

**OFFICIAL DISCOURSE AND POLITICAL RIGHTS:
A CRITICAL ANALYSIS OF
THE TURKISH CONSTITUTIONAL SYSTEM**

**Thesis submitted for the degree of Doctor of Philosophy
at the University of Leicester**

by

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ABSTRACT

Title: Official Discourse and Political Rights: A Critical Analysis of the Turkish Constitutional System.

by Zühtü Arslan

This dissertation is about the political rights in the Turkish Constitutional system. It critically analyses the Turkish Constitution and the case-law of the Constitutional Court concerning the political rights. In this analysis, I will use a liberal framework which is based on the constitutional principles of political neutrality and the rule of law. These liberal principles provide the necessary setting in which the political rights are protected.

It is widely believed that the official ideology of Turkish Constitution has much in common with liberal ideas, and indeed it aimed at establishing a liberal democracy. My study refutes this argument. The main argument of this thesis, on the contrary, is that the official ideology of the Turkish Constitution, namely Kemalism, is not compatible with the liberal principles of political neutrality and the rule of law. As such Kemalism, together with the strong state tradition in Turkish political culture, constitutes the most serious obstacle to the protection of liberal political rights.

The dissertation consists of two parts. While Part I sets out the theoretical framework of political rights, Part II tries to analyse the Turkish Constitution in the light both of this theoretical background and of Kemalist principles. A particular chapter in the second part is devoted to the critical evaluation of the decisions given by the Turkish Constitutional Court. It is argued that the Court's approach to political rights is determined by the official ideology of the Constitution. In other words, it is an ideology-based, not a rights-based, approach.

This study concludes that the Turkish Constitutional system has to undergo some institutional and structural changes, and radical paradigm shifts in order to remove the obstacles to the implementation of political rights. The Court in particular must adopt the rights-based approach to political rights. At the heart of all these changes and paradigm shifts, I argue, lies the self-awareness and authenticity which may be achieved through a journey to selfhood.

STATEMENT

The work described in this thesis has been carried out by the author in the Faculty of Law at the University of Leicester, between October 1991 and July 1996. The work has not been submitted for any other degree at this or any other university.

Signed: *Z. Aslan*

Date: *25.11.1996*

for Hülya

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INTRODUCTION

This study purports to critically analyse the development of political rights in the Turkish constitutional system. This analysis will be carried out in the light of a liberal model of political rights which is set out in Part I of the study. Political rights are used in its broader sense as the rights against the state. They are inspired from the celebrated assertion that '[i]ndividuals have rights, and there are things no person or group may do to them (without violating their rights). So strong and far-reaching are these rights that they raise the question of what, if anything, the state and its officials may do.'¹ Political rights in this sense are part of human rights² about which a few remarks will be in order.

Human Rights: For and Against

The idea of human rights has become, as Jeremy Waldron put it, 'the new criterion of political legitimacy'.³ It is seen as a 'discourse that legitimises and deligitimises power'.⁴ The fulfilment of human rights has become, in the words of John Rawls, 'a necessary condition of a regime's legitimacy'.⁵ This development can be traced, at historical level, to the French Declaration of the Rights of Man. Article 2 of the French Declaration states that 'the end in view of every political association is the preservation of the natural and imprescriptible rights of man'.⁶

The doctrine of natural or human rights⁷ as formulated by the French Declaration has been criticised by many theorists from the various angles of

¹ R.Nozick, *Anarchy, State, and Utopia*, Oxford: Basil Blackwell, 1974, p.ix.

² M.Freeden, *Rights*, Milton Keynes: Open University Press, 1991, p.6.

³ J.Waldron (ed.), *Nonsense Upon Stilts: Bentham, Burke, and Marx on the Rights of Man*, London and New York: Methuen, 1987, p.1.

⁴ R.Gaete, 'Postmodernism and Human Rights: Some Insidious Questions', *Law and Critique*, 2/2 (1991): 149-170, at p.169.

⁵ J.Rawls, 'The Laws of Peoples', *Critical Inquiry*, 20/1 (Autumn 1993): 36-68, at 59.

⁶ Declaration of the Rights of Man and the Citizen, French National Assembly, 27 August 1789, Article II. Cited in T.Paine, *Rights of Man*, Harmondsworth: Penguin Books, 1969, p.132.

⁷ For the sake of argument I use the terms 'natural rights', 'Rights of Man', and 'human rights' interchangeably, although they have different connotations in content. The term

political spectrum. Even some liberal philosophers, as well as conservatives and socialists, have severely challenged the idea of human rights. Examples of such critiques are to be found in the work of Bentham, Burke, and Marx.⁸ In his essay 'Anarchical Fallacies', Bentham attacked the view that the object of all governments is 'the preservation of the natural and imprescriptible rights of man'. 'Natural rights', he declared, 'is simple nonsense: natural and imprescriptible rights, rhetorical nonsense,- nonsense upon stilts.'⁹ For him, they are 'the mortal enemies of law, the subverters of government, and the assassins of security'.¹⁰ By the term 'rights' Bentham always understood 'legal rights', nothing else. He makes it clear that 'to me a right and a legal right are the same thing, for I know no other'.¹¹ He goes on to argue that there is a correlative relation between right and law resembling that of father and son. He maintains that:

'natural rights' was eventually replaced by the term 'human rights', i.e., what today called human rights were once called natural rights which was to be linked to natural law. (M. Cranston, 'What are Human Rights', in W. Laqueur & B. Rubin (eds.), *Human Rights Reader*, New York: New American Library, 1979, p.17.) It may be said however that the term 'human rights' is more extensive than the term 'natural rights'. First of all, natural rights are claimed to be valid for all time in the sense that new natural rights may never emerge. New human rights, on the contrary, may come into being over time. This may happen simply because changed circumstances make possible the protection of or advancement of interests, as of right, that could previously not be given this status. Secondly, whereas natural rights are commonly said to be absolute, not subject to exception, human rights are not normally so defined. See J. R. Pennock, 'Rights, Natural Rights and Human Rights: A General View', J.R.Pennock and J.W.Chapman (eds.), *Human Rights: Nomos XXIII*, New York: New York University Press, 1981, p.7. For a useful discussion on the distinctive features of contemporary conception of human rights see also J. W. Nickel, *Making Sense of Human Rights*, Berkeley: University of California Press, 1987, pp.6-12.

⁸ See J.Bentham, 'Anarchical Fallacies', in Waldron (ed.), *Nonsense upon stilts*, pp.46-69; E.Burke, *Reflections on the Revolution in France*, Harmondsworth: Penguin Books, 1968; K.Marx, 'On the Jewish Question', in D.McLellan (ed.), *Karl Marx: Selected Writings*, Oxford: Oxford University Press, 1971.

⁹ J.Bentham, 'Anarchical Fallacies', p.53.

¹⁰ *Ibid.*, p.69.

¹¹ See J. Bentham, 'Supply Without Burthen or Escheat Vice Taxation', in Waldron (ed.), *Nonsense upon Stilts*, p.73.

Right is with me the child of law: from different operations of the law result different sorts of rights. A natural right is a son that never had a father.¹²

Burke as a conservative also objected to the idea of Rights of Man because it stimulated revolutionary sentiments in the common people leading to 'inexpiable war with all establishments'.¹³ For Burke, the 'pretended rights of men' is nothing but 'metaphysical abstraction' defying circumstantial evaluation.¹⁴ He declared that :

Circumstances (which with some gentlemen pass for nothing) give in reality to every political principle its distinguishing colour, and discriminating effect. The circumstances are what render every civil and political scheme beneficial or noxious to mankind.¹⁵

Thus Burke charged the theorists of rights with 'considering their speculative designs as of infinite value, and the actual arrangement of the state of no estimation.'¹⁶

Burke's criticism of human rights appears to rest upon his understanding of society. He argues that society is a contract,¹⁷ and the resolution of society into its constituent parts, whatever its individual advantages, violates this contract.¹⁸ For this contract is a 'partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born.'¹⁹ The 'eternal society'²⁰ that was established through

¹² *Ibid.* Bentham raised this point in *Anarchical Fallacies* as well. He declares that 'right is the child of law: from real laws come real rights; but from imaginary laws, from laws of nature,... come imaginary rights.' See Bentham, 'Anarchical Fallacies', p.69.

¹³ See Burke, *Reflections on the Revolution in France*, p.184.

¹⁴ *Ibid.*, p.90. Cf. D.G. Ritchie, *Natural Rights: A Criticism of Some Political and Ethical Conceptions*, London: Allen and Unwin, 1984, p.ix.

¹⁵ Burke, *Reflections on the Revolution in France*, p.90.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, p.194.

¹⁸ See Waldron, *Nonsense upon Stilts*, p.95.

¹⁹ Burke, *Reflections*., pp.194-195.

²⁰ Burke rhetorically declared that 'each contract of each particular state is but a clause in the great primeval contract of eternal society, linking the lower with the higher natures, connecting the visible and invisible world, according to a fixed compact sanctioned by the

the great contract is considered by Burke to be superior to and above the people who make it.²¹

When the Rights of Man are viewed, Burke argued, as independent of custom and tradition which are the essence of the eternal society, they become dangerous. No government or society is secure against such rights.²² Burke indeed sees these rights as destructive and dangerous. He says that '[a]gainst these [the rights of men] there can be no prescription; against these no agreement is binding ; these admit no temperament, and no compromise: any thing withheld from their full demand is so much of fraud and injustice'.²³ 'Against these their rights of men', he continues to warn, 'let no government look for security in the length of its continuance, or in the justice and lenity of its administration.' ²⁴

It is however worth noting that while Burke attacked the 'pretended rights of men' he nevertheless did not deny what he calls the 'real rights of men'.²⁵ In his view, rights are to be settled by convention which creates constitutional power of legislature , judiciary and executive.²⁶ This implies, some argue, that Burke was opposed to only some absolute interpretation of natural rights.²⁷ To put it another way, he clearly rejected the claim that there are natural rights in the sense that the French Revolutionaries proclaimed them. He did so, because these rights are independent of the

inviolable oath which holds all physical and all moral natures, each in their appointed place.' *Ibid.*

²¹ *Ibid.*, p.195.

²² See *ibid.*, pp.148-149.

²³ *Ibid.*, p.148.

²⁴ *Ibid.*, p.149.

²⁵ *Ibid.*

²⁶ *Ibid.*, p.150.

²⁷ See for example R.Kirk, *The Conservative Mind*, 7th Edition, Chicago:Regnery Books, 1986, p.22. Kirk goes even further when he claims that Burke accepted natural rights, and spoke of them on a number of occasions. He quoted Burke as saying that 'a conservation and secure enjoyment of our natural rights is the great and ultimate purpose of civil society.' Cited in R Kirk, 'Burke and Natural Rights', *The Review of Politics* , 13 (1951), at 444. See also M. F. X. Millar, 'Burke and the Moral Basis of Political Liberty', *Thought*, 16 (1941):79-101, at.98.

society, its history and character. Such rights, Burke concluded, do not exist.²⁸ On the other hand, if these rights are embedded in customs, traditions and social forms, they seem to be acceptable to Burke. Yet such an acceptance, as Brenkert put it, 'modifies not only the independence of these rights but also the liberal view that they attach simply to individuals.'²⁹

Karl Marx joined Burke in rejecting the rights of men, even though he described him as a 'sycophant' and 'vulgar bourgeois'.³⁰ Marx's criticism of 'the so-called rights of man' was grounded on their bourgeois contents. 'None of the supposed rights of man', he asserted, 'goes beyond the egoistic man... an individual withdrawn behind his private interests and whims and separated from the community.'³¹

Marx's critique, in his essay '*On the Jewish Question*', is of the idea of political emancipation of man. Political emancipation as distinct from human emancipation is 'the reduction of man, on the one hand to a member of civil society, an egoistic and independent individual, on the other hand to a citizen, a moral person.'³² According to Marx, this leads man, in the bourgeois state, to a double life, a life in the political community and one in civil society. Man is valued as 'a communal being' in the former, whereas in the latter he is active as 'a private individual' treating other men as means,

²⁸ Burke, *Reflections*, p.44.

²⁹ See G.G. Brenkert, *Political Freedom*, London:Routledge, 1991, p.57.

³⁰ The role of *Reflections on the Revolution in France* in earning Burke a pension in his retirement led some people to believe that he had 'sold-out'. Marx, among others, accused Burke of selling himself 'in the best market'. In *Capital*, Marx stated that: 'Burke was a sycophant who, in the pay of the English oligarchy, played the romanticist against the French Revolution, just as, in the pay of the North American colonies, at the outset of the American troubles he had played the liberal against the English oligarchy. To the very narrow he was a commonplace bourgeois.' See K Marx, *Capital*, Vol. II, trans. by Eden and Cedar Paul, London:Everyman Library, 1930, p.843.

³¹ K Marx, 'On the Jewish Question', in D. McLellan (ed.), *Karl Marx: Selected Writings*, Oxford: Oxford University Press, 1971, p.54.

³² *Ibid.*, p.57.

and degrading himself to a means.³³ This duality created somewhat 'absolute enslavement', not a true emancipation.³⁴ 'The *recognition of the rights of man* by the *modern State*', asserted Marx, 'has only the same significance as the *recognition of slavery* by the *State in antiquity*.'³⁵

True emancipation, Marx argues, could only be achieved by people taking control of the material conditions of their lives.³⁶ This proposal involves the unity of individual and society. In the words of Marx 'man must recognise his own forces as social forces, organise them, and thus no longer separate social forces from himself in the form of political forces.'³⁷ To sum up, Marx attacked human rights because he believed they represented a false view of human nature, as selfish, egoist, and of the social structure, as consisting of isolated monads separated from the community.³⁸

³³ *Ibid.*, p.46. For a comment on Marx's critique of bourgeois 'double life' see also J Charvet, 'A Critique of Human Rights', in J.R.Pennock and J.W.Chapman (eds.), *Human Rights:Nomos XXIII*, New York: New York University Press, 1981, pp.44-45.

³⁴ K. Marx, 'The Holy Family', (1845) in T.B. Bottomore and M.Rubel (eds.), *Karl Marx: Selected Writings in Sociology and Social Philosophy*, Harmondsworth: Penguin, 1963, p.225.

³⁵ *Ibid.*, p.224. (Emphasis in original)

³⁶ It appears that, on that point, Marx turned Hegelian philosophy upside-down. Hegel himself was sceptical about human rights regarding them as 'empty abstraction'. He argued that a social order founded on such abstractions will be unable to secure human freedom. There must be 'a well-constituted ethical life', which will remedy the 'principle of atomicity'. Though Marx concurred with Hegel on the question of atomicity, he nevertheless rejected Hegel's solution to the problem. Marx believed that the real obstacle to human emancipation was poverty and exploitation rather than the lack of ethics. See A. Wood, 'Introduction' to *Hegel's Elements of Philosophy of Right*, trans. by H B Nisbet, Cambridge: Cambridge University Press, 1991, pp.xvi-xvii. See also J Waldron, *Nonsense upon Stilts*, p.122; J. Plamenatz, *Man and Society, Vol.III: Hegel, Marx and Engels, and the Idea of Progress*, London: Longman, 1992, pp.89-90.

³⁷ Marx, 'On Jewish Question', p.57.

³⁸ See K Marx, 'Critique of the Gotha Programme', in *K Marx and F Engels : Selected Works*, in one volume, London: Lawrence and Wishart, 1968, p.324.

Partly due to the influence of these criticisms by Bentham, Burke, and Marx the idea of human rights suffered a decline in the nineteenth century.³⁹ Yet the present century has witnessed a revival of this idea. The reasons for this revival are two folds. First, the maltreatment of human beings by totalitarian governments during the second quarter of the twentieth century has brought about a popular and eventually political demand for the protection of basic rights.⁴⁰ Second, further development of democratic doctrine through the extension of the ideal of equality found its expression not only in the national constitutions but also in the Universal Declaration of Human Rights.⁴¹

The revival and popularity of human rights has by no means ruled out the necessity and quest for a philosophical foundation for them. Professor Hart makes this clear in his article '*Between Utility and Rights*'.⁴² He argues that political philosophy has, for much of this century, been based on a 'widely accepted old faith that some form of utilitarianism, if only we could discover the right form, must capture the essence of political morality.'⁴³ According to Hart, however, this old faith is finally being replaced by a 'new faith' which is 'that the truth must lie not with a doctrine that takes the maximisation of aggregate or average general welfare for its goal, but with a doctrine of basic human rights, protecting specific basic liberties and interests of individuals, if only we could find some sufficiently firm foundation for such rights to meet some long familiar objections.'⁴⁴ For a long time, rights theorists have tried to develop many arguments in defence

³⁹ See K.Minogue, 'The History of the Idea of Human Rights', in Laquer and Rubin (eds.), *Human Rights Reader*, p.18. See also M.N.Shaw, *International Law*, Second Edition, Cambridge: Gratus Publications, 1986, p.117.

⁴⁰ Minogue, 'The History of the Idea of Human Rights', p.19.

⁴¹ See J.R.Pennock, 'Rights, Natural Rights, and Human Rights: A General View', in Pennock and Chapman (eds), *Human Rights: Nomos XXIII*, p.4.

⁴² H.L.A.Hart, 'Between Utility and Rights', in M.Cohen, (ed.), *Ronald Dworkin and Contemporary Jurisprudence*, London: Duckworth, 1983.

⁴³ *Ibid.*, p.214.

⁴⁴ *Ibid.*

of this 'new faith'.⁴⁵ Indeed, to find firm foundations for individual rights is much more difficult than to claim that we have human rights. 'Although everyone proclaims the sanctity of "freedom" and "human rights"', says Masters, 'the foundations of these principles are unclear'.⁴⁶ Even some prominent rights theorists acknowledge this fact. M. Freedman, for example, emphasises that 'it is impossible to prove conclusively that human beings have rights in the existential or moral senses'.⁴⁷ Dworkin also concedes that there is a difficulty in demonstrating the existence of human rights.⁴⁸

Like in most moral issues of our time, two broad theoretical positions may be discerned with respect to the foundation of human rights. On the one hand, there are those 'foundationalists' who attempt to ground the rights on such ideals as equality,⁴⁹ rationality⁵⁰, and autonomy⁵¹. They argue that since human beings are equal, rational, and autonomous moral agents they are entitled to certain rights and liberties to realise these fundamental values. The so-called 'anti-foundationalists', on the other hand, reject any foundational explanation for the ethical or political norms. Some of these

⁴⁵ For an overview of these arguments see J.J. Shestack, 'The Jurisprudence of Human Rights', in T. Meron (ed.), *Human Rights in International Law: Legal and Policy Issues*, Oxford: Clarendon Press, 1984, pp. 65-113.

⁴⁶ R.D. Masters, 'The Problem of Justice in Contemporary Legal Thought', in R.D. Masters and M. Gruter (eds.), *The Sense of Justice*, London and New Delhi: Sage Publications, 1992, p. 5.

⁴⁷ See Freedman, *Rights*, p. 28.

⁴⁸ See R. Dworkin, *Taking Rights Seriously*, London: Duckworth, 1977, p. 81.

⁴⁹ See, e.g., R. Wasserstrom, 'Rights, Human Rights, and Racial Discrimination', *The Journal of Philosophy*, 61/20 (October, 1964): 628-641, and G. Vlastos, 'Justice and Equality', in J. Waldron (ed.), *Theories of Rights*, Oxford: Oxford University Press, 1990, pp. 41-77. Originally printed in R. Brandt (ed.), *Social Justice*, New Jersey: Englewood Cliffs, 1962, pp. 31-72. For a criticism and refutation of Vlastos' arguments see K. Nielsen, 'Scepticism and Human Rights', *The Monist*, 52 (1968): 573-594.

⁵⁰ See, for instance, T. Machan, 'Towards a Theory of Individual Human Rights', *The New Scholasticism*, 51/1 (Winter, 1987), p. 43, and A. Rand, *Capitalism: The Unknown Ideal*, New York: Signet Books, 1967, p. 18, and 320-328.

⁵¹ See A. Ingram, *A Political Theory of Rights*, Oxford: Clarendon Press, 1994.

theorists deny the existence of human rights,⁵² others recognise the necessity of the rights provided that they will not be grounded on transcendental and metaphysical grounds.⁵³

Human rights are the off-spring of modernity.⁵⁴ They are one of the truth claims or 'grand narratives' of the Enlightenment.⁵⁵ They are typical examples of modernity's man-centered vision. As Bassam Tibi points out, 'human rights law is a product of the cultural project of modernity. It has been a product of establishing the principle of subjectivity, i.e. of a man-centered view of the world and of the related legal underpinning which is part and parcel of modernity'.⁵⁶

This subjectivist view of human rights is severely criticised and rejected by communitarians and postmodernists alike. They argued that the liberal conception of the self as autonomous moral agent is merely an abstraction, and even an illusion. For Lyotard, 'human beings are never the authors of what they tell, that is, of what they do'.⁵⁷ They celebrated 'the end of man' and indeed end of all 'foundations' (grunds) with special emphasis to cultural relativism and contextuality.⁵⁸ I will not directly take a side in this all-out war waged against the autonomous self, even though it appears to be 'a grand Either/or choice'.⁵⁹ In other words, it is not my intention here to develop or defend a particular rational ethical argument for the idea that

⁵² See J.O.Nelson, 'Against Human Rights', *Philosophy*, 65(1990): 341-348, at 347, A.Quinton, *The Politics of Imperfection*, London: Faber, 1978, p.61, and A. MacIntyre, *After Virtue*, London: Duckworth, 1981, p.67: 'the truth is plain: there are no such rights, and belief in them is one with belief in witches and in unicorns.'

⁵³ See, for example, R.Rorty, 'Human Rights, Rationality, and Sentimentality', in S.Shute and S.Hurley (eds.), *On Human Rights*, New York: Basic Books, 1993.

⁵⁴ R.Gaete, *Human Rights and the Limits of Critical Reason*, Aldershot: Dartmouth, 1993, p.1.

⁵⁵ *Ibid.*

⁵⁶ B. Tibi, 'Islam and Individual Human Rights', *Universitas*, 35/1(1993):17-26, at 25. See also M.Erdogan, 'Insan Haklari Nedir?', *Polemik* 12 (March-April 1994):3-5, at 3.

⁵⁷ J-F. Lyotard, *Just Gaming*, Manchester: Manchester University Press, 1985, p.36.

⁵⁸ We shall take up the communitarian and postmodernist critique of liberal self as the bearer of rights in the Chapter 4 below.

⁵⁹ See R.J.Bernstein, *The New Constellation: The Ethical -Political Horizons of Modernity/Postmodernity*, London: Polity Press, 1991, pp.7-8.

individuals have rights against the state. Nor is it my intention at all to take sides with those who argue that human rights are nothing but nonsense phantoms, or in Baudrillard's words, one of the 'soft, easy, *post coitum historicum* ideologies'.⁶⁰ Nevertheless, I have personal 'incredulity' towards postmodernist refutation of the subject. This 'incredulity' is visible in Chapter 4 which takes up the criticism of the liberal conceptions of the self and community. It will be argued however that both liberals and their challengers agree on, albeit in different premises, the necessity of a plural and tolerant framework in which individuals will live without trying to kill each other. This framework is in fact an indispensable part and parcel of the liberal democracies. In Levine's words: 'liberal democratic theory presupposes a historically and conceptually distinctive framework of moral and political notions, centered around particular concepts of freedom and individual interest, and that these core concepts rest ultimately, on a very particular- and vulnerable- notion of practical reason or (if we adopt the point of the agent) rational agency'.⁶¹ Thus my main concern throughout the Part I of the study is to set out some constitutional principles of this 'distinctive framework' to develop the political rights. This theoretical section is devoted to the constitutional principles of rule of law, and political neutrality which constrain the absolute power of the state.

Whatever the merits of postmodern arguments, the postmodernists, like Bauman and Lyotard, emphasise the significance of human rights, albeit on a different 'ground'.⁶² Lyotard states that:

A human being has rights only if he is other than a human being. And if he is to be other than *a* human being, he must in addition become an *other* human being.⁶³

More importantly, perhaps with the influence of the communitarian and postmodern critique of metaphysical grounds for the ethical and political claims, some liberal rights theorists such as Ronald Dworkin⁶⁴ and John Rawls seem to adopt a some kind of 'apologetic' attitude towards the

⁶⁰ J. Baudrillard, *Cool Memories*, London: Verso, 1990, p.223.

⁶¹ A. Levine, *Liberal Democracy: A Critique of Its Theory*, New York: Columbia University Press, 1981, p.6.

⁶² See Z. Bauman, *The Postmodern Ethics*, Oxford: Blackwell, 1993, p.4.

⁶³ J.-F. Lyotard, 'The Other's Rights', in Shute and Hurley (eds.), *On Human Rights*, p.136.

⁶⁴ See Dworkin, *Taking Rights Seriously*, p.xi.

theoretical foundation of the rights. They, in a word, refuse to play the traditional role of moral magician by plucking ethical claims out of a metaphysical hat.⁶⁵ In a recent essay, Rawls made it clear that:

These [human] rights do not depend on any particular comprehensive moral doctrine or philosophical conception of human nature, such as, for example that human beings are moral persons and have equal worth or that they have certain particular moral and intellectual powers that entitle them to these rights. To show this would require a quite deep philosophical theory that many if not most hierarchical societies might reject as liberal or democratic or else as in some way distinctive of Western political tradition and prejudicial to other countries.⁶⁶

This passage implies that in fact the idea of human rights is a product of western liberal tradition, but in order to make it universally applicable we must refrain from any theoretical attempt to reveal this fact. Let's pretend that human rights are simply there. They do not need any moral or philosophical ground for justification. This pragmatic view of human rights is also shared by some postmodernists like Rorty.⁶⁷ Leaving aside the question of whether Rawls' theory of rights is in fact based on a priori conception of the self as a rational and autonomous being⁶⁸, we can move on to the relation of rights with liberal political tradition.

Human Rights, Liberalism, and Universality

There is no doubt that universality is one of the constitutive tenets of human rights. The term human rights suggests 'the rights of all human beings anywhere and anytime'.⁶⁹ In other words, they are, by definition,

⁶⁵ See, e.g., *ibid.*

⁶⁶ J. Rawls, 'The Law of Peoples', in Shute and Hurley (eds.), *On Human Rights*, pp.56-57.

⁶⁷ See Rorty, 'Human Rights, Rationality, and Sentimentality', in Shute and Hurley (eds.), *On Human Rights*, pp.112-134.

⁶⁸ For an affirmative response to this question, see A. Baron, 'Lyotard and the Problem of Justice', in A. Benjamin (ed.), *Judging Lyotard*, London and New York: Routledge, 1992, pp.28-29.

⁶⁹ L. Henkin, 'The Universality of the Concept of Human Rights', *The Annals*, 506(November, 1989):10-16, at 11.

rights that belong to all men.⁷⁰ This stems from the suggestion that there are or ought to be some moral principles common to all individuals.⁷¹ Moral principles, however, are not only factor affecting individuals, let alone their disputable position as the foundation of universal human rights. Human beings are also guided by ideological beliefs and cultural patterns that vary from one country to another. Hence many theorists believe that human rights are a Western ideological notion.⁷² This belief may historically be traced to the relationship between the bourgeoisie and the theory of rights during the French Revolution and afterwards. In his exposition of the French Revolution, Habermas has drawn attention to this relationship. 'From the very beginning', he asserts, 'an intimate relationship existed between philosophy [natural law] and the bourgeois revolution, no matter how much philosophers since then may have entertained suspicions as to the illegitimate nature of this relationship'.⁷³ More importantly he draws a distinction between classical natural law and modern natural law, and defines the latter as the positivisation of the former.⁷⁴ He goes on to argue that 'the act by which the positivisation of Natural Rights was initiated, in

⁷⁰ Gewirth, for example, defines human rights as 'rights that all persons have simply insofar as they are human'. See A. Gewirth, 'The Basis and Content of Human Rights', in Pennock and Chapman (eds.), *Human Rights: Nomos XXIII*, p.119. Cf. J. Donnelly, *Universal Human Rights in Theory and Practice*, Ithaca and London: Cornell University Press, 1989, p.12.

⁷¹ See A.J. Milne, *Human Rights and Human Diversity*, London: Macmillan, 1986. Milne suggests that 'everywhere there is morality, there is not everywhere the same morality'. Even though he acknowledges that there always exists a 'diversity of morals', he nevertheless claims that there are some moral principles which are essential for social life in every form of community. *Ibid.*, pp.45-61.

⁷² See, for instance, A. Pollis & P. Schwab, 'Human Rights: A Western Concept with Limited Applicability', in A. Pollis and P. Schwab (eds.), *Human Rights: Cultural and Ideological Perspectives*, New York: Praeger Publishers, 1979, pp.1-17.

⁷³ J. Habermas, *Theory and Practice*, trans. by J. Viertel, London: Heinemann, 1974, p.82.

⁷⁴ Habermas states that: 'While in classical Natural Law the norms of moral and just action are equally oriented in their content toward the good- and that means the virtuous- life of citizens, the formal law of the modern age is divested of the catalogues of duties in the material order of life, whether of a city or of a social class. Instead it allows a neutral sphere of personal choice, in which every citizen, as a private person can egoistically follow goals of maximising his own needs'. See *ibid.*, p.84.

America as well as in France, was a declaration of fundamental rights'.⁷⁵ The most significant examples of this act of positivisation⁷⁶ in the present century are the Universal Declaration of Human Rights of 1948 together with later covenants which supplement it, and the European Convention on Human Rights of 1950.⁷⁷

However, it is argued that the ideal standard erected in the Universal Declaration for all peoples reflects the values and institutions of liberal-democratic society.⁷⁸ Milne claims that the Preamble of the Declaration⁷⁹ is 'by implication calling upon all nations to become liberal-democratic industrial societies'.⁸⁰ Given the differing cultural patterns, ideological underpinnings, and developmental goals of non-western countries, it is said that attempts to impose the Declaration, as it currently stands, 'reflect a

⁷⁵ *Ibid.*, p.85. Leo Strauss too distinguished the modern natural right doctrine from the classical one. For him, while the classical natural right was originated by Socrates and developed by Plato, Aristotle, the Stoics, and the Christian thinkers such as Thomas Aquinas, the modern idea of natural right emerged in the seventeenth century. See L. Strauss, *Natural Right and History*, Chicago: The University of Chicago Press, 1953, p.120.

⁷⁶ On the positivisation of human rights see also T. Campbell, 'Introduction: Realising Human Rights', in T. Campbell, et al, (eds.), *Human Rights: From Rhetoric to Reality*, Oxford: Basil Blackwell, 1986.

⁷⁷ For the texts of these documents, see I. Brownlie (ed.), *Basic Documents on Human Rights*, Third Edition, Oxford: Clarendon Press, 1992.

⁷⁸ See Milne, *Human Rights and Human Diversity*, p.2. Cf. B. Russell, *Authority and the Individual*, London: George Allen and Unwin Ltd., 1949, p.68: 'the "liberty" and the "rights"...could only be secured by the State...that is called "Liberal"'. It is only in the West that this liberty and these rights have been secured.'

⁷⁹ The Preamble states that: '(Now therefore the General Assembly proclaims) *This Universal Declaration of Human Rights* as a common standard of achievement for all peoples and all nations to the end that every individual and every organ of society keeping this declaration constantly in mind, shall strive by teaching and education to secure respect for these rights and freedoms, and by progressive measures national and international, to secure their effective recognition and observance...' See Brownlie (ed.), *Basic Documents on Human Rights*, p.22.

⁸⁰ Milne, *Human Rights and Human Diversity*, pp.2-3.

moral chauvinism and ethnocentric bias'.⁸¹ Similarly it is argued that the European Convention 'is based on a western, liberal conception of human rights and liberties'.⁸²

None of these arguments however radically disturbs the fact that the human rights as formulated in these documents are universally accepted.⁸³ In other words, as Donnelly emphasised, 'the historical particularity of the idea and practice of human rights' is not incompatible with the universality of these rights.⁸⁴ Today, there is a wide-range consensus, at least in verbal terms, about the importance of these rights. 'All states', says Donnelly, 'regularly proclaim their acceptance of and adherence to international human rights norms'.⁸⁵

I can now turn to examination of political rights, and of the liberal model that will be laid down for the analysis of the development of political rights in the Turkish constitutional system.

⁸¹ See A.Pollis & P.Schwab, 'Human Rights: A Western Concept with Limited Applicability', p.14. See also M. Lazreg, 'Human Rights, State and Ideology: An Historical Perspective', in Pollis and Schwab (eds.), *Human Rights: Cultural and Ideological Perspectives*, pp.32-34.

⁸² J.Colwill, *Universal Human Rights? The Rhetoric of International Law*, Centre for the Study of Democracy, (University of Westminster Press), Research Papers, Number 3, Autumn 1994., p.14. Cf. J. T. Wright, 'Human Rights in the West: Political Liberties and the Rule of Law', in Pollis & Schwab (eds.), *Human Rights- Cultural and Ideological Perspectives*, p.18.

⁸³ It must be noted that although the idea of human rights as formulated in the 'western' human rights documents are the product of a specific historical culture, that is liberalism, the ideal of human rights *per se* can be found in most non-western cultures. On this point see, e.g., Y.Khushalani, 'Human Rights in Asia and Africa', *Human Rights Law Journal*, 4(1983): 403-442, and Pollis & Schwab, 'Human Rights: A Western Concept with Limited Applicability', p.15.

⁸⁴ Donnelly, *Universal Human Rights in Theory and Practice*, p.49. Cf. D.Weissbrodt, 'Human rights: an historical perspective', in P.Davies (ed.), *Human Rights*, London and New York: Routledge, 1988, pp.1-20, at 1.

⁸⁵ Donnelly, *Universal Human Rights*, p.1.

Political Rights and Turkish Constitution

Political rights are, needless to say, an important cluster of human rights in general. They can be found in almost every international human rights document.⁸⁶ The concept of a political right can be defined as, in the words of Dworkin, 'an individuated political aim'.⁸⁷ Dworkin explains this definition as follows.

An individual has a right to some opportunity or resource or liberty if it counts in favour of a political decision that the decision is likely to advance or protect the state of affairs in which he enjoys the right, even when no other political aim is served and some political aim is disserved thereby, and counts against that decision that it will retard or endanger that state of affairs, even when some other political aim is thereby served.⁸⁸

By 'political rights' Dworkin seems to mean rights against the government.⁸⁹ Following Dworkin, in this study we will use the term political rights for those rights which can be claimed against the state or government. The rights vis-a-vis the state include a very wide range of rights, from the right to freedom of thought, speech to the right to vote. While the rights like freedom of thought and expression are considered 'essentially political', '[t]he right of everyone to take part in the government of his or her country is exclusively political'.⁹⁰ I will call these rights broader and narrow senses of the political rights respectively concentrating on the latter. The 'exclusively political right' to participate in politics will be the primary subject of the Chapter 8 which will take up the issue of political party cases before the Constitutional Court of Turkey. This right is chosen, not only because it is 'exclusively political', but also because it in a way

⁸⁶ See, e.g., Articles 18- 21 of the Universal Declaration of Human Rights; Articles 9-11 of the European Convention on Human Rights; Articles 12-16 of the American Convention on Human Rights.

⁸⁷ Dworkin, *Taking Rights Seriously*, p.91.

⁸⁸ *Ibid.*

⁸⁹ See J. Raz, 'Professor Dworkin's Theory of Rights', *Political Studies*, 26 (1978):123-137, at 124.

⁹⁰ J.P.Humphrey, 'Political and Related Rights', in T.Meron (ed.), *Human Rights in International Law: Legal and Policy Issues*, Oxford: Clarendon Press, 1984, p.172.

embraces such other 'essentially political' rights as freedom of thought and expression. The Constitutional Court, therefore, restrains at the same time these rights when it dissolves the political parties which are the primary means for realising the right to participation.

Article 21 of the Universal Declaration describes political rights in its narrow sense.

1. Everyone has the right to take part in government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.⁹¹

This article, which is regarded as 'revolution within a revolution',⁹² stresses two important points about political rights. First, they are derived from the principle that the will of the people is the basis of political authority. Second, they are the rights that provide everyone with the opportunity to participate in government through elections. By '*genuine* elections', though it does not specifically mention, the Declaration implies multi-party elections. The so-called 'one-party democracy' would not meet the conditions of political rights set forth in this article.

The 1982 Turkish Constitution devoted Chapter Four to the political rights. Under the heading 'Political Rights and Duties', the Constitution lists, *inter alia*, the rights to vote, to be elected, to engage in political activity, and to form political parties. We will concentrate on the rights guaranteed under Articles 67 and 68, namely the rights to engage in political activity including the right to form and join political parties. Article 67 states that:

...citizens have the right to vote, to be elected, and to engage in political activities independently or in a political party, and to take part in a referendum.⁹³

⁹¹ See Brownlie, *Basic Documents on Human Rights*, p.25.

⁹² See A.Rosas, 'Article 21', in A. Eide et al (eds.), *The Universal Declaration of Human Rights: A Commentary*, Drammen: Scandinavian University Press, 1992, pp.299-326, at 299.

⁹³ See *The Constitution of the Republic of Turkey*, Ankara: BYEGM Matbaasi, p.29. (Hereinafter the Constitution)

Article 68 of the Constitution is to some degree a repetition of the previous article. It, together with Article 69, includes provisions about political parties. After stating that 'citizens have the right to form political parties, and to join and withdraw from them in accordance with the established procedure', it goes into detail about the political parties from their role in a democratic system to their activities and dissolution.⁹⁴ All the rights in Chapter Four of the 1982 Constitution may be translated into one single right: the right to political participation.

As mentioned before, since the right to political participation involves such other rights as freedom of speech, assembly and association, I will frequently refer to its broader sense as rights against the state. Without reference to these rights, especially to free speech, it is impossible to fully understand the state of the right to political participation.

In analysing the development of political rights in Turkey, I will use a liberal model of political rights. This model is an abstraction in the sense that it is based on the works of various liberal theorists, i.e., it has not been proposed by a single thinker. Therefore it goes without saying that the particular views of this or that philosopher may well diverge, even conflict with, the model. It is in fact a theoretical framework for illustrating the argument that political rights needs a particular constitutional setting to develop. In other words, this framework will explore the constitutional principles necessary for the development of political rights. After analysing the idea of political rights in a historical context in Chapter 1, the constitutional principles of the political neutrality, and the Rule of Law will be dealt with in Chapter 2 and 3 respectively. The political neutrality serves to establish an impartial state in a pluralistic society. This principle entails that the state should be neutral between the conception of goods individuals have. That is, it is not for government to pursue a particular conception of good life. Rather, it must provide political and legal means by which individuals are able to pursue their own conception of good.⁹⁵ The Rule of Law is a principle which is supposed to provide some kind of protection for the political rights by subjecting the rulers to general laws. These two constitutional conditions will help to draw a rough picture of the

⁹⁴ *Ibid.*, pp.29-31.

⁹⁵ See Chapter 2 below.

relationship between state and individuals in liberal theory. These constitutional principles function as the protector of the individuals, because they in a sense exert constraints on the 'arbitrary' and 'absolute' power of the state. This in turn will help explain how different this picture is from that of Turkey. Chapter 4 will undertake the critique of the fundamental liberal ideals on which the state-individual relations are based.

At this point, I must justify my choice of a liberal framework rather than any other theory for analysing political rights in the Turkish Constitutional system. There are three reasons for this choice. First of all, the idea of human rights has been associated with liberalism. Indeed, as Goodwin rightly stresses, the history of rights is, 'in effect, the three-hundred years history of liberal thought and the 'individual versus the state' antagonism is, effectively, a liberal invention'.⁹⁶ Even Harold Laski, as a socialist, acknowledges that 'liberalism has sought, almost from the outset of its history, to limit the ambit of political authority, to confine the business of government within the framework of constitutional principle; and it has tried, therefore, fairly consistently to discover a system of fundamental rights which the state is not entitled to invade'.⁹⁷ Similarly, Heller and Feher maintain that '[a]ttributing 'inalienable' rights to members of an integration on the basis of their personhood could be considered as the single greatest contribution of liberal theories to the development of modern *Sittlichkeit*'.⁹⁸ The identification of the rights with liberalism is much more obvious in the sphere of what is called 'negative rights'. As Donnelly put it '[t]he liberal tradition has indeed given considerable, and often preponderant, emphasis to primarily negative rights'.⁹⁹ The civil and political rights are considered

⁹⁶ B. Goodwin, *Using Political Ideas*, Second Edition, New York: John Wiley & Sons Ltd., 1987, p.229. See also V.A.Leary, 'Postliberal Strands in Western Human Rights Theory: Personalist-Communitarian Perspectives', in A.A.An-Naim(ed.), *Human Rights in Cross-Cultural Perspectives*, Philadelphia: University of Pennsylvania Press, 1992, pp.105-132, at 105.

⁹⁷ H.J.Laski, *The Rise of European Liberalism: An Essay in Interpretation*, London: Allen & Unwin, 1958, p.15. Cf. B.Russell, *Authority and the Individual*, London: George Allen and Unwin Ltd., 1949, p.68.

⁹⁸ A. Heller and F. Feher, *The Postmodern Political Condition*, Oxford: Polity, 1988, pp.52-53.

⁹⁹ Donnelly, *Universal Human Rights in Theory and Practice*, p.100. Cf. I.Shapiro, *The Evolution of Rights in Liberal Theory*, Cambridge: Cambridge University Press, 1986, p.276.

'negative rights' or 'negative freedoms' in the sense that they entail the abstinence of external constraint.¹⁰⁰

Secondly, liberal democracies are presented by the theorists of modernisation as an idealised model for the political development of third-world countries. Modernisation theory 'self-consciously universalizes a historical Western concepts'.¹⁰¹ Accordingly the model of liberal democracies provides a paradigm against which to contrast and compare other countries. Political development, as Robert Packenham has argued, has been accepted, explicitly or implicitly, as the equivalent of the development of a liberal, constitutional democracy.¹⁰²

The latest defender of this line is of course Francis Fukuyama. He argued that liberal democracy constitutes the 'end point of mankind's ideological evolution' and the 'final form of human government', and as such constitutes the 'end of history'.¹⁰³ 'The state that emerges at the end of history', Fukuyama asserts, 'is liberal insofar as it recognises and protects through a system of law man's universal right to freedom...'.¹⁰⁴ He rules out possible ideological alternatives to liberalism (other than fascism and communism which are already 'dead') on the ground that they are unable to take on any universal significance and to offer 'anything like a comprehensive agenda for socio-economic organization'.¹⁰⁵ Thus, the 'universality' of liberal values leads to the assertion that liberal democracy is the ultimate ideology at the end of history, and the only and best model for developing countries.

The third, and perhaps most important reason for choosing the liberal model is the argument that the rights and freedoms in the constitutions of

¹⁰⁰ For the distinction of negative and positive liberties see I. Berlin, *Four Essays on Liberty*, Oxford and New York: Oxford University Press, 1969, pp.122-134.

¹⁰¹ A. Gurnah and A. Scott. *The Uncertain Science: Criticism of Sociological Formalism*, London and New York: Routledge, 1992, p.133.

¹⁰² R.A. Packenham, *Liberal America and the Third World: Political Development Ideas in Foreign Aid and Social Science*, Princeton: Princeton University Press, 1973, p.4.

¹⁰³ See F. Fukuyama, 'The End of History', *The National Interest*, 16(Summer 1989):3-18, at 4.

¹⁰⁴ *Ibid.*, p.5.

¹⁰⁵ *Ibid.*, pp.14-15. For a more advanced and detailed version of Fukuyama's argument see also his book *The End of History and the Last Man*, London: Hamish Hamilton, 1992.

the Republic of Turkey reflect the Western liberal approach.¹⁰⁶ This is especially true of the 1961 Constitution.¹⁰⁷ I would argue that this argument is misleading, for there are certain fundamental obstacles to the realization of liberal rights, particularly the rights against the state, even though ostensibly the constitutions of the Republic list many rights which are similar or sometimes identical to those of liberal human rights documents.

These obstacles are rooted in the socio-economic, ideological and cultural structures of Turkey which determine the nature and colour of political rights. Part II of the dissertation will be devoted to examination of these institutional and structural problems of the Turkish constitutional system. I will exclude the discussion of socio-economic factors, even though they are important in understanding the development of political rights in any country. It is almost taken for granted that in the West bourgeois class played a leading role in the achievement of liberal, pluralist, and democratic regime.¹⁰⁸ In Turkey, as Kazim Berzeg noted, there has never existed a bourgeois class in its western sense.¹⁰⁹ It is widely believed that the Turkish bureaucracy has played the similar role to that of the bourgeoisie in the West. After the establishment of the Republic, the state attempted to create a bourgeoisie class to flourish the capitalist development.¹¹⁰ This eventually yielded a tension between the bureaucracy and newly emerging bourgeois. This conflict is important because, as Keyder points out, 'it was either the bureaucracy or groups within bourgeoisie who, through their conflict,

¹⁰⁶ See for example E Ozbudun, 'Human Rights and the Rule of Law' in *Perspectives on Democracy in Turkey*, Ankara: Turkish Political Science Association, 1988, pp. 193-209.

¹⁰⁷ See C.H. Dodd, *Democracy and Development*, Beverley: The Eothen Press, 1979, p.82. See also I.Sunar and S.Sayari, 'Democracy in Turkey: Problems and Prospects', in G. O'Donnell et al. (eds.), *Transitions from Authoritarian Rule: Southern Europe*, Baltimore and London: The John Hopkins University Press, 1986, p.175; J.S.Szyliowicz, 'The 1961 Turkish Constitution: An Analysis', *Islamic Studies*, 2/3 (September 1963): 363-381, at 380.

¹⁰⁸ L.Binder, *Islamic Liberalism: A Critique of Development Ideologies*, Chicago and London: The University of Chicago Press, 1988, p.18.

¹⁰⁹ K.Berzeg, 'Liberalizm, Ahlak, Hukuk', *Polemik*, 12 (March-April 1994): 9-16, at 15. See also M.Ozel, *Birey, Burjuva ve Zengin*, Istanbul: Iz Yayincilik, 1994, pp.192-193.

¹¹⁰ See M. Heper, 'The Recalcitrance of the Turkish Public Bureaucracy to "Bourgeois Politics"- A Multi-Factor Political Stratification Analysis', *The Middle East Journal*, 30/4 (1976): 485-500.

defined the parameters of state policies, administrative forms and the political regime'.¹¹¹ Nevertheless, the socio-economic features of Turkish society, and particularly the 'alleged' conflict of bourgeoisie and bureaucracy is outside our study, though a study of their impact on the development of the political rights would be interesting.

We will rather concentrate on political-legal, and ideological factors. The civil-military bureaucracy, which constructed a new nation-state, has always been conservative and restrictive towards political rights considering itself as the saviour of the state. 'Saving the state' justified everything that the bureaucracy has done from sacrificing 'civil rights for *raisons d'état*', to ignoring ideas of participation and democracy for the sake of solidarity.¹¹² In Chapter 5, I shall raise this point indicating that this mission was a historical legacy left by the Ottoman bureaucrats.

In Chapter 6, I will dwell on Kemalism as the state-ideology, and discuss its compatibility with the liberal model of political rights. This discussion is crucial since Kemalism has shaped modern Turkey from the state apparatus to the physical appearance of the people living in Turkey. It is deeply embedded in the political and legal establishment. From the very beginning, Kemalist principles and reforms have been protected through constitutional and other legal means. In a word, Kemalism is the official discourse which pervades the constitutional system of the Turkish Republic, and thus adversely affects the issue of political rights.

Some students of Turkish politics argue that Kemalism has much more in common with libertarian philosophy than with the anti-liberal ideologies of the twentieth century.¹¹³ This is a very nice myth. And our study, in a sense,

¹¹¹ C.Keyder, *State and Class in Turkey*, New York: Verso, 1987, p.4.

¹¹² *Ibid.*, p.199.

¹¹³ See, for example, E.Ozbudun and A. Kazancigil, 'Introduction', in *Ataturk: Founder of a Modern State*, London: C.Hurst & Company, 1981, p.5. In a similar manner, it is argued that Kemalism aimed at establishing a 'liberal' 'democratic' state, despite the fact that it initially turned out to be 'authoritarian' ideology with its practice. See B.Tanor, *Türkiye'nin İnsan Hakları Sorunu II: Hukuk Otesi Boyutlar*, İstanbul: BDS Yayınları, 1991, pp.88-89; B.Daver, 'Ataturk ve Sosyo-Politik Sistem Gorusu', in *Çağdaş Düşüncenin İzinde Atatürk*, İstanbul: Eczacıbaşı Vakfı yayınları, 1983, pp. 247-279, I.Giritli, 'Atatürkçülük İdeolojisi', *Atatürk Araştırma Merkezi Dergisi*, 1/1(1984):102-107, and E.Ozbudun, 'Atatürkçü Düşünce

is about demystification of this myth. I will argue that Kemalism in fact wreaked a great havoc on the development of political rights. It is not compatible with the liberal principles of the political neutrality and the rule of law, and thus constitutes the main obstacle to the realization of political rights and freedoms as conceived in liberal philosophy.

Analysing Kemalism, I will draw on Kemalist principles, which is called 'six arrows'¹¹⁴, other sayings of M. Kemal and the program of his party, RPP. Of these principles etatism and nationalism are most important for our purpose. These two strands of Kemalist ideology have deep implications for policies affecting the development of political rights. It will be emphasised that etatism is rooted in the strong state tradition of Turkey. This brings us to examine the cultural factors.

The perception of state and religion will be dealt with as a cultural factor. The state has been (is) considered as 'sacred' in Turkish culture. Due to perhaps the lack of a cultural heritage of individualism,¹¹⁵ the state has become the embodiment of the people, and as such gained the priority over the individual.¹¹⁶ The perception of embodied and 'sacred state' has provided an easy justification for absolute regimes in Turkey. It, for example, has facilitated the military interventions in politics.¹¹⁷ The Preamble of the 1982 Constitution was the most clear example of this 'legitimizing' function. It explicitly mentioned that the 1980 Coup was carried out 'at a time when the approach of a separatist, destructive and bloody civil war... threatened the existence of the sacred Turkish state'.¹¹⁸ Once the state is deemed sacred it brings about the absolute obedience to

Sisteminin Demokrasiye Yönelik Niteliği', *H.U. Edebiyat Fakültesi Dergisi*, 4/1(1986):165-170, at 167.

¹¹⁴ These principles are republicanism, secularism, etatism, populism, nationalism, and reformism.

¹¹⁵ See Chapter 4 below.

¹¹⁶ See F.Ahmad, *The Making of Modern Turkey*, London and New York: Routledge, 1993, p.17.

¹¹⁷ *Ibid.*

¹¹⁸ *The Constitution*, p.3. The Preamble of the 1982 Constitution was recently amended. The 1995 Amendment removed from the Preamble the statements justifying the military coup of 1980. See Law no:4121, *Resmî Gazete*, 26 Temmuz 1985, Sayı:22355.

the authority. This has in turn, as Serif Mardin points out, prevented the emergence of an institutionalised tradition of a popular opposition against the state which had played a crucial role in the development of Western democracies.¹¹⁹ Chapter 7 will discuss this statist tradition, and other restrictions placed upon the political rights in the 1982 Constitution.

As for religion my argument is related to the official ideology of the Constitution, namely Kemalism. Islam unlike some other religions is believed to be a way of life with its socio-economic, political and legal programs.¹²⁰ That is to say that it may potentially offer an alternative way to the liberal and socialist systems.¹²¹ This nature of Islam leads us to one of the crucial points of this study. From the very beginning of the Republic, the state has tried to 'secularize' Islam, quite simply because it has seen religion as the only plausible alternative to the prevailing political regime. We will thus explore the state-religion relations in Turkey from both political and legal perspectives. I will argue that the psychological pressure on the ruling class about the possibility of an Islamic regime, no matter how unlikely this is, has given rise to a more restrictive constitutional system concerning political rights. The Kemalist principle of secularism has been arbitrarily invoked to stifle and repress the political rights in its broader sense. Chapter 8, where the judgements of the Constitutional Court are analysed, will reveal the use of this ideological ground in restricting the political rights.

¹¹⁹ See S. Mardin, 'Opposition and Control in Turkey', *Government and Opposition*, 1(1966):375-387.

¹²⁰ See, e.g., K.Ahmad, 'Islam: Basic Principles and Characteristics', in K.Ahmad (ed.), *Islam: Its Meaning and Message*, Second Edition, Leicester: The Islamic Foundation, 1976, pp.37-38., A.A. Maududi, 'What Islam Stands for', in A.Gauhar (ed.), *The Challenge of Islam*, London: Islamic Council of Europe, 1978, p.6ff, and G.H. Jansen, *Militant Islam*, London and Sydney: Pan Books, 1979, pp.17-30,

¹²¹ Even Fukuyama concedes that in the modern world only Islam has offered a 'theocratic state' as a political alternative to both liberalism and communism. See Fukuyama, 'The End of History', p.14.

All these arguments will be presented in a historical context. Since the right to participation is the constitutive characteristic of democracy¹²² this study may turn out to be a study about the development of democracy in Turkey. Therefore, historically, the starting point has to be 1946 when Turkey was transformed to a multi-party political system. But we still need to examine the developments before that date in order to better understand the political rights development in Turkish Constitutional system.

I will begin with the constitutional development in the late Ottoman Empire. The analysis of that period will give us the chance to see the ideological and political background of modern Turkey. Indeed, many students of Turkish politics believe that the ideology of Young Turks had an enormous influence on the Kemalist ideology.¹²³ Kemalism, as Nermin Abadan asserts, constituted 'a continuum with the Tanzimat, Young Ottomans, and Young Turks'.¹²⁴ In the first chapter of Part II, together with the ideology of Young Turks, the constitutional movements of that era particularly the 1876 Constitution will be dealt with.

This will be followed by the constitutional development in modern Turkey. The constitution of 1924 will be briefly explored as the first constitution of the Republic. This constitution was in force for more than thirty years (1924-1960) including the some period of multi-party democracy. The 1961 Constitution is considered as the most liberal constitution of the Republic, even though it was prepared under the instruction of military junta of 1960.¹²⁵ Another important development concerning political rights was the establishment of the Constitutional Court at that time. This court was given

¹²² See R. Blackburn, 'The Right to Vote', in R. Blackburn(ed.), *Rights of Citizenship*, London: Mansell, 1993, pp.75-98, at 75: 'The right of every citizen to vote and take part in the political process of a state is the foundation of its democracy'.

¹²³ See, for example, I. Tekeli & G. Saylan, 'Turkiye'de Halkcilik Ideolojisinin Evrimi', *Toplum ve Bilim*, 5-6(1978):44-110; Z. Toprak, 'II. Mesrutiyette Solidarist Dusunce:Halkcilik', *Toplum ve Bilim*, 1(1977):92-123.

¹²⁴ See N. Abadan, 'Patterns of Political Modernization and Turkish Democracy', *Turkish Yearbook of International Relations*, 18(1979):1-26, at 25.

¹²⁵ See A. Pollis, 'Development, Growth and Human Rights: The Case of Turkey', in D.P.Forsythe, (ed.), *Human Rights and Development: International Views*, London: Macmillan, 1989, p.252.

the authority to decide the constitutionality of the acts of parliament. Furthermore, it has the power to dissolve the political parties whose programme or activities do not comply with the provisions of the constitution. These political trials, alongside the role of the Constitutional Court in the Turkish political and legal life, will be evaluated in the last chapter of the study. I will argue that the Turkish Constitutional Court has adopted an 'ideology based' approach to the political rights. It strictly clings to the official ideology of the state, that is Kemalism. This creates a major dilemma in the jurisdiction of the Court which is supposed to provide a protection for the political rights of individuals against the state power. My overall conclusion is that the Court is far from serving this 'protective' function.

Having surveyed the historical background of the development of political rights, we will turn to the prevailing constitutional regime which was created by the 1982 Constitution. This constitution is also a product of the military coup d'état which took place on 12 September 1980. Despite this, it is claimed that the Constitution of 1982 recognizes, albeit in a more restrictive way than the 1961 Constitution, all the basic rights commonly found in liberal democratic constitutions.¹²⁶ This will urge us to occasionally refer to both the 1961 Constitution and the European Convention on Human Rights to be able to compare some similarities and differences between these documents and the 1982 Constitution.

To sum up, the primary aim of this study is to show that there are certain ideological, political and cultural factors that affect in a negative way the realisation of the liberal idea of political rights in Turkish Constitutional system. Kemalism and the strong tradition of statism are the principal obstacles to the development of political rights.

Finally, I must make it clear that this study is a diagnosis rather than a solution. Yet it does not follow that its results do not have a bearing on our course of action. 'Identifying problems', as Bradney emphasises, 'will always be simpler than suggesting solutions'.¹²⁷ Solutions however always entail the prior identification of the problems. Indeed, the understanding of the obstacles to the political rights in Turkey is in a way a premise for any

¹²⁶ See Ozbudun, 'Human Rights and the Rule of Law', p.198.

¹²⁷ A.Bradney, *Religions, Rights and Laws*, Leicester: Leicester University Press, 1993, p.160.

action aiming to overcome these problems. In the Conclusion, nevertheless, there will be a theoretical discussion on the possible solutions to the problem of political rights. It will be suggested that some institutional and structural changes are needed to achieve the implementation of the political rights. At the bottom of all these changes, I shall argue, lies the self-awareness and authenticity which might be gained through a journey to selfhood. This journey will help to redefine ourselves as conscious and autonomous human beings who have rights against the state.

PART I

**THE STATE, INDIVIDUAL, AND RIGHTS: A THEORETICAL
FRAMEWORK FOR ANALYSING POLITICAL RIGHTS**

CHAPTER 1- THE IDEA OF RIGHTS AGAINST THE STATE: AN OVERVIEW

There is hardly a constitution nowadays which does not have a section, written or unwritten, setting out fundamental rights. And it is obvious that - when something crucial is at stake - these basic rights are precious and dear to us, whatever the individual may otherwise claim.

Jurgen Habermas¹

Do we really have rights against the state? This question is relevant because history reveals that the most serious threat to individual rights has come from the state.² 'When unlimited and unrestricted by individual rights', writes Ayn Rand, 'a government is man's deadliest enemy'.³ States are known as the most heinous violators of citizens' rights and liberties.⁴

Most people, therefore, would respond affirmatively to the above question on the ground that in order to protect individuals the state should not have unlimited power.⁵ Political power, as Habermas points out, is not a characterless medium; it must be subjected to certain moral

¹ J. Habermas, 'On Morality, Law, Civil Disobedience and Modernity', in *Autonomy and Solidarity*, Interviews with J. Habermas, Ed. by Peter Dews, Revised Edition, London: Verso, 1992, p.223.

² H. Spencer, *The Man Versus the State*, (1884), Indianapolis: Liberty Classics, 1982, pp. 146-147. See also G. J. Schochet, 'Introduction: Constitutionalism, Liberalism, and the Study of Politics' in J.R. Pennock and J.W. Chapman (eds.), *Constitutionalism: Nomos XX*, New York: New York University Press, 1979, p.4.

³ A.Rand, 'Man's Rights', in A Rand, *Capitalism: The Unknown Ideal*, New York: Signet Books, 1967, p.326.

⁴ See P. Johnson, *Modern Times*, New York: Harper Colophon, 1985, p.729.

⁵ See B. Constant, *Political Writings*, (1815), trans. B. Fontana, Cambridge: Cambridge University Press, 1988, p.179.

limitations.⁶ The idea of the constitutional state is intended to face this difficulty.⁷ Indeed, the aim of constitutionalism is to protect individuals against the sovereign by imposing some restrictions upon its power.⁸

To this end modern constitutions pay special attention to individual rights.⁹ And constitutional rights as such become *a conditio sine qua non* of democracy. According to H.A. Rommen, 'democracy means essentially that the constitution contain an effective bill of rights enforceable against the "government"...'.¹⁰

Classical Contract Theories: Hobbes, Locke and Rousseau

The contractarian theories can be the starting point for dealing with the idea of rights against the state. Generally speaking the social contract theories¹¹ set out the relationship between the individuals and the state, parties to an original contract. Individuals are both parties to the contract and the ultimate arbiters of the compliance of the other party, namely the state.¹² This is clear even in Hobbes' theory which is based

⁶ J. Habermas, 'Discourse Ethics, Law and Sittlichkeit', in *Autonomy and Solidarity*, p.252.

⁷ *Ibid.*

⁸ C.T. Friedrich, *Man and His Government*, New York: Mc Graw-Hill, 1963, p.217.

⁹ H.A. Rommen, 'The Genealogy of Natural Rights', *Thought*, 29(1954):403-425, at.403.

¹⁰ *Ibid.* Cf. F. Hayek, *The Constitution of Liberty*, pp.107-109, and A.P. d' Entrèves, *Natural Law*, 2nd Edition, London: Hutchinson, 1970, p.143: 'Only when the rights of man are secured can democracy be a true democracy.'

¹¹ Social contract theories have frequently been challenged by various thinkers. Herbert Spencer, for instance, criticised the hypothesis of a social contract as being 'ill-based' or even 'base-less'. Spencer, *The Man Versus the State*, pp. 131-132. Anarchists also attack the notion of social contract. By creating a state, they argue, 'men create an institution that is far more dangerous to them than the power of other men taken singly'. See D. Miller, *Anarchism*, London: J.M. Dent and Sons, 1984, p.6.

¹² See J. Locke, *Two Treatises of Government*, (1651), Cambridge: Cambridge University Press, 1988, pp.240-241.

on the fear of instability and chaos.¹³ Although Hobbes created in a way an absolute sovereign¹⁴, he nevertheless acknowledged limits to the obligations of citizens. He argued that since persons made a contract to have their lives saved from violent death, their obligations ceased if the sovereign became incapable of protecting them.¹⁵ That is to say that man never has to renounce his fundamental right to resist those who 'assault him by force, to take away his life'.¹⁶

Locke, like Hobbes, commences from the position of a hypothetical 'state of nature'.¹⁷ However, unlike Hobbes,¹⁸ he argues that within this state

¹³ T. Hobbes, *Leviathan*, (1651), Everyman Edition, London: J.M.Dent and Sons Ltd., 1914, Part I, Ch. XIV, p.67: '...the condition of Man ...is a condition of Warre of everyone against everyone'. Hobbes' main problem, as Raphael observed, was to avoid this civil war, and create a stable ordered society. See D.D.Raphael, *Hobbes: Morals and Politics*, London: George Allen & Unwin, 1977, p.29. Cf. G.Shelton, *Morality and Sovereignty in the Philosophy of Hobbes*, London: Macmillan, 1992, p.308, and M. Forsyth, 'Thomas Hobbes: Leviathan', in M.Forsyth and M. Keens-Soper (eds.), *A Guide to the Political Classics: Plato to Rousseau*, Oxford: Oxford University Press, 1988, p.142.

¹⁴ See N. Bobbio, *Thomas Hobbes and the Natural Law Tradition*, trans. D.Gobetti, Chicago and London: University of Chicago Press, 1993, p.161; K.R.Minogue, 'Thomas Hobbes and the Philosophy of Absolutism', in D.Thomson (ed.), *Political Ideas*, Harmondsworth: Penguin, 1969, pp.53-56; Spencer, *The Man versus the State*, pp.125-128.

¹⁵ Hobbes, *Leviathan*, Part 2, Ch.XXI, pp.114-15.

¹⁶ Hobbes, *Leviathan*, Part I, Ch. XIV, p.68. It appears that in Hobbes' theory two sorts of rights may be distinguished: the first is inalienable rights of individuals (right to self-preservation), the second is alienable rights (rights of governing self). For Hobbes it is the latter which can be renounced to the sovereign. (See, *Leviathan*, Part 1, Ch.14, p.65.) See also C.B. Macpherson, 'Natural Rights in Hobbes and Locke', in D.D.Raphael (ed.), *Political Theory and the Rights of Man*, London: MacMillan, 1967, pp.1-16; R.Tuck, *Natural Rights Theories: Their origin and development*, Cambridge: Cambridge University Press, 1979, pp.119-142; and Minogue, 'Thomas Hobbes and the Philosophy of Absolutism', p.62.

¹⁷ For a general treatment of the problem of the historicity of social contract see M. Lessnoff, 'Introduction: Social Contract', in M.Lesnoff (ed.), *Social Contract Theory*,

of nature, 'a state of perfect freedom',¹⁹ there exist certain rights which were encapsulated in the concept of 'property'.²⁰ The Lockean conception of 'property' has a much broader meaning than just being physical possession.²¹ By 'property' he means rights to life, liberty and economic entitlements.²²

Oxford: Basil Blackwell, 1990, pp.12-15. Modern contractarian theorists, most notably Buchanan and Rawls, have also tried to justify their use of hypothetical means e.g. 'state of nature' and 'social contract' in their theories. See J.Buchanan and G.Tullock, *The Calculus of Consent*, Michigan: University of Michigan Press, 1965, p.63. J.Rawls, *Political Liberalism*, New York: Columbia University Press, 1993, pp. 271-75.

¹⁸ A critical analysis of Hobbessian state of nature is to be found in L. Strauss, *The Political Philosophy of Hobbes : Its Basis and Its Genesis*, trans. E.M.Sinclair, Chicago & London: The University of Chicago Press, 1952, pp.104-105. For a comparison between Hobbessian natural world and Freudian state of nature see R.West, 'Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law', *University of Pennsylvania Law Review*, 134 (1986): 837-882, at pp.827-828. West argues that although Freud's account of 'the patricidal brother horde' is different from the classical contract theories, it has certain affinities with the Hobbessian state of nature. The fundamental difference lay in their consequences: 'The Hobbessian compact...yields a political authority, while the Freudian compact yields an autonomous Rule of Law'. *Ibid.*, p.828.

¹⁹ Locke, *Two Treaties of Government*, Ch.II, p.269.

²⁰ *Ibid.*, pp.270-71.

²¹ See V. Medina, *Social Contract Theories*, Savage: Rowman & Littlefield, 1990, p.32, C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke*, Oxford: Oxford University Press, 1962, p.198, and his *The Rise and Fall of Economic Justice and Other Essays*, Oxford: Oxford University Press, 1987, p.71.

²² Locke, *Two Treaties of Government*, Ch. IX, p.350. See also A. J. Simmons, *The Lockean Theory of Rights*, Princeton: Princeton University Press, 1992, p.228. Despite this broad interpretation of property, Locke could not escape from the accusations of being a spokesman for a class of people known as 'the rising bourgeoisie'. Macpherson, for instance, argues that Locke 'provides a positive moral basis for capitalist society'. See *The Political Theory of Possessive Individualism*, p.221. For a defence of Locke against Macpherson, see I .Berlin, 'Locke and Professor Macpherson', in J.Lively and A.Reeve

All individual rights are regarded by Locke as having existence prior to the concepts of civil government and positive law. The state did not provide these rights which were the gift of the Law of God.²³ The aim of the social contract is nothing but the protection of the rights and entitlements individuals have.²⁴ To this end, individuals surrender their powers of protection and enforcement to a government in a political society which can maintain natural rights with greater efficacy.²⁵ Locke, however, stated that the renouncement of these rights is not absolute, and does not thus give an unlimited power to the sovereign.²⁶ If the sovereign fails to perform its duty of security, individuals may resume their rights by discarding the political institution created.²⁷ As David Held put it, Locke formulated the central argument of modern liberalism; 'that is, that the state exists to safeguard the rights and liberties of citizens who are ultimately the best judges of their own interests; and that accordingly the state must be restricted in scope and constrained in practice in order to ensure the maximum possible freedom of every citizen'.²⁸

(eds.), *Modern Political Theory From Hobbes to Marx- Key Debates*, London & New York: Routledge, 1989, pp.72-80, and A.S.Kaufman, 'A Sketch of a Liberal Theory of Fundamental Rights', *Mind*, 52 (1968):595-615, at 525.

²³ See M. Oakeshott, *Morality and Politics in Modern Europe: The Harvard Lectures*, New Haven and London: Yale University Press, 1993, p.56.

²⁴ Locke, *Two Treaties of Government*, p.350.

²⁵ *Ibid.*, p.331, and 350. See also M. MacDonald, 'Natural Rights', in J. Waldron (ed.), *Theories of Rights*, Oxford: O.U.P., 1984, p.26.

²⁶ *Ibid.*, p.353.

²⁷ J.Waldron, *Nonsense Upon Stilts: Bentham, Burke, and Marx on the Rights of Man*, London & New York: Methuen, 1987, p.10.

²⁸ D.Held, 'Central Perspectives on the Modern State', in G. McLennan, D.Held, and S.Hall (eds.), *The Idea of the Modern State*, Milton Keynes: Open University Press, 1984, p.41.

In contrast to Locke's liberal account of rights, Rousseau presents a radically different view.²⁹ The idea of rights against the state seems to be alien to Rousseau. Although the *Social Contract* begins with the famous statement that 'man was/is born free, and everywhere he is in chains', he gives the state 'an absolute power over all its members'.³⁰

Rousseau sees the social contract, unlike Hobbes and Locke, not as a surrender of individual power to a political sovereign but as a pact made among free individuals to enter into political society together.³¹ Since the state, he argued, is preferable to any other alternative, individuals make no 'real renunciation' of their rights in creating it.³² What they do is to make 'an advantageous exchange of an uncertain and precarious mode of existence for a better and more assured one'.³³ As a result of this 'exchange' the contract becomes the guiding spirit of the community, the 'general will'. Therefore, each individual is to surrender his particular will to this general will which is the proper expression of his own morality.³⁴

Rousseau holds that the contract establishes among citizens an equality as to the enjoyments of the same rights.³⁵ However, he does not invoke

²⁹ Vaughan takes this contrast between Locke and Rousseau to its extreme point. He states, with perhaps some exegeration, that 'while the Contract of Locke is expressly devised to preserve and confirm the rights of the individual, that of Rousseau ends, and is intended to end, in their destruction..'. C.E.Vaughan, 'Introduction' to C.E.Vaughan (ed.), *Political Writings of Jean-Jacques Rousseau*, Oxford: Blackwell, 1962, p.48. See also M. Lessnoff, *Social Contract*, London : Macmillan, 1986, p.80.

³⁰ J.J. Rousseau, *Of the Social Contract*, trans. by C. M. Sherover, New York: Harper & Row, 1984, (Book II, Ch.4), p.27.

³¹ *Ibid.*, p.30.

³² *Ibid.*

³³ *Ibid.*, pp.30-1.

³⁴ *Ibid.*, p.30. As Chapman points out, Rousseau conceives the general will or more concretely the state 'as essentially the institutional expression of man's moral purpose'. See J. W. Chapman, *Rousseau: Totalitarian or Liberal*, New York: Ams Press, 1968, p.141.

³⁵ Rousseau, *Of Social Contract*, p.30.

a theory of specific natural rights. The only 'inalienable' right which he seems to define is 'the right to participate, as a free and politically equal member, in a free social order'.³⁶ For Rousseau, Sherover says, individual rights are 'those individual claims or opportunities which the society deems useful to protect for the sake of the common good'.³⁷ It follows that the common good, as a 'yardstick' has priority over the individual rights and liberties.

Whereas liberals traditionally have sought to protect rights and liberties by treating all authority with caution, Rousseau's prescription seems to be reverse. Since the general will, he puts, 'is always upright [rightful] and always tends toward the public utility'³⁸, the possibility of its being in conflict with the citizens' rights and interests seems to be ruled out.³⁹ For Rousseau, sovereign political power is unlimited.⁴⁰ He explicitly declared that 'as nature gives each man an absolute power over all his limbs, the social pact gives the body politic an absolute power over all its members, and it is the same power which directed by the general will, ...bears the name of sovereignty'.⁴¹ This notion of infallible and absolute sovereignty renders Rousseau's theory vulnerable to the charge of authoritarianism.⁴² While some have seen him as 'the supreme

³⁶ C. M. Sherover, 'Introduction' to J.J. Rousseau, *Of Social Contract*, p.xxiv.

³⁷ *Ibid.*, p.xxv.

³⁸ Rousseau, *Of Social Contract*, Ch. III, p.26.

³⁹ See Lessnoff, *Social Contract*, p.81.

⁴⁰ For the argument that sovereignty in Rousseau is in fact limited see Sherover, 'Introduction', p.XXXI, and H.Mc Coubrey, *The Development of Naturalist Legal Theory*, London: Croom Helm, 1987, p.75.

⁴¹ Rousseau, *Of Social Contract*, Ch.IV, pp.27-28.

⁴² See D'Entreves, *Natural Law*, p.142. See also C.Taylor, 'The Politics of Recognition', in A.Gutmann (ed.), *Multiculturalism and "The Politics of Recognition"*, Princeton: Princeton University Press, 1992, p.51. Taylor claims that Rousseau's general will 'has been the formula for the most terrible forms of homogenizing tyranny, starting with the Jacobins and extending to the totalitarian regimes of our century'. *Ibid.*

prophet of modern democracy'⁴³ or 'a passionate lover of liberty',⁴⁴ others regarded him as 'the most formidable support[er] for all kinds of despotism'.⁴⁵ These conflicting views of Rousseau in fact spring from the ambiguities or even paradoxical nature of his conception of general will.⁴⁶ The aim of the social contract for Rousseau is to protect the individual and his freedom.⁴⁷ On the other hand he turned out to advocate an unlimited and absolute political body arising out of the social contract.⁴⁸

Rousseau tries to overcome this paradox by simply identifying the individual with the unlimited sovereign, the state.⁴⁹ This is made clear when Rousseau sees a law-breaker, who violates the social pact, as a 'rebel' and 'traitor' whose death or expulsion from the state may become necessary.⁵⁰ It implies, indeed illustrates, the 'sacredness' of the body

⁴³ D'Entreves, *Natural Law*, p.142.

⁴⁴ A. Rapaczynski, *Nature and Politics: Liberalism in the Philosophies of Hobbes, Locke, and Rousseau*, Ithaca & London: Cornell University Press, p.219.

⁴⁵ Constant, *Political Writings*, p.177. Isaiah Berlin also says that Rousseau turned out to be 'the most sinister and formidable enemy of liberty in the whole history of modern thought'. See his *Freedom and Its Betrayal*, Six Lectures, BBC Third Programme, 1952, quoted in d'Entreves, *Natural Law*, p.142.

⁴⁶ For the paradox of sovereignty in Rousseau's thought see A. Levine, *The End of the State*, London: Verso, 1987, pp.32-34.

⁴⁷ *Of Social Contract*, Book I, Ch.VI, p.14.

⁴⁸ *Ibid.*, Book II, Ch.IV, pp.27-28.

⁴⁹ A.Cobban, *Rousseau and the Modern State*, Second Ed., London: George Allen & Unwin Ltd., 1964, p.67, and J.D.Mabbott, *The State and the Citizen*, London: Hutchinson University Library, 1948, p.148.

⁵⁰ *Of Social Contract*, Ch.5, p.32. See also M. Keens-Soper, 'Jean-Jacques Rousseau: The Social Contract', in M. Forsyth and M. Keens-Soper (eds.), *A Guide to the Political Classics*, Oxford: Oxford University Press, 1988, p.184; R. M. MacIver, *The Modern State*, Oxford: Oxford University Press, 1926, p.445.

politic, the state, and nothing less than 'the dissolution of the individual in the state' to borrow Berlin's words.⁵¹ Rousseau writes:

...when the Prince has said to him: "It is expedient for the State that you die, " he should die; because it is only on this condition that he has lived in security until then, and his life is...a conditional gift of the State.⁵²

As we shall see, this statist tradition associated with Hegel and Rousseau,⁵³ whose Social Contract is often taken as the 'gospel of etatisme',⁵⁴ played very significant role in the official ideology of Turkey which in turn adversely affected the development of political rights in Turkish constitutional system.⁵⁵

Modern Rights Theorists : Rawls and Dworkin

John Rawls argues that his theory tries to reconcile the two main traditions of Locke which is based on liberty, and of Rousseau which is based on equality.⁵⁶ The adjudication between these two contending traditions⁵⁷ can be carried out, he says, 'first, by proposing two principles of justice to serve as guidelines for how basic institutions are to realise the values of liberty and equality, and second, by specifying a point of

⁵¹ I.Berlin, *The Crooked Timber of Humanity*, London: John Murray, 1990, p.126. Cf. Mabbott, *The State and the Citizen*, p.149.

⁵² *Of Social Contract*, Ch.V, p.32.

⁵³ See King, R., *The State in Modern Society: New Directions in Political Sociology*, New Jersey: Chatham House Publishers, 1986, p.55.

⁵⁴ Cobban, *Rousseau and the Modern State*, p.64.

⁵⁵ This will be explored in Chapter 7 of the study.

⁵⁶ J.Rawls, 'Justice as Fairness: Political not Metaphysical', *Philosophy and Public Affairs*, 14/3 (1985):223-251, at 227.

⁵⁷ The Lockean tradition, according to Rawls, gives greater weight to rights such as freedom of thought and conscience, basic rights of the person and of the person, and the rights covered by the rule of law, whereas the tradition associated with Rousseau gives greater importance to 'equal political liberties and the values of public life'. See *ibid.*, p.227 ; Rawls, *Political Liberalism*, pp.4-5.

view from which these principles can be seen as more appropriate than other familiar principles of justice to the nature of democratic citizens viewed as free and equal persons.⁵⁸

There is no doubt that in Rawls' theory the constitution is the most important 'basic institution' to realise liberty and equality. He views the constitution as the main political institution (in the basic structure of a society) which lays down the form of government, and of the relations between the state and individuals.⁵⁹ The constitution, he asserts, assigns certain rights to the individual,⁶⁰ the rights that are justified with reference to the first principle of justice.⁶¹ The first principle of justice plays a central role in Rawls' theory because it 'defines the common status of equal citizenship in a constitutional regime and lies at the basis of the political order.'⁶² This principle reads as follows:

Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.⁶³

⁵⁸ *Ibid.*

⁵⁹ Rawls, *A Theory of Justice*, p.7; *Political Liberalism*, p.227.

⁶⁰ *A Theory of Justice*, p.7 and 199.

⁶¹ *Ibid.*, p. 61.

⁶² *Ibid.*, p.373.

⁶³ Rawls, *Political Liberalism*, p.5. This is the latest and modified statement of the first principle of justice which was initially set out in *A Theory of Justice* (p.60). The main reason for this modification, says Rawls, is the initial wording of the principle which led Hart to misinterpretation of the idea of 'priority of liberty'. For Hart's criticism see H.L.Hart, 'Rawls on Liberty and its Priority', *University of Chicago Law Review*, 40/3 (Spring 1973):537-55, reprinted in N. Daniels (ed.), *Reading Rawls: Critical Studies of A Theory of Justice*, Oxford: Basil Blackwell, 1975, pp.230-52. Rawls' response is to be found in *Political Liberalism*, pp.289-371, particularly see p.292.

Among the constitutional rights and liberties⁶⁴ Rawls attaches a special weight to the right to political participation which 'requires that all citizens are to have an equal right to take part in, and to determine the outcome of, the constitutional process that establishes the laws with which they are to comply'.⁶⁵

For Rawls, the principle of participation, derived from the original position⁶⁶, is an integral part of the constitution, 'the highest-order system of social rules for making rules'⁶⁷. The constitution therefore should embody and preserve this principle, 'if the state is to exercise a final and coercive authority over a certain territory'.⁶⁸ Rawls stresses that the constitution should take steps to increase the value of the equal rights to participation for all members of society.⁶⁹ For this purpose, a variety of ways can be adopted. Property and wealth, for instance, may be kept widely distributed in a society where private ownership of the means of production is recognised. Furthermore, political parties must be made independent of private economic interests (in a 'private property democracy'), as well as of governmental control and bureaucratic power (in a 'liberal socialist regime') by providing them with sufficient tax revenues.⁷⁰

⁶⁴ Rawls seems to use the terms 'liberties' and 'rights' interchangeably throughout his *A Theory of Justice*. See R. Martin, *Rawls and Rights*, Kansas: University Press of Kansas, 1985, pp. 26-27.

⁶⁵ Rawls, *A Theory of Justice*, p.221.

