in a democracy is passivized and left over to the authority who can ask the right questions at the right time (Scheuerman, 1996: 312-313). In other words, the mechanisms pertaining the self-government of the people are never reactivated. In this respect, Schmitt lays the foundations of a mass-based plebiscitarianism (Scheuerman, 1996: 322). It is also true that Schmitt describes some democratic procedures for constitution-making practices. However, in the end, these procedures do not allow to make a distinction between truly democratic beginnings. A revolutionary constitution, a constitution made after a *coup dôétat* by a non-democratically elected body or even constitutions made and imposed by foreign powers can be bestowed with democratic legitimacy as long as the principle of peopleôs sovereignty is recognized in the beginning and acknowledged in the preamble or text of the constitution. In this respect, Schmittôs adoption of the constitution-making power of the people as the basic principle of democratic legitimacy does not resolve the tension between the democratic theory of self-government and constitutionalism. It is not the people that directly decide on the fundamental parameters of the state such as the type and form of government and the content of rights and liberties. In other words, the constitutional order does not evolve as a result of a peopleôs self-legislating activity. Democratic self-legislation of the people on the essentials of constitutional order is present neither in the beginning

nor after its establishment. The people is only considered as the last resort of democratic legitimacy. In Schmittôs conceptualization, a constitution does not necessarily have to be made through democratic procedures to be democratic. It is considered democratically legitimate as long as any serious social or political upheavals emerge or the express consent of the people is ensured in a plebiscite.

CHAPTER 3

HABERMASôS DISCOURSE THEORY: PROCEDURAL LEGITIMACY OF CONSTITUTION-MAKING PRACTICES IN MODERN DEMOCRACIES

Habermasôs theory of procedural democracy and discourse theoretic understanding of law is an initiative to reconstruct the normative theory of law and democracy adequate to the empirical conditions of complex and pluralistic societies. In *Between Facts and Norms,* Habermas reinterprets the principle of popular sovereignty on the basis of the *principle of discourse,* the basic concept of his moral theory, and develops the theoretical basis of a *democratic* constitutional state. More precisely, he presents a ñsociologically informed conceptualization of modern positive law and system of rights,ò and ña normative account of constitutional stateò (Rehg, 1996: 10). In this framework, Habermas formulates a distinctive conception of legal validity and accompanying concept of positive law which is legitimized on the basis of *discursively structured political opinion and will formation processes* both in state institutions like the parliament and the courts and in the political public sphere. Such conceptualization highlights the significance of an inclusive public sphere emerged out of a strong civil society composed of educated, well-informed and active citizenry. In such a context, the positive law legitimated in *discursively structured political opinion and will formation processes* forms the basis of the legitimate exercise of political power.

Habermas acknowledges the fact that in the *post-metaphysical* conditions of contemporary societies which are marked with *complexity* and *plurality of life forms,* neither religious doctrines nor metaphysical considerations could form a basis for the rationality of law. The legal order of the state could no longer be legitimized on the basis of divine law as in the case of medieval societies or on the basis of rational natural law as in the case of social contract theories (Habermas, 1986: 260-271). In this respect, he takes it for granted that the disenchantment of religious worldviews and the inevitable process of positivization of law are complementary processes

(Habermas, 1996: 71). Moreover, he recognizes the *legitimacy crisis* faced by modern welfare states as a result of increases in state regulation in economy and society in general.[47] The crucial point is that Habermas is always critical to reducing the problem of legitimacy of positive law and exercise of political power to a mere discussion of efficiency (Habermas, 1996: 436). For him, the concerns of legitimacy should be kept strictly apart from the concerns of efficiency imposed by the imperatives of economy and administration. Hence only the extension of democratic rights and liberties, but nothing else, could be the solution to the loss of legitimacy of state institutions. In this sense, he conceives the future of constitutional state as strictly linked to democratization reforms (Habermas, 1996: 444).

It is from such a perspective that he thinks that modern positive law could be a legitimate means for the organization of a just and rational society. He argues that positive laws can be justified on the basis of practical discourses institutionalized by means of legal procedures. Legal norms subjected to discursive opinion and will formation processes of citizens gain legitimacy as the addresses of law conceive themselves also as the authors of these laws. ñFrom the standpoint of *legal theory*, the modern legal order can draw its legitimacy only from the idea of self-determination: citizens should always be able to understand themselves also as authors of the law to which they are subject as addresseesò (Habermas, 1996: 449). As a result, in discourse theoretic understanding of law, neither the law is dissolved into pure facticity and become a pure instrument of politics as in the case of

[47] According to Habermas, in modern welfare states, as the state intervenes into more areas of social life and regulates an increased number of fields like the planning of education programs, social security, marriage and universities which used to be considered once in the sphere of tradition and culture, there emerges a need to justify these increased state interventions (Habermas, 1975: 70-72). Moreover, advanced capitalist societies inevitably face legitimation difficulties because of the class structure of society. Habermas states that in these societies ñ[E]ven if the state apparatus were to succeed in raising the productivity of labour and in distributing gains in productivity in such a way that an economic growth free of crises (if not disturbances) were guaranteed, growth would still be achieved in accord with priorities that take shape as a function, not of generalizable interests of the population, but of private goals of profit maximization. ... In the final analysis, *this class structure* is the source of the legitimation deficitò (Habermas, 1975: 73).

Schmittôs theory, nor the politics is understood as restrained by laws conceived as external elements as in the case of liberal constitutionalism. Habermas, in this way, tries to establish an internal relationship between democracy and constitutionalism in order to deal with the problem of democratic legitimacy.

However, unlike Schmitt, Habermas does not provide us with a systematic constitutional theory. Rather his considerations on the constitution and his formulation of a democratic procedure for legitimate constitution-making and constitutional reform practices in contemporary constitutional democracies emerge as by-product of his main arguments. Yet, his conceptualization of legal validity, particularly his key concept of discourse principle plays a central role in his designation of democratically legitimate constitution-making and constitutional review processes in contemporary societies.

In this framework, my major aim in this chapter is to examine Habermasôs theory of procedural democracy and discourse theoretic understanding of law in order to analyze how he conceptualizes legitimacy of legality. In fact, this conceptualization would lay the ground for the consequent analysis of Habermasôs conceptualization of the constitution as well as democratic legitimacy of constitution making and constitutional review processes. For this purpose, I will develop my argument in an incremental manner. First I will begin with the characteristics of modern positive law, particularly its sociological and normative functions and the tension between facticity and validity. Then I will elaborate on Habermasôs conceptualization of legal validity. At this stage, I will discuss Habermasôs conception of discourse principle (D) since it constitutes the core of his theory of legitimacy of law and political order. From Habermasôs viewpoint, the adoption of the discourse principle to the medium of law results in the principle of democracy and the co-original genesis of rights which in turn paves the way for legitimate law-making processes in constitutional democracies. It is also on this basis that Habermas reconstructs the legitimacy of the historically first constitution. Lastly, I will examine Habermasôs conceptualization of

democratic legitimacy of constitutional review processes in contemporary constitutional democracies.

3.1 Characteristics of Modern Positive Law

In *Between Facts and Norms*, Habermas develops his *normative account of modern positive law* mainly on the premise that positive law could serve for the realization of two significant purposes in the conditions of increased complexity and plurality of contemporary societies: *social integration* and *rationalization or legitimation of political power*. According to him, modern positive law could serve as a medium for the establishment and maintenance of a legitimate social order through stabilizing behavioral expectations and coordinating the actions of individuals as well as for steering and controlling the actions of government (Habermas, 1996: 67-68).

Indeed Habermas does not endorse a concept of positive law in mere factual terms. He develops a conception of positive law in more extensive terms including its normative aspects. He tries to shed light on the *potentia* of positive law for the realization of a rational society: if only rights are translated into and guaranteed by legal form they could contribute to the achievement of a democratic account of rule of law. In this respect, he draws attention to the *potentia* of modern positive law to link the private and public autonomy of individuals or in other terms to establish an internal relation between the constitutional state and the principle of sovereignty of people. The modern positive law could therefore contribute to the achievement of both self-understanding and self-actualization of people in modern societies (Habermas, 1996: 93-102).

In order to justify his argument, Habermas invokes Kantôs conceptualization of the universal principle of right and theory of social contract.[48] In addition, he benefits

[48] Kantôs theory of social contract which serves for the institutionalization of each individualôs natural right to equal liberties is distinctive since it provides a procedure for ña kind of sociation ruled by the principle of lawò (Habermas, 1996: 93). According to Habermas, ñKantôs social contract lays down the performative conditions under which rights acquire legitimate validity, for óright is the limitation

from Rousseauôs conceptualization of general will.[49] Here my aim is not to analyse Habermasôs derivation of the complementary relationship between private and public autonomy from the formulations of these theorists. But suffice it to say that for Habermas the two philosophers, Rousseau and Kant, partially succeed in building a notion of autonomy which simultaneously embodies private and public autonomy by combining practical reason and sovereign will together (Habermas, 1996: 100). Nevertheless, their formulations remain ultimately partial since they could not manage to *integrate the two concepts in an evenly balanced manner*: ñOn the whole, Kant suggests more of a liberal reading of political autonomy, Rousseau a republican readingò (Habermas, 1996: 100). In this respect, Habermasôs discourse theory of law and democracy might be considered as a major endeavour to build upon the theoretical formulations of Kant and Rousseau and develop a notion of autonomy guaranteed by positive law which would evenly bring the private and public autonomy together.[50]

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of each personôs freedom so that it is compatible with the freedom of everyone, insofar as this is possible in accord with a general lawôò (Habermas, 1996: 93). Therefore for Habermas, Kant brings in the body of positive law the private and public autonomy of the individual as the moral individual adopts the social perspective of practical reason: ñBecause the question concerning the legitimacy of freedom-securing laws must find an answer *within* positive law, the social contract establishes the principle of law by binding the legislatorôs political will-formation to conditions of a *democratic procedure*, under these conditions the results arrived at in conformity with this procedure express per se the concurring will or rational consensus of all participants. In this way, the morally grounded primordial human right to equal liberties is intertwined in the social contract with the principle of popular sovereigntyò (Habermas, 1996: 93-94).

[49] Habermas underlines the centrality of general and abstract laws in Rousseauôs conceptualization of popular sovereignty. ñThe united will of the citizens is bound, through the medium of general and abstract laws, to a legislative procedure that excludes per se all nongeneralizable interests and only admits regulations that guarantee equal liberties for allò (Habermas, 1996: 101).

[50] Indeed, Habermas critically reflects on the controversial relationship constructed by the liberal political tradition and civic republicanism between the principle of rule of law and the principle of popular sovereignty. As he states ñthe ôliberalô traditions conceive human rights as the expression of moral self-determination, whereas ôcivic republicanismô tends to interpret popular sovereignty as the expression of ethical self-realization. From both perspectives, human rights and popular sovereignty do not so much mutually complement as compete with each otherò (Habermas, 1996: 99). Accordingly, it is usually considered that there is a tension between the impersonal principle of rule of law based on the natural rights of individuals and the self-organization of a people on the basis of its self-legislation (Habermas, 1996: 100). The liberal tradition, departing from the fear of tyranny of majority, insists on the priority of human rights which guarantee the pre-political liberties of the individuals and introduces these human rights as main limitations against the sovereign will of the people. Civic republicans, on the other hand, underline the noninstrumental aspect of civic self-organization and state that human rights should be the result of conscious self-legislation of a people.

Habermas maintains that rationalization of religious world views has culminated in a state of affairs in which the social institutions such as tradition, morality and religion which once had the force of regulating and coordinating the behaviour of individuals and thus ensuring social integration began to be questioned (Habermas, 1996: 113). To the extent that behaviour expectations and their justification become problematic, their capacity to regulate and coordinate social action has diminished and is reduced to habit or customary law. The emerging morality replacing the old one, or *postconventional morality* in Habermasôs terms, does not claim universal validity; on the contrary it can be challenged at any time (Habermas, 1996: 113). In large and complex societies, in which the force of morality to regulate social action is diminished, only the institutionalization of a democratic legal order could provide adequate compelling force to regulate interactions between anonymous individuals. At this point, one should argue that Habermas sees such regulation as a process which should somehow be realized. Therefore, the positive law takes the role of regulation and backed by sanctioning power of the state, it enables offsetting of the weaknesses of a *postconventional* morality and contributes to social integration:

> It [law] functions as a kind of ótransmission beltô that picks up structures of mutual recognition that are familiar from face-to-face interactions and transmits these, in an abstract but binding form, to the anonymous, systematically mediated interactions among strangers. Solidarity-the third source of societal integration beside money and administrative power-arises from law only indirectly, of course: by stabilizing behavioural expectations, law simultaneously secures symmetrical relationships of reciprocal recognition between abstract bearers of individual rights (Habermas, 1996: 448-449).

In this respect, Habermas conceives law both as ña system of knowledgeò and ña system of action (Habermas, 1996: 114). ñWe can understand it just as much as a text that consists of normative propositions and interpretations, as we can view it as an institution, that is as a complex of normatively regulated action. Because motivations

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This dichotomy results in a major problem when the constitution-making practice is taken into consideration. This is because, the perception of an external relation between human rights and popular sovereignty would result in a situation in which human rights would be conceived as an external element imposed upon the sovereign will of the people as self-legislating entity.

and value orientations are interwoven with each other in law as an action system, legal norms have the immediate effectiveness for action that moral judgments as such lackò (Habermas, 1996: 114). Positive law regulates the behaviour of individuals more effectively than the moral rules since the latter are not backed by state sanction.

In addition, the ñfacticity of the genesis of lawò, in other terms that it is enacted and administered by positively authorized bodies, relieves the individuals from the burden of justification and application of the legal norms. Habermas explicates this as ñlaw complements morality by relieving the individual of the cognitive burdens of forming her own moral judgmentsò (Habermas, 1996: 115). Furthermore, the sanctioning force of the legal form reduces the uncertainty about whether the individual would conform his behaviour with the moral ought (Habermas, 1996: 116).

From another perspective, Habermas points out the significance of the function of positive law for the rationalization of the actions of government and legitimization of the state. Indeed, he acknowledges the instrumental function of law for the exercise of political power. In contemporary societies, the policies of government penetrate into and govern the social and economic interactions between individuals only through the medium of law and legal programs. Yet he still strives to illustrate the ñco-original constitution and conceptual interpenetration of law and political powerò (Habermas, 1996: 132). The positive laws sanctioned by the coercive power of the state gain compelling force to coordinate and stabilize the actions of the individuals. In addition, legal norms gain stability and consistency if they are supported by the judiciary institutionalized as an organ of the state power. ñIn short, state becomes necessary as a sanctioning, organizing, and executive power because rights must be enforced, because the legal community has need of both a collective self-maintenance and an organized judiciary, and because political will-formation issues in programs that must be implementedò(Habermas, 1996: 134).

Nevertheless, Habermas also underlines the normative aspects of modern positive law along with its instrumental qualities. For him, law considerably helps to secure reciprocity in social interactions. To illuminate the reciprocity guaranteeing character of modern positive law, Habermas elaborates on Kantôs universal principle of right. ñThis principle considers an act to be right or lawful as long as its guiding maxim permits one personôs freedom of choice to be conjoined with everyoneôs freedom in accordance with a universal lawò (Habermas, 1996: 83). In this respect, for Habermas, ñ[T]he concept of a law or legal statute makes explicit the idea of equal treatment already found in the concept of right: in the form of universal and abstract laws all subjects receive the same rightsò (Habermas, 1996: 83). In fact the freedom reinforcing character of law, thus its guaranteeing of equal treatment for each and every individual in society, reflects also its relational character. According to Habermas, this reciprocity, in other words the mutual recognition of rights is the fundamental gain of modern positive law in normative sense and it is the only way to organize a just society composed of free and equal individuals. In other words, the issue of democracy enters into scene only at the level of normative gains of modern positive law.

Along with these properties, Habermas also draws attention to the paradoxical character of modern positive law as an initial step of developing a normative conception of legal validity, (Habermas, 1996: 28-34). In the following, I will elaborate on this paradox inherent in positive law.

3.1.1 Tension Between Facticity and Validity

According to Habermas, modern positive law is janus-faced since it is inscribed with a tension between facticity and validity.[51] Legal norms, on the one hand, stand as

[51] This tension inscribed in law is mainly the reflection of the tension inherent to the lifeworld of human species: ñThe validity we claim for our utterances and for practices of justification differs from the social validity or acceptance of actually established standards and expectations whose stability is based merely on settled custom or the threat of sanctionsò (Habermas, 1996: 20). In this respect, there is a continuous tension between the intersubjective expectations and standards of behaviour which are constructed through the medium of language and their claim to validity in context transcendental

artificial facts produced by positive authorities and attached with threat of sanctions backed by the coercive power of state. On the other hand, the same norms claim universal validity thus normative bindingness independent from the context of their genesis. For Habermas, this tension between the positivity and claim for universal validity of positive laws might also be explicated from the perspective of the two moments of law. Drawing upon Kantôs considerations on legal validity, Habermas asserts that modern positive law is coercive since it is backed by state sanction to guarantee compliance. But it also guarantees freedom as it designates the legitimate boundaries of social action of individuals (Habermas, 1996: 31). Habermas explains this tension between facticity and validity in following passage:

> Modern law is formed by a system of norms that are coercive, positive, and, so it is claimed, freedom-guaranteeing. The formal properties of coercion and positivity are associated with the claim to legitimacy: the fact that norms backed by the threat of state sanction stem from the changeable decisions of a political lawgiver is linked with the expectation that these norms guarantee the autonomy of all legal persons equally. This expectation of legitimacy is intertwined with the facticity of making and enforcing law (Habermas, 1996: 447).

Depending upon this janus-based character of law, Habermas states that the subjects of the legal order could take two attitudes towards law (Habermas, 1996: 448). The individual could either choose to behave strategically and act in conformity to law in order to refrain from the negative effects of sanctions, or could comply with the law just because of órespect for the law.ô According to Habermas, legal system as a social order could become permanent only if it has social acceptability thus legitimacy in the eyes of its addressees. For him, average compliance to the law because of its sanctioning force is not sufficient for lawsô sustainable enforceability. To become sustainable, the law must also have a normative claim to validity that is rationally recognized. In other words, the virtue of a legal order does not solely emerge from its

terms. In light of this tension, Habermas insists on the possibility of constructing a social order and offers a communicative action theory on the basis of which modern positive law can be re-formulated as a solution to the problem of social integration confronted by complex and pluralistic modern societies and how the social coordination between the actions of different individuals can be achieved.

rights guaranteeing character equally for all persons in the society, but also from the recognition of its authority as a socially just order by the persons it addresses (Habermas, 1996: 31).

3.2 Legitimacy of Legality in Habermasôs Discourse Theory

In the following, I will first of all present Habermasôs critique of legal positivist and legal formalist traditions and afterwards explicate his own conception of legal validity on the basis of the ñdiscourse principle,ò the basic concept of his moral theory.

3.2.1 Critique of Legal Positivism and Legal Formalism

Habermasôs insistence on the dual character of modern positive law in fact illuminates the fundamental linkage between his conception of law and morality and thus differentiates his conceptualization of legal validity from other legal and sociological approaches that treat law in a morally neutral sense. In fact, Habermas severally criticizes legal and sociological theories which embark on morally-neutral conceptualizations of law. In this respect, his proceduralist understanding of law differs substantially from the legal formalism of Weber and legal positivism of Kelsen, both of whom conceive law as independent from morality.[52] In order to delineate Habermasôs account of legitimate law, I deem it necessary to briefly mention the theoretical formulations of these theorists and explain how Habermasôs conceptualization of legitimacy of legality differs from them.[53] Then I will present a

[52] In *Between Facts and Norms*, Habermas expresses a general criticism about the morally-neutral conceptualizations of law by making specific reference to legal positivism. Along with this, he specifically criticizes Kelsenôs legal positivism where he discusses the relationship between private and public autonomy. In addition, he presents an open criticism of Weberôs formalism in his essay entitled *Law and Morality*. Here, I would like to elaborate on these two figures together and make some inferences about Habermasôs perspective on the subject. This is because; the two figures and their approaches have some common denominators that are problematic from Habermasôs viewpoint.

[53] Habermas in his endeavour in *Between Facts and Norms* to develop a sociological concept of law which would also have normative aspect presents also a critical analysis of systems theory of Luhmann and Rawlsôs theory of justice (Habermas, 1996: 48-64). Briefly he criticizes both theorists for taking the modern law from a one-sided perspective. In case of Luhmann, the problem for

general explication of Habermasôs account of legitimacy of legality in its relationship with his theory of *discourse ethics* and *communicative action*.

Recall that legal positivism conceives the legal systems of modern societies as composed of positive laws issued and enforced by authorized bodies in line with the pre-established law making procedures usually embodied in the text of constitution. Hence the parliamentary legislation process is viewed as the sole source of law and the systematized hierarchy of legal norms, as well as their formal characteristics, are considered to be the basis of rationality thus validity of law. Being a prominent figure of legal positivist tradition, Kelsen in his *Pure Theory of Law* similarly conceives the hierarchical structure of the legal system as the main principle for lawôs validity (Kelsen, 2005: 193-199). For him, the validity of a certain legal norm rests on its conformity to the superior norm in the hierarchical structure of the legal order, and this system of ascriptions lasts until the constitution as the highest law of the land. In this respect, he substantially overvalues the hierarchical structure of the legal system, and in his conceptualization the legal system, in a sense, involves the principle of its own operation independent from morality or any other source (Dyzenhaus, 1994: 10).

Indeed Kelsen takes great pains to draw a bold line between law and morality. For him, it is true that the legal system and morality are both normative orders commanding certain kinds of behaviour in different situations. Thus the issue is not what the law and morals command, but how they command (Kelsen, 2005: 62). Law is a coercive social order that attaches a sanction in case of violation of legal norms whereas morality does not impose such kind of *factual* sanctions but only

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Habermas is his taking the law only from a functionalist viewpoint and ignoring its normative aspects (Habermas, 1996: 48). According to him, Luhmannôs conceptualization of legal system in complete isolation from other social realms such as economy, morality and politics tends to ignore the socially integrative potential of the legal system. Habermas also finds Ralwsôs theory of justice problematic to the extent that he seems to adopt a normative approach while leaving aside historical and social facts in his conceptualization of ócoriginal positionô and óveil of ignorance.ô In his later writings, Habermas criticizes Rawls for not considering moral perspective in the original position (Habermas, 2009: 43-74).

encompasses approval or disapproval of norm-conforming and norm-opposing behaviours. Moreover, Kelsen rejects to explain the validity of positive law on the basis of its conformity to any kind of moral system. This is simply because he conceives moral insights as values, thus morality for him is a phenomenon depending on subjective value preferences. ñEvery moral value is relative. There is no absolute value in general and an absolute moral value in particular. If law is described as a part of morals -if the validity of a legal norm is established on the basis of its conformity to a moral norm- this would be a mistake since what men have considered as good or evil, just or unjust, at different times and in different places no common element at allò (Kelsen, 2005: 65).

In *Between Facts and Norms*, Habermas openly criticizes Kelsenôs analysis of the legal order as a self-referential legal system (Habermas, 1996: 86). According to him, ñKelsen detached the legal concept of a person not only from the moral person but even from the natural person, because a fully self-referential legal system must get by with its self-produced fictionsò (Habermas, 1996: 86). He argues that ñOnce the moral and natural person has been uncoupled from the legal system, there is nothing to stop jurisprudence from conceiving rights along purely functionalist linesò (Habermas, 1996: 87). Hence for Habermas, legal positivism contributed to the ñhollowing out of the substance of rights, or robbing the private law of its moral content, and conceptualization of the law only in functional or instrumental termsò (Habermas, 1996: 87-88).

Similar to Kelsen, Weber also conceives moral insights as value preferences depending on subjective choice. And this is in fact where Habermas criticizes Weber most (Habermas, 1986: 227). In *Law and Morality*, he critically examines Weberôs formalism as he thinks that Weber also adopted a positivistic concept of morally-neutral law and regarded the formal characteristics of law as the sole basis of its rationality (Habermas, 1986: 219). Drawing upon Weberôs analysis of modern law, Habermas describes these formal properties of law in three respects.

> First, the systematic perfection of a body of clearly analyzed legal provisions brings established norms into clear and verifiable order. Second, the abstract and general form of the law, neither tailored to particular contexts nor addressed to specific persons, gives the legal system a uniform structure. And third, a judiciary and an administration bound by law guarantee due process and a reliable implementation of laws (Habermas, 1986: 222).

Habermas indeed accepts the significance of formal characteristics of law as demarcated by legal formalism. However he also locates this theoretical specification within the socio-historical conditions in which it has been developed. Thus for Habermas, the overrating of the formal characteristics of bourgeois law could only be understood in a capitalist social and economic context in which lawôs predictability and regularity, both in the administration and legal jurisdiction, served vital for the functioning of an economy and society based on market.[54] Hence this narrow understanding of formalism cannot account for the legitimacy of law in the conditions of modern welfare states where the mode of state intervention has gradually transformed law and the lines between the public and private law begin to blur. Habermas here makes reference to the materialization of law where conditional programs are introduced in the legal system and the extent of administrative measures increased in parallel to the extension of enfranchisement and increased demand for social justice.[55] It is on the basis of this narrow specification of the formal characteristics of law and its morally-neutral conceptualization that Habermas criticized Weber, particularly for not recognizing the moral core of formal legal norms (Habermas, 1986: 226). For Weber conceived moral insights as *subjective value orientations,* he could not see the vital role played by moral *principles* in guiding the legal and political discourses (Habermas, 1986: 227).

[54] Habermas draws attention to the socio-historical character of formal paradigm of law in the fifth chapter of *Between Facts and Norms,* where he deals with the problem of rationality in adjudication.

[55] In *Law and Morality*, Habermas presents a comprehensive analysis of the materialization or deformalization of modern law (Habermas, 1986: 231-233). He elucidates on the developments in modern societies that have widely affected the nature of law and draws attention to the transformation of rule oriented programs into goal-oriented ones in the legal sphere.

Habermas is well aware of the fact that in *postmetaphysical* conditions of modern societies, religious and metaphysical doctrines are no longer available to provide a legitimate basis for the exercise of political power. In this respect, he reflects on the socio-historical development of societies and underlines the critical moment of passage to modernity (Habermas, 1986: 260-267).[56] Habermas maintains that in medieval societies, the legal system had a tripartite structure in which the divine law whether in the form of sacred law of God or law of nature was standing at the top and legitimating the use of bureaucratic law of the political ruler (Habermas, 1986: 261). The divine law was deriving its legitimating force from its *indisponibility*, thus it cannot be changed or reformed by the will of the political ruler. On the other hand, the ruler could use this divine law in order to implement his political domination in his territory. In this sense, law was instrumental for the exercise of the political power. Even in these times, there was a tension between these two moments of the law; its *indisponibility* and *instrumental* character used for political domination. And yet the balance could be secured as long as the sacred law remained unchallenged. In passage to modernity, not only the divine law has been disenchanted but also the bureaucratic law is increasingly positivized. In this respect, the modern societies are only left with positive law. And there emerged a need to find a functional equivalent of divine law, or *supra-positive authority* which would legitimize the exercise of political power (Habermas, 1986: 263).

Legal positivism and legal formalism tried to meet the challenge of legitimization of the exercise of coercive political power by means of positive law. Both strands of legal theory considered law in a morally-neutral sense and invested an unrestricted trust in the legitimacy of legality. However, as long as positive law is at the disposal of political power, and can be changed by its will, the legitimacy of legality remains still problematic. In this sense, for Habermas, positive law does not (in fact cannot)

[56] Habermas also explains the sociological disenchantment of the law and the corresponding theoretical formulations developed to interpret it in the second chapter of *Between Facts and Norms*. Here, I prefer to follow his considerations in *Law and Morality* since they draw a more concrete framework for my analysis.

render legitimacy automatically. Indeed, neither legal positivism nor legal formalism considered the issue of legitimacy and that of legality as two distinct problems. Legality is directly identified with legitimacy. In the following, I will discuss the way in which Habermas tries to resolve the problem concerning legitimacy of legality by taking this insight into consideration.

3.2.2 Legal Validity in Habermasôs Discourse Theory

For Habermas the legitimacy of legality stems neither from the formal characteristics of positive law as legal formalism of Weber claims, nor from the hierarchical structure of laws as legal positivism of Kelsen argues. According to him, both approaches are unable to establish an adequate balance between the two moments of law, *indisponibility* and *instrumentality*. Starting from this point of view, Habermas constructs legal validity on the basis of these two dimensions. On the one hand, similar to legal positivism, he endorses the positivity of law and acknowledges the significance of its legislation and enforcement by positively authorized institutions in accordance with the pre-established law-making procedures. In this respect, he appreciates the semantic structure of general and abstract laws as well. However, he also takes great pains to demonstrate that such a narrow understanding of formal characteristics of law could hardly provide justice in societies in which market economies have created a great deal of inequalities.[57] Therefore, Habermas strives to develop a different account of rational law which takes the issue of *justice* seriously and is sensitive to social transformations.

In this framework, he concentrates on the significance of the rational acceptability of the laws by the subjects of the legal order as a second dimension of legal validity. For Habermas, the law is legitimate as long as it is conceived rationally acceptable by the addresses of law or in other words, rationality of law carries normativity within itself. This normative dimension of legal validity in fact constitutes the core of

[57] Habermas, 1986 and Habermas 1996.

Habermasôs account of procedural understanding of law and legitimacy and reveals the linkage that Habermas establishes between law and morality. According to him, the semantic structure of the law is not a guarantee of substantive equality;

> The form of universal normative propositions says nothing about their validity. Rather, the claim that *a norm lies equally in the interest of everyone* has the sense of rational acceptability: all those affected should be able to accept the norm on the basis of good reasons. But this can become clear only under the pragmatic conditions of rational discourses in which the only thing that counts is the compelling force of the better argument based on relevant information (Habermas, 1996: 102-103) [*emphasis mine*].

This normative dimension of Habermasôs conceptualization of legal validity is in a sense an interpretation of the *relational* character of law. Indeed, in *Between Facts and Norms*, he gives utmost significance to explicating the *intersubjective* character of the rights (Habermas, 1996: 87-93). For Habermas, the legal form establishes an intersubjective relation by guaranteeing mutual recognition of rights. To be more precise, the law explicates and guarantees the personal integrity of the individual and opens up a space of freedom in which he can pursue his own rational plan of life. Thus it designates the legitimate boundaries of social action between citizens by taking the interests of them all in an equal basis and it ensures reciprocity between anonymous individuals (Habermas, 1996: 87-88).

In light of these considerations, for Habermas, the semantic structure of general and abstract laws as well as their mere positivity could provide only a weak basis for the legitimacy of the modern positive law. Instead he constructs the legitimacy of legality and of political domination on the basis of legally institutionalized discursive opinion and will formation processes. From his viewpoint, the legitimacy of law and of the exercise of political power arises *performatively* as the subjects of the legal system participate on an equal and free basis in the political opinion and will formation processes in political public sphere and become at the same time the authors of the law. Therefore, the legitimacy of political power does not stem from a

ñbelief in the legality of the exercise of political power*ò* as in Weberôs conception of legal domination in modern societies (Habermas, 1986: 219).

In this context, the principle of democracy plays a fundamental role in Habermasôs conceptualization of legitimacy of legality and the consequent legitimation of the exercise of political power. He indeed constructs the principle of democracy on the basis of the key category of his discourse ethics, namely the principle of discourse. Thus in order to present his account of legitimacy of legality, I will first elaborate on discourse principle which he proposes as a rule of argumentation for reaching rational consensus in practical discourses, and then explicate the principle of democracy which is a legally institutionalized form of the former. In this respect, the discursively structured opinion and will formation processes regulated specifically by the principle of discourse will not serve only as a criterion for legitimate-law making but also for the legitimacy of the actions of the government.

3.2.3 Principle of Discourse as a Rule of Argumentation in Practical Discourses

Habermas thinks that in contemporary societies marked by the plurality of private gods and demons, people no longer hold the same conceptions of good since they are highly differentiated in their religious and moral commitments. In this sense, comprehensive questions concerning an individualôs life are considered within the framework of ethical life and left to the choice of individuals. Yet the individuals can still arrive at *impartial* judgments based on reason that can gain the consent of all affected parties about the issues of justice. Let me now present such potential for judgment understood by Habermas.

In his moral theory *discourse ethics*, Habermas strives to demonstrate that moral phenomena can be elucidated by means of moral argumentation processes and that the impartial judgments based on reason could be reached through practical discourses in which all the affected parties involved on an equal basis (Habermas,

1990a: 43-115).[58] Indeed, one of the major but also challenging premises of discourse ethics is that the answers concerning the question of ñWhat I ought to do?ò can claim to be true or false (Habermas, 1990a: 56). It is thus a matter of justification of the alternatives on the basis of good reasons and the recognition of the outcome by the participants as a socially valid solution. In simpler terms, Habermasôs morality assumes the possibility of true/false statements in moral matters.

In Habermasôs theory of discourse ethics and communicative action, the discourse principle establishes a *procedure* for the framework in which practical discourses can be conducted and impartial solutions can be achieved (Habermas, 1990a: 56). Habermas explicates the discourse principle as: ñjust those action norms are valid to which all possibly affected persons could agree as participants in rational discoursesò (Habermas, 1996: 107).[59] In order to develop discourse principle, he reformulates the basic concept of Kantôs moral theory, the categorical imperative, in an *intersubjective* manner and develops a distinctive conceptualization of autonomy (Habermas, 1998: 33). Kantôs universalization test, applied to reach a generalizable maxim, is taken out of its *hypothetical* and *monological* application by a single individual and located in a rational discourse between several individuals. A norm is accepted as valid if it could meet with the approval of every individual participated

[58] In this respect, Habermas criticizes but also distinguishes his own theory from moral skeptics such as *emotivism*, *imperativism* and *prescriptivism* which conceive normative statements merely in terms of imperatives, emotions or prescriptions but not in terms of *cognitive substances* (Habermas, 1990a: 50-57). Furthermore, Habermas is critical of meta-ethical approaches to moral theory, for instance *ethical relativism*, which conceives moral insights as a matter of subjective feelings and which claims that moral arguments cannot end up with a solution that can be accepted by all involved. In fact, while insisting that moral insights have cognitive substance, Habermas also strives to distinguish discourse ethics from material ethics by emphasizing that discourse ethics only establishes a procedure to guarantee the impartiality of judging.

[59] According to Habermas, different forms of argumentation require different forms of operationalization of the principle of discourse (Habermas, 1996: 109). In this respect, while in moral discourses conducted for the justification of moral norms the principle of discourse takes the form of principle of universalization; in discourses of application, where the adequacy of moral norms to specific situations is assessed, the discourse principle takes the form of principle of appropriateness (Habermas, 1996: 109). This differentiation is particularly relevant to demarcate the boundary between practical discourses conducted in the political public sphere and legal discourses conducted in the judiciary.

in the discourse. The legitimate boundaries of individual action in society are rationally identified by all the members of that society. According to Habermas, in developing his categorical imperative Kant does not consider the contingency brought by different socio-historical contexts in which the identities of individuals are formed (Habermas, 1998: 33). Kant assumes in a sense a *transcendental ego* which could free himself from the effects of heterogeneous conditions of life. Habermasôs *intersubjective* formulation of the categorical imperative, on the other hand, is a major attempt for the *detranscendentalization of the acting subject,* in other words to bring the individual ñin to the linguistically articulated lifeworld of socialized subjectsò and locate him in the contingency of socio-historical conditions (Habermas, 2008: 40).

> The reflexive application of the universalization test calls for a form of deliberation in which each participant is compelled to adopt the perspective of all others in order to examine whether a norm could be willed by all *from the perspective of each person*. This is the situation of a rational discourse oriented to reaching understanding in which all those concerned participate. This idea of a discursively produced understanding also imposes a greater burden of justification on the isolated judging subject that would monologically applied universalization test (Habermas, 1998: 33).

In Habermasôs terms, órational discourseôrefers to *argumentation processes aimed at reaching an understanding* and where the relevant information for arriving impartial judgments are freely floating in the public sphere so that every individual could form his own judgment (Habermas, 1996: 107-108). According to Habermas, the outputs of rational discourses claim to have normative validity since they are *intersubjectively* formed and socially recognized. Habermas includes into rational discourses all the pragmatic, ethical and moral discourses as well as bargaining processes so long as they are regulated by the discourse principle (Habermas, 1996: 108). Depending on the specific features of the circumstances the type of discourse will change and an action norm would be justified on the basis of pragmatic, ethical and moral reasons.[60]

[60] Here, it is necessary to draw attention to a significant change in Habermasôs theoretical approach in *Between Facts and Norms* (Ferrara, 1999: 43). In his previous writings such as *Justification and*

In fact, Habermas constitutes the conditions of a rational discourse that guarantee an impartial outcome on the basis of his theoretical considerations on communicative action and discourse ethics. Here my aim is not to present a comprehensive account of Habermasôs theory of discourse ethics and communicative action. But suffice it to say that in his communicative action theory he introduces a differentiation between *action oriented toward reaching an understanding* and *action oriented towards success* for the analysis of modern societies (Habermas, 1990: 133-134). By action oriented towards success, Habermas refers to strategic action in which an individual acts in order to change the attitude of the other side, not by convincing him about the rationality of his validity claims but by means of force, lies or some other means. On the contrary, in case of *action oriented toward reaching an understanding*, the individual no longer wants to change the attitude of the other side by any external factor to the communication process but to arrive at an agreement about something in the world by bringing plausible propositions justified on the grounds of good reasons.[61]

Application and *Law and Morality*, he has made a demarcation between moral and ethical use of practical reason and correspondingly between moral and ethical discourses. Nevertheless, in *Between Facts and Norms* he introduces a new distinction between pragmatic, ethical and moral discourses; he thus includes pragmatic use of practical reason into his classification. This development in Habermasôs thought and extension of the range of practical discourses indicates his acknowledgment of the empirical reality of contemporary societies, mainly the imperatives imposed by economy and administration.

[61] He maintains that any individual who engages in action oriented toward reaching an understanding should assume three *formal-pragmatic presuppositions of communicative action* (Habermas, 2008: 25). These are mainly ñthe shared presupposition of a world of independently existing objects, the reciprocal presupposition of rationality or óaccountability,ô the unconditionality of context-transcending validity claims such as truth and moral rightness, and the demanding presuppositions of argumentation that force participants to decenter their interpretive perspectivesò (Habermas, 2008:28). For him, the idealizing presuppositions of communicative action do not have a transcendental meaning like Kantôs *a priori* categories. Rather any individual who has a natural capacity to use the medium of language inevitably assumes these conditions when he engages in communicative action. In fact, Habermasôs communicative action theory is built upon the premise that social reality, such as moral norms and intersubjectively hold values is constructed through the medium of language. Individuals engaging in communicative action reach a rational consensus upon something in the world. ñIn this performative attitude toward one-another, they share communicative experiences with one another against the background of an intersubjectively shared ï that is, sufficiently overlapping ï life-world. Each can understand what the other one says or meansò (Habermas, 2008: 40). In this sense, in the everyday course of communicative action, the validity of socially applied norms of action is continually challenged, tested, invalidated and reestablished through the medium of intersubjective communication processes. These norms are reproduced as the actors take yes or no positions toward the norms in question. When there is a consensus on the validity of intersubjectively shared norms and

In this context, the discourse principle requires on the part of the participants that they should be willing to justify their claims to validity on the basis of generalizable maxims in rational discourses and coordinate their actions according to the outcome. Moreover, Habermas states that individuals participating into practical discourses hold intuitively and accept implicitly some argumentative presuppositions (Habermas, 2008: 50). Habermas describes these argumentative presuppositions as (1) *publicity and inclusiveness* which refers to requirement of inclusion of all parties possibly affected in the discourse, (2) *equal rights to engage in communication*, in other words *reciprocity* implying that the claims of each participant have to be treated equally, (3) *exclusion of deception and illusion*, and (4) *subjection of oneôs behaviour in argumentation to the rules of egalitarian universalism* or *readiness to justify oneôs own propositions on the basis of good reasons* (Habermas, 2008: 50).[62] Let me now focus on the implications on law and politics that are generated by this discourse principle.

Discourse theoretic formulation of law has therefore implications on the concept of legal validity. In Habermasôs theory, legitimate law is not conceived solely on procedural terms, rather it ñinvolves a complex notion of validityò (Habermas, 1996: 207). As the discursive law-making process involves moral discourses and the ultimate decision is formulated on the basis of the moral perspective, the content of laws also becomes in line with right. Habermasôs moral concept of discourse principle in this respect forms the basis of his political theory. To the extent that the political is aimed at designation of the rules concerning living together it also gains a moral moment. The moral reasons and insights could penetrate into legal norms

rules of action, the communication between the members of the society continues without any problem. The issues are tackled in the everyday course of communicative action. The problem arises when there is a disagreement about the validity of a social norm. In this case, the communication between individuals is transferred to a reflective level, where individuals come together and reflect upon the validity of that norm. In such kind of practical discourses, the principle of universalization acts as a rule of argumentation in order to secure impartial judgments.(Özbank, 2009: 31-34)

[62] For a more detailed analysis of how Habermas derives the argumentative presuppositions of discourse, see (Habermas, 1990a: 79-99).

through the moral discourses conducted in the formal law-making institutions as well as informal public sphere. This implies the embeddedness of morality to law. Every legal norm partakes from morality in different weights. However, this does not result in the erosion of the difference between law and morality. Because law benefits from morality as long as it can translate the moral reasons into its own language, legal code and consistently integrate them to the existing legal order.

In light of this, Habermas thinks that once the rational discourses regulated by the principle of discourse are legally institutionalized as part of legislation process, the reciprocal equality guaranteeing character inherent in the discourse principle would become a part of the legislation process thus would pave the way for just outcomes in the equal interest of all. He entitles the legal institutionalization of the discourse principle as democratic principle. In this sense, in the coming section, I will elaborate on this issue and complete the bridge Habermas develops between his moral theory and discourse theory of law.

3.2.4 Principle of Democracy as a Procedure for Legitimate Law Making

As stated in the previous part, discourse principle is substantial since Habermas develops his conception of legitimate law on the basis of its legally institutionalized adoption in practical discourses in the political public sphere. For this reason, at this stage, I consider it necessary to reflect on the demarcation between the discourse principle as a theoretical construction in Habermasôs discourse ethics and the principle of democracy in his procedural account of legitimate law and democracy. Once the discourse principle is adopted to the medium of law, it takes the form of a principle of democracy and constitutes the core of Habermasôs analysis of ñtwo-track model of democracyò and discourse theoretic understanding of law. In this respect, while the principle of discourse serves as a rule of argumentation for reaching impartial solutions in practical discourses, the principle of democracy provides a procedure for legitimate law-making (Habermas, 1996: 110). Habermas explains the principle as follows:

> Specifically, the democratic principle states that only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted. In other words, this principle explains the *performative meaning of the practice of self-determination* on the part of legal consociates who recognize one another as free and equal members of an association they have joined voluntarily (Habermas, 1996: 110) [*emphasis mine*].

In this respect, the principle of democracy is nothing but the legally institutionalized and guaranteed form of the principle of discourse in legislation process. Consequently, law is legitimate so long as it is produced in legally institutionalized discursive opinion and will formation processes open to all citizens. The legal institutionalization of the discourse principle which guarantees equality and reciprocity between the participants of practical discourses provides a procedure for arriving at impartial solutions to the issues of common concern. It enables that the decisions concerned with the common good are made in the equal interest of all. In ideal conditions, once the addressees of law become also the subjects of law making, the belief factor in the construction of legitimacy loses weight. The passivity attributed to citizens gives way to active involvement and *self-determination* by the part of citizens. Nevertheless, despite its theoretical soundness, Habermasôs theory is open to a variety of criticisms when it comes to application in real life situations.

Regarding the merits of the principle of democracy, Habermas also mentions its steering function of the legal order. He maintains that:

> Hence the principle of democracy must not only establish a procedure of legitimate law-making, it must also *steer the production of the legal medium itself*. The democratic principle must specify, in accordance with the discourse principle, the conditions to be satisfied by individual rights in general, that is, by any rights suitable for the constitution of a legal community and capable of providing the medium for this communityôs self-organization. Thus, along with the system of rights, one must also create the *language* in which a community can understand itself as a voluntary association of free and equal consociates *under law* (Habermas, 1996: 111) [*emphasis original*].

In Habermasôs discourse theory of law, the *system of rights* which simultaneously guarantees the private and public autonomy of the individuals emerges as a *logical* consequence of the adoption of the principle of discourse into medium of law (Habermas, 1996: 121). Habermas reconstructs the genesis of rights in a *stepwise fashion:* ñ[O]ne begins by applying the discourse principle to the general right to liberties -a right constitutive for the legal form as such- and ends by legally institutionalizing the conditions for a discursive exercise of political autonomyò (Habermas, 1996: 121). This reconstruction signals indeed the *co-originality of human rights* and *political participation rights* as well as the *co-originality of constitutionalism and democracy*. Moreover, in his later writings Habermas deploys this formulation concerning the genesis of system of rights to present a democratic constitutional beginning (Habermas, 2001: 766-781). In the following, I will elaborate on his formulation of the system of rights in two stages without establishing a link with a democratically legitimate constitution-making practice. I will examine this link instead in the following sections of the chapter under a specific title.

3.2.5 System of Rights

From Habermasôs viewpoint, modern positive law takes over the normative functions of moral norms in modern societies. This is because the positive law helps to stabilize the actions of individuals as it confines them to a certain framework. On the other hand, it is through the positive law that the individuals are constructed as legal subjects and entitled with rights and liberties. For such a positive legal order to be legitimate, Habermas conceives the designation of the legislative procedure according to the principle of popular sovereignty as an indispensible condition. It is in this respect that the system of rights comes into play since it is only by means of the rights that the political autonomy of the citizens can be secured (Habermas, 1996: 83). In this framework, Habermas conceives it critical for the citizens of a democratic constitutional state must mutually give themselves three categories of rights.

The first category of rights concerns the ñ[B]asic rights that result from the politically autonomous elaboration of the *right to the greatest possible measure of equal individual liberties*ò (Habermas, 1996: 122). He identifies two corollary rights for this first category: (1) ñ[B]asic rights that result from the politically autonomous elaboration of the *status of a member* in a voluntary association of consociates under law,ò and (2) ñ[B]asic rights that result immediately from the *actionability* of the basic rights and from the politically autonomous elaboration of individual *legal protection*ò or in other words, the *basic rights of due process* (Habermas, 1996: 122). Habermas states that these basic rights which guarantee the private autonomy of the individual can be generated by the application of the discourse principle to the medium of law. These basic rights lay a conducive ground for the individuals to mutually recognize each other as the addressees of law (Habermas, 1996: 123).

The second category of rights concerns the political participation rights of the individuals. This category in fact signifies the passage from the philosopherôs viewpoint to the participantsô perspective thus brings a *performative* and reflexive quality to the process. These are mainly the ñ[B]asic rights to equal opportunities to participate in processes of opinion- and will-formation in which citizens exercise their *political autonomy* and through which they generate legitimate lawò (Habermas, 1996: 123). As Habermas states, only through the acknowledgement of the political rights of the individuals that the basic rights could be reassessed and developed. In fact, these rights are necessary if the private individuals as the subjects of the legal order are to recognize themselves as also the authors of the law (Habermas, 1996: 123).

Lastly, Habermas enlists the economic and social rights as the third category: ñ[B]asic rights to the provision of living conditions that are socially, technologically, and ecologically safeguarded, insofar as the current circumstances make this necessary if citizens are to have equal opportunities to utilize the civil rights listedò above (Habermas, 1996: 123). These rights indeed set the necessary framework for the exercise of the private and political rights of the citizens.

Habermas conceives the legal *form* as a necessary condition to entitle actors with rights and liberties (Habermas, 1996: 123). However, as it becomes obvious the legitimacy of legality does not emerge simply from the legal *form* but also from the adoption of the discourse principle that is by bringing equality and mutual compatibility between the rights of each person (Habermas, 1996: 123).

Indeed, by emphasizing the significance of three categories of rights, Habermas attempts to get over the old fashioned hierarchy and more probably the duality between basic rights and liberties of individuals and the political participation rights or in other words, between the rights of ancients and the rights of moderns. For him, the relation between these two categories cannot be understood in terms of a priority. Rather there exists a complementary relation and moreover circularity between these two sets of rights. It is to demonstrate this circularity that Habermas constructs the system of rights in a stepwise fashion. ñThe logical genesis of these rights comprises a circular process in which the legal code, or legal form, and the mechanism for producing legitimate law-hence the democratic principle- are co-originally constitutedò (Habermas, 1996: 122). The individual rights and liberties and the political participation rights constitute together an indivisible set that each category of right determines the possibility of the other. Through this circular construction of rights, ñ[T]he citizens themselves become those who deliberate and, acting as constitutional assembly, decide how they must fashion the rights that give the discourse principle legal shape as a principle of democracyò (Habermas, 1996: 127). Moreover, through the construction of rights in this way, it becomes clear that constitutionalism and democracy are *co-original* and necessitate each other. In this respect, for Habermas the basic rights are not limitations on the self-legislative processes of a political community; rather they constitute the enabling conditions (Habermas, 1996: 128). By defending co-originality of constitutionalism and democracy, he indeed adopts a contradistinctive position to Schmitt. Recall from the second chapter that Schmitt takes great pains to draw a bold line between the socio-historical developments of these two phenomena and examines democratic form of government in isolation from the premises of constitutional government such as the

principle of separation of powers and political pluralism. Contrary to this attitude, Habermas assumes every constitutional beginning as a democratic enterprise, since constitutionalism implies before anything else the mutual commitment to give each and every citizen equal rights and liberties. I will discuss in detail the main tenets of Habermasôs account of democracy in the consecutive section.

The significance of Habermasôs co-originality thesis stems from his emphasis on the vital role of political rights in a democratic constitutional state. In this respect, he takes the possibility that a constitutional state might not be democratic as a serious threat. He states that ñ[O]nly the rights of political participation ground the citizenôs reflexive self-referential legal understanding. Negative liberties and social entitlements, on the contrary, can be paternalistically bestowedò (Habermas, 1996: 84). Moreover, ñ[Th]e human rights grounded in the moral autonomy of individuals acquire a positive shape solely through the citizenôs political autonomyò (Habermas, 1996: 94).

Habermas, through his conceptualization of a system of rights which simultaneously guarantees the private and public autonomy of the individuals strives in a sense to bridge the gap between the private individual and citizen. Recall that in *On the Jewish Question*, Marx successfully demonstrated that the bourgeois formal rights inevitably result in the creation of a cleavage between the private individual and the *citoyen* (Marx, 1978: 26-52). According to Marx, the formal rights of the individual pave the way for the *political emancipation* of men as they are treated equally in public realm. Yet these rights also help to disguise the oppression and exploitation in the private realm because economic and social inequalities continue to exist there. In this respect, for Marx the claims to impartiality and formal equality of bourgeois formal law prove to be insufficient for ensuring substantive equality, thus for the achievement of true *human emancipation*. Habermas, in fact with his conceptualization of the principle of discourse and the concomitant system of rights seem to strive to get over this cleavage. By means of the three sets of rights, the

individual is not endowed only with civil and political rights but also with basic economic and social rights necessary to utilize the first two.

Once the principle of discourse turns out to be a legally institutionalized principle of democracy, the citizens as the subjects of the legal order gain the right to equally participate into legislation processes. This process calls for different types of discourses depending on the nature of the subject in need of regulation and corresponding types of reasons on the basis of which the validity claims are justified. This basically refers to organization of pragmatic, ethical-political and moral discourses conducted in the public political realm and even bargaining processes in some cases. In this respect, as long as the principle of democracy designates a legal procedure in which the practical discourses related to public decisions and law-making are conducted, it remains procedural. Nonetheless, so long as the legislation process is open to moral reasons which could be generalized to the all participants, it aims at achieving substantive equality.

In the following section, I will focus on the details of Habermasôs conceptualization of legitimate law-making procedure in the parliament. This formulation will also provide us with a framework for democratically legitimate constitution-making and constitutional reforms practices in contemporary constitutional democracies in which discourse principle is legally institutionalized in legislative process.

3.3 Principles of Democratic Constitutional State

As explicated previously, from Habermasôs viewpoint the mere legal form cannot be a source for the lawôs normative bindingness. Rather, normative bindingness of the law stems from the procedure of law-making which involves the equal and free participation of citizens in legislation processes. However for Habermas, the principle of popular sovereignty in modern societies can no longer be achieved either through direct participation of the citizenry into law-making processes or only through their representatives (Habermas, 1996: 135). In this respect, he points out the

significance of the ñ*legal institutionalization* of a far-reaching network of discoursesò in the parliament, administration and courts as well as in the public sphere as the basis of the *democratic rule of law* (Habermas, 2001: 722).

In the following, I will focus my analysis considerably on Habermasôs conceptualization of legitimate law-making processes in constitutional democracies. This conceptualization involves above all discursively formulated legislation processes in the parliament along with informal public discourses conducted by the participation of citizens in the political public sphere. This expedition will also provide the basic tenets of Habermasôs theory of procedural democracy which embarks on a demarcation between *communicative power* generated in the legislative bodies and *administrative power* of the government.

3.3.1 Discursive Process of Law-Making in the Parliament

As Habermas states a political community confronts in real life processes with various types of questions including pragmatic, ethical-political and moral ones. Each time the political community is compelled to make a decision or resolve a conflict, it has to respond to this requirement through *rational political will formation* if the citizens want to organize their lives collectively in a legitimate way. In this respect, a democratic legislative process should involve ñcomplex network of communicative forms aimed at reaching an understanding as well as bargainingò (Habermas, 1996: 162-181).[63]

It is in this framework that in *Between Facts and Norms*, Habermas presents an abstract model of ñrational political will-formation as a network of discourses and negotiationsò in the parliamentary institution and designates this model as the fundamental component of legitimate law-making in a democratic constitutional state (Habermas, 1996: 162-168). In this model, the parliamentary institution which is

[63] For Habermasôs detailed explication of different types of discourses requiring different use of practical reason, see Habermas, 1996: 159-164.

structured in line with discursive opinion- and will- formation processes plays a central role for the formation of communicative power (Habermas, 1996: 162). Indeed for Habermas, the communicative power formed during the parliamentary discussions and having close connections with public discourses conducted in the political public sphere is the key to steer and control the administrative power of the government.

According to Habermas, a legitimate process of law-making in the parliament might include pragmatic, ethico-political and moral discourses as well as bargaining processes regulated by the discourse principle.

> Depending on the matter in need of regulation and the need for decision, sometimes the moral and legal aspects of an issue stand in the foreground; at other times the ethical aspects stand out. Sometimes empirical questions are involved that call for expert knowledge; at other times it is a matter of pragmatic questions that require a balancing of interests and, thus, fair negotiations. The legitimation processes themselves move through various levels of communication (Habermas, 2001: 773).

In pragmatic discourses, parliamentary representatives make strategic choices between different alternatives to attain a pre-given political objective or to resolve a controversy of common concern, and try to reach a *rational consensus* on the basis of empirical facts (Habermas, 1996: 164). In cases in which the representatives cannot agree on a generalizable interest but still volunteer to coordinate their actions, the *bargaining* processes take effect (Habermas, 1996: 165). In bargaining processes, unequal social power of the actors penetrates into the communication process and the representatives try to reach a *compromise* in line with the bargaining power they have.[64] Interestingly however, Habermas conceives that a bargaining process does not hinder a just solution if it is ultimately regulated by principle of discourse.[65]

[64] Habermas makes a demarcation between *rational consensus* and *compromise*: ñWhereas a rationally motivated consensus rests on reasons that convince all the parties *in the same way*, a compromise can be accepted by the different parties each for its own *different* reasonsò (Habermas, 1996: 166).

[65] According to Habermas, the principle of discourse could provide a procedure for a just bargaining process since he thinks that in such cases, the bargaining power of the parties could be balanced through the discourse principle (Habermas, 1996: 166).

The deliberations in the parliament might also evolve towards ethical-political discourses if the issue in need of regulation is about an *existential* question for the life of the community. In ethical-political discourses, the political community usually reflects upon its own identity and tries to achieve a self-understanding about how it would like to see itself in the future (Habermas, 1996: 160). For such kind of discourses Habermas gives the examples of *ecological questions concerning the protection of the environment and animals*, *immigration rules* or *the rights of minorities* (Habermas, 1996: 165). In these discourses the political culture as well as shared values and traditions play a vital role as the outcome is likely to change the identity of the community.[66]

Lastly, the parliamentary discussions might evolve around moral discourses as in the case of social policy or tax law. ñIn any case, such moral issues call for discourses that submit the contested interests and value orientations to a universalization test within the framework set by the system of rights as it has been constitutionally interpreted and elaboratedò (Habermas, 1996: 165).

In Habermasôs model of rational political will formation, either the bargaining processes or ethical-political discourses or the pragmatic discourses should end up with the choice of policies or decisions that would be in the *equal interest of all members* since the discourse principle regulates the discourses. In fact Habermas does not provide a clear perspective about who will decide on the nature of the problems, the related types of discourses required and the reasons which will ultimately overrule the others. Rather he presents a definitive framework for the types of discourses to be conducted. In this respect, he seems to omit the circumstances in which the interest of one party might dominate the others or the social power of one actor or fraction might pressure the others for the choice of a certain outcome, or simply a situation in which none of the reasons presented by the

[66] It is on the basis of this that ñ[R]eason and will reciprocally determine each other in ethical discourses, for these discourses remain embedded in the context they thematizeò (Habermas, 1996: 163).

participants receive sufficient recognition from others. In these kinds of cases it is likely that a partial solution will be reached, the decision of an actor or of a fraction will dominate, or a decision has to be made between equally recognized alternatives. Hence Habermas reduces the resolution of complex political issues which require a definite decision to a technical issue and misreads the nature of the political phenomena. [67]

Habermas at most proposes the *rule of majority* in order to finalize rational discourses and make decisions in the end (Habermas, 1996: 179). According to him, the deliberations finalized with the majority votes of participants are never exhausted and closed to further deliberation. Rather ñthe decision reached by the majority only represents a caesura in an ongoing discussion, the decision records, so to speak, the interim result of a discursive opinion-forming processò (Habermas, 1996: 179). In sum, in Habermasôs discourse theory of democracy, it is the moral perspective that is decisive in the last instance of law-making processes.

> The question having *priority* in legislative politics concerns how a matter can be regulated in the equal interest of all. The making of norms is primarily a justice issue and is gauged by principles that state what is equally good for all. é The politically enacted law of a concrete legal community must, if it is to be legitimate, be at least compatible with moral tenets that claim universal validity going beyond the legal community (Habermas, 1994: 139).

In this respect, in Habermasôs discourse theory neither norm nor decision serves as the basis of legitimate law. He explains the genesis of legitimate law neither on the basis of the arbitrary will of the parliamentary representatives or some other law-making authority nor on the basis of an impersonal rule of law representing the objective reason. Rather Habermasôs conceptualization of the discursive law-making processes in the parliament results in a configuration of *will* and *reason* that in the

[67] In fact, Mouffe severally criticizes Habermas for associating democratic ideals with órational consensus.ô (Mouffe, 2002: 85-110). Departing from a Schmittian perspective on the definition of the political, she argues that the political cannot be reduced to a platform of rational consensus (Mouffe, 2002: 103). This would mean above all the ignorance of the antagonism inherent in society. Moreover, she criticises Habermas for assuming a power free public sphere.

end the outcome serves to the equal interest of all the members of that community.[68] This reconciliation is achieved or expected to be achieved to a great extent through discourse principle legally institutionalized as a procedure in parliamentary law-making processes.

3.3.2 Democratic Legitimacy of the Legal Order

In consistence with the above formulation, Habermas states that:

> A legal order *is* legitimate to the extent that it equally secures the co-original private and political autonomy of its citizens; at the same time, however, it *owes* its legitimacy to the forms of communication in which alone this autonomy can express and prove itself. In the final analysis, the legitimacy of law depends on undistorted forms of public communication and indirectly on the communicational infrastructure of the private as well. This is the key to a proceduralist understanding of law (Habermas, 1996: 409).

It is in this framework that Habermas formulates his conception of democratic constitutional state on the basis of his considerations about the legitimate law-making processes legally institutionalized around the discourse principle. According to him, in a constitutional state in which *rational political will-formation* is adopted in the legislature, the instrumentalization of law in the hands of the government is prevented to a large extent (Habermas, 1996: 168). Moreover, to the extent that the actions of the government remain in line with the laws created through *rational political will-formation processes*, the political power gains legitimacy. Habermasôs conceptualization of the relation between law and politics in this sense signals a reciprocally complementary but also complex structure. Moreover, this conceptualization results in a peculiar conceptualization of the political power. Indeed, Habermas conceives political power composed of communicative power generated in the rational political opinion and will formation processes in the

[68] Habermas states that in different forms of communication and corresponding types of discourses, ñthe constellation of reason and will varies depending on the pragmatic, ethical, and moral aspects of a matter in need of regulationò (Habermas, 1996: 164).

political public realm and administrative power of the government. In Habermasôs viewpoint, the actions of the government are legitimate only if they are bound with the communicative power generated in the political public realm. The law is the sole source which could establish such a linkage between the two powers. ñThus the law is not only constitutive for the power code that steers administrative processes. It represents at the same time the medium for transforming communicative power into administrative powerò (Habermas, 1996: 169).

In light of these considerations, Habermas reinterprets the principle of popular sovereignty from the discourse theoretic approach to law and politics. In this respect,

> ...the principle of popular sovereignty states that all political power derives from the communicative power of citizens. The exercise of public authority is oriented and legitimated by the laws citizens give themselves in a discursively-structured opinion- and will-formation. If we first view this practice as a problem solving process, then it owes its legitimating force to a *democratic procedure* intended to guarantee a rational treatment of political questions. The rational acceptability of results achieved in conformity with the procedure follows from the institutionalization of interlinked forms of communication that, ideally speaking, ensure that all relevant questions, issues, and contributions are brought up and processed in discourses and negotiations on the best available information and arguments. The legal institutionalization of specific procedures and conditions of communication is what makes possible the effective utilization of equal communicative freedom and at the same time *enjoins* the pragmatic, ethical, and moral use of practical reason or, as the case may be, the fair balance of interests (Habermas, 1996: 170).

As it is obvious, Habermas accepts from the outset the difficulty of making laws and policies through the direct participation of citizens in political will formation processes. This seems to be the result of his acknowledgement of the high level of functional differentiation of economic and social life and plurality of life contexts as well as population density in modern societies. Therefore, he proposes the adoption of a *parliamentary principle* according to which the parliament will be organized around various effectively functioning commissions and committees for deliberation and decision making (Habermas, 1996: 170). Once the operation of these representative bodies is regulated in line with the discourse principle, this would

pave the way for the utilization of communicative freedoms in pragmatic, ethical-political and moral discourses and thus result in just solutions (Habermas, 1996: 171). Here it is significant that the parliamentary representatives should act as if neither deputies nor proxies of the citizens (Habermas, 1996: 182). Rather they should adopt a moral perspective and act as if they are representing all citizens in society in dealing with the policies or legal programs.[69] This *enlarged perspective* in Arendtôs terms is only possible as the members of these bodies take seriously the public opinion circulating in the political public sphere. Therefore, it is substantially significant to establish linkages between the formal discursive political will formation processes in the legislature and the informal discursive settings in the political public sphere.

In this framework, discourse theoretic approach to law also requires *political pluralism* (Habermas, 1996: 171). ñParliamentary opinion- and will-formation must remain anchored in the informal streams of communication emerging from public spheres that are open to all political parties, associations, and citizensò (Habermas, 1996: 171). Regarding the issue, Habermas emphasizes the significance of the *principle of publicity* and *public use of reason* endorsed by classical liberal figures such as Kant and Mill. ñOnly the principles of the *guaranteed autonomy of public spheres* and *competition between different political parties*, together with the parliamentary principle, exhaust the content of the principle of popular sovereigntyò (Habermas, 1996: 171). This requires the establishment of constitutional guarantees which aim to prevent the manipulation and distortion of public opinion.

In fact, Habermasôs conceptualization of democratic constitutional state expresses a basic tenet: ñthe organization of the constitutional state is ultimately supposed to serve the politically autonomous self-organization of a community that has

[69] It is ambiguous to what extent the parliamentary representatives could adopt a moral perspective and put themselves in the shoes of all citizens when engaging in discourses. Moreover, the discourses and corresponding reasons circulating in the political public sphere might be substantially various that this could contribute to the difficulty of finding adequate solutions to already controversial issues.

constituted itself with the system of rights as an association of free and equal consociates under lawò (Habermas, 1996: 176). In this respect, the discourse theoretic formulation of popular sovereignty necessitates along with discursively structured political will formation process in the legislature, some other principles that has to be constitutionally guaranteed. Habermas enlists these principles as follows:

> (1) the principle of comprehensive legal protection for individuals, which is guaranteed by an independent judiciary; (2) the principles requiring that administration be subject to law and to judicial review (as well as parliamentary oversight); and (3) the principle of the separation of state and society, which is intended to prevent social power from being converted directly into administrative power, that is, without first passing through the sluices of communicative power formationò (Habermas, 1996: 169-170).

Indeed, Habermas conceives the *separation of powers* of the state and the concomitant *principle of the legality of administration* indispensable for a democratic rule of law.[70] For him, ñthe separate branches of government has the purpose of binding the use of administrative power to democratically enacted law in such a way that administrative power regenerates itself solely from the communicative power that citizens engender in commonò (Habermas, 1996: 173). This has significant implications on the formulation of the relationship between the legislature and executive.[71] The executive in this sense is strictly bound by the laws legitimately enacted by the parliament and decisions made by the judiciary. The administrative

[70] As it is laid out previously, Habermas insists from the outset that constitutionalism and democracy are not mutually exclusive but rather complementary traditions. In this respect, he endorses an opposite approach when compared with Schmitt. As a consequence of this attitude, it is no surprise that Habermas appropriates the principle of separation of powers advocated by liberal tradition when he is developing his theory of democracy.

[71] According to Habermas, ñ[T]he rationality of a specialized and competent fulfilment of tasks by experts is no protection against a *paternalistic* self-empowerment and self-programming on the part of administrative agencies. The logic of separated powers demands instead that the administration be empowered to carry out its tasks as professionally as possible, yet only under normative premises not at its disposal: the executive branch is to be limited to *employing* administrative power according to the lawò (Habermas, 1996: 188).

power could only provide the enabling conditions for the making and enforcing of the law. The administrative powerôs any extension beyond the legitimately enacted laws implies violation of the legitimacy of the political power. ñTo the extent that the law should normatively be a source of legitimation and not just a medium for the exercise of political authority, administrative power must remain bound to communicatively generated powerò (Habermas, 1996: 188). In this framework, the institutions of a constitutional state should guarantee the citizensô utilization of their political autonomy.

> On the one hand, they must *enable the communicative power of a rationally formed will* to emerge and find binding expression in political and legal programs. On the other hand, they must allow this communicative power to circulate throughout society via the reasonable application and administrative implementation of legal programs, so that it can foster *social integration through the stabilization of expectations and realization of collective goals*ò (Habermas, 1996: 176) [*emphasis mine*].

After having explicated democratic legitimacy of the legal order, I will focus on Habermasôs conception of political public sphere in the following.

3.3.3 Political Public Sphere

In light of these, it might be argued that Habermasôs discursive theory of democracy embarks on an informed and lively political public sphere based on a strong civil society. Indeed, the democratic procedure presupposes a *normative conception of public sphere* which requires enlightened, participatory and active citizenry. The political public sphere functions as a kind of warning system to the extent that it detects and identifies the problems of common concern, develops adequate solutions for them and ensures that these problems are brought to the agenda of the parliament (Habermas, 1996: 359). In Habermasôs discourse theory of democracy, the public opinions formed in informal public discourses *influence* the formal political discourses in the parliament. It is through this way that the public opinion has an *influence* on the formation of communicative power in the parliament.

> But public influence is transformed into communicative power only after it passes through the filters of the institutionalized *procedures* of democratic opinion- and will-formation and enters through parliamentary debates into legitimate lawmaking. The informal flow of public opinion issues in beliefs that have been *tested* from the standpoint of the generalizability of interests. Not influence per se, but influence transformed into communicative power legitimates political decisions (Habermas, 1996: 371).

This communicative power indeed is the key to tackle with the functional imperatives of the administrative power and the unequal power relations in society thus the only source to steer the government (Habermas, 1996: 359). In this respect, the communicative power is always in struggle with the social power of actors in the society and the administrative power of the government and bureaucracy.

Habermas also explicates the conceptual relation between public sphere and *civil society*. According to this, civil society is closely related to the communicative structures of public sphere. Habermas states that a strong public sphere can only be formed on the basis of a strong civil society; and a strong civil society can only flourish in a liberal political culture (Habermas, 1996: 371). For him ñu*nder certain circumstances* civil society can acquire influence in the public sphere, have an effect on the parliamentary complex (and the courts) through its own public opinions, and compel the political system to switch over to the official circulation of powerò (Habermas, 1996: 373). Therefore, it is true that Habermas questions the extent of autonomy that a civil society could have in contemporary societies. However he also believes that if the adequate conditions for undistorted processes of communication are created in civil society, this could pave the way for the emergence of a well-functioning and critical political public sphere (Habermas, 1996: 375). Among the actors of a critical public sphere, Habermas enlists the mass communication, journalists and publishers. ñOnce again, in the final analysis, the only thing that serves as a ópalladium of libertyô against the growth of independent, illegitimate power is a suspicious, mobile, alert, and informed public sphere that affects the parliamentary complex and secures the *sources from which legitimate law can arise*ò (Habermas, 1996: 441-2).

Habermasôs procedural democracy also imposes normative burdens to political parties. Political parties act as *catalysts of public opinion*: On the one hand, they contribute to political will-formation process in the parliament while on the other they serve as *recruiting machines* since ñthey select personnel and dispatch leadership groups into the political systemò (Habermas, 1996: 443).

3.4 Democratic Legitimacy of the Constitution

As it is clear so far, Habermas never engages in a systematic analysis of constitutions or democratically legitimate constitution-making or reforming practices in contemporary constitutional democracies in his writings as Schmitt does in his *Constitutional Theory*. He focuses rather on the issue of legal validity and tries to develop a reconstructive social theory which would form the basis of a legitimate legal order and political power. Nonetheless, taken from a different angle, Habermasôs formulation of democratic principle as a criterion of legitimate law-making seems to present a procedure for democratically legitimate constitution making and constitutional change practices in contemporary constitutional democracies

In light of the above considerations, the constitution laying down the basis of the constituted powers becomes legitimate so long as it is *intersubjectively* formulated and discursively formed in legislative processes. Only through this way the consequent generations could find the opportunity to participate in the original act of constitution making practice and *retrospectively* legitimate a constitution which is not formulated by themselves but by the constitutional framers. It can be said from Habermasôs perspective that the democratically legitimate constitution would be the one involving legal norms guaranteeing the private and public autonomy of the individuals at the same time. In this respect, Habermas explicates the legitimacy of the constitution on the basis of his formulations about the genesis of system rights and more strikingly associates the constitutional beginning with a democratic founding. As a result of his co-originality thesis, every constitutional beginning

becomes also democratic as he considers that constitutional authors have already internalized the main components of discourse theory. In the following, I will concentrate my analysis on Habermasôs conceptualization of the constitution together with his system of rights. The analysis will inevitably bring us to the problem of circularity in Habermasôs discourse theory between the system of rights as constitutional essentials and the democratic procedure. In this respect I will elaborate on some criticisms brought to Habermasôs theory along with his response.

3.4.1 Origin of the Constitution: System of Rights Revisited

Recall from the previous part of this chapter that in *Between Facts and Norms*, Habermas asserts that the adoption of the discourse principle to the medium of law results in the democratic genesis of rights. This means that the citizens must inevitably give each other the rights guaranteeing their private and public autonomy at the same time if they want to legitimately organize their lives through positive law (Habermas, 1996: 122). The logical construction of system of rights presupposes circularity between civil and political rights, and strikingly locates the citizens to the position of a constitutional assembly to decide on the scope and content of the rights that they would be willing to give each other.

In his later writings, Habermas associates the reconstruction of the genesis of rights with a democratic constitutional beginning. In this context, he presents a two-staged procedure which serves as the basis of the democratic legitimacy of the historically first constitution. In the first stage, he assumes a hypothetical *original condition* in which an arbitrary number of citizens engage in a constitution-making practice (Habermas, 2001: 776). This stage in fact takes place in thought and illustrates the logical necessity of legal institutionalization of a system of rights for the legitimate organization of a political community. It is in this stage that citizens through self-reflection become conscious of the activity in which they engage and thus give mutual rights to each other. In such conceptualization, it is only after this self-reflection that an actual constitution-making practice could take place and the

abstract form of rights created in the first stage can be fulfilled according to the requirements of the empirical conditions and the socio-historical contingencies.

This formulation brings us to his emphasis upon the *unsaturated* quality of the basic rights (Habermas, 1996: 125). The abstract rights logically derived in the first stage of the constitution-making practice serve basically as legal principles that guide the framers of the constitutions. Hence they can be interpreted and designated in concrete form by the actors participating in the constitution making processes in later stages *in response to changing circumstances*. This analysis signals the socio-historical character of the system of rights; but most of all, the *historical and dynamic conceptualization of the constitution* open to changing socio-political conditions (Habermas, 1996: 128).

It is apparent that Habermasôs considerations about the origin of the constitution definitely rely on a normative point of view rather than a realistic perspective as is the case in Schmitt. Contrary to Schmittôs insistence, he mainly presents a democratic procedure or letôs say *regulative ideal* for the constitutional framers for the act of constitution making. In this respect, the question about the empirical origin or material basis of the constitution seems to be left unanswered. Keeping this blank in mind, I will explicate in the following Habermasôs conceptualization of the constitution in line with his formulation of system of rights.

3.4.2 The Concept of Constitution: Constitution as an Unfinished Project

As it is indicated in the previous section, Habermas explains the origin of the constitution on the basis of a logical reconstitution of an original condition which runs parallel to the genesis of rights. This reconstruction culminates in the dynamic conceptualization of the constitution which is open to changes in the political life of a community. It is crucial to emphasize once again that the system of rights which is the result of a logical reconstruction serves as legal principles for the framers of the constitution. These sets of rights are open to reinterpretation, expansion in scope and

enrichment in content according to the socio-historical context of the political community (Habermas, 1996: 128). Furthermore, the dynamic conceptualization implies the *performative* character of the constitution. Citizens are burdened with the responsibility to reflect upon and interpret the system of rights, thus they have to act in a self-referential manner. Habermas states that;

> The character of constitutional foundings, which often seal the success of political revolutions, deceptively suggests that norms outside of time and resistant to historical change are simply ósetô The technical priority of the constitution to ordinary laws belongs to the systematic elucidation of the rule of law, but it only means that the content of constitutional norms is *relatively* fixed. As we will see, every constitution is a living project that can *endure* only as an ongoing interpretation continually carried forward at all levels of the production of law (Habermas, 1996: 129).

The *performative* meaning of the constitution comes to light each time the citizens engage in rational political will formation processes. Through the democratic procedure the original founding event is renewed and legitimated: ñconstitutional rights and principles merely explicate the performative character of the self-constitution of a society of free and equal citizens. The organizational forms of the constitutional state make this practice permanentò (Habermas, 1996: 384). In this respect, Habermas draws attention to the *double temporal character* of a democratic constitution (Habermas, 1996: 384). On the one hand, the constitutional text as a *historical* document signals above all the original founding event. The constitution in this sense defines and guarantees the basic rights of the individual and rules of living together. From a normative perspective, on the other hand, the constitution signals the unfinished character of the founding event. For Habermas, the constitution is not something exhaustive with the founding event of the state. On the contrary, it is an *unfinished project* as the system of rights enshrined in the original text of constitution might always be criticized, reinterpreted and reformulated by the citizens in line with the socio-historical developments and new needs of society (Habermas, 1996: 384).

In this sense, the democratic procedure of legitimate law-making refers most of all the ñon-going process of constitution-makingò (Habermas, 1996: 384-385). Such

understanding of the constitution as a ñmedium of self-determination on the part of free and equal citizensò is what reduces the tension between facticity and validity inherent in constitutional text (Habermas, 1996: 387). Hence, from Habermasôs viewpoint, the constitutional text signals not a dogma but the crystallization of communicative reason in the on-going life of a political community. The founding event is revisited and reinterpreted by the consequent generations each time they engage in self-legislative activities. Therefore, the democratic self-legislation further implies the *intersubjective* constitution of the political community. The dynamic understanding of the constitution aims to close the gap between the founding fathers and the present generations, and avoid the problem of identification that the later generations feel since they live under the rules enacted not by themselves but by their forebears (Honig, 2001: 796).

As the constitutional text loses its static character, it becomes responsive to the demands of different social forces. Through the informal and formal democratic discursive areas legally institutionalized, the subjects of law find the possibility of influencing political decisions concerning public matters. Accordingly, we can state that Habermas achieves to a certain extent to keep the constituent power of the people continuing to operate within the framework of constituted powers as ñthe legally constituted power of authority operates in productive tension with a continuing background commitment to popular sovereigntyò (Loughlin and Walker, 2007: 6).

However, Habermasôs intersubjective conceptualization of popular sovereignty refers to a notion of *subjectless* constituting power as Habermas never makes reference to a ñcollectively acting citizenryò (Michelman, 1996a: 313-314). In discourse theory of law and democracy, the anonymous forms of communication in the political public sphere never give rise to a notion of ópeopleô homogeneously unified and collectively acting before the political and legal unity of the state. Rather the individuals, as the constitution-making practice already makes implicit, form a citizenry only through the legislative process as it sets the first stage of social integration. In fact, for

Habermas, conceptualization of people as a homogeneous unity capable of acting collectively is condemned to be a fiction in complex and pluralistic contemporary societies.

On the other hand, it might be argued that the conception of constitution as an unfinished project contains in itself a strong belief in progress (Honig, 2001: 797). Habermas conceives the constitutional project as a self-learning and self-corrective process. The present and future generations are presumed as the agents of constitution-making process and burdened with a political responsibility to be democrats to realize the still untapped rights contained in the constitution (Honig, 2001: 797). My aim here is not to decipher the sources of Habermasôs belief in historical progress and social evolution. Amongst other reasons it might be the result of his commitment to Enlightenment ideals. Yet I have to admit that this belief in progress and its reflection in the conception of the constitution as an ever progressive project seem to be teleological and ignore the still unfinished political struggles between different power fractions within a society. It is still the case in most of contemporary societies that the minorities struggle even for their fundamental rights and liberties or the exploited classes fight for their basic economic rights. Thus it is impossible to know from the beginning the results of these on-going struggles and assume that the rights contained in the constitution will be enhanced. If this is the case then not only the retrospective legitimacy of the historically first constitution but also the present constitution-making process (if there is one) will be put in question. And the most significant danger stemming from such belief is that even the recently made constitution might be thought as democratically legitimate.

It is true that the understanding of constitution as an open project delivers the political struggles in the society as inexhaustible and ever on-going. However the accompanying belief in self-correction also results in the idea that the past struggles are permanently concluded in favour of the social groups facing injustice (Honig, 2001: 798). This might also lead to a situation in which the present constitution is

accepted as legitimate as it is believed that its undemocratic elements will be corrected in some time in future.

Honig intelligently draws attention to the dangers of Habermasôs thesis on the co-originality of democracy and constitutionalism. He states that thinking democracy and constitutionalism together might help to preserve the *status quo* and strengthen the pressure of the current constitutional order over suppressed groups in the society (Honig, 2001: 801). This co-originality might unknowingly close the door for the emergence of new and just beginnings. Concerning the subject, he maintains that

> Thinking in terms of a *constitutional/democracy spectrum rather than in terms of an abstract binary* might broaden our vision, permitting us to see that contexts and constitutions vary and that some are more hospitable than others to democratic agency or *a*constitutionalism. Some constitutions are also more aware than others of their own limitations. (Honig, 2001: 801) [*emphasis original*].

After explicating Habermasôs conception of the constitution, let me focus in the following the criticisms brought to his considerations by major political and legal theorists.

3.4.3 Origin of the Constitution Revisited: Criticisms to Habermasôs Formulations

In light of these, it becomes obvious that Habermasôs conception of the constitution as a future oriented open text enables the consequent generations to improve and transform the system of rights enshrined in the founding event through democratic will formation processes. The political participation rights are vital in this sense for the laws enacted by previous generations to claim normative bindingness and democratic legitimacy on consequent generations. Only if the consequent generations could have the equal opportunity to reinterpret these rights and shape them according to their own conditions that the legal order would be legitimate. Accordingly, in Habermasôs theory the acts of constitution-making and constitutional change are

legitimized by reference to the *presupposition* that the political participation rights are already included in the original constitution as the constitutional framers prefer no other but constitutional form as a basis of common life of the political community.

In this respect, Michelman draws attention to the problem of óinfinite regressô in Habermasôs discourse theory (Michelman, 1996a: 308). Recall that according to Habermasôs *co-originality* thesis, the system of rights, namely the fundamental rights and liberties of citizens and the political participation rights required for the principle of discourse, are simultaneously determined in a hypothetically constructed original condition in which a number of persons enter into a constitution-making practice. This logical presupposition constitutes the basis on which Habermas associates a constitutional beginning with a democratic founding. And this is exactly the point that Michelman criticizes. Contrary to Habermasôs argument, ñMichelman has called into question the coherence of the notion of a democratic foundingò and problematized the first constitutional assembly which is operationalized in the absence of a democratic procedure (Ferrara, 2001: 783). Concerning the issue, Michelman states that

> If it takes a *legally* constituted democratic procedure to bring forth legitimate laws, then the (legitimate) laws required for the framing of *this* juris-generative event must themselves be the product of a conceptually prior procedural event that itself was framed by (legitimate laws that must, as such, have issued in their turn from a still prior (legitimately) legally constituted event. And so on, it would appear, without endé (Michelman, 1996a: 308).

Habermas has tried to get over the problem of infinite regress by insisting on the *co-originality* of constitutionalism and democracy. In this respect, by invoking the examples of America and Germany, he emphasized the constitutional framersô willingness to mutually give each other the rights since by the act of constitution they want to organize their lives legitimately (Habermas, 1996: 194). In addition, he has proposed to understand ñthe regress itself as the understandable expression of the future-oriented character, or openness, of the democratic constitutionò (Habermas,

2001: 774). This is because according to him, ña constitution that is democratic -not just in its content but also according to its source of legitimation- is a tradition building project with a clearly marked beginning in time. All the later generations have the task of actualizing the still-untapped normative substance of the system of rights laid down in the original document of the constitutionò (Habermas, 2001: 774). With these formulations, Habermas seems to acknowledge the fact that every constitutional act may not imply at the same time a democratic beginning. For the discourse theoretic understanding of law and democracy to count in a society, a liberal political culture based on equal recognition and freedom has to be internalized by the majority of the citizenry. Only if a liberal political culture already exists at the time of the first constitution-making practice, and only if the equal and free participation of citizens is guaranteed in the historically first constitution, then it could be conceived as democratically legitimate. Regarding the subject, Habermas states that;

> The interpretation of constitutional history as a learning process is predicted on the nontrivial assumption that later generations will start with the same standards as did the founders. Whoever bases her judgment today on the normative expectation of complete inclusion and mutual recognition, as well as on the expectation of equal opportunities for utilizing equal rights, must assume that she can find these standards by reasonably appropriating the constitution and its history of interpretation. The descendents can learn from past mistakes only if they are ón the same boatô as their forebears. They must impute to all the previous generations the same intention of creating and expanding the bases for a voluntary association of citizens who make their own laws. All participants must be able to recognize the project as *the same* throughout history and to judge it from *the same* perspective (Habermas, 2001: 775).

In fact, in spite of his powerful formulations, Habermasôs account of democratic legitimacy of first constitution is still open to criticisms. His logical reconstruction of an original condition for the first constitution making practice requires the centrality of a moral perspective, apart from political and strategic considerations on the part of the citizens. In order to mutually give each other the same rights, the citizens have to apply the universalization test in the original condition thus put themselves in the shoes of everybody else. In addition to this, he assumes that the citizens already have

knowledge about their position in society. Thus the socio-historical contingencies also penetrate into this process. This reconstruction seems to bring a heavy moral burden to the participants. Moreover, Ferrara argues that even if the citizens have moral perspective, this is not sufficient for Habermasôs model to succeed: ñthe óconstitutional projectô of which forebears and successors are equally part certainly cannot be understood in procedural terms alone. Forebears and successors must share much more than principle óDô or even its specification as a óprinciple of democracyô for Habermasôs model to workò (Ferrara, 2001: 787). In this respect, Ferrara draws attention to the significance of a ñliberal democratic political identityò shared by the citizenry prior to democratic founding.

It might be argued that Habermasôs logical construction of an original condition remains considerably normative in explaining a constitutional beginning in actual terms. It is true that it takes into account socio-historical realities such as the power constellations in the society or the vital role of certain political actors in the formation of the constitutional text. Yet, he explains this formation not on the basis of the decision of constitutional framers. Even at this stage he resorts to the assumption of communicative rationality presupposed to be existing among these figures. Moreover, his discursive theory of law and democracy does not account for the cases in which the constitutional beginning emerged not as a result of internal dynamics of a society but from external sources, such as constitution-making under occupation, or by foreign political powers. As a result, it remains questionable whether he would consider a constitution imposed by foreign actors and simultaneously guaranteeing private and public autonomy of citizens as democratically legitimate or not.

3.4.4 Democratic Legitimacy of Constitution-Making and Constitutional Change Practices in Contemporary Societies

Explicating in detail Habermasôs conceptualization of a democratically legitimate constitution, I return to the significant point regarding our argument, namely the

democratic legitimacy of constitution making and constitutional change practices in contemporary societies. When the problem of circularity concerning the origin is ignored, Habermasôs discourse theory in fact provides us with a procedure for legitimate constitution making and constitutional change processes in democratic societies. He in fact does not provide us with concrete steps. However we can make some inferences from the general framework he draws on discursive political opinion and will formation processes in state institutions and in the political public sphere. The establishment of bodies based on democratic participation and decision-making procedures both in the public sphere and in state institutions will form the basis of democratic constitution making and constitutional change practices. Thus, as long as there is a debate about the constitutional essentials and issues of justice this will be decided in a participatory manner if we would attain democratic legitimacy.

In the framework of a democratically legitimate constitution-making practice, first of all a special committee responsible for drafting a text of constitution might be established within the parliament. This special committee must consist of parliamentary representatives and its work must be regulated by the discourse principle. For instance, the nomination and appointment of the president and the members of the committee and decision-making mechanism must be regulated on the basis of equal and free participation (Habermas, 1996: 171). The work of this committee must be open to the content of public discourses freely floating in the political public sphere. For this purpose, a legally institutionalized communicative channel might be established between the parliamentary committee and civil society institutions including voluntary associations and other public bodies which are also organized on a participatory basis. Or an independent media might serve as a medium. The constitutional text thus must be drafted by taking the public opinion into consideration. In the end, after the draft is approved in the parliament, it might be presented to public referendum. For the approval process, Habermas would certainly propose the rule of majority. At this stage, whether qualified majority is needed or not might be debated in relevant bodies. It is sure that for the smooth functioning of this process, a number of background principles should also be

fulfilled. Indeed, Habermasôs normative account of public sphere provides us with these principles. Among these, the principle of publicity and openness, general elections based on equal and free participation, a free and undistorted media, political pluralism and a competitive political party system might be enlisted.

As an alternative, a constitutional assembly the work of which must be regulated in line with the democratic principle might also be established. The text of constitution drafted by the constitutional assembly will be democratically legitimate if various societal groups could form their opinions on free and equal basis in political public sphere without any distortion or external pressure and their opinions are taken into consideration in the legislation process of the assembly. For Habermas, in sum, ñ[T]he fostering of autonomous public spheres, an expanded citizen participation, curbs on the power of the media, and the mediating function political parties that are not simply the arms of the state are of central significance for thisò (Habermas, 1996: 442). In this respect, he also appreciates the significance of ñinserting plebiscitary elements into the constitution (direct popular vote, petitions for a referendum, etc.), as well as the proposals to introduce democratic procedures at a grass-roots level (in the nomination of candidates, will-formation inside the party, etc.)ò for undistorted functioning of political public sphere (Habermas, 2001: 442).

In case of constitutional change, on the other hand, a differentiation must be made between a change in constitutional essentials and an ordinary change. I think Habermasôs discourse theory of law and democracy requires citizen participation for democratic legitimacy only when there is a need to rethink on constitutional essentials. Thus the ordinary provisions of the constitution might be well changed through the ordinary legislative procedures of the parliament, namely through pragmatic discourses. The citizen participation is needed however in case of constitutional essentials and issues of justice that are likely to affect the common life of the political community. For this process, a similar model to the constitution-making practice through the establishment of a special parliamentary committee might be pursued. In the end, however, there is no difference between a constitution-

making and constitutional change practice in terms of citizensô participation as long as the latter is about constitutional essentials.

As it is seen, Habermasôs theory of discourse highly draws on a free public sphere and undistorted mass communication for democratic constitution-making and constitutional change practices. However, it also seems that in the conditions of contemporary societies where the social and economic power of certain economic and political actors is decisive in the end, this assumption sounds unrealistic. This theory also requires the inclusion of all societal groups into public discourses. Yet again when the complexity of contemporary societies is taken into consideration this would also form a highly optimistic assumption.

3.4.5 Democratic Legitimacy of Constitutional Review

After making some inferences about democratically legitimate constitution making and constitutional change practices from Habermasôs viewpoint, I will expound in this section his conceptualization of democratic legitimacy of constitutional review. As indicated previously, he conceives the principle of rule of law in general and separation of powers in particular as the fundamental guarantee for procedural understanding of law and democracy. The legitimacy of the legal order and political power ultimately depends on the legal institutionalization of discursive will formation processes in state institutions. In this context, the administrative power of the executive is mostly curbed and controlled by the communicative power formed in the legislature, and by the judiciary (Habermas, 1996: 241). In such a framework, Habermas conceives judicial review as an indispensable element of a democratic rule of law. He recognizes the expansion of judicial powers *vis-à-vis* the democratically legitimate legislature as an inevitable result of emerging welfare state policies. In this respect, the expansion of judicial powers is not something to the detriment of the idea of separation of powers. On the contrary, it is something to be taken into

consideration together with transition from a formal paradigm of law to a welfarist one.[72]

Indeed Habermas considers judicial review critically necessary not only to balance the administrative power of the executive but also to ensure that the legislative decisions are in accordance with the rights and liberties guaranteed by the constitution. In general, constitutional courts engage in two distinctive duties: reviewing constitutionality of law through abstract and concrete judicial review, and examining constitutional complaints.[73] Habermas conceives no danger in concrete judicial review and constitutional complaints in terms of the violation of separation of powers. This is due to the fact that in these cases the constitutional court engages into discourses of norm application which in turn highly contributes to the consistency of law (Habermas, 1996: 240). However, it is in *abstract judicial review,* in other words, in reviewing parliamentary statutes immediately after their adoption that the constitutional court gets into hot water. Here, as in the case of *hard cases* which ordinary courts sometimes encounter, the constitutional court has to engage in a discourse of basic rights that requires constructive interpretation on the part of constitutional judges (Habermas, 1996: 243).[74] Indeed for Habermas, the competition

[72] Transition from a liberal paradigm of law to a welfarist one implies above all materialization and re-moralization of law in Habermasôs terms (Habermas, 1996: 246). Welfare state policies imply most of all conditional programs and facilitation of political policy making in the executive. In such a framework, Habermas considers judicial review necessary for reviewing the constitutionality of the statutes passed by the government and the legislature in general.

[73] In constitutional law, the constitutional court might review the constitutionality of a law in three ways: through abstract and concrete judicial review and in constitutional complaints upon the petition of an individual citizen. In concrete judicial review, ña lower court suspends its proceedings and petitions the Constitutional Court to rule on the constitutionality of a law that is relevant to the particular caseò (Habermas, 1996: 240).

[74] In the fifth chapter of *Between Facts and Norms*, Habermas deals with the problem of rationality in adjudication. He states that ñ[W]ithin this sphere of adjudication, the immanent tension in law between facticity and validity manifests itself as a tension between the principle of legal certainty and the claim to a legitimate application of law, that is, to render correct or right decisionsò (Habermas, 1996: 197). In order to reduce this tension in the sphere of jurisdiction, he proposes two solutions: the judiciary should decide upon the case by taking all the features of the concrete case into consideration thus not only norms in the existing legal statutes but also the principles as higher norms should be treated seriously. In this sense, Habermas adopts an attitude that is in contradistinction to the doctrine of legal positivism. Secondly, and as a consequence of the first, he proposes Dworkinôs method of

between the constitutional court and democratically legitimate legislature is revealed mostly in case of *abstract judicial review* and this brings the legitimacy of constitutional adjudication in question.

For Habermas, constitutional jurisprudence in *abstract judicial review* is substantially related to the way in which the constitution is perceived by constitutional judges. Contrary to the conception of constitution as a ñconcrete order of valuesò as in the case of Schmittôs constitutional theory, Habermas in fact conceives the constitution as ña system of rules structured by principlesò (Habermas, 1996: 254). Recall from the previous chapter that Schmitt conceives the constitution as the *fundamental political decision of the constitution-making power over the type and form of the concrete existence of the political unity*. In this respect, Schmitt considers the constitutional text consisting mostly of the values preferred by the sovereign authority. It is just for this reason that Schmitt rejects constitutional review by the judiciary in substantive constitutional disputes; because for him, deciding on the political questions concerning the existential form of the political unity is a duty specifically reserved to the political executive.

On the contrary, Habermas stresses the terminological difference between intersubjectively shared values and principles or higher-level norms (Habermas, 1996: 255-261). First of all, while values impose action norms depending upon the preference of certain goods, the principles impose universally valid norms of action independent from subjective preferences. Hence values are *teleological* or relative whereas the principles have a *deontological* character: ñ[V]alid norms of action obligate their addresses equally and without exception to satisfy generalized

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constructive interpretation but with a reservation. He defends that particularly in *hard cases* in which several basic rights collide in an individual case or where a legislation issued in favour of a right collides with other rights, ñthe individual case has to be interpreted in terms of the entirety of a rationally reconstructed legal order.**ò** However, for him, the derivation of the principles of the legal order should not be conducted on a *monologi*cal basis and left to the individual judge. Rather jurisdiction should be institutionalized in order to combine legal procedures regulating the jurisdiction process with the *legal discourses* in which the parties to the case could bring their own reasons to rational consideration.

behavioural expectations, whereas values are to be understood as intersubjectively shared preferencesò (Habermas, 1996: 255). Secondly, values and principles differ in the degree of their validity claims. Habermas states that one can take only a óyesô or ónoô situation against a norm, meaning that he can either agree or disagree with it. In case of an evaluative statement, on the other hand, the subject might agree or disagree with it to a certain degree. Thirdly, norms oblige their addressees unconditionally and universally, while shared values bind them relatively. And finally, norms constitute an integrated framework in which none of them contradicts with the other, whereas there is not such a systematic relationship among the values.

In the framework of this logical distinction, Habermas conceives the basic rights in the constitution neither culturally shared value orientations of a particular political community nor pure legal principles as Dworkin does. He acknowledges that basic rights as principles which guide the constitutional framers do not stand aloof from culturally established values. On the contrary, at the time of legislation, the policy goals as preferred goods and value orientations of the legislator penetrate into law. However, this diffusion occurs only after the value orientations have taken the form of mutually recognized (socially valid) norms as they pass through the lens of normativity. Thus they cannot remain as partial interests or preferences of a specific party; to be valid for all participants, they have to be transformed into contents serving the equal interest of all. Regarding this, he states that:

> As norms [basic rights], they regulate a matter in the equal interest of all; as values, they enter into a configuration with other values to comprise a symbolic order expressing the identity and form of life of a particular legal community. No doubt values or teleological contents also find their way into law, but law defined through a system of rights domesticates, as it were, the policy goals and value orientations of the legislator through the strict *priority* of normative points of view. Anyone wanting to equate the constitution with a concrete order of values mistakes its specific legal character; as legal norms, basic rights are, like moral rules, modeled after obligatory norms of action ï and not after attractive goods (Habermas, 1996: 256).

