Türkisch-Koreanische Strafrechtssymposium

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A Comparative Approach on New Turkish Constitutionalism

Asst. Prof. Dr. Saadet Yüksel

I. Introduction

Although many societies may face similar issues while drafting a new constitution, every society has its own values and desires. Thus, since I do not seek a prototype in this paper, I will try to identify some forms of constitution-making. I will mostly focus on some comparative examples and components that might have similar features with Turkey while taking particular notice of constitution-making through a constituent assembly or a parliamentary constitution making process, which have been subject to major discussions in Turkey.

It might be said that the forms of constitution making vary as every country’s experiences and circumstances that give rise to making a new constitution. Social and economic crises as in the making of 1791 French Constitution,\(^1\) revolution as in the German Constitution of 1848,\(^2\) breaking away from an old regime and reforming it as in Central and Eastern Europe in the 1970s and early 1990s (as in Spain, Hungary, Poland) and as in South Africa\(^3\) and the creation of a new state as in Czechoslovakia\(^4\) might be considered some contexts of constitution making. It could

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1. Istanbul Üniversitesi Hukuk Fakültesi Anayasa Hukuku Anabilim Dalı.
3. Id. at 371.
5. Andrew Arato, Forms of Constitution Making and Theories of Democracy, 17 Cardozo L.
be said that, unlike what was debated in Turkey for a long time, even though constitution making through constituent assembly might be seen as a dominant form of constitution making, there have been other formations of constitution making adopted by countries which pursued a constitution making process.

II. Comparative Examples of Constitution Making

In Central and Eastern Europe, society’s will was represented mostly in the formation of the constitutional committees rather than constituent assemblies. Especially in the countries which faced a break from a communist regime, it might be said that similar social and economic circumstances grounded similar mechanisms in terms of the representation of the people’s will. For instance, in Poland, two branches of the Parliament - Sejm Constitutional Committee and Senate’s Committee - were established as two constituent assemblies to prepare the first draft of the new Constitution. After the drafts were made public in 1991, they received criticisms. There were conflicts between two committees’ interests and disagreements on the procedure of the adoption of the new constitution.5

Following debates in 1992, Democratic Union, the largest party of the Parliament, submitted a draft which proposed major changes to the powers and relationships of the President and the Prime Minister. The draft called the Small Constitution was submitted to the Senate after the adoption by the Sejm. After the Senate was adopted the draft and the conflict between the two chambers of the Parliament continued for a long time, the procedure for the adoption of constitutional acts was

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6 Id.
changed to overrule the confrontation of the Senate. Moreover, several procedural changes such as required majority amendments were made. Even though some of these changes were brought before the Constitutional Court, they were not overruled by the Court. Finally, the Constitution was adopted by the Parliament and then approved by referendum in 1997.

Hungary, as the other former soviet country, had a very similar transition process. Extensive discussions over the issue were also seen in the Hungarian process. Round table talks which were started by the Communist Party in 1989, extended over the time comprehensively. It came to be known as the National Round Table Talks including not only the Communist Party, but also other segments of society including opposition parties. The talks resulted in many changes, including the submission of several legislative acts, and these changes were accepted by the Parliament in 1989. On the one hand, the Hungarian example, at first sight, might be seen as a constitutional change rather than a new constitution. On the other hand, it is important to note that the amended Constitution, in its preamble, stated the temporary nature of the amended text and emphasized that this attempt was determining the Hungarian Constitution "before the enactment of the new Constitution of the country". This was also stated by the Constitutional Court. Moreover, the Parliament, its legislations and later constitutional amendments clearly demonstrated that the new order was a complete transition.

9 Garlicki, Zofia, supra note 7, at 394-96.
14 Thomas M. Franck and Arun K. Thiruvengadam, Norms of International Law Relating to the Constitution-Making Process in Framing the State in Times of Transition: Case Studies in
It might be thought that the demand for post-communist change and transformation of political formations would enable the pursuit of a constitution making process in a short period of time plagued by less disagreement. However, as seen above, this was not possible even in the Polish and Hungarian examples in which society’s will for breaking away from the old regime was pretty clear and there were extensive procedures which made it possible for society to be engaged with the process. It might also be seen as an instance where it became easier for people, even now, to exercise their political rights and freedoms. Therefore, on the one hand, it might be said that there was an attempt by constitutional framers through round table talks to claim “revolutionary legitimacy”. On the other hand, it is important to note that these constitution-makings were also criticized because the people were not taking place at the center; it was not a legal break from old regime; and indeed it was the different ideologies that had an essential impact on the process, rather than the people, as the constituent power.