⁶⁶ The 'original position' in Rawls' theory is a purely hypothetical situation which corresponds to the state of nature in the traditional theories of social contract. People in the original position with a 'veil of ignorance', argues Rawls, would reach an agreement on the two principles of justice. See Rawls, *A Theory of Justice*, p.12, and 17-21.

⁶⁷ Rawls, *A Theory of Justice*, p.222.

⁶⁸ *Ibid.*, p.222.

⁶⁹ For a critical treatment of the reasons behind Rawls' emphasis on the right to political participation and more generally of his constitutional theory see B. Barry, *The Liberal Theory of Justice*, Oxford: Clarendon Press, 1973, pp. 135- 137.

⁷⁰ Rawls, *A Theory of Justice*, pp.225-6; Rawls, *Political Liberalism*, p.328.

In *A Theory of Justice*, Rawls has also enumerated certain elements of a constitutional regime to satisfy the principle of participation.⁷¹ First, there must be a representative body selected by and ultimately accountable to the electorate. This body is a legislature with lawmaking powers. Second, 'all sane adults' must be entitled to have the right to take part in political affairs through the elections which are free, fair, and regularly held. Last, but by no means least, there must be 'firm constitutional protections' for certain rights and liberties.⁷²

Rawls sees these basic rights and liberties as what he calls 'constitutional essentials' of which two kinds can be discerned:

- a. fundamental principles that specify the general structure of government and the political process: the power of the legislature, executive and the judiciary; the scope of majority rule; and
- b. equal basic rights and liberties of citizenship that legislative majorities are to respect: such as the right to vote and participate in politics, liberty of conscience, freedom of thought and of association, as well as the protections of the rule of law.⁷³

These basic rights, he maintains, are 'unalienable and therefore can neither be waived nor limited by any agreements made by citizens, nor overridden by shared collective preferences'.⁷⁴ Rawls, however, by no means argues for absolute rights⁷⁵, although he excludes certain grounds such as utilitarian and perfectionist values from restraining basic rights, a matter to which we shall return soon.

⁷¹ Rawls, *A Theory of Justice*, p.222.

⁷² *Ibid.*, pp.222-3.

⁷³ Rawls, *Political Liberalism*, p.227.

⁷⁴ J.Rawls, 'Social Unity and Primary Goods', in A.Sen and B.Williams (eds.), *Utilitarianism and Beyond*, Cambridge: Cambridge University Press, 1982, p.171n.

⁷⁵ Rawls, *Political Liberalism*, pp.294-295.

Rawlsian basic rights have been criticised as 'purely formal and procedural'.⁷⁶ This criticism is worth mentioning because it is levelled against not only Rawls, but also other liberals who stand for the idea of individual rights against the state. Norman Daniels, for instance, argues that Rawls and earlier liberals failed to convince us that it is possible to realise a maximally extensive system of equal rights and liberties without eliminating the inequalities of wealth and power in society.⁷⁷

Rawls' response to this criticism is twofold. First, he distinguishes between the basic liberties and the value of these liberties.⁷⁸ The former entitle individuals 'to do various things, if they wish, and...forbid others to interfere'.⁷⁹ Poverty and lack of material means, Rawls concedes, have a negative effect on the exercise of these liberties. Yet he considers these obstacles not as 'restricting a person's liberty', but 'as affecting the worth of liberty, that is, the usefulness to persons of their liberties'.⁸⁰

⁷⁶ See I. Shapiro, *The Evolution of Rights in Liberal Theory*, Cambridge: Cambridge University Press, 1986, p.224; N. Daniels, 'Equal Liberty and Unequal Worth of Liberty', in *Reading Rawls*, pp.253-281.

⁷⁷ Daniels, 'Equal Liberty...', p.281.

⁷⁸ Rawls, *Political Liberalism*, p.325.

⁷⁹ Shapiro points out that Rawls appeals to the negative libertarian conception of rights 'as spheres surrounding individuals'. See his *Evolution of Rights in Liberal Theory*, p.224.

⁸⁰ Rawls, *Political Liberalism*, p.326. The usefulness of liberties, says Rawls, is 'specified in terms of an index of the primary goods regulated by the second principle of justice'. By primary goods Rawls means 'rights, liberties, and opportunities, income and wealth, and the social bases of self-respect'. See J. Rawls, 'A Well-Ordered Society', in P.Laslett and J.Fishkin (eds.), *Philosophy, Politics and Society*, Oxford: Basil Blackwell, 1979, p.11. For criticism of the conception of primary goods see R. Moore, 'Rawls on Constitution-Making', in *Constitutionalism: Nomos X*, pp.247-269. The second principle of justice is formulated to justify social and economic inequalities under two conditions: 'first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society'. See Rawls, *Political Liberalism*, p.6.

The basic liberties are the same for everyone whatever their economic and social position, whereas the worth of these liberties are not the same for each citizen; those who have greater wealth and income will therefore have greater means of exercising their liberties.⁸¹ Rawls attempts to enhance the worth of liberties for those less-well off through 'all-purpose material means' (of primary goods which includes income and wealth) available to the least advantaged members of society.⁸²

Despite this attempt, Rawls' distinction between liberty and the worth of liberty, as Daniels rightly puts it, seems to be arbitrary,⁸³ and as Rawls himself acknowledges, 'settles no substantive question'.⁸⁴ The second way in which Rawls tries to meet the objection that the basic rights are merely formal is grounded on his idea of the 'fair value' of political liberties.⁸⁵ The aim of the fair value principle is to ensure an equality as to the worth of the political liberties of all individuals, an equality 'in the sense that everyone has a fair opportunity to hold public office and to influence the outcome of political decisions'.⁸⁶

When and only if assured their fair value, asserts Rawls, the political liberties have two fundamental roles to play. First of all, they positively affect 'the moral quality of civic life'.⁸⁷ He argues that the political rights i.e. 'taking part in political life ...gives him [the individual] an equal voice along with others in settling how basic social conditions are to be arranged'.⁸⁸ Political rights, as a means to create a public will that consults and takes everyone's views and interests into consideration,

⁸¹ *Ibid.*, p.326.

⁸² *Ibid.*

⁸³ See Daniels, 'Equal Liberty and Unequal Worth of Liberty', pp.259-263.

⁸⁴ Rawls, *Political Liberalism*, p.326.

⁸⁵ Rawls accepts that although the idea of fair value is crucial aspect of justice as fairness, it was not sufficiently explained in his theory. See *ibid*, p.327.

⁸⁶ *Ibid*. See also above note 64 for the measures Rawls proposed to enhance the fair value of political liberties.

⁸⁷ Rawls, *A Theory of Justice*, p.233.

⁸⁸ *Ibid*.

'lay the foundations for civic friendship and shapes the ethos of political culture'.⁸⁹ Secondly, these rights play an important role in enhancing self-esteem and 'the sense of political self competence' of the individuals. According to Rawls, these rights 'strengthen men's sense of their own worth, enlarge their intellectual and moral sensibilities, and lay the basis for a sense of duty and obligation upon which the stability of just institutions depends'.⁹⁰ Now we can turn to Dworkin.

It would not be exaggeration to say that Dworkin's treatment of rights is the most sophisticated and penetrating one in recent liberal writings.⁹¹ His theory is based on rights; it is in his words a 'right-based' theory.⁹² Dworkin begins the construction of his theory by attacking what he calls the 'ruling theory of law' -legal positivism⁹³ and utilitarianism.⁹⁴ He

⁸⁹ *Ibid.*, p.234.

⁹⁰ *Ibid.*

⁹¹ See R.P.Churchill, 'Dworkin's Theory of Constitutional Law', *Hastings Constitutional Law Quarterly*, 8/47 (Fall 1980):47-91, at 47.

⁹² Dworkin classifies the political theories as 'right-based', 'goal-based', and 'duty-based' theories. See R. Dworkin, *Taking Rights Seriously*, London: Duckworth, 1977, pp.171-173. (Hereinafter *TRS*). For the application of this classification to moral theories see e.g. J.L. Mackie, 'Can There Be a Right-Based Moral Theory', in J. Waldron (ed.), *Theories of Rights*, pp.168-182. Joseph Raz rejected the view that political morality is in fact right-based. See his article, 'Right-Based Moralities' in *ibid.*, pp.182-201.

⁹³ *TRS*, p.vii. For Dworkin's attack on legal positivism see also G.Carrio, 'Professor Dworkin's Views on Legal Positivism', *Indiana Law Journal*, 55/2 (1979-80):209-246; D. Lyons, 'Principles, Positivism, and Legal Theory', *Yale Law Journal*, 87 (1977), pp.416-426. See also W.J.Waluchow, *Inclusive Legal Positivism*, Oxford: Clarendon Press, 1994, for an attempt to reconcile between Dworkinian natural law theory and legal positivism.

⁹⁴ Utilitarianism, as a form of consequentialism, is usually described as the doctrine that values actions by their capacity to increase or maximise pleasure or happiness of the individuals. See J.Smart & B.Williams, *Utilitarianism: For and Against*, Cambridge, Cambridge University Press, 1973, pp.79-80. See also B.Williams, *Morality: An*

makes it clear that the ruling theory is defective because it rejects the idea of individual rights against the state which are prior to the rights created by explicit legislation.⁹⁵ Then he attempts to build up his alternative 'superior' theory of rights step by step.

Although Dworkin's account of adjudication is the most crucial, and seems to be inseparable, part of his theory,⁹⁶ here we will confine our analysis into his concepts of a right, and of rights against the state.

Dworkin makes a distinction between rights against the state, which justify a political decision that requires government to act, and rights against citizens, which justify a decision to coerce particular individuals.⁹⁷ Ordinary civil cases, he says, involve the latter, while constitutional and criminal law cases involve rights against the state.⁹⁸ Then the question becomes what kinds of rights people have against the government.

Obviously, Dworkin has difficulty in answering this question. He does not produce a list of these moral and legal rights. Nor does he intend to present such a list.⁹⁹ Even the constitutional system, he asserts, falls short of establishing what these rights are, though the constitution does contribute to the protection of moral rights against the state.¹⁰⁰ In Dworkin's theory, in fact, 'rights may vary in strength and character

Introduction to Ethics, Cambridge : Cambridge University Press (Canto Edition), 1993, p.82.

⁹⁵ TRS, p.xi. For the rejection of the view that utilitarian theory is incompatible with the moral rights see J.Gray, *Liberalisms: Essays in Political Philosophy*, London and New York: Routledge, 1989, pp.95-96; and L.W.Sumner, *The Moral Foundation of Rights*, Oxford: Clarendon Press, 1987, especially pp.163-198.

⁹⁶ Dworkin's theory of judicial adjudication will be dealt with in Chapter 3 below.

⁹⁷ TRS, p.94n.

⁹⁸ *Ibid.*

⁹⁹ TRS, p.xiv.

¹⁰⁰ TRS, p.184-6.

from case to case, and from point to point in history'.¹⁰¹ This dynamic view of rights, which is called 'relativism',¹⁰² will ensure the expansion of individual rights to fit new circumstances.¹⁰³

Nonetheless it is inevitable, he concedes, that some department of government will have the final say on what law will be enforced. In practice, it is for the government to decide 'what an individual's rights are, because its police will do what its officials and courts say'.¹⁰⁴ Dworkin, however, warns people to insist that government should take their rights seriously by following a coherent theory of what these rights are.¹⁰⁵

The necessity of a 'coherent' theory of rights as a guideline for governments urges us to examine the very conception of a right in Dworkin's thought. He defines a strong sense of 'right' that individuals claim when they appeal to political and moral rights.¹⁰⁶ 'If someone has a right to something', Dworkin asserts, 'it is wrong for the government to deny it to him even though it would be in the general interest to do so'.¹⁰⁷ This sense of a right is, what Dworkin calls, the 'anti-utilitarian' concept of a right. For him, this is the distinctive concept of an

¹⁰¹ TRS, p.139.

¹⁰² See Churchill, 'Dworkin's Theory of Constitutional Law', p.56, and 59-66

¹⁰³ TRS, p.199.

¹⁰⁴ TRS, p.184.

¹⁰⁵ TRS, p.186.

¹⁰⁶ Dworkin makes a familiar distinction between the two senses of the term right. To say that it is right for someone to do something is different from saying that someone has a right to do something. It is the latter to which Dworkin refers when he speaks of the strong sense of the 'right'. TRS, pp.188-189. For this distinction see also E. Andrew, *Shylock's Rights: A Grammar of Lockean Claims*, Toronto: University of Toronto Press, 1988, pp.10-11, and R.Dagger, 'Rights', in T.Ball, J.Farr and R.L.Hanson (eds.), *Political Innovation and Conceptual Change*, Cambridge: Cambridge University Press, 1989, p.293.

¹⁰⁷ TRS, p.269.

individual rights against the state which is the heart of the constitutional theory.¹⁰⁸

It is argued that, despite Dworkin's claim that his concept of a right is 'anti-utilitarian', he seems to deny the traditional incompatibility between rights and utilitarianism¹⁰⁹ by referring to the claim that adhering to the requirements of justified rights contributes to the realisation of utilitarian requirements.¹¹⁰ Dworkin's justification of rights against government is said to be based on a particular version of utilitarianism called 'personal preference' utilitarianism.¹¹¹ That is, in Dworkin's view, we justify our rights against the state by showing that, because of them, political decisions will be more consistent with the requirements of personal preference utilitarianism than would otherwise be the case.¹¹²

From this it follows that Dworkin in fact endorses that kind of utilitarianism. Is it really so? He explicitly rules out such an endorsement, in the appendix to *Taking Rights Seriously*, by declaring that 'my arguments are arguments against an unrestricted utilitarianism, not in favour of a restricted one.'¹¹³

¹⁰⁸ *Ibid.*

¹⁰⁹ See Sumner's *The Moral Foundation of Rights*, for the rejection of the view that rights are traditionally incompatible with utilitarian moral outlook.

¹¹⁰ Dworkin says that the opposition of the ruling theory to the idea of natural rights stems from a Benthamian view that natural rights can have no place in a respectably empirical metaphysics. He went on to say that his account of rights does not presuppose any ghostly forms. In fact, he holds, it is 'parasitic on the dominant idea of a collective goal of the community as a whole.' See TRS, p.xi.

¹¹¹ See, D.W. Haslett, 'The General Theory of Rights', *Social Theory and Practice*, 5 /3-4 (1980):427-459, at 433.

¹¹² *Ibid.*

¹¹³ TRS, p.357. Despite Dworkin's refusal to give an endorsement to a restricted version of utilitarianism, Haslett believes that the most notable feature of his theory is that 'rights are justified, not because they detract from the realisation of utilitarian

Dworkin rejects the idea that if individuals have rights against the government, like the rights to free speech or political activity, the community will be better off as a whole.¹¹⁴ He argues that this idea (that individual rights may lead to overall utility in the long run) is irrelevant to the defence of these rights. It is irrelevant because when we say that someone has one of these rights it means that 'he is entitled to do so even if this would not be in the general interest'.¹¹⁵

He also attacks the argument that utilitarianism has an egalitarian character as an 'illusion'.¹¹⁶ Utilitarianism claims that people are treated as equals when the preferences of each, weighted only for intensity, are balanced in the same scales without any discrimination of merit. This version of utilitarianism is described by Dworkin as 'corrupt' because it gives less weight to some persons than to others, or discounts some preferences.¹¹⁷ He states that:

The concept of a political right, in the strong anti-utilitarian sense..., is a response to the philosophic defects of a utilitarianism that counts external preferences and the practical impossibility of a utilitarianism that does not.¹¹⁸

To sum up, Dworkin views the preference utilitarianism as defective, because it does not distinguish between personal and external preferences, by doing so, it does not hold that 'each man is to count as one'.¹¹⁹

requirements, but because they contribute to the realisation of these requirements.' See Haslett, 'The General Theory of Rights', p.433.

¹¹⁴ TRS, p.270.

¹¹⁵ TRS, p.271.

¹¹⁶ TRS, p.275.

¹¹⁷ R. Dworkin, 'Rights as Trump', in Waldron (ed.), *Theories of Rights*, p.165.

¹¹⁸ TRS, p.277.

¹¹⁹ Dworkin, 'Rights as Trumps', p.155. However, Dworkin admits that personal and external preferences are sometimes so combined in practice that to distinguish between them is 'psychologically as well as institutionally impossible'. See TRS, pp.276-277.

We can now turn to the fundamental question in Dworkin's theory. How Dworkin provides justification for the idea of rights against the state? He points out that the concept of rights against the state rests upon two important basis. The first, associated with Kant, is the 'vague but powerful idea of human dignity' which rejects the ways of treating a man that are inconsistent with recognising him as a full member of the human community.¹²⁰ In Kantian thought, the notion of human dignity prohibits the use of any human agent as a mere means to the satisfaction of one's desires. That is, the individual has to be treated as end rather than means.¹²¹ The categorical imperative as the foundation of Kant's moral and political philosophy¹²² can provide a useful device for justification of rights.

The second ground Dworkin proposes is the idea of political equality. This supposes that every member of a political community must be entitled to same concern and respect of their government no matter whether they are weaker or more powerful.¹²³

Dworkin argues that anyone who believes that citizens have rights against the state must accept one or both of these ideas. It may only make sense to say that a man has a fundamental right against the state, 'if that

¹²⁰ TRS, p.198.

¹²¹ Kant's famous moral imperative reads as follows. 'Act in such a way that you always treat humanity, whether in your own person or in that of another, never simply as a means but always at the same time as an end.' See I. Kant, *Groundwork to the Metaphysics of Morals*, p.434, translated in H. J.Paton, *The Moral Law*, 3rd Ed., 1956, p.101. For an interpretation of positive and negative requirements of this imperative see I. Harris, *Kant: Moral Philosophy and Politics*, Discussion Paper, University of Leicester, 1992, p.6. See also J.G.Murphy, *Kant: The Philosophy of Right*, London: Macmillan, 1970, pp.73-86, and D. Boucher and P. Kelly, 'The Social contract and its critics: an overview', in D. Boucher and P.Kelly (eds.), *The Social Contract From Hobbes to Rawls*, London and New York:Routledge, 1994:1-34, at 8.

¹²² See H. Williams, 'Kant on the social contract', in Boucher and Kelly (eds.), *The Social Contract from Hobbes to Rawls*, pp.132-146, at pp.140-141.

¹²³ TRS, pp.198-99.

right is necessary to protect his dignity, or his standing as equally entitled to concern and respect'.¹²⁴

He endorses the second idea that people have the right to equal concern and respect. It is this fundamental political right that provides the ultimate justification for individual rights against the state.¹²⁵ The right to equal concern and respect, unlike the general right to liberty which Dworkin rejects,¹²⁶ has 'the advantage that it could be a final, not merely a *prima facie* right'.¹²⁷ In other words, one person's possession of this right will not be in conflict with another's.¹²⁸ Then this right certainly serves as the foundation of Dworkin's theory of rights.

Leaving aside the Kantian idea of human dignity, we may ask what kind of justification Dworkin provides for the right to equal concern and respect. Why should people be treated equally?

It appears that Dworkin never takes up the issue of justification of this fundamental right. He in fact explicitly rejects any commitment to what he calls 'ontological assumptions' about the nature of the rights.¹²⁹ We can assume, nevertheless, that the right to equal concern and respect is based on his moral theory which is itself based on the idea of individual autonomy. That is, individuals have the right to self-determination; they are capable of choosing or rejecting things. Since Dworkin's subjects are rational and autonomous 'human beings who are capable of forming and acting on intelligent conceptions of how their lives should

¹²⁴ TRS, p.199.

¹²⁵ Dworkin, *A Matter of Principle*, p.198. See also Haslett, 'The General Theory of Rights', p.430.

¹²⁶ TRS, p.269, 271, and R. Dworkin, 'We Do Not Have a Right to Liberty' in R. L. Cunningham (ed.), *Liberty and the Rule of Law*, London: Texas A&M University Press, 1979, pp.167-181.

¹²⁷ See J.L. Mackie, 'Can There Be a Right-Based Moral Theory', in Waldron(ed.), *Theories of Rights*, p.177.

¹²⁸ *Ibid.* See also J. Feinberg, *Social Philosophy*, New Jersey: Prentice-Hall, 1973, p.97.

¹²⁹ TRS, p.139. See also Churchill, 'Dworkin's Theory of Constitutional Law', p.67.

be lived',¹³⁰ they are entitled to have right to equal concern and respect. This point may clearly be seen in his attempt to justify the rights to pornography and homosexuality by reference to 'the right to moral independence' as a trump over utilitarian arguments.¹³¹

If Dworkin's account of rights is based on the conception of autonomy, then this may solve some problems arising out of his distinction between personal and external preferences. Recall the example in which he considers the demand of a law-school student for an all-white class as an external preference on the ground that he has racist claim which must be ruled out.¹³² First of all, there is no 'clear' evidence that Dworkin may produce in support of his argument that the student's preference has racist character.¹³³ He just assumes that the white student's demand constitutes an external preference which may lead to the denial of Blacks' right to be treated as equals.¹³⁴ Secondly and more importantly, if Dworkin believes in autonomy this student should have the right to choose the form of his class. Yet, he might have argued that, irrespective of the character of preferences, such a demand is to be ruled out simply because it violates other's autonomy, and is therefore not an example of individual autonomy. This is the point at which arises the issue of restraining individual rights.

The Limit of Rights against the State

Both Rawls and Dworkin recognise that individual rights are by no means absolute; there exist certain kind of restrictions to be imposed on

¹³⁰ TRS, p.272. See also A. Barron, 'Ronald Dworkin and the Postmodern Challenge', *Oxford Literary Review*, 11 (1989):121-136, at 132.

¹³¹ Dworkin, 'Rights as Trumps', p.165.

¹³² TRS, p.236: '...a white student prefers the company of other whites because he has racist social and political convictions, or because he has contempt for blacks as a group.'

¹³³ See S. Mendus, *Tolerance and the Limits of Liberalism*, London: Macmillan, 1989, p.140.

¹³⁴ TRS, p.236.

these rights. They, however, unequivocally exclude utilitarian grounds from justifying constraints upon individual rights.

According to Rawls, since the liberties and rights of individuals are bound to conflict with one another,¹³⁵ they are not absolute.¹³⁶ The priority of liberty in Rawls' view 'implies in practice that a basic liberty can be limited or denied solely for the sake of one or more other basic liberties, and never... for reasons of public good or of perfectionist values'.¹³⁷ By public good he obviously refers to utilitarianism.¹³⁸ The equal political rights, he argues, cannot be legitimately denied to some individuals on utilitarian grounds such as 'that their having these liberties may enable them to block policies needed for economic efficiency and growth'.¹³⁹

Dworkin, like Rawls, argues that a liberal state may constrain individual rights 'only on certain very limited types of justification'.¹⁴⁰ For Dworkin these 'constraints may be justifiable, but only because they are compromises necessary to protect the liberty or security of others'.¹⁴¹ The utilitarian claims are again clearly rejected as grounds to limit

¹³⁵ Some liberals argue that there is no conflict between rights. This view is based on the assumption that classical liberalism places its main emphasis on negative rights not to be interfered with. However, the right to free speech may conflict with the right not to be defamed. It is argued in this case that only the latter would be right since the 'right to free speech' is not a right not to be interfered with. One would enjoy this right in so far as most of the obvious ways of interfering with that freedom are illegitimate. See N. Simmonds, 'Rights, Socialism and Liberalism', *Legal Studies*, 5 (1985):1-9, at 8. See also R. Nozick, *Anarchy, State, and Utopia*, Oxford: Basil Blackwell, 1974, pp.28-29.

¹³⁶ Rawls, *Political Liberalism*, p.295; and his 'A Well Ordered Society', p.12.

¹³⁷ Rawls, *Political Liberalism*, p.295. For a critique of Rawls's exclusion of perfectionist principles see J.M. Finniss, 'Legal Enforcement of "Duties to Oneself": Kant v. Neo-Kantians', *Columbia Law Review*, 87 (1987):433-456, at 434-437.

¹³⁸ Rawls, *Political Liberalism*, p.294.

¹³⁹ *Ibid.*, pp.294-95.

¹⁴⁰ TRS, p.274.

¹⁴¹ TRS, p.267.

individual rights. In order to explain this rejection, Dworkin distinguishes between arguments of principle and arguments of policy. The former support a particular constraint on liberty on the ground that it is required to protect the distinct right of some individual who will be injured by the exercise of the liberty concerned. The latter support constraints on the ground that it is required to make community as a whole better-off.¹⁴² The arguments of policy include both utilitarian and ideal types. These arguments are ruled out by Dworkin on the basis that they are inconsistent with the principle of equal concern and respect.¹⁴³

He presents two models as a guideline for the government and the courts in deciding what moral rights individuals have and to what extent these rights are to be limited.¹⁴⁴ The first model, which can be called the 'balance model', suggests the existence of 'a balance between the rights of the individual and the demands of society at large'.¹⁴⁵ In this model, the rights of the society (or majority) is presented as a competing right that must be balanced against the rights of individual. That is, what government must do is to 'balance the general good and personal rights, giving to each its due'.¹⁴⁶

The requirement of 'justice' is used as the only criteria for the balance between individual rights and society's general benefit. Dworkin neither here nor anywhere in his book, *Taking Rights Seriously*, undertakes a conception of justice. It is understood, however, that whenever he uses the term 'justice' he seems to refer to a conception based on the principle of equal concern and respect.¹⁴⁷ Nevertheless, Dworkin

¹⁴² TRS, p.274.

¹⁴³ TRS, pp.274-275. Dworkin nevertheless suggests that the utilitarian calculations must be based on personal preferences, ignoring external preferences, if utilitarian arguments of policy are to be used to justify constraints on liberty. See, TRS, p.276.

¹⁴⁴ TRS, p.197

¹⁴⁵ TRS, p.197-98.

¹⁴⁶ TRS, p.198.

¹⁴⁷ In fact, Dworkin in his essay 'Justice and Rights' argues that right to equal concern and respect lies at the basis of Rawls's conception of justice as fairness, and that the

describes this model as 'indefensible' on the ground that it rests on 'the confusion of society's rights with the rights of members of society', a confusion which may destroy the very concept of individual rights.¹⁴⁸

The second model concentrates on abridging a right rather than inflating one. Thus it follows that once a right is granted in clear-cut cases, then the government may act to limit that right only when there is some 'compelling reason'.¹⁴⁹ The model strongly rejects the argument that a right ought to be curtailed simply because otherwise society would pay a further price.¹⁵⁰

Under this model Dworkin proposes three grounds that can be invoked by the government to limit a particular right. First, the Government must show that the values protected by the original right are not really in question in the marginal case, or at stake only in some 'attenuated form'. Second, it must show that if the original right is defined to include the marginal case, then some competing right would be abridged. Third, it may show that if the right were so defined, then the cost to society would be greater than the cost paid to grant the original right.¹⁵¹

To sum up, in liberal theory individuals have fundamental rights against the state which may legitimately be limited only under the most compelling circumstances. The compelling reason is basically the

original position serves as a device for testing which principles of justice this right requires. Hence, he thinks Rawls' theory of justice is a right-based theory. See *TRS*, p.180. Yet, Rawls explicitly disavows such an interpretation. He says, justice as fairness is a conception-based, an ideal-based view. See Rawls, 'Justice as Fairness...', pp.236-237. ¹⁴⁸ *TRS*, 199. We will argue in the Second Part of our study (Chapter 7) that the system of restrictions for rights adopted in the Turkish Constitution is based on the 'balance model'. This model, together with other utilitarian grounds, is used to draw boundaries of individual rights in the Turkish Constitution.

¹⁴⁹ *TRS*, p.200.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

violation of other's rights and liberties, but not some vague grounds of utilitarian outlook such as 'national security' or 'public interest' which are called 'phantom perils'.¹⁵² 'Recent history', as Moore rightly put it, 'has provided all-too-ample illustrations of the hazards that follow from official paranoia when phantom perils are invoked to legitimate the curbing of rights'.¹⁵³

One of the central arguments of this thesis is that the nature and characteristics of the state-individual relations in Turkish constitutional system resembles that of Rousseau and Hegel as opposed to the liberal tradition. This statist tradition which is deeply rooted in Turkish political culture subordinates the individual vis-a-vis the political body. It also provided, as we shall see,¹⁵⁴ those in power the opportunity to curb the individual rights on the ground of the utilitarian perils such as the public interest which is perceived as 'the slogan of the ideology of statism'.¹⁵⁵

¹⁵² R. Moore, 'Rawls on Constitution -Making', p.254.

¹⁵³ *Ibid.*

¹⁵⁴ See Chapter 7 below.

¹⁵⁵ W. P. Baumgarth, 'Hayek and Political Order: The Rule of Law', *Journal of Libertarian Studies*, 2/1 (1978): 11-28, at 19.

CHAPTER 2- CONSTITUTIONAL PRINCIPLE I: THE POLITICAL NEUTRALITY

The state is not to do anything intended to favor or promote any particular comprehensive doctrine rather than another, nor to give greater assistance to those who pursue it.

John Rawls¹

Modern liberal thinkers appear to have abandoned the 'ancient' project of pursuing the idea of a political community.² Most of the liberals today leaves out the notion of 'an objective moral order which would define man's telos'.³ They argue instead that the liberal is and must be neutral over the moral conceptions of good.⁴ Liberalism incorporates the fundamental principle that 'the state is an instrument for satisfying the wants men happen to have, rather than a means of making good men.'⁵

What is it then to be neutral? 'To be neutral' says Montefiore, 'is to do one's best to help or to hinder the various parties concerned in an equal degree.'⁶ This implies that one can only be neutral if he can affect the fortunes of the parties, and if he has reasons for helping or hindering the parties. Neutrality therefore can be seen as 'both an intentional and a causal concept in the sense that it relates to the directed, or at any rate to the directable, causal impacts that one agent may or may not have on the policies of another.'⁷

¹ J. Rawls, 'The Priority of the Rights and Ideas of the Good', *Philosophy and Public Affairs*, 17(1988): 251-276, at 262.

² See A. MacIntyre, *After Virtue*, Second Edition, London: Duckworth, 1985, p.156. This project of creating a good society is traced to Aristotles. See Aristotle, *Politics*, trans. Sir E. Barker, Oxford: Clarendon Press, 1946, p.1.

³ R. Plant, *Modern Political Thought*, Oxford, Basil Blackwell, 1991, p.75.

⁴ *Ibid.*

⁵ B. Barry, *Political Argument*, London: Routledge & Kegan Paul, 1965, p.66.

⁶ A. Montefiore (ed.), *Neutrality and Impartiality*, Cambridge: Cambridge University Press, 1975, p.5.

⁷ *Ibid.* For Montefiore, neutrality thus defined differs from both 'indifference' and 'detachment' in that it does not entail the setting aside of the personal preferences. A

Our concern is *political* neutrality. Liberal neutrality, as a 'political value', does not require people in general to be neutral on the question of what constitutes the good life.⁸ It is the political body that should be neutral over the conceptions of goods individuals happen to have.

Joseph Raz argues that there are three main principles which can be derived from the concept of political neutrality. To him, no political action may be undertaken or justified on the ground that:

- i) it promotes an ideal of the good or enables individuals to pursue an ideal of the good.
- ii) it promotes an ideal of the good except in order to secure for all persons an equal ability to pursue in their lives and promote in their societies any ideal of the good through nonpolitical action.
- iii) it promotes an ideal of the good except in order to secure for all persons an equal ability to pursue and promote any ideal of the good in their lives through political means.⁹

Having distinguished these principles of political neutrality Raz maintains that while Nozick and other libertarian liberals are committed to a version of the first principle, Rawls and other egalitarians accept consequentialist (or what he calls 'comprehensive') neutrality which is similar to the third principle.¹⁰

criticism of this definition of neutrality may be found in L. Kolakowski, 'Neutrality and academic values', in Montefiore (ed.), *Neutrality and Impartiality*, pp.72-73.

⁸ J. Waldron, *Liberal Rights: Collected Papers 1981-1991*, Cambridge: Cambridge University Press, 1993, pp.154-155.

⁹ J. Raz, 'Liberalism, Autonomy, and the Politics of Neutral Concern', *Midwest Studies in Philosophy*, 7(1982):89-170, at 92-93.

¹⁰ *Ibid.*, p.93. Kymlicka, unlike Raz, regards Rawls' theory as endorsing justificatory neutrality. He argues that the two fundamental components of liberal justice for which Rawls stands - respect for liberty, and fairness in the distribution of resources- preclude comprehensive neutrality in Rawls' position. W.Kymlicka, 'Liberal Individualism and Liberal Neutrality', *Ethics*, 99 (July 1989): 883-905, at 884.

Justifying Neutrality: The Priority of the Right over the Good

The liberal principle of political neutralism is justified by appeal to the commitment to individual autonomy.¹¹ Since individuals are autonomous moral agents who are best capable of deciding how to conduct their lives, the state has no right to impose on them a particular conception of the good or lifestyle.¹² The autonomous moral agents, argues Rawls, have two essential characteristics: the capacity for a sense of right or justice, and the capacity for a conception of the good.¹³ The first appeals to the principles which 'establish a final ordering among the conflicting claims that persons make one another'.¹⁴ The principles of the good on the other hand refer to 'what is the good of particular individuals'.¹⁵ The principle of the right provides a suitable framework in which different conceptions of the good are to be pursued and realised.¹⁶ Therefore the right has priority over the good. This is so because as Rawls expressed the conceptions of the good are contingent and incommensurable in their nature. Rawls argues that it is 'the presupposition of liberalism...that there are many conflicting and incommensurable conceptions of the good, each compatible with the full autonomy and rationality of human persons'.¹⁷ This engenders the idea

¹¹ Waldron, *Liberal Rights*, p.155.

¹² J.Raz, *The Morality of Freedom*, Oxford: Oxford University Press, 1986, p.108. Raz argues however that liberals' attempt to justify political neutralism on the ground of autonomy is doomed to failure, because autonomy requires only plurality not neutrality. See Raz, 'Liberalism, Autonomy, and the Politics of Neutral Concern', p. 115

¹³ Rawls, *A Theory of Justice*, pp.560-567.

¹⁴ Rawls, *A Theory of Justice*, p.448.

¹⁵ Rawls, *A Theory of Justice*, p.448. Cf. I.Kant, 'On the common saying: "this may be true in theory, but it does not apply in practice" ', in H.Reiss (ed.), *Kant's Political Writings*, Cambridge: Cambridge University Press, 1988, p.73.

¹⁶ See G.P. Fletcher, 'Human Dignity as a Constitutional Value', *U.W. Ontario Law Review*, 22(1984):171-182, at 175, C. Fried, 'Liberalism, Community, and the Objectivity of Values', *Harvard Law Review*, 96 (February 1983):960-968, at 960n, V.J.Seidler, *Kant, Respect and Injustice: The Limits of Liberal Moral Theory*, London: Routledge & Kegan Paul, 1986, pp.122-123.

¹⁷ J.Rawls, 'Social unity and primary goods', in A. Sen & B. Williams (eds.), *Utilitarianism and Beyond*, Cambridge : Cambridge University Press, 1982, p.160.

that the state under the guidance of the right must be neutral as between these conflicting conceptions of the good.¹⁸

For Rawls, government is neutral between various conceptions of the good, 'not in the sense that there is an agreed public measure of intrinsic value or satisfaction with respect to which all these conceptions come out equal, but in the sense that they are not evaluated at all from a social stand point.'¹⁹ It follows from this that political actions cannot be justified by reference to some public ranking of the intrinsic value of different ways of life, because such a ranking does not exist.²⁰ This kind of neutrality, argues Kymlicka, is consistent with the legitimate consequences of cultural competition.²¹ Political neutrality as a constitutional value is indeed indispensable for creating and preserving 'a free democratic culture [in which] a plurality of conceptions of the good is pursued by its citizens'.²² It is often associated 'with tolerance of those with different ideas, with the accommodation of a variety of values or lifestyles,...and with providing for the equal rights of citizens'.²³

Dworkin too gives great weight to the principle of neutrality. His view of neutrality is based upon his belief that liberalism is founded on an idea of persons as entitled to equal concern and respect.²⁴ To put it another way, a certain conception of equality is the foundation of liberalism, but neutrality is its normal practical consequence.²⁵ This is the point where

¹⁸ Rawls, 'The Priority of the Rights and Ideas of the Good', p.262.

¹⁹ Rawls, 'Social Unity and Primary Goods', p.182.

²⁰ Rawls, *A Theory of Justice*, p.19.

²¹ Kymlicka, 'Liberal Individualism and Liberal Neutrality', p. 886.

²² Rawls, 'Social unity and primary goods', p.160.

²³ R.E.Goodin & A.Reeve, 'Liberalism and neutrality', in Goodin & Reeve (eds.), *Liberal Neutrality*, London: Routledge, 1989, pp.1-2.

²⁴ R.Dworkin, 'Liberalism', in *A Matter of Principle*, Cambridge, Mass.: Harvard University Press, 1985, p.183

²⁵ R.Dworkin, 'Neutrality, Equality, and Liberalism', in D.Maclean and C.Mills (eds.), *Liberalism Reconsidered*, New Jersey: Rowman & Allanheld, 1983, pp.1-11, at p.2. A critical account of Dworkin's ideas on liberal neutrality is to be found in R. Bellamy, 'Defining Liberalism: Neutrality, Ethical or Political?', in Bellamy (ed.), *Liberalism and Recent Legal and Social Philosophy*, Stuttgart: Franz Steiner Verlag Wiesbaden

Dworkin differs from Ackerman on the question of neutrality. It appears that in Dworkin's theory neutrality is not the constitutive value of liberalism, but is rather derived from the more fundamental principle of equality.²⁶ Ackerman, on the contrary, argues that a commitment to neutral dialogue is the constitutive value of liberalism, and any legitimate principles of equality have to meet conditions imposed by neutrality.²⁷

Dworkin holds that the principle of treating citizens as equals may be interpreted in two fundamentally different ways:

The first supposes that government must be neutral on what might be called the question of the good life. The second supposes that government cannot be neutral on that question, because it cannot treat its citizens as equal human beings without a theory of what human beings ought to be.²⁸

The first interpretation, in Dworkin's view, is the one which squares best with the liberal political morality. The second account of the principle of equality may imply that it is *logically* impossible for government to be neutral on the question of the good life. However, this is not that which Dworkin intended. He believes it is *morally* wrong for government not to be neutral. Indeed, he makes it clear that:

...political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life. Since the citizens of a society differ in their conceptions, the government does not treat them as equals if it prefers one conception to another, either because the officials believe that one is

GMBH, 1989, pp.23-43. For a Dworkinian response see R. Guest, 'Neutrality as the Basis for Liberalism: A Response to Bellamy', in *ibid*, pp.44-50.

²⁶ See R.Guest, 'Neutrality as the Basis for Liberalism...', p.45: 'Dworkin's neutralism...derives from his endorsement of the very abstract principle: people have equal rights to concern and respect'.

²⁷ B.Ackerman, *Social Justice and the Liberal State*, Yale Univ. Press, New Haven, 1980, p.11. See also L.Alexander, 'Liberalism as Neutral Dialogue: man and Manna in the Liberal State', *UCLA Law Review*, 28/4 (1981): 816-858.

²⁸ Dworkin, 'Liberalism', p.191.

intrinsically superior, or because one is held by the more numerous or more powerful group.²⁹

Dworkin's account of neutrality entails a number of distinctions.³⁰ The requirement that the state should not make it easier to pursue one particular conception of the good rather than another is constrained by the fact that not all people begin in a position of equality in regard to their chances of pursuing their conception of the good. How should the state deal with these inequalities without violating the principle of neutrality? In the first place, Dworkin urges a distinction between deserved and undeserved or chosen and unchosen inequalities. Where those inequalities are a consequence of individual preferences, then the costs of the preferences must be borne by the individuals themselves. For instance, if X's conception of the good life includes living in detached house, it is likely that X will be less successful in pursuing that conception than Y who wants to live in a terraced house. This is however not unfair, since X's preference for detached house is an expensive preference, and there is no reason why the state must subsidise X's choice and impose the cost of it on those who choose to live in terraced house. Dworkin emphasises that:

Tastes as to which people differ are, by and large, not afflictions, like diseases, but are rather cultivated in accordance with each person's theory of what life should be like. The most effective neutrality, therefore, requires that the same share be devoted to each, so that the choice between expensive tastes can be made by each person for himself...³¹

Thus, it would not be wrong to say that the conception of the good adopted by (in our example) X will not necessarily be satisfied to the same extent as the conception of the good adopted by Y. This is also consistent with the principle of neutrality, because that principle

²⁹ *Ibid.*

³⁰ One of these distinctions, as we have already seen in the preceeding chapter, is between personal and external preferences. Dworkin argues that a liberal neutral state should not take into account the external preferences; it does not have to be neutral over the external preferences. See Chapter 1 above.

³¹ Dworkin, 'Liberalism', p.193.

requires only that all should have equal shares (not equal satisfaction or success) in order to pursue their conception of the good life.

It hardly needs saying that all inequalities are not of this sort. Some inequalities, like those associated with physical handicap, are not chosen: they are not preferences similar to those for detached house, but given conditions.³² This follows that the state is required to subsidise or compensate for the unwanted inequalities suffered by handicapped people.

One may say that Dworkin's distinction between the chosen and the unchosen inequalities is a difficult, if not impossible, distinction to sustain in practical cases. This distinction may often be more or less arbitrary. True, we can easily see that people choose to live in a detached house, and that they do not choose physical handicap. But, clearly these are not the only cases in which the inequalities occur. Our conception of the good life is, in a way, determined by the social and economic environment in which we find ourselves, rather than being the consequences of bare choice. Poverty and deprivation, for instance, 'may impose limits to our choices between ways of life as effectively as physical handicap does'.³³ That is, choices are developed, shaped, in an atmosphere which is not always chosen, but given.³⁴

Criticism of Political Neutrality

The principle of political neutrality has been severely criticised from various angles by both communitarians and liberals themselves. One common objection directed toward neutrality is that the principle of neutrality will likely end up in moral scepticism. As Dworkin concedes political neutrality is 'vulnerable to the familiar charge that it rests on

³² Dworkin says that 'some people will have special needs, because they are handicapped; their handicap will not only disable them from the most productive and lucrative employment, but will incapacitate them from using the proceeds of whether employment they find as efficiently, so that they will need more than those who are not handicapped to satisfy identical ambitions.' *Ibid.*, p.195.

³³ S. Mendus, *Toleration and the Limits of Liberalism*, London:Macmillan, 1989, p.136.

³⁴ *Ibid.*

moral skepticism or nihilism'.³⁵ And this scepticism leads ultimately, in the words of Leo Strauss, 'to the view that every preference, however evil, base, or insane, has to be judged before the tribunal of reason as legitimate as any other preference'.³⁶

However, this criticism, that neutrality must collapse into scepticism, seems to be unsatisfactory, given the fact that individual diversity as a guiding principle of neutrality does not entail that there are no right answers to the question of what the good life is. The principle of neutrality may be underpinned by belief in the value of autonomy rather than by scepticism. One may believe that there is a right way for each person to live, even s/he may believe that there is only one conception of the good which is best for all people. Yet this belief can possibly be outweighed by the idea that it is better for everyone as autonomous beings to choose their own way of life than to have one imposed on them.³⁷ Above all, as Dworkin points out, political neutrality is required 'not because there is no right and wrong in political morality, but because that is what is right'.³⁸

The principal argument raised by communitarians against the principle of neutrality is that liberalism cannot possibly sustain its claim to neutrality, because it presupposes an ideal of the good life.³⁹ This view is

³⁵ R.Dworkin, 'What Liberalism Isn't', *New York Review of Books*, (January, 20, 1983):47-50, at 47; and his 'Liberalism', p.205.

³⁶ L.Strauss, *Natural Right and History*, Chicago: University of Chicago Press, 1953, p.42.

³⁷ Mendus, *Toleration and the Limits of Liberalism*, p.81.

³⁸ Dworkin, 'Liberalism', p.203.

³⁹ See e.g. M.J.Sandel, *Liberalism and the Limits of Justice*, Cambridge Univ. Press, Cambridge, 1982, pp.49-53 ; P. De Marneffe, 'Liberalism, Liberty, and Neutrality', *Philosophy and Public Affairs*, 19/3(Summer 1990):253-274, at 254; T. Nagel, 'Rawls on Justice', in N.Daniels (ed.), *Reading Rawls*, Oxford: Basil Blackwell, 1975, pp.1-16. Nagel argues that Rawls' theory of justice is not neutral because it is based on a presupposed conception of human good, 'a liberal, individualistic conception according to which the best that can be wished for someone is the unimpeded pursuit of his own path'. It can therefore only be neutral among various life plans of those who have individualistic conception of the good, and be unneutral toward many whose 'conceptions

also shared by some liberals such as Raz,⁴⁰ Robin West,⁴¹ and W.A. Galston.⁴² According to Raz 'it is the goal of all political action to enable individuals to pursue valid conceptions of the good and to discourage evil or empty ones.'⁴³ He sees the political neutrality as a doctrine of restraint⁴⁴ which limits the ideals in politics.⁴⁵ The political neutrality, emphasises Raz, requires the state to be neutral not only toward 'unacceptable' conceptions of the good, but also toward 'acceptable', 'correct' and 'desirable' ideals.⁴⁶ Raz reaches the conclusion that strict political neutrality is impossible,⁴⁷ for a morally sound political order cannot be neutral about which ways of life are good and which are evil.⁴⁸

Robin West goes even further. He claims that liberalism strictly clings to the conservative ideal of creating 'a state in which all members of the community share in the good life'.⁴⁹ Liberals, however, for him differ from conservatives in that 'they are committed to a *naturalistic* and *evolving* conception of the good life, instead of a moralistic and static one'⁵⁰. The ultimate goal of liberalism therefore is to establish a community based on this particular conception of the good life. Though this goal implies to some extent a political neutrality toward the nature

of the good do not fit into the individualistic pattern'. *Ibid.*, p.10. Cf. P.Jones, 'The ideal of the neutral state', in Goodin & Reeve (eds.), *Liberal Neutrality*, pp.22-23.

⁴⁰ Raz, *The Morality of Freedom*, p.133.

⁴¹ R.L.West, 'Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision', *University of Pittsburgh Law Review*, 46(1985): 673-738.

⁴² W.A.Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State*, Cambridge: Cambridge University Press, 1991, p.79.

⁴³ Raz, *The Morality of Freedom*, p.133.

⁴⁴ *Ibid.*, p.110.

⁴⁵ Raz, 'Liberalism, Autonomy, and the Politics of Neutral Concern', p.91, and 98.

⁴⁶ *Ibid.*, p.91.

⁴⁷ For Raz's distinction between 'strict' and 'less- strict' neutrality, see his *The Morality of Freedom*, pp.112-13.

⁴⁸ Raz, 'Liberalism, Autonomy, and the Politics of Neutral Concern', p.93; Raz, *The Morality of Freedom*, p.120. See also P.Neal, 'Liberalism and Neutrality', *Polity*, 17(Summer 1985):664-684, at 667, 671-72.

⁴⁹ West, 'Liberalism Rediscovered...', pp.673-74.

⁵⁰ *Ibid.*, p.674. (Emphasis in original)

and content of *the* good life, 'liberalism itself does not require neutrality.'⁵¹

It is frequently argued that liberalism cannot really be neutral between values since it favours for the supreme worth of certain values such as individual liberty, tolerance, and respect for the rights.⁵² For Macedo, 'liberalism stands, above all, for the positive value of freedom, freedom to devise, criticise, revise, and pursue a plan of life, and it calls upon people to respect the rights of others whether or not they share the same goals and ideals.'⁵³

With respect to this argument, a rapid response may come from liberal neutralists. They would say that these positive values are (and have to be) taken for granted simply because they are precondition of the principle of political neutrality. The positive values such as autonomy and freedom give the chance and opportunity to everyone to pursue their own conception of the good.⁵⁴ As Charles Taylor put it bluntly, 'freedom is important to us because we are purposive beings'.⁵⁵ Neutrality is not and cannot be absolute; it has its own limits.⁵⁶ Sadurski expresses the limit of neutrality as follows.

⁵¹ *Ibid.* See also D. Dyzenhaus, 'Liberalism, Autonomy, and Neutrality', *University of Toronto Law Journal*, 42 (1992):354-375, at 375.

⁵² See, e.g., S.Lee, *Law and Morals*, Oxford and New York: Oxford University Press, 1986, pp. 15-16: '...there is no cause to regard liberalism as necessarily as superior creed solely because it is sometimes represented as being morally neutral. It is not neutral. It is partisan, affirming the value of freedom or of autonomy or liberty. That is one vision of morality and one which many of us find attractive, but it needs to be judged on its merits.'

⁵³ See S.Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism*, Oxford: Oxford Univ. Press, 1990, p.258.

⁵⁴ See H. Häyry, 'Liberalism and Legal Moralism: The Hart- Devlin Debate and Beyond', *Ratio Juris*, 4/2(July 1991):202-218), at 212-213.

⁵⁵ C. Taylor, 'What's Wrong with Negative Liberty', in A.Ryan (ed.), *The Idea of Freedom: Essays in Honour of Isaiah Berlin*, Oxford: Oxford University Press, 1979, p.183.

⁵⁶ See J.T. Valauri, 'The Concept of Neutrality in Establishment Clause Doctrine', *University of Pittsburgh Law Review*, 48(1986), pp.83-151, at 91.

Political neutrality cannot be neutral between those sets of values which are consistent with the fundamental ideals which provide the initial justification for neutrality (such as tolerance and equal moral agency) and those which are not.⁵⁷

The Idea of Constitutional Neutrality : A Constrained Conception

Almost all the critics of neutrality appear to come to the same conclusion : a comprehensive/strict neutrality is indefensible because it is impossible. How about a more limited conception of neutrality which will be easier to realise?

As a response to the severe criticism that neutrality is impossible , some writers attempted to develop a conception of 'constrained',⁵⁸ 'weaker',⁵⁹ or 'less strict'⁶⁰ neutrality. Downing and Thigpen, for example, begin to build their idea of constrained neutrality with the well known claim that neutrality is a secondary principle in liberal theory.⁶¹ It is subordinated to a superior principle: equal freedom (not equal concern and respect as Dworkin defends).⁶² The fundamental principle of the equal freedom is described as 'the freedom of all individuals to choose and to pursue their conception of the good'.⁶³ Such a constrained neutrality is thought to be 'essential to diversity within liberal societies'.⁶⁴ It is also, they argue,

⁵⁷ W.Sadurski, *Moral Pluralism and Legal Neutrality*, Dordrecht: Kluwer Academic Publishers, 1990, p.101. See also P.Jones, 'The ideal of the neutral state', p.28; L. Alexander & M. Schwarzschild, 'Liberalism, Neutrality, and Equality of Welfare vs. Equality of Resources', *Philosophy and Public Affairs*, 16/1(Winter 1987):85-110, especially p.109; Waldron, *Liberal Rights*, p.157. Waldron argues that neutrality itself is a value among other values, and liberal state is not expected 'to be neutral about neutrality'.

⁵⁸ L.A.Downing and R.B.Thigpen, 'A Defense of Neutrality in Liberal Political Theory', *Polity*, 21(1989):502-516, at 504.

⁵⁹ Jones, 'The ideal of the neutral state', p.27.

⁶⁰ Raz, *The Morality of Freedom*, p.112.

⁶¹ Downing & Thigpen, 'A Defence of Neutrality..', p.504.

⁶² See Dworkin, *A Matter of Principle*, p.183.

⁶³ Downing & Thigpen, 'A Defence of Neutrality..', p.516.

⁶⁴ *Ibid.*

perfectly compatible with the liberal political order, i.e. a neutral political order is possible.⁶⁵

They make a distinction between the two kinds of policies, namely 'discretionary policy' and 'primary goods policy'. The former is not neutral when it gives preference to the some people 'whether directly or by structuring situations within which persons pursue their goals'.⁶⁶ This is justified on the basis that liberal principle of political freedom provides those who gain power in a democratic struggle with the right to implement their agenda through discretionary policy.⁶⁷

Primary goods policy is claimed to be neutral because it carries out the liberal commitment to equal freedom. They define primary goods as 'those goods which permit and enable people to be autonomous whatever their life plans'.⁶⁸ The concept of primary goods, as it is in Rawls' theory,⁶⁹ is used for those things needed by everyone, because they are indispensable to the pursuit of different conception of the good life.⁷⁰

They also distinguish between two types of primary goods, protective goods and enabling goods. Protective goods provides 'the framework of institutions and rights within which individuals can choose their life plans'.⁷¹ Within this framework, however, the violation of neutrality might arise; some persons might unjustly impose their own conception

⁶⁵ *Ibid.*, p.510, and 516.

⁶⁶ *Ibid.*, p.511.

⁶⁷ *Ibid.*, pp.510-11.

⁶⁸ *Ibid.*, p.511.

⁶⁹ See Rawls, 'A Well-Ordered Society', in P.Laslett & J. Fishkin (eds), *Philosophy, Politics and Society*, 5th Series, Oxford: Basil Blackwell, 1979, p.11.

⁷⁰ Downing & Thigpen, 'A Defence of Neutrality..', p.511. However, they, unlike Rawls, do not stand for a strategy of maximizing primary goods in a hypothetical situation. They argue, instead, that primary goods policy is neutral since, by providing for the needs of all, such policy does not prefer a particular conception of the good life. *Ibid.*, p.512.

⁷¹ *Ibid.*

of the good life on the rest of the society.⁷² Enabling goods, they assert, are 'those primary goods that constitute the material and cultural means for each person to pursue his or her life plan'.⁷³ Since enabling goods policy furthers autonomy, it is neutral toward the particular conception of the good.⁷⁴

This argument, however plausible, seems to have a serious dilemma to overcome. Where does the solution lie, if the two policies (primary good and discretionary policies) conflict? To put it another way, what, if an unneutral discretionary policy undermines the neutrality of the political order? They acknowledge this difficulty, but they suggest that this can be sorted out by the practical means that primary good policy creates 'for restraining discretionary policy in the interests of equal freedom'.⁷⁵ That is, people may utilise protective and enabling policies to claim that a discretionary policy violates their rights. Moreover, some protective policies provide certain civil liberties through which individuals may influence discretionary policy.

This account of neutrality can be reformulated in a constitutional framework which will allow everyone an equal chance to endorse any conception of the good. The constitution is neutral because it generally provides primary goods. A liberal constitution is neutral, because it is not based on any conception of the good life.⁷⁶ This does not entail, however, that the laws and regulations utilised by discretionary policies must be neutral.⁷⁷ They are in fact not neutral when they benefit some persons more than others.⁷⁸ Yet the unneutral laws and regulations will not undermine the overall neutrality of the political order, if they are effectively constrained by the neutral constitution based on such liberal principles as toleration, autonomy, equal freedom, and the priority of

⁷² It is said that there are authoritative institutions and procedures to resolve these claims, and that though protective policy is often associated with the judiciary, most governmental institutions may, and indeed do, provide protective goods. See *ibid.*, p.511.

⁷³ *Ibid.*, p.511.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, p.513.

⁷⁶ See Jones, 'The Ideal of the neutral state', p.27.

⁷⁷ Raz, *The Morality of Freedom*, pp.112-113.

⁷⁸ Downing & Thigpen, 'A Defence of Neutrality', p.512.

the right over the good. In sum, we could say that a constrained constitutional neutrality is possible in the liberal political order even though some governmental discretionary policies may inevitably create unneutral consequences.

Political Neutrality and Secular State

The liberal state, as we have argued, is neutral in the sense that it is not an instrument to adopt and promote a particular comprehensive doctrine.⁷⁹ Political neutrality rejects the idea that the primary task of the state is to impose a conception of the good on its inhabitants.⁸⁰ It is not, therefore, for the state to adopt a comprehensive doctrine, and to force its citizens to conduct their lives in accordance with this official doctrine.⁸¹ Liberals generally agree on the primary function of the state which is to secure 'a framework of law through which individuals may pursue their own particular goals'.⁸² The liberal state, as Jeremy Waldron puts it, is the political entity 'in which people will practice and pursue a variety of opposing and incommensurable life styles'.⁸³

One of the practical implications of the political neutrality lay in the relationship between the state and religion. This relationship is envisaged as 'a natural locus of the liberal neutrality'.⁸⁴ The liberal

⁷⁹ See Rawls, 'The Priority of Right and Ideas of the Good', p.262.

⁸⁰ See Raz, *The Morality of Freedom*, p.108.

⁸¹ In the second Part of the study I shall argue that the Turkish constitutional system is not liberal, because it ignores one of the constitutional principles of liberalism, i.e., political neutrality by endorsing Kemalism as an official ideology which is protected, and imposed on citizens through legal, constitutional and other means. See Chapter 6 below.

⁸² M. Loughlin, *Public Law and Political Theory*, Oxford: Clarendon Press, 1992, p.96. See also L.Alexander, 'Liberalism as Neutral Dialogue..', p.854, and C.S.Nino, 'Moral Discourse and Liberal Rights', in N.MacCormick and Z.Bankowski(eds.), *Enlightenment, Rights and Revolution: Essays in Legal and Social Philosophy*, Aylesbury: Aberdeen University Press, 1989, p.158.

⁸³ J.Waldron, 'Theoretical Foundations of Liberalism', *Philosophical Quarterly*, 37(1987):127-150, at.144.

⁸⁴ Sadurski, *Moral Pluralism and Political Neutrality*, p.167.

neutral state is also a secular state⁸⁵ which is based on two principles: 'the separation of the state and religion, and the freedom of religion'.⁸⁶ The first principle known as the Non-establishment principle⁸⁷ requires the state not to involve in religious matters, whereas the second principle known as the Free Exercise principle⁸⁸ requires the state not to 'inhibit religious expression and activities'.⁸⁹

The non-establishment principle is generally conceived as an institutional means for the realisation of the religious freedom.⁹⁰ That is, citizens may freely exercise their religions, if only if the state does not

⁸⁵ Sadurski writes : 'The idea of a secular liberal state, i.e. the state which neither gets involved with matters religious nor inhibits in any way religious expression and activities, has been long understood as best encapsulated by the idea of the state's neutrality toward religion'. *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ First Amendment of the US Constitution expresses this principle as follows: 'Congress shall make no law respecting an establishment of religion'. Article 116 of the Australian Constitution is almost identical with the First Amendment. It reads: 'The Commonwealth shall not make any law for establishing any religion'. For the texts of these articles see respectively *The Constitution of the United States of America*, N.J.Small & L.S.Jayson (eds.), Washington: US Government Printing Office, 1964, p.57, and R.D.Lumb & K.N.Ryan, *The Constitution of the Commonwealth of Australia*, Second Edition, Sydney: Butterworths, 1977, p.liv.

⁸⁸ First Amendment of the US Constitution also guarantees the freedom of religion: 'Congress shall make no law...prohibiting the free exercise [of religion] '. *The Constitution of the United States of America*, p.57. Similarly Article 116 of the Australian Constitution states that 'the Commonwealth shall not make any law... for prohibiting the free exercise of any religion'. Lumb & Ryan, *The Constitution of the Commonwealth of Australia*, p.liv. Free exercise principle is also protected through international human rights documents. See e.g. Article 18 of the International Covenant on Civil and Political Rights: 'Everyone shall have the right to freedom of...religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching'.

⁸⁹ Sadurski, *Moral Pluralism and Legal Neutrality*, p.167.

⁹⁰ See Sadurski, 'Introduction' to W.Sadurski (ed.), *Law and Religion*, Aldershot: Dartmouth, 1992, at xxi.

interfere with the religious affairs of citizens.⁹¹ In reality, however, the relationship between two principles of secularism is problematic.⁹² This is partly due to the controversial nature and scope of the second principle, i.e., freedom of religion.

The US Supreme Court in a number of cases held that freedom of religion consists of two aspects: freedom to believe and freedom to exercise.⁹³ The former freedom is absolute, but the latter is not.⁹⁴ In *Reynolds v. United States*, the Court made this distinction and invoked it to justify outlawing polygamy which was then practised by Mormons

⁹¹ *Ibid.*

⁹² In US a number of cases, and literature concerning this problem have emerged. The principal cases in which the Supreme Court's approach to the state-religion relations can be found are: *Everson v. Board of Education*, 330 US 1 (1947), *Board of Education v. Allen*, 392 US (1967), *Lemon v. Kurtzman*, 403 US 602 (1971), *Committee for Public Education and Religious Liberty v. Nyquist*, 413 US 756 (1973), *Roemer v. Maryland Pub. Works Bd.*, 426 US 736 (1976), *Wolman v. Walter*, 433 US 229 (1977). For the interpretations of the Supreme Court judgements (for and against) see.e.g. W.G. Katz, 'Freedom of Religion and State Neutrality', *University of Chicago Law Review*, 20(1953):426-40; G. Merel, 'The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment', *University of Chicago Law Review*, 45(1978):805-843; L.Pfeffer, 'Freedom and/or Separation: The Constitutional Dilemma of the First Amendment', *Minnesota Law Review*, 64 (1980):561-584; see also articles collected in the following books: R. S. Alley (ed.), *The Supreme Court on Church and State*, New York: Oxford University Press, 1988; J.R. Pennock and J.W.Chapman (eds.), *Religion, Morality, and the Law: Nomos XXX*, New York and London: New York University Press, 1988; and Sadurski (ed.), *Law and Religion*. In Britain the examples of the tension between the law and religions are to be found in A. Bradney, *Religions, Rights and Laws*, Leicester, London and New York: Leicester University Press, 1993, pp.37-137.

⁹³ *Reynolds v. United States*, 98 U.S. 145 (1878), and *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

⁹⁴ The US Supreme Court's distinction between the freedom to believe and freedom to act is adopted by the drafters of the 1982 Turkish Constitution in respect to freedom of thought. See Chapter 7 below.

in the Western United States.⁹⁵ In 1940 the Supreme Court's distinction between freedom to believe and freedom to practice was endorsed by Justice Roberts who maintained that:

[T]he Amendment embraces two concepts- freedom to believe and freedom to act. The first is absolute but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.⁹⁶

This is in fact a futile, if not absurd, distinction, because both belief and practice are inseparable ingredients of religion.⁹⁷ As Bradney points out, '[f]reedom to believe can hardly be denied'.⁹⁸ The problems arise out from the requirements of religious freedom as freedom to express and exercise of religion, and from the State response to these possible requirements. To be more concrete some argue that freedom of religion requires the positive involvement of the State.⁹⁹ It is argued for instance that the State must financially support religious schools which constitute 'an important exercise of religious freedom'.¹⁰⁰ This argument ends up in the refusal of 'strict separationism' between the state and religion on the ground that it restricts freedom of religion.¹⁰¹ In a similar vein, the state compulsion in other religious matters, e.g. the compulsory religious education,¹⁰² may well be justified. And one even may say that this position is compatible with the liberal principle of political neutrality, in so far as the state treats all religions equally and unpreferably.

⁹⁵ Chief Justice Waite stated that: 'Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs, they may with practices'. *Reynold v. United States*, p.166.

⁹⁶ *Cantwell v. Connecticut*, pp.303-304.

⁹⁷ See A. Bradney, *Religions, Rights, and Laws*, p.5.

⁹⁸ *Ibid.*

⁹⁹ See Sadurski, 'Introduction', p.xiii.

¹⁰⁰ J. Hitchcock, 'Church, State, and Moral Values: The Limits of American Pluralism', *Law and Contemporary Problems*, 44/2(1981): 3-21, at 12; reprinted in Sadurski (ed.), *Law and Religion*, p.164. (References are made to the former)

¹⁰¹ Hitchcock, 'Church, State, and Moral Values..', p.14.

¹⁰² See Education Reform Act 1988 which makes compulsory religious education (s2 (1), and s8 (3)), and religious worship (s6(1), and s7(1)). In Turkey, under Article 24 of the 1982 Constitution religious education is compulsory.

Yet this view is fundamentally flawed. It is flawed for two obvious reasons. First of all, this argument fails not because in reality all religions are not treated equally, but because it is logically impossible to meet all the requirements of all religions which are incommensurably different and almost unlimited. Suppose that Muslims require the State to financially support building mosques that are no less important than religious schools for the exercise of religious freedom. Or even they may well want the State to help financially for the performance of their *Hadj* (pilgrimage), one of the pillars of Islam.¹⁰³ The state cannot afford to positively respond to all possible requests of religions. It is true that it may limit its support to specific demands, but any preference by the state between various requirements is doomed to be arbitrary.

Even if we accept, for the sake of argument, that the state may treat all religious demands equally in its help, there is a further objection to be met. That is, positive involvement of the state in religious affairs will necessarily jettison the principle of neutrality, for it will create non-neutral consequences between believers and non-believers, (or rather between religious and non-religious beliefs).¹⁰⁴ Therefore, if the principle of neutrality is to be maintained, as Sadurski has suggested, the strict separation of the state and religion is necessary.¹⁰⁵

In the Second Part of this study, I will argue that the Turkish Constitutional system does not adhere to the liberal ideal of political neutrality and secularism. The State in Turkey endorses a comprehensive ideology, Kemalism, which negates certain liberal values even though ostensibly accommodates secularism among its basic principles. The State is not neutral between different conceptions of the good; it adopts an official ideology and attempts to impose it (through various means) on the people living in the country.¹⁰⁶ This ideology, as we shall see, hymns a monolithic, one-dimensional society as opposite to the pluralistic society based on, among others, the

¹⁰³ See *Qur'an*, 2:189, 196-200, 203; 5:97, and 22:26-37.

¹⁰⁴ See Sadurski, *Moral Pluralism and legal Neutrality*, p.193.

¹⁰⁵ *Ibid.*

¹⁰⁶ See Chapter 7 below.

principle of political neutrality.¹⁰⁷ In this hymn, there is no place for such words as *difference* and *Other*.

The State is not secular either in the sense that it does not cling to the secular necessity of separation between the state and religion.¹⁰⁸ On the contrary, the very Turkish style secularism has been perceived as a means to control religion, and therefore to protect the official ideology. In the end, the Kemalist principle of secularism turned out to be an effective instrument to stifle and repress the religious freedom formally protected by the Constitution.¹⁰⁹

¹⁰⁷ See Chapter 6 below.

¹⁰⁸ See Chapter 6 , and Chapter 7 below..

¹⁰⁹ See Chapter 6 and Chapter 8 below.

CHAPTER 3- CONSTITUTIONAL PRINCIPLE II: THE RULE OF LAW

The effective limitation of power is the most important problem of social order.

F. A. Hayek¹

The Rule of Law as a Restraint

Roscoe Pound once wrote that 'he rebelled against control of his will by the state..., but he loved to lay down rules'.² Pound was no doubt referring to the Puritan attitude towards authority which played a significant role in the development of constitutionalism in the United States.³ Nevertheless these words also reflect the idea behind the principle of the rule of law, 'the central jewel in liberalism's crown'.⁴

As a 'rule following animal',⁵ man tends to be governed by law, and requires those who govern to conform to laws and rules. In Hayek's view, man as a rule-follower is successful not because he consciously knows the necessity of observing rules, but because 'his thinking and acting are governed by rules which have by a process of selection been evolved in the society in which he lives...'.⁶ These rules, for Hayek,

¹ F.A. Hayek, *Law, Legislation and Liberty*, Vol. 3, London: Routledge & Kegan Paul, 1982, p.128. (Hereafter L.L.L.)

² R. Pound, *The Spirit of the Common Law*, Boston: Beacon Press, 1966, p.56.

³ See J.L.O' Brian, 'The Value of Constitutionalism Today,' in A.E. Sutherland (ed.), *Government under Law*, Cambridge: Harvard University Press, 1956, p.508; J. Gaer & B. Siegel, *The Puritan Heritage: America's Roots in the Bible*, New York: Mentor, 1964, pp.92-98.

⁴ A.C. Hutchinson and P. Monahan, 'Introduction' to A.C. Hutchinson and P. Monahan (eds.), *The Rule of Law: Ideal or Ideology*, Toronto: Carswell, 1987, p.ix. See also D.J. Manning, *Liberalism*, London: J.M. Dent & Sons Ltd., 1976, p.14.

⁵ See R.S. Peters, *The Concept of Motivation*, London, 1959, p.5. Peters says that 'man is as much a rule following animal as a purpose-seeking one. His actions are not simply directed towards ends; they also conform to social standards and conventions, and unlike a calculating machine he acts because of his knowledge of rules and objectives'. Quoted in Hayek, L.L.L., Vol.1, p.11.

⁶ *Ibid.* For an attempt to justify the rule of law on 'naturalistic' and 'historical' grounds as exemplified in the theory of Freud see R. West, 'Law, Rights, and Other Totemic

'have evolved in the process of the growth of society embody the experience of many more trials and errors than any individual mind could acquire'.⁷ Whatever the merit of this argument,⁸ it points to the central characteristic and function of the rule of law: to restrain certain conduct of individuals and the state.⁹

The definition of the rule of law lies in its words. It means literally 'the rule of the law'.¹⁰ Although in its broadest sense the rule of law means that people should obey the law and be ruled by it, in political and legal theory it is used in a narrower sense; that is, the state must be ruled by, and subject to, the law.¹¹ Like the principle of political neutrality, the rule of law is a constitutional principle which serves as a restraint on the body politic in order to protect the rights and liberties of individuals against the state.

Illusions: Legal Liberalism and Freud's Theory of the Rule of Law', *University of Pennsylvania Law Review*. 134(1986): 816-882.

⁷ F. A. Hayek, *Studies in Philosophy, Politics and Economics*, London: Routledge and Kegan Paul, 1967, p.43.

⁸ The conception of man as 'rule-following animal' may not be self-evidently true. Even if man is a rule-follower, there is no guarantee that he is always successful by acting according to the rules evolved in the society. Society is capable of evolving and making 'harmful' as well as 'useful' rules. Hayek in fact acknowledges this possibility, but he believes that the course of the evolution will produce the necessary dynamicism that could correct any deviate or harmful behaviour. (See F. A. Hayek, 'Kinds of Order in Society', *New Individualist Review*, 3/2(1960), p.7.) However, the question that remains unanswered is what, if any, is the coherent ground for such a belief in evolution.

⁹ This characteristic of the rule of law or law in general yielded some sceptical and cynical remarks about law. Bentham, for instance, said that 'a law, whatever good it may do in the long run, is sure in the first instance to produce mischief...'. Law according to Bentham, 'may be a necessary evil, but still at any rate it is an evil. To make law is to do evil that good may come'. See J. Bentham, *Of Laws in General*, London: Athlone Press, 1970, p.54.

¹⁰ See J. Raz, 'The Rule of Law and Its Virtue', in R.L. Cunningham (ed.), *Liberty and the Rule of Law*, London: Texas A & M Univ. Press, 1979, p.5.

¹¹ *Ibid.* The *Rechtsstaat*, the German equivalent of the rule of law, is defined as 'a society ruled by procedural justice and guaranteeing the universal and equal distribution of basic constitutional rights'. T. O'Hagan, *The End of Law?*, Oxford: Basil Blackwell, 1984, p.131.

The rule of law is indeed seen as 'a protection against the arbitrariness of state action'.¹² It is this lack of arbitrariness that seems to distinguish the rule of law from the rule of man.¹³ The former seeks to demolish arbitrariness by ensuring 'predictability' and 'justice as regularity'.¹⁴ As a protection against the arbitrary power, the principle of the rule of law has been identified with constitutionalism which stands for the limited government.¹⁵ Constitutionalism is 'a legal limitation on government ; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law'.¹⁶ In this sense, the constitutional government is taken as a synonym for the rule of law.¹⁷

¹² See R.A.Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist*, London:Macmillan, 1980, p.84 In a similar vein, Edward Thompson argues that the rule of law, as 'an unqualified human good', may impose a vital inhibition on state power. E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act*, London: Allen Lane, 1975, p.266.

¹³ F. Sejersted, 'Democracy and the rule of law: some historical experiences of contradictions in the striving for good government', in J. Elster and R. Slagstad (eds.), *Constitutionalism and Democracy*, Cambridge: Cambridge University Press, 1988, pp.131-152, at p.135. Not everybody, of course, agree with Sejersted. Howard Zinn, for instance, argues that '[t]he "rule of law" in modern society is no less authoritarian than the rule of men in premodern society; it enforces the maldistribution of wealth and power as of old, but it does this in such complicated and indirect ways as to leave the observer bewildered...' H. Zinn, 'The Conspiracy of Law', in R.P.Wolff (ed.), *The Rule of Law*, New York: Simon and Schuster, 1971, p.18.

¹⁴ Sejersted, 'Democracy and the rule of law...', p. 135.

¹⁵ All constitutional government is by definition limited government' says Professor Charles Mc Ilwain. See his *Constitutionalism: Ancient and Modern*, Revised Edition, New York: Great Seal Books, 1947, p.21. See also M. Rosenfeld, 'Modern Constitutionalism as Interplay Between Identity and Diversity: An Introduction', *Cordazo Law Review* 14(1993): 497-531, at 497: 'modern constitutionalism requires imposing limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights'.

¹⁶ *Ibid.*, pp.21-22. For an almost identical definition of constitutionalism see also K.G.Wheare, *Modern Constitutions*, Second Edition, London: Oxford University Press, 1966, p.137, and Hayek, *L.L.L.*, Vol.2, p.61.

¹⁷ See C.J. Friedrich, *Constitutional Government and Politics*, New York: Harper, 1937, especially Ch. VII.

The notion of the rule of law is by no means new. In *Politics*, Aristotle raises the question to whom final authority should belong, to some person or to the law? He declares that:

[T]he supreme power should be lodged in laws duly made, and that the megistrate or magistrates, either one or more, should be authorised to determine those cases which the laws cannot particularly speak to us, as it is impossible for them, in general language, to explain themselves upon everything that may arise.¹⁸

In Aristotle's thought, since the laws are drawn in accordance with political regimes, they will inevitably favor the purposes of one ruling group or another.¹⁹ The rule of law therefore becomes, in reality, the rule of democratic laws, oligarchic laws, and aristocratic laws so that the rule of law can be just or unjust, depending on the regime to which the

¹⁸ Aristotle, *Politics*, Everyman Edition, trans. by W.Ellis, London:Dent & Sons, 1282b, p.88.

¹⁹ Like Aristotle, Neumann also draws attention to the fact that the rule of law has the function of disguising interests. He argues that in paying reverence to the 'law', one can conceal the fact that the 'law' is made by man. Hence he concludes that 'the rule of law means the rule of the bourgeoisie, that is to say, of that part of the people which has at its command property and education...'. See F. Neumann, *The Rule of Law : Political Theory and the Legal System in Modern Society*, Dover: Berg, 1986, p.125. Marxists also criticised the rule of law in a similiar way. As Hugh Collins points out, '[t]he principal aim of Marxist jurisprudence is to criticise the centepiece of liberal political philosophy, the ideal called the Rule of Law'. H. Collins, *Marxism and Law*, Oxford and New York: Oxford University Press, 1982, p.1 and especially pp.124-147. For the Marxist critique of the rule of law see also B. Fine, *Democracy and the Rule of Law*, London and Sydney: Pluto Press, 1984, p.2 ; S. Picciotto, 'The theory of the state, class struggle and the rule of law', in B. Fine et al (eds.), *Capitalism and the Rule of Law*, London: Hutchinson, 1979, pp.164-178 ; T. O'Hagan, *The End of Law?*, pp.46-53, and E.B. Pashukanis, *Law and Marxism: A General Theory*, ed. C. Arthur, tr. B. Einhorn, London: Inklings, 1978, especially pp.146-149. For the criticism of the Marxist approach to the rule of law from within see, e.g., C.Sypnowich, *The Concept of Socialist Law*, Oxford: O.U.P, 1990, p.61; and E.P.Thompson, *Whigs and Hunters*, p.266:'I am insisting only upon the obvious point, which some modern Marxists have overlooked, that there is a difference between arbitrary power and the rule of law... the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good'.

laws belong.²⁰ In discussing monarchy he asserts that 'it is more proper that law should govern than any one of the citizens'.²¹ It appears that this statement directly inspired the modern use of the phrase 'government by laws not by men'.²²

The Elements of the Rule of Law: From Dicey to Hayek

Dicey and Hayek are two well-known defenders of the doctrine of the rule of law. Despite the fact that they are two liberals of different times and of countries, they have much common in explaining various aspects of the rule of law.

In *The Law of the Constitution*,²³ Dicey has given, in the words of Hayek, 'a brilliant though somewhat one-sided exposition of the principle of the Rule of Law as it prevailed in England'.²⁴ For Dicey, there are three main aspects of the rule of law.²⁵ First, he holds that the rule of law 'means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness...'.²⁶

This statement leads us to perhaps one of the most important problems of the rule of law. That is, the problem of distinguishing between

²⁰ Aristotle, *Politics*, 1282b p.88-89.

²¹ *Ibid.*, 1287a, p.101.

²² The liberal polarity between the 'rule of men' and the 'rule of law' is rejected by the anarchist writers as superfluous. Max Stirner, e.g., argues that the government by law, like government by men, makes one submissive to the wills of another, and therefore '[o]ne is enthralled...in legal form'. M. Stirner, *The Ego and His Own*, trans. S. T. Byington, New York: Libertarian Book Club, 1963, p.109. See also D. Miller, *Anarchism*, London and Melbourne: J. M. Dent & Sons Ltd., 1984, pp.22-24, and A. Carter, *The Political Theory of Anarchism*, London: Routledge & Kegan Paul, 1971, p.42.

²³ A.V.Dicey, *Introduction to The Study of The Law of The Constitution*, 10th ed., London: Macmillan, 1959.

²⁴ See F. Hayek, *The Political Ideal of the Rule of Law*, Cairo: National Bank of Egypt, 1955, p.28.

²⁵ Dicey, *The Law of the Constitution*, pp.202-3.

²⁶ *Ibid.*, p.202.

'regular law' and 'arbitrary power'.²⁷ If the law itself gives the power how can we say that it is arbitrary? In other words, it may well be claimed that arbitrary power is compatible with the rule of law.²⁸

This criticism seems to reduce the idea of the rule of law to 'legality'. According to Heuston this is 'pedantic' and 'verbal', because a legal power can still be contrary to the rule of law. He makes it clear that 'what is authorised by the law cannot indeed be illegal within the framework of that particular system'²⁹, but it may very well be contrary to the Rule of Law as a principle of constitutional government'.³⁰ For Heuston, the misunderstanding arises from the (wrong) impression that the rule of law was a *legal* principle, whereas it is in fact a *constitutional* principle.³¹

²⁷ See Sir W.I. Jennings, *The law and the Constitution*, Fifth Edition, London: University of London Press, 1959, p.306.

²⁸ See for example Raz, 'The Rule of Law and Its Virtue', p.12. For a detailed criticism of Dicey, see also F.H.Lawson, 'Dicey Revisited I', *Political Studies*, 7/2(1959):109-126, F.H.Lawson, 'Dicey Revisited II', *Political Studies*, 7/3(1959):207-221.

²⁹ This is obviously a positivistic view of the legality. As Dworkin points out, legal positivism is based on the 'axiom that the existence of law is independent of the value of that law'. On the contrary, he argues, natural law theorists claim that law has to 'satisfy certain minimal standards of justice' to be able to gain validity. (R. Dworkin, 'Legal Theory and the Problem of Sense', in R. Gavison (ed.), *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart*, Oxford: Clarendon Press, 1987, p.16) For legal positivists moral principles are not 'sufficient' or 'necessary' condition of legality. In the words of Austin, '[t]he existence of law is one thing; its merit or demerit is another'. (J. Austin, *The Province of Jurisprudence Determined*, ed. H.L.A. Hart, London: Weidenfeld and Nicolson, 1954, p.184.). Legality is therefore merely a function of the 'social situation' in which the majority of the people 'obey the orders backed by threats of the sovereign person or persons'. (See H.L.A. Hart, *The Concept of Law*, Oxford: Clarendon Press, 1961, p.97.) Natural law theorists however argue for a contrasting conception of law and legality. St Aquinas, the father of natural law, stated that 'if in any point it [human law] departs from the law of nature, it is no longer a law but a perversion of law'. St.T. Aquinas, *Summa Theologica*, in Basic Writings of Saint Thomas Aquinas, II, ed. A.C. Pegis, New York: Random House, 1945, p.784.