Habermas therefore presents a different framework for constitutional review since he conceptualizes the constitution in different terms. For him, the constitution conceived in Schmittian terms results in an understanding of constitutional principles as subjective value preferences and this ultimately hinders the democratic legitimacy of the constitution as well as of constitutional jurisdiction. Accordingly, he offers that constitutional adjudication, particularly *abstract judicial review*, must be guided by basic rights understood as principles. Indeed Habermas considers basic rights enshrined in the constitutional text as legal principles that are *universally binding*. Hence he rigidly objects the ñvalue jurisprudenceò of the constitutional court. ñInsofar as a constitutional court adopts the doctrine of an objective order of values and bases its decision making on a kind of moral realism or moral conventionalism, the danger of irrational rulings increases, because functionalist arguments then gain the upper hand over normative onesò (Habermas, 1996: 259). From Habermasôs viewpoint, the deontological character of the rights should be taken very seriously (Habermas, 1996: 260). Only in parallel to this, the legal validity of the constitutional court decisions could become unproblematic and be perceived as right decisions.

> An adjudication oriented by principles has to decide which claim and which action in a given conflict is right ï and not how to balance interests or relate values. True, valid norms make up a flexible relational structure, in which the relations can shift from case to case; but *this* shifting is subject to the coherence proviso, which ensures that all the norms fit together into a unified system designed to admit exactly one right solution for the case. The legal validity of the judgment has the deontological character of a command, and not the teleological character of a desirable good that we can achieve to a certain degree under the given circumstances and within the horizon of our preferences. What is the best for us at a given point does not *eo ipso* coincide with what is equally good for all (Habermas, 1996: 260-61).

Such angle also brings into light that constitutional disputes, including the ones concerning constitutional essentials can be resolved within the framework of rational discourses conducted among the judges of constitutional court (Habermas, 1996: 261). This is because Habermas ultimately ties the democratic legitimacy of constitutional court rulings to the institutionalization of legal discourses along with court procedures. ñIn any event, rulings on constitutional complaints and the concrete

constitutional review initiated by individual cases are both *limited* to the *application* of (constitutional) norms presupposed as validò (Habermas, 1996: 261). In these cases ñ[T]he legitimating reasons available from the constitution are given to the constitutional court in advance from the perspective of the application of law-and not from the perspective of a legislation that elaborates and develops the system of rights in the pursuit of policiesò (Habermas, 1996: 262). In case of *abstract constitutional review*, on the other hand, the cases should be taken in principle from the viewpoint of the legislature (Habermas, 1996: 262). Habermas maintains that in these cases, legal adjudication must review most of all the considerations and arguments that have been already brought to the legislation process and served as the rational basis of the enacted law. Thus, the court should assess whether the legislation process has operated in line with the discourse principle or not.

The constitutional court then constitutes a fundamental element of Habermasôs discursive theory of law and democracy, and is assigned with a specific normative duty. The court must mainly operate in order to ensure the pursuit of discursive procedures of legitimate law making in actual legislative processes (Habermas, 1996: 274). In this respect, the court must not only prevent the violation of rights by the actions of legislature and executive, but also protect them against the destructive effects of unequal social and economic power constellations in society (Habermas, 1996: 275). The discursive adjudication process when combined with discursive legislation procedures will be the main guarantee of a democratic rule of law. Regarding the subject, he maintains that;

> If one understands the constitution as an interpretation and elaboration of a system of rights in which private and public autonomy are internally related (and must be simultaneously enhanced), then a rather bold constitutional adjudication is even required in cases that concern the implementation of democratic procedure and the deliberative form of political opinion- and will formation. To be sure, we have to free the concept of deliberative politics from overly strenuous connotations that would put the constitutional court under permanent pressure to act. The court may not assume the role of a regent who takes the place of an underage successor to the throne. Under the critical gaze of a robust legal public sphere ï a citizenry that has grown to become a

> ócommunity of constitutional interpretersôï the constitutional court can at best play the role of a tutor. There is no need to idealize this role, as self-assured constitutional scholars have done, unless one is seeking a trustee for an idealistically depicted political process (Habermas, 1996: 280).

In light of these considerations, it becomes clear that Habermas mainly defines the legitimate borders of constitutional review in a legal framework institutionalized in accordance with discursive political-opinion and will formation procedures. In such a legal order, the constitutional court would contribute to the fulfilment of the principle of popular sovereignty, thus constitute an indispensable element of the system. Nonetheless, the constitutional court should neither engage in judicial activism nor operate under judicial self-restraint. The striking point is that Habermas seems to make a room for the constitutional court judges to reinterpret the principles inherent in the legal order in a constructive manner by taking into consideration the specific circumstances of each particular case. To the extent that constitutional court judges take the basic rights inherent in the constitution as principles with a deontological character and reassess the legislative process in terms of the proper application of the democratic principle, the constitutional court decisions would be democratically legitimate. It is significant that this reconstructive interpretation is not to be understood as óvalue jurisprudence.ô In fact, Habermas takes great pains to distinguish his method from the latter since it would pave the way for illegitimate decisions.

3.5 Concluding Remarks: Procedural Legitimacy in Habermasôs Discourse Theory of Law and Democracy

Through the discourse theory of law and democracy, Habermas engages in a reconstruction of the main tenets of principle of popular sovereignty under the rubric of constitutional state. As it is seen, his formulation of democracy differs from the liberal account of formal democracy to the extent that it takes citizen participation in legislation process and rational discourses in political public sphere seriously. He avoids reducing democratic rule to organization of regular general elections or the mere existence of representative institutions. Rather, by taking the representative

institutions of formal democracy as his reference point, he tries to develop it in more participatory terms under complex and plural conditions of contemporary societies. The *deliberative democracy* in his terms is developed on the basis of an ñinterplay between, on the one hand, the parliamentary will-formation institutionalized in legal procedures and programmed to reach decisions and, on the other, political opinion-formation along informal channels of political communicationò (Habermas, 1996: 275).

The discursive reconstruction of democratic self-legislation takes its roots in fact from his conceptualization of legal validity. It is sure that Habermas takes positivity of law seriously and appreciates the legality of statutes. Yet mere legality does not form a sufficient ground for legal validity from his point of view. In this respect, by engaging in a kind of genealogical analysis of órightô both in sociological and theoretical terms, he sheds light to the relational character of law. He brings into light the mutual recognition and equal treatment guaranteed by the notion of óright,ô and adds a normative dimension to the conception of legal validity. This second dimension requires self-legislation on the part of citizens: for the law to be legitimate, the citizens as the addresses of law should participate on an equal and free basis into law-making processes.

In such a framework, Habermasôs formulation of a very distinctive concept of the political becomes also obvious. In deliberative democracy, the political is no more understood as a constitutive phenomenon within society (Habermas, 1996: 372). Rather it is reduced to one of the subsystems of the social such as economy, law and culture which could only affect other subsystems through the medium of law. Moreover, as his insistence on rational discourses for political opinion and will formation processes displays, he assumes that issues related to constitutional essentials and justice could be resolved and decisions on these issues could be reached through forms of *argumentation aimed at reaching an understanding*. He argues that this assumption is inevitable if the citizens want to live together in a rationally organized society. It is certain that Habermasôs argument is persuasive in

logical terms notably for societies which have internalized liberal democratic culture. However, there is still room for these countries to follow a different route. Furthermore, this assumption is still questionable in societies which are deeply fragmented in terms of class conflicts or religious differences. Regarding this issue, Mouffe directs a penetrative criticism to Habermasôs theory of deliberative democracy. She generally accuses Habermas for not understanding the nature of the political and for assuming the political sphere as a neutral ground in which universally valid solutions could be formulated (Mouffe, 2000: 97). For her, the political sphere is embedded with an irreducible *antagonism* stemming from the plurality of subject positions. Apart from this criticism, even for democratic countries one might imagine a reverse case in which partial interests thus *strategically oriented action* in Habermasôs terms become determinant in the argumentation process. Besides, one might reject into engaging in argumentation altogether. Or as Ranciere states the argumentation might be formed from the outset on the basis of a hierarchical positioning for the individuals (Ranciere, 2005: 75). Thus not only the object of discourse but also *the status of the subjects of discourse* might be problematic and the argumentation process might itself be a medium for achieving recognition (Ranciere, 2005: 84).

In fact, Habermas seems to take into account only the former case while leaving the latter and the third unanswered. He strives to encapsulate the first kind of cases under his formulation of pragmatic discourses in which pragmatic reasons enter into argumentation process. Still it remains dubious whether the moral point of view will become decisive in the final resolution. Therefore, it is still unclear that the laws produced in these processes achieve substantive equality.[75] Habermas always speaks of legitimate law making processes based on discourses free from *distortion* and *coercion*. However, such kind of an assumption is very problematic when real life conditions of contemporary societies, particularly unequal social and political power

[75] Rawls in his debate with Habermas depicts this problem. See for more details (Rawls, 2009: 123-136).

of the actors, and the role of media in shaping discourses are taken into consideration.

This formulation has implications on his conceptualization of democratic legitimacy of the constitutional order as well as constitution making and reforming processes. As discussed in detail in the previous sections, Habermas acknowledges the historical dimension of the constitution. The constitution is a historical text since it is drafted by certain political actors in definite socio-historical conditions. However, he does not interpret this factuality at the origin of the constitution as that a *decision* of certain real individuals. Similar to Rawlsôs original position, Habermas reconstructs a *logical original condition* for the first constitution-making practice.[76] However, different from Rawlsôs formulation, Habermasôs logical reconstruction requires a moral perspective on the part of citizens participating in the practice. In order to mutually give each other the same rights, the citizens have to apply the universalization test in the original condition thus put themselves in the shoes of everybody else. In addition to this, Habermas, unlike Rawlsôs *veil of ignorance* in the original position, assumes that the citizens already have certain degree of knowledge about their position society. Thus the socio-historical contingencies also enter this process. He thinks that as the citizens would decide on the rules of living together from a moral point of view; this practice would result in the creation of constitutional principles that are *in the equal interest of all*. Thus in Habermasôs theoretical designation of the first constitution-making practice, neither decision nor will is decisive for the outcome. Rather the practical reason becomes determinant. It seems that this practical reason decisive in the first constitution-making practice is transformed into communicative reason created in *intersubjective* communication processes among the citizens in later stages of empirical constitution making and constitutional change practices. Thus the written constitution is reinterpreted and reshaped in accordance with changing societal needs and conditions.

[76] I am referring to Rawlsôs considerations in *Political Liberalism*, 2007.

In this respect, Habermas considers the constitution as a future oriented and open text. The democratic constitutional beginning, recall the *co-originality thesis*, is further improved as the consequent generations participate into legislation processes. Habermas conceives this participation vital for the laws enacted by previous generations to claim normative bindingness and democratic legitimacy on the consequent generations. Only if the consequent generations could have the equal opportunity to reinterpret these rights and shape them according to their own conditions that the legal order would be legitimate. Accordingly, in Habermasôs theory the acts of constitution-making and constitutional change are legitimized by reference to the presupposition that the political participation rights are already included in the original constitution as the constitutional framers prefer no other but constitutional form as a basis of common life of the political community. Regarding the issue, he states that

> If, under the conditions of a more or less well-established welfare-state compromise, one wants to hold on not only to government by law but to democracy as well, and thus to the idea of the legal communityôs self-organization, then one can no longer maintain the liberal view of the constitution as a óframeworkô regulating primarily the relation between administration and citizens. Economic power and social pressure need to be tamed by the rule of law no less than does administrative power. On the other hand, under the conditions of cultural and societal pluralism, the constitution must also not be conceived as a concrete legal order that imposes a priori a total form of life on society as a whole. Rather the constitution sets down the political procedures according to which citizens can, in the exercise of their right to self-determination, successfully pursue the cooperative project of establishing just conditions of life (Habermas, 1996: 263).

In fact, Habermasôs formulation highlights the people as the constituent power. I mean even the first constitution, which is determined by the will of concrete political actors in the past is legitimated on the basis of the logical presupposition of self-legislating people. Habermasôs *co-originality thesis* insisting on the internal relation between democracy and constitutionalism is a major component of this theoretical justification. On the other hand, however, Habermasôs conception of people never culminates into a homogeneous and collectively acting unity. Rather, it seems that

the constitution of people as a citizenry is synchronic with the act of constitution-making as a self-legislative process. This implies most of all the self-reflexivity involved in Habermasôs formulation of original condition. Thus Habermas never assumes the existence of a people having a political unity of its own before the constitutional founding. I think such conceptualization constitutes the Achillesô heel in Habermasôs theory. For the considerations of the discourse theory of law and democracy to hold for legitimating the first constitution-making practice, the people must most of all come from a liberal political culture. Unless this condition is fulfilled, the first constitution is doomed to be the decision of some concrete political actors in the past.

As it is clear, Habermas explains the constitutional founding merely on the basis of the internal dynamics of a society. He emphasizes above all the self-legislating activities of the citizenry. This approach interestingly signifies the opposite of Schmittôs constitutional theory, since Schmitt develops the constitutional beginning on the basis of an existential tension between a pre-constitutional political unity of people and their ónemy.ô It is true that Habermas does not resort to a metaphysical conception to explain the constitutional beginning like Schmitt. Yet he invokes a *logical reconstruction* of an original position. This results in the ignorance of cases in which the constitutional beginning emerged as a result of external sources, such as constitution-making under occupation, or by foreign political powers. Thus, it remains questionable whether Habermas would consider a constitution imposed by foreign actors but simultaneously guaranteeing private and public autonomy of citizens as democratically legitimate or not.

CHAPTER 4

THE CONSTITUTIONS OF 1921 AND 1924, CONSTITUTIONAL AMENDMENTS OF 1923 AND 1937

In this chapter of the thesis, I will examine changing conceptions of legitimacy of constitution making and constitutional change processes in Turkey by reference to Schmittôs and Habermasôs constitutional theories. I will concentrate on the constitutional debates in the Turkish Grand National Assembly during the making of 1921 and 1924 constitutions and constitutional amendments of 1923 and 1937 for understanding the perception of the parliamentary representatives about the concept of constitution and its legitimacy. In this respect, I will try to interpret, on the basis of the parliamentary minutes, how the framers of the constitutions, particularly the members of the Constitutional Committees and generally the members of the parliaments, conceive the constitution, the practice of constitution making and constitutional change and how they justify their practice. I will furthermore question whether they problematize the democratic legitimacy of the constitutions and their authority to make new constitutions or not. In this analysis, I will benefit at certain points from the conceptual tools developed by Schmitt and Habermas in order to deepen the constitutional debates and to provide a political theoretical reading of the constitutional developments in Turkey.

As it has been discussed in the previous two chapters of this thesis, Habermasôs theory of procedural democracy is a major endeavour to constitute a complementary relationship between the law and politics from a normative perspective. Habermas, taking into consideration the reality of modern societies which is characterized with disenchantment of religious worldviews once holding societies together and endowing the political power with uncriticizable authority, strives to bring into light the moral aspect of the modern law and thus its legitimizing potential for the actions of the political power. For him, the text of constitution and the concomitant social and political order form a dynamic platform for intersubjective formation, not a

dogma or simple legal document, to live in equal and free conditions. In this framework, Habermas strives to enable the abstract notion of peopleôs sovereignty come into practice and realized in real life processes through the legal institutionalization of procedural democracy, as the citizenry would actively participate into law-making processes including the determination of constitutional essentials.

Schmitt, on the contrary, offers a realist social imagination insisting on the priority and decisiveness of the political over the law. He mainly sheds light on the instrumentality of law, generally mystified fact under the discourse of rationality of legal order of legal positivist and formalist traditions. In Schmittôs realist framework, the law, the content of which is determined by the political leader, becomes the expression of a concrete order (Dyzenhaus, 2007: 133).[77] Despite his harsh criticisms against legal positivism which ties the validity of law into conformity to certain procedures in law making processes, Schmitt in fact himself seems to partake into the premises of legal positivism originating from the body of Hobbesôs Leviathan. Roughly speaking, the commands of the ruling authority which are inherently in coherence with the rule of nature are conceived legitimate in themselves in Hobbesôs Leviathan as long as they serve to secure law and order. Similar to this imagination, Schmitt attaches unquestionable legitimacy to the actions of the sovereign as for him they are always and already aimed at the protection of the existing Constitution. In this respect, the Constitution, once fixed by the founding fathers of the state, forms the basis of state ólifeô and contains the inalterable decisions of them in Schmittôs theory.

[77] Regarding the subject, Dyzenhaus further states that in Schmittôs theory, the authority of the leader does not originate from the law, but rather from the people-nation (Dyzenhaus, 2007: 133). However, this charismatic authority reminiscent of Weberôs ideal type is not based on social consent. It is based instead on the vital decision on friend and enemy constructing the homogeneous substance of people-nation. According to Dyzenhaus, consent cannot be a determinant element in Schmittôs theory since for him the political unity is constructed upon a deliberate decision.

Political and legal theories of Habermas and Schmitt thus provide us with two paradigms; one aimed at ensuring democratic legitimacy through the participation of citizens in law making and political will formation processes, and the other aimed at popular democracy requiring yes or no votes of the citizenry through a peopleôs referenda in times of constitutional crisis but nothing more. In terms of the relationship between the law and the political, we are also provided with a binary perspective. From the angle of Habermasôs normative framework, the political is inextricably intertwined with the law to the extent that the justice and social acceptability of the actions of the political power is weighted by the law, the endurance of which is in turn ensured by the coercive power of the state. In Schmittôs theory, on the other hand, the element of the juristic is clarified in the presence of the arbitrary will of the lawmaker and become an extension of the decision expressing the vital distinction between the friend and enemy of the state. Moreover, through the opposite formulations of Habermas and Schmitt, particularly between the edges of normativist and realist perspectives, we come to terms with the conceptualization of law as a sphere for political struggle. From Schmittôs viewpoint, law becomes the static and inalterable expression of the balance of power struggles whereas for Habermas it still carries the potential for emancipating the future generations through the rationalization of political power.

A careful study of the current literature on the constitutions and constitutional history of Turkey shows that the constitutional developments have usually been studied through a legal analysis of constitutional texts or in the framework of the contextual political and social developments accompanying constitutional periods. There is abundance of studies conducted by legal and political scholars on the texts of constitutions and their individual provisions.[78] In addition, the constitutional history

[78] The following studies might be considered in this framework: Teziç, Erdoĝan. (2013). *Anayasa Hukuku*, 16th ed., Beta Yayēnlarē, Ķstanbul. Tanör, Bülent & Yüzbaķēoĝlu, Necmi. (2013). *1982 Anayasasēna Göre Türk Anayasa Hukuku*, 13th ed., Beta Yayēnlarē, Ķstanbul. Özbudun, Ergun. (2008b). *Türk Anayasa Hukuku*, 9th ed., Yetkin Yayēnlarē, Ankara. Özbudun. (2012). *1924 Anayasasē*, Ķstanbul Bilgi Üniversitesi Yayēnlarē, Ķstanbul. Özbudun. (2008a). *1921 Anayasasē*, Atatürk Kültür, Dil ve Tarih Yüksek Kurumu, Atatürk Araķtērma Merkezi, Ankara. Parla, Taha. (2007). *Türkiyeôde Anayasalar*, Ķletiķim Yayēnlarē, Ķstanbul. Among these, Özbudun mentions in his studies (2012) and

of Turkey has been studied by a variety of political scientists in relation to the political developments of their period.[79] I think such legal and political approaches are significant for providing data about the development of constitutional democracy of Turkey. Yet I do not think that they present a complete analysis until they are supplemented by a careful examination of the thoughts and considerations of the framers of constitutions. I believe that the political culture of a society -the ways in which democracy is understood, state society relations are conceptualized and the relations between the legislative, executive and judiciary bodies are perceived by the dominant political actors- is often the determinant factor in the constitution making and constitutional change processes. Hence, an exhaustive analysis regarding the changing dynamics of understanding legitimacy of Turkish constitutions should take into account critically the dominant intellectual perspective shared by the founding fathers and authors of consequent constitutions. The minutes of parliamentary meetings are considerably significant in this respect for being the manifestation of the dominant political culture and more specifically of the intellectual perspectives and the comprehensive doctrines shared by the founding fathers and the authors of successive constitutions.

From this viewpoint, I basically aim in this chapter to engage in a hermeneutical interpretation of the constitutional debates included in the parliamentary minutes of the Turkish Grand National Assembly in order to derive, if possible, a political theoretical reading of the constitutions and their making processes. From a complete

(2008a), the constitutional debates in the first and second Turkish Grand National Assemblies. However, he does not engage in a detailed analysis about how the framers of constitutions perceive the constitution and its democratic legitimacy.

[79] Tanör, Bülent. (2012). *Osmanlı-Türk Anayasal Gelişmeleri (1789-1980),* YKY Yayınları, İstanbul. Özbudun, Ergun. (2011). *The Constitutional System of Turkey: 1876 to the Present*, New York: Palgrave Macmillan. Özbudun, Ergun & Gençkaya, Ömer Faruk. (2010). *Türkiye'de Demokratikleşme ve Anayasa Yapımı Politikası*, Doğan Kitap. Özbudun. (2009). *Türkiye'nin Anayasa Krizi (2007-2009),* Liberte Yayınları, Ankara.

body of parliamentary minutes, I will concentrate on the parts related to the major questions of this thesis and interpret the data within the framework of the entire statements included in the parliamentary debates by reference to the political and legal theories of Habermas and Schmitt. In this way, I will try to shed light on the changing dynamics upon which the authors of constitutions in Turkey strive to ground legitimacy of constitutions.

1921 Constitution or *Teúkilat-ē Esasiye of 1921* in official terms is the starting point of my examination. I will firstly discuss the perceived political and legal status of the first Grand National Assembly and in relation to this perception, the conceptualization of 1921 Constitution by the parliamentary representatives. I believe that the conception of the constitution, its perceived legal and political status and the conceptualization of its legitimacy are closely related to the self-understanding of the framers of the constitution. For this purpose, in the following, I will deal first of all with the perception of the members of the parliaments of the parliamentary institution itself. Afterwards, I will elaborate on how the parliamentary representatives construct the notion of ôTurkish nationô and deploy it as the foundation of legitimacy of the constitutional order. Then, I will scrutinize the parliamentary debates related to the constitutional amendment of 29 October 1923 declaring the Republic as the form of state. Here my aim will be to explore the basis on which the Constitutional Committee lays its justifications for amending the 1921 constitution even if this change concerns the fundamental principles of the constitution. Afterwards, I will examine the parliamentary discussions about 1924 Constitution, namely *Teúkilat-ē Esasiye* of 1924, in order to understand the rationale behind making a new constitution. Lastly, I will scrutinize the constitutional amendment of 1937 by means of which the political principles included in the program of the Republican Peopleôs Party are transformed into constitutional principles of the state.

4.1 The Constitution of 1921 (*Teκkilat-ē Esasiye of 1921*)

Teκkilat-ē Esasiye of 1921 is not a constitution in its full sense since it does not include the systematic parts of a constitutional text such as the fundamental rights and liberties, the judiciary and the procedures for constitutional amendment. In line with this, it might be argued in the framework of the parliamentary discussions that the members of the first Grand National Assembly do not conceive it as a constitution marking the founding moment of a new state. They rather conceive it as a *constitutional law* laying the basis for a new principle of government and the accompanying state administration for the proper direction of national forces in the war of liberation. This is mostly evident from the tendency of the members of the Assembly to name it as *constitutional law* in parliamentary debates. This perception is also supported when the procedure adopted during the parliamentary discussions about *Teκkilat-ē Esasiye of 1921* is taken into consideration. Indeed in the making of 1921 Constitution, the Assembly follows an ordinary law making procedure. Hence the parliamentary representatives do not feel the need to adapt a special procedure for the discussion and approval of *Teκkilat-ē Esasiye of 1921*. Moreover, they do not envisage a special procedure in *Teκkilat-ē Esasiye of 1921* for consequent constitutional amendments.

Nevertheless, the first Turkish Grand National Assembly interestingly acts as constituent power in the making of 1921 constitution as it bounds itself with no law including *Kanun-i Esasi*, the constitution of the Ottoman State. Not only the framers of the constitution but also the majority of the parliamentary representatives acknowledge the fact that the Assembly as the true representative of the nation is not bound by any other law. They indeed assume that the Assembly derives the political and social principles to make the constitutional law from the traditions of the political community.

In the framework of these preliminary insights derived from the parliamentary discussions, I consider necessary to examine first of all how the parliamentary

representatives in the first Grand National Assembly conceive the legal status and powers of the parliamentary institution itself for grasping how and on what basis they conceptualize 1921 constitution and its legitimacy. In this regard, in the following, I will firstly explore the self-perception of the members of the parliament and then elaborate on their perception of 1921 constitution and its legitimacy.

4.1.1 The Status and Powers of the Turkish Grand National Assembly from the Perspective of the Members of the Assembly

The first Turkish Grand National Assembly convenes most of all for the self defence of the *nation* and the *State* against the invading forces after the Armistice of Montrose. Upon the occupation of Istanbul on 16 March 1920 and the consequent prorogation of the Chamber of Deputies in Istanbul, the leader of the national liberation forces, Mustafa Kemal, makes a pronouncement to governorships, districts and corps commanders on 19 March 1920. In this pronouncement, Mustafa Kemal stresses the urgent necessity to convene a new assembly with *extraordinary* powers[80]: ñit is considered mandatory to convene by the nation an assembly with extraordinary powers in Ankara in order to reflect on and implement the measures for the defence of the centre of state, independence of the nation and liberation of stateò (Özbudun, 2008a: 58) [*translation mine*]. Later in his *Nutuk*, Mustafa Kemal states that his intention was the establishment of a ñconstituent assemblyò which would have the power to change the regime from the very first. Thus he used the phrase ñconstituent assemblyò in the first script of the pronouncement. However later, he replaced it with the phrase ñassembly with extraordinary powersò after he exchanged views with the corps commanders and got their remarks that his intention might be misunderstood (Kemal Atatürk, 2013: 287).

After its convention, the extraordinary status of the Grand National Assembly is reinforced and guaranteed with the second article of the draft constitution which identifies the Assembly as the *sole and true representative of the nation*: ñexecutive

[80] Mustafa Kemal deploys the term ñsalahiyet-i fevkaladeyi haiz bir meclisò in the pronouncement.

power and legislative authority are united in the body of the Grand National Assembly, the sole and true representative of the nation.ò[81] This article which institutionalizes the unity of powers in state administration is accepted without any objection in parliament discussions. In this respect, the members of the Assembly appear to assume an identity between the will of the nation and the decisions of the parliament, and embrace enthusiastically the principle of parliamentary supremacy.

Therefore, the Grand National Assembly is considered as constituent assembly from the outset and it is circumscribed by no law, not even by *Kanun-i Esasi* which is the preceding constitution of the Ottoman State. The extraordinary status of the Grand National Assembly is also expressed many times by the members of the Assembly during the constitutional debates. In the last parliamentary debate concerning 1921 Constitution, the constituent power of the Assembly is acknowledged clearly than elsewhere. During the discussions about the articles concerning the powers and operation of the Assembly, Hulusi Efendi claims that the Grand National Assembly has even the power to change the provisions of *Kanun-i Esasi*.[82] According to him, the Grand National Assembly has taken the responsibility for ensuring justice in the earth, which belongs originally to the God.[83] Hence it is bound by no law; it draws its

[81] ñKıra kudreti ve tekıri salahiyeti milletin yegane ve hakiki mümessili olan Büyük Millet Meclisinde tecelli ve temerküz eder.ò

[82] The fifth article of the draft constitution identifies the powers of the Assembly, while the seventh article regulates its operation. Particularly the seventh article envisages the establishment of two committees in the Assembly. According to this, after general elections the Assembly would convene in the form of a general assembly in order to determine the general route of the institution but delegate its entire powers to a permanent committee two months after its convention. Hulusi Bey severely objects to this article since he conceives only the general assembly as the true representative of the national will. He states that ñé ikinci olarak: Bu Heyeti Umumiyenin yerine halef olacak Heyeti Daimeye Heyeti Umumiyeden intikal eden salâhiyetten bahsedilir ve denir ki; «Iki ay sonra Büyük Millet Meclisine ait bütün hukuk ve salâhiyete vaziülyed olmak.... ilâ». Burada da fikrimi izah edeyim: Heyeti Umumiyenin haiz olduğu bütün salâhiyet malûm, hiç bir salâhiyet bundan hariç değildir, Bu salâhiyeti kendisine vekil olacak Heyeti Daimeye tevdi ediyor, bunun içinde Kanunu Esasi tedvini salâhiyeti de var mıdır efendiler (var sesleri). Nasıl olur da Kanunu Esasi tedvini hakkı da kendisine halef olan bir heyete verilebilir? Binaenaleyh ben bunu muvafık göremiyorum. Buraya bir kayıt koymak lâzım gelir. Nasıl olur da milletin intihabiyle ben geldiğim halde bütün hukuk ve salâhiyetimi bakkasına verip gideyim?ò *TBMM, ZC.*, Cilt 7, Iı135, 20.1.1337, p.327.

[83] ñHiç bir milletin, hiç bir devletin kanununda böyle bilâkaydü kart umumî bir salâhiyet yoktur. Bu o kadar vazıhtır ki; bu o kadar umumidir ki: bilâkaydü kart bakka hiç bir key kabul etmiyor. Ancak

powers from the nation; in this respect it has an unlimited power. Nevertheless, Hulusi Bey argues afterwards that the unlimited power of the Assembly is only circumscribed by the canon law as it is indicated in the article 118 of *Kanun-i Esasi*: ñGentleman! Kanunu Esasi designates our authority to make and amend the laws. é This is stipulated in the Article 118 of Kanunu Esasi.ò[84]

Hüseyin Avni Bey, another ambitious defender of parliamentary supremacy, stresses the unlimited power of the Assembly in a similar fashion and objects to the fifth article in its entirety which identifies the duties of the Assembly. He argues that the Assembly should instead designate the duties of the cabinet council and its members:

> Gentleman; Grand National Assembly (GNA) is unconditionally decisive on the destiny of the country. The Assembly appoints a set of representatives for the execution of this duty. *The duties of these representatives must be restrained, but otherwise the duty of the GNA cannot be restrained. The GNA has absolute power over everything*. There is only one thing that you must restrain, the authority and duty of your representatives. é You are writing Kanunu Esasi. Determine the authority to be given to your representatives for the execution of the law. There is no need to determine your own authority. *We are unconditionally the sovereign anyway.*[85] [*emphasis mine*]

It is obvious from the debates that Hulusi and Hüseyin Avni Beys are both enthusiastic defenders of parliamentary supremacy. It is in this sense that they object to the designation of parliamentôs duties since this will imply a limitation on its

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Allaha ait olan, Allaha mahsus olan bir hareketi üzerine almēk. Millet Meclisi yer yüzünde tatbik noktai nazarēndan adaleti vediatullah olmak üzere üzerine almēk oluyor. Böyle birinci maddede umumî ve sarih bir ĸekil kabul olunduktan sonra Meclisi baĸka ĸeyle tahdit etmeĵe hiç lüzum yoktur.ò *TBMM, ZC.*, Cilt 7, Ķ135, 20.1.1337, pp.328-29.

[84] ñEfendiler! Bu bizim kavaninin vaz ve tadili hakkēndaki salâhiyetimizi Kanunu Esasē beyan ediyor. é Kanunu Esasimizin 118 inci maddesinde vardē. ò*TBMM, ZC.*, Cilt 7, Ķ135, 20.1.1337, p.329.

[85] ñEfendiler; Büyük Millet Meclisi bilâkaydü ĸart mukadderatē memlekete vaziülyeddir. Bunun icrasēna bir takēm vekiller tâyin eder. *Bu vekillerin vazifesi takyit edilmeli, yoksa Büyük Millet Meclisinin vazifesi takyit kabul etmez. O her ĸeye mutlak olarak hâkimdir.* Yalnēz takyit edeceĵ iniz bir ĸey var ki o da vekillerinizin salâhiyet ve vazifesidir. é Kanunu Esasî yapēyorsunuz. Hukuku tabiiyemizin icrasē için vekillerinize vereceĵ iniz salâhiyeti tesbit edin. Kendi salâhiyetinizi tesbit etmeĵe lüzum yoktur. *Zaten bilâkaydü ĸart mutlak olarak biz hâkimiz.***ò** [*emphasis mine*] *TBMM, ZC.*, Cilt 7, Ķ135, 20.1.1337, p.328.

powers. These two figures also emphasize that it is the canon law that solely draws the legal boundary for the legitimacy of parliamentary actions.

Contrary to these figures, Vehbi Bey argues that the provisions of *Kanun-i Esasi* which are not amended but implemented until that time remain to be legally valid, hence there is no need to reiterate the authority of canon law in the present law: ñThe parts of Kanunu Esasi which are not *de facto* or *de jure* amended until now are in force but, if not, the state is without foundation.ò[86]

Mustafa Kemal in fact presents the most striking views regarding the powers of the Assembly. In this framework, he emphasizes that the first article which establishes the principle of national sovereignty and the second article which identifies the Assembly as the sole representative for the execution of this sovereignty must be conceived as two distinct matters. The first article does not automatically assign the parliament with unlimited power. Hence, the powers of the Assembly should be designated in the law.[87] He maintains that the members of the Assembly obviously accept the legal validity of *Kanun-i Esasi* provisions which are not amended or eliminated until now. It is in this respect that any hesitation to identify the duties of the Grand National Assembly might easily result in its confusion with the Ottoman legislature. It is indeed critical at this point that Mustafa Kemal takes great pains to differentiate the Grand National Assembly from the Ottoman legislature. He states that:

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[86] ñElimizdeki Kanunu Esasinin bu ana kadar fiilen veya kanunen tadil edilmeyen aksamē elyevm meriyülicradē. Öyle olmazsa memleketin temeli yok demektir.ò *TBMM, ZC*., Cilt 7, Ķ135, 20.1.1337, p.329.

[87] Regarding the subject, Mustafa Kemal maintains that: ñBir defa birinci maddede vuku bulan ifadenin manasē, hâkimiyet bilâkaydüķart millete ait olduĵ una dairdir. Fakat ondan sonra da halkēn mukadderatēnē bizzat ve bilfiil idare etmesine müstenit bir usulü idarenin de takip edileceĵ i söyleniyor. Binaenaleyh halkēn mukadderatēnē bizzat ve bilfiil deruhte etmesinde gayet ķümullü bir mana vardē. Bunlarēn her birini ayrē ayrē tâyin ve tahdit etmek lâzēm gelir ve bu tâyin ve tahdide baķladĵ ēmēz zaman bunun mebdei Meclisi Âlinizdir. Onun için Meclisi Âlinizin dahi salâhiyeti gayet bariz bir surette bütün milletçe bilinmek lâzēmdē. Yoksa alelētlak ve bilâkaydüķart kelimesi ile baķlayan cümle Meclisi Âlinizin salahiyetini ifadeye kâfi deĵ ildirò. *TBMM, ZC*., Cilt 7, Ķ135, 20.1.1337, p.330.

> Meclisi Mebusan (The Assembly of the Ottoman State) has the authority to amend the provisions of Kanunu Esasi on the condition that it decides on qualified majority. Yet, does it have the authority to totally dismantle Kanunu Esasi and replace it with another one? *On the other hand, your Supreme Assembly has the authority of constituent assembly. It can dismantle existing Kanunu Esasi and replace it with a new one.* If we do not clarify this matter, we cannot dare to amend Kanunu Esasi, the several provisions of which are still in force. It is because of this reason that we have to clarify this matter and this does not mean, as you assume, the limitation of the authority of your Supreme Assembly, but broadening of its authority. It entirely proves that your Supreme Assembly is also a constituent assembly.[88] [*emphasis mine*]

Mustafa Kemalôs above phrase and the fact that it meets with no objection in the parliamentary debate is significant for making clear that the constitutive legal and political status of Grand National Assembly is comprehensively acknowledged by the parliamentary representatives at that time. In fact, this seems to be in accordance with the initial aims of Mustafa Kemal for calling the convention of a national assembly with extraordinary powers. Yet even at the peak of this perception, the first Grand National Assembly does not consider *Teúkilat-ē Esasiye* as a constitution laying the basis of a new social and political order. In the following, I will explore the parliamentary debates regarding this interesting point and examine how the framers of the constitution regard their own practice.

4.1.2 Conception of Teúkilat-ē Esasiye of 1921

It is necessary to indicate an interesting point from the outset that the framers of *Teúkilat-ē Esasiye of 1921* do not act on the assumption that they are writing a *new constitution*. At least, the majority of the members of the Assembly do not think that

[88] ñVakā Meclisi Mebusanēn Kanunu esasi mevaddēnē sülüsanē ekseriyeti mevcudiyle karar vermesi úartiyle tadile salâhiyeti olduĝ una dair bir iúaret vardē. Fakat tamamen Kanunu Esasiyi kökünden yēkarak yerine diĝer bir Kanunu Esasi koymaĝa salâhiyeti var mēdē? *Halbuki Meclisi Âliniz ayni zamanda bir meclisi müessesan (kurucu meclis) salâhiyetini haizdir. Mevcut kanunu Esasiyi kaldē ē r, yerine yenisini koyabilir.* Binaenaleyh bunu ifade etmezsek henüz mevaddēnēn bir çoĝ u cari olan Kanunu Esasiye göre Kanunu Esasiyi tebdile cesaret bulamayēz. Bundan dolayē bunu ifade etmek lâzēmdē ve bu zan olunduĝ u gibi Meclisi Âlinizin salâhiyetini tahdit (sēnērlandērma) deĝil, tevsi (genińletme) ediyor. Meclisi Âlinizin aynē zamanda bir de Meclisi müessesan mahiyetinde olduĝ unu dahi tamamen ispat ediyor.ò *TBMM, ZC.*, Cilt 7, Ķ135, 20.1.1337, p.330.

they are founding a new constitutional order in terms of establishing a new state. As it is declared many times in various settings, but particularly in the parliamentary statement approved before the discussions of *Teşkilat-ı Esasiye of 1921*, the Turkish Grand National Assembly mainly convenes for the specific purpose of the self defence of the nation and the state. Thus *Teşkilat-ı Esasiye of 1921* means most of all *constitutional law* indispensable to direct the national forces during the war of liberation for national independence. It is in this respect that the period between 1921 and 1924, until the approval of 1924 constitution, is marked with the simultaneous presence of two constitutions, namely *Teşkilat-ı Esasiye of 1921* and *Kanun-i Esasi*.

The constitution of 1921 is conceived as constitutional law, not as a new constitution eliminating *Kanun-i Esasi*, and accordingly discussed and accepted as an ordinary law, without the adoption of a specific parliamentary procedure. The text of the constitution entitled as "Teşkilat-ı Esasiye Kanunu Lahiyası" is originally a program of the government prepared by the members of the cabinet council[89] and brought to the Assembly for approval on 13 September 1920 with the signature of Mustafa Kemal. The statement of the government called "Halkçılık Programı" is first red in the Assembly on 18 September 1920 and discussed mainly in terms of its legal status, particularly whether it is a draft law or program of the government (Özbudun, 2008a: 19).[90]

The statement of the government involved seven parts, namely the purpose and work, main provisions, administration, province, district (kaza), local administration (nahiye) and public inspectorships. In this respect, it was setting the general framework for state administration; identifying the principle of government, the powers and composition of the Turkish Grand National Assembly, the relations

[89] İcra Vekilleri Heyeti.

[90] According to Özbudun, the determination of the legal status of the document was significant; because if it is a draft law, it would be submitted to a specific parliamentary committee to be discussed in detail, or if it is the program of the government it would be submitted to the plenary session for the vote of confidence.

between the Assembly and cabinet council and finally the relations between the central government and local administrations.

In parliamentary discussions, Finance Minister Ferit Bey stressed that this is not a law but a program of government since it is very short and composed of parts regarding governmental issues such as the establishment, government of provinces and local administrations.[91] Thereby, he continued, the program has to be considered as a manifestation of the general route of the government and the necessary legislation concerning each part will be prepared and presented as a specific law later on. Tevfik Rüktü Bey insisted, on the other hand, that the cabinet council is not a separate institution from the Grand National Assembly thus it cannot have a program of its own.[92] He maintained that the government rather prepared the main tenets of a parliamentary program, the details of which have to be worked out in a specific parliamentary committee. After a stressful discussion, the members of the parliament decided on the submission of the program to a special committee, which will be established by the participation of three members from each existing parliamentary committees.

The Special Committee examined the proposed program of the government and submitted it as a draft law concerning the establishment, namely ñTeşkilat-ē Esasiye Kanunu Lahiyasēò to the plenary session two months after its first introduction by the cabinet council.[93] The discussions which began on 18 November 1920 took place two months and the law was finally adopted on 20 January 1921. *Teşkilat-ē Esasiye of 1921* is relatively short since it is composed of 23 main and 1 individual articles. It involves most of all provisions concerning the principle and type of government, the

[91] *TBMM, ZC*., Cilt 3, İç. 67, 18.9.1336, p. 203.

[92] *TBMM, ZC*., Cilt 3, İç. 67, 18.9.1336, p. 207.

[93] ñEncümen-i Mahsusò. The Specific Committee consists of Yunus Nadi as president, İsmail Suphi Soysallē as reporter, Mehmet Şükrü as clerk, İbrahim Süreyya, Murat (Çorum) and Mehmet Vehbi as members.

type of elections to be held for the Grand National Assembly and the local administrative councils (*nahiye*) and the relations between the central and local governments. In this respect, it does not contain any part concerning the fundamental rights and liberties of citizens, the judiciary and the procedures for constitutional amendment.

The first part of the government program, composed of four articles regarding the *aim and work* of government, is considered necessary by the Special Committee since it also identifies the aim and *rasion dêtre* of the Grand National Assembly together with its army. However, for the generality of the statements involved in this part, it is transformed into a parliamentary statement declaring the legitimate purpose and position of Grand National Assembly and its armed forces *in the eyes foreign states.*[94]

The following four articles constituted the first four articles of *Teúkilat-ē Esasiye of 1921*. Article 1 marks a radical rupture from *Kanun-i Esasi* as it establishes national sovereignty as the principle of legitimacy for the first time: ñThe sovereignty is unconditionally vested in the nation. The type of government is based on the self-government of the people.ò[95] It is with the 1921 Constitution that the principle of constitutional monarchy is eliminated and replaced with the principle of national sovereignty.[96] As indicated in the previous section, the second article designates the Grand National Assembly as the sole and true representative of the nation, and states

[94] The reporter of the Special Committee, Ķsmail Suphi Soysallē states that: ñMilli hudutlarēmēz dahilinde kalmak istiyoruz. Zulme, tahakküme karúē isyan ediyoruzò. *TBMM, ZC*., Cilt 5, Ķ99, 18.11.1336, p. 410.

[95] ñHakimiyet bilakaydü úart milletindir. Ķdare usulü halkēn mukadderatēnē bizzat ve bilfiil idare etmesi esasēna müstenittirò.

[96] Tanör states that the principle of national sovereignty has been expressed long before 1921 Constitution, at the local congresses convened during the course of national liberation. Yet the principle has a distinctive meaning in Turkish case. Though the principle has emerged as an issue of internal sovereignty against the power of monarchy in the experiences of western states, it implied two things at once in Turkish case: it became both the driving notion of the national battle for *external sovereignty* during the days of Armistice of Montrose, and the banner of *democratic sovereignty* against Ottoman monarchy (Tanör, 2012: 227).

that it combines in itself the legislative and executive powers. In this respect, it introduces the unity of powers in the execution of state power. And the third article identifies the form of government: ñThe Peopleôs Government of Turkey is governed by the Grand National Assembly and entitled as óThe Government of Grand National Assembly of Turkey.ò[97] Therefore, by far extending the initial purpose of its preparation, the first three articles of the draft law set forth the constituent will for the foundation of a new state. In Schmittian terms, these three articles represented the substance of the constitution regarding the fundamental political decision on the type and form of government. And, moreover, the legitimacy of the constitution is constructed on the basis of the nation conceived as the constitution-making power.

In general, it might be said that the Special Committee preserved the main tenets of the government program, particularly the first three articles concerning the fundamental political decision on the stateôs concrete form of existence. Nevertheless, the Committee introduced vocational representation in the fourth article by changing the initial proposal of the government which foresaw universal direct suffrage for the composition of the Assembly. In addition, the Committee found it necessary to separate the president of the Assembly from the president of the cabinet council. For the purposes of our subject, the first change concerning the vocational representation is substantial since the majority of the parliamentary representatives consider it as the basis of the sustainability of the legitimacy of the constitution.

It is interesting that neither the members of the cabinet council nor the members of the Special Committee act as if they are preparing a text of constitution aimed at the establishment of a new state. This is also evident from the fact that the Grand National Assembly adopts no specific procedure for the discussion and approval of the constitution. Tanör explains this interesting situation on the basis of the peculiar

[97] ñTürkiye Halk Hükümeti Büyük Millet Meclisi tarafēndan idare olunur ve óTürkiye Büyük Millet Meclisi Hükümetiô unvanēnētakērò.

circumstances of that period. According to him, this tendency is a result of the common intention of the constitutional framers to set the minimum requirements necessary for the transition period. That is why *Kanun-i Esasi* is not entirely eliminated and its provisions that are not in conflict with *Teşkilat-ı Esasiye of 1921* continued to be legally valid (Tanör, 2012: 253). Hence the period between the enforcement of 1921 Constitution and the adoption of 1924 Constitution is marked with the adoption of two constitutions at the same time.

It is true that the members of the parliament acknowledge the first Grand National Assembly as a constituent assembly with extraordinary powers. However for them the Assembly signifies a constituent assembly convened for the specific purpose of the self defence of the state and the nation, and its endurance is dependent on the attainment of this purpose. Thus the legislation for the attainment of this specific purpose could not be the basis of a new state but would be necessary for saving the existing one.

The reporter of the Special Committee, İsmail Suphi Soysallı, describes the moment of the reading of the draft law in the Assembly as one of the most significant moments of the Turkish political and administrative life.[98] He maintains, on behalf of the members of the Special Committee, that the initial government program is transformed into a draft law regarding the establishment. He states that the parliament convened for the aim of self-defence, thus its initial aim is not to establish a new state administration or to change the type of government. However, the necessity to make a reform in state administration has been acknowledged in time because the existing conditions of the state are not only due to external threats but also due to internal factors, particularly bad government prevailing for a long time since *Tanzimat*. Therefore the majority of the members of the parliament believe in the preservation of the existing state but act as if a new principle of government is introduced with the constitutional law. The main purpose is to make a reform in state

[98] *TBMM, ZC.*, Cilt 5, İç. 99, 18.11.1336, p. 407 and 413.

administration which is plagued with the problem of bad government. Ķsmail Suphi Soysallē states that;

> The defects of the country, the prevailing bad government is of great significance. We understood the necessity of reformation and revolution by ourselves, as a repercussion of the pouring bloods, ruined homes and whines of the peasants before our eyes. And we began to make some preparations in order to form a new government. As a result, your Supreme Assembly has convened for defense but also decided to find out the best principle of government in order to keep this country and nation alive and to do anything, any revolution when it deems necessary. Hence the programme entitled as Halkçēlēk Programē and submitted by the Government to your Supreme Assembly is an outcome of such considerations. [99]

From the expressions of Ķsmail Suphi Soysallē, it becomes obvious that the Special Committee examined the government program by holding the belief that it would make a radical reform in state administration and enable a good government. Therefore, the initial aim is not to establish a new state through the annihilation of *Kanun-i Esasi*. It is indeed for this purpose that members of the parliament, though acknowledging the significance of the draft law they are discussing and the extraordinary status of the parliament, never mention ó*new state*ô.

However it is also true that the framers of the constitution are aware of the fact that they have stepped in a fundamental issue considering the establishment. During the parliamentary discussions, for instance, Mehmet ĶükrüBey, the clerk of the Special Committee, states that the parliament has engaged in a fundamental issue which will bring forth prosperity and happiness: ñHence the Grand National Assembly has touched upon the most significant subject, in accordance with its supremacy, which

[99] ñMemleketin illetlerinin, dahili suiidarenin (kötü yönetim) büyük bir tesiri vardē. Gözümüzün önünde akan kanlarēn, yēkēlmēk yuvalarēn; köylülerin eninlerinin (acē, sēzlayēk) tesiriyle kendiliîimizden; ēslah ve inkēlap zaruretini anladēk ve yeni idare kurmak için bir takēm istihzarat yapmaya baĸladēk. Binaenaleyh bugün Meclisi Aliniz müdafaa için toplanmēk olmakla beraber, bu memleketi, bu milleti yaĸatmak için en iyi esas nerede ise onu bulmaîa ve ledelhacce (ihtiyaç görüldüîü zaman) her ĸeyden inkēlap yapmaya her ĸey ve her ĸey yapmaîa karar vermiĸtir. Ķte Hükümetin halkçēlēk programē namē altēnda Meclisi Alinize sevk ettiîi program bu fikirlerin mahsulüdür.ò *TBMM, ZC.*, Cilt 5, Ķ99, 18.11.1336, p. 409.

would bring prosperity. It is indeed deliberating on the law of Teşkilatē Esasiye.ò[100] The constitutional framers are also conscious of the fact that this fundamental law has to be in line with the traditions of the political community; it must take into consideration the existing circumstances and meet the needs of the society.

They are additionaly aware of the fact that the principle of national sovereignty constitutes a radical rupture in the development of society. Tunalē Hilmi Bey, for instance, states that the parliament engages in an initiative aiming a change in the fundamentals of the land: ñé while we are spilling bloods, losing lives in battlefronts and suspecting that we have not been able to rescue the country yet, we are at the same time attempting to change the foundation of the country which has been prevailing for centuries with full intention and belief of rescuing itò.[101]

Having explicated how the parliamentary representatives conceive *Teşkilat-ē Esasiye of 1921*, in the following, I will deal with how they conceptualize ó*Turkish nation*ô and utilize it in order to ground the legitimacy of the constitutional order.

4.1.3 Conception of the ñTurkish Nationò

It might be argued that the members of the first Grand National Assembly generally think of the decisions of the Assembly as legitimate in themselves as the Assembly convene in extraordinary circumstances. The parliamentary statement makes clear that the members of the Special Committee as the framers of the constitution think of the Grand National Assembly as the pivotal institution along with its armed forces for the achievement of national liberation and salvation of the sultanate and

[100] ñİşte Büyük Millet Meclisi hakikaten büyüklüğü üyle mütenasip refahü saadet bahşedecek en mühim bir meseleye temas etmiş ve en mühim meselenin müzakeresinde bulunuyor ki o da Teşkilatē Esasiye kanunudur.ò *TBMM, ZC*., Cilt 5, İçtima 100, 20.11.1336, p. 461.

[101] ñé cephelerde kanlar dökerken, canlar verirken, henüz memleketi kurtaramadığımızı zannederken, tamamen kurtarmış olmak iman ve itikadiyle memlekette asırlardan beri devam eden temeli değiştirircesine bir teşebbüste bulunuyoruzò. *TBMM, ZC*., Cilt 5, İçtima 100, 20.11.1336, p. 461.

caliphate.[102] It is emphasized in the parliamentary statement that the Assembly will strive to establish the necessary institutions in the fields of land, education, justice, finance, economics and pious foundations in order to bring prosperity and happiness to the nation. Moreover, it is stated that the Assembly is determinant in this duty to *derive its political and social principles from the spirit of the nation and to preserve the tendencies and traditions of the nation itself.*

It seems that the identification of the Grand National Assembly as the sole legitimate institution for the salvation of nation and the state results in the identification of the will of the ñTurkish nationò with the will of the Assembly. Accordingly, this seems to provide a justificatory base for the members of the Assembly to consider themselves and their decisions, specifically the 1921 Constitution for the sake of our analysis, as the legitimate product of national will. Therefore we might claim that the concept of ónationô is usually deployed by the framers of the Constitution in order to justify the acts of the Assembly. In this respect, the president of the Special Committee, Yunus Nadi Bey, states that:

> Gentleman, Grand National Assembly (GNA) is truely supreme. I would like to draw your attention to such supremacy. It is the proxy of the nation. *Such supremacy does not depend upon anything other than the will of the nation.* The GNA, coming into existence in such quality, has continued until now to defend, together with the nation, the future of the country (which must be defended as a result of the proxy of the nation and will of the nation) under difficult conditions. It [the Assembly] performs its duty. However, the duty of the GNA could not be merely the defense of the country. The GNA is perhaps not a product of revolution but the producer of revolutioné The GNA has preserved its quality as a government institution, [or] as a state institution, in order to rescue the country from dangerous demolition. Similarly, it has to determine the type of government of the polity from now on. é *the nation has emerged in a new form by gathering itself and it has the right to decide on its new form. The nation wants to show that it will last forever, this is the right of nation, and to do this is the duty of the GNA.*[103] [*emphasis mine*]

[102] *TBMM, ZC.*, Cilt 5, Ķ99, 18.11.1336, p. 414.

[103] ñEfendiler Büyük Millet Meclisi (BMM) hakikaten büyüktür. Bu büyüklüğe nazarē dikkatinizi celbederim. O, milletten aldığ ēmēz vekâlete müstenittir, *o büyüklük falanēn filanēn arzusuyla değ ildir ve bu milletin arzusuyla buraya gelmiķsiniz*. BMM evet bu suretle geldikten sonra millete vekâleten ve

At this point, it becomes necessary to explore how the framers of the constitution conceptualize ôTurkish nationô in their minds. A careful examination of the parliamentary debates makes it apparent that the notion of ôTurkish nationô is usually deployed in order to signify a *homogeneous unity* sharing a common historical and traditional background. In this respect, it is significant to underline the fact that the members of the Assembly do not simply mention ôTurkish peopleô living in a certain territory. They instead seem to deploy the term ôTurkish nationô consciously in order to indicate a certain ónational identityô formed by an ethical substance in order to differentiate it from other political communities.

In this framework, it is possible to detect a number of symptoms from the parliamentary debates signifying the basis on which the unity of the Turkish nation is imagined. In the constitution of this political imaginary, the existential threat of foreign invaders and the state of war in the era of national liberation seems to be the major factor. The unity of the ôTurkish nationô seems to be constituted on the basis of a real external enemy, particularly *imperialist* and *capitalist states, and their allied forces within the country*. In the parliamentary statement, the elements against which the new political order establishes itself in unity becomes explicit as the members of the Assembly describe the purpose of the Grand National Assembly as to rescue the ñTurkish nationò from the oppression and domination caused by imperialism and capitalism: ñThe Turkish Grand National Assembly has an organized army to defend *in the face of the assaults of imperialist and capitalist enemies attacking the life and future of the nation* and to cut those acting against this objective down to sizeò[104]

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milletin bütün arzusuna teban müdafaa olunmasē lazēm gelen memleketin istiklalini milletle beraber, bu ĸeraiti mükküle içerisinde müdafaa etmekte ĸimdiye kadar devam etmiĸtir. Vazifesini ifa ediyor. Fakat Büyük Millet Meclisiôinin vazifesi yalnēz memleketin müdafaasēna münhasēr kalamazdē. BMM belki bir mahsulü inkēlap deĵildir, fakat BMM herhalde bir amili inkēlaptēr. é BMM nasēl ki bu memleketi tehlikeli inhilal izmihlalden kurtarmak için bir Hükümet teĸekkülü, bir Devlet teĸekkülü mahiyetini muhafaza etmiĸse, bundan sonra da memleketin alacaĵ ē ĸekli idarenin ne olduĵ unu tespit etmek mecburiyetindedir. é *millet kendisini toplayarak yeni bir ĸekilde meydana çēkmēĸtēr, bu yeni ĸekle esas vermek hakkēdēr. Ķelebet devam edeceĵ ini göstermek ister, hakkēdēr ve bunu yapmak Büyük Millet Meclisiôinin vazifesidir.*ò [*emphasis mine*] *TBMM, ZC.*, Cilt 6, Ķ105, 29.11.1336, p. 129.

[104] ñTürkiye Büyük Millet Meclisi, milletin hayat ve istiklaline suikast eden *emperyalist ve kapitalist dümanlarēn tecavüzatēna karĸē müdafaa ve bu maksada münafi hareket edenleri* tedip azmiyle müessess bir orduya sahiptir.ò [*emphasis mine*] *TBMM, ZC.*, Cilt 5, Ķ99, 18.11.1336, p. 414.

[*emphasis mine*]. It might be suggested that the existential threat of foreign invaders permeates even the parliamentary discussions and the state of war is substantially invoked in justifying the decisions to be taken. The notion of *Turkish nation implying a political community united for self-preservation against a common enemy* seems to be conceptualized in a similar manner to Schmittôs constitutional theory. The framers of the Constitution imagine the last remnant population within the borders of *Misak-ē Milli* as the constituent power of the Grand National Assembly and the true author of the constitutional law. Hence the decisions of the Assembly including the constitutional law are conceived as the *positive deeds of the nation* understood in political -particularly in Schmittian sense carrying a friend-enemy distinction- terms.

Moreover, the imagination of a *homogeneous unity* goes parallel to the alienation of Christian population. During the parliamentary debates on vocational representation, some members of the Assembly express their worries since this will enable the Christian population to become part of the Assembly as well. Mahmut Esat Bey gives assurance that even in this case the majority of the Assembly will consist of Muslim population. Furthermore, he argues that Christians have no right to claim to be members of the parliament; they resign from the citizenship of the country as they serve the interests of foreign powers:

> Perhaps it would not be correct to say things against the Christians in Meclisi Mebusan. But I do not consider myself in Meclisi Mebusan and I am expressing myself as a man who is convinced by the idea that the Christian population has no right in this country. They have resigned from the citizenship of this country by treason, by pointing gun. They are the ungrateful children of Ottoman history and have no rights in this country. They are the spies of imperialism and traitors in this country, which wants to defend its rights, and gentleman, they have no place in this Assembly.[105]

[105] ñBelki Osmanlē Meclisi Mebusanēnda Hēristiyanlar aleyhinde söylemek doĵru olmazdē. Fakat kendimi, mânayi kadimde olan Osmanlē Meclisi Mebusanēnda farzetmiyorum ve bu memlekette Hēristiyan tabakasēnēn hiç bir hakkē olmadēĵē [fikrine] sahip olmuĸ bir adam sēfatiyle söz söylüyorum. Onlar bu memleketin vatandaĸlēĵēndan istifa etmiĸlerdir ve ihanetle, silâh çekerek istifa etmiĸlerdir. Onlar Osmanlē tarihinin nankör çocuklarēdēr ve bu memlekette hiç bir haklarē kalmamēĸtēr. Kendi hakkēnē müdafaa etmek isteyen bu memlekette onlar, emperyalizmin casuslarēdēr ve bu vatanēn hain çocuklarēdēr, onlarēn bu Mecliste iĸi yoktur efendiler.ò *TBMM, ZC*., Cilt 5, Ķ99, 18.11.1336, p. 437.

Mahmut Esat Beyôs statement meets with no objection; on the contrary it seems to be supported by Salih Efendi and some other members present in the discussion: ñAnyway they cannot stop, they are on their way to Erivan (voices of ólet them goô)ò.[106] In another parliamentary discussion concerning the subject, we observe that Vehbi Bey takes a moderate attitude and states that there is no inconveniency for the Christian population to become members of the Assembly as long as they abide by the same principles and objectives: ñIf anyone, who has the capability to come here and be elected as a representative, comes here from industrial community, they might also sit here with the same right and similarly defend their rights on the condition that they face the difficulties that we encounter and respect to our objectives and principles and act in line with them.ò[107]

In addition to the imagination of political unity against the perception of enemy, the members of the Assembly tend to ignore probable social cleavages and conflicts originating from class, ethnicity or political ideology basis. It is generally acknowledged that the majority of society within the declared borders mainly consists of the peasantry. Mehmet Ķükrü Bey argues for instance that there exists no capitalist as there is no industry in the country.[108] The people living in the country earn their lives from their own business; hence guild institutions form the basis of national economy. For this reason, the framers of the Constitution propose vocational representation as the most reliable instrument to bring the people to the Assembly. During the parliamentary discussions, members of the Assembly argue that the representation of the people in the Assembly might be best achieved by means of the development of existing guild organizations throughout the country. Therefore, they

[106] ñZaten rica etseniz de duramayacaklardęr, kendileri Erivanôa gidiyorlar (Aman gitsinler sesleri).ò *TBMM, ZC.*, Cilt 5, Ķ99, 18.11.1336, p. 437.

[107] ñMemlekette eĵer ashabē sanayiden buraya mebus olarak gelmeye istidadē olan ve intihap edilebilen bir zat gelebilirse ve onlar da bizim katlandęğ ēmēz mükkülata katlanērlarsa ve bizim gayelerimize, bizim umdelerimize riayet etmek ve onlarla beraber yürümek ĸartiyle onlar da burada aynē hakla oturabilirler ve aynē suretle haklarēnē müdafaa edebilirler.ò *TBMM, ZC.*, Cilt 6, Ķ106, 30.11.1336, p. 150.

[108] *TBMM, ZC.*, Cilt 5, Ķ100, 20.11.1336, p. 460.

tend to ignore political and ideological differentiations within society along with the possibility of establishing different political parties.

Consistent with the parliamentary discussions regarding *Teşkilat-ı Esasiye*, the consideration of the Turkish nation as the author of 1921 Constitution (i.e, the constitution making power) is also reiterated in Rıza Nur Beyôs speech on 30 October 1922 declaring the demolition of the Ottoman State: ñé When the Turkish Nation, the constituent and true owner of the Ottoman Empire saw the treason of the Palace and Babıâli, it promulgated the law of Teşkilâtı Esasiye, by the first article of which it has given the sovereignty to itself [the nation] by taking it from the Sultan and by the second article of which it has assigned [the Grand National Assembly] legislative and executive powers.ò[109] Rıza Nur Beyôs speech is significant furthermore for holding the claim that the Turkish nation existed long before the Ottoman State:

> Examine the history carefully. There is no six hundred years of sultanate law. There has been nine hundred years law of the nation and the State of Turkey has existed here for nine hundred years. There clearly exists the Turkish Nation in Anatolia. It has ruled, its rule first began with the Sultan of Seljuk. This dynasty disappeared and was replaced with Ottoman dynasty which has also disappeared today. The nation has founded its own government (voices of ôbravoô and applauses). This officially implies the State of Turkey, there is nothing else, and this approval is nothing other than the designation of this fact.[110]

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[109] ñé Osmanlı imparatorluğunun müessis ve sahibi hakikisi olan é Türk Milleti Saray ve Babıâlinin hiyanetini gördüğü zaman Teşkilâtı Esasiye Kanununu ısdar ederek onun birinci maddesiyle hâkimiyeti Padişahtan alıp bizzat millet ve ikinci maddesiyle de icrai ve teşriî kuvvetleri onun yedi kudretine vermiştir.ò *TBMM, ZC*., Cilt 3, Iş129, 30.10.1338, p. 292.

[110] ñTarihi iyi tetkik ediniz. Altı yüz senelik bir hukuku saltanat yok. Dokuz yüz senelik bir hukuku millet vardır ve dokuz yüz seneden ziyade burada bir Türkiye Devleti vardır. Anadolu'da bir Türk Milleti vazıh bir surette mevcuttur. O Hükümet inmiştir, iptida Selçuk Hükümdariyle başlamıştır. O hanedanı saltanat münkariz olmuştur. Onun yerine Osmanlı Hanedanı saltanatı kaim olmuştur. Bugün o da münkariz olmuştur. Millet kendi Hükümetini kurmuştur. (Bravo sadaları, alkışlar) Resmen Türkiye Devleti bu demektir, başka bir şey yoktur, bu takrir bunu tavzihten ibarettir.ò *TBMM, ZC*., Cilt 3, Iş129, 30.10.1338, p. 296.

In sum, we might claim that the parliamentary representatives conceive the decisions of the Assembly, particularly Teşkilat-ē Esasiye of 1921, legitimate in itself as the Assembly convenes and operates in extraordinary conditions of state of war. In the construction of legitimacy, the members of the Assembly mobilize the modern conceptual framework of liberal constitutionalism. Similar to Sieyesôs conception, the nation is assumed as the origin of the constitutional order and source of its legitimacy.[111] Furthermore, the conceptualization of the Turkish nation as a political community united for self-preservation against a common enemy and the assumed ethical substance mobilized to form its unity comes closer to Schmittôs arguments in his constitutional theory. In the following, I will discuss how the members of the Assembly constitute the legitimacy of 1921 Constitution in relation to their conception of Turkish nation as the constitution making power in Schmittôs terms.

4.1.4. Conception of the Legitimacy of *Teşkilat-ē Esasiye of 1921*

In light of parliamentary debates, it seems plausible to examine the perception of legitimacy of the framers of the Constitution and members of the Assembly in two dimensions. The first dimension concerns the basis on which the members of the Assembly constitute the legitimacy of the constitutional law, and the second dimension is about the conditions they deem necessary for the sustainability of this perceived legitimacy. I think that this situation, in other words the fact that parliamentary representatives are not only concerned about legitimacy of the constitutional law but also about its sustainability in the long term, might be considered as an indication that they consider legality and legitimacy as two distinct issues.

As indicated in the previous section, it might be argued that the members of the Assembly perceive parliamentary decisions inherently legitimate as they consider themselves as the true and sole representatives of the nation. In order to justify this

[111] Sieyesôs conceptualization is expounded in footnote 26.

argument, they comprehensively make reference to extraordinary circumstances and to the *raison dôetre* of the parliamentary institution. In this respect, the national struggle against foreign invaders seems to be taken as an indicator of peopleôs common will to live together and thus serves as the generating force of legality and legitimacy of constitutional law. Indeed the framers of the constitution seem to take legitimacy of the constitutional law seriously since they strive to justify their actions by often citing that the political and social principles they adopt are derived from the tendencies and traditions of the nation, and are in line with social needs. However, it also becomes obvious from parliamentary discussions that they make effort to draw the parameters of this perceived legitimacy. Hence they discuss the sustainability of this legitimacy as well around the issue of vocational representation.

From the viewpoint of Assembly members, the fact that the current Assembly is established via elections throughout the country is an important factor that increases the legitimacy of its decisions. Among others, Yunus Nadi Beyôs following statement is an explicit manifestation of both the extraordinariness and legitimacy of the parliamentary elections: ñYou know how the Grand National Assembly is elected. Grand National Assembly is formed by the participation of all official and nonofficial national institutions which have the authority to execute elections in significant times of the nation. *And no individual on this earth can question its legitimacy*. Yet such procedure was a product of extraordinary circumstances. I cannot imagine regulating such procedure as a law.ò[112] [*emphasis mine*]

As indicated in previous sections of this chapter, the principle of national sovereignty, which does not necessarily mean democracy is overwhelmingly internalized by the members of the Assembly as a political ideal. However, the issue of how this principle will be put into practice results in long parliamentary

[112] ñBüyük Millet Meclisiônin nasıl intihap olduğunu biliyorsunuz. Büyük Millet Meclisi, milletin mühim tarihi anlarında; intihap yapmak salahiyetini haiz, resmi ve gayri resmi bütün teşekkülatın milliyenin iştirakiyle yaptırılmıştır ve *meşruiyetinde hiç kimsenin kainatta hiçbir ferdin itirahı olamaz*. Fakat bu şekli intihap, fevkalade bir zamanın şekli idi. Bunu kanun şeklinde tesbit etmeğe imkan tasavvur edemem.ò *TBMM, ZC*., Cilt 6, İçtima105, 29.11.1336, p. 130.

discussions. In fact, the fourth article proposed by the Special Committee introducing vocational representation in the Grand National Assembly constitutes the core of the debates. It is during these debates that the issue of sustainability of legitimacy of constitutional law comes to fore and is discussed in an implicit manner.

During parliamentary debates, the framers of the Constitution largely share and defend the idea that the principle of national sovereignty is best implemented through the institutionalization of vocational representation. They consider this type of election necessary in order to prevent tyranny of minority over majority and to protect the people from the bad government of civil servants (bureaucracy) and intellectuals that do not understand peopleôs needs.[113] Ķsmail Suphi Soysallē explains the justification behind the proposal of the Special Committee on vocational representation on the basis of their intention to institutionalize true government by people: ñThe procedure of vocational representation would enable those who have not been able to speak until now, those who have the right to speak according to the law but cannot practice it in actual terms, to come to the Assembly and defend and preserve their right by means of speech, ideas and vote. In this respect, vocational representation is the most proper procedure.ò[114]

Regarding the subject, Mahmut Esat Bey expresses one of the most interesting opinions and states that neither the parliamentary institution nor the constitution can solely form a guarantee for the liberty of the nation. Representative government does not result in self-government of the people. For the people to be the master of its own, representative government must be strengthened with an adequate election system, namely with vocational representation:

[113] See the statement of Ķsmail Suphi Soysallē, *TBMM, ZC.*, Cilt 5, Ķ99, 18.11.1336, pp. 433-34.

[114] ñTemsili mesleki usulü dairesinde, bu memlekette ĸimdiye kadar söz söylemeye malik olmayan; hukuken malik fakat fiilen malik olmayan halk Meclise gelecek ve hukukunu, sözü ile, fikri ile, reyi ile müdafaa ve muhafaza edecektir. Binaenaleyh, temsili mesleki en muvafĕk usuldür.ò *TBMM, ZC.*, Cilt 5, Ķ99, 18.11.1336, p. 433.

> Distinguished gentleman, the parliamentary procedure is not a way to bring the nation directly to power. Hence by merely adopting the parliamentary procedure and by adopting any kind of election procedure, we are not endowing the nation with freedom. The nation does not become the sovereign. Perhaps the parliamentary procedure is one of these ways. Yet it does not encompass all. Hence, gentleman, the parliamentary procedure adopted by the great French revolution, the parliamentary procedure which was adopted earlier by the English revolution could not make the people happy and paved the way for great (great) revolutions which affected the world from time to time. Because, despite the adoption of the parliaments and the approval of Kanunu Esasi with applauses, those strada of society which carry all the burdens of the country on its shoulders, has always whined under slavery and has never become the master. And when this strada was whining under misery, the bourgeoisie came its way and made the mockery of it with Kanunu Esasi in its hands. This is what also happened in our country.[115]

Another member of the Special Committee, Mehmet Ķükrü Bey, justifies vocational representation by making reference to the first article of the constitutional law. He argues that vocational representation is nothing but the implementation of the first article, government of people by the people themselves:

> Gentleman, in the first article of this law enacted by ourselves, it is stipulated that ñThe sovereignty is unconditionally vested in the nationò and afterwards it is added that ñThe type of government is based on the self-government of the people.ò In this respect, the rejection of vocational representation is nothing but the rejection of the first article. The enactment of vocational representation implies the approval of the first article. The authority of the first article depends on vocational representation.[116]

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[115] ñMuhterem efendiler, parlâmento usulü, bir milleti doĵrudan doĵruya ikь bakēna getirecek yollardan deĵildir. Fakat yalnēz parlâmento usulünü kabul etmekle ve her hangi bir intihap usulünü kabul etmekle, millete hürriyetini bahкetmiк olmuyoruz. Millet efendiliĵine malik olmuyor. Belki parlâmento usulü bu yollardan biridir. Fakat hepsi deĵildir, iкte efendiler; Fransēz ihtilâli kebirinin kabul ettiĵi bu parlâmento usulü, daha ondan evvel eski Ķngiliz ihtilâlinin kabul ettiĵi bu parlâmento usulü, halkē memnun edememiкtir ve zaman zaman dünyayē sarsan büyük büyük ihtilâllere meydan vermiкtir. Çünkü parlamentolarēn kabulüne ve Kanunu Esasinin alkēĵlarla tasdikine raĵmen bir tabaka vardēr ki, memleketi omuzlarēnda taкēyan bir tabaka vardēr ki o, daima esaret altēnda inlemiктir, efendiliĵe nail olmamēктēr ve o sefalet içinde inlerken (Burjuva) tabakasē onun önüne çēkmēk, elindeki Kanunu Esasi ile o zavallē tabakanēn önünde istihza etmiкti. Bizim memleketimizde de böyle olmuктur.ò *TBMM, ZC.*, Cilt 5, Ķ99, 18.11.1336, p. 435.

[116] ñEfendim, kabul etmiк olduĵumuz bu kanunun birinci maddesinde; «Hâkimiyet bilakaydüкart milletindir» denildikten sonra «idare usulü halkēn mukadderatēnē bizzat ve bilfiil idare etmesi esasēna müstenittir» dedikten sonra temsili meslekiyi kabul etmemek, birinci maddeyi reddetmekten baкka bir

For the president of the Special Committee, Yunus Nadi Bey, the type of election is crucial since it is decisive for the determination of the type of government: ñHow a nation is governed and which form it would take are deduced from the type of election. Because the individuals that would govern the nation emerge from elections,ò[117] and it is about making the people the master of its own laws: ñThe duty is twofold in case of elections as it encompasses the concern to make people the master of its own laws.ò[118]

In fact, on the basis of the first article of 1921 Constitution, ñThe sovereignty is unconditionally vested in the nation. The type of government is based on the self-government of the people,ò and the above discussions in the parliament, one might easily get the impression of a strong adherence on the part of the members of the Assembly to the ideal of direct democracy at first sight. This impression might even be reinforced by the fact that the constitutional law encompasses provisions for the implementation of regional autonomy in local administrations. However a careful analysis also shows that, though the members of the Assembly defend vocational representation for the sake of direct democracy, this principle is still understood as a version of representative democracy, not even as a participatory one. In other words, as the following parliamentary debates are examined, it unfolds that the principle of national sovereignty is understood neither in the form of direct democracy nor in a *participatory* manner, but rather in a peculiar version of representative democracy.

This peculiar understanding of democratic government becomes evident particularly during the discussion of Mesut Beyôs proposal for the adoption of peopleôs initiative

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кey deĵildir. Temsili meslekiyi kabul etmek, birinci maddeyi teyit etmek demektir. Onun kuvvei teyidiyesi temsili meslekidir.ò *TBMM, ZC.*, Cilt 5, Ķ100, 20.11.1336, p. 460.

[117] ñBir milletin ne кekilde idare edileceĵi ve ne mahiyette olacaĵē tarzē intihabattan istidlal olunur. Çünkü onu idare edecek zevat intihabattan çēkacaktē.ò *TBMM, ZC.*, Cilt 6, Ķ105, 29.11.1336, p. 130.

[118] ñBu intihap meselesinde halkē kendi hukukuna hakim kēlmak endiкesi iki katlē bir vazife oluyor.ò *TBMM, ZC.*, Cilt 6, Ķ105, 29.11.1336, p. 132.

and introduction of referendum in law making process.[119] Indeed Mesut Beyôs proposal constitutes an exception to representative form of national sovereignty since it institutionalizes (1) referendum; the regular submission of the laws passed by the parliament to peopleôs vote, and (2) referendum and peopleôs initiative; the right to propose the submission of a new law or a law amending an existing one, to peopleôs vote two months after its approval by the parliament, and the submission of a law proposal initiated by one of the members of the cabinet council or three members of the Grand National Assembly or at least 2 500 citizens from each province to general vote.[120] Mesut Bey tries to justify his proposal by asserting that self-government of people implies most of all self-legislation by the people thus to make the people the author of their own laws. For the proper institutionalization of the principle of national sovereignty, the people must be endowed with the right of self-legislation:

> Gentleman! The article which we enacted stipulates that ñThe sovereignty is unconditionally vested in the nation.ò My proposal is related to this article. We state that the power and authority of the executive solely belongs to the Grand National Assembly. In this respect, when the sovereignty is unconditionally vested in the nation, the direct, self-government of the nation is acknowledged. The direct government implies that the nation can take its right directly, in other words the nation should have the right to propose a legislation. é then it is required that the nation should have the right and authority to propose a legislation. Otherwise what is meant by the right stipulated in Kanunu Esasi? The introduction of this right signifies that the nation participates in person to

[119] *TBMM, ZC.*, Cilt 6, Ķ110, 7.12.1336, p.259.

[120] ñ**MADDE 1.** Siyasi ve içtimai umdelerini milletin ruhundan alan Büyük Millet Meclisi halkõn mâruz bulunduğu avamili sefaleti izale etmek, içtimai uhuvvet ve teavün hislerini tenmiye ve takviye eylemek maksadiyle idarî, malî, iktisadi, içtimai mesaüde lüzum görecek i teceddüdat ve tesisatõ vüeude getirmek üzere tanzim edecek i kanunlarõn; milletin temayülât ve ananat ve ihtiyacatiyle mütenasip olup olmadığõnõ, ârayi umumiyei millete arz ve ekseriyetin tasdikõna iktiran ettirmek suretiyle, anlamadõkça mevkii tatbika vazõndan ehemmiyetle tevakki eder. **MADDE 2.** Müceddeden kanun tanzimi, kavanini mevcudeden birinin tadili ve Büyük Millet Meclisince peyderpey neşrolunmakta olan kanunlardan bazõlarõnõn tarihi neşrinden itibaren iki ay zarfõnda milletin tasdikõna arz ve teklifi, Heyeti Vekile ile Büyük Millet Meclisi âzasõndan her birinin ve efradõ milletin hakkõdõr. Gerek Heyeti Vekileden biri tarafõndan, yahut Büyük Millet Meclisinin üç âzasõ canibinden ve gerek muhtelif vilâyet halkõndan âzami on bin, asgari Ķki bin beş yüz kişi tarafõndan vâki olacak her teklifin ârayi umumiyei millete vaz'õ mecburidir. Teklifatõ vakõa Büyük Millet Meclisinin ait olduğu encümeninde tetkik ve Heyeti umumiyede tasdik olunduktan sonra kaleme alõnan maddei kanuniye milletin ârayi umumiyesine arzolunur. Ekseriyeti mutlaka ile kabul olunursa düstürülamel olur.ò *TBMM, ZC.*, Cilt 6, Ķ110, 7.12.1336, p.259.

> the work and activities of the GNA which is composed of its own representatives. It is entitled with the right to legislate. This is because we want to rescue the nation from the oppression of civil servants and others. In this respect, we should also endow the people with the right to legislate. The right to amend the provisions of the existing laws should be granted to the nation.[121]

However, the members of the Assembly present in relevant parliamentary discussions do not support Mesut Beyôs proposal. Among them, Ragıp Bey argues that this conception of self-legislation would make the parliament unnecessary while Yahya Galip Bey states that the presence of the representatives of the nation is a sufficient criterion for the principle of national sovereignty.[122] Tunalı Hilmi Bey maintains that this procedure which is implemented in Switzerland is not adequate for the development level of the Turkish nation: ñYet I do not think that we have developed so far.ò[123] Mustafa Kemal also expresses a similar opinion to Yahya Galip: ñWho is the nation you mention, are not we its representatives?ò[124] In general, they refuse to discuss the proposal since they consider it irrelevant with their present debate.

In light of these debates, it might be rightly suggested that the members of the first Grand National Assembly conceive the principle of national sovereignty in an essentialist manner. It mostly serves as a rethorical principle or discursive tool for

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[121] ñEfendiler! Şimdi bizim kabul ettiğimiz madde mucibince «Bilâ kaydükart hâkimiyet milletindir» dedik, Bendenizin ilâve etmek istediğim madde buna taallûk eder. Diyoruz ki, icra kuvveti ve salâhiyeti münhasıran Büyük Millet Meclîsine aittir. Halbuki, bilâkaydükart hâkimiyet millette olunca bilâvasıta doğrudan doğruya milletin Hükümeti kabul edilmiş demektir. Buna böyle bilâ vasıta Hükümet demekle; millet doğrudan doğruya hakkını alabilir, yani milletin hakkı teklife lâyik olması lâzımgelir. ...o halde efradı milletin kanun teklifine hak ve salâhiyeti olmak lâzımgelir, öyle olmazsa Kanunu Esaside verdiğimiz şu hak ne olur? Bu hakkı vermekle millet kendi vekillerinden mürekkep olan Büyük Millet Meclisinin mesai ve icraatına bizzat iştirak etmiş demek oluyor. Vazı kanun hakkını alıyor. Çünkü milleti memurinin, şunun, bunun zulmünden kurtarmak istiyoruz. Şu halde kanun vazı hakkını da millete bahsetmeliyiz. Kavanini mevcudeden birinin ahkâmını tadil etmek hakkı millete verilmelidir.ò *TBMM, ZC.*, Cilt 6, Iş110, 7.12.1336, pp.260-1.

[122] *TBMM, ZC.*, Cilt 6, Iş110, 13.12.1336, p.261.

[123] ñFakat zannetmem ki biz o kadar müterakki bir hale gelmiş olalım.ò *TBMM, ZC.*, Cilt 6, Iş110, 13.12.1336, p.262.

[124] ñMillet dediğin kimdir, biz vekilleri değil miyiz?ò *TBMM, ZC.*, Cilt 6, Iş113, 7.12.1336, p.339.

justifying the newly emerging constitutional order. Indeed they refuse to elaborate on mechanisms such as referendum or peopleôs initiative that could enable people to participate into law making processes.

In the following, I will discuss that the members of the first Grand National Assembly seem to endorse the concepts of liberal constitutionalism in terms of adopting the relationship between the nation as the constituent power and the Assembly as the constituted power, and elaborate on their perception of the nature of this relationship between the two powers.

4.1.5. Conception of the Relationship Between the ôNationô and the Assembly

In fact, the debate outlined above concerning Mesut Beyôs proposal is also relevant for showing the way the members of the first Grand National Assembly conceive the relationship between the nation and the Assembly. In this respect, as the parliament establishes itself from the beginning as the true and sole representative of the nation, the majority of the members of the Assembly assume a perfect identification between the will of nation and the decisions of the Grand National Assembly.

Hüseyin Avni Beyôs statements in the last parliamentary discussion mentioned at the beginning of this chapter might be taken as a concrete example of this assumption. Hüseyin Avni and some other figures in the Assembly seem to endorse the idea of parliamentary supremacy in order to limit the powers of the cabinet council. For some others, it seems to serve as a strategy to struggle with monarchy. For whatever reasons the members of the Assembly support the idea of parliamentary supremacy, it culminates in an assumption of identity between the nation as the constituent power and the Assembly as constituted powers.

Contrary to this perception, Mesut Bey mainly questions the extraordinary and limitless power assigned to the Assembly. For him, the nation as the constituent power has the natural right to review the laws passed by the Assembly since the

parliamentary institution might also issue laws detriment to the interests of the nation. Thatôs why he seems to feel the need to make a distinction between the two powers and underline the superiority of the nation. Regarding the subject, he maintains that:

> In that case, when we state that ñthe sovereignty belongs to the nation,ò do we have the right to make the nation accept a law which it does not want? No. Such Assembly [Meclisi Mebusan] once existed in Istanbul. They also used to make laws, dissolve the assembly if they had no confidence and do anything they wanted. We have now both the executive and legislative powers. é We are entitling the government with more authority than the authorities stipulated between the eighth and twenty sixth articles of Kanunu Esasi. We should entitle the nation with a right just because there is no other Assembly equivalent to ours and whatever we decide becomes law. Meclisi Mebusan could not before legislate a law which would endanger the unity and solidarity of the nation, but we can (the voices of ónough, enoughô, noices).
>
> We are now the sole Assembly. There is no power that will amend a decision we make. In this respect, there is the need for a power equivalent to it. It is possible that we are overwhelmed by emotions and decide on something as if it is in the interest of the country. This is the reason why the nation is the equivalent of this Assembly.[125]

Indeed, the quoted statement of Mesut Bey is a significant indicative of his suspicion about the probable arbitrariness of parliamentary legislation and explains the rationale behind his proposal for the institutionalization of democratic forms of legislation like peopleôs initiative and referendum.

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[125] ñKu halde «Hakimiyet milletindir» deyince; kendinin arzu etmediği bir kanunu kendisine kabul ettirmeğe hakkımız var mıdır? Yok. Bu Meclisi Mebusan Istanbul'da vardı. Onlar da kanun yapıyorlardı, bu teşekkül eden vükelâyi onlar da itimatları olmazsa iskat ederlerdi ve her bir şey yaparlardı. Şimdi biz hem icra kuvvetini, hem de teşri kuvvetini haiziz. é Hükümete, Kanunu Esasinin sekizinci maddesinden yirmi altıncı maddesine kadar geçen maddelerde beyan olunan salâhiyetlerden fazla bir salâhiyet veriyoruz. Ku hakla millete bir hak vermeliyiz ki; bizim fevkimizde başka bir Meclis yoktur, biz her neye karar verecek olursak o karar meriyyülicradır. Evvelce milletin vahdet ve tesanüdünü ihlâl edebilecek bîr kanunu Meclisi Mebusanımız vazedemezdi, fakat biz koyabiliriz (Kâfi kafi sesleri, gürültüler).

Şimdi bir tek Meclisiz. Vereceğimiz kararı tadil edecek bir kuvvet yoktur. Ku halde her halde onun fevkinde bir kuvvet lâzımdır. Hissiyata mağlubiyetle bir takım şeylere, vatanın menafiidir, diyerek karar verebiliriz ve onun için bu Meclisin fevkinde olan millettir.ò *TBMM, ZC.*, Cilt 6, Ş113, 7.12.1336, p.339.

Recall from the second chapter of the thesis that the dichotomous conceptualization concerning constituent and constituted powers has been first developed by Sieyes and he considered the supreme instituting power of the people as a cushion against the omnipotent powers of the absolutist monarchy and the privileged orders of the ancient regime.[126] According to Sieyes, constituent power, the power to produce constitutional norms and set the limits of state power, is situated within the ónationô. Yet he refrained from assigning the nation with the power of self-rule and assigned the parliamentary institution with the duty to represent and decide on the ógeneral willô of citizens. This conception has also been utilized by Schmitt in order to ground the legitimacy of the constitutional order. However, this time, Schmitt does not entrust the parliament with the duty to directly represent the people. For him indeed the parliament signifies most of all an institution alienated from the will of the nation. Therefore, he focuses instead on the authority of the president, the only authority for him competent to achieve a perfect identification with the will of the nation.

In the case of first Turkish Grand National Assembly, we see that the parliamentary representatives endorse the concepts of modern constitutionalism in terms of adopting the dichotomous conceptualization and the resultant problematization concerning the nation as the constituent power and the Assembly as the constituted power. Moreover, similar to Sieyesôs and Schmittôs perspectives, the parliamentary representatives seem to adopt the conceptualization of constituent power of the people as the basis of legitimacy. Yet, in contrast to Schmittôs views, they seem to assume a perfect identification between the will of nation and will of the parliamentary institution. For this reason, they conceive the decisions of the first Grand National Assembly, particularly *Teúkilat-ē Esasiye of 1921* which is legislated in extra-constitutional circumstances, to carry democratic legitimacy in itself. In the following sections of this chapter focusing on the constitutional amendment of 1923, *Teúkilat-ē Esasiye of 1924* and constitutional amendment of 1937, I will claim that

[126] Sieyeôs considerations on the subject are explained in footnote 26.

the parliamentary representatives increasingly invoke an essentialist understanding of democratic legitimacy and justfy their actions on this basis.

In the following, let me discuss the parliamentary debates concerning the constitutional amendment of 1923 in order to understand in what terms the parliamentary representatives conceive their practice and ground its legitimacy.

4.2 Constitutional Amendment of 29 October 1923 Declaring the Republic as the form of State

Teşkilat-ı Esasiye of 1921 was amended two years after its adoption by the second Grand National Assembly established on 11 August 1923. The second Grand National Assembly convenes as an ordinary legislature, thus it has a different political status than the first Grand National Assembly (Özbudun, 2012: 1). Yet the Assembly, particularly a dominant group of parliamentary representatives, seems to feel no hesitation to make an amendment in 1921 constitution, even if it concerns the fundamental principles of the constitution. In fact, this would also be the case in the adoption of *Teşkilat-ı Esasiye of 1924*, where in a similar vein an ordinary legislative institution engages into the practice of making a constitution *in toto*. In this section of the chapter, I will explore the basis on which the Constitutional Committee lays its justifications for amending the 1921 constitution on 29 October 1923.[127]

1923 constitutional amendment brings changes in the first, third, eighth and ninth articles of *Teşkilat-ı Esasiye of 1921*. Along with the declaration of the *Republican* form of government, it introduces new articles designating Islam as the religion of state and Turkish as its official language. The remaining changes are mainly related to the introduction of an office of presidency and related regulations.

[127] Constitutional Committee is composed of Yunus Nadi as president; Feridun Fikri as clerk, Celal Nuri as reporter, İbrahim Süreyya, Kyas Sami, Refik (Konya), Mehmed and Rasih (Antalya) as members.

The constitutional amendment of 1923 is in fact the official declaration of the beginning of a new ósteteô as the first amended article now states the type of government of the óState of Turkeyô as Republic: ñThe State of Turkey is a Republic.ò[128] As indicated previously, the principle of national sovereignty was first introduced in *Teúkilat-ē Esasiye of 1921*. However this signifies only an implicit designation, despite its political and legal quality, the framers of *Teúkilat-ē Esasiye of 1921* avoid using the term óRepublicô to name the new form of government (Parla, 2007: 17). Hence the constitutional amendment of 1923 signifies the very first moment in which the notion of ñTurkish Stateò is deliberately mentioned in the constitution.[129]

It is possible to find out in the parliamentary discussions the retrospective acknowledgement of *Teúkilat-ē Esasiye of 1921* as the beginning of the Turkish State. This is in fact not the first time that parliamentary representatives talk of a new State. Long before the constitutional amendment of 1923 we come across with the mention of it, particularly in the parliamentary discussion held on 30 October 1922. In this respect, the political status of *Teúkilat-ē Esasiye of 1921*, unacknowledged at the time of its enforcement, seems to be accepted by the same (first) Assembly and by the same parliamentary representatives in the discussion of the parliamentary decision no 308. The parliamentary decision no 308 indeed signalled the demolition of the

[128] ñTürkiye Devletinin úekli Hükümeti Cumhuriyettir.ò

[129] It is true that the word ñTurkish Stateò is also included in the third article of *Teúkilat-ē Esasiye of 1921*: ñTürkiye Devleti Büyük Millet Meclisi tarafēndan idare olunuré ò. In fact there is a significant difference between the first version of the third article red in the parliamentary discussion and the adopted one after it is voted by the representatives. In the first version of the article it is stated that the peopleôs government of Turkey is governed by the Grand National Assembly: ñTürkiye halk hükümeti Büyük Millet Meclisi tarafēndan idare olunur.ò It seems in this respect that the article initially aims at the designation of a republican form of government in state administration, not the designation of a new State. However, as the parliamentary discussions continue, the reporter of the Special Committee, Đsmail Suphi Soysallē, submits a change in the proposed article which mentions ñTurkish Stateò for the first time: ñTürkiye Devleti Büyük Millet Meclisi tarafēndan idare olunur.ò The proposed change is significant since it signals a new State, not merely a new type of government. Interestingly, Đsmail Suphi Soysallēôs change proposal is accepted without any serious opposition in the parliament. I think that this might be the case because the members of the first Grand National Assembly have not noticed the distinctive meaning of the proposed change and hence they might agree with the new article without weighting its complete results.

Ottoman State as of 16 March 1920, and the institutionalization of the peopleôs government of Grand National Assembly as its successor with the promulgation of *Teúkilat-ē Esasiye of 1921*. Rēza Nur Beyôs and 78 other representativesô proposal submitted to the Assembly on 30 October 1922 for the adoption of the decision indicating the demolition of the Ottoman State and the promulgation of *Teúkilat-ē Esasiye of 1921* as the foundational act of the new Turkish State is as follows:

> When the Turkish Nation, the constituent and true owner of the Ottoman Empire, saw the treason of the Palace and Babēâli, it promulgated the Law of Kanunu Esasiye, by the first article of which it has given the sovereignty to itself [the nation] by taking it from the Sultan and by the second article of which it has assigned [the Grand National Assembly] legislative and executive powers. Through the seventh article, all laws related to sovereignty such as the declaration of war or peace treaty are united in the will of the nation. Since then, in response, the old Ottoman Empire has been demolished and replaced with the national State of Turkey, and the Sultan has been eliminated and replaced with the GNA.é [130]

In this framework, the explicit declaration of the Republican type of government with the constitutional amendment of 1923 seems to be the continuation of the parliamentary decision no 308. In addition, it signifies the reinforcement of the acknowledgement of the founding act of *Teúkilat-ē Esasiye of 1921* as the beginning of a new constitutional order. In fact, the proposal for the constitutional amendment of 1923 results in a lively discussion in the second Grand National Assembly. Some of the parliamentary representatives claim that the proposal contradicts with *Kanun-i Esasi*, and brings about a fundamental change in *Teúkilat-ē Esasiye of 1921*. However, these claims are outvoted by the majority of the Assembly members as the decision is accepted by majority of votes only one day after its submission.

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[130] ñé Osmanlē imparatorluĝunun müessis ve sahibi hakikisi olané Türk Milleti Saray ve Babēâlinin hiyanetini gördüĝü zaman Teúkilâtē Esasiye Kanununu ēsdar ederek onun birinci maddesiyle hâkimiyeti Padiúahtan alēp bizzat millet ve ikinci maddesiyle de icrai ve teúriî kuvvetleri onun yedikudretine vermiútir. Yedinci maddeyle harp ilânē, sulh akdi gibi bütün hukuku hükümraniyi milletin nefsinde cemeylemiútir. Binaenaleyh; o zamandan beri eski Osmanlē Ķmparatorluĝu münhedim olup yerine yeni ve millî bir Türkiye Devleti, yine o zamandan beri Padiúah merfu olup yerine Büyük Millet Meclisi kaim olmuútur. é ò *TBMM, ZC.*, Cilt 3, Ķ129, 30.10.1338, pp. 292-93.

Regarding the retrospective acknowledgement of the foundation of the new state, Yunus Nadiôs and Vasıf Beyôs expressions are very enlightening. The opening speech of the president of the Constitutional Committee, Yunus Nadi, crystallizes the dominant opinion shared by the parliamentary representatives in that period.[131] In his speech, Yunus Nadi identifies the Turkish nation as the constituent power of the new state, the most significant indicator of which is the establishment of the first Grand National Assembly after the Armistice of Montrose. *Teşkilat-ı Esasiye of 1921* is explained in terms of a positive deed of the Turkish nation. Yunus Nadi continues that the second Grand National Assembly will contribute to the constitutional order established with *Teşkilat-ı Esasiye of 1921*. Thus *Teşkilat-ı Esasiye of 1921* is conceived as the starting point of the constitutional development of new Turkish State. Regarding the subject, Yunus Nadi states that:

> Those who signed the Armistice of Montrose with us ï before their signature dried out- acted to divide the State of Turkey by disregarding all the provisions of the Armistice. The country was invaded piece by piece. And at last, by the invasion of Đstanbul, they attempted to terminate the life of the State of Turkey and supposed that they succedded in it. In such difficult conditions, the Turkish Nation, by not enduring such assassination and leaving the old state institution (that the assassins supposed to captivate) in their hands, established your forerunner Grand National Assembly, the Turkish Grand National Assembly (TGNA) here in Ankara. Its form is not important. Turkish Nation has declared to the whole world that (I exist) and (I am the State). Hence, *the Teşkilatı Esasiye is the expression of the act of Turkish Nation.* And this commission existing today by gaining victories that you see is the Turkish Nation which has been crystallized in the body of the TGNA. The TGNA has created a unique masterpiece in our history and in Turkish history. We are all bounded up with Teşkilatı Esasiye with the ambition and will of the Nation which constitutes the origin. The second TGNA will augment the base founded by ourselves (some of which we propose now and some of which we will present gradually for your consideration) through completion and amendments. As the first Assembly is proud of establishing the government, this Supreme Assembly will be proud of augmenting it.[132] [*emphasis mine*]

[131] *TBMM, ZC*., Cilt 3, Đç43, 29.10.1339, p.91.