³⁰ F.V.Heuston, *Essays in Constitutional Law*, Second Edition, London:Stevens & Sons Ltd., 1964, p.40.

³¹ *Ibid.*, pp.40-41. See also I.Harden and N.Lewis, *The Noble Lie: The British Constitution and the Rule of Law*, London: Hutchinson, 1986, p.19.

However, this answer seems to be unsatisfactory. Even if we accept that the rule of law is a constitutional, rather than legal, principle, we have a question unanswered. What, if an action is regulated by the constitution itself, and becomes a constitutional principle? Can it still be arbitrary and therefore contrary to the rule of law? Suppose that the constitution of a particular society gives the president or king the power to imprison anybody without any reason. Is this still contrary to the rule of law as a 'constitutional principle'?

'Yes' would say Hayek, for 'if a constitutional law gave the government unlimited power to act according to its desire, it would certainly no longer operate under the Rule of Law, although all its act would be legal'.³² According to Hayek, the Rule of Law is therefore not only 'meta-legal' but also 'meta-constitutional' (if the distinction between the terms 'legal' and 'constitutional' makes sense). The rule of law is, he argues, 'more than mere Constitutionalism: it implies certain requirements concerning the contents of the Constitution'.³³ It is, therefore, not 'a rule of the law' but rather 'a rule about the law' ; 'a doctrine *about* what the law ought to be, or about certain general attributes which the laws must possess in order to conform to it'.³⁴

Dicey's response to the above question would be somehow different. According to Dicey, Parliament is given by the Constitution an unlimited power to act.³⁵ He quoted affirmatively De Lolme's famous expression: '...Parliament can do everything but make a woman a man, and a man a woman'.³⁶ Legislative supremacy, for Dicey, is perfectly compatible with the Rule of Law.³⁷ Parliamentary sovereignty 'favours'

³² Hayek, *The Political Ideal of the Rule of Law*, p.33.

³³ *Ibid.*

³⁴ *Ibid.* (Emphasis in original.)

³⁵ Dicey, *The Law of the Constitution*, p.39ff. Before Dicey, Blackstone held that the Parliament has a 'transcendent and absolute' power. See Sir W. Blackstone, *Commentaries on the Laws of England*, 15th Ed., London, 1809, Vol. 1, p.160.

³⁶ Dicey, *The Law of the Constitution*, p.43. For a criticism of Dicey's view of parliamentary sovereignty see, e.g., C.R.Munro, *Studies in Constitutional Law*, London: Butterworth, 1987, pp.81-108.

³⁷ Dicey, *The Law of the Constitution*, p.406ff.

the rule of law and vice versa.³⁸ This idea rests on the assumption that the Parliament would never act in a way that is contrary to the rule of law.³⁹ Yet Dicey's juxtaposition of the principle of parliamentary sovereignty with the rule of law is not convincing. The fundamental flaw in his argument is that it simply ignores the fact that the rule of law entails by definition restrictions not only on those who apply law, but also on those who contrive law.⁴⁰ As Allan emphasised, if and when unlimited absolute power is ascribed to the Parliament (whatever the grounds of this ascription), nobody can ever guarantee that rights and liberties will always be protected.⁴¹ In short, the Rule of Law and absolute power are mutually exclusive.

Dicey summarised the second aspect of the rule of law in the following terms:

It means...equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there can be with us nothing really corresponding to the 'administrative law' (*droit administratif*) or the 'administrative tribunals' (*tribunaux administratifs*) of France.⁴²

By equality he suggests that an official is subject to the same rules as an ordinary citizen.⁴³ That is, if a public officer commits crime he will be liable for it in the ordinary civil courts.⁴⁴ The rule of law as 'equality before law', therefore, entails the same jurisdiction of ordinary courts for all people including officials. Since French administrative law, for Dicey, provides a separate jurisdiction for public officials, it is not consistent with the rule of law.⁴⁵

³⁸ *Ibid.*, p.406, and 411.

³⁹ *Ibid.*, p.71.

⁴⁰ D. Lyons, *Ethics and the Rule of Law*, Cambridge: Cambridge University Press, 1984, p.200.

⁴¹ T.R.S. Allan, *Law, Liberty, and Justice*, Oxford: Clarendon Press, 1993, p.16.

⁴² Dicey, *The Law of the Constitution*, pp.202-3.

⁴³ See Jennings, *The Law and the Constitution*, p.312.

⁴⁴ *Ibid.*

⁴⁵ See note 42 above, and note 47 below.

Dicey in an article, almost two decades after the publication of the *Law of the Constitution*, admitted some errors he made in his treatment of the French administrative law.⁴⁶ Nevertheless, he maintained his contention that the rule of law is not compatible with administrative law.⁴⁷

The last aspect of 'the rule of law', Dicey says, is 'the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts...'.⁴⁸ Hence he reaches the conclusion that 'the constitution is the result of the ordinary law of the land'.⁴⁹

In *The Law and Constitution* Jennings argues that it is correct to say that 'the law of the land is the result of the Constitution', and that 'law and constitution cannot be separated'.⁵⁰ But it is wrong, he points out, to say that the rules are the consequence of the individual rights and not their source. The powers of the administrative authorities are limited by the rights of individuals. Conversely, the individual rights are limited by

⁴⁶ See Dicey, 'Droit Administratif in Modern French Law', *Law Quarterly Review*, 17(July 1901):302-18.

⁴⁷ See D.C.M. Yardley, *Introduction to British Constitutional Law*, 2nd ed. London: Butterworth's, 1964, p.60. With his view of *droit administratif*, Dicey came under severe attack by many scholars. He was accused of misunderstanding or even distorting French administrative law. See, e.g., H.W.R. Wade, *Administrative Law*, Third ed., Oxford: Clarendon Press, 1971, p.7.; S.A. de Smith, *Judicial Review of Administrative Action*, Second ed., London: Stevens & Sons, 1968, p.5 ; M.A. Sieghart, *Government by Degree: A Comparative Study of the Ordinance in English and French Law*, London: Stevens & Sons, 1950, p.221 ; C.F. Strong, *Modern Political Constitutions*, Sixth ed., London: Sidgwick & Jackson, 1963, pp.285-6. It is also a commonplace that Dicey's treatment of *droit administratif* created a dramatic impact on the development of administrative law in England. See W.A. Robson, *Justice and Administrative Law: A Study of the British Constitution*, Third ed., London: Stevens & Sons, 1951, p.28 ; J.A.G. Griffith and H. Street, *Principles of Administrative Law*, Fourth ed., London: Pitman Publishing, 1967, p.3, and Hayek, *The Political Ideal of the Rule of Law*, p.29.

⁴⁸ Dicey, *The Law of the Constitution*, p.203.

⁴⁹ *Ibid.*

⁵⁰ Jennings, *The Law and the Constitution*, p.313.

the powers of the administration. 'Both statements are correct; and both powers and rights come from the law- from the rules' says Jennings.⁵¹

We may now turn to Hayek who 'inherited more of Dicey's apprehensions' than any other defender of the Rule of Law.⁵² Hayek presents, in the words of Raz, 'one of the clearest and most powerful formulations of the ideal of rule of law'.⁵³

As a liberal Hayek believes in liberty. Yet he believes in the constitution of liberty. In other words, he prefers a constituted liberty to a nonconstituted one, even though the former may well be incompatible with the reality of freedom in its totality.⁵⁴ For him, 'order' is the prerequisite for freedom.⁵⁵ Thus he argues for a (liberal) order which is 'an indispensable concept' without which 'we cannot do'.⁵⁶ It is the ideal of the rule of law that lies at the very heart of this order.

'The Rule of Law', for Hayek, means 'that government in all its actions is bound by rules fixed and announced beforehand- rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge'.⁵⁷ He goes on to argue that 'within the known rules of the game the individual is free to pursue his personal ends and desires'.⁵⁸ This implies that 'known rules' can restrict freedom of individuals. But the question is : what sort of features does Hayek accord to the rules or the law in order to make them capable of restricting freedom?

⁵¹ *Ibid.*, p.314.

⁵² See J. Shklar, 'Political Theory and the Rule of Law', in A. C. Hutchinson and P. Monahan(eds.), *The Rule of Law: Ideal or Ideology*, Toronto: Carswell, 1987, p.7.

⁵³ See Raz, 'The Rule of Law and Its Virtue', p.3.

⁵⁴ See G. Dietze, 'The Necessity of State Law', in R.L.Cunningham (ed.), *Liberty and the Rule of Law*, London: Texas A&M Univ. Press, 1979, p.80.

⁵⁵ *Ibid.* Cf. L.T.Hobhouse, *Liberalism*, Oxford: Oxford University Press, 1964, p.17.

⁵⁶ Hayek, *L.L.L.*, Vol.1., p.35.

⁵⁷ F.A.Hayek, *The Road to Serfdom*, London:Routledge & KeganPaul, 1944, p.54. For a similar approach to the Rule of Law see also F. Neumann, *The Rule of Law*, p.32.

⁵⁸ Hayek, *The Road to Serfdom*, p.54.

By the rule of law, as we have already seen,⁵⁹ Hayek does not mean the mere observance of constitutionally enacted laws. It is, as Samuel Brittan suggests, a conception 'in favor of *general* rules and against discretionary power'.⁶⁰ To Brittan, Hayek's most important contribution to the discussion of the ideal of the rule of law is his interpretation of it as 'the rule of impartial *general* laws...'.⁶¹ Hayek makes this clear when he asserts that:

The conception of freedom under the law...rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free.^[62] It is because the judge who applies them has no choice in drawing the conclusions that follow from the existing body of rules and the particular facts of the case, that it can be said that laws and not men rule... This, however, is true only if by 'law' we mean the general rules that apply equally to everybody....As a true law should not name any particulars, so that it should especially not single out any specific persons or group of persons.⁶³

Hayek quickly adds that this 'generality' of laws by no means deny the existence and necessity of 'special rules' which apply to different classes of people provided these rules are equally recognised by both those inside and outside the group.⁶⁴

⁵⁹ See notes 29-31 above.

⁶⁰ S. Brittan, *The Roles and Limits of Government: Essays in Political Economy*, London: Temple Smith, 1983, p.63. (Emphasis added). Brittan argues that it is this conception from which Hayek attempts to derive not only the fundamental political and legal basis, but also economic policies of free society.

⁶¹ *Ibid.*, p.64. (Emphasis added.)

⁶² For the opposite view of the rule of law see note 22 above, and R.P. Wolff, 'Violence and the Law', in Wolff (ed.), *The Rule of Law*, pp.61-62.

⁶³ Hayek, *The Constitution of Liberty*, pp.153-54. Hayek's assertion that judges have no discretion as to the content of the existing legal rules reflects a positivistic outlook. It is ironic that like Hayek, Dworkin who is an arch rival of legal positivism argues that judges have no choice and discretion but to apply principles embodied in a given legal system. I shall criticise this view of judicial discretion soon.

⁶⁴ *Ibid.*, p.154. Hamowy challenges Hayek's view that special laws can be drawn without mentioning a proper name. See Hamowy, 'Law and the Liberal Society', pp.291-292: 'That no proper name be mentioned in a law does not protect against particular

In developing his theory of the rule of law (as the rule of general laws) Hayek was inspired by the philosophies of David Hume and Immanuel Kant to which he frequently refers.

Hume argues that the benefit of law 'arises from the whole scheme or system... only from the observance of a general rule... without taking into consideration ...any particular consequences which may result from the determination of these laws, in any particular case which offers.'⁶⁵ Similarly in Kant's view, an abstract and impartial law must be general and it cannot be devised in terms of a specific purpose such as welfare.⁶⁶

In his Cairo Lectures, Hayek quotes the celebrated Kantian principle that you should always act only on that maxim whereby 'thou canst at the same time will that it should become a universal law'.⁶⁷ He interprets Kant's 'categorical imperative' as 'an extension to the field of morals of the basic idea underlying the Rule of Law'.⁶⁸ This is made even clearer in *Studies* where Hayek declares that:

persons and groups being either harassed by laws which discriminate against them or granted privileges denied the rest of the population. A prohibition of this sort on the forms laws may take is a specious guarantee of legal equality, since it is always possible to contrive a set of descriptive terms will apply exclusively to a person or group without recourse to proper names.'

⁶⁵ D. Hume, *Enquiry Concerning the Principles of Morals*, quoted in Hayek, *LLL*, Vol.1, p.113. See also Hayek, *Studies in Philosophy, Politics and Economics*, p.43.

⁶⁶ I. Kant, *The Metaphysical Elements of Justice*, cited in *ibid.* In fact, the rule of law as the rule of general laws may be found in the thoughts of other contractarian theorists such as Locke and Rousseau. According to Locke, people must be ruled 'by promulgated established Laws, not to be varied in particular Cases, but to have one Rule for Rich and Poor, for the Favourite at Court, and the Country Man at Plough'. J. Locke, *Two Treatises of Government*, ed. P. Laslett. Cambridge: Cambridge University Press, 1988, Ch.X, 142, p.363. Rousseau likewise stated that 'when I say that the object of the Laws is always general, I mean that the law considers [all] the subjects in a body and [all] the actions as abstract, never a man as an individual nor a particular action'. J.J. Rousseau, *Of Social Contract*, trans. C.M.Sherover, New York: Harper, 1984, Ch. VI, par. 101, pp.34-35.

⁶⁷ I. Kant, *Fundamental Principles of Morals*, quoted in Hayek, *The Political Ideals of the Rule of Law*, p.18.

⁶⁸ Hayek, *Political Ideal of the Rule of Law*, p.18.

It is sometimes suggested that Kant developed his theory of the *Rechtstaat* by applying to public affairs his conception of the categorical imperative. It was probably the other way around, and Kant developed his theory of the categorical imperative by applying to morals the concept of the rule of law which he found ready made (in the writings of Hume).⁶⁹

It is clear that Hayek's argument is based on the Kantian universalizability which is described as 'the possibility of willing that the rules should be applied to all instances that correspond to the conditions stated in it'.⁷⁰ Hayek reaches his argument by applying the test of universalizability to the maxims which are used in making a legal order. Such a legal order with the rule of law at its centre confers maximum freedom upon individuals.

Hayek's account of the rule of law has been criticised by some writers.⁷¹ The common complaint seems to be that Hayek expects too much of the rule of law itself, whereas it is only one of the virtues a legal order may possess.⁷² The conception of the rule of law, as Hamowy stresses, is *necessary* but not *sufficient* condition for a 'free society'.⁷³

Hayek is also criticised on the ground that the test of universalizability he defends is formal and susceptible to even oppressive and discriminatory laws.⁷⁴ John Gray argues that while a Hayekian *Rechtstaat* could contain invasive intervention in peaceful market exchange, forced segregation and immigration controls, 'a stable and mild traditional tyranny, on the other hand, might tolerate freedom in

⁶⁹ Hayek, *Studies in Philosophy, Politics and Economics*, London: Routledge and Kegan Paul, 1967, pp.116-117.

⁷⁰ *Ibid.*, p.168.

⁷¹ Apart from Raz, see for example J. Gray, 'F.A.Hayek on Liberty and Tradition,' *Journal of Libertarian Studies*, 4(Spring 1980):119-137, and R. Hamowy, 'Law and the Liberal Society: Hayek's Constitution of Liberty,' *Journal of Libertarian Studies*, 2(Winter 1978):287-297.

⁷² See Raz, 'The Rule of Law and Its Virtue', p.4, 21 ; R. Hamowy, 'Freedom and the Rule of Law in F.A.Hayek,' *Il Politico*, 36(1971):349-377, at p.376.

⁷³ Hamowy, 'Freedom and the Rule of Law in F.A.Hayek', p.376.

⁷⁴ See R. Hamowy, 'Law and the Liberal Society: F.A. Hayek's Constitution of Liberty', *Journal of Libertarian Studies*, 2/4(1978): 287-297. See also Raz, 'The Rule of Law and Its Virtue', p.12.

all these areas, and yet fail the tests which Hayek mistakenly regards as necessary for a free society'.⁷⁵

The last, but by no means least, criticism levelled against Hayek is that his conception of the Rule of Law is too weak to protect individual liberty, because it implicitly leaves out the conception of rights.⁷⁶ This criticism points to the necessity of 'bridging law and justice; of moralising the rule of law'.⁷⁷ As we shall see below it is Dworkin who attempts to fill this gap in the theory of the Rule of Law.

The Rule of Law and Political Rights

The rule of law is seen essentially as a principle for the protection of the rights of individual.⁷⁸ A wider conception of the rule of law was proclaimed, however rhetorically, at the First Conference of the International Commission of Jurists held in New Delhi as to include the legal protection of social, economic and cultural conditions alongside the classical civil and political rights. It was declared that the Rule of Law

⁷⁵ Gray, 'F.A.Hayek on Liberty and Tradition,' p.126. In a later article John Gray has changed his mind, and has taken the view that the critics of Hayek, including himself, were mistaken in considering the Hayek's (or indeed Kant's) universalizability as a wholly formal test. J.N.Gray, 'F.A.Hayek and the Rebirth of Classical Liberalism', *Literature of Liberty*, 5(1982):19-66, at 51.

⁷⁶ See J.Gray, *Liberalisms:Essays in Political Philosophy*, London and New York: Routledge, 1989, p.95: 'In his [Hayek's] conception, moral as well as legal rights fall out of the rule of law as variable and defeasible guarantees of protected areas of action, subject to an overriding test of their utility-promoting effects'. Baumgarth, likewise, argues that 'Hayek's conceptual dependency of rights upon the principle of the rule of law deprives the former of any use as an independent criterion of judging laws'. W. Baumgarth, 'Hayek and Political Order: The Rule of Law', p.19. See also C. Kukathas, *Hayek and Modern Liberalism*, Oxford: Clarendon Press, 1990, pp.154-155.

⁷⁷ See B. Bowring, 'The Rule of Law From No-Law-Reflections on Law, Legitimacy and Justice in the New Europe', Paper delivered in the Annual Conference of SLSA held in Nottingham, on 28- 30 March 1994, p.19.

⁷⁸ See N.M.Dermot, 'Opening of the Preliminary Discussion', in *Development, Human Rights and the Rule of Law*, convened by the International Commission of Jurists, Oxford: Pergamon Press, 1981, p.25. Cf. Rawls, *A Theory of Justice*, p.235-243. For a comment on Rawls's handling of the Rule of Law see, e.g., M. J. Radin, 'Reconsidering the Rule of Law', *Boston University Law Review*, 69(1989):781-819, at 787-790.

requires 'not only the recognition of civil and political rights but also the establishment of the social, economic, educational and cultural conditions which are essential to the full development of his personality'.⁷⁹

Apart from this 'official blessing'⁸⁰ of the I.C.J., the rule of law is today largely believed to be a 'legal' vehicle for controlling the powers of the state.⁸¹ It must be seen a negative value which is designed to minimise a great danger of arbitrary power created inevitably by the law itself.⁸² This principle, as we have seen, simply means that the state should be subject to the law. It may take no action not in accordance with its own established legal procedures,⁸³ and indeed with international law, and supra-national agreements such as the European Convention on Human Rights.

But conformity with the rule of law ironically, as Raz emphasised, may well be compatible with gross violations of rights and freedoms.⁸⁴ In Dworkin's words, 'compliance with the rule book is plainly not sufficient for justice; full compliance will achieve very great injustice if the rules are unjust'.⁸⁵ To avoid this injustice, Hayek suggests that the rule of law does not merely mean compliance with and enforcement of the laws. For him, '[t]he Rule of Law is therefore not a rule of law, but a

⁷⁹ I.C.J., *The Rule of Law and Human Rights: Principles and Definitions*, Geneva, 1966, p.9. On that point see also N. S. Marsh, 'The Rule of Law as a Supra-National Concept', in A.G.Guest(ed.), *Oxford Essays in Jurisprudence*, First Series, Oxford: Oxford University Press, 1961, p.223.

⁸⁰ Raz sees this 'official blessing' of the International Commission of Jurists (I.C.J.) as another example of 'perversion of the doctrine of the rule of law'. See Raz, 'The Rule of Law and Its Virtue', pp.3-4.

⁸¹ See J.T.Wright, 'Human Rights in the West: Political Liberties and the Rule of Law', in A.Pollis & P.Schwab (eds), *Human Rights: Cultural and Ideological Perspectives*, N.Y.: Praeger, 1979, p.20.

⁸² See Raz, 'The Rule of Law and Its Virtue', p.16.

⁸³ See note 10 above.

⁸⁴ See Raz, 'The Rule of Law and Its Virtue', p.14. See also T.R.S Allan, *Law, Liberty, and Justice*, p.20.

⁸⁵ R. Dworkin, 'Political Judges and the Rule of Law', in *A Matter of Principle*, Cambridge and London: Harvard University Press, 1985, p.12.

rule concerning what the law ought to be, a meta-legal doctrine or a political ideal'.⁸⁶ This leads to the identification of the rule of law with the rule of the 'good' or 'true' law.⁸⁷ Yet the question what makes a law 'good' or 'bad' immediately arises. Hayek replies this question, to recall, as follows:

Law in its ideal form might be described as a 'once-and-for-all' command that is directed to unknown people and that is abstracted from all particular circumstances of time and place and refers only to such conditions as may occur anywhere and at anytime.⁸⁸

In Hayek's view only the general, abstract laws which developed spontaneously can be deemed as 'good' and 'just'⁸⁹, and therefore capable of protecting the rights and freedoms of individual.⁹⁰ Hayek concedes sometimes that even general rules may possibly be used to severely restrict freedom.⁹¹ He nevertheless maintains that this is 'very unlikely' given the fact that the main safeguard (the Rule of Law) means 'rules must equally apply to the government as well as the governed'.⁹²

It seems that mere generality and equality of law may not provide sufficient conditions for justice. Dworkin's alternative is what he calls 'rights conception' of the rule of law.⁹³ What distinguishes this conception from 'the rule book conception' of the rule of law is that 'it requires, as part of the ideal of law, that the rules in the rule book capture and enforce moral rights'.⁹⁴ Unlike Hayek Dworkin grounds his

⁸⁶ Hayek, *The Constitution of Liberty*, p.206.

⁸⁷ *Ibid.*, p.153.

⁸⁸ *Ibid.*, pp.149-50.

⁸⁹ *Ibid.*, p.210: 'it is doubtful whether we possess any other formal criteria of justice than generality and equality [of laws]'. See also Kukathas, *Hayek and Modern Liberalism*, pp.155-156.

⁹⁰ For a critical treatment of Hayek's view about the relationship between the rights and the rule of law see W.P.Baumgarth, 'Hayek and Political Order: The Rule of Law', *Journal of Libertarian Studies*, 2/1(1978): 11-28, particularly pp.18-20.

⁹¹ See Hayek, *The Constitution of Liberty*, p.154.

⁹² *Ibid.*, p.155.

⁹³ Dworkin, 'Political Judges and the Rule of Law', p.11.

⁹⁴ *Ibid.*, p.12.

conception of the Rule of Law directly on the rights of individuals against the state.

Dworkin's conception of Rule of Law is also closely related to his theory of judicial adjudication. The distinction between 'principles' and 'policies' lies at the heart of Dworkin's theory of adjudication. They correspond to 'rights' and 'goals' respectively. 'Principles are propositions that describe rights; policies are propositions that describe goals', says Dworkin.⁹⁵ It is the former that must be taken into account in deciding cases.⁹⁶ The Rule of Law requires accordingly judges not to base their judgement on policies aiming at the promotion of some utilitarian conceptions such as 'general welfare' or 'public interests'.⁹⁷ Quite the contrary. It requires that 'judges *do* and *should* rest their judgements on...arguments of political principle that appeal to the political rights of individual citizens'.⁹⁸

This brings to the fore the importance of the rule of law as a fundamental element of a judicial mechanism. A secure legal system with an impartial and 'objective'⁹⁹ judiciary can provide a necessary framework for the enforcement of rights in general and political rights

⁹⁵ R. Dworkin, *Taking Rights Seriously*, London: Duckworth, 1977, p.90.

⁹⁶ For a detailed exploration of this fundamental distinction see *Taking Rights Seriously*, pp.81-105

⁹⁷ Dworkin, 'Political Judges and the Rule of Law', p.11. Dworkin argues that even if a judge in his decision appeals to the arguments of policies, it might be seen as an appeal to principles, that is, to the rights of individuals. See Dworkin, *Taking Rights Seriously*, p.100.

⁹⁸ Dworkin, 'Political Judges and the Rule of Law', p.11. (Emphasis added)

⁹⁹ The terms 'objective' and 'subjective' appear to be extremely vague. As Hare puts it, "hardly any moral...philosophers give any clear idea of how they are using the terms 'objective' and 'subjective'". (R. M. Hare, *Moral Thinking*, Oxford: Clarendon Press, 1981, p.206.) We will use the word 'objective' in its ordinary sense. That is, a person is 'objective', in deciding a case, if he goes beyond his own feelings, and refer to the occurrence of an outside, non-psychological fact 'producing' norm. For the use of the term 'objectivity' in this sense, see J.Gorecki, 'Human Nature and Justification of Human Rights', *The American Journal of Jurisprudence*, 34 (1989):43-60, at 44.

in particular.¹⁰⁰ The idea of an independent and impartial judiciary has two aspects. First, it refers to the judge's role and position separate from the legislative and executive powers.¹⁰¹ This ensures that 'judges stay within their task of rule-applying'.¹⁰² The second aspect of the impartiality refers to the moral autonomy of the judges in deciding cases.¹⁰³ In other words, judges have often come to face alternative moral choices in the course of adjudication. Judges constitute 'an interpretive community', and as member of this community they are bound to 'act as independent moral choosers'.¹⁰⁴

We may also distinguish between the external and internal problems that an independent and impartial judiciary may face. The former is to be solved by such rules as 'the method of appointing judges, their security of tenure and the way of fixing their salaries' and so on.¹⁰⁵ These are designed to deal with external problems, and 'guarantee that judiciary will be free from extraneous pressures and independent of all authority save that of the law'.¹⁰⁶

The internal problem is concerned with the principle of 'judicial discretion'. In other words, it is about the question how judges decide and/or should decide. In Chapter 8, the issue of legal interpretation will

¹⁰⁰ See R.P.Claude, 'The Classical Model of Human Rights Development', in R.P.Claude (ed.), *Comparative Human Rights*, London: The Johns Hopkins University Press, 1976, p.10: 'The tie between legal security and political freedom lies in the fact that in the liberal tradition the chief institutional solution to limiting the use of power has historically relied on balanced power wrapped up in the stipulations of legal limits. It is a problem of setting legitimate limits to domination'. See also Harden and Lewis, *The Noble Lie*, pp.54-55.

¹⁰¹ This is the traditional doctrine of separation of powers which is usually traced to Montesquieu. According to Montesquieu the existence of a separate and independent judiciary is essential to secure the political liberty. See Montesquieu, *The Spirit of the Laws*, trans. and ed. A. M.Cohler et al, Cambridge: Cambridge University Press, 1989, Part 2, Book 11, Ch.6, pp.156-166.

¹⁰² Radin, 'Reconsidering the Rule of Law', p.817.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ Raz, 'Rule of Law and Its Virtue', p.10.

¹⁰⁶ *Ibid.*

be discussed at length with some examples taken from the jurisdiction of Turkish Constitutional Court. It is necessary, however, to briefly touch upon the nature of judicial adjudication, because it is an inseparable part and parcel of the Rule of Law.

Judges and the Enforcement of Rights

In *Nicomachean Ethics*, Aristotle asserts that, in order to fill a gap in the law, a judge should 'say what the legislator himself would have said had he been present, and would have put into his law if he had known'.¹⁰⁷ In *Ethics and the rule of law*, David Lyons, a contemporary writer, declared that:

If courts render authoritative interpretations of the law, but they have discretion to decide its meaning when its unclear, then they do not simply apply the law. They also help to make it. They do not simply adjudicate: they also 'legislate'.¹⁰⁸

Dworkin has launched a powerful challenge against this positivist outlook of judicial adjudication. He produced 'the most sophisticated rights-based theory of adjudication'.¹⁰⁹ He argues that judges do not (and should not) legislate.¹¹⁰ The judge has no discretion at all even in the most controversial cases, where reasonable lawyers disagree as to the proper verdict.¹¹¹ Judges, Dworkin concedes, may have 'discretion' in

¹⁰⁷ Aristotle, *Nicomachean Ethics*, trans. D. Ross, Oxford: Oxford University Press, 1925, 1137b, p.133. This positivist idea is best expressed in Article 1 of the Swiss Civil Code: 'Where no provision is applicable, the judge shall decide according to the existing customary law and, in default thereof, according to the rule which he would lay down if he had himself to act as legislator'. This Article was also translated into Turkish Civil Code. See A.Guriz, 'Sources of Turkish Law' in T.Ansay and D.Wallace (eds.), *Introduction to Turkish Law*, 3rd Ed., Deventer: Kluwer, 1987, pp.1-22, at 3.

¹⁰⁸ D.Lyons, *Ethics and the rule of law*, p.88.

¹⁰⁹ A. Gutmann, 'The Rule of Rights or the Right to Rule?', in J.R.Pennock and J.W.Chapman (eds.), *Justification: Nomos XXVIII*, New York and London: New York University Press, 1986, p.167.

¹¹⁰ Dworkin, *Taking Rights Seriously*, p.82.

¹¹¹ In fact in Dworkin's theory of adjudication with respect to the role of judges there is no real difference between hard cases and 'the simple run-of-the-mill lawsuit'. His theory 'does not draw a sharp line between easy and hard cases, as positivism does; instead it makes available for hard cases the same warrant the judge has in any easy

two very weak senses of the word. First, it is true that their decisions, right or wrong, are generally determinative of the dispute in a case. Second, in reaching their decisions they have to apply judgement. But these are by no means 'discretion' of having a choice between a decision one way or the other.¹¹²

As we have already seen, Dworkin argues that judges in political cases *do* and *should* appeal to the principles, i.e., to political rights.¹¹³ The political cases are those cases which involve political rights. Judges generally decide these cases either 'by confirming or denying' certain political rights.¹¹⁴ Here I will reject the descriptive part of Dworkin's hypothesis that judges *do* base their decisions on the political rights. In other words, I read Dworkin's thesis as an example of, what Loughlin calls, 'liberal normativism'.¹¹⁵ And this example can be taken as a prescription for judicial behaviour.

It is not very important in practice whether judges make laws or they just appeal to some principles. The point is *how* judges reach a decision in a case, no matter whether they have discretion or not. Let me be clearer. The question whether judges simply do legislate or appeal to the principles in political cases is less significant than the question what kind of factor becomes determinant in their verdict. The judges in fact do not reach the judgement by making laws or referring to the principles. They rather reach the verdict on their personal background, and then appeal to rules or principles to rationalise their decision.

In constitutional cases, whether they are making laws as quasi-legislator, or simply applying to the principles, 'judges are inevitably deploying their own values and political beliefs'.¹¹⁶ The role of judge's personal values and beliefs about what is good for others is usually underestimated. If we look at and carefully examine some cases brought

case, that he is doing his best to enforce rights...'. R.Dworkin, 'Philosophy and the Critique of Law', in R. P. Wolff (ed.), *The Rule of Law*, New York: Simon and Schuster, 1971, pp.158-59.

¹¹² See Dworkin, *Taking Rights Seriously*, pp.31-9.

¹¹³ See note 98 above.

¹¹⁴ *TRS*, p.101.

¹¹⁵ M. Loughlin, *Public Law and Political Theory*, Oxford: Clarendon Press, 1992, p.249.

¹¹⁶ See J.Waldron, *The Law*, London and New York: Routledge, 1990, p.146.

before judges, we can see how the judgements reflect their misconception and prejudices about some issues like religion and morality.¹¹⁷ Once they have reached 'decisions on the basis of [their] personal reactions to the facts', then they have 'sought for legal language to justify [their] choices'.¹¹⁸ They indeed can find a 'legal' justification either by appealing to some 'principles', or by making laws. The ways of justification, in the last analysis, do not alter the decision itself. This is the position which is generally ascribed to the legal realists.¹¹⁹ For legal realists, judges are not constrained by external forces in deciding hard cases.¹²⁰ They argue that judges in fact often ostensibly refer to the legal rules 'pretending that it was the rule rather than something else that determined the outcome'.¹²¹

However, the fact that judges deploy their personal values and beliefs in the process of decision making does not deter us from saying that there may be some other factors which may well determine their judgements. I argue indeed that the primary external constrain which exerts influence on the judges is the prevailing political paradigm. This main paradigm, along side the sub-paradigms of judges, affects the judgements in the political cases.¹²² In most of the cases, as we shall see in Chapter 8 below, the Turkish Constitutional Court appeals to the arguments

¹¹⁷ For the examples of this judicial behaviour see Part II, Ch.8.

¹¹⁸ M.Shapiro, *Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence*, New York: Free Press, 1964, p.15.

¹¹⁹ The prominent figures of the legal realism are Jerome Frank and K. Llewellyn. While Frank called himself as a 'fact-sceptic' who found a fundamental uncertainty and unpredictability in fact-finding process of the courts, Llewellyn came to known as a 'rule-sceptic' who rejected the idea that rules 'are the heavily operative factor in producing court decisions'. See respectively J. Frank, *Law and the Modern Mind*, New York: Brentano's, 1930, p.x, and K. N. Llewellyn, *Jurisprudence: Realism in Theory and Practice*, Chicago: University of Chicago Press, 1962, p.56. For the German legal realists known as 'the School of Free Law', see M.Weber, *On Law on Economy and Society*, ed. M.Rheinstein, tr. E. Shils, Cambridge, Mass.:Harvard University Press, pp.309-310.

¹²⁰ See Llewellyn, *Jurisprudence*, pp.55-57, and see also J. Coleman, 'Negative and Positive Positivism', *Journal of Legal Studies*, 11(1982):139-162, at 147-148.

¹²¹ F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Oxford: Clarendon Press, 1991, p.194.

¹²² See Chapter 8 below.

derived from the main paradigm of the state. In the *Headscarf Case*, for instance, where arose the issue of constitutionality of the law which legalised wearing headscarves in the universities, the Court adopted what I call an ideology-based approach as opposed to rights-based approach, and denied the freedom of religion and conscience for some individuals on ideological and utilitarian grounds.¹²³ This is in fact not an isolated example of the Court's approach. It, rather, reflects the Court's general approach which is ideology-based, not rights-based. The Court, therefore, does not enforce the rights of individuals against the state; it is rather extremely restrictive towards the political rights.

In order to evade the 'external scepticism', on which arguably the theories of legal realism is premised,¹²⁴ I would argue that a normative suggestion to the problem of adjudication is possible. This suggestion is derived from the normative aspect of Dworkin's theory of judicial adjudication. To put it bluntly judges *ought* to decide cases according to the requirements of the rights. Their approach *must* be rights-based, not ideology-based. They *must* keep in mind that there are certain rights prior to and more important than the existing legal rules. This in fact amounts to the role of the judiciary: that is to protect and enforce individuals' rights.¹²⁵ In the liberal tradition it is this role that provides a justified power with judges.¹²⁶ To conclude, deployment of the rights-based approach in constitutional cases is essential for realising the 'rights conception of the Rule of Law'. Otherwise we cannot go beyond the rhetoric that 'as a fine sonorous phrase', the Rule of Law is 'to be put alongside the Brotherhood of Man, Human Rights and all the other slogans of mankind on the march'.¹²⁷

¹²³ See Chapter 8 below. The ideological and utilitarian grounds are in fact inextricably linked. The latter often functions as disguise for ideological preferences. See Chapter I above.

¹²⁴ Dworkin, *Law's Empire*, p.272.

¹²⁵ *TRS*, p.87.

¹²⁶ See J.H.Reiman, 'Law, Rights, Community, and the Structure of Liberal Legal Justification', in J.R.Pennock and J.W.Chapman (eds.), *Justification: Nomos XXVIII*, New York and London: New York University Press, 1986, pp.178-203, at p.180.

¹²⁷ R.M.Jackson, *The Machinery of Justice in England*, Sixth Ed., Cambridge: Cambridge University Press, 1972, p.341.

CHAPTER 4- INDIVIDUALISM, COMMUNITY, AND DEMOCRACY: A CRITIQUE OF LIBERALISM

In the preceding chapters, we have attempted to draw a picture of the liberal political order in which individual rights and liberties can be protected. The liberal state¹ is described as the 'rights-based state'² with the principles of rule of law and political neutrality at its centre. The rights-based state entails the positivization of natural rights; i.e. the constitutional formulation of rights.³ This is essential because in such a state 'the individual rights and liberties are the basis of constitutional structure'.⁴ These rights are seen as the necessary condition of the moral legitimacy of government.⁵ The idea of rights therefore has central place in the positive definition of the liberal state. The liberal polity means 'not only that public power of every kind is subject to the general laws of the country, but also that the laws themselves are subject to the material limitation stemming from the recognition of certain fundamental rights'.⁶

¹ Generally speaking liberals have been traditionally suspicious of the state and its powers. Yet they differ from the Anarchists in that liberals regard the state as a 'necessary evil'. This tradition is based on the liberal belief in 'the ability of individuals to look after their own interests, and in the self regulating capacity of society'. See A. Arblaster, *The Rise and Decline of Western Liberalism*, Oxford: Basil Blackwell, 1984, p.50. This liberal belief may find its best expression in Thomas Paine who says : "Society is produced by our wants, and government by our wickedness; the former promotes our happiness *positively* by uniting our affections, the latter *negatively* by restraining our vices. The one encourages intercourse, the other creates distinctions. The first is a patron, the last is a punisher. Society in every state is a blessing, but government even in its best state is but a necessary evil; in its worst state, an intolerable one." See T.Paine, *Common Sense*, Harmondsworth:Penguin, 1976, p.65.

² N.Bobbio, *Liberalism and Democracy*, trans. M. Ryle and K.Soper, London: Verso, 1990, p.12.

³ *Ibid.*

⁴ D.A.L.Thomas, *In Defence of Liberalism*, Oxford: Blackwell, 1988, p.14.

⁵ H.Spector, *Autonomy and Rights:The Moral Foundation of Liberalism*, Oxford: Clarendon Press, 1992, p.1. See also J.L.Cohen and A.Areto, *Civil Society and Political Theory*, Cambridge, Mass.: The MIT Press, 1992, p.9.

⁶ See Bobbio, *Liberalism and Democracy*, p.12.

The rights-based state can also be negatively defined. It is, as a neutral entity, antagonistic to any form of paternalism. The duty of the state, in the paternalistic view, is to care for its subjects in a similar way in which a father cares for his children.⁷ It is this paternalism that Kant sees as 'the greatest conceivable despotism'.⁸ The liberal state is not only anti-paternalistic but also in a way 'anti-perfectionist' and 'anti-utilitarian' on the basis that 'the moral ends assumed by the former and the aggregative methods adopted by the latter fail to show sufficient respect to different individual lives'.⁹

Now the question is to which liberalism, or rather version of liberalism, does this picture of the state belong? Clearly, not all liberals concur in the conception of the state we explored above. This is also true for the theoretical framework of political rights that has been set up in this study. As already indicated in introductory chapter, this framework is by no means the reflection of a single liberal thinker, nor is it an edifice on which all liberals will fully agree. In fact, in constructing this theoretical framework we have referred to various liberals whose account of the liberal state and individual rights may be conflicting. However, this does not prevent us from identifying the version of liberalism with which we are concerned here. With its special emphasises on such notions as 'the rule of law', 'political neutrality', and 'the individual rights and liberties', the liberalism in question may be described as, in the words of Michael Sandel, 'deontological liberalism'.¹⁰

⁷ *Ibid.*, p.17.

⁸ I. Kant, 'On the common saying: 'this may be true in theory, but it does not apply in practice,' in *Political Writings*, ed. H.Reiss, trans. H.B. Nisbet, 2nd Ed, Cambridge: Cambridge University Press, 1991, p.74: 'A government might be established on the principle of benevolence towards the people, like that of a father towards his children. Under such a *paternal government* (*imperium paternale*), the subjects, as immature children who cannot distinguish what is truly useful or harmful to themselves, would be obliged to behave purely passively and to rely upon the judgement of the head of state as to how they *ought* to be happy, and upon his kindness in their happiness at all. Such a government is the greatest conceivable *despotism*...'.

⁹ R. Bellamy, *Liberalism and Modern Society : An Historical Argument*, Cambridge: Polity, 1992, p.219.

¹⁰ M.J.Sandel, *Liberalism and the Limits of Justice*, Cambridge: Cambridge University Press, 1982, p.1. The terms 'rights-based liberalism', 'egalitarian' (or welfare)

There are three reasons for choosing the deontological or Kantian liberalism.¹¹ First of all, it represents a political theory which may be called 'right-based'. It is premised in the principle of right (or justice), and rights of individual which outweigh in certain cases 'considerations of the overall good or the likelihood of attaining some general end state'.¹² That is, Kantian liberalism explicitly rejects the utilitarian and consequentialist arguments which value actions to the extent that they reduce the pains and increase the pleasure of the greatest number.¹³

Secondly, the principle of equality is strongly emphasised in Kantian liberalism. The idea that individuals, as autonomous moral beings, must be treated with equal concern and respect lies at the heart of the liberalism in question. This may increase, (if there is any), the chance of liberalism's applicability to the developing countries, like Turkey, where equality is among the most valued principles.¹⁴

liberalism', 'ethical liberalism', 'procedural liberalism', and 'contractarian liberalism' are also used for this version of liberalism. See respectively R. B. Thigpen & L.A. Downing, 'Liberalism and the Communitarian Critique', *American Journal of Political Science*, 31(August 1987): 637-655, at 639, L. E. Lomasky, *Persons, Rights, and the Moral Community*, Oxford: Oxford University Press, 1987, p.84, S.Shiffrin, 'Liberalism, Radicalism, and Legal Scholarship', *UCLA Law Review*, 30(1983):1103-1217, at 1106, C.Taylor, 'Cross-Purposes: The Liberal-Communitarian Debate', in N.L.Rosenblum(ed.), *Liberalism and the Moral Life*, Cambridge, Mass.: Harvard University Press, 1989, p.164, and A.Patten, 'The Republican Critique of Liberalism', *British Journal of Political Science*, 26/1(Jan.1996):25-44, at 25.

¹¹ Kant is the source of inspiration for ethical liberals of modern world. Like Kant, they reject utilitarianism, praise individual rights, and conceptions of respect and dignity. See Shiffrin, 'Liberalism, Radicalism, and Legal Scholarship', at 1106n, and 1121n.

¹² C. Fried, 'Liberalism, community and the objectivity of values', *Harvard Law Review*, 96(1983):960-68, at 960n. See also R.Dworkin, *Taking Rights Seriously*, London: Duckworth, 1977, p.173.

¹³ See Chapter 1 above.

¹⁴ S.Mardin, 'Turkey: The Transformation of an Economic Code', in E.Ozbudun and A.Ulusun (eds.), *The Political Economy of Income Distribution in Turkey*, New York and London: Holmes and Meier Publishers, 1980, p.23.

The last reason for picking up the Kantian liberalism is that it is the dominant form of liberal political theory.¹⁵

In this chapter, I will deal with the communitarian and postmodern challenges against the principles of this dominant and powerful form of liberalism. These critics, particularly the communitarians, argue for, among other things, the advocacy of involvement in public life, increased participation in communities and in the political sphere.¹⁶ This generates another challenge that liberals face: liberalism is incompatible with the idea of democracy. This issue is discussed at the end of the chapter. The chapter will finally take up the possible implications of these critiques for the analysis of Turkish constitutional system.

The Loss of Community?: Communitarian Critique of Liberalism

In recent years deontological liberalism has encountered a serious challenge from communitarians¹⁷ who reject the liberal commitment to 'individualism' and to 'rights'.¹⁸ Since the criticisms of human rights

¹⁵ See M. Sandel, 'Introduction', in M. Sandel (ed.), *Liberalism and Its Critics*, Oxford: Basil Blackwell, 1984, p.4.

¹⁶ See S.Avineri & A.De-Shalit, 'Introduction' to Avineri and De-Shalit(eds.), *Communitarianism and Individualism*, Oxford: Oxford University Press, 1992, p.9.

¹⁷ Communitarianism is a broad creed that involves methodological and normative arguments, moral and political claims, radical philosophers as well as moderate ones. Allen Buchanan distinguishes between radical and moderate communitarians. While the radical communitarian 'rejects individual civil and political rights out of hand', the moderate one 'acknowledges individual civil and political rights but denies that they have the sort of priority the liberal attributes to them'. See A.E. Buchanan, 'Assessing the Communitarian Critique of Liberalism', *Ethics*, 99(July 1989): 852-882, at 855. See also his 'Individual Rights and Social Change', *Philosophical Papers*, 20(1991):51-75, at 63.

¹⁸ Thigpen and Downing, 'Liberalism and the Communitarian Critique,' p.637. Many scholars have paid close attention to the academic debate between liberals and communitarians. As a result, a number of literature emerged. See, e.g., W.Kymlicka, 'Liberalism and Communitarianism', *Canadian Journal of Philosophy*, 18(June 1988):181-204.; J.R.Wallach, 'Liberals, Communitarians, and the Tasks of Political Theory', *Political Theory*, 15(November 1987):581-611; A.Gutmann, 'Communitarian Critics of Liberalism', *Philosophy & Public Affairs*, 14(1985): 308-322.; M. Walzer, 'The

have been examined before¹⁹, here I shall concentrate on communitarian attacks against the liberal conception of 'self'.

Michael Sandel summarises the core thesis of 'deontological liberalism' in the following terms.

[S]ociety, being composed of a plurality of persons, each with his own aims, interests, and conceptions of the good, is best arranged when it is governed by principles that do not themselves presuppose any particular conception of the good; what justifies these regulative principles above all is not that they maximize the social welfare or otherwise promote the good, but rather that they conform to the concept of right, a moral category given prior to the good and independent of it.²⁰

The priority of right, as the core idea of liberalism, may be understood in two senses, Sandel argues. First, it means that 'individual rights cannot be sacrificed for the sake of general good'. Second, the priority of right means that 'the principles of justice that specify these rights cannot be premised on any particular vision of the good life'.²¹ Thus the rights are justified not on the utilitarian basis (that they maximize the general welfare), but rather on the ground that they establish a framework within which its citizens can pursue their own values and ends, consistent with a similar liberty for others.²²

The liberal ideal of the priority of right, Sandel asserts, is based on a particular conception of the self which is prior to and independent of the purposes and ends individuals have.²³ This what he calls

Communitarian Critique of Liberalism', *Political Theory*, 18(February 1990):6-23, and E.Frazer and N.Lacey, *The Politics of Community: A Feminist Critique of the Liberal-Communitarian Debate*, New York and London: Harvester Wheatsheaf, 1993, esp. pp.101-130.

¹⁹ See Introduction above.

²⁰ Sandel, *Liberalism and the Limits of Justice*, p.1. See also Fried, 'Liberalism, community and the objectivity of values', p.960.

²¹ M.Sandel, 'Morality and the Liberal Ideal', *New Republic*, (May, 1984):15-17, at.16.

²² *Ibid.* For Sandel, deontological liberalism tries to create this framework (through constitutional and legal means), for the establishment of the liberal 'just society'. See M. Sandel, 'The Procedural Republic and the Unencumbered Self', *Political Theory*, 12/1(1984):81-96, at 82.

²³ *Ibid.*, p.86.

'unencumbered self' is a choosing self, independent of its desires and ends in contrast to the utilitarian self which is defined as the sum of its desires.²⁴ The priority of the self over ends is crucial because without it the priority of the right to the good is meaningless. For Sandel, the priority of the self means 'I am never defined by my aims and attachments, but always capable of standing back to survey and assess and possibly revise them'.²⁵ The logical consequence is that 'if the self is prior to its ends, then the right must be prior to the good'.²⁶

It is Rawls' conception of the self that Sandel specifically targets.²⁷ Rawls seems to reject the Kantian abstraction of a radically disembodied, transcendent self.²⁸ In order to construct 'a viable Kantian conception of justice', he argues, 'the force and content of Kant's doctrine must be detached from its background in transcendental idealism'.²⁹ Rawls, unlike Kant³⁰, does not seek to detach moral theory from general facts about human nature and circumstances.³¹ It does not follow however that Rawls' concept of justice is based on a particular view of human

²⁴ See Sandel, 'Morality and the Liberal Ideal', p.17

²⁵ *Ibid.* See also his 'The Procedural Republic and the Unencumbered Self', p.86.

²⁶ See Sandel, 'Morality and the Liberal Ideal', p.17.

²⁷ Sandel, *Liberalism and the Limits of Justice*, p.49.

²⁸ See J.Rawls, 'The Basic Structure as Subject', *American Philosophical Quarterly*, 14(1977), p.165.

²⁹ Rawls claims that such a construction of justice, which is based on social contract, can meet the objections that idealists raised against the Kantian moral theory. (See *ibid*). Indeed, Hegel attacked the 'abstract' and 'antihistorical' character of Kantian morality, arguing that morality has a history and that to conceive it as something apart from social and political circumstances is simply to misconceive it. Such antihistorical theories, in Hegel's view, are false because they fall short of understanding the nature of human diversity in all of its detail. See S. B. Smith, *Hegel's Critique of Liberalism: Rights in Context*, Chicago : The University of Chicago Press, 1989, p.71. For a criticism of 'ahistorical' concept of morality see also A. MacIntyre, *A Short History of Ethics*, New York: Macmillan, 1976, particularly pp.1-2, and A. MacIntyre, *After Virtue*, London: Duckworth, 1981, pp.42-45.

³⁰ I.Kant, *Groundwork of the Metaphysic of Morals*, (p.32) in H.J.Paton, *The Moral Law*, London: Hutchinson University Library, 1948, p.74: '[M]oral principles are not grounded on the peculiarities of human nature, but must be established a priori by themselves..'

³¹ See Fried, 'Liberalism, Community, and the Objectivity of Values', p.962.

nature.³² By identifying the individualism of his theory with the subject (rather than object) of desires, Rawls avoids relying on any particular theory of human motivations, such as the assumption that man is by nature selfish and egoist.³³ What Rawls tries to do is to recast the Kantian doctrine within the 'canons of a reasonable empiricism'.³⁴

Sandel argues that this attempt ends up in a 'deontology with a Humean face' which is bound to fail.³⁵ It fails because it has contradictory tenets. For Sandel, even though Rawls tries to distance himself from the Kantian conception of transcendent self, the model of original position is nothing but a modern restatement of the Kantian view.³⁶ It is the Kantian picture of subject, he asserts, that we find in Rawls' original position where the priority is given to the principles chosen by those persons who are ignorant of any information about their beliefs, norms, classes, statuses, etc.³⁷

Such a conception of the self is the basis of 'abstract individualism' for which allegedly liberals argue.³⁸ Alasdair MacIntyre blames this modern individualism for the abandonment of the idea of the telos.³⁹ He argued

³² He explicitly expresses that 'a theory of human nature is not part of the framework of the original position'. J. Rawls, 'Kantian Constructivism in Moral Theory', *The Journal of Philosophy*, LXXVII (September 1980): 515-572, at p.537. For the contrasting view that Rawls in fact assumes a specific account of human nature, see I. Shapiro, *The Evolution of Rights in Liberal Theory*, Cambridge: Cambridge University Press, 1986, p.207, and J. Boyle, 'Is Subjectivity Possible? The Post-Modern Subject in Legal Theory', *University of Columbia Law Review*, 62(1991):489-524, at 507-508n.

³³ See Sandel, *Liberalism and the Limits of Justice*, p.147.

³⁴ Rawls, *A Theory of Justice*, p.165.

³⁵ Sandel, *Liberalism and the Limits of Justice*, p.14.

³⁶ See *ibid.*, p.49, and Fried, 'Liberalism, Community, and the Objectivity of Values', p.963.

³⁷ Sandel, *Liberalism and the Limits of Justice*, p.49.

³⁸ See W. Kymlicka, 'Liberalism and Communitarianism', *Canadian Journal of Philosophy*, 18/2 (June 1988):181-204, at 181.

³⁹ For MacIntyre, the abandonment of the classical idea of telos is the main cause of the contemporary moral chaos (i.e. the diversity of arbitrarily chosen, incommensurable values). Without this idea of telos, he argues, moral declarations could only be arbitrary preferences because human beings cannot know their good unless they understand their

that liberals defended individualism in order to be able to liberate persons from the 'outmoded forms of social organization which had imprisoned [them] simultaneously within a belief in a theistic and teleological world order and within those hierarchical structures which attempted to legitimate themselves as part of such a world order'.⁴⁰ Therefore individualism, in the view of MacIntyre, not only undermined the hierarchical social structures, but also destroyed the teleological understanding of man as the bearers and seekers of virtues.

It is impossible, MacIntyre claims, to know the telos when the human good is seen as prior and independent of all social roles which help man to be a functional concept.⁴¹ Referring to Aristotelian virtue, he says that man's identity was determined by his roles and statuses 'within a well-defined and highly determinate system of roles and statuses'.⁴² Thus 'a man who tried to withdraw himself from his given position in heroic society would be engaged in the enterprise of trying to make himself disappear'.⁴³ Once this conception of role-based telos is rejected, man could no longer say that 'I belong to this clan, that tribe, this nation... [h]ence what is good for me has to be the good for one who inhabits these roles'.⁴⁴ The liberal notion of 'abstract self' is but a mirage, for we understand 'ourselves as the particular people, as bearers of this history, as sons and daughters of that revolution, as citizens of this republic'.⁴⁵

highest end. Human beings cannot reach unity and intelligibility without a single, final good (a telos). See MacIntyre, *After Virtue*, pp.203-204.

⁴⁰ *Ibid.*, p.58.

⁴¹ *Ibid.*, p.56: 'to be a man is to fill a set of roles, each of which has its own point and purpose'.

⁴² *Ibid.*, p.115.

⁴³ *Ibid.*, p.119. See also P.Berger, B.Berger, and H.Kellner, *The Homeless Mind*, New York: Vintage Books, 1974, p.90: 'In a world of honor [similar to the heroic society of MacIntyre] the individual discovers his true identity in his roles, and to turn away from the roles is to turn away from himself.'

⁴⁴ MacIntyre, *After Virtue*, pp.204-5.

⁴⁵ Sandel, *Liberalism and the Limits of Justice*, p.179. The communitarian idea of 'situated self' is by no means novel. The nineteenth century existentialist thinker Kierkegaard, for instance, emphasised the situational nature of the individual. In his *Either/Or* he stated that 'every individual, however original he may be, is still a child of God, of his age, of his nation, of his family and friends'. 'Only thus', concluded S.

The rejection of 'the situated-self' inevitably gives rise to, in the words of Peter Berger, 'the naked self' which 'beyond institutions and roles, as the *ens realissimum* of human being, is the very heart of modernity'.⁴⁶

In a similar fashion, Charles Taylor depicts such a detachment of individual from its communal ties as 'atomism'.⁴⁷ Liberal individualism, for Taylor, is one of the malaises of modernity alongside instrumental reason⁴⁸ and political alienation,⁴⁹ malaises which 'thicken the darkness around the moral ideal of authenticity'.⁵⁰ The individualism is both cause and the consequence of the loss of 'moral horizons' which used to confer on our lives 'meaning' and 'purpose'.⁵¹ Taylor writes:

Kierkegaard, 'is he truly himself'. See S. Kierkegaard, *Either/Or*, Vol.1, trans. D.F. and L.M.Swenson, Princeton: Princeton University Press, 1971, p.143. Cf. G.W.F.Hegel, *Reason in History: A General Introduction to the Philosophy of History*, trans.

R.S.Hartman, New York: The Liberal Arts Press, 1953, p.66: 'each individual is the son of his people and, at the same time ...the son of his age'.

⁴⁶ Berger, *The Homeless Mind*, p.213.

⁴⁷ C.Taylor, 'Atomism', in C.Taylor, *Philosophy and the Human Sciences: Philosophical Papers 2*, Cambridge: Cambridge University Press, 1985, pp.187-210. See also C.Taylor, *Sources of the Self*, Cambridge: Cambridge University Press, 1989, pp.500-501: 'the atomistic focus on our individual goals dissolves community and divides us from each other.'

⁴⁸ See Taylor, *Sources of the Self*, p.500: 'the instrumental mode of life, by dissolving traditional communities or driving out earlier, less instrumental ways of living with nature, has destroyed the matrices in which meaning could formerly flourish'.

⁴⁹ C.Taylor, *The Ethics of Authenticity*, Cambridge, Mass.: Harvard University Press, 1992, pp.1-12.

⁵⁰ *Ibid.*, p.21.

⁵¹ *Ibid.*, p.3. Taylor rules out what he calls 'single-factor theories' as candidates to overcome the malaises of modernity. For him, the rights theory, like utilitarianism, is a single-consideration theory that 'can do no justice to the diversity of goods we have to weigh together in normative political thinking'. See C.Taylor, 'The diversity of goods', in A.Sen and B.Williams (eds.), *Utilitarianism and beyond*, Cambridge: Cambridge University Press, 1982, p.143, and his *Sources of the Self*, p.102, and 503.

The dark side of individualism is a centring on the self, which both flattens and narrows our lives, makes them poorer in meaning, and less concerned with others or society.⁵²

Indeed, the severest criticisms of liberalism, as Wolff stressed, point to the absence of 'community' in even the most efficient and affluent liberal state.⁵³ As a result of 'individualist liberal ideology', it is argued, 'we have lost our sense of communal wholeness'.⁵⁴

The communitarians, nevertheless, do not deny the fact that liberals have their own conception of community, albeit it is 'impoverished' like the liberal self.⁵⁵ They accuse liberals of having a vision of society in which an instrumental view of community (as constructed by individuals for the fulfilment of essentially individual ends) is adopted.⁵⁶ This instrumental view of the community is clear in Gauthier's book, *Morals By Agreement*. He maintains that a just (liberal) society provides a 'framework for community but is not communal'.⁵⁷ He goes on to argue that 'the socialization that it [just society] affords its members promotes the realization of their autonomy'.⁵⁸

For the communitarians, generally speaking, the key value is that of community membership. The community is, they argue, both the chief source of political norms and of individual's identity. Community membership is, as Micheal Walzer states, the key value because it is the criterion for distribution of all other social goods.⁵⁹ It is the *determinate* factor in defining the identity of the individual. Individuals can only develop their 'characteristically human capacities' within community.⁶⁰

⁵² Taylor, *The Ethics of Authenticity*, p.4.

⁵³ See R.P. Wolff, *The Poverty of Liberalism*, Boston: Beacon Press, 1968, p.183.

⁵⁴ R.Shusterman, 'Eliot and Adorno on the Critique of Culture', *Theory, Culture, and Society*, 10(1993):25-52, at 36.

⁵⁵ Fried, 'Liberalism, Community, and the Objectivity of Values', p.962.

⁵⁶ See M. Loughlin, *Public Law and Political Theory*, Oxford: Clarendon Press, 1992, p.100.

⁵⁷ D.Gauthier, *Morals By Agreement*, Oxford: Clarendon Press, 1986, p.339. (Emphasis added.)

⁵⁸ *Ibid.*, p.339 and 350.

⁵⁹ M. Walzer, *Spheres of Justice*, New York: Basic Books, 1983, pp.31-32.

⁶⁰ Taylor, 'Atomism', pp.190-191.

As Taylor puts it, 'living in society is a necessary condition of the development of rationality...or of becoming a moral agent in the full sense of the term,...or of becoming a fully responsible, autonomous being'.⁶¹

Elsewhere, Taylor argues for a community which constitutes a common culture. This common culture which embodies a common language is the precondition of moral autonomy (the capacity to form independent moral convictions).⁶² Incidentally this is exactly Dworkin's vision to which we shall return later.

Sandel too criticises the liberal view of community. The conception of community, he asserts, can figure only 'sentimentally' in liberal theory where priority is given to the radically separate self and the plurality of persons.⁶³ Having analysed the claims of community that Kantian liberals propose Sandel maintains that, because of their conceptions of the 'thin' self,⁶⁴ they (Rawls and Dworkin) are pushed to a communitarianism that seems to be contradicting their starting point : the radical separateness and inviolability of the self.⁶⁵ He declares that:

[T]he moral vocabulary of community in the strong sense cannot in all cases be captured by a conception that 'in its theoretical basis is individualistic'. Thus a 'community' cannot always be translated without loss to an 'association', nor an

⁶¹ *Ibid.*, p.191.

⁶² See C.Taylor, 'Language and Human Nature', in C.Taylor, *Human Agency and Language : Philosophical Papers 1*, Cambridge: Cambridge University Press, 1985, p.19

⁶³ Sandel, *Liberalism and the Limit of Justice*, p.149.

⁶⁴ T.B.Strong distinguishes between a 'thin' self and a 'thick' self attributing them to liberals and communitarians respectively. He observes that "'liberals' tend to think that a self that is not socially shaped is, or should be, available: a thin self. Communitarians tend to emphasise the predominance of social and historical factors in the construction of the self: here the self is 'thick'." See T.B.Strong, 'Introduction: The self and Political Order,' in T.B.Strong (ed.), *The Self and the Political Order*, Oxford: Blackwell, 1992, p.6.

⁶⁵ See Sandel, *Liberalism and the Limit of Justice*, pp.14, and 135-147.

'attachment' to a 'relationship', nor 'sharing' to 'reciprocating', nor 'participation' to 'co-operation', nor what is 'common' to what is 'collective'.⁶⁶

He also attempts to give his own understanding of the community, though not in detail. He writes:

For a society to be a community in strong sense, community must be constitutive of the shared self-understanding of the participants and embodied in their institutional arrangements, not simply an attribute of certain of the participants' plans of life.⁶⁷

In the end, Sandel claims that liberalism's principal premises are wrong and contradictory, and that liberalism is defective 'within its own terms and more generally as an account of our moral experience'.⁶⁸ He concludes that:

Within its own terms, the deontological self, stripped of all possible constitutive attachments, is less liberated than disempowered.⁶⁹

End of Man in the Fin de Millénnium ? Postmodern Critique of Liberalism

Sandel's conclusion constitutes the vantage point for the postmodern critique of the liberal Enlightenment. In fact, this critique points to an historically familiar description of the negative aspects of modernity encapsulated in such words as exploitation, alienation, fragmentation, disenchantment, anomie, and so forth.⁷⁰ The critique raged against the rationality of Enlightenment has been shared by many thinkers in a broad spectrum ranging from Marx to Weber, Critical theorists to Postmodernists. For Marx, this rationality in the form of capitalism

⁶⁶ Sandel argues that Rawls' idea of the priority of plurality to unity normally applies to the second of each of these pairs, 'it does not necessarily hold for the first'. *Ibid.*, p.151.

⁶⁷ *Ibid.*, p.173.

⁶⁸ *Ibid.*, p.177.

⁶⁹ *Ibid.*, pp.177-78.

⁷⁰ For a comprehensive treatment of these conceptions in the social theory, see, e.g., R. A. Nisbet, *The Sociological Tradition*, London: Heinemann, 1966, pp.264-312.

created a situation where 'All that is solid melts into air'.⁷¹ For Weber, it will lead to the bondage of bureaucratic 'iron cage'.⁷² For critical theorists the Enlightenment with the aim of the 'disenchantment of the world' turned out to be a 'mass deception'.⁷³

Postmodernity⁷⁴ is also a reaction to the negative effects of the modernity. It is conceived 'as modernity emancipated from false

⁷¹ K. Marx and F. Engels, *The Communist Manifesto*, (1888), trans. S. Moore, London: Penguin Books, 1967, p.83. See also the influential book by the same title, M. Berman, *All That is Solid Melts into Air*, New York: Verso, 1982.

⁷² M. Weber, *The Protestant Ethic and the Spirit of Capitalism*, trans. T. Parsons, London: George Allen and Unwin Ltd., 1930, p.181. Weber's apocalyptic remarks about the possible effect of rationality is worth quoting. 'Together with the machine, the bureaucratic organization is engaged in building the bondage houses of the future, in which perhaps men will be like peasants in the ancient Egyptian State, acquiescent and powerless, while a purely technical good, that is rational, official administration and provision becomes the sole final value, which sovereignly decides the direction of their affairs'. Quoted in D. Lyons, *Postmodernity*, Buckingham: Open University Press, 1994, p.31.

⁷³ See T.W. Adorno and M. Horkheimer, *The Dialectic of Enlightenment*, trans. J. Cumming, London: Verso, 1979, especially p.3, and pp.120-167. For a critical reading of this celebrated text see J. Habermas, 'The Entwinement of Myth and Enlightenment: Re-Reading Dialectic of Enlightenment', *New German Critique*, 26(1982):13-30, and S. Crook, *Modernist Radicalism and Its Aftermath: Foundationalism and Anti-Foundationalism in Radical Social Theory*, London and New York: Routledge, 1991, pp.77-105. See also H. Marcuse, *One Dimensional Man*, London: Abacus, 1964 for an exposition of the negative results of 'technological' and 'political' rationality as the 'mere stuff of domination'. *Ibid.*, p.14.

⁷⁴ 'Postmodernity' and 'postmodernism' are ambiguous and vague concepts. They mean different things to different people. For various use of these terms see, e.g., A. Giddens, *The Consequences of Modernity*, Oxford: Polity Press, 1990, pp.45-52, C. Douzinas and R. Warrington with S. McVeigh, *Postmodern Jurisprudence: the Law of Text and the Texts of Law*, London and New York: Routledge, 1991, pp.14-15, M. Sarup, *A Introductory Guide to Post-Structuralism and Postmodernism*, Second Edition, New York: Harvester Wheatsheaf, 1993, pp. 130-132, G.E. White, *Intervention and Detachment: Essays in Legal History and Jurisprudence*, New York and Oxford: Oxford University Press, 1994, p.13n, and H. Bertens, *The Idea of the Postmodern: A History*, London and New York: Routledge, 1995, pp.3-19. In our study, we use 'postmodernity' in its general sense to

consciousness'.⁷⁵ In this sense it is 'parasitic' on modernity.⁷⁶ Postmodernists, to a great extent, agree with the above-mentioned critics of Enlightenment about the predicament of modernity. Yet they accuse them, perhaps with the possible exception of Weber, of being blind to the destructive and oppressive nature of *all* totalising ideologies.⁷⁷ Marxism as an offspring of the modernity is itself a 'meta-narrative',

refer to a new 'epoch' which comes after modernity, irrespective of the question whether such an epoch really exists or is a mere illusion. The term 'postmodernism' is used to describe the cultural, political, intellectual movements in the 'postmodern epoch' that can be seen perhaps as an attack against the rationality of Enlightenment, and all 'totalising' techniques and ideologies. For a similar usage of these concepts see S. Best and D. Kellner, *Postmodern Theory: Critical Interrogations*, London: Macmillan, 1991, p.5.

The term 'poststructuralism' is often used side by side, even interchangeably with 'postmodernism'. It is commonly believed that the postmodernist intellectual movement is inspired from the poststructuralism which roughly refers to the textualism of Derrida and the genealogy of Foucault. (See J. Sturrock, *Structuralism and Since*, Oxford and New York: Oxford University Press, 1979, esp. pp.81-116, and 154-180. For a collection of literary critical essays by the post-structuralists see J.V. Harari, *Textual Strategies; Perspectives in Post-Structuralist Criticism*, London: Methuen & Co. Ltd., 1979. See also P. Dews, *The Logic of Disintegration: Post-Structuralist Thought and the Claims of Critical Theory*, London: Verso, 1987, and R. Boyne, *Foucault and Derrida: The other side of the reason*, London: Unwin Hyman, 1990, for the debate between Foucault and Derrida on various issues such as the nature of reason and otherness.) However, in his article 'Mapping the postmodern', Huyssen claims that 'poststructuralism is much closer to modernism than is usually assumed by the advocates of postmodernism'. He even goes further when he asserts that 'poststructuralism is primarily a discourse of and about modernism'. (A. Huyssen, 'Mapping the postmodern', *New German Critique*, 33(1984), pp.37-38.) Asked about the advent of postmodernity, Foucault himself responded in an ironic way: 'What are we calling postmodernity? I'm not up to date?'. See M. Foucault, 'Structuralism and Poststructuralism', *Telos*, 55(1983):195-211, at 204.

⁷⁵ Z. Bauman, *Intimations of Postmodernity*, London and New York: Routledge, 1992, p.188.

⁷⁶ See A. Heller and F. Fehér, *The Postmodern Political Condition*, Oxford: Polity, 1988, p.11.

⁷⁷ See S.K. White, *Political Theory and Postmodernism*, Cambridge: Cambridge University Press, 1991, pp.119-120.

and therefore is no less 'dangerous' than liberalism.⁷⁸ Postmodernism rejects these grand narratives⁷⁹ which have attempted to provide a foundational and universalist explanation of human condition.⁸⁰ This negation constitutes the central strand of postmodernity which is described by Lyotard as 'incredulity toward metanarratives'.⁸¹ According to Rorty, '[t]hese metanarratives are stories which purport to justify loyalty to, or breaks with, certain contemporary communities, but which are neither historical narratives about what these or other communities have done in the past nor scenarios about what they might do in the future'.⁸² The postmodernists, like Communitarians,⁸³ also reject the

⁷⁸ J-F. Lyotard, *The Postmodern Condition: A Report on Knowledge*, Manchester: Manchester University Press, 1984, p.37. For Marxist responses to postmodernist critique (Lyotard in particular) see, e.g., T. Eagleton, 'Capitalism, Modernism and Postmodernism', *New Left Review*, 152(1985), pp.60-73, A. Callinicos, *Against Postmodernism: A Marxist Critique*, Oxford: Polity Press, 1989, J. O'Neill, *The Poverty of Postmodernism*, London and New York: Routledge, 1995, and for a rather soft and compromising critique see F. Jameson, 'Post-Modernism or the Cultural Logic of Late Capitalism', *New Left Review*, 146(1984):53-92.

⁷⁹ See, J.Keane, *Democracy and Civil Society: On the Predicaments of European Socialism, the Prospects for Democracy, and the Problem of Controlling Social and Political Power*, London and New York: Verso, 1988, p.232: 'post-modernism is committed to the task of dissolving the dominant language games which have hitherto cemented together and 'naturalized' a particular -modern- form of social bonding.'

⁸⁰ The postmodern distrust to foundationalism can be traced to Nietzsche who declared 'the end of all *Grunds* with the 'death of God'. See G. Vattimo, *The End of Modernity: Nihilism and Hermeneutics in Post-modern Culture*, trans. J.R. Snyder, Oxford: Polity, 1988, p.164, and pp.176-177; I.Hassan, *The Postmodern Turn: Essays in Postmodern Theory and Culture*, Columbus: Ohio State University Press, 1987, p.180: 'We have killed our gods, and now we have nothing upon which to found our discourse.' For a collection of papers on the anti- foundationalist views of practical reason in socio-political, moral, and legal spheres see E.Simpson, *Anti-Foundationalism and Foundationalism in Practical Reasoning*, Alberta: Academic Publishing & Printing, 1987.

⁸¹ Lyotard, *The Postmodern Condition*, p.xxiv.

⁸² R. Rorty, 'Postmodernist Bourgeois Liberalism', in R.Rorty, *Objectivity, Relativism, and Truth: Philosophical papers*, Vol I, Cambridge: Cambridge University Press, 1991, p.199. For Rorty, unlike Kantian liberalism, postmodern bourgeois liberalism escapes the charge of metanarrative because it defends the institutions and practices of particular

'ethnocentrism' of these 'ahistorical' and 'foundational' stories.⁸⁴ '[W]e postmodernist bourgeois liberals,'⁸⁵ says Rorty, 'no longer tag our central beliefs and desires as 'necessary' or 'natural' and our peripheral ones as 'contingent or 'cultural'.⁸⁶

To avoid these bifurcations, the postmodernists wage war against 'truth claims'⁸⁷, and all the legitimating metanarratives of modernity.⁸⁸ In his postmodern manifesto Lyotard declares that:

democracies (i.e. 'the rich North Atlantic democracies') without using Kantian grounds such as 'rationality' and 'morality'. (*Ibid.*, p.198.) For a criticism of Rorty's arguments, see R.J. Bernstein, *The New Constellation: The Ethical-Political Horizons of Modernity/Postmodernity*, Oxford: Polity Press, 1991, pp.230-293, and R. Bhaskar, *Philosophy and the Idea of Freedom*, Oxford: Basil Blackwell, 1991, pp.97-108.

⁸³ Recall that the Communitarians too spurn the 'universal' and 'ahistorical' moral arguments. See note 29 above.

⁸⁴ R. Rorty, 'On ethnocentrism: A reply to Clifford Geertz', in *Objectivity, Relativism, and Truth*, pp.203-210.

⁸⁵ It must be noted that Rorty himself is critical of the postmodernists like Lyotard and Foucault. See R. Rorty, 'Habermas and Lyotard on Postmodernity', in R.J. Bernstein (ed.), *Habermas and Modernity*, Cambridge: Polity Press, 1985, pp.161-176. In the second volume of his Philosophical Papers, Rorty emphasises that he did not describe himself as a 'postmodernist', because he has abandoned 'the attempt to find something common to Micheal Graves's buildings, Pynchon's and Rushdie's novels, Ashberry's poems, various sorts of popular music, and the writings of Heidegger and Derrida'. See R. Rorty, *Essays on Heidegger and Others*, Cambridge: Cambridge University Press, 1991, p.1. Despite this disavowal, as Bauman rightly points out, Rorty's above-quoted statement itself reflects the very manner of postmodernism. 'Rorty is at his 'most postmodern' in his denial of his postmodernity', says Bauman. See Z. Bauman, 'Philosophy as the mirror of time', *History of the Human Sciences*, 5/3(1992):57-63, at 62-63.

⁸⁶ Rorty, 'On ethnocentrism..', p.208.

⁸⁷ T. Ball, *Reappraising Political Theory: Revisionist Studies in the History of Political Political Thought*, Oxford: Clarendon Press, 1995, p.291.

⁸⁸ Postmodernists are accused of being reductionist. It is argued that they reduce the modernity to 'unified form', ignoring its achievements and positive aspects. See D. Kolb, *The Critique of Pure Modernity: Hegel, Heidegger, and After*, Chicago and London: The University of Chicago Press, 1986, pp. 256-261. According to Kolb, postmodernists depict 'the modern world as more unified than it is, with the consequence that the postmodern gesture becomes too stereotyped'. In fact, Kolb claims, the modernity is a multi-

Let us wage war on totality, let us be witnesses to the unrepresentable; let us activate the differences and save the honour of the name.⁸⁹

This declaration (the concluding sentence of *The Postmodern Condition*) echoes the basic parameters of a possible ethico-political project of postmodernism.⁹⁰ The aim of this project is 'to create a theory of justice, while maintaining total opposition to all totalising techniques'.⁹¹

Although Heidegger, one of the most important intellectual sources of postmodernist creed, rejected ethics as a metaphysical attempt⁹², postmodernists are concerned with the ethical.⁹³ Bauman, for instance, argues that in the postmodern epoch the topicality and importance of ethical and moral matters such as human rights by no means vanished.⁹⁴ These problems 'only need to be seen, and dealt with, in a novel [postmodern] way'.⁹⁵ The postmodern ethical as Martin Jay pointed out has the common feature of 'resistance to systematic moral

dimensional phenomenon, and it has 'internal multiplicity' which makes futile any 'outside' (post) attempt to end the supposedly 'unified' modern epoch. *Ibid.*, p.259.

⁸⁹ J-F. Lyotard, 'Answering the Question: What is Postmodernism?', trans. R.Durand, in the Appendix of *The Postmodern Condition*, p.82.

⁹⁰ See F.Jameson, 'Foreword' to *The Postmodern Condition*, p.xx.

⁹¹ Douzinas, et al, *Postmodern Jurisprudence*, p.17. For a critical analysis of this project see also S. Raffel, *Habermas, Lyotard and the Concept of Justice*, London: Macmillan, 1992, esp. pp.49-86.

⁹² See Heidegger, 'Letter on Humanism', in M. Heidegger, *Basic Writings*, Revised and Expanded Edition, ed. by D. F.Krell, London: Routledge, 1993, pp.258-259. A recent study on Heidegger argues that despite his rejection of ethics, the question of ethics is central to Heidegger's thought. See J.Hodge, *Heidegger and Ethics*, London and New York: Routledge, 1995.

⁹³ M. Jay, *Force Fields: Between Intellectual History and Cultural Critique*, New York and London: Routledge, 1993, p.39. See also P.Goodrich, C.Douzinas, and Y.Hachamovitch, 'Introduction: Politics, ethics and the legality of the contingent', in C.Douzinas, et al.(eds.), *Politics, Postmodernity, and Critical Legal Studies: The Legality of the Contingent*, London: Routledge, 1994, pp.1-35, at 22.

⁹⁴ Z. Bauman, *Postmodern Ethics*, Oxford: Blackwell, 1993, p.4.

⁹⁵ *Ibid.*

codes and integrated forms of life'.⁹⁶ This 'resistance' is based on the postmodern distrust towards foundational narratives which inevitably lead to domination, coercion, and repression. Yet, they accept the necessity of moral commands, even though the question of sender (of these commands) is left out. Lyotard says that '[t]he position of the sender, as authority that obligates, is left vacant, that is, the prescriptive utterance comes from nothing: its pragmatic virtue of obligation results from neither its content nor its utterer'.⁹⁷

Such a 'groundless' conception of ethics does not provide firm answer, apart from pragmatic one, for the question of why should I obey the moral commands? For Levinas, the Jewish thinker who has exerted a considerable influence on the thoughts of postmodernists, most notably on Lyotard and Derrida,⁹⁸ it is the transcendental divine source which delivers ethical commands.⁹⁹ For Kantians, the moral autonomy of individuals (as end in themselves) justifies the moral commands. The postmodern ethical however repudiates these 'metaphysical'¹⁰⁰ grounds for morality.

Whatever the 'ground'(lessness) of their moral thoughts, the postmodernists value the plurality of cultural, ethnic, and religious 'small narratives'.¹⁰¹ They aim to (re)conceptualise a 'pluralistic justice'

⁹⁶ Jay, *Force Fields*, p.44. See also White, *Political Theory and Postmodernism*, p.116.

⁹⁷ J-F. Lyotard and J-L Thebaud, *Just Gaming*, trans. W. Godzich, Minneapolis, 1985, p.72.

⁹⁸ Jay, *Force Fields*, p.40.

⁹⁹ See E. Levinas, 'Revelation in the Jewish Tradition', trans. S.Richmond, in Levinas, *The Levinas Reader*, ed. by S.Hand, Oxford: Basil Blackwell, 1989, pp.191-210.

¹⁰⁰ The term 'metaphysical' is generally refers to the arguments that involve 'speculative, a priori and totalising formulations'. See S. Crook, *Modernist Radicalism and Its Aftermath*, pp.220-21. Crook argues that the postmodernism failed to escape from 'metaphysics', because it adopts an 'irrational monism' based on 'the speculative assertion that 'everything' is the result of the proliferation of a single principle, perhaps power, or intensity, or discourse'. In this sense, for Crook, postmodernism 'offers only a monistic and nihilistic reversal of modernist [metaphysical] radicalism'. See *ibid*, p.221, and 17.