[132] ñMondros Mütarekesini bizim ile imzalayanlar ï tâbiki marufu ile henüz imzaları kurumadan - o mütareke mevaddını bütün ahkâm ve mevaddını payimal ederek Türkiye Devletini parçalamak üzere hareket ettiler. Memleket taraf taraf işgaller altında kaldı. Ve nihayet Đstanbul'un işgaliyle Türkiye Devletinin hayatına hatime vermek suikastında bulundular ve bununla suikastlarını ikmal etmiş

Similarly, Vasıf Bey stresses in his speech the foundation of the new Turkish state and asserts that the republican form of government originates from the *character and spirit of the Turkish nation*:

> Fellows! The New Turkish State was not a state founded by the leader of a tribe in order to be honoured with the crown. It is a state originating directly from the spirit of the Turkish Nation and which wants to save its independence and to live in liberty. The Turkish Nation has been attaining for the first time for centuries a state which is in conformity to its spirit and characteré Fellows! During the foundation of this New State, within all storms of trouble surrounding the country, there was only one objective: to get rid of the enemy oppressing and crushing the country and to put an end to its attacks and to save this beautiful country from its poisonous clawé There is no doubt that the type of government was not of concern in the face of such holy objective. It was not possible to think about the form of government in the presence of such objective. It was not possible to deliberate by sacrificing the objective. Thatôs why, the sovereignty of the nation was declared.[133]

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olduklarını zannettiler. Bu ahval ve şerait içinde Türk Milleti mâruz kaldığı suikaste tahammül etmeyerek, onların yeddi zaptlarına aldıklarını zannettikleri eski teşkilâtı Devleti, onların ellerinde bırakarak burada, Ankara'da selefi âliniz olan Büyük Millet Meclisini, Türkiye Büyük Millet Meclisini kurdu - Eşkâlinin ehemmiyeti yoktur - Türk Milleti; (Ben varım) ve (Devletim) diye bütün dünyaya bunu ilân etti. *İşte bu Teşkilâtı Esasiye Türk Milletinin hareketinin ifadesidir,* bu gördüğünüz zaferleri istihsal ederek bu günkü mevcudiyeti gösteren heyet de; bugünkü Türkiye Büyük Millet Meclisine vücut vermiş olan Türk Milletidir. Türkiye Büyük Millet Meclisi bu itibarla tarihimizde ve Türk tarihinde emsali nadir görülmüş bir harika ibda etmiştir. Kendisinin masdarı olan Milletin azim ve himmetiyle Teşkilâtı Esasiyemize bütün milletçe merbutuz. İşkinci Türkiye Büyük Millet Meclisi; şimdi bir kısmına teklif ettiğimiz ve kısmı diğerini peyder pey nazarı tasvibinize arz edeceğimiz ikmalât ve tadilât ile bu kurduğumuz esası takviye ve ila edecektir. Hükümeti tesis etmek şerefi birinci Meclise ait ise; bu esası takviye ve ila etmek şerefi de bu Meclisi Aliye ait olacaktır.ò *TBMM, ZC.*, Cilt 3, İş43, 29.10.1339, p.90.

[133] ñArkadaşlar! Yeni Türkiye Devleti, her hangi bir kabile serdarının, her hangi bir kabile reisinin taca mazhar olmak için kurduğu bir devlet değildi. İştiklâlini kurtarmak isteyen, hür yaşamak isteyen, Türk Milletinin doğrudan doğruya ruhundan doğan bir devlettir. Türk Milleti asırlardan beri kendi ruhuna, kendi seciyesine tevafuk eden bir devlete ilk defa kavuşuyor. é

Arkadaşlar! Memleketin etrafını saran bütün bu felâket fırtınalarının içinde bu Yeni Devlet kurulurken yalnız bir tek gaye vardı. O da Memleketi çiğneyen, ezen düşmanı kovmak ve tasallutuna nihayet vermek ve güzel memleketi onun zehirli pençesinden kurtarmak... Bu mukaddes gayenin karşısında, hiç küphesiz şekli Hükümet mevzuu bahsolamazdı. Bu gayenin karşısında eşkâli hükümeti düşünmek imkânı yoktu. Gayeyi feda ederek münakaşa etmek mümkün değildi. Onun için milletin doğrudan doğruya hâkimiyetine, mukadderatına vâzıulyed olduğu ilân edildi.ò *TBMM, ZC.*, Cilt 3, İş43, 29.10.1339, p.93.

In the discussions related to the proposal of the Constitutional Committee, we witness that the representatives also discuss the authority of the Assembly to make such an amendment in the constitution. During the discussions, the common point expressed by the representatives taking the floor is that the constitutional amendment does not establish a new principle in state administration, but only designate the form of government in legal terms which has been *de facto* adopted until that time. They particularly claim that the amendment is legitimate since the Assembly does not change the fundamentals of the State, but builds on the basis established by *Teşkilat-ı Esasiye of 1921*, which did not contain any republicanism. Moreover, they tend to conceive the constitutional amendment as an act of the Turkish nation, hence legitimate in itself. For instance, Eyüp Sabri Efendi argues in reference to some opinions expressed in public journals that the present Assembly has the authority to make a constitutional amendment. According to him, this is mainly because the amendment is not the introduction of a new constitutional principle but the designation of the exact concept for the *de facto* operating type of government:

> Fellows! Some views that I saw in the press compel me to speak a little bit more. The press states whether the Assembly has the authority to amend the Law of Teşkilatı Esasiye or not? Gentleman! In our case, the National Assemblies have all along had the authority to amend both the basic laws and the constitution (Kanunu Esasi) in our history. There is a clear provision concerning this subject in Kanunu Esasi. And additionally a Constitutional Commitee is established in accordance with the bylaw of the Assembly. If the Assembly does not have such authority, the provisions in Kanunu Esasi, the bylaw of the Assembly and the Constitutional Committee established according to that bylaw have no *raison d'être*. (voices of 'it is right') Gentleman! As I said previously, when the government came into existence, it was constituted in the form of Republic, it was completely Republic. We could not constitute the government in another form. In fact, all the scholars of philosophy and law produced many ideas in this subject; they ultimately came up with three forms of government. We certainly do not claim to have more knowledge from all the scholars in the world and we cannot find out a fourth form of government.[134]

[134] ñArkadaşlar! Matbuatta gördüğüm bâzı mütalâalar bendenizi fazla olarak birkaç söz söylemeye mecbur ediyor. O da şudur: Matbuat diyor ki; Meclisin, Teşkilâtı Esasiye Kanunu tadile salâhiyeti var mı, yok mu? Efendiler! Bizde öteden beri kavanini mevzuamızda Millet Meclislerinin gerek Kavanini Esasiye ve gerek Teşkilâtı Esasiyeyi tadile salâhiyeti vardır. Kanunu Esaside bu hususa dair mevaddı sariha mevcud olduğu gibi Meclisin Nizamnamei Dahilisiyle de ayrıca bir Kanunu Esasi Encümeni teşekkül etmiştir. Meclisin böyle bir salâhiyeti olmadığı takdirde Kanunu Esasideki o mevaddımızın,

Rasih Efendi emphasizes a similar viewpoint that the amendment is nothing but the open declaration of the principle of national sovereignty.[135] Moreover, Rasih Efendi strives to justify the amendment and the additional second article in reference to Islam: ñIslam also commands in a clear and explicit way that the people and the ummah is the sovereign, here fellows! The form of government that we determine, we endorse today, I mean the National Government, is the form commanded to you by the supreme foundation. The nation executes its right and sovereignty directly on its own.ò[136] Similarly, Mehmed Emin Bey maintains that the republican form of government is legitimate since it is commanded by Islam.[137] Mehmed Emin describes the republican form of government as the government of God, and the government of the Turkish nation as the successor of the government established by the prophet in Mecca. It has to be added that these statements are welcomed by applauses in the Assembly.

In compliance with the statements of the above mentioned representatives, Şeyh Saffet Efendi argues that the first amended article has *de facto* existed but been forgotten to be mentioned in *Teşkilat-ı Esasiye of 1921* because of the stressful conditions caused by war.[138] Şeyh Saffet Efendi also describes the State established

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nizamnamemizin ve nizamnameye tevfikan tessüs eden Kanunu Esasi Encümenimizin hikmeti mevcudiyeti kalmaz efendiler! (Doğru sesleri) Efendiler! Demin arz ettim ki Hükümet tessüs ettiği zaman Cumhuriyet sisteminde, teşekkül etmiştir; tamamen Cumhuriyet idi. Biz başka suretle bir Hükümet tenkil edemezdik. Esasen bütün erbabı ilim ve hukuk bu babta pek çok imali fikir etmişler; neticede Hükümete ancak üç şekil verebilmişlerdir. Biz bittabi bütün dünya erbabından daha fazla ilim iddiasında bulunacak değiliz ve biz dördüncü bir şekil bulamayız.ò *TBMM, ZC*., Cilt 3, Şş43, 29.10.1339, p.94.

[135] *TBMM, ZC*., Cilt 3, Şş43, 29.10.1339, p.95.

[136] ñO din de kendisine hakkın cumhurda ve cumhuru ümmette olduğunu pek vazıh, pek ayan olarak beyan buyuruyor, işte arkadaşlar! Bugün tesbit ettiğimiz ve bugün üzerinde yürüdüğümüz şekli Hükümet yani Millî Hükümet, ancak o esasatı âliyenin size telkin ettiği şekildir. Millet doğrudan doğruya hak ve hâkimiyetini kendisi istimal ediyor.ò *TBMM, ZC*., Cilt 3, Şş43, 29.10.1339, p.95.

[137] *TBMM, ZC*., Cilt 3, Şş43, 29.10.1339, p.96.

[138] *TBMM, ZC*., Cilt 3, Şş43, 29.10.1339, p.97.

in the time of the prophet as a republic and in this respect presents Islam as a kind of higher law.

In light of above mentioned considerations, it becomes obvious that the framers of the constitutional amendment of 1923 conceive their practice as an ordinary constitutional change, and mainly justify the authority of the parliament to engage in such activity on the basis of this ordinariness. For them, the constitutional amendment does not signify a change in constitutional principles, but rather an open declaration of *de facto* existing one, namely the principle of national sovereignty. The parliamentary representativesô overwhelming stress on the ordirariness of the constitutional change might be viewed as a deliberate attempt for avoiding the feeling of a rupture, hence for ensuring the legitimacy of the new constitutional order. Indeed, the invocation of Islam and the will of God by a number of representatives as mentioned above might also be considered as the direct resultant of the necessity to confer legitimacy to the new constitutional order. Yet it might be still argued that the parliamentary representatives invoke in the last instance the constitution making power of the nation in order to justify the constitutional amendment. Similar to Schmittôs positive concept of constitution, the parliamentary representatives conceive *Teşkilat-ē Esasiye of 1921* as a positive deed of the Turkish nation. And they strive to construct the legitimacy of the constitutional amendment upon this basis, as if it is a completion of the founding decision.

In the following, I will examine the parliamentary debates during the making of the Constitution of 1924.

4.3 The Constitution of 1924 (*Teşkilat-ē Esasiye of 1924*)

It is indicated in the previous section that the second Grand National Assembly convenes as an ordinary legislature thus has a different political and legal status than the constituent Assembly of the National Liberation era. Yet the Assembly seems at first sight to engage into writing a ónewô constitution without questioning its

authority to do so. Similar to the way of thinking prevalent during the constitutional amendment of 1923, the parliamentary representatives and particularly the members of the Constitutional Committee as the constitutional framers seem to think that the Assembly as the true and sole representative of the nation is the successor of the first constituent Assembly and thereby authorized to make a new constitution. Concerning this interesting situation, Özbudun argues that this is unsurprising since the representatives still conceive the Second Grand National Assembly as a constituent one (Özbudun, 2012: 1). I think this might be an easy explanation tending to neglect the content of constitutional debates taking place at that time. One has to question the conviction that it was really the case that there did not occur any dispute amongst the representatives concerning the authority of the Assembly to make a new constitution. In addition, one should ask whether it was really the case that the members of the Assembly thought that they are writing a ónewô constitution. In this framework, it is significant to elucidate whether the members of the second Grand National Assembly conceive the act they were engaged in as a practice of new constitution making. And if this is the case, how they ground the legitimacy of this founding act considering the fact that the Assembly is a mere ordinary legislative body.

Indeed, from their angle, 1924 constitution is not only necessary but also inevitable since the provisions of *Teúkilat-ē Esasiye of 1921* and the constitutional law adopted in the following years lack regulations adequate to and required by peace conditions. Lausanne Peace Conference has just been concluded and it has been generally thought that *Teúkilat-ē Esasiye of 1921* is merely designating the institutions required for a state of war. Furthermore, it is largely shared that there was a need to compile *Teúkilat-ē Esasiye of 1921* together with the following constitutional law, to systematize and extend them in a single legislation.

Departing from this basis, my aim in this section of the chapter is to examine the parliamentary debates about 1924 constitution and try to shed light into the perceptions of framers of the constitution in terms of conceptualization of constitution and its legitimacy. In this endeavor, I will examine first the

parliamentary debate about the authority of the Assembly to make a new constitution *in toto* and then continue with the perception of 1924 Constitution from the perspective of parliamentary representatives.

4.3.1 The Debate about the Authority of the Assembly to Make a Constitution *in Toto*

The initiative for *Teşkilat-ē Esasiye* of 1924 began with the Constitutional Committee involved in the constitutional amendment of 1923.[139] In fact, the president of the Constitutional Committee, Yunus Nadi, stated at the time of 1923 constitutional amendment that the Committee would continue its examinations and submit its proposals in the forthcoming period. Yet the launch of such significant initiative without the submission of any proposal must have resulted in criticisms indicating a procedural deficiency that in order to correct the situation a number of proposals are submitted to the Committee (Balta, 1957: xii).[140]

The draft proposal of 1924 Constitution involving 108 articles and a provisional article is submitted to the General Council of the Assembly on 9 March 1924. At the beginning of the proposal, the Committee made reference to the constitutional amendment of 1923 and emphasized that *Teşkilat-ē Esasiye of 1924* is the continuation of the process began with the adoption of *Teşkilat-ē Esasiye* in 1921. The parliamentary debates concerning the new constitution take place almost one and a half month, and the constitution was finally approved on 20 April 1924.

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[139] The Constitutional Committee is composed of Yunus Nadi as president; Feridun Fikri as clerk, Celal Nuri as reporter, İbrahim Süreyya, Kıyas Sami, Ebubekir Hazēm, Faik (Ordu), Ali Rēza, Avni (Bozok), Refet (Bursa), Mahmud (Siirt) and Ahmed Süreyya (Karesi) as members.

[140] The Constitutional Committee mentions the proposals of Ahmed Saki (Antalya), Ali Rēza (İstanbul), Ali Saib (Kozan) and Süreyya (Karesi) in the introduction of their proposal for 1924 Constitution (*TBMM, ZC.*, Cilt 7, İç7, 9.3.1340, p.213). It seems that one of these proposals concerns a constitutional amendment in *Teşkilat-ē Esasiye* and one of them is about the compilation of all constitutional laws together with *Teşkilat-ē Esasiye* in a single legislation.

The draft proposal of the Constitutional Committee involved six chapters designating respectively the fundamental principles, legislature, executive, judiciary, public rights of Turkish citizens and individual provisions. In the sixth chapter of the draft constitution, the Committee described the amendment procedure of the Constitution and included the rule prohibiting the submission of any amendment proposal regarding the first article of the Constitution. Hence, for the first time in the constitutional history of Turkey, the supremacy of the constitution has been institutionalized and inalterable provisions adopted.

It is indeed interesting that the members of the second Grand National Assembly do not consider *Teşkilat-ē Esasiye of 1924* as a new constitution indicating a ófounding act'. This is evident from the parliamentary discussions, and particularly from the expressions of the reporter of the Committee, Celal Nuri Bey.[141] Celal Nuri Bey emphasizes in his speech introducing the proposal for *Teşkilat-ē Esasiye of 1924* that the source of legitimacy of the present proposal stems from the national revolution: ñThe source of our proposal is directly the national revolution. In other words, if the revolution had not happened, then we would have no power to arrange such legislation.ò[142] He continues that the constitutional text they have prepared forms the final moment of social and political transformation of Turkish society which began with the adoption of *Teşkilat-ē Esasiye of 1921*. According to him, *Teşkilat-ē Esasiye of 1921* is the founding act of the state for designating the principle of national sovereignty as the principle of government for the first time in Turkish history, and establishing the necessary state administration required for the state of war.[143] This act is followed by the parliamentary decision concerning the abolition of sultanate, Lausanne Peace Conference declaring the independence of the Turkish state, the

[141] *TBMM, ZC*., Cilt 7, Ķ7, 9.3.1340, pp.224-27.

[142] ñTeklifi kanunimizin membaē (kaynaĵ ē) doĵrudan doĵruya millî inkēlâptēr. Yani bu inkēlâp olmamēş olsaydē buradaki mevaddē tertibetmekte yet-i kudretimiz olmayacaktēò *TBMM, ZC*., Cilt 7, Ķ7, 9.3.1340, p.227.

[143] *TBMM, ZC*., Cilt 7, Ķ7, 9.3.1340, p.224.

constitutional amendment of 1923 declaring the Republic and lastly with the abolition of the caliphate. In this respect, *Teкkilat-ē Esasiye of 1924* is most of all a systematic elucidation of these constitutional developments and the principle of national sovereignty in a single constitutional text. These constitutional developments signify indeed the incremental stages of social and political maturation of Turkish revolution:

> Gentleman! I think that the revolution has reached maturity by the submission of the proposal for the Law of Teкkilatē Esasiye by our Committee. The draft Law of Teкkilatē Esasiye is the indicator of the victory of a five year national mission. We can claim that the author of this law is directly the Turkish Nation. We will give a final certain shape to our revolution through the enactment of this law.[144]

Hence, the framers of *Teкkilat-ē Esasiye of 1924* interestingly perceive their practice as a complementary constitutional amendment which systematizes and makes additions to the constitutional order established with *Teкkilat-ē Esasiye of 1921*. For them, *Teкkilat-ē Esasiye of 1924* does not designate a distinctive constitutional principle, but reinforces and supplements already established principle of government. Regarding the subject, Celal Nuri continues that:

> As you know, such kinds of laws do not emerge suddenly. The French Constitution could be made within four and a half years between 1871 and 1875. In our case, it has taken approximately the same time (if we count the days) from the first constitution of Teкkilatē Esasiye till our meeting. We could not make it suddenly. We could not present it to you immediately on the day of its introduction. Hence this is the case in other countries as well. é We are writing the law following the declaration of the Republic. We are now including in this law all the complementary provisions.[145]

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[144] ñEfendiler, encümenimiz Teкkilât-ē Esasiye Kanunu teklifini huzuru âlinize getirmekle bu inkilâbēn kemale gelmiк olduĵ unu zannediyorum. Bu Teкkilât-ē Esasiye Kanunu lâyihasē beк senelik bir cehdi millinin (milli çalēкmanēn) hücceti muzafferiyetidir (üstün geldiĵ inin delilidir). Ķddia edebiliriz ki bu kanunu yazan doĵ rudan doĵ ruya Türk Milletidir. Bu kanunun kabulü ile inkilâbēmēza bir кekli katiyet vermiк olacaĵ ēz.ò *TBMM, ZC.*, Cilt 7, Ķ7, 9.3.1340, p.224.

[145] ñMalûmuâliniz bu gibi kanunlar pek çabuk olmaz. Fransēz Kanunu Esasisi 1871ôden 1875 senesine kadar dört buçuk senede yapēlabilmiкti. Bizde de ilk Teкkilât-ē Esasiyeyi vücuda getirdikten sonra bu celsemize kadar geçen günler hesap edilecek olursa aкaĵ ē yukarē o kadar bir zaman geçmiктir. Bunu birden bire yapamazdēk. Bunu kurulduĵ u gün birdenbire huzuru âlinize takdim edemezdik. Nitekim baкka yerlerde de böyle olmuктur. é bunun gibi Cumhuriyetin ilânēna peyuste olan bu kanunu

In this framework, parliamentary debates, particularly the speech of the reporter of the Constitutional Committee, give the impression that the authors of 1924 Constitution do not conceive their practice as the beginning of a new constitutional order. Rather they seem to take *Teşkilat-ē Esasiye of 1921* as the basis of the constitutional order on which they are acting. *Teşkilat-ē Esasiye of 1924* is conceptualized most of all as a complementary act to combine the individual constitutional laws and supplement them with additional legislation.

In general, the emphasis upon continuity is reminiscent of the parliamentary representativesô stance during the constitutional amendment of 29 October 1923 and might be considered as the back bone of their arguments aimed at constructing and reinforcing the legitimacy of the new constitutional order. Indeed, in the case of *Teşkilat-ē Esasiye of 1924*, this seems to form the core of Constitutional Committeeôs justification for writing a new constitutional text, and the basis for the legitimacy of the constitution. In the following chapters of the thesis, we will see that the stress of the framers of constitutions on this perceived continuity and their deliberate attempts to conceal the ruptures caused by new constitutional beginnings will strengthen as the necessity to provide legitimacy to the process will be felt more. In this regard, not only the legitimacy of constitutional amendments like the constitutional amendment of 1937 but also new constitutions as in the case of 1961 constitution will tried to be explained on the basis of this perceived continuity and by making direct reference in the last instance to the original founding event.

Let me focus once again on the parliamentary discussions concerning *Teşkilat-ē Esasiye of 1924.* During the parliamentary debates, we also see that some members of the Assembly including Abidin Bey and Mahmud Esad Bey severely criticize the Constitutional Committee and the text of constitution submitted to the Assembly as they conceive the main tenets of the proposal in contradiction with the very

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yapmakla öyle bir harekette bulunuyoruz. Şimdi bu kanunun içine itmam edici (tamamlayēcē) bütün mevaddē koymuş oluyoruz.ò *TBMM, ZC*., Cilt 7, Ş7, 9.3.1340, p.225.

substance of *Teкkilat-ē Esasiye of 1921,* namely with the principle of national sovereignty and the unity of powers. It is true that some provisions of the proposal, particularly the ones giving the president of the republic the right to veto parliamentary legislation and the right to dismiss the parliament signify a deviation from the principle of unity adopted in *Teкkilat-ē Esasiye of 1921* as now the president of the republic together with the executive would emerge as a separate source of authority. Therefore, for these members, the second Grand National Assembly is engaging into a founding act violating the substance of *Teкkilat-ē Esasiye* and it is in this respect that the Assembly is unauthorized to make such change in the constitution. Because for them this authority lays only within the nation as the origin of the constitutional order. Abidin Beyôs statement is significant in order to shed light to the issues significant for our examination.[146] He is indeed one of the parliamentary representatives questioning the authority of the second Grand National Assembly to make a new constitution. Hence we might say that he takes a critical approach regarding the entire text of 1924 Constitution, but particularly regarding its provisions that might jeopardize parliamentary supremacy.

According to Abidin Bey, *Teкkilat-ē Esasiye of 1921* is substantially significant since it signifies the founding act of the State and establishes republican form of government by eliminating monarchy. For him, *Teкkilat-ē Esasiye* is legitimate in itself insofar as it takes its origins from the *spirit of the nation*, and from the national battle fought against the enemy: ñé the Turk has come up with a law stemming from his heart, with a rule regulating its internal politics. This internal rule, gentleman, is the Law of Kanunu Esasiye.ò[147] *Teкkilatē-Esasiye* therefore derives its substance from the spirit of Turkish revolution and provides a framework clearly identifying the political and social identity of the nation. It indeed forms the highest moment of development in Turkish history. In these circumstances, the proposal of

[146] *TBMM, ZC*., Cilt 7, Ķ7, 9.3.1340, pp.228-29.

[147] ññé Türk, ruhundan kopan bir kanun ile, siyaseti dahiliyesinin bir düsturu ile ortaya atddē Bu düsturu dahilisi efendiler, Teкkilat-ē Esasiye Kanunudur.ò *TBMM, ZC*., Cilt 7, Ķ7, 9.3.1340, p.228.

Constitutional Committee for *Teşkilat-ı Esasiye of 1924* might not be conceived as a proposal for ónewô constitution but only as a constitutional amendment.[148]

Abidin Bey emphasizes that fundamental laws such as *Teşkilat-ı Esasiye* are usually legislated in European states and in America by constituent assemblies specifically established for this purpose. In this respect, the first Grand National Assembly had the legitimate authority to make *Teşkilat-ı Esasiye* since it has a distinctive political and legal status as the constituent assembly of the nation. However, the second Grand National Assembly does not have such a status thus is not empowered to write a ónewô constitution. For him, the problem is not only that the present Assembly does not have sufficient authority but also avoids from establishing a constituent assembly for this duty.[149]

Abidin Bey hence takes a critical attitude towards the present Assemblyôs endeavor to engage into such a constitutive act.[150] Contrary to the assertions of the

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[148] ñBinaenaleyh efendiler, bu kelimatı tevkiriye (tanzim) ile bünyanı (yapı) dâhiliyemizi tarsin etmekte olan (sa lamlaıtıran) Teıkilâtı Esasiye Kanununu arz etmiı olduu um mukaddeme ile, bütün Türk tarihinin en yüksek bir devrelini yaıatmıı, Türkün siperlerinden tutunuz Akdenize kadar kanıyla beraber yo urulmuı olan *bu Teşkilâtı Esasiye Kanununu tadil ederken* biraz bahis ve tenkid etmeme müsaade buyurmanızı rica edece im. Teıkilâtı Esasiye yani bu yeni inkılâptan mülhem olarak (kalbe do muı) Kanunu Esasiye diye mâruf olmuı olan (bilinen) kanun bizim memleketimizde Teıkilâtı Esasiye diye tevsim edilmiıtir (adlandırılmııtır). Ķster Kanunu Esasi deyiniz, ister Teıkilâtı Esasiye deyiniz bendenizin noktai nazarıma bir darbei nazarda bir milletin hüviyeti sivasiye ve içtimaiyesini sarih bir tarzda gösterir bir çerçevedir.ò [*emphasis mine*] *TBMM, ZC*., Cilt 7, Ķ7, 9.3.1340, p.229.

[149] ñ*Ķster ihtilâl sıfatını izafe ediniz, ister inkılâp sıfatını daha muvafıık görünüz her halde Türkiye Büyük Millet Meclisi ile ikinci Büyük Millet Meclisi arasında bâzı evsafı hususiye ve fark irae etmektedir.* Avrupaôda, Amerika'da ve sair memleketlerde yani Kanunu Esasiyi kendisine düstur esas ittihaz etmiı olan memleketlerde bu gibi asli kanunlar sureti katiyede behemehal o Devletin, o milletin Meclisi müessesanı tarafından tertip ve tesbit olunur. *Mahiyeti itibariyle, hüviyeti itibariyle Türkiye Büyük Millet Meclisi bizzat kendisine mahsus ve fakat tam ve kâmil mânasında bu evsafı haiz bir Meclisi müessesan dei ildir.* Sulhun imza edilmesinden ve muktaziyatı için sulhe intikal etmesi lâzımgelen tadilâtı Ķkinci Büyük Millet Meclisi yaptıktan sonra acaba ne gibi mahzur veyahut faidesizlik mutasavver idi ki; *Kanunu Esasi Encümeni bu Teşkilâtı Esasiye Kanununu Meclisi Müessesan mahiyetinde, Meclisi Müessesan makamında gelecek olan heyet tarafından yapılmasını tecviz etmiyorlar.* Çünkü noktai nazarı âcizaname göre Teıkilâtı Esasiye Kanununda Cumhuriyet safhasına dâhil olduktan sonra hususatı saireyi tesbit etmek kuvvei icraiye ve kuvvei teıriîyenin hiçbir suretle fiil ve hareketine tavrı ve miıkvarlarına bir sekte îras etmiyecek olan bu Meclisi Müessesandan neden sarfınazar buyurdular?ò [*emphasis mine*] *TBMM, ZC*., Cilt 7, Ķ7, 9.3.1340, p.229.

[150] In fact, Abidin Beyôs argument gains a full meaning when the entirety of parliamentary discussions for 1924 Constitution is examined. The debate is mostly about which principle will be dominant in 1924 Constitution, the principle of unity of powers or the separation of powers. In *Teşkilat-ı Esasiye*

Constitutional Committee that their constitutional proposal does not introduce a new principle of government; Abidin Bey claims that it is likely to make a change in constitutional principles. Similar to Abidin Bey, Mahmud Esad Bey also rejects the proposal since for him it violates the spirit of revolution.[151] He mainly questions how the Assembly could bring a law proposal violating the supremacy of the Assembly.[152]

In light of the above discussion, it seems that not only Abidin Bey and his supporters, but also the framers of the Constitution share some kind of a Schmittian conception of *positive constitution* since for them, *Teşkilat-ı Esasiye* has a *substance* determining the type and form of the Turkish State and this can only be changed by the constitution making power of the Turkish nation. Therefore, the conflict between the Assembly members seems to arise not from this shared conception of *constitutional substance*, but from their different perception of the proposal of the Constitutional Committee. While Abidin and Mahmud Esad Bey think that the proposal for *Teşkilat-ı Esasiye of 1924* violates the substance of *Teşkilat-ı Esasiye,*

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of 1921, the unity of powers is firmly established and the Grand National Assembly is endowed with both legislative and executive powers. In Constitutional Committeeôs proposal for a new constitution, on the other hand, there appear some provisions regarding the executive organ and its powers which might violate the supremacy of the Assembly. Hence, some members of the Assembly including Abidin Bey consider these provisions as a threat to the supremacy of the Assembly and they reject the proposal in its entirety in order to evade this situation. In this respect, Ķükrü Saraçoğlu is eager to defend parliamentary supremacy. During parliamentary discussions, he highly criticizes the draft proposal of the Constitutional Committee which, according to him, deviates from the unity of powers in the execution of national sovereignty: ñBizim yaptığımız gibi, bir ihtilâl ile hatalarını mehmaemken tashih etmiş ve herhangi bir devlete verilecek Teşkilâtı Esasiye Kanunu, bendenizin kanaatimce her şeyden evvel ihtilâlin prensiplerini hâdisata tesbit etmektir. Her şeyden evvel ihtilâlin aramızda yaşattığı, yazdığı ve yazısız ahkâmını tesbit etmektir. Her şeyden evvel maziye rücu ve avdet ihtimalini bütün kuvvetiyle kapatmak (çok doğru sesleri) ve nihayet efendiler, milletin doğrudan doğruya hakkını ihzal ederken hakkı meclisten millete doğru olan yolları mümkün olduğu kadar açık bırakmak ve milletin hâkimiyet fiiliyesine doğru yürümektir. Zannediyorum ki, bizim Kanunu Esasi Encümenimiz bu hususta lâzım geldiği kadar etraflı ve ihatalı hareket ederek bize bir lâyiha getirmiş değildir.ò *TBMM, ZC.*, Cilt 1, Ķ13, 16.3.1340, s.528.

[151] *TBMM, ZC.*, Cilt 7, Ķ7, 9.3.1340, p.239.

[152] *TBMM, ZC.*, Cilt 7, Ķ7, 9.3.1340, p.240.

the members of the Constitutional Committee think that it reinforces and supplements it with necessary legislation.[153]

All these parliamentary discussions also bring to daylight a significant character of the second Grand National Assembly: though the Assembly consists of members of the Republican Peopleôs Party, the constitutional debates generally seem to take place in a free atmosphere (Özbudun, 2012: vii). It is obvious that some of the representatives including Abidin and Mahmud Esad Bey show a certain degree of resistance particularly during the discussion of the provisions designating the powers of the president of the republic. In later stages, we see that their oppositions are taken into consideration to a certain extent.

After examining the parliamentary debate about the authority of the second Grand National Assembly to engage in a constitutional amendment particularly concerning the constitutional principles, I will explore in the following the conception of the constitution by the parliamentary representatives.

4.3.2 Conception of *Teкkilat-ē Esasiye of 1924* by the Parliamentary Representatives

It might be argued that the debate about the authority of the second Grand National Assembly to make *Teкkilat-ē Esasiye of 1924* is inextricably linked with the conception of the constitution by the members of the Assembly. It is certain from the parliamentary discussions that *Teкkilat-ē Esasiye of 1921* is conceived by the Assembly members as the founding act of the Turkish State. They all tend to see *Teкkilat-ē Esasiye of 1921* as a rupture in the history of Turkish nation since it introduces the principle of national sovereignty. Therefore, different from the

[153] Refet Bey, one of the Members of the Constitutional Committee, proposes to establish a bicameral Assembly in order to solve the problem of parliamentary authority (*TBMM, ZC*., Cilt 1, Ķ7, 9.3.1340, pp.234-36). In this respect, he offers the assignment of one camera with the duty to write a new constitution and the other with the duty to review and approve.

prevalent perception among the members of the first Grand National Assembly, the constitutive character of *Te*ĸ*kilat-ē Esasiye of 1921* is acknowledged retrospectively.

On the other hand, the proposal for 1924 Constitution signals the designation of the constitutional principles of *Te*ĸ*kilat-ē Esasiye*, namely the principle of national sovereignty and the form of its implementation, and the following constitutional laws in a systematic and complementary fashion in line with the emerging internal and external political conditions. In this framework, for the members of the Constitutional Committee, *Te*ĸ*kilat-ē Esasiye of 1924* implies a continuation, not a rupture from the previous constitutional order. It might be argued that the claim for continuity had become the criterion of legitimacy. It is in this respect that the framers of the constitution seem to feel no hesitation to prepare a draft proposal for a new constitution without questioning their authority to do so. For them, 1924 Constitution is not new since they think that it does not involve a new principle of government but forms the final moment of revolution.

From this angle, the members of the Assembly, including even the opponents of the draft law, seem to be largely attached to a positive conception of constitution in Schmittian terms. Recall that for Schmitt, ñ[t]he constitution in the positive sense originates from an act of the constitution-making power,ò and it denotes precisely the ñfundamental political decision of the constitution making power over the type and form of the concrete existence of the political unityò. In this respect, according to Schmitt, the constitution is the distinct manifestation of a specific preference for the concrete form of state. Thus the constitution is not neutral or formal in legal terms; on the contrary, it is *material* and has a *political substance* to the extent that it embodies the deliberate decision for certain constitutional principles reflecting certain ideologies.

In Turkish case, the members of the second Grand National Assembly seem to largely agree that the decision for republic and unity of powers in *Te*ĸ*kilat-ē Esasiye of 1921* constitutes the substance of the constitution. Thus for them this decision can

only be changed by the nation itself. Therefore, the disbute in the second Grand National Assembly concerning the authority of the Assembly to make a new constitution mainly stems from this issue; if the constitution is the act of the nation determining *the type and form of the concrete existence of the political unity*, then it is only the nation as the constitution making power to change this fundamental political decision. For the opponents of the draft constitution, the proposal for *Teúkilat-ē Esasiye of 1924* involves the constitutional principle of separation of powers which signal a deviation from the principle of unity of powers adopted in *Teúkilat-ē Esasiye of 1921*. In addition to this, they concern that this fundamental change in the constitutional principles is being made by an Assembly that has convened as an ordinary legislature and thus by a legislature that has not been empowered by the nation for the specific duty of constitution making.

The claim that the members of the Grand National Assembly largely share a positive concept of constitution is also reinforced when the fact that the framers of the Constitution add a provision prohibiting any amendment in the first article of the Constitution which designates Republic as the type of State is taken into consideration. Indeed, by describing the specific procedures for the consecutive constitutional amendments in the 104th article of the draft constitution, and prohibiting any change in the first article, the members of the Constitutional Committee manifest their attachment to the idea of ñhard constitutionò.[154] Moreover, they seem to put forward the Republican type of state as a principle that has to be protected against any threat.

Celal Nuri Beyôs speech provides us with further clues about how *Teúkilat-ē Esasiye of 1924* is conceived by the framers of the constitution. Celal Nuri Bey states that the draft proposal for *Teúkilat-ē Esasiye of 1924* involves not only the ideals and aims of Turkish nation, but more significantly it reflects the reality and the factual conditions

[154] According to this, the proposal for a constitutional amendment has to be submitted by at least one third of the total number of parliamentary representatives. And the proposal has to be accepted by the two third of it.

of the nation at that time. The constitution in this respect is the manifestation of the tendency and needs of the Turkish society.[155]

Having said that, we also encounter with an interesting viewpoint on the part of the framers of *Teşkilat-ı Esasiye of 1924* which regards the constitutional developments as the successive stages of the political maturation of Turkish society. Previously indicated speech of Celal Nuri Bey, reporter of the Constitutional Committee, is very enlightening in this regard. Actually he begins his words by emphasizing that 1924 Constitution represents the final moment of maturation in social revolution: ñGentleman! I think that the revolution has reached maturity by the submission of the proposal for the Law of Teşkilatı Esasiye by our Committee.ò[156] In fact, this viewpoint is reiterated by a number of representatives during the parliamentary discussions. For instance, in the preamble of the draft law prepared by the Constitutional Committee, it is stated that;

> If you have a look at the history of our revolution which ended with victories and attainment of the future and independence of the nation and country, you will see that, similar to other countries which underwent through various stages in their revolutions, we have had some experiences in terms of constitutional law and gone towards maturation. The declaration of the Republic is one of those stages of maturation. In case of the adoption of the Law which honours us, our young Republic will perhaps reach the last invariable stage of its development in terms of constitutional law since all the law and working procedures of the Assembly and government are determined on the basis of experience.[157]

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[155] *TBMM, ZC*., Cilt 7, İç7, 9.3.1340, p.225.

[156] *TBMM, ZC*., Cilt 7, İç7, 9.3.1340, p.224.

[157] ñZaferlere ve mülk ve milletin temini istikbal ve istiklâline müntehi olan inkilâbımızın tarihine nazar olunacak olursa görülür ki nerede, inkilâbatında muhtelif safhalar geçirmiş memleketler gibi, hukuku esasiye noktai nazarından birtakım tecrübelerde bulunmuşuz ve kemale doğru gitmişiz. Cumhuriyetin ilânı bu tekâmül merhalelerinden biridir. Takimi ile şerefyabolduğumuz lâyihanın kabulü takdirinde ise Meclisin, hükümetin bilcümle hukuk ve vazaifi ilmî ve tecrübi esasata müsteniden tesbit edildiğinden genç Cumhuriyetimiz teşkilâtı esasiye itibariyle tekâmülünün belki son lâyetegayyir merhalesine varmış olacaktır.ò *TBMM, ZC*., Cilt 7, İç7, 9.3.1340, p.213.

Feridun Fikri Bey, the clerk of the Constitutional Committee, also highlights that *Teşkilat-ē Esasiye of 1924* represents the final point in the development of the nation and national sovereignty. He precisely states that;

> In my opinion, this is the last stage of maturation and progress of our national sovereignty and development. We have not yet reached to this point but we stand in the last stage in the administration of the community. And this is the highest stage that the Turkish Nation can reach in terms of its public maturation.[158]

It seems that the members of the Constitutional Committee do not only capitalize on the idea of continuity but also on progress in order to provide legitimacy to the process and its outcome. In fact, the debates of *Teşkilat-ē Esasiye of 1924* will not be the first and last time that we face this articulation. In the following chapter, we will see that the framers of 1961 constitution similarly endorse the idea of continuity and progress in order to provide legitimacy to their practice.

Regarding the debates concerning *Teşkilat-ē Esasiye of 1924*, Tunalē Hilmi Bey, on the other hand, severely criticizes this idea which, from his viewpoint, disregards social progress and change. According to him, the fixation of social development at a certain point of time might result in a gap between present and consequent generations. He argues that;

> Because the minutes of the Assembly involves the expression of a very dangerous opinion. It states that ñIn case of the adoption of the Law, our young Republic will perhaps reach the last invariable stage of its development in terms of constitutional law since all the law and working procedures of the Assembly and government are determined on the basis of experience.ò Fellows, letôs call it human life, it always progresses. To assume the Republic, which was declared a minute ago, in the last stage of its development implies the denial of maturation, the infinite maturation. Maturation will last forever. Fellows, if we convey such idea to the youth, we will be creating the gaps ourselves. For that reason, No.

[158] ñBendenizce tekâmülü millîmizin, hâkimiyeti milliyemizin dâhil olduğu en son noktai kemal ve terakki burasēdlē. Şimdi bu noktaya vâsıl olmamakla maşerî idarenin en son kademesine vâsıl olmuş bulunuyoruz ve bu, Türk Milletinin en son tekâmülü umumiyesinde vâsıl olduğu en yüksek merhaledir.ò *TBMM, ZC.*, Cilt 7, Şt7, 9.3.1340, p.242.

> We should yell at the youth and say that ñWe are founding the necessary structure by the Law of Teкkilatē Esasiye and giving it to you. Yet, you must know that you are, always and forever, worthy of development thus preserve this structure.ò Indeed, the same Committee points out in its previous statement that it is considered convenient and necessary to complement our organization by always taking into consideration our national needs. They are approving me. In this respect, there is a contradictory interest, duty, so, my fellows had better change their opinions. They are stating afterwards, the declaration of the Republic is one of the stages of this development. The regulation of the Law of Teкkilatē Esasiye is one of these stages.[159] é My last word, fellows, is that you should not consider this as the last stage of Republic. This is because we have gaps in front of us and if we feed such opinion, we would dig those gaps for ourselves.[160]

It is really interesting that Tunalē Hilmi Beyôs statements bring to daylight the inconsistency in the thoughts of the Constitutional Committee members regarding the conceptualization of constitution. Though they emphasize that *Teкkilat-ē Esasiye of 1924* reflects the reality and factual conditions of Turkish nation and that it takes into consideration the needs of the society, the framers of the Constitution seem to close the constitutional text to further changes that might arise because of changing social needs and demands. It seems that for them, the constitutional decision binds the future of the nation by determining the type and form of ñits concrete political existenceò to employ a Schmittian term. We might say that similar to Schmittôs

[159] ñÇünkü Esbabē mucibe mazbatasēnda gayet tehlikeli bir kanaat bulunduĵ una dair sözler vardē. «Lâyihanēn kabulü takdirinde genç Cumhuriyetimiz Teкkilâtē Esasiye itibariyle tekâmülün belki son ve lâyeteĵ ayyir merhalesine varmēк olacaktē» diyor. Arkadaкlar hayatē beкer diyelim, hayatē beкer deyiniz. Daima tekâmüle (ileri) doĵ ru gidiyor. Daha demin ilân edilmiк olan Cumhuriyeti son merhalesine vâsēl olmuк farz etmek, tekâmülü, kemali, lâyetenahi olan tekâmülü âdeta inkâr etmek demektir, tekâmül ve kemali kēyamete kadar devam edecektir. Arkadaкlar eĵ er biz gençliĵ e bu fikri verecek olursak önümüzde açēlacak olan uçurumlarē kendimiz kazēmēк olacaĵ ēz. Binaenaleyh, hayēr. Gençlere baĵ ērmalēyēz ve demeliyiz ki : «Teкkilâtē Esasiye Kanuniyle icab eden bir yapēyē yapēyor ve size veriyoruz, Lâkin bilki sen, daima ve daima, kēyamete kadar tekâmüle namzetsin ve ona göre bu yapēyē muhafaza et.» Nitekim bunun birkaç cümle yukarēsēnda yine o Encümen diyor ki: Daima millî ihtiyaçlarēmēzē nazarē itibara alarak teкkilâtēmēzē itmam etmemiz pek musip ve pek muvafēк görülmüкtür. Beni tasdik ediyorlar. O halde tezattan ibaret bir faide, bir vazife var ki, arkadaкlar olan kanaatlerini lütfen deĵ iкtirsinler. Daha aкaĵ ēda diyorlar ki, Cumhuriyetin ilânē bu tekâmül merhalelerinden biridir. Teкkilâtē Esasiye Kanununun tanzimi de bu merhalelerden biridir.ò *TBMM, ZC.*, Cilt 7, Ķ7, 9.3.1340, p.237.

[160] ñSon sözüm arkadaкlar bunu Cumhuriyetin son merhalesi addetmeyiniz. Zira önümüzde uçurumlar vardē biz bu kanaati besleyecek olursak o uçurumlarē kendimize kazmēк oluruz.ò *TBMM, ZC.*, Cilt 7, Ķ7, 9.3.1340, p.238.

viewpoint, the constitution making is conceived by the framers of *Teşkilat-ı Esasiye of 1924* as the act of a deliberate will fixing the power struggles in society once and for all. This does not only mean closing the door to changing social needs and demands but also departure from the requirements of democratic legitimacy.

According to Tunali Hilmi Bey, on the other hand, as long as societies develop and change, the constitutions must also be amended by consequent generations in line with the social needs of that time. And in this endeavor, *Teşkilat-ı Esasiye* provides a basis, mainly serves as a bridge in order to link the founding fathers with consecutive generations. Tunalı Hilmi Beyôs statements in fact come close to a dynamic concept of constitution in which the constitutional text is improved in time according to societal demands and changes. And in this sense it is reminiscent of Habermasôs considerations on democratic constitution. Recall that for Habermas, democratic constitution has a *double temporal character*. On the one hand, the constitutional text as a *historical document* signals the original founding event and defines and guarantees the basic rights of the individual and rules of living together. From a normative perspective, on the other hand, the constitution signals the unfinished character of the founding event. For Habermas, the constitution is not something exhaustive with the founding event of the state. On the contrary, it is an unfinished project as the system of rights enshrined in the original text of constitution might always be criticized, reinterpreted and reformulated by the citizens in line with the socio-historical developments and new needs of society (Habermas, 1996: 384). This second aspect forms the *performative* meaning of the constitution and comes to day light each time when the citizens engage in rational political will formation processes. From the perspective of Habermasôs constitutional theory, democratic legitimacy of the constitution is significantly linked with the acknowledgement of this double temporal character of the founding event. Moreover, this conceptualization indeed corresponds to a dynamic understanding of the constitution which aims to ensure social integration and get over the problem of identification by closing the gap between the founding fathers and the consequent generations.

Similar to Habermasôs conceptualization of the constitution as a tradition building project open to future amendments in line with the requirements of the time, Tunalē Hilmi seems to conceive *Teкkilat-ē Esasiye* as the basis upon which a democratic tradition might evolve. It seems that for him, the constitution must be conceived as a dynamic text. Nevertheless, it is not possible from the content of the parliamentary debates to derive that he defends an idea of constitution democratically constructed in Habermasian terms. Yet we are sure that he tries to avoid the problem of identification between the founding fathers and the consecutive generations when he refers to the gap that might arise because of a static understanding of the founding event.[161]

In sum, it might be argued that the majority of parliamentary representatives in the second Grand National Assembly conceive the constitution in *positive* terms. Before anything else, they consider the constitution as an act of the Turkish nation. For them, Turkish nation put forward its common will to live together as a political unity in its struggle with the foreign invaders. Hence the struggle for independence along with the assumption of a shared history and tradition constitute, from the viewpoint of the framers of *Teкkilat-ē Esasiye of 1924*, the authentic basis of the political community. For them, the constitutional developments starting with *Teкkilat-ē Esasiye of 1921* and ending with *Teкkilat-ē Esasiye of 1924* signify the successive stages of the ñpolitical maturationò of Turkish nation that has been existing long before the respective constitutions. Consequently in this story, *Teкkilat-ē Esasiye of 1924* implies for them the final moment of social and political revolution and it is in this respect embodies inaltrable constitutional principles. *Teкkilat-ē Esasiye of 1924* is conceived in *material* terms since it involves the deliberate decision of the Turkish nation over the type and form of its concrete existence.

[161] Tunalē Hilmiôs statement does not met with a direct response, either negative or positive, from any other representative.

Having explicated the parliamentary representativesô understanding of the constitution, in the following I will examine a very closely related subject, namely their conceptions of the legitimacy of *Teşkilat-ē Esasiye of 1924* and of the relation between the constituent and constituted powers.

4.3.3 Conception of the Legitimacy of *Teşkilat-ē Esasiye of 1924*

It is seen from the parliamentary debates that the members of the Constitutional Committee highly invoke the constituent will of the nation and *Teşkilat-ē Esasiye of 1921* as its positive act, in order to justify the draft proposal for *Teşkilat-ē Esasiye of 1924*. Celal Nuri Bey, for instance, highlights once again the Turkish nation as the constituent power, particularly the actual author of the 1924 constitution when he states: ñWe can claim that the author of this law is directly the Turkish Nation. We will give a final certain shape to our revolution through the enactment of this law.ò[162] Moreover, he cites the success and positive social responses to *Teşkilat-ē Esasiye* in a comparison with the outcome of French revolution:

> Therefore, our law is a sharper victory. For this reason, we can be proud of it in the history of the Turkish Nation. It is the most significant and glorious happening almost seen for the first time not alone in the history of the Turkish Nation but even in the 1300 year old world of Islam. The French revolution has become in complete disarray as a result of restoration. It is understood that some laws, which do not take into consideration the tendencies and conditions of society, are written. On the contrary, we see that our revolution attains the admiration of the public and that it meets with no objection from any side. Thatôs why we deserve to be proud of.[163]

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[162] *TBMM, ZC*., Cilt 7, Ķ7, 9.3.1340, p.224.

[163] ñBinaenaleyh bu bizim kanunumuz daha seri bir muzafferiyettir. Bundan dolayēdır ki Türk Milletinin tarihinde bununla iftihar edebiliriz. Deĵil yalnēz Türk Milletinin tarihinde 1300 senelik Ķslâm âleminde bile hemen hemen ilk defa görülen en büyük ve en azametli bir vakadır. Fransēz inkilâbē ētlak olunan birtakēm iadei saltanatlarē hercümerçlerle (darmadaĵēnēk) olmuķtur, oradan anlaşēlēyor ki halkēn temayülât (eĵilim) ve vaziyetini pek nazarē dikkate almayan birtakēm vâzēē kanunlar bunlarē tesvidetmiķlerdir (yazmēşlardır). Halbuki biz de görüyoruz ki yaptēĵēmēz inkilâp lehülhamd umumum teveccühüne mazhar oluyor ve hiçbir taraftan bir şemei itiraz vuku bulmuyor. Bundan dolayē da müftehir olmak (iftihar etmek) hakkēmēzdır.ò *TBMM, ZC*., Cilt 7, Ķ7, 9.3.1340, p.225.

At this point, Celal Nuri Bey seems to endorse a sociological conception of constitutional legitimacy which is based on the assumption of social consent or acquiescence over the constitution as a whole in a political community.[164] In such conception, the absence of serious social resistance is considered sufficient for the perception of a constitution socially legitimate.

In general, the members of the Constitutional Committee and their supporters seem to believe that *Teúkilat-ē Esasiye of 1924* is a constitutional amendment preserving the constitutional principles adopted in *Teúkilat-ē Esasiye of 1921*. This is why they do not question the authority of the Assembly to engage in a practice aimed at writing a constitution in *toto* and thatôs why they ground the legitimacy of 1924 constitution on the will of the nation. On the other hand, the opponents believe that the proposal brings major changes in the principles of the constitution and it is on this basis that they question the practice by emphasizing the distinction between the political and legal status of the first and second Assemblies.

In this framework, the framers of *Teúkilat-ē Esasiye of 1924*, similar to the members of the first Turkish Grand National Assembly, seem to be highly inspired by the concepts of modern constitutionalism since they endorse the idea of constituent power of the people as the basis of legitimacy. In fact, they also come close to

[164] In political science literature, the constitutional legitimacy is analyzed in three different but closely interrelated aspects, namely legal, political or moral and sociological (Fallon, 2005). Legal legitimacy derives when the constitution making or reform process is conducted by the competent authorities in line with the predetermined legal procedure identified in the constitution. Secondly, as it is stated above sociological legitimacy of a constitution is largely conceptualized on the existence of social consent or acquiescence over the constitution as a whole in a political community. Regarding the subject, Barnett (2003) states that the existence of a legal order and the citizensô conformity to the rules of this order, or in his terms acquiescence, might be conceived as the basis of the tacit consent in society. Lastly, in case of moral conceptualization of legitimacy, democratic legitimacy requires the existence of legal mechanisms that enable either the direct participation of the subjects of the legal order or democratic representation of them in the political will formation processes concerning constitutional authorship and change. This implies the activation and institutionalization of the principle of sovereignty and the mechanisms of direct democracy in the constitution making/reforming processes and in political representation in general (Çelebi, 2012). Thus moral conceptualization of democratic legitimacy requires a much thicker normative framework than the legal or sociological legitimacy of a constitution. Upon this basis, we might claim that Schmittôs considerations seem to come close to sociological conception of legitimacy while Habermasôs theory falls within the framework of political or moral conceptions of legitimacy.

Schmittôs conceptualization of the legitimacy of constitution since they make reference at various times to the Turkish nation as the author of the constitution.

Moreover, the parliamentary debates concerning *Teúkilat-ē Esasiye of 1924* shed light on how the Assembly members conceive the relationship between the constituent and constituted powers. It seems that they adopt the tautologic conceptualization concerning the nation as the constituent power and the Assembly as the constituted power. In fact, this is particularly illuminated in the statements of the opponents of draft law. We see that the opponents of the draft law criticise the Constitutional Committee for changing the constitutional principles adopted in *Teúkilat-ē Esasiye* and question the authority of the second Grand National Assembly to do so on the basis of this distinction. Furthermore, they raise similar objections during the discussions of the constitutional provisions related to these principles.

To begin with, Abidin Bey seems to be conscious of and takes serious the difference between the constituent and constituted powers. Consistently with his overall rejection of the proposal for a new Constitution, he also objects to the article extending the term of general elections, on the basis that it is only the nation as the source of legitimate authority that can make such a change:

> We said earlier that we would accept only two years of parliamentary membership. This is contrary to moral considerations. This is contrary to legal considerations as well. Because we accepted the mandate within time limits. *And we do not have the right here to extend the term of office. It is directly the right of the client.* We cannot exercise such right. But it is right, it is concrete and there is necessity. I admit that. Thus it is possible from now on.[165] [*emphasis mine*]

[165] ñBiz demiúiz ki ancak iki senelik mebusluĝ u kabul edeceĝ iz. Bu telâkkiyatē ahlâkēyeye muhaliftir. Telâkkiyatē hukukiyeye de muhaliftir. Çünkü müddet ile mukayyedolmak üzere vekâleti kabul etmiúizdir. *Ve burada bu vekâlet müddetini temdid etmek bizim hakkēmēz deĝ ildir. Doĝ rudan doĝ ruya müekkilin (vekil tayin eden) hakkēdēr*. Biz bu hakkē istimal edemeyiz. Fakat hakikat vardē, hâdise vardē, zaruret vardē. Kabul ediyorum. Fakat bundan sonra olur.ò [*emphasis mine*] *TBMM, ZC.*, Cilt 7, Ķ7, 9.3.1340, p.230.

ķükrü Saraçoĵlu, another prominent figure criticizing the proposal for *Teкkilat-ē Esasiye of 1924*, underlines the constituent power of the nation when he is defending the principle of unity of powers in the execution of national sovereignty: ñé there is no separation and no division of powers; even there is no unity of powers at all. There is only one power which is the united power. There is only nation. It is the sole owner of national sovereignty. That is the united power. The sole performer, the sole source and the sole origin is the nation (voices of ódavoô). Since the nation signifies the people, there is no doubt that the most proper type of government for the nation is Republic.ò[166] However, according to him, even the adoption of unity of powers in the execution of national sovereignty and the assignment of the Turkish Grand National Assembly as the true and sole representative of the nation do not imply that the Assembly is all powerful in doing whatever it wants. The Assembly, as the constituted power, has to act within the legitimate boundaries of authority delegated by the constituent power of the nation.

> Turkish Grand National Assembly does not have the right to arbitrarily and unconditionally execute all the rights of the Turkish Nation. é What kind of a right that the Turkish Grand National Assembly cannot delegate to some one else? In my opinion, the most stringent limit is the entitlement of a right superior than the will of the Turkish Grand National Assembly. Thus it is such an empowerment that it creates, even for a while, the equivalent of the power of the Grand National Assembly. If the Grand National Assembly grants such right, this means in my opinion that it entitles someone else to a right, which it does not have, and without having the right to do so (voices of ódoô).[167]

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[166] ñé tefriki kuva, taksimi kuva yoktur; hatta tevhidi kuva da yoktur. Yalnēz bir tek kuvvet vardēr ki, o da vahdeti kuvvettir. Bir tek millet vardēr. Onun bir tek hâkimiyeti milliyesi vardēr. O da Vahdeti kuvvettir. Yegâne âmil, yegâne masdar, yegâne memba millettir. (Bravo sesleri) Millet, cumhur demek olduĵu için hiç кüphe yok ki millet için en uygun tarzē idare Cumhuriyettir.ò *TBMM, ZC.*, Cilt 7/1, Ķ13, 16.3.1340, p.528.

[167] ñTürkiye Büyük Millet Meclisi, Türk Milletinin bütün haklarēnē bilâkaydü кart keyfemayeкa istimal etmek hakkēnē haiz deĵildir. é Ne gibi bir hakkē Türkiye Büyük Millet Meclisi kendisinden baкka hiçbir kimseye veremez? Bendenizin kanaatime göre bunun en dar çerçevesi Büyük Millet Meclisinin iradesi karкēsēnda o iradeye mütefevvik her hangi bir hakkēn tanēnmasēdēr. Binaenaleyh her hangi bir karar ki, Büyük Millet Meclisinin haricinde, Büyük Millet Meclisinin kudretine müsavidir ve bunu biran için olsun yaratēyor. Eĵer bunu Büyük Millet Meclisi verecek olursa bendenizin kanaatimce kendi hakkē olmayan bir hakkē, hakkē tasarrufu olmayan bir кeyi baкka birisine vermiк oluyor demektir. (Doĵru sesleri)ò *TBMM, ZC.*, Cilt 7/1, Ķ13, 16.3.1340, p.528.

The issue of the legitimate boundaries of authority assigned to the Grand National Assembly by the nation comes to fore once again when the Assembly is discussing the thirteenth article of the proposal which foresees the prolonging of election term from two to four years. Emin Bey, in this regard, argues that the new election term must not be applied to the present Assembly but has to be valid for the successive parliament since the nation has given authority to the present Assembly only for two years: ñHow can we extend the term of office in a significant Law like Teкkilatē Esasiye without having the right to do so, even though we do not get such authorization from the nation and have been elected only for two years? I request that four years term of office is not applied to present Supreme Assembly.ò[168]

In fact, the expressions of the opponents of the draft law demonstrate a significant difference between the perceptions of the parliamentary representatives of the first and second Grand National Assemblies. The members of the first Grand National Assembly dominantly perceive the parliamentary institution as constituent Assembly in legal and political terms as they conceive the Grand National Assembly as the true and sole representative of the nation. This constitutes for them the legitimacy of *Teкkilat-ē Esasiye of 1921*. The members of the second Assembly, on the other hand, seem to diverge on the subject matter. The members of the Constitutional Committee strive to designate the legitimacy of *Teкkilat-ē Esasiye of 1924* on the same ground with the first constitution as they tend to invoke a direct linkage between themselves and the nation. They therefore tend to conceive the second Grand National Assembly as a constituent Assembly as well. However, this conviction is not supported by the opponents of the draft constitution. The opponents emphasize on the contrary that there is not a direct identification between the will of nation and will of the parliamentary institution in their case. This dissensus in the second Grand National Assembly signals that the assumed identity between the will of nation and the will of

[168] ñBöyle mühim bir Teкkilâtē Esasiye Kanununda ve kendi hakkāmēz olmayarak milletten böyle salâhiyet almadęğ āmēz halde, iki sene için geldiĵ imiz halde bunu nasēl olur da tezyid edebiliriz? Bu dört sene müddetin bu Meclisi Âliye teкmil edilmemesini rica ederim.ò *TBMM, ZC.*, Cilt 7/1, Ķ13, 16.3.1340, p.545. Musa Kazēm Efendi expresses similar worries about the subject, p. 546.

the parliament, particularly present in 1921, is no longer shared by all the members of the Assembly, and more significantly reveals the difficulty faced by the framers of the constitution in constructing the legitimacy of *Teúkilat-ē Esasiye of 1924*.

After examining the perception of the members of the Second Grand National Assembly about *Teúkilat-ē Esasiye of 1924*, in the following I will examine the parliamentary discussions during the constitutional amendment of 1937.

4.4 The Constitutional Amendment of 1937

Teúkilat-ē Esasiye of 1924 is amended five times after its adoption in 1928, 1931, 1934 and 1937. Among these, the constitutional amendments of 1928 and 1937 are distinctive in terms of scope and political significance. In 1928, the 2nd, 16th, 26th and 38th articles of the constitution are amended in order to eliminate all references to Islam without any serious opposition in the Assembly (Özbudun, 2012: 8). In 1931, the budgetary provisions are revised, while in 1934, the basic right for the women to vote and be voted is included in the constitution. In 1937, two constitutional amendments are made: Firstly, with the constitutional amendment dated 5 February 1937 the principles of Republican Peopleôs Party specified in its party program are transformed into constitutional principles and the position of political undersecretariat is established in state ministries. To be more precise, the second article of the constitution which specifies the official language and capital of Turkish State is amended and the Turkish State is identified as in the following: ñThe State of Turkey is Republican, Nationalist, Populist, Statist, Laic and Revolutionist. Its official language is Turkish and capital is Ankara.ò In the second constitutional amendment made on 29 November 1937, the position of political undersecretariat which is established with the recent amendment is eliminated.

In this section of the thesis, I will examine the parliamentary discussions regarding the first constitutional amendment made in 1937 since I believe that it signifies more than an ordinary constitutional amendment. This is because, the Assembly seems to

act as constituent power by identifying the state type in specific terms, thus making a change in the constitutional essentials. The Assembly, without being authorized by this specific duty, seems to engage in a constituent act in terms of adding new principles to the constitution, and making the political principles adopted by the Republican Peopleôs Party the principles of the constitution. To put it in a different way, the principles representing certain ideologies and thus partial interests are transformed through the constitutional text into common principles that must be respected by all citizens. In fact, the definite specification of the state type by the ruling party of the period implies the marginalization of other ideologies prevalent in society and exclusion of them from public political life. In this respect, though the constitutional amendment of 1937 is usually conceived as an ordinary constitutional amendment by legal and political scholars, I believe that it represents more than a constitutional amendment in political terms because of its constitutive aspect and exclusion of certain comprehensive doctrines from legal and political spheres. In Schmittain terms, a decisionist moment might even be observed in the sense of introducing more enlarged friend-enemy distinction.

The constitutional amendment of 1937 is first brought to the parliament as the legislative proposal of 154 representatives led by Đsmet Đnönü, and thereafter transformed into a proposal of the Costitutional Committee. It is significant to emphasize from the beginning that there takes place no discussion on the authority of the parliament to make such fundamental change in the constitution. The parliamentary representatives, as far as it is seen from the parliamentary debates, do not question the authority of the parliament to engage into a constitutional amendment with such scope. It is true that the parliament adopts the procedure specified in *Teúkilat-ē Esasiye of 1924* in order to make the constitutional amendment. For this reason, the parliamentary representatives might have accordingly considered the legality of the constitutional amendment as a sufficient basis for its legitimacy as well. It is also apparent from the parliamentary debates that the agents of the constitutional amendment strive to justify their practice by making reference to the specific characteristics of ôTurkish nationô and its ôstateô.

ķükrü Kaya, by taking the floor at the beginning of the constitutional debate, justifies the proposal for constitutional amendment on the grounds that the proposed principles of the Republican Peopleôs Party are already implemented in state administration and must continue to be implemented for the the independence of the state to be preserved in future.[169] According to Kaya, the principles of *republicanism*, *statism*, *nationalism*, *populism*, *laicism* and *revolutionism* are not new but *form the character of the nation* and originate in fact from the *will of Atatürk*. Kaya emphasizes that these principles have to be respected as a discharge of national debt to Atatürk since he has saved the Turkish nation and enabled it to have high qualities of civilization. It is in this respect that their inclusion in the constitution signifies their designation as the *principles of law regulating public life*: ñThe inclusion in Teĸkilatē Esasiye the major principles of which I submitted is the expression in legal terms of our devotion and sincere commitment as nation to the principles of Atatürk. We want that our undertakings in the political and executive fields find place in legal conceptions and consciences and become the origin, source and foundation of the legal life.ò[170]

The association of the proposed constitutional principles with the national characteristics of the political community and more significantly with the *will* of Mustafa Kemal is very strong in Kayaôs speech. Kaya describes the constitutional principles as Turkish in origin and totally in compliance with the needs of the society: ñAtatürkôs principles are Turkish. In other words, they are entirely derived, in terms of identity and origin, from the character of the nation and selected in compliance with all its needs and exigencies. These principles are Turkist as wellé It is in this respect that the quality of nationalism becomes an inherent necessity.ò[171]

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[169] *TBMM, ZC*., Cilt 16, Ķ33, 5.2.1937, pp.59-60.

[170] ñArz ettiĵim prensiplerin baĸlēcalarēnēn Teĸkilâtē Esasiyemize geçmesi, Atatürkôün prensiplerine milletçe beraber baĵlādēğēmēzēn ve samimî ilgimizin hukukî ifadesidir. Biz istiyoruz ki, siyaset ve icraat sahalarēnda yaptēğēmēz iĸler irfan ve vicdanē hukukilerde yer bulsun ve hukukî hayatēn mebdei, menĸei ve istinadgâhē olsun.ò *TBMM, ZC.*, Cilt 16, Ķ33, 5.2.1937, p.60.

[171] ñAtatürkôün vazettiĵi prensipler Türktür. Yani asliyeti ve menĸei itibariyle tamamiyle milletin kendi seciyesinden alēnmēĸ ve onun bütün ihtiyaç ve zaruretlerine uygun olarak seçilmiĸtir. Bu

Consistently with this, Kaya and other representatives taking the floor present rather peculiar definitions of the proposed principles. They explicate the concepts in complete disattachment from the socio-historical contexts in which they have been originally developed. To give an example, Kaya defines populism as the necessary ground for democratic government and legitimacy, and associates it with the conventions of the Republican Peopleôs Party conducted across the country.[172] He states that the annual January congress, the biennial provincial congress and the quadrennial national council are the equivalent of peopleôs initiative, popular referandum and self-legislative activities in Europen law, and argues that the Party reviews its activities and presents the outcome of its studies in these conventions. For him, these conventions constitute the ground for the populist conception of legitimacy of the laws enacted by the Turkish Grand National Assembly since they provide a platform for taking the ideas of the people.

Kaya furthermore claims that the Turkish nation has long been alienated to its own will since it has not been governed by the laws of its own legislation under the reign of Ottoman State.[173] For him, the only remedy for the Turkish nation to get over this trouble was to allow it to be the author of its own laws. And this has been achieved sofar as the *will* of the Turkish Grand National Assembly and the laws enacted by it now directly represent national will.

Şemsettin Günaltay, the president of the Constitutional Committee, stresses a similar viewpoint in order to justify the new principles of the state.[174] He specifies the principles as *sacred* originating from t*he life and history of the ôTurkô and from the*

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prensipler aynē zamanda Türkçüdür deé Bu itibarladē ki millicilik vasfē kendiliĝinden çēkan bir zaruret olur.ò *TBMM, ZC*., Cilt 16, Ķ33, 5.2.1937, p.60.

[172] *TBMM, ZC*., Cilt 16, Ķ33, 5.2.1937, p.60.

[173] *TBMM, ZC*., Cilt 16, Ķ33, 5.2.1937, p.61.

[174] *TBMM, ZC*., Cilt 16, Ķ33, 5.2.1937, pp.64-5.

revolutions it underwent through. According to him, they are the *raison dôetre* of the Turkish nation. He explicates this in the following words:

> Fellows, this provision encompasses sacred principles consisting of the life of the Turk, history of the Turk and revolutions that the Turk has undergone through centuries. These principles, as I said, are derived from the history of the Turk. If we examine the history of the Turk, we see that the Turk, rising above the humanity as a sacred being from the darkness of the past and the depths of centuries, has preserved its existence from that day to this, on the basis of the principles that we identify here today. The Turk has survived as long as it is nationalist; the Turk has survived as long as it is statist; the Turk has survived on the condition that it derived the principles of its own existence from its own spirité [175]

For Günaltay, the authors of the constitution must first of all take into consideration *the indigenous characteristics of the nation and the specificities of its spirit*. According to him, this is the main condition for the preservation and maintenance of the self-conscious of a nation: ñFellows, when the fundamental law of a nation is made, the first thing that must be taken into consideration is its own characteristic and the emergence of its own spirit. Only a nation founded on these principles could preserve its existence and identity in the face of strong storms.ò[176]

A careful examination of parliamentary discussions brings to the fore that nationalist arguments forged with strong perception of external enemy are widely shared by the members of the Assembly at the time of constitutional amendment. The survival and persistence of the óTurkish nation,ô particularly in the face of existential threats

[175] ñArkadaşlar; bu madde Türkün hayatından, Türkün tarihinden, Türkün asırlar içerisinde geçirmiş olduğu inkilâblardan mülhem olan kudsî esaslardır. Bu esaslar arzettiğim gibi, Türkün tarihinden çıkarılmıştır: Türkün tarihini karıştırırsak, mazinin karanlıklarına gömülen ve asırların en derinliklerinden kudsî bir varlık halinde beşeriyet üzerine yükselen Türk; ancak o günden bu güne kadar varlığını, bu gün burada tesbit ettiğimiz esaslara istinaden muhafaza etmiştir. Türk yaşamıştır, milliyetçi olduğu müddetçe; Türk yaşamıştır, Devletçi olduğu müddetçe; Türk yaşamıştır, ancak kendi varlığının esaslarının kendi ruhundan çıkardığı müddetçe...ò *TBMM, ZC*., Cilt 16, Ş33, 5.2.1937, p.64.

[176] ñArkadaşlar; bir milletin ana kanunu yapılırken ilk evvel nazarı itibare alınacak şey, o milletin kendi hususiyeti, kendi ruhunun tecelliyatı olmalıdır. Ancak o yoldaki umdelere istinad eden bir millet, en büyük fırtınalar karşısında varlığını ve benliğini muhafaza eder.ò *TBMM, ZC*., Cilt 16, Ş33, 5.2.1937, p.65.

caused by external enemies is one of the major issues continuously expressed by the parliamentary representatives. It is also possible to detect the traces of rewriting the history of the nation, and of sublimating its role in the overall history of the world in the parliamentary debates. For instance, Şükrü Kaya claims that the history of humanity and civilization begins with the Turks. Yet the Turks have had to confront so far various threats aimed to destroy itself:

> The history of humanity has begun with the Turks anyway. The history would not perhaps exist in the absence of the Turk and it is sure that the civilization would not start as well (voices of 'bravo', applauses). The Turks, influenced (since the beginning of human history till its last days) by such profound and strong assaults within the wave of human activities, have undergone through serious dangers in recent centuries (and in recent era). The Turks are wanted to be annihilated and wiped out from the history.[177]

It might be generally argued on the basis of the parliamentary debates that the constitutional amendment is supported by the majority of parliamentary representatives as there seem to appear no serious critical attitude against the new constitutional principles. Furthermore, it seems that the parliamentary representatives consider the inclusion of the proposed principles into the constitution necessary since they interpret them as the guiding principles for the consequent generations in dealing with political and social issues.[178] In this respect, they seem to conceive the constitution in static and *political* terms highlighting the unchangeable founding principles of the state.

Nevertheless, there seems to appear one dissenting voice amongst this uncritical audiance: Halil Menteşe objects to the change proposal in the second article of the constitution because of its potential for excluding the defense of any other ideology

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[177] "Zaten insanlık tarihi Türklerle başlamıştır. Türk olmasaydı belki tarih olmazdı ve muhakkak ki medeniyet de başlamazdı (Bravo sesleri, alkışlar). İnsanlık tarihinin başlangıcından son günlere kadar bütün faaliyetin dalgaları arasında bu kadar derin ve geniş hamlelerle müessir olan Türkler son asırlarda ve son devirlerde büyük tehlikeler geçirdi. Türkler coğrafyadan kaldırılmak ve istikbal tarihinden silinmek istendi." *TBMM, ZC.*, Cilt 16, İç33, 5.2.1937, p.59.

[178] See the statements of Hakkı Kılıçoğlu and Hüsnü Kitabcı, *TBMM, ZC.*, Cilt 16, İç33, 5.2.1937, pp.62-4.

or doctrine from public political sphere. He underlines the formal properties of constitutions: the constitution generally embodies rules designating the legal basis of the relationships between state organs and guarantees individual rights and liberties of the citizens.[179] In contrast, the definite specification of the properties of state in the constitution might hinder the impartiality of the constitution and result in the generation of *public enemies* in Schmittôs terms. Menteke basically questions whether a citizen publicly expressing and defending liberal ideas in economy, or a communist citizen propagandising internationalist ideas will be considered as a threat to the state and its constitutional order.

The dissenting ideas of Menteke meet with serious opposition of the members of the Constitutional Committee and the members of the Republican Peopleôs Party. Günaltay, for instance, argues in response that these acts have to be assessed within the framework of criminal law and punished accordingly.[180]

Recep Peker, one of the fiercest defenders of the constitutional amendment, expresses the necessity for a newly emerging state like the Turkish state to specify the border of its regime and strengthen it in line with this specification.[181] For Peker, supplementing the collectively acknowledged principle of republic with the political principles adopted by the Republican Peopleôs Party will make the latter an indispensable element of public political life. These principles will contribute to the achievement of national unity and solidarity in the future collective life of the political community and make all citizens ranging from an ordinary citizen to a judge in obligation to comply: ñIn brief fellows, the national entity consisting of all citizens irrespective of their official identity, would become, with the enactment of this law, a steady, large and more powerful body believing jointly in common fundamental

[179] *TBMM, ZC*., Cilt 16, Ķ33, 5.2.1937, p.62.

[180] *TBMM, ZC*., Cilt 16, Ķ33, 5.2.1937, p.65.

[181] *TBMM, ZC*., Cilt 16, Ķ33, 5.2.1937, pp.65-7.

principles (vioces of ôbravoô, applauses).ò[182] Accordingly, any individual or collective action violating the principles of constitution will be banned from the social, cultural or political spheres of life.

According to Peker, these principles must be taken into consideration in unity and interpreted in a different perspective from their definition and deployment in other socio-political contexts.[183] To be more precise, they have to be understood in relation to the specific circumstances of Turkish state. Peker describes the Republican Peopleôs Party as the source of ideas and policies of the new state, and he argues that it is natural that its party principles born out of its experiences are followed in state administration.[184] Moreover, Peker claims that the specific principles stemming from the life of political community is closely tied with the independence of state. Regarding the issue, Peker maintains that:

> It is particularly necessary that a nation and a State must have a regime of its own stemming from and suitable to its own life in order to be a fully independent State and nation. If not, the situation resembles to the time in which some part of the country is under foreign invasion. Hence the regime, constituting a vital substance of the country, is said to be under the occupation of foreign ideas.é It is necessary that the State must always be ready to protect itself in the face of devastating propagandas from east, west, south and north during a period of struggle with any internal and external challenges. For this reason, it is not sufficient today that only republicanism is written in the fundamental law of the State. We have to include in our constitution the other elements in the draft law deliberated today (voices of ôit is rightô).[185]

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[182] ñHulâsa arkadaılar, bu kanun çækünca resmî hüviyeti olsun olmasın bütün vatandaıların tertip ettiği millî bünye müıterek ana esaslara beraber inanan sarsılmaz, büyük ve daha kuvvetli bir kütle haline gelecektir (Bravo sesleri, alkıslar).ò *TBMM, ZC.*, Cilt 16, Içtima 33, 5.2.1937, p.65.

[183] *TBMM, ZC.*, Cilt 16, Içtima 33, 5.2.1937, p.66.

[184] *TBMM, ZC.*, Cilt 16, Içtima 33, 5.2.1937, p.67.

[185] ñBilhassa bir milletin ve bir Devletin tam müstakil bir Devlet ve millet olmak için kendi hayatından doğmuı ve kendi hayatına uygun kendi öz malı bir rejime sahip olmasına lâzımdır. Böyle olmazsa vaziyet yurdun bir parçasının ecnebi istilâsı altında bulunduğu zamana benzer. O halde yurdun hayatî bir esasını teıkil eden rejim ecnebi fikirlerin istilâsı altında demektir.

é Devletin herhangi iç veya dıı güçlüklerle uğraıma zamanında, ıarktan, garpten, cenuptan, ıimalden, esen tahrip propagandalarına karıı kendisini her zaman korumaya hazır bulunması elzemdir. Onun

As it is obvious from the parliamentary discussons, the principles of the constitution are not justified on a rational or discursive basis. The parliamentary representatives do not strive to justify them in a relationship with universal principles of justice or democratic form of government but rather on the basis of the assumed *substantive values* of the political community and the specific properties of the political regime. This fact becomes more apparent in Kayaôs concluding speech when he indicates that the fundamental principles of the Turkish Republic do not originate from the theories and ideas of philosophers or religious clergy.[186] They are particularly born out of the newly emerging circumstances and requirements of Turkish society. For him, good law is not the one legislated by philosophers or legal scholars; but rather the one fitted to the society and meets its requirements. Moreover, Kaya emphasises that these principles are not static but rather responsive to social developments. He states that:

> We have not obtained these principles in static terms. In other words, we have not obtained them in order to preserve them forever by applying a determinate formula. We have obtained them by acknowledging the daily necessities of life. This is the main spirit of revolutionism. The best laws written in the world are now covered in dust on display of libraries. There are so many perfect systems that could never find the ground and possibility for implementation. The best laws are not those having best provisions, but those most suitable to the nation (applauses), and the most significant duty of the National Assemblies is to make the laws that are most suitable to the nations, so did our Assembly. The National Assemblies are not the assembly area of some philosophers and lawyers. The National Assemblies are responsible for making the best law, on the basis of the inspiration they take from the requirements of the age and necessities of life, for the progress of the nation. And our Assembly has also made such laws since the day of its birth until today, and saved Turkey in this way (applauses, voices of óbravoô).[187]

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için Devletin ana kanununda yalnēz cumhuriyetçi olduĵumuzun yazēlē olmasē bu gün artēk kâfi deĵildir. Anayasamēza bugün müzakere edilen lâyihadaki diĵer unsurlarē da eklemeye mecburuz (Doĵru sesleri).ò *TBMM, ZC*., Cilt 16, Ķ33, 5.2.1937, p.67.

[186] *TBMM, ZC*., Cilt 16, Ķ33, 5.2.1937, p.70.

[187] ñBiz bu prensiblerimizi statik olarak almadēk. Yani muayyen bir formül tatbik ederek onu ebediyen muhafaza için almadēk. Hayatēn gündelik zaruretlerinden mülhem olarak aldēk. Inkēlâbcēlēĵēn esas ruhu budur. Dünya için en iyi yapēlan kanunlar bugün kütüphane camekânlarēnda tozlarla örtülüdür. Ne mükemmel sistemler vardē ki hiç bir tatbik sahasē ve imkânē bulamamēştēr. En iyi kanunlar

It is seen from the parliamentary debates that the expressions of the members of the Constitutional Committee are supported by the members of the parliament to a great extent. Their speeches are usually interrupted with applauses and ended with supportive discourses. In general, it might be claimed that the members of the Assembly tend to conceive the parliamentary institution as the direct representative of the national will as is the case in national liberation era. Indeed, we witness that a major shift from the formal criterion of ónationô to a substantive criterion like ôTurkishnessô occurs as the parliamentary representatives attach the proposed constitutional principles to an assumed identity of ôTurkishness.ô Günaltayôs explicit citation to the life and history of the ôTurkô for explaining the origin of the principles constitutes the major indication of this shift and signals the cyristallization of ôTurkish identityô on a concrete substance.

Moreover, the parliamentary representatives do not question the legitimacy of the constitutional amendment since they think that they have been already implemented political principles of the Republican Peopleôs Party which in turn represents the nation. At this stage, there seems to occur a full articulation with Schmittôs considerations as the parliamentary representatives understand the *constitutional principles* as the decision of a deliberate will, namely the *will of Mustafa Kemal*, and try to form their legitimacy on this ground. For them, these principles constitute the *substance* of the constitution which has to be protected against any existential threat. In this respect, political and economic doctrines such as statism, nationalism and populism which are in fact partial in themselves and the adoption of which is subject to a deliberate decision are generalized and made part of the constitutional order.

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maddeleri en iyi olan kanunlar değildir. Millete en uygun olan kanundur (Alkışlar) ve Millet Meclislerinin en büyük vazifesi milletlere en muvafık gelen kanunları yapmaktır ve bizim Meclisimiz de böyle yapmıştır. Millet Meclisleri bir takım filozofların ve hukukçuların mahalli içtimai değildir. Millet Meclisleri günün ihtiyaçlarından, hayatın zaruretlerinden aldıkları ilham üzerine milletin inkişafı için en iyi kanunu yapmakla mükelleftir ve bizim Büyük Millet Meclisimiz de doğduğu günden bugüne kadar böyle kanunlar yapmıştır ve Türkiyeôyi böyle kurtarmıştır (Alkışlar, bravo sesleri).ò *TBMM, ZC.*, Cilt 16, Ş33, 5.2.1937, p.71.

Accordingly, the expression of liberal, communist and Islamic ideas is banned from public political life.

In this framework, the political discourses aimed at forming the legitimacy of the constitutional amendment of 1937 might be counted as the sign of an articulation with Schmittôs conception of legitimacy. The constitution is conceived completely in political terms, designating the borders of the political regime thus classifying who will be included as part of the political unity and excluded as *public enemy* in Schmittôs terms. Pekerôs statements are very illuminating in this regard since he emphasizes the necessity for the state to specify the borders of its regime and strengthen it in line with the constitutional designation. For Peker, the constitutional principles are significant for the achievement of national unity and solidarity in collective life of the political community.

In the following, I will discuss the conceptions of the parliamentary representatives in the relevant Assemblies regarding the fundamental principles of the constitution since I believe this perception is closely related to their consideration of legitimacy of the constitution.

4.5 Fundamental Provisions of the Constitution, Principles or Values?

It is indicated in the previous section concerning 1921 constitution that the framers of *Teúkilat-ē Esasiye of 1921* act on extra-constitutional conditions as they take neither *Kanun-i Esasi* nor any other constitution adopted afterwards for the basis of their legislative practice. Upon this extra-constitutional basis, the first Grand National Assembly institutionalizes the principle of national sovereignty as the rule of government; *Teúkilat-ē Esasiye of 1921* in this sense signals a radical rupture from the previous constitutional order, and indicates a new constitutional beginning in the proper meaning of the word. In addition to the principle of government, the first Assembly also adopts the principle of unity of powers and assigns itself as the sole institution for the execution of national will. In fact, the parliamentary debates

concerning *Teкkilat-ē Esasiye of 1921* provides sufficient data to convince us that the framers of the Constitution generally consider the principle of national sovereignty as a universal rule of modern republican government since they strive to justify it on the basis of rational arguments focusing mostly on the political experiences of other nation states as well as the deficiencies of the current rule of government and needs of the society.

On the other hand, we see that the framers of 1924 Constitution no longer act in the same conditions with the members of the first Grand National Assembly. They take *Teкkilat-ē Esasiye of 1921* as the source of the constitutional order and strive to complement it with additional legislation suited for republican form of government and newly emerging peace conditions. During the parliamentary discussions concerning the general principles of 1924 Constitution, we witness that the members of the Assembly usually make reference to the specific character of *Turkish revolution*. In this respect, it is seen from the parliamentary debates that the Assembly generally pursues a pragmatic approach to the extent that the political and constitutional doctrines of western states are rarely cited directly and that the immediate adoption of them is considered as mimicry (Smith, 1957: xv). It is true that the framers of the Constitution take into consideration the constitutions of many states including France and Poland when forming the proposal. Yet these are considered as example cases and hence the specific political conditions of the State are taken as the basis.

Ahmed Süreyya Beyôs statement during the discussion of 1924 Constitution is illuminating to see how the members of the second Grand National Assembly conceive the fundamental provisions of the constitution. Ahmed Süreyya considers the first four principles of *Teкkilat-ē Esasiye* as the content of a political agreement between the Assembly and the nation, which has to be respected and preserved as long as the present constitutional order survives.

> Fellows, during the discussions about the Law of Teкkilatē Esasiye which confirms the independence and sovereignty of the nation é when we stood as

> candidates for parliamentary membership in the presence of the nation, we were declaring a principle. Particularly in the second article of these principles, we declared to the whole nation that we endorse the unonimous decision of the old Assembly concerning the abolition of the sultanate and the crystallization of the sovereignty and government in the body of the Turkish Grand National Assembly, the true representative of the Turkish Nation, as an invariable rule and confirm that such spirit is an eternal aim for us as well. *The principles are a political agreement, the sanctioning power of which is honor for all the members of the Supreme Assembly both in person and as a group between the nation, which is our constituent and masters, and ourselves*.[188] [*emphasis mine*]

During the parliamentary discussions concerning 1924 constitution, we also see that the formal properties of law, namely generality and abstractness are accepted and the idea that the constitution being the fundamental law of the land should involve general and impartial rules which would endure for a long time is comprehensively acknowledged. This is mostly evident in the discussions concerning the powers of the head of state. To give an example, Ebubekir Hazēm Bey expresses that the constitutional rules should not be made for a particular figure or circumstance. The constitutions must involve general rules independent from prominent figures and circumstances:

> As you all know, the constitutions (Kanunu Esasiler) are the laws that are exposed to the most frequent changes and amendments in the world. Nevertheless, it is also the constitutions that are made and have to be made with attention and prudence that will enable them to endure till eternity. é For this reason, it is necessary to pay great attention to the constitutions. We have to think a lot.[189]

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[188] ñArkadaĸlar, milletin istiklâl ve hâkimiyetinin kuvvei müeyyidesini teĸkil eden TeĸkilâtēEsasiye Kanununun müzakeresi esnasēnda é huzuru millete mebus namzetliĵimizi vaz'ettiĵimiz zaman bir *umde* (ilke) neĸretmiĸ bulunuyorduk. Bu umdelerin bilhassa ikinci maddesinde, saltanatēn ilgasēna, hukuku hâkimiyet ve hükümraninin é Türkiye halkēnēn mümessili hakikisi olan Büyük Millet Meclisinin ĸahsiyeti mâneviyesinde mündemiç bulunduĵuna dair eski Meclis tarafēndan müttefikan ittihaz edilmiĸ olan kararēn lâyetegayyer bir düstur olmak üzere bizler için kabul edilmiĸ olduĵunu bütün millete arz etmiĸ ve bu ruhun bizler için ebedî bir gaye olarak kabul edildiĵini millete temin eylemiĸtik. *Umdeler, Heyeti Celileyi teĸkil eden bütün arkadaĸlarēn ferden ve heyeti mecmualarē itibariyle, müntahēplerimiz ve efendilerimiz olan halk ile bizim aramēzda teati edilmiĸ ve kuvvei müeyyidesi namus diye telâkki olunmuĸ bir ahitnamei siyasidir*.ò [*emphasis mine*] *TBMM, ZC.*, Cilt 7/1, Ķ19, 23.3.1340, p.1000.

[189] ñMalûmuâlileridir ki dünyada en çok ve en seri tahavvülâta, tadilâta maruz kalan kanunlar, Kanunu Esasilerdir. Bu, böyle olmakla beraber ebediyetle devam edebilecek itina ile, basiret ile yapēlan ve

> é *But we cannot write Kanunu Esasi in accordance with and by taking into consideration Gazi Paşa's unique dispositions that are known by the whole world and by us*. Though we respect and trust him, we think as well. Because, we cannot give him an eternal life unfortunately. *Therefore, we have to arrange Kanunu Esasi by taking into consideration every possibility. Anyway, the laws are not made on the basis of absolute happenings. They are made on the basis of the changeable aspects of humanity.*[190] [*emphasis mine*]

Feridun Fikri Bey, the clerk of the Constitutional Committee, expresses similar concerns about the issue and emphasizes that the constitution has to involve impartial and clear provisions:

> Law has to be impersonal. It is not of concern the Head of State, the one and only of us all and the beloved and precious figure of the nation. We obey the Head of State, we respect him, but it is not of concern here, we are not deliberating on his personality. é our aim is to write a Law of Teşkilatē Esasiye free from any personal consideration which would be respected, which would endure but not changed and which would be inscribed in the spirit of the nationé [191]

It is also seen from the parliamentary discussions that the Assembly members conceive republican form of government in terms of indivisibility of national

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yapılmasē lâzēmgelen kanunlar da yine Kanunu Esasilerdir. é Onun için yapılacak Kanunu Esasilere çok dikkat etmek lâzēmdē. Çok düşünmeliyiz.ò *TBMM, ZC*., Cilt 8, İç24, 30.3.1340, p.105.

[190] ñé *Yalnēz Gazi Paşa Hazretlerinin bütün dünyaca ve bizce müsellem fēratē nadiranelerini göz önüne alarak tabiî ona göre Kanunu Esasē yapılmaz.* Binaenaleyh ona kemali hürmetimiz, kemali emniyetimiz olmakla beraber biz de düşünürüz. Çünkü maalesef kendilerine hayati ebediye vermek bizim elimizde değildir. *Binaenaleyh her türlü ihtimalâtē düşünerek Kanunu Esasimizi tanzim etmekliğimiz lâzēm gelir. Zaten Kanunlar, mutlaka vukuu mutlak olan şeyler üzerine olmaz. Beşeriyetten suduru melhuz olan şeyler üzerine yapılēr.ò* [*emphasis mine*] *TBMM, ZC*., Cilt 8, İç24, 30.3.1340, p.106. Regarding Ebubekir Hadēm Beyôs criticisms, the reporter of the Constitutional Committee, Celal Nuri Bey, insists on the generality of the provision related to the head of stateôs term of office: ñGazi Paşa Hazretlerinin ismi, şahsiyetleri, kendileri katiyen burada mevzuubahis değildir. Bu kanun; ebedi olmak üzere ve muhtelif kimselerin makamatē cumhuriyeyi işgal edebilmeleri noktai nazarēndan yapılmēştē.ò *TBMM, ZC*., Cilt 8, İç24, 30.3.1340, p.106.

[191] ñKanun gayri şahsî olur. Reisicumhurluk Makamēnē işgal eden ve cümlemizin başta cē olan ve milletin mahbup ve margubu olan é şahsiyetler mevzubahis değildir. Reisicumhura tazim ederiz; tekrim ederiz, yalnēz mevzubahis olan nokta; şahsiyet mevzubahis olmadığēna göre müzakere ediyoruz. é Maksadēmēz her türlü mülâhazatē şahsiyeden âri olarak memlekette payidar olabilecek, tagayyür etmeyecek, devam edecek, milletin ruhuna naşşolunacak sağlam bir Teşkilâtē Esasiye Kanunu vücuda getirmek é ò *TBMM, ZC*., Cilt 8/1, İç36, 13.4.1340, p.613.

sovereignty; in this respect, they do not seem to have an idea of rule of law or particularly the principle of separation of powers. Besides, it might be said that the fundamental principles of *Teşkilat-ı Esasiye of 1924* conceived as the substance of the Constitution are not understood in terms of general principles of law, but rather understood as rules stemming directly from and reflecting the specific character of Turkish revolution. Therefore, the constitutional principles are more like an outcome of a deliberate decision, partial in themselves.

Here I would like to draw attention to a definite shift in the basis of legitimacy of the constitutional principles. Recall from the previous chapter of the thesis that Habermas tries to construct the democratic legitimacy of the decisions of the courts in *hard cases* and of the constitutional court in *abstract judicial review* on the basis of the normative idea of *constitution as a system of rules structured by principles.* Habermasôs conception of constitution stands in clear opposition to Schmittôs considerations as the latter figure endorses the *material* conception of constitution posited by a concrete *will* and thus involving partial value preferences. Habermas in fact makes a logical distinction between intersubjectively shared values on the one hand and principles or norms on the other, and conceives the constitutional principles including basic rights of the individual neither as culturally shared value orientations of a particular political community, nor as pure legal principles justified on the basis of pure practical reason. He acknowledges that basic rights as principles which guide the constitutional framers do not stand aloof from culturally established values. On the contrary, at the time of legislation, the policy goals as preferred goods and value orientations of the legislator penetrate into law. However, this diffusion occurs only after the value orientations have taken the form of mutually recognized (socially valid) norms as they pass through the lens of normativity. Thus they cannot remain as partial interests or preferences of a specific party; to be valid for all participants, they have to be transformed into contents serving the equal interest of all. For Habermas, therefore, the constitution conceived in Schmittian terms results in an understanding of constitutional principles as subjective value preferences and this

ultimately hinders the democratic legitimacy of the constitution as well as of constitutional jurisdiction.

Taken from this perspective, it seems that the framers of *Te*ı*kilat-ē Esasiye of 1921* debate comprehensively about the principles regulating the constitutional order and conceive them as universal principles of legitimate form of government implemented in other democratic states as well. It is true that at some points in the parliamentary discussions they stress that the political and social principles that they adopt are derived from the tendencies and traditions of the nation and are in line with social needs. However, this seems to be an attempt to establish a linkage between criterion of legitimacy and culturally established values since they do not make specific reference to ethical values or cultural tradition of the political community in order to justify them. In addition to the strong emphasis on extraordinary conditions caused by the war of liberation, they also engage as indicated above in rational arguments focusing mostly on the political experiences of other modern states, the deficiencies of the current rule of government and needs of the society.

During the making of *Te*ı*kilat-ē Esasiye of 1924*, on the other hand, we see that the authors of the constitution examine the constitutional regimes of several countries including United States of America and Switzerland and benefit substantially from the constitutional texts of Poland and France. Yet we see no attempt in the parliamentary discussions to justify the proposed constitutional principles in direct relation with the experiences of other political communities or normative doctrines of democratic legitimacy. Constitutional principles are rather justified in reference to the *specific character of Turkish revolution,* thus on the basis of *assumed ethical substance of political community*. In this respect, there seems to be a shift in the basis of legitimacy. While the parliamentary representatives of the first Grand National Assembly seem to share a procedural understanding of legitimacy and try to justify the constitutional principles on a rational basis in connection with the cultural tradition of the nation, the members of the second Assembly seem to be attached to an essentialist understanding of legitimacy similar to Schmittôs conceptualization as

now they only make reference to the *homogeneity* of the nation, its ethical substance and political distinctiveness.

This shift is further clarified during the constitutional amendment of 1937 which transforms the political principles adopted by the Republican Peopleôs Party into *Teúkilat-ē Esasiye of 1924*. Because now, the legal aspect of the constitution which is even acknowledged during the parliamentary debates concerning *Teúkilat-ē Esasiye of 1924* is concealed and its political aspect in Schmittian sense is emphasized. Moreover, the legitimacy of the constitution, particularly of the constitutional principles is formed on the basis of this political distinction. *Teúkilat-ē Esasiye of 1924* is not merely a legal text defining the relations between different state organs now, but more significantly a political decision constituting the political community on the basis of friend-enemy distinction. It seems that with the constitutional amendment of 1937, the fundamental political decision concerning the concrete type and form of the political unity is extended and the borders of the polity are boldly drawn. With the specific designation of the properties of the state, the insiders and outsiders are made more visible and the violaters of the constitutional order are for the first time defined as *public enemy*. The shift in the basis of legitimacy of constitutional principles is radical since the amendment is made without concealing the partiality of party principles. It is the case that the framers of the constitutional amendment themselves emphasize the arbitrariness of the constitutional principles by insisting on their uniqueness and *national character* and moreover by associating them with the *will* of Mustafa Kemal.

Furthermore, as the parliamentary representatives present the constitutional principles as the guiding rules for the consequent generations in dealing with political and social issues, they seem to bind the future of the community by the constitutional decision. The static understanding of constitution thus seems to exhaust the power struggles between different social forces and comprehensive doctrines in society from the beginning and limit the sphere of the political.

Furthermore this limitation of the political has been expected to be extensive to legal institutions and practices.

4.6 Concluding Remarks

In this chapter of the thesis, I engaged in a hermeneutical interpretation of the constitutional debates included in the parliamentary minutes of the Turkish Grand National Assembly in order to present an alternative reading of the constitutions and their making process. I specifically concentrated on the constitutional debates in the Turkish Grand National Assembly during the making of 1921 and 1924 constitutions and constitutional amendments of 1923 and 1937 in order to understand the perception of the parliamentary representatives about the concept of the constitution and its legitimacy. In this analysis, I benefited from the conceptual frameworks developed by Schmitt and Habermas in order to better understand and deepen the constitutional debates in Turkey. Indeed, the theoretical categories employed by Habermas and Schmitt serve as main analytical tools to analyse how the dominant actors in Turkey perceive the legitimacy of the constitution, democracy and national sovereignty. Moreover they provide the theoretical ground to reveal the continuities and ruptures in their perception.