¹⁰¹ Heller and Fehér, *The Postmodern Political Condition*, p.5; Z. Bauman, *The Intimations of Postmodernity*, pp.36-37, and H.F. Haber, *Beyond Postmodern Politics: Lyotard, Rorty, Foucault*, New York and London: Routledge, 1994, p.119.

which will take account of the postmodern concern for the 'Other', 'unknown', 'excluded', 'unrepresented', 'marginalised'.¹⁰² The postmodern ethico-political project constitutes a response to '*difference, exclusion and marginalisation*' produced by modernity.¹⁰³ It stands for the rights of 'Other' against the individual. The postmodernists are therefore after 'the revenge of the marginalized "other" against the individual and associated selves and their capacities for quasi-autonomous, quasi-efficacious self-articulation'.¹⁰⁴ The 'revenge' requires nothing less than the abolition of the subject.¹⁰⁵ In a word, man is condemned to death.¹⁰⁶

¹⁰² See White, *Political Theory and Postmodernism*, pp.116-17. Feminists share these postmodern concerns from their perspectives. They agree with postmodernists that liberal conception of justice and rights is based on a 'centered self' which negates in certain respects 'the other', and the 'ethic of care'. Carol Gilligan, for instance, claims that the morality of rights is based on a male oriented approach, in contrast to 'feminine' morality of care which aimed at helping and caring for 'others' with the feeling of responsibility and compassion. See C.Gilligan, 'Concepts of the Self and of Morality', *Harvard Educational Review*, 47(1977):481-517. See also her influential book, *In a Different Voice: Psychological Theory and Women's Development*, Cambridge, Mass.: Harvard University Press, 1982. A number of critical articles on Gilligan's theory (and her response to critics) is to be found in M. J. Larrabee (ed.), *An Ethic of Care :Feminist and Interdisciplinary Perspectives*, New York and London: Routledge, 1993. Among these articles see especially G. Nunner-Winkler, 'Two Moralities? A Critical Discussion of an Ethic of Care and Responsibility versus an Ethic of Rights and Justice', (in *ibid*, pp.143-157) which questions Gilligan's distinction of two contrasting moralities in terms of Kantian conception of 'perfect' (negative) and 'imperfect' (positive) duties. See also S. Porgeirsdottir, 'Freedom, Community, and Family: Feminist Critique, Communitarianism, and Liberalism', in M.M.Kalsson, et al, (eds.), *Law, Justice, and the State*, Berlin: Duncker and Humblot, 1993, pp.399-408.

¹⁰³ A. Giddens, *Modernity and Self-Identity: Self and Society in Late Modern Age*, Oxford: Polity Press, 1991, p.6. (Emphasis in original).

¹⁰⁴ J.Fekete, 'Descent into the New Maelstrom: Introduction', in J.Fekete (ed.), *The Structural Allegory: Reconstructive Encounters with the New French Thought*, Manchester: Manchester University Press, 1984, pp.xv-xvi.

¹⁰⁵ Not all postmodernists seem to agree on the issue of abandoning the subject. Derrida, for instance, argues that we must retain, at least for the time being, the (name) subject in order not to undermine the foundations of democracy. According to Derrida 'the time and

Indeed, the conception of the subject has been devastatingly challenged in the hands of postmodernists. The aim of this challenge is to subvert the subject, and to undermine its position as self-constitutive agent, and to demote it 'from constitutive to the constituted status'.¹⁰⁷ The subject is constructed by language or power.¹⁰⁸ The self-constitutive, autonomous individual is 'the great mythic figure of the modern age'.¹⁰⁹ It is an 'illusion' which is anchored in the 'fundamental feeling...that man is the free being in a world of unfreedom'.¹¹⁰ It is Foucault's thesis that 'the individual is not a pregiven entity which is

space of this displacement [of the subject] opened up a gap, marked a gap, they left fragile, or recalled the essential ontological dragility of the ethical, juridical, and political foundations of democracy and of every discourse that one can oppose to national socialism...' 'These foundations', he asserts, 'were and remain essentially sealed within a philosophy of the subject'. The subject is important, because it is also 'a principle of calculability for the political (and even, indeed, for the current concept of democracy...), in the question of legal and human rights (including the rights of man...), and in morality'. (See J.Derrida, "Eating Well," or the Calculation of the Subject: An Interview with Jacques Derrida, in E. Cadava, P.Connor, J-L. Nancy (eds.), *Who Comes After the Subject?*, New York & London: Routledge, 1991, pp.96-120, at 104, and 108.) Yet, Derrida appears to (de)construct the subject as to embrace literally everything including animals. (*Ibid.*, p.106) For Derrida, although Heidegger and Levinas ridiculed the classical notion of humanism, they have fallen prey to a different kind of humanism by excluding the animals from the concept of the subject. He writes: 'The subject (in Levinas' sense) and the *Dasein* are 'men' in a world where sacrifice is possible and where it is not forbidden to make an attempt on life in general, but only on the life of a man, of other kin, on the other as *Dasein*.' See *ibid.*, p.113.

¹⁰⁶ See F.R.Dallmayr, *Twilight of Subjectivity: Contributions to a Post-Individualist Theory of Politics*, Amherst: The University of Massachusetts Press, 1981, esp. pp.21-29.

¹⁰⁷ Callinicos, *Against Postmodernism*, p.87. Cf. C.Norris, *The Truth about Postmodernism*, Oxford: Basil Blackwell, 1993, p.30.

¹⁰⁸ See K.Asher, 'Deconstruction's Use and Abuse of Nietzsche', *Telos*, 62(Winter 1984-85): 169-178, at 171, see also D. Macdonell, *Theories of Discourse: An Introduction*, Oxford: Basil Blackwell, 1986, pp.36-42.

¹⁰⁹ P.Fitzpatrick, *The Mythology of Modern Law*, London: Routledge, 1992, p.34.

¹¹⁰ F. Nietzsche, *The Wanderer and his Shadow*, (1880), sec.12, in *A Nietzsche Reader*, selected and translated by R.J.Hollingdale, London: Penguin Books, 1977, p.199. For Nietzsche's refutation of the subject see also his *On the Genealogy of Morals*, trans. W.Kaufman, New York: Vintage Books, 1969, p.45.

seized on by the exercise of power. The individual, with his identity and characteristics, is the product of a relation of power exercised over bodies, multiplicities, movements, desires, forces'.¹¹¹ With reference to his own mentor, Nietzsche, Foucault declares the end of man.

Rather than the death of God-or, rather, in the wake of that death and in a profound correlation with it- what Nietzsche's thought heralds is the end of his murderer; it is the explosion of man's face in laughter, and the return of masks;... it is the identity of the Return of the Same with the absolute dispersion of man.¹¹²

Liberal Response to Communitarians and Postmodernists

There are three possible directions that may be taken in responding to the communitarian and postmodern critics of liberalism. The first and perhaps easiest one is taken by those who argue that these critics do not offer an alternative at all.¹¹³ The second response is to claim that nothing is wrong with the conception of liberal individual self.¹¹⁴ The last direction, which may be called the 'compromising direction', is pursued by those liberals who seem to implicitly accept the main challenge of communitarians and postmodernists, but nevertheless claim either it is irrelevant to the discussion of justice (as the case for Rawls)¹¹⁵ or it is based on a misinterpretation of the liberal community

¹¹¹ M. Foucault, *Power/Knowledge, Selected Interviews and Other Writings 1972-1977*, trans. C. Gordon, L. Marshall, J. Mepham, K. Soper, Sussex: The Harvester Press, 1980, pp. 73-74, see also p. 98: 'The individual is ...not the *vis-a-vis* of power', but 'one of its prime effects'.

¹¹² M. Foucault, *The Order of Things: An Archaeology of the Human Sciences*, London and New York: Tavistock/Routledge, 1971, p. 385. Foucault concludes *The Order of Things* by stating that 'man would be erased, like a face drawn in sand at the edge of the sea'. See *ibid.*, p. 387.

¹¹³ See, A. Gutmann, 'Communitarian Critics of Liberalism', pp. 320-322; and C. Fried, 'Liberalism, Community, and the Objectivity of Values', pp. 966-968.

¹¹⁴ This is the position taken by D. Gauthier and W. Kymlicka. See D. Gauthier, *Morals By Agreement*, pp. 330-355, and W. Kymlicka, *Liberalism, Community, and Culture*, Oxford: Clarendon Press, 1989, pp. 47-74.

¹¹⁵ Rawls' response can be found in his articles 'The Idea of an Overlapping Consensus', *Oxford Journal of Legal Studies*, 7(1987):1-25, and 'The Priority of Right and Ideas of the Good', *Philosophy and Public Affairs*, 17(Fall 1988):251-276.

(as the case for Dworkin).¹¹⁶ These liberals also reject the communitarian claim that the individual rights undermine the genuine community.¹¹⁷

The view that the critics of liberalism offer no alternative theory is worth noting, but is not relevant here to close examination for one obvious reason. Even if we can show that they have no alternative at all, which is itself highly debatable, this does not change the attacks they directed towards liberalism. One might say, in the last analysis, that it is one thing to criticise a theory, and the quite another to offer an alternative. Thus leaving aside this response, we shall concentrate on the last two ones, starting with the latter.

The Self and the Liberal Community

Some liberals go beyond the defence of individual self in its own terms. They feel that they need to specifically emphasise the importance of the community in liberal theory. Apart from Rawls' approach, here two different positions may be distinguished. The first is Dworkin's position which underlines the nature of the liberal community. The other is that which stresses the particular importance of individual rights for the community, and attempts to develop a communitarian argument for liberalism.

Let us begin with Rawls. His response can be summarised as a denial of the claim that justice as fairness presupposes any particular controversial metaphysics of the self.¹¹⁸ Rawls makes it clear that his theory of justice 'starts from the idea that society is conceived as a fair system of cooperation and so it adopts a conception of the person to go with this idea'.¹¹⁹ Having distinguished a conception of the person from

¹¹⁶ See R. Dworkin, 'Liberal Community', *California Law Review*, 77(1989):479-504.

¹¹⁷ See, for example, J. Tomasi, 'Individual Rights and Community Virtues', *Ethics*, 101 (1991):521-536, at 522.; Buchanan, 'Assessing the Communitarian Critique of Liberalism', pp.859-862.

¹¹⁸ J. Rawls, 'Justice as Fairness: Political not Metaphysical', reprinted in T. B. Strong, *The Self and The Political Order*, p.95. For a critical comment on Rawls' refutation of the claim that his conception of the self is 'metaphysical', see C. F. Alford, *The Self in Social Theory*, New Haven and London: Yale University Press, 1991, pp.140-155.

¹¹⁹ Rawls, 'Justice as Fairness', p.103.

an account of human nature, he says, it is in effect a political conception of the person (a conception of citizen) he has in mind.¹²⁰

According to Rawls justice as fairness is developed as a political conception of justice which aims at removing the possible obstacles (including any conception of person adapted to a comprehensive moral doctrine) to the overlapping consensus in a diverse democracy.¹²¹ Rawls' political conception of justice is formulated 'not in terms of any comprehensive doctrine but in terms of certain fundamental intuitive ideas viewed as latent in the public political culture of a democratic society'.¹²² There exists, Rawls assumes, a tradition of democratic thought in any society, and its citizens are at least intuitively familiar with this tradition. In such a society the shared fundamental ideas and principles which are embodied in main institutions can be elaborated into a political conception of justice over which an overlapping consensus is possible.¹²³

With respect to the objection that this conception of political justice destroys the hope of political community, Rawls' reply is straightforward. The hope of political community, he says, must indeed be abandoned if it is meant to be 'a political society united in affirming a general and comprehensive doctrine'.¹²⁴ For neither this nor any other political project, he believes, can be a 'practicable alternative superior to the stable political unity secured by an overlapping consensus on a reasonable political conception of justice'.¹²⁵ This does not follow that

¹²⁰ *Ibid.*, p.118. See also Rawls, 'Kantian Constructivism in Moral Theory', pp.534-35.

¹²¹ Rawls, 'Justice as Fairness', p.97.

¹²² J. Rawls, 'The Priority of Right and Ideas of the Good', *Philosophy and Public Affairs*, 17(Fall 1988): 251-276, at 252.

¹²³ J. Rawls, 'The Idea of an Overlapping Consensus', *Oxford Journal of Legal Studies*, 7(1987)1-25, at 6.

¹²⁴ *Ibid.*, p.10. On that point, Habermas responds to the Communitarians in a similar way. He argues that 'if we take modern pluralism seriously we have to abstain from the claim that philosophy can spell out an excellent mode of life'. Quoted in D.M. Rasmussen, *Reading Habermas*, Oxford: Basil Blackwell, 1990, p.69.

¹²⁵ Rawls, 'Idea of Overlapping Consensus', p.6.

all values of community are impracticable.¹²⁶ On the contrary, Rawls says, liberal political views assume that the values of community are not only essential but also realisable in various associations such as churches and scientific societies.¹²⁷

Rawls also rejects the criticism that in a liberal state citizens have no fundamental aims. In the well-ordered society, he asserts, citizens share a common end which is given a high priority: 'namely, the end of supporting just institutions, and of giving one another justice accordingly'.¹²⁸ This common aim plays, he concludes, an important role in shaping the identity of individuals.¹²⁹

In his article 'Liberal Community' Dworkin has given a stronger account of community in response to the well-known charge that liberalism is hostile to the community.¹³⁰ What he tries to vindicate throughout the essay is that the values of community are very important for the individuals who identify themselves with these values, but this does not entail a homogenous community.

They [individuals] need a common culture and particularly a common language even to have personalities, and culture and language are social phenomena. We can have only the thoughts, and ambitions, and convictions that are possible within the vocabulary that language and culture provide, so we are all, in a patent and deep way, the creatures of the community as a whole.¹³¹

However, 'none of this', he goes on to argue, 'suggests that a community must be morally or in any other way homogenous'.¹³²

¹²⁶ Rawls reminds that only '*political* community and its values' are impracticable. See *ibid.*

¹²⁷ For Rawls, liberal theory rejects the state as a community in order to prevent, among other things, 'the systematic denial of basic liberties' and 'the oppressive use of the state's monopoly of (legal) force'. See *ibid.*

¹²⁸ Rawls, 'The Priority of Right and Ideas of the Good', p.269.

¹²⁹ Rawls, 'The Idea of Overlapping Consensus', p.10.

¹³⁰ Dworkin, 'Liberal Community', p.479.

¹³¹ *Ibid.*, p.488.

¹³² *Ibid.*

Dworkin argues that the pluralistic and tolerant (liberal) communities are more suitable for a rich cultural and linguistic provision.¹³³

Dworkin goes further when he says that it is possible to accept the ethical primacy of the community's life over individuals' without abandoning liberal tolerance and neutrality about the good life.¹³⁴ By the life of a community he means the formal acts of a political community¹³⁵: namely legislation, adjudication, enforcement, and the other executive functions of government.¹³⁶ Thus 'to make the idea of liberal community more attractive', Dworkin argues for the idea that liberal individuals should be integrated with their political community which has the priority over our individual lives.¹³⁷

Allen Buchanan's response is different from the others in that it has two-sided purpose. In trying to justify individual rights on the ground of community, he first emphasises that liberalism is far less individualistic than its critics appear to have supposed, second he develops a supportive (communitarian) argument for the individual rights.

The main thesis of this approach is that individual rights are perfectly compatible with the community.¹³⁸ Buchanan argues that despite the communitarian's dislike of the individual rights, it is possible to advance a communitarian justification for these rights. The basic individual civil and political rights, he says, provide firm protections for the flourishing of communities.¹³⁹

For Buchanan, historically individual rights, such as rights to freedom of association, expression, and religion, have played a significant role in

¹³³ *Ibid.*

¹³⁴ *Ibid.*, p.500.

¹³⁵ Dworkin seems to use the term political community in a different sense than Rawls uses it. The political community is for Dworkin a formal term meaning a political body which can be found in a given society, rather than 'a political society united in affirming a general and comprehensive doctrine'. See note 124 above.

¹³⁶ Dworkin, 'Liberal Community', p.500.

¹³⁷ *Ibid.*, pp.500, 501, and 504.

¹³⁸ See Buchanan, 'Assessing the Communitarian Critique of Liberalism', p.858, and see also Tomasi, 'Individual Rights and Community Virtues', p.522.

¹³⁹ Buchanan, 'Individual Rights and Social Change', p.63.

stopping the attempts to destroy various communities within nation states.¹⁴⁰ These attempts engenders liberalism's rejection of 'totalitarian' state. As the name implies, the 'totalitarian' state recognizes no limits on its authority, seeking to control every aspect of its citizen's lives. It is therefore one of the greatest threat to the communities whose existence would limit individual's dependence upon and allegiance to the state. Individual rights provide individuals with the necessary means to 'partake of the essential human good of community by protecting the existing communities' from external threats, and also 'by giving individuals the freedom to unite with like-minded others to create new communities'.¹⁴¹ Hence the argument goes :

To the extent that the totalitarian state is a threat to communities, we should regard the priority on individual civil and political rights usually associated with liberalism as the protector of community, even if the liberal political thesis is itself silent as to the importance of community in the good life.¹⁴²

Moreover, Buchanan maintains that there is another important reason why communitarians must value the individual rights. This is the instrumental role that these rights may play in creating a 'genuine' community. In a real world-context, Buchanan says, 'the winning of rights is frequently a necessary condition for the emergence of genuine political community'.¹⁴³ It follows that even if the communitarians were correct in holding the judgement that rights are unimportant in a genuine community, this would by no means overshadow the substantial value of individual rights in the process of transition to the 'genuine community'.¹⁴⁴

Therefore, the debate between communitarians and political liberals must be redescribed. According to Buchanan, it must be viewed as a

¹⁴⁰ Even Benjamin Barber as a communitarian acknowledges the historical role of the idea of natural rights in protecting individuals from tyranny. But he adds that it is a fiction which loses its all utility 'when it is offered as a real and sufficient psychosociological foundation'. See B.R.Barber, *Strong Democracy: Participatory Politics for a New Age*, Berkeley: University of California Press, 1984, p.100.

¹⁴¹ Buchanan, 'Assessing the Communitarian Critique of Liberalism', p.858.

¹⁴² *Ibid.*

¹⁴³ Buchanan, 'Individual Rights and Social Change', p.67.

¹⁴⁴ *Ibid.*

disagreement on strategies as to how best to serve the value of community, instead of as a conflict between those who value community and those who do not.¹⁴⁵ In a similar vein Kymlicka states that the liberals do not deny the significance of communal tasks and projects. While the Communitarians argue for the 'authoritative horizons' of communal values in adopting these projects, the liberals opt for the autonomous judgements about the communal values and possible ways of life.¹⁴⁶

Now we can examine the other main liberal response which focuses on the conceptual importance of the liberal self as an autonomous being in establishing a plural socio-political and ethical framework.

Postmodernism, plurality , and autonomy

As we have seen, the communitarians and postmodernists have "incredulity" toward foundational truth claims. Despite the risk of vulgarity, I would say that human beings live with their gods, be it a divine Being, Brahma, Nirvana, Reason, Science, Progress, Cogito, or Superman. Individuals define and are defined by these gods. To kill the gods therefore means an attempt to kill the sources of the self, the sources which confer meaning on the lives of human beings. The need for the gods points to the necessity of 'an absolute truth' to use Sartre's phrase.¹⁴⁷ This necessity is also the precondition of the critique. Habermas claims that 'Nietzsche's critique consumes the critical impulse itself'. For Habermas, 'if thought can no longer operate in the realms of truth and validity claims, then analysis and critique lose their meaning'.¹⁴⁸ Derrida seems to agree with Habermas when he says that:

¹⁴⁵ Buchanan, 'Assessing the Communitarian Critique of Liberalism', p.860.

¹⁴⁶ Kymlicka, *Liberalism, Community, and Culture*, pp.50-51.

¹⁴⁷ Referring to the certainty of Cartesian cogito, Sartre said: 'Before there can be any truth whatever, then, there must be an absolute truth, and there is such a truth which is simple, easily attained and within the reach of everybody; it consists in one's immediate sense of one's self'. J.P.Sartre, *Existentialism and Humanism*, trans. P.Mairet, London: Eyre Methuen Ltd., 1973, p.44.

¹⁴⁸ Habermas, 'The Entwinement of Myth and Enlightenment: Re-Reading Dialectic of Enlightenment', at p.25. Cf.D.Walsh, *After Ideology: Recovering the Spiritual Foundations of Freedom*, New York: HarperCollins Publishers, 1990, p.29.

'I cannot conceive of a radical critique which would not be ultimately motivated by some sort of affirmation, acknowledged or not'.¹⁴⁹

Postmodernity with its dream of a 'godless' epoch¹⁵⁰ cannot escape the necessity we have explored. Such a dream itself reflects, however implicitly and unintentionally, the belief in linear progress, one of the gods of modernity.¹⁵¹ The postmodernism therefore turns out to be a new grand narrative: '*a grand narrative of postmodernity*'.¹⁵² Even Lyotard comes close to acknowledge the existence of this new metanarrative. He states that:

[T]he great narratives are now barely credible. And it is therefore tempting to lend credence to the great narrative of the decline of great narratives.¹⁵³

As a new 'totalising' project, postmodernism reproduces the very predicaments of modernity¹⁵⁴, and its rejection of metaphysics becomes a mere 'rhetorical' claim.¹⁵⁵

¹⁴⁹ J.Derrida, 'Dialogue with Jacques Derrida', in R. Kearney (ed.), *Dialogues with Contemporary Continental Thinkers*, Manchester: Manchester University Press, 1984, p.118.

¹⁵⁰ See O'Neill, *The Poverty of Postmodernism*, p.197.

¹⁵¹ See Lyons, *Postmodernity*, p.18.

¹⁵² A.Gurnah and A.Scott, *The Uncertain Science: Criticism of Sociological Formalism*, London and New York: Routledge, 1992, p.148. (Emphasis in original)

¹⁵³ J-F. Lyotard, 'Universal history and cultural differences' in A. Benjamin(ed.), *The Lyotard Reader*, Oxford: Blackwell, 1989, p.318.

¹⁵⁴ See, e.g., P.A. Bové, *Intellectuals in Power: A Genealogy of Critical Humanism*, New York: Columbia University Press, 1986, p.3: 'Essentially, despite the attempts by Nietzsche and Foucault to undermine the major formations of humanistic practice, especially by questioning the status of the metaphysical subject..., their alternative practices cannot entirely avoid reproducing the tradition they hope to deconstruct'.

¹⁵⁵ See G. Rose, *Dialectic of Nihilism: Post-Structuralism and Law*, Oxford: Basil Blackwell, 1984, p.208. See also her 'The postmodern complicity', *Theory, Culture & Society*, 5/2-3(1988): 357-71, at 362: 'in social theory the notions of the "modern" and the "postmodern" are, in the first place, fundamentally the same, and, in the second place, are not "modern" or "new"- for want of a neutral term.' See also Crook, *Modernist Radicalism and Its Aftermath*, pp.151-152. Likewise Habermas argues that the postmodernist discourse is in fact premised upon the modernity. For him, the postmodernists 'recapitulate the basic experience of aesthetic modernity'. He goes on to

Now the question is how to establish a socio-political framework in which the gods of the people will peacefully live side by side without trying to kill each other. This is the project of political liberalism and to certain extent of postmodernism.¹⁵⁶ In other words, pluralism is the common value which pervades the writings of liberals and postmodernists alike, even though it is expressed in different terms, and on different epistemological grounds.¹⁵⁷ It amounts ironically to the 'ethical relativism' of John Keane¹⁵⁸, and 'moral universalism' of Habermas.¹⁵⁹ Keane writes that:

To defend relativism requires a social and political stance which is thoroughly modern. It implies the need for establishing or strengthening a democratic state and a civil society consisting of a plurality of public spheres, within which individuals

argue that '[t]hey claim as their own the revelations of a decentred subjectivity, emancipated from the imperative of work and usefulness, and with this experience they step outside the modern world'. 'On the basis of modernist attitudes,' Habermas concludes, 'they justify an irreconcilable anti-modernism'. See J.Habermas, 'Modernity versus postmodernity', *New German Critique*, 22(1981): 3-14, at 13. For a more detailed assertions and refutations of the postmodern arguments see J.Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures*, trans. F.Lawrence, Cambridge: Polity Press, 1987.

¹⁵⁶ It is argued that the postmodern ethical project inevitably merges into Kantian moral imperatives. R. Boyne, for instance, argues that '[i]f the task is to find a practical rule to guide the application of *other*-directed insights towards transgressive practices of social change, we are implicitly enjoined, by both Foucault and Derrida, to look the Kantian formulation of the categorical imperative'. According to Boyne, 'Kant saw the necessity of thinking different forms of reason, in particular of thinking in a practical-ethical way. Foucault and Derrida, from their respective standpoints, finally approach the same conclusion'. See R. Boyne, *Foucault and Derrida*, pp.168-169.

¹⁵⁷ For the differences and 'affinities' between liberals and postmodernists on ethical issues like tolerance see, e.g., D. Cornell, *The Philosophy of the Limit*, New York and London: Routledge, 1992.

¹⁵⁸ Keane, *Democracy and Civil Society*, see particularly pp.228-241.

¹⁵⁹ J.Habermas, *Autonomy and Solidarity: Interviews with Jürgen Habermas*, Revised Edition, ed. by P.Dews, London: Verso, 1992, p.240,

and groups can openly express their solidarity with (or opposition to) others' ideas.¹⁶⁰

In an interview, Habermas explained what his 'moral universalism' stands for:

What does universalism mean, after all? That one relativizes one's own way of life with regard to the legitimate claims of other forms of life, that one grants the strangers and the others, with all their idio-syncrasies and incomprehensibilities, the same rights as oneself, that one does not insist on universalizing one's own identity, that one does not simply exclude that which deviates from it, that the areas of tolerance must become infinitely broader than they are today- moral universalism means all these things.¹⁶¹

¹⁶⁰ Keane, *Democracy and Civil Society*, p.238. For Keane, 'ideologies are the enemy of democracy, for they each contain a fanatical core'. Like Lyotard, he also wages war on all these ideologies in the name of democracy. He concludes that '[t]o defend democracy against these ideologies is to welcome indeterminacy, controversy and uncertainty'. (*Ibid.*, p.241) Again like all other postmodernists Keane fails to escape the necessity of 'certainty', or truth claim. Why should we defend democracy against ideologies or metanarratives? Any answer to this question will inevitably make democracy vulnerable to the charge of being a metanarrative. For it will inevitably reproduce the very binary oppositions which are rejected by postmodernism. (see *ibid.*, p.241) According to Keane, democratic procedures with the help of the rule of law and independent judiciary 'minimize the risk of *despotism*'. (*Ibid.*, p.237. Emphasis added.) Democracy, as 'a condition of freedom from ideology', he argues, is 'the means by which a plurality of groups with different and often conflicting beliefs can live their differences and get along without murdering or dominating each other'. (J.Keane, 'Power-Sharing Islam?', in A. Tamimi (ed.), *Power-Sharing Islam?*, London: Liberty for Muslim World Publications, 1993, p.28.) This argument is almost identical to the political neutrality of Kantian liberalism. (See Chapter 2 of our study.) Like political neutrality, Keane's argument of democracy and plurality rests on a priori, 'determinate', and 'certain' judgement, that is , necessity of democracy. Not all beliefs and conducts are acceptable within the discourse of democracy and plurality, because 'to tolerate ideology is to stifle and potentially undermine the very plurality of language games'. (Keane, *Democracy and Civil Society*, p.235) In other words, the ideas are tolerable only to the extent that they are compatible with democracy. This blurs the distinction between democracy and its enemies, i.e, ideologies, grandnarratives, or metalanguage games...

¹⁶¹ Habermas, *Autonomy and Solidarity*, p.240.

At the core of this pluralism required by both 'ethical relativism' and 'moral universalism' alike lies the conception of autonomy.¹⁶² Indeed, as Raz put it rightly, pluralism is the necessary requirement of the value of autonomy.¹⁶³ We are autonomous beings according to the liberals.¹⁶⁴ The liberal individual, Gauthier argues, is normally capable of expressing his own preferences; and this capacity makes him autonomous.¹⁶⁵ He adds that this autonomy requires the existence of others.

For the liberal individual realizes that she must choose among many possible ways of life, and that the breadth and richness of her choices depend on the existence of other persons, choosing in other ways. She therefore sees her life in a social context, as made possible through interaction with others- interaction which of course also makes possible their lives.¹⁶⁶

The individuals are, as A. Bradney points out, a part of the society in which they live, and their identity may be shaped by others.¹⁶⁷ Yet 'none of this', Bradney adds, 'disturbs the centrality of the status of the individual in ethical argument since this is based not upon our conventional feelings and actions but upon the question of what we are'.¹⁶⁸ This brings to fore the existential view of subjectivity which is well exemplified in the thought of Sartre. Although Sartre himself is

¹⁶² I use the term autonomy as having two aspects: treatment of man as an end in itself, and the capacity to reflect on and choose between alternatives. The term 'radical autonomy' is sometimes used to express these two aspects of autonomy. See, e.g., M.J.Detmold, *Courts and Administrators: A Study in Jurisprudence*, London: Weidenfeld and Nicolson, 1989, p.113.

¹⁶³ See Raz, *The Morality of Freedom*, p.133.

¹⁶⁴ See Gauthier, *Morals By Agreement*, p.346.

¹⁶⁵ *Ibid.* For Gauthier, 'what makes a being autonomous is his capacity to alter given references by a rational, self critical, reflective procedure, not a capacity to produce preferences with no prior basis'. Therefore, he argues that an individual begins with socially determined (at least in part) preferences. See *ibid.*, p.349.

¹⁶⁶ *Ibid.*, p.347.

¹⁶⁷ See A. Bradney, *Religions, Rights and Laws*, Leicester: Leicester University Press, 1993, p.27.

¹⁶⁸ *Ibid.*

critical of liberalism in general¹⁶⁹ and the doctrine of natural rights in particular¹⁷⁰, his views on the individual has affinities with liberals' position that self is prior to its ends.¹⁷¹

It is very difficult and misleading, as Norman Green points out, to attempt to find in Sartre a simple definition of man.¹⁷² Misleading because for Sartre the priority of existence over essence is the fundamental condition of human reality.¹⁷³ By this he means that 'man first of all exists, encounters himself, surges up in the world- and defines

¹⁶⁹ N. N. Greene, *Jean-Paul Sartre: The Existentialist Ethic*, The University of Michigan Press, 1966, pp.vi, and 95.

¹⁷⁰ In his short story 'The Childhood of a Leader', Sartre's main character Lucien declares that : 'I HAVE RIGHTS!' Rights! Something of the nature of triangles and circles: they were so wonderful that they didn't exist,... rights were beyond existence like mathematical objects and religious dogmas'. (Cited in *ibid.*, pp.100-101) However, as Greene observed, Sartre does not attack the doctrine of natural rights as represented by the eighteenth-century writers like Voltaire. Hence Greene argues that Sartre has no objection to the idea of natural rights as long as it asserts the ability of individual reason to rise above historical circumstances and evaluate social institutions. Yet, the same idea for Sartre has become unsound, insofar as it asserts that certain rights are inherent in a natural moral order. To sum up, individual rights are seen by Sartre as 'a function of a particular social order and not of a universal order of nature'. See *ibid.*, p104. For Sartre's phenomenological approach to the concept of rights see also W.L.McBridge, *Sartre's Political Theory*, Indianapolis: Indiana University Press, 1991, pp.67-68, and 185. McBride quotes Sartre as saying that 'he [the true intellectual] challenges the abstract character of the rights of bourgeois 'democracy' not in that he might want to suppress them but because he wants to complete them with the concrete rights of socialist democracy by conserving, in all democracy, the functional truth of freedom'. *Ibid.*, p.185.

¹⁷¹ See M. Warnock, 'Introduction', to J.P. Sartre, *Being and Nothingness :An Essay on Phenomenological Ontology*, trans. H. E. Barnes, London: Routledge, 1991, p.xiv, Darilmayer, *Twilight of Subjectivity*, p.20, and P.Schlag, 'The Problem of the Subject', in D.Patterson(ed.), *Postmodernism and Law*, Aldershot: Dartmouth, 1994, pp.157-273, at 227.

¹⁷² Greene, *Jean-Paul Sartre: The Existentialist Ethic*, p.24.

¹⁷³ Sartre uses the terms 'human reality' and 'human condition' instead of the term 'human nature'. See Sartre, *Existentialism and Humanism*, pp.45-46 : 'although it is impossible to find in each and every man a universal essence that can be called human nature, there is nevertheless a human universality of *condition*.' (Emphasis in original)

himself afterwards'.¹⁷⁴ Given the contingency of essence, he argues, there can be no particular conception of man which must be imposed upon mankind.¹⁷⁵ No objective norms exist simply because individual freedom is the source of all values. He states that 'my freedom is the unique foundation of values and... nothing, absolutely nothing, justifies me in adopting this or that particular value, this or that particular scale of values'.¹⁷⁶ This leads to one of the most controversial aspects of the Sartre's theory: whether or not his philosophy makes any ethics possible. His critics argue that Sartre's subjectivistic position towards values undermines the possibility of an ethics.¹⁷⁷ It is said that if no values are objective, and they are simply created by each man himself, any ethics that would establish an objective set of norms according to which man decides what should or should not be valued is impossible.¹⁷⁸ Sartre and his defenders have responses to this criticism¹⁷⁹, but the detailed analysis of their answers falls outside of our study.

¹⁷⁴ Sartre, *Existentialism and Humanism*, p.28. According to Heidegger, Sartre's existentialism does not elude metaphysics, because 'the reversal of a metaphysical statement ['essence precedes existence'] remains a metaphysical statement'. See M. Heidegger, 'Letter on Humanism', in *Basic Writings*, p.205.

¹⁷⁵ *Ibid.*, p.31.

¹⁷⁶ Sartre, *Being and Nothingness*, pp.38, 94.

¹⁷⁷ See, for example, M. Warnock, *Existentialist Ethics*, London : Macmillan, 1967, pp.47-48. ; W. Frankena, *Ethics*, 2nd Ed., Englewood Cliffs, N.J.: Prentice-Hall, 1973, p.23 ; and see also R.J.Bernstein, *Praxis and Action*, Philadelphia: University of Pennsylvania Press, 1971, pp.151-154.

¹⁷⁸ See Warnock, *Existentialist Ethics*, p.47; Bernstein, *Praxis and Action*, p.152. Bernstein even accuses the Sartrean ontology of being destined to nihilism. The logical consequence of Sartre's position is, he says, 'not only despair, but nihilism in the coldly technical sense...[because] there never is nor can be any basic reason or justification for one value...rather than another'. *Ibid.*

¹⁷⁹ For a comprehensive treatment of Sartre's response to the objection that his theory does not allow an ethics, see T. C. Anderson, *The Foundation and Structure of Sartrean Ethics*, Lawrence: The Regents Press of Kansas, 1979, pp.27-39, see also G. C. Kerner, *Three Philosophical Moralists: Mill, Kant, and Sartre*, Oxford: Clarendon Press, 1990, pp.193-200.

It would not be wrong, nonetheless, to say that Sartre defines man as a being that chooses himself.¹⁸⁰ Man is initially indefinable simply because he is nothing.¹⁸¹ 'He will be anything until later, and then he will be what he makes of himself' says Sartre.¹⁸² This definition of man does not preclude interpreting the existentialist vision of subjectivism in a wider sense. According to Sartre 'when we say that man chooses himself we do mean that every one of us must choose himself; but by that we also mean that in choosing for himself he chooses for all men'.¹⁸³ Therefore, he reaches the conclusion that 'there is a possibility of creating a human community'.¹⁸⁴

By defending the priority of existence over essence and defining man as a chooser of himself, Sartre (and existentialists in general) seems to provide a significant support to liberals. For Sartre, man chooses his fundamental project about how to live which in turn determines his all lesser goals and ends.¹⁸⁵ Man is capable of changing his essence whenever he desires to do so; whatever he has chosen to become will be final only when he no longer can change his essence, i.e. when he dies.¹⁸⁶ Recall that Rawls similarly argues that individuals 'conceive themselves as capable of revising and altering [their] final ends'.¹⁸⁷

Sartre does not insist that the choice of man's own goals is the result of rational deliberation.

¹⁸⁰ Sartre, *Existentialism and Humanism*, p.29.

¹⁸¹ *Ibid.*, p.28.

¹⁸² *Ibid.* He also asserts, 'to say that we invent values means neither more nor less than this; there is no sense in life a priori. Life is nothing until it is lived; but it is yours to make sense of, and the value of it is nothing else but the sense that you choose.' *Ibid.*, p.54.

¹⁸³ Similarly, Sartre argues that 'when we say that man is responsible for himself, we do not mean that he is responsible only for his own individuality, but that he is responsible for all men'. *Ibid.*, p.28.

¹⁸⁴ *Ibid.*, p.54.

¹⁸⁵ See Sartre, *Being and Nothingness*, pp.481-489.

¹⁸⁶ Greene, *Jean-Paul Sartre- The Existentialist Ethic*, p.30.

¹⁸⁷ J.Rawls, 'A Well-Ordered Society', in P. Laslett and J. Fishkin (eds.), *Philosophy, Politics and Society*, Fifth Series, Oxford: Blackwell, 1979, p.7.

The question here is not of a deliberate choice. This is not because choice is less conscious or less explicit than a deliberation but rather because it is the foundation of all deliberation and because... a deliberation requires an interpretation in terms of an original choice.¹⁸⁸

He also does not deny that individual goals are shaped in a social context. In other words, the individual is social in the sense that his human reality is mediated through other members of the collectivity.¹⁸⁹ Sartre writes:

[I]t is not only one's own self that one discovers in the cogito, but those of others too...[W]hen we say 'I think' we are attaining to ourselves in the presence of the other, and we are just as certain of the other as we are of ourselves.¹⁹⁰

In a nutshell, autonomy is essential for the existential definition of the self. It is the *sine qua non* of the self. For 'to be human is to have the capacity to decide issues and to deliberate and choose between and among alternatives'.¹⁹¹

The very idea of autonomy on the other hand requires the existence of the Other. In other words, I am in a way parasitic on the Other. This is so both empirically and conceptually. My autonomy may make sense only insofar as there exist others. As Sartre put it, '[t]he other is indispensable to my existence, and equally so to any knowledge I can have of myself'.¹⁹² Unless I recognise others as autonomous beings (i.e. ends in themselves) I shall most likely end up in the fundamental predicament: 'absolute loneliness ...and terror'.¹⁹³ This points to the absolute necessity of living with others¹⁹⁴ as social beings or as 'zoon politikon' in Marx's words.

¹⁸⁸ Sartre, *Being and Nothingness*, pp.461-62.

¹⁸⁹ Greene, *Jean-Paul Sartre- The Existentialist Ethic*, p.37. Recall here Gauthier's conception of individual as a social being. See note 63 above.

¹⁹⁰ Sartre, *Existentialism and Humanism*, p.45.

¹⁹¹ S.R.Yarbrough, *Deliberate Criticism: Toward a Postmodern Humanism*, Athens and London: The University of Georgia Press, 1992, p.1.

¹⁹² Sartre, *Existentialism and Humanism*, p.45.

¹⁹³ Detmold, *Courts and Administrators*, p.124.

¹⁹⁴ For a general account of 'being-with-others', see J.Macquarrie, *Existentialism*, Harmondsworth: Penguin Books, 1972, pp.75-92.

The human being is in the most literal sense a zoon politikon...an animal which can individuate itself only in the midst of society.¹⁹⁵

Marx's 'zoon politikon' brings us to the conceptual dependence of individual on others. Giddens explains the relationship between the self and the Other in the following terms.

The 'problem of the other' is not a question of how the individual makes the shift from the certainty of her or his own inner experiences to the unknowable other person. Rather it concerns the inherent connections which exist between learning the characteristics of other persons and the other major axes of ontological security.¹⁹⁶

The ontological security or certainty of the identity requires the existence of difference and the other.¹⁹⁷ The Other is not therefore simply external to me, but he/she at the same time constitutes my identity. This is inevitable, because we are not living in a vacuum. As Giddens put it 'the constraints of the body ensure that all individuals, at every moment, are contextually situated in time and space.'¹⁹⁸ This contextuality generates the idea that the self is constituted by the 'social roles', 'authoritative horizons' of communal values¹⁹⁹, or 'power relations'.²⁰⁰ In this sense, he is what the community or power makes of him.²⁰¹ And this idea, as we have seen, rejects the liberal conception of the constitutive self.

The liberals in fact do not deny the contextuality. They are aware of the ontological embeddedness of human beings which makes it possible to constitute and shape their identities. Yet, liberals also argue that the self is prior to his ends, goals, communal values etc. in the sense that he has

¹⁹⁵ K. Marx, *Grundrisse*, trans. V. Nicolaus, London: Pelican, 1973, p.84.

¹⁹⁶ Giddens, *Modernity and Self-Identity*, p.51.

¹⁹⁷ W.E. Connolly, *Identity/Difference: Democratic Negotiations of Political Paradox*, Ithaca and London: Cornell University Press, 1991, p.64.

¹⁹⁸ *Ibid.*, p.187.

¹⁹⁹ See C.Taylor, *Hegel and Modern Society*, Cambridge: Cambridge University Press, 1979, pp.157-159.

²⁰⁰ See Foucault, *Power/Knowledge*, pp.73-74.

²⁰¹ The postmodernists would formulate it thus : 'My identity is what I am and how I am recognized rather than what I choose, want, or consent to'. See Connolly, *Identity/Difference*, p.64.

the capacity to reflect on, re-examine, change or even reject these goals and values which constitute his identity.²⁰² In this sense, he is what he makes of himself.

It is true that the liberal conception of autonomous subject seems to be 'alien to the reality of everyday life'.²⁰³ It is indeed difficult to perfectly realise our autonomy, not because there are certain strands of our identity such as our age, family, and nationality which are given and therefore beyond our autonomous choice, but because it is usually too risky to change or reject the constituent parts of our identities.²⁰⁴ This empirical difficulty, nevertheless, does not invalidate the conceptual existence of the autonomy. Nor does it undermine the importance of the autonomous subject.²⁰⁵ Human beings, for liberals, are still potentially even actually autonomous, albeit they are constrained by natural factors as well as social and political structures.

²⁰² Kymlicka, *Liberalism, Community, and Culture*, p.52. That self is prior to ends, according to Kymlicka, does not necessarily require an 'unencumbered' self as the Communitarians claim. Quite the contrary. He argues that 'the process of ethical reasoning is always one of comparing one 'encumbered' potential self with another 'encumbered' potential self'. That is to say that, '[t]here must always be some ends given with the self when we engage in such reasoning, but it doesn't follow that any particular ends must always be taken as given with the self'. *Ibid.*, pp.52-53.

²⁰³ See Habermas, *Autonomy and Solidarity*, p.223. Cf. A. Ingram, *A Political Theory of Rights*, Oxford: Clarendon Press, 1994, p.113.

²⁰⁴ In reality, the self is both constituted and constitutive. Tracy Strong makes this point as follows: 'A life is always more than we can make of it- that is what makes it a life, and not an autobiography. But a life is also for us only what we make of it and *the dialectic between these two actualities allows us to try to shape who we are.*' T. B. Strong, *The Idea of Political Theory: Reflections on the Self in Political Time and Space*, Notre Dame and London: University of Notre Dame Press, 1990, p.2. (Footnote is omitted, and emphasis added.) See also S.Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics*, Cambridge: Polity, 1992, p.5 : 'The identity of the self is constituted by a narrative unity, which integrates what "I" can do, have done and will accomplish with what you expect of "me," interpret my acts and intentions to mean, wish for me in the future, etc.'

²⁰⁵ Ingram, *A Political Theory of Rights*, p.113.

The idea of the autonomous subject has certain political implications. Those who argue that the subject is completely shaped by the given structures will inevitably lapse into a form of conservatism which will hymn the status quo, and resist any attempt to change it. As Best and Kellner assert, "[t]he death of man' also spells the death of a moral language whereby the the rights and freedoms of exploited, degraded, and repressed people can be upheld and defended'.²⁰⁶ By contrast, the autonomous subject resists such a conformism, and the abolition of this moral language. Alain Touraine expresses this point very well. 'The idea of the subject', he says, 'is a *dissident* idea which has always upheld the right to rebel against an unjust power'.²⁰⁷ With the death of subject, according to Touraine, 'our social and personal life will lose all its creative power and will be no more than a post-modern museum in which multiple memories replace our inability to produce anything of lasting importance'.²⁰⁸

In order not to turn into 'a post-modern museum', liberals have to value participation and democracy which arguably provides the 'best' means to develop and realise the autonomy, and individual rights and liberties. However, we have to spend more time and space to analyse the communitarian challenge that liberals underestimate, if not undermine, the value of participation in politics. At its extreme point, the communitarians, like Taylor, argue that communal participation in the highest political organization, i.e. political body, state, is an essential ingredient of the good life or at least of the best life for human beings.²⁰⁹ This leads to what Taylor calls 'civic humanism' the central notion of which is that 'men find their good in the public life of a citizen republic'.²¹⁰ The political implication of this conviction for the debate between communitarians and liberals is that the latter's theory is allegedly hostile to the idea of wide participation in politics, and thus to

²⁰⁶ Best and Kellner, *Postmodern Theory*, p.291.

²⁰⁷ A.Touraine, *Critique of Modernity*, trans. D.Macey, Oxford: Basil Blackwell, 1995, p.213. (Emphasis in original)

²⁰⁸ *Ibid.*, p.210.

²⁰⁹ See C. Taylor, 'Hegel: History and Politics', in M. Sandel (ed.), *Liberalism and Its Critics*, New York: New York University Press, 1984, pp.188-89.

²¹⁰ Taylor, 'Kant's Theory of Freedom', in *Philosophy and The Human Sciences*, *Philosophical Papers* 2, p.335.

democracy. The deontological liberals, as we shall see, accept democracy and wide participation without supporting the idea of civic humanism.

Liberalism versus Democracy ?

Most people including liberals nowadays seem to abandon Weldon's contention that 'democracy', 'liberalism', and 'capitalism' are simply different words for the same thing.²¹¹ They are in fact different words for different things. To give an example, Hayek asserts that 'liberalism is a doctrine about what the law ought to be, democracy a doctrine about the manner of determining what will be the law'.²¹² They may have historical relations and common ideals, but this is not the point. The point is rather whether liberalism is compatible with democracy.

In theoretical terms, as Barbara Goodwin points out, liberalism does not necessarily entail democracy, 'but democracy is probably the best guarantee for liberalism'.²¹³ She says that what liberal theory calls for is some form of constitutional system which limits the powers of government.²¹⁴ This is the starting point for the possibility of an antagonism between liberalism and democracy.

The concept of democracy, as Kelsen puts it, has been modified by political liberalism, the aim of which is to limit the power of the state in the interest of individual's freedom.²¹⁵ However, he maintains that the idea of democracy is by no means identical with liberalism, and even that there exists a certain antagonism between them.²¹⁶ According to Kelsen, the principle of democracy is based on the idea that the sovereignty of people is unrestricted as already expressed in The French Declaration of the Rights of Men.²¹⁷ Liberalism, on the contrary, stands

²¹¹ T.D.Weldon, *The Vocabulary of Politics*, Harmondsworth: Penguin, 1953, p.86.

²¹² F.Hayek, *The Constitution of Liberty*, London: Routledge & Kegan Paul, 1960, p.103.

²¹³ B. Goodwin, *Using Political Ideas*, 2nd ed., New York: John Wiley & Sons, 1987, p.37.

²¹⁴ *Ibid.*, p.38.

²¹⁵ H. Kelsen, 'Foundations of Democracy', *Ethics*, LXVI(1955):1-101, at 3.

²¹⁶ *Ibid.* See also Goodwin, *Using Political Ideas*, p.37.

²¹⁷ It reads as follows: 'The principle of all sovereignty resides essentially in the nation'. Cited in Kelsen, 'Foundations of Democracy', p.3.

for the restriction of political power whatever form the state may assume. Hence it means restriction of democratic power.²¹⁸

Such a conception of democracy based on absolute popular sovereignty appears to be undesirable, or to be alien to liberal theory in any case. Unlimited democracy is potentially, if not actually, totalitarian, and threatens the liberal values and institutions.²¹⁹ It is a conception of the 'doctrinaire democrat', says Hayek who draws a particular attention to the possible justification it provides for a arbitrary power.²²⁰ To avoid this, as Amy Gutmann states, 'liberalism constrains democratic authority'.²²¹ Gutmann writes:

The result of democratic processes, like all other, may be tyrannical. Liberalism tries to protect individuals from democratic tyranny by granting them rights that can be used as moral trumps against the exercise of that authority.²²²

The corollary of this is the assertion that liberal democracy is a limited democracy²²³ which is seen as a means rather than an end in itself.²²⁴ Marxists are of course not happy with the knotting the two words ('liberal' and 'democracy') together. This, Hoffman argues, simply mystifies the problem.²²⁵ For he claims that 'democracy is only possible when it transcends liberalism, just as popular rule is only possible when it transcends property'.²²⁶

²¹⁸ *Ibid.*, p.4.

²¹⁹ A.Arblaster, *The Rise and Decline of Western Liberalism*, Oxford: Basil Blackwell, 1984, p.78.

²²⁰ Hayek warns that 'the ideal of democracy, originally intended to prevent all arbitrary power, thus becomes the justification for a new arbitrary power'. See Hayek, *The Constitution of Liberty*, p.106.

²²¹ A.Gutmann, 'How Liberal is Democracy?', in D. MacLean and C.Mills (eds.), *Liberalism Reconsidered*, Totowa, N.J.: Rowman & Allanheld, p.25.

²²² *Ibid.*

²²³ Arblaster, *The Rise and Decline of Western Liberalism*, p.78.

²²⁴ See J.Schumpeter, *Capitalism, Socialism and Democracy*, 2nd ed., New York: Harper, 1947, p.242.

²²⁵ J. Hoffman, *State, Power, and Democracy*, Sussex: Wheatsheaf Books, 1988, p.201.

²²⁶ *Ibid.* See also his article 'Liberals versus Socialists: Who are the True Democrats?', in D. McLellan & S.Sayers (eds.), *Socialism and Democracy*, London: Macmillan, 1991, pp.32-45. Here Hoffman's conclusion is predictable. 'When it comes to 'the real

Similarly as a defender of participatory communitarianism, Benjamin Barber is not at ease with the idea of liberal democracy but on a different ground: participation. For Barber, the liberal conception of the individual 'undermines the democratic practices upon which both individuals and their interests depend'.²²⁷ From such a 'precarious' conception, he claims, no firm theory of participation can be expected to arise.²²⁸ Furthermore, he asserts that since liberals regard political community as an instrumental rather than an intrinsic good, they hold the idea of participation in disdain.²²⁹

Indeed, traditionally liberals have been, in a way, suspicious of the possible 'dangers inherent in wide popular participation in politics'.²³⁰ This fear of wide participation has paved the way for an elitist conception of democracy which is indebted to Schumpeter for much of its formulations.²³¹ Democracy, as he defined it, 'does not mean and cannot mean that the people actually rule in any obvious sense of the terms "people" and "rule" ... [it] means only that the people have the opportunity of accepting or refusing the men who are to rule them'.²³² This requires that the citizens 'must understand that, once they have elected an individual, political action is his business and not theirs'.²³³

democrats', our preference is clear. We back the socialists against the liberals but with this proviso: 'real democracy' is only defensible as a *post-liberal* phenomenon.' *Ibid.*, p.44.

²²⁷ Barber, *Strong Democracy*, p.4.

²²⁸ *Ibid.*

²²⁹ *Ibid.*, p.7.

²³⁰ See C. Pateman, *Participation and Democratic Theory*, Cambridge: Cambridge University Press, 1970, p.1.

²³¹ Schumpeter defines democracy as a method or 'institutional arrangement for arriving at political decisions in which individual acquire power to decide by means of a competitive struggle for the people's vote'. Schumpeter, *Capitalism, Socialism and Democracy*, p.269.

²³² *Ibid.*, pp.284-85.

²³³ *Ibid.*, p.295. For elitist approach to democracy see also T.R. Dye and L.H. Ziegler, *The Irony of Democracy*, North Scituate, Mass.: Duxbury Press, 1975, p.18 ; R. Dahl, 'Hierarchy, democracy, and bargaining in politics and economics', in H. Eulau (ed.), *Political Behaviour*, Glencoe, Ill: Free Press, 1956, pp.82-92, particularly p.87.

The elitist conception of democracy has clearly been antagonistic to the politics that desires the extension of public space as a result of participatory democracy. Yet in the process of the transformation of the public sphere, Habermas argues, traditional constitutional rights themselves such as freedom of speech, freedom of association and assembly have undergone a radical change.²³⁴ He says, in a structurally transformed public sphere²³⁵ these rights 'must no longer interpreted merely as injunctions but positively, *as guarantees of participation*, if they are fulfil their original function in a meaningful way'.²³⁶

Turning back to the Kantian liberals, we could say that they both suggest a structurally transformed public sphere, and also withstand the participatory democrats', like Barber's, critique by attaching a particular importance to the notion of participation. In other words, the argument that liberals undermine the idea of wide participation is not compelling. It is not compelling for two main reasons. First, Barber's critique is based on the liberal conception of individual. He claims that liberal democracy presumes individuals as 'solitary, as hedonistic and prudential, and as social only to the extent required by the quest for preservation and liberty in an adversary world of scarcity'.²³⁷ This is called 'competitive individualism' which liberals appear to disown.²³⁸ The deontological liberals, as Thigpen and Downing put it, defend 'moral individualism' (the conception of the persons as free moral agents) which is adopted by Barber himself.²³⁹ 'Freedom is integral to politics', he says, 'and for there to be a politics there must be a living notion of the free, choosing will'.²⁴⁰

²³⁴ J.Habermas, *The Structural Transformation of the Public Sphere*, trans. T.Burger, Cambridge, Mass.:The MIT Press, 1989, p.227.

²³⁵ By this Habermas means the 'transformation of the liberal constitutional state into a social-welfare state'. *Ibid.*, p.232. Given the fact that a social-welfare state may perfectly be liberal and constitutional, here he might imply the transformation of classic libertarian state into a welfare state.

²³⁶ *Ibid.*, p.227. (Emphasis added.)

²³⁷ Barber, *Strong Democracy*, p.213.

²³⁸ See Thigpen and Downing, 'Liberalism and the Communitarian Critique', p.654.

²³⁹ *Ibid.*

²⁴⁰ Barber, *Strong Democracy*, p.126.

The second reason why Barber's argument is not compelling can be found in deontological liberals' own approach to the idea of participation. Kant himself, in his *Metaphysical Elements of Justice*, says that the republic is 'the only enduring political constitution in which the law is autonomous and is not annexed by any particular person'.²⁴¹ A Kantian republic, as Steven Smith puts it, means 'one in which each individual had some share in forming the laws'. 'It is a form of government', he continues, 'which requires the maximum degree of participation in the shaping of public decisions'.²⁴²

Democracy is taken for granted by Kantian liberals. This is especially clear in Rawls who starts with 'the conviction that a constitutional democratic regime is reasonably just and workable, and worth defending'.²⁴³ For Rawls a well-ordered society is one 'in which some form of democracy exists'.²⁴⁴ He also argues that the political conception of justice is 'worked out to apply to what we may call the 'basic structure' of a modern constitutional democracy'.²⁴⁵ Most importantly Rawls sees political liberalism as perfectly compatible with the idea of wide participation.²⁴⁶

The idea is that without widespread participation in democratic politics by a vigorous and informed citizen body, and certainly with a general retreat into private life, even the most well-designed political institutions will fall into the hands of those who seek to dominate and impose their will through the state apparatus ... The safety of democratic liberties requires the active participation of citizens who possess the political virtues needed to maintain a constitutional regime.²⁴⁷

²⁴¹ I. Kant, *Metaphysical Elements of Justice*, trans. J. Ladd, Indianapolis: Bobs-Merrill, 1965, p.112.

²⁴² S. B. Smith, *Hegel's Critique of Liberalism: Rights in Context*, Chicago: The University of Chicago Press, 1989, p.60.

²⁴³ Rawls, 'The Priority of Right...', p.275.

²⁴⁴ Rawls, 'A Well-Ordered Society', p.15.

²⁴⁵ Rawls, 'The Idea of an Overlapping Consensus', p.3.

²⁴⁶ Rawls, 'The Priority of Right', p.272.

²⁴⁷ *Ibid.*, p.272. Rawls, however, explicitly rejects the idea of 'civic humanism' on the ground that it is a comprehensive doctrine where political life is not encouraged as necessary for the protection of the basic liberties of democratic citizenship. *Ibid.*, p.273. See also Buchanan, 'The Communitarian Critique of Liberalism', p.859.

The central role of political participation in protecting individual rights and liberties is also well expressed by R. Bellamy. The enjoyment of our rights and liberties, to a greater extent, depends on a democratic institutional structure which distributes power amongst the citizen body.²⁴⁸

Without the possibility of widespread political participation the state apparatus can fall into the hands of narrow cliques who seek to use it to further the particular interests of their class, group, religion, ideology or leader.²⁴⁹

To sum up, liberals are bound to value democracy and wide political participation, because individual rights and liberties are best protected through them.²⁵⁰ Democracy is important for liberals, because it provides a suitable milieu to promote 'the development of autonomous judgment among citizens', and to render this judgment represented in the political process.²⁵¹

Liberal Individualism and Turkish Political Culture

The liberal theory of rights is individualistic²⁵² in the sense that individuals are 'the primary bearers of moral value and of moral and

²⁴⁸ R. Bellamy, *Liberalism and Modern Society : An Historical Argument*, Oxford: Polity, 1992, p.258.

²⁴⁹ *Ibid.*

²⁵⁰ For the argument that democracy is justified on the ground of the protection of individual rights and liberties, see, e.g., F. Hayek, *The Constitution of Liberty*, pp.107-108.

²⁵¹ W. E. Connolly, *The Terms of Political Discourse*, Third Edition, Oxford: Blackwell, 1993, p.152. In his recent study, Habermas too draws attention to the complementary link between the 'moral autonomy' and 'political autonomy' of citizens which finds its expression in the process of political participation. See J.Habermas, *Faktizität und Geltung*, Frankfurt: Suhrkamp, 1992, p.123, and 155-157; cited in W.Outhwaite, *Habermas: A Critical Introduction*, Oxford: Polity, pp.141-142.

²⁵² J.Dunn, *Western Political Theory in the Face of the Future*, Cambridge: Cambridge University Press, 1993, p.33. It must be noted that our concern in this study is the liberal rights thesis which is based on the conception of individualism and autonomy. Yet, as Cohen and Arato has argued, '[w]hile it is of course individuals who have rights, the concept of rights does not have to rest on philosophical or methodological individualism...' See Cohen and Arato, *Civil Society and Political Theory*, p.22. In

legal rights'.²⁵³ The liberals, however, discern two conceptions of individualism: 'sociological' and 'moral' individualism.²⁵⁴ The former argues that individuals in a society have no intrinsic ties to one another.²⁵⁵ Liberals evade this 'bad sociology'²⁵⁶, by defending moral individualism which is based on autonomy. Moral individualism regards persons as autonomous moral agents who can choose and reconsider their ends 'in lights of their changing self-understanding'.²⁵⁷ They are in fact 'social beings who can critically evaluate their relationships'.²⁵⁸ As we have seen liberals reject the communitarian charge that the liberal self is 'egoistic' and 'unencumbered'. On the

Chapter 8 (pp.345-420) of this book they explore their 'new theory of rights' by reconceptualising the Habermasian discourse ethics. Likewise, Islamists have attempted to develop an alternative theory of rights based on the divine sources of Islam. See, e.g., R. Al-Ghannouchi, *Al-Hurriyyet Al-Ammah fi Al-Dawlah Al-Islamiyyah*, Beirut, 1993. The English translation of this book (Public Liberties in the Islamic State) is forthcoming. For a comprehensive treatment of the debate on 'Islamic Human Rights', see also A. E. Mayer, 'Universal versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?', *Michigan Journal of International Law*, 15/2(Winter 1994): 307-405.

²⁵³ N. Mc Cormick, *Legal Right and Social Democracy- Essays in Legal and Political Philosophy*, Oxford: Clarendon Press, 1982, p.247. See also T.Campbell, *The Left and Rights: A Conceptual Analysis of the Idea of Socialist Rights*, London: Routledge & Kegan Paul, 1983, p.83, G.P.Fletcher, 'Human Dignity as a Constitutional Value', *U. W. Ontario Law Review*, 22(1984): 171-182, at 173., W.Fach and G. Procacci, 'Strong Liberalism', *Telos*, 76(Summer 1988): 33-49, at 34.

²⁵⁴ R.B. Thighen and L.A. Downing, 'Liberalism and the Communitarian Critique', p.654, and L.A. Downing and R.B.Thigpen, 'A Defence of Neutrality', *Polity*, 21(1989):502-16.

²⁵⁵ *Ibid.*, p.509,

²⁵⁶ See M.Walzer, 'Liberalism and the Art of Seperation', *Political Theory*, 12 (August 1984):315-330, at 324.

²⁵⁷ Downing and Thigpen, 'A Defence of Neutrality', p.509. For a powerful defence of this moral individualism against the 'radical collectivism' originated in Plato, see K.R.Popper, *The Open Society and Its Enemies*, Vol I: The Spell of Plato, London : Routledge and Kegan Paul, 1952, esp. pp.99-106.

²⁵⁸ Downing and Thigpen, 'A Defence of Neutrality', p.509.

contrary, the liberal individual is seen as an integrated being with the community in which he lives.²⁵⁹

The sense of individuality²⁶⁰ is the precondition of negative freedom. As April Carter noted, the 'conception of freedom as the absence of external restraints on the individual would only be possible in a society with a highly developed sense of individuality and allowing a considerable degree of personal freedom'.²⁶¹

I will argue that such a sense of individuality is alien to a country, like Turkey, where 'individualism had no historical and philosophical root'.²⁶² The liberal picture of the self as an autonomous agent seems to be unfit for the political gallery of Turkey wherein individuals identify themselves with the 'general will', the state. The lack of individuality in Turkish society can be seen as a result of cultural, religious and political factors.²⁶³ Islam is generally interpreted as a communitarian religion which privileges the community, *cemaath*, over individual, the *ferd*. 'Islamism', says Yahya Sadowski, 'is a post-modernist doctrine, an attempt to reconstruct a new communitarian ideology by men (and an occasional woman) who have been exposed to, and grown disenchanted with, modernity'.²⁶⁴ Similarly, El-Affendi writes that Islamists adopt

²⁵⁹ See for example Dworkin, 'Liberal Community', pp.499-502.

²⁶⁰ For the term 'individuality', see J.Habermas, *Postmetaphysical Thinking: Philosophical Essays*, trans. W.M.Hohengarten, Cambridge: Polity Press, 1992, p.153: 'The expression "individuality" primarily means the singularity or particularity of a numerical individual, and not what is atomic or indivisible.'

²⁶¹ A.Carter, *The Political Theory of Anarchism*, London: Routledge and Kegan Paul, 1971, p.24. Cf. J.Donnelly, *Universal Human Rights in Theory and Practice*, Ithaca and London: Cornell University Press, 1989, p.90.

²⁶² E.Ozbudun and A.Kazancigil, 'Introduction', to A.Kazancigil and E.Ozbudun (eds.), *Ataturk: A Founder of a Modern State*, London: C.Hurst & Company, 1981, p.5.

²⁶³ On the 'lack' and 'fear' of individuality in Muslim societies see A.Bulaç, *Islam ve Demokrasi: Teokrasi-Totaliterizm*, Istanbul: Beyan Yayinlari, 1993, pp.23-24, and F. Mernissi, *Islam and Democracy: Fear of the Modern World*, trans. M.J.Lakeland, London: Virago Press, 1993, p.92, 110.

²⁶⁴ Y.M.Sadowski, 'Bosnia's Muslims? A Fundamentalist Threat?', *Brookings Review*, 13(January 1995), at 11. According to Sadowski, as one version of political interpretation of Islam, 'Islamism appeals to intellectuals and professionals who have had Western-

'the modern concept of the state as a principle of restriction and control, without subscribing to the liberal and individualistic morality which underpins this concept'.²⁶⁵ Lambton goes even further. He claims that 'Islam does not in fact recognise the legal personality of the individual in which his rights are secured to him and vested in him by law'.²⁶⁶ Needless to say that these statements reflect *particular* or even inaccurate interpretations of Islam.²⁶⁷ There are other views which stress the importance of individuality in any possible political project. El-Affendi himself urges the 'true Muslim' to strive for 'one thing:

style educations or lived abroad'. For Sadowski, 'Islamist ideologists invoke some of the medieval [Muslim] clerics..., but also draw on Western anti-modernist philosophers, such as Spengler, Heidegger, and Althusser'. (*Ibid.*) Obviously this brand of 'Islamism' does not appeal to all Islamists. In Turkey, for instance, it is true that very few Islamist intellectuals attempted to develop a critique of modernity. (See, e.g. A.Bulac, *Din ve Modernizm*, Istanbul: Endulus yayinlari, 1991; I.Ozel, *Uc Mesele: Teknik, Medeniyet, Yabancilasma*, Istanbul: Dergah Yayinlari, 1984, and E.Gurdogan, *Teknolojinin Otesi:Kaybolan Olcu ve Bozulan Denge*, Istanbul: Akabe Yayinlari, 1985.) However, most Islamists still cling to the modernist discourse in one way or another. In fact, they are not 'opposed to modernization' but to the ideology of 'modernism', i.e., they aim to 'modernize without Westernising'. (See respectively, H.Gulalp, 'A Postmodern Reaction to Dependent Modernization: The Social and Historical Roots of Islamic Radicalism', *New Perspectives on Turkey*, 8(Fall 1992): 15-26, at 16, and J.L.Esposito, *Islam: The Straight Path*, Expanded Ed., New York and Oxford: Oxford University Press, 1991, p.218.) According to Abdurrahman Arslan, an Islamist himself, such an attitude is paradoxical, because modernism is inextricably linked with Westernisation. For him Muslims therefore have to reject modernism, if they wish to be consistent in their opposition to the Westernisation. See A. Osmanoglu, 'Iflah olmaz bir anti-modernist: Abdurrahman Arslan', *Nehir*, 18(7 March 1995), pp.74-76.

²⁶⁵ A. El-Affendi, *Who Needs an Islamic State?*, London: Grey Seal, 1991, p.87.

²⁶⁶ A.K.S. Lambton, *State and Government in Medieval Islam*, Oxford: Oxford University Press, 1981, p.xv, see also pp.19-20. This is in fact a wrong and misleading judgement on the Islamic conception of individual and his/her rights. For the relevant references see note 252 above.

²⁶⁷ Indeed Muhammed Arkoun, for instance, emphasises the cognitive openness of the Qur'anic discourse, and criticises the 'dogmatic closure' of those who adopt a narrow, and 'closed' interpretation of the 'person'. See M. Arkoun, *Rethinking Islam: Common Questions, Uncommon Answers*, trans. R.D.Lee, Boulder and Oxford: Westview Press, 1994, pp.86-105.

democracy, the right of every individual not to be coerced into doing anything'.²⁶⁸ In an ideal Islamic polity which must be 'democratic'²⁶⁹, according to El-Affendi, 'the community cannot shoulder the individual's ultimate responsibility for his or her own actions, nor replace the individual's duty to prove his or her own moral worth and act as an example to others'.²⁷⁰ Our intention is not to vindicate the compatibility or incompatibility of Islamic political thought with liberal individualism.²⁷¹ What I want to emphasise is that Islam as historically interpreted in a particular geographic location, like Turkey, has played important role in shaping the common political culture and therefore the attitude towards political authority. The official interpretation of the religion has been frequently invoked to legitimate the presence of the authoritarian regimes throughout the history of Muslim societies.²⁷² Although Islam has been removed from the political sphere ever since the Republic of Turkey was established, it certainly continued to exert considerable influence on the consolidation of the newly established regime.²⁷³ Furthermore, with special emphasis on almost absolute obedience to the political authority, islam (with a small 'i') contributed

²⁶⁸ El-Affendi, *Who Needs an Islamic State?*, p.88.

²⁶⁹ *Ibid.*, p.90: 'The ideal state for today's Muslim, or the ideal Islamic state at any time, should first and foremost be democratic.' For a sharply contrasting interpretation of the relationship between Islam and Democracy, see Bulaç, *İslam ve Demokrasi*, pp.9-75. Cf. S.Mirzabeyoglu, *Bas Yucelik Devleti: Yeni Dunya Duzeni*, Istanbul: Ibda Yayinlari, 1995, pp.132-167.

²⁷⁰ El-Affendi, *Who Needs an Islamic State?*, p.89.

²⁷¹ For two different and contrasting judgements on this issue, see K.Berzeg, *Liberalizm Demokrasi Kapikulu Gelenegi*, Ankara: Siyasal Kitabevi, 1993, pp.21-25, and R. Ozdenoren, 'Yeni Dunya Düzeni ve Liberalizm Karsisinda Turkiye ve Islam', *Bilgi ve Hikmet*, 2(Spring 1993): 109-120, at 118-120.

²⁷² See Arkoun, *Rethinking Islam*, p.110; N.C.Coulson, *A History of Islamic Law*, Edinburgh: Edinburgh University Press, 1964, pp.133-134; H.Enayat, *Modern Islamic Political Thought*, London: Macmillan, 1982, p.12, 16; A.Hussain, *Beyond Islamic Fundamentalism: The Sociology of Faith and Action*, Leicester: Volcano Press, 1992, esp. pp.16-45.

²⁷³ As Leonard Binder noted, the political elite of the Republic especially in the latter part of 1940s 'began to realize that an established religion might help to enhance the authority and social control'. L.Binder, *Islamic Liberalism: A Critique of Development Ideologies*, Chicago & London: The University of Chicago Press, 1988, p.349.

much to the statist tradition which permeates all state apparatuses and society. As we shall see, the official policy towards the religion has another dimension, that is , to keep it under control lest 'political Islam' may gain momentum and therefore pose a serious threat to the *status quo*.²⁷⁴

The statist tradition in Turkey, more than anything else, prevented the development of a sense of individuality.²⁷⁵ This tradition created a sacred 'cult' of state for which individuals can be sacrificed if necessary. This necessity arises when there is a possibility of trade-offs between the rights of the individual and the interests of the state.²⁷⁶ Since it embodies all the interests of the individuals, the embodied state always finds a 'right' to impose its will on its subjects by any means necessary. In short, the state becomes an end in itself. Max Stirner says that the self-evidently accepted principle of 'the end hallows the means' may be applied to the State: 'the sacred State *hallows* everything that is serviceable to it'.²⁷⁷

Kemalism, with the help of this statist tradition, created its own Others, to speak in postmodern terms, as the West produced its Others.²⁷⁸ The

²⁷⁴ See Chapter 6 below.

²⁷⁵ It may be said of course that this statist tradition itself is in turn partly the consequence of the lack of individuality.

²⁷⁶ See Chapter 7 below.

²⁷⁷ M. Stirner, *The Ego and His Own*, trans. S. T. Byington, New York: Libertarian Book Club, 1963, p.107. (Emphasis in original.) The Machiavellian nature of the state is also well explored by Nietzsche in his discussion of the relationship between the State and philosophy. He proclaims that '[t]he State is never concerned with the truth, but only with the truth which is useful to it, or to be more precise, with *anything which is useful to it* whether it is truth, half-truth, or error'. F. Nietzsche, *Schopenhauer as Educator*, trans. J. W. Hillesheim and M. R. Simpson, Chicago: Gateway Editions, 1965, p.104. (Emphasis added.)

²⁷⁸ In his article entitled 'Ends of Man', Derrida talks about 'the violent relationship of the whole of the West to its other', be it 'linguistic', or 'ethnological, economic, political, military relationships..'. See J. Derrida, 'The Ends of Man', in J. Derrida, *Margins of Philosophy*, trans. A. Bass, Sussex: The Harvester Press, 1982, pp.134-35. It is argued that the West's other appeals to 'the nonwestern world', along side 'the victims of capitalism', and 'women'. See N. Fraser, 'The French Derridians: Politicizing

Islamists, Radical Leftists, and Kurds, among others, make up the Others of the Kemalist regime.²⁷⁹ They are the main victims of the so-called 'Enlightenment Revolution' of Turkey.²⁸⁰ They have been (Islamists and Kurds still are) deemed as the potential danger to the official identity. The Kemalist regime has used literally every means to suppress these 'dangerous' alternative identities. Therefore it would not be wrong to conceive the seventy years history of the Republic as the wars of identities, or rather as the suppression of certain identities by the official ideology. Since the identity is part and parcel of the self, this history turns out to be a living witness to one of the most dramatic stories in human history wherein the individual is oppressed and indeed denied by the state. Given the degree of this oppression and denial, one is tempted to say that '[e]ven the accusing eye of the historian is bound to flicker in the bright light'²⁸¹ of that story. Now we can begin to unravel the ideological and institutional structure of this regime by focusing on the historical development of constitutionalism and of political rights.

Deconstruction or Deconstructing the Political?', *New German Critique*, 33(Fall 1984): 127-154, at 129. Indeed, at the opening page of his celebrated text, *Orientalism*, Edward Said describes the Orient as a Western invention, and as 'one of its [West's] deepest and most recurring images of the Other'. See E.W. Said, *Orientalism*, New York: Vintage Books, 1978, p.1. On that issue, see also B.S. Turner, *Orientalism, Postmodernism, and Globalism*, London and New York: Routledge, 1994.

²⁷⁹ Nilüfer Göle adds liberals to these 'Others' of the Republic, and formulates it as 'the four fobies of Kemalism'. See N.Göle, 'Liberal Yanilgi', *Türkiye Günlüğü*, 24(Fall 1993): 12-17, at 14.

²⁸⁰ The term 'Enlightenment Revolution' is used by the Kemalists to exalt the Kemalist Revolution. See, i.e., B.Tanor, *Türkiye'nin İnsan Haklari Sorunu II: Hukuk-Otesi Boyutlar*, Istanbul: BDS Yayinlari, 1991, p.89; I. Selcuk, 'Madalyonun Arka Yuzu...', *Cumhuriyet*, 22 Aralik 1993, and S.Kili, '21. Yuzyila Girenken Ataturkcu Kultur Siyasasi', *Cumhuriyet*, 4 Mayıs 1995.

²⁸¹ I have borrowed (and slightly modified) this expression from George Watson who used it for the 'documented' and 'proved' assertion that most British intellectuals 'knowingly' supported the violence and mass-murders of the Stalinist dictatorship in the 1930s. See G. Watson, 'Were the Intellectuals Duped?: The 1930s Revisited', *Encounter*, XLI/6(December 1973): 20-30, at 30.

The Essentials of the Liberal Model: A Brief Summary

In Part I of the study, I set out the essential principles of the liberal political model in which the rights against the state are protected. This model is based on the basic idea that the right is prior to the good, and therefore the individual is prior to any social and political constructions. This priority in turn provides the necessary foundation for the existence of individual rights and freedoms which may be claimed against the state. This model also presents a set of constitutional principles to develop and protect these rights. Both the principle of political neutrality and the rule of law serve as restraints on the possible abuse of power. While the former prevents the state from imposing a particular ideology or a comprehensive doctrine on individuals, the latter limits the state by subjecting it to law. The liberal constitutional principles in a word aim to create a plural framework in which individuals will have their rights, and will live according to their own conceptions of the good life. Kantian liberalism offers a right-based moral theory which justifies the restriction of rights only on very limited and particular grounds. That is, rights can only be restricted if it violates the rights of other individuals. Kantian liberals rule out the utilitarian grounds for restricting rights.

PART II

POLITICAL RIGHTS IN THE TURKISH CONSTITUTIONAL SYSTEM

Introduction

In Part II of the study, the development of political rights in the Turkish Constitution is analysed in the light of the basic principles of the liberal model as explored in Part I. This analysis will be carried out in the historical context in order to better grasp the historical development of the Turkish constitutionalism. Many principles of the current constitutional system are the products of the ongoing process which started in the Ottoman period and continued over 70 years period of the Republic. Therefore, the Second Part of the thesis starts with the Ottoman Legacy which will reveal the roots of the Turkish Constitutionalism. Chapter 6 will deal with Kemalism, the official ideology of the Republic, and discuss the compatibility of the Kemalist principles with the liberal principles. This chapter will also briefly explore the political and constitutional developments of pre-1980 period. The political philosophy of the 1982 Constitution will be examined in Chapter 7 alongside its political and social backgrounds. Chapter 7 also takes up the issue of constitutional protection of political rights, and the restrictions to be placed on these rights. Having examined the protection and restriction of political rights in the Turkish Constitution, a chapter is devoted to the case law of the Turkish Constitutional Court. Chapter 8 will show us the 'ideology-based' approach of the Constitutional Court towards political rights. The Conclusion will include a summary of the basic problems of political rights in the Turkish Constitution, and some suggestions to overcome these deeply rooted problems.

CHAPTER 5- THE OTTOMAN LEGACY: THE ROOTS OF TURKISH CONSTITUTIONALISM

There is hardly any study of political development of modern Turkey that does not begin with the last period of Ottoman Empire. This is justifiable because not only the process of westernization¹ goes back to that period, but also the official ideology of the Republic, Kemalism, represents 'a continuum with the Tanzimat, Young Ottomans and Young Turks' of the Empire.² Paul Dumont has stated this link in the following terms:

There is an unbroken continuity in Turkish modernist doctrine from the ideology of the Tanzimat to the six Kemalist arrows. One can discern numerous changes along the way, but the main lines are clear: Kemalist thought was closely linked to that of the

¹ Westernisation is a generic term which may be described as the policy to adopt the western ways of life from political and legal institutions to cultural and behavioral elements. The degree and subject area of the westernisation has historically varied depending on the social and political conditions of different times in which the reformers found themselves. For instance, the reformers of *Tanzimat* and *Mesrutiyet* concentrated on introducing some western political and legal conceptions like constitution and parliament into the Empire, whereas the Kemalist reformers of the Republic showed the most radical example of westernisation by extending it even to the physical appearance of individuals. (See N.Göle, *Modern Mahrem: Medeniyet ve Ortunme*, Istanbul: Metis Yayinlari, 1991, p.49ff.) However, the westernised reformers of the Empire and the Republic have one thing in common: the belief in the superiority of western civilization. In as early as 1879, this common belief was stated by a former Minister of Education, Saffet Pasha, who declared that the Empire had to 'accept the *civilization* of Europe *in its entirety* - in short, prove[sic.] herself to be a reformed and civilized state...'. (Quoted in N. Berkes, *The Development of Secularism in Turkey*, Montreal: McGill University Press, 1964, p.185. Emphasis in original) In 1926, the Minister of Justice of the newly established Republic, M.E.Bozkurt, set out the main objection of the Kemalist Revolution in the following terms: 'The aim of the Turkish Revolution is to import the Western civilisation without any reservation or condition'. Quoted in Z.Emre and O.Nebioglu, 'Ataturk ve Batililasma', *I.U.H.F. Mecmuasi*, 45-47(1981-82):17-37, at 32. See also M.Rodinson, *Islam and Capitalism*, trans. B.Pearce, Harmondsworth: Penguin Books, 1974, p.127.

² N. Abadan-Unat, 'Patterns of Political Modernization and Turkish Democracy', *Turkish Yearbook of International Relations*, 18(1979): 1-26, at 25.

Young Turks, and it owed much to the ideological movements of the second half of the nineteenth century.³

Indeed, as Serif Mardin noted, we can find in the work of the Young Ottomans⁴ the roots of almost every area of modernization in today's Turkey, 'from the simplification of written language to the idea of fundamental civil liberties'.⁵ In short, the Ottoman Empire left a powerful legacy in the contemporary political and legal life of its principal heir, the Republic of Turkey.⁶ It is therefore indispensable to begin with the last period of the Empire in order to better understand the development of political rights in modern Turkey.

Tanzimat Period (1839- 1876)

The Turkish Constitutional movement is generally traced back to the year 1808 when the *Sened-i Ittifak* (Deed of Agreement) was declared.⁷ This was an agreement between the provincial notables⁸ and the Sultan

³ P. Dumont, 'The Origins of Kemalist Ideology', in J. M. Landau (ed.), *Ataturk and the Modernization of Turkey*, Boulder, Colorado: Westview Press, 1984, p.41.

⁴ The Young Ottomans movement emerged in the 1860s. Influenced by western ideas as encapsulated in such conceptions as 'freedom', 'parliament', and 'constitution' the founders of the movement aimed to transform the State from 'absolute into constitutional rule'. See S. Mardin, *The Genesis of Young Ottoman Thought: A Study in the Modernization of Turkish Political Ideas*, Princeton, N.J.: Princeton University Press, 1962, p.13. As we shall see their activities resulted in the promulgation of the 1876 Constitution.

⁵ Mardin, *The Genesis of Young Ottomans*, pp.3-4.

⁶ E. Özbudun, 'Development of Democratic Government in Turkey: Crisis, Interruptions, and Reequilibrations', in Ergun Özbudun (ed.), *Perspectives on Democracy in Turkey*, Ankara: Turkish Political Science Association, 1988, p.2, and I. Ortaylı, *İmparatorlukun En Uzun Yüzyili*, İstanbul: Hil Yayın, 1983, p.14.

⁷ C. Tuncay, 'New Turkish Constitutional Law System', *Turkish Review*, 1/5(1986): 21-45, at 22. For the text of the *Sened-i Ittifak* see S. Kili and S. Gözbuğuk, *Türk Anayasa Metinleri*, Ankara: Türkiye İis Bankası Yayınları, 1985, pp.3-7.

⁸ For the concept of 'notable' and the role of the provincial notables in the Ottoman social and political system see A. Hourani, 'Ottoman Reform and the Politics of Notables', in W. R. Polk and R. L. Chambers (eds.), *Beginnings of Modernization in the Middle East: The Nineteenth Century*, Chicago: University of Chicago Press, 1968,

aimed at establishing respective responsibilities and mutual demands of the parties.⁹ The *Sened* appeared to be 'an important step in legal-political development'.¹⁰ It was, for some writers, the first written document which restrained the 'absolute' and 'arbitrary' powers of the Sultan.¹¹

It is hard however to say that prior to the *Sened-i Ittifak* the Ottoman legal system was based on the arbitrary and unlimited power of the Sultan. The Sultan, in fact, had to rule in accordance with the law which consisted of the *Kanuns* (administrative laws)¹² and *Shariah* (Islamic Law).¹³ In its classical age, as Heper noted, the Empire can be considered as '*Rechtsstaat*' which 'required all in the bureaucratic centre, including the Sultan, to respect absolutely its rules and traditions'.¹⁴ According to Andrew Mango 'the Sultan was free to act only within the provisions of the *sharia* or to the extent to which he could twist the *sharia* to suit his

pp.41-68. Reprinted in A.Hourani, *The Emergence of Modern Middle East*, London: Macmillan, 1981, pp.36-67.

⁹ Berkes, *The Development of Secularism in Turkey*, p.91. The *Sened* in reality helped to legitimate the feudal status of the *derebeyis* (provincial notables) who repressed the local people. See H.Inalcik, 'Sened-i Ittifak ve Gulhane Hatt-i Humayunu', *Belleten*, 28/39(1964): 603-622, at 607; S.Karatepe, *Darbeler, Anayasalar ve Modernlesme*, Istanbul: Iz Yayincilik, 1993, pp.48-49; M. Soysal, *100 Soruda Anayasanin Anlami*, Istanbul: Gercek Yayınevi, 1990, pp.26-27.

¹⁰ Berkes, *The Development of Secularism in Turkey*, p.90.

¹¹ Tuncay, 'New Turkish Constitutional Law System', p.22.

¹² In the Ottoman Empire, alongside the *Sheriah* (*Seriat* in Turkish) law there was 'an independent category of law, called imperial laws or *Kanuns*..., which were derived directly from the sovereign will of the ruler'. See H. Inalcik, 'The Nature of Traditional Society: Turkey', in R.E.Ward and R.A.Dankwart (eds.), *Political Modernization in Japan and Turkey*, Princeton: Princeton University Press, 1964, pp.42-103, at p.57, and H. Inalcik, 'Osmanli Hukukuna Giris', *Siyasal Bilgiler Fakultesi Dergisi*, 13/2(1958):102-126.

¹³ For the relations of the *Kanuns* to *Sheriah* law see S.Sener, *Osmanli'da Siyasi Cozulme*, Istanbul:Inkilap, 1990, pp.17-38; J.Schacht, *An Introduction to Islamic Law*, Oxford: Clarendon Press, 1964, pp.90-92, and H.Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective*, Albany: State University of New York Press, 1994, pp.61-66.

¹⁴ M.Heper, *The State Tradition in Turkey*, London: The Eothen Press, 1985, p.26.

purposes. He was certainly not above the law. He was the guardian of it, and he could be deposed for infringing it'.¹⁵

Indeed, throughout the Ottoman period, deposing of the officials and Sultans was justified on the ground that they contravened the law.¹⁶ The decrees and executive acts of the Sultan and his officials were first subject to the approval of a religious hierarchy which represented the law of country, the *Shariah*.¹⁷ Although this is at least theoretically true, the effectiveness of the such a limitation was doubtful given the fact that *Seyhulislam*, head of the *ulema*,¹⁸ was to be appointed and could be disposed by the Sultan.¹⁹ Since the *ulema* was not 'an autonomous force or power vis-a-vis the state [the Sultan]',²⁰ the traditional Ottoman

¹⁵ A. Mango, *Turkey*, London: Thames and Hudson, 1968, , p.24. Alderson even goes further when he claims that until the beginning of the seventeenth century the Ottoman Sultans were essentially elected by the people, although 'electors', were in fact high officials. The ceremony of *biat*, after the thronement of the Sultan, Alderson argues, confirmed that the Sultan would be the representative of the people. See A.D. Alderson, *The Structure of the Ottoman Dynasty*, Oxford, 1956, p.8.

¹⁶ *Ibid.* See also M.Niyazi, *Türk Devlet Felsefesi*, Istanbul: Otuken, 1993, p.228.

¹⁷ J.Shaw, 'Some Aspects of the Aims and Achievements of the Nineteenth Century Ottoman Reformers', in W.R.Polk & R.L.Chambers, (eds.), *Beginnings of the Modernization in the Middle East, the Nineteenth Century*, Chicago: The University of Chicago Press, 1968, p.32. See also D.M.Dogan, *Tarih ve Toplum: Türkiye'de Toprak Meselesi ve Toplum Yapimizin Tarihi Olusumu*, İkinci Baski, Ankara: Rehber Yayinlari, 1989, p.102.

¹⁸ The *Ulema* was an institution in the Ottoman Empire comprised of *muderrises* (teachers), *kadis* (judges), and *muftis* (juristconsults). For details see J.S.Shaw, *History of the Ottoman Empire and Modern Turkey, Volume I: Empire of the Gazis : The Rise and Decline of the Ottoman Empire, 1280-1808*, Cambridge: Cambridge University Press, 1976, pp.132-139.

¹⁹ *Ibid.*, p.135. Some writers argue that the *Seyhulislams* were supposed to be appointed on the condition of '*la-yen azil*', that is, they shall not be dismissed. See Niyazi, *Türk Devlet Felsefesi*, p.227. In reality, however, they were frequently dismissed by the Sultan. *Ibid.*

²⁰ M.Heper, 'Center and Periphery in the Ottoman Empire: With Special Reference to the Nineteenth Century', *International Political Science Review* , 1/1(1980): 81-105, at 85. See also M. Sencer, 'Tanzimat'a Kadar Osmanli Yonetim Sistemi', *Amme Idaresi Dergisi* 17/2(June 1984):21-44, at 23.

political system cannot be considered as constitutional in its modern sense. It appears that the political and legal system was based on the personal 'good will' of the Sultan. In that respect, we can find some parallels between Dicey's juxtaposition of the parliamentary supremacy and the rule of law,²¹ and the Ottoman *Rechtsstaat*. The unlimited power is not compatible with the rule of law whether it vested in the Parliament or the Sultan. The principle of the Rule of Law rejects the assumption that the Sultan would always act in a way which is not contrary to the law.²² As a matter of fact, the Sultans ruled arbitrarily as the Empire evolved towards decline and corruption.²³ The reforms of the nineteenth century²⁴ were a reaction to this decline, but they also accelerated the decline and decadence of the Ottoman Empire.

The *Sened-i Ittifak* of 1808 was believed to be the first attempt to limit the 'arbitrary' and 'absolute' power of the Sultan. It was even considered as the 'Magna Carta of the Ottomans'.²⁵ The *Sened* however remained on paper,²⁶ and played a very limited, if any, role in the subsequent movements of constitutionalism.²⁷

²¹ See Chapter 2 above.

²² For a similar assumption made by Dicey in favour of the Parliament see Chapter 2 above.

²³ See Heper, *The State Tradition in Turkey*, p.31.

²⁴ The administrative and military reforms in the Empire goes back to the reign of the Sultan Selim III (1789-1807). For a comprehensive study of the Selim's reforms see S.J.Shaw, *Between Old and New: The Ottoman Empire under Sultan Selim III, 1789-1807*, Cambridge, Mass.: Harvard University Press, 1971.

²⁵ S.J. and E.K. Shaw, *History of the Ottoman Empire and Modern Turkey*, Vol.II: Reform, Revolution, and Republic: The Rise of Modern Turkey, 1808-1975, Cambridge: Cambridge University Press, 1977, p.3.

²⁶ A. Mumcu, *Insan Haklari ve Kamu Ozgurlukleri*, Ikinci Baski, Ankara: Savas Yayinlari, 1994, p.187.

²⁷ The failure of the *Sened-i Ittifak* was partly due to the unwillingness of the Sultan to limit his own sovereign authority. In fact, he avoided signing the document. So did many provincial notables for various reasons. (Only four of them had their signature on the agreement). See Shaw & Shaw, *History of the Ottoman Empire and Modern Turkey*, Vol II, p.3.

Perhaps the *Sened-i Ittifak* was not the Magna Carta of the Empire, but we had to wait only thirty years to see the so-called 'Turkish Declaration of Rights'²⁸, *Gulhane Hatt-i Humayun* of 1839.²⁹ This *Hatt* (Rescript), better known as *Tanzimat Fermani*, was not a constitution aiming to limit the authority of the sultan.³⁰ The *Hatt* was another but somewhat more radical example of the imperial tradition according to which the Sultans, on the ceremonial occasion of their enthronement, promised legal and just rule.³¹ The *Hatt-i Humayun* of 1839, however, implied that the Sultan would limit his powers by promising to accept any law made by the legislative machinery that he was establishing.³² Such an 'auto-limitation', Munci Kapani argued, made it a 'charter' rather than a 'constitution'.³³ In order to emphasise the difference between the *Hatt* and the constitution in its modern sense Mardin described it as 'the semi-constitutional charter'.³⁴

The *Hatt*, in a sense, laid down the role and responsibilities of the state *vis-a-vis* its subjects by explicitly referring to some basic rights of the latter. The security of life, honor, and property, and equal justice were guaranteed for all Ottoman subjects without any exception on the ground of religion. The *Hatt* stressed that it was the responsibility of the state to protect the rights of the subjects which were expressed as follows:

²⁸ T.Z. Tunaya, *Türkiye'nin Siyasi Hayatında Batılılaşma Hareketleri*, İstanbul, 1960, p.32. See also Shaw & Shaw, *History of the Ottoman Empire and Modern Turkey*, Vol II., p.61.

²⁹ The text of the *Gulhane Hatt-i Humayun* is in *Düstur*, 1. Tertip, Volume 1, pp. 2-5. The text in Latin script can be found in Kili and Gözübüyük, *Türk Anayasaları*, pp.11-13. For the English translation of the text see J.C. Hurewitz, *Diplomacy in the Near and Middle East*, Princeton: Princeton University Press, 1956, pp.113-116.

³⁰ R. H. Davison, 'The Advent of the Principle of Representation in the Government of the Ottoman Empire', in W.R.Polk & R.L.Chambers (eds.), *Beginnings of Modernization in the Middle East: The Nineteenth Century*, Chicago: The University of Chicago Press, 1968, p.97.

³¹ H.Inalcik, 'Sened-i Ittifak and Gulhane Hatt-i Humayunu', at 611, and 617.

³² Shaw & Shaw, *History of the Ottoman Empire and Modern Turkey*, Vol II., p.61.

³³ M. Kapani, *Kamu Hürriyetleri*, Altıncı Baskı, Ankara: A.U. Hukuk Fakültesi Yayınları, 1981, p.97.

³⁴ Mardin, *The Genesis of Young Ottoman Thought*, p.14.

fimabad eshabî cunhanin davalari kavanini ser'îye iktizasinca alenen bervechi tetkik gorulup hukmolunmadikca hic kimse hakkında hafi ve celi idam ve tesmim muamelesi icrasi caiz olmamak ve hic kimse tarafından digerinin irz ve namusuna tasallut vuku bulmamak ve herkes emval ve emlakine kemali serbestiyetle malik ve mutasarrif olarak ana bir taraftan mudahale olunmamak ...ve tebaayi saltanati seniyyemizden olan ehli Islam ve milleti saire bu musaadati sahanemize bilaistisna mazhar olmak uzere can ve irz ve namus ve mal maddelerinden hukmi ser'i iktizasinca kaffei memaliki mahrusamiz ahalisine tarafi sahanemizden emniyeti kamile verilmiş[tir]...³⁵

According to Lord Kinross the *Hatt* of 1839 was 'a charter of legal, social, and political rights...whose fundamental precepts and consequent decisions in Council the Sultan pledged himself by oath to observe'³⁶. There is however hardly any political right mentioned in the *Hatt*. It was the *Hatt-i Humayun* of 1856³⁷, commonly known as *Islahat Fermani*, that included, for the first time, examples of political rights. It mentioned on several occasions 'the application of the representative principle to various Ottoman political units'.³⁸ The *Hatt* of 1856 emphasised that the reorganization of the provincial councils was essential 'to provide for fair choice of delegates and free voting within them'.³⁹ Moreover, the *Meclis-i Vala-i Ahkam-i Adliye* (The Supreme

³⁵ *Düstur*, 1.Tertip, Vol.I, at 4. The translation of this statement reads: 'hereafter until the pleas of the criminal are examined and adjudged publicly, in accordance with the laws of the Seriat, no one shall be executed, secretly or publicly; and no one may attack the reputation and honor of another; everyone shall be free to possess and use his properties completely and fully, without interference from anyone...All the subjects of our illustrious Sultanate, both Muslims and the members of the other *millets*, shall benefit from these concessions without exception...' In Shaw & Shaw, *History of the Ottoman Empire and Modern Turkey*, Vol II., pp. 60-1.

³⁶ Lord Kinross, *The Ottoman Centuries: The Rise and the Fall of the Turkish Empire*, London: Jonathan Cape, 1977, p.474.

³⁷ *Düstur*, 1.Tertip, Volume 1, pp.5-11; Kili and Gozubuyuk, *Türk Anayasaları*, pp.14-18. The English text of the *Hatt-i Humayun* of 1856 is in Hurewitz, *Diplomacy in the Near and Middle East*, pp.149-53.

³⁸ Davison, 'The Advent of the Principle of Representation in the Government of the Ottoman Empire', p.101.

³⁹ *Ibid.*

Council of Judicial Ordinances)⁴⁰ was to be enlarged to include the non-Muslim members.⁴¹

These central and local councils played an important role in the legal and political life of the Empire during the *Tanzimat*, and constituted a means through which a limited right to participate in politics was observed. One of the practical aims of the Tanzimat edict of 1839 was to reduce the authority of the local governors.⁴² To this end, it ordered the establishment of local administrative councils which would enable the people to participate in administration at various levels.⁴³ These councils were formed as upper (*büyük*) and lower (*küçük*) councils depending on whether or not *muhasils* (local tax collector) were appointed to the city in which the councils were to be set up.⁴⁴

The provincial councils included both the appointed (officials) and elected (non-officeholding) representatives of the local community.⁴⁵ Elections, albeit indirect, provided the upper classes of subjects with the

⁴⁰ The *Meclis* was first established by Sultan Mahmud II on 24 March 1838. Under the *Gulhane Hatt-i Humayunu* it was granted the power to prepare laws necessary to carry out the reforms. See E.R.Toledano, 'The Legislative Process in The Ottoman Empire in the Early Tanzimat Period: A Footnote', *International Journal of Turkish Studies*, 1/2(Autumn 1980):99-107; Davison 'The Advent of the Representation of in the Government of the Ottoman Empire', p.97; J. Starr, *Law as Metaphor: From Islamic Courts to the Palace of Justice*, Albany: State University of New York Press, 1992, pp.25-27.

⁴¹ Davison, 'The Advent of the Principle of Representation in the Government of the Ottoman Empire', p.101.

⁴² The *Hatt* in fact limited the powers of the governors to only matters of security, and deprived them of collecting taxes. Financial matters were to be left to *Muhasils*, officials who were appointed by the central government with wide-ranging power. See H. Inalcik, 'Application of the Tanzimat and its Social Effects', *Archivum Ottomanicum*, 5(1973) : 97-127, at 99.

⁴³ Inalcik, 'Application of the Tanzimat and its Social Effects', p.99; Ortayli, *Imparatorlugun En Ezun Yüzyili*, p.87.

⁴⁴ Upper councils were set up in the capital cities of the sancaks and the sub-counties with *muhasils*, whereas the lower councils were formed in the counties and townships to which *muhasils* were not appointed. *Ibid*, p.100.

⁴⁵ *Ibid*, pp.100-1.

opportunity to choose their representatives who would present their interests in these councils.⁴⁶ Through these institutions non-muslim subjects of the Empire were also given some voice in the administration.⁴⁷

In his *Letters on Turkey*, Ubicini described these local councils as the most liberal institution introduced by the *Tanzimat* guaranteeing equal rights before law for all Ottoman subjects irrespective of their religion.⁴⁸ It is true that they were the first important institution in the Empire that partly adopted the principle of representation. Yet in reality the situation was different. In many cities and towns the councils were under the direct control of 'established local notables'.⁴⁹ More importantly the principle of representation entrenched in the councils was far from its western sense. The French traveller Perrot observed that:

Basically speaking, there is no general meeting of the community or elections in the European sense when it comes to the selection of the representatives to be sent to the council or to giving them instructions once elected. There is no representation of the community in the true sense of the word in these councils, just as there is no trace of any real home-rule.⁵⁰

In the capital, *Meclis-i Vala-yi Ahkam-i Adliye* (The Supreme Council of Judicial Ordinances) was set up,⁵¹ and given in effect legislative and

⁴⁶ S.J.Shaw, 'Some Aspects of the Aims and Achievements of the Nineteenth Century Ottoman Reformers', in W.R.Polk & R.L.Chambers, (eds.), *Beginnings of Modernization in the Middle East*, p.35.

⁴⁷ Inalcik, 'Application of the Tanzimat and its Social Effects', p.100 and 108.

⁴⁸ J.H.A. Ubicini, *Letters on Turkey*, trans. Lady Easthope, London, 1856, p.31.

⁴⁹ Inalcik, 'Application of the Tanzimat and its Social Effects', p.110.

⁵⁰ G.Perrot, *Souvenirs d'un voyage en Asie Mineure*, Paris, 1867, pp.343-346, quoted in *ibid.*

⁵¹ Shaw & Shaw, *History of the Ottoman Empire*, Vol.II, p.61. This was in fact the combination of the two legislative bodies into a single organ. To rationalize the process of legislation the authority and functions of the *Meclis-i Vala* (the Council of Justice), set up in 1838, and the *Meclis-i Tanzimat* (Council of Tanzimat), set up in 1854, was combined into a single body called the *Meclis-i Valay-i Ahkam-i Adliye* (Supreme Council of Judicial Ordinances). For the evolution of this council and other legislative councils prior to the 1876 Constitution, see S.J. Shaw, 'The Central Legislative Councils in

quasi-legislative functions.⁵² Although the *Meclis* operated 'on Western-style rules of parliamentary procedure', it was not a representative organ due to the fact that it was composed of appointed members.⁵³

The First Constitutional Period (1876-1878)

The idea of constitutionalism gained a substantial ground in the Empire at a time when there existed economic and social crises. The financial difficulties and the political unrest (rebellion) in the Balkans brought the State directly face to face with the intervention by the Western powers. The famous question came once again to surface: 'how can this state be saved?'.⁵⁴

The motive of 'saving the state' has been the principal concern of the Turkish reformers from Resit Pasha of the *Tanzimat* to Kenan Pasha of the 12 September Coup.⁵⁵ They did not aim to create a liberal polity where the individuals would have freedoms and political rights. The principles of the *Gulhane Hatt-i Humayunu*, as Inalcik noted, were not inspired from the liberal theory of natural rights.⁵⁶ The *Hatt* in reality aimed to 'appease the Great Powers', and to 'mobilize the masses behind the centre against the local notables' in order to strengthen the state.⁵⁷ Likewise, the primary concern of the Young Turks was not freedom or

the Nineteenth Century Ottoman Reform Movement Before 1876', *International Journal of Middle East Studies*, 1(1970):51-84.

⁵² B. Lewis, *The Emergence of Modern Turkey*, 2nd ed., Oxford University Press, 1969, p.114.

⁵³ Davison, 'The Advent of the Principle of Representation in the Government of the Ottoman Empire', p.97.

⁵⁴ F. Ahmad, 'The State and Intervention in Turkey', *Turcica- Revue D'Etudes Turques*, 16(1984):51-64, at 51.

⁵⁵ *Ibid.* The rhetoric of 'saving the state' was initiated by Alemdar Mustafa Pasha, the architect of the *Sened-i Ittifak*. Inalcik, 'Sened-i Ittifak ve Gulhane Hatt-i Humayunu', p.612. See also chapter 7 below, note 1 for the statement of Kenan Pasha of 12 September Coup (1980) in the same manner.

⁵⁶ *Ibid.*, p.620.

⁵⁷ M.Heper, 'Center and Periphery in the Ottoman Empire with Special Reference to the Nineteenth Century', *International Political Science Review*, 1/1(1980):81-105, at 92. Inalcik, 'Sened-i Ittifak ve Gulhane Hatt-i Humayunu', p.620.

constitutional rights.⁵⁸ Saving the state and avoiding the disintegration of the Empire was the principal aim of the Young Turk patriots.⁵⁹ Values like 'freedom' and 'rights' constituted a secondary concern for them, and worth respecting insofar as they served the principal concern, that is, 'integrity of the state'.⁶⁰ This attitude is perhaps understandable in a situation where the Empire faced the danger of dismantling under the pressure of growing nationalist movements.⁶¹ It however goes beyond this kind of 'emergency' situation. The rhetoric of 'saving the state' created a notorious tradition which still haunts the political and legal life of modern Turkey. This rhetoric not only serves as a pretext for justifying military interventions in politics, but it is also used in 'civil' periods to curb the political opposition and basic political rights.⁶² It helps to thicken the dark violent wall between the political elites, 'patriots', and the Others, 'traitors', who aim to undermine the very foundation of the state.⁶³ The civil and military elites loaded with the mission of 'saving the state' created serious barriers to freedom and political rights of the individuals, and therefore ironically to their own mission.

The fathers of the modern state elite, the Young Ottomans, began to argue for limitation of the Sultan's authority and the introduction of a parliament as the only way out of the crisis.⁶⁴ They were motivated by the contention that the adoption of the Western political institutions

⁵⁸ Mardin, *Jon Türklerin Siyasi Fikirleri*, p.301.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ For the advent of nationalism within the Ottoman Empire, see, e.g., W.W.Haddad and W. Ochsenwald (eds.), *Nationalism in a Non-National State*, Columbus: Ohio State University Press, 1977.

⁶² The most recent victim of this attitude was Yasar Kemal, a renowned novelist, who condemned the ongoing war between the State and PKK (Kurdish Workers Party). Kemal was prosecuted under the Article 8 of the Prevention of Terrorism Act of 1991 (No.3713) which bans any propaganda against the 'integrity of the state'. For the original version of Kemal's article for which he is condemned see Y.Kemal, 'Zulmün Artsin', in *Düşünce Özgürlüğü ve Türkiye*, Istanbul: Can Yayinlari, 1995, pp.65-78.

⁶³ See N.Göle, 'Liberal Yanilgi', *Türkiye Günlüğü*, 24(Fall 1993):12-17, at 15.

⁶⁴ See E. Kedouire, *Politics in the Middle East*, Oxford: Oxford University Press, 1992, p.66.

were indispensable for the salvation of the state. Particularly they required a political institution, parliament, that would be formed on the British model.⁶⁵ Midhat Pasha himself, the architect of the Constitution of 1876,⁶⁶ asserted that 'Turkey, in a word must be governed by constitutional regime, if it is desired that serious reforms be carried out... it is the only remedy for our ills...'⁶⁷

This remedy must be put into effect with the help of the Great Powers. It is indeed necessary to note that the reform movements of the Ottoman period emerged under the immense pressure of the Western states.⁶⁸ As Devereux has stated, 'to advance their own political interests, the European Powers began increasingly to assert a self-proclaimed right to intervene in the Empire's affairs'.⁶⁹ On the eve of the promulgation of

⁶⁵ These requirements were expressed in a document known as the 'Manifesto of Muslim Patriots' which were written and sent to the leading political leaders in Europe. After stating the plight of the Empire, the Manifesto laid down their proposals for the solution. It says, among others, that: 'What we require, in a word, is a Parliament on the English model. It will certainly not have at first the perfection which the system has attained in England, but it will, as we have said, prepare a better future.' Quoted in R. Devereux, *The First Ottoman Constitutional Period: A Study of the Midhat Constitution and Parliament*, Baltimore: The Johns Hopkins Press, 1963, p.32.

⁶⁶ For the text of the 1876 Constitution see *Düstur*, 1.Tertip, Volume 4, pp.4-20; Kili and Gozubuyuk, *Türk Anayasaları*, pp.31-44. The English translation can be found in Great Britain, House of Commons, Accounts and Papers, Vol.LXC (1877). Cmd.1641. Turkey. No.2 (1877). Correspondence Respecting the Conference at Constantinople and the Affairs of Turkey, 1876-77, pp.123-30.

⁶⁷ Midhat Pasha, 'The Past, Present, and Future of Turkey', *The Nineteenth Century*, 3/16(June 1878):981-1000, at 992-3. For similar arguments in favour of constitutional regime see also Esat Efendi, *Hukümet-i Mesrûta*, İstanbul: 1876, printed in T.Z.Tunaya, 'Osmanlı Anayasacılık Hareketi ve 'Hukümet-i Mesrûta'', *Bogazici Üniversitesi Dergisi*, 6(1978): 227-237, at 230-237.

⁶⁸ E.E. Ramsaur, *The Young Turks: Prelude to the Revolution of 1908*, Princeton: Princeton University Press, 1957, p.8. See also Lewis, *The Emergence of Modern Turkey*, p.116; Davison, 'The Advent of the Principle of Representation in the Government of the Ottoman Empire', pp.100-1.

⁶⁹ Devereux, *The First Ottoman Constitutional Period*, p.24.

the first constitution, a conference of ambassadors was held in Istanbul for the purpose of drafting a reform programme.⁷⁰

Thus the 1876 Constitution was not only the culmination of the reform movements that started in the beginning of the nineteenth century, but it was also the product of the Sublime Porte to avoid impending European intervention.⁷¹ It was, in the words of Norman Bentwich, 'an attempt to secure the good-will of Great Britain and the other Liberal States for the Ottoman Empire'.⁷² This is not to say however that the 1876 Constitution was induced by the Great Powers.⁷³ It was the product of the combination of internal and external factors of the time.

In the end, Sultan Abdulhamid promulgated the Constitution in 1876 with the following statement.

[This] fundamental charter establishes the prerogatives of the Sovereign, freedom, the civil and political equality of the Ottomans before the law, the powers and responsibilities of ministers and officials; the right of control exercised by

⁷⁰ *Ibid.*, p.8.

⁷¹ *Ibid.*, p.21; Karatepe, *Darbeler, Anayasalar ve Modernleşme*, p.67.

⁷² N. Bentwich, 'The Turkish Constitutions, 1876-1942', *Contemporary Review*, 923(Nov. 1942): 273-78, at 273. See also M.Kemal, *Ataturk'un Soylev ve Demeçleri I*, 4.Baski, Ankara: Turk Inkilap Tarihi Enstitüsü Yayınları, 1989, p.221.

⁷³ It is true that relations with the neighbour states exert a considerable impact on the constitutional development of the states. (See O.Hintze, 'the Formation of States and Constitutional Development: A Study in History and Politics', in *The Historical Essays of Otto Hintze*, ed. by F.Gilbert, New York: Oxford University Press, 1975, pp.157-178.) Typical examples of such an external influence on our constitutional development can be seen in the promulgation of the *hats* of the Tanzimat by which non-muslim subjects of the Empire were granted equal rights. (See, e.g., E.Z.Karal, 'Gulhane Hatt-i Humayununda Batinin Etkisi', *Belleten*, 28/112(1964):581-601, at 582, and K.H. Karpas, 'Transformation of the Ottoman State, 1789-1908', *International Journal of Middle East Studies*, 3(1972):243-281, at 259.) However, the Western attitude towards the constitutional development of the Ottoman Empire was not always supportive or affirmative. Indeed, they were sometimes indifferent to the establishment of a constitutional and parliamentary regime. See H. Temperley, 'British Policy Towards Parliamentary Rule and Constitutionalism in Turkey (1830-1914)', *Cambridge Historical Journal*, 4(1933):156-191, and Ramsaur, *The Young Turks: Prelude to the Revolution of 1908*, pp.143-148.

Parliament; the complete independence of the courts; the effective balancing of the budget; and administrative decentralization in the provinces, while safeguarding the central government's functions and power of decision.⁷⁴

Whatever the causes behind the promulgation of the Constitution, this was an important step in the constitutional protection of individual rights. The Constitution enumerated the basic rights of individuals. It reemphasised the equality of all Ottoman subjects before the law, and provided all Ottomans with 'the same rights and duties toward the country without prejudice regarding religion'. (Article 17). Article 26 of the Constitution 'completely and absolutely' prohibited torture in any form.⁷⁵ The Constitution was however not very generous with respect to political rights. It is true that freedom of press was guaranteed (Article 12). Freedom of association was also recognised under Article 13, but it appeared that this right was limited to commercial and cultural associations. As Devereux noted, 'by implication at least', it did not extend to the formation of political organisations.⁷⁶ According to Tunaya, 'freedom of thought, freedom of association and of assembly' were not to be found in the 1876 Constitution.⁷⁷ Perhaps the most radical change was the introduction of the right to political participation, albeit limited in its application. With the Constitution, Devereux observed, 'the Sultan became less than absolute and the right of the people to share in their government was recognized.'⁷⁸ The Constitution however did not provide any institutional and structural means to protect these rights against the sovereign.⁷⁹ In any case, it did not live long enough to realise the rights and freedoms guaranteed⁸⁰.

⁷⁴ Quoted in Kedourie, *Politics in the Middle East*, p.58.

⁷⁵ See *Düstur*, 1.Tertip, Vol.4, p.5, and p.6.

⁷⁶ *Ibid.*, p.76.

⁷⁷ T.Z.Tunaya, *Türkiye'de Siyasal Partiler*, Cilt III: *İttihat ve Terakki*, İstanbul: Hurriyet Vakfı Yayınları, 1989, p.393.

⁷⁸ Devereux, *The First Ottoman Constitutional Period*, p.15.

⁷⁹ Karatepe, *Darbeler, Anayasalar, ve Modernleşme*, p.95.

⁸⁰ *Ibid.*

Sultan Abduhamid dismissed and banished Midhat by exercising his authority under the Article 113 of the Constitution.⁸¹ Despite Midhat's dismissal the first election of deputies was completed, and the first session of the Ottoman Parliament was held on March 19, 1877.⁸²

The deputies of the Parliament were elected in accordance with the Provisional Electoral Regulation.⁸³ According to Regulation (Article 2), the elections had to be indirect because of the necessity to convene a parliament as quickly as possible. Since the election of the deputies by the people directly would delay this process, they would better be elected by the members of the provincial councils. The reason for the adoption of such a manner was rather interesting. These members of the Councils 'which, being already the result of popular suffrage, shall give to the choice made by them... the same value as that which the direct suffrage of the nation imparts'.⁸⁴ Notwithstanding the method of election, it is argued, the deputies 'proved themselves to be quite representative'.⁸⁵ The interests of the various parts of the Empire were more or less fairly represented in the Parliament.⁸⁶

The Parliament, established under the 1876 Constitution, failed to impose effective limits on the powers of executive, the Sultan. This was

⁸¹ The last sentence of this famous article reads as follows: 'Hukümetin emniyetini ihlal ettikleri idare-i zabitanın tahkikat-i mevsukası üzerine sabit olanları memalik-i mahruse-i sahaneden ihrac ve teb'id etmek munhasıran zat-i hazret-i padisahının yed-i iktidarındadır'. (The Sultan has the power to dismiss and banish those who violate the security of the government)

⁸² See Devereux, *The First Ottoman Constitutional Period*, p.108.

⁸³ This electoral regulation was in fact prepared before the Constitution came to effect. This revealed that Midhat wanted to convene a Chamber even before the official promulgation of the Constitution. See E.Ozbudun, 'Development of Democratic Government in Turkey: Crises, Interruptions and Reequilibrations', in E.Ozbudun(ed.), *Perspectives on Democracy in Turkey*, Ankara, 1988, p.6.

⁸⁴ Devereux, *The First Ottoman Constitutional Period*, p.124.

⁸⁵ *Ibid.*, p.126.

⁸⁶ The Muslims, whose population was greater than any other religious community in the Empire, had a majority in the Parliament. Nevertheless, the Christians and Jews were also better represented in accordance with their ratio in the country. For the distribution of deputies by religion as well as province and gender see *ibid.*, pp.138-145.

not only due to the indirect election of the deputies, but also to the fact that the Constitution could not provide the necessary means to restrict the authority of the Sovereign.⁸⁷ Apart from Article 113 which empowered the Sultan to expel anyone suspected of constituting a danger to the security of the state, the Constitution had other provisions giving effective and potentially dangerous powers to the executive.⁸⁸ Of these the most significant one provided that the Parliament could only meet when the Sultan summoned it, and could be suspended at his will. (Articles 44 and 35 respectively).⁸⁹

Using that 'right' granted by the Constitution itself, Abdulhamid suspended the Parliament on 14 February 1878 until the Young Turk Revolution of 1908.⁹⁰ The decision of the Sultan as to dissolve the Parliament was 'determined by the events and conditions he witnessed following his accession'.⁹¹ Facing with the economic, social and military difficulties, Abdulhamid was convinced that effective government could be achieved only through centralised rule based on the unification of different groups, and that thus the Empire was not ready for a parliamentary system.⁹² As Kedouire pointed out, during his three decades rule Abdulhamit achieved a relatively stable and effective administration through occasional use of force against his 'enemies'. And 'he continued the policy of modernization and centralization which had been the hallmark of the *tanzimat*'.⁹³

⁸⁷ Kedourie, *Politics in the Middle East*, p.69, and Karatepe, *Darbeler, Anyasalar ve Modernlesme*, p.95.

⁸⁸ The Parliament had no power to pass legislation contrary to the sovereign will of the Sultan. (See articles 53 and 54.) Article 7 of the Constitution granted the Sultan the power to dissolve the Parliament.

⁸⁹ *Düstur*, 1.Tertip, Vol.4, pp.7-9.

⁹⁰ Kedourie, *Politics in the Middle East*, p.73.

⁹¹ Shaw & Shaw, *History of the Ottoman Empire and Modern Turkey*, Vol.II., p.212.

⁹² *Ibid.*, pp.212-3.

⁹³ Kedourie, *Politics in the Middle East*, p.72.

However, a group of westernised young officers, came to known as Young Turks, (*Jon Turks*)⁹⁴ began to raise their voice with the same mission of the 'saving the state' at their heart. They were, according to Ahmad, 'liberals in the tradition of nineteenth century Europe and took their inspiration from France and England'.⁹⁵ Ramsaur describes the 'liberalism' of Young Turks as 'rudimentary and ill-digested liberalism acquired from Western Europe'.⁹⁶ As Parla rightly puts it, these judgements which seem to derive from the 'superficial constitutionalism' of the Young Turks are misleading, and they did not capture the true nature of Young Turks' political thought.⁹⁷ In fact, as we stressed before, the liberal values were not the concern of the reformists in the Empire. They were preoccupied with the 'reason of state'.⁹⁸ The Young Turks were no exception in this respect. Parla asserts that 'their political ideology was by definition anti-liberal...authoritarian and in most cases proto-fascistic'.⁹⁹ Therefore, Ramsaur comes to grips with the political thought of Young Turks when he calls them 'pseudo-liberals'.¹⁰⁰

The social and cultural characteristics of the Empire inevitably played a decisive role in shaping the political and social ideas of Young Turks.¹⁰¹ The strong tradition of 'community' (inspired from the notion of *ummah*),¹⁰² led the Young Turks to seek for an embodied national (*milli*) culture which does not value the individual, and is therefore

⁹⁴ For the connotations of the words 'Young' (*Genc*) and 'New' (*Yeni*), in the 19th century reform movements see B. Lewis, *The Political Language of Islam*, Chicago and London: The University of Chicago Press, 1988, pp.16-17.

⁹⁵ F. Ahmad, 'Great Britain's Relations with the Young Turks, 1908-1914', *Middle Eastern Studies*, 2(July 1966): 302-330, at 305.

⁹⁶ Ramsaur, *The Young Turks: Prelude to the Revolution of 1908*, p.147.

⁹⁷ T. Parla, *The Social and Political Thought of Ziya Gokalp, 1876-1924*, Leiden: E.J.Brill, 1985, p.21.

⁹⁸ See note 56ff above.

⁹⁹ Parla, *The Social and Political Thought of Ziya Gokalp*, p.21.

¹⁰⁰ Ramsaur, *Young Turks*, p.3.

¹⁰¹ Mardin, *Jon Turklerin Siyasi Fikirleri*, p.307-308.

¹⁰² The term '*ummah*' refers to 'an Islamic community, nation or a group'. See A.Hussain, *Beyond Islamic Fundamentalism: The Sociology of Faith and Action*, Leicester: Volcano Press, 1992, p.x.

'authoritarian' in this sense.¹⁰³ This anti-liberal ideology facilitated the establishment and consolidation of the authoritarian and despotic regime of the Young Turks.

With the aim of toppling the 'oppressive' regime of the Sultan, these 'pseudo-liberals' established an organisation called the Committee of Union and Progress (CUP)¹⁰⁴ which would dominate the political arena from 1908 until the end of the First World War. The Committee left a legacy of notorious despotism, and authoritarianism of political elites.

The Second Constitutional Period (1908-1918)

The activities of the Young Turks resulted in the Revolution of 1908 which started the second period of the parliamentary system. This period differed from the previous constitutional period in one important respect. It introduced the idea of organized political parties and party competition.¹⁰⁵ This was undoubtedly a significant step toward the realization of political rights in its western sense. The practice, however, proved that such a development was strictly limited, if not absent.

The CUP won a victory in the first parliamentary election held in 1908. The main opposition party, the Liberal Union Party (*Ahrar Firkasi*), was also a faction of the Young Turks movement.¹⁰⁶ Elections remained

¹⁰³ Mardin, *Jon Turklerin Siyasi Fikirleri*, pp.307-308.

¹⁰⁴ For the political history and organisational structure of the CUP, see I.Temo, *Ittihad ve Terakki Anilari*, Istanbul: Arba, 1987, and Tunaya, *Turkiye'de Siyasal Partiler, Cilt III: Ittihat ve Terakki*; F.Ahmad, *The Young Turks: The Committee of Union and Progress in Turkish Politics, 1908-1914*, Oxford: Clarendon Press, 1969, and M.S.Hanioglu, *Osmanli Ittihat ve Terakki Cemiyeti ve Jon Turkler*, Istanbul: Iletisim, 1985.

¹⁰⁵ Ozbudun, *Development of Democratic Government in Turkey*, p.8.

¹⁰⁶ There were two main factions in the Young Turk movements: Unionists and Liberals. The former, the members of the CUP, generally came from the lower classes of society, while the latter belonged to the upper classes. The liberals advocated the constitutional monarchy controlled by the high bureaucrats, and expected Britain as 'the mother of parliaments' to support their regime. The Unionists, though constitutionalists like liberals, were inspired by the examples of Germany and Japan. They aimed at creating a new regime which will bring about 'union and progress' in the Ottoman Empire. See F. Ahmad, *The Making of Modern Turkey*, London: Routledge, 1993, pp.33-34. The views of

indirect; the deputies were elected by those who were themselves elected by the people.¹⁰⁷ In a short time many political parties, from Islamic Unity to the Ottoman Socialist Party¹⁰⁸, were formed, but none of them could participate openly in politics because of the martial law¹⁰⁹ introduced after a vain attempt of counter-revolution known as *31 Mart Vakasi*.¹¹⁰ Most of the opposition groups came together under the new party, the Freedom and Accord Party (*Hurriyet ve Itilaf Firkasi*) formed in 1911.¹¹¹

However, the election of the 1912 was hardly 'free' and competitive. It came to be called the 'big stick election' because of the pressures and restrictions exerted by the CUP government. In the election of 1914 no opposition party was allowed to compete.¹¹² In fact, the Empire witnessed one of its most severe dictatorships during the period between 1913, when the CUP carried out a coup d'etat to directly rule, and 1918.¹¹³ This means that the constitutionalism movements of the Ottoman Empire ended up in failure.

The Failure of the Constitutionalism: An Appraisal

The Constitution of 1876, as we have already seen, lacked institutional means to impose certain restrictions on the powers of the Sultan. Even

Liberal faction in the CUP, especially Prens Sebahattin's liberal idea of decentralisation, are certainly worth analysing because they sowed the seeds of liberal tradition in Turkey. However, they have never played an important role, if any, in shaping the political and constitutional system of Turkey. They always remained in opposition, and failed to find a widespread public sympathy and acceptance. For the reasons of this 'failure' see Mardin, *Jon Turklerin Siyasi Fikirleri*, pp.287-299.

¹⁰⁷ Shaw & Shaw, *History of the Ottoman Empire and Modern Turkey*, Vol.II., p.277.

¹⁰⁸ The Ottoman Socialist Party was an underground party like The Ottoman Radical Reform Party. They both were suppressed and driven out to Europe by the army. See *ibid*, p.283.

¹⁰⁹ *Ibid*.

¹¹⁰ For the *31 Mart Vakasi* (the Incident of 31 March) see Tuncay, 'New Turkish Constitutional Law System', p.31; Tunaya, *Turkiye'de Siyasal Partiler*, Cilt III: *Ittihat Terakki*, pp.406-409.

¹¹¹ See T.Z.Tunaya, *Turkiye'de Siyasi Partiler, 1859-1952*, Istanbul, 1952, pp.315-344.

¹¹² See Ahmad, *The Young Turks*, pp.143-44.

¹¹³ See Tuncay, 'New Turkish Constitutional Law System', p.36.

if it had limited the authority of the Sultan, this would not destroy 'the absolute power' itself. Rather it would shift the power from the Sultan to the officials.¹¹⁴ The obvious example of such a shift practically can be seen in the aftermath of the Young Turk Revolution of 1908.

[I]t gradually became more and more evident not that constitutionalism had replaced autocracy, but that army officers, engaging in successive *coups d'etat*, had become the sole legatees of the Sultan's autocracy....They were legatees whose power was more extensive, more ruthlessly used, and more remote from the governed than that of the sultans.¹¹⁵

The constitutional reforms of the Empire failed to introduce a limited government, and to secure the fundamental political rights of individuals. One of the reasons for this failure lies in the destruction of the traditional social and political structure of the Ottoman Empire. It was based on a 'check and balance' system.¹¹⁶ The traditional Ottoman state was decentralised and limited. Most of the social and legal matters were left to the '*millets*', (i.e. religious communities) to be dealt with.¹¹⁷ Toynbee and Kirkwood have well summarised the functions attributed to these '*millets*'. They did not only perform 'ecclesiastical functions' for their respective members, but also

registered births, deaths, marriages and wills; maintained law-courts to decide cases of 'personal status' as between their own members and even to deal with ordinary civil litigation in which both parties were members of the same millet; and raised taxes to pay their way; and these functions which in the West would be regarded as attributes of sovereignty, and as such, would be jealously monopolized by the state, were expressly delegated to the millets by the Ottoman Government, which in the

¹¹⁴ Kedourie says that one of the achievements of Abdulhamit was to reverse 'the tendency for power to flow from the Sultan to the officials- a tendency which, in a sense, culminated in Midhat's coup d'etat'. Kedourie, *Politics in the Middle East*, p.72.

¹¹⁵ *Ibid.*, p.74. Cf. Mango, *Turkey*, p.29.

¹¹⁶ See S.J.Shaw, 'Some Aspects of the Aims and Achievements of the Nineteenth Century Ottoman Reformers...', p.33. See also S. Sener, *Osmanli'da Siyasi Cozulme*, pp.63-44

¹¹⁷ See C.H.Dodd, *Nations in the Ottoman Empire: A Case Study in Devolution*, Hull: Hull Papers in Politics, 1980, pp.1-13, and S.R.Sonyel, *Minorities and the Destruction of the Ottoman Empire*, Ankara: Turkish Historical Society Printing House, 1993, p.5, 445.

fields which it thus assigned to the millets, upheld their authority by the sanction of its own political and military force.¹¹⁸

This situation began to change in the period of *Tanzimat*. The Ottoman Empire became more centralised than ever. The central government took over most of the functions that previously belonged to the 'millets' or economic guilds. All the legislative, executive, and judicial powers, which had been divided in the old check and balance system, were also collected in the hands of the central government.¹¹⁹ This resulted in 'a kind of autocratic and unchallenged control' used by the officials over the subjects of the Empire.¹²⁰ This was the 'dictatorial aspect' of the *Tanzimat* that denied the 'older freedoms inherent in a decentralised system', and failed to introduce the idea of participation in government.¹²¹ This was also the case for the constitutional periods of the Young Turks.

Nevertheless, as Mardin asserts, the existence of the relatively autonomous 'millets' and of the provincial notables in the Empire was not sufficient for the emergence of a 'civil society' in its Hegelian sense, 'a part of society that could operate independently of central government and was based on property rights'.¹²² The Ottoman Empire did not have 'intermediate' or 'secondary' structures that would provide a link between the subjects and the Sovereign.¹²³ The lack of such a link, according to Mardin, would constitute difficulties for Turkey 'in the practice of modern democracy to the extent that the latter depends on this missing link, as also in taking over concepts of politics which had been built on a different social foundation'.¹²⁴

¹¹⁸ A.J. Toynbee and K.P. Kirkwood, *Turkey*, London: Ernest Benn, 1926, p.28. Cf. J. Schacht, *An Introduction to Islamic Law*, Oxford: Oxford University Press, 1964, p.92.

¹¹⁹ Shaw, 'Some Aspects of the Aims and Achievements of the Nineteenth Century Ottoman Reformers...', p.33.

¹²⁰ Shaw stressed that 'no one, even the Sultan' had ever held such a control over the subjects. *Ibid.*

¹²¹ *Ibid.*

¹²² See S. Mardin, 'Power, Civil Society and Culture in the Ottoman Empire', p.264.

¹²³ *Ibid.*, p. 264 and 279.

¹²⁴ *Ibid.* See also I. Küçükömer, *Halk Demokrasi İstiyor mu?*, İstanbul: Bağlam Yayıncılık, 1994, pp.56-57.

Another reason for the failure of constitutionalism can be found in the 'elitist' nature of reformers. From the very beginning, Turkish westernisation has been an elitist movement, gaining the character of 'revolution from above'.¹²⁵ In fact, in the words of Toynbee, it 'began as an artificial movement on the part of a Government, not as a spontaneous movement among a number of private individuals'.¹²⁶ The inevitable consequence of this was the dependence of the movements on the personal character of a few reformers,¹²⁷ like Midhat Pasha, who lacked the support of the masses.¹²⁸

This elitist attitude was particularly true of the reformers of the *Tanzimat* who were labelled by the Young Turks as 'hereditary aristocrats'.¹²⁹ The Young Turks, many of whom came from provincial or lower-class origin,¹³⁰ appeared to be 'anti-elitist', identifying themselves with the lower-classes.¹³¹ This 'anti-elitist' orientation,

¹²⁵ I use the phrase 'revolution from above' in the sense that it refers to the destruction of the *ancient regime* organised and performed by the military and civil bureaucrats without mass participation. On the contrary, 'revolution from below' involves a mass mobilization of the 'oppressed' groups. The Kemalist Revolution and the Iranian Revolution respectively constitute the typical examples of two kinds of revolutions in our century. See E.Ozbudun and A.Kazancigil, 'Introduction', to *Ataturk: Founder of a Modern State*, London: C.Hurst & Company, 1981, p.5; E.Ozbudun, 'Established Revolution Versus Unfinished Revolution: Contrasting Patterns of Democratization in Mexico and Turkey' in S.P.Huntington and C.H.Moore (eds.), *Authoritarian Politics in Modern Society: The Dynamics of Established One-Party Systems*, New York: Basic Books, 1970, p.390. For an empirical and conceptual analysis of 'revolution from above' see also B.Moore, *Social Origins of Dictatorship and Democracy: Lord and Peasant in the Making of the Modern World*, Harmondsworth: Penguin Books, 1966, esp. pp.433-453; E.K.Trimberger, *Revolution From Above*, New Brunswick: Transaction Books, 1978; F.Halliday and M.Molyneux, *The Ethiopian Revolution*, London: Verso, 1981, esp. pp.30-31.

¹²⁶ Toynbee and Kirkwood, *Turkey*, , pp.40-41.

¹²⁷ *Ibid*, p.49.

¹²⁸ When the Sultan dismissed Midhat the people of Istanbul did not 'react vigorously to his dismissal'. See Devereux, *The First Ottoman Constitutional Period*, p.108.

¹²⁹ Mardin, 'Power, Civil Society and Culture in the Ottoman Empire', p.277.

¹³⁰ See Mardin, *Jon Turklerin Siyasi Fikirleri*, p.70.

¹³¹ Mardin, 'Power, Civil Society and Culture in the Ottoman Empire', p.277.

however, did not make their movement 'democratic'.¹³² Despite their initial claim to bridge the cultural gap between the ruler and ruled,¹³³ The Young Turks eventually showed a notorious example of distrust of the ruled, common people (*halk*).¹³⁴ Therefore, the political elite¹³⁵ was reluctant 'to accept the political participation of large masses'.¹³⁶

The 'military mentality' of the reformers was another decisive factor in the fate of constitutionalism. This mentality was inevitably authoritarian by its nature, and as such incompatible with liberal ideas like limited government and individual rights. Dodd made this point clear by saying that:

Deeply influenced by liberal ideas on politics and government, isolated from the realities of political life, decisive and efficient by training and temperament, the officer class [bureaucrats] often did not realize the incompatibility of their liberal ideas and their authoritarian mentality.¹³⁷

For Toynbee, the Young Turks failed because of the 'predominance of the military element which was unfitted by its profession to carry through those liberal and constructive reforms'.¹³⁸

This military element, alongside the authoritarian civil bureaucracy, is the most important legacy that Young Turks of the Empire left to their

¹³² *Ibid.*, p.275.

¹³³ For the division of the Ottoman society into two main strata, ruler and ruled see H.Inalcik, 'The Nature of Traditional Society, Turkey', in R.Ward & D.Rustow (eds.), *Political Modernization in Japan and Turkey*, Princeton: Princeton University Press, 1964, p.44.

¹³⁴ Mardin, *Jon Turklerin Siyasi Fikirleri*, p.302.

¹³⁵ According to Mardin the Young Turks conceived that only the *political* elite could and should be created, whereas in the West alongside the political elite there were intellectual, artistic, and technocratic elites. He argues that such departure from the West was in fact the product of the Ottoman social structure where people were divided into two certain groups, namely rulers and ruled. Mardin, *Jon Turklerin Siyasi Fikirleri*, pp.302-303. For a detailed account of political elite in Turkey, see F.W.Frey, *The Turkish Political Elite*, Cambridge: The M.I.T. Press, 1965.

¹³⁶ Mardin, 'Power, Civil Society, and Culture in the Ottoman Empire', p.280.

¹³⁷ C.H. Dodd, *Democracy and Development in Turkey*, London: Eothen Press, 1979, p.50.

¹³⁸ Toynbee and Kirkwood, *Turkey*, p.38.

successors in the Republic of Turkey. With its periodical coup d'etats and other institutional influences, the military today has remained the main difficulty of Turkey in adopting a 'liberal' constitution, and thus a liberal theory and practice of political rights.

CHAPTER 6- THE POVERTY OF THE IDEOLOGY: KEMALISM AND POLITICAL RIGHTS

Kemalism is the official ideology of the State in Turkey.¹ It is also considered as an 'ultra-constitutional' positive norm on which the Turkish constitutional and legal system are based.² Kemalism is, as Berkes points out, the 'legal foundation of the modern Turkish regime'.³ From this it follows that every single provision of the Constitution and even act of Parliament has to be in compliance with the ideology of Kemalism⁴ or 'Ataturkculuk' as some tend to call it.⁵

¹ See S. Yerasimos, 'The Monoparty Period', in I.Schick and E.O. Tonak (eds.), *Turkey in Transition: New Perspectives*, New York & Oxford: Oxford University Press, 1987, p.66, and U. Cizre-Sakallioglu, 'Kemalism, Hyper-Nationalism and Islam in Turkey', *History of European Ideas*, 18/2(1994):255-270, at 256.

² A.Duran, 'Anayasal Duzende Ataturk Devrimleri ve Ulusculuk', in *Bildiriler ve Tartismalar*, Ankara: T.C. Is Bankasi Kultur Yayinlari, 1983, p.162.

³ N.Berkes, *Turk Dusununde Bati Sorunu*, Ankara: Bilgi Yayınevi, 1975, p.138.

⁴ See M. Ozyoruk, *Idare Hukuku Dersleri*, Ankara, 1976, p.50.

⁵ Erdogan, for instance, makes a distinction between 'Kemalism' and 'Ataturkculuk'. For him, while the former represents a relatively elitist and authoritarian model, the latter stands for a more democratic and pragmatic model. (M.Erdogan, *Liberal Toplum Liberal Siyaset*, Ankara: Siyasal Kitabevi, 1993, p.169). Such a distinction appears to be arbitrary and misleading. In fact, there is no such thing as 'Ataturkculuk' or 'Ataturkism'. Even if some prefer to use the term 'Ataturkculuk' it will turn out to be another name for the ideology of Kemalism, not a different model. The term Kemalism or rather Kamalism was printed in the 1935 programme of the R.P.P. of which Ataturk was the founder and eternal leader. (The word Kemalism became Kamalism as a result of the Turcification of the language. See M. Tuncay, 'Ataturk'e Nasil Bakmalı', *Toplum ve Bilim*, 4(Winter 1978), p.89.). The incorporation of the term 'Kamalism' into the R.P.P. Programme, in the life time of Ataturk, as Parla emphasises, rules out any possible historical and analytical foundation for the claim that these two terms are different. See T. Parla, *Turkiye'de Siyasal Kulturun Resmi Kaynaklari*, Vol. 3: *Kemalist Tek Parti ideolojisi ve CHP'nin Altı Oku*, Istanbul: İletişim Yayınları, p.23; see also A.Mumcu, 'Ataturkculuk Ideolojisi (Ataturkcu Dusunce Sistemi)', in *Ataturkcu Dusunce*, Ankara: Ataturk Arastirma Merkezi, 1992, p.175, and P.Hughes, *Ataturkculuk ve Turkiye'nin Demokratikleşme Sureci*, Istanbul: Milliyet Yayınları, 1994, p.13.

The principles and reforms of Atatürk⁶ have been protected by separate provisions of the Constitution.⁷ Apart from the Turkish Constitution, an Act of Parliament was too passed to give protection to Atatürk himself, or rather his 'memory'.⁸ The Protection of Atatürk Act⁹ is still in force¹⁰, and many people are being prosecuted and sentenced for violating it.¹¹ Article 1 of this Act reads that 'anyone who insults or swears at the memory of Atatürk will be punished with imprisonment for up to three years'.¹² In a recent case, the

⁶ M.Kemal was given the surname Atatürk (Father Turk or Father of the Turk) in 1934. See Lord Kinross, *Atatürk: The Rebirth of a Nation*, London: Weidenfeld & Nicolson, 1990, p.474, and M.Bright, 'Turkey: From Empire to Modern State', *The Guardian*, 12 April 1994, p.10.

⁷ In 1937 the principles of Kemalism were written in the 1924 Constitution. The 1961 and the 1982 Constitutions did not only mention these principles as the basic norms of the state (Articles 2 of the both Constitutions), but they also devoted a particular article to the protection of the Kemalist reforms. (Article 153 and Article 174 respectively). They also expressly indicated that it is impossible to claim that these principles and reforms are not in compliance with the Constitution. For the texts of these articles, see S.Kili and S.Gozubuyuk, *Türk Anayasa Metinleri*, Ankara: Is Bankasi Yayinlari, 1985, p.111, 224 and 312.

⁸ This law, commonly known as 'Atatürk'u Koruma Kanunu' (The Protection of Atatürk Act) came into force in 1951, thirteen years after Atatürk died.

⁹ *Atatürk aleyhine Islenen Suclar Hakkinda Kanun*, No. 5816, Resmi Gazete (Official Gazette), 31 July 1951.

¹⁰ In the course of drafting the 1982 Constitution, a member of the Constitutional Commission raised the issue of including this Act into the Article 174 of the Constitution which protects the Kemalist Reforms in order to grant more, firm, protection to Kemalism. Orhan Aldikacti, the Chairman of the Commission, rejected this proposal on the ground that the Protection of Atatürk Act is already in force and its unconstitutionality cannot be raised. See *Anayasa Komisyonu Gorusme Tutanaklari*, (1982), Vol.14., p.202.

¹¹ M.Kacar was one of the latest victims of the Protection of Atatürk Act. During the 10 November ceremony held in the mausoleum of Atatürk, Kacar told the members of protocol that 'the idols cannot save you'. He was tried and found guilty under the Articles 1/1 and 2/1 of the Act. He was sentenced to 4 years and 6 months for insulting the memory of Atatürk. See *Cumhuriyet*, 15 February 1995. In a similar vein, the Mayor of Rize, Sevki Yilmaz, said that 'I do not bow to idols, those who do must be crazy' referring to the ceremonial celebrations before the statue of Atatürk. Yilmaz's trial under this Act continues. See *Hurriyet*, 12 April 1995.

raison detre of the Act was clearly indicated. The Court, in sentencing a journalist for violating the Act, held that 'the Protection of Ataturk Act is a special law aimed at protecting not only the status of Ataturk, but also his transhuman (extrahuman) characteristics'.¹³

It is a kind of blasphemy law. Given all those legal and institutional protections, in fact, Ataturk has become the prophet of Kemalism, 'the Turkish national faith'.¹⁴ Therefore any study about political rights in the Turkish constitutional system would be found wanting without taking up the issue of Kemalism. The analysis of the Kemalist ideology is indispensable to understand the true nature of state- individual relations in Turkey. However, before going into detail about the basic tenets of Kemalism, a few remarks on the concept of ideology would be helpful.

I use the term ideology throughout this study in the sense that Karl Mannheim described it. For Mannheim there are two sorts of ideas that transcend the situation: ideologies and utopias.¹⁵

Ideologies are the situationally transcendent ideas which never succeed de facto in the realisation of their projected contents.¹⁶

In Mannheim's eyes, ideologies are the typical thought orientation of prevailing social strata that regards as utopias¹⁷ all the ideas of those in opposition.¹⁸ Ideologies are needed for legitimating and consolidating the

¹² *Ibid* . Under this Act, those who breaks or soils the statute of Ataturk can also be sentenced up to five years imprisonment.

¹³ Cited in M.Altan, 'Demokrasiyle beslenmeyen Cumhuriyet ölür...', *Sabah*, 28 Ekim 1995.

¹⁴ S.Kili, *Kemalism*, Istanbul: Robert College Publication, 1969, p.7. See also T. Akyol, "Dinazor' ve 'libos", *Pazar Postasi*, 11 Subat 1995, p.3 for an analysis of cultural background of treating Kemalism as a religion.

¹⁵ K.Mannheim, *Ideology and Utopia*, London: Routledge & Kegan Paul Ltd., 1936, p.175.

¹⁶ *Ibid* .

¹⁷ For Mannheim, utopias too transcend the situation. Yet utopias differ from ideologies 'in the measure and in sofar as they succeed through counter-activity in transforming the existing historical reality into one more in accord with their own conceptions'. *Ibid* ., p.176.

¹⁸ *Ibid* ., pp.176-177.

status quo. They help to stabilise the hegemony of the ruling groups in a given society.¹⁹

Kemalism like, any other ideology, has reproduced the conditions of 'domination' and 'hegemony'.²⁰ It exercised this reproduction by using what Althusser calls 'repressive state apparatuses' (e.g. police, army and courts) and 'ideological state apparatuses' (e.g. schools and associational institutions).²¹ Kemalist ideology therefore serves as a means for ensuring

¹⁹ *Ibid.*, p.36. For the definition of ideology in this 'critical' sense see also J.B.Thompson, *Studies in the Theory of Ideology*, Cambridge: Polity Press, 1985, p.4.

²⁰ The concepts of 'domination' and 'hegemony' are used in their Gramscian sense. This however does not necessarily mean that the Marxist model is applicable to the political and legal development of Turkey. I use these terms pragmatically, that is, to explain the situation on much more familiar grounds. According to Gramsci 'domination' denotes the supremacy of the ruling group by force or coercion. To ensure domination the ruling group uses coercive state apparatuses. 'Hegemony', on the other hand, refers to a kind of social control exercised by such institutions as schools, churches, and trade unions. For Gramsci, 'domination' and 'hegemony' correspond respectively to two parts of the state: political and civil society. He formulates the definition of the state as follows: 'State= political society + civil society, in other words hegemony protected by the armour of coercion'. (See A.Gramsci, *Selections from the Prison Notebooks*, trans. Q.Hoare and G.N. Smith, London: Lawrence and Wishart, 1971, p.263. On the concept of 'hegemony' in Gramsci's political thought see also J.V. Femia, *Gramsci's Political Thought: Hegemony, Consciousness, and the Revolutionary Process*, Oxford: Clarendon Press, 1987, pp.23-60; C. Buci-Glucksmann, *Gramsci and the State*, trans. D.Fernback, London: Lawrence and Wishart, 1980, esp.pp.47-68.) In the light of these explanations, it would not be wrong to say that the Kemalist regime has been closer to 'domination' than 'hegemony'. This is so because in Turkey the institutions of civil society, e.g. educational and religious institutions, are not autonomous; they are strictly under control of the political society.

²¹ See L.Althusser, 'Ideology and Ideological State Apparatuses (Notes towards an Investigation)', in L.Althusser, *Essays on Ideology*, London and New York: Verso, 1984, 1-60. Surely for Marxists the reproduction of the conditions of production takes place in 'infrastructure'(economic base) which determines the 'superstructure' (politico-legal and ideological base). (*Ibid.*, pp.7-10.) In our case the reproduction, as we shall see, take place in the 'superstructure' to use the Marxist dichotomy for the sake of argument. That is why, some writers did not describe Kemalist revolution as 'revolution'. For them, it was a coup d'état which did not alter the relations of production. (See C.Keyder, *State and Class in Turkey: A Study in Capitalist Development*, London & New York: Verso, 1987, p.200, and S.

the domination of the ruling group(s), and the conservation of the political regime.

Kemalism²², is composed of the principles and policies which were elaborated in both M. Kemal's speeches and the programmes of his political party, the Republican People's Party (RPP).²³ The principles of Kemalism are republicanism, nationalism, populism, reformism (or revolutionism), statism (or etatism), and laicism.²⁴ The praxis of this ideology can be found in the Reforms and other activities of Ataturk and his friends. Thus a complete picture of Kemalism can only be drawn by examining both aspects of the ideology- theory (principles) and praxis.

First, we will dwell on the principles of nationalism and populism, and show that they aimed at the creation of one 'unified and classless nation'. Second, the principle of statism will be dealt with. This will move us directly to the conceptions of state, individual and rights in Kemalist ideology. Last, but not least, the principle of secularism in Kemalist ideology will be discussed in the light of political neutrality. In underlining the basic tenets of Kemalism, together with their practical implications, we will get to grips with the main issue, that is, the compatibility of this

Bromley, *Rethinking Middle East Politics*, Austin: University of Texas Press, 1994, p.123.) Nonetheless, this does not invalidate the analogy I draw with the Althusserian conceptions. The aim of 'reproduction' in both realms is to preserve the status quo, and the interests of the ruling groups be it bourgeois or bureaucracy.

²² Some students of Turkish politics claim that Kemalism is not an ideology. It is, for them, either a 'philosophy' or 'the view about a historic event (Kemalist Revolution)'. See respectively Erdogan, *Liberal Toplum Liberal Siyaset*, pp.170-171, and N.Berkes, *Türk Düşününde Batı Sorunu*, p.66. Professor Giritli refutes these ideas. For him, those who argue that Kemalism is not an ideology are after 'an ideological vacuum in Turkish society' so that they will be able to 'fill the void with their own brand of foreign ideology'. Kemalism, Giritli maintains, is a pragmatic ideology, a 'way of life'. I. Giritli, 'Kemalism as an Ideology of Modernisation', *Annals*, 27(1981): 397- 402, at 399. Whether Kemalism can be regarded as an ideology or philosophy or a way of life has not very much significance for our study, because it would not in any way affect our arguments. I agree nevertheless with those who call it an ideology, although I certainly reject the Giritli's assertion that those who claim that Kemalism is not an ideology are in fact the 'enemies of Kemalism'.

²³ The RPP (initially People's Party) was established by M.Kemal in 1924.

²⁴ See, e.g., Y.Yücel, 'Ataturk İlkeleri', *Belleten*, LII/204(November 1988): 807-823, at 810.

ideology with the liberal constitutional model of political rights explained in the first part of the study.

Nationalism, Populism and Kemalist Solidarity

The word '*millet*' (of Arabic origin) in Turkish has been used for the equivalent of the 'nation'²⁵. This word however has undergone a radical transformation over time.²⁶ In the Ottoman Empire, it corresponded to the religious communities living in the country²⁷. Religious characteristics of the term '*millet*' remained unchanged on the eve of the establishment of the Republic. But this time it denoted all Muslim ethnic groups in the country. In his speech to the Grand National Assembly in 1920 M.Kemal made it clear that:

The people who constitute this high Assembly are not just Turk or Circassian, Kurd or Laz. They are composed of all the Islamic elements and constitute a coherent whole... Consequently the millet cannot be reduced to one element only; it is the collection of various Muslim elements [like Turk, Kurd or Circassian].²⁸

Such a religious conception eventually proved to be at odds with the desire to create a nation-state in the model of Western Europe.²⁹ The solution to this problem was the term 'the people of Turkey', unified by the bonds of

²⁵ For the evaluation of the term 'nation' see E. Kedourie, *Nationalism*, Fourth Expanded Ed., London: Blackwell, 1993, pp.5-7; S.I.Benn and R.S.Peters, *Social Principles and the Democratic State*, London: George Allen & Unwin Ltd., 1959, pp.247-251.

²⁶ For the etymological origin, and 'political' transformation of the term '*millet*' see A.Bulac, *Modern Ulus Devleti*, Istanbul: Iz Yayincilik, 1995, pp.173-197.

²⁷ See Chapter 5 above.

²⁸ M.Kemal, *Ataturk'un Soylev ve Demecleri I*, 4.Baski, Ankara: Turk Inkilap Tarihi Enstitusu Yayinlari, 1989, pp.74-75. (Reprinted in one volume by Ataturk Arastirma Merkezi, *Ataturk'un Soylev ve Demecleri I-III*, Ankara, 1989. Hereafter the references will be made to this edition.)

²⁹ Yerasimos, 'The Monoparty Period', p.69.

race, religion, and culture.³⁰ Later on the '*millet*' came to describe 'the Turkish people'³¹, dropping the 'religion' from its definition.³²

Kemalist nationalism³³ appears to be based on the assumption that there exists (or rather must be) only one nation, that is Turkish, within the boundaries of the country.³⁴ This nation, in the words of the RPP Programme, was 'the political Unit composed of citizens bound together with the bonds of language, culture, and ideal'.³⁵ The legal definition of the term 'Turkish' or 'Turk' might be used as a proof for the claim that Kemalist nationalism is by no means exclusive and chauvinistic. Under Article 88 of the 1924 Constitution, 'as regards citizenship, everyone living in Turkey is Turk irrespective of race or religion'.³⁶ The 1961 and 1982 Constitutions remained more or less the same regarding the legal definition of the word 'Turk'.³⁷

³⁰ M.Kemal, *Ataturk'un Soylev ve Demecleri I*, p.236: 'Efendiler! Türkiye halkı ırkan veya dinen ve harsen muttehit ...bir heyeti ictimaiyedir.' (Gentlemen! The people of Turkey is a social edifice unified by race, or religion and culture.)

³¹ Yerasimos, 'The Monoparty Period', p.69.

³² Indeed, M.Kemal eventually rejected the 'religion' as the definitive feature of the '*millet*'. He enumerated the 'natural' and 'historical' factors that affected the emergence of the Turkish nation as follows:

"a- Unity in political body (state); b- Unity in language; c- Unity in race and origin; d- Historical kinship (relationship); e- Moral kinship'. See A. Afetinan, *Medeni Bilgiler ve M.Kemal Ataturk'un El Yazilari*, Ankara: Turk Tarih Kurumu Yay., 1969, p.22.

³³ Nationalism was in fact another legacy left by the Young Turks of the late Ottoman Empire. In the first decade of the twentieth century, the Young Turks begun to reflect on nationalism as the only alternative to 'save' the state. See O.Akyar, 'Ataturk's Quest for Modernism', in J.M.Landau (ed.), *Ataturk and the Modernization of Turkey*, Boulder, Colorado: Westview Press, 1984, pp.46-47. See also Y.Akcura, *Uc Tarz-i Siyaset*, (1904), 2.Baski, Ankara: Turk Tarih Kurumu Yayinlari, 1987, pp.19-36.

³⁴ A.Mango, *Turkey: The Challenge of a New Role*, Westport and London: Praeger, 1994, p.31.

³⁵ Program of the People's Party of the Republic, 1935, in D.E. Webster, *The Turkey of Ataturk: Social Process in the Turkish Reformation*, Philadelphia: The American Academy of Political and Social Science, 1939, Appendix E., p.307.

³⁶ See Kili, *Turk Anayasa Metinleri*, p.128.

³⁷ See *ibid*, p.186 and 274.

Along side this formal and legal aspect of Kemalist nationalism, a close examination of the speeches of M.Kemal and his friends, and of the policy toward ethnic communities in the country will reveal a long neglected aspect of Kemalism, that is the ethnocentric³⁸, exclusive and even chauvinistic nationalism.³⁹ These ethnocentric and exclusive elements can be discerned at two interrelated levels: positive and negative. At positive level, we have seen the attempts to exalt and prove the supremacy of the Turkish race. At negative level (perhaps as the logical corollary of the former) there comes the denial of the cultural identities of other ethnic minorities.

The examples of the exalting the Turkish race are to be found in the speeches of M.Kemal⁴⁰ and his friends.⁴¹ Moreover, the so-called 'Turkish History Thesis' (*Türk Tarih Tezi*), and the Sun-Language Theory (*Güneş Dil Teorisi*) constituted important steps to 'promote national identity'.⁴² According to the former thesis:

Turks were Aryans from Central Asia, where all civilizations had originated. The Turks in due course had migrated to various parts, and brought the arts of Civilization with them. They thus founded Chinese, Indian, and Middle-Eastern civilizations. In the Middle-East, the Sumerians and the Hittites were in reality Turks, and Anatolia, where the Hittites founded civilization 4,000 years before the Christian era, was thus Turkish from prehistoric times.⁴³

³⁸ For the distinction of the ethnocentric and polycentric nationalisms, see A.D. Smith, *Theories of Nationalism*, London: Duckworth, 1971, pp.158-159.

³⁹ See Parla, *Kemalist Tek Parti ideolojisi ve CHP'nin Altı Oku*, p.210.

⁴⁰ For the samples of Atatürk's speeches about the supremacy of Turkish race see *ibid*, pp.181-182, 186-187, 190-202.

⁴¹ Among them, M. Esat Bozkurt said that : 'Let friends and foes listen, in my view Turk is the master of this country. In the fatherland of Turks, those who are not pure (genuine) Turk have only one right, that is to be servant, to be slave'. *Hakimiyet-i Milliye*, 19.9. 1930, p.3. Cited in Parla, *Kemalist Tek Parti Ideolojisi ve CHP'nin Altı Oku*, p.208.

⁴² See S.Mardin, 'Religion and secularism in Turkey', in *Atatürk: Founder of a Modern State*, p.211. See also J.M.Landau, *Pan-Turkism in Turkey: A Study in Irridentism*, Hamden, Connecticut: Archon Books, 1981, pp.75-76.

⁴³ E.Kedourie, *Politics in the Middle East*, Oxford & New York: Oxford University Press, 1992, p.288. Cf.Webster, *The Turkey of Atatürk*, p.242.

Similarly the 'Sun-Language Theory' was grounded in the idea that Turkish was the original language on earth and many other languages developed from it.⁴⁴ For Mardin these 'ideologies' were necessary means for building 'a Turkish identity'.⁴⁵ Building identities on 'mythological' foundations might be acceptable to some people. However, I must point to the other and often neglected side of this story of 'identity-building'. That is denial of others' identity.

The negative aspect of the ethnocentric nationalism seems to be common in the emergence of the nation-states.⁴⁶ In Western European countries where there exist significant ethnic minorities, the dominant people inhabiting the 'heartland' imposed uniformity on them 'either by force of arms, or by cultural domination, or both'.⁴⁷ Kemalists followed the same pattern. As Zehra Arat put it, 'in an effort to create a national identity, ethnic and linguistic differences were overlooked and cultural hegemonies were established'.⁴⁸ Indeed, Kemalist nationalism aimed to create a homogenous and unified nation state.⁴⁹ To this end, it 'fought savagely against ethnocultural and confessional distinctions, which constituted obstacles to national unity and hence to the stabilization and diffusion of central power'.⁵⁰

⁴⁴ See B. Oran, *Atatürk Milliyetçiliği: Resmi İdeoloji Disi Bir İnceleme*, 3. Basım, İstanbul: Bilgi Yayinevi, 1993, pp.273-277.; Lord Kinross, *Atatürk*, p.469. Kinross reports that 'A British diplomat was once startled by Kemal's statement that Kent was a Turkish name, and its existence in the country a proof that the Turks had conquered Britain, while one of his colleagues, an Irishman, was dubbed a Turk on the grounds that all words with the prefix 'ir' were of Turkish origin'. *Ibid.*

⁴⁵ Mardin, 'Religion and secularism in Turkey', pp.211-212.

⁴⁶ See P. Worsley, *The Third World*, 2nd Ed., London: Weidenfeld & Nicolson, 1967.

⁴⁷ *Ibid.*, p.70.

⁴⁸ Z.F. Arat, *Democracy and Human Rights in Developing Countries*, Boulder and London: Lynne Rienner Publishers, 1991, p.59.

⁴⁹ See U. Steinbach, 'Atatürk's Impact on Turkey's Political Culture since World War II', in J.M. Landau (ed.), *Atatürk and the Modernization of Turkey*, Boulder, Colorado: Westview Press, 1984, p.85.

⁵⁰ M. Arkoun, *Rethinking Islam: Common Questions, Uncommon Answers*, Boulder: Westview Press, 1994, pp.88-89.

Turkey has never been a culturally and ethnically homogenous country.⁵¹ The 'ethnic minorities' of Turkey, it is true, have been given equal legal protection as citizens⁵², provided they abdicate their ethnic particularities.⁵³ That brought about the denial and elimination of the cultural identities of these communities.⁵⁴ According to H.Kohn who is supportive of the Kemalist Revolution, the Kemalist regime wanted to solve the Kurdish problem 'by trying to make Turks of them[Kurds]'.⁵⁵ Kemalists pushed hard 'with cruel determinataion' to eliminate the Kurds and indeed all other minorities, because '[t]here was no room for national minorities in the Europeanized national state which Mustafa Kemal created'.⁵⁶

To eliminate the ethnic minorities, the dominant ideology not only imposed a ban on education in the languages of these minorities, but also it

⁵¹ See K.Berzeg, *Liberalizm Demokrasi Kapikulu Gelenegi*, Ankara: Siyasal Kitabevi, 1993, p.140. As M.Kemal indicated in early 1920s the 'millet' in Turkey did not consist of Turks only. There have been other ethnic groups like Kurds, Lazs and Circassians which make up the mosaic of the country. See note 28 above.

⁵² Article 69 of the 1924 Constitution stated that 'all Turks [people of Turkey as citizens] are equal before the law'. The 1961 and 1982 Constitutions provided the same equal status for every Turk irrespective of race, religion, etc. (Articles 12 and 10 respectively).

⁵³ Yerasimos, 'The Monoparty Period', p.69.

⁵⁴ In his book, *Ihtiyat Kuvvet*, Hikmet Kivilcimli writes that the cultural and political objective of Kemalism, as regards Kurdistan, is to deny the existence of the Kurdish people living there, and to destroy and silence them H. Kivilcimli, *Ihtiyat Kuvvet: Milliyet (Sark)*, Istanbul: Yol Yayinlari, 1979, p. 156. For the examples of official approaches to the issue of ethnic identity of Kurds, see also E. Tusalp, *Eylul Imparatorlugu, Dogusu ve Yukselisi*, 3rd Ed., Istanbul: Bilgi Yayınevi, 1988, p.265.; M.Serif Firat, *Dogu Illeri ve Varto Tarihi*, İkinci Baski, Istanbul: MEB Basımevi, 1961. In the Preface of this book, General Cemal Gursel, the chairman of the National Union Committee of 1960 Coup, and later the president of Turkey, made this 'historic' judgement about Kurds. 'There is no a distinct race in the world that can be called Kurd'. (*Ibid.*, p.4) Finally see also R. Peker, then the General Secretary of the RPP, *CHP Programinin İzahı Mevzuu Uzerinde Konferans*, Ankara: Hakimiyet-i Milliye Matbaası, 1931.

⁵⁵ H.Kohn, *Revolutions and Dictatorships: Essays in Contemporary History*, Cambridge, Mass.: Harvard University Press, 1939, p.262. See also E.Mortimer, *Faith and Power: The Politics of Islam*, London: Faber and Faber, 1982, p.139: '...the new nationalist regime denied the existence of any seperate cultures within Turkey and made the Kurds into Turks by decree.'

⁵⁶ *Ibid.*

occasionally prevented them from speaking their mother tongues.⁵⁷ The most recent example of such a ban was the Language Prohibition Act of 1983. Under this Act (Article 3) 'any kind of activity towards the use of languages, other than Turkish, as mother (first) language is illegal'.⁵⁸

The ethnocentric and chauvinistic nationalism of the Kemalist regime not only deprived some people of their rights to express themselves and their identities but at the same time it paved the way for a rather reactionary and militant Kurdish nationalism⁵⁹ leading to the armed conflict in the East and in South East of Anatolia.⁶⁰ Although the Kurdish issue is 'the biggest single political problem Turkey faces today'⁶¹, we will leave aside this 'practical' problem, and take up the broader conceptual issue of Kemalist authoritarianism. For our study, the more important consequence of Kemalist nationalism lies in its instrumental value to create a homogeneous, united and classless nation.⁶² And this brings Kemalist populism to the fore.

The Kemalist principle of populism has social and political aspects. The social aspects of it, together with the nationalism, aimed at the creation of a

⁵⁷ For the ban on speaking Kurdish, for example, during the one-party rule, and its dramatic consequences in the lives of Kurdish people see F. Baskaya, *Paradigmanın İflası*, Istanbul: Doz Yayınları, 1991, p.56.

⁵⁸ Language Prohibition Act of 1983, Law no: 2982, 19 October 1983. This law was abolished as late as in 1991.

⁵⁹ According to Abdulmelik Firat, an independent MP, the pressure of Kemalism has induced Kurds to become a nation. An interview with Firat by S. Yilmaz, *Turkish Daily News*, November 4, 1994, p.A3. See also Parla, *Kemalist Tek Parti ideolojisi ve CHP'nin Alti Oku*, p.209.

⁶⁰ The PKK (Kurdistan Worker Party) started an armed struggle against the Turkish state in 1984 with the aim of an independent separate homeland for Kurdish people.

⁶¹ Mango, *Turkey: The Challenge of a New Role*, p.31.