*Te*ĸ*kilat-ē Esasiye of 1921* signifies a radical rupture from *Kanun-i Esasi,* the constitution of the Ottoman State, as it eliminates constitutional monarchy and introduces national sovereignty as the principle of legitimacy for the first time in the constitutional development of the society. Moreover, *Te*ĸ*kilat-ē Esasiye of 1921* designates the Grand National Assembly as the sole and true representative of the nation and establishes unity of powers in the execution of state power. In this respect, by far extending its initial purpose regarding the self defence of the *nation* and of the Ottoman State against the invading forces after the Armistice of Montrose, the first Grand National Assembly exerts the constituent will for the foundation of a new state through adopting *Te*ĸ*kilat-ē Esasiye of 1921.* Moreover, the Assembly acts in extra-constitutional conditions as it bounds itself with no law including *Kanun-i Esasi.*

Despite this fact, the parliamentary representatives still do not consider *Teкkilat-ē Esasiye of 1921* as a constitution marking the beginning of a new social and political order but rather as a *constitutional law* laying the basis for a new principle of government and the accompanying state administration for the proper direction of the national forces in the war of liberation. Hence, though they acknowledge the constituent status of the Assembly from the very beginning, they do not conceive *Teкkilat-ē Esasiye of 1921* as a constitution in its full sense. That is the main reason for the tendency of the members of the first Grand National Assembly to name it as *constitutional law* in parliamentary debates.

It seems in light of the constitutional debates that the political significance of *Teкkilat-ē Esasiye of 1921* began to be acknowledged retrospectively, particularly within the body of the same (first) Assembly during the discussion of the parliamentary decision no 308 indicating the demolition of the Ottoman State as of 16 March 1920, and the institutionalization of the peopleôs government of Grand National Assembly as its successor with the promulgation of *Teкkilat-ē Esasiye of 1921*. In this respect, Rēza Nur Beyôs and 78 other representativesô proposal submitted to the Assembly on 30 October 1922 for the adoption of the decision indicating the demolition of the Ottoman State and the promulgation of *Teкkilat-ē Esasiye of 1921* as the founding act of the new Turkish State seems to be the manifestation of a radical change in the perception of the parliamentary representatives and their initiation to reflect it in legal and political terms.

Consistently with this, during the parliamentary discussions about the constitutional amendment of 1923, which declares the principle of national sovereignty as the republican form of government, we observe that *Teкkilat-ē Esasiye of 1921* is conceived as the starting point of the constitutional development of the Turkish state. Indeed the framers of the constitutional amendment of 1923 describe their practice as an ordinary constitutional change despite it concerns the constitutional principles, and strive to justify their practice by invoking the constitution making power of the people. However, the designation of republic as the state form seems to imply more

than a legal change since it might also be considered as a political move aimed to fight against the power constellations in society defending monarchy and caliphate (Teziç, 2013: 171).

The retrospective conceptualization of *Teúkilat-ē Esasiye of 1921* as the *founding act* of the Turkish state seems to be reinforced in the body of the second Grand National Assembly to the extent that the framers of *Teúkilat-ē Esasiye of 1924* consider the constitutional text as the final moment of social and political transformation of Turkish society began with the adoption of *Teúkilat-ē Esasiye of 1921*. Hence they consider the making of *Teúkilat-ē Esasiye of 1924* as a complementary constitutional amendment signifying most of all the systematic elucidation of the principle of national sovereignty and the constitutional laws adopted after *Teúkilat-ē Esasiye of 1921* in a single constitutional text. For them, *Teúkilat-ē Esasiye of 1924* does not designate a distinctive constitutional principle, but reinforces and supplements already established principle of government with the same criterion of legitimacy.

In general, it might be argued that the majority of parliamentary representatives in the first and second Grand National Assemblies conceive the constitution in *positive* terms. Similar to Schmittôs conception of positive constitution, the constitutions of 1921 and 1924 are conceptualized in metaphysical terms as an act of the nation conceived as unitary entity existing long before the constitutional act. For them, Turkish nation put forward its common will to live together in political unity in its struggle with the foreign invaders during the war of liberation. Hence the struggle for independence along with the assumption of a shared history and tradition constitute the authentic basis of the political community. Specifically for the framers of *Teúkilat-ē Esasiye of 1924,* the constitutional developments starting with *Teúkilat-ē Esasiye of 1921* and ending with *Teúkilat-ē Esasiye of 1924* signify the successive stages of ñthe political maturation of Turkish nationò. Consequently in this narrative, *Teúkilat-ē Esasiye of 1924* implies for them the final moment of social and political revolution and it is in this respect embodies the founding principles of the state which have to be protected against the enemies of the state. The constitution is thus

conceived in *material* terms involving the deliberate decision of the Turkish nation over the type and form of its concrete existence.

The parliamentary discussions also shed light upon whether the parliamentary representatives problematize legitimacy of the constitutions and if so, on what basis they try to construct it. It might be suggested in this regard that the framers of the constitutions strive to base the legitimacy of *Teşkilat-ē Esasiye of 1921* and *Teşkilat-ē Esasiye of 1924* respectively by invoking the constitution making power of the people in Schmittôs terms. It remains disputable whether such invocation provides a democratic character to their conception of legitimacy. The parliamentary representatives thus seem to mobilize the modern conceptual framework of modern constitutionalism for the construction of legitimacy of the constitutions and constitutional amendments. In this conceptualization, the Turkish nation is assumed as the origin of the constitutional order, while the Grand National Assembly as its direct representative. However, the adoption of the principle of national sovereignty does not go beyond an essentialist understanding of popular sovereignty. For the framers of the constitutions in general, and the members of the Grand National Assembly in particular, the principle of national sovereignty serves mostly as a rhetorical principle or discursive tool for justifying the newly emerging constitutional order since they refuse to elaborate on mechanisms such as referendum or peopleôs initiative that could enable the people to participate into law making processes and have a say in deciding the essentials of the constitution.

Furthermore, the parliamentary representatives tend to conceptualize the *Turkish nation* as *a political community united for self-preservation against a common enemy.* Imperialism and capitalism referring specifically to the Western states trying to invade the country during the war of liberation and the remnant Christian population of the Ottoman State as their internal allies are constructed as the enemies of the political unity. Against the existential threat of the enemy, the parliamentary representatives tend to deploy the notion of ôTurkish nationô in order to signify a *homogeneous unity* sharing a common historical and traditional background and

fighting for self-preservation in this life and death struggle. In this respect, the members of the Assembly do not simply mention ôTurkish peopleô living in a certain territory; they instead seem to consciously deploy the term ôTurkish nationô in order to indicate a certain ónational identityô formed by an *assumed ethical substance* in order to differentiate it from other political communities.

The parliamentary discussions are illustrative of the fact that the political aspect of the constitution in Schmittian terms becomes more hegemonic and its legal aspect is increasingly concealed as the regime consolidates itself in time. The parliamentary debates concerning *Teúkilat-ē Esasiye of 1921* show that the principle of national sovereignty is discussed and justified by the parliamentary representatives on the basis of rational arguments focused on universal principles of republican government. Indeed the parliamentary representatives of the first Grand National Assembly seem to justify the constitutional principles on a rational basis in connection with the cultural tradition of the nation.

However, beginning with the parliamentary discussions related to *Teúkilat-ē Esasiye of 1924,* it is possible to observe that the parliamentary representatives no longer invoke transcontextual ideas in order to justify their claims about constitutional principles but increasingly make reference to national characteristics and the factual conditions of the society. This might be read as increase in parochialism. In this respect, the members of the second Grand National Assembly seem to be attached to an essentialist understanding of legitimacy similar to Schmittôs conceptualization as now they only make reference to the *homogeneity* of the nation, its ethical substance and political distinctiveness.

This situation is radicalized particularly during the parliamentary debates concerning the constitutional amendment of 1937 which specifies the state type in definite terms. The parliamentary discussions during the constitutional amendment of 1937 seem to represent a divergence from universalizable validity claims in Habermasôs terms and a lean towards the contingent preference of a particular political ideology shared by

the governing party members. During the discussions concerning the constitutional amendment of 1937, we see that the constitutional principles are justified by reference to the *specific character of Turkish revolution,* thus on the basis of *assumed ethical substance of political community*. Thus the formal aspect of the constitutional text, the impartiality and abstractness of the constitutional principles, is weakened to a great extent. Now the legal aspect of the constitution which is even acknowledged during the parliamentary debates concerning *Teúkilat-ē Esasiye of 1924* is concealed and the political aspect of the constitution signifying the friend-enemy distinction is emphasized. Moreover, the legitimacy of the constitution, particularly of the constitutional principles is formed on the basis of this political distinction. For the framers of the constitutional amendment of 1937, *Teúkilat-ē Esasiye of 1924* is not merely a legal text defining the relations between different state organs, but more significantly a political decision constituting the political community on the basis of the friend-enemy distinction reflected in the properties of the state.

It might be argued in this regard that the constitutional amendment of 1937 signifies the turning point in which the borders of the legitimate political activity approved by the dominant political actors are determined and guaranteed through the constitutional text. As the Assembly identifies the state type in specific terms by including the political principles adopted by the Republican Peopleôs Party into the constitutional text, it acts as constituent power by making a change in the substance of the constitution in Schmittôs terms. This results in a peculiar situation in which the principles representing certain ideologies and thus partial interests are transformed through the constitutional text into ñuniversal principlesò that must be respected by all citizens, and marginalization of other ideologies prevalent in society and exclusion of them from public political life. It is sure that the amendment introduced a new criterion of legitimacy for political power and government by reference to certain enduring aspects of state. Yet these aspects were heavily ideological or containing elements of a certain comprehensive doctrine. Hence this might be

considered as a sufficient ground in order to conceptualize the constitutional amendment of 1937 as more than an ordinary constitutional amendment.

CHAPTER 5

THE CONSTITUTION OF 1961

In the previous chapter of the thesis, I discussed the changing conceptions of legitimacy of constitution making and constitutional change processes by taking into consideration the constitutional debates in the Turkish Grand National Assembly. I evaluated the perspectives of the authors of 1921 and 1924 constitutions as well as 1923 and 1937 constitutional amendments by reference to Schmittôs and Habermasôs constitutional theories. I concentrated particularly on the views of the parliamentary representatives about the constitutions and constitutional legitimacy, and tried to locate their understanding within the theoretical paradigms provided by Habermas and Schmitt. In this chapter, I will extend the analysis to the 1961 constitution and examine the constitutional debates within the Constituent Assembly with the same intention.

I deem significant to remind from the outset the distinctive characteristic concerning the making of 1961 constitution. As it is well known, 1961 constitution was written after the military coup of 27 May 1960 and under the tutelage of *Milli Birlik Komitesi* (National Unity Committee - NUC), which is formed completely by the military officials. However, the constitutional debates, strictly speaking, the debates within the House of Representatives, seem to take place in a legal atmosphere, where almost the entire constitution (except for a number of provisions some of which I will delineate in detail in the following sections) is debated within the framework of the legal terminology of liberal constitutionalism derived especially from the constitutions of Western European states. Moreover, there is an apparent increase in discursiveness to the extent that the opponents could change the initial proposals of the Constitutional Committee and the parties try to justify their claims through rational discourses, including pragmatic, ethico-political and moral discourses in Habermasôs terms.

The draft constitution of 1961 is prepared by the Constitutional Committee elected by the House of Representatives among themselves and consisting twenty members all of which are the prominent law professors of that time.[192] Additionally, as far as it is seen from the Assembly minutes, the members of the House of Representatives joining into debates concerning the draft constitution are overwhelmingly the graduates of law faculties. Therefore, one might consequently think that the legal terminology prevalent in the constitutional debates is an immediate impact of the legal background of the framers of the constitution. However, one might also argue that the severe political reaction to *Demokrat Parti* (Democrat Party -DP) rule, which can easily be traced throughout the discussions, has been transformed into a legal form during the making of 1961 constitution. Moreover, the overwhelming appeal to legal terminology and universal principles of democracy and the rule of law might also be the sign of the compelling need to provide legitimacy to the process.

In light of these preliminary remarks, I will elaborate first a number of major developments preceding the preparation of the 1961 constitution. I will then explore the Report of the Constitutional Committee which is presented to the House of Representatives on 9 March 1961 and which involves along with the draft text of the 1961 constitution, the justification for a new constitution.[193] The Report is in fact very informative of the perception of the constitutional authors about the military coup of 27 May. I find this perception critical since the justification of the *coup d'état* is directly associated with the justification for the writing and legitimacy of the new constitution. I will then elaborate on the constitutional debates both in the House of Representatives and National Unity Committee in order to come to terms with the

[192] The Constitutional Committee involved Enver Ziya Karal as the president, Muammer Aksoy as the speaker, Hüfzü Veldet Velidedeoğlu as the reporter and Emin Paksüt, Turhan Feyzioğlu, Turan Güneş, Tarık Zafer Tunaya, Coşkun Kırca, Amil Artus, Doğan Avcıoğlu, Münci Kapani, Mümin Küley, Ragıp Sarıca, Bahri Savcı, Celal Sait Siren, Mümtaz Soysal, Cafer Tüzel, Abdülhak Kemal Yörük, Sadık Aldoğan, Nurettin Ardıçoğlu and Hazım Dağlıas the members.

[193] The Draft Constitution for the Republic of Turkey and the Report of the Constitutional Committee annexed to *TM, TD.*, Cilt 2, B: 34, 30.3.1961.

major questions of this thesis: conception of the constitution, constitutional legitimacy, and constitutional review by the authors of 1961 constitution.

5.1 Major Developments Preceding the Preparation of 1961 Constitution

In order to provide a complete analysis of the parliamentary discussions concerning the making of 1961 constitution, it is necessary to mention a few critical developments that influenced the formation of the process and the content of negotiations. Among them comes first the Law no 1 issued by the National Unity Committee on 12 June 1960.[194] The law, by eliminating and amending some of the provisions of the *Teşkilat-ı Esasiye of 1924*, established the provisional government of the NUC, which was delegated with the powers of the Turkish Grand National Assembly until a new constitutional order was established in accordance with *democratic procedures*. The law served in fact as a provisional constitution for the military regime since it included a number of provisions designating legislative, executive and judiciary organs and establishing *Yüksek Adalet Divanı* (Supreme Council of Justice) which would judge the leaders of Democrat Party.

In the beginning of the law, the critical point for our discussion, the rationale for the military intervention is expressed. The law stated that the Turkish Grand National Assembly has lost its legitimacy and turned into a party group as a result of the violation of the 1924 constitution by the leaders of the governing party, the elimination of all the individual rights and liberties of the *Turkish Nation* and establishment of a single party dictatorship through the annihilation of the

[194] The Law no 1 is composed of four chapters including in each part the general provisions, National Unity Committee (its composition, duties and rules of operation), the head of the state and council of ministers. The Law was empowering the National Unity Committee directly with legislation and indirectly with execution deployed by the head of the state and council of ministers. In the last section of the Law enlisted the provisions of the 1924 constitution which are eliminated. More significantly, it is emphasized that the first article of the 1924 constitution designating the type of the state as Republic cannot even proposed to be changed. In this respect, they declared their commitment to the constituent will expressed in the 1924 constitution. For the complete text of the Law see Kili, Suna & Gözübüyük, A. Şeref. (2006). *Türk Anayasa Metinleri: Senedi İttifaktan Günümüze*, İş Bankası Yayınları, İstanbul, p. 155.

opposition. In this framework, the army has intervened on behalf of the *Turkish Nation* in order to fulfil its legal duty defined in its internal service law as ‗to protect and secure the *Turkish homeland* and *the Republic* designated by *Teşkilat-ē Esasiye* and to establish anew the ‗Rule of Law' against the unlawful actions of the previous government which has put into danger the *Turkish homeland* and *national existence*.

The second major development decisive for the formation of the constitution making process is the enactment of the Law no 157 by the NUC as an addition to the Law no 1 on 13 December 1960.[195] The Law no 157 was basically regulating the formation of a Constituent Assembly which is obliged to draft and adopt a new constitution and election law. According to the Law, the Constituent Assembly composed of the House of Representatives and National Unity Council was founded on the basis of the *National Revolution of 27 May 1960* which signalled *the right to rebel (direnme hakkē) of the Turkish Nation against oppression*.

It is upon this legal basis that the 1961 constitution was drafted by a constitutional committee the members of which came from the House of Representatives. The Law no 157 about the establishment of the Constituent Assembly also defined the procedure for the making and adoption of the new constitution. According to the Law, once the draft Constitution was discussed and approved by the House of Representatives, it would be submitted for the discussion of the National Unity Committee. And in case of a disagreement, a joint committee would be established in

[195] The Law no 157 regulating the establishment of Constituent Assembly had seven chapters. In the first chapter, general provisions are set out including the aim of the Constituent Assembly and the rule of general representation. In the second, third and fourth chapters, the establishment and composition of the Constituent Assembly (the House of Representatives in particular), its duties and powers and meeting and decision procedures are defined. In the fifth chapter of the Law, the rules about the preparation and adoption of the new constitution and election law are defined. In the sixth chapter, the results of a delay or a failure in the adoption of the new constitution are identified. According to the Law, the Constituent Assembly is obliged to prepare the constitution and election law 27 May 1961 at the latest and the duration can only be extended once for 15 days. In case of an exceeding, it is stipulated that a new House of Representatives would be elected. The law also regulated the election of a new House of Representatives in case of the disapproval of the constitution in the referendum. Finally, in the last chapter, several relevant issues are regulated.

order to settle the disputed provisions. The Constitution would be finally approved through the national referendum stage.

What is critical for our discussion here is that the justification expressed at the beginnings of the above mentioned laws are reiterated both in the Report of the Constitutional Committee for its proposal and justification for a new constitution, and during the constitutional debates in the House of Representatives by other several representatives. The rhetorical formation of the legitimacy of the military coup and the so-called inevitability of the intervention for the protection of the Republic and the *Turkish Nation* seem to go hand in hand with the justification of the constitution making practice and the new constitution. The authors of the 1961 constitution highly capitalize in this respect on the requirements of the concrete situation, i.e. the constitutional violations of Democrat Party government, and deploy them as a justificatory base for their intervention. In fact, it is hard to decipher the exact effects of military tutelage over the making of 1961 constitution on the basis of the debates in the House of Representatives. However, the belief of the members of the House of Representatives in the legitimacy of the military coup seems to be their own worldview, independent from the military tutelage and pressure of the National Unity Council as far as the arguments in the parliamentary minutes are considered.

In the following, I will concentrate on the preparation process of 1961 constitution including the establishment of the Constituent Assembly and particularly the House of Representatives.

5.2 The Constituent Assembly of 1961

The Constituent Assembly convened on 6 January 1961 for the specific purpose of writing a new constitution and election law. The Assembly was bicameral; it was composed of the National Unity Committee which was already formed by the military cadre involved in the *coup dêtat* and the House of Representatives the members of which were elected in accordance with the Law no 158. According to

this law, the House of Representatives would consist of 10 members directly elected by the Head of State, 18 members directly elected by the National Unity Committee, members of the council of ministers, 75 members indirectly elected by the provinces, 45 representatives from *Cumhuriyet Halk Partisi*, the Republican Peopleôs Party (CHP) and 25 representatives from *Cumhuriyetçi Köylü Millet Partisi*, the Republican Peasant Nation Party (CKMP) and 75 members representing various professional institutions including bar associations, the press, Veteran Association, artisansô and tradersô associations, the representative of the youth, trade unions, chambers of commerce and industry, teachersô associations, agricultural organizations, representatives of universities and the judiciary. In this respect, the Constituent Assembly was not founded through direct elections by the citizenry, but partly on co-optation and partly on indirect election. Besides, in accordance with the above mentioned Law, the representation of the Democrat Party or any person supporting its policies was banned in the Constituent Assembly. Therefore, the Constituent Assembly was not sufficiently inclusive since it excluded the representatives of some major segments of society such as the constituents of DP and the Kurdish minority. Moreover, the members of the House of Representatives or the Constituent Assembly in general happened to share a common political position. Indeed they were mainly critical about the former Democrat Party government and seem to be close to Republican Peopleôs Party in ideological and political terms.[196]

Once convened, a Constitutional Committee of twenty members was formed within the House of Representatives. The Constitutional Committee began to prepare its proposal for the constitution of 1961 on 7 January 1961 and submitted it to the House of Representatives on 9 March 1961. The Committee benefited from the draft constitution prepared by the law professors of Istanbul University as the study text and the draft constitution prepared by the law professors of Ankara University as an auxiliary text. The Commission also engaged into a comparative study of world

[196] Their critical attitude towards Democrat Party policies becomes apparent particularly during the debates in the House of Representatives. For the same comment see also Özbudun (2011: 10) and Karpat (2009: 172).

constitutions and practices and benefited highly in this sense from the constitutions of Italy and West Germany both of which have recently adopted western forms of democratic institutions.[197]

In fact, the Military following the day of *coup dôétat* formed a ósScience Councilô with a number of law professors from Istanbul University and asked them to prepare a provisional constitution eliminating *Teúkilat-ē Esasiye of 1924* and a Report of Constitutional Committee which would form the legitimacy of the intervention (Suavi and Takkān, 2014: 65). The president of the Council was Sāddēk Sami Onar, a prominent professor of administrative law at Istanbul University and the members are Naci ĶensoyÌ professor of penal law, Hāfzē Veldet VelidedeoĵÌlu professor of civil law, Hüseyin Naili KubalēÌ professor of constitutional law, Ragāp SarēÌca professor of administrative law, Tarēk Zafer TunayaÌ professor of constitutional law and Ķsmet GiritliÌ associate professor of administrative law.[198] Later three professors of law from

[197] The authors of 1961 constitution seem to be inspired by the Basic Law for the Federal Republic of Germany (1949) to a great extent. This is particularly valid both for the point of departure and destination of the framers of the two constitutions. Schäfer argues that the framers of the Basic Law acted on the basis of ñGermanyôs difficult past,ò specifically the failure of the Weimar constitution in creating a well-functioning democracy and the experience of the National Socialist regime characterized by the abuse of law and violation of even the most basic rights (Schäfer, 2002: 407). In opposition to the Weimar constitution which institutionalized a strong legislature with the right to restrict the fundamental rights and liberties, the authors of the Basic Law established a powerful Federal Constitutional Court and an óextensive catalogue of basic rights with legally binding forceô (Schäfer, 2002: 408). Basic Law also prohibited constitutional amendments concerning the basic principles of the constitution. Schäfer describes the German case as ómilitant substantive theory of democracyô as the authors of the Basic Law, in contrast with the Weimar constitution, limited direct popular involvement in government to a great extent. They were more ñcautious towards democracy and a plebiscitary involvement of the peopleò (Schäfer, 2002: 408). We might argue that the framers of 1961 constitution adopted a similar attitude as well. They aimed to break with the tradition of *Teúkilat-ē Esasiye of 1924* which resulted in a strong legislature and majoritarian understanding of democracy. They emphasized in the constitutional debates the significance of the institutionalization of independent judiciary and strong constitutional court in order to establish limited government. Moreover, they refrained from including in the constitution the forms of direct popular government such as referendum, popular initiative and constitutional complaint.

[198] The members of the Ķstanbul Committee were severe critics of political parties and in line with this they defended a Constituent Assembly established on the basis of vocational representation (Karpat, 2009: 171). The professors of Ankara University, on the contrary, seemed to be liberal in political terms since their proposal was defending political pluralism and civil associations. In their proposal, for instance, Ankara Committee emphasized the need to establish a Constituent Assembly directly elected by the citizenry in order to ensure democratic legitimacy and argued that any constitution determined by the National Unity Committee and submitted to popular vote would lack democratic legitimacy (1960: 5). Karpat argues that in opposition to the members of Ankara Committee who were

Ankara University were included in the Council. However, the studies concerning the preparation of the draft constitution were carried out separately by the law professors and in the end they delivered two separate texts to the Constitutional Committee.[199]

In the following, I will elaborate on the arguments developed in the report of the Constitutional Committee for the justification of the new constitution and for its specific articles. This will deepen the debate and clarify further the perspective of the authors of 1961 constitution.

5.3 The Report of the Constitutional Committee and the Rationale for a New Constitution

The Report of the Constitutional Committee is critical for understanding the political position of the authors of the constitution and the philosophy of the new constitution.[200] Moreover, it sheds light on the self-perception of the framers of the constitution. Through the draft text of the constitution, the constituent will to found a new social order based on western forms of democracy and the rule of law is emphasized. In other words, the framers of the constitution engage in an act of *political reconstruction through the constitution* as they try to break with the principle of parliamentary supremacy of the previous constitutional era and introduce

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inspired by the modern concepts of political science, the members of Istanbul Committee were drowned within the theories of state defended by the nineteenth century European jurisprudence (Karpat, 2009: 172). The significant point for our discussion is that during the constitutional debates in the House of Representatives, particularly concerning a number of critical articles related to the principles of constitution, the Constitutional Committee is criticized by some representatives for departing from the proposal of Istanbul Committee. In this respect, it might be argued that the Constitutional Committee seem to adopt a more liberal and pluralist attitude than the Istanbul Committee in drafting the constitution.

[199] Professors Tahsin Bekir Balta, Yavuz Abadan, Süheyp Derbil, Kemal Galip Balkar, Associate Professors Arif T. Payaslıoğlu, Cemal Mıhçıoğlu, İbrahim Yasa, Doctors Bülent Daver, Şeref Gözübüyük, Necat Erder, Türkkaya Ataöv, Cemal Aygen, Taner Timur and Özer Ozankaya contributed to the preparation of the draft constitution submitted by Ankara University.

[200] The Report of the Constitutional Committee is submitted to the House of Representatives on 9 March 1961 and the discussions began on 30 March 1961.

parliamentary democracy based on moderate separation of powers as is the case in many Western (democratic) states.[201] New constitution contained distinctive principles of liberal democracy such as a comprehensive system of rights and liberties, moderate separation of powers and limited government with an independent judiciary and constitutional review, which are not contained in the founding constitution of the Republic, *Te*κ*kilat-ē Esasiye of 1924*. Yet it also preserved the constituent will embedded in the original founding event and signalled continuity in this regard as commitment to the Republican form of government and particularly to the Revolution Laws is underlined strongly. In other words, the authors of 1961 constitution took great pains to partake in the *constitutional reason* of the founding fathers in order to justify their practice.[202]

[201] Here I borrow Arjomandôs (2003) term in order to describe the position of the framers of 1961 constitution. Arjomand deploys the term ñpolitical reconstructionò in a different plain, in order to define the *new constitutionalism*, specifically the constitutional changes in many regimes of post-1989 era, which are marked by ñthe construction of new political communities, modernization or transition to democracy ï where socio-political forces and institutional interests are aligned behind competing and heterogeneous principles of orderò (Arjomand, 2003: 22). And he argues that Turkey entered into the phase of *ideological constitution making* with the constitutional amendment of 1928 and skipped to the phase of new constitutionalism only after the constitutional changes made in 2003 for aligning with European Union *acquis* (Arjomand, 2003: 9). He conceptualizes ideological constitutions as the *instruments of social transformation* where the dominant ideology of powerful actors is deployed to design the society. Arjomand stresses that for Turkey, the dominant ideology of social transformation was secularism throughout these years. Highly inspired by Arjomand, Shambayati also argues that the constitutions of many modern regimes aim at transforming the nation through the ideals of the constitution and Turkeyôs constitutions form no exception to this tradition (Shambayati, 2008: 99). Shambayati calls this process as *social engineering through constitutionalism* and argues that for Turkish leaders, the aim was most of all bringing ñthe nation to the level of contemporary civilizationò which is Western and secular (Shambayati, 2008: 99). Nevertheless, my considerations regarding 1961 constitution are not fully in accord with these two figures. Turkeyôs 1961 constitution is not an ideological constitution in pure sense. It also reflects the desire for political reconstruction of the constitutional order, particularly for transition to a democratic regime based on the rule of law.

[202] Regarding my deployment of Michelmanôs notion of ócconstitutional reasonô here, I deem necessary to mention some of his theoretical considerations. In fact, Michelmanôs considerations are significant for explicating the gaps in Habermasôs theory and bringing forth new dimensions to the deliberative democratic tradition (1995a, 1996a, 1996b, 1998). Similar to Habermas, Michelman aims to establish an internal relationship between the principle of national sovereignty and the rule of law. In accurate terms, he deals with the issue of democratic legitimacy of the constituted powers. Taking into consideration the complex and pluralistic conditions of modern societies, Michelman loosens Habermasôs requirement of citizensô participation in every act of legislation by proposing a constitutional division of legislative labor. In this respect, the citizens are required to merely participate in the determination of constitutional essentials and the functions of ordinary law-making and law-doing will be legitimized indirectly. In fact, Michelmanôs *jurisgenerative politics*, in which citizens severally evaluate the constitutional essentials in line with their own conceptions of life, fulfills two objectives: it provides a basis for democratic legitimacy for the entire juridico-political

In the Report, the authors of the constitution explained the need to write a new constitution in *toto* on the basis of an argument focusing on the shortages of the 1924 Constitution and inadequacies of the election law for the maintenance of a democratic form of government. It was argued that the parliamentary government system established by the 1924 constitution has turned into a government of majority violating the fundamental rights and liberties of the citizens and paralyzing the operation of democratic institutions. The lack of surveillance on the legislative culminated in the overwhelming domination of the governing party and paved the way for the undermining of minority. Moreover, the political disorder caused by the shortages of the constitution deteriorated when combined with the implications of the election law based on large districts, list system, single round and simple majority.

It is furthermore stated that as the governing Party tried to preserve its dominant position in the Parliament, these all culminated in the deviation from the main route of *democratic development* and indicated a deviation from the constitutional system, from the principles of *Western democracy* and from the principles the *Turkish Revolution*. In the Report, the Constitutional Committee referred to some of the indications of the deviation from democratic principles. These are mainly the denial

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system and transforms the individuals pursuing private interests into public regarding citizens (Ferrara, 1999: 135). Accordingly, it becomes at the same time *demogenerative* process and its product as *demogenerative law*. Moreover, Michelman argues that a constitution claims legitimacy on the basis of the expectation that its authors acted as if they were ôalways under lawõ. In this respect, the constitutional authors do not act arbitrarily when they are framing the constitution. They always act in conformity with a pre-existing regulative idea of political reason or right. This enduring and contentful idea of political reason or right ôsprings from the shared political culture and past of the self-governing peopleõ (Michelman, 1996b: 302). Michelman aims to bridge the gap between the constitutional authors and the consequent generations by introducing an imaginary ôconstitutional reasonõ, based on an ñexpectation of or commitment to some cultural, dispositional or experiental commonalityò shared by them all (Michelman, 1995a: 241). He incorporates normative and cultural elements in order to legitimize the first constitution of a polity. Even if we accept the naïve idea about the presence of such a *community ethos*, his theory still does not fully explain the legitimacy of the acts of constitution making in periods of civil war, revolutions and regime change. Here, I think that Michelmanõs concept of ôconstitutional reasonõ fits best for explaining the political position of the authors of 1961 constitution as they strive to legitimize the constitutional text by making direct citation to the founding constitution: they identify the principle of Republic as the defining aspect of the new constitution and Revolution Laws as the integral and unchangeable component of it. This endeavor might be read as a deliberate intention to prove that they are committed to the constituent will of the founding fathers, that they act ôalways under lawõ when they are framing the new constitution and as a consequence their work is legitimate.

of the opposition, the prevention of the free organization and operation of the political parties, restrictions on the press through economic and legal measures, manipulation of public opinion through the means of State Radio, illegally supported journals and publication bans, pressure upon judiciary, civil servants regime, partisan attitude in economic and social life and finally the restrictions of the rights and liberties of the citizens through a variety of laws. Moreover, it is stated that the governing party deviated from the essentials of the *Turkish Revolution* in order to get the support of ñanti-revolutionary segments of societyò.

In the Report, the Constitutional Committee described the urgent needs of society that became visible before the ó*Revolution of 27 Mayô* as the necessity to reformulate the institution of national representation and to ensure limited government. Moreover, the Constitutional Committee, similar to the vocabulary deployed in the Law no 1 and Law no 157, cited the self-defence of the nation and its right to revolution to lay the justificatory base for the new the constitution: ñThe deployment of the right of self-defence and revolution by the nation has been the rationale for a return to the principles of revolution and writing a new constitution in order to establish a State based on the rule of law within the framework of written essentials above.ò[203] Therefore, the *coup dô état* is conceived not as an undemocratic intervention of the military to the political field but as an exercise of self-defence and right to revolution by the *Nation* to return to the original founding event and reformulate the fundamental principles of the constitutional order.

In this respect, it might be argued that the rationale for the military coup is inextricably linked with the justification for making a new constitution and these are all explained by the ñaspirations of the entire citizenryò. The reference to the ó*right to*

[203] ñMilletçe bir meкru müdafaa ve ihtilal hakkēnēn kullanēlmasē, bir yandan inkēlap prensiplerine dönüкün, bir yandan yukarēda yazēlē esaslar dairesinde bir hukuk Devletinin kuruluкu yolunda akaî ēda sunulmuк olan yeni bir Anayasanēn yapēlēкēnēn sebebi olmuктur.ò The internal linkage established between the military coup and the new constitution is not only apparent in the report of the Constitutional Committee. In fact, it is cited in the statements of several representatives. For instance ķahap Kitapçē, the representative of CHP, invokes 27 May as the source of the strength and excitement of the new constitution (*TM, TD.*, Cilt 2, B: 34, 30.3.1961, p. 371).

revolution of the Turkish Nationô reiterated in the Report of the Constitutional Committee is deployed both for providing legitimacy to the Constituent Assembly and its subsequent task.[204] The military coup, enforcement of the Law no 1 and the establishment of the Constituent Assembly for the specific purpose of making a new constitution are all conceived as parts of a revolutionary moment reactivating the constitution-making power of the people in Schmittian terms.

[204] Here I deem a detailed explanation of Arendtôs perspective on the relationship between revolutions and public freedom necessary since I believe that the perspective of the Constitutional Committee approaches to a distorted version of her considerations. Arendtôs *Revolution and Public Happiness* (1960) and *On Revolution* (1963) are critical texts for revealing the vicious circle between the constituent and constituted powers in the theory and practice of modern constitutionalism. In other words, her contribution is significant to the extent that it reveals the problem of legitimacy of revolutionary beginnings and the authority of the first constitution. She makes a clear distinction between two, namely the revolutionary constitution which is a product of the people actively participated in the act of constitution making as in the case of American Revolution, and the non-revolutionary constitution which is a product of the government as in the case of French Revolution (Arendt, 1963: 143). According to Arendt, while in American case, authority of law is built on the constitution and the basis of power is established on the people themselves; in French case the basis of legitimacy of both power and law is formed on the ónationô. However, this fixation has inevitably culminated in the creation of the vicious circle between the constituent power and constituted power or the paradox of constitutionalism. In her comparative analysis of American and French revolutions, Arendt constructs a linkage between the idea of modern revolution and public freedom. She considers that the modern revolutions open the door to new beginnings which can enable realization of public freedom through the constitution making process. In this respect, she thinks that constitution making might be a major founding act, or the product of the revolutionary force of the people, to construct a public space for the actualization of public freedom (or *isonomy* in other terms) in which the division between the rulers and the ruled is eliminated and the citizens participate in determination of public matters in equal terms. On the other hand, she argues that modern revolutions might also culminate into two situations in which the institutionalization of public freedom fails. These are the institutionalization of constitutional government and the situation of continuous revolution. In these situations, the constitution becomes not an *enabling* but *safeguarding* act as it aims to put an end to the revolutionary force of the people as well as to limit the power of government. In this light, we might argue that Arendt constructs a mutually exclusive relationship between the pure political moment of revolution in which the constituent power of people is crystallized and the constitutional government where it is choked. The constitutional government, therefore, additionally signifies for Arendt the restraint on constituent power. In light of these explanations, I argue that the authors of 1961 constitution tend to assume their work as a revolutionary constitution as they see the military coup as an act of the people and the constitution making process as the institutionalization of a democratic state based on the rule of law. Therefore, they tend to legitimize the constitution making process by invoking the revolutionary force of the people and by emphasizing its emancipatory potential. However, in their conceptualization, the inclusion of fundamental rights and liberties of the citizens and political rights does not mean the institutionalization of public freedom implying the direct participation of citizens in determination of public political issues as is the case in Arendt. They rather take rights as negative liberties and a component of formal democracy.

It must be the result of such understanding that there takes place no serious debate in the Constituent Assembly concerning the legitimacy of writing an entirely new constitution.[205] Neither the members of the House of Representatives nor the National Unity Committee problematize the practice of writing a new constitution. Moreover, they do not question the legitimacy of their act. Indeed during the discussions in the House of Representatives it becomes evident that the representatives justify the practice of writing a new constitution in *toto* on the same basis by focusing on the gaps in the 1924 constitution and the consequent ñconstitutional violationsò of DP government.

On the other hand, the report of the Constitutional Committee signals a major change in the perception of the authors of the constitution: they now seem to acknowledge the necessary distinction between the republican form of government and democracy. Indeed the assumed identity established between the principle of national sovereignty and democratic form of government by the authors of previous constitutions began to be problematized as a result of the ten years rule of Democrat Party. Moreover, the authors of 1961 constitution began to consider the principle of the rule of law and the concomitant institutions indispensible for the proper functioning of democracy. The strong emphasis on the institutionalization of a democracy based on the principle of the rule of law in the draft constitution and during the discussions seems to emerge from such problematization.

After examining the rationale for the new constitution expressed in the report of the Constitutional Committee, I will deal in the following with the subject of how the authors of 1961 constitution construct the legitimacy of the constitution. Now I will not only benefit from the Constitutional Committee report but penetrate into the

[205] Mehmet Altēnsoyôs statement, representative of Republican Peasant Nation Party, forms the only exception of this silence. He defends that the constitution of 1924 should be amended instead of writing a new constitution (*TM, TD.*, Cilt 2, B: 35, 31.3.1961, p. 400). However, his argument is not supported by any other representative.

discussions in the House of Representatives and National Unity Committee in order to provide an extended debate.

5.4 Conception of the Legitimacy of 1961 Constitution by the Members of the Constituent Assembly

It might be argued in light of the constitutional debates that the authors of the constitution tend to ground the legitimacy of their practice and the concomitant constitution by invoking once again the constituent power of the people and their common will to live together in a *democratic republic*. It seems that for them, the overt reference to the abstract notion of national sovereignty added with the convention of the Constituent Assembly for the particular purpose of constitution making and the procedure stipulating a referendum for the approval of the constitution reinforce the basis of the legitimacy of their practice.

Once the constitutional debates in the House of Representatives are examined carefully, it becomes obvious that the constitutional authors strive to justify their practice which is closely tied to the *coup dôétat* of 27 May in reference to the founding constitution of the Republic and Mustafa Kemalôs will reflected in the principles of *Revolution*. The commitment of the Constituent Assembly to the founding act of the State becomes increasingly evident during the discussions of ósecond Republic.ô In the discussions, one also easily witnesses that the underlying reasons of the military coup of 27 May are reinterpreted by the members of the House of Representatives in order to justify the constitution making process and the reinterpreted meaning is substantially invoked for steering the process.[206]

One of the distinctive features of the discussions is that almost all members of the House of Representatives seem to appropriate and glorify the coup. In general, however, the members of the Constituent Assembly do not identify the incident as a

[206] This is mostly evident during the general Meetings no. 34, 35 and 36 in the House of Representatives.

ómilitary coup.ô Rather they insistently describe it as a órevolutionô and link it with civil insurrection. For instance, the president of the Constitutional Committee, Enver Ziya Karal, refers to the historic meaning of the órevolution of 27 Mayô as one of the principles that directed the work of the Committee.[207] For him, the military coup is an outcome of the Turkish nationôs desire for progress and it put an end to the ten years arbitrary rule of the Democrat Party.[208] In fact, Karal seems to conceive the military coup as a stage in the democratic development of the Turkish nation and the constitution as the product of the new era and mindset brought with it.[209] Cemil Sait Barlas, representative of CHP, similarly perceives the military coup as óa stage in the historical development of Turkish nation and Republic founded by Atatürk.ô[210] Such outlook is reflected in the speeches of many representatives, but becomes more visible in the statement of Osman Şefik Kşan, representative of CHP, as he asserts that the coup is an act of the nation aimed at the preservation and completion of óAtatürkôs revolution.ô[211]

It is in this respect that at the very beginning of the constitutional debates a group of representatives gives a proposal for the inclusion of a preamble in the constitution, which would convey the spirit of the constitution, particularly its moral and philosophical foundations, and explain how the present generation has been forced to engage into revolution, the last legitimate resort to take back its rights.[212] The

[207] *TM, TD.*, Cilt 2, B: 34, 30.3.1961, p. 364.

[208] *TM, TD.*, Cilt 2, B: 34, 30.3.1961, p. 365.

[209] *TM, TD.*, Cilt 2, B: 34, 30.3.1961, p. 366.

[210] *TM, TD.*, Cilt 2, B: 35, 31.3.1961, p. 405.

[211] ñYirminci asrēn, en asil, en ĸuurlu, en temiz ihtilali, iĸte böylece yaratēldē. Bu ihtilal, emsali her memlekette görülen askeri bir Hükümet darbesi olmaktan ziyade, kērk yēl önce yapēlmēĸ olan Atatürk ihtilalinin korunmasē ve nihai hedefine ulaĸmasē için giriĸilmiĸ bir millet hareketidir.ò *TM, TD.*, Cilt 2, B: 34, 30.3.1961, p. 386.

[212] These include Muharrem Kşan Kēzēloğlu and Bedrettin Tuncel (members of the Council of Ministers), Mehmet Esat Çağa (representative of the Head of State), Daniĸ Koper and Fethi Çelikbaĸ (representatives of artisansô and tradersô associations), Ferid Melen (representative of Van) and Nüvit Yetkin (representative of CHP) (*TM, TD.*, Cilt 2, B: 34, 30.3.1961, p. 367).

proposal meets with the overwhelming support of the members of the House of Representatives and even a number of proposals for preamble are presented to the meeting immediately after.[213]

In connection with the reverence to the military coup, there is a general tendency to refer to the practice of constitution making as the establishing of the foundations of the Second Republic, one of the distinctive characteristics of which is the institutionalization of a democratic form of government based on the rule of law. The act of constitution making is conceptualized indeed as a moment in the democratic development of the Turkish nation which began in the 1920s but is ruptured with the Democrat Party rule between 1950 and 1960. In this respect, we witness that the members of the Constituent Assembly identify the period until the military coup of 27 May as the era of the First Republic while the period after it as the era of the Second Republic. And they construct the binary opposition between the two republics on the basis of the ónundemocratic rule of Democrat Partyô and the introduction of western forms of democratic institutions based on the principle of the rule of law, such as the comprehensive system of rights and liberties for the citizens, the introduction of constitutional court, independence of the judiciary, establishment of a second camera in the Parliament and of *Yüksek Seçim Kurulu*, Supreme Board of Elections and guarantees given to political parties with the new constitution.

I have to emphasize that the reaction against the Democrat Party rule is so strong that it permeates the constitutional debates and is reflected even in the way the provisions are formulated. Kazım Orbay, the president of the House of Representatives, asserts for instance that the leaders of Democrat Party undermined the common good for their private interests and the óRepublican armyô in order to return the will of nation to its place established the Constituent Assembly.[214] Similarly, Kasım Gülek, the

[213] The proposals are submitted by Đsmet Giritli (representative of artisansô and tradersô associations) and Kemal Türkoğlu (representative of National Unity Committee).

[214] *TM, TD.*, Cilt 2, B: 34, 30.3.1961, p. 363.

representative of Adana, associates the Democrat Party rule with degeneration as he maintains that ñé ten years experience of democracy is unfortunately degenerated. The Revolution of 27 May was necessary in this respect. The Revolution of 27 May rescued the Turkish democracy from such degeneration. We are now laying the foundation of the Second Republic with this Constitution.ò[215]

The constitutive role of the military coup in the perspectives of the representatives and constitution making process is best reflected in Alp Kuranôs statement, the representative of National Unity Committee, as in the following:

> For that reason, those who have the political power, those who are preparing the new Constitution of Turkey today, I mean we, must put into practice the principles and the reasons of May 27 in the Constitution of the Second Republic. What are the reasons behind the April 28 incidents and May 27 Revolution? What were the principles that the coup of May 27 wanted to bring forward? It is possible to resume this with one sentence only: To integrate the Atatürk revolutions, the one and only living condition of the Turkish nation, into our country in such a way that no one could ever say or do anything at the expense of them. *To wipe away the enemies of Atatürk from Turkish political life for good.* Following these words, it may be told that there exists democracy and the coup of May 27 was initiated to establish true democracy. However, as you know democracy already exists in the revolutions of Atatürk. Atatürk revolutions are the democracy itself and without those it is not possible to neither think about democracy nor put it into practice. (voices of ôbravoô) [216]
> [*emphasis mine*]

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[215] ñé 10 yélék demokrasi tecrübesi maalesef soysuzlakta. 27 Mayés Ihtilâbé bundan dolayé lazémdé. 27 Mayés devrimi Türk demokrasisini bu soysuzlakmadan kurtardé. Şimdi yeni bir Anayasa ile Ikinci Cumhuriyetin temellerini atmaktayéz.ò*TM, TD.*, Cilt 2, B: 35, 31.3.1961, p. 433.

[216] ñBinaenaleyh, bugün siyasî iktidaré bilfiil elinde bulunduranlar, bugün yeni Türk Anayasasiné hazérlayanlar, yani bizler 2. Cumhuriyetin Anayasasénda 27 Mayésén yapélmaké sebeplerini ve ilkelerini gerçekletirmek zorundayéz. Nelerdir 28 Nisan olaylarené, 27 Mayés devrimini yaptéran sebepler? Nelerdir 27 Mayés ihtilâlinin gerçekletirmek istediği prensipler? Bunu bir tek cümle ile özetlemek mümkündür. Türk milletinin asgari ve yegâne, yakama kartéolan Atatürk devrimlerini, bir daha hiç kimsenin el ve dil uzatamayacaği é bir kekilde memleketimize yerletirmek. *Atatürk dükmanlaréné Türk siyasî hayaténdan kesin olarak tasfiye etmek.* Bu sözlerden sonra, belki denebilir ki, bir de demokrasi vardér, 27 Mayés ihtilâli, asél demokrasiyi gerçekletirmek için yapélmaktér. Fakat yüksek malûmunuzdur ki, Atatürk devrimleri içinde demokrasi bizatihi mevcuttur. Atatürk devrimleri demokrasinin kendisidir ve Türkiye'de Atatürk devrimleri olmaksézén, demokrasiyi ne dükünmeye, ne de gerçekletirmeye imkân vardér. (Bravo sesleri).ò*TM, TD.*, Cilt 2, B: 35, 31.3.1961, p. 408.

It is interesting that Kuran links the motivation for the military coup with the aims of the new constitution and such linkage seems to be shared widely by the representatives. They seem to internalize the arbitrariness of the military coup and in connection with this, the arbitrary making of the new constitution. This reflection is also supported by the general tendency not to question the legitimacy of their act. Kuranôs statement furthermore includes significant clues regarding the assumed enemies of the constitutional order. For him, these consist mostly of the enemies of *Atatürk* and *his revolutions*. Moreover, according to Kuran, the constitution of the Second Republic has to respond to three related questions: in which regime the Turkish nation could preserve its national existence and independence, in which regime it could precede to the stage of developed nations and in which regime the citizens could equally live in prosperity. And from his viewpoint, the answer to these questions is the ideal of western form of democracy, which has already been contained in *Atatürk*ôs will and in the history of the Turkish nation as reflected in the war of liberation and *Atatürk*ôs revolutions.[217] Therefore, Kuran refers to the constituent will inscribed in the founding constitution of the Republic despite his strong emphasis on the establishment of second republic.

Muhittin Gürün, the representative of the judiciary, on the other hand, describes the act of constitution making as a project and justifies the writing of a new constitution on the basis of the necessity to adjust the 1924 constitution in accordance with social developments and changing needs of the society.[218]

In this framework, the members of the Constituent Assembly consider the making of the constitution as the founding act of the Second Republic and themselves as the founders of it. Indeed, the emphasis on the Second Republic is felt strongly in the speeches of almost all members of the Constituent Assembly taking the floor in

[217] *TM, TD.*, Cilt 2, B: 35, 31.3.1961, pp. 408-411.

[218] *TM, TD.*, Cilt 2, B: 35, 31.3.1961, p. 415.

general discussions.[219] My impression and the significant point in terms of our discussion is that, for them, the Second Republic does not imply a rupture in terms of founding a new state but rather the continuation and a further stage of the First Republic founded in 1924 since the commitment to *Atatürk*ôs principles is preserved, particularly through the additional article 1 of the constitution.[220]

One of the most severe critiques of the notion of ôSecond Republicô is expressed by Emin Soysal, the representative of CHP, as he emphasizes the continuation of the republican regime founded in 1924.[221] Reminiscent of Schmittôs conceptualization of commissarial dictatorship, Soysal argues that the army intervened in order to remove the governing party violating the constitution and re-establish the constitutional order. Here Soysalôs belief in the idea of constitutional substance is revealed as he describes the process as a constitutional amendment in which the new constitution is rewritten in the framework of the principles of 1924 constitution. Soysal states that:

> The army defended the 1924 Constitution and the principles of the Republic that are its regime. As a continuation, we are amending the Constitution. The Republic continues to exist and will do so. é The Republic established by the Great Leader Atatürk continues to exist. It has been rescued from those who wanted to ruin and condemn it. I think the term Second Republic has been derived from France. Yes, the First and the Second Republic were established in France. The First Republic was declared there after the emperorship. After a

[219] The statements of Şahap Kitapçē (*TM, TD*., Cilt 2, B: 34, 30.3.1961, pp. 371-376), Đsmet Giritli (*TM, TD*., Cilt 2, B: 34, 30.3.1961, p. 376), Osman Şefik Đnan (*TM, TD*., Cilt 2, B: 34, 30.3.1961, p. 386), Mehmet Altēnsoy (*TM, TD*., Cilt 2, B: 35, 31.3.1961, p. 400), Bahri Yazē (*TM, TD*., Cilt 2, B: 35, 31.3.1961, p. 402), Alp Kuran (*TM, TD*., Cilt 2, B: 35, 31.3.1961, p. 407), Mühittin Gürün (*TM, TD*., Cilt 2, B: 35, 31.3.1961, p. 415), Kasēm Gülek (*TM, TD*., Cilt 2, B: 35, 31.3.1961, p. 433), Halil Akyavaı (*TM, TD*., Cilt 2, B: 35, 31.3.1961, p. 437), Đhan Özdil (*TM, TD*., Cilt 2, B: 36, 3.4.1961, p. 449), Ahmet Demiray (*TM, TD*., Cilt 2, B: 36, 3.4.1961, p. 450). Actually the list might be included with the statements of the members of the National Unity Committee such as Ahmet Yēldēz (*MBK, GKT*., Cilt:6, B: 81, 9.5.1961, p. 3) and Vehbi Ersu (*MBK, GKT*., Cilt:6, B: 81, 9.5.1961, p. 3).

[220] Though the draft constitution involves provisions concerning the establishment of the constitutional court, the first additional article forbids any attempt to claim the unconstitutionality of a number of laws promulgated in the early years of the Republic. These laws include the law on unification of education, the hat act, civil marriage provision of civil law, the law on the recognition of international law, law on Latin alphabet, law on the elimination of nicknames and dress law.

[221] *TM, TD*., Cilt 2, B: 36, 3.4.1961, p. 471.

> certain period of time, the Second Republic was declared. As a result of the Republican regime established by Atatürk, there is established neither emperorship nor dictatorship with amending the Constitution today. The government of National Unity has nothing to do with them. It only worked in terms of loyalty to the Constitution. [222]

The statement of Tarık Zafer Tunaya, the speaker of the Constitutional Committee, is also illuminating in terms of demonstrating how the authors of 1961 constitution regard themselves and legitimacy of the constitution. Tunaya compares the present Constituent Assembly with the first Grand National Assembly in order to underline its extra-ordinary powers. Tunaya indeed conceives the coup of 27 May as the exercise of the *Turkish Nationôs right to revolution against domination* proving the democratic maturity of the *Turks*, and their desire to live in liberty within national land. And he further states that the present Assembly works in the same heroic atmosphere with the first Assembly:

> Turkish Grand National Assembly formed a free, national and independent democratic Turkey 41 years ago with the act of ñDefense of Law.ò Similarly, today, the Supreme Assembly, just like the Assembly ñhaving extraordinary powersò, will seek for respecting the freedom, nationalism and independence of this country all the time, but at the same time enriching it with the gifts of the 20th century democracy. And as the Great Leader Atatürk says, content, successful and victorious Turkish Republic will exist forever. *(Strong applauses)*[223]

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[222] ñOrdu 1924 Anayasasınıve onun rejimi olan Cumhuriyet esaslarınızın müdafaasınıyaptık. Gene bu müdafaanın devamı olarak bizler de Anayasanın tadilini yapmaktayız. Halen Cumhuriyet devam etmektedir ve devam edecektir. é Büyük Atatürk'ün kurduğu Cumhuriyet devam ediyor. Onu sakatlayan, onu lekelemek isteyen ellerden kurtarılmıştır. İkinci Cumhuriyet tâbiri Fransa'dan alınan bir tâbir olarak kullanılmaktadır sanırım. Evet, Fransa'da Birinci ve İkinci Cumhuriyetler kurulmuştur. Orada imparatorluktan sonra Birinci Cumhuriyet ilân edilmiştir. Aradan bir müddet geçtikten sonra İkinci Cumhuriyet ilân edilmiştir. Halbuki Atatürk'ün kurmuş olduğu Cumhuriyet neticesinde, bugün Anayasanın tadili ile ne bir imparatorluk, ne de bir dikta rejimi kurulmuş değildir. Millî Birlik idaresinin Cumhuriyete fasıla veren dikta rejimi krallık ile uzaktan yakından alâkası yoktur. O, doğrudan doğruya Anayasaya sadakat bakımından çalışmıştır.ò *TM, TD*., Cilt 2, B: 36, 3.4.1961, p. 471.

[223] ñNasıl ki, bundan 41 yıl önce bir Müdafaayı Hukuk hareketiyle Türkiye Büyük Millet Meclisi hür, millî, bağımsız demokratik bir Türkiye kurmuşsa, bugün bu Yüksek Meclis de, o Meclis gibi «salâhiyeti fevkalâdeyi haiz» olarak bu memleketin hürriyetine, milliyetine, bağımsızlığına her zaman riayet eden, fakat aynı zamanda onu yirminci yüz yılın demokrasi nimetleriyle teçhiz eden yolda yürüyecektir. Ve Büyük Atatürk'ün deyimi ile mesut ve muvaffak ve muzaffer Türkiye Cumhuriyeti ilelebet payidar olacaktır (şiddetli alkışlar).ò *TM, TD*., Cilt 2, B: 37, 4.4.1961, p. 500.

As it is seen, the members of the House of Representatives conceive the principle of national sovereignty as one of the fundamental features of the Republic and more significantly as the source of legitimacy of the new constitution despite the suspension of 1924 constitution by the military coup. Additionally, their position does not go beyond the rhetorical deployment of the principle and remains far from a dialogical understanding as in the case of Habermas. In specific terms, they do not construct the legitimacy of the constitution on the basis of a democratic procedure. Indeed, this perspective shared almost by the entire representatives interestingly fits to Schmittôs conception of constitutional legitimacy.

Recall that Schmitt mentions two major cases regarding the subject: *constitutional elimination* and *constitutional annihilation*. The first, which makes sense for our case, refers to the elimination of the existing constitution by a revolution, *coup dôétat*, or statutory violations of constitutional laws but preserving at the same time the underlying constitution-making power. According to Schmitt, in such kind of circumstances the constitutional order has still democratic legitimacy because there always exists a *constitutional minimum* along with the constitution-making power. In other words, so long as the people continue to live together as a political unity, the *constitutional minimum* -the origin of the constitution- is not affected by such incidents (Schmitt, 2008: 140). Schmitt thinks that the legitimacy gap caused by these events can be compensated by the consent of the people. For him, people activate its constitution-making power anew in response to the new condition when the principle of constitution-making power of the people is acknowledged subsequently in the preamble or text of constitution and the new constitutional order meets with no serious resistance (Schmitt, 2008: 141). Similar to Schmittôs conception, which is centred on strong rhetorical but weak communicative terms, the members of the Constituent Assembly tend to think of the new situation caused by the military coup as a case of *constitutional elimination* and moreover as legitimate since the principle of national sovereignty and constituent will is preserved in the new constitution.

The continuation of the Republic founded in legal terms in 1923 is specifically highlighted by the members of the Constitutional Committee during the discussions concerning the first article of the draft constitution. Regarding the issue, Turan Günek, the speaker of the Constitutional Committee, asserts that the military coup of 27 May does not constitute a rupture in constitutional history.[224] On the contrary, it signifies the deliberate ―act of the Turkish army―s patriot sons aimed at protecting the Turkish Republic‖ as designated in the first article of 1924 constitution.[225] Günek states that the principle of republic is more than a mere article guaranteed in 1924 constitution. For him, the principle derives its origins from the unwritten sources of law, Turkish history and consciousness of the Turkish nation. Günek furthermore points out that this article constituted the main boundary when the Constitutional Committee was conducting its work. He precisely states that:

> Dear friends, when you have given responsibility to the Constitutional Committee for preparing a project of Constitution, we, as the Committee, have thought that we have probably the power to amend the whole constitution except for one matter on behalf of the Supreme Assembly. That matter is that amending the article (in 1924 Constitution) that rose out of the non-written legal rules that are superior to the Constitution as well as of the Turkish history and the social conscience of the Turkish nation.[226]

Günek continues that it is mainly for this reason that the notion of ―Second Republic‖ is not endorsed by the Constitutional Committee. Once the Republic is established in 1923, it would last forever. He adds that:

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[224] *TM, TD.*, Cilt 2, B: 40, 7.4.1961, pp. 666-7.

[225] *TM, TD.*, Cilt 2, B: 40, 7.4.1961, p. 667.

[226] ―Muhterem arkadaklarım, Anayasa Komisyonumuzu bir Anayasa projesi yapmakla görevlendirdi‖iniz zaman belki bütün Anayasayı de‖i tirme yetkisine, Yüksek Meclisinizin ve ona nevama vekâleten komisyonumuzun yetkisi bulundu‖unu, fakat bir hususta ise hiçbir yetkiye sahip olmadı‖ını dü ünmü tür. O da 1924 Anayasasında, hatta onun üstünde yazılı olmayan hukuk kaidelerinden, Türk tarihinden ve Türk milletinin topyekûn vicdanından do‖mu olan maddeye, ne lâfzında, ne yerinde en ufak bir tadil getirmeyi kendisinin yetkileri, kendisinin vazifeleri dı ında olarak telâkki etmi tir.‖ *TM, TD.*, Cilt 2, B: 40, 7.4.1961, p. 666.

> For that reason, *the military coup did not bring a new republic to Turkey. Likewise, the coup in Turkey did not assign your Supreme Assembly the duty of establishing the republic.* In this country, the Turkish bayonets that defended the republic founded by Atatürk and the people hand in hand, the unique Turkish Armed Forces, fulfilled their duty to secure, strengthen this republic and make it last forever as Atatürk put forward. That is why, our Commission does not find the concept of Second Republic compatible with the legal realities and expressions that is usually used to refer to a new constitution. Every generation will contribute to some extent to the republic inherited by us from Atatürk. And this will continue in such a way that nothing could prevent this from happening since the moment of the establishment of the republic.[227] [*emphasis mine*]

Günekôs statements also reveal that the members of the Constitutional Committee endorse the conceptual distinction between the constituent power of the nation and constituted powers. The Constituent Assembly is bounded by the original founding act. This explains why the republican principle and revolution laws are taken as the basis of the constitution yet to be written. Therefore, the authors of the constitution seem to construct the legitimacy of the Constituent Assembly and the constitution of 1961 by mobilizing an idea reminiscent of Schmittôs concept of commissarial dictatorship, that the Constituent Assembly is delegated by the nation with the authority to re-establish the constitutional order in accordance with the founding principles. Moreover, they seem to internalize the positive concept of constitution as in the case of Schmitt. The republican principle is conceived more than a legal norm; it constitutes the substance of the constitution in the sense that it forms the fundamental political decision regarding the concrete type of stateôs existence. It is in this framework that their identification of the army with the nation and the military coup with the nationôs will makes sense. And it is exactly for this reason that the

[227] ñBinaenaleyh, *Türkiye'ye ihtilâl yeni bir cumhuriyet getirmiкdeĝildir. Ve Türkiye'de ihtilâl, Yüksek Meclisinize yeni bir cumhuriyet kurma vazifesini de vermiкdeĝildir.* Bu memlekette Atatürk'ün ve onun yanēnda topyekûn milletin kurmuк olduĝu cumhuriyeti korumuк bulunan Türk süngüleri, Türk'ün güzide Silahlē Kuvvetleri bu cumhuriyeti tarsin etmek, bu cumhuriyeti kuvvetlendirmek, bu cumhuriyeti Atatürk'ün dediĝi gibi ilelebet payidar kēlmak vazifesini yerine getirmiкlerdir. Bu bakēmdan çok defa yeni bir anayasayē ifade etmek için kullanēlan ikinci cumhuriyet mefhumunu komisyonumuz hukukî realitelere, hukukî ifadeye pek uygun telâkki etmemektedir. Atatürk'ün bize hediye etmiк olduĝu cumhuriyete, her yetiкen kuкak, her yetiкen nesil tarafēndan bir кeyler katēlacaktēr. Fakat bu cumhuriyet kurulduĝu andan itibaren hiçbir kuvvetin mâni olamayacaĝē кeklinde yoluna devam edecektir.ò *TM, TD.*, Cilt 2, B: 40, 7.4.1961, p. 667.

Constitutional Committee involved in its proposal that the first article cannot be proposed to be changed. I think the establishment of a link with the constituent power contained in the historically first constitution might be the sign of their deliberate aim to construct the legitimacy of 1961 constitution.

The notion of óSecond Republicô and its meaning results in a lively debate among the members of the National Unity Committee as well. Ahmet Yıldız, for instance, acknowledges the continuation of the first republic but also draws attention to the radical change in society and the establishment of a new regime with the constitution of the Second Republic.[228] On the contrary, Suphi Karaman and Mucip Ataklı underline the endurance of the first republic. The striking viewpoint is expressed by Cemal Gürsel, the Head of the State, as he emphasizes the continuity between the two republics on the basis of the fundamentals of the regime and *Atatürk*ôs heritage. He states that:

> Friends, Ahmet Yıldız is right to a great extent in his opinions. The ideas supporting that the First Republic continues to exist along with the second one has some reasons. You know, the Fifth Republic was established in France. After every change the republics were named as ñfirst, second etc.ò, however, the essence did not change. There occurred a very big incident. The First Republic ended because of the mean actions of the governors of Democrat Party. After that, the Second Republic was founded. As a principle, in the First Republic we are commemorating Atatürk. However, we accept this coup as a continuation of the First Republic because we believe that the establishment is a work of art adopted by Atatürk and we wonôt let this work be ruined. Nevertheless, those who will write history will mention this as the Second Republic.[229]

[228] *MBK, GKT.*, Cilt:6, B: 81, 9.5.1961, p. 3.

[229] ñArkadaşlar, Ahmet Yıldız'ın düşüncelerinde büyük bir hakikat payı vardır. İkinci Cumhuriyet karşısında birinci Cumhuriyetin devam ettiği kabul eden fikirler bazı sebeplere dayanıyor. Biliyorsunuz, Fransa'da, Beşinci Cumhuriyet kurulmuştur. Her değişiklikten sonra Cumhuriyetlere birinci, ikinci denmiştir ama esas değişmemiştir. Büyük bir hâdise olmuştur. Demokrat Parti idarecilerinin pespaye hareketleri ile Birinci Cumhuriyet sona ermiştir. Bunun sonunda ikinci Cumhuriyet kurulmuştur. Birinci Cumhuriyette biz ideal olarak, sembol olarak Atatürk'ü anıyoruz. Ama biz, ideal olarak, idareyi Atatürk'ün kabul etmiş olduğu eser olarak kabul ettiğimiz içindir ki, bu büyük eserin parçalanmasına müsaade etmediğimizden dolayı bu ihtilâli Birinci Cumhuriyetin devamına kabul ediyoruz. Fakat tarihi yazanlar bunu ikinci Cumhuriyet olarak yazacaklardır.ò *MBK, GKT.*, Cilt:6, B: 81, 9.5.1961, p. 6.

In light of the discussions, we might say that apart from some exceptions, the notion of second republic generally signifies continuity, not rupture, in the republican regime for the members of the Constituent Assembly. The majority of the members of the Constituent Assembly seem to consciously refrain from insisting on rupture in presenting the justificatory base for their practice. They might have thought that the idea of rupture could distort their efforts to construct the legitimacy of the new constitution. Consistently with this impression, the constitutional authors consider their practice as a moment in the *nationôs democratic development* since the constitution of 1961 guarantees the principle of the rule of law along with the necessary institutions not existing in the previous one.[230] In fact, the debate sheds light into major questions of this thesis. The constitutional authors partake in the *constitutional reason* of the founding fathers to the extent that they are committed to the fundamental principles endorsed in the 1924 constitution. This is ensured mostly through the first article of the constitution and the additional article one which forbids the submission of the revolution laws to the constitutional court for unconstitutionality. It is within the context of this continuity that the constitutional authors conceive the military coup as an act of the nation by constituting an identity between the army and the Turkish nation and deliberately ground the legitimacy of the constitution.

The members of the Constituent Assembly seem to consider themselves as the second constituent assembly empowered directly by the nation following the war of liberation.[231] In this regard, they assume the writing of the new constitution as inherently legitimate from the outset. The arbitrariness of the military coup and the writing of the new constitution, instead of changing the existing one, are endorsed

[230] For instance, according to Tunaya, 1961 constitution signals the convergence of Turkeyôs constitution with the constitutions in Western (democratic) states. In this respect, it is a reflection of *democratic development of the Turkish nation* (*TM, TD.*, Cilt 2, B: 37, 4.4.1961, p. 501).

[231] In the last General Meeting of the Constituent Assembly in which the constitution is approved, Cemal Gürsel, the President of the State defines the present Assembly as the second Constituent Assembly: ñé Cumhuriyetimizin ikinci Kurucu Meclisini yüksek bakarēē ve 27 Mayēs dolayēēyla kutlar, derin saygē ile selamlarēm (ķiddetli alkēklar)ò (*KM, TD.*, Cilt 2, B: 15, 27.5.1961, p. 110).

without any questioning of legitimacy. Hence, they do not hold a consideration of legitimacy originating from the implementation of a democratic procedure as in Habermasôs theory. On the contrary, the strong rhetorical emphasis on the principle of national sovereignty seems to work at the expense of a dialogical understanding of it. It is true that the constitutional authors, particularly the members of the Constitutional Committee, acknowledge the significance of obtaining social consent through writing a constitution with abstract and impartial provisions. And they all mention the significance of the referendum process. Still their emphasis on the democratic procedure seems to be weak. It might be argued instead that their perspective comes close to Schmittôs conceptualization of constitutional legitimacy since they make substantial reference to the ñconstitution making power of the peopleò in order to explain their position. And as they value the referendum stage, getting the approval of the people at the end, their understanding of constitutional legitimacy comes closer to Schmittôs theory.

After explicating the conception of constitutional legitimacy of the members of the Constituent Assembly, I will elaborate in the following on a related subject, how they conceive the constitution in light of the constitutional debates.

5.5 Conception of the 1961 Constitution by the Members of the Constituent Assembly: The Constitution as an Instrument of Social and Political Development?

At the beginning of the constitutional debates, Enver Ziya Karal, the president of the Constitutional Committee, states that the Committee has taken into consideration the common good of the society in conducting its work.[232] The Committee aimed in this sense to draft a constitution which derived its origins from the ñnational foundations and dispositions including the highly esteemed values of the Turkish nation such as state building, devotion to the right and justice, protection of property and freedom of

[232] *TM, TD.*, Cilt 2, B: 34, 30.3.1961, p. 364.

conscienceò.[233] In his statement, Karal also cites the meaning of a constitution. From his viewpoint, the constitution is a product of negotiations, and its endurance is highly dependent on its capacity to adapt to social developments. This is the reason why some constitutions are partly amended and reinterpreted in order to meet the expectations and world view of the new generations.

In this context, Karal explains the general characteristics of the draft constitution and mentions firstly its commitment to revolutionary philosophy. According to him, the draft constitution of the Committee is revolutionary since it is the product of the órevolution of 27 May,ô and more significantly since it values *Atatürkôs revolutions* and introduces new institutions accordingly, and contains the principles enabling the nationôs desire for progress.[234] It is interesting that afterwards, he underlines that the constitution is not attached to any doctrine, thus it is impartial to any ideology, philosophy or mindset. And thirdly he states that the constitution is committed to the principles of democracy and the rule of law.

It is paradoxical that though *Atatürkôs revolutions* are highly esteemed and the principles of liberal constitutionalism and western form of liberal democracy are endorsed in the draft constitution, we see the tendency of the members of the Constitutional Committee to describe the text as a formal legal document. The situation gets more confusing as the Committee states in its report that they do not only aim the designation of certain state organs and the relations among them with the constitution, but also the inclusion of certain *ideological fundamentals* and comprehensive set of liberties. Hence from the outset they make explicit the political substance of the constitution in terms of preference for certain ideological premises despite their overt insistence not to do so.[235]

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[233] *TM, TD.*, Cilt 2, B: 34, 30.3.1961, p. 364.

[234] *TM, TD.*, Cilt 2, B: 34, 30.3.1961, p. 366.

[235] From a Rawlsian perspective, the willingness of the framers of the constitution to incorporate *Atatürkôs revolutions* along with the fundamentals of constitutional democracy into the constitution might be thought as a perfect instance of interaction of the political power with a *comprehensive*

The Committeeôs implicit but deliberate preference for a certain political position is crystallized along the constitutional debates. The political substance of the constitution is initially revealed in the report of the Constitutional Committee, and furthermore in the statements of the members of the Committee and of the House of Representatives throughout the discussions. It becomes clear that the constitution is considered as a frame including the preference for western type of parliamentary democracy based on the rule of law and positioned against the ideologies of communism and fascism and reactionary movements opposing revolution laws.[236] The political substance of the constitution in Schmittôs terms and the controversies over it are indeed illuminated particularly during the discussions concerning the second article of the constitution which defines the type of the state.

The enemies of the constitution are indeed disclosed throughout the discussions. Fascist and communist ideologies and additionally reactionary movements are identified as menace to the constitutional order of the state and unity of the nation. Moreover, a number of representatives insist that the constitution must have a distinctive ónational characterô and criticize the Constitutional Committee for not

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doctrine. Recall that, in *Political Liberalism*, Rawlsôs major aim is to construct a *political conception of justice* that could gain the consent of every citizen in a modern democratic society marked by conditions of plurality, and thus provide a *liberal principle of legitimacy* for the exercise of coercive power of the state (Michelman, 2003: 395). For Rawls (2007), the possibility of living in just and equal terms in a society depends on the institutionalization of the basic structure of that society (the constitutional essentials) in accordance with such a political conception of justice standing aloof from the religious, philosophical and moral doctrines held by the individuals living in that society. Deveci argues that in Rawlsôs theory, the political conception of justice as the criterion of legitimacy implies most of all *political neutrality with respect to comprehensive worldviews and ideologies* since these can be discriminatory and repressive towards their rivals when they come to power (Deveci, 2006: 132). The contrary of this perspective occurs in Turkish case first of all when the six principles included in the Republican Peopleôs Partyôs programme are incorporated into *Teúkilat-ē Esasiye of 1924* with the constitutional amendment of 1937. And in case of 1961 constitution, this becomes particularly valid when the demands of a notable number of representatives to incorporate the principle of nationalism into the second article of the constitution and its incorporation in the final stage in the preamble of the constitution are taken into consideration. Therefore, a significant aspect of legitimacy, political neutrality with respect to certain ideological baggage, seems to be ignored by the framers of 1961 constitution (together with the framers of 1937 constitutional amendment).

[236] For instance, Alp Kuran explains the political route of the constitution within the framework of an opposition to Marxism and acceptance of western democracy, which according to him, is already involved in the principles of *Atatürk* (*TM, TD*., Cilt 2, B: 35, 31.3.1961, p. 411).

drafting such a constitution. In this context, an overwhelming number of representatives insist on the inclusion of the principles of ŏTurkish nationalismô and órevolutionismô in the second article of the constitution.

In the second article of the constitution, the Commission enlists the democratic and laic character and underlines further that the state is based on respect for fundamental rights and liberties together with the principles of work and social justice: ñTurkish Republic is democratic and laic; it is based on human rights and the principles of labour and social justice.ò The article is criticized from three aspects: some of the representatives criticize the Constitutional Committee for not incorporating the principles of ŏTurkish nationalismô and órevolutionism,ô whereas some argue that the definition of the state on the basis of the *principles of work and social justice* might pave the way for a communist or statist regime, and finally some of them request the definition of the *principle of laicism* in the constitution. In fact, the demand for the inclusion of the principles of Turkish nationalism and revolutionism gave rise to prolonged discussions not only in the House of Representatives but also within the National Unity Committee and joint committee, and only after long hours of discussion the issue could be resolved.[237]

Regarding the principle of laicism, the kernel of the dispute is about whether the state could interfere in the religious sphere and control religious life through the regulation of religious education, religious practice, rituals and etc. Particularly the conservative representatives from the right of political spectrum demand that the principle should be specifically defined in the constitution as it is understood in western states; as the separation of state and religion and the non-interference of the state in religious

[237] The constitutional debate within the House of Representatives is concluded in line with the second proposal of the Constitutional Committee whereas the debate within the National Unity Committee resulted in the decision to include the principle of nationalism in the second article of the constitution. As a consequence, the issue is taken to the meeting of joint committee together with other contentious articles. The members of the joint committee agreed on the removal of the notion of nationalism from the second article of the constitution since the article stipulates the legal character of the state, but incorporation of the principle together with its definition in the preamble of the constitution (The Report of the Joint Committee on the Draft Constitution, annexed to *KM, TD*., Cilt 2, B: 15, 26.5.1961, p. 1).

affairs. The principle is mainly discussed and problematized in the House of Representatives in relation to the nineteenth article which designates the freedom of religion and conscience, and enables state intervention in religious affairs. In this respect, Abdülhadi Toplu, representative of Muk, criticizes the regulation of religious education by the state[238]; Sadettin Tokbey, representative of CKMP, argues that the article does not provide sufficient guarantee for believers[239]; and Cevdet Aydn, representative of Siirt, criticizes the foundation of the Presidency of Religious Affairs as a branch of public administration.[240] Therefore, the representatives do not challenge the principle; on the contrary they support it but object to the way of its designation in other articles of the constitution.

Contrary to this, the members of the Constitutional Committee and some representatives argue that the principle can only be defined within the specific conditions of Turkish society, and the state has to control the religious affairs. Tark Zafer Tunaya, the speaker of the Constitutional Committee, argues that the principle of laicism is the most significant element of Turkish revolution as well as a democratic necessity. It signifies above all the salvation of state administration from the fanaticism of religion and superstition, and prevention of social and political life from the tutelage of religious communities.[241] Muammer Aksoy, the speaker of the Constitutional Committee, similarly indicates that the principle of laicism must first of all rescue the State from the domination of religion.[242] He states that:

> é *considering the conditions of our country* we witnessed people who wanted to give secularism very broad and dangerous meanings like ñthe state is functioning under religionò. We want to emphasize and respond to this.

[238] *TM, TD.*, Cilt 3, B: 42, 11.4.1961, p. 93.

[239] *TM, TD.*, Cilt 3, B: 42, 11.4.1961, p. 94.

[240] *TM, TD.*, Cilt 3, B: 42, 11.4.1961, p. 95.

[241] *TM, TD.*, Cilt 2, B: 37, 4.4.1961, p. 503.

[242] *TM, TD.*, Cilt 3, B: 43, 12.4.1961, p. 123.

> Undoubtedly, secularism does not mean atheism. However, if secularism in the Western world, which has completely different social and political aspects, is recognized in our country as a whole, we reach negative results, not positive ones. Separation of religion and state is enough for the West to reach its secularism objective. Nevertheless, that would not be applicable for our main goal. If religion, even institutionalized, remains out of the control of the state, religion could become a political power, because of the reasons I will mention in a while, and indeed it did from time to time. Ultimately, theocratic state could even be established exploiting the hesitation of the public where general suffrage prevails but the rate of literate people and those who are going to school is relatively low. In other words, the freedom of conscience and the principle of laicism could terminate entirely.[243] [*emphasis mine*]

In this respect, Aksoy argues that the principle of laicism should be defined within the specific conditions of Turkish society: ñThe principle of laicism has settled there. Yet we have still those tendencies striving to go back, in other words the political reactionaries, social reactionaries, any kind of reactionaries that want to make union with religious reactionaries.ò[244] At the end of the discussions, the viewpoint of the Committee predominates and the relevant articles, namely the nineteenth article concerning the freedom of religion and conscience and the additional article concerning the presidency of religious affairs, are finalized respectively.

On the other hand, a number of representatives object to the definition of the state on the basis of *principles of work and social justice* since for them this would impose

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[243] ñé *memleketimizdeki ıkartlar göz önünde bulundurulunca*, lâikliği e, ódevletin, dinin vesayeti altına girmesi sonucuna ulaıtıranô pek geniı ve tehlikeli manalar vermek isteyen kiıilere ıahit olduk. Bunu belirtmek ve cevaplandırmak isteriz. Ķüphesiz ki lâiklik, dinsizlik demek deği ildir. Ancak, bu alanda tamamen farklı sosyal ve siyasi geliıme ve ıartlara sahip olan Batı alemindeki lâiklik kavramı, bizde yüzde yüz kabul edilirse, müspet deği il tamamen menfi bir sonuca ulaıılır. Dinle Devletin birbirinden tamamen ayrılması, Batıda lâikliği in hedefine ulaıması için kâfidir. Fakat bizde asla gayeye hizmet edemez. Din, teıkilatlandığı ı zaman bile Devletin kontrolü dıında kalırsa, bizdeki biraz sonra arz edeceği im özelliklerden dolayı, din siyasi bir kuvvet haline gelebilir ve zaman zaman gelmiıtir. Nihayet, genel oyun kabul edildiği i fakat okuma yazma bilen ve tahsil görenler nispetinin çok düıük olduğu bir memlekette, halkın bir an için gaflet göstermesinden faydalanılarak ñteokratik devletò hedefine bile ulaıılabilir. Yani neticede, vicdan hürriyeti ve lâiklik esası tamamen sona erebilir.ò *TM, TD.*, Cilt 3, B: 43, 12.4.1961, p. 122.

[244] ñLâiklik prensibi oralarda tam olarak yerleımiıtir. Bizde ise hâlâ herhangi bir alanda geriye dönme temayülü yani siyasi irticalar, sosyal irticalar, her nevi irticalar, hep dinî irticaın ittifakına müracaat etmektedir.ò*TM, TD.*, Cilt 3, B: 43, 12.4.1961, p. 122.

statism in economic policy, hinder private entrepreneurship and liberties such as right to property and succession. They further argue that the article carries the potential for the adoption of a communist regime.[245] It is true that all members of the House of Representatives agree on the objective of economic development and the necessity of state intervention in order to fuel economic activity. Still a number of representatives devoted to economic liberalism bring harsh criticisms to the members of the Constitutional Committee for implicitly favoring *statism*, *socialism* and even *communism* in designating the articles. The dispute on *statism* extends to other related articles of the constitution, regulating particularly confiscation and nationalization, and results in comprehensive discussions about the proper limits of free market economy, public/private distinction and etc.[246] These representatives tend to object to state intervention in the economy for they generally consider it as a sign of restriction of economic activity. The members of the Constitutional Committee, on the other hand, try to justify their proposals on the basis of the general principles of public administration and the practices of other countries. Above all they emphasize the requirement for a constitution to be impartial and abstract in order to provide the general framework ensuring the equal interest of all.

To give an example, the process of confiscation defined in the 38th article of the draft constitution cause severe controversy in the House of Representatives as a number of representatives consider the regulation detrimental to private property. Hence they demand a detailed article addressing even some concrete cases and thus minimizing the possibility of infringements on the right to property. Against these demands and

[245] See the statement of Fethi Çelikbaş, the representative of chambers and artisans (*TM, TD.*, Cilt 2, B: 36, 3.4.1961, p. 463).

[246] In the initial draft of the constitution, the processes of confiscation and nationalization are regulated in the 38th article. However, the content of the article received severe criticisms from a number of representatives devoted to economic liberalism as they think of the regulation detrimental to private property and entrepreneurship. Hence a number of change proposals are given and the articles are submitted to the Constitutional Committee for reconsideration. In the second round discussions, the Constitutional Committee came with two articles (38th and 39th articles) regulating confiscation and nationalization separately. Here I am referring to the second round discussions during the 56th and 57th meetings of the House of Representatives.

criticisms, Aksoy reiterates the impartial and abstract character of the constitution as in the following:

> é the provisions of our constitution, the limits of property rights were mentioned free of the doctrines, within obligatory terms. é .Here we are only preparing a framework. There is no single thing inside. Let the next generations fill this blank according to the principles of law, justice and the needs of the country. *(Applauses).* [247]
>
> Our duty as the Constituent Assembly is to adopt the provisions that would provide the democratic and social conditions that the coming political powers would need on the one hand, and to set the boundaries that should not be passed in the future even by the law-makers on the other hand. [248]

In another case regarding the article on nationalization, Turan Günek responses against the accusations toward the Constitutional Committee that:

> é I would like to indicate that the article is compatible with the principles of administrative law adopted by all writers, books, laws and countries as I concern that some of our friends consider that we are at variance with them in terms of economic doctrine.[249]
>
> é It is not possible for the articles of this Constitution prepared by the representatives of the Turkish nation to reflect any private or individual interest of any class. Turkish nation made their representatives work on a Constitution

[247] ñé anayasamēzdaki hükümler, hususiyetle mülkiyet hakkēnēn sēnērlarē, doktrinlerden uzak olarak, zaruri olan ölçü içinde vazedilmiktir. é Biz burada sadece bir çerçeve hazērlēyoruz. Çerçevenin içi bomboktur. Bok olan bu çerçevenin, hukuk esaslarēna, adalete ve memleket ihtiyaçlarēna uygun olarak doldurulmasēnē gelecek nesillere bērakalēm (Alkēlar).ò *TM, TD.*, Cilt 4, B: 56, 28.4.1961, p. 422.

[248] ñBizim bir Kurucu Meclis olarak vazifemiz, bir taraftan gelecekteki iktidarlarēn lüzum görecekleri demokratik ve sosyal hal suretlerini saî layacak hükümleri kabul etmek; diî er taraftan da, gelecekteki kanun koyucunun dahi akmamasē lazēm gelen sēnērlarē bugünden koymaktēr.ò*TM, TD.*, Cilt 4, B: 56, 28.4.1961, p. 435.

[249] ñé madde münasebetiyle bir defa daha arkadaklarēmēzēn komisyonla sanki bir iktisadi doktrin ihtilafē içindelermik gibi bir kanaate sahip olmalarē, maddenin getirmik oluî u hukuki hudutlar içinde münakaka ve müzakere yollarēnē kapayacaî ēndan endike ettiî im için maddenin idare hukukunun bilcümle müellif, kitaplar, kanunlar ve memleketler tarafēndan kabul edilmik esaslardan bakka bir key olmadē ēnē ikaret etmeyi yerinde telakki ederim.ò *TM, TD.*, Cilt 4, B: 57, 29.4.1961, p. 462.

that would guarantee the welfare and freedom of all citizens and bring bright days for everyone.[250]

At the end of the discussions, the articles in question are finalized partly by taking into account the opponentsô proposals. In this light, it might be said that the constitutional debates in the House of Representatives take place in a discursive environment to a certain extent.[251] The procedure for parliamentary discussion enables the expression of even harsh criticisms against the proposals of the Constitutional Committee, and whenever it is needed the time allowed for the representativesô statements is prolonged to enable a healthy debate. The parties to the discussion bring forward their claims and try to justify them through rational discourses including pragmatic, ethico-political and moral discourses in Habermasôs terms. It remains controversial whether the result of all discussions ends up with the choice of policies or decisions that would be in the *equal interest of all* as is the aim of Habermasôs theory. Yet it might be still argued that when especially the parliamentary discussions for *Teúkilat-ē Esasiye of 1924* and constitutional amendment of 1937 are taken into consideration, the argumentation processes concerning most of the issues in the House of Representatives constitute a significant change and signal an increase in discursiveness in political will formation.

In addition to these debates, we see that a significant number of representatives criticize the entire constitution as not being ónationalô on the grounds that the principle of (*Atatürk*ôs) nationalism (understood in terms of the *unity of the nation on the basis of a shared cultural and historical heritage*) is not mentioned. During the general discussions about the draft constitution, the dispute begins with a number of representatives criticizing the draft constitution as being scientific but not

[250] ñé Türk Milletinin mümessilleri tarafēndan yapēlmēú olan bu Anayasa maddelerinde bildiî iniz gibi hiçbir zümrenin hususi ve úahsi menfaatleri bulunmasē da mümkün olmayacaktē. Türk Milleti topyekûn bütün fertlerinin refahēnē, hürriyetini ve güneúli ufuklara gitmesini temin edecek bir Anayasa üzerinde mümessillerini çalēútērmēútē.ò *TM, TD.*, Cilt 4, B: 57, 29.4.1961, p. 469.

[251] The Constitutional Committee generally insists on its own proposals during the reconsideration of the articles on the basis of the accepted amendment proposals in the general meeting of the House of Representatives. In fact, this is severely criticized by a number of representatives.

ónationalô.[252] They criticize the Committee for not incorporating the principles of ónationalismô and órevolutionismô in the second article of the constitution.[253] Rauf Gökçen, representative of State Presidency, stresses for instance that the principle forms the basis of the *national consciousness* and hence its absence creates a gap in the *spirit of the constitution*.[254] The principle of nationalism is generally conceived by these representatives as an antidote against communist in the sense of internationalist, and racist movements. The representatives consider that the principle might serve to promote national unity and prevent society from extreme rightist and leftist ideologies.

In response to these criticisms, members of the Constitutional Committee generally refer to the universality of the constitutional principles and advocate that they are in line with the principles of western democracy. Aksoy emphasizes the formal character of the constitution and insists that the constitution does not favour any doctrine or party programme such as *statism*, liberalism and socialism.[255] He stresses that the constitution is fitted to the requirements of modern century since it enables the implementation of liberal, *statist* or socialist party programmes respectful to human rights, democracy and the rule of law, but not to communism or the liberalism of the nineteenth century as such. He specifically maintains that:

> Friends, there is no doctrine in this Constitution. There is no party program in this Constitution. There is neither statism, liberalism, socialism nor any ñizm.ò This Constitution has no colour but that does not mean that it does not have a character. It has a character. It is a Constitution that is suitable to the level of modernism that the 20th century reached and that allows the implementation of any party program. There could be implemented statism or liberalism but never communism. You can apply socialism because it respects human rights,

[252] Fakih Özfakih (CHP), Cevdet Gebeloğlu (Bitlis), Rauf Gökçen (State Presidency), Remziye Batırbaygil (National Unity Committee) and Şefik Işıkan (CHP) are among these representatives.

[253] *TM, TD*., Cilt 2, B: 36, 3.4.1961, pp. 455-92.

[254] *TM, TD*., Cilt 2, B: 36, 3.4.1961, p. 459.

[255] *TM, TD*., Cilt 2, B: 36, 3.4.1961, p. 494.

> democracy, and the rule of law. Besides, it has the social mentality. Likewise you can implement the liberalism of the 20th century because it also recognizes the human rights and respects human dignity. I am not talking about the liberalism of the 19th century that uses 8-aged children for cleaning the chimneys and say ñafter climbing the chimneys three times, I do not care if they die or not. (Applauses)[256]

Additionally, by citing the statement of Celal Nuri Bey, the speaker of the Constitutional Committee drafting *Teşkilat-ı Esasiye* of 1924, Aksoy emphasizes that the constitution which is the work of ôTurkish Nationô is in perfect accordance with its needs.

Tunaya similarly expresses that the constitution incorporating republican and unitary state with parliamentary democracy and with the principles of laicism and social welfare encompassed in its unity the principle of nationalism.[257] More significantly, he makes citation to the borders of the constitution by bringing its impartiality to the fore. He maintains that:

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[256] ñArkadaşlar, bu Anayasada asla doktrin yoktur. Bu Anayasada hiçbir partinin programı yoktur. Ne devletçilik vardır, ne liberalizm, ne sosyalizm ve ne de her hangi bir «izm» vardır. Bu Anayasa, renksiz, -fakat renksiz dediysek karaktersiz değil - karakter sahibi bir Anayasadır. 120 nci asrın ulaştığı medeniyet seviyesine uygun, her parti programının tatbik edilmesine imkân veren bir Anayasadır. Orada devletçilik de tatbik edilebilir, liberalizm de tatbik edilebilir; fakat komünistlik asla tatbik edilemez. Sosyalizmi tatbik edebilirsiniz, çünkü o da insan haklarına hürmetkârdır, demokrasiyi tanır, insan haklarını tanır, hukuk devletini tanır. Onun yanında sosyal zihniyete de sahiptir. Keza 20 nci asrın liberalizmini tatbik edebilirsiniz. Çünkü o da sosyal hakları tanır, insan haysiyetine gerçek mamada hürmet eder. Yoksa, sekiz yaşındaki çocukları, yüksek bacaları temizletmek işinde kullanan üç defa inip çıktıktan sonra, ölürse ölsün beni ilgilendirmezô diyen 19 ncu asrın liberalizmini değil. (Alkışlar)ò *TM, TD.*, Cilt 2, B: 36, 3.4.1961, p. 494. Here, Aksoy tries to explain their perspective in writing the constitution on the basis of political neutrality towards *reasonable doctrines* in the public sphere thus reminding us Rawlsôs considerations in *Political Liberalism*. For Aksoy, and for the Constitutional Committee in general, political ideologies and worldviews consistent with universal principles of right form reasonable doctrines which might be freely defended in the *political public sphere* in Habermasôs terms. Yet the comprehensive doctrines that are not respectful to the fundamental human rights, democracy and the rule of law have still to be excluded from the constitutional order since they can destroy the constitutional order completely. For the framers of 1961 constitution, the unreasonable doctrines are comprised most of all of communist, fascist and reactionary ideologies. These might be added with economic liberalism of the nineteenth century as stated by Aksoy in his above statement. It is interesting that the framers of 1961 constitution give voice to Rawlsôs ideas three decades before their exposition in *Political Liberalism*.

[257] *TM, TD.*, Cilt 2, B: 37, 4.4.1961, p. 502.

> We do not consider the Constitution as a party program. The constitution is not a party program. It is a cadre that does not impose this or that economic ideology. *The constitution is such a cadre that all ideas are welcome on condition that they are not obsessed with communism and fascism, that they do not suffer from reactionism and do not ruin the indivisibility of Turkey.* These ideas could be put into practice. Institutions based on these ideas could be established. As such, in this picture both the statist and a liberal would find the opportunity to implement their programs having obtained the votes of the public. Parties that want or do not want to establish social rights and reforms via the state could prevail. Today, the State helps this area and has responsibilities in this area. Right now, it is recognized by all countries that this attitude is something above the parties. [258] [*emphasis mine*]

As it is clearly seen, the Committee meets the criticisms and particularly responds to demands regarding the incorporation of the principle of nationalism by emphasizing that the constitution has to be *impartial* and *universal* in its principles in order to ensure national unity and to meet the needs of society. However, as the debate deepens in the proceeding discussions, the underlying rationale behind striving for impartiality regarding the subject unfolds.

In the consequent discussions, the Commission proposes the notion of ónational stateô for amending the article as in the following: ñTurkish Republic is a national, democratic, laic and social State based on the rule of law and human rights.ò The notion of ónational stateô also receives several objections from the members of the House of Representatives.[259] It is generally seen that among these representatives

[258] ñBiz Anayasayõ bir parti programõ olarak kabul etmiyoruz. Anayasa bir parti programõ deùildir. Õu veya bu iktisadî görüúü empoze etmeyen bir kadrodur. *Anayasa öyle bir kadro ki, komünizm ve faúizme saplanmamak, irticaa gitmemek, Türk bütünlüùünü parçalamamak úartõ ile her türlü fikirler serbestçe ileri sürülebilir.* Bu fikirler tesir sahasõ bulabilirler, bunlara dayanan müesseseler kurulabilir, öyle ki bu tasarõ içinde bir Devletçi de bir liberal de, halk, oyu ile kendilerini iú baúõna getirdiùi takdirde programlarõnõ uygulamak imkânlarõnõ bulacaklardõr. Sosyal haklarõ ve reformlarõ Devlet vasõtalarõ ile gerçekleútirmek isteyen partiler veya istemeyen partiler bulunabilir. Zamanõmõzda Devlet bu sahaya yardõm etmekte ve Devlet bu sahada ödevli kõlõnmaktadõr. O kadar ki, böyle bir tutumun partiler üstü bir mesele olduùu artõk bütün dünya memleketlerinde görülmektedir.ò *TM, TD*., Cilt 2, B: 37, 4.4.1961, p. 506.

[259] Ahmet Karamüftüoùlu (agriculture associations), Kasõm Gülek (Adana), Abdülhadi Toplu (Muú), Hamza Eroùlu (CHP), Õemsettin Günaltay (CHP), Rauf Gökçen (State Presidency), Õevket Raúit Eyüboùlu (Manisa), Mehmet Hazer (CHP), Emin Soysal (CHP) and Ferid Melen (Van) are among the representatives harshly criticizing the Constitutional Committee for not incorporating the principle of nationalism into the constitution (*TM, TD*., Cilt 4, B: 54, 26.4.1961, pp. 288-305).

each presents his own definition of the principle. In this context, the principle is explained among others as to strive for the progress of the nation; as an element of social policy or as cultural unity. Toplu, inspired by the political atmosphere of the 1920s, describes the principle as a panacea against the external influences like *Arab racism*, *panislamism* and *slavism* and integrates it with the cold war conditions as an antidote against domestic *communist imperialism*.[260] One of the most striking viewpoints comes from Gökçen as he states that the Turkish State cannot be vested with any political ideology other than nationalism.[261] And the other comes from Kasēm Gülek, representative of Adana, as he indicates that the principle does not originate from the party programme of CHP but from *Atatürk*.[262] The common element in their perspective is the emphasis made on *Atatürk* and Turkish revolution. In fact, the constitutional debate is overdosed with nationalist assertions as Hamza Eroĵlu, representative of CHP, puts stress on the Turkish identity and maintains that ñThe principle of ónationalismô must be involved in the Constitution for the future of the Turkish State and the existence and unity of the Turkish nation. I do not recognize any thing other than Turk on these lands, and believe in whom saying ói am Turkôò[263]

Against these sharp evaluations, Aksoy reiterates the objectivity of their proposal and argues that nationalism is an ideology adopted by nations but not by states.[264] And he furthermore refers to the specific meaning of the principle in international law and indicates that the inclusion of the principle in the constitution would pave the way for the right to self-determination of minorities within national borders. Tunaya

[260] *TM, TD.*, Cilt 4, B: 54, 26.4.1961, pp. 298-9.

[261] *TM, TD.*, Cilt 4, B: 54, 26.4.1961, p. 295.

[262] *TM, TD.*, Cilt 4, B: 54, 26.4.1961, p. 297.

[263] ñTürk Devletinin istikbali için, Türk milletinin varlēĵ ē ve birliĵ i için, ómilliyetçilikô ilkesinin Anayasada yer almasē lazēmdēr. Ben bu topraklar üzerinde Türkôten baĸka bir ĸey tanēmēyor ve ben ôTürkümô diyene inanēyorum.ò *TM, TD.*, Cilt 4, B: 54, 26.4.1961, p. 298.

[264] *TM, TD.*, Cilt 4, B: 54, 26.4.1961, p. 291.

expresses a similar viewpoint and argues that *Atatürk*ôs nationalism aimed at the foundation of an independent and democratic nation state, and this objective has been accomplished so far.[265] Yet the principle might be interpreted differently in the context of current international developments. As the Turkish State has adopted the human rights regime of western states, the principle could be understood as self-determination in the international law and this might pave the way for the emergence of separatism.[266] Tunaya in fact seems to allude to the Kurdish people without giving an exact definition but by making direct reference to the people living in the region encompassing eastern part of Turkey and Iraq, Iran and Syria.[267]

The dispute about the incorporation of the principles of nationalism and revolutionism into the second article of the constitution is revived during the constitutional debates in the National Unity Committee. While some members of the Committee advocate the principle, some others object to its incorporation.[268] Mehmet Özgüneк argues for the inclusion of the principle into the constitution since he considers it necessary for achieving unity in language and culture.[269] According to him, *Atatürk*ôs revolutions might be grouped into two: westernization (Batēdēk) and nationalism. In this respect, the elimination of the principle of nationalism and revolutionism from the constitution would certainly imply disabling one of *Atatürk*ôs

[265] *TM, TD*., Cilt 4, B: 54, 26.4.1961, p. 302.

[266] *TM, TD*., Cilt 4, B: 54, 26.4.1961, p. 303.

[267] In the end, any of the amendment proposals brought by the above mentioned members of the House of Representatives are accepted. The article of the Committee is submitted to open vote and is accepted in the House of Representatives with 136 yes votes against 50 no and 7 hesitant votes.

[268] Suphi Karaman, Kadri Kaplan, Sami Küçük, Mehmet Özgüneк, Suphi Gürsoytrak and Kamil Karavelioʃlu argue for the incorporation of the principle (*MBK, GKT*., Cilt:6, B: 81, 9.5.1961, pp. 8-13). In the end of the voting, the members of the National Unity Committee agree on the inclusion of the principle of nationalism, but not the principle of revolutionism, into the constitution. Nevertheless the majority of them advocate its definition in the constitution otherwise they worry that it could result in Turkism or Turanism.

[269] *MBK, GKT*., Cilt:6, B: 81, 9.5.1961, p. 9.

arms. Besides, he assures that the principle would not cause separatist movements as its presence in the constitution for forty years has not resulted in such a case.

Kamil Karavelioğlu conceives the principle as a directive for domestic politics that would basically serve to assimilate the Kurdish minority living in the southern and eastern parts of the country. Regarding the subject, he maintains that:

> I think the reason why Turkish states are collapsing is lack of a strong ground. *It means minorities inside the country could not be made Turkish. We are also in the same situation today. Today, making the Southerns and Eastern Anatolia Turkish is one of the fundamental duties of the State.* There is nothing wrong with ñnationalismò. Saying this we do not expect anything but National Pact and our borders. We need this inside our borders. Let nationalism be mentioned in the Constitution as an abstract concept and be as a directive. [270] [*emphasis mine*]

Similarly, Kadri Kaplan considers the principle fundamental for the persistence of the state. For him, the principle would contribute to national unity by assimilating minorities.

> Dear friends, you would agree that we need an indivisible nation within the boundaries of this country having a common spirit. The persistence of this country depends on that. Some of our friends said that there are some distinctive matters. é In this country, everyone is Turkish except for some minorities. Why are we hesitating to stress this here? *It is necessary to persuade gradually those who do not consider themselves Turkish that they are Turkish, and to strengthen the grounds of this community.* When attached to Ottomanism and arabis, the community began to be separated. Even the notion of Theocratic State did not it.[271] [*emphasis mine*]

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[270] ñBen Türk devletlerinin yıkılmasının sebebini zeminin sağlam olmayışında bulurum. é *Devlet içindeki azınlıkları Türkleştirememiştir. Bugün biz de aynı durumdayız. Bugün, Güney - Doğu Anadoluyu Türkleştirmek Devletin esas vazifelerindendir.* «Milliyetçiliğin» hiçbir mahzuru yoktur. Bunu ifade ederken, Misakı Millî dışında, hudutlarımız dışında hiçbir şey beklemiyoruz. Ama hudutlarımız içinde buna ihtiyaç vardır. Milliyetçilik mücerret (soyut) bir kelime olarak Anayasaya girsin. Anayasada bir direktif olarak bulunsun.ò *MBK, GKT.*, Cilt:6, B: 81, 9.5.1961, p. 12.

[271] ñŞunu takdir buyurursunuz ki, muhterem arkadaşlar, bu memleketin sınırları içinde müşterek bir şuura sahip olan bölünmez bir milletin mevcut olmasına lâzımdır. Bu memleketin bekasına bağlıdır. Yine arkadaşlarımız ifade buyurdular, bazı ayrıcalıklı unsurlar vardır dediler. é Bu memlekette bir kısım azınlık müstesna hepsi Türk'tür. Bunu burada perçinlemekten niye çekiniyoruz. *Türkiye Cumhuriyeti içinde kendini Türk saymayanlara Türk olduğunu yavaş yavaş işlemek ve bu cemiyeti sağlam temeller*

Suphi Gürsoytrak expresses a similar viewpoint when he states that ñDear friends, the whole matter is to prevent the minorities from playing a role in the future. If we do not include the principle of nationalism in the Constitution, any government could do nothing when the minorities demand to live in their own ways, to have separate schools and etc.ò[272]

The statements of the members of the National Unity Committee are significant to manifest a widely shared prejudice that national or ethnic identity could be constructed on the basis of the constitution. This point of view clearly lacks sociological imagination. And it ignores the specificities of the historical context.

It might be argued in the light of above mentioned discussions in the House of Representatives that the members of the Constitutional Committee object to an explicit reference to the principle of nationalism in the constitution since from their viewpoint this might either disturb Kurdish minority and trigger movements like Turkism and Turanism or enable Kurdish minority to claim right to self-determination, and in the end might result in national decomposition. Thus departing from these worries, they generally argue for the incorporation of universal principles to the constitution. The members of the House of Representatives demanding the incorporation of the principle try to justify their proposal, on the other hand, by reference to the aim of ensuring national unity. A notable number of National Unity Committee members goes further and interpret the principle of nationalism fanatically as an ideological armoury to assimilate minorities and thus to achieve national unity. The principle is expected to serve mainly as a directive to transform minorities into individuals having the identity of the ôTurk.ô

üzerine oturtmak lâzımdır. Osmanlılığa başlandığı gün, Arapçılığa başlandığı gün ayrılmaya doğru gitmiştir. Dini Devlet tabiri dahi kurtaramamıştır.ò *MBK, GKT.*, Cilt:6, B: 81, 9.5.1961, p. 13.

[272] ñEfendim, bütün mesele azınlıkların ilerde herhangi bir rol oynamasını önlemektir. Biz milliyetçilik umdesini Anayasaya koymazsak, azınlıklar, ôbizi, siz şu istikamete tevcih edemezsiniz. Biz ayrı okul isteriz, vesaireé ô dedikleri zaman bu Anayasa karşısında hiçbir Hükümet hiçbir şey yapamaz.ò *MBK, GKT.*, Cilt:6, B: 81, 9.5.1961, p. 13.

In this framework, a change in the perception of the members of the Constituent Assembly is observable. During the discussions related to the constitutional amendment of 1937, the members of the Assembly considered the six principles included in the programme of CHP as the key to national unity and ascribed them to the entire citizenry. Constitutional debates in 1961 demonstrate however that the principles of national unity are now considered fewer, mostly *Atatürkôs nationalism* and sometimes incorporated with the objective of *national development.* Besides, the representatives apparently refrain from reducing the principle into an element of party ideology contrary to the case of 1937 constitutional amendment in order to endow it with a more common outlook. Moreover, the principle of nationalism also seems to be defined in more rigid terms, particularly during the debates in the National Unity Committee, as it is strictly associated with Turkish ethnic identity at the expense of other, i.e. Kurdish, ethnicities. In this case, the principle of nationalism is deliberately conceived as an instrument of assimilation in the statements.

The debates regarding the second article of 1961 constitution shed light on the perception of the members of the Constituent Assembly about the constitutional principles. After a careful scrutiny, we encounter with two dominant attitudes. One major perspective is generally held by the members of the Constitutional Committee. They, on the one hand, strive for objectivity in their statements and emphasize during the discussions that the constitutional principles have to be universal, not partial reflecting the preference for certain ideologies like nationalism, *statism* and etc. Letôs call this Rawlsian viewpoint of political justice, or neutrality in an anachronistic sense. They try to preserve the formal aspect of the constitutional text, the impartiality and abstractness of the constitutional principles. This is particularly relevant for their defence in debates related to nationalism and *statism*. On the other hand, they adopt a partial approach in the case of principle of laicism and emphasize the peculiarities of Turkish state and society in designating the relevant articles. Hence, the members of the Constitutional Committee seem to adopt a pragmatic attitude depending on the content of the controversial issue. They seem to be

oscillating between universal principles and particular necessities of the concrete situation in justifying the constitutional principles. It might be argued in this sense that their position oscillates between Schmittôs and Habermasôs considerations on the issue.

Recall that in Habermasôs theory, especially his considerations regarding constitutional review, constitutional principles are thought as norms that claim universal validity independently from the perspectives of constitutional authors. It is only if as norms they contribute and promote the equal interest of each citizen, the constitution could claim democratic legitimacy. On the other hand, for Schmitt, the constitutional decision represents the preference for certain ideologies or values of dominant political figures usually mystified with the abstract notion of the constitution-making power of people. And from Schmittôs viewpoint, this political aspect of the constitution, based on the friend-enemy distinction, forms the main source of its legitimacy. In case of 1961 constitution, the constitutional framers (the members of the Constitutional Committee) try to establish a delicate balance between the particular necessities of the Turkish context and the universal principles of law and democracy. The principle of laicism is articulated in the constitution on the basis of the requirements of the concrete situation. More precisely, the friend-enemy distinction plays a major role in the stipulation of the principle in the constitution. Whereas in case of the principle of nationalism, statism and in the argumentation processes related to fundamental rights and liberties (together with economic and social rights), the framers of the constitution seem to be expressing context transcending validity claims of communicative reason aimed at reaching objectivity. Their insistence on impartiality in discussions might be viewed as an example of this position.

We encounter with the second major perspective in the statements of a number of representatives and particularly of members of the National Unity Committee. Some representatives and members of the NUC as the most ideologically attached ones, advocate the principle of (*Atatürk*ôs) nationalism as the founding ideology of the

state, thus they argue for its inclusion in the constitution in order to designate the type of state.[273] In this respect, there is a general tendency to endorse constitutional principles as political value judgments and to preserve them as they are designated in the founding constitution of the state. A considerable amount of Constituent Assembly members indeed tend to designate constitutional principles through discussions in which they prioritize certain ideologies or segments of society.[274] Therefore, their approach seems to fit to a Schmittian conception of legitimacy based ñon friend-enemy distinction relying on a logic of exclusionò (Deveci, 2006: 131).[275]

After explicating the Constituent Assembly membersô understanding of constitution and the basis of its legitimacy, I will elucidate in the following how the members of the Constituent Assembly conceive the constitutional review process.

5.6 Conception of Constitutional Review by the Members of 1961 Constituent Assembly

The members of the House of Representatives generally agree on the necessity of the establishment of a constitutional court to review the constitutionality of laws issued by the parliament. During the constitutional debates, almost all members of the Constituent Assembly support the establishment of it. We see that a great number of

[273] At the end of the debates, the perspective of the Constitutional Committee predominates as the article is voted and approved as proposed by the Committee in the final meeting of the Constituent Assembly.

[274] In addition to the debate about the inclusion of the principle of nationalism into the constitution, one may give the example of the discussion about the preamble. Yăddēz and Yurdakuler, two members of the National Unity Committee, propose making reference to the Turkish armed forces in the preamble of the Constitution (*MBK, GKT.*, Cilt:6, B: 81, 9.5.1961, pp. 3-7). Yăddēz suggests mentioning the role of the army in the 27 May coup while Yurdakuler proposes the inclusion of the statement ñ27 Mayēs Silahlē Kuvvetlerin eli ile, Türk Milleti tarafēndan yapēlmēştērò (*MBK, GKT.*, Cilt:6, B: 81, 9.5.1961, p. 7). A number of National Unity Committee members oppose to the propositions, however, as this would imply the prioritization of one segment of society over others.

[275] 1961 Constitution is voted and approved on 27 May 1961 in the Constituent Assembly (*KM, TD.*, Cilt 2, B: 15, 27.5.1961, pp. 109-112). [22 out of 23 members of the National Unity Committee and 238 out of 240 members of the House of Representatives approved the draft constitution whereas 2 members of the House of Representatives remained hesitant.

representatives taking the floor during the general discussions mention the Court, and independent judiciary in general, as one of the most significant elements of the new constitution since they conceive it indispensable for ensuring the principle of rule of law. The Report of the Constitutional Committee too, in parallel to the statements expressed in the general discussions, emphasizes the significance of the Court to ensure the compliance of state activities with the laws as a constitutive element of the rule of law.[276] The representatives comprehensively acknowledge that the Article 103 of *Te*ĸ*kilat-ē Esasiye of 1924* guaranteed the supremacy of the constitution. However, the Article could not have been properly enforced as the courts avoided deciding in relevant cases.[277]

During the discussions, disputes arise between the Constitutional Committee and some members of the House of Representatives about the composition of the court, the tenure of its members and the authorities of the court. Some of these disputes highlight how the court is perceived, whether as a judicial or political institution, by the members of the House of Representatives.

A careful scrutiny of these debates brings forth a commonly shared point of view. The constitutional court is conceived above all as the guardian of the constitution, the pivotal institution for preventing the violation of the constitution by the governments holding the majority of seats in the parliament. Regarding the issue, the representatives seem to take into consideration not only the future prospects of being a constitutional democracy but also the incidents experienced during the DP government as well. Kemal Türkoĵlu draws attention for instance to the issue that

[276] The Draft Constitution for the Republic of Turkey and the Report of the Constitutional Committee annexed to *TM, TD.*, Cilt 2, B: 34, 30.3.1961, p. 6.

[277] For instance, Kemal Türkoĵlu (representative of National Unity Committee) argues that in Anglo-Saxon countries such as United States and England, the constitutionality of the laws issued by the parliament is judged by ordinary courts and usually by the appellate courts, not by a separate Constitutional Court established by this sole purpose (*TM, TD.*, Cilt 4, B: 53, 25.4.1961, p. 192). However, in Turkey, though the supremacy of the constitution is guaranteed in the 103th article of *Te*ĸ*kilat-ē Esasiye of 1924*, the courts refrained from deciding in such cases. This has made the establishment of the Constitutional Court a necessity.

the laws passed in the parliament during DP government are criticized solely by political figures and the press.[278] Muammer Aksoy similarly mentions the political instances experienced so far as directing the establishment of the Court.[279] As a result, the Constitutional Committee seems to assign the court primarily with the duty of controlling and circumscribing the actions of prospective governments. In this respect, it seems to push the courtôs role in preventing the violation of the fundamental rights and liberties of citizens to a second degree. The Committeeôs distrust in political power and state-centred attitude becomes particularly apparent during the discussions related to the authorities of the court and individualsô right to petition.

The debates demonstrate the confusion on the part of some representatives about the duties of the constitutional court as well. As I will elucidate in the following, a number of representatives taking the floor tend to conceive the court more than an institution of judicial review, as a political rival of the legislature in fact.

Firstly, I will touch upon the debate on the origin of the members of the constitutional court since it is illustrative of how the court is perceived by some representatives. The origin of the judges of the constitutional court becomes a point of controversy in many respects, but more significantly for our discussion because five members are decided by the parliament.[280] In its draft proposal, the Constitutional Committee sets forth fifteen permanent and five substitute members for the court. Seven members are determined by the political organs like the

[278] *TM, TD.*, Cilt 4, B: 53, 25.4.1961, p. 197.

[279] *TM, TD.*, Cilt 4, B: 53, 25.4.1961, p. 217.

[280] Fethi Çelikbaş, representative of artisansô and tradersô associations, indicates for instance that it is significant that the members of the constitutional court come from a variety of institutions (*TM, TD.*, Cilt 4, B: 53, 25.4.1961, p. 196). He argues in this respect that the advocates and university professors could also be the members of the Court. Çelikbaş mainly stresses that the law has to be interpreted in line with social developments during constitutional review. Yet the judges are generally conservative in executing their duty.

legislative and the Head of State while eight members are chosen by the respective judicial institutions.

Sadettin Tokbey, representative of CKMP, objects to the selection of five members by the legislative and asserts that the legislative should not have a say in the selection of the judges of the court. He argues that the court is responsible after all for the judicial review of the laws issued by the parliament.[281] In this respect, he seems to regard the constitutional court above all as a rival institution for controlling the legislative. This objection results in a lively discussion revealing the basic tenets of the Constitutional Committeeôs perspective on the issue. Nurettin Ardēçoĵlu, the speaker of the Committee, responses that they adopted a moderate system in the selection of the members of the constitutional court by taking into consideration the circumstances of Turkey. He continues that in comparison to other countries such as Germany and Austria where almost all judges of the court are decided by the parliament, Turkey constitutes the example in which least number of judges is selected by political authorities.[282] Moreover, the political authorities are not completely free since they have to comply with certain requirements in making their selection.

Regarding the subject, Aksoy, the speaker of the Constitutional Committee, mentions the constitutional court as one of the defining elements of the constitution.[283] Similarly he explains the reason for the multitude of the judges chosen by the judiciary (apolitical appointment procedure) as a result of the specific conditions of Turkey without explaining what constitute these conditions in clear terms. However, he emphasizes the significance of finding a right balance between the judiciary and legislative in the selection of the judges and draws attention to the danger of transforming into a ógState of Judges.ôRegarding the subject, he states that:

[281] *TM, TD*., Cilt 4, B: 53, 25.4.1961, p. 193.

[282] *TM, TD*., Cilt 4, B: 53, 25.4.1961, p. 195.

[283] *TM, TD*., Cilt 4, B: 53, 25.4.1961, p. 197.

> First of all, let me repeat that none of the existing modern constitutions has given such comprehensive reference to the members elected by the judicial organ as those set forth in the draft before you. Why did we do that? *Because we considered the peculiarities of our country!* The German Constitution makes the legislative assembly elect all its members. é Among the modern constitutions, for example the Italian one, as a great step, it was adopted that one third of the members would be elected by the judges. We did not find this sufficient and made a further, more courageous step just like requiring the election of the majority by the judges. However, not finding this sufficient either, making the judges elect all the members, not assigning the legislative organ that represents the national will, and partial President of the Republic the authority to even elect the minority of members, looking for a second extremism mean immoderateness. As long as this country remains as a state ruled by law, it is not untypical to accept our judges as the guardians of the state. Since those who have been elected as members of the Constitutional Court are judges in nature, there arises an understanding like a ñState of Judgesò is being established. It is for sure that the fact that all the members are elected out of the judges and the judges are predominant is not legitimate. ñState ruled by lawò is one thing, ñstate of judgesò is another.[284] [*emphasis mine*]

Therefore, from Aksoyôs viewpoint, the limited government must not be taken to its extreme since this would result in the negation of the legislature representing the *national will*. He seems to be aware of the potential danger for the judicialisation of politics and differentiate constitutional democracy from the ñState of Judges.ò

The most notable debate revealing how the constitutional court is perceived by the authors of the constitution takes place during the discussion concerning the Article 146 designating the term of office of the constitutional court judges. In its proposal,

[284] ñEvvelâ ĸunu tekrar edeyim ki, mevcut modern anayasalarēn hiçbirisinde, yargē organlarē tarafēndan seçilen üyelere, huzurunuza getirilmiĸ olan tasarēdaki kadar geniĸ yer verilmemiĸtir. Niçin bunu yaptēk? *Memleketin özelliğ ini düĸündük de onun için!* Alman Anayasasē, üyelerin tamamēnē yasama meclislerine seçtiriyor. é Modern anayasalardan Ķalyan Anayasasēnda, büyük bir adēm olarak, üyelerin üçte birinin hâkimler tarafēndan seçilmesi esasē kabul edilmiĸtir. Biz bununla da yetinmedik; çoğ unluğ un hâkimler tarafēndan seçilmesi gibi daha ileri, daha cesur bir adēm attēk. Ama bunu da kafi görmeyerek, bütün üyeleri hâkimlere seçtirmek ve - genel olarak millî iradeyi temsil eden - yasama organēna veya tarafsēz Cumhurbaĸkanēna, azēnlığ ē tekkil edecek miktarda üye seçme yetkisini dahi tanēmamak, ikinci bir ekstrem'e gitmek, ifrattan tefride düĸmek demektir. Bu memleket hukuk devleti olarak kaldēkça, hâkimlerimizi hukuk devletinin bekçisi olarak kabul etmemiz tabiîdir. Anayasa Mahkemesi üyeliğ ine seçilen ĸahēslar, hâkim niteliğ ine sahip kimseler olduğ undan, «Hâkimler Devleti» kuruluyormuĸ gibi bir zehap hâsēl olmaktadēr. Pek tabiîdir ki, bütün azalarēn da hâkimlerden seçilmesi ve bir hâkimler hâkimiyetinin 'kurulmasē caiz değ ildir. «Hukuk Devleti» baĸkadēr, «Hâkimler Devleti» baĸkadēr.ò *TM, TD.*, Cilt 4, B: 53, 25.4.1961, p. 197.

Constitutional Committee sets the end of tenure at the age of 70 and regards this as a guarantee for the endurance and stability of the court against the political power.[285] Sāmī Atalay, representative of Kars, and Ferid Melen, representative of Van, argue on the contrary that the tenure of judges has to be limited with a specific period. While Sāmī Atalay defends a *wait and see* approach, Ferid Melen explains the rationale behind his opinion in a rather distinctive manner. He argues that constitutional court has to be regarded in different terms than the other courts since it is more of a political institution executing the right to sovereignty like legislative.[286] Thus, he stresses that similar to political organs in democratic regimes, the members of the court have to be selected for a limited period.

In response to Melen's statement, Ardāçoğlu takes the floor and expresses immediately that the Committee does not agree with Melen's words defining the constitutional court as a political organ.[287] Ardāçoğlu stresses that the fundamental duty of the court is to conduct judicial review of the laws and in this respect, it has to be differentiated from the legislature. He maintains that;

> Distinguished friends, the principle that requires the existence of the Constitutional Court is to scrutinize the constitutionality of the laws. Constitutional Court is an organ that performs a judicial function and it is judicial due to its nature. For that reason, our Committee could not naturally agree on the opinion that the Court is a political organ. I am of the opinion that this should be elaborated in order not to cause misunderstanding in the future when minutes are being looked into. Because of that, *we cannot think of a political organ that is superior to the parliament functioning on the basis of national will.* The parliament represents the national will. It is not possible to have an organ that would examine its decisions politically. Hence, it is necessary to say that the Constitutional Court is not a political organ but a

[285] See the statement of Ardāçoğlu in *TM, TD.*, Cilt 4, B: 53, 25.4.1961, p. 205.

[286] *TM, TD.*, Cilt 4, B: 53, 25.4.1961, p. 204.

[287] *TM, TD.*, Cilt 4, B: 53, 25.4.1961, p. 205.

judicial organ as far as its establishment and duties are concerned.[288] [*emphasis mine*]

In fact, Aksoyôs statement gains its full meaning when it is taken into consideration together with Ardəçoƒluôs successive statement presented above. During the constitutional debates the members of the Constitutional Committee take great pains to define the constitutional court as a judicial organ, thus not a political rival of the legislative or executive as such. By emphasizing the primary function of the Constitutional Court as conducting judicial review, they strive to explicate that the Court is not aimed at the creation of new law. From their viewpoint, the Court would definitely interpret the laws when it is conducting its duty. However, this interpretation would be confined to the existing laws of the legal order.[289] They seem in this respect to restore the balance between the legislative and the judiciary and to offset the excessive uses of power by the executive as it has been during DP government. The attentive attitude of the Constitutional Committee to present the constitutional court as a judicial institution comes to the fore once again when the authorities of the court are debated.

This time, ƒükufe Ekitler, representative of the Head of State, expresses her concern about the potential transfer of legislative power to the constitutional court at the expense of legislature. She acknowledges the significance of the court in the protection of human rights and prevention from the oppressive uses of political power.[290] She argues however that the court should not be assigned with the

[288] ñMuhterem arkadaƒlarəm; Anayasa Mahkemesinin vücudunu zaruri kəlan prensip; kanunlarən Anayasaya uygunluƒunun kazai murakebesini yapmaktər. Anayasa mahkemesi kazai bir fonksiyonu ifa eden, kuruluƒu itibarəyla da kazai olan bir organdər. Binaenaleyh siyasi organ ƒeklindeki telâkkiye tabiatəyla Komisyonumuz iƒtirak edemez. Əeride zabətlar tetkik edildiƒi zaman yanləƒ bir anlayəƒa meydan vermemek için tasrih edilmesi lâzəm gelir kanaatindeyim. Əu bakəmdan; *milli irade ile gelmiƒ olan parlamentonun fevkinde bir siyasi organ tasavvur edilemez.* Parlamento iradei milliyeyi temsil ediyor. Onun kararənə siyasi yönden tetkik edecek bir organ tasavvuru mümkün deƒildir. Bu bakəmdan Anayasa Mahkemesinin bir siyasi organ deƒil, kuruluƒu ve görevleri bakəməndan kazai bir organ olduƒunun belirtilmesi icabeder.ò *TM, TD.*, Cilt 4, B: 53, 25.4.1961, p. 205.

[289] *TM, TD.*, Cilt 4, B: 53, 25.4.1961, p. 211.

[290] *TM, TD.*, Cilt 4, B: 53, 25.4.1961, p. 214.

authority to repeal the law since this would be an intervention in legislative activity. She indicates that the judiciary should remain in the framework of the law and only give the decision on the unconstitutionality of a law issued by the parliament.[291] From her viewpoint, the authority of the court to repeal an unconstitutional law would constitute an encroachment on the principle of separation of powers.

Ardēçoĵ lu, the speaker of the Constitutional Committee, states in return that the issue about the authority of the constitutional court to repeal the law caused controversy in other countries as well and it is resolved in the end with the approval of this duty.[292] Ardēçoĵ lu stresses that the authority of the court to repeal the law does not imply that the court is a political institution; on the contrary it is a part of constitutional jurisdiction. Aksoy, the speaker of the Constitutional Committee, additionally maintains that they aimed to found a *true* constitutional court in light of the political developments experienced so far. According to Aksoy, the (constitutional) system could collapse if detrimental provisions, such as Ekitlerôs proposal, are included. He continues that;

> *As a result of the political incidents that we have gone through, there have been such developments in our lives that we cannot pretend that we know nothing about them. One of those developments is that the extreme conflict between the political parties plays an important role in our social lives and has the capacity to do so in the future. é* As the esteemed delegation is well aware, although Article 103 of the previous Constitution does not allow that laws against the Constitution be implemented, this is not applied in practice. The adoption and implementation of numerous anti-democratic laws concerning individualsô rights led to the paralyzation of our political lives. In order to not to leave the destiny of the Constitution up to the political power, I mean in order to protect the Constitution from unlawful legislation, we paved the way to the establishment of the Constitutional Court that is the sole assurance of the Constitution. It is essential to recognize the authority of the Court to repeal the laws especially considering the conditions of our country.[293] [*emphasis mine*]

[291] *TM, TD.*, Cilt 4, B: 53, 25.4.1961, p. 215.

[292] *TM, TD.*, Cilt 4, B: 53, 25.4.1961, p. 215.

[293] ñ*Bugüne kadar yaĸadığımız siyasi hâdiseler neticesinde, siyasi hayatımızda öylesine geliĸmeler oldu ki, bunları bilmezlikten gelemeyiz. Bu geliĸmelerden biri de, siyasi partiler arasındaki aĸıcı*

As Aksoyôs statement demonstrates, the representatives seem to be inspired in establishing the Constitutional Court not only by the democratic institutions of Western European states, but also take into consideration the incidents experienced during the DP government. Therefore, they seem to be directed both by the future prospects of being a constitutional democracy and the past political experiences. However, in this endeavour to found a *true* constitutional court, the Committee seems to remain ignorant to some democratic considerations. This becomes evident when Sadettin Tokbey, representative of CKMP, and Suphi Batur, representative of Sinop, propose that the right to individual petition to the court should also be guaranteed in the constitution.[294] Batur states that:

> Dear friends, I am not of the opinion that the Constitutional Court safeguards our fundamental rights and freedoms adequately. Indeed, as my friends mentioned previously, the doors of the Constitutional Court are closed tightly to the individuals. However, as known, fundamental rights and freedoms depend on the individuals. In other words, their real subject is the individuals. What could be the guarantee of our fundamental rights and freedoms when this road is closed to the individuals? When making a constitution in a country it is not enough to revise those of this state or that state. In my opinion, it is necessary to consider the realities of the country, identify them and integrate them into the constitution. When we look at the realities of our country, we see that it has always been the officials and official organs that have breached the fundamental rights and freedoms while it is always the individuals whose rights are violated. We give the right to apply to those who break and violate the rights, but not to the individuals [who suffer from violation].[295]

çatışmanın, toplum hayatımızda büyük bir faktör olarak rol oynadığı ve gelecekte de rol oynama istidadı gösterdiği idir. é Yüksek Heyetin malûmudur ki, eski Anayasamızın 103 ncü maddesi, Anayasaya aykırı kanunların uygulanmamasını imkânını verdiği halde, tatbikatta bu yola gidilememiştir. Ferdin haklarını doğrudan doğruya ilgilendiren birçok antidemokratik kanunların kabul edilmesi ve bunların yıllarca yürürlükte kalması, siyasi hayatımızın felce uğramasına sebep olmuştur. İşte Anayasanın kaderini, yani Anayasaya aykırı kanunların Anayasayı fiilen delik deşik hale getirip getirmemesini, siyasi iktidarın arzusuna bırakmamak içindir ki, en emin bir Anayasa teminatı olan Anayasa Mahkemesini kurmak yoluna gittik. Bunun normal neticesi olan iptal dâvasını da kabul etmek, bilhassa memleketimizin şartlarını bakımından pek lüzumludur.ò *TM, TD.*, Cilt 4, B: 53, 25.4.1961, p. 217.

[294] *TM, TD.*, Cilt 4, B: 53, 25.4.1961, p. 216.

[295] ñMuhterem arkadaşlar, Anayasa Mahkemesi[nin] temel hak ve hürriyetlerimiz açısından kâfi teminat getirdiği kanaatinde değilim. Filhakika benden evvelki arkadaşlarımızın da belirttiği gibi, Anayasa Mahkemesinin kapısı sırf sırf kimselere kapatılmış bulunmaktadır. Hâlbuki bilindiği veçhile temel hak ve hürriyetler kimselere bağlıdır, yani asıl süjesi kimselerdir. Bu yolu kimselere kapattıktan sonra

Aksoy however objects to the proposal on behalf of the Constitutional Committee and states that this would increase the work load of the court. And the individuals disturbed by the law could also apply to the court through *exceptio*.[296] In the end, the proposal of the Constitutional Committee without the individual right to petition to the court is accepted in the House of Representatives. It becomes apparent that Constitutional Committee conceives the achievement of limited government as the primary objective. Though the members acknowledge the courtôs indispensible quality for the protection of rights and liberties of citizens, they avoid recognizing the right to petition to individuals. This might be seen reasonable as the recognition of the right to individual petition to the Constitutional Court has only a short history.

These debates demonstrate in sum that the Constitutional Committee conceives the Constitutional Court along with independent judiciary as the constitutive element of the rule of law. Their major aim is to ensure the compliance of the laws issued by the parliament and the activities of the government with the constitution and the legal order in general. They consider the constitutional court as the guardian of the constitution, the pivotal institution to offset the power of the legislature and executive. In other words, they aim to restore the balance between the legislative and the judiciary and to offset the excessive uses of power by the executive as it has been during DP government. In this regard, they seem to be inspired not only by the democratic institutions of Western European states, but also by the past experiences of the polity. The constitutional debates regarding the foundation of a constitutional court take place in a discursive manner since the proposal of the Constitutional Committee is discussed on a rational basis and some of its parts are amended in accordance with the change proposals of the other representatives. In the end, the

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temel hak ve hürriyetlerimizin garantisi ne olabilir? Bir memlekette Anayasa yaparken sadece ĸu veya bu devletin Anayasasēna bakmak kâfi gelmez. Memleketin gerçeklerine bakmak ve onlarē tespit etmek ve onlarē Anayasaya geçirmek icap eder kanaatindeyim. Memleketimizin gerçeklerine eĵ ilip baktęĵ ēmēz vakit temel hak ve hürriyetleri çiĵ neyenler daima resmî ĸahēslar ve resmî organlar olmuĸlardē. Haklarē çiĵ nenenler ise kiĸilerdir. Biz tutuyor, haklarē çiĵ neyen ve zedeleyenlere müracaat hakkēnē veriyoruz, bu hakkē kiĸilere tanēmēyoruz.ò *TM, TD.*, Cilt 4, B: 53, 25.4.1961, p. 216.

[296] *TM, TD.*, Cilt 4, B: 53, 25.4.1961, p. 217.

rules concerning the foundation of the court seem to originate from the normative ideals of constitutional democracy and the concrete (specific) requirements of the polity.

Finding the right balance between the law and political is a delicate issue. To succeed in this endeavour, the members of the Constitutional Committee emphasize the significance of the court as a judicial institution, thus not as a political organ. Their insistence to prevent the arbitrary rule of future governments, their distrust to political power originating mainly from the experience of DP rule, seems to contribute perhaps unintentionally to the courtôs perception as a rival (political) institution to executive. This disposition seems to be consistent with the general tendency to conceive the constitution as a static act of founding in which the fundamental political decision in Schmittôs terms is determined by the dominant political actors from the outset and cannot be changed by prospective parliamentary majorities in the future.

5.7 Concluding Remarks

In this chapter of the thesis, I engaged in a hermeneutical interpretation of the constitutional debates included in the minutes of the Constituent Assembly in order to understand how the framers of 1961 constitution conceive the constitution, whether they problematize the legitimacy of the constitution and if so on what basis they try to ground it. In this endeavour, I benefited at certain points from the concepts developed in Schmittôs and Habermasôs constitutional theories. I also referred to the considerations of Arendt, Michelman and Rawls where I deemed relevant. As discussed in the previous chapter, political and legal theories of Habermas and Schmitt provide us with two opposite, namely normative and realist, perspectives fruitful for deepening the constitutional debates and providing a political theoretical reading of the constitutional developments in Turkey. In other words, their conceptions serve as a precursor to assess the acts of constitution

making and constitutional reform processes in Turkey from the perspective of political theory.

The constitution of 1961 is written after the military coup of 27 May and under the tutelage of the National Unity Committee formed completely by military officials. The constitution is written by the Constituent Assembly established for this specific purpose, and finally approved through peopleôs referendum. The Constituent Assembly was not founded through direct election by the citizenry; but partly on co-optation and partly on indirect election. Besides, the representation of Democrat Party or any person supporting its policies was banned in the Constituent Assembly. In this respect, the Constituent Assembly was not inclusive enough as all segments of society was not represented and properly participated in the constitution making process. Moreover, as far as it can be observed in the Assembly minutes, the members of the Constituent Assembly happened to share a common political position: they were mainly critical about the former Democrat Party government and seem to be devoted to the founding ideology of the state, in terms of commitment to Turkish nationalism and *laws of revolution* (devrim kanunlarę).

Nevertheless, as it is highlighted elsewhere in this chapter, the constitutional debates, strictly speaking the debates within the House of Representatives, take place in a legal atmosphere, where the majority of constitutional provisions and some of the constitutional principles is debated within the framework of the legal terminology of liberal constitutionalism. Moreover, there is an apparent increase in discursiveness to the extent that the opponents could change the initial proposals of the Constitutional Committee and the parties try to justify their claims through rational discourses, including pragmatic, ethico-political and moral discourses in Habermasôs terms. This is particularly the case in discussions concerning the principle of *nationalism*, *statism* (i.e. the articles related to confiscation and nationalization) and the constitutional court.

The constituent will to design the constitutional order and along with that the society within the parameters of Western European states comes to the fore in the making of 1961 constitution. Indeed, the constitutional authors seem to conceive the constitution ideally as the principal instrument for the institutionalization of parliamentary democracy based on the rule of law. In addition, highly influenced by the doctrine of national development in the 1960s, they give utmost significance to economic development through state intervention in economy. For these purposes, they include in the draft constitution guarantees for the introduction of a system of checks and balances including judicial independence, constitutional review and etc. along with a comprehensive catalogue of rights and liberties. They strive to guarantee in the constitutional text civil liberties and political rights of the citizens along with economic and social rights. However in their endeavour to institutionalize the system of rights the constitutional authors do not seem to constitute an internal relationship between the constitution making process and democracy, as in the case of Habermasôs conceptualization of a democratic founding. The rights are perceived at most the ógoodsô granted to the individuals of an underdeveloped society. The constitutional authors do not envisage a mutual relation between civil liberties and political rights, thus they do not consider that the citizenry in the future might hold on to their rights and reformulate the parameters of the constitutional order according to their own needs and demands.

The establishment of the constitutional court might also be viewed as an integral part of the political objective for becoming a constitutional democratic state. The constitutional court along with the independent judiciary is conceived as a fundamental institution to achieve the principle of rule of law and limited government. The court is assigned with the duty to conduct judicial review, in terms of both form and substance, of the constitutionality of the laws issued by the parliament. In this respect, the court is viewed as the guardian of the constitution for preventing and eliminating the constitutional violations of governments. Indeed, the members of the Constitutional Committee take great pains to define the constitutional court as a judicial organ, not a political rival of the legislative or

executive as such. Yet their insistence to prevent the arbitrary rule of future governments, their distrust to political power originating mainly from the experience of DP rule, seems to contribute perhaps unintentionally to the courtôs perception as a rival (political) institution to executive.

The authors of the constitution tend to moreover consider the constitution as a legal fence by the help of which the assumed destructive power of certain political ideologies and social cleavages can be circumscribed and domesticated.[297] The debates clearly demonstrate the intention of the constitutional authors to keep future constitutional changes and ordinary politics implying the determination and execution of government policies within the legal parameters set by the constitution.[298] Similar to Arendtôs identification of ancient Greek thought and particularly of Platonôs considerations on law and politics, the constitution in the Turkish case seems to be considered as the main instrument for setting the legal parameters of legitimate political activity or more precisely the constitution making as a neutral activity to constitute the legal order in which political activity will definitely move.[299]

This impression is particularly valid for the parliamentary debates in which *Atatürkôs revolutions*, specifically the principle of Turkish nationalism, and the principles of liberal constitutionalism are highly esteemed while the political ideologies of communism and fascism, and reactionary movements aimed at the destruction of

[297] Here, by deploying the term ñfenceò I mainly refer to the conceptualization of law in classical philosophy, particularly in Platonôs *Nomoi* as explained by Arendt (2007a). Arendt argues that the law is conceieved in external terms to the politics of the polis, in a sense as a neutral field determining mainly the borders of legitimate political activity.

[298] This intention comes to daylight especially during debates concerning the establishment of a second camera in the Turkish Grand National Assembly, the constitutional court and other several related provisions.

[299] Arendt argues that in ancient Greek thought, laws are assumed to enable the stability of *polis* life and construct the public realm as a common space of living against mortality and variability of *human condition* (Arendt, 2007a: 713-726). In this conceptualization, the political life could begin only after the laws are written and law-making signifies mainly a pre-political moment, by the means of which the destructive force of new beginnings originated from human *natality* is circumscribed.

(*Atatürk*ôs) *revolutions* are explicitly defined as the enemies of the state. Despite the strong emphasis upon the impartiality of the constitution, there are times in which the political substance of the constitution in Schmittôs terms, or the preference of certain ideologies through such friend-enemy distinction, is acknowledged and praised by the members of the Constituent Assembly. From a Rawlsian perspective, the exclusion of the ideologies of communism and fascism and reactionary movements from the constitutional order is illustrative of the *unreasonable doctrines* for the framers of the constitution whereas the endorsement of *Turkish nationalism* might be seen as the interaction of a comprehensive doctrine with the public power. As Deveci argues, from the angle of Rawlsôs theory, such ñaffiliation or exclusive interaction between public power and a comprehensive doctrine or ideology is doomed to cause a serious problem of legitimacyò (Deveci, 2006:132) since this would inevitably endanger the neutrality of the constitutional order. The constitutional debates make visible that the framers of the constitution seem to be neutral towards political ideologies and worldviews consistent with universal principles of right and *the principles of revolution*. And they consider comprehensive doctrines that are not respectful to these criteria as detrimental to the constitutional order they form.

The tendency of the authors of the constitution to conceive the constitution making process completely in legal terms contributes to the mystification of the underlying political struggles at the heart of society to a certain extent. Yet the strong emphasis on and sometimes overt reference to Mustafa Kemalôs will as reflected in *the principles of revolution* and the articulation of the principle of Turkish nationalism along with these principles in the preamble of the constitution provides us with a strong (perhaps too strong) clue about the friends and enemies of the constitution. As it becomes clear during the constitutional debates, the principle of nationalism is usually conceived as the key to *national unity*, as a panacea to the disintegrative force caused by social cleavages based on ethnicity and the ideologies of communism and fascism. The tendency to domesticate and circumscribe these political movements through marginalization in the constitution seems to contribute to the imagination of the constitution as a static act of founding. This also signals a

sociological imagination in which the rules of the game are determined by the dominant actors at the beginning and the future initiatives to infringe, reset and reformulate are strictly forbidden.

The constitutional debates in the Constituent Assembly shed light on whether the representatives problematize the legitimacy of the constitution and if so, on what basis they try to construct it. Throughout the debates it is seen that the rationale for the military coup, which is called revolution, is inextricably linked with the justification for making a new constitution and these are all explained by the aspirations of the entire citizenry. The framers of the constitution do not question such arbitrary linkage; moreover, they tend to identify the nation with the army, and the military coup with the nationôs will. The members of the Constituent Assembly in general and the authors of the constitution in particular made substantial reference to the óright to revolution of the Turkish Nationô not only for explaining the rationale for the military coup but also for providing legitimacy to the Constituent Assembly and its subsequent work. Indeed the military coup, the suspension of some provisions of 1924 constitution, and the establishment of the Constituent Assembly for the specific purpose of making a new constitution are all conceived as parts of a revolutionary moment reactivating the constitution-making power of the people in Schmittian terms.

It must be the result of such understanding that there takes place no serious debate in the Constituent Assembly concerning the legitimacy of writing a new constitution in *toto*. Neither the members of the House of Representatives nor the National Unity Committee problematize the practice of writing a new constitution. Moreover, they do not question the legitimacy of their act. Indeed during the discussions in the House of Representatives it becomes evident that the representatives justify their practice of writing a new constitution by focusing on the gaps in the 1924 constitution, the shortages of the election law and the consequent ñconstitutional violationsò of DP government. The severe political reaction to DP rule and particularly the policies implemented after 1955 is substantially shared by almost all

members of the Constituent Assembly that the legitimacy of the Assembly and the constitution is justified on the basis of the memory of the past.

The statements reveal that the members of the Constitutional Committee endorse the conception of liberal constitutionalism concerning the distinction between the constituent power of the nation and constituted powers. In this framework, they tend to compare the present Constituent Assembly with the first Grand National Assembly in order to underline its extra-ordinary powers, precisely its representative character of the *national will*. Similar to Schmittôs conceptualization and to previous constitution making practices in 1921 and 1924, they invoke the constitution making power of the people as stated in the preamble: ñThe Turkish Nation whom has lived in independence and fight for its rights and liberties throughout its history, has made the Revolution of May 27 by using its right to rebel against a government which has lost its legitimacy because of its unlawful and unconstitutional dispositions and actionsé ñ[300] Indeed, their position does not go beyond the rhetorical deployment of the principle of national sovereignty and remains far from a dialogical understanding as in the case of Habermas. In specific terms, they do not construct the legitimacy of the constitution on the basis of a democratic procedure.

Furthermore, they seem to construct the legitimacy of the Constituent Assembly and the constitution of 1961 by mobilizing an idea reminiscent of Schmittôs concept of commissarial dictatorship, that the army and Constituent Assembly are delegated by the nation with the authority to re-establish the constitutional order in accordance with the founding principles included in the historically first constitution of the state. Therefore, from the perspective of the framers of the constitution, the suspension of 1924 constitution by the military coup does not pose a legitimacy problem. Similar to Schmittôs conception, they seem to think of the new situation caused by the military

[300] ñTarihi boyunca baĵ ēmsēz yaĸamēĸ, hak ve hürriyetleri için savaĸmēĸ olan; Anayasa ve hukuk dēĸē tutum ve davranēĸlarēyla meĸruluĵ unu kaybetmiĸ bir iktidara karĸē direnme hakkē kullanarak 27 Mayēs 1960 Devrimini yapan Türk Milleti é ò The Report of the Joint Committee on the Draft Constitution, annexed to *KM, TD*., Cilt 2, B: 15, 26.5.1961, p. 1.

coup as a case of *constitutional elimination* in which the *constitutional minimum*, namely the constitution-making power of the people, is preserved as the people continue to live together as a political unity. Consistently with this, the authors of the constitution also seem to endorse Schmittôs positive concept of constitution. The republican principle is conceived more than a legal norm; it constitutes the substance of the constitution in the sense that it forms the fundamental political decision regarding the concrete type of stateôs existence. This makes sense when the proposal of the Constitutional Committee about the inalterability of the first article is taken into consideration. In a similar vein, we see that the *laws of revolution* are also interwoven with the substance of the constitution. This becomes evident specifically from the additional article one which forbids the submission of the revolution laws to the constitutional court for unconstitutionality.

The authors of 1961 constitution, like their predecessors making 1924 constitution, capitalize highly on the idea of *continuity* and *progress* in order to provide legitimacy to the constitution making process and its outcome. As it becomes clear in the constitutional debates regarding the ósecond republic,ô the emphasis on continuity with the previous constitutional order on the basis of the principle of national sovereignty and revolution laws constitute the backbone of their arguments for constructing and reinforcing the legitimacy of the new constitutional order. The majority of the members of the Constituent Assembly seem to consciously refrain from insisting on rupture in presenting the justificatory base for their practice. They might have thought that the idea of rupture could distort their efforts to construct the legitimacy of the new constitution.

Moreover, they strive to legitimize the new constitution by stressing its incremental character in terms of institutionalization of a democratic government based on the rule of law. The constitutional debates in fact signal a major change in the perception of the authors of the constitution: they now seem to acknowledge the necessary distinction between the republican form of government and democracy. Indeed the assumed identity established between the principle of national sovereignty and

democratic form of government by the authors of previous constitutions began to be problematized as a result of the ten years rule of Democrat Party. Moreover, the authors of 1961 constitution began to consider the principle of rule of law and the concomitant institutions indispensable for the proper functioning of democracy. The strong emphasis on the institutionalization of a democracy based on the principle of rule of law in the draft constitution and during the discussions seems to emerge from such perspective.

In addition, the debates regarding the second article of 1961 constitution shed light on the perception of the members of the Constituent Assembly about the constitutional principles and about the constitution in a mediated way. I find the demands for the inclusion of the principle of (*Atatürk*ôs) nationalism in the constitution very critical in this respect. Some members of the Constituent Assembly, defend the principle as the founding ideology of the state, thus they argue for its inclusion in the constitution in order to designate the type of state. In this respect, they seem to understand constitutional principles as political value judgments and to preserve them as they are designated in the founding constitution of the state. The members of the Constitutional Committee, on the other hand, seem to adopt a pragmatic attitude depending on the content of the controversial issue. They try to establish a delicate balance between the particular necessities of the Turkish context and the universal principles of law and democracy. The principle of laicism is articulated in the constitution on the basis of the requirements of the concrete situation. More precisely, the friend-enemy distinction plays a major role in the stipulation of the principle in the constitution. Whereas in case of the principle of nationalism, *statism* and in the argumentation processes related to fundamental rights and liberties (together with economic and social rights), the framers of the constitution seem to be expressing context transcending validity claims of communicative reason aimed at reaching objectivity. Their insistence on impartiality in discussions might be viewed as an example of this position. It might be argued in this sense that their position oscillates between Schmittôs and Habermasôs considerations on the issue.

In sum, an overwhelming majority of the members of the Constituent Assembly tend to conceptualize the constitution in Schmittôs terms, posited directly by the nation and encompassing the fundamental decision regarding the concrete type of state. In this conception, the will of the founding fathers, particularly Mustafa Kemal, believed to be reflected in the laws of revolution plays a critical role.[301] The reference to ónational sovereigntyô remains rhetorical and does not yield to a kind of constitutional order based on active citizenry. The constitution is not understood as a dynamic set of norms enabling citizens to participate into law-making processes. Therefore, constitutionalism and democracy are not conceived in direct interaction with each other as in Habermasôs theory.

[301] In addition to the debates presented above, the statement of Behçet Kemal Çaî lar might be considered as an example of this attitude. Çaî lar thanks to the members of the Constitutional Committee for providing *Atatürk*ôs revolutions with constitutional guarantee (*TM, TD.*, Cilt 2, B: 36, 3.4.1961, p. 467). He views the revolutions indispensable for the survival of the state and freedom of the Turkish nation. Moreover, for him these revolutions form the spirit of the constitution.

CHAPTER 6

THE CONSTITUTIONAL AMENDMENT OF 1971

The Constitution of 1961 was amended seven times between 1969 and 1974. The constitutional amendment of 1971 has distinctive political significance among these amendments in terms of scope and conditions of its formation. It is distinctive in political terms because of the number of articles changed and the quality of the changes. Besides the amendment is conducted by an interim government within an ordinary legislature after the military intervention of 12 March 1971. In this respect, it signifies more than a constitutional amendment in legal terms.

It is interesting that the need to amend the constitution is mentioned neither in the memorandum of the military officials issued in 12 March nor in the first declarations of the Prime Minister of the interim government, Nihat Erim. In the memorandum of 12 March, the military officials mainly stated that the outlook, opinion and actions of the parliament and the government have caused anarchy, fellow quarrel and economic and social unrest in the polity; have resulted in the loss of hope regarding the attainment of the objective of reaching the level of contemporary civilization assigned by *Atatürk* and in the failure of the implementation of the reforms envisaged by the Constitution (Aydēn and Takkēn, 2014: 205).[302] As a consequence, the future of the Turkish Republic has been substantially jeopardized. The generals also demanded in the memo the establishment of a powerful and credible government which would put an end to anarchy, embrace the reforms envisaged in the Constitution from Atatürkôs perspective and implement the laws of revolution.

[302] The memo is signed by the Chief of General Staff, Memduh Taĵ maç and commanders-in-chief of armed forces, Faruk Gürler, Muhsin Batur and Celal Eyiceoĵ lu and submitted to the Head of State, Cevdet Sunay on 12 March 1971. The generals invited the government to resignation and called for the establishment of a supra-party ñnational unity governmentò instead by means of the memo (Aydēn and Takkēn, 2014: 204).

Consistently with the memorandum, Erim called his government as a ñreform governmentò in the first meeting of his premiership and emphasized that the primary duty of the government is to implement the necessary reforms (Aydın and Takkın, 2014: 205). However, only two months after the inauguration of the interim government, Erim made a radical shift in his position and made the first call for the necessity of constitutional amendment in the beginning of June.[303] Immediately afterwards, he engaged into a series of meetings with the party leaders to make deliberations, particularly on the proposal drafted by his government. The duty of constitutional amendment was then conveyed to the Interparty Committee of the National Assembly consisting of three representatives from each of the Republican Peopleôs Party, *Adalet Partisi* (Justice Party), *Demokratik Parti* (Democratic Party) and *Milli Güven Partisi* (National Faith Party).

The draft proposal prepared by the Interparty Committee introduced changes in thirty five articles of 1961 constitution and brought about nine provisional articles.[304]

[303] As we learn from Cevat Önder (spokesperson of Democratic Party in constitutional debates), Erim explained the reasons for constitutional amendment in radio and television speeches on 8 June and 13 June 1971 (*MM, TD.*, Cilt 17, B: 156, 27.08.1971, p. 267). In his statements, Erim mentioned the aim of ensuring peace and security and implementing the necessary reforms. Zihni Betilôs (Justice and Constitutional Committee of the Republican Senate) statement is also illuminating about the preparation process of the constitutional amendment. Betil states that the final draft accepted by the Interparty Committee is then submitted to the decision bodies of each Party for getting approval. In the final stage, the justification of the constitutional amendment was written and the text was presented to the Parliament as the proposal of 430 representatives (*CS, TD.*, Cilt 67, B: 115, 14.09.1971, p.503).

[304] The constitutional amendment involved changes in Article 11 (the substance of fundamental rights and liberties, their limitation, and prohibition of abuse), 15 (private life), 19 (freedom of religion and conscience), 22 (freedom of the press), 26 (freedom to utilize the communication devices other than the press), 29 (right to establish associations), 30 (security of the person), 32 (due process of law), 38 (confiscation), 46 (right to establish unions), 60 (military service), 61 (tax duty), 64 (duties and authorities of the Turkish Grand National Assembly), 80 (interpellation), 110 (the office of commander in chief), 111 (National Security Council), 114 (judicial remedy), 119 (prohibition of the membership of civil servants in political parties and trade unions), 120 (universities), 121 (radio and televisions and news agencies), 124 (martial law and warfare), 127 (Supreme Court of Accounts: the audit of the assets of the Armed Forces and state economic enterprises), 134 (the profession of judge), 137 (prosecution office), 138 (military jurisdiction), 139 (Supreme Court of Appeals), 140 (Council of State), 141 (Military Court of Appeals), 143, 144 (the establishment, duties and powers of the Supreme Council of Judges), 145, 147, 149, 151 and 152 (appointment of Constitutional Court judges, duties and authorities of Constitutional Court, decisions of the Court and etc.). The amendment also brought about provisional Articles 12, 13, 14, 15, 16, 17, 18, 19 and 20.

When the fact that 1961 constitution was composed of 157 articles is taken into consideration, the scope of the constitutional amendment becomes obvious. Moreover, the change proposals were mainly about the reconstitution of the relations between the legislative, executive and the judiciary, or *the reorganization of state power* in Tanörôs terms and the reorganization of the fundamental rights and liberties (Tanör, 2012: 413).

Such a comprehensive constitutional amendment affecting the principles of the constitution had to be certainly made by a parliament enabling inclusive (on equal and free basis) representation of all segments of society. Democratic and open deliberations in the public sphere could have been additionally conducted for strengthening its democratic legitimacy. We see rather the mobilization of an ordinary legislature, and the adoption of the ordinary amendment procedure stipulated in 1961 constitution, for such a (constituent) constitutional amendment. In addition, the process is carried out in *extraordinary* conditions in which several cities are ruled under martial law and without allowing the public, let alone the experts of the issue, sufficient time to deliberate and have influence on the changes.[305]

In this section of the thesis, I will focus on the constitutional amendment of 1971. I will try to decipher through the minutes of both *Millet Meclisi* (National Assembly) and *Cumhuriyet Senatosu* (Republican Senate) the major questions of the thesis concerning; whether the members of the parliament critically evaluate the legitimacy of their practice, particularly whether there did take place any questioning on the part of representatives about the ordinary procedure adopted for such constitutional amendment and whether they did ever question the authority of the Parliament to make such a change. And if they have been concerned for the legitimacy of their act, on what grounds did they try to lay the justificatory base?

[305] After the military intervention, martial law is introduced in eleven cities including Ankara, Ķstanbul, Ķzmir, Ķzel and Adana (Aydēn and Takkēn, 2014: 206). The criticisms regarding the extraordinary conditions and the insufficient time to make proper deliberations in the public sphere are also expressed by Mehmet Ali Aybar (Turkish Labor Party) during the constitutional debates in the National Assembly (*MM, TD.*, Cilt 17, B: 156, 27.08.1971, p. 290).

To this purpose, I will first discuss the status and powers of the parliament from the perspective of the representatives. Indeed, the constitutional debates are very informative about their approach to the present constitutional amendment and to the authority of the parliamentary institution in general. Secondly, I will elaborate on the rationale for the constitutional amendment, as made explicit in the justification of the Interparty Committee and throughout the statements of party representatives. In the final stage, I will try to explicate on what grounds the representatives conceptualize the legitimacy of 1971 constitutional amendment.

6.1 The Status and Powers of the Turkish Grand National Assembly from the Perspective of Representatives

As indicated above, the constitutional amendment of 1971 introduces substantial changes in the relations between legislative, executive and judicial organs and in the definition of fundamental rights and liberties as well as political, economic and social rights of the citizens. Here I will not mention these amendments in detail since the major aim of this section is not to do so. Suffice it to say that the amendment increases the power of the executive; introduces limitations for several rights and liberties (and sanctions in case of *abuse*); weakens the judicial guarantees, and increases the role of the armed forces in state administration (Erdoĵan, 2009: 138-9).

In general, the limitation of the rights and liberties defined in the constitution is allowed for the purposes of vague concepts such as *the unity of the state with its land and nation*, *national security*, *public order*, *public interest*, *general morality* and *general health*.[306] In addition, the utilization of these rights *on the grounds of*

[306] These concepts are altogether mentioned in the amendment proposal for the Article 11 of 1961 constitution whereas only the relevant ones are utilized in the following individual articles. The proposal of the Interparty Committee is as follows: ñMadde 11. ð Temel hak ve hürriyetler, Devletin ülkesi ve milletiyle bütünlüĵünün, Cumhuriyetin, millî güvenliĵin, kamu düzeninin, kamu yararının, genel ahlâkın ve genel saĵlıĝın korunması amacıyle veya Anayasanın diĵer maddelerinde gösterilen özel sebeplerle, Anayasanın sözüne ve ruhuna uygun olarak, ancak kanunla sınırlanabilir. Kanun, temel hak ve hürriyetlerin özüne dokunamaz. Bu Anayasada yer alan hak ve hürriyetlerden hiçbirisi, insan hak ve hürriyetlerini veya Türk Devletinin ülkesi ve milletiyle bölünmez bütünlüĵünü veya dil, ırk, sınıf, din ve mezhep ayırımına dayanarak, nitelikleri Anayasada belirtilen Cumhuriyeti ortadan

language, race, class, religion and sectarian differences and *for the annihilation of the unity of the state with its land and nation and of the Republic defined in the second Article of the constitution* is prohibited. It is interesting that the inclusion of concepts such as *national security, public order, public interest* and *general morality* in the definition of rights and liberties were also demanded by a number of conservative representatives during the constitutional debates of 1961 constitution. Yet these demands were mostly rejected by the members of the Constitutional Committee since they were ambiguous and vague, thus might pave the way for the arbitrary limitation of rights by governments. It seems that during the extraordinary circumstances of 12 March, these demands find easy access to the constitution.

The amendment also includes provisions related to the Constitutional Court. 1961 constitution remained silent about the scope of the Courtôs authority in reviewing the constitutionality of constitutional changes (Kaboĵ lu, 2007: 110). The constitutional amendment of 1971 limits however the constitutional review of such changes to only procedural terms.

In fact, an attentive scrutiny of the constitutional debates brings into light not only the perception of the representatives about the parliamentôs authority in making the present constitutional amendment but also about the legislatureôs authority in general. The second aspect is made explicit particularly during the discussions of the provisions related to the Constitutional Court in the Republican Senate.

Throughout the discussions in the National Assembly, we first encounter the general tendency to conceive such comprehensive amendment as an ordinary constitutional change. The representatives generally claim that the parliament exercise the authority assigned to itself with the constitution of 1961. Emin Paksüt (*Milli Güven Partisi*) indicates for instance that the parliament uses the authority assigned to itself in the

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kaldērmak kastē ile kullanēlamaz. Bu hükümlere aykērē eylem ve davranēklarēn cezasē kanunda gösterilir.ò (*MM, TD.*, Cilt 17, B: 162, 05.09.1971, p.706)

Article 155 of 1961 constitution. He argues that the authority of the parliament is absolute in the sense that it can engage in constitutional amendments in accordance with the will and needs of the nation and this authority cannot be questioned by any other authority.[307] A similar perspective is also reflected in the speech of Prime Minister Erim when he asserts that the parliament has the authority to amend the constitution in accordance with the predetermined procedure.[308] In this respect, the parliamentary representatives seem to mainly underline the legality of their practice.

Furthermore, during the constitutional debates in the National Assembly, almost no representative alleges that the parliament is unauthorized to engage into such a comprehensive constitutional amendment. A limited number of representatives rather criticize the amendment in terms of content.[309] Indeed, the constitutional debates in the Republican Senate are more severe than the National Assembly in this respect. It is throughout the debates in the Republican Senate that the perception of the representatives about the authority of the parliament becomes obvious. We encounter here rather a problematic perspective which focuses on the constituent character of the present parliament and the parliamentary institution in general.

The debate begins as Ahmet Yıldız from the Group of National Unity brings severe criticisms about the constitutional amendment. Yıldız invites all parties to rational

[307] *MM, TD.*, Cilt 17, B: 156, 27.08.1971, pp.266-7.

[308] *MM, TD.*, Cilt 17, B: 162, 05.09.1971, p.782.

[309] These are Mehmet Ali Aybar from Turkish Labor Party and Celal Kargılı and İbrahim Öktem from CHP. These representatives generally question the necessity and quality of the constitutional amendment. Kargılı in particular criticizes the general attitude defending the constitutional amendment on the basis of the requirements of the concrete situation: ñAnayasa değişikliklerine rastgele nedenlerle başvurulmasıve günün koşullarına göre Anayasa değişikliğine gidilmesinin ciddi sakıncalar doğuracağıve bu yolda yapılan değişikliklerin yeni Anayasa değişikliklerinin davetçisi olacağına inanmaktayım. Anayasa değişikliklerinin, ancak, mevcut anayasaların devrim, reform ve ileriye dönük atılımlara engel olduğu ve mevcut düzenin gerisine ve toplumun arzuladığı düzenin karşısına dikildiği zamanlar yapılabileceğine inanmaktayım. Oysa 1961 Anayasası[nın] değişikliği bu nedenlerin hiçbirisine dayanmamaktadırò (*MM, TD.*, Cilt 17, B: 162, 05.09.1971, p. 776).

discourse in Habermasôs terms to present the justification of their claims[310] and questions the authority of the parliament to make such an amendment: ñIt is controversial that the present Assembly has the right and authority to make such comprehensive constitutional amendments as well.ò[311]

As the debate deepens, it is seen that mostly the representatives from the Justice Party claim that the parliament has the powers and status of a constituent assembly. Ahmet Nusret Tuna (Justice Party) for instance, directly associates the parliament with a constituent assembly: ñé the constituent assemblies make the constitution of the nations. Your Supreme Assembly performs today the duty of a constituent assembly.ò[312] Tuna furthermore defends the idea of parliamentary supremacy by referring to the notion of ñnational willò and criticizes the power relations established among the legislative, executive and judicial organs by the constitution of 1961.[313] He tries to justify his assertions on the basis of 1924 constitution as in the following:

> 1924 Constitution is based on national will, on the fact that sovereignty belongs to the nation. Nation uses its right via the Parliamentary. In the 1961 Constitution, it is indicated that the sovereignty belongs to the nation and the nation uses its right via the institutions, associations that are indicated in the Constitution. However all these usages have passed through the judicial body

[310] Yıldız states that ñ[D]uygusal olmadan, konuyu bilimsel ve toplumsal gerçeklerimizin ve rejimimizin gerekleri ışığında incelemeliyiz. Ne bunu biz yaptık ve ne de yapılışına katıldık, duygularına yer vermeden bir tartışma yöntemi öneriyoruz. Biz, belirttiğimiz nitelikte olan bir konuşma yapmaya çalışacağız. Bu bakımdan, ileri süreceğimiz gerekçeli görüşlere karşı, gerekçelere dayanan karşı görüşleri konuşmacılardan rica ediyoruzò (*CS, TD.*, Cilt 67, B: 113, 12.09.1971, p.234). Yıldız defines the constitutional amendment as an act of ñcounterrevolutionaryò forces consisting of social segments (including the conservative and reactionary fractions and the dominant classes) mainly opposing equal and free social order and impartial state (*CS, TD.*, Cilt 67, B: 113, 12.09.1971, pp. 235-8).

[311] ñBugünkü Meclisin, bu ölçüde büyük Anayasal değişiklikleri yapma hak ve yetkisi de tartışılmaya değer bir konudur.ò *CS, TD.*, Cilt 67, B: 113, 12.09.1971, p. 241.

[312] ñé milletlerin Anayasasını kurucu meclisler yapar. Bugün Yüksek Heyetiniz bir kurucu meclis görevi ifa etmektedir.ò *CS, TD.*, Cilt 67, B: 113, 12.09.1971, p. 251.

[313] *CS, TD.*, Cilt 67, B: 113, 12.09.1971, p. 253.

> eventually. The practice is realized as the sovereignty belongs to the judicial body.[314]

Tunaôs assertions are welcomed explicitly by Ömer Lütfi Hocaoî lu and Ziya Termen from Democratic Party. Similar to Tuna, Hocaoî lu conceives the strengthening of the executive as a return to the principle of unity founded by the constitution of 1924; moreover as a ñreturn of the nation to its own existence, to know itself and to protect its national unityò.[315] Termen also emphasizes the necessity for returning from the normative understanding of the state stipulated in 1961 constitution back to a classical understanding of state based on absolute power as in the case of 1924 constitution.[316]

Ekrem Özden (CHP) emphasizes the constituent character of the present parliament as well. However, he does not refer to the principle of parliamentary supremacy in order to back up his idea and states basically that the parliament has the authority to make constitutional changes by complying with the rules stipulated in the constitution.[317] These members, including Tuna, generally hold the idea that the parliament might amend the entire constitution with the exemption of the state type defined in 1961 constitution.

Only a few members of the Republican Senate challenge the association of the parliament with a constituent assembly. Turgut Cebe (Democratic Party) for instance, brings criticisms regarding such inclination when he is opposing the

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[314] ñ1924 Anayasasēnēn dayandęē millî iradedir, egemenliî in millette oluĸudur. Millet bu hakkēnē Parlamenterler vasētasēyla kullanēr. 1961 Anayasasēnda egemenlik millette gösterilmekle beraber, millet bu hakkēnē Anayasada gösterilen kurumlar, teĸekküller vasētasēyla kullanēr, demiĸtir. Fakat kullanmalarēn hepsi netice itibariyle yargē organēndan geçirilmiĸtir. Tatbikatēn sonu, egemenlik yargē organēnēndēr, ĸeklinde tecelli etmiĸtir .ò *CS, TD.*, Cilt 67, B: 113, 12.09.1971, p. 255.

[315] *CS, TD.*, Cilt 67, B: 113, 12.09.1971, p. 269.

[316] *CS, TD.*, Cilt 67, B: 113, 12.09.1971, p. 275.

[317] *CS, TD.*, Cilt 67, B: 116, 20.09.1971, p. 621.

limitation of the scope of constitutional review.[318] Fatma Hikmet Işıkmen (Turkish Labor Party) gives voice to more profound criticisms and argues that there is an unbridgeable gap between the constitutional amendment and 1961 constitution in philosophical terms, thus the amendment cannot be considered as an ordinary change.[319] The amendment signifies rather a new constitution: ñé it is obvious that the subject of our debate is not a simple constitutional amendment, but a new Constitution, the Constitution of 1971.ò[320] She additionally points out that the amendment would surely affect large segments of society; hence it has to be voted through a peopleôs referendum. Similar to Işıkmen, Lütfi Akadlē (representative elected by the President of the Republic) insists that the parliament has no authority to engage into such a constitutional amendment since it is not a constituent assembly.[321]

In fact, the members of the Republican Senate who are critical about the constitutional amendment seem to generally share a Schmittian conception of positive constitution. In this regard, they tend to conceive the constitution in *material* terms that the fundamental principles of the constitution, or its *substance* conveying the philosophy of the authors of the constitution, cannot be amended through the pursuit of such an ordinary amendment procedure. Though they largely agree that the constitution might be amended in line with the emerging needs of society, they also advocate that the fundamental principles of the constitution are exempt from this amendment.

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[318] *CS, TD.*, Cilt 67, B: 113, 12.09.1971, p. 284.

[319] *CS, TD.*, Cilt 67, B: 113, 12.09.1971, pp. 289-91.

[320] ñé tartēkteğ ēmēz konunun basit bir Anayasa deği ikliği deği il, yeni bir Anayasa, 1971 Anayasasē, olduğ u açēktēr.ò *CS, TD.*, Cilt 67, B: 113, 12.09.1971, p. 291.

[321] *CS, TD.*, Cilt 67, B: 115, 14.09.1971, p. 508. Akadlē delivers a critical speech about the limitation of the scope of constitutional review and states that ñ[B]ir kere, bu deği ikliği kabul edecekler münhasēran Anayasa yapma görevi ile toplanmēş ve bu görevi yerine getirdikten sonra dağēlacak bir Kurucu Meclis niteliği inde deği ildir. Bilakis, tabiatē icabē iktidarēnē devam ettirmek isteyen bir siyasi toplulukturò (*CS, TD.*, Cilt 67, B: 115, 14.09.1971, p.509).

The debate about the authority of the parliament to engage into such comprehensive amendment deepens during the discussions regarding the limitation of the scope of constitutional review. The senators from the Group of National Unity, namely Selahattin Cizrelioğlu and Suphi Karaman, insist that such comprehensive amendment limiting especially the scope of constitutional review must be submitted to popular referendum.[322] Karaman, reminding interestingly Schmittôs categorical classification between the political and legal provisions of the constitution, underlines that the constitution consists of two types of provisions, namely the fundamental and procedural articles.[323] For him, the limitation of the scope of constitutional review implies a change in one of the fundamental articles related to the organization of state power. The amendment contains specifically the danger of unlimited and arbitrary authority assigned to the legislature for changing the constitution. Thus it might even pave the way for the foundation of a new state. He states that:

> Now, if the legislative is authorized to make changes on the Constitutionôs *substantive articles* and with no limits, it may be that, someday in the Parliament, the oppositionôs reaction against these kinds of changes may be too harsh, and because there is no Constitutional Court assurance, then the society falls into depression. My fellows, I see the danger of changing the 2nd Republic, the body, the structure of the 2nd Republic introduced with May 27 Constitution in the 147th article. It will lead to great depressions and *by changing this 147th article, we pave the way for the 3rd Republic.*[324] [*emphasis mine*]

[322] *CS, TD.*, Cilt 67, B: 116, 20.09.1971, pp. 611-3.

[323] *CS, TD.*, Cilt 67, B: 116, 20.09.1971, p. 625.

[324] ñşimdi, Anayasanõn *esas maddelerinde* ve böyle sõnõrsõz bir şekilde değişiklik yapma yetkisi yasama organlarõna tanõnacak olursa, olabilir ki, günün birinde Parlamentoda bu türlü değişiklik teşebbüslerine karşõ içindeki muhalefet de çok şiddetli olabilir ve Anayasa Mahkemesi teminatõ da olmadõğõ için, o zaman toplum bunalõma gider. Arkadaşlar, ben bu 147 nci maddenin altõnda 2 nci Cumhuriyetin, 27 Mayõs Anayasasõ ile başlayan 2 nci Cumhuriyet strüktürünün, bünyesinin değiştirilmesi tehlikelerini görüyorum. Büyük bunalõmlara yol açacaktõr ve *biz bu 147 nci maddeyi değiştirmekle 3 ncü Cumhuriyete giden yollarõ açmõş oluyoruz.*ò *CS, TD.*, Cilt 67, B: 116, 20.09.1971, p. 626.

Therefore, similar to Schmittôs conception, the constitutional principles signify for Karaman the fundamental political decision about the concrete existence of the state. Consequently he conceives a change in these principles the foundation of a new polity.

Behind the idea of most representatives regarding the parliamentôs authority to make such amendment seems to stand the belief in the principle of parliamentary supremacy and majoritarian understanding of democracy. The accuracy of this reflection is supported by the substantial reference made to ideas like ñsovereignty belongs unconditionally to the nationò and consequently ñthe parliament is the sole representative of the national will.ò It is well known that the principle of parliamentary supremacy conflicts with the principle of the rule of law which foresees a system of checks and balances between the constitutional organs. In addition, the majoritarian understanding of democracy tends to ignore the plurality in society and democratic demands of minorities. In this respect, the majority of the members of the parliament supporting the constitutional amendment of 1971 for these reasons seem to significantly diverge from the premises of liberal constitutionalism and democratic theory. Moreover, they seem to be alien to the framers of 1961 constitution in political and philosophical terms since the latter strived most of all to establish the principle of the rule of law. The statement of Nahit Altan (Justice Party) is illustrative about this diversion:

> [The Constitutional Court] will control which issues of the Constitution needs to be changed or not, but according to what it will control and audit? It does not have a Constitution above the Constitution and a right above the Constitution that is granted to itself. If we grant this, such a right, that would be contrary to democracy, would be an intervention to the duties and authorities of the Parliament and would be contrary to national sovereignty, to the principle of ñsovereignty unconditionally belongs to the nationò, to the evolution of society. In this respect, changing this article as such is appropriate. Principally, the issue of constitutions do not change can never be claimed.[325]

[325] ñ[Anayasa Mahkemesi] Anayasanēn hangi hususlarēnēn deĝiıktirilmesi lazēm gelip gelmediĝini kontrol edecektir ki, neye göre kontrol edecektir, neye göre denetleyecektir? Elinde, Anayasanēn üstünde bir Anayasa ve Anayasanēn üstünde kendisine verilmiı bir hak yoktur. Bunu verdiĝimiz takdirde, böyle bir hakkē, bu demokrasiye aykērē olur, Parlamentonun vazife ve salahiyetlerine

It becomes obvious in light of parliamentary debates that particularly the representatives from the right of political spectrum demand a powerful executive and defend this request under the banner of the principle of parliamentary supremacy endorsed in the founding constitution of the polity. These representatives also seem to reject in this sense the idea of limited government of liberal constitutionalism. Altanôs, and Tunaôs considerations mentioned at the beginning, when taken together with the criticisms of Hocaoĵlu and Termen from Democratic Party, enable us to make a general inference. The idea that the parliament has the authority to make such constitutional amendment seems to be the part of reaction against the principle of the rule of law (moderate separation of powers) adopted in 1961 constitution. In this respect, the constitutional amendment seems to be conceived as a partial return to *normative* constitutional order founded by *Teúkilat-ē Esasiye of 1924*. This might be otherwise considered as a strategic act to empower the executive; in order to succeed in; they might be striving to present the constitutional amendment as a partial return to the original establishment.

Against such outlook, we see that the representatives from Turkish Labor Party and the Group of National Unity take a firm guard. And it is seen that the representatives from Republican Peopleôs Party mostly remain silent during the discussions about this controversial issue. At first sight, it is surprising that the principle of the rule of law is advocated by the members of the Group of National Unity who mostly come from the military cadre involved in the coup of 27 May.[326] Yet they seem to form a bridge with the authors of 1961 constitution and share their political ideals, since they also involved in the making of 1961 constitution.

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müdahale olur ve milli hâkimiyet, ñegemenlik kayētsēz ŧartsēz milletindirò prensibine aykārē olur, cemiyetin tekâmülüne aykārē olur. Bu bakēmdan bu maddenin bu deĵiŧikliĵe uĵramasē yerindedir. Esasen, anayasalarēn deĵiŧmeyeceĵi hususu hiçbir zaman iddia edilemez.ò *CS, TD*., Cilt 67, B: 116, 20.09.1971, p.627.

[326] The Group of National Unity was established in legal terms in 1964 and involved members some of which engaged into the military coup of 27 May. These senators were Vehbi Ersü, Ahmet Yēldēz, Muzaffer Yurdakuler, Kamil Karavelioĵlu, Sami Küçük, M. ķükran Özkaya, Süphi Gürsoytrak, Sezai Okan, Haydar Tunçkanat, Suphi Karaman, Fahri Özdilek, Sētkē Ulay, and Selahattin Özgür.

After explicating the perception of the members of the parliament about the parliamentary institution in general and its authority to amend the constitution, I will elaborate in the following the rationale for the constitutional amendment expressed individually by the party representatives. This discussion will lay the groundwork for the critical analysis of the criteria upon which the members of the parliament construct the legitimacy of the constitutional amendment.

6.2 The Rationale for 1971 Constitutional Amendment from the Perspective of Parliamentary Representatives

It might be stated at the outset that the general justification for the constitutional amendment of 1971 prepared by the Interparty Committee is very short and far from explaining the true rationale for such comprehensive amendment. In the justification, the whole argument is unconvincingly based upon the necessity of amending the constitution ñin light of the ten year experienceò and ñby taking into consideration the challenges and shortages encountered during the implementation.ò Moreover, despite the quality of the changes brought about, the justification interestingly claims that 1961 constitution is amended ñby completely protecting the emancipating structure and fundamental principles of the constitution.ò

The arguments pointed out in the justification unsurprisingly overlap with the statements of all party representatives involved in the Interparty Committee. All parties, without exception, support the constitutional amendment; but yet on different justificatory bases.[327] We see that almost no representative criticize either the scope or the procedure adopted for such constitutional amendment. The major and stable opponent in the National Assembly is Mehmet Ali Aybar, from *Türkiye İşçi Partisi*

[327] During the first round (general) discussions in the National Assembly, four Party leaders took the floor and delivered speeches. These are respectively İsmet İnönü, Süleyman Demirel, Cevat Önder and Emin Paksüt on behalf of the Republican Peopleôs Party, Justice Party, Democratic Party and National Faith Party.

(Turkish Labor Party) and Senators from *Milli Birlik Grubu* (Group of National Unity) in the Republican Senate.[328]

Throughout the constitutional debates in the National Assembly, the party representatives took the floor and made speeches basically to defend or explicate the proposed amendments. In addition to such uncritical outlook, the change proposals brought by a number of critical representatives (mostly Mehmet Ali Aybar) are generally rejected by the remaining number of representatives against one or two yes votes. At the beginning of the discussions, the working procedure of the Assembly is accepted upon a proposal. According to this, the general discussions would be followed by the discussion of individual articles. The problematic point is that the voting of each article at the end of the debate is made through open voting procedure. Besides, the general discussions are ended all of a sudden by the adoption of a sufficiency proposal despite the multitude of the representatives applied to make speech.[329] Moreover, as the opposition of Aybar continues and deepens, Hüsamettin Bakker (Justice Party) gave a proposal concerning the limitation of the time allowed for the explanation of change proposals to five minutes.[330] In this respect, it might be argued that the constitutional debates are marked by a decrease in discursiveness as they are not eligible for rational and critical deliberations.[331]

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[328] During the constitutional debates in the National Assembly, Aybar brought change proposals concerning almost all of the proposed amendments. He generally argued that the constitution is made of principles and concepts and that it cannot involve restrictive provisions (*MM, TD.*, Cilt 17, B: 157, 28.08.1971, pp.326-9). In addition to Aybar, only a small number of representatives, namely Celal Kargılı and İbrahim Öktem from CHP, criticized the amendment from different respects. On the other hand, during the constitutional debates in the Republican Senate, the Senators from the Group of National Unity brought severe criticisms against the constitutional amendment.

[329] *MM, TD.*, Cilt 17, B: 156, 27.08.1971, p.293.

[330] *MM, TD.*, Cilt 17, B: 157, 28.08.1971, p. 335.

[331] The lack of discursiveness is also emphasized by a number of critical members of the parliament. These are mostly the representatives of Turkish Labor Party (namely Mehmet Ali Aybar and Fatma Hikmet Işkın) and National Unity Group. Mucip Atakli'nin assertions at the end of constitutional debates in the Republican Senate deserve attention in this respect: "*Olağanüstü şartlar içerisinde* Anayasa değişikliği, vicdani kanaatlerin şek ve şüpheden ari olarak tecelli ettiği kanısını yaratamaz. Hükümet teklifi olarak partilere sunulan, *gizli ve uzun toplantılar sonunda* bir anlaşmanın eseri diye parlamentoya takdim edilen bu teklif *zabıtlara intikal ettirilmeyen tartışmalar* nedeniyle daima elektiri

We witness that the constitutional amendments are generally defended on the basis of the newly emerging needs of society and the *shortages* aroused during the ten years implementation of 1961 constitution. Similar to the previous tendencies in constitution making and change processes, the party spokespersons, particularly Süleyman Demirel, Cevat Önder and Emin Paksüt, overwhelmingly capitalize on the idea of ñsocial needsò but also differently on the requirements of the concrete situation, implying particularly the need to take adequate measures against *extreme left* and *extreme right* (reactionary) movements. These representatives account for the limitations brought to fundamental rights and liberties on the basis of the need to prevent abuse of rights by these fractions. They argue that even the democratic states have such restrictions on rights in their constitutions.[332] Among the party representatives, only Ismet Inönü manifests an apologist attitude towards the military intervention of 12 March.[333] Nevertheless he makes the most defending speech in favor of the principles of 1961 constitution.

The justification based on the requirements of the concrete situation is even valid for CHP as the Party Leader Inönü argues that the polity struggles with anarchy and financial constraints, that the social unrest caused by *extreme rightist* (reactionary movements and opponents of the principles of laic Republic) and *extreme leftist* groups prevent the liberty of education, and that the laws are not adequate to tackle

konusu olarak demokraside açıklık prensibinin ihlalinin bir belgesi halinde gelecek kuşaklara intikal edecektir.ò [*emphasis mine*] (*CS, TD.*, Cilt 67, B: 116, 20.09.1971, p. 638)

[332] For instance, Önder defends the limitations brought to the freedom of the press by giving example from the Basic Law of Federal Germany (*MM, TD.*, Cilt 17, B: 157, 28.08.1971, p.328). Yet he is accused by the opponents with misinterpreting the Basic Law and thus misdirecting the constitutional debates.

[333] It seems that CHP supports the constitutional amendment rather for a distinctive reason. It is true that Inönü defines the period as a transition process, interestingly as a stage in the progress of the democratic regime and hence adopts an apologist attitude toward the military intervention of 12 March (*MM, TD.*, Cilt 17, B: 156, 27.08.1971, p.252 and pp.257-8). Inönü argues that the military intervention was inevitable and urgent since the conflicts among the citizenry are about to cause a horrible civil war. However, as the support of CHPôs representatives for Aybarôs statements (they at times applaud loudly) and Inönüôs statement defending 1961 constitution are taken into consideration, it might be argued that CHP supports the constitutional amendment not for its content or necessity but for not contradicting the demands of armed forces.

with such chaotic circumstances.[334] Nevertheless, Đ¸nönü also adds that the approval of the constitutional amendment by the Republican Peopleôs Party does not signify the approval of the argument, defended by the previous governing (Justice) Party from the very beginning, that 1961 constitution is the cause of the hardships and unrest in the country: ñThe Constitution has no relation to, and no defect and deficiency in the face of anarchic movements.ò[335] In this respect, Đ¸nönü explains the rationale behind their support for the constitutional amendment as the elimination of the shortages encountered so far, prevention of delays, clarification of the provisions and inclusion of new ones.[336]

Demirel grounds the necessity of the constitutional amendment on the requirements of the concrete situation, the activities of the *extreme rightist* and *extreme leftist* groups, and mainly refers to the experiences and newly emerging needs in state administration.[337] And diverging from Đ¸nönü, he brings profound criticisms regarding the principles of 1961 constitution. He criticizes 1961 constitution for it encompasses *extreme* limitations on the political power of governments and parliamentary majorities based on ñnational willò; enables the judicial review substituting the executive and administration, and establishes an inadequate balance between the constitutional organs. He emphasizes that the fundamental rights and liberties cannot be utilized to threaten the constitutional order and that 1961 constitution does not involve necessary sanctions to prevent such abuse of rights.

Demirelôs statement is significant to illustrate the assumed enemies of the constitutional order from the perspective of the framers of the constitutional amendment. The defense of the *national unity* and S*tate* against the ñ*separatist*

[334] *MM, TD.*, Cilt 17, B: 156, 27.08.1971, p.252.

[335] ñAnayasanēn, anarĸik hareketlerin zuhurunda hiçbir dahli, hiçbir kusuru ve eksiĵ i yoktur.ò *MM, TD.*, Cilt 17, B: 156, 27.08.1971, p.254.

[336] *MM, TD.*, Cilt 17, B: 156, 27.08.1971, p.254.

[337] *MM, TD.*, Cilt 17, B: 156, 27.08.1971, pp.258-260.

*movements*ò which include reactionary and most of all leftist ideologies is reflected in his state-centred outlook. He seems to endorse a Schmittian logic of exclusion based on friend-enemy distinction and conception of the priority of stateôs existence against the citizen as he argues that the national consciousness and the spirit of national unity are dependent on the protection of the domestic peace against the separatist movements; that the Turkish Republic stipulated in the second article of the constitution must not be devastated; that the principle regarding the indivisible unity of the Turkish State with its land and nation must not be violated by any person or institution through the utilization of the rights involved in the constitution; and that otherwise not only domestic peace but also national unity and liberal regime and as a result the State will be put in danger.[338]

In parallel to Demirelôs viewpoint, Cevat Önder (Democratic Party) insists that constitutional amendment is required to eliminate the gaps and defects of 1961 constitution encountered during ten years of implementation, and to take measures against ñdeviant ósapø kô ideological interpretations and imaginations.ò[339] For him such need is felt long before the military intervention of 12 March.[340] Önder is very critical about the principle of separation of powers stipulated in the constitution of 1961.[341] He claims by quoting Mustafa Kemalôs words against the opponents of parliamentary government in the first Grand National Assembly that 1961 constitution founded a constitutional order different from the system established by

[338] *MM, TD.*, Cilt 17, B: 156, 27.08.1971, p.261. Mahmut ķevket Doĵan (Justice Party) also makes a supportive speech of the constitutional amendment. He claims that 1961 constitution is alien to the national realities and interests, and written in line with partial theoretical doctrines (*MM, TD.*, Cilt 17, B: 162, 05.09.1971, p.774). According to him, the country is in anarchy because the balance between authority and freedom is not adequately established in 1961 constitution and because the executive is assigned with insufficient powers.

[339] *MM, TD.*, Cilt 17, B: 156, 27.08.1971, p. 266.

[340] *MM, TD.*, Cilt 17, B: 156, 27.08.1971, p.268.

[341] Önder claims that 1961 constitution is a reaction constitution in a negative sense (*MM, TD.*, Cilt 17, B: 156, 27.08.1971, p.267).

Mustafa Kemal on the basis of the principle of parliamentary supremacy.[342] Moreover, 1961 constitution could not succeed in establishing a parliamentary government based on moderate separation of powers to the extent that the executive is endowed with inadequate powers and the independence of the judiciary resulted in judicial arbitrariness and supremacy against the legislature and executive.[343] In this respect, Önder argues that the constitutional amendment would surely contribute to the rebalancing of power relations between three branches of the state.

Similarly to other party representatives, Emin Paksüt (National Faith Party) explicates the need for constitutional amendment on the basis of social needs. He refers mainly to the social conflicts caused by *extreme rightist* (reactionary) and *extreme leftist* movements and points out that the amendment is necessary to clarify the existing articles and to prevent misinterpretations of the principles.[344]

On the other hand, Aybar (Turkish Labor Party) strongly objects to the tendency to represent such comprehensive constitutional amendment as an ordinary amendment of 1961 constitution.[345] He argues that the amendment changes the constitution in a fundamental, restrictive manner and paradoxically the party leaders pretend to amend the constitution for protecting the rights. He draws attention to the lack of public discussions regarding the issue and problematizes the extraordinary thus inadequate conditions to engage into such comprehensive constitutional amendment.

As it is obvious from the constitutional debates, almost all party representatives refer to the social unrest caused by leftist and rightest movements and mostly argue (except for CHP) that the provisions of 1961 constitution do not empower the

[342] *MM, TD.*, Cilt 17, B: 156, 27.08.1971, p.269.

[343] *MM, TD.*, Cilt 17, B: 156, 27.08.1971, pp.271-2.

[344] *MM, TD.*, Cilt 17, B: 156, 27.08.1971, pp.278-82.

[345] Aybar argues that the reforms foreseen in 1961 constitution should be put into practice instead (*MM, TD.*, Cilt 17, B: 156, 27.08.1971, pp.291-2).

executive sufficiently to stifle such problems. Particularly from the viewpoint of the representatives of Justice Party, Democratic Party and National Faith Party, the polity has almost come at the edge of civil war which ultimately endangers the existence of the nation; and the Republic is jeopardized as these groups try the conquer the polity from within. In order to specify the so-called civil war conditions, they make substantial reference to some incidents in the universities such as the propagation of Marxist-Leninist-Maoist ideologies in university faculties both by students and academics, and some illegal activities of these groups, particularly the armed conflict between one of these groups and the gendarmerie in the Middle East Technical University.[346] Moreover, these representatives bring harsh criticisms about the power relations established among the three branches of the State with the constitution of 1961. They complain that 1961 constitution did not contain adequate sanctions for the prevention of abuse of rights and additionally resulted in a weak executive, the actions of which were constrained either by the law or by the court decisions (they cite the decisions of the Council of State and Constitutional Court).

In sum, they seem to form the rationale for the constitutional amendment on the basis of a suspicious and bizarre allegation; that 1961 constitution is the cause of social unrest and hardships. In addition, it seems dubious whether the concrete situation really creates an existential danger/threat for the constitutional order or not. And their argument regarding the explanation of the executiveôs inability to tackle with the threat/danger (whether imaginary or real) to Stateôs existence in connection with the

[346] Demirel for instance draws attention to Marxist, Leninist and Maoist groups among the university youth and claims that these groups aim to destroy the Turkish Republic: ñé Cumhuriyet Halk Partisi Sayın Genel Bakkanının óGençlerô dediği kimseleri iyi tekhis etmek lazımdır. é Evet, memlekette anarki hareketlerine birtakım gençler karışmıştır, bu doğrudur. Bunlar kimlerdir ve ne yapmak istiyorlardı? Bunlar doğrudan doğruya Türkiyeôde Cumhuriyeti yıkmak istiyorlardı. Siz bırakın, óBunlar acaba ku muydu, bu muydu?ô demeyi, kendileri mahkemelerde, óBiz Marksist, Leninist ve Maocuyuz diyorlar. é Türkiyeôde anarki hareketlerini yaratan, óGençlerô denilen, örgütlerde yer alan kişiler ne kehir çetesidir, ne kehir eşkıyasıdır; dünyanın çeşitli memleketlerinde görüldüğü gibi doğrudan doğruya bir memleketi içinden fethetmeye memur edilmiş komünist çeteleridir (A.P. sıralarından óBravoô sesleri, şiddetli alkışlar) (*MM, TD*., Cilt 17, B: 156, 27.08.1971, p. 264). Similarly Önder (Democratic Party) argues that the right to rebel acknowledged in the preamble of the Constitution for the entire citizenry is abused to rebel against legitimate authority: ñDirenme hakkı, meşru otoriteye isyan hakkı olarak kullanılmıştır. Orta Doğu Teknik Üniversitesiônde silahlı jandarma kuvvetleriyle çarpışanlara lütfen hatırlayınızò (*MM, TD*., Cilt 17, B: 156, 27.08.1971, p. 270).

obstacles created by the moderate separation of powers stipulated in 1961 constitution seem to be unconvincing and weak. It is not in fact clear how they establish the linkage between the two phenomena. As far as the constitutional debates are taken into consideration, such rhetorical linkage seems to be a strategic move for justifying the amendment.

In the following, I will engage into a further critical analysis of the arguments which the representatives mobilize in order to legitimize the constitutional amendment. This will make the problematic perspective of the representatives and the quality of the amendment in general more explicit.

6.3 The Conception of the Legitimacy of 1971 Constitutional Amendment

The constitutional debates provide significant insight into the conceptualization of legitimacy of the constitutional amendment by the parliamentary representatives. As it is asserted above, the party leaders commonly make reference to the social unrest resulting from the activities of *extreme left* and *extreme right*. And they try to account for the need of constitutional amendment in terms of taking the adequate measures against the proliferation of such movements. For instance, Erim argues that the constitutional amendment is necessary because the polity is confronted with ñconspiracy from within and outside.ò[347] And Kasēm Gülek (representative elected by the President of the Republic) refers to ñinternal and external enemies.ò[348] As discussions proceed and individual articles are debated, it is seen that the idea of ñinternal and external threats to the Stateôs existenceò is generally mobilized by the representatives in order to further justify the constitutional amendment. This attitude is in fact prevalent in whole discussions but particularly become evident during the debates related to the fundamental rights and liberties (Article 11) and autonomy of universities (Article 120).

[347] *MM, TD.*, Cilt 17, B: 162, 05.09.1971, p.782.

[348] *CS, TD.*, Cilt 67, B: 113, 12.09.1971, p.299.

It is apparent that the constitutional amendment of 1971 is not triggered by the aim to comply with ñuniversal principles of right and democratic form of governmentò but rather to adjust the constitution in accordance with the ñconcrete political, social and economic conditions of the polity.ò In addition to above mentioned statements of all party leaders, Tunaôs (Justice Party) considerations regarding the establishment of a balance between the *ideal* and *reality* is significant to illustrate such arbitrary inclination.[349] Tuna argues that the constitution might be perfect in ideal terms but still not in compliance with the reality of the polity. Thus the authors of the constitution should form the amendments in accordance with the qualities of the social entity (*toplumun bünyesi*). His words are illuminating about the intrinsic rationale of the amendment: ñThe constitution is not amended just because it is poor; it has to be amended because it does not fit to the entity of the nation.ò[350] When Hocaoĵlu (Democratic Party) criticizes 1961 constitution and supports the amendment, he refers exactly to the same rationale:

> *Instead of preparing a Constitution that is suited to the entity of the nation, the ways to stereotype the nation by force were attempted.* However, a building that would be built with the materials from the national entity, based on the fundamental principles of the law and the regime would be both pleasant and very convenient. The world knows that the Turkish Nation has a profound experience on State administration, and his material is very rich as well.[351] [*emphasis mine*]

Termen (Democratic Party) is another representative who conceives the constitution of 1961 as the cause of social unrest and hardships, and the constitutional amendment as a remedy to these problems. He in this regard demands that the

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[349] *CS, TD.*, Cilt 67, B: 113, 12.09.1971, p. 252.

[350] ñAnayasa deĵiıtirilirken mutlaka kötü olduĵundan dolayē deĵiıtirilmez, bir milletin bünyesine uymamasē bakēmēndan da deĵiıtirilmesi zaruri olabilir.ò *CS, TD.*, Cilt 67, B: 113, 12.09.1971, p. 252.

[351] ñ*Millî bünyeye uygun bir Anayasa hazē lamak yerine, milletin yeni bir kalē ba zorla sokulma yollarē denenmiıtir*. Hâlbuki hukukun ve rejimin temel prensipleri üzerine malzemesi millî bünyeden alēnarak kurulacak bina hem sevimli hem de çok rahat olacaktē Dünya bilir ki, Türk Milletinin Devlet idaresinde geniı tecrübesi vardē, elindeki materyali de çok zengindir.ò *CS, TD.*, Cilt 67, B: 113, 12.09.1971, p. 269.

constitution should be amended in accordance with the necessities of the concrete circumstances. He moreover claims that 1961 constitution should be further amended because the state and regime are in danger. He states that:

> Similar to the rationale behind the amendment of Kanuni Esasi dated 1876 in 1908, the conception of law of 1924 in 1937 and lastly in 1961, there shows up as the necessity of history today to amend the present Constitution on the basis of the signs indicating that the state is in danger and the regime is in danger.[352]

> Turkey is a country which is compelled to live under *fragile neighbourhood conditions*. It is imperative and required, in the face of domestic economic conditions the homogeneity of which is difficult to ensure, that our domestic life must evolve, in accordance with religion, language and technical developments, *around the classical type of state based on proportional authority commanded by the realities rather than the ideal type of state.* It is proper to excuse for now the Esteemed Government for not touching upon such requirement through the present amendment. However, it must be definitely known and not forgotten that the conception of constitution of 1961 which is not suited to the entity of the Turk will transform, be transformed into pyramid state within natural conditions and governed by the Parliament through sooner or later departing from invisible state type. We should indicate on this occasion that we do not consider the present amendments as encapsulating the entire legal requirements of Turkey.[353] [*emphasis mine*]

Similar to Termen, Hamdi Özer (Justice Party) draws attention to the significance of conformity between the constitution and the *social entity*, and emphasizes the danger of civil war mainly caused by imperialism and foreign ideologies.[354] It is seen that

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[352] ñ1876 Kanunu Esasi'sinin 1908'de, 1924 yasa anlayışının 1937 ve onun da 1961'de değiştirilmesi zorunluluğu hangi sebeplerle vuku bulmuşsa bugünkü Anayasanın da tehlikedeki devlet, tehlikedeki rejim işaretlerinden hareket edilerek değiştirilmesi bu tarihin zarureti olarak kendini göstermiştir.ò *CS, TD.*, Cilt 67, B: 113, 12.09.1971, p. 274.