⁶² The objective of one homogeneous nation does not of course pertain to Kemalist nationalism only. Sekon Toure, for instance, wrote that '[i]n three or four years, no one will remember the tribal, ethnic, and religious differences which have caused so much difficulty to the country and people in the recent past... We are for a united people, a unitary state at the service of an indivisible nation.' S. Toure, *La Lutte du Parti Democratique de Guiree Pour L'Emancipation Africaine*, Conakry: Imprimerie Nationale, 1959, pp.58, 149. Quoted in P.E. Sigmund, 'Introduction' to Sigmund (ed.), *The Ideologies of the Developing Nations*, New York & London: Praeger, 1963, p.7.

solidaristic society. The roots of solidarism⁶³ in Kemalist ideology goes back to Ziya Gokalp, a prominent ideologue of the Young Turks.⁶⁴

Influenced by the positivist thinkers of the West, most notably Durkheim, Gokalp developed his corporatist social theory⁶⁵ based on the conceptions of 'collective conscience' and 'social solidarity' against the 'class conflicts'.⁶⁶ Gokalp asserted that:

If a society comprises a certain number of strata or classes, this means that it is not egalitarian. The aim of populism is to suppress the class or strata differences and to replace them with a social structure composed of occupational groups solidary with each other. In other words, we can summarise populism by saying: there are no classes, there are occupations.⁶⁷

Similarly, Kemalism began by rejecting class conflicts on the ground that there was not a class phenomenon in Turkish society. According to Atatürk:

This nation has suffered so much from political parties. In other countries, political parties have been formed particularly for economical purposes. For in these countries there exist various classes with conflicting interests. We do not have various classes here, so that the plight of (our) political parties is obvious. By the word 'People's Party' I mean all the nation [not a particular class].⁶⁸

The Programme of the People's Party reflected these thoughts of Atatürk. It maintained that:

It is one of our main principles to consider the people of the Turkish Republic, not as composed of different classes, but as a community divided into various professions

⁶³ The term solidarism is used by the students of Turkish politics to refer to the theory based on the idea that 'there was no necessary conflict between classes in modern society'. S.Mardin, 'Religion and Secularism in Turkey', p.212.

⁶⁴ See Timur, *Türk Devrimi ve Sonrası*, p.102.

⁶⁵ For a comprehensive treatment of Gokalp's theory, see T.Parla, *The Social and Political Thought of Ziya Gokalp 1876-1924*, Leiden: E.J.Brill, 1985. See also I.Tekeli and G.Saylan, 'Türkiye'de Halkçılık İdeolojisinin Evrimi', *Toplum ve Bilim*, 5-6(Summer-Fall 1978):44-100, particularly pp.61-2.

⁶⁶ Timur, *Türk Devrimi ve Sonrası*, p.102.

⁶⁷ Quoted in Z.Toprak, 'II. Mesrutiyet'te Solidarist Düşünce: Halkçılık', *Toplum ve Bilim*, 1(Spring 1977): 92-123, at 92.

⁶⁸ M.Kemal, *Atatürk'un Soylev ve Demeçleri*, Vol.II, p.101.

according to the requirements of the division of labour for the individual and social life of the Turkish people.⁶⁹

Kemalism attempted to replace social classes with occupational groups⁷⁰ 'to secure social order and solidarity instead of class conflict, and to establish harmony of interests'.⁷¹ Hence it set forth the social elements of a classless and united Turkish society. The social aspect of the Kemalist populism was doomed to failure because it involved the denial of the very existence of social classes and class interests.⁷² In his book, *Roman Gibi*, S.Sertel wrote that once he asked Ahmet Agaoglu the meaning of the 'classless society'. Agaoglu replied:

I could not understand it either. The Turkish nation is a whole, within which, however, there exist classes. A classless society can only be found in a socialist regime alone. But we are not preparing a socialist constitution.⁷³

To explain this 'idealistic' aspect of Kemalist populism, Mardin argues that it represented in fact an 'ideal' to realise in the future.⁷⁴ This judgement might shed light on our discussion whether or not political aim of Kemalism was to establish a liberal democratic regime.⁷⁵ I will argue that the Kemalist political project was not liberal democracy; it was at best a solidarist populism. I will explore this argument in the paragraphs that follow.

The political aspect of Kemalist populism represents the idea of 'the sovereignty of the people', and merges with the principle of Republicanism. For M.Kemal 'the new Turkish state is a populist state, it is the people's

⁶⁹ Webster, *The Turkey of Atatürk*, p.308.

⁷⁰ The Programme went on to list the professions. Parla argues that unlike Gokalp's classification of the occupational groups, the RPP's classification appears to be 'based on what resembled essentially a social class categorisation, despite claims to the contrary'. See Parla, *The Social and Political Thought of Ziya Gökalp*, p.64.

⁷¹ Webster, *The Turkey of Atatürk*, p.308.

⁷² See S. Selek, *Anadolu İhtilali*, İstanbul, 1968, p.173.

⁷³ S. Sertel, *Roman Gibi*, İkinci Baskı, İstanbul:Belge Yayınları, 1987, p.70. Agaoglu was himself a member of the Constitutional Commission. He was referring to the preparation of the 1924 Constitution.

⁷⁴ S.Mardin, *Makaleler I: Türkiye'de Toplum ve Siyaset*, İstanbul: İletişim, 1990, p.237.

⁷⁵ See, e.g., B.Tanor, *Türkiye'nin İnsan Hakları Sorunu II*, pp.88-89.

state. The institutions of the past established a personal state; it was a state which belonged to individuals'.⁷⁶

At the ideological level, Timur argues, the principle of populism provided a 'justification' and 'rationalisation' for Kemalist ideology to embrace 'liberalism'.⁷⁷ Although this may be true for economic 'liberalism' (of 1923-1930)⁷⁸, it would certainly be misleading to conceive that this is also the case for political liberalism. In fact, the Kemalist solidarism and populism are not compatible with liberalism in several respects.

First, whatever the merit of solidarism as a social theory regarding the liberal values of tolerance and populism⁷⁹, Kemalist solidarity appears to be exclusive both in its theory and practice. As we have already seen, it ruled out the need for other political parties on the ground that Turkish society did not have social classes, the *raison d'être* of the political parties.⁸⁰

Assuming, for the sake of argument, that Kemalism aimed at a solidarist democracy⁸¹, there are contrasts and inconsistencies between the populist conception of democracy and liberal democracy. In liberal theory, there is no necessary connection between 'right' (or morality in general) and 'the will of the people', although it deems as indispensable political participation (e.g. voting) to restrain officials.⁸² The liberal state is limited by the

⁷⁶ Kemal, *Ataturk'un Soylev ve Demecleri*, I, p.338.

⁷⁷ Timur, *Türk Devrimi ve Sonrası*, p.106.

⁷⁸ 'Economic liberalism' refers to policies which are primarily based on the principles of 'free market', and 'private enterprise'.

⁷⁹ Parla argues that though solidarism certainly rejects liberalism as a political or economic model, it nevertheless embraces the liberal values especially tolerance and pluralism. See Parla, *The Social and Political Thought of Ziya Gökalp*, p.44, 67.

⁸⁰ See note 68 above. See also I.Besikci, *Cumhuriyet Halk Fırkası'nın Programı(1931) ve Kürt Sorunu*, İstanbul: Belge Yayınları, 1991, pp.8-12.

⁸¹ On the relation of Kemalist solidarism and populism with democracy see L. Koker, *Modernleşme, Kemalizm ve Demokrasi*, İstanbul: İletişim Yayınları, 1990, pp.116-117; M.Tuncay, *T.C.'nde Tek-Parti Yönetimi'nin Kurulması (1923-1931)*, 3.Basım, İstanbul: Cem Yayınevi, 1992, p.209, and M.Altan, 'Türkiye'nin Bütün Sorunu Politik Devletten Liberal Devlete Gecmemesidir', in M.Sefer and Ç.Dizdar, 2. *Cumhuriyet Tartışmaları*, Ankara: Basak Yayınları, 1993, pp.35-36.

⁸² See W. H. Riker, *Liberalism against Populism*, San Francisco: W.H.Freeman & Company, 1982, pp.12, 14.

principles of right which grants certain freedoms and rights to individuals. Therefore, political power is not absolute and unlimited in a liberal constitutional system. The rights and liberties must be protected and guaranteed against the possible abuse of the power, whether it is vested in the hands of a monarch, or the representatives of majority of people.⁸³

In populist political theory, on the other hand, sovereignty belongs to the nation, the 'general will', and the result of the 'will of incorporated people' necessarily represents 'right' and therefore must be obeyed.⁸⁴ The champion of this populist theory was Rousseau whose ideas influenced the founder of the Republic of Turkey.⁸⁵ According to Rousseau 'liberty is obedience to a law we [the people] have prescribed for ourselves'.⁸⁶ That is, liberty is derived from the voice of people, for as Atatürk says 'the voice of the people is the voice of God'.⁸⁷ It goes without saying how vulnerable this theory is to abuse and manipulation in order to build an authoritarian regime⁸⁸ such as that of M.Kemal. Indeed, in reality Kemalist populism served only a rhetorical function, which in turn facilitated the establishment and the consolidation of a one-party dictatorship.

Statism versus Liberalism

Statism (or etatism) normally refers to the economic policy which 'called for artificial stimulation of the economy through government intervention'.⁸⁹ This policy was embraced in 1931⁹⁰ after the failure of 'liberal' economic

⁸³ See Chapter 3 above.

⁸⁴ Riker, *Liberalism against Populism*, p.11.

⁸⁵ See Koker, *Modernleşme, Kemalizm ve Demokrasi*, p.82, and Hughes, *Atatürkçülük*, p.33.

⁸⁶ J.J.Rousseau, *Social Contract*, Book I, Chapter 8. Cited in *Liberalism against Populism*, p.11.

⁸⁷ M.Kemal delivered a speech in the 1923 İzmir Economic Congress and said to the delegates : '...The words that you will utter, the measures that you will prescribe may be considered as directly spoken by the people...the voice of the people is the voice of God'. *Soylev, II*, p.99. Cited in B.Lewis, *The Emergence of Modern Turkey*, Second Edition, London: Oxford University Press, 1968, p.1968, p.466. The word *Haq* (with capital H) means God, but *hak* (with small h) is the equivalent of the term 'right' or 'justice'.

⁸⁸ Riker, *Liberalism against Populism*, p.249.

⁸⁹ M.M.Finefrock, 'Laissez-Faire, The 1923 İzmir Economic Congress and early Turkish Developmental Policy in Political perspective', *Middle Eastern Studies*, 17(July 1981): 375-93, at 375.

⁹⁰ Kili, *Kemalism*, p.94.

policies due to 'the lack of private capital, lack of technical know-how and the lack of experienced Turkish businessmen'.⁹¹ This adoption, Kili asserts, was the consequence of 'pragmatic considerations rather than the result of profound ideological debate'.⁹² Statism, however, became one of the basic principles of the Kemalist ideology.

Despite the fact that the Programme of the RPP⁹³, did not rule out private enterprises⁹⁴, some prominent politicians of the Party severely attacked the idea of liberalism. Our main concern here is not the economic aspect of statism, but these attacks deserve to be quoted to show the authoritarian and absolutist mind of the leading Kemalists.

During the Assembly debates as to whether the principle of statism should be incorporated into the Turkish constitution⁹⁵, a question was raised. If the principle was incorporated, would it be illegal to advocate liberalism against statism?⁹⁶

Semseddin Gunaltay replied to this question as follows.

A liberal will not be allowed to defend the principles of liberalism. The opposition to statism will be a crime, as any action that does not conform with the Constitution.⁹⁷

⁹¹ *Ibid.*

⁹² *Ibid.*, p.101. Cf. O.Mehmet, 'Turkey in Crisis: Some Contradictions in the Kemalist Development Strategy', *International Journal of Middle East Studies*, 15(1983): 47-66, at 50, and Rodinson, *Islam and Capitalism*, p.128.

⁹³ The Programme stated that: 'Although considering private work and activity a basic idea, it is one of our main principles to interest the state activity in matters where the general and vital interests of the nation are in question, especially in the economic field, in order to lead the nation and the country to prosperity in as short a time as possible.' Weber, *The Turkey of Ataturk*, p.309.

⁹⁴ Some writers argue that the statism served as a means to develop a bourgeoisie class and capitalism in the country. See for example D.Perincek, *Osmanli'dan Bugune Toplum ve Devlet*, Ucuncu Baski, Istanbul: Kaynak Yayinlari, 1991, p.152.; and Timur, *Turk Devrimi ve Sonrasi*, pp.122-123.

⁹⁵ Statism was written into the 1924 Constitution on 5 February 1937. See S.Kili, *Turk Anayasa Metinleri*, p.111.

⁹⁶ See I.Kucukomer, *Duzenin Yabancilasmasi: Batilasma*, p.107.

⁹⁷ Quoted in *ibid.*

Recep Peker, the General Secretary of the RPP, went even further. He stated that:

No activity shall be permitted in support of liberalism, which is the violation of statism... Liberalism is so damaging an element for the life of the Turkish State.⁹⁸

As these quotations suggested, the principle of statism 'eventually became one of sacred pillars of Kemalist ideology'.⁹⁹ It is true that statism was to be abandoned as official economic policy from time to time after the transition to the multi-party system. Yet statism is, as E.Z.Karal points out, by no means restricted to the economic sphere alone.¹⁰⁰ It has at the same time 'social, ethical, and national' aspects.¹⁰¹ In short, the Kemalist principle of statism can be seen in general terms as 'a paternalistic approach in which the state has responsibility for organising the life of the nation and finding solutions to all its problems'.¹⁰²

This paternalism is deeply embedded in a political culture where the state is symbolised by the figures of family, father (Baba) or Mother (Ana).¹⁰³ *Devlet Baba* (Father State) in this culture takes care of his immature children, the citizens. Identified himself with the state Atatürk expressed the best example of the 'father-state' attitude. To solve the internal political conflict between two prominent politicians of the Party (Fethi Okyar and İsmet İnönü) he told them: 'Now I am a father. You two are my children. Therefore you are indifferent in my eyes'.¹⁰⁴ The father is not only

⁹⁸ *Ibid* . See also F.Ahmad, *İttihatçilikten Kemalizme*, trans. F.Berktaş, İstanbul: Kaynak yayınlari, 1986, p.235.

⁹⁹ P.Dumont, 'The Origins of Kemalist Ideology', in J.M.Landau (ed.), *Atatürk and the Modernisation of Turkey*, Colorado: Westview Press, 1984, p.39.

¹⁰⁰ E.Z.Karal, 'The Principles of Kemalism', in A.Kazancıgil and E.Özbudun (eds.), *Atatürk: Founder of a Modern State*, London: C.Hurst & Company, 1981, p.21.

¹⁰¹ *Ibid* .

¹⁰² Dumont, 'The Origins of Kemalist Ideology', p.39. Cf. T.Özal, *Turkey in Europe and Europe in Turkey*, Nicosia: K.Rustem & Brother, 1991, p.292.

¹⁰³ See F.Ahmad, 'The State and Intervention in Turkey', *Turcica- Revue D'Etudes Turques*, 16(1984):51-64, at 54; A.Y.Sarıbay, *Postmodernite, Sivil Toplum ve İslam*, İstanbul: İletişim Yayınları, 1994, p.161.

¹⁰⁴ Cited in Sarıbay, *Postmodernite, Sivil Toplum ve İslam*, p.161. Even today politicians frequently use these family figures. The President Süleyman Demirel is known as 'Baba'

responsible for the needs of his 'children', but he is also in a position to expect from them almost absolute reverence and obedience. One recent allegory of the 'father- state' can be found in the statement of Fethullah Gulen Hoca, a leading religious figure in Turkey. Asked, in an interview, if his respect for state authority stems from the 'extreme' reverence he paid for his father, Gulen replied that: 'Yes that is right. This is for me primarily a matter of historical consciousness.'¹⁰⁵ This approach is an example of anthromorphism. In its nature, 'anthromorphism is an insidious and totalitarian figure'.¹⁰⁶

Liberal political theory, as we have seen, refutes such an anthromorphic and paternalist approaches to the state.¹⁰⁷ For liberals, the state is merely an institution which helps protect individual rights. It is an edifice constructed by individuals through contract or whatever in order to provide a better safeguard for the rights and liberties of individuals. And at least theoretically, the state will wither away whenever it ceased to serve this primary function.¹⁰⁸ Since individuals are the 'creator' and 'master' of the state, they cannot be treated as 'immature' children. They are in fact autonomous beings; they can choose their way of life. The state is nothing but a mere instrument which is necessary to realise the autonomy. It however 'even in its best state is but a necessary evil; in its worst state, an intolerable one'.¹⁰⁹ The liberals therefore reject the paternalist state which decides on behalf of its subjects. For it is 'the greatest conceivable despotism' in the words of Kant.¹¹⁰

(Father), while the Former Prime Minister Ciller describes herself as 'Ana' (Mother) in addressing the people. See *ibid* .

¹⁰⁵ N. Akman, 'Fethullah Hoca Anlatiyor', 2,(this must be 3) (interview with F. Gulen), *Sabah*, 25 Ocak 1995, s.23. Gulen here refers to the historical legacy of the Ottoman Empire. For him Turkish people have traditional respect for the 'militarist state'. *Ibid* .

¹⁰⁶ C.Douzinas and R.Warrington with S.McWeigh, *Postmodern Jurisprudence: The Law of Text in the Texts of Law*, London: Routledge, 1991, p.66.

¹⁰⁷ See Chapter 4 above.

¹⁰⁸ See Chapter 1 above.

¹⁰⁹ T.Paine, *Common Sense*, Harmondsworth: Penguin, 1976, p.65. See also Chapter 4 above.

¹¹⁰ I. Kant, *Political Writings*, Second Ed., ed H.Reiss, Cambridge: Cambridge University Press, 1991, p.74., See also Chapter 4 above.

Political statism, unlike economic statism, remained to be one the definitive features of the Turkish constitutional system.¹¹¹ Thus I must continue to unravel the Kemalist principle of statism to see its implications for individual rights and liberties.

In Kemalism, the state is identical with the nation, 'the collection of individuals'.¹¹² As a logical result of his populism, M.Kemal identified 'the Turkish nation' with 'the state' of which the political regime was Republic, 'peoples' rule'.¹¹³ The identification of the state with the nation and vice versa has been common amongst the Kemalists. Orhan Arsal, for instance, in his pamphlet entitled *Devletin Tarifi* (The Definition of State), first reflected on populism and then gave his view of the state.

We do not have (political) party, for it means division and fragment. It is not acceptable to take over the state...through this or that means, and abuse it against other groups. Today the so-called the RPP (Republican People's Party), which may perfectly be called as the RPO (Republican People Organ), is the collection of the (all) citizens. Hence the definition of the State according to the ideology of Turkish Revolution. 'State is nothing but the nation united around its Father (Ataturk)'.¹¹⁴

I must quote again a long text from the writings of Ataturk to be able to show the Kemalist approach towards the role of the state regarding individual rights and liberties. In *Medeni Bilgiler* he wrote that:

Liberty is the liberty of social and modern man. Therefore, individual liberty must be conceived by taking into account the common interests of every individual and the whole nation. The liberty of man cannot be absolute. It is restricted by the rights and liberties of others, and by the common interest of the nation. In fact, *the essence and duty of the state is to restrict the liberty of the individual*. For the state is not only an organisation that grants the liberty of man, but at the same time it is under an obligation to reconcile all the private interests for the sake of general and national goals.¹¹⁵

¹¹¹ See Parla, *The Social and Political Thought of Ziya Gokalp*, p.42.

¹¹² Afet Inan, *Medeni Bilgiler ve M.Kemal Ataturk'un El Yazilari*, p.26.

¹¹³ *Ibid.*, p.26.

¹¹⁴ O.Arsal, *Devletin Tarifi*, Ankara: Recep Ulusoglu Basimevi, 1938, p.32. Emphasis added.

¹¹⁵ Afet Inan, *Medeni Bilgiler*, pp.52-53. Emphasis added.

Two important points can be drawn from this statement. First, the state is the only source of rights and liberties, i.e. it is the state, nothing else, that accords rights to individuals. Ataturk emphasised this positivistic belief by saying that 'the state designates the rights and duties of everyone; no body can claim any right beyond this designated sphere'.¹¹⁶ Similarly, the Programme of the RPP explicitly stated that 'the Party [the State-party]¹¹⁷ does not make any distinction between men and women in *giving* rights and duties to citizens'.¹¹⁸ The emphasis in the Programme was, as Parla points out, placed on the Party (or the state) as the creator (dispenser) of the rights and duties of individuals (men and women indiscriminately).¹¹⁹

The second point is that these rights and liberties must be limited by the state. To put it another way, the state accords only limited rights. 'These rights', the Programme of the RPP says, 'are within the bounds of the State's authority'.¹²⁰ It is the duty of the state to define and limit the scope of the rights and liberties. The Party Programme referred to this duty of the state, for instance, in defining or rather rejecting some social and economic rights. It was for the state, according to the Programme, to reconcile the interests of workers and employers.¹²¹ Hence, there was no need for other institutions and activities such as trade unions, strikes and lock-outs.¹²²

The basic assumption seems to be based on the contention that the state knows better the interests of individuals and of the nation as a whole. What if there occurs a conflict between the rights of individuals and the interest of the state? Yusuf Akcura replied this as follows.

¹¹⁶ *Ibid.*, p.43. See also A. Afet Inan, *M.Kemal Atatürk'ten Yazdıklarım*, İstanbul: Milli Eğitim Basımevi, 1971, p.30.

¹¹⁷ Here the 'Party' and the 'state-party' or even 'state' may well be used interchangeably. The 1935 Regulation of the RPP made it clear that the Party and the government, which was born out of the party itself, was a unity completing each other. See Parla, *Kemalist Tek Parti İdeolojisi*, p.153. For the identification of the RPP as the 'state-party' see also F.H.Tokin, *Türk Tarihinde Siyasi Partiler ve Siyasi Düşüncenin Gelişimi (1839-1965)*, İstanbul: Elif yayınları, 1965, p.76.

¹¹⁸ Webster, *The Turkey of Atatürk*, p.308. Emphasis added.

¹¹⁹ Parla, *Kemalist Tek-Parti İdeolojisi ve CHP'nin Altı Ok'u*, pp.33-34.

¹²⁰ Webster, *The Turkey of Atatürk*, p.308.

¹²¹ *Ibid.*, p.311.

¹²² *Ibid.*

In a modern state, if some liberties are to be in conflict with the authority of the state, the persistence of the state authority practically and legally has the priority against the individual liberty. For the State embodies and reflects the rights and interests of all individuals.¹²³

Kemalists did not neglect of course to stress the traditional or even 'natural' reverence that the Turkish nation has for the authority of the state. The Turkish nation, in the words of Vedat Nedim, 'is a nation which believes in and respects the authority of the State.'¹²⁴ He went on to say that 'this feeling of respect stems from its (Turkish nation's) nature, innate'.¹²⁵

Having created such a vision of the state as the embodiment of the nation, it would not be difficult to justify any action in the name of the state. Indeed, the state apparatus was used as a 'terror machine' during the one-party dictatorship to suppress the opposition to the status quo, and to consolidate the revolution.¹²⁶

The Kemalist state, in the end, turned out to be 'a jealous God intolerant of variety and autonomy in any form' to borrow the words of Toynbee and Kirkwood.¹²⁷ Obviously, the conceptions of the state, liberty and rights in Kemalist ideology are not compatible with the liberal model of political rights. First of all, this model requires to some extent the political neutrality of the state towards the individuals' conceptions of good.¹²⁸ With its project of a homogeneous, classless and unified nation (in a particularly heterogeneous country), the Kemalist state could not and cannot meet the condition of political neutrality.

¹²³ Y. Akcura, 'Asri Turk Devleti ve Munevverlere Dusen Vazife', *Turk Yurdu*, 3/13(1925), p.12.

¹²⁴ V.Nedim, 'Devletin Yapicilik ve Idarecilik Kudretine Inanmak Gerekir', *Kadro*, 2/15 (Mart 1933):13-19, at 14.

¹²⁵ *Ibid*.

¹²⁶ For the examples of violence in the Kemalist Revolution, see H.C. Armstrong, *Grey Wolf: Mustafa Kemal*, New York: Books for Library Press, 1932, pp.226-227, and indeed the rest of the book.

¹²⁷ A.J.Toynbee and K.P.Kirkwood, *Turkey*, New York: Charles Scribner's and Son's, 1927, p.4.

¹²⁸ See Chapter 2 above.

Secondly, in the liberal model the existence of political rights is prior to the written laws of the state whose *raison detre* is to protect them.¹²⁹ The case, as we have seen, is the reverse in Kemalist political theory which regards the state as the source of and prior to the rights and liberties.¹³⁰

Kemalist Secularism: 'Turkish Renaissance'?

Kemalism established the principle of secularism 'as the foundation stone of Turkish constitutional theory and political life'.¹³¹ Despite attempts to find historical and social roots to Turkish secularism,¹³² as a 'political ideology' it was the offspring of the Republic.¹³³ Secularism was introduced into the Constitution in 1937, and it became the official ideology of the Republic.¹³⁴ As such it proved to be the most ambiguous and problematic principle of Kemalist ideology.

In liberal political theory, secularism is conceived as one form of political neutrality. The separation of state from religion, in its general sense, is the precondition of the neutrality of the state towards various and often conflicting conceptions of good.¹³⁵ The principle of secularism, however, has another complementary aspect in liberal theory, that is, freedom of

¹²⁹ See Chapter 1 above.

¹³⁰ See notes 115-120 above.

¹³¹ S.Mardin, 'Religion and Secularism in Turkey', in A.Kazancigil and E.Ozbudun (eds.), *Ataturk : Founder of a Modern State*, London: C.Hurst and Compony, 1981, p.191.

¹³² See, e.g., Berkes, *The Development of Secularism in Turkey*, Montreal: McGill University Press, 1964. In this study I am not concerned in great detail with the conceptual analysis of secularism, and its historical and sociological development in the West. For such studies see, e.g., M. Turkone, 'Islamlasma, Laiklik ve Demokrasi', *Turkiye Gundemi*, 13 (Winter 1990), pp.36-42, N.Mert, *Laiklik Tartismasina Kavramsal Bir Bakis: Cumhuriyet Kurulurken Laik Dusunce*, Istanbul: Baglam Yayıncılık, 1994, A. Bulac, 'Islam ve Modern Zamanlarda Din-Devlet Iliskisi', *Cogito* 1 (Summer 1994), pp.65-85, and N.Vergin, 'Din ve Devlet Iliskileri: Dusuncenin "Bitmeyen Senfoni"si', *Turkiye Gunlugu*, 29 (July-August 1994), pp.5-23, A.Arslan, 'Turk Laikligi ve Gelecegi Uzerine Bazi Dusunceler', *Liberal Dusunce*, 1 (Winter 1996), pp.54-76.

¹³³ Mert, *Laiklik Tartismasina Kavramsal Bir Bakis*, pp.57-59.

¹³⁴ *Ibid.*, p.63.

¹³⁵ See Chapter 2 above.

religion and conscience. It entails the protection of religious freedom in the sense that everybody has the right to believe and act accordingly.¹³⁶

In Turkey the situation is different. The principle of secularism is not (and indeed has never been) the separation between the state and religion in its proper sense. In the words of Rustow 'Ataturk's own principle of laiklik (secularism, laicism) is by no means the exact equivalent of the separation of church and state as understood in Europe and or the United States'.¹³⁷ Kemalist secularism, in reality, meant the protection of the state against religion. This is partly derived from the suspicious attitude of Kemalists towards religion as a 'potential power' which would undermine the regime.¹³⁸ This attitude gave rise to the control and suppression of religion.¹³⁹

Perhaps Kemalists have never heard the anarchist thinker, Bakunin, who said that '[t]here is not, there cannot be, a State without religion'.¹⁴⁰ Nor they have ever probably come across with Kropotkin's concept of the 'Triple Alliance' of which religion is one of the constituent strands.¹⁴¹ Yet they were convinced from the very beginning that religion is too serious and important a matter to be left in the hands of individuals and religious communities.¹⁴² State control of religion has taken different forms and

¹³⁶ See A.F.Basgil, *Din ve Laiklik*, Istanbul:Yagmur Yayınevi, 1985, p.161, and Y.G.Ozden, *İnsan Hakları Laiklik Demokrasi Yolunda*, Ankara: Bilgi Yayınevi, 1994, p.192. For a contrary view see A.N.Yurdusev, 'Laiklik ve Modern Uluslararası Sistem', *Liberal Düşünce*, 1 (Winter 1996):77-84, at 80.

¹³⁷ D.A.Rustow, *Turkey: America's Forgotten Ally*, New York and London: A Council on Foreign Relations Book, 1987, p.29.

¹³⁸ See D.M.Dogan, *Bir Savas Sonrası İdeolojisi: Kemalizm*, Konya: Esra Yayınları, 1993, p.99.

¹³⁹ J. Esposito, *Islam and Politics*, New York:Syracuse University Press, 1991, p.98.

¹⁴⁰ M. Bakunin, *God and the State*, ed. G. Aldred, Glasgow and London: Bakunin Press, 1920, p.42.

¹⁴¹ According to Kropotkin, the military, judiciary and religion make up of the Triple Alliance which constitutes 'mutual assurance for domination', and 'command[s] in the name of the interests of society'. P. Kropotkin, *The State: Its Historic Role*, London: Freedom Press, 1969, p.31.

¹⁴² E. Mortimer, *Faith and Power: The Politics of Islam*, London: Faber and Faber, 1982, p.146.

policies over time.¹⁴³ The cruel suppression of religion by the early Kemalists was eventually replaced with a somewhat more 'flexible' and 'pragmatic' policy towards religion. At that point, we can discern two broad interpretations in the praxis of Kemalist secularism. On the one hand there are what may be called 'orthodox' Kemalists who stand for the strict control and supervision of, without granting any possible 'concession' to, religion.¹⁴⁴ The 'pragmatist' Kemalists, on the other hand, tend to utilise religion for the consolidation of Kemalist regime. The political elite of the Republic, as Leonard Binder emphasised, 'beg[a]n to realize that an established religion might help to enhance the authority and social control'.¹⁴⁵ As a result some kind of 'modus vivendi' emerged between the state and official religion.¹⁴⁶ Accordingly, the 'state subsidizes and otherwise supports official Islam, while the latter recognizes the autonomy of the state and serves it as an instrument of solidarity and social control'.¹⁴⁷ Although these two interpretations of Kemalist secularism have certain implications for the practical exercise of state-religion relations, they have one deep and uncompromised commitment, that is the preservation of state control over religion.¹⁴⁸ To keep religion under control, the Kemalist regime

¹⁴³ See, e.g., H.A.Reed, 'The Religious Life of Modern Turkish Muslims', in R.N.Frye (ed.), *Islam and the West*, The Hague: Mouton&Co., 1957, p.109ff.

¹⁴⁴ For the examples of 'orthodox' approach to Kemalist secularism, see B.Tanor, *Türkiye'nin İnsan Hakları Sorunu I*, pp.58-77; Y.G.Ozden, *Hukukun Ustunlugune Saygi*, Ankara: Bilgi Yayınevi, 1990, pp.197-211, and 407; Y.G.Ozden, *İnsan Hakları Laiklik Demokrasi Yolunda*, Ankara: Bilgi yayinevi, 1994, pp.75ff, 466-475.

¹⁴⁵ L.Binder, *Islamic Liberalism: A Critique of Development Ideologies*, Chicago & London: The University of Chicago Press, 1988, p.349.

¹⁴⁶ See A.Mango, *Turkey: The Challenge of a New Role*, Westport and london: Praeger, 1994, p.31.

¹⁴⁷ *Ibid.*

¹⁴⁸ It must be emphasised that the difference between these two approaches is purely tactical, not conceptual. The 'pragmatist' Kemalists are no less suspicious of the religion than the 'orthodox' are. General Evren, for instance, as the leader of the 12 September Coup, and then the President of the Republic of Turkey has been against the wearing of headscarves in the Universities. He indeed brought the case before the Constitutional Court which declared unconstitutional the Act that abolished the ban on headscarf in the Universities. (See 25 AMKD 133, and Chapter 8 below) Similarly, Professor Aldikacti, the President of the Constitutional Committee of 1982, severely criticised the 'concessions' given to religion by the politicians of the multi-party period, despite the 'principal

has established, *inter alia*, an institution called the Directorate of Religious Affairs (*Diyanet Isleri Baskanligi*),¹⁴⁹ and religious schools known 'Imam-Hatip Liseleri'.¹⁵⁰ At constitutional level, the 1982 Constitution reflects the 'pragmatist' approach to religion with its provision concerning 'compulsory religious education' (Article 24) at its centre.¹⁵¹ The Constitutional Court, on the other hand, seems to represent the views of 'orthodox' Kemalists. This can be clearly seen in its judgements in the political cases which will be examined in Chapter 8 below.

Yet a few words about the relationship between 'Turkish secularism' and individual rights will be in order. The aim of Kemalist secularism, according to Mardin, was to 'broaden the autonomy of the individual', and to 'liberate the individual from ..the idiocy of traditional, community-oriented life'.¹⁵² This argument seems not to be compelling. First, the Kemalist reforms in the religious sphere reflect the attempt to control and wipe out religion from the public sphere, rather than the aim to broaden the autonomy of individuals. Second, even if Mardin's argument is sound, it would be said that the Kemalist secularism failed to 'broaden' individual autonomy.¹⁵³ In fact, such

concession' of the 1982 Constitution which introduced compulsory religious education. (Article 24). See O.Aldikacti, 'Ataturk Inkilaplarindan Laiklik', *I.U.H.F. Mecmuasi*, 45-47 (1981-82): 39-47, at 46-47.

¹⁴⁹ Morteimer, *Faith and Power*, p.150. Cf. Y.Aktay, 'Laiklik ve Din Egitimi', *Hak-Is Dergisi*, 29(May 1994), pp.62-63. On the importance of this institution from the perspective of the principle of secularism see B.V. Dinckol, *1982 Anayasasi Cercevesinde ve Anayasa Mahkemesi Kararlarinda Laiklik*, Istanbul: Kazanci Kitap Ticaret, 1992, pp.163-169; M.Soyisal, *100 Soruda Anayasanin Anlami*, Sekizinci Baski, Istanbul: Gercek Yayınevi, 1990, pp.258-260.

¹⁵⁰ For the attempts to institutionalise secularism in Turkey see, for instance, O.Caha, 'Osmanli'dan Cumhuriyete Laiklik', *Hak-Is Dergisi*, 29(May 1994):30-39, at 37.

¹⁵¹ According to Article 24 of the Constitution 'Education and instruction in religion and ethics shall be conducted under state supervision and control. Instruction in religious culture and moral education shall be compulsory in the curricula of primary and secondary schools.'. See The Constitution, p.12.

¹⁵² Mardin, 'Religion and Secularism in Turkey', p.213. See also Sarıbay, *Postmodernite, Sivil Toplum ve Islam*, pp.146-147; Perincek, *Osmanli'dan Bugune Toplum ve Devlet*, p.157; B.Tanor, *Türkiye'nin İnsan Hakları Sorunu II: Hukuk-Otesi Boyutlar*, Istanbul: BDS Yayınları, 1991, pp.87-88.

¹⁵³ For a sociological analysis of the reasons behind this failure see Sarıbay, *Postmodernite, Sivil Toplum ve Islam*, pp. 145-154.

an aim is not and cannot be realisable within the framework of Kemalist ideology. This is so not because from the very outset Kemalist Jacobinism¹⁵⁴ have never respected the autonomous choices of individuals¹⁵⁵, but because the authoritarian and monistic nature of Kemalist ideology is not compatible with this aim. As we argued in Chapter 4, individual autonomy is the precondition of pluralism and vice versa.¹⁵⁶ In other words, the autonomy of individuals can only be 'broadened', whatever that means, in a plural political and social system which would recognise the differing values, and would not impose a particular conception of the good life on individuals. Kemalism, however, is far from being an ideology which respects the plural values and identities of individuals. And its principle of secularism has served to ensure the domination and hegemony of this authoritarian regime. The alleged 'good will' of Kemalists, therefore, cannot wash away the stains of injustice and brutality from the praxis of Kemalist secularism. Secularism in Turkey has always been invoked as a means to curb individual rights and freedoms,¹⁵⁷ and thus to *narrow* the autonomy of the individual. This notorious policy which is especially and insistently pursued by the Constitutional Court of Turkey has been 'justified' on the ground that 'our' principle of secularism is different from that of 'others' (West's).¹⁵⁸ That is, we have 'Turkish secularism' which is also called 'Turkish Renaissance'.¹⁵⁹ According to Caglar, this is 'the active-militant secularism' which stands for the protection of the official ideology through state control over religion.¹⁶⁰ In Chapter 8, we shall examine the application

¹⁵⁴ 'Kemalist Jacobinism' is used to pay attention to the terror and repression of the Kemalist Revolution which very much resembled the Jacobean episode of the French Revolution.

¹⁵⁵ As Turner emphasised 'Kemalist reforms had obviously been forced upon many sections of society against their wishes and interests'. See B.S.Turner, *Weber and Islam: A Critical Study*, London and Boston: Routledge and Kegan Paul, 1974, p.169.

¹⁵⁶ See Chapter 4 above.

¹⁵⁷ See Chapter 8 below.

¹⁵⁸ See, e.g., 20 AMKD 345, pp.358-359, and 25 AMKD 133, pp.145-146.

¹⁵⁹ Ozden, *Insan Haklari Laiklik Demokrasi Yolunda*, p.79.

¹⁶⁰ B.Caglar, 'Turkiye'de Laikligin "Buyuk Problemi" Laiklik ve Farkli Anlamlari Uzerine', *Cogito*, 1(Summer 1994): 109-115, at 113. Cf. L.Koker, 'Laiklik ve Demokrasi', *Hak-Is Dergisi*, 29(May 1994):40-45, at 42.

of this 'militant secularism' *sui generis*¹⁶¹ to practical cases before the Constitutional Court.

Now we can move to the constitutional and political developments in the period of the First and Second Republics.

The Constitution of 1924 and First Republic

The 1924 Constitution was the first constitution of the Turkish Republic and remained in effect until 1960 when the first military coup d'état happened. It bore, however, certain parallels with the 1921 Constitution, the constitution of the war years.¹⁶²

The Constitution of 1921¹⁶³ was, in M.Kemal's eyes, a 'genuine law' (Kanun-i Hakiki), because it was not the result of an 'imitation'.¹⁶⁴ He spoke to the Assembly that :

Law cannot be made by imitation...Law must be a genuine law, a natural law. That is to say, it must be a divine (ilahi) law (applause). Gentlemen! Our Constitution (Teskilat-i Esasiye) is such a genuine law, because it inspired from the conscience and opinion of our nation.¹⁶⁵

¹⁶¹ For the *sui generis* characteristics of the Turkish secularism see, for instance, O.Abel, 'Dinlerin Etiği Olarak Laiklik', in O.Abel, M.Arkoun, S.MArdin, *Avrupa'da Etik, Din ve Laiklik*, Istanbul: Metis Yayınları, 1995, pp.27-40, at 31.

¹⁶² S.Kili, *Turkish Constitutional Developments and Assembly Debates on the Constitutions of 1924 and 1961*, Istanbul: Robert College Research Center, 1971, p.19. The text of the 1921 Constitution is in Kili and Gozubuyuk, *Türk Anayasaları*, pp.91-93.

¹⁶³ For the Assembly debates on 1921 Constitution see E.Ozbudun, *1921 Anayasası*, Ankara: Atatürk Araştırma Merkezi, 1992, pp.19-50.

¹⁶⁴ See Kemal, *Atatürk'un Soylev ve Demeçleri*, I, p.224..

¹⁶⁵ *Ibid* . M.Kemal's reference to the divine law has been rightly interpreted as a clear example of his pragmatism. Bulent Tanor argues that this reference does not show that Atatürk adhered to a theological legal doctrine. For him, it must be construed as one of the tactics M.Kemal often invoked to control the 'conservative' or 'religious' members of the Parliament. (B.Tanor, 'Mustafa Kemal ve Anayasal Gelisme Dinamiklerimiz', *I.U. Hukuk Fakultesi Mecmuası*, 43/1-4(1977), p.390) For this pragmatic reason, even a provision was added to the 1921 Constitution reading that 'the aim of the Assembly is to save the Sultanate and the Caliphate'. See Y.Altug, 'The Development of Constitutional Thought in

M.Kemal, however, appeared to change his views about the 'genuine law' after the establishment of the Republic. Among his reforms, the reception of western laws¹⁶⁶ played a very significant role in transforming the legal and political structure of Turkey.¹⁶⁷ This reception in fact was not a limited copying of the foreign laws; it was a 'complete reception of the modern western laws'.¹⁶⁸

Of these laws the most important one was the civil code. After the 'failure' of a Commission which was set up for the preparation of the Turkish civil code, M.E. Bozkurt, then the Minister of Justice, proclaimed that the Swiss Civil Code would be translated and incorporated into Turkish law.¹⁶⁹ Bozkurt, as 'a prominent theoretician of Kemalist ideology',¹⁷⁰ on that occasion pointed out that 'the aim of the Turkish Revolution is to import the Western civilisation, without any reservation or condition'.¹⁷¹

To realise this objective the children of the Revolution needed a state mechanism by which power would be vested in them. In the course of drafting the Constitution Kemalists wanted to attach more power to the executive.¹⁷² Yet they failed; their proposal was rejected by the majority of the Assembly.¹⁷³

Turkey', in A.Evin (ed.), *Modern Turkey: Continuity and Change*, Leske: Shrifter Des Deutschen Orient- Instituto, 1984, p.132.

¹⁶⁶ For the issue of reception in the Turkish legal reform, see the collection of essays published in Unesco, *International Social Science Bulletin*, 9(1957), pp.13-81.

¹⁶⁷ A detailed account of this transformation can be found in C.L. Ostrorog, *The Angora Reform*, London: University of London Press, 1927.

¹⁶⁸ E. Cihan, 'Ataturk Hukuk Devrimi Uzerine', *I.U.H.F. Mecmuasi*, 48-49/1-4(1982-83): 183-194, at 191.

¹⁶⁹ Z.Emre and O.Nebioglu, 'Ataturk and Batililasma', *I.U.H.F. Mecmuasi*, 45-47(1981-82):17-37, at 31-32.

¹⁷⁰ Kili, *Kemalism*, p.103.

¹⁷¹ Cited in Emre & Nebioglu, 'Ataturk and Batililasma', p.32.

¹⁷² They attempted to do this by proposing a powerful position for the president who would be entitled, among other things, to dissolve the Assembly. The presidency of M.Kemal was almost certain at that time. See Timur, *Turk Devrimi ve Sonrasi*, p.66.

¹⁷³ *Ibid.*

The reason behind the proposal of Kemalists may be found in their desire to maintain the political status quo in which they were the ruling strata.¹⁷⁴ As a matter of fact, the absolute power of the executive given by the Assembly under the 1921 Constitution provided the necessary means for the 'Jacobean dictatorship' to suppress its opponents during the revolutionary transformation.¹⁷⁵

The Constitution of 1924, like its predecessor 1921 Constitution, stressed the principles of 'parliamentary supremacy' and 'unity of powers' rather than 'separation of powers'.¹⁷⁶ Article 3 of the Constitution stated that 'the sovereignty belongs unconditionally to the nation'.¹⁷⁷ The Grand National Assembly alone was granted the right to use this sovereignty on the behalf of the nation (Article 10).¹⁷⁸ Thus the political system under the 1924 Constitution came to be called 'Assembly Government' (*Meclis Hukumeti*).¹⁷⁹

Kemalists of the one-party period always disliked and despised the liberal theory of separation of powers. Yavuz Abadan asserted that:

The liberal doctrine of separation of powers makes difficult the activities and conduct of the state first by establishing a balance of power between the organs of the state, and second by laying down some rules to limit and control state activities in favour of individuals...Turkish democracy has completely destroyed this liberal check-balance construction which contrasts the rights of individuals with the activities of the state.¹⁸⁰

¹⁷⁴ Perincek, *Osmanlı'dan Bugüne Toplum ve Devlet*, p.285.

¹⁷⁵ Some writers attempt to justify the Kemalist dictatorship on the ground that it was 'necessary' and 'inevitable' to pave the way for modernisation, and 'enlightenment', just in the same way French Jacobenism was necessary to consolidate the revolution. See Tanor, *Türkiye'nin İnsan Hakları Sorunu II: Hukuk-Otesi Boyutlar*, pp.89-90; E.Aybars, *İstiklal Mahkemeleri, 1923-1927*, Ankara: Kültür ve Turizm Bakanlığı Yayınları, 1982.

¹⁷⁶ Timur, *Türk Devrimi ve Sonrası*, p.66.

¹⁷⁷ For the full texts of the Turkish Constitutions of 1921, 1924, and 1961 see S. Kili, *Turkish Constitutional Development*, APPENDIX B, C, D.

¹⁷⁸ *Ibid.*, p.163.

¹⁷⁹ M. Soysal, 'Türk Anayasacılığında Kemalist Yaklaşımın Anlamı', in *Bildiriler ve Tartışmalar*, Ankara: İS Bankası Yayınları, 1983, p.211.

¹⁸⁰ Y.Abadan, *Hukukçu Gözü ile Milliyetçilik ve Halkçılık*, Ankara: C.H.P. Yayınevi, (Ankara Halkevi, 23.5.1938 tarihli Konferans), pp.9-10. Quoted in Koker, *Modernleşme, Kemalizm ve Demokrasi*, p.83.

The Constitution of 1924 concentrated all powers in the hands of the Assembly.¹⁸¹ This meant, in reality, the power vested in those who controlled the Assembly. 'It was the government', Kili asserted, 'which dominated the Assembly' though in theory it was the contrary.¹⁸² After all, it was M.Kemal who controlled and dominated the Assembly and the government. He personally decided who was going to stand as deputy candidates in indirect elections.¹⁸³ As Parla pointed out, there was no place in M.Kemal's 'political vocabulary' for such words as 'democracy', 'pluralism', 'democratic election' and so on.¹⁸⁴ In a word, the Kemalist regime was the typical example of 'bonapartism'.¹⁸⁵

With respect to political rights, the Constitution of 1924 was extremely brief. Article 70 guaranteed political rights in general terms.

Personal immunity, freedom of conscience, of thought, of speech and press, and the right to meet and associate and to incorporate form part of the rights and liberties of Turkish citizens.¹⁸⁶

Mumcu argues that the right to associate in this provision implicitly granted the right to form political parties as a 'natural right'.¹⁸⁷ Article 68 of the Constitution set forth the restrictions to be imposed on these rights and liberties. It stated that 'the limits of an individual's liberty, which is his natural right, extend only to the point where they infringe on the liberties enjoyed by the fellow-citizens'.¹⁸⁸

¹⁸¹ In this Constitution although the judicial power at first sight appeared to be recognised as a separate power (Article 8), and the independence of the courts was guaranteed (Article 54), these provisions were overridden by the provisions granting the Assembly 'absolute' power over all the organs of the state including judiciary. See A. Mumcu, '1924 Anayasası', *Atatürk Araştırma Merkezi Dergisi*, 1/5 (Mart 1986) pp.395-6.

¹⁸² Kili, *Turkish Constitutional Developments*, p.22.

¹⁸³ T.Parla, *Türkiye'de Siyasal Kültürün Resmi Kaynakları*, Vol.II: *Atatürk'un Soylev ve Demeçleri*, İstanbul: İletişim Yayınları, 1991, pp.38-55.

¹⁸⁴ *Ibid.*, pp.54-55. See also Dogan, *Bir Savaş Sonrası İdeolojisi: Kemalizm*, p.74.

¹⁸⁵ *Ibid.*, p.75. For the term 'bonapartism' see R.Scruton, *A Dictionary of Political Thought*, London: Pan Books, 1982, pp.42-43.

¹⁸⁶ Kili, *Turkish Constitutional Development*, p.168.

¹⁸⁷ Mumcu, '1924 Anayasası', pp.398-399.

¹⁸⁸ Kili, *Turkish Constitutional Development*, p.168.

The Constitution of 1924 appeared to provide better protection for the political rights when compared to the detailed provisions of the 1961 and 1982 Constitutions which are certainly more restrictive.¹⁸⁹

As a result of this guarantee, the Progressive Republican Party (*Terakkiperver Cumhuriyet Firkası*) was formed in the same year the Constitution came to effect.¹⁹⁰ This Party had a 'liberal' programme favouring the principles of 'minimal state', 'de-centralised government', and 'individual liberties'.¹⁹¹ The Programme particularly emphasised that 'the Party respects religious beliefs and convictions'.¹⁹²

The Progressive Party soon became, as Zurcher asserted, 'a serious challenge' to the Kemalists¹⁹³ until it was closed under the *Takrir-i Sukun Kanunu* (Law on the Maintenance of Order)¹⁹⁴ which made impossible any kind of legal political opposition in Turkey'.¹⁹⁵

The Progressive Party was dissolved under the pretext of 1925 Kurdish Revolt (*Seyh Sait Ayaklanması*)¹⁹⁶, and its members together with the journalists who supported the Party were sent to the Tribunals of

¹⁸⁹ See Mumcu, '1924 Anayasası', p.398.

¹⁹⁰ Timur, *Türk Devrimi ve Sonrası*, p.68.

¹⁹¹ For the text of the Programme of the Progressive Republican Party see E.J. Zurcher, *Political Opposition in the Early Turkish Republic: The Progressive Republican Party 1924-1925*, Leiden: E.J. Brill, 1991, APPENDIX A, pp.138-146.

¹⁹² *Ibid.*, p.139. In dissolving the Progressive Party this Article was used as an 'evidence' of the subversion. See Timur, *Türk Devrimi ve Sonrası*, p.68, and K.Karabekir, *Kürt Meselesi*, Istanbul: Emre Yayınları, 1994, pp.40-41.

¹⁹³ Kucukomer maintains that this Party would have won the first free election, if it was allowed to complete its organisation throughout the country. Kucukomer, *Düzenin Yabancılaşması*, p.100.

¹⁹⁴ For the Assembly debates on this Law see Karabekir, *Kürt Meselesi*, pp.18-32, and R.Orbay, *Cehennem Degirmeni: Siyasi Hatıralarım 2*, Istanbul: Emre Yayınları, 1993, pp.192-194.

¹⁹⁵ Zurcher, *Political Opposition in the Early Turkish Republic.*, p.vii.

¹⁹⁶ For a detailed analysis of this revolt and the advent of Kurdish nationalism see R.Olson, *The Emergence of Kurdish Nationalism, 1880-1925*, Austin: University of Texas Press, 1989, and Karabekir, *Kürt Meselesi*, pp.9-44.

Independence.¹⁹⁷ These Tribunals, members of which were chosen from amongst the loyalists of M.Kemal, were used to silence the opposition to the Kemalist reforms.¹⁹⁸

Despite the immense oppression of Kemalists, the reaction to one-party rule was gaining substantial ground by 1930.¹⁹⁹ M.Kemal wanted to create a limited and controllable second party of opposition with the mission of 'channeling the discontent into harmless movement'.²⁰⁰ He authorised his loyal friend Fethi Okyar to form the new party, and make 'mild' opposition in the Assembly.²⁰¹

The Free Party, led by Okyar, received an unexpected popular support, and like the Progressive Party of 1924, posited a serious threat to those in power.²⁰² Again the revolution and reforms were in danger.²⁰³ In the end, the Free Party too shared the same destiny, and it was dissolved on the

¹⁹⁷ M.E.Yalman, 'The Struggle For Multi-Party Government in Turkey', *Middle East Journal*, 1(January 1947):46-58, at 48. See also A.A.Cruickshank, *The Growth of the Opposition in Turkish Politics, 1919-1946*, Unpublished PhD thesis, Oxford, 1963, pp.218-222.

¹⁹⁸ For a typical example of rationalisation of these Tribunals and their decisions see Aybars, *İstiklal Mahkemeleri*, esp. p.30. A critical analysis of the Tribunals can be found in A.T.Alkan, *İstiklal Mahkemeleri*, Istanbul: Agac Yayinlari, 1993, and Armstrong, *Grey Wolf*, pp.272-75, 265-66.

¹⁹⁹ See S.J. Shaw & E.K. Shaw, *History of the Ottoman Empire and Modern Turkey, Vol.II: Reform, Revolution, and Republic: The Rise of Modern Turkey, 1808-1975*, Cambridge: Cambridge University Press, 1977, p.382.

²⁰⁰ *Ibid*. Another interpretation of the decision taken by M.Kemal as to the establishment of the second opposition party was put forward by Y.Kadri Karaosmanoglu, a Kemalist novelist. For Karaosmanoglu, one of the intentions of M.Kemal in creating the Free Party was to let the underground reactionary opposition erupt to the surface, and to warn the rulers of the RPP that the Revolution was not yet completed and consolidated. See Y.K. Karaosmanoglu, *Politikada 45 Yil*, Ankara: Bilgi Yayınevi, 1968, pp.104-105.

²⁰¹ The closest friends of Atatürk, including some deputies, joined this newly established party. Even the membership of M.Kemal's sister, Makbule, was considered his 'gift' to the new movement. See W.Weiker, *Political Tutelage and Democracy in Turkey: The Free Party and Its Aftermath*, Leiden: E.J.Brill, 1973, pp.76-80.

²⁰² Yalman, 'The Struggle For Multi-Party Government in Turkey', p.48.

²⁰³ Mumcu, '1924 Anayasası', p.397.

ground that 'the Turkish people were not yet ready to rule themselves'.²⁰⁴ The time was not ripe for democracy.²⁰⁵

The people of Turkey would not be ready to be given their right to rule themselves until 1946, therefore they had to be ruled by the RPP and its 'permanent chairman', which embodied 'all interests in the state'.²⁰⁶

After the 1935 Congress of the RPP, the unity of the party and the government was formally recognised. Through a party regulation the Secretary-General of the Party became at the same time the Minister of the Interior, and in the provinces the governors (*vali*) were the chairman of the provincial party organisation.²⁰⁷ When reminded that such a regulation did not comply with the Article 9 of the Civil Servant Law, which prohibited government officials from joining the political parties and organisations, M.Kemal cunningly interpreted this law.²⁰⁸ He said that:

I do not see any reason why this law should be changed. For it only prohibits government officials from joining the political parties other than my party. Therefore, this article is even useful, and must not be changed at all.²⁰⁹

This arbitrary interpretation of the Civil Servant Law provides an argument against the claim that Kemalism respected the principle of the rule of law.²¹⁰ On another occasion a famous lawyer told M. Kemal that none of the principles and rules he implemented could be found in law-books.²¹¹ M. Kemal's response was interesting .

²⁰⁴ Yalman, 'The Struggle For Multi-Party Government in Turkey', p.49.

²⁰⁵ See M. Belge, 'Demokrasinin vakti gelmedi', *Pazar Postasi*, 28 Ocak 1995.

²⁰⁶ Shaw & Shaw, *History of the Ottoman Empire and Modern Turkey, Vol.II*, , pp.383 and 384. See also Kinross, *Ataturk :The Rebirth of a Nation*, p.392.

²⁰⁷ See T.Z.Tunaya, *Turkiye'de Siyasal Partiler, 1859-1952*, Istanbul, 1952, p.570.

²⁰⁸ E. Z.Karal, *Ataturk'ten Dusunceler*, Istanbul: M.E.B. Yayinevi, 1981, p.41.

²⁰⁹ *Ibid* .

²¹⁰ For this claim see Kili, *Kemalism*, p.89.

²¹¹ K.Ariburun, *Ataturk'ten Anilar*, Ankara: Turkiye Is Bankasi Kultur Yayinlari, 1969, p.317.

The acts become rules and principles only after they are experienced and practised. Therefore let me act first, then you can write it in law-books,²¹²

To characterise the one-party rule and the true nature of Kemalism, M.E.Bozkurt maintained that:

A contemporary German historian says that both national socialism and fascism are nothing but a slightly changed version of M.Kemal's regime. That is true. That is an entirely correct view. Kemalism is an authoritarian democracy whose roots lie in the people.²¹³

This 'authoritarian democracy' remained the political regime of the Turkish Republic until 1946, when the multi-party system was adopted. This adoption was the result of a combination of external and internal factors.²¹⁴ The victory of the 'Democratic Powers' in the Second World War, and the establishment of the United Nations urged the rulers of the RPP to move towards the multi-party system.²¹⁵ The internal social and economic distress and unrest²¹⁶ along with the belief that consolidation of the Revolution and reforms was completed²¹⁷ had also affected the transition to the multi-party political system.

The 1924 Constitution did not, perhaps could not, provide the necessary instruments to prevent one-party dictatorship for two reasons. First, most provisions of the Constitution such as that of political rights were simply not implemented by M.Kemal and Kemalists alike; they were just dead letters. This was the unfortunate and innocent side of the failure for the

²¹² *Ibid* . In a newspaper interview, M.Kemal also said that 'law of the Revolution is superior to the prevailing laws'. Ari Inan (ed.), *Gazi Mustafa Kemal Atatürk'un 1923 Eskişehir-İzmit Konuşmaları*, Ankara: Türk Tarih Kurumu Yay., 1982, p.83.

²¹³ M.E.Bozkurt, *Atatürk İhtilali*, Istanbul: As Matbaası, 1967, pp.136-137. Bozkurt also quotes, no doubt to exalt him, Atatürk as saying that 'it is said that I am a dictator. Yes true, I am a dictator, but I became dictator by winning the hearts [of the people]'. Cf. Tuncay, T.C. 'inde Tek-Parti Yönetimi'nin Kuruluşu (1923- 1931), p.217.

²¹⁴ On a detailed account of these factors see K. H. Karpat, *Turkey's Politics: The Transition to a Multi-Party System*, Princeton: Princeton University Press, 1959; S. Burcak, *Türkiye'de Demokrasi'ye Gecis, 1945-1950*, Istanbul: Olgac Matbaası, 1979.

²¹⁵ Burcak, *Türkiye'de Demokrasi'ye Gecis*, pp.41-42.

²¹⁶ S.Agaoglu, *Demokrat Partinin Doğuş ve Yükseliş Sebepleri, Bir Soru*, Istanbul, 1972, p.146.

²¹⁷ Perincek, *Osmanlı'dan Bugüne Toplum ve Devlet*, p.253.

Constitution. Second, the Constitution had a basic shortcoming that was the lack of a control mechanism.²¹⁸ It was effectively utilised to give an absolute power to the rulers to realise the Kemalist reforms.²¹⁹

This shortcoming of the Constitution emerged as a problem in the period of Multi-Party rule as well. In the words of C.Dodd,

In the decade after 1950 this Constitution ...quite easily opened up the way to the emergence of dominant-party government, as it had to single-party domination in the time of Ataturk and Inonu...²²⁰

The constitutional period of the First Turkish Republic in the end was closed by the 1960 Coup D'etat.²²¹ The military as Keyder points out condemned the Democrat Party (DP), which had been in power since 1950, for 'betraying the Kemalist ideals'.²²² The army conveyed the message that it was the guardian of the regime.²²³ This marked the beginning of a very significant tradition in Turkish politics: military interventions. Whenever the Kemalist reforms are perceived to be in danger, 'the army as the guardian of the Kemalist *Sunna*, will step in, and hang the principal traitor to the Tradition'.²²⁴ The punishment for betraying Kemalism was indeed severe. Fifteen leading members of DP was sentenced to death by a special tribunal called Court of High Justice (*Yuksek Adalet Divani*). Three of them,

²¹⁸ One may raise the objection that even if the Constitution of 1924 did have such a check and control mechanism over the absolute power of the legislature, it would have not worked in any way because of the attitude of Kemalists towards power. However, this speculation is an entirely another matter.

²¹⁹ Kili, *Turkish Constitutional Developments*, p.21.

²²⁰ C.H.Dodd, *The Crisis of Turkish Democracy*, Second Edition, London: The Eothen Press, 1990, p.70.

²²¹ On the reasons for the 1960 Coup, see G.S.Harris, 'The Causes of the 1960 Revolution in Turkey', *The Middle East Journal*, 24(1970): 438-454.

²²² C.Keyder, 'The Political Economy of Turkish Democracy', in I.C.Schick and E.O.Tonak(eds.), *Turkey in Transition: New Perspectives*, Oxford: Oxford University Press, 1987, p. 46

²²³ See B.Karakartal, 'Turkey: The Army as Guardian of the Political Order', in C. Clepham and G.Philip (eds.), *The Political Dilemmas of Military Regimes*, London, 1985, pp.46-63.

²²⁴ E.Gellner, *Encounters with Nationalism*, Oxford: Blackwell, 1994, p.85.

namely the Prime Minister Adnan Menderes, and two ministers, Fatin Rustu Zorlu and Hasan Polatkan were executed.²²⁵

*The Constitution of 1961 and Second Republic*²²⁶

Since the 1961 Constitution was the offspring of the so-called 'Gentle Coup' of 1960²²⁷, whose aim was 'to protect the reforms and principles of Ataturk'²²⁸, it was inevitably based on Kemalist ideology.²²⁹ Not only the Preamble of the Constitution indicated 'the full dedication' to Kemalism, but also for the first time Article 153 brought under protection all the Reform Laws passed during the period of M.Kemal.²³⁰ Most importantly this article emphasised that 'no provision of this constitution shall be construed or interpreted as rendering unconstitutional the following Reform Laws.'²³¹ Therefore the Constitution gave an absolute, unlimited protection to Kemalist reforms.²³²

²²⁵ H.Ozdemir, 'Siyasal Tarih (1960-1980)', in *Turkiye Tarihi, Vol.4 : Cagdas Turkiye*, pp.198-199.

²²⁶ It must be noted that the division of the Republic's political life into three periods is merely historical marked by the promulgation of various constitutions. Although each period has brought about some important changes, they do not represent a radical rupture in the political regime of Turkey. In that respect we must not obfuscate between the Second Republic started with the 1961 Constitution and the intellectual movement of the 'Second Republicanism' which emerged in the late 1980s. For a comprehensive treatment of this late movement, (which stands for civil society, and democratic and non-ideological state) and its critics, see M. Sever and C.Dizdar, *2. Cumhuriyet tartismalari*, Ankara:Basak Yayinlari, 1993.

²²⁷ F.W.Frey, *The Turkish Political Elite*, Cambridge, Mass: M.I.T. Press, 1965, p.38.

²²⁸ Kili, *Kemalism*, p.6. The National Unity Committee, which made the 1960 coup, declared that 'the aim of the National Unity Movement is to consider Turkey and the Turkish nation as a whole, and establish an impartial and virtuous administration based on the reforms of Ataturk...'. T.C. M.B.K. Direktifi ve Temel Gorusleri, Ankara, 1960, p.1 cited by Kili in *Kemalism*, p.183. See also Hughes, *Ataturkculuk*, pp.92-94.

²²⁹ Kili, *Kemalism*, p.5.

²³⁰ Kili, *Turkish Constitutional Developments*, pp.172, 201.

²³¹ The Reform Laws, protected by both the 1961 Constitution (Article 153) and the 1982 Constitution (Article 74), are as follows: '1-The Law on the unification of education, of March 3, 1340 (1920), No.430. 2- The Hat Law, of November 25, 1341 (1925), No.671. 3- The Law on closing down of dervish convents, and mausoleumis, and the abolition of the office

The Reform laws attempted to dismantle the 'ancient' symbols (like fez, and Arabic scriptures), and to replace them with 'modern' ones (like hat, and Latin scriptures). Such symbols, as Arkoun points out, represent in a way the 'collective sensibilities' of societies.²³³ Therefore, the attempt to change the collective sensibilities 'called for' the use of force; new symbols were introduced into social life at the expense of many lives.²³⁴ Ironically some of these 'modern' symbols like hat fell prey to time, and became 'obsolete'. The Hat Law which enforces people to wear a hat is today a dead letter; hardly any one abides by this law,²³⁵ as well as other Reform Laws.²³⁶ More importantly, these laws are restrictive of the rights and liberties of, at least some individuals. This was conceded by Professor Aldikacti, the chairman of the Constitutional Committee of 1982.²³⁷ He stated that the Reform Laws such as Hat Law and the Law on the Closure of Dervish Convents and Tombs may not be compatible with the basic rights and liberties. For Aldikacti the drafters of the 1961 Constitution thought that possible juridical

of keepers of tombs, and the Law on the abolition and prohibition of certain titles, of November 30, 1941. 4- The conduct of the act of marriage according to article 110 of the Civil Code of February 17, 1926, No.743. 5- The law concerning the adoption of international numerals of May 20.1928, No.1288. 6- The law concerning the adoption and application of the Turkish alphabet, of November 1, 1928, No.1353. 7- The law on the abolition of titles and appellations such as efendi, bey, pasa, of November. 26, .1934, No.2590. 8-The law concerning the prohibition to wear certain garments, of December 3, 1934, No.2596.'

²³² For the explanation of these Reform Laws, see A.Gokce, 'Devrim Yasaları ve 1961 Anayasası', *Danistay Dergisi*, Atatürk'un Dogumunun 100.Yili Ozel Sayi, (1981): 50-63.

²³³ See m.Arkoun, *Rethinking Islam*, p.25.

²³⁴ According to Bromley 'the fez and turban were banned and European-style hats were made compulsory; indeed, seventy people were executed for opposition to the hat laws!' S. Bromley, *Rethinking Middle East Politics*, Austin; University of Texas Press, 1984, p.126.

²³⁵ Although the Hat law is still in force, nobody is prosecuted any longer for not wearing the hat. In the Human Rights Commission of the Parliament, one member has announced that as long as the ban on headscarves continues he will sue whoever violates the Hat Law (indicating the politicians and bureaucrats). *TBMM İnsan Hakları Komisyonunda Güneydogu ve Turban Tartismasi*, Istanbul: Gorus, 1992, p.112.

²³⁶ Similarly, the use of titles like 'effendi' or 'pasha' was abolished, but ironically most people in today's Turkey use these titles for the champions of these laws like 'Kemal Pasha', Ismet Pasha', or 'Kenan Pasha'.

²³⁷ *Anayasa Komisyonu Gorusme Tutanaklari*, Vol.14, p.197.

decision as to the unconstitutionality of the Reform Laws would undermine the Kemalist reforms. They decided, therefore, this door had to be closed in order to avoid such undesirable consequences.²³⁸

Despite its entrenchment of these 'archaic' laws, the 1961 Constitution had also a liberal aspect concerning the protection of rights and freedoms.²³⁹ Article 11 provided that 'the law shall not infringe upon the *essence* of any right or liberty not even when it is applied for the purpose of upholding public interest, morals and order, social justice as well as national security'.²⁴⁰ Two significant features of this article can be distinguished. First, the conception of essence of right or liberty was marked as the ultimate point for any legal restriction. This conception of 'essence' was taken from the Bonn Constitution,²⁴¹ and, like it, emerged as a reaction to the authoritarian and absolutist political systems of the past.²⁴² However, the definition of the term 'essence' proved to be extremely difficult, if not impossible. In practice it was for the Constitutional Court to decide what the 'essence' of a specific right or liberty was.²⁴³

The second point about Article 11 is that it did not invoke very commonly used utilitarian arguments to limit the 'essence' of rights. As such it provided a right-based approach which was banished by the amendments of 1971, and later by the 1982 Constitution.²⁴⁴

The Constitution of 1961 also protected the political rights, along with the freedom of thought and faith (article 19). Article 56 guaranteed the right to form political parties 'without prior permission', and stressed that they 'shall operate freely'.²⁴⁵ However, Article 57 qualified this right by stating that 'the statutes, programs and activities of political parties shall conform to the principles of a democratic and secular republic...'. Otherwise, they

²³⁸ *Ibid.*

²³⁹ See Cizre-Sakallioğlu, 'Kemalism, Hyper-Nationalism...', p.260.

²⁴⁰ Kili, *Turkish Constitutional Developments*, p.173. Emphasis added.

²⁴¹ See Article 19 of the Bonn Constitution.

²⁴² F. Sağlam, *Temel Hakların Sınırlanması ve Ozu*, Ankara: AU.SBF Yay., 1982, p.141.

²⁴³ On the interpretation of the conception of 'essence' by the Constitutional Court see I.O.Kaboglu, *Kolektif Özgürlükler*, Diyarbakir: DUHF Yayınları, 1989, pp.263-267.

²⁴⁴ See Chapter 7 below.

²⁴⁵ Kili, *Turkish Constitutional Developments*, p.180.

'shall be permanently dissolved'.²⁴⁶ The authority to dissolve political parties was given to the Constitutional Court. Under Article 19 this Court could also close the political parties which 'exploit and abuse religion or religious feelings... for the purpose of political or personal benefit or for gaining power, or for even partially basing the fundamental social, economic and legal order of the State on religious dogmas'.²⁴⁷

As a reaction to the 1924 Constitution, which was believed to be susceptible to one-party dictatorship²⁴⁸, the 1961 Constitution strove to limit political power through 'autonomous' and 'independent' institutions.²⁴⁹ The Constitutional Court was undoubtedly the most important and effective one. It was established with the authority to review the constitutionality of the laws passed by the Grand National Assembly (Article 147).²⁵⁰ The Court was 'expected to counter-balance political institutions which had provided ample proof in recent history of their tendency to abuse their powers'.²⁵¹ The establishment of the Constitutional Court, as Dodd pointed out, would help the protection of individuals against the government.²⁵² On the other hand, with its power to dissolve parties which do not conform to the 'secular' and 'democratic' principles of the Constitution, the Court might turn out to serve as a security valve for the maintenance of the prevailing ideology and its regime.

The 1961 Constitution failed to enable the political process to survive the economic and social crisis that emerged in the 1960s, and led to the military intervention of 1971.²⁵³ The military formed a caretaker government whose prime minister, Nihat Erim, denounced the Constitution as being a 'luxury'

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*, p.175.

²⁴⁸ See C.Tuncay, 'New Constitutional Law System', *Turkish Review*, 1/5(1986:21-45, at 24.

²⁴⁹ See J.S.Szyliowicz, 'The 1961 Turkish Constitution: An Analysis', *Islamic Studies*, 2/3(September 1963): 363-381, at 377.

²⁵⁰ Kili, *Turkish Constitutional Developments*, p.200.

²⁵¹ R. Aybay, 'The Constitution and Judicial Review in Turkey' in *Armagan*, Kanun-i Esasi'nin 100.Yili, Ankara: AUSB Yayinlari, 1978, p.342.

²⁵² Dodd, *Crisis of Turkish Democracy*, p.71.

²⁵³ For an analysis of '12 March Regime' (12 Mart Rejimi) see Ozdemir, 'Siyasal Tarih(1960-1980)', pp.226-236.

for Turkey.²⁵⁴ Since it was a 'luxury' or 'too advanced', in the words of Dodd,²⁵⁵ regarding the rights and liberties of the individual, the Constitution had to be remedied and revised in certain respects.

The amendment to the Article 11 of the 1961 Constitution read that '[n]one of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating human rights and liberties or the integrity of the state with its territory and nation, of destroying the Republic, whose principles are set forth in the Constitution, with the discrimination on the basis of language, race, class, religion, or sect.'²⁵⁶

With these amendments, Soysal argues, more restrictions were imposed upon the rights.²⁵⁷ These restrictions, for him, turned upside down the idea of individual rights against the state; the protection of the state against the individual became main concern.²⁵⁸

Finally, the 1961 Constitution, together with the amendments of 1971, left three important legacies to the 1982 Constitution. They are the constitutional protection of Kemalism, the Constitutional Court, and the National Security Council (Article 111)²⁵⁹ by which began the institutionalisation of army involvement in Turkish politics. I will argue in the next chapter that these are the key legacies that have directly affected the development of political rights in Turkey.

²⁵⁴ See Soysal, *Anayasanın Anlamı*, p.105.

²⁵⁵ Dodd, *Crisis of Turkish Democracy*, p.39.

²⁵⁶ Kili & Gozubuyuk, *Türk Anayasa Metinleri*, p.174.

²⁵⁷ Soysal, *Anayasanın Anlamı*, p.117.

²⁵⁸ *Ibid.*, p.119.

²⁵⁹ Kili, *Turkish Constitutional Developments*, p.192.

CHAPTER 7- THE POLITICS OF THE TEXT: THE 1982 CONSTITUTION AND POLITICAL RIGHTS

Introduction: The Unfinished Symphony of the Military

In the early morning of 12 September 1980 Turkey woke up with a familiar voice which announced the third Turkish military takeover of the Republic. 'The aim of the operation', as usual was 'to protect the integrity of the country and the nation, and the rights and liberties of the nation,...and to reinstate the supremacy of law and order...'¹ This coup marked the end of the Second Republic.

The National Security Council (NSC),² which assumed legislative and executive power, promised to turn 'the administration of the country to a liberal, democratic, secular administration based on the rule of law, which would respect human rights and freedoms'.³ This called for 'the preparation of a new Constitution, Electoral Law, Political Parties Act

¹ General Secretariat of the National Security Council, *12 September in Turkey: Before and After*, Ankara: Ogun Kardesler Printing House, 1982, p.229. General Evren, the Chief of the Coup, attempted to justify the military takeover by referring to Article 35 of the Internal Service Act of the Turkish Armed Forces which grants the army 'the duty to protect and safeguard the Turkish land and the Turkish Republic as stipulated by the Constitution'. (See Turk Silahlı Kuvvetlerinin Hizmeti Kanunu, No:211, *Resmî Gazete*, 10 Ocak 1961, No: 10703.) It is argued however that neither Article 35 of the Internal Service Act, nor any provision of the Constitution concerning the military has given the Turkish armed forces the 'right' or 'duty' to take over the power. Thus 12 September Coup, like its predecessors, lacked any 'legal' and 'legitimate' ground; it created a 'de facto' regime. See M. S. Gemalmaz, *The Institutionalisation Process of the 'Turkish Type of Democracy': A Politico- Juridical Analysis of Human Rights*, Istanbul: Amac Yayincilik, 1989, p.1, and 6-7; M.S. Gemalmaz, 'The Need for a 'de jure- de facto' Division: A New Standard in Reading Human Rights', *Turkish Yearbook of Human Rights*, 9-10(1987-88): 3-10; H. Ozdemir, *Rejim ve Asker*, Istanbul: Afa Yayinlari, 1989, pp.215-220.

² The National Security Council was composed of Evren, as Chief of the General Staff, and the commanders of land and air forces, navy, and gendarmerie.

³ *12 September in Turkey: Before and After*, p. 227.

and related legislative arrangements'.⁴ Despite this initial 'assurance', all these laws including the Constitution itself turned out to be extremely restrictive and repressive with respect to the rights and freedoms of the individual.⁵ The 'rationale' behind these repressive laws was 'the belief that this would prevent the recurrence of the political anarchy that had existed prior to the military take-over'.⁶ As Harris put it, '[v]aluing the welfare of society above the rights of individuals, the generals saw the need to prevent anarchy-at whatever cost to personal rights that might be necessary'.⁷

Inspired by the principles of Kemalism,⁸ the generals indeed did their best to prevent 'anarchy', and 'save' the integrity of the state. They had everything at their disposal to achieve this 'messianic' mission.⁹ Since the political parties were held directly responsible for the plight of pre-Coup period, the NSC started off with banning all kinds of political activities,¹⁰ and dissolving political parties that existed at the time of

⁴ *Ibid.* To prepare the new constitution and other laws, the junta established a Constituent Assembly which consisted of the NSC and a Consultative Assembly. The members of the latter (160) were directly and indirectly appointed by the NSC. Although in theory, as William Hale pointed out, the Consultative Assembly had legislative power, the ultimate and absolute say rested with the NSC. See W.Hale, *Turkish Politics and the Military*, London and New York: Routledge, 1994, p.256.

⁵ See Gemalmaz, *The Institutionalisation Process of the 'Turkish Type of Democracy'*, pp.14-19.

⁶ F.Ahmad, 'The Transition to Democracy in Turkey', *Third World Quarterly*, 7(April 1985): 211-226, at 213. Cf.M.Heper, 'State, Democracy, and Bureaucracy in Turkey', in M.Heper (ed.), *The State and Public Bureaucracies: A Comparative Perspective*, New York & London:Greenwood Press, 1987, at 138.

⁷ G.S.Harris, *Turkey: Coping with Crisis*, Boulder, Colorado: Westview Press, 1985, p.149.

⁸ General Evren promised from the very beginning that he would adhere to the Kemalist principles in ruling the country. See U.Steinbach, 'The Impact of Ataturk on Turkey's Political Culture Since World War II', in J.M.Landau (ed.), *Ataturk and the Modernization of Turkey*, Boulder, Colorado: Westview Press, 1984, pp.77-88, at 77.

⁹ For the traditional roots of this mission see Chapter 5 above.

¹⁰ Siyasi Partilerin Feshine Dair Kanun, No: 2533, 16.10.1981, *Resmi Gazete*, 16 Ekim 1981, Sayı:17486 Mukerrer. See also M.Sencer, '12 September and its Aftermath:From the

coup.¹¹ Most of the leading members of the political parties were detained, and some of them faced trial.¹²

Moreover, in reshaping the new political system, the junta decided to exclude almost all former politicians from participating in politics for 5-10 years.¹³ The new constitutional order created new politicians 'who did not fall into the 5-10 year prohibition category of former politicians'.¹⁴ This was, as Dodd observed, 'a wholesale condemnation of the previous regime, but one which also aimed to ensure that politicians displaced by the military would not be in a position to take revenge for their overthrow in 1980'.¹⁵ In addition to this, the Junta exercised a total control on the establishment of new political parties which would run in the 1983 election.¹⁶ Under the new Political Parties Act,¹⁷ a party could be formed only by those approved by the NSC.¹⁸ The NSC also generously used its veto in determining election candidates.¹⁹

Perspective of Human Rights', *Turkish Yearbook of Human Rights*, 9-10(1987-88):49-58, at 50.

¹¹ See F.Tachau and M.Heper, 'The State, Politics, and the Military in Turkey', *Quarterly*, 16/1(October 1983):17-33, at 27.

¹² For these trials and verdicts, see Gemalmaz, *The Institutionalisation Process of the 'Turkish Type of Democracy'*, pp.5-6.

¹³ The ban on former politicians was formulated by the Provisional Article 4 of the 1982 Constitution. See S.Kili and S.Gozubuyuk, *Turk Anayasa Metinleri*, Ankara: Is Bankasi Yayinlari, 1985, p.315. Provisional Article 4 was abolished with a referendum held on 6 September 1987. For the result of this referendum see *Resmi Gazete*, 12 September 1987, No:19532.

¹⁴ B.A.Yesilada, 'Problems of Political Development in the Third Turkish Republic', *Polity*, (1988):345-372, at 352.

¹⁵ C.H.Dodd, *The Crisis of Turkish Democracy*, Second Edition, London: The Eothen Press, 1990, p.85.

¹⁶ Yesilada, 'Problems of Political Development', p.355.

¹⁷ *Siyasi Partiler Kanunu*, No: 2820, 22 Nisan 1983, *Resmi Gazete*, 24 Nisan 1983, No: 18027.

¹⁸ Only three parties were formed as a result of the approval of the NSC. For the ideological bases of these 'NSC-Based Political Parties', see Yesilada, 'Problems of Political Development', p.356.

¹⁹ The NSC vetoed about 20% of the candidates of approved parties, and 90% of

Before handing over its power, the Junta pursued the same tradition of other coups, that is, to ensure that they will be safe when the military rule is over. To this end, the NSC adopted two techniques which were regulated through the provisional articles of the new Constitution. First, Provisional Articles 1 and 2 provided the chairman and other members of the NSC with powerful status in the new constitutional system.²⁰ The second technique is perhaps more important from the angle of human rights and rule of law. Provisional Article 15 of the Constitution gave the members of the junta and other officials the opportunity to get away with everything they have done during the military rule.²¹ It unequivocally rules out the possibility of judicial review against the 'decisions or measures whatsoever taken by: the Council of National Security [NSC],... the governments formed during the term of office of the Council; or the Consultative Assembly'.²² The Constitutional Court affirmed that the ban on judicial review imposed by the Provisional Article 15 is still in force, and therefore, it held that the laws enacted in that period cannot be subjected to constitutional review.²³

Apart from the gross abuses of human rights in general and the complete suspension of political rights in particular,²⁴ the 12 September

independent candidates, B.Tanor, 'Who is in Charge in Turkey', *ICJ Review*, 34(December 1984): 61-68, at 62. A detailed analysis of the restrictions on political rights in the course of transition to civil law can be found in J.H. Mc Fadden, 'Civil-Military Relations in the Third Turkish Republic', *The Middle East Journal*, 39/1(Winter 1985): 69-85, especially pp.74-79.

²⁰ With the acceptance of the Constitution, the leader of the junta would become the President of the Republic for seven years. The NSC itself would turn to the Presidential Council, and the commanders of the NSC would 'acquire the title of members of the Presidential Council' for a period of six years. See *The Constitution of the Republic of Turkey*, (hereafter the Constitution) Ankara:BYEGM Matbaasi, 1982, pp.87-88.

²¹ *The Constitution*, p.92.

²² *Ibid.*

²³ Constitutional Court Decision, 28 Kasim 1985, No;1985/19, 1985/21, *Resmi Gazete*, 22 Aralik 1985, No:18966.

²⁴ See Sencer, '12 September and its Aftermath', p.50, Helsinki Watch, *Human Rights in Turkey's 'Transition to Democracy'*, New York, 1983. This Report also touches upon the 'unqualified' United States support to the military junta of 12 September. (*Ibid.*, p.4, and

Coup left an 'authoritarian' legacy with the Constitution of 1982 at its centre.

The Political Philosophy of the Constitution

Constitutions, in a way, constitute a response to the developments and problems of the previous period.²⁵ The 1982 Constitution is no exception to this.²⁶ Professor Aldikacti, the Chairman of the Constitutional Committee set up for the purpose of drafting new constitution, declared in his first speech to the Committee that:

the prevailing [political and social] silence is due to the military rule and Martial Law, and it is [therefore] temporary. With the transition to a normal [civil] regime all the old cleavages will re-emerge. We have to create a constitution which will restrict and reduce these conflicts as much as possible. I think this must be the main direction of our work.²⁷

This fear of 'anarchy' and 'terror' played a vital role in shaping the basic characteristics of the new Constitution. It made the Constitution extremely authoritarian with respect to political rights and liberties. The immediate implication of the generals' fear of 'anarchy' was the policy of depoliticisation of the society from head to foot. This policy can best be seen in the Constitution itself. Article 33, for instance, prohibited associations from pursuing political aims, participating in political activities, and receiving support from political parties or giving support to them, and also from taking joint action with labour unions, with

79-97) On the West's attitude towards military coups in Turkey, see also M.A.Birand, *The Generals' Coup in Turkey: an Inside Story of 12 September*, London: Brassey's, 1987, pp.185-186, A.Altan, 'Etkili Cevreler', *Yeni Yuzyil*, 10 Mayis 1996, and my study, *Human Rights Issue in Turkey and Its Implications for Euro-Turkey Relations*, Unpublished MA Dissertation, Leicester, 1991, pp. 77-78.

²⁵ M. Soysal, *100 Soruda Anayasanin Anlami*, Sekizinci Baski, Istanbul: Gercek Yayınevi, 1990, p.5.

²⁶ For the 'reactionary' characteristic of the 1982 Constitution with respect to basic rights, see Y. Sabuncu, '1982 Anayasasi ve Temel haklar ve Ozgurlukler', *Mulkiyeliler Birligi Dergisi*, 10/76(Ekim 1984):15-21, particularly see p.21.

²⁷ Danisma Meclisi, *Anayasa Komisyonu Gorusme Tutanagi*, (hereafter AKGT), Cilt. 1, (1982), p.48.

public professional organisation or with foundations.²⁸ More specifically, the activities of the labour unions were restricted and 'depoliticised' to the utmost under Article 52 of the 1982 Constitution.²⁹ Although Article 52 of the Constitution was abolished by the 1995 Amendments,³⁰ 'politically motivated' and 'solidarity' strikes are still prohibited. (Article 54).³¹

Birol Yesilada has attempted to summarise the nature of the post-1980 political system in the following terms.

[T]he type of political system envisioned in the 1982 Constitution was a highly centralized state with a depoliticised society. This contrasted with the pluralistic system that had evolved over the previous three decades. Interest associations and political parties that had flourished under pluralist liberal democracy now had to give up their individual freedoms and political rights and accept a new political system which emphasised centralisation and concentration of power in the hands of the state with strong oversight powers for the military. These characteristics resemble the basic elements of exclusionary state corporatism.³²

This judgement is accurate only in one aspect, that is, the assessment of the political system established by the 1982 Constitution. It is however misleading to ignore or deny the authoritarian legacy of the pre-1980 period. The 1961 Constitution might be considered as more 'liberal'³³ in

²⁸ *The Constitution*, p.17. These restrictions on the associations were removed from Article 33 by the amendment of 1995. See Law No: 4121, *Resmi Gazete*, 26 Temmuz 1995, Sayi:22355. Yet the Law of Associations (1983) prevented a number of occupational groups such as soldiers, teachers, civil servants, or university students from forming associations. See L.W.Pewsnar, *Turkey's Political Crisis*, New York: Praeger, 1984, p.99.

²⁹ *The Constitution*, p.24.

³⁰ See Law No: 4121, *Resmi Gazete*, 26 Temmuz 1995, Sayi:22355.

³¹ *The Constitution*, p.26.

³² Yesilada, 'Problems of Political Development', pp.353-54.

³³ See I.Sunar and S.Sayari, 'Democracy in Turkey: Problems and Prospects', in G. O'Donnell et al. (eds.), *Transitions from Authoritarian Rule: Southern Europe*, Baltimore and London: The John Hopkins University Press, 1986, p.175; J.S.Szyliowcz, 'The 1961 Turkish Constitution: An Analysis', *Islamic Studies*, 2/3(September 1963): 363-381, at 380.

some respects.³⁴ Yet it does not follow that it brought about a political system that can be called as a pluralist 'liberal democracy'. In fact, the introduction of some important anti-democratic institutions, such as the National Security Council,³⁵ to the political and legal system of Turkey goes back to 1961 Constitution.³⁶

Since 1961 Turkish politics has always been under the scrutiny of the military; it has not been a completely autonomous liberal democracy, and this has been particularly the case since 1971. The role of the national Security Council with its substantial military membership has of late years been enhanced. The military has taken upon itself the duty of offering advice and has delivered stiff warnings as soon as the political situation has shown signs of getting out of hand.³⁷

The pre-1980 political order cannot be called 'pluralist' for at least two closely interrelated reasons. In the first place, Kemalism has always been at the heart of the constitutional system.³⁸ The entrenchment and absolute protection of Kemalist ideology through legal means has been the main obstacle against the emergence of a pluralist society.³⁹ As we have seen in the first Part of the study, the adoption of a comprehensive doctrine by a political system is not compatible with the liberal principle of political neutrality which is one of the constitutional conditions for the development of political rights.⁴⁰ The second reason why the pre-1980 period was not 'pluralist' is that it retained fundamental restrictions on freedom of thought and expression. Articles 141, 142 and 163 of the Penal Code, which prohibited the propaganda of such 'harmful' ideologies as socialism and *shariah*, were abolished as late as 1991⁴¹. In

³⁴ See Chapter 6 above.

³⁵ This constitutional institution must not be confused with the NSC of the 12 September Coup.

³⁶ H.Ozdemir, *Rejim ve Asker*, p.5.

³⁷ Dodd, *The Crisis of Turkish Democracy*, p.27.

³⁸ See Chapter 6 above.

³⁹ According to Andrew Mango, 'the 1961 Constitution had departed from liberal concepts' when 'it entrenched the principles of Atatürk'. See A.Mango, 'The Third Turkish Republic', *World Today*, 39/1(January 1983):30-38, at 36.

⁴⁰ See Chapter 2 above.

⁴¹ Terörle Mücadele Kanunu (Prevention of Terrorism Act) abolishes the so-called

short, the 1982 Constitution and other laws of this period have taken from the pre-1980 constitutional and legal system some authoritarian and restrictive elements which will adversely affect political rights.

The typical way of rationalising the authoritarian nature of the constitutions is the rhetoric of so-called 'delicate' balance between individual rights and the interests of the society or the state. The quest for such a balance seems to be derived from the assumption that there is inevitably a conflict between 'the rights of the individual and those of the state'.⁴² This balance is inevitable and 'necessary', according to Dr Beddard, since 'it is not *reasonable* that a state, with all the resources at its command, should reject its superior position and place itself... on an equal footing with each of its citizens'.⁴³

This is very awkward way of justifying restrictions on individual rights to protect the 'interests' of the state. It ignores and undermines the liberal idea that *raison d'être* of the state itself is to protect individuals and their rights.⁴⁴ This approach echoes a Hegelian conception of the state which rejects 'the liberal assertion that a well-ordered society must be based on the conception of individual rights and freedoms'.⁴⁵ Bertrand Russell puts forward in a rather simple manner the fundamental difference between the Hegelian tradition and the liberal tradition of the state.

The real question we have to ask in connection with Hegel is...whether the State is good per se, as an end: do the citizens exist for the sake of the state, or the State for the sake of the citizens? Hegel holds the former view; the liberal philosophy that

ideological offences (Article 25) with the exception of the one which is directed against the integrity of the state. (Article 8). See Terörle Mucadele Kanunu, No:3713, 12.4.1991, *Resmî Gazete*, 12 Nisan 1991, No:20843, mukerrer). For a brief evaluation of this Act see Tanor, *Türkiye'nin İnsan Hakları Sorunu I*, pp.v-xx.

⁴² R. Beddard, *Human Rights and Europe*, Third Ed., Cambridge: Grotius Publications Ltd., 1993, p.179.

⁴³ *Ibid.* Emphasis added.

⁴⁴ See Chapter 4 above.

⁴⁵ A.W. Wood, 'Introduction' to *Hegel's Elements of the Philosophy of Right*, Trans. H. B. Nisbet, Cambridge: CUP, 1991, p.xvi.

comes from Locke holds the latter.⁴⁶

For Hegel, the State is 'an absolute and unmoved end in itself, and in it, freedom enters into its highest right, just as this ultimate end [the State] possesses the highest right in relation to individuals, [die Einzelnen], whose *highest duty* is to be members of the State'.⁴⁷ The State, in Hegel's view, is 'the march of God in the world'⁴⁸, and as such it is 'the absolute power on *earth*'.⁴⁹ He went on to argue that:

If the state is confused with civil society and its determination is equated with the security and protection of property and personal freedom, *the interest of individuals* [der Einzelnen] as such becomes the ultimate end for which they are united; it also follows from this that membership of the State is an optional matter. - But the relationship of the State to the individual [individuum] is of quite a different kind. Since the state is objective spirit, it is only through being a member of the State that the individual [individuum] himself has objectivity, truth, and ethical life.⁵⁰

The philosophy behind the 1982 Constitution appears to reflect the

⁴⁶ B. Russell, *A History of Western Philosophy*, Second Edition, London: Allen & Unwin, 1961, p.713.

⁴⁷ Hegel, *Elements of the Philosophy of Right*, p.275.

⁴⁸ *Ibid.*, p.279, and G.W.F.Hegel, *Reason in History: A General Introduction to the Philosophy of History*, New York: The Liberal Arts Press, 1953, p.53. Shlomo Avineri objects to what he calls 'mistranslation' of Hegel's famous expression that 'State is the march of God in the world'. According to Avineri, the correct translation must read as follows: 'It is the way of God in the world, that there should be [literally:is] the state'. By this Hegel meant, he claims, 'not that the state is the 'March of God' on earth or anything of this nature, but that the very existence of the state is part of a divine strategy, not merely human arbitrary artefact'. (See S.Avineri, *Hegel's Theory of the Modern State*, Cambridge: Cambridge University Press, 1972, p.177). Nonetheless, this does not change the fact that Hegel attributes 'sacredness' or 'divinity' to the state, no matter whether it is ontologically the 'march of God' or the mere 'will of God' on earth. In other words, 'his advocacy of State absolutism' is still there. See R.S.Peters, 'Hegel and the Nation-State', in D.Thomson(ed.), *Political Ideas*, Harmondsworth: Penguin, 1969, pp.130-142.

⁴⁹ Hegel, *Elements of the Philosophy of Right*, p.366. Emphasis in original.

⁵⁰ *Ibid.*, p.276. Emphasises in original.

Hegelian tradition of 'absolute state' rather than the liberal tradition of the 'limited state'. The signs of this philosophy can be discerned in several respects. In the first place, General Evren paid special attention to the 'certain rights' that the State has in his opening speech before the Consultative Assembly.⁵¹ The drafters of the Constitution similarly emphasised the importance of the 'rights of the state' against the rights of individual. It was pointed out, in the Constitutional Committee, that the rights of the state are among 'natural rights', therefore individual rights and freedoms cannot be deemed as prior to the state's rights.⁵²

By imposing severe restrictions on the rights and freedoms of the individual, the 1982 Constitution puts special emphasis on the idea of protecting state vis-a-vis individual.⁵³ The priority, as Mumtaz Soysal asserts, is given to the authority, the state; and the rights and freedoms of individuals are to be protected in the light of this priority.⁵⁴ In other words, under the Constitution, individuals have rights to the extent that they are not in conflict with the interests (or 'rights') of the State.

The Hegelian understanding of the state reaches its zenith in the 1982 Constitution, when the Preamble, which represents the philosophy of the Constitution⁵⁵, declared the State as 'sacred'. The Preamble of the Constitution is not a merely rhetorical text. It is legally binding part of the Constitution, and in fact is invoked by the Constitutional Court to justify its judgements.⁵⁶ Moreover, the Political Parties Act of 1983 has granted more protection to the Preamble of the Constitution. The Act prohibited the political parties from trying to change the principles

⁵¹ *Newspot: Weekly Turkish Digest*, 23 October 1981.

⁵² See *Anayasa Komisyonu Gorusme Tutanagi*, Cilt.1, p.414.

⁵³ S.Kili, 'Temel Hak ve Ozgurlukler Yonunden 1961 ve 1982 Anayasalari', *Anayasa Yargisi*, 1(1984): 23-28, at 28. Cf. I.O.Kaboglu, *Kolektif Ozgurlukler*, Diyarbakir: DUHF Yayinlari, 1989, pp.258-259.

⁵⁴ M. Soysal, 'Temel Nitelikleriyle 1961 ve 1982 Anayasalari', *Anayasa Yargisi*, 1(1984):11-20, at 18. See also B.Tanor, *Turkiye'nin Insan Haklari Sorunu I: Hukuki Boyutlar*, Istanbul: BDS Yayinlari, 1991, p.259.

⁵⁵ H. Hatemi, 'Anayasa Kisi Hak ve Hurriyetleri', in Hak-Is, *Anayasa Kurultayi*, Ankara, 1992, p.303, Tanor, *Turkiye'nin Insan Haklari Sorunu I*, p.257.

⁵⁶ See Chapter 8 below.

entrenched in the Preamble. The Preamble of the 1982 Constitution however recently underwent a change which removed the expression of 'sacred state', and other statements written by the 12 September Junta to justify and legitimise their intervention.⁵⁷ This Amendment to the Constitution represents perhaps the attempt to free the Turkish political system from the shadow of 12 September *coup d'état*. It does not reflect the idea that individual must be prior to the state, though the amendment has indirectly removed an obstacle to the realisation of this idea. The statist tradition in a word constitutes potentially the most serious obstacle to the protection of political rights which are defined as 'the rights against the state'.⁵⁸

Constitutional Protection of Political Rights

Despite its authoritarian outlook, the 1982 Constitution ostensibly guarantees political rights both in its broad and narrow senses. As we have seen before, political rights in its broader sense include those rights which can be claimed against the state. The Constitution protects such political rights as freedom of thought (Article 25), freedom of dissemination of thought (Article 26), freedom of assembly (Article 33), and freedom of press (Article 28). The provisions under the heading 'Political Rights and Duties' protect political rights in its narrow sense, i.e. right to political participation, such as rights to vote, to be elected, and to form political parties.⁵⁹

In analysing the political rights in the 1982 Constitution, it would be helpful for practical reasons to distinguish between structural provisions and rights provisions.⁶⁰ The former deals with the functional and power relations between the basic institutions of the polity, while the latter is devoted to the protection and restriction of individual rights and

⁵⁷ See Law No: 4121, *Resmî Gazete*, 26 Temmuz 1995, No: 22355.

⁵⁸ See Chapter I above.

⁵⁹ *The Constitution*, Chapter 4, Articles 67-69, pp.29-31.

⁶⁰ I have taken this division from Cass R. Sunstein who uses it to explain the functions of constitutional provisions in relation to democracy. See his 'Constitutions and democracies: an epilogue', in J.Elster & R. Slagstad (eds.), *Constitutionalism and Democracy*, Cambridge: Cambridge University Press, 1988, pp.327-28.

freedoms. Without explaining power relations in Turkish political system, the constitutional protection of rights wouldn't be understood properly. The structural provisions reveal the basic framework in which the political rights are to be protected and restricted.

As for the structural provisions, I constrain myself to a brief examination of the State Security Courts (Article 143) and the National Security Council (Article 118). These two institutions are important because they represent the attempt to protect the state and its regime against individuals. Article 143 of the Constitution explains in the following terms the *raison d'être* of the State Security Courts, which can be seen as contemporary examples of the Tribunals of Independence of one-party rule.⁶¹

Courts of the Security of the State shall be established to deal with offences against the indivisible integrity of the State with its territory and nation, the free democratic order, or against the Republic whose characteristics are defined in the Constitution, and offences directly involving the internal and external security of the State.⁶²

State Security Courts were originally established by the amended Article 136 of the 1961 Constitution in 1973.⁶³ They were dissolved three years later as a result of the decision taken by the Constitutional Court on a procedural grounds.⁶⁴ The Parliament was unable to enact a new law for the reformation of these special courts before 1980.⁶⁵

'The Security Courts dispute', Hale argues, 'was about the proper extent

⁶¹ See Chapter 6 above.

⁶² *The Constitution*, p.69.

⁶³ For the text of amended Article 136 of the 1961 Constitution see Kili and Gozubuyuk, *Türk Anayasa Metinleri*, pp.213-214.

⁶⁴ W. Hale, 'Turkish democracy in travail: the case of the State Security Courts', *World Today*, (May 1977):186-194, at 190. See also O.K.Keskin, *Devlet Güvenlik Mahkemelerinin Yapisi, Gorevleri ve Yargilama Usulleri*, Ankara: Kazanci Yayinlari, 1987, p.1, 18.

⁶⁵ Professor Aldikacti criticised the failure of the civil governments to pass the act for State Security Courts. See his speech in the Symposium organised by Hak-Is, *Anayasa Kurultayi* (27-29 Subat 1992), pp.293-94.

of civil liberties, and that in this respect the question of the powers and composition of the Courts was less crucial than the nature of the laws they had to force'.⁶⁶ Given the fact that basic articles of the Penal Code dealing with political offences (namely 141, 142 and 163) were not in effect any more, one could say that the National Security Courts have merely symbolic significance.⁶⁷ This is not the case. The very existence of these 'extraordinary' courts, composed of two civilian and one military judges,⁶⁸ assumes that there are offences against the State, the Republic and its official ideology, i.e. Kemalism. It also assumes that, as Gemalmaz pointed out, the civil judiciary is not 'competent to protect the integrity of the State'.⁶⁹ Therefore so-called 'specialist Courts' were needed.⁷⁰ Having mentioned some legal and practical problems arising from 'the structure, organisation and procedure of' the State Security Courts, Gemalmaz concludes that 'trial before these special courts is no more compatible with basic Human Rights standards than trials before military courts'.⁷¹

The National Security Council (NASEC), which is the legacy of the 1961 Constitution,⁷² is another peculiar body that has played a very important role in the development of democracy in Turkey.⁷³ It is the main constitutional organ through which the military has increased its authority over the political system. Indeed, through NASEC which consists of four civil and five military members under the chairmanship

⁶⁶ Hale, 'Turkish democracy...', p.194.

⁶⁷ Articles 141, 142, and 163 of the Penal Code were abolished by the Prevention of Terrorism Act of 1991. However, Article 9 of the latter Act introduced a new political offence. Under the Act, for instance, Ismail Besikci was sentenced for writing 'heretical' books and articles which were considered to be in violation of the the unity and integrity of the state. See *Hurriyet* 12 April 1995, and *Sabah* 16 April 1995.

⁶⁸ *The Constitution*, p.69.

⁶⁹ Gemalmaz, *The Institutionalisation Process*, p.27.

⁷⁰ Keskin, *Devlet Guvenlik Mahkemelerinin Yapisi*, pp.20-21, 146-147.

⁷¹ *Ibid.*, p.28. Cf. H.Celenk, *12 Eylul ve Hukuk*, Ankara: Onur yayinlari, 1988, pp.33-34.

⁷² See Article 111 of the 1961 Constitution in Kili and Gozubuyuk, *Turk Anayasa Metinleri*, p.204.

⁷³ For a comprehensive treatment of the subject see H.Ozdemir, *Rejim ve Asker*, pp.87-126.

of the President of the Republic,⁷⁴ 'the army kept a watching brief' on the civil governments.⁷⁵ The formation of the NASEC, as Ozdemir has stressed, indicates the discredited tendency of the army towards the principle of 'general vote' and 'political party regime'.⁷⁶

Article 118 of the 1982 Constitution states that 'the National Security Council shall submit to the Council of Ministers [the government] its views on taking decisions and ensuring necessary coordination with regard to the formulation, establishment and implementation of the national security policy of the State'.⁷⁷ The government, Article 118 goes on, has to 'give priority consideration to the decisions of the National Security Council concerning the measures that it [NASEC] deems necessary for the preservation of the existence and independence of the State, the integrity and indivisibility of the country, and the peace and security of society'.⁷⁸

The Constitution nowhere defines the conception of 'national security'. But the Law on National Security Council and The General Secretariat of the NASEC⁷⁹, provides the following definition for this conception.⁸⁰

National Security is to preserve and protect the constitutional order, national existence and integrity, the political, social, cultural and economic interests and contractual rights (in international arena) of the State against all kinds of internal and external threats.⁸¹

⁷⁴ The NASEC is composed of the President (as chairman), Prime Minister, the Ministers of National Defence, Internal Affairs, and Foreign Affairs, the Chief of the General Staff, the Commanders of the Ground Forces, Navy, the Air Forces, and the gendarmerie. *The Constitution*, p.55.

⁷⁵ Hale, *Turkish Politics*, p.324.

⁷⁶ Ozdemir, *Rejim ve Asker*, p.107.

⁷⁷ *The Constitution*, p.55.

⁷⁸ *Ibid.*

⁷⁹ Law No: 2945, 1983, *Resmî Gazete*, 11 Kasım 1983, No:18218.

⁸⁰ In Ozdemir's view, this Law is one of the legal devices that 'institutionalised the ideology of national security state against the individual and society'. Ozdemir, *Rejim ve Asker*, p.111.

⁸¹ *Ibid.*

In addition to this broad definition of National Security, the Law also enumerates the duties and powers of the NASEC and General Secretariat⁸² extremely broadly so that almost nothing is left outside its scope of power. The NASEC has the duty, *inter alia*, to direct the Turkish nation towards 'national goals' by gathering it behind the Kemalist (Ataturkcu) thought, and the principles and reforms of Ataturk.⁸³ In reality, the National Security Council has never confined itself to the military sphere.⁸⁴ It did not only act sometimes as an 'upper cabinet'⁸⁵ rather than as a 'advisory' body in the pre-1980 period, the NASEC has frequently dealt with various matters. In 1987, for instance, NASEC complained and issued a warning to the government about the revival of Islam in Turkey as a threat to Kemalist principle of secularism.⁸⁶

Therefore, in the eyes of the NASEC the conception of national security does not stand only for the internal and external security of the state in its classical sense.⁸⁷ As Hikmet Ozdemir points out, it implies the preservation and protection of a particular political ideology against possible ideological threats.⁸⁸

A close reading of the rights provisions in the 1982 Constitution will reveal the same rationale which exists behind the structural provisions, that is, the preservation and protection of the State and its official ideology vis-a-vis individuals. This was indeed the basic aim of the 1982 Constitution, that is to 'protect the State against the individuals'.⁸⁹

⁸² See Ozdemir, *Asker ve Rejim*, pp.116-126.

⁸³ *Ibid.*, p.122.

⁸⁴ Hale, *Turkish Politics*, p.291.

⁸⁵ Soysal, *Anayasanin Anlami*, pp.348-49.

⁸⁶ Similarly, in 1986 the NASEC drew attention of the government to the religious programmes on television and radio. See M.Heper, 'Executive in the Third Turkish Republic', paper submitted to conference on 'Executive Leadership and the Executive Establishment', Washington, D.C., September 1988. Quoted by Dodd, *Turkish Democracy*, pp.107-108.

⁸⁷ For a comment on the conception of national security, see B. Tanor, *Siyasi Dusunce Hurriyeti ve 1961 Turk Anayasasi*, Istanbul:Oncu Kitabevi, 1969, pp.145-150.

⁸⁸ Ozdemir, *Rejim ve Asker*, p.89.

⁸⁹ This aim was expressed by Kenan Evren, the head of 12 September Junta and the

Ergun Ozbudun says that the 1982 Constitution 'recognizes all basic human rights commonly found in liberal democratic constitutions'.⁹⁰ This is apparently true because the Constitution lists almost all civil and political rights such as rights to freedom of thought (Article 25), freedom of speech (Article 26), freedom of press (Article 28), freedom of assembly (Article 33), and political participation (Article 68) and so on.⁹¹ Although the Constitution lists almost all classical civil and political rights, it attaches much more weight to the restriction of these rights than to their protection.⁹²

Restrictions on Political Rights

The 1982 Constitution, before listing the rights, provided a general provision for the restriction of *all* the rights and freedoms guaranteed.⁹³ Article 13 of the Constitution states the grounds of restriction as follows.

Fundamental rights and freedoms may be restricted by law, in conformity with the letter and spirit of the Constitution, with the aim of safeguarding the indivisible integrity of the state with its territory and nation, national sovereignty, the Republic, national security, public order, general peace, the public interest, public morals and public health, and also for specific reasons set forth in the relevant articles of the Constitution.⁹⁴

We can in fact distinguish between two kinds of constraints imposed on political rights embodied in the Constitution: general and specific. Kemalism as official ideology of the Constitution⁹⁵ constitutes the

President of the Republic later. Cited in M. Belge, 'Depomuz saglam', *Pazar Postasi*, 22 Nisan 1995. See also B.Caglar, 'Anayasa Mahkemesi Kararlarinda "Demokrasi"', in *Anayasa Yargisi*, 7(1990):57-127, at 77, 91.

⁹⁰ E. Ozbudun, 'Human Rights and the Rule of Law', in *Perspectives on Democracy in Turkey*, Ankara:1988, p.198.

⁹¹ For the text of these articles see *The Constitution*, p.12, 13,14, 16, and 29 respectively.

⁹² A.Mumcu, *Insan Haklari ve Kamu Ozgurlukleri*, Ikinci Baski, Ankara: Savas Yayinlari, 1994, p.

⁹³ Article 13 specifically mentions, in its last paragraph, that 'the general grounds for restriction set forth in this article shall apply for all fundamental rights and freedoms'.

⁹⁴ *The Constitution*, p.7.

⁹⁵ See Chapter 6 above, and note x below.

general restriction on the rights in general and the political rights in particular. The Preamble of the Constitution sets out that 'no protection shall be afforded to thoughts or opinions contrary to ...the nationalism, principles, reforms and modernism of Ataturk'.⁹⁶ Article 2 explicitly mentions, *inter alia*, 'secularism' and 'Kemalist nationalism' as the characteristics of the State.⁹⁷ Article 42, which provides the right of education, states that 'training and education shall be conducted along the lines of the principles and reforms of Ataturk'.⁹⁸ Similarly, 'the State shall take measures to ensure the training and development of youth...in line with the principles and reforms of Ataturk'.⁹⁹ Moreover, on assuming office, the deputies (Members of the Turkish Grand National Assembly) and the President of the Republic have to take the oath to 'remain loyal' to Kemalism.¹⁰⁰ Article 174 of the Constitution (like Article 153 of the 1961 Constitution) gives a special protection to the reforms of Ataturk, reforms whose compatibility with the rights of individual is very much in doubt, as Professor Aldikacti conceded.¹⁰¹

The rights to political participation have been restricted again on general and particular grounds. Let me begin with the latter. Articles 68 and 69 have constrained the activities of political parties, as a corollary of depolitisation policy started by the 12 September Coup.¹⁰² Under Article 68, political parties were prohibited from forming 'auxiliary bodies such

⁹⁶ *The Constitution*, p.4.

⁹⁷ *Ibid.* Furthermore, Article 2 refers to 'the principles set out in the Preamble' of the Constitution. During the debates in the Constitutional Committee, it was stressed that the principles stated in the Preamble stand for the Kemalist principles, and for all reforms of Ataturk. *Anayasa Komisyonu Tutanagi*, C.7, 1982, p.297.

⁹⁸ *The Constitution*, p.20.

⁹⁹ *Ibid.*, p.27.

¹⁰⁰ For the texts of these oaths see Article 81 and Article 103. *The Constitution*, p.35 and 47 respectively. The constitutional obligation to take this particular oath has sometimes caused problem in Turkish politics. In the last opening ceremony of the Assembly, such a problem erupted when some Kurdish nationalist deputies declined to take the oath as it is in the Constitution. After a long quarrel they reluctantly took (or rather read) the 'official' and 'ideological' oath.

¹⁰¹ *Anayasa Komisyonu Gorusme Tutanagi*, C.14, (1982), p.197. See also Chapter 6 above.

¹⁰² See note 28ff above.

as women's or youth branches', and from establishing 'foundations'.¹⁰³ Article 69 stated that:

Political parties shall not have political ties and engage in political cooperation with associations, [labor] unions, foundations cooperatives, and public professional organisations and their higher bodies in order to implement and strengthen their party policies, nor they shall receive material assistance from these bodies.¹⁰⁴

These restrictions on political parties were removed by the 1995 Amendments which in fact legalised the practice.¹⁰⁵ Prior to the Amendments, the political parties had already auxiliary bodies under different guises. The Political Parties Act 1983 has also to be amended in line with the constitutional changes in order to remove these restrictions on the political parties. As for the general restriction, though Articles 68 and 69 of the Constitution do not explicitly mention Kemalist principles, they implicitly make reference to it by stating that the programmes and statutes of political parties have to be in conformity with 'the principles of the democratic and secular Republic'.¹⁰⁶ More importantly, the Political Parties Act 1983¹⁰⁷ which was promulgated in accordance with the last paragraph of Article 69 of the Constitution,¹⁰⁸ declares that:

Political parties are indispensable elements of the democratic political life. They shall operate as loyal to the principles and reforms of Atatürk.¹⁰⁹

¹⁰³ *The Constitution*, p.30.

¹⁰⁴ *Ibid.*

¹⁰⁵ See Law No: 4121, *Resmi Gazete*, 26 Temmuz 1995, Sayı:22355.

¹⁰⁶ *Ibid.* Article 69 also states that the programmes and statutes of political parties 'shall not contravene the restrictions set forth in Article 14 of the Constitution; those that contravene them shall be dissolved permanently'.

¹⁰⁷ Law no: 2820, *Resmi Gazete*, 24 Nisan 1983, Sayı: 18027.

¹⁰⁸ The last paragraph of Article 69 says that 'the formulation and activities, supervision, and dissolution of political parties shall be regulated by law within the above mentioned provisions'. *The Constitution*, p.31.

¹⁰⁹ (Article 4 of the Act). Article 5 of the Act also places restriction on the right to form political parties by referring to the principles set forth in the Preamble, and to Article 14 of the Constitution.

Part 4 of the Political Parties Act is devoted to the protection of the Kemalist principles and reforms, and the secular state. Apart from Article 84, which repeats Article 174 of the Constitution, Article 85 of the Act specifically prohibits political parties from 'insulting' and 'humiliating' the personality, activity, and memory of Ataturk who is 'the saviour of the Turkish nation and creator of the Turkish Republic'.¹¹⁰

The adoption of an official ideology to impose its principles on everybody is fundamentally in conflict with the liberal idea of political neutrality. The liberal principle of political neutrality is based on the argument that the State cannot (should not) adopt a particular conception of good as superior to other conceptions, and impose it on its citizens.¹¹¹ In the words of John Rawls 'the state is not to do anything intended to favor or promote any particular comprehensive doctrine rather than another'.¹¹² This principle constitutes one of the requirements that must be met in order to develop political rights.

In the lights of these statements, we can say that the very existence of Kemalism as an official ideology of the Constitution is inconsistent with political neutrality. Hence it has been (is) one of the basic obstacles to the development of political rights in Turkey. Even if we did not take political neutrality into consideration, we could still argue that Kemalist ideology itself in certain respects incompatible with the liberal model.¹¹³

The idea of state's rights against the rights of individual which seems to prevail in the philosophy of the 1982 Constitution is also alien to the right-based liberal theory. In liberal theory, only individuals have rights; they have rights against state and against fellow citizens.¹¹⁴ Political rights are by definition the rights that individual have against the state. These rights are so 'strong' and 'far-reaching', as Nozick asserts, 'that they

¹¹⁰ See *Resmî Gazete*, 24 Nisan 1983, Sayı:18027, p.19.

¹¹¹ See Chapter 2 above.

¹¹² J.Rawls, 'The Priority of the Rights and Ideas of the Good', *Philosophy and Public Affairs*, 17(1988):251-276, at 262.

¹¹³ See Chapter 6 above.

¹¹⁴ R. Dworkin, *Taking Rights Seriously*, London: Duckworth, 1977, pp.184-6.

raise the question of what, if anything, the state and its officials may do'.¹¹⁵ Dworkin replies this question by saying that 'if someone has a right to something it is wrong for the government to deny it to him even though it would be in the general interest to do so'.¹¹⁶ This statement represents a complete rejection of utilitarian or consequentialist grounds for restricting political rights, grounds which have been adopted by the 1982 Constitution.¹¹⁷ This does not mean, however, that the state can never justifiably constrain individual rights in the liberal model.¹¹⁸ It may restrict rights of an individual only when there exist some compelling reason.¹¹⁹ These reasons¹²⁰ are neither ideological grounds like the preservation and protection of the Republic, or Kemalism, nor utilitarian interests like protection of public morals. That society would pay a further price for extending it cannot be accepted as an argument for curtailing a right.¹²¹ In the liberal model, there is no place for a compromise or balance between the rights of individuals and those of state. For there is no such thing as the rights of state.

Under the heading 'Prohibition of Abuse of Fundamental Rights and Freedoms' Article 14 repeats some of the grounds concerning the protection of the State.¹²² These grounds (be it general or specific),

¹¹⁵ R. Nozick, *Anarchy, State, and Utopia*, Oxford: Basil Blackwell, 1974, p.ix.

¹¹⁶ Dworkin, *Taking Rights Seriously*, p.269.

¹¹⁷ See note 121 below.

¹¹⁸ *Ibid.*, p.22.

¹¹⁹ *Ibid.*, p.24.

¹²⁰ Dworkin proposes three grounds that can be invoked by the government to limit the definition of a particular right. First, the Government must show that the values protected by the original right are not really in question in the marginal case, or at stake only in some 'attenuated' form. Second, it must show that if the original right is defined to include the marginal case, then some competing right would be abridged. Third, it may show that if the right were so defined, then the cost to society would be greater than the cost paid to grant the original right. See *ibid.*

¹²¹ *Ibid.*, p.49.

¹²² Article 14 asserts that 'none of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation, of endangering the existence of the Turkish State and Republic...'. *The Constitution*, p.7.

Article 13 adds, 'shall not conflict with the requirements of the democratic order of society and shall not be imposed for any purpose other than those for which they are prescribed'.¹²³ The restrictions of the constitutional rights therefore must be necessary in a 'democratic order'. Since this is an important criteria for restricting restrictions, I will explore it in greater detail.

European Convention and 'Democratic Society'

The Constitutional Committee frequently referred to the European Convention on Human Rights and Universal Declaration of Human Rights as models in restricting political rights.¹²⁴ Article 13(2) of the 1982 Constitution which embodies the condition of 'democratic order' was obviously inspired by the Convention.¹²⁵ Furthermore, Turkey has ratified the Convention, and recently accepted the right to individual petition to the Convention organs.¹²⁶ Under the 1982 Constitution, international agreements have the force of statutory law, and even superior to national (ordinary) laws in that unconstitutionality of these agreements may not be claimed.¹²⁷ The European Convention, therefore has to be 'considered by the Turkish judges'.¹²⁸ It would be helpful, for

¹²³ *Ibid.*

¹²⁴ *Anayasa Komisyonu Gorusme Tutanagi*, 1982, Cilt. 8, p.89.

¹²⁵ See *Gerekeceli Anayasa*, Ankara:Degisim Yayinlari, 1984, p.16. See also Caglar, 'Anayasa Mahkemesi Kararlarinda "Demokrasi"', pp.93-94, and B.Caglar, 'Anayasa Yargisinda Yorum Problemi: Karsilastirmali Analizin Katkilar', *Anayasa Yargisi*, 2(1986):163-195, at 180-181

¹²⁶ See C.Rumpf, 'The Protection of Human Rights in Turkey and the Significance of International Human Rights Instruments', *Human Rights Law Journal*, 14/11-12(1993): 394-408, at 402; I.Cameron, 'Turkey and Article 25 of the European Convention of Human Rights', *International and Comparative Law Quarterly*, 37(October 1988):887-925 for the Turkish declaration of 1987 recognizing the jurisdiction of the European Commission of Human Rights.

¹²⁷ See *The Constitution*, p.39. The last paragraph of the Article 90 states that '[i]nternational agreements duly put into effect carry the force of law. No appeal to the Constitutional Court can be made with regard to these agreements, on the ground that they are unconstitutional'.

¹²⁸ Rumpf, 'The Protection of Human Rights in Turkey', p.401.

all these reasons, to see the interpretation by the Strasbourg organs of the criteria 'requirements of a democratic order'.

Paul Sieghart asserts that the aim of the Commission in assessing the limitations is to achieve 'a pluralistic, open, tolerant society' involving a delicate balance between the interests of the individual and the 'greater good of the majority'.¹²⁹ Likewise, Professor Schermers, a member of the European Commission, points out that the formulation used for restricting rights in the Convention represents an attempt to balance the interest of the state against the interests of the individual.¹³⁰ To achieve this balance, the Convention set out a wide range of grounds for restricting the political rights and freedoms.¹³¹ The second paragraphs of the articles 9-11 lists such grounds as 'national security', 'territorial integrity', 'public morals', 'public order', 'public safety', 'public health', and so forth.¹³² These restrictive grounds reflect the utilitarian outlook which inevitably ends up in the belief that 'individual interests must on all occasion be subordinated to those of a group'.¹³³ Kantian liberals, as we have seen, refute this utilitarian reasoning of the 'greatest

¹²⁹ P. Sieghart, *The International Law of Human Rights*, Oxford: Clarendon Press, 1983, p.93. Cf. A.H. Robertson and J.G. Merrills, *Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights*, Third Edition, Manchester & New York: Manchester University Press, 1989, p.126.

¹³⁰ H.G. Schermers, *The European Commission of Human Rights from the Inside*, Hull: Hull University Press, 1990, p.8.

¹³¹ For the text of the Convention see, I. Brownlie (ed.), *Basic Documents on Human Rights*, Third Edition, Oxford: Clarendon Press, 1992, pp.326-362.

¹³² These ground for restrictions can also be found in Article 8 of the Convention, and in Article 2 of Protocol No.4, and Article 1 of Protocol 7. Although the enumerations of the grounds somewhat vary from one article to another, they are largely similar. The qualifications set forth in those articles are national security, territorial integrity, public safety, public order, the prevention of crimes, morals, health, the reputation and the rights and freedom of others, the economic welfare of the country, the prevention of disclosure of information received in confidence and the guaranteeing of the impartiality of the judiciary. See Brownlie, *Basic Documents*, pp.330-331, 346-347, 352.

¹³³ J.E.S. Fawcett, *The Application of the European Convention on Human Rights*, Oxford: Clarendon Press, 1987, p.282.

happiness of greatest number'.¹³⁴ Moreover, these grounds for restriction are extremely vague and ambiguous, so that, if interpreted broadly, they may make the protection of rights 'illusory'.¹³⁵ In other words, they have left 'the quite fallacious impression that the limitation clause takes away with one hand all that the principal clause has given with the other'.¹³⁶

Nonetheless, the condition 'necessary in a democratic society' is also embodied in Articles 8-11 of the Convention to limit these restrictions. The restrictions must be, *inter alia*, 'necessary in a democratic society'.¹³⁷ But what does 'democratic society' entail? What does 'necessary' mean? The answers to these difficult questions lie in the case-law of the Strasbourg organs.

The Commission and the Court have frequently referred to the 'margin of appreciation' doctrine¹³⁸ in handling the cases that involved the

¹³⁴ See notes 115-120 above.

¹³⁵ P.van Dijk and G.J.H. van Hool, *Theory and Practice of European Convention on Human Rights*, Second Edition, Deventer: Kluwer Law and Taxation Publishers, 1990, p.583.

¹³⁶ P.Sieghart, *The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights*, Oxford and New York: Oxford University Press, 1986, p.81.

¹³⁷ The Convention also states that these restrictions must be 'prescribed by law', or be 'in accordance with law'. (While Articles 9(2), 10(2), and 11(2) contain the phrase 'prescribed by law', the term 'in accordance with law' is to be found in article 8(2) of the Convention, and Article 2(3,4) of Protocol No.4, and Article 1(1) of Protocol No.7.) For the interpretation of this condition by the Convention organs see, e.g., *Sunday Times v. UK*, (1979) 2 EHRR 245, par.47, 49; *Silver v. UK* (1983) 5 EHRR 347, par.87; *Malone v. United Kingdom*, (1984) 7 EHRR 14, par.67. See also von Dijk and Hoof, *Theory and Practice of the European Convention*, pp.578-583, and M.W.Janis and R.S.Kay, *European Human Rights Law*, Connecticut: The University of Connecticut Law School Foundation Press, 1990, pp.297-300. A.H.Robertson and J.G.Merrills, *Human Rights in Europe*, Third Edition, Manchester and New York: Manchester University Press, 1993, pp.196-198.

¹³⁸ Undoubtedly, the 'margin of appreciation' doctrine is one of the most controversial issue in the judgements of the Court and Commission. It is frequently invoked. Indeed, in the words of R.J.Mac Donald, a member of the Court, '[t]he margin of appreciation is at the heart of virtually all major cases that come before the Court, whether the judgments

grounds of restrictions upon rights. In determining whether a particular interference is 'necessary' the Contracting States to the Convention are given 'a very broad "margin of appreciation"'.¹³⁹ This is however not an unlimited discretion; the final 'appreciation' as to the compatibility with the Convention is for the Court.¹⁴⁰ In the *Silver Case*,¹⁴¹ the Court outlined its general approach towards questions of restrictions and the 'margin of appreciation' as follows:

(a) the adjective 'necessary' is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable', or 'desirable'...

(b) the Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention...

(c) the phrase 'necessary in a democratic society' means that, to be compatible with the Convention the interference must, inter alia, correspond to a 'pressing social need' and be 'proportionate to the legitimate aim pursued'...

(d) those paragraphs of Articles of the Convention which provide for an exception to a right guaranteed are to be *narrowly* interpreted...¹⁴²

However, the judgements of the Court have not always showed that it interpreted these grounds 'strictly' and 'narrowly'. In the *Handyside*

refer to it explicitly or not'. Cited in Van Dijk and Van Hoof, *Theory and Practice*, p.586. On the concept of 'margin of appreciation' in the jurisdiction of the Convention see also C.Morrison, 'Margin of Appreciation in European Human Rights Law', *Human Rights Journal*, 6(1973):263-286, J.G.Merrills, *The Development of International Law by the European Court of Human Rights*, Manchester: Manchester University Press, 1988, pp.136-159.

¹³⁹ See Van Dijk and Van Hoof, *Theory and Practice*, p.585, and Janis and Kay, *European Human Rights Law*, pp.239-240.

¹⁴⁰ See, e.g., V.Berger, *Case Law of the European Court of Human Rights I: 1960-1987*, Dublin: The Round Hall Press, 1989, p.110.

¹⁴¹ *Silver v. UK* (1983), 5 EHRR 347.

¹⁴² *Ibid.*, par.97, pp.376-77. Emphasis added.

Case ¹⁴³ where the ban on a book by English Courts was raised, the Court took a 'firm' position about the 'protection of morals', and interpreted this interest very broadly. Having considered the arguments against the restriction on the right in question, it reached the conclusion that it was impossible to identify a uniform European conception of morals.¹⁴⁴ Thus the States had a margin of appreciation in deciding what was 'necessary' to protect morals.¹⁴⁵

So far as the interests of 'national security' and the 'prevention of disorder' are concerned, a broader 'margin of appreciation' has been given to the contracting States. In its judgement in the *Klass Case* ¹⁴⁶ where the question of secret surveillance arose, the Court found it easy to decide whether the interference in question satisfied the condition 'in the interest of national security and for the prevention of crime'.¹⁴⁷ The Court, however, had difficulty in answering the question of whether the measures taken by the contracting State involved could be deemed as 'necessary in a democratic society'. The Court's response was affirmative because 'it is certainly not for the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field'.¹⁴⁸

The Court in *Klass* also underlined a principal matter, that is, the balance between the interests of individual and interests of society as a

¹⁴³ *Handyside v. UK*, (1976) 1 EHRR 737.

¹⁴⁴ *Ibid.*, para. 48, p.753.

¹⁴⁵ The Court maintained that 'by reason of their direct and continues contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements [of morals] as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them'. *Ibid.*, pp.753-754.

¹⁴⁶ *Klass v. Federal Republic of Germany*, (1978) 2 EHRR 214.

¹⁴⁷ *Ibid.*, par.46, p.231.

¹⁴⁸ *Ibid.*, par.49, p.232. The Court, however, appeared to be 'aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it'. Hence it emphasised that the Contracting States might not adopt whatever measures they deem appropriate in the name of the prevention of espionage and terrorism. *Ibid.*, par.49, p.232.

whole. It maintained that: 'some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention.'¹⁴⁹ The Court again decided in favour of the interest of the State in question.¹⁵⁰

The Court, however, occasionally interpreted the phrase 'necessary in a democratic society' in a very strict and narrow way. In *The Sunday Times Case*,¹⁵¹ for instance, the Court found the ban on the publication of an article *not* 'necessary in a democratic society'.¹⁵² According to Eric Barendt, this judgement 'should be recognised as a major contribution to the international jurisprudence of free speech'.¹⁵³

To sum up, the Convention organs set out the principle of 'narrow' and 'strict' interpretation of the 'necessity' of restrictions, although in reality they sometimes interpreted them 'broadly'. They also invoked the 'margin of appreciation' doctrine which assumes that the states are in a better position to appraise whether a particular restriction is necessary in a democratic society. This margin of appreciation is granted to 'the domestic legislator...and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force'.¹⁵⁴ Now we can turn to the Turkish constitutional system to show how this condition is understood and interpreted.

1982 Constitution and 'Democratic Order'

The 1982 Constitution replaced the conception of 'essence' with 'necessity of democratic order' in limiting the grounds of restriction.¹⁵⁵ The drafters of the Constitution have presented two reasons for this

¹⁴⁹ *Ibid.*, para 59, p.237.

¹⁵⁰ In *Klass* the Court held that 'having regard to the nature of the supervisory and other safeguards provided for by the G10.. the exclusion of judicial control does not exceed the limits of what may be deemed necessary in a democratic society'. See 2 EHRR. 214, par. 56, p.235.

¹⁵¹ *Sunday Times v. UK*, (1979) 2 EHRR 245.

¹⁵² *Ibid.*, par.67, p.282. See also Berger, *Case Law I*, pp.110-111.

¹⁵³ E.Barendt, *Freedom of Speech*, Oxford: Clarendon Press, 1985, p.234.

¹⁵⁴ *Handyside v. UK*, (1976) 1 EHRR 737, par.48, p.754.

¹⁵⁵ For the principle of 'essence of the rights' see Chapter 6 above.

replacement: first the new criterion is more 'clear' and 'practical', second it conforms with international conventions and declarations.¹⁵⁶

The criterion 'requirements of democratic order', in fact, was chosen because it would give the government greater power to restrict the rights and freedoms of individual.¹⁵⁷ This fact can be clearly seen from the debates in the Constitutional Committee. Professor Aldikacti and some other members of the Committee argued that the criterion of 'essence' is extremely 'vague' and 'abstract' to construe, whereas the 'requirements of democratic order' is much more 'clear' and 'flexible' for interpretation.¹⁵⁸ To illustrate this, they cited the example of freedom of demonstration. By using the 'essence of rights' criteria, for them, you cannot possibly postpone or cancel a particular demonstration in a particular time.¹⁵⁹ Postponing or cancelling such a demonstration, they argued, would mean the denial of the right concerned on the ground that it violated the 'essence' of the rights. When it comes to the new criterion, in their view, it is easier to interpret such a restriction as being one of the requirements of democratic order.¹⁶⁰ Professor Golcuklu, a member of the Commission, went even further to say that since democratic society is not an 'anarchic' society you can easily justify this restriction of the right to demonstration.¹⁶¹

However, the term 'requirements of democratic order' proves to be no less problematic than the term 'essence'. The theoretical debate about this principle is somewhat different from that of the European Convention. It is on the issue whether 'democratic order' refers to the 'democratic' regime created by the 1982 Constitution or to the 'universal' principle of democracy.¹⁶² According to Erdogan Tezic, there are two ways that can be employed by the Constitutional Court in

¹⁵⁶ See *Gerekceli Anayasa*, p.16.

¹⁵⁷ See Kaboglu, *Kolektif Ozgurlukler*, p.276.

¹⁵⁸ Danisma Meclisi, *Anayasa Komisyonu Gorusme Tutanagi* (AKGT), C.8, p.77.

¹⁵⁹ AKGT, pp.76-77.

¹⁶⁰ *Ibid.*, p.77, and for Golcuklu's view see *ibid.*, pp.80-81.

¹⁶¹ *Ibid.*, p.81, and see also p.147.

¹⁶² On this issue see Kaboglu, *Ozgurlukler Hukuku*, pp.272-283; B.Caglar, 'Anayasa Mahkemesi Kararlarinda "Demokrasi"', *Anayasa Yargisi*, 7(1990):57-127, at 96-97.

interpreting the 'requirements of democratic order of society'.¹⁶³ Firstly, the Court may define the principle in specific terms and judge the decisions and measures of the government accordingly. Secondly, the Court may take it as a 'postulate', a general and universal principle without defining its content.¹⁶⁴

Tezic explicitly rejects the first option on the ground that it may lead to a 'rule of judges'.¹⁶⁵ For him, such a way may endanger the multi-party political system by imposing a particular ideology on this system. This is dangerous because, he concludes, 'in a multi-party liberal democracy there is no place for official ideology'.¹⁶⁶

M. Turhan completely agrees with Tezic's preference that the Court must treat 'the requirements of a democratic order' as a 'postulate'.¹⁶⁷ Otherwise, he argues, the Court would impose its understanding of democracy. And this will in turn be violation of the principle that 'in a multi-party democratic country there is no place for official ideology'.¹⁶⁸

These statements appear to reflect the deep and strong distrust of the authoritarian nature of the 1982 Constitution, and its understanding of 'democratic order'. In other words, they point to the fact that the 'democratic order' as indicated in the 1982 Constitution is by no means 'democratic' and 'liberal'. Therefore any definition of the principle of 'democratic order' in terms of *this* Constitution will inevitably constitute an official ideology which is alien to the liberal-democratic systems.

It is ironic however that, at the same page, Turhan contradicts himself by saying that this criterion (necessities of democratic order) must be taken into account within the framework of 'Kemalist thought system', i.e.

¹⁶³ E. Tezic, *Anayasa Hukuku*, Istanbul: Beta, 1986, pp.195-96

¹⁶⁴ *Ibid.*, p.196.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*, p.196.

¹⁶⁷ M.Turhan, 'Anayasamız ve Demokratik Toplum Düzeninin gerekleri', *Anayasa Yargisi*, 8(1991):401-420, at 419.

¹⁶⁸ *Ibid.*

Kemalism.¹⁶⁹ He even argues that such an approach is not optional because of the Preamble of the Constitution.¹⁷⁰ Indeed, the Preamble declares that this Constitution has to be interpreted along, *inter alia*, 'the direction of the concept of nationalism as outlined by Ataturk, the founder of the Republic of Turkey, its immortal leader and unrivalled hero; and in line with the reforms and principles introduced by him'.¹⁷¹ The same Preamble also states that 'no protection shall be afforded to thoughts or opinions contrary to ...the nationalism, principles, reforms and modernism of Ataturk'.¹⁷²

Turhan seems to be right, albeit inconsistent, because Kemalism is the legal-official ideology of the Constitution.¹⁷³ In *Huzur Partisi Case*, the Constitutional Court made it clear that 'Kemalist principles and reforms constitute the basic foundation and philosophy of the 1982 Constitution'.¹⁷⁴ Yet the question whether or not Kemalism itself is compatible with 'the requirements of a democratic order' remains to be asked for writers like Turhan.¹⁷⁵ Even if they answer this question

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *The Constitution*, p.3.

¹⁷² *Ibid.*, p.4. Turhan's suggestions were reflected in the Declaration by which Turkey recognised the competence of the European Commission of Human Rights. Paragraph (iv) of the Declaration reads that 'for the purpose of competence attributed to the Commission under this declaration, the notion of "a democratic society" in paragraphs 2 of Articles 8,9,10 and 11 of the Convention must be understood in conformity with the principles laid down in the Turkish Constitution and in particular its Preamble and its Article 13'. Quoted in Cameron, 'Turkey and Article 25 of the European Convention on Human Rights', p.889. Cameron argues that Turkey is the first and only contracting state which made *ratione materiae* reservations to Article 25. These reservations, for Cameron, obviously indicate that 'Turkish government considers that in those areas covered by the *ratione materiae* reservations its law and practice may not comply with the Convention'. (*Ibid.*, p.890). On the validity of this Declaration and 'reservations' (or 'interpretative declarations') see *ibid.*, pp.891-895, and Rumpf, 'The Protection of Human Rights in Turkey', p.403.

¹⁷³ See K. Bumin, 'Anayasa ve Devletin Ideolojisi', in *Anayasa Kurultayı*, p.49.

¹⁷⁴ 20 AMKD 345, at 364. (E.1983/2, K.1983/2)

¹⁷⁵ See Chapter 6 above.

affirmatively, they cannot escape a further question. Does the very existence of Kemalism *as an official ideology* have any place in a pluralist liberal democracy? If 'yes' their arguments collapse throughly. Or alternatively they may change their preferences between the above-mentioned options. Indeed to suggest that the Constitutional Court must interpret the principle of 'democratic order' in terms of Kemalism is to opt for Tezic's first option. That is, it must be defined as an official ideology, and imposed on the society.

The Constitutional Court of Turkey has attempted to interpret the principle of 'democratic order' on several occasions.¹⁷⁶ In its 1986 ruling, the Court found constitutional the Provisional Article 1 of the Free Territories Act which prohibited the right to strike within the Free territories for the period of 10 years. For the Court this ban on the right to strike was compatible with the 'requirements of democratic social order'.¹⁷⁷ The Court held that:

The law-maker may place restrictions on basic rights and freedoms...which will not be in conflict with the 'requirements of democratic order of society'. There is no doubt that by 'democratic order of society' we mean the liberal [*hurriyetci*] democracy and its legal order *as shown in our Constitution*.¹⁷⁸

In its *Police case* judgment¹⁷⁹, the Constitutional Court interpreted the term in conjunction with the principle of 'essence'.¹⁸⁰ It implied that the question is not an either/or matter; these two principles can be used together in constitutional adjudication.¹⁸¹ The Court also referred to 'the

¹⁷⁶ See 20 AMKD 161 (E.1984/1, K.1984/2); 21 AMKD, pp.99-129 (E.1984/12, K.1985/6); 22 AMKD, p.224 (E.1985/21, K.1986/23), and 22 AMKD, pp.323-418, (E.1985/8, K.1986/27).

¹⁷⁷ 22 AMKD, p.224

¹⁷⁸ *Ibid.*, Emphasis added.

¹⁷⁹ In this case, the Constitutional Court found unconstitutional an amendment to Police Power Act of 1934. The amendment (1/F of the Act of 1985) granted the Police more power to get the fingerprints of and to photograph those whose behaviour was in contrary to the general moral rules of the social order. 22 AMKD 323.

¹⁸⁰ *Ibid.*, p.365.

¹⁸¹ See Kaboglu, *Ozgurlukler Hukuku*, pp.282-283.

Classical democracies as the political regimes where the the basic rights and liberties are protected to a great extent'.¹⁸² The Court pointed out that freedoms may be restricted under the exceptional circumstances such as the existence of a threat to the endurance of the 'democratic social order'.¹⁸³

It is argued that while the Court, in its first judgement invoked a so-called 'national democratic order' as found in the 1982 Constitution, the latter judgment indicated the reference to the 'standard democratic order' as found in the Western political regimes.¹⁸⁴ Whether these judgements reflect the 'inconsistency' of the Court¹⁸⁵, or a 'progress' towards what Caglar called the 'favor libertatis' principle based on the 'ideology of human rights'¹⁸⁶ is not in fact very important in the last analysis. With respect to political rights, the Court either used 'democratic order' to justify the restriction in question¹⁸⁷, or did not use it at all. The necessity of democratic order is constrained by the necessity of Kemalist ideology.¹⁸⁸ Therefore, it would not be wrong to say that the Court in political cases replaced the 'necessity of Kemalism' with the 'necessity of democratic order'. Indeed, since its ruling in 'Police case' where it arguably adopted the condition of 'standard democratic order', the Court has undermined the naive optimism of people like Caglar. It has maliciously acted as a violator of the rights, rather than protector of them.¹⁸⁹

I argue therefore that there are two alternatives that the Court may adopt in its attitude towards the political rights and liberties. They are the ideology-based approach and the rights-based approach. The former is based on the idea that the rights and liberties of individuals can only be guaranteed to the extent they are not in conflict with the predefined

¹⁸² 22 AMKD, p.365.

¹⁸³ *Ibid.*, p.366.

¹⁸⁴ Caglar, 'Anayasa Mahkemesi Kararlarinda "Demokrasi"', p.97.

¹⁸⁵ Kaboglu, *Ozgurlukler Hukuku*, p.283.

¹⁸⁶ Caglar, 'Anayasa Mahkemesi Kararlarinda "Demokrasi"', pp.91, and 97.

¹⁸⁷ See, e.g., 20 AMKD, p.198, 25 AMKD, p.148.

¹⁸⁸ See 25 AMKD, p.150, 152, and 158.

¹⁸⁹ See Chapter 8 below.

constitutional ideology. The latter springs from the contention that there are 'strong' and 'far reaching rights' which can only be restricted on particular circumscribed occasions. The ideology-based approach tends to interpret the grounds of restrictions as broadly as possible, whereas the rights-based approach interpretes these grounds 'narrowly'.

The Constitutional Court has adopted the ideology-based approach. In the following chapter, I will analyse in detail the decisions of the Court involving political rights in order to understand and criticise this ideology-based approach.

CHAPTER 8 - THE POLITICS OF CONSTITUTIONAL INTERPRETATION: THE CONSTITUTIONAL COURT AND POLITICAL RIGHTS

Judges, Paradigms and Political Cases

'Law is an interpretive concept' says Dworkin.¹ Long before Dworkin, Hobbes made the same observation about the nature of law: 'All Lawes, written, and unwritten, have need of Interpretation'.² Adjudication is also described as interpretation which constitutes a 'process by which a judge comes to understand and express the meaning of an authoritative text and the values embodied in that text'.³ Interpretation in turn is a matter of choice. It is a choice between alternative ways of settling a legal dispute. It would not be wrong therefore to say that every judgement judges made is in the end 'a moral and political choice'.⁴

The question is what, if anything, determines and constrains the realm of interpretation. In Dworkin's view, it is legal history or legal precedent that binds judges. 'A Judge's duty', according to Dworkin, 'is to interpret the legal history he finds and not to invent a better history'.⁵ To explain the judge's duty in 'constructive interpretation'⁶ Dworkin has used analogies with literary interpretation.⁷ For Dworkin, a judge is like a writer who continues the 'chain novel' already started by earlier writers.⁸ The aim of each novelist (or judge) is to produce a chapter which will fit the 'bulk of the

¹ R. Dworkin, *Law's Empire*, London: Fontana Press, 1986, p.410. Cf. H.L.A. Hart, *The Concept of Law*, Oxford: Clarendon Press, 1965, p.200: 'Laws require interpretation if they are to be applied to concrete cases'.

² T. Hobbes, *Leviathan*, London: J.M.Dent & Sons Ltd., 1914, p.146.

³ M. Fiss, 'Objectivity and Interpretation', *Stanford Law Review*, 34(1982): 739-63, at 739.

⁴ E. Mensch, 'The History of Mainstream Legal Thought', in D. Kairys (ed.), *The Politics of Law: A Progressive Critique*, Revised Edition, New York: Patheon Books, 1990, p.22. See also Hart, *The Concept of Law*, p.200: '[j]udicial decision, especially on matters of high constitutional import, often involves a choice between moral values..'.⁵

⁵ R. Dworkin, 'Law as Interpretation', *Texas Law Review*, 60(1982):527-550, at 544.

⁶ For Dworkin's distinction between 'conversational interpretation' and 'constructive interpretation' see Dworkin, *Law's Empire*, p.50.

⁷ See Dworkin, 'Natural Rights Revisited', *University of Florida Law Review*, 34(1982):165-188, at 166-8. See also Dworkin, *Law's Empire*, pp.228-38.

⁸ Dworkin, *Law's Empire*, p.229.

text',⁹ and ultimately to produce the 'best ' novel (or legal doctrine) possible.¹⁰ A judge is therefore constrained by the need for 'fit' with existing legal materials. This seems to push Dworkin towards legal positivism of which he is fiercely critical.¹¹ To escape such a consequence he has referred to the subjective nature of the requirement of 'fit'. He argues that the judges' convictions about fit, not historical legal materials themselves, constitute real constraints in legal interpretation.¹² These convictions about fit will create 'a rough threshold requirement that an interpretation of some part of the law must meet if it is to be eligible at all'.¹³ These convictions are in fact 'political not mechanical'.¹⁴ Dworkin asserts that 'the constraint fit is ...the constraint of one type of political conviction on another in the overall judgement which interpretation makes a political record the best it can be overall'.¹⁵ This points to the normative aspect of Dworkin's theory of interpretation. 'Constructive interpretation', Dworkin argues, 'is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong'.¹⁶

On the other hand, the constraint is also 'the structural constraint of different kinds of principle within a system of principle'.¹⁷ This structural constraint with threshold requirement, in Dworkin's theory, rules out the possibility of interpretation based on judges' own 'personal convictions of justice'.¹⁸

According to Professor Fish, Dworkin's search for 'a way to protect against arbitrary readings' is doomed to failure because of his understanding (or

⁹ *Ibid.*, p.231.

¹⁰ *Ibid.*, p.229. For a critical comment on Dworkinian use of 'best' interpretation see S. Guest, *Ronald Dworkin*, Edinburgh:Edinburgh University Press, 1992, pp.27-28.

¹¹ For Dworkin's criticism and refusal of legal positivism, see *Taking Rights Seriously*, pp. vii-xiii.

¹² Dworkin, *Law's Empire*, p.257.

¹³ *Ibid.*, p.255.

¹⁴ *Ibid.*, p.257.

¹⁵ *Ibid.*, p.257.

¹⁶ *Ibid.*, p.52.

¹⁷ *Ibid.*, p.257.

¹⁸ *Ibid.*, p.255.

rather misunderstanding) of the nature of interpretation.¹⁹ Fish argues that Dworkin failed to see the fact that 'interpretation is a *structure* of constraints, a structure which, because it is always and already in place, renders unavailable the independent and or uninterpreted text and renders unimaginable the independent and freely interpreting reader'.²⁰

In this chapter, I will call these structural constraints 'paradigms'.²¹ Judges, especially in constitutional jurisdiction, I will argue, decide cases according to their political beliefs, convictions, and feeling which make up of their paradigms. It is paradigms of judges that are decisive in constitutional disputes. In other words, judges generally read their paradigms (particularist conceptions of social and political philosophy) into the constitution irrespective of the 'real' or 'literal' meaning of the constitutional text concerned.²² As Skhlar observed, 'one's political preferences will determine one's interpretation of the Constitution'.²³ Interpretation is therefore political in the sense that it is determined or predetermined by our political values. In this context, Frederic Jameson sees 'the political perspective not as some supplementary method, not as an optional auxiliary to other interpretive methods ...but rather as the absolute horizon of all reading and all interpretation'.²⁴

¹⁹ S. Fish, *Doing What Comes Naturally*, Oxford: Clarendon Press, 1989, p.98.

²⁰ *Ibid.* p.98: 'Interpreters are constrained by their tacit awareness of what is possible and not possible to do, what is and not a reasonable thing to say, what will and will not be heard as evidence, in a given enterprise; and its within those same constraints that they see and bring others to see the shape of the documents to whose interpretation they are committed'.

²¹ For the role of paradigm in legal interpretation see A. Marmor, *Interpretation and Legal Theory*, Oxford: Clarendon Press, 1992, p.21.

²² See E. McWhinney, *Supreme Courts and Judicial Law-Making: Constitutional Tribunals and Constitutional Review*, Dordrecht: Martinus Nijhoff Publishers, 1986, pp.91-92.

²³ J.N.Skhlar, *Legalism: Law, Morals and Political Trials*, Cambridge, Mass.: Harvard University Press, 1964, p.210.

²⁴ F. Jameson, *The Political Unconscious*, New York: Ithaca, 1981, p.17. Cf. H.F.Haber, *Beyond Postmodern Politics: Lyotard, Rorty, Foucault*, New York and London: Routledge, 1994, p.116: 'Language, then, is never merely discursive; it is also always political in that it forces a choice between narratives...'

It appears that there is a clear contradiction in this position. If we argue that constitutional interpretation is located within a certain paradigm that guides and determines it, we have to rule out the possibility of personal preferences in interpretation. I will attempt to show that this is not contradiction, and these two positions can co-exist, and indeed be interwoven. In doing so, I will use the device of what I call the 'hierarchy of paradigms'.²⁵ It is possible to distinguish between two kinds of paradigms: the main-paradigm and the sub-paradigm. The former is the more general structure or framework in which constitutional interpretation operates. It exists independently of the personal preferences of the members of interpretive community. The latter reflects the personal political and moral beliefs of the members of a given interpretive community such as the Constitutional Court of Turkey. The relationship between these two paradigms is hierarchical. That is, the sub-paradigms must be in compliance with the main paradigm. They are in fact usually compatible or even identified with the main paradigm. However, there is still the possibility of conflict between these two paradigms. In this case, two things may happen. First, if the majority of the sub-paradigms are in conflict with the main paradigm, a new main paradigm may emerge although this is highly unlikely.²⁶ The second possibility is the elimination of sub paradigms by removing the members of interpretive community concerned. With respect to the Constitutional Court of Turkey, there is no clear conflict among paradigms. In other words, as we shall see, the Court has always been loyal to, and operated in, the main paradigm (i.e. Kemalism).

The practical and political implication of this argument lies in the importance of the courts as a means to preserve the *status quo*. The principle function of judiciary is, in the words of Professor Griffith, 'to support the institutions of government as established by law'.²⁷ The judiciary has carried out this function by being 'a particular form of social control, the

²⁵ This argument is developed for the purpose of explaining the interpretive work of Turkish Constitutional Court. Its applicability to other systems remains to be tested.

²⁶ Unlikely, simply because the change of main paradigm does not solely depend on the sub-paradigms of a particular community. It involves the participation of certain other elements in a political system.

²⁷ J.A.G. Griffith, *The Politics of the Judiciary*, Third Edition, London: Fontana, 1985, p.235.

recruiting of support for the regime'.²⁸ Indeed, the Constitutional Court of Turkey has significantly contributed to the maintenance of the *status quo*.²⁹ It is futile to discuss here whether this contribution is made 'blindly' or 'deliberately' as a 'conscious participation in a discursive exercise of power' to borrow the words of Kerruish.³⁰ Suffice it to say that the Constitutional Court has functioned as an 'ideological state apparatus' in its Althusserian sense³¹ to protect and preserve the official ideology of the state.

The typical and best example of the role played by paradigms can be seen in what is called 'political trials'. For Otto Kirchheimer, these trials can best be described as 'attempts by regimes to control opponents by using legal procedure for political ends'.³² Therefore the policy that political trials (the 'Gordian Knots' of a liberal legal system)³³ pursue is 'the destruction, or at least the disgrace and disrepute, of a political opponent' who usually declines to accept the official ruling paradigm.³⁴ The distinctive characteristic of political trials is the '*perception* of a direct threat to established political power'.³⁵ The ruling elite, through courts, attempts to destroy this 'threat', whether it is real or not. The political trials are seen as 'a functional authentication of political repression'.³⁶ The judicial procedure

²⁸ M. Shapiro, *Courts: A Comparative and Political Analysis*, Chicago: The University of Chicago, 1981, p.22.

²⁹ See notes 55-59 below.

³⁰ V. Kerruish, *Jurisprudence as Ideology*, London: Routledge, 1991, p.130. For a critical review of Kerruish's argument see J. Goldsworthy, 'Is Jurisprudence Liberal Ideology?', *Oxford Journal of Legal Studies*, 13/4 (Winter 1993): 548-570.

³¹ See L. Althusser, 'Ideology and Ideological State Apparatuses', in *Essays on Ideology*, London and New York: Verso, 1984, pp.1-60.

³² O. Kirchheimer, *Political Justice*, Princeton; Princeton University Press, 1961, p.6.

³³ R. Christenson, *Political Trials: Gordian Knots in the Law*, New Jersey: Transaction Publishers, 1986, p.9. Christenson argues that political trials are like Gordian Knots, because 'while a court may cut through the issues with a rule in a sharp decision - the defendant may be convicted or acquitted- the dilemmas of responsibility, morality, representation, or legitimacy remain'.

³⁴ Shklar, *Legalism*, p.150.

³⁵ T.L. Becker, 'Introduction' to *Political Trials*, T.L. Becker (ed.), New York: Bobbs-Merrill, 1971, p.xi. (Emphasis added.)

³⁶ C. Sumner, *Reading Ideologies: An Investigation into the Marxist Theory of Ideology and Law*, London: Academic Press, 1979, p.259.

is, in a word, 'a reliable way of eliminating ...pesky irritants or deadly challenges'.³⁷ These challenges and threats may vary from one country to another, and from one period to another.

In 1951, dissenting Justice Douglas (of the US Supreme Court) in *Dennis v. United States* where the issue of communist propaganda was at stake stated that :

Some nations less resilient than the United States, where illiteracy is high and where democratic traditions are only budding, might have to take drastic steps and jail these man for merely speaking their creed. But in America they are miserable merchants of unwanted ideas.³⁸

A decade after this statement of Justice Douglas, 'the crusading liberal judge',³⁹ in another country (Turkey) where illiteracy was high, the rulers were trying to take drastic steps to curb a different kind of 'unwanted ideas'. During the discussion about the importance of secularism in the constitutional system, the spokesman of the Constitutional Committee of 1961 asserted that:

In a country where the general vote is accepted, but illiteracy is high, it is possible to achieve the objective of [the establishment of] a theocratic state by benefiting from the negligence of the people.⁴⁰

These statements, although different in their nature and purpose, have one thing in common. They conceive the official established paradigm as the only choice that reasonable and educated people would opt for. Perhaps as a corollary of this, they reflect a great despisal of the Other (i.e. political opponents of the regime) who sees different ideas as a viable alternative to the dominant paradigm. Political trials as such, says Shklar, are endemic in Western Civilisation beginning with the trials of Socrates.⁴¹ According to

³⁷ Becker, 'Introduction', p.xii.

³⁸ *Dennis v. United States*, 341 U.S. 494, at 588-589 (1951). In this case the Supreme Court sustained the convictions of eleven leaders of the Communist Party by a US district court.

³⁹ McWhinney, *Supreme Courts and Judicial Law-Making*, p.52.

⁴⁰ *Temsilciler Meclisi Tutanak Dergisi* (TMTD), C.3, p.92.

⁴¹ Shklar, *Legalism*, p.150. He argues that 'the intellectual history of Europe opens with the trial of Socrates, and we have been trying real and fancied traitors and subversives ever since'. *Ibid.*

Shklar, 'there never was a golden age in which governments refused to persecute anyone [political opponent], though there once was a hope that we would reach that end'.⁴²

Similarly, a close examination of the history of the Turkish Republic will reveal the fact that there has been hardly any period in which political trials are absent. From the very beginning, the Tribunals of Independence were established with the aim of eliminating the 'political enemies' of the regime. Likewise, political trials took place in the post-coup periods. In the aftermath of the military coup of 1960, for instance, the former Prime Minister with two of his cabinet ministers were tried and executed.⁴³ After the 1980 Coup, a great number of politicians faced trial and some of them were convicted.⁴⁴ The State Security Courts,⁴⁵ the main instrument of political trials, have also operated (and still do) for a long time during which many so-called 'political criminals' have been prosecuted and sentenced.⁴⁶

However, in this chapter I will confine myself to the political trials before the Constitutional Court. There are two main reasons for this choice. First, unlike other courts or tribunals dealing with 'political crimes', the decisions of the Constitutional Court have been regularly published in the Official Gazette and subsequently reprinted in the Journal of the Court. This obviously provides an easy access to the Court's judgements. The second reason is the role of the Constitutional Court in interpreting the political rights. The Court is the highest organ that is given the right to interpret the Constitution and apply it accordingly to the particular cases brought before it.⁴⁷ In an Annual Conference of the Constitutional Court, the President of the Court described this role in the following terms.

It should not be forgotten that the Constitutional Court is the sole organ authorised to interpret the Constitution, that the Constitution is given meaning according to the explanations and assessments made by the Constitutional Court, and that the

⁴² *Ibid.*

⁴³ See Chapter 6 above.

⁴⁴ See Chapter 7 above.

⁴⁵ See Chapter 7 above.

⁴⁶ Some Kurdish MPs were recently put on trial before the State Security Court of Ankara, and sentenced to various terms of imprisonment. See note 232 below.

⁴⁷ See *The Constitution of the Republic of Turkey*, Ankara: BYEGM Matbaasi, pp.72-73.

Constitution is understood and implemented in the fashion the Constitutional Court interprets it as long as a decision is not reversed.⁴⁸

Even though this may be seen as an exaggerated statement of the Court's position,⁴⁹ nevertheless its decisions are legally binding on other organs of the state (Article 153). Having examined the political rights in the Turkish Constitution, it is therefore indispensable to move to the interpretations of these rights by the Constitutional Court. Political trials involve political rights in one way or another. In our selection, the political rights can be found in their broadest sense ranging from the right to freedom of expression to freedom of religion and conscience.

⁴⁸ Y.G.Ozden, 'Opening Speech', in *Constitutional Jurisdiction*, Ankara 1993, p.4.

⁴⁹ In the United States, the view that the Supreme Court is the ultimate interpreter of the Constitution has been subject to criticism. The Supreme Court on some occasions has held that it is to be the final interpreter of the Constitution, and its interpretation is binding for other judicial and political institutions. (See for instance *Cooper v. Aaron* 358 US 1 (1958), and *US v. Nixon* 418 US 919 (1983)). S. Macedo rejected this view of what he calls 'judicial interpretive supremacy' which creates 'a hierarchy of constitutional interpreters'. For Macedo, the Supreme Court is one of the members (institution) of 'a liberal community of interpreters', and hence we must conceive that 'constitutional interpretation is an eminently political enterprise and that the Courts' role (no means the dominant role) exists within a larger political process of constitutional interpretation'. (S. Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism*, Oxford: Clarendon Press, 1990, p.147.)

A similar argument may be developed with respect to the Constitutional Court, despite the strong language of the Article 153 of the Constitution which states that 'the decisions of the [Constitutional] Court are final...and binding on the legislative, executive, and judicial organs, on the administrative organs, and on persons and corporate bodies'. This Article, however, does not preclude other legislative and executive organs from interpreting the Constitution as they understand it, and acting accordingly. In other words, the Constitutional Court is not 'the sole' interpreter of the Constitution. It is true that the Constitutional Court's decision overwhelms the interpretations of other institutions, if a conflict emerges between the interpretations of the Court and that of others in a particular case. Yet there is still no constitutional obstacle to the broader interpretation of the Constitution in which other institutions of the political system participate by both interpreting the Constitution as they understand it, and challenging the interpretation of the Court in certain ways (e.g. enacting similar law if the previous one was annulled by the Court).

The Constitutional Court of Turkey: Guardian of Rights?

'Court-based' constitutional review as a way of controlling executive and legislative action is considered to be one of the most significant developments in constitutionalism of the post-world war II era.⁵⁰ The Turkish Constitutional Court was established with the 1961 Constitution as a result of the combination of internal and external changes.⁵¹

In liberal theory, supreme courts or constitutional courts are conceived as 'a bulwark of fundamental rights'.⁵² In other words, they are institutional means to protect fundamental rights against any possible attack by the state.⁵³ The Turkish Constitutional Court has also seen its role in this way. In one of its decisions, the Court held that the *raison detre* of the Court is to protect the rights and freedoms set forth in the Constitution against the possible threats of the law-makers.⁵⁴ Yekta Gungor Ozden, the President of the Constitutional Court, went even further.

[The concept of] Human rights is a universal whole. It must be experienced and defended under any situation and circumstance, *it must not be limited for any reason*, and

⁵⁰ McWhinney, *Supreme Courts and Judicial Law-Making*, p.1, and I.O.Kaboglu, *Anayasa Yargisi: Demokrasi Kavraminin Donusumu Uzerine*, Ankara:Imge Kitabevi, 1994, p.111.

⁵¹ The external development was the adoption of constitutional courts by some continental European states like Italy and Germany in the aftermath of the World War II. This was a reaction to the pre-war political regimes of these countries. (See B. Daver, 'Anayasa Mahkemesi Kararlari Acisindan Siyasal Partiler: BirKac Ornek Olay', *Anayasa Yargisi*, 2(1986):93-140, at 106. See also B. Kuzu, '1961 ve 1982 Anayasalarinda ve Bunlara Iliskin Siyasi Partiler Kanunlarinda Siyasi Parti Kavrami, Kurulusu ve Kapatma Rejimi-Karsilastirmali Bir Inceleme', *IUHF Mecmuasi*, CLII1-4 (1986-87): 145-184, at 156.) The internal factor that affected the establishment of the Constitutional Court lies in the political conditions of the pre-1960 coup milieu. The Court was a response to the parliamentary majority (DP) of the 1950s which allegedly abused the power to eliminate the political opposition, and more importantly to destroy the the principles of Kemalist Revolution. (See Chapter 6 above.)

⁵² The Hon. Sir John Laws, 'Is the High Court the Guardian of Fundamental Constitutional Rights?', *Public Law*, (Spring 1993): 59-79, at 59.

⁵³ Dworkin, *Taking Rights Seriously*, p. 87, and L.Duran, 'The Function and Position of Constitutional Jurisdiction in Turkey', *Turkish Public Administration Annual*, 11(1984): 3-42, at 3.