[353] ñTürkiye, nazik, *komşu şartlar tehdidinde* yaşamaya mecbur bir memlekettir, iç hayatımız din, dil, teknik gelişimler doğrultusunda ve homojenitesi çok zor sağlanabilecek ekonomik iç şartlar önünde i*deal devlet tipine değil hakikatlerin emrettiği nispî otoriteye dayalı klâsik devlete doğru yönelmek zorunluk ve ihtiyacındadır*. Bu ihtiyaca bu değişiklik vesilesiyle el atmayan Sayın Hükümeti şu an için mazur görmek icabeder. Fakat kesinlikle bilinmeli ve unutulmamalıdır ki, Türk bünyesine uymayan 1961 Anayasa anlayışı er geç görünmeyen devlet tipinden ayrılarak tabiat kanunlarış çizgisindeki ve Parlâmento hâkimiyetindeki pramit devlete dönecek, döndürülecektir. Vâki değişiklikleri, bugünkü Türkiye'nin kanuni ihtiyaçlarının tamamını kapsar görmediğimizi de bu vesile ile belirtmeliyiz.ò*CS, TD.*, Cilt 67, B: 113, 12.09.1971, p. 275.

[354] *CS, TD.*, Cilt 67, B: 113, 12.09.1971, pp.276-7.

assertions brought against 1961 constitution in order to support constitutional amendment are also accompanied by a Schmittian idea of ñinternal and external threats to stateôs existence.ò In this respect, the civil war like conditions caused by *extreme left* and *extreme right*, but particularly by the former, is one of the most emphasized subjects.

It might be argued that the case of 1971 constitutional amendment shows the fragility of Schmittôs theoretical standpoint. Recall that Schmitt identifies the ñstate of exceptionò in connection with the presence of an ñexistential threat to the State.ò And he explains the legitimacy of the sovereign decision in the state of exception upon the basis of the aim of protecting the constitutional order in the face of such ñexistential threat.ò The present case shows that Schmittôs perspective is vulnerable to exaggerated and unsubstantiated interpretations of the state of exception. The debates about the constitutional amendment are illustrative of the arbitrariness of the decision upon the state of exception and on the friend and enemy of the constitutional order. It reveals that both the identification of the state of exception and the distinction made between the friend and enemy of the State is left to the arbitrary will of the dominant political actors at the moment of constitutional decision. Here we see the marginalization and exclusion of class based ideologies, namely communism, from the legitimate field of politics. Communism is conceptualized as a menace toward ñunityò and ñintegrityò of the state and nation, and declared as unconstitutional.

Moreover, we witness that the majority of the framers of the constitutional amendment overwhelmingly think that 1961 constitution is the main cause of the concrete situation. Such outlook might be problematic even from Schmittôs viewpoint since he strived to protect the Weimar Constitution from the extreme leftist and rightist ideologies via the mobilization of the Article 48 throughout the 1920s.[355]

[355] Article 48 of the Weimar Constitution basically assigned the President with the power to issue extraordinary measures in a state of exception.

It might be argued in this framework that the concern ñto preserve the existence of the Stateò becomes a key criterion of justification during the discussions. Hüsnü Dikeçligil (Democratic Party) mentions for instance the possibility of the stateôs annihilation in case of a failure in amending the constitution: ñé the problem is not the blowout, but the explosion, annihilation of Turkeyé ò[356] Dikeçligil supports the amendment of the Article 11 in this sense as for him it would protect *the morality, national unity and integrity of the Turkish nation*.[357]

It is also significant to indicate that the demand of the framers of constitutional amendment to protect the State through the utilization of vague concepts in several articles seems to be the indicator of a political attitude. Particularly the utterance of *the unity of the state with its land and nation* seem to signify the fundamental decision on the concrete existence and form of the state and the determining factor in the definition of the friend and enemy of the constitutional order from a Schmittian perspective. The utterance was first mentioned in the third article of 1961 in order to define the unitary form of the state: ñThe State of Turkey is an undivisible unity with its territory and nation.ò With the constitutional amendment of 1971, however, the legal definition of the state form seems to be extended to the nation as well and endowed with a political substance. The nation is now conceptualized as an indivisible unity. This implies ignorance of divisions in society on the basis of class, ethnicity, religion, ideology and etc. Such monolithic and repressive viewpoint seems to be shared by almost all parties in the National Assembly. Moreover, class based politics is codified as a major threat to *the unity of the state with its land and nation*. The critiques of this viewpoint are labeled with the ñcrime of being communistò and marginalized. Indeed while communism is alienated, socialism is defined outside the ñconventional dispositions of the nation.ò[358] Aybar seems to be one of the numbered

[356] ñé mesele arabanēn tekerleĵinin patlamasē meselesi deĵil, Türkiyeônin patlama, yok olma meselesindeé ò *CS, TD.*, Cilt 67, B: 114, 13.09.1971, p.333.

[357] *CS, TD.*, Cilt 67, B: 114, 13.09.1971, p.334.

[358] See the statement of Cevdet Akçalē(*MM, TD.*, Cilt 17, B: 162, 05.09.1971, p. 708).

critiques of such inclination and who reads 1961 constitution in more emancipatory terms as allowing also socialism and Marxism:

> Being a democratic constitution, our 1961 Constitution has not banned Marxism, socialism. Which is banned is to capture the power via unconstitutional ways by using force and violence and to remain in power by discharging the opposition. Which is banned is to demolish democratic institutions. Which is banned is to demolish the Republic, the qualities of which are indicated in the Constitution, thus the regime of national, democratic, secular and social state based on the rule of law, human rights and the principles designated in the preamble of the Constitution. Notably the amendment proposal concerning the article 11 and all amendment proposals should be understood and implemented according to the above mentioned direction in order to preserve the 1961 Constitutionôs democratic character. If we are going to live in a democratic regime, the left would be under the guarantee of the Constitution.[359]

The debate also sheds light on the perspective of representatives about the components of the *extreme left*. From the viewpoint of the majority, the *extreme left* signifies ñ*bölücüler*ò and also involves ñ*kürtçüler.*ò This becomes evident most of all in Salim Hazerdaçlôos (CHP-independent) statement about the fundamental rights and liberties:

> There is the issue of *class dispute* in this 11th article. *And the issue of indivisibility of Turkish homeland, Turkish country and Turkish nation is of great importance.* ...My distinguished friends, the anarchical activities in the pre-March 12 Turkey were devoid of an idea, an essence and the most horrible thing is the separatist activities in Turkey. Dev-Gençôs ñEastern culture centres,ò ñpeoples of Turkeyò phrases almost became fashion. All my life, I have lived in the eastern region. In eastern cities, in this region of the country, it

[359] ñDemokratik bir yasa olan 1961 Anayasamêz, Marksizmôi, sosyalizmi yasaklamamêktêr. Yasak olan, Anayasa dêkê yollardan cebir ve kiddet kullanarak iktidarê ele geçirmek ve muhalefeti tasfiye ederek iktidarda kalmaktêr. Yasak olan, demokratik müesseseleri yok etmektir. Yasak olan, nitelikleri Anayasada belirtilen Cumhuriyeti, yani insan haklarêna ve Anayasanên bakangêcêndaki ilkelere dayalê millî demokratik, lâik ve sosyal hukuk devleti rejimini yok etmektir. 1961 Anayasasênên demokratik niteliçi korunmuk olmak için, bakta 11 nci madde hakkêndaki teklif olmak üzere bütün deçikiklik tekliflerini yukarda açêklanan doçrultuda anlamak ve uygulamak zorunluçu vardêr. Demokrasi rejimimde yakayacaksak, sol, Anayasa teminatê altênda bulunacaktêr.ò *MM, TD.*, Cilt 17, B: 162, 05.09.1971, p.708. Suphi Karaman (Group of National Unity) expresses similar considerations. He argues that class based politics is allowed as long as it is democratic and not aimed at the annihilation of the Republic (*CS, TD.*, Cilt 67, B: 114, 13.09.1971, pp.329-30).

> is seen that a few greedy and exploiter had voiced, wanted to foster a movement, and exploiters wanted to provoke poor people from time to time but people never had such a desire and a tendency. I feel ashamed of pronouncing and speaking this word, ñkurdismò.[360] [*emphasis mine*]

Furthermore, during the constitutional debates related to the autonomy of the universities, the majority of the representatives try to justify their assertions on the basis of the ñcommunist threat.ò[361] Such criterion of legitimacy seems to be parallel with the assertions brought for the general justification of the amendment. In fact not only communism, but also *democratic socialism* is perceived as a threat to the existence of the state and excluded from the constitutional order. This is most evident in Tayfur Sökmenôs (representative elected by the President of the Republic) speech: ñThe rightist, leftist and socialist ideas should never be adopted in Atatürkôs Turkeyé In our country, there can be neither democratic fascism and Hitlerism nor established a party of democratic socialism, it must not be established.ò[362] Sökmenôs statement shows the ultimate point that the language of threat/danger to Stateôs existence might end up and thus abused in order to counteract and exclude the opposing ideologies even when they are democratic.

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[360] ñBu 11 nci maddede *sendika kavgasi konusu var. Bir de Türk Vatanõnõn, Türk ülkesinin, Türk Milletinin bölünmezliği konusu önemle yer almaktadõr.* é Muhterem arkadaşlarõm, 12 Mart öncesi Türkiye'deki anarşik hareketler fikirden, esastan yoksun ve en korkunç olanõ Türkiye'deki bölücülük hareketleri idi. Dev-Genç'in ñDoğu kültür ocaklarõò ñTürkiye halklarõò sözü âdeta Türkiyeôde moda oldu. Kendimi bildim bileli Doğu bölgesinde ikamet etmiş bir arkadaşõnõzõm. Doğu illerinde, yurdun bu bölgesinde 3-5 muhterisin, istismarcõnõn zaman zaman dile getirdiği, hareket yaratmak istediği, istismarcõlarõn zavallõ insanlarõ tahrik etmek için yaptõğõ hareketler görülmüş, fakat halkta katiyen böyle bir arzu, böyle bir cereyan olmamõştõr. Bu sözcüğü, ñkürtçülükò sözünü telâffuz etmeye, tekellüm etmeye utanç duyarõm.ò *CS, TD*., Cilt 67, B: 114, 13.09.1971, p.327.

[361] Regarding the subject, Dikeçligil states that ñTürk Milletinin Maarifine hiçbir devirde girmemiş olan komünizm hareketleri girdi. Hiçbir devirde bu kadar olmamõştõr. Samimiyetle söylüyorum, çekişmemizin nedenleri bu. Türk Milletinin ayakta durmasõ, beka bulmasõ için Hükümetlerin uyanõk olmasõ lâzõmdõr. Teker patladõ değil, Devletin tekeri patlõyor. Devlet adamõnõn vazifesi otomobilinin tekerini patlatmamaktõrò (*CS, TD*., Cilt 67, B: 115, 14.09.1971, p.468).

[362] ñAtatürkôün Türkiyeôsinde sağcõlõğõ, solculuğu ve sosyalistliği asla gidilmemeli é Ülkemizde demokratik faşizm ve Hitlerizm olamayacağõ gibi, demokratik sosyalizm partisi de kurulamaz ve kurulmamalõdõr.ò *CS, TD*., Cilt 67, B: 114, 13.09.1971, pp.330-1.

Moreover, it is considered that communist ideology affected most of all the youth has its origins outside and supported by foreign powers, as reflected in the words of Arif Hikmet Yurtsever (Democratic Party) as in the following:

> Benefiting from this, extreme leftist ideology members which have foreign origins have chosen the method of penetrating into our universities from all aspects in order to fulfill their intentions. On the one hand, they have worked with all their efforts on some faculty members and student groups and turned them into extreme leftist militants, and on the other hand they tried very hard to transform our universities into headquarters for their actions in order to fulfill their disgusting intentions.[363]

In his subsequent words, Yurtsever even states, similar to Erim, that Turkey is exposed to a conspiracy with its land and nation: ñé Turkey faces an assassination with its territory and nation.ò[364] It would not be false to claim that the assertions more or less similar to Yurtseverôs are generally expressed by the representatives from the right. Hence, we encounter an unsubstantiated form of Schmittian logic of exclusion here to the extent that the communism, socialism and Marxism are declared as the enemy, ñmenace to stateôs existenceò and have foreign allies striving to damage the polity.

Therefore, the constitutional debates about the critical articles, namely Article 11 and Article 120, provide significant insight into the conception of *reasonable* and *unreasonable* ideologies in Rawlsôs terms from the perspective of the majority of representatives.[365] Moreover, there seems to be a diversion in the criterion of

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[363] ñBundan istifade eden kökü dēkarda bulunan akēē sol ideoloji mensuplarē, gayelerini tahakkuk ettirebilmek için üniversitelerimize her yönü ile nüfuz etmek metodunu seçmikler, bir taraftan bazē öî retim üyeleri ve bazē öî renci gruplar üzerinde bütün güçleri ile çalēkarak onlarē birer akēē sol militanēhaline getirirken, diî er taraftan da üniversitelerimizi kendi menfur gayelerinin tahakkuku için birer eylem karargâhē haline getirmeye büyük gayret sarf etmiklerdir.ò *CS, TD.*, Cilt 67, B: 115, 14.09.1971, p. 470.

[364] ñé Türkiye, ülkesi ve milletiyle suikasta maruz kalēyor.ò *CS, TD.*, Cilt 67, B: 115, 14.09.1971, p. 470.

[365] It is observed that while the idea regarding the elimination of the ñexistential threat to the stateò is deployed for providing a general justificatory base for the amendment, the specific conditions of the polity are emphasized in order to account for the individual articles. In this context, while Mehmet Hazer (CHP) insists that the executive should be assigned with the power to issue decree with the

legitimacy in light of the debates. It is true that 1961 constitution was written after the military coup of 27 May and under military tutelage. Yet the framers of the constitution strived to introduce liberal democratic forms of government based on the principle of the rule of law. As became obvious in the previous chapter of the thesis, in doing this, the constitutional framers (the members of the Constitutional Committee) tried to establish a delicate balance between the particular necessities of the Turkish context and the universal principles of law and democracy. They most of the time referred to the universal principles of right while in some cases (i.e. the principle of laicism and nationalism) adopted a pragmatic attitude and preferred to refer to the specific conditions of the polity in order to justify the constitutional principles. In specific terms, their position seemed to oscillate between Schmittôs and Habermasôs considerations on the issue.

The formation process and the content of 1971 constitutional amendment on the other hand seem to reflect the political and economic conditions at the beginning of the 1970s. In this respect, not the *normative ideals* (or universalizability in Habermasôs terms) but the arbitrary will of the framers of the constitutional amendment based on the unsubstantiated requirements of the concrete situation seem to completely determine the amendment. The political aspect of the constitutional amendment, particularly the friend-enemy distinction made explicit throughout the constitutional debates and in the constitutional text seems to form the main source of its legitimacy from the perspective of the representatives. They substantially mobilize the language of threat/danger to Stateôs existence in a reactive manner. In fact, the difficulty to justify the constitutional amendment seems to increase when compared to the constitution of 1961 as the latter was progressive in terms of content. Hence, the constitutional amendment of 1971 brings into light the

force of law, he mainly emphasizes that Turkey is an underdeveloped country and thus in need of urgent development (*CS, TD*., Cilt 67, B: 114, 13.09.1971, p.331). Mehmet Ķmen (representative elected by the President of the Republic) also manifests a similar attitude in case of confiscation (*CS, TD*., Cilt 67, B: 114, 13.09.1971, p.371). Therefore, the amendments are considered as the key to trigger the economic and social development of the polity.

problematic nature of Schmittôs conception of state of exception or concrete situation as it might be interpreted very arbitrarily and in a complete decisionist manner.

6.4 Concluding Remarks

The constitution of 1961 is amended several times after its adoption. Among these, the constitutional amendment of 1971 signifies more than an ordinary constitutional amendment for its scope and political significance. This is because; the parliament acts as constituent power by reorganizing the power relations among the constituted powers and redefines (in restrictive manner) several rights and liberties. In specific terms, the parliament seems to be introducing a change in the constitutional essentials without being specifically authorized by this duty, and by completely referring to the particular conditions/concrete situation of the polity.

The parliamentary debates highlight that there is a general tendency to conceive such comprehensive amendment as an ordinary constitutional change. The representatives generally claim that the parliament has authority to amend the constitution and acts in line with the predetermined procedure defined in the constitution of 1961. Therefore, almost any representative questions neither the authority of the parliament nor the legitimacy of the amendment. Furthermore, during the constitutional debates in the Republican Senate, a more problematic perspective becomes obvious as some representatives of Justice Party and Democratic Party defend the amendment by focusing on the constituent character of the present parliament and the parliamentary institution in general. These representatives demand a powerful executive and defend this request under the banner of the principle of parliamentary supremacy by refering to the notion of ñnational willò and criticizing the power relations established among the legislative, executive and judicial organs by the constitution of 1961.

Besides, the representatives supporting the constitutional amendment (specifically the representatives from Justice Party and Democratic Party) try to establish a link between the constitutional amendment and the founding constitution of the Republic,

Teúkilat-ē Esasiye of 1924. In other words, they strive to justify their assertions by invoking the principles of 1924 constitution. Such a move, coupled with severe criticisms brought against the principles of 1961 constitution by the leaders of the political parties (except for CHP), might be viewed as a deliberate attempt to provide a legitimate basis for the amendment. In addition, their defense of the principle of parliamentary supremacy might be viewed as an inclination towards a majoritarian understanding of democracy. They in this respect seem to reject the premises of liberal constitutionalism (particularly the principle of separation of powers and limited government) and democratic theory. Moreover, they seem to deviate from the framers of 1961 constitution in political and philosophical terms since the latter strived at least to establish the principle of the rule of law.

In connection with this, it is seen that the majority of the representatives capitalize substantially on the idea of *national sovereignty*. They make reference to ideas like ñsovereignty belongs unconditionally to the nationò and ñthe parliament is the sole representative of the national will.ò Yet the argument for *national sovereignty* remains rhetorical and far from a dialogical understanding as no argument for the introduction of instruments of direct democracy or even of a participatory version is mentioned throughout the debates. In specific terms, the constitutional amendment of 1971 signifies a complete break from dialogical/procedural understanding of constitutional legitimacy as the majority of representatives do not construct the legitimacy of the constitution on the basis of a democratic procedure, depending on rational will formation processes in the parliamentary institution and in the public sphere in general. During the debates the quest usually made for the strengthening of the executive and leveling of the democratic rights guaranteed by the constitution of 1961 meets with only a small critical response. There is an apparent and very serious decrease in discursiveness to the extent that the debates are performed without rational discourses supported by validity claims justified on universal grounds. This is reflected in the fact that almost all of the change proposals submitted by the opponents are rejected by the overwhelming majority of votes. Therefore, neither the quality and inclusiveness of constitutional debates, nor the approval procedure of the

constitutional amendment (such comprehensive amendment is not submitted to popular referendum despite the demands of a number of critical representatives in this respect) qualifies for a dialogical understanding of the principle of national sovereignty as in the case of Habermasôs theory. The constitutional amendment seems to be the part of reaction against the moderate separation of powers endorsed in 1961 constitution and conceived as a partial return to *normative* constitutional order founded by *Teúkilat-ē Esasiye of 1924*.

As discussed above, there is also an apparent tendency to explain the need for constitutional amendment on the basis of the requirements of the concrete situation: to take adequate measures related to the economic and social backwardness of the polity and to tackle with social unrest assumed to be caused mainly by *unreasonable* doctrines in Rawlsôs terms, namely communism and reactionary movements. It is moreover seen that assertions brought against 1961 constitution in order to support constitutional amendment are also accompanied by a Schmittian idea of ñinternal and external threats to the existence of State.ò With the constitutional amendment, the unitary form of the state defined in the third article of 1961 constitution is extended to define the nation as well and thus endowed with a political substance. The vogue and ambiguous phrase ñunity of the state with its land and nationò is deployed in order to conceptualize the nation as an indivisible unity. As a sign of political maneuver, such outlook surely lacks sociological imagination and tends to ignore divisions in society on the basis of class, ethnicity, religion, ideology and etc. and the specificities of the historical context. Unfortunately, such monolithic and repressive viewpoint seems to be shared by almost all parties (except for Turkish Labor Party and the Group of National Unity in the Republican Senate) in the National Assembly.

In accordance with this, the parliamentary debates demonstrate that the reorganization of state power on the basis of the perception of a ñthreat to the concrete existence of the Stateò goes together with *logic of exclusion*, in other words, the explicit specification of the enemies of the constitutional order in the constitution.

The political unity of the nation seems to be constructed upon the principle of Turkish nationalism and thus imagination of homogeneous community. Any threat towards such assumed unity, mostly the communist and socialist ideologies (and their regional variants based on Kurdish ethnicity) are qualified as ñseparatistò and thus excluded from the field of *legitimate politics*. In Schmittian terms, a decisionist moment is observed in the sense of introducing more enlarged friend-enemy distinction. Class based politics is codified as the *public enemy* against *the unity of the state with its land and nation*. The critiques of this viewpoint are labeled with the ñcrime of being communistò and marginalized. This implies that certain ideologies (thus partial interests) are favoured in the constitutional text at the expense of the mentioned ones.

The idea of ñinternal and external threats to concrete existence of the Stateò and the accompanying logic of exclusion seems to be strategically mobilized by the majority of representatives in order to constitute a legitimate base for the constitutional amendment. It seems dubious if the concrete situation creates a real existential danger/threat for the constitutional order or not. And their argument regarding the explanation of the executiveôs inability to tackle with the threat/danger (whether imaginary or real) to Stateôs existence in connection with the obstacles created by the moderate separation of powers stipulated in 1961 constitution seem to be unconvincing and weak. It is not in fact explicit how they form the relationship between the two phenomana. Overall, they seem to ground the rationale for the constitutional amendment on the basis of a suspicious and bizarre allegation; that 1961 constitution is the cause of social unrest and hardships.

It might be argued that the constitutional amendment of 1971, both in terms of formation process and content, is determined by the perception of a (imaginary or real) state of exception and alleged requirements of the concrete situation. In the final moment, the arbitrary decision of the framers of the constitutional amendment, on the state of exception and friend-enemy distinction, takes effect and the political aspect of the constitutional amendment is presented as the main source of legitimacy.

The case of 1971 constitutional amendment reveals the weakness of Schmittôs theoretical standpoint. Recall that Schmitt identifies the ñstate of exceptionò in connection with the presence of an ñexistential threat to the State.ò And he explains the legitimacy of the sovereign decision in the state of exception upon the basis of the aim of protecting the constitutional order in the face of such ñexistential threat.ò The present case shows that Schmittôs perspective is vulnerable to exaggerated and unsubstantiated interpretations of the state of exception. The constitutional debates are illustrative of the arbitrariness of the decision upon the state of exception and on the friend and enemy of the constitutional order. In specific terms, it reveals that the identification of the state of exception and the distinction made between the friend and enemy of the State is left to the arbitrary will of the dominant political actors at the moment of constitutional decision.

In sum, the difficulty to legitimize the constitutional amendment of 1971 upon the basis of the concrete situation seems to increase when compared to the difficulty felt in the case of *Teúkilat-ē Esasiye of 1924* and the constitution of 1961. The founding fathers of *Teúkilat-ē Esasiye of 1924* strived to constitute their legitimacy on the grounds of actual state of war. And the constitution of 1961 could have been partially legitimized for its progressive content. Nevertheless, in case of the constitutional amendment of 1971, we encounter with the deployment of the language of threat to Stateôs existence in a reactive manner and on the basis of an exaggerated illustration of concrete situation.

CHAPTER 7

THE CONSTITUTION OF 1982

The Constitution of 1982 is the second constitution in the constitutional history of the Turkish polity written after a military intervention and under the tutelage of military rule. The constitution of 1982 *reorganized the state power* in a peculiar manner through the reconstitution of the relations between the legislative, executive and judiciary, and introduced a radical shift in the philosophy of fundamental rights and liberties towards an authoritarian and restrictive direction (Özbudun, 2011: 44). In rough terms, the limitation of the rights and liberties and strengthening of the executive went far beyond the constitutional amendment of 1971. The new constitution indicated in a sense the formulation of a new era in state/society and state/individual relations.

The National Security Council (NSC), composed of the five highest ranking generals in the Turkish armed forces, took over the government on 12 September 1980, and abolished the Grand National Assembly and the Justice Party government immediately after.[366] The military junta did not only terminate all political activities but also closed down all political parties including the major ones, namely Republican Peopleôs Party, Justice Party, Nationalist Movement Party and National Salvation Party.

Two days after the military takeover, General Kenan Evren, the leader of the NSC, is assigned to the presidency of state, and within one week a cabinet consisting of 27 members is established under the leadership of retired admiral Bülend Ulusu.[367] Yet

[366] These are General Kenan Evren, Chief of the General Staff; Nurettin Ersin, Commander of the Land Forces; Tahsin ķahinkaya, Commander of the Air Forces; Nejat Tümer, Commander of the Naval Forces; and Sedat Celasun, Commander of the Gendarmerie Forces.

[367] The new cabinet included five retired soldiers and five professors, and eleven of the members were ministers in previous governments (Aydēn and Takkēn, 2014: 327).

the cabinet had only limited authority of advising the NSC and executing its decisions (Aydın and Takkın, 2014: 327). In effect, the military junta did not abolish the constitution of 1961. The provisions of the constitution remained in force with some reservations along with the decisions of NSC.[368] The NSC would temporarily take over the legislative power, and General Evren, the duties and powers of the head of state, until a new Grand National Assembly convenes and begins its duty in accordance with the provisions of the constitution to be prepared by the Constituent Assembly and accepted in referendum.[369]

In the Declaration no 1 issued by the National Security Council, it is stated that the *existence*, *regime* and *independence* of the State of Turkish Republic (*Türkiye Cumhuriyeti Devleti*) has been under the threat of external and internal enemies in recent years.[370] The State has been made inoperative, the constitutional institutions have become contradictory or silent, and the political parties have failed to ensure unity and solidarity to rescue the State and to take necessary measures due to idle conflicts and uncompromising attitudes. Hence destructive and divisive (*bölücü*) groups have increased their activities and the life and property of the citizens have been jeopardized. In brief, the deliberate proliferation of reactionary and deviant (*sapık*) ideologies instead of *Atatürkçülük* has taken the polity to the edge of disintegration and civil war. *The State has been powerless* and *helpless*.

As it is seen, the political instability and social unrest were presented as the underlying reasons of the military coup. Moreover, the Declaration continued,

[368] According to the Law on the Constitutional Order no 2324, dated 27.10.1980, the constitution of 1961 would remain in force until the new constitution takes effect. The Law forbids the plea of unconstitutionality of the declarations, decisions and laws issued by the National Security Council. Moreover, the provisions of these regulations conflicting with the provisions of the constitution would be treated as constitutional amendments and those conflicting with the provisions of ordinary laws would be treated as ordinary law changes (Kili and Gözübüyük, 2006: 263-4). The provisions of the Law are significant for revealing that the National Security Council is presupposed as the constitution making power in the polity.

[369] Article 2 of the Law on National Security Council no 2356, dated 12.12.1980.

[370] MGK TD, Cilt 1, B: 1, 19.09.1980, p.4.

similar to the Law no 1 issued by the National Unity Committee in 1960 that the army has intervened on behalf of the *Turkish Nation* in order to protect the unity of the land, ensure national unity and solidarity, to prevent a possible civil war and fellow quarrel (*kardeşkavgası*), to *reestablish the existence and authority of the State* and to eliminate all the causes hindering the functioning of the democratic order.

Beginning with the first day of the military intervention, the leader of the military junta declared in many occasions that there is the urgent need to write a new constitution based on *the principles of national sovereignty, democracy* and *laic Republic* in order to meet the óneed of authorityô (Tanör, 2013: 88). In this framework, a bicameral Constituent Assembly was established by Law no 2485 on 29 June 1981 in order to prepare the new constitution, and the referendum law along with the law on political parties and election law.[371] The first chamber, Consultative Assembly (*Danışma Meclisi*), was composed of 160 civil members, all of which were appointed by the National Security Council while the second chamber was the National Security Council itself. It is within such institutional context that the 1982 constitution is prepared and submitted for a referendum.

It is interesting that in parallel to the statements of General Evren in terms of the ñneed of authority,ò the idea of ñpowerful stateò becomes the leitmotiv directing the course of constitutional debates in the Consultative Assembly. Moreover, the Declaration of the military junta becomes one of the main texts cited by the authors of the constitution during the debates in the Consultative Assembly to provide a rationale for the practice of writing a new constitution. We see that the members of the Consultative Assembly strive to strengthen this rationale with some allegations concerning the constitution of 1961. In fact, they substantially make reference to the so-called gaps of 1961 constitution and the problems resulting from its misinterpretation.

[371] The Constituent Assembly is also assigned with legislative power until a new Grand National Assembly convenes.

In light of these preliminary remarks about some of the developments preceding the making of 1982 constitution, I will elaborate in this chapter the constitutional debates in the Constituent Assembly in order to understand the perspectives of the authors of the constitution about the constitution and its legitimacy. My elaboration will mainly focus on the minutes of Consultative Assembly since there takes place no discussion but only ratification in the National Security Council.[372] To this purpose, first, l will concentrate on the preparation process of the constitution of 1982. I will discuss in this respect the characteristics of the Constituent Assembly and the content of the Report of the Constitutional Committee. Afterwards, I will focus on the constitutional debates in the Consultative Assembly in order to highlight how the framers of the constitution conceive the text of constitution and on what grounds they try to construct its legitimacy. This analysis will also shed light on the linkages formed between the military intervention and the practice of writing a new constitution. And lastly, I will examine how the authors of the constitution conceive the constitutional review. In this exploration, the theoretical frameworks of Schmitt and Habermas would be my main precursors as were in the previous chapters.

Let me briefly remind at this point that Schmitt and Habermas provide us with two substantially different conceptions of constitution, namely realist and normative. Schmitt conceptualizes the constitution most of all in material sense, based on the substantive understanding of the political. For him, the constitution forms the fundamental political decision on the concrete existence (form and type) of a political community. The constitution is understood in realist terms, posited by and dependent upon the (arbitrary) will of the dominant actors or social powers at the time of constitution making. Moreover, from Schmittôs perspective, the constitution in positive terms is (and has to be) static in terms of the fundamental political

[372] National Security Council devotes two sessions to the constitutional debates. These are *MGK, TD*, Cilt 7, B: 117, 24.09.1982, and *MGK, TD*, Cilt 7, B: 118, 18.10.1982. In the first session, the Council ratifies the law on submission of the constitution to referendum while in the second session; it ratifies the proposal of the Consultative Assembly for the constitution of 1982. The discursiveness in the Council is substantially low that both sessions are conducted *without any debate* on the substance of the law proposals, and ratification takes place in line with the Report of the Constitutional Committee of NSC.

decisions it embodies. In case of Habermas, on the other hand, we come to terms with a procedural understanding of politics, and in consistence with this, a procedural conception of the constitution based on the communicative will formation processes in the political public sphere. The act of constitution making signifies a dynamic platform for the intersubjective constitution of the basic (normative) rules of living together on equal and free basis, and the constitutional text becomes open to democratic demands of social groups. In this context, while Schmitt offers us a realist conception of constitution based on the factual power constellations at the time of constitution making, Habermasôs endeavor signifies a major construction of a normative act of constitution making where rational and moral individuals mutually assign each other with equal rights and liberties. It is in this conceptual framework that I will scrutinize the minutes of the Constituent Assembly and try to get an enlarged perspective about how the constitutional text and the act of constitution making is conceived by the authors of the 1982 constitution.

7.1 The Constituent Assembly of 1981

The constitution of 1982 is prepared within the bicameral Constituent Assembly established in accordance with the Law no 2485. The Constituent Assembly of 1981 differed from the Constituent Assembly of 1961 in many respects, but most of all in terms of its composition and the division of powers between its two chambers in the constitution making process. The difference is significant for indicating the variation in the quality of democratic representation of two Assemblies and the constitutions as their end results.

Recall that the civilian chamber of the Constituent Assembly of 1961 (the House of Representatives) was not founded through direct elections by the citizenry, but partly on co-optation and partly on indirect election. In addition, the representation of Democrat Party or any person supporting its policies was banned in the Constituent Assembly. Hence, it was not sufficiently inclusive since it excluded the representatives of some major segments of society including the constituents of

Democrat Party, and happened to represent a common political position in terms of commitment to *Turkish nationalism* and *laws of revolution*.

Despite this, the Constituent Assembly of 1981 was still less representative than the Constituent Assembly of 1961 since all the members of its civilian chamber were appointed by the military junta. [373] In addition, this time not only one political party, but all the political parties were excluded from the constitution making process; the members of the Consultative Assembly had to have no previous attachment to any of the political parties. This does not, of course, mean that they had no certain worldviews. In reality they tended to share certain perspectives which would be delineated during the analysis of the constitutional debates. As an initial remark, suffice it to say here that the members of the Consultative Assembly were highly critical about the political parties and distrustful to politics partially due to the experience of past political developments.

Moreover, the Consultative Assembly of 1981 had relatively less power than the House of Representatives in the constitution making process. In case of 1961 constitution, the constitution making procedure allowed the establishment of a joint committee involving the members of the House of Representatives and the National Unity Committee in order to settle the disputed provisions. No such committee is foreseen in case of 1982 constitution, and the National Security Council had the final say over the constitution. This had enabled the National Security Council to make substantial changes in the draft constitution approved and submitted by the Consultative Assembly.[374] Therefore, it might be argued that there was a significant

[373] According to the Law no 2485, the National Security Council would appoint 120 members of the Consultative Assembly among the candidates nominated by the governor of each city, and 40 members directly.

[374] In order to evaluate the proposal submitted by the Consultative Assembly, a Constitutional Committee is established within the National Security Council. The Committee involved the General Secretary of the Council, and the staff of the Councilôs Directorate of Law Affairs, Laws and Decisions. The draft constitution of the Consultative Assembly originally involved 193 articles and 11 provisional articles. The Constitutional Committee of NSC, on the other hand, submitted a proposal consisting of 177 articles and 15 provisional articles by eliminating and merging some of the articles. The Committee accepted 40 articles without any amendment; eliminated 5 articles; included 5 new

difference between the two Constituent Assemblies in terms of their quality of democratic representation. The Constituent Assembly of 1982 was less representative and the will formation process within the Assembly is less discursive and democratic as the final decision is tied to the arbitrary will of the members of the National Security Council.

After explaining the Constituent Assembly of 1981 and explicating its difference from its predecessor, let me focus on the contents of the report of the Constitutional Committee and the Committeeôs rationale for writing a new constitution.

7.2 The Report of the Constitutional Committee

The draft constitution of 1982 is prepared by the Constitutional Committee elected by the Consultative Assembly among themselves on 23 November 1981.[375] The Constitutional Committee was composed of fifteen members. The president of the Committee was Orhan Aldıkaçtı, a prominent professor of constitutional law and who has been involved in constitutional forums before the military coup.[376] After six

articles and amended the rest of the articles included in the proposal of the Consultative Assembly (Annex to *MGK, TD*, Cilt 7, B:118, 18.10.1982, pp.1-201). If the fact that the NSC ratified exactly this proposal is taken into consideration, the extent of determinacy of the NSC in the constitution making process becomes apparent.

[375] The Constitutional Committee involved Orhan Aldıkaçtı as the president, Feyyaz Gölcüklü as the vice president, Şener Akyol as the speaker, Turgut Tan as the reporter and Tevfik Fikret Alpaslan, Hikmet Altuğ, Kemal Dal, Feridun Ergin, Feyzi Feyzioğlu, Ihsan Göksel, Rafet Đbrahimoğlu, A. Mümin Kavalalı, Recep Meriç, Teoman Özalp and Muammer Yazar as the members.

[376] For instance, Prof. Aldıkaçtı participated in a constitutional forum entitled ôGetting the Political Regime Operational, the Constitution and Election Systemô organized by daily newspaper *Tercüman* in April 1980 (Tanör, 2013: 56). At the forum, Aldıkaçtı mainly defended the system of parliamentary democracy against the proposals of presidential or semi-presidential systems and criticized the governments that did not implement the constitution of 1961. According to him, the empowerment of the executive and a number of additional arrangements in 1961 constitution would make the system better. The Committee included a number of interesting figures as well, like Şener Akyol, professor of civil law and member of a conservative national association called *Aydınlar Ocağı* (Takkın, 2007: 264), and Rafet Đbrahimoğlu, secretary general of *Turkish Confederation of Employer Associations* (TĐSK) (Tanör, 2013: 98).

months work, the Constitutional Committee submitted its proposal for the new constitution to the General Meeting of the Consultative Assembly on 17 July 1982.[377] The initial proposal of the Constitutional Committee involved four chapters (the general principles, fundamental rights and duties, fundamental organs of the republic and final provisions), and a chapter including individual justification for each provision. Yet the proposal was lacking critical parts such as the general justification for the new constitution, the preamble which was referred in the first part of the draft proposal, and provisional provisions necessary for defining the transition period to civilian rule. In fact, the proposal was highly criticized by the members of the Consultative Assembly during the debates because of its lacking such critical parts, particularly the general justification and the preamble which would explain in a sense the legitimacy of the new constitution.

The other interesting point is that though the draft proposal was ratified by all of the fifteen members of the Constitutional Committee, eleven of them voted against a variety of individual articles and submitted justification for their opposition.[378] The controversial provisions were not the same for the dissenters, but very informative about the variety of the membersô worldviews.[379] Still, it might not be sufficient to

[377] Report of the Constitutional Committee, Annex to *DM, TD*, Cilt 7, B: 120, 04.08.1982, p. 3.

[378] These members are Feyyaz Gölcüklü, Turgut Tan, Tevfik Fikret Alpaslan, Kemal Dal, Feyzi Feyzioğ lu, Ihsan Göksel, Mümin Kavalalē, Recep Meriç, Teoman Özalp and Muammer Yazar.

[379] For instance, while Feyyaz Gölcüklü and Turgut Tan mostly voted against the provisions concerning fundamental rights and liberties (some of their criticisms were about the excessive nature of limitations introduced on the fundamental rights and liberties), Tevfik Fikret Alpaslan voted against the article on freedom of religion and conscience (he demanded compulsory religious teaching at primary and secondary schools). The deficiencies of the draft constitution and the working procedure of the Constitutional Committee were also the target of criticisms of Feyzi Feyzioğ lu and Kemal Dal. The two figures mainly criticized the Constitutional Committee for using the time inefficiently, working not in an inclusive manner, and submitting a deficient proposal in the end. Kemal Dal, on the other hand, severely opposed to the organization of the executive in the draft proposal. In fact, there was an apparent confusion concerning the future regime of the polity in the proposal. Exceeding far the symbolic powers assigned to the head of state in a parliamentary democracy, the status and powers of the president of the republic were strengthened to a great extent. Yet the office of presidency was not held (legally or politically) responsible for its decisions but elected by the parliament. The mismatch between the excessive powers along with irresponsibility and the election procedure became a point of controversy both within the Committee and among the members of the Consultative Assembly during the debates. Dal mainly drew attention to this confusion in the proposal. In addition,

consider it as a sign of free debate in the Committee mostly because of the extraordinary conditions introduced by the military junta.[380]

A careful scrutiny of the proposal demonstrates that the provisions of the draft constitution seem far away from being general and abstract. Rather the Committee seems to set regulations for resolving concrete problems confronted before the military coup. In other words, the authors of the constitution seem to be inspired most of all by the factual reality of past politics and present conditions at the time of writing.[381] In this respect, the constitution was more like a *regulatory* constitution, instructing what to do specifically in a concrete situation (Tanör, 2013: 139).

The proposal for the constitution of 1982 brought about major changes in the relations among the legislative, executive and the judiciary and in their internal functioning. Here I will not mention all these changes in detail since my major aim is not to do so. Instead I will try to draw attention to a number critical points illuminating my discussion concerning the conception of the constitution and its legitimacy by the authors of the constitution.

The first part of the draft constitution is stipulating the general principles in ten articles. The essential characteristics of the State are defined in the first three articles.

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he objected to the division in the execution of national sovereignty (Annex to *DM, TD*, Cilt 7, B: 120, 04.08.1982, pp. 81-2).

[380] As we learn from Tanör, even Orhan Aldıkaçtı stated in one of his statements to the newspaper of *Cumhuriyet* that the most important difficulty of his situation stems from writing a democratic constitution in undemocratic conditions (Tanör, 2013: 95). On the contrary, Feyzioğlu emphasized at a time during the constitutional debates that the Committee has prepared the proposal in an entirely free atmosphere of thought and decision without taking any suggestion, inspiration or advice from any post or position (*DM, TD*, Cilt 7, B: 126, 12.08.1982, p.517). Thus no member of the Committee has felt the difficulty of writing a democratic constitution in undemocratic conditions. Nevertheless, Feyzioğlu claimed that some of his considerations have not been sufficiently included in the proposal thus criticized the working procedures of the Committee as well. Feyzioğlu's statement seems to be in this sense a little bit ambivalent and in fact, the opposing statements of the two members compel us not to make certain observation about the freedom of discussion in the Committee.

[381] This observation is supported by the content of the constitutional debates, particularly the concrete cases presented by the members during the discussions in order to justify their claims.

The first article declares the type of the Turkish State as republic and states that this provision cannot be amended or proposed to be amended. The second article enumerates the fundamental principles of the republic: ñ*democratic*, *laic* and *social state based on the rule of law*, in accordance with the concepts of social peace, national solidarity and justice; respectful of human rights, *committed to Atatürkôs nationalism* and based on the principles specified in the preamble.ò[382] Finally, the third article stipulates the indivisible unity of the State with its territory and nation, defines the official language, flag, national anthem and capital city. As stated in the justification of the provision, these properties signified *sacred* symbols representing the *moral values* of the Turkish State and Nation from the perspective of the Constitutional Committee.

The fourth article of the draft constitution is untypical since for the first time in constitutional history of the polity introduced a provision concerning the fundamental objectives and duties of the State: ñto protect the independence and integrity of the Turkish Nation, indivisibility of its land, the Republic and democracy, and to ensure the happiness and peace of the individuals and society. é ò[383] The remaining articles of the first part are designating the principles of national sovereignty and equality before law; the legislative, executive and judiciary; and the principle of sovereignty of the constitution.

In the second part of the draft constitution, the fundamental rights and liberties are stipulated in the most restrictive manner. It might be argued that going far beyond the

[382] In the justification of the article, the Constitutional Committee identifies *democracy* as the political regime that the sovereignty belongs to the nation, and *laicism* as a condition in which each individual is free to believe and worship in any religion and cannot be discriminated on this basis. The Committee defines the *social state based on the rule of law* in a very strange way as limited government and in which the workers/earners should assist those who are not able to achieve his/her planned material and moral things.

[383] The article continues as ñThe State endeavours to eliminate the political, economic and social obstacles limiting the fundamental rights and liberties in a way compatible with the principles of the rule of law and justice, and to ensure the conditions necessary for the development of the material and moral existence of the individual.ò

constitutional amendment of 1971, the civil, political, economic and social rights are limited by introducing of a large number of vague concepts which might be open to arbitrary interpretation. The restrictions are twofold. The first is the general restrictions concerning all the rights included in the constitution (article 12). According to this, the utilization of the rights and liberties shall be limited only through law to protect *the indivisible unity of the State with its territory and nation, Republic, public order, general security, public interest, general morality, general health and other individualsô rights and liberties.* It is interesting that the rights and liberties are linked to the individualôs duties and responsibilities to the society, his/her family and other individuals. ñAll in all, the Constitution seems to have adopted a concept of freedom limited with duties, or a system where the enjoyment of fundamental rights and freedoms is subject to the performance of certain dutiesò (Özbudun, 2011: 45). The second restriction is the specific limitations indicated in the definition of each individual article.

In addition, ñthe enjoyment of rights and liberties in order to destroy the indivisible integrity of the State with its territory and nation, to endanger the existence of the Turkish State and Republic, to destroy fundamental rights and liberties, to ensure the government of one person or fraction, to enable one class to subject the other social classes, to create language, race, religion or sectarian differences and to constitute a state order based on communism, fascism or theocracy is prohibitedò (article 13). The draft constitution also envisages a controversial regulation in terms of human rights, *the loss of a right* in case of abuse. In consistence with the stipulation of the fundamental rights and liberties in the most restrictive manner as stated above, for the first time in 1982 constitution, the Constitutional Committee introduces the ambiguous provision concerning the loss of a right of an individual in case of abuse in its proposal. The significance of such suggestion is that it forms a critical endeavor to give constitutional status to a highly regressive (and conditional) regulation in terms of human rights. Yet the proposal of the Constitutional Committee of the Consultative Assembly concerning the loss of a right is surprisingly ruled out by the National Security Council and the provision does not appear in the 1982 constitution.

The report of the Constitutional Committee is significant for revealing the political position of the authors of the constitution thus the philosophy of the new constitution. In terms of our discussion, the political substance of the draft constitution, in Schmittôs terms the fundamental political decisions pertaining to the concrete type and form of the state seems to be mostly involved in the first part of the constitution. In fact, the *political aspect* (the constitution of the unity of the political community on the basis of the either/or decision between friend and enemy) becomes far dominant in 1982 constitution that the entire constitutional text seems to form the ñexpression of state lifeò in Schmittôs terms.[384]

In particular, the general principles and general provisions concerning rights and liberties seem to encompass the constitutional provisions in which the fundamental political decisions are crystallized. In the first part, the State is conceived as a legal and political subject that has substantive purposes or interests of its own, while in the second part, the scope and content of the fundamental rights and liberties are defined at the expense of the ñStateôs right of self-preservationò in Schmittian terms. Here, it is possible to observe the deviation from liberal conception of rights as the State is prioritized over the rights of the individual, and the State and individual are conceptualized as two opposed subjects where the former has to be protected against the latter.[385] The constitutional debates further show the realist outlook of the

[384] During the debates in the Consultative Assembly, the freak terminology of óstate rightô is also expressed by Turhan Güven (*DM, TD*, Cilt 7, B: 120, 04.08.1982, p.41). Güven blames the constitution of 1961 for the incidents before September 12, and asserts that the abuse of rights and liberties caused the weakening of Stateôs power and authority: ñThe individual rights and liberties are granted to eliminate neither the rights of other individuals nor *the rights of the state*.ò [*emphasis mine*] (*DM, TD*, Cilt 7, B: 120, 04.08.1982, p.41)

[385] The problematic philosophy of 1982 constitution is reflected in the peculiar conception of state/individual relations in its provisions. Though, Aldēkaçtē claims at the beginning of debates that the philosophy of the constitution is centered on the sacredness of the human and human thought, it is seen that the constitutional text is full of provisions based on the dichotomy of state and individual, and the primacy of the former over the latter. The members of the Consultative Assembly generally consider the state as the protector of the individualsô rights and liberties and link the endurance of these rights to the stateôs existence. In this regard, they conceive the state as a subject that has its own substantial purposes and interests that take precedence over any other interest. Such outlook is mirrored in the speeches of many members such as Fuat Yēlmaz and Nazmi Önder. Yēlmaz mainly defends the draft proposal (particularly empowerment of the executive at the expense of the judiciary and restriction of rights and liberties) by stating that he respects all judicial, political and professional

members of Consultative Assembly, that the rights of the individual signify nothing unless they are guaranteed and protected by the proper authority of the State.[386] Moreover, once again the either/or decision between friend and enemy is disclosed during the constitutional debates as certain ideologies and social movements, explicitly c*ommunism, fascism or theocracy* and implicitly *Kurdish nationalism* are defined unconstitutional.

In fact, the political substance of the constitution is revealed furthermore during the constitutional debates in the Consultative Assembly. This time, not only the members of the Constitutional Committee but also the members of the Consultative Assembly taken the floor make statements disclosing the material aspect of the constitution. I will discuss this subject in detail in the section concerning the conception of the constitution by the members of the Consultative Assembly. But let me elaborate on the rationale for the new constitution as manifested in the Report of the Constitutional Committee and disclosed in much clearer terms in the statements of the members of the Consultative Assembly in the following.

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institutions, but more than these and above all he respects ñthe everlasting endurance of the unity of the land and nation: and the rebirth and endurance of the *sublime* Turkish State.ò Hence in order to sublimate the nation, land and the state, the law of the totality (*bütünün hukuku*) has to be valued more than the law of individual and institutions (*DM, TD*, Cilt 7, B: 124, 10.08.1982, p.319). Similarly, Önder congratulates the Constitutional Committee for preparing a draft constitution expressing the idea of ósacred stateô in its chapters concerning ógeneral principlesô and ófundamental rights and libertiesô (*DM, TD*, Cilt 7, B: 126, 12.08.1982, p.458). On the other hand, Özer Gürbüz takes a critical position against such outlook. He criticizes that the philosophy of the constitution is distrust to society and that the principle of democracy, the rule of law and social state is swallowed in the draft constitution (*DM, TD*, Cilt 7, B: 124, 10.08.1982, p.87).

[386] Regarding such realist attitude, the statements of Atalay Peköz and Mümin Kavalalē (member of the Constitutional Committee) are further illustrative. Peköz states that ñé the existence of citizensô rights and liberties is dependent on their designation in the constitution of the Turkish State. If the Turkish State or its fundamental properties are destroyed, it is not possible to mention the rights and liberties of Turkish citizens.ò (*DM, TD*, Cilt 7, B: 126, 12.08.1982, p. 487); while Kavalalē indicates that ñ[w]e must understand and behave accordingly, as nation, individuals and institutions, that the liberties cannot exist if the State is non-existent, that the liberties are not limitless and that each of us has duties as well as rightsò (*DM, TD*, Cilt 7, B: 127, 16.08.1982, p.605).

7.3 The Rationale for the New Constitution: ñThe Necessity of a New Light to the Darkness of September 12ò

The Report of the Constitutional Committee does not include a general justification for the new constitution. Yet in the introduction part, the Committee gives some preliminary signs of its position and states that their intention is to write a new constitution in order to ñprevent going back to the incidentsò before September 12.

The Committee argues that the designation of the principle of separation of powers in 1961 constitution has culminated in a powerless executive unable to conduct state activities, and some of the constitutional organs, particularly the judiciary, manifesting political inclinations.[387] The gaps in the fundamental rights and liberties and their misinterpretations have paved the way for the proliferation of activities aimed at *weakening of the State authority*, *changing its democratic regime* and *eliminating its unity and independence*. According to the Constitutional Committee, such attempts did not originate solely from the provisions of 1961 constitution, but also from the political outlooks and implementations of the governments.

Therefore, the Committee blames to a great extent the governments before September 12 as well as the constitution of 1961 for the resultant social and political instability. It invokes a familiar argument that the existence of the state has been in danger as was the case in the constitutional amendment of 1971. In fact, such an outlook becomes more obvious in the statements of the Constitutional Committee members during the debates. And it is largely shared by the members of the Consultative Assembly. The general discussions in the Assembly additionally illustrate (once again) the direct linkage established between the military intervention and the practice of writing a new constitution.[388]

[387] It is notable that the Committee states in its report that the constitution of 1961 subordinated the executive to the legislative.

[388] This perspective becomes obvious from the outset as Vefik Kitapçığil, the president of the Consultative Assembly, launches the general discussion on the draft constitution by giving a statement praising the military coup of September 12 (*DM, TD*, Cilt 7, B: 120, 04.08.1982, p.11). Reminiscent

To begin with the members of the Constitutional Committee, Orhan Aldıkaçtı explains the rationale for writing a new constitution through reiterating the arguments presented in the Report.[389] He asserts that the establishment of a weak executive subject to legislative power and the gaps in the designation of the fundamental rights and liberties in the 1961 constitution are among the reasons for the social and political instability. Nevertheless, the governments that failed to implement its provisions must also be taken into consideration. He argues that ñthose who aim to divide the Turkish Republic (namely fascist, reactionary and communist movements)ò deliberately misinterpreted the rights and liberties in the constitution in order to attack to the democratic order. Aldıkaçtı states that the constitutional amendment of 1971 has been conducted to prevent such movements yet it failed. It is in this respect that the foundation of the State on the basis of *Atatürkôs principles* and the limitation of the rights and liberties in clearer terms than 1961 constitution and 1971 amendment are required urgently.

In another session, Feyzi Feyzioğlu explains the rationale behind writing a new constitution as follows:

> It is requested from us to prepare a constitution furnished with provisions strong enough to prevent the parliamentary system from degeneration and deadlocks; to definitely avoid going back to the circumstances of anarchy, terror and separatism of the period before September 12, 1980; to re-establish the authority and existence of the state by inspiring from *Atatürkôs nationalism* and to eliminate factors hindering the operation of the democratic order.[390] [*emphasis mine*]

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of the declaration no 1 of the NSC, he asserts that the Turkish Nation and Land is rescued from the edge of annihilation through the intervention of September 12. He also emphasizes that the objective of the military intervention is to re-establish the authority of the state.

[389] *DM, TD*, Cilt 7, B: 120, 04.08.1982, pp.13-6.

[390] ñBizden ne isteniyordu? Hür demokratik parlamenter sistemin dejenere edilmesine ve tıkanmasına engel olacak, 12 Eylül 1980 öncesi günlerin bir daha geri gelmemesini sağlayacak anarşi, terör, bölücülük hareketlerini kesinlikle önleyecek, Atatürk milliyetçiliğinden hız ve ilham alınarak devlet otoritesini ve varlığını yeniden tesis edecek ve demokratik düzenin işlemesine engel olacak sebepleri ortadan kaldıracak güçte ve muhtevada hükümlerle donatılmış bir Anayasa hazırlamak.ò *DM, TD*, Cilt 7, B: 126, 12.08.1982, p.517.

In fact, the object of addressing the requirements of the concrete situation, or of the political, economic and social conditions of the polity, rather than complying with universal standards of democracy or the rule of law, comes to the fore and becomes the determining factor in the writing of the new constitution. This becomes more apparent in the statement of Şener Akyol, the speaker of the Constitutional Committee.[391] Akyol mainly refers to the social unrest, political instability and economic hardships just before September 12. According to him, it is urgent to bring peace to the streets, to the government and to the economic production. The devastation ñnecessitated a new light to the darkness of September 12, regardless of the perfectness of the present constitution or itôs amenable to critiquesò.[392] For Akyol, the new constitution signifies the key to such light. He furthermore cites the societyôs reaction to the extent of deaths before September 12 as the instruction to make a new constitution.[393]

During the constitutional debates, it is generally seen that the members of the Consultative Assembly begin their statements with praising the military coup and afterwards they express the reasons of writing a new constitution. In general, they refrain from identifying the incident as a ómilitary coupô and instead deploy the term

[391] *DM, TD*, Cilt 7, B: 127, 16.08.1982, pp.562-3.

[392] Akyol exactly states that ñBir an için 1961 Anayasasõnõn mükemmel olduğunu kabul etsek bile, olaylarõn bizi getirdiği yerde artõk o Anayasanõn mükemmel olup olmadõğõnõ tartõşmaya yer olmaksõzõn yeni bir düzenlemeye ve özellikle sosyal ve ekonomik haklar bakõmõndan yeni bir düzenlemeye ihtiyaç ortaya çõkmõştõr. Demiyorum ki, 1961 Anayasasõ döneminde, bundan tevakki etmek isterim; ama hemen 12 Eylül 1980 öncesinde ülkemizde barõş yoktu, siyasi mekanizma işlemiyordu ve bu iki olgunun tabiî sonucu olarak gayri safî millî hâsõlamõz kişi başõna düşme tehlikesiyle karşõ karşõyaydõk. Herkesin ve hepimizin anlayacağõ şekilde buhran fakrü zarurete bizi itmekteydi. Işõk, sokaktaki barõşõn, yönetimdeki barõşõn ve üretimdeki barõşõn temini bir zorunluluktu, ister elimizde mükemmel bir Anayasa olsun, ister tenkidi mucip bir Anayasa olsun, 12 Eylül karanlõğõna yeni bir şafak gerekliydi. Işõk bu şafağõ sağlamak zorundadõr. Milletin bizden beklediği o karanlõk güne, geceye mutlaka yeni bir şafak, yüksek dozda, yüksek voltajda bir şafak istemektedir.ò (*DM, TD*, Cilt 7, B: 127, 16.08.1982, p.562)

[393] ñHangi millet, herhangi bir ilan edilmiş savaş olmadan 5-6 bin ölü verdikten sonra tepki duymazdõ, duymamõştõ, duymasõ düşünülmemiştir. Işõk ülkemizdeki halkõmõzõn, milletimizin duyduğu bazõ tepkiler vardõr. Bunlar bizim için tepki Anayasasõ yapmak yolunda değil; ama o şekilsizliklara çareler aramak için yeni bir Anayasa yapma direktifi anlamõna gelmiştir.ò (*DM, TD*, Cilt 7, B: 127, 16.08.1982, p.563)

óOperation of September 12.ô And they tend to conceive it as a critical turning point in which the polity is rescued from the edge of destruction.

To give an example, for Evliya Parlak, the coup of September 12 signifies most of all a turning point in which the polity is rescued from the edge, the unity of the nation is re-established and the constitutional democracy is protected from destructive attacks.[394] From his viewpoint, the writing of new constitution remains within the objectives of the military coup, thus an indispensable phase for transition to democracy and for not returning back to the period before September 12. From the perspective of Hamza Eroğlu, the military intervention signifies the victory of democracy and human rights as it is conducted against the regime of tyranny which aimed to destroy the Turkish State and eliminate the human rights.[395] For him, the Turkish Army has engaged in a historical duty to protect and preserve the Republic inherited from *Atatürk*. Moreover, Abbas Gökçe associates the military coup with the War of Independence and the Constituent Assembly with the First Grand National Assembly,[396] while Turgut Kunter calls the military coup as the óOperation for the Protection of the Republicô (*Cumhuriyeti Koruma ve Kollama Harekatı*).[397]

Kazım Öztürk, expressing one of the most essentialist and Turk centric conceptions of constitution making process, goes too far to define the military coup as the constituent power filling the authority gap.[398] He refers to the *principles of Atatürk* as the source of inspiration of the Constituent Assembly and argues that the *Turkish*

[394] *DM*, *TD*, Cilt 7, B: 121, 05.08.1982, pp.112-3.

[395] *DM*, *TD*, Cilt 7, B: 123, 09.08.1982, p.236.

[396] *DM*, *TD*, Cilt 7, B: 124, 10.08.1982, p.405. Gökçe seems to have conservative republican ideas. Though he glorifies the coup and criticizes the 1961 constitution, he brings criticisms about the excessive limitation of rights and liberties in the draft constitution prepared by the Constitutional Committee.

[397] *DM*, *TD*, Cilt 7, B: 126, 12.08.1982, p.492.

[398] *DM*, *TD*, Cilt 7, B: 120, 04.08.1982, pp.22-23.

Nation, due to the nature of its race in founding states and historical experience in constitutionality, has the power to make its own constitution without referring to any foreign source. According to him, 1961 constitution was based on theory rather than social reality and hence resulted in a powerless state and limitless liberties. Turkish Nation deserves more liberties than stipulated in the constitution, yet the psychological, geopolitical and social structure of the Turkish Nation does not allow such stipulation.

On the other hand, some of the members seem to acknowledge that the military coup is an (undemocratic) interference into civilian politics. Yet they seem to prefer it to political instability and social unrest of the period before September 12. Such ambivalent attitude becomes visible through Fikri Devrimselôs considerations. He seems in a sense to appropriate the coup which has abolished all the institutions and actors of civilian politics, for the sake of unity of the nation and state, but at the expense of democracy.[399] Moreover, he considers that the objective of the military intervention is to make the *principles of Atatürk* the philosophy of the constitution, the basis of democracy and properties of the state.[400]

As it is seen, the underlying rationale for writing a new constitution, how it is associated with the motives of the military coup and how it is deployed by the members of the Consultative Assembly in order to justify their practice unfold as the constitutional debates proceed. After explicating this subject, I will discuss in the following how the members of the Constitutional Committee in particular and the members of the Consultative Assembly in general strive to legitimize the practice of writing a new constitution.

[399] *DM, TD*, Cilt 7, B: 123, 09.08.1982, pp.198-210.

[400] *DM, TD*, Cilt 7, B: 123, 09.08.1982, p.210.

7.4 The Conception of the Legitimacy of 1982 Constitution by the Members of the Constituent Assembly

The constitutional debates reveal that the authors of the constitution strive to justify their practice in connection with the reasons of the military coup, and legitimize the new constitution in reference to the *principles of Atatürk*. Parallel to the arguments in the Declaration no 1 of the National Security Council, the incidents before September 12 are considered by the overwhelming majority of the members as a deviation from the *principles of Atatürk*. For them, the constitution of 1961 has contributed to this deviation since it was neither matching with the national entity (*milli bünye*) nor based on social reality. It is in this context that it has paved the way for a powerless executive and the resultant weakening of *State* authority. In fact, the members make substantial reference to the activities of certain groups, mostly fascist, communist and reactionary ones, which from their perspective aim at the disintegration of the state. Thus they also capitalize on the idea of ñexistential threat to the stateò in order to support their validity claims. It is in this framework that they insist on the necessity to strengthen the *State* and reestablish its authority on the basis of the *principles of Atatürk* and thus they insist on writing a new constitution.[401] Consistently, the motto of ñpowerful stateò becomes the dominant idea driving the course of the constitutional debates and utilized in order to justify restrictions on the

[401] Though this is the case, it is still dubious why the constitution of 1961 is not amended or proposed to be amended, and an entire new constitution is written instead. The constitutional debates in the Consultative Assembly are not informative about this preference. Indeed, there is no sign of questioning on the part of the members. Moreover, it is not clear how the new constitution written in line with *the principles of Atatürk* would contribute to the strengthening of the state. The underlying reasons of such envisage is not explained either. In this light, it might be argued that the members were possibly following the route driven by the National Security Council without questioning it. In addition, they might have favoured writing a new constitution because they thought that the Constituent Assembly of 1961 was not democratically legitimate since it was less representative and inclusive than the Consultative Assembly. For instance, according to Turhan Güven, the Consultative Assembly was representative of the entire nation. This was because the military intervention of September 12 was conducted against ñneither a group nor a partyò (*DM, TD*, Cilt 7, B: 120, 04.08.1982, p.38). In other words, the 1961 constitution is presented as a sectarian (or partial) constitution because of the sectarian dimension in 1960 intervention. The confidence in the legitimacy of the Constituent Assembly reaches its peak in the statement of Süleyman Sārē Kārcalē as he identifies the Consultative Assembly with the constituent power of the First Grand National Assembly (*DM, TD*, Cilt 7, B: 122, 06.08.1982, p.154).

rights and liberties, strengthening of the executive and particularly the new status and powers assigned to the head of the state.

Moreover, reminiscent of the previous tendencies in constitution making and change processes, the members of the Consultative Assembly overwhelmingly focus on the idea of óconcrete circumstancesô in order to justify the making of new constitution. Indeed, they strive to explain the necessity of the new constitution on the basis of the intention ónot to return back to the period before September 12.ô In this endeavour, particularly the provisions of 1961 constitution, and sometimes the previous governments that failed to implement its provisions, become the main target of criticisms.

In order to clarify these general inferences, I will focus in the following on the statements of a number of members of the Consultative Assembly. But let me remind from the outset that my exploration here will not be exhaustive of all the relevant statements. I will rather concentrate on a number of them in order to shed light on the general tendency.[402]

In this context, Enis Muratoĵlu associates the justification for the writing of a new constitution with the incidents before September 12. For him, the period before the coup is marked with deviation from *the principles and revolution of Atatürk*, and proliferation of movements such as communism, fascism and theocracy.[403] In a similar vein, Osman Yavuz states explicitly that ñ[t]he main justification of the draft

[402] During the general discussions of the draft constitution, 93 members have taken the floor in order to bring their considerations. Hence the volume of parliamentary minutes is too large to bring forth all relevant statements to the discussion above.

[403] *DM, TD*, Cilt 7, B: 122, 06.08.1982, p.150. Muratoĵlu continues that ñBu ortamdan yararlanan yękęcę ve bölücü mihraklar terör ve anarkiyi alabildiĵine azdęrmęklar ve ideolojik amaçlę sendikalar millî ekonomiyi tahrip edici faaliyetlerini, devletin otorite zaafęndan da yararlanarak alabildiĵine sürdürmüşlerdi. Şşte bu ortam içerisinde, demokrasimize yürekten baĵlę ve Türk Milletinin baĵręndan çękmęk olan Türk Silahlę Kuvvetleri, bir iç savaşęn ve hatta belki bir yękęlęşęn eşiĵinden Türkiye'mizi kurtarmęş ve kęsa bir süre zarfęnda huzur ve sükûnu saĵlamęştęr.ò (*DM, TD*, Cilt 7, B: 122, 06.08.1982, p.150)

constitution is the circumstances and conditions of Turkey before September 12.ò[404] In his subsequent words, his Schmittian outlook becomes explicit ñé for the sake of enlarging the individualsô rights and liberties in a limitless manner, it is forgotten that the individuals also have duties and responsibilities for the survival of the state (*devletin bekasé*), as a result the state has been left powerless and inoperative.ò[405]

Mahir Canova explains the justification for the new constitution on the basis of an opposition he establishes with the 1961 constitution.[406] From his viewpoint, the 1961 constitution signifies a rupture or breaking point from the constitution of 1924. Therefore, the new constitution will be a return to the founding *principles (of Atatürk)* and a reorganization of them in a proper manner. Canovaôs statement might be considered as an example of significant distortion or rewriting of constitutional history of the polity since the *principles of Atatürk* were not originally involved in the 1924 constitution but included afterwards, with the constitutional amendment of 1937.

Reminding Öztürkôs considerations quoted in the previous section, Abbas Gökçe claims that ñ[t]he 1961 constitution is written mostly by theoreticians to find the ideal in law without taking into consideration the realities of the country; hence its convenience to the *entity of the Turkish Nation* (*Türk Milletinin bünyesi*), prospective results and capability to endure are ignoredò [*emphasis mine*].[407] For Gökçe, the law

[404] *DM, TD*, Cilt 7, B: 122, 06.08.1982, p.180.

[405] ñBu tasarénén en büyük gerekçesi, Türkiye'nin 12 Eylül öncesi içerisinde bulunduğu ortam ve ĸartlardér. Kiĸi hak ve özgürlüklerini hudutsuz olarak geniĸletip koruyalém derken, sénérsèz hürriyet verelim derken devletin bekasé için, kiĸilerin de devlete karĸé ödev ve sorumluluklarénén olduğu unutulmuĸ, bu yüzden devlet güçsüz, iĸ yapamaz duruma getirilmiĸtir. Sénérsèz hürriyet arzu edenler, sonunda ülkeyi anarĸi ortaména sürüklemiĸler, kardeĸi, kardeĸe vurdurmuĸlardér.ò *DM, TD*, Cilt 7, B: 122, 06.08.1982, p.180.

[406] *DM, TD*, Cilt 7, B: 124, 10.08.1982, p.306.

[407] ñ...1961 Anayasasé ülke gerçekleri göz önüne alénmadan, hukukta ideali bulma çabasé içerisinde, daha çok teorisyenler taraféndan hazérlanmĸ, Türk Milletinin bünyesine uygun olup olmadığé, doğuracağé sonuçlar ve uzun yèllar uygulanabilir nitelikte bulunup bulunmadığé gözden kaçérèlmĸtér.ò *DM, TD*, Cilt 7, B: 124, 10.08.1982, p.404.

is formed by the realities of the country, the structure of society, and conventions and traditions. In this regard, it is not possible to defend the constitution of 1961. He maintains that:

> Just as a fashionable dress purchased from the most prominent fashion house of Europe does not fit all sizes, a constitution prepared in accordance with the norms of ideal law without taking into consideration the structure and reality of the country does not comply with our *national entity*. The constitution of 1961 was like a garment purchased from a famous fashion house, fashionable and fit ideal body size. It complied with the norms of ideal law, yet not with our *national entity*.[408] [*emphasis mine*]

As a matter of fact, the tendency to set the parameters of the constitution on the basis of the factual (and perhaps historical) reality of the polity rather than the transcontextual normative framework is so strong that it seems to dominate the entire discussions. In addition to Gökçeôs considerations presented above, Yavuz Altopôs statement might be taken as an explicit example of such inclination. Though Altop brings forward a number of reasonable criticisms against the draft constitution, he does not hesitate to argue that the constitution must not be merely evaluated from the perspective of law or theory.[409] From his viewpoint, ñtranscribing the provisions of the constitution from the constitutions of democratic societies or from Universal Declaration of Human Rights must not be the only criterion in the evaluation of the constitution.ò[410] The level of societal development, the attitude and behavior of

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[408] ñGünün modasına ve ideal vücut ölçülerine uygun olup da Avrupa'nın en ünlü modaevinden alınan bir elbise nasıl her bedene uymazsa, toplumun yapısı ve ülkenin gerçekleri göz önünde bulundurulmadan ideal hukuk normlarına uygun olarak hazırlanan bir Anayasa da millî bünyemize uymaz. İşte 1961 Anayasası ünlü bir modaevinden alınmış, günün modasına ve ideal vücut ölçülerine uygun konfeksiyon bir elbise gibiydi. İdeal hukuk normlarına uygundu; fakat millî bünyemize uygun değildi.ò (TD, Cilt 7, B: 124, 10.08.1982, p.404)

[409] Altop criticises that the fundamental concepts and institutions of parliamentary democracy such as rights and the judiciary are designated in the draft constitution in light of the experience of the period before September 12. Yet, the executive and the political power are exempted from such designation. As a result of this unrealistic outlook, the executive is strengthened in an immeasurable manner, fundamental rights and democratic institutions are left open to the undemocratic limitations of the political power. (DM TD, Cilt 7, B: 126, 12.08.1982, p.460)

[410] DM TD, Cilt 7, B: 126, 12.08.1982, p.459.

political cadres and parties are determinant in the implementation of the constitution. Therefore, all the qualities of *our national entity* should be taken in the constitutional debates.

As it is obvious, an overwhelming majority of the members of the Consultative Assembly make reference to phrases such as ñnational entityò and ñrealities of the country.ò However, it is not clear what they intend to mean with such terms. They might refer to the backwardness of society, both in political and economic terms or to the unpreparedness to threats. Yet it seems that the members generally capitalize on such terms in order to rationalize the improper stipulation of rights and universal principles of law in the constitution.

Moreover, inspired overwhelmingly by the past and present circumstances of the polity, Ertuĝrul Alatlē introduces a peculiar terminology concerning the constitution making process, and strives to legitimize the practice within such distinctive framework.[411] He in this sense introduces the notion of ñfounder of stateò; proposes the substitution of the term ñlaw of stateò (*devletin hukuku*) for ñconstitutionò; and defines the constitution making process with the peopleôs ñright to design the state.ò[412] His statement in fact signals a confused but *state-centric* mind. He classifies the laws into four categories with regard to their objectives and origin (in natural law) 1) the law of state, 2) the laws of democracy, 3) the laws to protect state and democracy, and lastly 4) the laws concerning daily life and addressing the needs of society.[413] Seemingly by taking the exceptional conditions at the time of writing as a reference, Alatlē describes a constitution making procedure based on the course of developments experienced so far, and as defined in the decisions and laws issued by

[411] *DM*, *TD*, Cilt 7, B: 124, 10.08.1982, pp.331-335.

[412] The terminology he proposes includes respectively ñdevlet kurucusu,ò ñdevlet yasasē,ò and ñdevlete biçim verme hakkēò

[413] *DM*, *TD*, Cilt 7, B: 124, 10.08.1982, p.334.

the National Security Council.[414] Strangely enough, he qualifies Kenan Evren as the founder of state and the period after September 12 as the re-foundation of Turkish state.

The constitutional debates provide us with sufficient evidence that the context dependency of the constitution making process peaks in 1982 constitution. It might be argued that the constitution of 1982, both in terms of formation process and content, is entirely determined by the state of exception and requirements of the concrete situation.[415] As it is seen, the members of the Consultative Assembly do not problematize the arbitrariness of the military coup, rather they overwhelmingly appropriate it. As a consequence, they do not question the authority of the Constituent Assembly in writing an entirely new constitution. Furthermore, the discursiveness decreases radically as the opponents in the Consultative Assembly find almost no response to their change proposals and the provisions are usually justified by the parties (both by the members of the Constitutional Committee and proponents in the Consultative Assembly) through merely pragmatic and ethico-political discourses in Habermasôs terms. Most of the cases, they either make reference to the concrete circumstances or to the imagined qualities of *national entity*. Interestingly, against the change proposals of opponents, the voting of draft provisions usually end up in accordance with the decisions of the Constitutional

[414] ñMillet; özlem, istek, ihtiyaç ve çkarlarna en uygun devleti kurmak için «Devlete Biçim Verme Hakknnò kullanlmasnda kendisine önderlik eden devlet kurucusuna, kurulan devletin, ilk bakanlğ, keref, görev ve sorumluluğunu vermesini bilecek kadar aklselim sahibi, olgun ve vefakârdr. Devlet kurucusu, devletin yklma noktasna kadar tahrip edilmesinin nedenlerini, kaçmaz bir gerçekçilikle saptayp, gelecee dönük hukuksal «tedbirler sistemini» oluştururken, toplumsal gelişmenin ulaştğ düzeyin ve tarihî çizgisinin muhafaza ve inkişaf ettirilmesine özen gösterir.ò (*DM, TD*, Cilt 7, B: 124, 10.08.1982, p.332)

[415] We see that even some members of the Consultative Assembly draws attention to the dangers of such context-dependent attitude. Serda Kurtoğlu warns in this regard that the constitution making process should not be conditioned by concrete issues (*DM, TD*, Cilt 7, B: 124, 10.08.1982, p.348). Similarly, Necip Bilge states that they must refrain from preparing a *regulatory* constitution, providing detailed instructions for each and every issue. In opposition to the majority of members, he refers to international agreements and Universal Declaration of Human Rights in terms of the principles of democratic government and fundamental rights and liberties, and insists that Turkey should not make a return from the universal point reached so far (*DM, TD*, Cilt 7, B: 124, 10.08.1982, p.357).

Committee. Moreover, the articles rewritten by the Constitutional Committee are usually accepted without making any additional discussions on them. In fact, this is also criticized by some members in the Consultative Assembly.[416]

It is true that in some sessions, questions and criticisms of the opposing members are addressed by the members of the Constitutional Committee,[417] and the criticisms brought by a number of opponents in several issues are very severe and irreconcilable.[418] It is also valid that the members are provided with sufficient time to bring forward their opinions in the initial sessions of the constitutional debates. However, in the forthcoming days, due to the multitude of members willing to make speech, and time constraint to submit the proposal for the examination of the National Security Council, the time allowed for the statements is decreased to a considerable extent upon a decision taken in the Assembly.[419]

The constitutional debates additionally reveal that the members of the Consultative Assembly invoke a number of problematical associations which close rational discourses on and contribute to the discursive formation of the legitimacy of the military coup and the constitution. To set the framework, they identify the period before September 12 with loss of public order and safety for citizens. In this context, they first of all associate the pre-September 12 events and developments with the

[416] At the initial phase of the 133th session, during the discussion of rearranged article 14 concerning suspension of fundamental rights and liberties, Tülay Öney and Cahit Tutum bring criticisms about such inclination in the Consultative Assembly (*DM, TD*, Cilt 8, B: 133, 23.08.1982, pp. 343-4).

[417] This is particularly true for the 127th session of the Consultative Assembly, during which the chapters of the draft constitution are presented by the members of the Constitutional Committee (*DM, TD*, Cilt 7, B: 127, 16.08.1982, pp.528-629).

[418] For instance, Mustafa Alpdündar makes direct and harsh criticisms to the Constitutional Committee about the restriction of workersô rights in the chapter of economic and social rights (*DM, TD*, Cilt 7, B: 127, 16.08.1982, pp.576-7).

[419] During the constitutional debates, a number of members voice criticisms about these limitations. Abdülbaki Cebeci maintains that the draft constitution is prepared *behind closed doors* (*DM, TD*, Cilt 7, B: 120, 04.08.1982, p.20); while Feridun Güray claims that the Consultative Assembly has been left with limited time to deliberate on the draft constitution and that the concerned parties are not invited to the Constitutional Committee meetings (*DM, TD*, Cilt 7, B: 120, 04.08.1982, p.32).

constitutional order established by the 1961 constitution. Secondly, they associate the 1961 constitution with idealism. Thirdly, they interestingly associate strong state with executive superiority. Fourthly, they associate peace/order/stability with the *principles of Atatürk* without providing any rationale how these would result in such condition. And lastly, they associate transcontextual normative framework with idealism.

As the debates deepen and the individual provisions are discussed, we see the tendency that the provisions are justified by validity claims based on concrete political, social and economic circumstances rather than principles. In specific terms, they are explained mostly on the basis of the concrete problems faced during the implementation of 1961 constitution. Ķener Akyolôs defence of the clause on ólossô during the discussions on article 13 (the abuse of rights and liberties) might be considered as an explicit example of such inclination. Akyol asserts that the aim of the article is to protect the State and the nation: ñthe ólossô in case of abuse is a very serious sanction, yet the destruction of the State is more serious than that. In light of events experienced so far, our aim is to prevent the failure of administration and State because of gaps in law.ò[420] In the continuation of his words, Akyol admits that they designated the sanction by taking into consideration the conditions of the country and sticking to the general philosophy of this constitution.[421]

[420] ñHak kaybē aĵ ēr bir müeyyidedir; ama bir devletin çökmesi ondan da aĵ ēr bir durumdur. Amaç budur. Amaç, geçirdiĵ imiz olaylarda idarenin, devletin kanun boĸluklarē karĸēsēndaki aczini önlemektir.ò *DM, TD*, Cilt 8, B: 130, 19.08.1982, p.166.

[421] Akyol exactly states in Turkish that ñÖzetle ve toplamak gerekirse, biz bu kötüye kullanmaya karĸē müeyyideyi ülkemizin ĸartlarēnē ve bu Anayasanēn genel felsefe ve kalēn çizgisini dikkate alarak ve sadece Türkiye'de uygulanan bir hüküm olarak deĵ il, bir baĸka ülkede de uygulanan, uygulanmaĸ bir hüküm olarak; fakat çok nadir uygulanmaĸ bir hüküm olarak, çünkü cesaret kērēcē, önleyici (preventif) etkisi sebebiyle çok uygulanmasēna gerek ve yer kalmadan etkisini gösteren bu hükmün bizim Anayasamēzda da yer almasēnēn bütün temel hak ve özgürlükler için gerçek bir teminat olduĵ u inancēndayēz.ò (*DM, TD*, Cilt 8, B: 130, 19.08.1982, p.166)

In a similar vein, Orhan Aldīkaçtī emphasizes the destructive repercussions of the previous governmentsô failure in implementing the provisions of 1961 constitution during the debates about the right to establish associations (article 33). And reminiscent of Akyolôs admission, he states that ñé it might be bizarre for many that this constitution will involve articles that should not be in a constitution, yet this is the requirement of our society.ò[422]

In fact, the tendency to designate the provisions of the constitution in accordance with the requirements of the concrete situation and the inclination to justify them on this basis is criticized by some members of the Consultative Assembly. Though these members are not numerous, their criticisms are just to the point. For instance, when the Constitutional Committee insists on regulating the freedom of thought and freedom of expression in separate articles and defining limitations for the latter, Halil Ġbrahim Karal objects to such disposition by problematizing the general philosophy prevalent particularly in the fundamental rights and liberties part.[423] He states that many articles of the draft constitution are similar in the sense that first, a democratic arrangement is made yet immediately afterwards, exemptions are enumerated one by one. He mainly considers this deficiency as a problem in terms of constitutional legitimacy and argues that such disposition ruins the foundations of democracy.

Bekir Hamitoğullarī draws attention to the same issue during the discussions on the freedom of the press. Objecting to the restrictions introduced in this field, Hamitoğullarī asserts that it is significant that the initiative to prevent the abuse of a right should not lead to the ruining of the right.[424] The weight should be given instead to preventing such attempts of abuse. In this respect, he insists that Turkey

[422] ñé Anayasamīzīn felsefesini, Anayasamīzī ele alīrken açīkladığımīz görüşü belirtmeye çalīştığımīz zaman ileri sürdüğümüz gibi, bu Anayasamīz (ta gene 2 sene evvel de söylemiştim) birçoklarīna garip gelecek, bu Anayasamīzda bir Anayasada olmamasī gereken maddeler bulunacak, çünkü bizim toplumumuzun gereği bu.ò (*DM, TD*, Cilt 8, B: 132, 21.08.1982, p.321).

[423] *DM, TD*, Cilt 8, B: 132, 21.08.1982, p.279.

[424] *DM, TD*, Cilt 8, B: 132, 21.08.1982, p.284.

needs a powerful state, yet having a powerful state is substantially dependent on a powerful press.

The considerations of Süleyman Sā-rē Kā-calē are in fact reflecting the full picture. He criticizes the general tendency to define the rights and liberties in very restrictive terms, and states that the restrictions are generally compelled by the past experience but not by law or right.[425] For him, this is the reason why the members of the Constitutional Committee have difficulty in explaining their proposals.

In this light, it might be argued that the making of the 1982 constitution is generally marked by the dominance of ñpragmaticò and ñethico-political discoursesò in the Consultative Assembly in Habermasôs terms. The emphasis on the concrete circumstances and their precedence in the formulation of individual provisions indicate the intensification of pragmatic discourses and dominance of strategic action in the constitution making process. This results in an increase in the partiality of the constitutional text, with deep concern for the particular (national) requirements, at the expense of abstractness and generality. The situation worsens as the massiveness of ethico-political discourses is also taken into consideration. I mean the frequent utilization of notions such as *the principles of Atatürk* or *Atatürkôs nationalism*, the *entity* of the Turkish Nation, the *national culture*, or *national history* in order to justify the validity claims about a particular principle of the constitution or provision. Here becomes operational a kind of imaginary *community ethos;* presupposed by the members of the Consultative Assembly and utilized in order to support the justificatory base for validity claims. As a result, moral discourses ideally aimed at achieving the *equal interest of all* are considerably lacking in the making of 1982 constitution. Such deficiency distances the constitutional text from being formal or neutral and inclusive, and coincides with Schmittôs conception of a material constitution reflecting the preference of a certain ideological perspective.

[425] *DM, TD*, Cilt 8, B: 132, 21.08.1982, pp.314-315.

At this stage, I deem it critical to underline that the making of new constitution is not conceived as a rupture to the continuity of the state. For the members of the Consultative Assembly, the new constitution does not mark the foundation of a new state, but strengthening of the present one through the reorganization of state power between the constitutional organs, and enforcing its authority on the basis of the *principles of Atatürk*. In this framework, Alaeddin Aksoy, by emphasizing the decisive role of the *principles of Atatürk* in the constitution, states that ñthe new constitution will sustain the Turkish State and Republic, re-establish the state with all its institutions and not allow its exploitation, underestimation and disregard.ò[426] In a similar vein, Bekir Tünay asserts that the objective of the military coup is explicit: to re-establish the Turkish Republic which is attempted to be destroyed from its very foundations. Hence the new constitution will accomplish the founding philosophy of establishment, namely *the revolutions and principles of Atatürk*.[427]

As it is seen, there takes place no serious debate in the Consultative Assembly concerning the legitimacy of writing an entirely new constitution.[428] None of the members show an implicit (let alone explicit) tendency to question the status of the Constituent Assembly in engaging into such endeavour. On the contrary, we witness

[426] DM TD, Cilt 7, B: 126, 12.08.1982, p.475.

[427] Tünay states in Turkish that ñ12 Eylül Harekâtēnēn maksadē açēk. Temellerinden çökertilmek istenen Türkiye Cumhuriyetini yeniden kurmak. Kurulukun temel felsefesi Atatürk inkēlâp ve ilkeleri. Bu Anayasa böyle bir kuruluku gerçekleştirecek, hem de demiri ile, harcē ile, hareketi ve ruhu ile gerçekleştirecek. Işte bu büyük eksik.ò (DM TD, Cilt 7, B: 126, 12.08.1982, p.520)

[428] The considerations of Cahit Tutum might be an exception to such uncritical attitude in the Consultative Assembly. Tutum in fact brings a self-criticism about the legitimacy of making a new constitution and draws attention to a number of critical issues (*DM, TD*, Cilt 7, B: 124, 10.08.1982, pp.339-343). He states that the legitimacy of a constitution might be improved in two ways. The first is the direct or indirect participation of the people into the constitution making process. The second and more significant than the first is the compliance of the resolutions involved in the constitution to the needs of society. Tutum maintains that the first option will be somehow realized through the referendum process. Yet the second is highly problematic in their practice since their judgments on the resolutions might be misguided for two reasons: the representative quality of the Consultative Assembly (the fact that it does not represent all the segments of society) and the shock of the past period. He in this sense warns about such misguided tendency and states that the draft constitution must be ready to face accusations such as that it is *centralist, authoritarian* and *tutelary*, prepared under the influence of conservative opinions and particularly the social experiences of the past (*DM, TD*, Cilt 7, B: 124, 10.08.1982, p.341).

once again (similar to the case of 1961 constitution) that they presuppose a direct linkage between the military coup and the will of nation as they explain their practice with the rationale for the coup, and invoke the idea of constitution-making power of the Turkish nation. It might be argued in this respect that they implicitly conceive the elimination of the existing constitution by the military coup as a *constitutional elimination* in Schmittôs terms. Recall that Schmitt considers such incidents harmless to the democratic legitimacy of the constitutional order as long as the *constitutional minimum* (the principle of national sovereignty) is preserved. Indeed it only makes sense within Schmittôs theoretical framework that the members do problematize neither the legitimacy of the Constituent Assembly nor the writing of a new constitution.

From another angle, departing from the authors of 1961 constitution, the members of the 1981 Constituent Assembly explain the rationale behind the new constitution (and the content of the provisions) completely on the basis of concrete circumstances. Recall that the authors of 1961 constitution try to justify the practice of writing a new constitution by focusing on the gaps in the 1924 constitution and the consequent ñconstitutional violationsò of Democrat Party government. And in their endeavour, they strive to establish a delicate balance between the particular necessities of the Turkish context and the universal principles of law and democracy. Similar to their predecessors, the authors of 1982 constitution base their arguments on a severe critique and sometimes refutation of the 1961 constitution.[429] Yet, they capitalize entirely on the requirements of the concrete situation, not on universal

[429] For instance, Asēm Kŝneciler claims that the constitution of 1961 hindered both national sovereignty and state authority. The Constitutional Court hindered the national sovereignty while the decisions of the Council of State hampered the executive. In fact, neither the spirit of 1961 constitution nor its text involved such intention. Yet the institutions it introduced abused its provisions. Thus they [Consultative Assembly] refuse the constitution of 1961 in terms of these respects, and this is the reason why they are here. Kŝnecilerôs statement in Turkish is as follows: ñ1961 Anayasasē ne millî iradeye, ne de devlet otoritesine nefes aldē-mamēkta; ikisine de ipotek koymuķtur. Millî iradenin köstekleyicisi Anayasa Mahkemesi, icranēn köstekleyicisi de Danētay kararlarē olmuķtur. é 1961 Anayasasēnēn metinlerinde hatta ruhunda böyle bir kasē yoktur; ama getirmiķ olduŝu müesseseler bunu pekâlâ kötü istikametlerde kullanabilmiķtir. Ķte bu yönüyle biz 1961 Anayasasēnē reddediyoruz. Zaten bu maksatla da buraya toplanmēķ bulunuyoruz.ò (*DM, TD*, Cilt 7, B: 125, 11.08.1982, p.445)

principles of law and democracy, in designating the constitutional provisions for the aim of re-establishing the state, strengthening its authority and power in the face of political instability, civil war conditions and economic downturns. Moreover they mobilize the Schmittian idea of ñinternal and external threats to the existence of the Stateò similar to their forerunners who engaged in the constitutional amendment of 1971, as they term communist, fascist and reactionary movements as the enemies of the Republic.[430] It might be claimed in this respect that there is a continuation with the 1971 constitutional amendment in terms of the criterion of legitimacy.

In sum, it must be stated that the reference to the constitution-making power of the nation does not go beyond a mystification or rhetoric in case of 1982 constitution. It might be thought as an unfounded argument invoked in order to disguise the sheer power of the military junta in the writing of the new constitution. Therefore, the definition of the period before September 12 as a major era of *constitutional crisis*, substantial reference to the *principles of Atatürk*, and to the qualities of an imaginary *national entity* remain strategic actions in order to provide legitimacy to the process and new constitution.

After propounding on the conception of the legitimacy of 1982 constitution by the members of the Constituent Assembly, I will elaborate on their conception of the constitution in the following.

7.5 Conception of the Constitution by the Members of the Constituent Assembly: A Constitution for Protection?

In case of 1982 constitution, we see that neither the members of the Constitutional Committee nor the members of the Consultative Assembly show any effort to disguise the ideological substance of the constitution. We see that the initial

[430] In line with such perspective, Asēm Kî neciler states that ñthe draft proposal will save the state from the attacks of anarchists, separatists and enemies of the regimeò (*DM, TD*, Cilt 7, B: 125, 11.08.1982, p.446).

constitutional debates are marked by substantial reference made to the *principles of Atatürk*, particularly to republicanism, nationalism and laicism. These principles are termed as *Atatürkçülük* and defined by the members as the founding ideology of the constitutional order yet to be formed. Reminiscent of the statement in the Declaration no 1 of the National Security Council, they explain the rationale behind the writing of a new constitution as the realization of this ideology. Therefore, the constitution comes to represent most of all the distinct manifestation of a specific preference for certain world view and ideology, rather than a neutral or formal text encompassing universal principles of human rights, law and democracy.

It is possible to identify a number of salient perspectives concerning the central role attributed to the *principles of Atatürk*. We witness the elevation of *Atatürkçülük* to the level of an *authentic ideology* alternative to so-called foreign and hostile ideologies, most of all to communism. In this respect, the emphasis is especially made to its power to unite the nation around a common ideal. For instance, Bekir Hamitoğullarē suggests that an *Atatürkist* (*Atatürkçü*) development plan has to be developed and reflected in the constitution. From his perspective, ñ[t)he rival ideologies can be impeded if social capitalism against fascism and *Atatürkist* social democracy against communism and theocracy are formed in compliance with the political structures of Turkey.ò[431] He continues that the constitution should also involve an ideal in terms of this ideology for the youth. ñI am sure that only if the constitution introduces such an ideal and the *Atatürkist* ideology is forged enough to cope with and challenge the other contemporary ideologies, the traitors aiming to destroy Turkey could never reach their aims.ò[432] Here it is possible to detect the signs of an endeavor to universalize such ideology to all segments of society, and to

[431] ñTürkiye'nin siyasal yapēlarēna uygun olarak bir yandan faĸizmi önleyebilmek için sosyal kapitalizm, öbür taraftan komünizm ve teokrasiyi engelleyebilmek için Atatürkçü sosyal demokrasi oluĸturulursa ancak bunlar engellenebilir.ò *DM, TD*, Cilt 7, B: 122, 06.08.1982, p.179.

[432] He states in Turkish that ñAnayasa böylesi bir ideal getirdiği yerde ve arz ettiğim Atatürkçü ideolojiyi çağdaĸ diğer ideolojilerle boy ölçüĸebilecek, onlara meydan okuyabilecek bir kēvama getirildiği takdirde, ben eminim ki Türkiye'yi yok etmek isteyen hain güçler hiçbir zaman emellerine ulaĸamayacaklardēr.ò (*DM, TD*, Cilt 7, B: 122, 06.08.1982, p.179)

exclude certain ideologies from the constitutional order.[433] Similarly, according to Osman Yavuz, the draft constitution is constructed on the basis of the philosophy of *Atatürkçülük* which involves the idea of powerful, reformist and developmental state. It is in this respect that the draft constitution is closed to fascism, communism and anarchy, thus crisis.[434]

Fikri Devrimsel, on the other hand, insists that the constitution of 1982 and the political regime that would be the product of this constitution should be based on the philosophy of *Kemalism* consisting of the *principles of Atatürk*. And this should be demarcated in the second article of the constitution as in the following: ñ[t]he State of Turkey (*Türkiye Devleti*) is republican, nationalist, populist, laic and reformist. The republic is democratic, national and a social state based on the rule of law and committed to human rights and the fundamental principles stated in the preamble.ò[435] In order to strengthen his perspective, Devrimsel quotes one of Kenan Evrenôs statements: ñthe principles of Atatürk would be indoctrinated to the consequent generations in the form of an ideology.ò According to him, the meaning of these principles would come to light during the formulation of the provisions of the constitution. And as the people approve them, the controversies over their meaning would terminate. As a result, these principles would no longer remain within the program of a particular political party but would be the common principles that form the basis of all parties and society. For Devrimsel, the inclusion of these principles in the constitution would also enable the exclusion of the *enemies of Atatürk*, mainly reactionists, racists and internationalists, from the Turkish political life. This is the

[433] It is strange that though the members underline their commitment to the principles of Atatürk and insist that the constitution has to be written in accordance with them, they also claim that they remain impartial in their endeavour. To exemplify such position, Nuri Özgökerôs considerations are significant: ñI am expressing my views completely in impartial terms, without being committed to anything but to the principles of Atatürk in theoretical terms, without being resigned to any interest and without being captured by any fanatical viewpoint.ò (*DM, TD*, Cilt 7, B: 125, 11.08.1982, p.423)

[434] *DM, TD*, Cilt 7, B: 122, 06.08.1982, p.181.

[435] *DM, TD*, Cilt 7, B:123, 09.08.1982, p.202.

requirement of Turkeyôs specific conditions and its future. Devrimsel also claims that the *principles of Atatürk* involve democracy.[436]

Halil Gelendost also emphasizes that Turkeyôs route to progress and development passes through the embracement of the *principles of Atatürk*, rather than importing foreign ideologies.[437]

It is observable throughout the debates that *Atatürkçülük* as ideology is formed on the basis of imagination of a *homogeneous community ethos*: unity in language, history and religion. The divisions in the society based on class, religion or ethnicity are completely ruled out. Furthermore, the homogeneity of the Turkish nation is assumed through a strong emphasis upon *Turkishness* and Islam.[438] And sometimes, it is possible to perceive a certain tone of alienation from the ñWestò or ñWestern civilizationò in the statements of the members. This is what is exactly implied by Nuri Özgöker when he states:

> We cannot completely adhere to the models that others [*Western civilization*] develop for themselves, for their own people and orders. This is contrary to our idea of independence and freedom. We can only think of getting the good parts of those models that are suitable for us. Thinking the opposite contradicts with the principles of Atatürk.[439]

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[436] In his subsequent words, Devrimsel criticizes the draft constitution for introducing the elements of repressing the ruled and disfranchising them in terms of fundamental rights and liberties instead of introducing preventive provisions for the abuse of political power by the rulers (*DM, TD*, Cilt 7, B:123, 09.08.1982, p.203).

[437] *DM, TD*, Cilt 7, B: 125, 11.08.1982, p.433.