⁵⁴ 22 AMKD. p.365.

its essence must not be compromised... The jurists, especially the Constitutional Court judges, have a great responsibility in this aspect. *Our court makes decisions which are based on human rights.*⁵⁵

Despite this human rights rhetoric, as we shall see, a close analysis of case law in constitutional adjudication will reveal a different story. The Constitutional Court indeed functions as 'a watchdog of the regime' again in the phrase of the President of the Court.⁵⁶ 'In the Turkish constitutional system', Caglar asserts, 'the constitutional jurist is primarily the jurist of the ideology of the Constitution'.⁵⁷ That is, the principal concern of the Court is to protect the official ideology, Kemalism, with the principle of secularism at its centre. The Court as such is, as Hikmet Ozdemir put it, 'one of the most conservative organs' in the political and legal status quo.⁵⁸ He argued that the Court has interpreted the Constitution in a way that the rights and liberties have been sacrificed for the sake of the state, 'sacred authority'.⁵⁹

The Constitutional Court has frequently acted (and still acts) to eliminate the opponents of the prevailing political regime.⁶⁰ This will be made clear

⁵⁵ Y.G.Ozden, 'Opening Speech', in *Constitutional Jurisdiction*, Ankara: 1993, p.13. (Emphasis added)

⁵⁶ Y.G.Ozden, *Hukukun Ustunlugune Saygi*, Ankara: Bilgi Yayınevi, 1990, p.413, 130, and 162.

⁵⁷ B.Caglar, 'Turkiye'de Laikligin "Buyuk Problemi": Laiklik ve Farkli Anlamlari Uzerine', *Cogito*, 1 (Summer 1994): 109-115, at 114.

⁵⁸ H. Ozdemir, *Sivil Cumhuriyet*, Istanbul: Boyut Yayinlari, 1991, p.100.

⁵⁹ *Ibid.*

⁶⁰ A. Unsal on the contrary argues that the Constitutional Court constitutes an example of 'counter-justice' which operates against arbitrary rule. For him, the term 'agent-justice' as the instrument of ruling regime is not the right description for the the Court, because the Court has occasionally been in conflict with the government. (Unsal has taken the distinction between 'counter-justice' and 'agent-justice' from R. Charvin, *Justice et Politique*, Paris: LGDJ, 1968, p.10. Quoted in A. Unsal, *Siyaset ve Anayasa Mahkemesi*, Ankara: AU SBF Yayinlari, 1980, p.25, note 117. (For the disputes of the Court with the governments before 1980, see Unsal, *ibid.*, pp.162-165) However, this argument is not compelling. First, the Constitutional Court's occasional conflict with the elected governments of the day does not prove that it is a 'counter-justice'. This conflict, as is the case for many other constitutional courts, springs from inherent tension between the Court and other elected institutions of the state. Moreover, it is clearly wrong to assume that the Court has always been right in

by analysing the political cases before the Court which involved the political rights. In these cases, the approach of the Court, I argue, is not 'rights-based' as claimed by the Court above. I describe it as an 'ideology-based' approach replacing the term 'goal-based' in Dworkin's distinction.⁶¹ This description may be found arbitrary by saying that the idea of rights is itself an ideology.⁶² I am not concerned with this question here.⁶³ Suffice it to say however that even if the 'rights-based' approach is ideological, this is not the 'ideology' that the Court adopts in deciding cases. By 'ideology-based' approach, I mean the position which gives priority to the protection and preservation of the regime with its official ideology. In this approach, rights and freedoms are not only arbitrarily defined and limited, they are often denied for the sake of the official ideology. Political rights are recognised only to the extent that they are not in conflict with and not undermining the ideology concerned.

One of the excuses for the narrow interpretation by the Court of the rights has been presented on the ground of the constitutional text itself. Professor Duran sums up this argument as follows:

[B]ecause the regulations in the second part of the [1982] Constitution called 'Fundamental rights and duties' are far from providing the true human rights and fundamental freedoms of pluralist liberal democracy it seems that the High Court [Constitutional Court] generally does not have the means of providing security and protection in this subject.⁶⁴

It is true, as we argued in the preceding chapter, that the 1982 Constitution with its restrictive even 'authoritarian'⁶⁵ nature creates a serious obstacle to

this conflict, and to jump to conclusion that therefore the Court is not an instrument of the ruling ideology. This was, as we shall see, exactly the point in the *Headscarf* case where the Court was in conflict with the government of the day, and was clearly wrong.

⁶¹ Dworkin, *Taking Rights Seriously*, pp.172-73.

⁶² See, for instance, Kerrushi, *Jurisprudence as Ideology*, pp.16-19, and S. A. Scheingold, *The Politics of Rights*, New Haven and London: Yale University Press, 1974, p.13ff.

⁶³ The ideological nature of the rights discourse was partly taken up in Introduction of our study.

⁶⁴ Duran, 'The Function and Position of Constitutional Jurisdiction in Turkey', pp.40-41.

⁶⁵ 'Authoritarian' is the word used by Yargitay (Court of Appeal). See *Yargitay Kararlari Dergisi*, 9/11(November 1983), p.1591. Cited in Duran, 'The Function and Position of Constitutional Jurisdiction in Turkey', p.39.

the constitutional protection of rights and particularly of political rights.⁶⁶ The real problem with the Constitutional Court, however, is not lack of means. 'We are under a Constitution, but the Constitution is what the judges say it is' to borrow the words of Justice Hughes of the US Supreme Court.⁶⁷ In that sense, the Constitutional Court has the power of interpretation which provides the necessary means to protect the rights of individual. The fact that rights provisions are formulated in vague and general terms⁶⁸ provides the Court with the opportunity to effectively use this means. The problem therefore consists in the Court's above-mentioned approach which allows the narrowest possible interpretation of individual freedoms and rights. Now we can turn to the examples in which this approach is to be found.

Political Rights Before the Constitutional Court

Before analysing the decisions of the Court that will reveal the Court's 'ideology-based' approach to political rights, it may be helpful to recall the possible criterion for restricting political rights in liberal model. As mentioned at the end of the last chapter, in liberal theory the state may justifiably constrain political rights under very restricted circumstances.⁶⁹ The state may restrict political rights if it plausibly believes that the exercise of this right creates great danger to the rights of other individuals.⁷⁰ One of the circumstances in which political rights can be abridged is the existence of the 'clear and present danger' arising from the use of a particular right.⁷¹ This must be a 'clear and substantial' danger, as in the case of man falsely crying 'Fire!' in a crowded theatre.⁷²

⁶⁶ See Chapter 7 above.

⁶⁷ *Addresses and Papers of Charles Evans Hughes* (1908), p.139. Cited by D. G. Barnum, *The Supreme Court and American Democracy*, New York: St. Martin Press, 1993, p.vii.

⁶⁸ See Dworkin, *Taking Rights Seriously*, p.133. See also Scheingold, *The Politics of Rights*, p.30: 'No matter how carefully drafted, legal rules are never without a certain range of ambiguity or open texture'.

⁶⁹ See Chapter 7 above.

⁷⁰ Dworkin, *Taking Rights Seriously*, p.202.

⁷¹ *Ibid.*, p.195.

⁷² *Ibid.*, p.204.

The US Supreme Court has occasionally adopted this liberal approach towards restricting political rights.⁷³ This criterion was first introduced by Justice Holmes to the US constitutional jurisdiction. In *Schenck v. United States*, Holmes stated that :

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about substantive evils that Congress has a right to prevent.⁷⁴

Chief Judge Learned Hand also said in a similar manner:

In each case [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.⁷⁵

This criterion implies that the restriction of political rights must be deemed as an exception of extraordinary circumstances. This of course entails that such criterion must be interpreted as narrowly as possible. Our argument is that Turkish Constitutional Court has never used this criterion in restricting political rights. The main function of the Courts in liberal theory is to give effect to the rights, and protect them against possible unjustified interference by the government.⁷⁶ This function is derived from the liberal 'rights conception' of the Rule of Law according to which 'judges do and should rest their judgements on... arguments of political principle that appeal to the political rights of individual citizens'.⁷⁷ The Turkish Constitutional Court ignored and undermined this liberal approach to political rights. Instead, it appeared to restrict political rights arbitrarily by

⁷³ See T.I.Emerson, *Toward A General Theory of the First Amendment*, New York: Vintage Books, 1966, pp.51-56.

⁷⁴ *Schenck v. United States*, 249 U.S. 47, at 52 (1919).

⁷⁵ Quoted in *Dennis v. United States*, 341 U.S. 494 (1951). In this case, Justice Brandeis was also quoted as saying: 'Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women... To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced'. (*Ibid.*, p.585). Likewise, in 1957 the Supreme Court expressed the 'clear and present danger' in strict and narrow terms suggesting '[not]to burn the house to roast the pig...' See *Butler v. Michigan*, 352 U.S. 380, at 383 (1957).

⁷⁶ See Chapter 2 above.

⁷⁷ R.Dworkin, 'Political Judges and the Rule of Law', in *A Principle of Matter*, p.11.

using ideological grounds such as the principle of 'secularism' and 'Turkish nationalism'. As we shall see soon, the Court in its judgements has gone beyond control of the legality or constitutionality of the issues concerned. The Court, in these cases, acted as if it was an advocate of the established official ideology, not as an arbiter between the regime and individuals let alone being a protector of the latter against the former. Indeed, the Court indulged in the debates on whether the thoughts and claims of the parties are historically or politically true. Then it tried to disprove their arguments.⁷⁸ If the Court adopted the 'rights-based approach in these cases, it should have instead confined itself to the investigation of legal and constitutional compliance. But it acted as a spokesman of Kemalism, and attempted to put an 'ideological uniform' on political parties⁷⁹ and individuals alike.

The following cases were chosen because they represent the best examples in which the Court's 'ideology-based' approach can be seen, because they illustrate the political and ideological dimensions of the constitutional interpretation. They are indeed a representative sample of the Court's decisions on political rights. These cases involve the political rights in its broadest sense, as the rights against the state. They deal with the rights to freedom of religion and conscience, freedom of expression, and political participation.

I tried to show the insistent attitude of the Constitutional Court with respect to the political rights by examining the cases from the periods of both the 1961 Constitution and the 1982 Constitution. This will reveal the fact that the Court has not changed its 'ideology-based' approach for over twenty years.

Militarist Secularism versus Political Rights

As was argued in Chapter 6, the Kemalist principle of secularism has served as a means for restricting political rights.⁸⁰ The 'strict' and 'militant' secularism meant complete state control over religion, and as such generated a strong tension between the Kemalist guardians of the regime on

⁷⁸ See Perincek, *Anayasa ve Partiler Rejimi: Türkiye'de Siyasi Partilerin İç Düzeni ve Yasaklanması*, Third Ed., Istanbul: Kaynak Yayınları, 1985, p.354.

⁷⁹ *Ibid.*, p.356.

⁸⁰ See Chapter 6 above.

the one hand, and the religious opponents on the other. The Constitutional Court has always been loyal to Kemalism in general, 'militant' secularism in particular. The Court conceives secularism as 'an ultra-constitutional norm' which places inherent restrictions on political rights.⁸¹ That is, there is no such thing as political rights if it is in conflict with peculiar Turkish type of secularism.

*National Order Party (NOP) Case*⁸²

The National Order Party (*Milli Nizam Partisi*)⁸³ was the first political party which was dissolved by the Constitutional Court⁸⁴ on the ground of secularism.⁸⁵ The Constitutional Court based its decision on two main bodies of evidence. The first comprised three small booklets⁸⁶ written by the leader of the Party to express the ideas of the Party.⁸⁷ The second was the 'Declaration', 'National Order Oath' and 'National Order Anthem' of the Party which were adopted and read in the Party Congress.⁸⁸ Having summarised the contents of these documents, the Court reached the conclusion that the goals and activities of the National Order Party contravened the Preamble, Articles 2, 19, and 57 of the Constitution, and Articles 92, 93, and 94 of the Political Parties Act.⁸⁹ The Court's verdict was

⁸¹ See note 141 below.

⁸² 9 AMKD 3 (E.1971/1, K.1971/1).

⁸³ The NOP was considered to be the first 'independent' movement of the Republic which represented the religious opposition to the westernisation. See A.Y.Saribay, *Türkiye'de Modernleşme, Din ve Parti Politikası: MSP Örnek Olayı*, İstanbul: Alan Yayıncılık, 1985, p.104.

⁸⁴ The Turkish Constitutional Court, like German Federal Court, is granted the power to dissolve political parties.(Article 69) See *The Constitution*, p. 31.

⁸⁵ Prior to the establishment of the Constitutional Court some political parties had been dissolved by ordinary courts. See B.Daver, 'Anayasa Mahkemesi Kararları Açısından Siyasal Partiler: Bir Kac Örnek Olay', pp.107-109, and Tikves, 'Cumhuriyetimizin Elli Yıllık Doneminde Laikliğe Aykırı Partilerin Kapatılması Sorunu', pp.262-266.

⁸⁶ These booklets were entitled 'İslam ve Bilim', 'Basında Prof. Dr. Necmeddin Erbakan', and 'Prof. Necmeddin Erbakan- Mecliste Ortak Pazar'. 9 AMKD, p.57.

⁸⁷ The Court quoted long extracts from these three booklets, see 9 AMKD , pp. 56-65.

⁸⁸ According to the Court, in these documents the Party, *inter alia*, started the history of Turkish nation from its adoption of Islam, and took oath to struggle until the victory in spiritual war of independence. 9 AMKD, p.68.

⁸⁹ 9 AMKD, p.69.

not based on detailed reasoning. The Court found the Party's understanding of religion as contrary to its own and to the main paradigm within which it operates. It held that:

[In these booklets] religion is presented as the only source, order, or basis for all worldly matters (e.g. social and individual relations, politics, economics, science and technology) rather than as a matter of conscience, belief and opinion between man and God...⁹⁰

The Court also maintained that the Party through these booklets 'exploited and abused religion' in order to get more votes, because in addressing people they always used religious words like 'Our Muslim Brothers', or 'Dear Muslims'.⁹¹ By extracting some sentences from these booklets, the Court went on to argue that the aim of the Party did not comply with the principle of secularism guaranteed by the Constitution. Some of these statements are worth quoting.⁹²

'Natural and positive knowledge came from the messengers'.

'The foundations of the sciences lies in the Qur'an'

'The only way out for us and Westerners alike is the islamisation'

'It is wrong to arrest a person for reading *Risale-i Nur*'⁹³

'The Article 163 of the Penal Code must be abolished and the freedom of religion must be granted to Muslims'⁹⁴

'Religious education must be compulsory'.

The Court concluded that these statements 'clearly' indicate that the Party acted against the certain provisions of the Constitution.⁹⁵ These provisions

⁹⁰ 9 AMKD, p.65.

⁹¹ 9 AMKD, pp.65-66.

⁹² In 9 AMKD, pp.66-67.

⁹³ *Risale-i Nur* is the common name for the collection of books written by religious scholar Said Nursi. On the sociological and political role of this scholar see, for example, S. Mardin, *Religion and Social Change in Modern Turkey: The Case of Bediuzzaman Said Nursi*, Albany State University of New York Press, 1989.

⁹⁴ The Article 163 of the Penal Code prohibited the certain kind of religious thought. In 1991, it was abolished alongside the Articles 141 and 142 of the Penal Code which prohibited the propaganda of communist ideology. See Prevention of Terrorism Act of 1991.

⁹⁵ 9 AMKD, p.67.

were the Preamble of the Constitution which emphasised 'the principle of Turkish Nationalism', Article 19 which guaranteed the freedom of religion and conscience, and prohibited the abuse of religion and religiously sacred matters.⁹⁶

The Court never explained why these statements in fact violated the Constitution. Nor did it present any interpretation of the relevant constitutional provisions used in dissolving the Party. The National Order Party appeared to be dissolved on the ground that it violated the principle of secularism guaranteed by the Constitution and the Political Parties Act. According to Tikves, the Party was dissolved because of its alleged aim which was to establish a 'theocratic state' by using the social milieu where general suffrage was accepted despite the high rate of illiteracy.⁹⁷

The NOP was *perceived* as a serious challenge to the prevailing *status quo*, irrespective of whether or not it in fact aimed at establishing a 'theocratic state'. It was this perception rather than statements in the booklets and documents that played a crucial role in dissolving the Party. Ironically, the last two statements quoted above have been realised by the 'secular' state itself in the post-1980 period. While compulsory religious education was introduced into the 1982 Constitution, Article 163 of the Penal Code was abolished by the Prevention of Terrorism Act of 1991.⁹⁸ Under Article 24 of the current Constitution:

Education and instruction in religion and ethics shall be conducted under state supervision and control. Instruction in religious culture and moral education shall be compulsory in the curricula of primary and secondary schools.⁹⁹

⁹⁶ 9 AMKD, pp.67-68. The Court also referred to the Article 57, 92 and 93 of Political Parties Act which contained the prohibitions on political parties with respect to the principle of secularism.

⁹⁷ Tikves, 'Cumhuriyetimizin Elli Yillik Doneminde Laiklige Aykiri Partilerin Kapatilmasi Sorunu', pp.289-290. Cf. B.V.Dinckol, 1982 *Anayasasi Cercevesinde ve Anayasa Mahkemesi Kararlarinda Laiklik*, Istanbul: Kazanci Kitap Ticaret A.S., 1992, p.179.

⁹⁸ Law No: 3713, *Resmî Gazete*, 12 Nisan 1991, Sayi:20843.

⁹⁹ *The Constitution*, p.12.

This is not to say that such a 'pragmatic' attitude to religious education is compatible with the principle of secularism in its proper sense.¹⁰⁰ This is however important to show that the principle of Kemalist secularism has been interpreted differently, and invoked arbitrarily to restrain the political rights. As noted before, the Court represented the 'orthodox' and 'strict' interpretation of Kemalist secularism.¹⁰¹ It has consistently adhered to this interpretation, and in a way rejected any 'different' approach to the principle of secularism. The Prosperous Party Case is another good example where the Court dogmatically defended the Kemalist principles.

Prosperous Party (PP) Case ¹⁰²

The Prosperous Party (*Huzur Partisi*) was established in 1983, the last year of the military rule.¹⁰³ The Party was dissolved the same year by the Constitutional Court on the ground that its Programme was in violation of secularism guaranteed by the Constitution and Political Parties Act of 1983.¹⁰⁴ The Programme of the PP stated that a review of the Turkish alphabet was necessary, with an addition of a vowel, in order to develop the Turkish language.¹⁰⁵ According to the Programme one has to 'analyse the old Turkish alphabet which consisted of 35 letters in the light of Kemalist spirit and understanding'.¹⁰⁶ The Court found this suggestion as in conflict with Article 174 of the Constitution which guarantees, among others, the Act on Adoption and Application of the Turkish Alphabet.¹⁰⁷ In its judgement, the Court referred to earlier decisions¹⁰⁸ that emphasised the 'openness' of the Kemalist Revolution, the importance of science and

¹⁰⁰ For the discussion of secularism as a form of state neutrality towards the differing conceptions of the good, see Chapter 3 and Chapter 6 above.

¹⁰¹ See Chapter 6 above.

¹⁰² 20 AMKD 345 (E.1983/2, K.1983/2)

¹⁰³ For the 12 September Military Coup, and its impact on the post-military constitutional system of Turkey, see Chapter 7 above.

¹⁰⁴ Political Parties Act (1983) (*Siyasi Partiler Kanunu*), Law No:2820, *Resmî Gazete*, 24 Nisan 1983, Sayı:18027.

¹⁰⁵ 20 AMKD, p.364.

¹⁰⁶ *Ibid.*

¹⁰⁷ *The Constitution*, p.87. For the Reform Laws see also Chapter 6 above.

¹⁰⁸ For the cases referred, see 13 AMKD, p.116, (E.1973/37, K.1975/22), and 9 AMKD, p.143, (E.1969/31, K.1971/3). Cited in 20 AMKD, pp.362-363.

technology, scientific method in education and so on.¹⁰⁹ It was stated that the Kemalist Revolution did not contain 'static' principles, because 'the conditions of the modern social life continuously change as the science and technology develops'.¹¹⁰ Despite this rhetoric of 'scienticism' and 'openness', the Court failed to escape the contradiction.¹¹¹ It cited, at the same page, the Preamble of the Constitution which states 'no protection shall be afforded to thoughts or opinions contrary to ...the nationalism, principles, reforms and modernism of Atatürk'.¹¹² The Court nowhere explained why the attempt to develop the Kemalist reforms was in conflict with the 'dynamic' and 'open' principles of Kemalism. The dogmatic interpretation of the Court is clearly visible here. It did not even tolerate the suggestion or argument about the development and reconsideration of the Reforms, no matter how trivial and insignificant this change may be.¹¹³ Indeed the dissenting members of the Court made it clear that 'the desire to enrich the Turkish alphabet could not be considered as a violation of the script reform'.¹¹⁴

The Programme of the PP also suggested that religious education may be introduced into the curricula of the Universities.¹¹⁵ And it mentioned the necessity of 'an education system which will take into account religious and moral values'.¹¹⁶ The Court ignored the principles set out in the Constitution which made religious education compulsory in 'primary and secondary schools', but left 'other religious education and instruction' to the own desires of individuals.¹¹⁷ It found in these statements violations of the principle of secularism and the Kemalist reforms and principles protected by the Political Parties Act of 1983,¹¹⁸ even though the Programme did not

¹⁰⁹ 20 AMKD, pp.362-363.

¹¹⁰ *Ibid.*, p.362.

¹¹¹ The dissenting members of the Court also paid attention to this contradiction. *Ibid.*, p.370.

¹¹² *Ibid.*, pp.362-363.

¹¹³ The Court's reasoning was that even the 'slightest concession' from the principle of secularism will end up in the destruction of the whole Kemalist revolution. See 20 AMKD, p.362.

¹¹⁴ 20 AMKD, p.370.

¹¹⁵ 20 AMKD, p.357.

¹¹⁶ *Ibid.*, 358.

¹¹⁷ See *The Constitution*, p.12.

¹¹⁸ 20 AMKD, p.364.

argue for *compulsory* religious education in the Universities.¹¹⁹ Again no explanation was presented as to *why* and *in what way* these statements violated the Kemalist principles.

One might argue that the Constitutional Court decided these two cases under the pressure of military regimes.¹²⁰ One even might go as far as Feroz Ahmad to say that the NOP was 'dissolved by the military regime'.¹²¹ Even if we view this argument as convincing, it does not follow that the Court was reluctant to dissolve the Parties concerned. The Court in fact has never changed its 'ideology-based' approach to the political rights.

The Court's restrictive approach to political rights can also be seen in a number of its decisions taken under the civil regimes. The Court distinguished freedom of thought and freedom of dissemination of this thought. The former, according to the Court, belongs to the inner part of the person, and therefore is absolute. The latter freedom is social in its nature, and therefore must be subjected to restrictions.¹²² Although the 1961 Constitution did not include such a distinction in protecting freedom of thought,¹²³ the Court invoked it to restrict freedom of expression with the aim of protecting principle of secularism.¹²⁴

¹¹⁹ This point was raised by the dissenting judges, Orhan Onar and Mehmet Cinarli. See *Ibid.*, p.369.

¹²⁰ See Perincek, *Anayasa ve Partiler Rejimi*, p.350.

¹²¹ F. Ahmad, *The Making of Modern Turkey*, London: Routledge, 1993, p.162.

¹²² 1 AMKD, p.159. (E. 1963/17, K.1963/83), and 1 AMKD p.173 (E. 1963/17, K. 1963/84). This distinction has played important role in drafting the freedom of thought and freedom of dissemination of thought as separate provisions in the 1982 Constitution. For Professor Golcuklu's explanations on this subject see AKGT, C.8, pp.273-74.

¹²³ See Article 20 of the 1961 Constitution. In S.Kili and S.Gozubuyuk, *Turk Anayasa Metinleri*, Ankara: Is Bankasi Kultur Yayinlari, 1985, p.176. It appears that the 1961 Constitution reflected the liberal argument that freedom of expression is an inseparable part and parcel of freedom of thought. For this argument see, e.g., L.T. Hobhouse, *Liberalism*, Oxford: Oxford University Press, 1964, p.19: '...liberty of thought is very little avail without liberty to exchange thoughts - since thought is mainly a social product; and so with liberty of thought goes liberty of speech and liberty of writing, printing, and peaceable discussion'. Cf. M.Horkheimer, 'On the Concept of Freedom', *Diogenes*, 53(1966):73-81, at 76.

¹²⁴ See 18 AMKD 265, p.273.

The Court, for instance, found constitutional Article 163/4 of the Penal Code which prohibited the 'propaganda' and 'suggestion' of Islam as a basis for political, social, and economic order.¹²⁵ The Court declared that 'the Constitution itself has imposed restrictions on freedom of thought in order to protect and preserve the principle of secularism'.¹²⁶ The Court also maintained that Article 163/4 of the Penal Code was not in conflict with the Article 19 of the 1961 Constitution which protected the freedom of religion and conscience. For the Court, the terms in Article 19 such as 'abuse' and 'exploit' corresponded to the terms 'propaganda' and 'suggestion' of the Article 163/4 of the Penal Code.¹²⁷ It is difficult to understand the logic of the Constitutional Court, because these terms are essentially different and refer to different activities. The term 'propaganda'¹²⁸ differs from the 'abuse' or 'exploitation' in that it is, as Tanor asserted, nothing but 'an effective way of expressing thoughts'.¹²⁹

The Court's restrictive attitude towards rights and its adherence to the main paradigm which affects and even determines its interpretation can nowhere be seen more visible than in the Headscarf Case.

*Headscarf Case*¹³⁰

This case where the freedom of religion and conscience¹³¹ was at issue is a typical example of the Constitutional Court's 'ideology-based' approach to the rights and freedom of the individuals. The Court, as we shall see,

¹²⁵ 18 AMKD 265, p.267, 271 (E.1980/19, K.1980/48).

¹²⁶ 18 AMKD, p.273.

¹²⁷ 18 AMKD, p.272.

¹²⁸ On a different occasion the Court regarded the translation and publication of a book as the 'crime' of propaganda. 18 AMKD p.339 (E.1979/31, K.1980/59, 27.11.1980).

¹²⁹ Tanor, *Türkiye'nin İnsan Hakları Sorunu I*, p.78.

¹³⁰ 25 AMKD 150 (E.1989/1, K.1989/2)

¹³¹ Freedom of religion, like freedom of thought, is a political right in its broader sense (as rights against state). This is much more apparent and clear in the context of Turkish constitutional system where freedom of religion is necessarily related in one way or another to the principle of secularism, defining characteristic of the political regime. Therefore any case which involves freedom of religion has inevitably raised the question of whether it contravenes the principle of secularism. Indeed, any action against secularism, according to Y. G. Özden, bears political characteristic in that it is directed against the basic order of the State. See Özden, *Hukukun Üstünlüğüne Saygı*, p.205.

invoked the principles of Kemalism especially secularism as a yardstick for setting the boundaries to the constitutional rights.

The Court in this case declared unconstitutional an Act of Parliament which was passed to remove what was known as the 'headscarf ban' in the universities. Until the enactment of the Act, female students in the universities had not been allowed to wear a headscarf.¹³² This caused public distress in the country, and several actions like demonstrations, vigils, and hunger strikes had taken place to protest against the ban.¹³³ Some students who insisted on wearing a headscarf were removed from the universities, and their legal struggle ended up in failure.¹³⁴ The government of the day attempted to solve this problem by passing the Act (Amendment to the Article 16 of the Higher Education Act) of which the most controversial part reads as follows:

¹³² The ban on wearing headscarf was introduced by the Council of Higher Education (YOK) in 1987. The Council added a new paragraph (C) to the Article 7 of its Disciplinary Bylaw stating that 'uncontemporary appearance and modes of clothing' shall be banned in the university buildings. The headscarf (or Turban) was considered to be 'uncontemporary'. This ban caused problems for female university students who wear headscarves. As a result of social and political pressure, Parliament passed an Act to permit headscarf in the universities. This Act was annulled by the Constitutional Court. Parliament passed another Act in 1990 stating that 'no prohibition shall be imposed on modes of clothing and external appearance in the universities, unless it contravenes the laws in force'. An application was lodged once more to the Constitutional Court on the ground that the Act was unconstitutional. The Court this time found the Act constitutional, but declared that the Act in question did not invalidate its previous decision which banned wearing headscarf in the universities. (For a brief legal history of the 'headscarf problem' see N.Narli, 'The turban: the symbol of piety, identity or radicalism', *Turkish Daily News*, 7 October 1994, p.B1, B3.) At the present, there is an ambiguity about the headscarf ban. While some universities exercise the ban, others do not. See the Report of the Human Rights Commission set up in Parliament. (TBMM, D:77, 14.5.1992), and *TBMM İnsan Hakları Komisyonunda Güneydoğu ve Turban Tartışması*, Istanbul: Gorus, 1992, pp.44-64, 100-134.

¹³³ See Narli, 'The turban', p.B1.

¹³⁴ In 1987, the Council of State (*Danıştay*), the supreme administrative court, rejected the application concerning the removal of the headscarf ban imposed by the Disciplinary Bylaw of the Council of Higher Education. See note 169 below.

[Within the buildings of the universities] it shall be permitted to cover for religious reasons their heads and necks with a headscarf or turban.¹³⁵

The basic question, according to the Court, is whether an Act of Parliament can be enacted on the ground of religious rules.¹³⁶ The Court replied to this question negatively, and found the Act as contravening the Preamble, and Articles 2, 24, and 174 of the Constitution.¹³⁷

The Court first declared that the principles of secularism and Kemalist nationalism guaranteed in the Preamble and Article 2 of the Constitution made it impossible to view this Act as constitutional.¹³⁸ The Court explicitly ruled out that there may exist some 'democratic rights' conflicting with the principle of secularism.¹³⁹ The Court, however, reluctantly conceded that secularism in fact may not be compatible with the protection of rights and freedoms. According to the Court, the Constitution is extremely vigilant to protect the principle of secularism against freedoms; 'it does not sacrifice this principle for the sake of liberties'.¹⁴⁰ It is obvious that the Court conceived secularism as an 'ultra-constitutional norm' which determines the boundary of the rights.¹⁴¹ But how is this principle described by the Court? A definition of secularism was not given by the Court, though it said that the principle of secularism cannot be seen as a mere separation of religion and the state, and must be interpreted according to the social and political conditions of Turkey.¹⁴² That is, in Turkey, as Tikves maintained, 'secularism means the protection of Kemalist Revolution rather than the separation of religion and the state'.¹⁴³ For Y. Gungor Ozden the principle of secularism is the 'legal name of Kemalism'.¹⁴⁴

¹³⁵ 25 AMKD, p.138.

¹³⁶ 25 AMKD, p. 142.

¹³⁷ 25 AMKD, p.158.

¹³⁸ 25 AMKD, pp.142, and 151.

¹³⁹ 25 AMKD, p. 150.

¹⁴⁰ 25 AMKD, p.158.

¹⁴¹ See Tanor, *Türkiye'nin İnsan Hakları Sorunu I*, p.73.

¹⁴² 25 AMKD, p.145.

¹⁴³ Tikves, 'Cumhuriyetimizin Elli Yıllık Döneminde Laikliğe Aykırı Partilerin Kapatılması Sorunu', p.280.

¹⁴⁴ Ozden, *Hukukun Üstünlüğüne Saygı*, p.204. Ozden also argues (in the same case) that 'secularism is the necessary condition of being human'. See *ibid.*, p.209. Cf. Y.G.Ozden,

Similarly the Court held that the Act was in conflict with the principle of Kemalist nationalism which is based on the idea of 'nation' not 'religion'.¹⁴⁵ More interestingly the Court maintained that the Act has nothing to do with freedom of religion and conscience as protected by Article 24 of the Constitution.¹⁴⁶

Freedom of wearing in a particular way creates disparity between believers and disbelievers. Freedom of conscience is the right to believe whatever you want. By obfuscating freedom of conscience with secularism, liberty of religious wearing cannot be defended. The issue of wearing is restricted by the Turkish Revolution and Kemalist principles; it is not a matter of freedom of conscience.¹⁴⁷

In this paragraph, the Court uses two broad grounds for restricting the right in question: the principle of equality and the principles of Kemalism. First of all, the Court interpreted the principle of equality in a bizarre way and found the Act as a violation of this principle guaranteed in the Article 10 of the Constitution.¹⁴⁸ The Court's understanding of equality seems to be compatible with any rule stating 'everybody shall wear headscarf in the universities' or even 'everybody shall wear 7 size shoes' to avoid the possible 'disparity'. In short, equality does not mean that you must be treated in an absolutely identical way with others. The Court should have referred to the German Constitutional Court¹⁴⁹ which stated that 'the principle of equality does not demand that the legislator treat individuals and their relevant social groups in absolutely the same way; it allows differentiations that are justified by pertinent considerations'.¹⁵⁰

If the Court interpreted the principle of equality in its liberal sense as 'equal respect and concern',¹⁵¹ it would not see any violation of equality in

İnsan Hakları Laiklik Demokrasi Yolunda, Ankara: Bilgi Yayınevi, 1994, p.444: 'One is not human being, unless he is secular'.

¹⁴⁵ 25 AMKD, p.151.

¹⁴⁶ 25 AMKD, p.154.

¹⁴⁷ 25 AMKD, p.154.

¹⁴⁸ 25 AMKD, pp.152-53.

¹⁴⁹ On some occasions, the Court in fact refers to the German Constitutional Court. See, for instance, *People's Labor Party Case*, 29 AMKD 924.

¹⁵⁰ *Bavarian Party Case* 6 B VerfGE 84 (1957), quoted in W. F. Murphy and J. Tanenhaus, *Comparative Constitutional Law: Cases and Commentaries*, London: Macmillan, 1977, p.579.

¹⁵¹ See R.Dworkin, *Taking Rights Seriously*, London: Duckworth, 1977, pp.198-199.

wearing certain things by some individuals. The liberal conception of equality appears to be based on the 'radical autonomy' of human beings which entails the treatment of man as an end itself.¹⁵² Therefore the *ban* on wearing a headscarf may be regarded as a violation of principle of equality because it ignores the radical autonomy of some individuals whose identity is closely associated with their beliefs.

The next step of the argument that wearing a headscarf creates a disparity between believers and disbelievers is that it as such may destroy the friendly atmosphere of the universities. Indeed, the President of the Court pointed out that

The utilisation of certain symbols [i.e. headscarf] by students in state institutions of higher learning [universities] to advertise their religion, sect, religious order or origin, may destroy the atmosphere of friendship and fraternity which is needed for contemporary education since these symbols may invite pressure in favour of these symbols or otherwise.¹⁵³

First of all, this reasoning appears to be based on the presumption that certain symbols can be used *only* for the purpose of advertisement or propaganda. This is wrong because they can be used for religious or conscious or any other reasons without intention of propaganda. Secondly, and more importantly, even if this assumption is true, that does not necessarily mean they will 'destroy the atmosphere of friendship and fraternity' by causing 'pressure in favour of these symbols'. No empirical evidence has been presented to support the idea that wearing certain clothes like headscarf destroys the peaceful atmosphere in the universities. If the President or other members of the Court might still insist that 'well.. they *may* cause this consequence' the only answer remains is that virtually *anything* may destroy (or may be utilised to destroy) the peaceful environment of the universities.

As regards the principles of Kemalism, the Court treats these principles, secularism in particular, as 'ultra- constitutional' norms¹⁵⁴ to restrict the freedom and rights of individuals.¹⁵⁵ For Ozden, it is only natural to refer to

¹⁵² See Chapter 1 above.

¹⁵³ Y.G.Ozden, 'Opening Speech', in *Constitutional Jurisdiction*, p.4.

¹⁵⁴ See note 141 above.

¹⁵⁵ See 25 *AMKD*, p.150.

these principles as 'constitutional source and legal ground' simply because the Preamble of the Constitution specifically mentions adherence to the reforms of Ataturk.¹⁵⁶ The Court also attempted to justify the priority given to the foundational principles of the state.¹⁵⁷ In interpreting laws, the Court emphasised, 'it is inevitable to regard the foundational principles of the state[e.g. secularism and Kemalist nationalism] as superior to other provisions of the Constitution'.¹⁵⁸ This is in fact acknowledgement of these principles as constituting what I call the 'main-paradigm' within which the Court operates. As I said before this paradigm exists independently of the members of the particular interpretive community (the Court in our case). Yet, one must bear in mind that interpretation of this main paradigm is crucial for its application. The members of the interpretive community frequently read their own conception and understandings into the main paradigm. By arguing that wearing a headscarf is in conflict with the Article 174 of the Constitution which guarantees the reforms of Ataturk,¹⁵⁹ the Court behaved in this way. As dissenting member Cinarli stressed, none of these reform laws in fact provides any prohibition on women with respect to wearing certain clothes.¹⁶⁰ In a word, the Court used an irrelevant aspect of the main-paradigm to justify its decisions.

In its Headscarf judgement, the Constitutional Court has invoked two further grounds, that is, the violation of 'rule of law' and principle of 'democratic order'.¹⁶¹ According to the Court:

Laws cannot be based on and bound by religion. The rule of law will be damaged, if the laws derive their principles from religion (but not from life and law). Since religious laws do not recognise the freedom of conscience, there will be need for different laws for each religion in a nation-state where it is impossible to meet this

¹⁵⁶ 18 AMKD, p.275.

¹⁵⁷ 11 AMKD, p.2, 141. (E.1972/56, K.1973/11).

¹⁵⁸ *Ibid.* In fact these principles are protected by extra constitutional means. Article 4 of the Constitution states that 'the provision of Article 1 of the Constitution establishing the form of the state as a Republic, the provisions of in Article 2 on the characteristics of the Republic, and the provision of Article 3 shall not be amended, nor shall their amendment be proposed'. See *The Constitution*, p.5.

¹⁵⁹ 25 AMKD, pp.174-158.

¹⁶⁰ 25 AMKD, p.163.

¹⁶¹ 25 AMKD, pp. 151-152.

necessity...In order to develop and progress, it is indispensable to give priority to rationality and science, not to the static norms of religion. Legal regulation is a matter of world (a worldly matter?) not a matter of religion. That is why the Act examined is not compatible with the rule of law. Laws cannot be premised on religious foundation.¹⁶²

The Court here appears to try to kill two birds with one stone. First, it tries to dismiss religion by showing it as a body of 'static norms' which constitutes a barrier against development and progress as well as freedom of conscience. This indicates the prejudice and preconception of the Court towards religion which apparently played very important role in invalidating the Act concerned. Second, in order to show that this invalidation is carried out within the principle of rule of law, the Court attempted to prove that laws based on religious rules are not compatible with the rule of law. However, the Court is not convincing as to why that is true. In the first place, a law which says that anybody has the right to wear headscarf for religious reasons does not necessarily mean that it accepts religion *per se* as a source of law. We may distinguish between law about religion and religious law. I will return to this issue soon. Secondly, why are laws based on religious principles not compatible with the rule of law? Does the definition of rule of law¹⁶³ exclude these kinds of laws? Even if we take the Hayekian conception of rule of law as 'rule of good law', this still does not preclude morality or religion from being a source of 'good law'.¹⁶⁴

The Court, in this case, has frequently referred to the incompatibility of *Shariah* with the principle of 'democratic order'.¹⁶⁵ The Court stressed that democratic order is the opposite of the *Shariah* which aims at dominance of the religious rules.¹⁶⁶ The Court clearly assumes that by the term 'religious reason' in the Act the law-makers referred to one of the elements of the

¹⁶² 25 AMKD, p.152. The Court here seems to contradict itself. First, here it talks about freedom of conscience, although it elsewhere held that the Act has nothing to the freedom of conscience. (See above note 117) Second, here it says freedom of religion has no place in religious rules, in the next paragraph the Court concedes that 'teocratic state may have tolerance towards other religions'. See 25 AMKD, p.152.

¹⁶³ See Chapter 3 above.

¹⁶⁴ For Hayek's concept of rule of law, see Chapter 3 above.

¹⁶⁵ 25 AMKD, p.151.

¹⁶⁶ *Ibid.*

Shariah, and that headscarf is nothing but a deliberate symbol of *Shariah* which reflects the political opposition to the Republican regime.¹⁶⁷

The Constitutional Court is by no means alone in interpreting the issue of headscarf in this what may be called 'conspiratorial' way. The Council of State (*Danistay*)¹⁶⁸ the highest administrative court, also made a similar point prior to the Court's judgement. It held that:

Without any specific intention or purpose, some of our less educated girls (and women) cover their heads under the influence of traditions and costumes of social environment in which they live. It is known, however, that some educated girls have covered their heads with the intention of opposing the principles of the secular Republic, and of advocating a political order based on religion. For them, the headscarf is not an innocent habit, but rather a symbol of a world view- a symbol against the freedom of woman and the basic principles of the Republic.¹⁶⁹

The fundamental flaw in the judgement of the Constitutional Court lies in its reading of this Act. The Court obviously misread the Act by assuming that this Act was nothing but an indication of the desire to create a 'theocratic state'.¹⁷⁰ It appears that the Court has grounded all its reasoning on this wrong assumption. It is wrong for two reasons. First of all, the Act emerged to remove a clear violation of freedom of religion and conscience

¹⁶⁷ In Ozden's view, the headscarf is a symbol, not an innocent cover stemming from religious belief. Therefore, Ozden suggests, even in the Faculties of Theology students cannot wear headscarf. 'Headscarf is a sign of opposition against the regime'. See Ozden, *Hukukun Ustunlugune Saygi*, p.407. Perhaps for this reason, Ozden is proud of being first person to impose ban on headscarf when he was the president of the Bar of Ankara, see *ibid*, p.407.

¹⁶⁸ For the place and role of the *Danistay* in Turkish Law see S.Guran, 'Administrative Law', in T.Ansay & D.Wallace (eds.), *Introduction to Turkish Law*, 3rd Ed., Deventer: Kluwer Law & Taxation Publishers, 1987, pp.61-103, at 99.

¹⁶⁹ *Danistay* 8. Daire: 20.12.1983, E. 1983/142, K.1983/2788; 23.2.1984, E.1983/207, K.1984/330; 13..12.1984, E. 1984/636, K.1984/1574.

¹⁷⁰ This reminds us Lord Denning's statement about the method of interpretation in Continental Europe. He asserted that 'judges in the Continental Europe adopt the 'schematic' and 'teleological' method of interpretation... All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence...they solve the problem by looking at the design and purpose of the legislature'. Lord Denning, in *Buchanan v. Babco* [1977] 1 All ER 518, at pp.522-3.

which can be found in every human rights document.¹⁷¹ As Erdogan pointed out, this right is not based on religion, or religious rules, but on secular values that are accepted in 'modern civilisation'.¹⁷² Secondly, the issue of headcovering is primarily a religious (not political) matter¹⁷³; a matter of belief deriving from the authoritative sources of Islam.¹⁷⁴ It constitutes a personal religious obligation which must be freely performed in a liberal constitutional system. The headscarf as a sign of identity, surely, may have some political significance in a country where the headcovering 'was considered as treason and betraying the fundamental principles of Atatürk's reforms'.¹⁷⁵ It might emerge as a symbol of a suppressed identity. Nonetheless, this by no means alters the religious character of headcovering. Nor does it justify the ban on wearing headscarf. Even if it was true that individuals wear headscarves for merely political reasons, the Court had to produce convincing arguments for the justification of the ban on 'political' headscarf. In any case, the Court did not and could not produce any criteria to distinguish between 'religious' headscarf and 'political' headscarf. The intention of headcovering, in fact, is not very important from the perspective of individual rights and freedoms. It is obviously a religious obligation, and constitutes a subject matter of freedom of religion and conscience.¹⁷⁶ A 'rights-based' approach entails handling the case in this way. The Constitutional Court, however, misinterpreted the problem, and misread the Act simply because it adopted an 'ideology-based' approach towards the protection of individual rights and freedoms.

¹⁷¹ See for example Article 18 of the Universal Declaration of Human Rights, Article 9 of the European Convention of Human Rights, Article 12 of the American Convention on Human Rights, and Article 8 of the African Charter on Human and Peoples' Rights. For the texts of these articles, see I. Brownlie, *Basic Documents on Human Rights*, Third Ed., Oxford: Clarendon Press, 1992, pp.25, 330, 501, 554 respectively.

¹⁷² M. Erdogan, *Liberal Toplum Liberal Siyaset*, Ankara: Siyasal Kitabevi, 1993, p.210.

¹⁷³ Even Ozden acknowledges this when he said that 'by turban we mean the religious headscarf, not my mother's headscarf'. Y.G.Ozden, *Insan Haklari Laiklik Demokrasi Yolunda*, Ankara: Bilgi Yayinevi, 1994, p.395.

¹⁷⁴ See, e.g., *The Holy Qur'an: Text, Translation, and Commentary*, trans. by A.Yusuf Ali, Maryland: Amana Corp, 1983, pp.904-905.

¹⁷⁵ Narli, 'The turban', p.B1.

¹⁷⁶ See S.Armagan, 'Universitelerimizdeki Basortusu Meselesi Hakkinda Bir Degerlendirme', *D.U. Hukuk Fakultesi Dergisi*, 6(1993):25-46, at 31.

Furthermore, the very wording of the Act itself did not provide an unequivocal support for the Court's assumption. The headcovering for 'unreligious' reasons was not prohibited by the Act, as dissenting judge Cinarli pointed out.¹⁷⁷ The Act did not mention the term Islam as a religion. Although in a predominantly Muslim populated country 'religious reason' may refer to the Muslims, it still does not prevent persons other than Muslims from covering their heads with headscarf.

The Court failed to see the difference between law about religion and religious law. It insisted that the Act in question derives from religious rules, and therefore it is a law based on religion. As stated above, wearing a 'headscarf' is a religious obligation deriving from the verses of the Qur'an.¹⁷⁸ But this is an entirely different matter, and the Act has nothing to do with this aspect of the matter. In other words, the Act has a descriptive nature not a prescriptive one.¹⁷⁹ It does not say that Muslim girls *should* wear headscarf, but what it says is that those who believe they should wear headscarves are to be free to act accordingly. In this sense, the Act very much resembles the Motor-Cycle Crash-Helmet (Religious Exemption) Act of 1976 in Britain.¹⁸⁰ This Act provides Sikhs with an exemption from wearing a helmet in riding a motor-cycle, a requirement of the Road Traffic Act of 1972.¹⁸¹ Although for a male Sikh wearing a turban is a religious obligation,¹⁸² it is difficult if not impossible to read this Act as advocating that all Sikhs must wear a turban for religious reason. It has nothing to do with the prescriptive character of wearing turban in Sikh religion. Rather it may be seen as a legal instrument to protect the religious freedom of some individuals who have objections to wearing helmet due to their religious beliefs.

¹⁷⁷ 25 AMKD, p.163.

¹⁷⁸ See note 174 above.

¹⁷⁹ It must be noted however that like any other law, this Act of 1989 has a prescriptive aspect in its broader sense suggesting that no one should interfere with those who want to wear headscarf and turban.

¹⁸⁰ See Road Traffic Act 1988 s 16(2).

¹⁸¹ Now enacted in Road Traffic Act 1972 s 32 (3).

¹⁸² See A. Bradney, *Religions, Rights, and Laws*, Leicester: Leicester University Press, 1993, p.5.

Even if we believe in objectivity in constitutional interpretation, we can still say that the Court's interpretation of the Headscarf Act and the Constitution is non-objective as well as wrong. It is not objective in the sense that it disregards one of the 'well-recognised disciplining rules' of objectivity which prohibits the judge from being influenced by personal animosities or bias'.¹⁸³ We have seen the personal bias of the Court towards religion, and its role in deciding the case.¹⁸⁴ However, the interpretation of the Court, for us, is wrong not because it is non-objective. Even if it was objective, it would still be wrong because it clearly denied a particular right of individuals. Instead of giving effect to the rights created by legislature,¹⁸⁵ it 'invalidated' the freedom of religion and conscience of some individuals.

Separatism and the Integrity of the Ideology

As explained in Chapter 6, the Kemalist Revolution and the principles of Kemalism aimed at creating one homogeneous and indivisible Turkish nation. This necessarily entailed a governmental policy which persistently denied the existence of different ethnic groups, cultures, and languages other than Turkish.¹⁸⁶ Various legal means have been used to maintain and

¹⁸³ I use the term 'objectivity' in its Fissian sense. Objectivity in this sense 'implies that an interpretation can be measured against a set of norms that transcend the particular vantage point of the person offering the interpretation'. For Fiss, objectivity in law is possible through 'disciplining rules' which are to be set and applied by the legal interpretive community, and which function as constraints on interpretation. (Fiss, 'Objectivity and Interpretation', p.744.) Fish in his article 'Fish v. Fiss' rejects Fiss' conception of 'disciplining rules'. Fish argues that rules are themselves texts, and therefore in need of interpretation. Since these rules are 'the product of an interpretation', he concludes, they cannot provide constraints on interpretation. Fish, *Doing What Comes Naturally*, pp.121-122.

¹⁸⁴ See note 162 above.

¹⁸⁵ See Dworkin, *TRS*, p.81. Similarly Sir John Laws emphasises that 'where Parliament confers a right, the court's duty, elementarily, will be to enforce it'. See his article 'Is the High Court the Guardian of Fundamental Constitutional Rights?', p.59.

¹⁸⁶ See Chapter 6 above. Landau argued that 'Turkish governments have made efforts to integrate the Kurds and other smaller national minorities into the Turkish body politic.' J.M. Landau, *Radical Politics in Turkey*, Leiden: E.J. Brill, 1974, p.146. Cf. K.H.Karpat, *Turkey's Politics: The Transition to A Multi-Party System*, Princeton: Princeton University Press, 1959, p.254: 'This policy [of Nationalism] was carried out in many cases by deliberately attempting to assimilate non-Turkish Muslim minorities, such as the Kurds...This was

pursue this policy. Those who opposed this official discourse and advocated cultural rights of some ethnic groups, most notably Kurds, have been prosecuted.¹⁸⁷ Here I am not concerned with the nature and legal position of these cultural rights. This may be a subject of another study, but I will focus on some political party cases where freedom of thought and expression was at issue. Our argument about the attitude of the Constitutional Court towards these parties remains same: the Court's approach again was 'ideology-based', rather than 'rights-based'. The Court in these cases clearly acted and decided cases under the influence and instruction of the main-paradigm which stands for the denial of different ethnic groups, cultures, and languages. It struggled to protect the 'integrity' of the official ideology, rather than the 'integrity of the state', against the alleged danger of separatism.

*Turkish Labor Party (TLP) Case*¹⁸⁸

In this case, the Court dissolved the Turkish Labor Party (*Türkiye İsci Partisi*) for violating the principle of the 'integrity and indivisibility' of the state and nation guaranteed by the Political Party Act (Article 89) and the Constitution. (Article 57).¹⁸⁹ The main evidence for the judgement of the Court was decisions taken in the Party's Fourth Congress. In this Congress, the Party declared that in the eastern part of Turkey there lives a group of people called the 'Kurdish People' who have long been subjected to the systematic policy of 'oppression' and 'assimilation'.¹⁹⁰ The TLP also announced that the 'Eastern Question' is not merely a problem of regional development, but rather it is a broader question with implications for the democratic rights and claims of the Kurdish People.¹⁹¹ In line with its

considered natural, since anything done on behalf of nationalism and for its consolidation was deemed acceptable.'

¹⁸⁷ İsmail Besikci, for instance, is the most famous victim of Kemalist nationalism. He was sentenced to 198 years in total for writing books and articles which have been considered as 'heretical'. (See *Hürriyet*, 12 April 1995, and *Sabah*, 16 April 1995) Yasar Kemal, a renowned novelist, was the latest 'traitor' whose article was alleged to be in breach of the Prevention of Terrorism Act of 1991.

¹⁸⁸ 9 AMKD 80 (E. 1971/3, K.1971/3)

¹⁸⁹ See 9 AMKD, p.131

¹⁹⁰ 9 AMKD, p.111.

¹⁹¹ 9 AMKD, pp.111-112.

ideological affiliation,¹⁹² the Party made it clear that it saw the 'Kurdish problem' from the perspective of the working class's struggle for the socialist revolution.¹⁹³

The Court discussed these points in detail and produced well-known counter-arguments.¹⁹⁴ It rejected the 'allegations' of the Party and accused them of being a part of separatist activities, even though the Party explicitly asserted that it stands for the indivisibility of Turkey with its nation and country, and that it is against any kind of 'regionalism' and 'separatism'.¹⁹⁵

The point here is not whether there is a 'distinct' Kurdish people or whether this people has been subjected to the policy of assimilation by the regime. The point rather is whether it is 'wrong' or 'forbidden' to argue about these questions through different means like political parties. The Court, instead of raising this point, acted as a spokesman of the official thesis on the historical and sociological position of the Kurdish People. It tried to justify its decision on the ground that the ideas of the Party concerned 'misrepresented' the historical 'facts'.¹⁹⁶ The Court did not raise the question whether or not a political party has the right to defend 'wrong' ideas, and express them.¹⁹⁷ It did not handle the case from the perspective of political rights. Again a rights-based analysis would first recognise the right to express different views, and then seek for possible grounds for restricting this right. That this view is different from the official dogma does not constitute such a ground for limiting or destroying the rights. By contrast, the Court's judgement implies that nobody has the right to have opinions contrary to the official ideology of the State. It assumes that expression of these 'sensitive' issues in a different way, or perhaps 'inaccurate' way, may (indeed does) violate the 'integrity' and 'indivisibility' of the State. In other words, the Constitutional Court has insistently attempted to 'protect' and 'preserve' the indivisibility of the state and nation by dissolving political parties which adopted and advocated a different and often contrary thesis from that of official ideology about what is called 'Eastern Question'.

¹⁹² For the ideology of the TLP see Landau, *Radical Politics in Turkey*, pp.137-147.

¹⁹³ 9 AMKD, p.112.

¹⁹⁴ *Ibid.*, pp.113-119.

¹⁹⁵ *Ibid.*, p.118., and p.101-102, 129.

¹⁹⁶ *Ibid.*, pp.113-119.

¹⁹⁷ Cf. Perincek, *Anayasa ve Partiler Rejimi*, p.351.

*Turkish Workers' Party (TWP) Case*¹⁹⁸

The prosecutor requested the closure of the TWP on the basis that section H of the Party's programme violated Article 89 of the Political Parties Act of 1965.¹⁹⁹ The relevant section (H) of the Party programme defended 'the right to learn, to teach, to explain, to propagate freely science and the arts..., rights which are to be realised according to article 12 of the Constitution by teaching, under the supervision and control of the Minister of Education, in their mother tongue those citizens whose language of origin is not Turkish'.²⁰⁰

Article 89 of the Political Parties Act 1965 forbade any claim that in Turkey there exist different ethnic groups, and languages other than Turkish.

Political parties are not allowed to allege the existence on the territory of the Turkish Republic of minorities originating from differences of national or religious culture or of language.

Political parties may not aim at undermining national integrity by maintaining, developing or propagating languages or cultures other than the Turkish culture and language and thus creating minorities on the territory of the Turkish Republic.²⁰¹

Article 81 of the new Political Parties Act of 1983 retained this ban on the political parties.²⁰² This Act again explicitly prohibited political parties from asserting that there are ethnic groups in the country deriving from different race, religion, language, and culture. The Act also banned the use of 'legally forbidden' languages in the propaganda and programme of parties.²⁰³ The Court rejected the claims that these Acts were unconstitutional.²⁰⁴ However, the very wording of these Acts in fact implied that there are national, religious and linguistic minorities in this country. In addition, Articles 12

¹⁹⁸ 18 AMKD 3 (E.1979/1, K.1980/1)

¹⁹⁹ 18 AMKD, p.6.

²⁰⁰ Quoted in M. Simon, 'The Trial of the Türkiye Emekçi Partisi (Turkish Workers' Party) Before the Constitutional Court of Turkey', *ICJ Review*, 24(1980):53-64, at 57.

²⁰¹ *Ibid.*, p.57.

²⁰² Political Parties Act 1983, Law No.2820, *Resmî Gazete*, 24 April 1983, Sayı.18027.

²⁰³ *Ibid.*

²⁰⁴ See 18 AMKD, p.33, 39; 27 AMKD 885 (E.1990/1, K.1991/1)

and 10 of the 1961 and 1982 Constitutions respectively guaranteed the legal equality of all individuals irrespective of language, race, colour, etc.²⁰⁵

In the TWP case, to remove the tension the Court attempted to soften the strictness of Article 89 of the Political Parties Act 1965. It held that this Article did not prohibit political parties from 'objectively' alleging the existence of groups different from the majority on the ground of religion or language.²⁰⁶ According to the Court, the Act in fact banned the 'explicit or implicit allegation that these groups must have the legal status of minorities to be able to preserve and develop their distinct existence and characteristics'.²⁰⁷ Such an 'allegation', the Court maintained, was in breach of 'national integrity', because it would undermine 'Turkish Nationalism' which resisted religious, cultural, and racial divisions.²⁰⁸ In a word, the judgement of the Court implies that 'you can argue that there exist different cultural, and racial groups within the country', but cannot defend any attempt to preserve and develop the distinct characteristics of these groups such as language and culture. Indeed, the Court dissolved the TWP on the ground that its programme advocated the right to learn and teach in languages other than Turkish.²⁰⁹

The Constitutional Court failed to understand or concede the fact that the existence of ethnic groups in a particular country must surely have some political and legal implications such as the recognition of the right to express themselves in their native language. On the eve of the Republic, M.Kemal expressly mentioned ethnic groups,²¹⁰ and contemplated the possible specific legal and political status they could have.²¹¹ In 1922, Parliament had gone even further when it debated the issue of some kind of

²⁰⁵ For the texts of these Articles see S.Kili and S.Gozubuyuk, *Türk Anayasaları*, p.174, and *the Constitution*, p.6.

²⁰⁶ 18 AMKD, p.29.

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*, p.30.

²⁰⁹ *Ibid.*, p.41.

²¹⁰ See Chapter 6 above and Perincek, *Anayasa ve Partiler Rejimi*, pp.279-281.

²¹¹ See R.Olson, 'Kurds and Turks: Two Documents Concerning Kurdish Autonomy in 1922 and 1923', *Journal of South Asian and Middle Eastern Studies*, 15/2 (Winter 1991): 21-31, at 22.

administrative autonomy to be granted to Kurds in the eastern provinces.²¹² Despite these initial attempts, the Republic of Turkey was established on the principle of 'Turkish Nationalism', and later 'Kemalist Nationalism' which included all ethnic groups under the umbrella of the 'Turkish nation' and 'Turkish Culture'.²¹³

The Court held that Article 89 of the Political Parties Act 1965 must be read in conjunction with Article 57 of the Constitution which prohibited political parties from acting in a way contrary to the 'indivisibility and integrity of the state and nation'.²¹⁴ Yet the Court failed to convincingly show that the programme of TWP violated the principle of 'integrity of the nation and state'. It just assumed that any proposal different from that of the official discourse constituted an attempt to 'create' a minority, and therefore a danger to the 'integrity of the state'.

*People's Labour Party (PLP) Case*²¹⁵

This is one of the most recent political trials before the Constitutional Court. In this case the Court made references to the previous cases,²¹⁶ and made similar points. The Court has again chosen to defend the indefensible, that is the non-existence of a distinct Kurdish nation, instead of arguing the case from the perspective of rights.²¹⁷ It insisted that the Kurdish language is not 'original' (whatever that means), and therefore it cannot be used as an

²¹² The document concerning the draft law which was debated in the Grand National Assembly of Turkey can be found in FO 371 Public Record Office [Foreign Office]371-778/Eastern [Turkey] E 3553/96/65, No.308. An abridged version of this document reprinted in R.Olson, *The Emergence of Kurdish Nationalism and the Sheikh Said Rebellion: 1880-1925*, Austin: University of Texas Press, 1989, Appendix II, pp.166-168. See also Olson, 'Kurds and Turks: Two Documents Concerning Kurdish Autonomy in 1922 and 1923', pp.23-29.

²¹³ The Court in TWP case made it clear that under Article 3/2 of the Constitution, 'Turkish Culture constitutes the only national culture in the country'. 18 AMKD, p.30.

²¹⁴ *Ibid.*

²¹⁵ 29 AMKD 924 (E.1992/1, K.1993/1)

²¹⁶ *Ibid.*, pp.1161-1162.

²¹⁷ Yimaz Aliefendioglu, the concurring member of the Court, emphasised this point. See 29 AMKD, pp.1188-1189.

instrument of modern education and common communication.²¹⁸ The Court went on to say that:

There cannot be distinction between the 'Turkish nation' and 'Kurdish nation'. In the Republic of Turkey there is only one state and one nation. Within a state there cannot exist more than one nation...The state is 'UNIQUE', the country is 'INDIVISIBLE', the nation is 'ONE'.²¹⁹

The most important aspect of the Court's judgement lies in the statement which declares the 'principles' and 'values' of the Republic as 'unquestionable' and 'uncompromisable'.²²⁰ This reflects the 'dogmatic' attitude of the Court towards the official ideology of the State. By rendering the 'principles' and 'values' of the Republic 'unquestionable', the Court has easily accused any movement which criticises these principles and values of being 'separatist' or 'subversive'.²²¹

For the Court, the important thing was the aim of the speeches delivered by the Party officials.²²² These speeches,²²³ the Court held, aimed at creating a minority, and hence destroying the 'indivisibility' of the state and country.²²⁴ It is understood that the Court has convicted the Party not for what the Party officials have done, but rather for what their statements will do in terms of the 'integrity' and 'indivisibility' of the state. The Court maintained that 'the initial claims about the recognition of the cultural identity which seems acceptable may in fact lead to the tendency towards creating a minority and demanding separation from the whole'.²²⁵

²¹⁸ *Ibid.*, pp.1156-1157.

²¹⁹ *Ibid.*, p.1116. Emphasis in original.

²²⁰ *Ibid.*

²²¹ *Ibid.*, and p.1175.

²²² *Ibid.*, p.1169.

²²³ See, *ibid.*, pp.929-992. The speeches of Party officials in provinces were also quoted, despite the legal fact that their speeches do not bind on the legal status of the Party. (*Ibid.*, pp. 992-1022.) It is argued however that these speeches and activities by the local officials of the Party are worth mentioning since they are similar or identical to the speeches of responsible officials of the Party. *Ibid.*, pp.1022-1023, and 1151.

²²⁴ *Ibid.*, p.1175.

²²⁵ *Ibid.*, p. 1163.

To justify its judgement the Court has frequently referred to the 'natural right' of the state to protect its existence against possible dangers and attacks. The state, the Court says, like every human being has the right to protect and preserve its existence.²²⁶ It is assumed that the speeches of the Party officials constitute a danger against the existence of the state. Again, the *perception* of this danger has a crucial role to play. The Party officials, as dissenting member Aliefendioglu observed, consistently emphasised their desire to continue their struggle within the democratic system.²²⁷ The Court has never explained why the expression of a particular thought itself may cause danger to the 'integrity' and 'existence' of the state. Nor has it justified the measure of dissolving a political party as an effective way of protecting the existence of the state.²²⁸

In brief, the Court here decided the case according to its preconceptions and prejudices. Its departure point has been the 'unquestionable' and narrowly interpreted principles and values of the Republic. Political rights and freedoms involved in these cases have been seen from this point, and usually regarded as threats to the official ideology of the state. This dogmatic and 'ideology-based' approach of the Court is not compatible with the liberal constitutional principles of political neutrality which negates the adoption of an official ideology, and the principle of the Rule of Law which necessitates the rights-based approach to the political rights.

Democracy Party (DEP) Case

The Constitutional Court has persisted in its ideology-based approach, and dissolved most recently Democracy Party (DEP) on the ground that it violated the Constitution which protects the 'integrity and indivisibility of the state'.²²⁹ The Court invoked two bodies of evidence in its judgement. The Party leader's speeches, and the Declaration of Party Executive Committee. In his speeches, the Party leader emphasised the need for a democratic system in which the 'Kurdish Problem' would be discussed

²²⁶ *Ibid.*, p.1143, 1175.

²²⁷ *Ibid.*, pp.1191-1192.

²²⁸ The Court has merely stated that the issue of dissolution of political parties is a practice that can be seen in some other modern democratic countries like Germany. (See *ibid.*, p.1176.)

²²⁹ E.1993/3, K.1994/2, *Resmî Gazete*, No.21976, 30.6.1994.

freely.²³⁰ However, in these speeches the military struggle of the PKK was implicitly praised, and the issue of 'Kurdish state' was raised.²³¹ This may be seen as a concrete evidence that the DEP in fact aimed at establishing a separate independent state, and thus violated the principle of 'integrity of the state'. Now the question becomes whether or not a political party can advocate a separate homeland through democratic means without resorting to violence. The Court answered this question in a negative way, and dissolved the Party. This however did not solve the problem. On the contrary, it exacerbated the situation. By dissolving the DEP the Court in a way closed the door to dialogue with the Kurdish People which is vital for a peaceful solution to 'Kurdish Question'. The Parliament firmly locked this door by lifting the 'immunities' of the DEP deputies. These MPs were subsequently charged and sentenced to various years of imprisonment ranging from 2.5 to 14 years.²³²

Having examined the approach of the Court to political rights one may conclude that the Constitutional Court of Turkey like many other courts 'in the societies of our world today', in the words of Griffith, does not 'stand out as protectors of liberty, of the rights of man, of the unprivileged'.²³³

²³⁰ *Ibid.*, pp.10-11.

²³¹ *Ibid.*, p.12.

²³² For the arrest and trial of these MPs see H.Pope, 'Arrested Kurdish MPs could be executed', *Independent*, 4 March 1994, p.15. See also J. M. Brown, 'Europe Link Questioned', in *Financial Times Survey: Turkey*, April 1994, p.10.

²³³ Griffith, *The Politics of Judiciary*, p.234.

CONCLUSION

Political rights as rights against the state lay in the foundation of liberal democratic constitutions. To realise these rights, the Constitution must set out some restrictions on the use of political power. In liberal polities, as explored in the first Part of the study, the most important principles for constraining state power are the 'Rule of Law' and 'political neutrality'. These principles aimed at creating a political and legal framework in which the rulers will be subjected to the law, and individuals will be free to choose and pursue their own conceptions of the good. In a word, the constitutional principles of the Rule of Law and political neutrality are of paramount importance for the protection and development of political rights.¹

The very idea of political rights itself rests on the premise that the individual is the fundamental value, and prior to any social and political constructions, most notably the state. In liberal theory, the *raison d'être* of the state is to protect the rights of individual.² Therefore, any political culture which privileges the state over the individual will inevitably fail to achieve the protection of individual rights against the state. The Turkish constitutional system tends to protect the state and its official ideology vis-a-vis the individuals. This philosophy behind the Constitution makes it extremely restrictive in terms of political rights. The adoption of an authoritarian official ideology exacerbated the situation. Obviously this statist and restrictive characteristic of the Turkish Constitutional system is at odds with the liberal tradition of political rights protected by the principles of the Rule of Law and political neutrality.³

Aided by the restrictive nature of the Constitution, the Constitutional Court has presented in practice notorious examples of the 'ideology-based' approach to political rights. The Court, in its judgements, sacrificed these rights for the sake of the official ideology, Kemalism.⁴ There is a need for a radical shift in the attitude of the Court towards

¹ For these principles see Chapter 2 and 3 above.

² See Chapter 1 and Chapter 4 above.

³ See Chapter 6 and 7 above.

⁴ See Chapter 8 above.

political rights. This entails, to a great extent, the abandonment of Kemalism as official ideology. The principles of Kemalism, as I have showed, are not compatible with the liberal theory of political rights. Kemalism in fact yielded to an authoritarian and suppressive politico-legal system, thanks to its monolithic vision, and to blind zealots of this vision. Kemalism never aimed at establishing a liberal pluralistic political system. Even if Kemalism had such an aim, the prerequisite of realising this aim is nothing short of abolishing Kemalism as official ideology. This is so not only because Kemalism in essence is an authoritarian, and illiberal ideology, but also the very existence of an official ideology, and its forceful imposition on individuals, is not compatible with the liberal principles of pluralism and political neutrality.⁵ Dismantling Kemalism as official ideology will not only help remove some broad and unnecessary restrictions on political rights, but will also facilitate the advent of paradigm shift in the jurisdiction of Constitutional Court. The Court may, indeed must, replace Kemalism with the paradigm of political rights. It must adopt the rights-based approach to political rights instead of its long practised 'ideology-based' approach. This paradigm shift certainly depends on institutional and structural changes as well as on the setting of cultural and behavioral conditions.

First, and foremost, a new constitution must be prepared on the philosophical dictum that individual is prior to the state. Unless this priority is constitutionally established, nobody will be able to cease the sacrifice of the individual and his rights for the sake of the state. The individual and his rights must be granted the status of 'sacred', not the state and its official ideology. The state exists for the better protection of individuals, not the other way around. Recently an important, but by no means sufficient, step was taken in this direction. The Preamble of the Constitution was partly amended in the way that it removed the rhetorical and justificatory statements of the 12 September Coup.⁶ This amendment is significant from the aspect of demilitarisation of the Turkish political system. The civil Parliament has in a way shown that it

⁵ See Chapter 2 above.

⁶ See Law No: 4121, *Resmî Gazete*, 26 Temmuz 1995, Sayı: 22355.

has the capacity and power to change the Constitution no matter how trivial this change is.

One may think that the recent elections can provide an opportunity to make some radical changes to improve the protection of political rights. The results of the general election of 24 December 1995 have however not changed, and probably will never change the illiberal principles of the Turkish Constitution. This is so, simply because the real power in that system lies elsewhere, not in the hands of the political parties. The radical changes in the Constitutional system cannot be done against the wishes of civil and militarist elites. *Refah* (the 'Islamist' Welfare Party as some tend to call it⁷), gained 21.3 % of the total votes in the general election,⁸ and came to the government only as the part of the Coalition.⁹ Even if we believe that the Welfare Party has plans to change the *status quo*, a belief which is itself controversial, the Party has no power to do this. As a matter of fact, *Refah* publicly declared that it is loyal, and will remain loyal to the Constitution which adopts Kemalism as the official ideology. In the recent Party Conference, the leader of *Refah*, Professor Erbakan repeated that his Party was/is the real supporter of the Kemalist principles. Many people therefore believe now the WP is already in the process of the integration with the prevailing political regime. Some even go further by asserting that *Refah* has always been a rightist, conservative movement posing no threat to the establishment.¹⁰ In a word, the December election result is not significant because it will not generate a radical paradigm shift in the Turkish constitutional system.

The demilitarisation of the Turkish politics must be achieved. This is a crucial step to be taken in a country like Turkey where the military frequently intervenes in politics be it directly or indirectly. 'The question of political liberalism in Turkey', as Leonard Binder put it, 'is less a matter of the rise of the bourgeoisie than it is a question of the meaning

⁷ See J.Rugman, 'Turkish Parties unite to Deny Islamists Power', *The Guardian*, 27 December 1995, p.11.

⁸ *The Times*, 26 December 1995, p.7.

⁹ *The Guardian*, 29 June 1996, p.14.

¹⁰ See R.Cakir, 'Refah Light', *Radikal, Pazar Dergisi*, 20 Ekim 1996, Sayi:2, pp.12-13.

to be attributed to the military intervention'.¹¹ With respect to political rights, the meaning of the military interventions is clear. They meant massive violations of individual rights, and almost total destruction of political rights.¹² The State 'has not opted to create a 'defensive army'...to replace the 'army of the regime' charged with the task of preserving Kemalism'.¹³ The post-military constitutional system of Turkey failed to confine the military to its barracks with the primary and sole function of protecting the country against external dangers. The military has continued to exert considerable influence on the political life through such organs as National Security Council, and the State Security Courts.¹⁴ According to Ozdemir, under the current constitutional system, 'the political power is vested in the National Security Council'.¹⁵ The practical step to demilitarise the constitutional system might begin with the abolition of the State Security Courts, and the National Security Council. The latter may be replaced by a new organ which would consist of the President, and the members of the Cabinet, including the Defence Minister as the representative of the military.

Another vital measure in the development of political rights is the Constitutional recognition of ethnic groups within the country. This is indispensable for establishing a pluralist polity where every citizen can live in accordance with his/her conception of the good life. Instead of imposing an official culture and language on everybody, different cultural and linguistic characteristics should be recognised, and protected. Such recognition is in fact induced by the sociological reality of the 'heterogeneous' populace living in Turkey.¹⁶ Pretending that there are no different peoples other than Turks will only 'legally' conceal this

¹¹ L.Binder, *Islamic Liberalism: A Critique of Development Ideologies*, Chicago and London: The University of Chicago Press, 1988, p.347.

¹² See Chapter 7 above.

¹³ M.Altan, 'Turkey boxed in by Greece and Syria', *Turkish Daily News*, 3 January 1996, and O.Servet, 'Cumhuriyet ve Militarizm', *Pazar Postasi*, 10 Haziran 1995.

¹⁴ See Chapter 7 above.

¹⁵ H.Ozdemir, 'Fatih Sultan Mehmet Istanbul'unda Sivil Toplum Oldugunu Iddia Ediyorum', in M.Sever and C.Dizdar, *2.Cumhuriyet Tartismalari*, Ankara: Basak Yayinlari, 1993, p.76.

¹⁶ See Chapter 6 above.

reality, and accelerate the bloody conflict between the regime and those ethnic groups, as is the case with the Kurds. The recognition of individual rights to express themselves, in whatever culture and language, will also contribute to a healthy political participation and democracy. Political rights such as freedom of speech, assembly, and participation cannot be conceived without using one's own native culture, language and other particular characteristics which constitute the identity of certain individuals.

These constitutional and structural changes, however, are only part of the story. They are necessary, but not sufficient to establish the ideal polities, be it Kingdom of God, Kingdom of Ends, or *Al-Madinah al-Fadilah*.¹⁷ As Horkheimer put it, 'not only the objective possibilities that are gained through the elimination of restraints, but also subjective freedom, the inner disposition of the person who makes use of these possibilities, determine the degree of freedom'.¹⁸ The roots of the problem in fact lie within ourselves. Asked about the time of the Kingdom of God, Jesus Christ said that 'The Kingdom of God is not coming with signs to be observed; nor will they say, "Lo here it is!" or "there it is!"; for in fact the Kingdom of God is in the midst of you'.¹⁹ Nietzsche, the author of the *Anti-Christ*, appears to agree with Jesus. 'No one else can build a bridge', Nietzsche asserts, 'on which you must cross the river of life, no one but you alone'.²⁰

The precondition of achieving the pluralist polity in which the political rights would be realised is in a way to develop individual awareness. Individuals must be aware that they have 'strong and far-reaching...rights that they raise the question of what, if anything, the

¹⁷ *Al-Madinah al-Fadilah* (the Virtuous City) is the political project of Al-Farabi, a Muslim philosopher of the tenth century. The Virtuous City was modelled on Plato's Republic. For an introductory exposition of al-Farabi's ideal state in comparison with the Republic see M.Fakhry, *A History of Islamic Philosophy*, Second Edition, London: Longman, 1983, pp.107-128.

¹⁸ M.Horkheimer, 'On the Concept of Freedom', *Diogenes*, 53(1966):73-81, at 77.

¹⁹ Luke 17:20-21.

²⁰ F.Nietzsche, *Schopenhauer as Educator*, trans. J.W.Hillesheim and M.R.Simpson, Chicago: Gateway Editions, 1965, p.4.

state and its officials may do'.²¹ This awareness cannot be gained only through formal education; it is not enough to include human rights lessons in the curricula of the schools. It involves a much more broader process which might be seen as journey to selfhood. This journey is destined to redefine ourselves as autonomous beings, and regain the 'authenticity' which 'connotes full awareness of self'.²² Both self-identity²³, and authenticity are three dimensional process involving the awareness of past, present, and future. 'If men walked backwards', stated Debrey, 'into the future, instead of turning their back on the practices of the past, they would not open the wrong door so often'.²⁴ Likewise, '[a]uthenticity is ...both past and future linked contingently by the ontological void of today'.²⁵

Self-identity, and authenticity is possible without lapsing into the dangerous zone of essentialism and integrism. 'Identity-definition' is in reality based on the existence of others.²⁶ I can only define myself in relation to others. 'A self exists only within...webs of interlocution' says Taylor.²⁷ These interlocutors do not necessarily constitute a homogeneous whole; they are 'friends' as well as 'foes'. That is, the polarities of 'us' and 'others' will never vanish. Nothing is wrong with these polarities insofar as they are accommodated in a plural society

²¹ R.Nozick, *Anarchy, State, and Utopia*, Oxford: Basil Blackwell, 1974, p.ix.

²² A. Bradney, *Religions, Rights and Laws*, Leicester: Leicester University Press, 1993, p.25.

²³ Habermas argues that identities can possibly be changed and redefined. See J.Habermas, 'The Limits of Neo-Historicism', in J.Habermas, *Autonomy & Solidarity: Interviews with Jurgen Habermas*, ed. P. Dews, London and New York: Verso, 1992, p.243: '[O]ur identity is not only something pregiven, but also, and simultaneously, our own project. We cannot pick and choose our own traditions, but we can be aware that it is up to us *how* we continue them....[E]very continuation of tradition is selective, and precisely this selectivity must pass today through the filter of critique, of a self-conscious appropriation of history, or -if you wish- through an awareness of sin.'

²⁴ R.Debrey, *Critique of Political Reason*, trans. D.Macey, London: Verso, 1983, p.4.

²⁵ A. Al-Azmeh, *Islams and Modernities*, London and New York: Verso, 1993, p.48.

²⁶ See Chapter 4 above.

²⁷ C. Taylor, *Sources of the Self: The Making of the Modern Identity*, Cambridge: Cambridge University Press, 1989, p.36.

based on mutual understanding and tolerance instead of domination and exploitation. As Lyotard put it, 'you shall not refuse to others the role of interlocutors'.²⁸ In a pluralist polity the 'other' should not be stifled and silenced, for 'every human being carries within him the figure of the other'.²⁹ Any attempt, in fact, to remove the distinction of us/others will inevitably end up in some kind of monistic and authoritarian regime. Kemalist populism and solidarism, and 'existing real socialisms' are examples of such authoritarian attempts.

The journey to selfhood is also a journey from being to becoming; the journey of becoming 'man'.³⁰ According to Shariati, 'man is a three dimensional being' who is self-conscious, chooser, and creator.³¹ Becoming is therefore to realize and define the self as 'man', a 'being', who can choose, and most importantly revolt.³² As autonomous being, man can choose his own ways of life, and conceptions of good, and can revolt against the determinisms of 'history' and 'society'.³³ He can revolt against the political power, if it arbitrarily curbs his rights and freedoms. This revolt is justified, because the rights themselves are justified on the ground of autonomy. Autonomy is the *sine qua non* of the political rights. Any attack against them is therefore an attack against autonomy. To treat people as equal, for instance, means to treat them as autonomous beings. Otherwise, it would amount to treating someone as less than human. Having attained these rights, which are in turn instrumental to autonomy, it is possible to realise the radical autonomy which posits the individual as end in itself, not means for the ends of

²⁸ J-F, Lyotard, 'The Other's Rights', in S.Shute and S.Hurley (eds.), *On Human Rights: The Oxford Amnesty Lectures 1993*, New York: Basic Books, 1993, p.147.

²⁹ *Ibid.*, p.136.

³⁰ The term 'man' is used in its genealogical sense as the equivalent of human being. Therefore it should not be interpreted as suggesting a sexual or gender bias.

³¹ A. Shariati, *Man and Islam*, trans. F.Marjani, Houston: Filinc, 1981, p.51.

³² *Ibid.*, p.49. Shariati here cites Camus as saying that 'I revolt, therefore I am'. With this expression, according to Shariati, Camus indicated the 'most exalting' feature of 'becoming'. *Ibid.*

³³ See note 19 above.

others.³⁴ The achievement of political rights, and degree of realization of autonomy is dependant on institutional and structural conditions, as well as on the full awareness of the self.

Now, I have completed the circular assertion of this dissertation. That is, individuals as autonomous beings have rights against the state. These rights can be exercised in a plural constitutional framework within which the individuals would follow their own conceptions of the good without the intervention of the state. The establishment and endurance of such a framework ultimately depends on the individual consciousness, awareness, and self-definition of our identity. I shall leave the last word to the poet Eliot who wrote:

And the end of all our exploring
Will be to arrive where we started
And know the place for the first time.³⁵

³⁴ For the basic charecteristics of this 'man-centered' world view, see A.Alatli, *Or'da Kimse Var mi?: Kitap 4: O.K.Musti Turkiye Tamamdir*, Istanbul: Boyut Yayınevi, 1994, p.324ff.

³⁵ T.S. Eliot, Little Gidding, in *Collected Poems, 1909-1962*, London: Faber and Faber, 1963, p.222.

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