[438] Regarding the subject, Nuri Özgöker states that ñIn Turkey there is only one community from Turkish descent. This is the Turkish Nation. The existence of this community forms the first one of the principles of Atatürk. Besides, every Turk from Turkish descent is Muslim. Such community does not exist in any other country in the world. Though the native language of our prophet is Arabic and Koran is in Arabic, all Arabs are not Muslim. On the other hand, all the Turkish descendants are Muslim. Here it is the lively example: refugees from Afghanistan.ò (*DM, TD*, Cilt 7, B: 125, 11.08.1982, p.424).

[439] ñBiz, bakkalarēnēn kendileri için, kendi halklarē ve düzenleri için gelixtirdikleri modellere tam olarak baĵlē kalamayēz. Bu bizim baĵēmsēzlēk ve özgürlük düküncemize ters düker. Biz sadece o modellerin iyi taraflarēnē, bize uygun gelebilecek olanlarēnē almayē dükünebiliriz. Bunun aksini dükünmek, Atatürk ilkelerine ters düker.ò *DM, TD*, Cilt 7, B: 125, 11.08.1982, p.424.

Such homogeneous understanding of society is also interwoven with certain *logic of exclusion*. Marxism both in its communist and socialist forms are declared as the enemy of the constitutional order. The ñenemies of the nation and landò, in Mehmet Akdemirôs terms, through making alliances with their foreign collaborators, tried to trigger racist and sectarian conflicts within society.[440] It might be argued in this respect that the constitution comes to signify Schmittôs well known category of the political, ñeither/or decision between friend and enemyò. And the objective of preserving ñthe existence of the State in the face of internal and external threatsò is once again takes precedence in the making of constitution.

The members of the Consultative Assembly generally refer to the *principles of Atatürk* in connection with the preamble, and in order to demarcate the fundamental qualities of the state in the second article. Similar to the perception of the parliamentary representatives in the constitutional amendment of 1937, they consider them as general, but not partial, guiding principles for the state and nation, and insist on their inclusion altogether into the constitution.[441] Moreover, there is an obvious tendency to attribute the principles to Mustafa Kemalôs personality thus personalize them. The principle of republicanism, for instance, is conceived as more than a principle of government. It is considered as the legacy of Mustafa Kemal and as a moral principle embedded in the national consciousness. Besides, there is a tendency to identify *Atatürkôs Republic* in its most basic terms as ónational sovereignty belongs to the people,ô with democratic form of government.[442]

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[440] *DM, TD*, Cilt 7, B: 122, 06.08.1982, p.190.

[441] Utkan Kocatürk (*DM, TD*, Cilt 7, B:128, 17.08.1982, p. 646), and Bekir Tünay (*DM, TD*, Cilt 7, B: 128, 17.08.1982, p. 669). Tünay goes a step further and states that the *principles of Atatürk* are guiding not only for the Turkish nation but also for the world as a whole just because they are scientific. Muzaffer Ender and Zeki Çakmakçē demand that these principles should be included in the constitution together with their definitions (*DM, TD*, Cilt 7, B: 128, 17.08.1982, p.656 and p.670). Mehmet Hazer, on the other hand, opposes to such demand as this would prevent their reinterpretation in light of new circumstances and needs (*DM, TD*, Cilt 7, B: 128, 17.08.1982, pp.670-1).

[442] Such viewpoint becomes visible in Halil Ýbrahim Karalôs statement as he emphasizes the democratic character of *Atatürkôs Republic* among fascist, communist, theocratic and dictatorial republics (*DM, TD*, Cilt 7, B: 128, 17.08.1982, p. 669).

On the other hand, the debates show that there are conflicting accounts of the principle of nationalism. In contrast with the members who insist on the inclusion of *Atatürkôs nationalism* in the second article of the constitution, a number of them argue that the principle of *Turkish nationalism* has to be considered in connection with the state and independently from Mustafa Kemalôs personality. In this context, they insist that there does not exist a separate *nationalism* of *Atatürk* but an all-encompassing *Turkish nationalism*.[443] Regarding the subject, Ihsan Göksel argues that there is no difference between *Atatürkôs nationalism* and *Turkish nationalism*, thereby nationalism cannot be explained in connection to one person. By citing Mustafa Kemalôs own words, he continues that ñ[o]ne of the forgotten qualities of the Turk is nationalism.ò For Göksel, Mustafa Kemal has derived the Turkish nationalism from the dark passages of history and has formed it more properly than any other sociologist and turcologist. In fact, it seems common that the members insisting on the recognition of Turkish nationalism as a constitutional principle tend to sublimate the notion of ñTurkish Nationò hence attribute to it everlasting and divine qualities.

In the face of these controversies, the Constitutional Committee seems to take a moderate position by including in the second article the phrase of ñcommitted to Atatürkôs nationalismò. Aldeğkaçtē, the president of the Committee, explains their rationale to mention *Atatürkôs nationalism* instead of Turkish nationalism with the concern that the inclusion of the latter could result in extreme forms of nationalism.[444]

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[443] Ihsan Göksel, Mehmet Pamak and Ertuğrul Zekai Ökte (*DM, TD*, Cilt 7, B: 128, 17.08.1982, pp.659-66).

[444] *DM, TD*, Cilt 7, B: 128, 17.08.1982, p.674. In fact, among the members involved into the discussion, only Dündar Soyer seems to have an impartial perspective. He argues that references in the constitution to notions such as ñAtatürkçülük,ò ñthe principles of Atatürk,ò ñin line with the principles Atatürk,ò or ñthe revolutions of Atatürkò might pave the way for unending controversies within the country and even outside. In this respect, the inclusion of the phrase of ñAtatürkôs nationalismò in the constitution is not proper in terms of law (*DM, TD*, Cilt 7, B: 128, 17.08.1982, p.664).

Throughout the course of constitutional debates in 1982, it is possible to discover peculiar conceptions of constitution as well. As indicated in the previous section of this chapter, Alatlē introduces very strange terminology concerning the constitution making process. In a similar vein, Ömer Adnan Örel defines the constitution in a distinctive way. According to him, the definition of the constitution as social contract has to be enlarged as the constitution also signifies a *protection plan,* which will enable the protection of the existence, independence, integrity and indivisibility of the State, the Republic and national interests against any kind of internal and external enemy and ensure the happiness, liberty and justice within the nation.[445] Indeed these conceptions are significant to be illustrative of the dominance of *state-centric* perspective in the constitution making process.

It might be argued in light of constitutional debates that the members of the Consultative Assembly have mostly conservative republican and conservative nationalist world views, locating the state authority to the center. Their statements, particularly the emphasis on the significance of the *principles of Atatürk*, their criticisms against the provisions of 1961 constitution and the explicit demand for powerful state authority might be considered as the evidence of such statist perspective dominating the constitutional debates.[446] Such state-centric mind is

[445] DM TD, Cilt 7, B: 126, 12.08.1982, p 508.

[446] In fact, the degree of their conservatism goes far beyond the conservatism of the members of the Constitutional Committee in some cases. To exemplify, during the debates about the limitation of fundamental rights and liberties (article 12), the majority of the members of the Consultative Assembly do not show any interest to criticize the vague notions introduced by the Committee. Moreover, they oppose to members criticizing the introduction of a clause on ólossô of a right,ô and ñthe replacement of the óessence of rightsô guarantee with the phrase that restrictions on fundamental rights shall not be against óthe requirements of the democratic social orderòò [I borrowed the phrase from Özbudun, 2011: 47]. For the constitutional debates referred, see *DM, TD*, Cilt 8, B: 130, 19.08.1982, pp.129-149. Or we can cite the members who insist on the addition of ósocialismô to the enemies of the constitutional order during the debates on article 13 concerning abuse of rights. Namely Nurettin Ayanoĵlu and Asēm Kŷneciler propose the addition of the phrase ósocialismô before the phrase of ócommunismô in article 13 (*DM, TD*, Cilt 8, B: 130, 19.08.1982, pp.172-3). It is even the case that during the constitutional debates on fundamental rights and liberties, the members of the Consultative Assembly submit more restrictive change proposals than the Committeeôs. This tendency in fact draws the attention of some members and thus become a point of criticism in their statements. For instance, Fikri Devrimsel defines the general tendency in the draft proposal to introduce very strict limitations on the rights and liberties as óswallowing of the substance of democracyô (*DM, TD*, Cilt 8, B: 132, 21.08.1982, p.288).

moreover visible throughout the constitutional text. In this framework, the entire text of the draft constitution of 1982 seems to form the *expression of state life* in Schmittôs terms, rather than explicate the lawful relations between state organs and guarantee the fundamental rights and liberties of the individual against the infringements of political power. In particular, the first part of the draft constitution seems to be the manifestation of the conception of state as a legal and political subject that has substantive purposes or interests of its own; while in the second part, the scope and content of the fundamental rights and liberties seem to be defined at the expense of the *Stateôs right of self-preservation* in Schmittian terms.

Recall that in Schmittôs theory, the vicious idea of *Stateôs right of self-preservation* yields the primacy of the state over the legal order and the individual, and paves the way for unlimited power for state authority. The overwhelming tendency to defend the idea of ñpowerful stateò on the basis of ñpowerful executiveò in the constitutional debates might be interpreted within such framework. In fact, a great number of provisions and constitutional debates concerning them illuminate the background idea of *raison dôetat* shared by the majority of the members of the constitutional committee and the Constituent Assembly.

Coinciding with Schmittôs conception, the members of the Consultative Assembly conceptualize the state and individual/groups as two distinct subjects and the former is prioritized over the latter. In addition to a variety of evidences provided by the constitutional debates, such conceptualization is also reflected in the preamble of the Constitution as the Turkish state is declared ósacredô. From the viewpoint of the members of Consultative Assembly, the rights of the individual signify nothing unless they are guaranteed and protected by the proper authority of the state.

Recall also that the authors of 1961 constitution tend to consider the constitution as a legal fence by the help of which the assumed destructive power of certain political ideologies and social cleavages can be circumscribed and domesticated. Hence they conceive the constitution as the main instrument for setting the legal parameters of

legitimate political activity, and the practice of constitution making as a neutral activity to constitute the legal order in which political activity will definitely move. Similar to the conception in 1961 but going further, the authors of 1982 constitution consider the constitution as a legal fence in which not only certain political ideologies and social cleavages but also social change in its entirety can be circumscribed and kept under control. As emphasized by Tanör, the 1982 constitution becomes the main instrument to interpenetrate, design and control the political and social life in its entirety (Tanör, 2013: 139). Therefore, the constitution comes to serve as the main instrument of social transformation since its authors aim at transforming the nation through the ideals depicted in the constitution. And in case of 1982 constitution, the parameters of the legal fence seem to be more restrictive (and regressive) and encompassing as now more areas of life become the target of ñsocial engineering through constitutionalismò as conceptualized by Shambayati (2008: 99). [447] In this sense, national culture, education, university, mass media, working life and other areas of life get within the range of such ideological constitution (Takkēn, 2007: 254).

The constitutional debates on the principle of laicism and in conjunction, the debates on the freedom of religion and conscience (article 24) make apparent such inclination to design and control society. The principle of laicism becomes a point of controversy in terms of the extent of stateôs role in religious education. In case of 1982 constitution, the members of the Consultative Assembly seem to have reached an agreement on the meaning of the principle of laicism: separation of state and religion, and state control over religion.[448] However, now the contested issue is the extent of stateôs control over religion; whether the state should be active in religious teaching or not. The debates in connection with the compulsory religious education demonstrate the deliberate attempts to instrumentalize religion, and design society in

[447] Here I benefit from Arjomandôs and Shambayatiôs considerations on ideological constitutions.

[448] Recall that in case of 1961 constitution, there was controversy over the meaning of the principle of laicism. To mention roughly, while some members defended certain amount of stateôs control over religion, some others severely rejected such control.

conservative parameters. Most of the members consider religion as an instrument of control over society as well as ensuring unity.[449] They tend to think that religious education might enable the formation of a young generation submissive and closed to left ideologies (Takkān, 2007: 260). In this regard, they insist that religious education is a national requirement, and it is necessary to protect religion -an essential component of national culture- against attacks. Again in case of laicism, we see the pragmatic approach of the constitutional authors, depending on the concrete conditions of the polity. They treat religion in unconventional terms: ñIslam as defined within the limits of the constitution, as a personal affectionò (Erdoĵ an, 2009: 154).

After explicating the conception of the constitution by the members of the Consultative Assembly, I will propound in the following the conception of constitutional review.

7.6 Conception of Constitutional Review by the Members of the Constituent Assembly in 1982

The constitutional court is designated under the supreme courts heading of the draft constitution. According to the initial proposal of the Constitutional Committee, the constitutional court consisted of fifteen members, all of which would be selected by the head of state (article 179). Departing from the constitution of 1961, the Constitutional Committee did not define any rule or procedure for the appointment of court members and their qualifications in the proposal. As a result, the head of state

[449] *DM, TD*, Cilt 9, B: 140, 01.09.1982, pp.274-5. In the discussions, it is possible to detect a positivist attitude towards society. The society is conceived as an organic unity that can be reengineered in reference to certain ideal. And the national education system indoctrinated with the principles of Atatürk and Islam as defined within the limits of the constitution is perceived as the condition for the endurance and reproduction of such ideal society. Therefore, it is believed that not only the youth throughout the education system and universities, but also civil society and its institutions including unions, associations and political parties can be the subject of constitutional reengineering in line with the ideology of the framers of the constitution.

is left with great discretionary power to decide on the composition and origin of the court members. This signified in fact the subordination of the constitutional court to the executive (particularly to the head of state) in terms of appointment procedure (Parla, 2007: 127).

Moreover, the Constitutional Committee has narrowed down the scope of constitutional review thus the power of the constitutional court in its proposal.[450] The duties of the court are defined as the substantive and procedural review of the laws, law-amending ordinances and the standing orders of the Turkish Grand National Assembly in terms of constitutionality; and procedural review of the constitutional amendments (article 182). As the debates progressed, the Constitutional Committee additionally gave a change proposal concerning the duties of the court and included that the constitutional court has no review powers over law-amending ordinances issued during war, martial law or a state of emergency.

In fact, the initial designation of the scope of constitutional review together with the change proposal seems to be in line with Schmittôs considerations on the scope of competence of the constitutional court. Recall that Schmitt is highly critical of constitutional courtôs engagement in cases where fundamental political decisions are at issue. He in this respect draws attention to the ambiguity of trying to separate legal issues from political questions and openly objects the distinctive position of the constitutional court to decide on all disputes of constitutional interpretation. He mainly advocates political supervision over the constitution on the basis of the historical experience of French Sénat Conservateur. He demands the establishment of a political organ ñsuch as ósenateô in the style of the Napoleonic constitutions,ò which according to him would decide with more integrity over constitutional disputes (Schmitt, 2008: 164). In French case, the Senate Consul engaged in political

[450] Parla states that the 1982 constitution introduced a division of labour between the constitutional court and the head of state in terms of constitutional review (Parla, 2007: 79). In this regard, the head of state is endowed with the right to present the constitutional amendments to referendum if he deems necessary. The head of state is also given the right to claim plea of unconstitutionality of the laws, law-amending ordinances and the standing orders of the Turkish Grand National Assembly.

supervision, while the constitutional court focused on procedural issues and supervised the implementation of the wording of the constitution (Teziç, 2013: 211). Schmitt seems to embrace the idea of Senate Consul as the protector of the constitution since he thought that this Senate would easily avoid from implementing universally recognized principles of law whenever the ôstate interestô is in danger. Whenever there emerges a case which endangers the survival of the state, he thought this political organ would outreach the general principles of law and decide in favour of the state. In his later writings, namely in the *Guardian of Constitution* (1931), Schmitt also mentions the president (against the political premium of the dominant party in parliament) as the sole authority to present the unity of the peopleôs *will* and give expression to this *will.* According to him, the president situated above all the political parties in the parliament and acting on the basis of his plebiscitary legitimacy, would be the highly political but also neutral third party to decide on the fundamental political issues. In this context, the designation of the scope of constitutional review and the power of the constitutional court in 1982 constitution seems to come close to Schmittôs considerations with one exception. Similar to Schmitt, the authors of 1982 constitution refrain from giving the constitutional court the authority to decide on fundamental political questions and in exceptional circumstances such as war, martial law or a state of emergency where the stateôs interest is at stake. Yet different from Schmitt whom prefers the establishment of a political organ such as Senate Consul or directly the authority of the president to decide in such cases, the authors of 1982 constitution vest the authority to decide upon the executive.

During the constitutional debates, the designation of the court in the first part of the ôsupreme courtsô chapter becomes a point of controversy. Some members object to such ranking and demand the replacement of the provisions concerning the court in the last chapter of the ôsupreme courtsô heading.[451] These members mainly try to distinguish the constitutional court from other supreme courts such as the Supreme

[451] The proposal of Güven et. al. (*DM, TD*, Cilt: 10, B: 148, 10.09.1982, pp.149-150).

Court (*Yargıtay*) or the Council of State (*Danıştay*), just because they think that the constitutional court might make political decisions.[452] They cite the constitution of 1961 and claim that it did not designate the constitutional court as a supreme court either. According to Turhan Güven, the court would essentially function as an organ of audit as far as its duties enumerated in the draft constitution are taken into consideration, contrary to the other supreme courts directly executing the judiciary function.[453] Fikri Devrimsel supports Güvenôs proposal, and states that the court is no more a judicial court but a simple review organ over the legislative as it is no more assigned with the function of High Court (*Yüce Divan*).[454]

In response to these arguments, Aldıkaçtı, the president of the Constitutional Committee, asserts that the constitutional court generally explains the basic law of a country and designates the constitutionality of the laws and activities of state organs.[455] It is in this respect that the Committee defined the court in the first part thus not for its priority or supremacy over other supreme courts. He furthermore emphasizes the judicial aspect of the court and argues that the constitutional review encompasses making a decision on a controversial issue thus resolving a dispute as a judicial organ.[456]

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[452] The status of the constitutional court also becomes a point of controversy between Mehmet Hazer and Orhan Aldıkaçtı at a later stage of the discussions. Contrary to Hazerôs claim on the political status of the court, Aldıkaçtı insists that the constitutional court in essence is not political. However, in case of its becoming a political institution, it would be in a similar situation in 1974. (*DM, TD*, Cilt: 10, B: 148, 10.09.1982, pp.166-8).

[453] *DM, TD*, Cilt: 10, B: 148, 10.09.1982, p.155.

[454] *DM, TD*, Cilt: 10, B: 148, 10.09.1982, p.156. Some members, namely Kazım Öztürk and Kâşif Vardal, object to the withdrawal of the High Court function from the constitutional court and assignment of a committee consisting of heads of penal chambers of the Supreme Court instead (*DM, TD*, Cilt: 10, B: 148, 10.09.1982, pp.186-7). The Constitutional Committee of National Security Council included in its proposal the function of High Court (article 148) and in this framework, the court is also assigned with this duty.

[455] *DM, TD*, Cilt: 10, B: 148, 10.09.1982, p.154.

[456] *DM, TD*, Cilt: 10, B: 148, 10.09.1982, pp.156-7.

The second dispute relates to the large scale of discretionary power granted to the head of state in the appointment of courtôs members. Recall that the constitution of 1961 introduced a mixed court the members of which are ñpartly chosen by the other high courts and partly by elected branches of governmentò (Özbudun, 2011: 112). In addition, the necessary legal and professional qualifications were stipulated in the constitution (Özbudun, 2011: 112). Contrary to such designation, the draft proposal of the Constitutional Committee strengthened the head of state in the selection of the members of the court as it defined no specific appointment procedure or qualification in the proposal. As a result, the head of state is left with great discretionary power to choose the members.[457] During the constitutional debates, Abdülbaki Cebeci draws attention to the possibility that such appointment procedure might hinder the independency of court judges;[458] whereas Kâzım Vardal concerns that the failure of the court might also damage the reputation of the head of state.[459] A great number of members demand the description of the necessary qualifications of constitutional court judges and their origin in the constitution. And accordingly they give change proposals.[460] The Constitutional Committee insists on its perspective and rejects all change proposals. The voting of the change proposals results in line with the Committeeôs opinions.

A careful scrutiny of the constitutional debates shows that the members of the Consultative Assembly do not question the *raison dôêtre* of the constitutional court. Yet, they seem to be eager to accept the court merely with limited scope of duties as defined by the Constitutional Committee. The general inclination throughout the

[457] The selection procedure and necessary qualifications of court members are designated in the Report of the National Security Councilôs Constitutional Committee, and only afterwards it is included in the constitution of 1982 (Article 146) (Annex to *MGK, TD*, Cilt 7, B: 118, 18.10.1982, p.171).

[458] *DM, TD*, Cilt: 10, B: 148, 10.09.1982, p.160.

[459] *DM, TD*, Cilt: 10, B: 148, 10.09.1982, p.163.

[460] For instance, Fikri Devrimsel and Kazım Öztürk. (*DM, TD*, Cilt: 10, B: 148, 10.09.1982, pp.159-160)

debates seems to be the concern to clearly demarcate the boundaries of the constitutional court, and to secure the supremacy of the legislative (and executive). Regarding such concern, Şener Akyolûs speech (the speaker of the Constitutional Committee) is illuminating: the Constitutional Committee aims with the duties assigned to the court ñon the one hand to completely guarantee the principle of national sovereignty, and on the other hand to constitute the rule of law, the trust on the promulgated and declared laws.ò[461] He maintains that large number of decisions made by the court to annul laws on the basis of procedural irregularities during the implementation of 1961 constitution is no longer possible. The members conceive the legislative as the sole representative of the national will, and thus strive to take measures to prevent its hindrance by the decisions of the court.[462] In this framework, they also include a separate provision in the draft constitution that the constitutional court cannot act as a lawgiver in annulling a law or provision of a law, thus create a provision which would pave the way for a new implementation (article 187).

As it is seen, the constitutional debates concerning the constitution of 1982 differ from the debates in 1961 radically in terms of the perception of the constitutional court by the members of the Constituent Assembly. In 1961, the authors of the constitution tend to take into consideration the future prospects of being a constitutional democracy together with the past political experiences, particularly incidents experienced during Democrat Party government. In this framework, they conceive the constitutional court as the guardian of the constitution, the pivotal institution for preventing the violation of the constitution by the governments holding the majority of seats in the parliament. Even some members of the House of Representatives tend to regard the court as a rival institution for controlling the legislative. In case of 1982 constitution, such perspective seems to reverse. Now the majority of the members of the Consultative Assembly strive to guarantee the

[461] *DM*, *TD*, Cilt: 10, B: 148, 10.09.1982, p.188.

[462] Kazım Öztürkûs criticisms against the decisions of the court concerning the repeal of law and consequent proposal support such point of view (*DM*, *TD*, Cilt: 10, B: 148, 10.09.1982, p.186).

sovereignty of the legislative while slightly acknowledging the supremacy of the constitution. They seem to reorganize the power relations between constitutional organs in favor of the legislative and executive and at the expense of judiciary. Moreover, in this endeavor they seem to exclusively take into consideration the past experiences, particularly the previous decisions of the constitutional court which from their perspective impeded the functioning of the parliament and governments. Thus they seem to depart from the ideals of constitutional democracy in designating the court, most of all its composition, the procedure on the selection and tenure of its members and its duties and powers. Also, no reference to other countries in terms of these details is remarkable.

7.7 Concluding Remarks

The constitution of 1982 introduced major changes in the relations among the legislative, executive and judiciary as well as in their internal functioning. Additionally, it marked, in comparison with the 1961 constitution, a radical shift in the philosophy of fundamental rights and liberties towards an authoritarian and restrictive direction. The new constitution represented in a sense a new era in state/society and state/individual relations.

The constitutional debates within the Consultative Assembly make explicit that the sovereign will to design the constitutional order and along with that society within authoritarian and conservative parameters comes to the fore in the making of 1982 constitution. Indeed, the conception of the constitution as the main instrument to control and design society in line with the *fundamental political decision by the bearer of the constitution making power* in Schmittôs terms reaches its peak. The debates manifest that (similar to the constitutional amendments of 1937 and 1971) one-sided political decision of the authors of constitution takes precedence and becomes the determining force in the making of 1982 constitution. Thus just as Schmitt describes, the constitution becomes valid and founds a new concrete order by virtue of the existing political will which establishes it.

Generally there takes place no debate in the Consultative Assembly concerning the legitimacy of writing an entirely new constitution. The members do problematize neither the legitimacy of the military coup nor the authority of the Constituent Assembly engaging into such practice. On the contrary, we witness once again (similar to the case of 1961 constitution) that they presuppose a direct linkage between the military coup and the will of nation as they explain their practice in reference to the rationale for the coup and invoke the idea of constitution-making power of the Turkish nation. It might be argued in this respect that they implicitly conceive the elimination of the existing constitution by the military coup as a *constitutional elimination* in Schmittôs terms and do not perceive the interference detrimental to the legitimacy of the constitutional order since the *constitutional minimum* (the principle of national sovereignty) is preserved.

The constitutional debates provide us with sufficient evidence that the context dependency of the constitution making process peaks in 1982 constitution as the factual reality of the polity rather than the normative framework concerning universal standards of constitutional democracy becomes the main source of reference for the framers of constitution in justifying the practice of writing a new constitution and the validity claims about provisions.[463] It seems that the constitution of 1982, both in terms of formation process and content, is entirely determined by the discourse on the state of exception and by very strong reliance on concrete circumstances.

Regarding the formation process, it is significant to underline that the constitution is prepared within the bicameral Constituent Assembly established for this purpose, but the democratic legitimacy of which is highly problematic since it is not formed on a participatory and egalitarian basis. All the members of its civilian chamber, Consultative Assembly, are appointed by the military junta while the members of the

[463] Erdoĵan (2009: 154) argues as well that legal concepts and terms are defined according to the ideological priorities rather than technical requirements or universal considerations.

second chamber, National Security Council are the leaders of the military coup themselves. In addition, all the political parties are excluded from the constitution making process as the members of the Consultative Assembly must not have an attachment to any of the political parties. And lastly, the will formation process within the Assembly is problematic mostly because the National Security Council has crushing dominance over the Consultative Assembly and has the final say over the constitution.

Regarding the content, it is generally observed that the authors of 1982 constitution explain the rationale for the new constitution (and the provisions) completely on the basis of the requirements of the concrete situation. They found their arguments on a severe critique and sometimes refutation of the 1961 constitution. Yet, more significantly they capitalize entirely on the political, economic and social circumstances of the polity, not on universal principles of human rights, law and democracy, in designating the constitutional provisions. Therefore, contrary to their predecessors in 1961, they show no willingness to establish a balance between the particular necessities of the Turkish context and the universal principles of constitutional democracy. Moreover they mobilize the Schmittian idea of ñinternal and external threats to the existence of the Stateò similar to their forerunners who engaged in the constitutional amendment of 1971. They underline continually their objective to re-establish the state, strengthen its authority and power in the face of political instability, civil war conditions and economic downturns, and against the so called divisive attempts of communist, fascist and reactionary movements. These movements are declared as the enemies of the Republic and sometimes as the internal branches of foreign enemies of the Republic which are never defined in explicit terms. It is plausible to claim in this sense that there is a continuation with the 1971 constitutional amendment in terms of the criterion of legitimacy because the logic of friend-enemy distinction is at the center.

In such context, the reference to the constitution-making power of the nation does not go beyond a mystification or rhetoric in case of 1982 constitution. It serves

instead as an ideological shield to disguise the sheer power of the military junta in the writing of the new constitution. In fact, the definition of the period before September 12 as a major era of *constitutional crisis,* substantial reference to the *principles of Atatürk*, and to the qualities of an imaginary *national entity* all seem to be strategic actions in order to provide legitimacy to the process and new constitution.

Similar to Schmittôs conception of positive constitution and as if proving its adequacy, an overwhelming majority of the members of the Consultative Assembly conceptualize the constitution as more than a formal legal text consisting universal principles of right and democracy. For them, the constitution signifies inherently the sovereign decision of concrete actors for certain values and ideologies (as reflected in their insistence on the will of *Atatürk* and on the ideology of *Atatürkçülük*). As a consequence, none of the members show any effort to disguise the ideological substance of the constitution. We see that they made substantial reference to the *principles of Atatürk*, or *Atatürkçülük* and define it as the founding ideology of the forthcoming constitutional order. They interpret *Atatürkçülük* as an *authentic ideology* alternative to so-called foreign and hostile ideologies, but most of all to communism. And they emphasize in particular its power to unite the nation around a common ideal. In this context, they form the ideology of *Atatürkçülük* on the image of a *homogeneous community ethos*, namely unity in language, history and religion; and ignore completely the divisions in society based on class, religion or ethnicity. Indeed, the homogeneity of the Turkish nation is formed on the basis of a strong emphasis upon *Turkishness* and Islam. And sometimes such formation is also interwoven with a certain tone of alienation from the ñWestò or ñWestern civilizationò as disclosed in the statements of some members. In this framework, the constitution of 1982 comes to represent most of all the distinct manifestation of a specific preference for certain world view and ideology (mostly against Enlightenment ideals of universalism, language of rights and the rule of law), rather than a neutral or formal text encompassing universal principles of rights, law and democracy.

Moreover, reflecting the state-centric perspective dominant throughout the discussions, the entire text of 1982 constitution becomes *the expression of state life*, rather than guaranteeing the fundamental rights and liberties of the individual against the infringements of political power and stipulating adequate checks and balances between state organs. In this regard, it might be argued that the authors of the 1982 constitution overwhelmingly take the state as an entity or organic unity rather than a legal institution. In other words, they tend to have organic conception of state rather than state as a neutral/formal legal institution as the guarantor of individuals rights and liberties. Reflecting such perspective, the first part of the draft constitution seems to be the manifestation of the conception of state as a subject and entity that has substantive purposes or interests of its own; while in the second part, the scope and content of the fundamental rights and liberties seem to be defined at the expense of the *Stateôs right of self-preservation* in Schmittian terms.

Similar to Schmittôs theory where the vicious idea of *Stateôs right of self-preservation* yields the primacy of state over the legal order and the individual, and paves the way for unlimited power for state authority; the members of the Consultative Assembly conceptualize the state and individual as two distinct subjects and prioritize the former over the latter. More significantly they defend the idea of ñpowerful stateò on the basis of ñpowerful executiveò and that the state can violate the fundamental rights and liberties of individuals in various states of exception defined in vague terms in the constitution. In fact, constitutional debates on a great number of provisions illuminate the background idea of *raison dôetat* shared by the majority of the Constituent Assembly members. Consistently, the constitution comes to signify Schmittôs well known category of the political, ñeither/or decision between friend and enemy,ò as the objective of preserving ñthe existence of the State in the face of internal and external threatsò takes precedence in the making of constitution.

Hence, it might be argued that the 1982 constitution signifies in pure terms the *fundamental political decision by the bearer of the constitution making power over the type and form of the concrete existence of the political unity.* Such material

conception of constitution is accompanied by also static[464] and instrumental understanding of constitution whereby the political and social life in its entirety might be redesigned and kept under control within the parameters of the constitution. Indeed such outlook goes far beyond the perspective of the framers of 1961 constitution since the latter tend to consider the constitution merely as a legal fence by the help of which the assumed destructive power of certain political ideologies and social cleavages can be circumscribed and domesticated. In this respect, the framers of 1961 constitution conceive the constitution as the main instrument for setting the legal parameters of legitimate political activity, and the practice of constitution making as a neutral and perhaps more technical and normative activity to constitute the legal order in which political activity will definitely move. In case of 1982 constitution, on the other hand, the constitution comes to serve as the main instrument of social transformation. From the perspective of its authors, the constitution becomes the key to transform the nation through the ideals depicted in the constitution, more specifically to construct an indivisible social unity free from all kinds of contradictions and to minimize the pluralisms in society. The parameters of 1982 constitution are enlarged and boldly drawn as now national culture, education, university, mass media, working life and other areas of life become the target of *social engineering through constitutionalism*. And that target in turn is presented as an urgent need for ñnot going back to pre-coup.ò

[464] Regarding the static understanding of constitution, the National Security Councilôs decision to stipulate the initial three articles of the constitution as unamendable is very informative. Here, it is also possible to detect the divergent opinions held by the Constitutional Committee of the Consultative Assembly and NSC. Recall that the Committee originally proposed the prohibition of making amendments only in the first article of the constitution concerning the republican type of state. Moreover, Aldẽkaçtẽ, the president of the Committee, emphasizes during the constitutional debates on the second article that the essential part of the article is formed by the phrase ñTurkish Republic is democratic, laic and social state based on the rule of lawò (*DM, TD*, Cilt 7, B:128, 17.08.1982, p.717). And he criticizes the tendency to understand other qualities attributed to the state in the second article in static/everlasting terms. For him, there has to be made a distinction between constitutional principles and values since contrary to the former, the latter might change in time as the society progresses. Here, Aldẽkaçtẽ seems to make a significant distinction between norms and values included in the constitution. On the other hand, the NSC acts diametrically opposed to Aldẽkaçtẽ as it preferred to enlarge the scope of unamendable provisions and included the first three articles of the constitution explained in the initial sections of this chapter.

Throughout the constitutional debates, the discursiveness decreases to a considerable extent and the dialogical understanding of the constitution recedes to minimum. The limited number of opponents find almost no response to their change proposals and the provisions are usually justified by the parties (both by the members of the Constitutional Committee and proponents in the Consultative Assembly) through merely pragmatic and ethico-political discourses in Habermasô terms. Most of the cases, these members make reference either to the concrete circumstances or to the qualities of an imagined *national entity*. To explicate, first, we see the tendency to justify the provisions with validity claims based on concrete political, social and economic circumstances. In specific terms, the members cite immensely the concrete problems faced during the implementation of 1961 constitution. Second, we witness the frequent utilization of notions such as *the principles of Atatürk* or *Atatürkô nationalism*, the *entity* of the Turkish Nation, the *national culture*, or *national history* for justifying the validity claims about a particular principle of the constitution or provision. Here becomes operational a kind of imaginary *community ethos* mentioned above*;* presupposed by the members of the Consultative Assembly and utilized in order to support the justificatory basis for their claims.

It is true that in some sessions, questions and criticisms of the opposing members are addressed by the members of the Constitutional Committee, and a number of opponents bring very severe and irreconcilable criticisms on several issues. It is also valid that the members are provided with sufficient time to bring forward their opinions in the initial sessions of the constitutional debates. However, despite the change proposals of opponents, the voting of draft provisions usually end up in accordance with the decisions of the Constitutional Committee. And the articles rewritten by the Constitutional Committee are usually accepted without any additional discussions. Moreover, in the forthcoming days of debates, due to the multitude of members willing to make speech, and time constraint to submit the proposal for the examination of the National Security Council, the time allowed for the statements is decreased to a considerable extent upon a decision made in the Assembly.

Altogether, the lack of moral discourses aimed ideally at achieving the *equal interest of all*, and the dominance of pragmatic and ethico-political discourses in the will formation processes within the Consultative Assembly, contribute to the partiality of the constitutional text and hinder its abstract and general character. The absence of abstractness and generality is significant because these two features are supportive of formalist conception of constitution which also brings impartiality and inclusiveness. The situation worsens when the fact that no rational discourses take place within the National Security Council but only (arbitrary) decisions contingent upon the will of the military leaders are made is taken into consideration.

CHAPTER 8

THE CONSTITUTIONAL AMENDMENTS OF 1995 AND 2010

The constitution of 1982 has become subject to seventeen amendments since its ratification in referendum on November 7, 1982.[465] In this chapter of the thesis, I will explore two of them, the amendments of 1995 and 2010, since the debates on these amendments could provide valuable insight for the subject of the thesis. I will explore the parliamentary minutes within the theoretical frameworks provided by Schmitt and Habermas and shed light into how the members of the parliaments conceive the constitution, how they conceptualize constitutional legitimacy and how they interpret themselves as engaging in constitutional amendments. In this respect, first of all I will focus on the constitutional amendment of 1995 which is conducted under the coalition government of True Path Party (DYP) and CHP formed after the general elections of 1991.[466] Afterwards, I will expound the parliamentary debates on the constitutional amendment of 2010 which is conducted under the single party government of Justice and Development Party (AKP).

8.1 The Constitutional Amendment of 1995

The constitutional amendment of 1995 is significant since itôs large in scope, concerned mostly with political rights and made by the initiative of the politicians.[467]

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[465] These are 1987, 1993, 1995, 1999 (two times), 2001 (two times), 2002, 2004, 2005 (two times), 2006, 2007 (two times), 2008, 2010 and 2011 amendments.

[466] The coalition government of the True Path Party (DYP) and Social Democrat Peopleôs Party (SHP) has turned into the coalition government of DYP and CHP as SHP merged with CHP on February 18, 1995.

[467] The constitutional amendment brought about changes in the preamble and in Articles 33 (freedom of association), 53 (right to collective labour agreement), 67 (right to vote, to be elected and to engage in political activity), 68 (forming parties, membership and withdrawal from membership in a party), 69 (principles to be observed by political parties), 75 (composition of Turkish Grand National Assembly), 84 (loss of membership), 85 (parliamentary immunity), 93 (convening and recess of TGNA), 127 (local administrations), 135 (professional organizations having the characteristic of public institutions), 149 (procedure of functioning and trial of constitutional court), and 171

The amendment, in effect, contributed to the improvement of political pluralism and participation of the citizenry to political activities to a certain extent. Among the improvements brought by it, the following is worth to mention. First, the amendment has repealed the bans introduced by the 1982 constitution on civil society organizations such as trade unions, associations, foundations, cooperatives and public professional organizations from pursuing political aims, engaging in political activities, collaborating with political parties, funding them or being funded by them (Articles 33, 52, 69, 135, 171) (Özbudun, 2011: 54). Second, the party bans and the sanctions in case of violation of these bans are enumerated in the constitution thus the arbitrary extension of these bans by the lawmaker is prevented (Sevinç, 1997: 634).[468] In addition, the formation of international, woman and youth branches of the parties is allowed (article 68). On the other hand, the amendment has failed to improve the union rights as the reconciliation among the parties dissolved during the constitutional debates and the amendments regarding these rights were rejected at the end.[469]

(cooperatives) of the 1982 constitution. The amendment has also repealed Article 52 (activities of unions). However, the timing and the content of the constitutional amendment might also prevent one from believing that it is a pure product of civilian politics. Regarding the timing, it is notable that the amendment is not conducted during the government of ANAP between 1987 and 1989 despite the partyôs insistence on a constitutional reform. Regarding the content, the fact that some critical provisions (for instance Article 24 on freedom of religion and conscience) initially agreed by all parties are excluded from the final proposal without any explicit reason, and that the provisions related to the military coup (for instance provisional articles ensuring the constitutionality of the coup and the laws enacted afterwards) are not entirely made subject to amendment) remain significant factors that prevent one from believing that it is a pure product of civilian politics. Indeed, the content of the amendment and the course of constitutional debates give the impression that the parties act within a framework predetermined by the decision of a political will outside the parties in the Assembly to amend 1982 constitution.

[468] According to Sevinç, the amendments regarding political parties can be examined into three headings: the activities no more banned, the rules not concerning party closures, and the bans concerning party closures (Sevinç, 1997: 634-40).

[469] The initial proposal of DYP, SHP and ANAP included the right to form unions and to collective bargaining for civil servants together with other related regulations as well (articles 51, 52, 53, 54 and 128). First, the provisions are changed by the Constitutional Committee in a regressive manner. Second the members of DYP and ANAP remain reluctant in defending them in the constitutional debates. According to Gülmez, the disposition of these members towards union rights is the manifestation of their inconsistency and inclination to consider them as political investment for appealing to the people (Gülmez, 1999: 3-30). He asserts that even the lawyer members or those having background in unions either did not know or had the wrong/deficient information about international labour accords, namely ILO regulations.

The initial proposal for the constitutional amendment is signed by 301 members of the parliament, and is in fact the product of a large but fragile reconciliation between the three major parties, namely the True Path Party (DYP), Social Democrat Peopleôs Party (SHP) or CHP, and Mother Land Party (ANAP) of the 1990s. The original draft is scrutinized by the Constitutional Committee[470] of the Turkish Grand National Assembly (TGNA) and amended in its several parts in a regressive manner.[471]

It is generally observed that there exists an overarching consensus among the political parties in terms of the acknowledgement of 1982 constitution as an offspring and imposition of the military coup. Hence, the parties comprehensively agree on the need to amend the constitution and even write a new (civilian) one. In this respect, they also share a common perspective that the existing reconciliation is not enough but significant for the improvement of democratic participation and political pluralism in society. Such perspective is shared by other two parties in the Assembly, namely Democratic Left Party (DSP) and Nationalist Movement Party

[470] The Constitutional Committee consists of Ķerif Ercan (DYP) as the president, Seyfi Oktay (CHP) as vice president, Coŋkun Kāıca (DYP) as the reporter, and Ali Dinçer (CHP), Vehbi Dinçerler (ANAP), Mehmet Gazioĵlu (DYP), Lütfü Esengün (RP), Ali Oĵuz (RP), Kaya Erdem (ANAP), Münif Ķslamoĵlu (DYP), Mehmet Keçeciler (ANAP), Tevfik Diker (DYP), Osman Seyfi (DYP) and Sadēk Keseroĵlu (DYP) as members.

[471] The initial proposal of DYP, SHP and ANAP involved amendments in the preamble and in Articles 33, 51 (right to organize unions), 52, 53, 54 (right to strike and lockout), 67, 68, 69, 75, 76 (eligibility to be a deputy), 82 (activities incompatible with membership), 84, 85, 86 (salaries and travel allowances), 93, 127, 128, 135, 149, 171 and in the provisional article 15 of the constitution of 1982. The proposal submitted by the Constitutional Committee to the General Assembly of TGNA included, on the other hand, significant differences from the initial reconciliation of the parties. For instance, while the Constitutional Committee agreed on the amendments in the first three paragraphs of Article 33 (freedom of association), it extended, on the contrary, the suspension of associations from activity by the decision of an authority vested with power by law where a delay constitutes a prejudice to *national security* and *public order*. In Articles 51, 53, 54 and 128 concerning union rights, the Committee introduced similar regressive changes in the initial proposal. During the constitutional debates, the changes of the Constitutional Committee are highly criticized by the members of respective parties, but especially by CHP. In fact, the difference seems to be one of the factors contributed to the dissolution of the reconciliation among the parties. The second factor contributing to the dissolution of the reconciliation is definitely the pragmatist and populist outlook of the parties during the constitutional debates. These explain why some of the articles included in the initial proposal of the parties cannot get qualified majority in ratifications thus are eliminated from the constitutional amendment.

(MHP) as well.[472] The consideration that the existing reconciliation does not include all of their demands yet they support it for the common good of the polity is explicated repeatedly by the members of the parties taken the floor.

As we learn from the statements of members, the preparation process of the proposal for constitutional amendment traces back to the late 1991 as the president of the Assembly, Hüsamettin Cindoruk calls for the launch of the studies.[473] During the interparty negotiations, each party adopts a different attitude. While DYP and SHP adopt a minimalist approach (the provisions having the consensus of all parties are included in the reform package, those which are not reconciled are eliminated), ANAP and RP impose the amendments in Articles 14 (prohibition of abuse of fundamental rights and freedoms) and 24 (freedom of religion and conscience) as a condition for their adoption of any amendment. As the negotiations continue, first the discussion on Article 24 is proposed to be deferred and then the article is eliminated from the constitutional debates entirely.[474] In reality, CHP is very firm not to make Article 24 a subject of discussion.[475] Afterwards, RP decides not to participate into preparation studies and to remain in opposition during the constitutional debates in the Assembly. The interparty negotiations cease in 1994 as a result of these developments. When the negotiations restart in the beginning of 1995, the RP

[472] The perspectives of Welfare Party (RP) and Grand Union Party (BBP) are rather different. I will delineate their positions in the following section while examining the conception of the legitimacy of constitutional amendment by the members of the Assembly.

[473] Mahmut Oltan Sungurlu (ANAP) and ķevket Kazan (RP). *TBMM, TD*, Cilt 88, B:123, 14.06.1995, pp.367-377.

[474] We learn this as ķevket Kazan (RP) explains the rationale behind Welfare Partyôs opposition to the amendment and fiercely blames CHP for its approach about Article 24. Kazan additionally claims that CHP initially agreed on the amendment of Article 24. However as the negotiations progressed, its leading cadre changed position and they also got the support of DYP in this matter (*TBMM, TD*, Cilt 88, B:123, 14.06.1995, p.377).

[475] CHPôs firm attitude during the preparation process of the proposal is also explicated by Mümtaz Soysal during the constitutional debates. He emphasizes that ñé the amendment is a significant reconciliation which is achieved by the exclusion of some most fundamental matters like the one [principle of laicism] from the standpoint of his party é ò (*TBMM, TD*, Cilt 88, B:123, 14.06.1995, p.372).

contributes no more to the studies while ANAP changes its prior disposition and decides to stay within the reconciliation.[476] These reveal that the agreement on the amendment is not as easy and straightforward as it is usually thought.

In fact, the decision of CHP to close the debates on Article 24 and DYPôs support in this regard seems to determine the course of constitutional debates. It definitely paves the way for the members of RP challenging directly and criticizing endlessly CHP mostly about the principle of laicism. It is seen that the members of RP link the discussion of every provision, irrespective of its relevance, ultimately to the amendment of Article 24, the last paragraph of which constitutes, from their perspective, a limitation on human rights.[477] Moreover, they allege that CHP has done anti-religious deeds (*din düşmanlığı*).

In light of these initial insights about the constitutional debates on the constitutional amendment of 1995, I will elaborate in the following the conception of the constitution and constitutional change by the members of the parliament. I will try to shed light on how they interpret the constitution of 1982 and how they justify their initiative to change some of its provisions.

8.1.1 The Conception of the Legitimacy of 1995 Constitutional Amendment by the Members of the Assembly

The constitutional debates illustrate that the members of the Assembly justify the constitutional amendment in direct relation to the conception of 1982 constitution.

[476] Mahmut Oltan Sungurlu states that ANAP is the main actor for the restarting of interparty negotiations thus decided to stay in the coalition just because they think that the amendment is insignificant in terms of democratization and freedoms but significant for increasing participation and union rights (*TBMM, TD*, Cilt 88, B:123, 14.06.1995, p.367).

[477] The last paragraph of Article 24 of 1982 constitution bans the exploitation or abuse of religion or religious feelings for personal or political interest, and prohibits even partially basing the social, economic, political or legal order of the state on religious tenets: ñNo one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political interest or influence, or for even partially basing the fundamental, social, economic, political, and legal order of the State on religious tenets.ò

Throughout the debates, the common acknowledgement of the members of the Assembly comes to the fore: the constitution of 1982 is an offspring of military rule thus it has to be substantially amended, even rewritten by the representatives of the nation. It is also comprehensively indicated that every party has promised to amend the constitution before the general elections of 1991, thus made its own study for constitutional reform. In this context, the parties implicitly question the legitimacy of 1982 constitution and allude to the problems with its content and the procedure of its making.

Nevertheless, the major parties seem to hold divergent opinions on previous constitutions of the polity. Mahmut Oltan Sungurlu states on behalf of ANAP that the constitutions of 1961 and 1982 are the products of military coup, written by university scholars and reflecting the desires and considerations of the military junta.[478] Mümtaz Soysal (CHP) criticizes, on the other hand, the constitution of 1982 and the laws reaching approximately to a number of 700 adopted during the military rule of September 12 for not being democratic.[479] Similarly, Uluç Gürkan (CHP) argues that neither the procedure of making nor the content of 1982 constitution is democratic.[480] He additionally stresses that 1982 constitution is an obstacle in front of democratization of the country.

The constitutional debates also reveal that Welfare Party remains the most severe critique of the constitutional order of the polity since 1924 constitution. Şevket Kazan (RP) claims that the constitutions of 1924, 1961 and 1982 have the same characteristic of being repressive, imposed from top down and aimed to design the nation.[481] He continues that, though these constitutions declare that "sovereignty is

[478] *TBMM, TD*, Cilt 88, B:123, 14.06.1995, p.367.

[479] *TBMM, TD*, Cilt 88, B:123, 14.06.1995, p.372.

[480] *TBMM, TD*, Cilt 89, B:126, 21.06.1995, p.196.

[481] *TBMM, TD*, Cilt 88, B:123, 14.06.1995, p.377.

vested unconditionally in the nation,ò the unamendable clauses are apparently repressive; suppress the nation and make them anxious during the periods of their implementation. In the following debates concerning Article 67 (right to vote, to be elected and to engage in political activity), Lütfü Esengün (RP) criticizes the constitution of 1982, and additionally the electoral system in force since the 1950s as being arbitrary and unjust.[482] He maintains that the rules related to the electoral system are left to the arbitrary will of the lawmaker as the constitution does not include fundamental principles for the justful representation of the nation in the TGNA. This paved the way for unjust rules in previous electoral laws (majority system between 1950 and 1960, the national remainder system, and the proportional representation system without a threshold) and all are added by the *mentality of September 12*, as a national threshold of 10 per cent is introduced in order to prevent the representation of parties like National Salvation Party in the Assembly. Therefore, the Welfare Party does not criticize solely the 1982 constitution, but also the whole of constitutional order and its tradition from the very beginning of the republic.

Indeed, the significance of the constitutional amendment for the parties and the justification of it become explicit in light of their criticisms. In this context, the Prime Minister Tansu Çiller (DYP) emphasizes that the constitutional amendment signifies a major stage in the development of democracy in Turkey as it is the first constitutional reform made by the initiative of (civilian) politicians since the transition to multiparty system in 1945.[483] Though the amendment is not complete as it does not address all problems of the constitutional order, it is the beginning of a

[482] *TBMM, TD*, Cilt 89, B:127, 22.06.1995, p.298. Esengünôs main target of criticism is the introduction of the phrase ñthe electoral laws should observe the principles of justice in representation and stability in governmentò in Article 67 of the constitution. Esengün asserts that the addition of a vague phrase like ñstability in governmentò would constitute the constitutional basis for the future election frauds. The addition is also criticized by Uluç Gürkan (CHP) (*TBMM, TD*, Cilt 89, B:127, 22.06.1995, p.314). Gürkan states that in Turkey, stability is searched in wrong places, in governments. On the contrary, the stability should be searched in the state, public administration and fundamental national policies.

[483] *TBMM, TD*, Cilt 88, B:123, 14.06.1995, pp.382-3.

process of constitutional change. Therefore ñthe process of constitutional reform, which takes its source from the will (and desire) of Turkish nation circumscribed by the unchanging qualities and principles of the Turkish Republicò, will continue as new needs are felt and as public discussions develop to provide new directions. In her speech, Çiller underlines notably the need to make compromises and reach reconciliation in democratic constitutional reform processes made by civilians.

For CHP, the amendment is vital for the emancipation of citizenry to a certain degree and entitling the workers to more rights. Mümtaz Sosyal explains the significance of the amendment in three main respects. He states that the amendments considering the preamble and the provisional article 15 of 1982 constitution signify the elimination of alleged legitimacy of the military coup from the constitution and the initial step for questioning the constitutionality of the laws enforced afterwards.[484] In fact, such perspective is quite significant to illustrate the general recognition about the illegitimacy of the military interference and its repercussions not only in the highest law of the land but in the ordinary laws as well.[485] Secondly, the amendment is significant from the angle of CHP for constituting a society enabling participation and pluralism. And thirdly, the amendment brings about improvements in the organization of working life and union rights, particularly of civil servants.

Uluç Gürkanôs statement in a subsequent session complements Sosyalôs considerations and reminds Çillerôs emphasis upon the civilian character of the constitutional amendment. As indicated in the beginning, the parties widely share the opinion that the amendment is not exhaustive of all solutions to the problems of 1982

[484] *TBMM, TD*, Cilt 88, B:123, 14.06.1995, pp.373-5.

[485] In his subsequent statement, Soysal also states that the elimination of the first two paragraphs of the preamble implies the removal of an historical fact (the deliberate efforts to legitimize the military intervention) from the legal text (*TBMM, TD*, Cilt 88, B:123, 14.06.1995, pp.414-5). He explains the aim of the amendment as follows: ñThe first thing is that the attitude of the past which also brought us to constitutional amendment is wrongé Letôs do not deceive ourselves, the nation did not approve it [1982 constitution] through deliberation, but through ratification and the conditions of the ratification are obviousò (*TBMM, TD*, Cilt 88, B:123, 14.06.1995, p. 415).

constitution. Yet from their perspective it constitutes an opportunity to start a new era of constitutional reform taking its direction from the will of nation. Gürkan argues in this respect that it is impossible to adjust 1982 constitution in accordance with the fundamental principles of democracy and rule of law.[486] *The mentality of September 12* which constitutes the basic philosophy of 1982 constitution has to be entirely overthrown. However, such a comprehensive amendment is not feasible as the present composition of the Assembly is taken into consideration. Therefore, the best solution is to make improvement in the constitution to the extent that the conditions permit. Such constitutional amendment would pave the way for constitutional reform processes made through democratic procedures and based on the will of nation instead of reforming constitutions in extraordinary periods and interim regimes.

The need to amend 1982 constitution is also expressed by the members of MHP and BBP. However, while MHP members appreciate the present constitutional amendment with acknowledging its shortages, BBP members seem to hold rather regretful ideas about the amendment. In this respect, Muharrem ķemsek (MHP) insists that the Assembly should make a new constitution with civil philosophy and with the collaboration of all parties, but also recognizes the improvements brought by the amendment.[487] Esat Bütün (BBP), on the other hand, emphasizes the significance of amending the constitution independently from all pressures and impositions.[488] Yet he also underlines that the Assembly muffs the chance partially because of political reasons, partially because of the partiesô efforts to appeal to people. Indeed, Bütünôs considerations interestingly remind ķevket Kazanôs (RP) criticisms on the constitutional order as he argues that though it is declared that ñsovereignty is vested

[486] *TBMM, TD*, Cilt 89, B:126, 21.06.1995, p.196.

[487] He conceives the amendment as a significant duty of the Assembly which would improve political activities and make the political field more inclusive since the university scholars, civil servants, the youth, the woman and civil society institutions like associations and foundations would contribute to politics (*TBMM, TD*, Cilt 88, B:123, 14.06.1995, p.397).

[488] *TBMM, TD*, Cilt 88, B:123, 14.06.1995, p. 416.

unconditionally in the Turkish Nationò, the Turkish nation has never been qualified with sovereignty.[489] According to Bütün, a number of impositions and unamendable provisions still exist in the constitution, and even the proposition to change them is not allowed though they are not implemented. He furthermore underlines that an entirely new constitution should be made as 1982 constitution is not based on the will of nation. He indeed associates the essence of 1982 constitution with the philosophy of the single party period and maintains that ñIf sovereignty belongs unconditionally to the people, if democracy is the regime of not only the privileged but all people, the whole provisions of 1982 constitution should be amended.ò[490]

As indicated above, the members of Welfare Party criticize not only 1982 constitution but also the constitutional order since the foundation of the republic as being repressive and undemocratic. Accordingly they express the most severe criticism concerning the constitutional amendment. At the beginning of general discussions, Şevket Kazan emphasizes the shortages of the amendment and puts forward that ñthe constitution, if it is the constitution of the nation -so it is, it has to be- should be purged of all provisions impeding the nation from believing and living as it chooses. This is democracy; this is the alphabet of human rights.ò[491] During the discussions about the preamble, Abdullah Gül (RP) discredits the constitutional amendment and stresses the need to make an entirely new constitution. From his viewpoint, much of the amendment has nothing to do with democratization, freedom, liberty and participation as the governing parties [DYP and CHP] have the mentality of single party period.[492] He further questions the legitimacy of the constitutional amendment by claiming that the amendment is not made in order to meet the demands of the Turkish Nation or because the nation deserves more democracy but

[489] *TBMM, TD*, Cilt 88, B:123, 14.06.1995, p. 417.

[490] *TBMM, TD*, Cilt 88, B:123, 14.06.1995, p. 417.

[491] *TBMM, TD*, Cilt 88, B:123, 14.06.1995, p. 379.

[492] *TBMM, TD*, Cilt 88, B:123, 14.06.1995, pp.409-10.

because it is imposed by the Western states in the European Council and Parliament.[493] In this context, Gül invites the members of the Assembly to make a democratic constitution which is respectful to and not afraid of the tradition, identity, culture and religion of the nation.[494] Moreover, he suggests the inclusion of a *complete* definition of the principle of laicism similar to the definitions in the constitutions of European states in the preamble of the constitution. He states that

> It is expressed in the preamble that ñsacred religious feelings shall absolutely not be involved in state affairs and politics as required by the principle of secularism.ò It is ok, fine; we have to include the opposite as well; we have to define measures in order to prevent the interference of the state into the religion of the nation.[495]

It is problematic that while the members of Welfare Party criticize Article 24 on freedom of religion and conscience because they think it contradicts with the principles of universal human rights, they bring no criticism about the article of the constitution regulating the Directorate of Religious Affairs, which might be considered as the pivotal institution mediating the stateôs control over religion in society. In addition, RP members seem to refer merely to Islam when they mention the religion of the nation. In this respect, the emphasis upon human rights seems to be superficial as they tend to ignore the plurality of religions (no matter how some are marginal) in society in terms of beliefs and commitments.

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[493] *TBMM, TD*, Cilt 88, B:123, 14.06.1995, p.410.

[494] *TBMM, TD*, Cilt 88, B:123, 14.06.1995, p.413.

[495] ñé bu bakangãç ilkesinde "...laiklik ilkesinin gereği olarak kutsal din duygularının, devlet işlerine ve politikaya kesinlikle karıştırılamayacağı ē.." söyleniyor. Tamam, güzel; bunun tersini de koymamız lazım; devletin de milletin dinine, milletin dininin gereğini yerine getirmesine karşı bir tedbir koymamız lazım.ò *TBMM, TD*, Cilt 88, B:123, 14.06.1995, p.413. Gülôs demand to include exactly such definition of the principle of laicism in the constitution resembles the demands of the right wing members of the Constituent Assembly of 1961. Recall that during those constitutional debates, there occurred a controversy among the members on the definition of laicism as well. While one camp requested that the state should not interfere into religious affairs, the other (dominant or powerful camp, particularly the members of the Constitutional Committee) insisted that the principle of laicism cannot be defined in Turkey in that way since the specific conditions of society differ from European societies. It is ironic but understandable that such controversy on the principle of laicism did not arise during the constitutional debates on 1982 constitution as all members of the Constituent Assembly agree that the state should control religion.

It might be argued that the controversy over the principle of laicism makes its mark on the constitutional debates. The opposition of Welfare Party, which originates mainly because of the elimination of Article 24 from the scope of the amendment, turns into deliberate attempts of RP members to distort argumentation processes in the Assembly. It is seen that futile discussions rather than rational discourses are conducted as the RP members strive to increase polarization on the basis of the principle of laicism. Here I deem necessary to mention the main elements of this controversy.

The members of RP generally claim that the last paragraph of Article 24 limit the freedom of religion and conscience of the individuals in society. In order to support their arguments, they claim that girls wearing head scarfs are prohibited from entering universities, that lawyers and engineers wearing head scarf or bearded are not registered to bars or to unions of engineers and architects.[496] They also target CHP in their criticisms as they allege that the mosques are turned into warehouses or barns under CHP government. The members mainly discredit the constitutional amendment through claiming that the amendment is not made by civilian initiative and that the public is deceived under the name of democratization.[497] They undoubtedly cause deadlock in the negotiations as they bring forward a great number of change proposals to the articles. Furthermore, during the debates on Article 68 (forming parties, membership and withdrawal from membership in a party), Oî uzhan Asiltürk (RP) goes as far as to propose the removal of ñthe deliberate and intentional implementation of laicism in the form of hostility to religion (*din düşmanlığı*) in Turkeyò as a result of Article 24, and he rejects the amendment on Article 68.[498]

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[496] Fethullah Erbaş (*TBMM, TD*, Cilt 89, B:128, 23.06.1995, p.502).

[497] For instance, during the discussions about Article 82 (activities incompatible with membership), Ahmet Dökülmez argues that the authors of 1961 constitution, 1971 constitutional amendment and 1982 constitution are the same (*TBMM, TD*, Cilt 89, B:129, 24.06.1995, p.570). In a similar vein, Mehmet Elkatmış questions the civilian character of the constitutional amendment and argues that democratization is not directly achieved through amending the constitution; for democratization the constitution should meet the needs of society (*TBMM, TD*, Cilt 89, B:129, 24.06.1995, p.594)

[498] *TBMM, TD*, Cilt 89, B:128, 23.06.1995, pp. 426-7.

In fact, the intentional acts of RP members to distort the entire constitutional debates, irrespective of the article in deliberation get reaction from members of several parties. It is observed that CHP members generally refrain from entering into a debate about the principle of laicism. They mostly underline that the principle is the fundamental principle of the state and closed to discussion as it is approved in Soysalôs statement. In a different occasion, Coкkun Gökalp (CHP) states explicitly that such an amendment in Article 24 as requested by RP could culminate in multi legality (*çok hukukluluk*) and ultimately cause confusion, division and disintegration.[499] Bülent Ecevit (DSP) also takes side with CHP on the matter and argues that the examples of RP members have nothing to do with Article 24 as its last paragraph fairly prohibits the abuse or exploitation of religious beliefs, religion or sacred values.[500] For him, the defence of the opposite would definitely pave the way for the abuse or exploitation of religion. He maintains that

> The constitutional amendment is aimed to resolve the regime crisis. If the demands of Welfare Party are realized, the crisis could worsen; the fundamentals of the state and unity of nation could devastate, and moreover the religion could be transformed in to a means of political exploitation.[501]

Iккn Çelebi and Mahmut Oltan Sungurlu from ANAP draw attention to the pointlessness of the conflict over the principle of laicism and argue that it obstacles the constitutional debates.[502] Çelebi stresses that the constitution has to be brief and substantial, and designate only the fundamental, general and common principles.[503] He continues that however, the constitutional debates are corrupted from the very

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[499] *TBMM, TD*, Cilt 89, B:128, 23.06.1995, p. 434.

[500] *TBMM, TD*, Cilt 88, B:123, 14.06.1995, p.389.

[501] ñAnayasa deî iкiklikleriyle rejim bunalкmкnк aкkmamкz bekleniyor. Eî er, Refah Partisinin burada ifade edilen istekleri gerçekleкirse, кimdikinden çok daha aî ъr bir rejim bunalкmк ortaya çekabilir; devletimiz ve ulusal birliî imiz temelinden sarsкlabilir; üstelik, din, bir siyasal istismar aracк haline getirilebilir.ò *TBMM, TD*, Cilt 88, B:123, 14.06.1995, p.389.

[502] *TBMM, TD*, Cilt 89, B:128, 23.06.1995, pp.430-31 and pp.494-5.

[503] *TBMM, TD*, Cilt 89, B:128, 23.06.1995, p.430.

beginning as the articles are long and comprehensive, drowned into discussions and rejected by strategic moves of certain colleagues (amount to 169). He lays particular emphasis on the principle of pluralism when commenting on the issue of laicism as in the following:

> An interesting discussion on the concept of laicism has taken place since yesterday. Democracy is based on the principle of pluralism; and laicism is also based on the freedom of religion and conscience and the concept of pluralism. Here, there is no point to take laicism to a different dimension. It is important to talk in a democratic and plural environment. Democracy requires pluralism [and] implementation of modern law and laicism is pluralism, polyphony; is against monotone and theocratic orderé Thatôs why laicism should not be turned into an ideology or politicsé If laicism is transformed into a means of politics [or] ideology, the society could crash into serious disturbance.[504]

Apart from the controversy about the principle of laicism, an interesting debate about Turkish nationalism is triggered by the statement of RP member Fethullah Erbaκ during the discussions on Article 67 (right to vote, to be elected and to engage in political activity). The Article originally stipulates ñeach Turk turning thirty shall be elected.ò As we learn from the discussions, CHP proposed the substitution of the phrase ñeach Turkò for ñeach Turkish citizenò and the other parties in the reconciliation support CHP as well. The amendment is also preserved in the proposal of the Constitutional Committee. In this context, Erbaκ makes a statement during the constitutional debates mainly supporting the amendment and states exactly that the amendment has brought a major change to depart from a ñfascist and oppressive

[504] ñBurada, dünden beri yapılan bir baκka ilginç tartıκma, laiklik kavramı üzerinde oluyor. Demokrasi, çoğulculuk ilkesine oturur; laiklik de, düκünce ve vicdan özgürlüğü ve çoğulculuk kavramı üzerine oturur. Burada, laikliği, farklı bir boyuta, baκka bir boyuta çekmenin hiçbir anlamı yoktur. Demokrasi içinde, çoğulculuk içinde konuκmak önemlidir. Demokrasi, çoğulculuğu, çağdaκ hukukun uygulanmasını gerekli kılar ve laiklik, çoğulculuktur, çokseslilliktir; tekseslliği, teokratik düzene karşıdır. Çok sesli ve çok görüκlü olmak laikliğin; demokrat olmak, din, vicdan özgürlüğü ve düκünce özgürlüğünü kapsamasını anlamında, çok önem taşır. Bu anlamda, siyasî partiler, siyasî katılımı ortaya koymasını ve siyasî kadroların yetiκmesi açısından da çok önem taşır. é O nedenle, laikliği, bir ideoloji, bir siyaset haline getirmemek gerekir. Laikliğin, düκünce özgürlüğü, din, vicdan özgürlüğü kavramlarına dayandığını, çok sesliliği, farklılığı kapsadığını bilmek lazım. Laikliği, bir devlet yönetiminin veya laikliği, bir siyasetin, bir ideolojinin aracı haline getirdiği imiz zaman, toplumu ciddî kargaκaya, probleme iteriz.ò *TBMM, TD*, Cilt 89, B:128, 23.06.1995, pp.430-1.

opinion ignoring the existence of citizens from other races and ethnicities in the country**ò**.[505]

These words receive the sharpest criticism from Seyfi ķahin (MHP) and are interpreted as the sign of *hostility to Turkishness*.[506] ķahin opposes the association of *Turkishness* with fascism and emphasizes the indivisible unity of Turkish Nation in his statement. Another MHP member, Mustafa Daĵcē criticizes not only RP but also CHP for being communist just because of bringing such a proposal. He insists that he is not communist but Turkish nationalist and that ñthe nation will never let those who try to divide Turkey by detaching Turkish nationalism from Islamò.[507] It is really interesting that the debate between RP and MHP extends upon the nationalist statements of MHP members, and those parties which initially supported the amendment (particularly the Constitutional Committee and the members of DYP and ANAP) withdraw their support. It is seen that the Constitutional Committee demands the preservation of the original clause as the reporter, Coкkun Kērca states that there exists no difference between ñTurkish citizenò and ñTurkò as every Turkish citizen has the duty to embrace and not to deny his/her *Turkishness*.[508] In the end, the amendment in the Article is not accepted in the Assembly.

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[505] *TBMM, TD*, Cilt 89, B:128, 23.06.1995, p.500.

[506] ķahin states that ñBir partinin sözcüsü, óTürkô kelimesini, faкistlikle beraber cahilce söyledi. Faкistliĵin óTürkô kelimesiyle bir ilgisi yok; ama, Türk dükmanlēĵēnē, buradan kusmak için söylediĵini bildiĵim için, partisi de Batēdarēn aĵzēyla konuкtuĵu için, Batēdarēn da desteĵiyle hareket eden bir siyasî parti olduĵu için, Türk Milletine olan dükmanlēĵēnē kēnēyorum, soysuzluĵun meкrulaкmasēnē da kēnēyorum. Türk Milleti, tümüyle birdir, parçalanamaz, fitneye izin verilemez. óTürkô kelimesiyle óTürk vatandaкō ibaresi aynē manayē taкēr. Burada, Türk yazēdan birçok soysuz gelip geçmiкtir; çoĵu da geçer.ò(*TBMM, TD*, Cilt 89, B:128, 23.06.1995, p.505)

[507] *TBMM, TD*, Cilt 89, B:129, 24.06.1995, p. 542.

[508] *TBMM, TD*, Cilt 89, B:128, 23.06.1995, pp.508-9.

8.1.2 Concluding Remarks about 1995 Constitutional Amendment

The constitutional amendment of 1995 is significant in many respects. It is the first comprehensive amendment of 1982 constitution made by the initiative of political parties in the Assembly. It signifies in this sense a major deviation from the conventional practice of making/amending constitutions in extraordinary times such as after military coups or under interim governments directed mainly by the military. This is also why there is not much language of threat or a serious Schmittian reflection on the friend-enemy distinction. However, certain views from certain parties although rarely introduce a symbolic reference to enemy. The amendment is also substantial as it includes several improvements in terms of the elimination of a number of bans on political parties and civil society institutions. It has definitely contributed to the improvement of political participation and pluralism in society.

Consistently, most of the parties in the Assembly acknowledge the significance of the amendment. The parties, except RP and BBP, mainly conceive the amendment as an initial phase/starting point of a civilian constitution making practice. They also appreciate the amendment as an outcome of a comprehensive reconciliation both in the Assembly and in the public.

In fact, the scope of the amendment remains limited in terms of eliminating all the authoritarian and tutelary aspects of 1982 constitution, and the proposals for improving the union rights (of especially civil servants) are almost entirely eliminated.[509] Yet the amendment could still be considered as a major development as long as the difficulty to reach a consensus on constitutional essentials within such a divided Assembly is taken into consideration.

[509] The rejection of the amendment on the provisional Article 15 might also be mentioned. It is in fact very problematic not to totally eliminate the Article from the constitution but only allow questioning the constitutionality of laws issued during the period of September 12.

It is observed throughout the constitutional debates that the discursiveness is quite low. This is partially because the deliberation upon some critical issues is implicitly ruled out from the beginning, and partially because of the uncompromising outlook of the parties in the Assembly. The fragmentation of the parties about the fundamental principles of the constitutional order is indeed very high. Moreover, the debates cease suddenly during the second round discussions and are delayed for many sessions as the members of the Constitutional Committee are not present in the Assembly. Later we learn from the statement of Emin Kul (ANAP) that the proposal for constitutional amendment is removed from the General Meeting agenda upon the proposal of DYP and support of CHP.[510] The opposition of RP in every article of the proposal and the dissolution of the reconciliation particularly on the articles related to union rights seem to form the main reason behind such development. After many sessions, the debates restart with the introduction of an amendment proposal by DYP concerning Article 175 of the constitution on the ratification of constitutional amendments. DYP proposes in this respect the inclusion of a provisional article which designates the ratification of constitutional amendments until the last day of the present legislative period through open ballot. Yet this proposal could not reach qualified majority thus is rejected. As the debates continue, the discussions become exhausting.

RP members continue their opposition to the proposed amendments by submitting their own change proposals on each and every article and block the discussions. In addition, as the reconciliation dissolved, each party begin to submit its own proposals.

It is seen that the principles of laicism and Turkish nationalism continue to form the political criteria concerning the friend and enemy of the constitutional order in Schmittôs terms. In other words, they constitute the border principles designating the framework of the legal order. This is reflected explicitly in the statements of some

[510] *TBMM, TD*, Cilt 92, B:142, 18.07.1995, p.345.

members of the Assembly during the constitutional debates. Moreover, the members seem to comprehensively hold positive conception of constitution in line with Schmittôs considerations. Recall from the second chapter of the thesis that in Schmittôs theory the positive concept of constitution denotes ñthe fundamental political decision by the bearer of constitution-making power over the type and form of the concrete existence of the political unity.ò In this respect, the constitution refers most of all to the distinct manifestation of a specific preference for the concrete form of existence of the state. Hence, the constitution is not something neutral and formal as it is emphasized by the rule formalism of liberal constitutionalism. It is rather material in the sense that it embodies the deliberate decision in favor of certain ideologies, values and preferences. These decisions lay the basis for and determine the unchanging qualities of the constitutional order from the very beginning. It is in light of these considerations that the rigid disposition of CHP in terms of closing any debate on Article 24 concerning the principle of laicism or the debate about *Turkishness* might be better understood. Moreover, the Prime Minister Çillerôs statement that ñé the process of constitutional reform, which takes its source from *the will (and desire) of Turkish nation circumscribed by the unchanging qualities and principles of the Turkish Republic*é ò [*emphasis mine*] might make any sense. In all these cases, the members of the Assembly seem to invoke some unchanging qualities of the constitutional order, which are determined in the founding moment of the state and which have to be respected by the subsequent lawmakers in constitutional reform processes.

Aside from these fundamental political decisions which are strictly binding for future legislatives, the members of the Assembly seem to hold a dynamic understanding of the constitution where the constitution might be amended in line with societal developments and newly emerging needs and demands. This is mostly evident in the statements of Mümtaz Soysal (CHP) and Ikēn Çelebi (ANAP). During the debates on the provisional Article 15, Sosyal argues that the constitution stands in order to bring freedom to society, to open its way through but not to impede change or to impose

coercively the frozen mentalities to society.[511] In a similar vein, Çelebiôs statement during the debates on the principle of laicism that ñthe constitutions are surely alive like human and society, and it is the requirement of evolution that these living constitutions have to be criticized and amended through deliberation in time.ò[512] Overall, the 1995 constitutional amendment seems to depend upon a balance between the will to comply with universal standards of democracy and the requirements of the concrete order although there is no serious conceptualization of threat.

After explicating the 1995 constitutional amendment, let me analyse, in the following, the 2010 constitutional amendment.

8.2 The Constitutional Amendment of 2010

The constitutional amendment of 2010 is conducted under the single party government of AKP and introduced significant changes in the constitutional order. The amendment concerns a large range of subjects such as the equality of women and men, the rights of children, protection of personal data, union rights, military judiciary, party closures, the Constitutional Court and the High Council of Judges and Prosecutors (HSYK). The constitutional amendment is significant for our discussion since the debates in the Assembly, particularly about the amending provisions concerning the principles to be observed by political parties, and the composition and functioning of the Constitutional Court and HSYK, could provide valuable insight about the perspectives of the representatives on the constitution and constitutional legitimacy.

The initial proposal for the constitutional amendment is prepared and submitted to the TGNA with the signature of 265 members of AKP. Afterwards, it is scrutinized

[511] *TBMM, TD*, Cilt 90, B:132, 29.06.1995, p.315.

[512] *TBMM, TD*, Cilt 89, B:128, 23.06.1995, p.430.

by the Constitutional Committee of the TGNA and submitted to the General Meeting of the Assembly with only slight changes.[513] It is seen that from the first day of its introduction, the amendment prompts a tremendous amount of controversy and disagreement among the political parties present in the Assembly at that time, namely AKP, CHP, MHP and Peace and Democracy Party (BDP) mostly on the independence of the judiciary and the principle of the rule of law.

The constitutional debates manifest that the members of all parties in the Assembly acknowledge the problematical substance of 1982 constitution despite the sixteen amendments since its ratification. Consistently, they all emphasize the need to write a new constitution. Yet while the members of CHP, MHP and BDP accuse AKP for avoiding such initiative and imposing its own amendment proposal serving its partial interests; the members of AKP defend the amendment proposal by claiming that the present circumstances (specifically the fragmentation and lack of reconciliation in the Assembly) allow only such amendment.[514]

In fact, the procedure followed by AKP in the preparation process of such an extensive constitutional amendment proposal and a number of critical provisions of the amendment concerning the judiciary and party closures are severely criticized by the members of CHP, MHP and in some respects by BDP. Regarding the procedure, the fact that the amendment proposal is prepared by AKP but not by the collective study of all parties in the Assembly forms the main tenet of controversy from the perspective of other parties in the Assembly. Regarding the content of the amendment proposal, on the other hand, the provisions concerning the principles to be observed by political parties, the composition, functioning and powers of the Constitutional Court and HSYK constitute the main kernel of debates as the other

[513] The Proposal of Recep Tayyip Erdoĵan and 264 members of the Assembly for amending some provisions of the 1982 Constitution and the Report of the Constitutional Committee, pp.1-82. Annexed to *TBMM, TD,* Cilt 66, B: 88, 19.04.2010.

[514] The need for a new constitution is emphasized by several members of AKP such as Bekir Bozdaĵ, Cemil Çiçek and Burhan Kuzu during the constitutional debates.

parties conceive them as an interference with the independence of the judiciary and a clear violation of European and universal standards. These factors seem to determine the course of constitutional debates in the Assembly and in fact they definitely pave the way for the members of CHP and MHP challenging and criticizing AKP during the discussion of every provision, irrespective of its relevance with the concerned provisions.

The members of AKP, by acknowledging that the constitution of 1982 is accepted and entered into force under extraordinary conditions, argue that there is a need to entirely amend the 1982 constitution. Yet they also stress that the reconciliation within the Assembly has never reached to that level of making a new constitution thus only partial amendments could have been made in the constitution.[515] In this context, they emphasize the need to amend the constitution in order to meet the social needs and demands in required fields. It is seen throughout the debates that the members of AKP and the president of the Constitutional Committee, Burhan Kuzu (also a member of AKP), usually make reference to universal standards of human rights and democracy, and to certain international treaties in order to justify the amendment in the face of fierce opposition of the remaining three parties in the Assembly. For instance, they invoke the United Nations Convention on the Rights of the Child and European Convention on the Exercise of Childrenôs Rights to defend the amendment on Article 41 of the constitution; Convention of the International Labour Organization on the Freedom of Association and Protection of the Right to

[515] The 2010 amendment involves changes in the Articles 10 (equality before law), 20 (privacy of private life), 23 (freedom of residence and movement), 41 (protection of the family and childrenôs rights), 51 (right to organize unions), 53 (rights of collective labour agreement and collective agreement), 54 (right to strike and lockout), 69 (principles to be observed by political parties), 74 (Right of petition, right to information and appeal to the Ombudsperson), 84 (loss of membership), 94 (Bureau of the Assembly), 125 (Judicial review), 128 (Provisions relating to public servants), 129 (Duties and responsibilities, and guarantees in disciplinary proceedings), 144 (Supervision of judicial services), 145 (Military justice), 146 (Formation of Constitutional Court), 147 (Term of office of the members and termination of membership), 148 (Functions and powers), 149 (Procedure of functioning and trial), 156 (High Military Court of Appeals), 157 (High Military Administrative Court), 159 (High Council of Judges and Prosecutors) and 166 (Planning; Economic and Social Council). In addition to these changes, the provisional Article 15 is eliminated and the provisional Articles 18, 19 and 20 are included in the constitution with the constitutional amendment of 2010.

Organise in order to defend amendment proposals about union rights; and the criteria of the Venice Commission and the Commissionôs Declarations on Turkey in order to defend the amendment proposal on party closures. However, having said that they also ironically invoke the peculiarities of the Turkish context particularly involved in the 1982 constitution in order to defend some of the arrangements, for instance the assignment of the most of the Constitutional Court judges by the head of state.

A careful scrutiny of constitutional debates within the Assembly shows that there is enormous fragmentation between the parties about the perception of the amendment. CHP and MHP severely question the legitimacy of the constitutional amendment and object to the procedure of its making and essentials. They mainly argue that the amendment does not address social needs and demands, but is rather concerned with meeting AKPôs interests. It is also seen that the members of BDP criticize the amendment proposal in many respects, and submit change proposals during the debates. However, their opposition is not as severe as CHPôs and MHPôs. Overall, the three parties, CHP, MHP and BDP criticize AKP for engaging into such constitutional amendment instead of launching the process of new constitution making based on the equal participation of all parties in the Assembly and they blame AKP for imposing its own party interests. It is true that the majority of the amending provisions are aimed at meeting universal standards of democracy and human rights. In this respect, the constitutional amendment might be considered as a significant contribution to democracy. Nevertheless the designation of certain provisions, particularly those about the composition of constitutional court and HSYK, and the arguments brought by AKP members during the discussion of these provisions give the impression in the last instance that the amendment is also aimed at meeting AKPôs medium and long term interests. Consequently, compiling such divergent subjects, both progressive and regressive elements, within the same amendment package might be conceived as a political manoeuvre to get the support of different segments of society.

In the light of these initial remarks on the constitutional amendment of 2010, I will examine in detail in the following the conception of the legitimacy of the amendment by the members of the Assembly and try to shed light on their conception of constitutions.

8.2.1 The Conception of the Legitimacy of 2010 Constitutional Amendment by the Members of the Assembly

The members of CHP object to the amendment proposal for several reasons and voice the main reasons of their opposition in the resolution (*önerge*) they submit in order to extend the debates on every provision of the amendment. In fact, the main ideas underlined in the resolution presented by CHP in order to continue the debates are reiterated by the members of the party during the discussion of each article.

The members of CHP mainly argue that the discussion of the amendment proposal constitutes contradiction with the substance of the 1982 constitution since the proposal violates directly the inalterable Articles of the constitution, namely Articles 2 and 4, as it interferes with the independence of the judiciary and eliminates the tenure of judges.[516] From the perspective of CHP, the governing party aims through the amendment to seize the judiciary and to bring it under the surveillance of the executive. In this respect, the present constitutional amendment does not stem from social demands and needs as it is argued by the members of AKP.[517] It does not either bring any concrete solution to any concrete problem of the country such as unemployment, poverty and corruption. The amendment is rather the agenda of the political power. In this regard, the members of CHP emphasize the partiality of the constitutional amendment by insisting that the amendment aims to realize the interests of the governing party. It is partial in other words since it is not the product of a social and political reconciliation but the one-sided demand of the governing

[516] See the statement of Atilla Kart, *TBMM, TD*, Cilt 66, B: 88, 19.04.2010, p.865.

[517] *TBMM, TD*, Cilt 67, B: 89, 20.04.2010, pp.85-86.

party. They conceive the amendment mainly as an imposition that aims to disintegrate the society. From the angle of CHP, the procedure of constitutional amendment followed by AKP, specifically the fact that all provisions would be ratified at once in popular referendum, forms a critical problem in terms of democracy. They indicate that such an imposition is only relevant in times of *coup dô état*.

CHPôs main accusation against AKP throughout the constitutional debates is that the AKP has never internalized the principle of separation of powers, and the present constitutional amendment is a reflection of such tendency since the independence of the judiciary is jeopardized and the judiciary is subjected to the executive throughout the amendments on the Constitutional Court and HSYK.[518] In this context, they overwhelmingly emphasize the significance of reconciliation in such extensive constitutional reform processes in democratic regimes, and draw attention to the distinction between democracy based on plurality and majoritarian democracies in terms of providing legitimacy to the process.

Similar to CHP, the members of MHP claim that the amendment is unconstitutional and illegitimate, and criticize that it is made in extraordinary times similar to *coup dô état* through the imposition of parliamentary majority. And in a similar vein to CHPôs efforts, the members of MHP submit a resolution during the discussion of each provision in order to extend and in a sense impede the constitutional debates. In the resolution, MHP mainly demands the establishment of a ñconciliation commission for constitutional amendmentò (*Anayasa Değişikliği Uzlaşma Komisyonu*) and the disclosure of the principles which the parties would agree upon in the end of the studies.[519] From the perspective of MHP, the constitutional amendment should be made strictly on these grounds and within the Assembly which would convene after the elections.

[518] For instance Engin Altay, during the debates on Article 74 (Right of petition, right to information and appeal to the Ombudsperson), *TBMM, TD*, Cilt 67, B: 91, 22.04.2010, p.478.

[519] *TBMM, TD*, Cilt 67, B: 89, 20.04.2010, pp.84-5.

Concerning the amendment proposal in general, but particularly about the provisions on party closures, Constitutional Court and HSYK, the members of MHP argue that the parliamentary majority does not have the right to change the ñfounding law of the stateò (*kurucu devlet hukuku*).[520] The principle of separation of powers forms the basis of the State and the republic established by the constitution of 1924. However, the amendment aims to endanger the principle; subjects the judiciary to the executive. Such a change would be illegitimate. MHP members go as far as to claim that the amendment politicizes the judiciary thus would probably culminate in dictatorship.[521] Moreover, they claim that the amendment regarding the party closures violates the ñfounding law of the stateò as the inalterable provisions of the constitution are violated (crimes committed against the unity and indivisibility of the state with its land and nation are no longer considered as a cause of party bans).[522]

At this point, it is significant to emphasize that the members of MHP frequently underline the dynamic aspect of the text of constitution. From their viewpoint, the constitution might be amended in accordance with social needs and demands, and in order to catch up with universal norms of democracy and human rights. Regarding such outlook, Metin Çobanoĵ luôs statement is illuminating. He states that the text of constitution as a social phenomenon is not sacred and might be amended.[523] Yet the constitution must be amended in conformity to legal rules and inclinations (*temayül*). For ķenol Bal, the constitution as the fundamental norm of the polity is the product of the constituent will founding the state (*devleti kuran kurucu iradenin ürünü*).[524]

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[520] The statement of Mehmet ķandēr on behalf of the MHP group, *TBMM, TD*, Cilt 66, B: 88, 19.04.2010, p.867.

[521] The statement of Faruk Bal on behalf of MHP group, *TBMM, TD*, Cilt 66, B: 88, 19.04.2010, pp.883-4.

[522] The statement of Mehmet ķandēr on behalf of the MHP group, *TBMM, TD*, Cilt 67, B: 90, 21.04.2010, p.339.

[523] *TBMM, TD*, Cilt 67, B: 89, 20.04.2010, pp.69-70.

[524] *TBMM, TD*, Cilt 67, B: 89, 20.04.2010, p.115.

Thus the constitution must be amended in conformity to scientific methods; the amendment has to be debated within a democratic public space and decided through social consensus. In his following words, Bal opposes to the amendment proposal and associates it with the referendum of 1982 constitution since it would be submitted altogether to popular vote.[525] Consistently, during the debates on the amendment proposal on Article 69 of the constitution (the principles to be observed by political parties), Behiç Çelik states on behalf of MHP group that the constitution might be amended in order to institutionalize all requirements of democracy, to comply with universal principles of law, and to address social and economic demands.[526] Even a new constitution might be written. However, such initiatives must not violate ñthe founding philosophy of the republicò. It is interesting that the MHP members imagine an authentic and stable philosophy of the republic despite the number of constitutions adopted so far. Indeed, they never make an explicit explanation about what constitutes exactly ñthe founding philosophy of the republic.ò Yet it is understandable mostly from their arguments on party closures that they mainly refer to the unitary form of state.

The members of BDP emphasize most of all that a new (*civilian*) constitution must be made on the basis of participatory and inclusive procedures, and it should reflect the social consensus and address the democratic demands of all segments of society like different ethnicities, people from different religious backgrounds, disadvantaged groups and etc.[527] In this respect, Mehmet Nazir Karabaк claims that the severest issue of Turkey is the issue of constitutional change that would bring social peace.[528]

[525] *TBMM, TD*, Cilt 67, B: 89, 20.04.2010, p.117.

[526] *TBMM, TD*, Cilt 67, B: 91, 22.04.2010, p.481.

[527] For instance, the statement of Özdal Üçer on behalf of the BDP group, *TBMM, TD*, Cilt 67, B: 89, 20.04.2010, p.75.

[528] The statement of Mehmet Nezir Karabaк, *TBMM, TD*, Cilt 67, B: 89, 20.04.2010, pp.81-2.

Against all these considerations and criticisms, the members of AKP defend the legitimacy of the constitutional amendment by claiming that the Assembly has the right to execute its constitutive power within the framework of the constitution.[529] In this respect, Ahmet Kıyimaya stresses that the inalterable four articles of the constitution cannot be made subject of a constitutional change, yet the amendment of other articles cannot be impeded by associating them with these articles through interpretation either. In a similar vein, Bekir Bozdağ insists that the amendment is not in contradiction with the principle of rule of law, and contrary to the allegations it aims to strengthen democracy and the principle of rule of law.[530] Bozdağ claims that all the constitutions of the polity (1921, 1924, 1961 and 1982 constitutions) are made under extraordinary circumstances.[531] Moreover, the constitution of 1982 is embedded with the philosophy of supreme and sacred state as the principle of *raison d'état* (*hikmet-i hükümet*) is its basis, and some institutions like Supreme Military Council (YAK) and HSYK are inviolable. For Bozdağ, 1982 constitution is also forged with a certain ideology of state that all fields like education, science, art and culture have to comply with. The constitution does not allow the execution of the principle of national sovereignty, either. It is in this context that Turkey needs a new constitution based on human rights. And the amendment is necessary to open the way forward for Turkey.[532]

Similarly, the president of the Constitutional Committee, Burhan Kuzu, criticizes the constitutions of 1961 and 1982, and stresses that their essence is distrust to national will, to the politicians and to the will that come out of the ballot box. [533] From his viewpoint, such distrust is mostly reflected in the designation of the separation of

[529] Ahmet Kıyimaya, *TBMM, TD*, Cilt 66, B: 88, 19.04.2010, p.865.

[530] *TBMM, TD*, Cilt 66, B: 88, 19.04.2010, pp.868-9.

[531] *TBMM, TD*, Cilt 66, B: 88, 19.04.2010, p.875.

[532] *TBMM, TD*, Cilt 66, B: 88, 19.04.2010, p.876.

[533] *TBMM, TD*, Cilt 66, B: 88, 19.04.2010, pp.893-4.

powers, specifically the system of checks and balances stipulated in these constitutions. Here, Kuzuôs problematic conceptualization of national will becomes apparent. He seems to object to the division of powers between legislature, executive and judiciary, and defend mainly the indivisibility of the national will reflected in the principle of parliamentary supremacy. According to him, it is the legislature elected by the nation is the true representative of the nation and that must be the primary power, thus not the civilian-military bureaucracy, in state administration.

It is interesting that the members of AKP and the president of the Constitutional Committee frequently make reference to the standards of international institutions, multilateral treaties and European Union (EU) rules in order to support their validity claims. For instance, during the debates on the amendment proposal concerning principles to be observed by political parties, Ahmet Kıyimaya and Cemil Çiçek compare the fifty years Turkish experience in party closures with the experiences of EU countries.[534] Specifically Çiçek states that the political parties constitute the concrete form of freedom of speech and freedom of association, and complain about the problems confronted during the negotiations with the EU.[535] Similarly, Kuzu emphasizes the criteria of Venice Commission and the Commissionôs criticisms on Turkey in order to defend the amendment proposal.[536] Yet such reference to universal standards of democracy and the rule of law disappears when the amendment proposals concerning the designation of the Constitutional Court and HSYK are debated. For instance, Kıyimaya defends the proposal concerning the appointment procedure of the Constitutional Court judges (Article 146) by making reference to the peculiarities of the 1982 constitution: ñthe model adopted in the 1982 constitution is mainly appointment by the head of state and this model is preserved

[534] *TBMM, TD*, Cilt 67, B: 90, 21.04.2010, pp.346-7.

[535] *TBMM, TD*, Cilt 67, B: 90, 21.04.2010, p.365.

[536] Kuzu explains the three main criticisms as follows: 1) the criteria on party closures and specifically the reasons for party bans are numerous and vague, 2) a lot of parties are closed in practice, 3) the parties are defenseless as the right of litigation belongs to a single person, chief public prosecutor of the court of cassation.

with some decrease in our proposalò.[537] Furthermore, Kuzu strives to defend the legitimacy of the appointment procedure by claiming that the head of state is also elected by the people.[538]

Similarly, during the discussions of the proposal concerning the designation of the HSYK, Bekir Bozdaĵ argues that the proposal successfully addresses the criticisms underlined in the progress reports of the EU and other international documents.[539] However, we understand from the detailed explanation made by Ķ a Gök (CHP) and Bengi Yəldəz (BDP) that the proposal contradicts with EU standards and international practices in many respects.[540] Gök criticizes on behalf of CHP the role given to the head of state in the appointment of the members of the Council.[541] He additionally argues that the role assigned to the Minister of Justice and to the undersecretary in the HSYK contradicts with European countriesô practices and the assessments in the reports of the EU. In this framework, it might be argued that the members of AKP act strategically during the constitutional debates. In other words, they are mainly pragmatic. Depending upon the provision; they sometimes make reference to universal standards and practices, and sometimes invoke the peculiarities of Turkey and 1982 constitution in order to support their arguments.

[537] *TBMM, TD*, Cilt 68, B: 94, 25.04.2010, p.132. The proposal increases the number of Constitutional Court judges from eleven (and four substitute member) to seventeen. According to the new proposal, the three judges would be elected by the simple majority of the parliament while the remaining fourteen members would be appointed by the head of state (four members directly and ten members indirectly).

[538] *TBMM, TD*, Cilt 68, B: 94, 25.04.2010, p.136.

[539] *TBMM, TD*, Cilt 68, B: 96, 27.04.2010, p.546.

[540] *TBMM, TD*, Cilt 68, B: 96, 27.04.2010, pp.536-544.

[541] *TBMM, TD*, Cilt 68, B: 96, 27.04.2010, p,536. Contrary to the designation in the proposal which introduces the appointment of four HSYK members by the head of state, Gök refers to the reports of the European Council and maintains that the selection of the members of HSYK should be entirely delegated to the judges and prosecutors themselves.

In light of the constitutional debates it might be argued that the discursiveness of the argumentation processes is very low as the debates in the Assembly are plagued with reciprocal accusations, multitude of change resolutions, unsolved debates on procedure and strategic actions of the governing party. The members of CHP and MHP generally strive to defer, extend and impede the discussions through the resolutions and change proposals. It might be argued in this respect that during the 2010 constitutional amendment the members of CHP and MHP engage in a serious opposition against AKP similar to the members of Welfare Party during the constitutional amendment of 1995. It is also common in two constitutional amendments that the parties holding the parliamentary majority conceive themselves as the sole representative of the national will thus having the right to substantial constitutional change without seeking any reconciliation in the public and Assembly. Indeed, such an amendment is conceived legitimate in itself on the basis of the claims that it is in conformity to universal norms and standards.

8.3 Concluding Remarks

The attentive scrutiny of the constitutional debates on the 1995 and 2010 amendments brings into light two perspectives commonly shared by the members of the respective Assemblies. It is valid for the members of the parties engaged in both 1995 and 2010 constitutional amendments that they tend to refer to the substance of the constitution, which for them constitute the everlasting and unchangeable fundamental political decisions concerning the polity. Though they appreciate the constitutional reform processes aimed at meeting social demands and changing needs, they stand aloof from initiatives which could endanger ñmaterial part of the constitutionò in Schmittôs terms. In this respect, it might be argued that the members of parties overwhelmingly share a ñpositive conception of the constitutionò conceptualized by Schmitt in his *Constitutional Theory*. They consider that the inalterable provisions of the constitution, specifically the first four Articles which define ñthe concrete type and form of the political unityò constitute the substance of the constitution and reflect the unchanging political will of the constitution making

power at the time of founding. They seem to accept from the outset the normative bindingness of the provisions reflecting the will of the constitution making power and that any constitutional amendment has to be in line with these provisions. In this framework, the constitutional principles involved in these provisions, particularly in the second article of the 1982 constitution, namely the principles of republicanism, laicism, nationalism and the rule of law are acknowledged as part of the political decision that demarcates the distinctive aspects of the state. Such outlook might be considered as the main reason of the controversies emerged during the 1995 and 2010 constitutional amendments. It is seen that the constitutional debates in 1995 evolve around the principles of *laicism* and *nationalism*; while the debates in 2010 center in the principles of *rule of law* and *nationalism*.

In case of 1995 amendment, this is observable in most clear terms in Prime Minister Çillerôs statement when she states that ñthe process of constitutional reform, which takes its source from the will (and desire) of Turkish nation *circumscribed by the unchanging qualities and principles of the Turkish Republic*, will continue as new needs are felt and as public discussions develop to provide new directionsò [*emphasis mine*]. With the phrase of ñunchanging qualities and principles of Turkish Republic,ò she seems to refer to the fundamental political decisions that have to be respected by the consequent lawmakers in changing the constitution. Additionally, the members of CHP and DSP, and partly DYP and ANAP object to the demands of the members of RP just because they consider that any amendment concerning the Article 24 (the principle of laicism) would contradict with the substance of the constitution. In case of 1995 constitutional amendment, the demands of RP members could not access to the constitutional change process as they are in minority.

On the other hand, during the 2010 constitutional amendment, the members of CHP, MHP and BDP question the legitimacy of the constitutional amendment and object to the proposal introduced by AKP. The rationale behind such comprehensive objection, from the perspective of the members of CHP and MHP, is the idea that the provisions of the proposal, specifically concerning party closures, Constitutional

Court and HSYK contradict with the inalterable provisions of the constitution, namely the principle of the rule of law. Furthermore, the members of MHP object to the amendment concerning the ban on political parties just because they think that the amendment violates the principle of nationalism and unitary form of state. When MHP members mention ñthe founding law of the stateò or ñthe founding philosophy of the republicò they most probably consider the unchanging qualities of the polity designated in the constitution, and they feel a threat towards it.

It might also be argued on the basis of the constitutional debates that the considerations of the representatives in both constitutional amendments seem to partake in the conceptual frameworks of both Habermas and Schmitt in different respects. As explicated above, they on the one hand seem to hold a positive conception of the constitution as is the case in Schmitt. Thus they argue in favor of the normative bindingness of the inalterable provisions of the constitution for the subsequent lawmakers. On the other hand, similar to Habermas they make substantial emphasis upon the need of public deliberation and social consensus in constitutional reform processes.

The constitutional debates also provide us with valuable insight regarding the criterion of constitutional legitimacy mobilized by the authors of constitutional amendments. In general, they overwhelmingly underline their intention to comply with universal principles of law and democracy in engaging a constitutional reform process. And this is in fact valid for a comprehensive part of the constitutional amendments. However, such tendency seems to disappear in designating some critical provisions of the constitution, and leave its place to the stress on the requirements of the concrete order. In specific terms, they bring forward context dependent arguments in order to justify their claims. In case of 1995 constitutional amendment, this is particularly valid in debates concerning the designation of the principles of laicism and nationalism in relevant articles of the constitution. And in case of 2010 constitutional amendment, it is mostly observable in the actions of AKP members aimed to justify the peculiar designation of the articles concerning the

constitutional court and HSYK. Here mostly becomes prevalent pragmatic decision making. At these points, AKP gives the impression of realizing its interests in the judiciary through giving them a constitutional status. It might be argued in this light that the criterion mobilized in the justification of constitutional amendments of 1995 and 2010 is dependent on both context-dependency and universalizability. However, these two represent a strange mixture depending on the political parties who initiate the amendment.

Apart from these, the constitutional amendment of 2010 signifies a major step in terms of protection of fundamental rights and freedoms for introducing the individual constitutional complaint mechanism into Turkish legal system. The amendment has additionally assigned the Constitutional Court with the power to decide on individual applications. According to this mechanism, ñeveryone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities.ò And the application is made conditional with the exhaustion of ordinary legal remedies. Throughout the parliamentary discussions, it is seen that AKP members generally defend the constitutional complaint mechanism on the basis of pragmatic reasons. For instance, Suat Kılıç underlines the fact that Turkey has the second highest record of complaint in the European Court of Human Rights after Russia.[542] Thus the introduction of individual application into the national legal system would help Turkey to catch up with universal standards and eliminate factors harming its image. Yet even such a pragmatic disposition becomes valuable as the amending provision is passed in the face of the fierce opposition of CHP and MHP members.

[542] *TBMM, TD*, Cilt 68, B: 95, 26.04.2010, p.298.

CHAPTER 9

CONCLUSION

In this thesis, I aim to present a political theoretical reading of constitution making and constitutional change processes in Turkey in the framework of Schmittôs and Habermasôs theories. I concentrate on the constitutional debates in relevant Assemblies in order to elucidate changing conceptions of the constitution and constitutional legitimacy from the perspective of the framers of constitutions since the early Republican period. I examine, on the basis of parliamentary minutes, how the authors of the constitutions, particularly the members of the Constitutional Committees and generally the members of the parliaments, conceive the constitution, the practice of constitution making and constitutional change and how they justify their practice. In such political theoretical reading, I benefit mainly from the conceptual tools developed by Schmitt and Habermas. I also refer to the considerations of Arendt, Michelman, Rawls and a number of other theorists where I deem relevant in order to deepen the analysis and to provide a comprehensive reading of constitutional developments in Turkey.

I believe that Schmitt and Habermas provide us with a comprehensive set of conceptual tools to examine and interpret the political theoretical debates upon constitution making and constitutional reform processes in Turkey. The figures present two substantially different conceptualization of constitution and constitutional legitimacy, namely realist and normative, as delineated briefly in the following.

Schmitt develops his theoretical framework mainly to indicate the inconsistencies in legal positivist thought and liberal tradition. He severely criticizes legal positivismôs understanding of the legal order independent from personalist element and of legal order and the criterion of legality independent from social and historical phenomena. In his conceptualization, the constitutional decision of the constitution-making or

constituent power forms the basis of the legal system. In this context, the constitution is not understood in pure legal (formal or value-free) terms defining merely the relations between different state organs. In much deeper and concrete sense, it more significantly denotes the fundamental political decision binding the future of the community by determining the type and form of its concrete political existence and constituting the political community in a sense on the basis of the enemy-friend distinction. Moreover, the constitution is not impartial or impersonal conceived as the product of *pure will* as emphasized by the doctrine of liberal constitutionalism. It is rather material in the sense that it embodies the substantial decision in favor of certain ideologies, values and preferences. It is an expression of the constitution-making power laying out how it identifies *itself* as a unity against its enemies, in which form it wants to construct *itself* in its concrete existence and thus how it wants to see *itself*. In short, Schmittôs approach to constitution underlines the faculty of willing of those who decide in the time of constitution. Yet, such will can never be pure will in Kantian sense.

Therefore, in Schmittôs theory, the constitution is understood in realist terms, posited by and dependent upon the concrete will of the dominant actors or social powers at the time of constitutional act. His perspective yields a static constitution to the extent that it is sealed with the deliberate will fixing the power struggles in society once and for all.

Furthermore, contrary to the premises of liberal constitutionalism and legal positivism which result in ñthe juridification and limitation of the politicalò, Schmittôs theory of sovereignty stresses the primacy of the political over law and emphasizes the will of the sovereign to make final decisions concerning the norm and exception. Emphasizing the norm creating power of political decision of the sovereign, Schmitt conceptualizes the political as constitutive of all spheres of life and most significantly of the law. In other words, Schmitt constitutes legitimacy on the basis of the political rather than the legality principle, and the constitution making process gains legitimacy because of its political character. In this respect, his

conceptualization seems to have the strength of explaining the social reality of modern states and societies in more adequate terms. Contrary to the purely normative outlook of liberal constitutionalism and legal positivism toward political action, Schmitt brings facticity to the center of political and legal life by drawing attention to the significance of the state of exception.

Contrary to Schmittôs approach reducing the moment of law to the political, Habermasôs procedural democracy is a normative and sociological search for the reformulation of a delicate balance between the law and the political. Acknowledging the centrality of the function of law for the realization of a rational society under pluralistic conditions, Habermas tries to solve the tension between normativity and facticity. For him, the legitimacy of legality neither stems from the formal characteristics of positive law as legal formalism claims, nor from the hierarchical structure of laws as legal positivism argues. In contrast, he argues that positive laws can be legitimately justified on the basis of practical discourses institutionalized by means of legal procedures. Legal norms subjected to discursive opinion and will formation processes gain legitimacy as the addresses of law conceive themselves as the authors of these laws. As a result, in discourse theory of law, neither the law is dissolved into pure facticity and become a pure instrument of politics, as in the case of Schmittôs theory, nor the politics is limited by laws conceived as external elements as in the case of liberal constitutionalism.

Habermas, in this way, tries to establish an internal relationship between democracy and constitutionalism in order to deal with the problem of democratic legitimacy. More significantly, the constitutional text loses its static character and becomes a dynamic one responsive to the demands of different social forces as it is socially constructed through intersubjective communication processes. The constitutional moment is transformed into a platform of social interaction and consensus as it enables the intersubjective constitution of the basic (normative) rules of living together on equal and free basis, and the constitutional text becomes open to democratic demands for change and revision coming from social groups. Moreover,

Habermasôs conception of the constitution as a future oriented open text and tradition building project enables the consequent generations to improve and transform the system of rights enshrined in the founding event through democratic will formation processes. Accordingly, the acts of constitution-making and constitution-reforming are theoretically legitimized by reference to the procedures that are followed in the practice of constitution making. Yet the act of constitution making is conceived in more democratic terms at the expense of the concealment of the moment of the political. In other words, Habermas tends to disregard the nature of the political which is sealed with irreducible antagonism between the rivals, and assume the political sphere as a neutral ground in which universally valid solutions can be formulated (Mouffe, 2000: 97).

In this context, while Schmitt offers us a realist conception of constitution and constitutional legitimacy based on the factual power constellations at the time of constitution making, Habermasôs endeavor signifies a major construction of a normative act of constitution making where rational and moral individuals mutually assign each other with equal rights and liberties. It might be argued that the theories of Schmitt and Habermas bring into light two major determinants of the legal order. In Schmittôs theory, the decision on the state of exception or the requirements of the concrete order, which in the last instance contingent upon the arbitrary will of concrete political actors (factual power relations), takes effect in the justification of the constitution making/change processes. Such stance corresponds to the conception of the constitutional principles as partial value judgments. They are inevitably partial because principles are always contextual for Schmitt. From Habermasôs viewpoint, on the other hand, the context transcending validity claims like universal principles of right and democracy depending on the use of communicative reason become determinant in the justification of constitution making/change processes. As a result, the constitutional principles are perceived as universally valid norms, at least for the political community in consideration: they establish a fixed set of traditional norms. I deem these two substantially divergent approaches valuable to decipher and compare the continuities and ruptures in the criterion of constitutional legitimacy throughout

the constitutional debates in Turkey. In specific terms, on what grounds the constitutional legitimacy is formed in Turkish context, and which viewpoint comes to the fore and becomes hegemonic in each instance of constitution making and reform. In this framework, I try to highlight in the following, some of the main inferences that can be drawn from the examination of constitutional debates in Turkish polity without being too simplistic.

In Turkish context, it is possible to claim on the basis of the constitutional debates that the framers of the constitutions tend to share a positive conception of constitution in line with Schmittôs theory. They unexceptionally mobilize the rhetoric of the constitution making power of the nation in order to legitimize their practice, and overwhelmingly assume that the constitution has a *substance* reflecting the constituent will of the founding fathers, thus emphasize the material (political) aspect of the constitution. In addition, consistent with the positive conception of constitution, they mobilize the discourse of continuity and sometimes progress (beginning with the constitutional amendment of 29 October 1923) in order to construct and reinforce the legitimacy of the new constitutional orders in direct reference, in the last instance, to the original founding event. It is seen that the emphasis of the framers of constitutions on this perceived continuity and their deliberate attempts to conceal the ruptures caused by new constitutional beginnings strengthens as the necessity to provide legitimacy to the process is felt more.

In more specific terms, in line with Schmittôs positive conception of constitution, the constitution seems to denote for the members of the Assemblies in all constitution making and reform processes in Turkey ñthe fundamental political decision by the constitution-making power over the type and form of the concrete existence of the political unity.ò The constitution signifies particularly the crystallization of the specific decisions pertaining to the qualities of the stateôs concrete existence. From the perspective of the authors of constitutions, these decisions lay the basis for the legal system and determine the unchanging qualities of the constitutional order from the very beginning. The members of the Assemblies tend to invoke these unchanging

qualities of the constitutional order, which are determined in the founding moment of the state as reflected in *Teκkilat-ē Esasiye of 1924,* and which have to be respected by the subsequent lawmakers in constitutional reform processes. As a consequence, they strive to form the legitimacy of their practice by establishing a direct linkage between themselves and the framers of the historically first constitution as if they are partaking in the *constitutional reason* of the founding fathers.

I have seen that the majority of parliamentary representatives in the first and second Grand National Assemblies conceptualize the constitutions of 1921 and 1924 in metaphysical terms, as an act of the Turkish nation conceived as unitary entity existing long before the constitutional act. For them, the nation put forward its common will to live together in political unity in its struggle with the foreign invaders during the war of liberation. Hence the struggle for independence along with the assumption of a shared history and tradition constitute the authentic basis of the political community. Especially, the constitutional developments starting with *Teκkilat-ē Esasiye of 1921* and ending with *Teκkilat-ē Esasiye of 1924* have been understood as signifying the successive stages of ñthe political maturation of Turkish nationò by the framers of *Teκkilat-ē Esasiye of 1924.* Consequently in this narrative, *Teκkilat-ē Esasiye of 1924* implies for them the final moment of social and political revolution and it is in this respect embodies the founding principles which have to be protected against the enemies of the state.

In this respect, it is without doubt that the decision for the principle of national sovereignty or the republican principle forms the fundamental political decision demarcating the boundary of the constitutional order in Turkish context. The principle is invoked by all the framers of constitutions in order to form a linkage between themselves and the founding fathers to confer legitimacy to the process. Apart from the principle of national sovereignty, we witness that some other principles are also articulated to the substance of the constitution in different periods of constitutional moments in Turkey. For instance while the principle of unity of powers and the concomitant principle of parliamentary supremacy is endorsed during

the early republican period, the principle of the rule of law (or the principle of separation of powers) is adopted in 1961 constitution and preserved in different forms in the following constitutional moments. Yet the decision for and the designation of the principle become a source of controversy in the subsequent constitutional moments beginning with the constitutional amendment of 1971.

On the other hand, the 1937 constitutional amendment marks the beginning of a peculiar tradition in Turkish constitutional history in which the constitution comes to signify the crystallization of the Schmittian friend-enemy distinction in definite terms. With the inclusion of the political principles of the Republican Peopleôs Party, namely the principles of republicanism, statism, nationalism, populism, laicism and revolutionism, into the constitution, the borders of legitimate political activity approved by the dominant political actors gained a constitutional status. By identifying the state type in specific terms, the amendment culminated in a peculiar situation in which the principles representing certain ideologies thus partial interests are transformed through the constitutional text into ñuniversal principlesò that must be respected by all citizens, and marginalization of other ideologies prevalent in society and exclusion of them from public political life. It is sure that the amendment introduces a new criterion of legitimacy for political power and government by reference to certain enduring aspects of the state. Yet these aspects are heavily ideological or containing elements of a certain *comprehensive doctrine*. From a Rawlsian angle, that move created a turn towards an unreasonable articulation in a somehow pluralistic society.

In this respect, the 1937 constitutional amendment signifies full articulation with Schmittôs considerations as the parliamentary representatives understand the constitutional principles as the decision of a concrete will, namely the will of Mustafa Kemal, and try to form their legitimacy on this ground. For them, these principles constitute the substance of the constitution which has to be protected against any existential threat. Therefore, the constitution is conceived completely in political terms, designating the borders of the political regime: classifying who will

be included as part of the political unity and excluded as *public enemy* in Schmittôs terms.

Positive conception of constitution comes to the fore in somehow different form during the making of 1961 constitution. The authors of the constitution strive to legitimize the constitutional text by making direct citation to the founding constitution: they identify the principle of republic as the defining aspect of the new constitution, and the Revolution Laws as the integral and unchangeable component of it. This endeavor might be read as a deliberate intention to prove that they are committed to the constituent will of the founding fathers and that they act *always under law* when they are framing the new constitution. In such conception, the assumption that the will of the founding fathers, particularly Mustafa Kemal, is embedded in the laws of revolution plays a critical role.

Moreover, the authors of 1961 constitution tend to consider the constitution as a legal fence by the help of which the assumed destructive power of certain political ideologies and social cleavages can be circumscribed and domesticated.[543] Despite the prevalence of strong emphasis upon the impartiality of the constitution, this impression is particularly valid for the parliamentary debates in which *Atatürkôs revolutions*, specifically the principle of Turkish nationalism, and the principles of liberal constitutionalism are highly esteemed while the political ideologies of communism and fascism, and reactionary movements assumed to be aimed at the destruction of *Atatürkôs revolutions* are explicitly defined as the enemies of the state. It becomes clear during the constitutional debates that particularly the principle of nationalism is conceived as the key to *national unity*, as a panacea to the disintegrative force caused by social cleavages based on ethnicity and the ideologies

[543] Here, by deploying the term ñfenceò I mainly refer to the conceptualization of law in classical philosophy, particularly in Platonôs *Nomoi* as explained by Arendt (2007a). Arendt argues that the law is conceieved in external terms to the politics of the polis, in a sense as a neutral field determining mainly the borders of legitimate political activity.

of communism and fascism. The tendency to domesticate and circumscribe these political movements through marginalization in the constitution seems to contribute to the imagination of the constitution as a static act of founding. This also signals a sociological imagination in which the rules of the game are determined by the dominant actors at the beginning and the future initiatives to infringe, reset and reformulate are strictly forbidden.

The political aspect -the constitution of the unity of the political community on the basis of the either/or decision between friend and enemy- of the constitution reaches its peak in 1982 as the entire constitutional text seems to form the *expression of state life* in Schmittôs terms. An overwhelming majority of the members of the Consultative Assembly understand the constitution as more than a formal legal text consisting universal principles of right and democracy. For them, the constitution embodies inherently the sovereign decision of *Atatürk* and the ideology of *Atatürkçülük*. In this regard, the authors of 1982 constitution tend to conceive the constitution as the main instrument to interpenetrate, design and control the political and social life in its entirety. It comes to serve as the main instrument of social transformation since the authors aim at transforming the nation through the ideals depicted in the constitution. And in the case of 1982 constitution, the parameters of the constitutional decision seem to be more restrictive (and regressive) and encompassing as now more areas of life become the target of *social engineering through constitutionalism*. In this sense, national culture, education, university, mass media, working life and other areas of life get within the range of such ideological constitution.

The constitutional debates moreover manifest that the authors of the constitution tend to conceive the state as an entity or organic unity rather than a neutral/formal legal institution as the guarantor of individuals rights and liberties. Accordingly they define the scope and content of the fundamental rights and liberties at the expense of the *stateôs right of self-preservation* in Schmittian terms. Here, it is possible to observe the serious deviation from liberal conception of rights as the state is

prioritized over the rights of the individual, and the state and individual are conceptualized as two opposed subjects where the former has to be protected against the latter. The constitutional debates further show the realist outlook of the members of Consultative Assembly, that the rights of the individual signify nothing unless they are guaranteed and protected by the proper authority of the state. Moreover, once again the either/or decision between friend and enemy is disclosed during the constitutional debates as certain ideologies and social movements, explicitly communism, fascism or theocracy and implicitly Kurdish nationalism are defined unconstitutional.

In case of 1995 and 2010 constitutional amendments, it is seen that the members of the parties tend to refer to the substance of the constitution, specifically the inalterable first four Articles stipulating ñthe concrete type and form of the political unity,ò which for them define the everlasting and unchangeable qualities of the state thus the boundaries of legitimate constitutional change practices. Though they appreciate the constitutional reform processes aimed at meeting social demands and changing needs, they stand aloof from initiatives which could endanger *material part of the constitution*. They accept from the outset the normative bindingness of the provisions reflecting the will of the constitution making power and that any constitutional amendment has to be in line with these provisions.

In light of these considerations, the overt intention to ground the foundation of the state on the basis of *the ideology of Atatürkçülük or Atatürkôs principles* in the making of 1982 constitution might be considered as the peak of articulation with Schmittôs conception of constitution and constitutional legitimacy since the constitutional amendment of 1937. Such static (and dogmatic) outlook is far from a dialogical understanding of the constitution as suggested by Habermas where the constitution as a future oriented and open text could be further improved as the consequent generations have the equal opportunity to reflect upon, criticize and reinterpret the rights enshrined in the constitution and shape them according to their own conditions. From another angle, the positive conception of constitution endorsed

by the framers of constitutions might be the reason behind the general tendency to abstain from legal interpretation in Turkish context. It is seen that there emerges a notable resistance on the part of the framers of constitutions to leave the constitutional principles to the interpretive practices of subsequent lawmakers. It is an undeniable fact that the general and abstract character of the constitutional provisions disappears and their regulatory aspect, instructing what to do exactly in a concrete situation, gains precedence after the constitutional amendment of 1971. It might be argued that if the allergy for legal interpretation is progressive in the constitutional moment of 1961, it becomes regressive after 1971 and reaches its peak in 1982. It is even prevalent during the making of 1995 and 2010 constitutional amendments, particularly during the debates about the principle of laicism and Turkish nationalism. It is sure that such outlook excludes pluralism and discursiveness from public political realm.

The constitutional debates provide us with valuable insight regarding the second major question of the thesis pertaining to the criterion of constitutional legitimacy from the perspective of the authors of constitutions as well. I mean in what specific terms or on what grounds the framers of constitutions strive to construct constitutional legitimacy? Here the two major determinants of the legal order presented by the theories of Schmitt and Habermas become operational and enable us to explain the perspectives of the authors of constitutions.

It is plausible to argue in this regard that the tendency to justify the constitution making and constitutional change practices in Turkey on the basis of the requirements of the concrete order increases throughout the constitutional moments of 1921, 1924, 1937 and 1971 and reaches its peak in 1982. In all these instances, the justificatory arguments are context dependent which are mainly based on the requirements of the (assumed or real) state of exception. On the other hand, the making of 1961 constitution indicates a distinctive characteristic as it embodies the deliberate intention of the authors of constitution to strike a balance between context-

dependeny and transcontextuality or universalizability. In this respect, it represents a break in the general pattern of conceptualization of constitutional legitimacy.

In 1921 and 1924, the members of the Assembly perceive parliamentary decisions inherently legitimate as they consider themselves as the true and sole representatives of the nation. In order to justify the constitutional moments, they comprehensively make reference to the state of exception caused by war and the according *raison dêetre* of the parliamentary institution. In case of *Teúkilat-ē Esasiye of 1921*, the existential threat of foreign invaders permeates the parliamentary discussions and the state of war is substantially invoked in justifying the decisions to be taken. In a similar vein, the members of the second Assembly frequently emphasize the need to compile *Teúkilat-ē Esasiye of 1921* together with the following constitutional law in a single legislation adequate to and required by peace conditions in order to justify *Teúkilat-ē Esasiye of 1924*. Particularly in the first case, the national struggle fought against foreign invaders seems to be taken as an indicator of peopleôs common will to live together thus serves as the generating force of legality and legitimacy of constitutional law.

In case of 1921, the parliamentary representatives tend to conceptualize the ñTurkish nationò as a political community united for self-preservation against a common enemy. Imperialism and capitalism referring specifically to the Western states trying to invade the country during the war of liberation and the remnant Christian population of the Ottoman State as their internal allies are constructed as the enemies of the political unity. Against the existential threat of the enemy, the parliamentary representatives tend to deploy the notion of ñTurkish nationò in order to signify a homogeneous entity sharing a common historical and traditional background and fighting for self-preservation in this life and death struggle. In this respect, the members of the Assembly do not simply mention ótTurkish peopleô living in a certain territory; they instead seem to consciously deploy the term ñTurkish nationò in order to indicate a certain ónational identityô formed by an assumed ethical substance in order to differentiate it from other political communities.

The parliamentary discussions are illustrative of the fact that the emphasis on context dependency in justifying constitutional moments intensifies as the regime consolidates itself in time. This is perhaps not in compliance with liberalization and modernization thesis, neither with what we expect with the process of the consolidation of democracy. The parliamentary debates concerning *Te*ĸ*kilat-ē Esasiye of 1921* show that the principle of national sovereignty is discussed and justified by the parliamentary representatives on the basis of the rational arguments focused on universal principles of republican government and opposition established with the deficiencies of *Ancient (Ottoman) Regime*. Indeed the parliamentary representatives of the first Grand National Assembly seem to justify the constitutional principles on a rational basis in connection with the cultural tradition of the nation.

However, beginning with the *Te*ĸ*kilat-ē Esasiye of 1924*, they tend to concentrate less on transcontextual ideas but more on assumed national characteristics and the concrete circumstances of society in order to justify their claims. There occurs a gradual increase in parochialism to the extent that the members of the second Grand National Assembly strongly rely on the homogeneity of the nation, its ethical substance and political distinctiveness in order to construct legitimacy.

The situation is radicalized in the sense of being more parochial and less universal particularly during the parliamentary debates concerning the constitutional amendment of 1937 which specifies the state type in definite terms. The parliamentary discussions during the constitutional amendment of 1937 signal a divergence from *universalizable* validity claims in Habermasôs terms and a lean towards the arbitrary preference of a particular political ideology shared by the governing party members. During the discussions, we see that the constitutional principles are justified by reference to the specific character of Turkish revolution, thus on the basis of assumed ethical substance of political community. The formal aspect of the constitutional text, the impartiality and abstractness of the constitutional principles, is weakened to a great extent. Now the legal aspect of the constitution which is even acknowledged during the parliamentary debates concerning *Te*ĸ*kilat-ē*

Esasiye of 1924 is concealed and the political aspect of the constitution signifying the friend-enemy distinction is emphasized. Moreover, the legitimacy of the constitution, particularly of the constitutional principles is formed on the basis of this political distinction. For the framers of the constitutional amendment of 1937, *Te*ø*kilat-ē Esasiye of 1924* is not merely a legal text defining the relations between different state organs, but more significantly a political decision constituting the political community on the basis of the friend-enemy distinction reflected in the properties of the state.

Throughout the constitutional debates in the Constituent Assembly of 1961, it is seen that the rationale for the military coup, which is called ñrevolution,ò is inextricably linked with the justification for making a new constitution and these are all explained by the aspirations of the entire citizenry. The framers of the constitution do not question such arbitrary linkage; moreover, they tend to identify the nation with the army, and the military coup with the nationôs will. The members of the Constituent Assembly in general and the authors of the constitution in particular made substantial reference to the ñright to revolution of the Turkish Nationò not only for explaining the rationale for the military coup but also for providing legitimacy to the Constituent Assembly and its subsequent work. Indeed the military coup, the suspension of some provisions of 1924 constitution, and the establishment of the Constituent Assembly for the specific purpose of making a new constitution are all conceived as parts of a revolutionary moment reactivating the constitution-making power of the people in Schmittian terms. Thus their position remains far from a dialogical understanding as in the case of Habermas as they do not construct the legitimacy of the constitution on the basis of a democratic procedure.

However, I must also emphasize that though 1961 constitution is written after the military coup of 27 May 1960 and under the tutelage of National Unity Committee which is formed completely by the military officials, the constitutional debates, strictly speaking, the debates within the House of Representatives, seem to take place in a legal atmosphere, where almost the entire constitution (except for a number of

provisions some of which I delineated in detail in the concerning chapter) is debated within the framework of the legal terminology of liberal constitutionalism derived especially from the constitutions of Western European states. Moreover, there is an apparent increase in discursiveness to the extent that the opponents could change the initial proposals of the Constitutional Committee and the parties try to justify their claims through rational discourses, including pragmatic, ethico-political and moral discourses in Habermasôs terms.

It is seen that the representatives justify their practice of writing a new constitution by focusing on the gaps in the 1924 constitution, the shortages of the election law and the consequent ñconstitutional violationsò of DP government. Moreover, they strive to legitimize the new constitution by stressing its incremental character in terms of institutionalization of a democratic government based on the rule of law. The constitutional debates in fact signal a major change in the perception of the authors of the constitution: they now seem to acknowledge the necessary distinction between the republican form of government and democracy. Indeed the assumed identity established between the principle of national sovereignty and democratic form of government by the authors of previous constitutions began to be problematized as a result of the ten years rule of Democrat Party. This is perhaps an achievement in terms of democratization especially in comparison to 1937. Moreover, the authors of 1961 constitution began to consider the principle of the rule of law and the concomitant institutions indispensable for the proper functioning of democracy. The establishment of the constitutional court and the relevant measures to institutionalize independent judiciary might also be viewed as an integral part of the political objective for becoming a constitutional democratic state.

As it is indicated, the constituent will to design the constitutional order and along with that the society within the parameters of Western European states comes to the fore in the making of 1961 constitution. The constitutional authors seem to conceive the constitution ideally as the principal instrument for the institutionalization of parliamentary democracy based on the rule of law. In addition, highly influenced by

the doctrine of national development in the 1960s, they give utmost significance to economic development through state intervention in economy. For these purposes, they include in the constitution guarantees for the introduction of a system of checks and balances including judicial independence, constitutional review and etc. along with a comprehensive catalogue of rights and liberties. They strive to guarantee in the constitutional text civil liberties and political rights of the citizens along with economic and social rights. However in their endeavour to institutionalize the system of rights the constitutional authors do not seem to constitute an internal relationship between the constitution making process and democracy, as in the case of Habermasôs conceptualization of a democratic founding. The rights are perceived at most the ógoodsô granted to the individuals of an underdeveloped society. The constitutional authors do not envisage a mutual relation between civil liberties and political rights, thus they do not consider that the citizenry in the future might hold on to their rights and reformulate the parameters of the constitutional order according to their own needs and demands.

Despite some deficiencies indicated, it might be still argued that the making of 1961 constitution marks a distinctive moment in the constitutional history of Turkey as the authors of the constitution try to establish a delicate balance between the particular necessities of the Turkish context and the universal principles of law and democracy. They, most of the time, refer to the universal principles of right while in certain cases (i.e. the principle of laicism and nationalism) they adopt a pragmatic attitude and prefer referring to the specific conditions of the polity in order to justify the constitutional principles. In specific terms, their position seems to oscillate between Schmittôs and Habermasôs considerations on the issue. Perhaps, the sympathy that 1961 constitution creates in the reading of Turkish democracy comes from the role given to dialogical/Habermasian dimension introduced into our tradition of constitution making. Otherwise Schmitt was always there.

In an apparent opposition with the constitutional moment of 1961, the constitutional amendment of 1971, both in terms of formation process and content, is determined

by the perception of a (imaginary or real) state of exception and alleged requirements of the concrete situation. In the final moment, the arbitrary decision of the framers of the constitutional amendment, on the state of exception and friend-enemy distinction, takes effect and the political aspect of the constitutional amendment is presented as the main source of legitimacy. Here Schmittôs spectre becomes visible again. In this respect, the constitutional amendment of 1971 signifies a complete break from dialogical/procedural understanding of constitutional legitimacy as the majority of representatives do not construct the legitimacy of the constitution on the basis of a democratic procedure, depending on rational will formation processes in the parliamentary institution and in the public sphere in general.

It is observable from the constitutional debates that the constitutional amendment of 1971 is triggered by the aim to adjust the constitution in accordance with the concrete political, social and economic conditions of the polity at the beginning of the 1970s. There is considerable tendency to explain the need for constitutional amendment on the basis of the requirements of the concrete situation: to take adequate measures related to the economic and social backwardness of the polity and to tackle with social unrest assumed to be caused mainly by so-called *unreasonable* doctrines in Rawlsôs terms, namely communism and reactionary movements. In this respect, not the normative ideals but the arbitrary will of the framers of the constitutional amendment based on the unsubstantiated requirements of the concrete situation seem to completely determine the amendment. It is moreover seen that the assertions brought against 1961 constitution in order to support constitutional amendment are also accompanied by the mobilization of Schmittian idea, *internal and external threats to stateôs existence*, in a reactive manner.

In accordance with this, the parliamentary debates demonstrate that the reorganization of state power on the basis of the perception of a ñthreat to the concrete existence of the Stateò goes together with *a logic of exclusion*, in other words, the explicit specification of the enemies of the constitutional order in the constitution. The political unity of the nation seems to be constructed upon the

principle of Turkish nationalism and thus imagination of homogeneous community. Any threat towards such assumed unity, mostly the communist and socialist ideologies (and their regional variants based on Kurdish ethnicity) are qualified as ñseparatistò and thus excluded from the field of legitimate politics. In Schmittian terms, a decisionist moment is observed in the sense of introducing more enlarged friend-enemy distinction. Class based politics is codified as the *public enemy* against *the unity of the state with its land and nation*. The critiques of this exclusionary and even discriminatory viewpoint are labeled with the ñcrime of being communist.ò They are marginalized ideologically and criminalized legally.

In this respect, the civil war like conditions caused by extreme left and extreme right and the concern ñto preserve the existence of the Stateò become the key criterion for the justification during the constitutional amendment of 1971. It seems dubious if the concrete situation creates a real existential danger/threat for the constitutional order or not. And the argument regarding the explanation of the executiveôs inability to tackle with the threat/danger (whether imaginary or real) to Stateôs existence in connection with the obstacles created by the moderate separation of powers stipulated in 1961 constitution seem to be unconvincing and weak. It is not in fact explicit how the framers of the constitutional amendment form the relationship between the two phenomena. Overall, they seem to ground the rationale for the constitutional amendment on the basis of a suspicious and bizarre allegation; that 1961 constitution is the cause of social unrest and hardships.

The context dependency of the constitution making process and the concomitant claims for legitimacy remarkably peaks in 1982. Going far beyond the constitutional amendment of 1971, the formation process and content of 1982 constitution is determined by the one-sided political decision of the authors of the constitution concerning the state of exception and alleged requirements of the concrete situation. The emphasis on the ñneed for authorityò and the idea of ñpowerful stateò become the leitmotiv directing the course of constitutional debates. Generally there takes place no debate in the Consultative Assembly concerning the legitimacy of writing

an entirely new constitution. We witness once again (similar to the case of 1961 constitution) that the authors of constitution presuppose a direct linkage between the military coup and the will of nation as they explain their practice in reference to the rationale for the coup and invoke the idea of constitution-making power of the Turkish nation. It might be argued in this respect that they implicitly conceive the elimination of the existing constitution by the military coup as a *constitutional elimination* in Schmittôs terms and do not perceive the interference detrimental to the legitimacy of the constitutional order since the *constitutional minimum* (the principle of national sovereignty) is preserved.

It is generally observed that the authors of 1982 constitution explain the rationale for the new constitution (and the provisions) on the basis of the so called *self-evident* requirements of the concrete situation. They overwhelmingly stress the intention ñnot to return back to the period before September 12,ò and found their arguments on a severe (perhaps severest in Turkish history) critique and sometimes refutation of the 1961 constitution. More significantly they capitalize entirely on the political, economic and social circumstances of the polity, not on universal principles of human rights, law and democracy, in designating the constitutional provisions. Therefore, contrary to their predecessors in 1961, they show no willingness to establish a balance between the particular necessities of the Turkish context and the universal principles of constitutional democracy and the system of rights. Moreover they mobilize the Schmittian idea of ñinternal and external threats to the existence of the Stateò similar to their forerunners who engaged in the constitutional amendment of 1971. They underline continually their objective to re-establish the state, strengthen its authority and power in the face of political instability, civil war conditions and economic downturns, and against the so called divisive attempts of communist, fascist and reactionary movements. These movements are declared as the enemies of the Republic and sometimes as the internal branches of foreign enemies of the Republic which are never defined in explicit terms. It is plausible to claim in this sense that there is a continuation with the 1971 constitutional amendment in

terms of the criterion of legitimacy because the logic of friend-enemy distinction is at the center.

In such context, the reference to the constitution-making power of the nation does not go beyond a mystification or rhetoric in case of 1982 constitution. It serves instead as an ideological shield to disguise the sheer power of the military junta in the writing of the new constitution. In fact, the definition of the period before September 12 as a major era of *constitutional crisis*, substantial reference to the *principles of Atatürk*, and to the qualities of an imaginary *national entity* all seem to be strategic actions (in Habermasian terms, non-dialogical and distorted communicative actions) in order to provide legitimacy to the process and new constitution.

Throughout the constitutional debates of 1982, the discursiveness decreases to a considerable extent and the dialogical understanding of the constitution recedes to minimum. The limited number of opponents find almost no response to their change proposals and the provisions are usually justified by the parties through merely pragmatic and ethico-political discourses in Habermasõs terms. Most of the cases, these members make reference either to the concrete circumstances (concrete problems faced during the implementation of 1961 constitution) or to the qualities of an imagined *national entity*. We witness accordingly the frequent utilization of notions such as *the principles of Atatürk* or *Atatürkõs nationalism*, the *entity* of the Turkish Nation, the *national culture*, or *national history* for justifying the validity claims about a particular norm of the constitution or provision. Here becomes operational a kind of imaginary *community ethos;* presupposed by the members of the Consultative Assembly and utilized in order to support the justificatory basis for their claims.

The constitutional debates also reveal how the authors of the constitution conceive the constitutional review in Turkish context. It becomes obvious that the perception of the constitutional court by the members of the Constituent Assemblies in 1961 and

1982 differ radically from each other. The authors of 1961 constitution consider the constitutional court along with independent judiciary as the constitutive element of the rule of law. Hence, in 1961, the authors of the constitution tend to take into consideration the future prospects of being a constitutional democracy together with the past political experiences, particularly incidents experienced during Democrat Party government. Accordingly, they conceive the constitutional court as the guardian of the constitution, the pivotal institution for preventing the violation of the constitution by the governments holding the majority of seats in the parliament. Even some members of the House of Representatives tend to regard the court as a rival institution for controlling the legislative. In case of 1982 constitution, such perspective seems to reverse. Now the majority of the members of the Consultative Assembly strive to guarantee the sovereignty of the legislative while slightly acknowledging the supremacy of the constitution. They seem to reorganize the power relations between constitutional organs in favor of the legislative and executive and at the expense of judiciary. Moreover, in this endeavor they seem to exclusively take into consideration the past experiences, particularly the previous decisions of the constitutional court which from their perspective impeded the functioning of the parliament and governments. Thus they seem to depart from the ideals of constitutional democracy in designating the court, most of all its composition, the procedure on the selection and tenure of its members and its duties and powers. Also, no reference to other countries in terms of these details is remarkable.

The inferences drawn from the examination of constitutional debates enable us, in sum, with critical insight about the future prospects of constitutional democracy in Turkish context. The multitude of the acts of constitution making since the establishment of the Republic and the abundance and scope of constitutional amendments within the same period give the first impression that we are fond of making and changing constitutions. In liberal democratic tradition it is a widely acknowledged idea that the constitution as the supreme law of the land has to be general and abstract, thus impartial in ideological terms in order to claim legitimacy

in society. Yet it seems that there has developed in Turkish context a habit of mind understanding constitutions as political projects. This implies that the constitutional moments are conceived most of all as platforms of political contention where the dominant political actors strive to surpass the remaining opponents and design the constitution in their own interests. This unsurprisingly results in a text of constitution reflecting the dominance of a comprehensive doctrine, and in a situation where the legitimacy of the constitution is made a constant source of controversy not only from the perspective of successive generations but also of contemporary opponents. This tendency reveals the familiarity of the authors of constitutions in the Turkish context with Schmittôs realist considerations.

Indeed such persistence of Schmittian mentality seems to transform the constitution making and changing processes in Turkey into a tradition of friend-enemy distinction. The density of the friend-enemy distinction or the intensity of the language of threat mobilized in order to justify the constitution making process changes from time to time. At this point, I agree with Deveci that Derridaôs term ñhauntologyò is most suitable for explicating the peculiar pattern of Turkish polityôs constitutional development. Contrary to our fore-projection, the mentality of the authors of constitutions does not oscillate between the edges of Schmittôs and Habermasôs considerations. Instead, Schmittôs considerations seem to be relevant to the entire Turkish experience like a spectre which is neither present nor absent, neither dead nor alive. The spectre of Schmitt, in the form of the context-determinacy and friend-enemy distinction in constitutional moments becomes most visible in the making process of 1982 constitution along with the constitutional amendments of 1937 and 1971. On the contrary, it seems to recede to minimum, but still present, during the making of 1961 constitution and in the constitutional amendments of 1995 and 2010. It is surprising that the authors of 1961 constitution tend to conceive constitutional legitimacy in Schmittôs terms, but still the constitution they make is the most progressive constitution committed to universal norms, and the constitutional debates within the House of Representatives are notably dialogical.

In this light, such familiarity with Schmittôs mentality could account for the multitude of constitutional moments since the establishment of the Republic and the persistent efforts of the political actors to change the constitution nowadays. In fact, it is highly questionable whether we could get over such tendency and adopt a dialogical understanding of constitution in the near future or not, particularly during the most recent constitutional debates.

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APPENDIX A

TURKISH SUMMARY

SİYASET KURAMI IŞIĞINDA TÜRKİYE'DE ANAYASA YAPIMI VE DEĞİŞİKLİĞİ SÜREÇLERİ: SCHMITT VE HABERMAS'IN KURAMLARININ BİR UYARLAMASI

Bu çalışmada, Türkiye'de anayasa yapımı ve değişikliği süreçleri, siyaset kuramı çerçevesinde, Habermas ve Schmitt'in anayasa kuramları çerçevesinde incelenmiştir. Tezin birinci bölümünde, Schmitt ve Habermas'ın kuramları; anayasa yapımı ve değişikliği süreçlerinin mekanizması, kurucu iktidar kavramsallaştırması ve bu kavramın demokratik potansiyeli; kurucu bir eylem ve metin olarak anayasa kavramsallaştırması ve anayasa yargısının mekanizması konularıyla ilintili olarak açıklanmaktadır. Tezin ikinci bölümünde, birinci bölümde sunulan kuramsal çerçeve temelinde, Türkiye'de anayasa yapıcılarının erken cumhuriyet döneminden günümüze kadar değişen anayasa ve anayasal mekanizma kavrayışlarına odaklanılmaktadır. Bu bağlamda, anayasa yapıcılarının, Anayasa Komisyonu üyeleri başta olmak üzere genel olarak (kurucu ya da olağan) meclis üyelerinin, anayasayı nasıl kavradıklarını ve anayasa yapımı ile değişikliklerinin mekanizmasını hangi temeller üzerine kurduklarını anlamak amacıyla 1921, 1924, 1961 ve 1982 Anayasalarının yapım süreçleri ile 1923, 1937, 1971, 1995 ve 2010 anayasa değişiklikleri sırasında geçen meclis tartışmaları incelenmiştir.

Türkiye'de, Cumhuriyetin kuruluşundan bu yana üç anayasa ve çok sayıda anayasa değişikliği yapılmıştır. Ancak, sıklıkla anayasa yapma veya değiştirme, anayasanın ve mekanizmasının devamlı surette tartışılmasına ve siyasi gündemin ana konularından biri olmasına engel olamamıştır. Erken cumhuriyet döneminden bu yana, yalnızca anayasal düzenin yasama, yürütme ve yargı organlarının güç ve yetkileri ile bu organlar arasındaki ilişkiler ya da 1961 Anayasası ile kurulan anayasa mahkemesinin

anayasalarda belirlenen güç ve yetkileri değil, bizzat anayasaların ya da anayasal ilkelerin meşruiyeti de farklı açılardan tartışma konusu olmuştur. 1982 Anayasası yürürlüğe girdiği tarihten bu yana bir çok kez değiştirilmiş, özellikle 2000'li yılların başında Avrupa Birliği'ne uyum amacıyla yapılan değişiklikler ile insan hakları ve demokratik hak ve özgürlükler açısından olumlu gelişmeler kaydedilmiştir. Buna rağmen, siyasi aktörler 1982 Anayasasında değişiklik yapılması hatta tamamen yeni bir anayasa yapılması gerektiği yönündeki taleplerini sıklıkla dile getirmeye devam etmektedir. Türkiye'nin içinden geçtiği güncel anayasal kriz ise özellikle önemlidir. Çünkü anayasal demokrasinin en temel konularından birine, Cumhuriyet'in gelecek yönetim biçiminde yapılması istenen değişiklik talebine dairdir. Yeni bir anayasa ya da anayasada değişiklik yapmanın gerçekten gerekli olduğu zamanlar bir kenara konulursa, söz konusu tartışmalar incelendiğinde Türkiye'de ilginç bir bakış açısının oluştuğu söylenebilir. Bu bakış açısına göre, her toplumsal, ekonomik veya siyasi bunalım anayasa krizi ile ilişkilendirilmekte ve bunun akabinde söz konusu problemlerin yeni bir anayasa ile çözüleceği düşünülmektedir.

Öte yandan, Türkiye'deki hukuk ve siyaset bilimi literatürü incelendiğinde, mevcut çalışmaların çoğunlukla ya anayasaların hukuki incelemesine odaklandığına ya da anayasaların dönemsel siyasal, ekonomik ya da toplumsal gelişmeler çerçevesinde (dışsal bir açıdan) ele alındığına şahit olunmaktadır.[544] Elbette söz konusu çalışmalar, Türkiye'nin anayasa tarihinin incelenmesi açısından çok değer taşımaktadır. Ancak, anayasa yapıcılarının bizzat kendilerini ve pratiklerini nasıl anlamlandırdıklarına (*self-*

[544] Hukuk literatüründeki çalışmalar şu şekilde sıralanabilir: Teziç, Erdoğan. (2013). *Anayasa Hukuku*, 16. basım, Beta Yayınları, İstanbul. Tanör, Bülent ve Yüzbaşıoğlu, Necmi. (2013). *1982 Anayasasına Göre Türk Anayasa Hukuku*, 13. basım, Beta Yayınları, İstanbul. Özbudun, Ergun. (2008b). *Türk Anayasa Hukuku*, 9. basım, Yetkin Yayınları, Ankara. Özbudun. (2012). *1924 Anayasası*, İstanbul Bilgi Üniversitesi Yayınları, İstanbul. Özbudun. (2008a). *1921 Anayasası*, Atatürk Kültür, Dil ve Tarih Yüksek Kurumu, Atatürk Araştırma Merkezi, Ankara. Parla, Taha. (2007). *Türkiye'de Anayasalar*, İletişim Yayınları, İstanbul. Bu çalışmalar arasında, Özbudun (2012) ve (2008a) tarihli çalışmalarında birinci ve ikinci Türkiye Büyük Millet Meclislerindeki anayasa tartışmalarına odaklanmaktadır. Ancak Özbudun, Türkiye'de anayasa yapıcılarının anayasayı ve anayasal meşruiyeti nasıl kavramsallaştırdıklarına dair detaylı bir inceleme sunmamaktadır. Siyaset bilimi literatüründe yer alan çalışmalar ise şu şekilde sıralanabilir: Tanör, Bülent. (2012). *Osmanlı-Türk Anayasal Gelişmeleri (1789-1980)*, YKY Yayınları, İstanbul. Özbudun, Ergun. (2011). *The Constitutional System of Turkey: 1876 to the Present*, New York: Palgrave Macmillan. Özbudun, Ergun & Gençkaya, Ömer Faruk. (2010). *Türkiye'de Demokratikleşme ve Anayasa Yapımı Politikası*, Doğan Kitap. Özbudun. (2009). *Türkiye'nin Anayasa Krizi (2007-2009)*, Liberte Yayınları, Ankara.

understanding) ve anayasal meşruiyeti nasıl kurduklarına konusunu cevaplandırılmasına gereken bir soru olarak bırakmaktadır.

Çalışmanın özgünlüğünün ve katkısının bu noktada ortaya çıktığı söylenebilir: Türkiye'de anayasa yapımı ve değişikliği süreçlerinde, anayasa yapıcıların bakış açılarının ve düşüncelerinin siyaset kuramı ışığında, Habermas ve Schmitt'in kuramları çerçevesinde incelenmesi. Schmitt ve Habermas'ın kavramsal çerçeveleri konuya mevcut çalışmalardan farklı, yeni bir bakış açısı ile bakmamızı sağlamaktadır. Türkiye'de anayasaların daha önce ne bu iki kuramcının kavramsal çerçeveleri açısından çalışıldığı ne de meclislerde geçen tartışmalara odaklandığı görülmektedir. Çalışmada, Habermas ve Schmitt'in kuramsal çerçevelerinin tercih edilmesinin sebebi bu figürlerin anayasa ve anayasal meşruiyet tartışmalarında hem bütünlüklü hem de geniş kapsamlı yaklaşımlar sunmalarıdır. Buna ek olarak, Habermas ve Schmitt birbirinden çok farklı, neredeyse iki farklı uçta bulunan, normatif ve realist anayasa ve anayasal meşruiyet kavramsallaştırmaları sunmaktadır. Bu iki farklı kavramsallaştırma, Türkiye'de çeşitli anayasal momentlerde anayasa yapıcıların bakış açılarında ortaya çıkan devamlılık ve kopuklukların saptanması açısından önem taşımaktadır. Çalışmanın bağında, Türkiye'deki anayasa momentlerinde baskın olan bakış açılarının bu iki başlam arasında gidip gelecği düşünülmüştür. Ancak meclis tutanaklarını incelendiğinde çok farklı ve ilginç bir sonuçla karşılaşılmıştır.

Schmitt ve Habermas'ın anayasa ve anayasal meşruiyet kavramsallaştırmaları çok kısaca aşağıdaki gibi özetlenebilir. Schmitt'e göre, modern anayasalar iki temel unsurdan oluşmaktadır.[545] Bunlar, hukukun üstünlüğü ve kuvvetler ayrılığı ilkeleri ile temel hak ve özgürlükleri içeren burjuva Hukuk Devleti (*Rechtsstaat*) unsuru ve devletin tipi ve biçimine ilişkin temel siyasi kararları içeren siyasi unsur (*political component*)'dur. Ancak liberal anayasacılık kuramı ve onun egemen hukuk paradigması olan hukuk pozitivizminin anayasanın bütününü burjuva Hukuk Devleti

[545] Schmitt'in anayasa ve anayasal meşruiyete dair burada yer verilen görüşleri temel olarak *Anayasa Kuramı* eserinde dile getirdiği görüşlere dayanmaktadır. Schmitt, Carl. (2008). Constitutional Theory, derleyen ve çeviren Jeffrey Seitzer, London: Duke University Press.

unsuru ile özdeşleştirmesi, anayasanın siyasi unsurunun görmezden gelinmesine ve zaman içerisinde unutulmasına neden olmuştur. Dahası, bu eşitlik egemenlik kavramının gizemlileştirilmesine yol açmış; sonuç olarak, bazı mercilerin egemen eylemleri doğru bir şekilde ele alınamamıştır.

Schmitt'e göre modern anayasaların sistemli bir incelemesi anayasanın siyasi unsurunu dikkate almalıdır. Schmitt bu bağlamda özgün bir anayasa kavramsallaştırması sunmaktadır. Schmitt'in "pozitif anayasa kavramı" (*positive concept of constitution*), anayasa yapma iktidarının (tasarrufçasının) siyasal birliğin somut varoluş tipine ve biçimine ilişkin vermiş olduğu asli siyasi karara işaret etmektedir. Bu anlamda, anayasa yalnızca devletin yasama, yürütme ve yargı organları arasındaki ilişkileri ve bu organların işleyişlerini tanımlayan saf hukuki (biçimsel) bir niteliğe sahip değildir. Aynı zamanda, siyasi birliğin somut siyasal varoluş tipi ve biçimini tanımlamak suretiyle birliğin geleceğini bağlayan (bu anlamda sabit-değişmez) ve siyasi birliği bir bakıma dost-düşman ayrımı temelinde kuran özsel kararı (*substantial decision*) içeren maddi (*material*) bir mefhumdur. Dahası anayasa, liberal anayasacılık geleneğinde iddia edildiği gibi saf istenci (*pure will*) temsil eden tarafsız (*değer-nötr*) ve kişilerin iradesinden bağımsız (*impersonal*) bir norm ya da idea da değildir. Tersine, belli ideolojileri, değerleri ve tercihleri içermektedir. Anayasa yapma iktidarının, düşmanlarının varoluşsal tehdidi karşısında kendini nasıl tanımladığının ve somut varoluşunda kendini nasıl biçimlendirmek istediğinin bir ifadesidir.

Anayasa Kuramı'nda Schmitt asli siyasi kararın içeriğine dair somut örnekler vermektedir. Buna göre, demokrasi, hukuk devleti, cumhuriyet, kuvvetler ayrılığı ya da birliği veya parlamenter demokrasi ilkesine ilişkin herhangi bir karar asli siyasi karar niteliğindedir ve bu anlamda anayasanın özünü ve hukuk düzeninin temelini (meşruiyet kaynağını) oluşturmaktadır. Dolayısıyla Schmitt'e göre, hukuk devleti ilkesi ya da temel hak ve özgürlükler kataloğu anayasayı anayasa yapan kurucu unsurlar değildir. Bunların anayasada yer almasını, anayasa yapma iktidarının tasarrufçasının bu yöndeki iradesine bağlıdır. Görüldüğü üzere, Schmitt'in bu

yaklaşımı, söz konusu ilkeleri anayasanın evrensel geçerliliğe sahip temel tanımlayıcı unsurları olarak gören liberal anayasacılık kuramının anayasa kavramsallaştırmasından radikal bir sapmaya işaret etmektedir.

Schmitt'in pozitif anayasa kavramı, onun anayasanın ampirik temellerini nasıl açıkladığını ortaya koymaktadır. Bu bağlamda anayasa, hukuk formalizminin ya da hukuk pozitivizminin iddia ettiği gibi kendinden münferit bir evrensel geçerliliğe ve normatif bağlayıcılığa sahip en üst *norm* ya da düzenleyici bir *idea* değildir. Tam tersine, belirli bir somut iradenin ifadesi olduğu ölçüde olgusal bir gerçekliğe sahiptir.

Buna bağlı olarak, Schmitt'in kuramında anayasal meşruiyetin parametreleri "halkın anayasa yapma iktidarı" (*constitution-making power of the people*) formülasyonu çerçevesinde belirlenir. Halkın ya da ulusun devlet otoritesi tarafından güvence altına alınan toplumsal düzen ve güvenlik ortamında birlikte yaşamaya dair ortak bir istence sahip olduğu varsayımı anayasal düzenin tüm yasallığının (*legality*) ve meşruiyetinin temel kaynağını teşkil eder. Schmitt'e göre, halkın anayasa yapma iktidarı daha önceden oluşturulmuş bir yasal prosedür çerçevesinde düzenlenemez. Anayasal düzenin kaynağını teşkil eden halkın kurucu iktidarı, tüm kurulu iktidarın üzerindedir ve aynı zamanda kurulu iktidarla birlikte varlığını sürdürmeye devam eder. Diğer bir deyişle, halk istediği zaman harekete geçebilir ve somut varoluşunda kendine yeni bir biçim verebilir. Schmitt halkı-ulusu biçimsiz biçimlendirici kapasite (*formless formative capacity*) olarak ve halkın egemen kararını da mutlak bir başlangıç olarak nitelendirdiği ölçüde halka-ulusa ilahi bir nitelik atfetmektedir. Öte yandan, Schmitt modern kitle demokrasilerindeki halkı istikrarsız ve örgütsüz bir organ olarak tanımlar. Kendini yalnızca kamusal görüş (*public opinion*) biçiminde ifade edebilen halk, örgütlü bir birlik halinde tavsiyede bulunamaz, tartışamaz veya soru soramaz. Halk yalnızca devletin üst katmanlarınca yöneltilen açık bir şekilde formüle edilmiş sorulara evet veya hayır cevabı verebilir. Sonuç olarak Schmitt'te tanımlanan anayasal düzenin kaynağı olarak "halkın anayasa yapma iktidarı" mantıksal bir varsayımdan öteye gidemez. Ampirik düzlemde, yerini anayasa yapma

momentlerinde baskın olan siyasi aktörlerin keyfi iradesine bırakır. Bu anlamda, Schmitt'in kuramı norm ve istisnaya dair kurucu karar anını ve siyasal olanı (dost-düşman ayrımı) anayasa-yapma ediminin merkezinde yeniden konumlandırır. Devletin kuruluş anı siyasal birliğin bir başka kamusal düşmanın varoluşsal tehdidi karşısında kendini kolektif olarak kurmasıdır.

Schmitt, egemenin norm ve istisnayı tanımlayan siyasi kararına vurgu yapmak suretiyle siyasal olanın toplumsal hayatın tüm alanlarının, özellikle de hukukun kurucu unsuru olduğunu iddia etmektedir. Diğer bir deyişle, Schmitt anayasanın meşruiyetini yasallık ilkesi temelinde değil, siyasal olan temelinde açıklamakta ve anayasa yapma süreci siyasi niteliğinden ötürü kendinden menkul bir meşruluk kazanmaktadır.

Schmitt'in hukuki olanı siyasal olanın aracı/sonucu haline getiren yaklaşımının tersine, Habermas'ın prosedürel demokrasi ve hukukun tartışım kuramı, hukuk ve siyaset arasındaki dengeyi yeniden kurmayı amaçlayan normatif ve sosyolojik bir çalışmadır. Habermas, karmaşık ve çoğulcu toplumların ampirik koşullarına uygun bir normatif hukuk ve demokrasi kuramı inşa etme çabasında, halk egemenliği ilkesini, ahlak kuramının temel kavramı olan tartışma ilkesi (*discourse principle*) çerçevesinde yeniden yorumlamakta ve demokratik anayasal devletin teorik temellerini tanımlamaktadır.[546]

Habermas, hukuk pozitivizmi ve hukuk formalizmi yaklaşımlarından farklı bir yasal geçerlilik (*legal validity*) tanımı ve (hem parlamento ve mahkemeler gibi devlet kurumlarında ve hem de siyasi kamusal alanda) tartışımsal olarak yapılandırılmış siyasi görüş ve istenç oluşturma süreçleri (*discursively structured political opinion and will formation processes*) temelinde meşrulaştırılan pozitif hukuk tanımı

[546] Habermas'ın burada yer verilen görüşleri temel olarak *Between Facts and Norms* adlı çalışmasından faydalanılmak suretiyle özetlenmiştir. Habermas. (1996). *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, çeviren William Rehg, MIT Press, Cambridge, Massachusetts.

sunmaktadır. Habermas hukukun biçimsel özelliklerini ve parlamentonun aldığı kararların yasallığını (*legality*) önemsemektedir. Ancak ona göre yasal geçerlilik (ya da yasaların meşruluğu) yalnızca yasallık temelinde açıklanamaz. Habermas hukukun ilişkisel niteliğini vurgulamak suretiyle ôhakô (*right*) kavramının içerdiği ve güvence altına aldığı karşılıklı tanıma ve eşit muamele unsurlarını gün ışığına çıkarmakta ve böylelikle yasal geçerlilik kavramına normatif bir boyut kazandırmaktadır. Bu normatif boyut, en basit ifadeyle vatandaşların öz yasama eylemini gerektirmektedir: Yasaların meşru olabilmesi için, yasaların muhatapları olarak vatandaşların yasama süreçlerine eşit ve özgür bir biçimde katılmaları gerekmektedir.

Dolayısıyla Habermasôa göre yasaların meşruluğu, ne tek başına pozitif hukukun biçimsel (genel ve soyut yasalar) özelliklerinden ne de hukuk düzeninin hiyerarşik sistematiğinden doğar. Tartışımsal olarak yapılandırılmış siyasi görüş ve istenç oluşturma süreçleri temelinde meşrulaştırılan pozitif hukuk, aynı zamanda siyasi iktidarın meşruiyetinin temelini oluşturur. Bu bağlamda, pratik tartışmalarda tarafsız sonuçlara ulaşılmasını mümkün kılan bir prosedür sunan tartışma ilkesi (yalnızca rasyonel tartışma süreçlerinde tüm katılımcılar tarafından onaylanan bir norm geçerli olarak değerlendirilebilir) pozitif hukukun meşrulaştırılmasında önemli bir rol oynamaktadır. Habermasôa göre, tartışma ilkesinin hukuki olarak kurumsallaştırılmış ve güvence altına alınmış biçimi olan demokrasi ilkesi, siyasi birliğin ortak meselelerine dair herkesin çıkarını eşit derecede sağlayacak çözümlerin üretilmesinde tarafsız bir prosedür sağlamaktadır. Bu prosedüre göre, sadece tartışımsal yasama sürecinde bütün vatandaşların rızasını almış yasalar meşruiyet iddia edebilir.

Bu yasal geçerlilik tanımı, Habermasôın anayasal meşruiyet kavramsallaştırması için de zemin hazırlamaktadır. Habermas, tarihsel olarak ilk anayasanın meşruluğunu iki aşamalı bir prosedür çerçevesinde yeniden inşa etmektedir. Birinci aşama, belirsiz sayıda vatandaşın anayasa yapma pratiğine girişimini mantıksal (hipotetik) başlangıç durumudur. Düşünsel olan bu aşama, siyasi birliğin meşru örgütlenmesinin temel

koşulunun haklar sisteminin (*system of rights*) hukuki olarak kurumsallaşmasına başlığı olduğunu ortaya koyar. Bu aşamada, rasyonel ve ahlaki bireyler (özdüşünümsel olarak) girişimcikleri anayasa-yapma pratiğinin bilincine varır ve birbirlerine karşılıklı haklar verirler. Habermas, vatandaşların birlikte yaşamanın meşru kurallarının ahlaki bir bakış açısıyla belirleyeceğini (Kant'ın monolojik *evrenselleştirme ilkesi* öznelerarası süreçlerde diyalojik hale gelerek *tartışma ilkesi* biçimini alır) düşünmektedir. Dolayısıyla Habermas'ın bu yeniden inşasında anayasa ilkelerinin tanımlanmasında ne saf istenç ne de somut bireylerin keyfi istenci belirleyici güce sahip olmaktadır. Habermas'a göre, ancak bu aşamadan sonra gerçek bir anayasa yapma pratiği oluşabilir ve birinci aşamada oluşturulan haklar sistemi ampirik koşullar ve toplumsal tarihsel değişikenlere göre geliştirilebilir.

Dolayısıyla, Habermas'ın tartışma kuramında, ne Schmitt'in kuramında olduğu gibi hukuk saf olgusallık temelinde açıklanmakta ve siyasi iktidarın aracı haline gelmekte, ne de liberal anayasacılık geleneğinde olduğu gibi hukuk ve siyasal alan birbirine dışsal olarak tanımlanmak suretiyle siyasal alanın yasalarla sınırlandırıldığı bir anlayışa oluşmaktadır.

Habermas'ın anayasal meşruiyetin kuruluşuna dair iki aşamalı prosedürü, demokrasi ile anayasacılığın eş-kökenli (*co-original*) olduğunu ve birbirini gerektirdiğini ortaya koymaktadır. Buna göre, temel haklar, siyasi birliğin öz-yasama (*self-determination*) süreçleri üzerindeki kısıtlamalar değildir. Daha ziyade öz-yasamayı mümkün kılan koşullardır. Görüleceği üzere, anayasacılık ve demokrasinin eş-kökenli olduğunu savunmak suretiyle Habermas Schmitt'in karşısında konumlanmaktadır. Schmitt'in demokrasiyi anayasal yönetimin kuvvetler ayrılığı ve siyasi çoğulculuk gibi ilkelerinden ayrı olarak incelemesine karşılık, Habermas her anayasal bağlamda demokratik bir girişim olarak kavramsallaştırmaktadır. Çünkü ona göre, anayasacılık her şeyden önce tüm vatandaşların birbirine eşit hak ve özgürlükler bahşettiği karşılıklı bir taahhüt fikrini içinde barındırmaktadır.

Bu prosedür, aynı zamanda anayasanın tarihsel ve dinamik kavramsallaştırmasına (*ikili zamansallığına*) işaret etmektedir. Bir yandan, tarihsel bir metin olarak anayasa temel kurucu momentin ifadesidir. Normatif bir bakış açısından ise, kurucu momentin bitmemişliğine, açık uçluluğuna işaret etmektedir. Anayasa, ilk anayasa metnindeki soyut haklar sisteminin her zaman için vatandaşlar tarafından elektirilebileceği, yeniden yorumlanabileceği ve toplumsal-tarihsel gelişmelere ve yeni demokratik taleplere uygun şekilde yeniden formüle edilebileceği bir gelenek inşa etme projesidir (*tradition building project*). Bu kavramsallaştırmada, haklar sistemi gelecek nesillerin anayasa yapıcıları için hukuki yol gösterici ilkeler olarak işlev görmektedir.

Anayasanın dinamik kavramsallaştırması aynı zamanda anayasanın edimsel (*performative*) yönüne de işaret etmektedir. Edimsel anlamda anayasa, vatandaşların rasyonel siyasal istenç oluşturma sürecine dahil oldukları her anda ortaya çıkmakta; diğer bir deyişle, demokratik prosedür, temel kuruluş anının, her seferinde yenilenmesini ve meşrulaştırılmasını sağlamaktadır. Habermas'a göre, "devam eden bir süreç olarak anayasa" (*on-going process of constitution making*) fikri, kurucu babalarla halihazırdaki nesiller arasındaki boşluğun kapanmasını ve gelecek nesillerin kendileri tarafından değil de kendilerinden önceki nesiller tarafından belirlenen kurallar altında yaşamalarından dolayı oluşacak meşruiyet açığının yok olmasını sağlamaktadır. Buna bağlı olarak, Schmitt'in kuramında hukukun ve siyasal olanın meşruiyetinin temellendirilmesinde yalnızca mantıksal bir işlev gören "halkın kurucu iktidarı" nosyonu, Habermas'ın kuramında ampirik bir geçerlilik kazanmakta ve anayasal düzen içerisinde belli bir ölçüde işlev görmeye devam etmektedir.

Özetlemek gerekirse, Schmitt bize anayasa yapma-kurma momentinde olgusal iktidar gruplaşmalarını temelinde inşa edilen bir anayasa ve anayasal meşruiyet kavramsallaştırmasını sunarken, Habermas'ın kuramı rasyonel ve ahlaki bireylerin birbirlerine karşılıklı olarak eşit haklar ve özgürlükler bahşettiği normatif bir anayasa-yapımı edimine işaret etmektedir. Habermas ve Schmitt'in kuramlarının hukuk düzeninin iki temel belirleyicisine açıklık getirdiği söylenebilir. Schmitt'in

kuramında, anayasa yapımı/değişikliği süreçlerinin mekrulaştırılmasında son kertede somut siyasi aktörlerde cisimleşen egemenin, keyfi iradesine dayanan istisna durumuna dair karar ile somut düzenin gereklilikleri etkin rol oynamaktadır. Böyle bir bakış açısı, anayasa ilkelerinin de kısmi değer yargıları olarak anlamlandırılmasına ve böylece görecelileştirilmesine yol açmaktadır. Bu ilkeler kaçınılmaz olarak kısmidirler, çünkü Schmitt için her zaman başlamsaldırlar. Habermas'ın bakış açısına göre ise, anayasa yapımı/değişikliği süreçlerinde belirleyici etken iletişimsel aklın kullanımına dayanan evrensel hak ve demokrasi ilkeleri gibi başlamış olan geçerlilik iddialarıdır (*transcontextual validity claims*). Sonuç olarak anayasa ilkeleri evrensel geçerliliğe sahip normlar olarak -en azından söz konusu siyasi topluluk için geleneksel normları oluşturdukları ölçüde- başlayıcılığa sahip olurlar.

Türkiye'de olağan ve kurucu meclislerin tutanakları, Schmitt ve Habermas'ın kuramsal çerçeveleri temelinde incelendiğinde anayasa ve anayasal meşruiyetin anayasa yapıcılar tarafından nasıl algılandığına dair bir takım sonuçlar ortaya çıkmaktadır. Bu sonuçlar aşağıdaki gibi özetlenebilir.

Türkiye'de anayasa yapıcıların anayasayı Schmitt'in pozitif anayasa kavramsallaştırmasıyla örtüşen bir biçimde tanımladıkları gözlemlenmektedir. Bu çerçevede, anayasa yapma /değiştirme girişimini "halkın anayasa yapma iktidarı" retoriğine başvurmak suretiyle gerekçelendirmeye çalışmakta, anayasanın kurucu iradenin (Mustafa Kemal Atatürk) tercihlerini yansıtan değişmez bir öze sahip olduğunu iddia etmekte, ve bu anlamda anayasanın maddi (siyasi) unsurunu öne çıkartmaktadırlar. Anayasa yapıcıların, anayasa yapma/değiştirme girişimini meşrulaştırmak için "devamlılık" ve bazen de "ilerlemeci" söylemini kullanmak suretiyle doğrudan kurucu iradenin cisimleştiği kurucu momente, yani 1924 anayasasına başvurdukları gözlemlenmektedir. Anayasa yapma/değiştirme girişimlerinin meşrulaştırılması güçleştikçe de devamlılık vurgusunun ve yeni anayasal başlangıçların yol açtığı kopuklukları gizleme çabalarının arttığı gözlemlenmektedir.

Daha spesifik olmak gerekirse, Türkiye'de anayasa yapıcılar anayasayı devletin somut varoluş biçimine ilişkin temel kararların cisimleştiği bir mefhum olarak tanımlamaktadır. Tartışmalardaki hakim düşünce, devletin kurucu momentini temsil eden 1924 anayasasında içerilen siyasi kararların hukuk sisteminin temelini oluşturduğu ve anayasal düzenin değiştirilemez niteliklerini teşkil ettiği idir.

Buna göre, ulusal egemenlik ilkesi anayasanın özünü, tartışmalarda geçtiği şekliyle ruhunu ve felsefesini oluşturan temel unsurdur. Bu ilke istisnasız tüm anayasa yapıcılar tarafından bu şekilde tanımlanmaktadır. Bununla birlikte, farklı anayasal momentlerde etkin olan anayasa yapıcıların bakış açılarına göre başka ilkelerin de anayasanın özüne eklemlendiği görülmektedir. Örneğin, erken Cumhuriyet döneminde (özellikle 1921 Anayasası) kuvvetler birliği ilkesinin ve buna bağlı olarak yasamanın üstünlüğünün anayasanın özünü teşkil ettiği düşünülürken, 1961'den itibaren bu ilkenin yerine kuvvetler ayrılığı (hukuk devleti) ilkesinin geçtiği, ancak ilkenin izleyen dönemlerdeki anayasa yapıcılar tarafından sorunsallaştırıldığı gözlemlenmektedir. Söz konusu ilkenin varlığı ve anayasada belirleniş biçimi, özellikle 1961'i izleyen anayasal momentlerde farklı cenahlardan (sağ ve muhafazakar kesim) gelen anayasa yapıcılar tarafından farklı şekillerde eleştirilmekte ve meşruiyeti sorgulanmaktadır. Kuvvetler ayrılığı ilkesine eleştirel bakan anayasa yapıcıların ortak noktası, bunların hepsinin 1924 Anayasasına ve Mustafa Kemal Atatürk'ün iradesine referans vermeleri ve karşılaşılan siyasi ve toplumsal sorunların sorumlusu olarak ilkenin tanımlandığı 1961 Anayasasını görmeleridir.

Daha detaylı incelendiğinde, birinci ve ikinci Millet Meclislerindeki vekillerin 1921 ve 1924 Anayasalarını metafizik terimlerle, kurucu momentten çok önce birlik halinde var olan Türk ulusunun (milletinin) kurucu bir edimi şeklinde açıkladıklarını gözlemlenmektedir. Bu anlayışa göre, Kurtuluş Savaşı'nda işgalci kuvvetlere karşı verilen mücadele Türk milletinin birlikte yaşamaya dair ortak iradesini ortaya koymaktadır. Türk milletinin otantik özünü de başlangıçsızlık mücadelesi ile ortak tarih ve gelenek varsayımını oluşturmaktadır. Özellikle 1921 tarihli Teşkilat-ı Esasiye

Kanunuyla bakılayan ve 1924 tarihli Teşkilatı Esasiye Kanunuyla sonlanan tarihsel dönem, anayasa yapıcılar tarafından "Türk milletinin siyasi olgunluğa ulaşmasının ya da başka bir deyişle kemale ermesininö birbirini izleyen aşamaları" olarak anlamlandırılmaktadır. Bu anlatıya göre, 1924 tarihli Teşkilat-ı Esasiye Kanunu toplumsal ve siyasal devrimin son aşamasını teşkil etmekte ve devletin düşmanlarına karşı korunması gereken kurucu ilkeleri barındırmaktadır.

1937 yılındaki anayasa değişikliği ile Türkiye'nin anayasa tarihinde tuhaf bir geleneğin başladığına tanık olunmaktadır. Cumhuriyet Halk Partisi (CHP)'nin siyasi ilkelerinin, anayasanın ikinci maddesinde devletin niteliklerini tanımlayacak surette anayasal ilkeler haline getirilmesi ile anayasa Schmittçi anlamda bir dost-düşman ayrımı temelinde tanımlanmaya başlamaktadır. Söz konusu ilkeler (cumhuriyetçilik, devletçilik, milliyetçilik, halkçılık, laiklik ve devrimcilik) dönemin egemen siyasi aktörleri tarafından onaylanan meşru siyasal alanın sınırlarını çizmektedir. Bu anlamda, salt hukuki bir zeminde tanımlanamayacak olan 1937 değişikliği, bu değişikliği yapan vekillere göre devlet yönetiminde o zamana kadar fiilen uygulanmakta olan ilkelerin anayasal ilkeler haline getirilmesinden ibarettir. Buna karşılık, aynı vekillere göre gelecek nesillere devlet yönetiminde yol gösterecek olan bu ilkeler, herhangi bir varoluşsal tehdide karşı korunması gereken anayasanın özünü teşkil etmektedir. Dolayısıyla, 1937 değişikliği ile anayasa, tamamen siyasi unsur çerçevesinde -siyasi rejimin sınırlarını çizen, birliğin parçası olabilecekleri ve Schmitt'in terimi ile söylemek gerekirse dışlanması gereken kamusal düşman(lar)ı (*public enemies*) tanımlayan- kavranmaya başlamaktadır. Ancak Türkiye deneyiminde, kamusal düşmanların Schmitt'in düşüncesindeki gibi başka bir devleti değil, farklı ideolojileri işaret ettiği gözlemlenmektedir.

Anayasanın değiştirilemez bir öze sahip olduğu, bu anlamda siyasi birliğin somut varoluş tipini ve biçimini belirleyen asli siyasi karar olarak algılandığı Schmitt'in pozitif anayasa kavramsallaştırması, 1961 Anayasasının yapım sürecinde farklı bir tezahürle ortaya çıkmaktadır. Anayasa yapma girişimi doğrudan kurucu anayasaya (1924 Anayasası ve *Atatürk ilke ve devrimlerine*) yapılan referanslar (devamlılık)

temelinde meşrulaştırılmaktadır. Bu anlamda halk egemenliği ilkesinin ve *Atatürk devrimlerinin* anayasanın değişmez özü olarak kavrandığı görülmektedir. Buna karşılık komünist ve faşist ideolojilerle *Atatürk devrimlerini* yok etmeye çalışan gerici hareketlerin anayasal düzenin dışında, düşman olarak tanımlanmasında meclis tartışmalarında hakim bir eğilim olarak ortaya çıkmaktadır. 1961 Anayasasını yapan vekillerin (Temsilciler Meclisi üyelerinin bir kısmı), özellikle Anayasa Komisyonu üyelerinin, anayasayı belli siyasi ideolojiler ile toplumsal bölünmelerin yıkıcı etkilerinin kontrol altına alınmasını sağlayacak tarafsız, soyut ve genel normlardan oluşan bir yasal çerçeve (Arendtçi anlamda bir *legal fence*) olarak kavradıkları söylenebilir. Bu anlayış, bilhassa anayasanın devletin niteliğini tanımlayan ikinci maddesine ilişkin tartışmalarda (üçüncü cumhuriyetçi tartışmaları ve anayasaya Türk milliyetçiliğinin bir ilke olarak girmesine yönelik taleplere ilişkin tartışmalar) belirginleşmektedir.

Öte yandan, anayasayı siyasi unsur -siyasi topluluğun birliğinin dost ve düşman ayrımına ilişkin karar temelinde tanımlanması- temelinde tanımlama eğilimi 1982 Anayasası tartışmalarında zirveye ulaşmaktadır. 1982 Anayasasını yapan Danışma Meclisi üyelerinin devlet otoritesini *Atatürkçülük* ideolojisi veya *Atatürk ilkeleri* temelinde yeniden kurmaya/güçlendirmeye yönelik açık çabaları, anayasa yapıcılarını bakış açılarının Schmitt'in anayasa ve anayasal meşruiyet kavramsallaştırması ile örtüştüğü 1937'den sonraki en belirgin doruk noktası olarak tanımlanabilir. Tutanaklar incelendiğinde görüldüğü üzere, 1982 tartışmalarında, anayasa evrensel hak ve özgürlükler ile demokrasi ilkesinin güvence altına alındığı biçimsel bir hukuki metin olmaktan çok öte bir biçimde, siyasi topluluğun birliğini kuran dost/düşman ayrımına ilişkin kararı içeren siyasi bir metin olarak kavramsallaştırılmaktadır. Tüm anayasa metni de bu görüşü yansıtacak biçimde, Schmitt'in terimleriyle devlet hayatının bir ifadesi (*expression of state life)* olarak biçimlendirilmektedir. Danışma Meclisi üyelerinin çoğunluğu açısından anayasa biçimsel bir hukuki belge olmaktan çok daha ötesini, *Atatürk'ün egemen kararını* ve *Atatürkçülük ideolojisini* içeren siyasi (maddi) unsura işaret etmekte ve toplumsal ve siyasi hayatı bütün yönleriyle bu unsura göre şekillendirmenin ve kontrol etmenin temel aracı haline gelmektedir.

Anayasa, ulusu anayasada tanımlanan idealler çerçevesinde dönüştürmenin aracı olarak görüldüğü ölçüde toplumsal dönüşümün temel aracı olmaktadır.

Dahası, 1982 Anayasasını yapanların, devleti temel hak ve özgürlükleri güvence altına alan tarafsız/biçimsel bir hukuki kurum olarak değil de organik bir birlik (*organic unity* ya da *entity*) olarak kavradıkları gözlemlenmektedir. Buna bağlı olarak, anayasa yapıcılar temel hak ve özgürlüklerin kapsamını ve içeriğini yine Schmitt'in terimleriyle devletin kendini koruma hakkı (*state's right of self-preservation)* pahasına tanımlamaktadırlar. Dost/düşman ayrımına ilişkin karar, komünizm, faşizm ve teokrasinin açık bir şekilde, Kürt milliyetçiliğinin ise üstü kapalı bir biçimde anayasal düzenin karşıtı olarak tanımlanmasını içermektedir. Bu anlamda, anayasa yapıcıların anayasayı diyalojik bir prosedür zemininde meşrulaştırmaktan oldukça uzak olduklarını söylenebilir.

Meclislerdeki anayasa tartışmaları, çalışmanın ikinci sorusuna da (anayasa yapıcılar anayasal meşruiyeti hangi temelde kuruyor, pratiklerini hangi temelde gerekçelendiriyorlar?) bir takım cevaplar vermektedir. Tutanaklar incelendiğinde, Schmitt ve Habermas'ın kuramlarında belirginleşen hukuk düzeninin iki belirleyici unsurunun, Türkiye bağlamında anayasa yapıcıların bakış açılarının anlaşılmasını açısından işlevsel hale geldiği görülmektedir.

1921, 1924, 1937, 1971 ve 1982 anayasa momentlerinde anayasa yapımı/değişikliği girişimleri giderek artan bir biçimde somut düzenin gerekliliklerı öne sürülerek gerekçelendirilmektedir. Tüm bu kurucu momentlerde, öne sürülen geçerlilik iddiaları (gerçek ya da tahayyülü) bir istisnai durumun gerekliliklerine, diğer bir deyişle, bağlamsal argümanlara odaklanmaktadır. Yine bu momentlerde "devletin varoluşsal bir tehditle karşı karşıya olduğu" varsayımı zemininde beliren dost/düşman ayrımının, farklı şekillerde ve derecelerde tezahür ettiği, buna paralel olarak da süreç boyunca içerleme/dışlama mantığının vurgulandığı gözlemlenmektedir. Buna karşıtlık, 1961 Anayasasının yapım sürecinin bu kurucu momentlerden farklılaştığı söylenebilir. Meclis tutanakları incelendiğinde, 1961

Anayasasını yapan aktörlerin (özellikle Anayasa Komisyonu üyeleri) anayasa yapım sürecini meşrulaştırmak için başlam-başlamlık (Türkiye'nin kendine özgü koşulları) ile başlamış akan, evrensellik arasında hassas bir denge kurmaya çalıştıkları gözlemlenmektedir. Bu açıdan, yaygın olarak paylaşılan anayasal meşruiyet kavramsallaştırmasından önemli bir sapmayı temsil etmektedir. Öte yandan, "Türk vatanının ve milletininö tehlikede olduğu iddiası ve buna başlıca olarak bazı siyasi ideoloji ve hareketlerin anayasal düzenin karşıtı olarak tanımlanması bu anayasa yapımı sürecinde de karşımıza çıkmaktadır. Başlam-başlamlık (somut düzenin gereklilikleri) ve evrensel ilke ve normlar arasında denge kurma çabasını 1995 anayasa değişikliğini yapan siyasi aktörler için de söylemek mümkündür. Öte yandan, 2010 yılındaki anayasa değişikliğinde, değişikliğin belirleyicisi olan aktörlerin (siyasi iktidarın vekilleri) evrensel geçerlilik iddialarına stratejik amaçlarla başvurduklarını, bazen de başlam başlamlı geçerlilik iddialarını sunduklarını görülmektedir.

Daha spesifik olmak gerekirse, 1921 ve 1924 Anayasalarını yapan vekillerin, meclis kararlarını, milletin tek ve gerçek temsilcileri olduklarını varsayımından hareketle kendinden menkul bir meşruiyete büründürdükleri söylenebilir. 1921 Anayasasına (Teşkilat-ı Esasiye) dair meclis tartışmalarında geçerlilik iddialarını, savaşın yarattığı olağanüstü koşullar (gerçek bir düşmanın varoluşsal tehdidi) ile Meclisin bu koşullardaki varoluş nedenine (devlet ve milletin meşru müdafaası) odaklanmaktadır. Bu başlamda, emperyalist/kapitalist devletler ile onların ülke içerisindeki uzantıları (Ermeniler açık bir şekilde dile getirilmektedir) anayasal düzenin karşıtı/düşmanı olarak tanımlanmaktadır. 1924 Anayasasına dair meclis tartışmalarında ise yeni bir anayasa yapma gerekçesi olarak 1921 tarihli Teşkilat-ı Esasiye Kanununu izleyen yıllardaki anayasal kanunlarla birlikte sistemli bir şekilde derleme ve barış koşullarına uygun hale getirme ihtiyacı vurgulanmaktadır. Meclis tutanakları, rejim konsolide oldukça başlamsal geçerlilik iddialarının anayasa yapma/değiştirme momentlerinde giderek artan şekilde vurgulandığını göstermektedir.

Birinci Meclisteki vekiller anayasa ilkelerini (ulusal egemenlik ilkesi) gerekçelendirmek için rasyonel argümanlara (demokratik yönetim ve halk egemenliği ilkesinin evrenselliğine ve Osmanlı Devleti zamanından bu yana süregelen kötü yönetimin yerine yeni bir yönetim ilkesinin getirilmesinin gerekliliğine) ve "Türk milletininö kültürel gelenekleri/eğilimleri iddialarına başvurmaktadırlar. Ancak 1924 Anayasasına dair meclis tartışmaları başta olmak üzere izleyen anayasal momentlerde, Türk milletinin homojenliği, etik özü ve siyasi farklılığı gibi içe dönük (parochial) argümanların giderek daha fazla gerekçelendirme zemini olarak kullanıldığına şahit olunmaktadır.

İçe dönük ya da bağlam-bağımlı bakış açısı 1937 değişikliğinde daha da güçlü bir şekilde ortaya çıkmaktadır. Meclis tartışmaları, Habermas'ın terimleriyle ifade etmek gerekirse evrensel geçerlilik iddialarından uzaklaşarak, iktidardaki siyasi parti vekillerince benimsenen spesifik ideoloji çerçevesindeki keyfi tercihlere odaklanmaktadır. Anayasa ilkeleri (devletin niteliklerini tanımlayan ikinci madde) *Türk devriminin* özgün karakteri ve siyasi topluluğun tahayyülü etik özüne referansla gerekçelendirilmektedir.

1961 Anayasası tartışmalarına bakıldığında, darbenin ve yeni anayasa girişiminin "Türk milletinin başkıcı yönetime karşı devrim hakkı" temelinde haklılaştırılmaya çalışıldığı gözlemlenmektedir. Bu anlamda, askeri darbe, 1924 Anayasasının bazı hükümlerinin askıya alınması ve yeni bir anayasa yapma görevi için Kurucu Meclis oluşturulması, Schmitt'in terimleriyle halkın anayasa yapma iktidarının yeniden hayata geçmesi/etkin hale gelmesi olarak kavranmaktadır. Bununla birlikte, 1961'de özellikle Temsilciler Meclisi'nde vuku bulan anayasa görüşmelerinin Habermas'ın terimiyle tartışımsal niteliğinin (discursiveness) oldukça yüksek olduğuna tanık olunmaktadır. Görüşmelerde, muhaliflerin Anayasa Komisyonunun ilk bakıştaki önerilerini değiştirebildikleri ve tarafların iddialarını gerekçelendirmek amacıyla rasyonel tartışmalara başvurdukları görülmektedir. Öte yandan, görüşmelerde özellikle Anayasa Komisyonu üyelerinin kendilerinden önceki anayasa yapıcıları tarafından sorunsallaştırılmayan cumhuriyet yönetimi ile demokrasi arasındaki

zorunlu ayrılığı gördüklerine tanık olunmaktadır. 1961 Anayasasını yapanlar, hukuk devleti (kuvvetler ayrılığı) ilkesi ve beraberindeki kurumların demokrasinin iyi bir şekilde işleyişi için vazgeçilmez olduklarını düşünmektedir. Anayasa mahkemesi ve yüksek seçim kurulunun kurulması ve yargı bağımsızlığının güvence altına alınması bakış açısındaki bu değişimin önemli göstergelerindendir.

1961 Anayasasını yapanların bakış açısına göre, anayasa hukuk devleti ilkesine dayalı parlamenter demokrasinin kurumsallaştırılması için bırakılmaz enstrüman olma özelliğine sahiptir. Bu nedenle, anayasada yargı bağımsızlığı ve kuvvetler ayrılığı, anayasa yargısı ve geniş bir haklar ve özgürlükler kataloğu güvence altına alınmaktadır. Sorunlu bazı noktalarına rağmen, yine de 1961 Anayasasının yapım sürecinin Türkiye'nin anayasa tarihinde farklı bir yere sahip olduğunu söylemek mümkündür. Çünkü anayasa yapıcıları, özellikle anayasayı ve anayasa ilkelerini meşrulaştırma çabalarında bağlamsal gereklilikler ile (ülkeye özgü koşullar vurgusu) evrensel hukuk ve demokrasi ilkeleri arasında bir denge kurmaya çalışmaktadır. Örneğin, anayasa ilkelerini çoğunlukla evrensel geçerlilik iddialarına başvurmak suretiyle gerekçelendirmelerine rağmen laiklik ilkesi ve milliyetçilik tartışmalarında Türkiye'nin ıkendine özgü koşullarına öncelik vurgu yapmak suretiyle pragmatik bir tutum sergiledikleri gözlemlenmektedir. Bu anlamda, tartışmalarda hem Schmitt'in ve hem de Habermas'ın anayasal meşruiyet kavramsallaştırmalarına belli ölçülerde başvurdukları görülmektedir.

1971 tarihli anayasa değişikliğinin, 1961 Anayasasının yapımına çok açık bir karşıtlık içerisinde, içerik ve oluşturulma sürecinin biçimi bakımından (daha çok tahayyülü) bir istisnai durum algısına ve somut durumun gerektirdiklerine vurgu yapılmak suretiyle meşrulaştırılmaya çalışıldığı görülmektedir. Anayasa görüşmelerinde, özellikle aşırı sağ ve aşırı sol grupların yarattıkları iç savaş ve kaos ortamında ılımlı ve dış dünyanların tehdidi karşısında devletin varlığının korunması gerekliliği sıklıkla vurgulanmakta ve bu anlamda temel meşruiyet kriteri olmaktadır. Öte yandan, değişikliği gerekçelendirmek amacıyla vekiller, sorunlu bir şekilde (meşru gerekçe göstermeksizin) 1961 Anayasasında benimsenen kuvvetler ayrılığı

ilkesinin düzenleniş biçiminin yürütmeyi (yargı karşısında) zayıflattığını ve bundan dolayı yönetimlerin gerekli önlemleri alamadığını iddia etmektedirler. Bu durum, Schmitt'in kuramının kırılgan noktasını ortaya koymak açısından oldukça önemlidir. Hatırlanacak olursa, Schmitt istisna durumunu devletin varoluşsal bir tehditle karşı karşıya olduğu an ile ilişkilendirmekte ve istisna durumunda egemenin kararının meşruiyetini bu varoluşsal tehdit karşısında anayasal düzeni korumak maksadı zemininde kurmakta idi. 1971 yılındaki anayasa değişikliği, istisna durumunun ve anayasal düzenin dostunun/düşmanının tanımlanmasının tamamiyle süreçte etkin olan siyasi aktörlerin keyfi iradelerince belirlendiğini göstermek açısından önemli takımaktadır. 1971 değişikliği, anayasal meşruiyetin diyalojik temelde kavramsallaştırılmasından kesin bir kopuşa işaret etmektedir.

"Devletin somut varlığına tehdit" vurgusu, dışlama mantığıyla, yani anayasal düzenin düşmanlarının bizzat anayasada tanımlanması ile birlikte işlemektedir. Ulusun siyasi birliği Türk milliyetçiliği ilkesi temelinde ve dolayısıyla homojen bir topluluk tahayyülü üzerinde kurulmaktadır. Bu birliğe tehdit oluşturabilecek herhangi bir unsur, komünist ve sosyalist ideolojiler ile bunların Kürt etnisitesi temelindeki bölgesel farklılaşmaları meşru siyaset alanından dışlanmaktadır. Sınıf temelli siyaset, devletin vatanı ve milletinin birliğine karşı konumlanan kamusal düşman olarak tanımlanmaktadır.

Anayasa yapımı sürecinde başlam-başımlılık ve buna bağlı olarak artan meşrulaştırma gayreti 1982 Anayasası görüşmelerinde zirveye çıkmaktadır. 1971 değişikliğinin çok ötesine geçerek, 1982 Anayasasının içeriği ve oluşturulma süreci, tamamıyla anayasa yapıcıların istisna durumuna ve somut durumun hangi düzenlemelerin yapılmasını gerektirdiğine ilişkin tek taraflı siyasi kararları tarafından belirlendiği söylenebilir. "Otorite ihtiyacı" ve "güçlü devlet" fikri anayasa görüşmelerini yönlendiren temel ana motiftir.

1982 Anayasasını yapan Danışma Meclisi üyeleri yeni anayasa yapımını ve anayasanın hükümlerini somut durumun apaçık gereklilikleri (*self-evident*

requirements) temelinde haklılaştırmaya çalışmaktadır. Meclis üyelerinin ñ12 Eylül öncesi duruma dönmemeò isteği ine güçlü vurgu yaptıkları ve argümanlarını 1961 Anayasasının bazı zamanlarda reddine varan elestirilere yol unlaştırdıkları göze çarpmaktadır. Dahası, anayasa hükümleri tamamen siyasi, ekonomik ve toplumsal koşullar örnek gösterilmek suretiyle belirlenmektedir. Bu bakımdan, 1982 Anayasasını yapanlar, 1961ôde etkin olan figürlerin tersine, ülke koşullarının gerektirdikleri ile evrensel anayasal demokrasi ve haklar sistemi ilkeleri arasında bir denge kurmaya yeltenmemektedirler. 1971 deği iklikli ini yapanlara benzer bir şekilde, ñdevletin varlığının iç ve dış düşmanların tehdidi altında olduğu fikrini sık sık dile getirmektedirler.

Bunlara ek olarak, 1982 Anayasası görüşmelerinin, tartışmacı niteli inin (discursiveness) oldukça düşük olduğ u ve anayasal meşruiyetin diyalojik temelden çok uzak bir biçimde kavramsallaştırıldığı söylenebilir. Görüşmelerde herhangi bir anayasa hükmüne ilişkin geçerlilik iddialarının çoğ unlukla ñAtatürk ilkeleri,ò ya da ñAtatürk milliyetçili i,ò ñTürk Milletinin bünyesi,ò ñmilli kültürò ve ñmilli tarihò gibi unsurlara referansla açıklandığı görülmektedir.

Bu anlatılanlar ışığında, Türkiye baş lamında anayasa görüşmelerinin Schmitt ve Habermasôın anayasa kuramları çerçevesinde incelenmesi, sonuç olarak aşağıdaki şekilde yorumlanabilir:

- Türkiyeôde anayasa çoğ unlukla bir siyasi proje olarak algılanmaktadır. Anayasa momentleri baskın siyasi figürlerin muhaliflerini etkisiz hale getirmek ve anayasal düzeni kendi çıkarlarına uygun şekilde dizayn etmek için uygun bir platform olma özelliği i taşımaktadır. Bu da anayasa metninin kaçınılmaz olarak belli bir ideolojiyi ya da kapsamlı bir doktrini yansıtmasına neden olmaktadır. Türkiyeôde anayasaların ve meşruiyetlerinin hemen hemen her dönemde tartışmalı olması, anayasanın tarafsız/biçimsel bir metin olmaktan ziyade bir öze sahip siyasi bir metin olarak anlaşılıyor olmasından kaynaklanabilir.

- Bu açıdan, Türkiye'de anayasa yapımı/değişikliği süreçlerinde çoğunlukla Schmittçi bir bakış açısının egemen olduğu ve bu süreçlerin bir dost/düşman ayrımı yapma geleneğine dönüştüğü söylenebilir. Dost/düşman ayrımının belirginliği ve devletin varlığına tehdit içeren iç ve dış düşmanlar argümanı, çalışmada incelenen anayasa momentleri içinde farklı şekillerde ve derecelerde tezahür etmektedir. Bağlam-bağımlı geçerlilik iddialarıyle dost/düşman ayrımının en çok 1982 Anayasasıile 1937 ve 1971 değişikliği görüşmelerinde belirginleşmektedir. 1961 Anayasası ile 1995 ve 2010 değişikliği görüşmelerinde ise hala varlığını sürdürmeye devam etmekle birlikte minimum düzeye indiği söylenebilir. Öte yandan, 1961 Anayasasını yapan aktörlerin Schmittçi bir anayasal meşruiyet kavramsallaştırmasına yaslanmaları, özellikle 1961 Anayasasının Türkiye'de evrensel normlara uygun olarak şimdiye kadar yapılmış en ilerici anayasa olduğu gerçeği ve Temsilciler Meclisindeki tartışmaların diğer anayasa momentlerindeki tartışmalara kıyasla çok daha fazla diyalojik olduğu gerçeği göz önünde bulundurulduğunda ilginç bir bulgu olarak karşımıza çıkmaktadır.

APPENDIX B

CURRICULUM VITAE

PERSONAL INFORMATION

Surname, Name: Güvenç Akçaoĵlu, Müge Hayriye
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EDUCATION

Degree	Institution	Year of Graduation
MS	METU, European Studies	2007
BS	Hacettepe University, Business Administration	2004
High School	Ayrancē Super High School, Ankara	2000

WORK EXPERIENCE

Year	Place	Enrollment
2005- Present	Ministry of Finance of Turkey	European Union Expert

FOREIGN LANGUAGES

Advanced English, Intermediate Italian, Beginner French

PUBLICATIONS

1. Güvenç, Müge H., ñAB Bütçesinin Finansmanē Öz Kaynaklar Sistemi,ò *Maliye Dergisi*, Sayē158, Ocak-Haziran 2010, (513-530).

2. Güvenç, Müge H., ñAvrupa Birliĵi Bütçesi: 2014-2020 Yēlarēna Ķsa Bakkin Çok Yēlē Mali Çerçeve,ò *Maliye Dergisi*, Sayē165, Temmuz-Aralēk 2013, (259-274).

HOBBIES

Travel, Movies, Philosophy, Swimming.

APPENDIX C

TEZ FOTOKOPİSİ İZİN FORMU

ENSTİTÜ

Fen Bilimleri Enstitüsü	☐
Sosyal Bilimler Enstitüsü	X
Uygulamalı Matematik Enstitüsü	☐
Enformatik Enstitüsü	☐
Deniz Bilimleri Enstitüsü	☐

YAZARIN

Soyadı: Güvenç Akçaoğlu
Adı : Müge Hayriye
Bölümü : Siyaset Bilimi ve Kamu Yönetimi

TEZİN ADI (İngilizce) : "Political Theoretical Reading of Constitution Making and Constitutional Change Processes in Turkey in the Framework of Schmitt's and Habermas's Theories"

TEZİN TÜRÜ : Yüksek Lisans ☐ Doktora X

1. Tezimin tamamından kaynak gösterilmek şartıyla fotokopi alınabilir. ☐

2. Tezimin içindekiler sayfası, özet, indeks sayfalarından ve/veya bir bölümünden kaynak gösterilmek şartıyla fotokopi alınabilir. ☐

3. Tezimden bir (1) yıl süreyle fotokopi alınamaz. X

TEZİN KÜTÜPHANEYE TESLİM TARİHİ