Like Poland and Hungary, Spain also previously had a revolutionary change and has been considered as one of the countries which had a peaceful and negotiated transition to a constitutional democracy. But what made the Spanish constitution making process important for Turkey? It has been suggested, particularly after 2007, that the Spanish model should be followed in Turkey and it has been said that there was an attempt to emulate the process, which started with the request to a group of law professors to prepare a draft and led to a failure that had features similar to those in the Spanish process. Therefore, before explo-

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16 Arato, Dilemmas Arising From The Power To Create Constitutions In Eastern Europe, 14 Cardozo L. Rev. 661, 682 (1992-1993).
18 Arato, Dilemmas Arising From The Power To Create Constitutions In Eastern Europe, supra note 16, at 678-682.
19 Arato, Post-Sovereign Constitution-Making and Its Pathology in Iraq, supra note 102, at 538.
ring the similarities and differences between the two processes, I should briefly reflect on the social and political circumstances of Spain when its constitution was drafted and adopted and also the features that had a great impact on the success of the Spanish constitution making process.

It is pertinent to note that even though the Spanish transition might be deemed as a peaceful transition like the later examples of Poland and Hungary, the latter did not look like the Spanish model just as the Spanish model did not look like prior models such as the American and French transitions. 20 It has been said that Spain’s process of a peaceful transition was founded upon a new model. 21

Even though the constitution making process in Spain started in July 1977, the efforts to reform the authoritarian regime, which took place around 40 years, occurred in 1970s, just after General Franco died. In 1976, two legislative acts were adopted: legalizing the establishment of political parties and calling for free parliamentary elections. 22 It should be noted that some commentators consider the 1977 Parliament to be a constituent assembly since it was a newly elected Parliament which also had wide-ranging representation from the different parts of the society. 23

After the first free election, in July 1977, the new Parliament opened; at this time, the sovereignty of the people and the King’s passive role in politics were announced. 24 This was going to be an important step in the constitution-making efforts and in the process of drafting a new constitution. Indeed, in July 1977, the Parliament made a decision to elect a constitutional committee of 36 members that would select a group of people called the “Ponencia,” 25 to draft the constitution. This group was

21 Id. at 1914.
23 Rosenfeld, supra note 20, at 1911-12; see also Andrew Arato, Forms of Constitution Making and Theories of Democracy, 17 Cardozo L. Rev. 191, 198 (1995-1996).
24 Rosenfeld, supra note 20, at 1911.
25 Peaceful Transitions to Constitutional Democracy: Transcript of the Proceedings, supra note
composed of seven lawyers and legal scholars who were also representatives from major political parties. They decided to have a president for each session by rotation rather than instituting a permanent president. Even though they pursued their work confidentially, the chairman of the session updated the press at the end of every session.\textsuperscript{26}

The draft prepared by the seven drafters was proposed to the Parliament and also to the public. After some changes were made to it, the draft constitution, which eliminated the laws of the old authoritarian regime, was accepted by a vast majority of the Parliament. After that, it was approved by the popular vote of the people by referendum and in 1978 it was promulgated by the King.\textsuperscript{27}

In Turkey, the Spanish example was discussed particularly when drafting a constitution at the request of the majority party of 2007. However, it might be said that the fact that a group of seven people drafted the constitution was almost the only similarity between the Turkish and Spanish processes. Even the formation of the group of seven drafters in Turkey was different from the Spanish example. Unlike the Turkish example, in Spain the group had a representative from each major political party such as the Socialist, Communist, Catalan, and the principal rightist party, and therefore, political representatives and also society, through drafters’ updates, were not alienated from the work of the group although they might not be considered a constituent assembly.\textsuperscript{28} However, in Turkey, the group of drafters did not include political parties’ representatives and more importantly people were informed about the draft after it was written. The major criticisms were focused on the lack of representation of the opposition’s view, the idea of “hidden intentions”,\textsuperscript{29} and a political project.

\textsuperscript{26} Rosenfeld, supra note 20, at 1965-66.
\textsuperscript{27} Rosenfeld, supra note 20, at 1914, Peaceful Transitions to Constitutional Democracy: Transcript of the Proceedings, supra note 107, at 1966.
\textsuperscript{28} Rosenfeld, supra note 20, at 1913; see also Arato, supra note 4, at 198.
\textsuperscript{29} Ozbudun, Genckaya, supra note 3, at 105.
Furthermore, the Spanish example could be analyzed as "a process proceeded by means of consensus" since there was consensus among the drafters and also among the people to break away from the old regime and there was also a commitment to have a transition to a constitutional democracy. In contrast, the Turkish example would not be considered as reforming an old regime like the Spanish example and it included no consensus, not only in Parliament but also in the public.

Where on the one hand even the authority of the Turkish Grand National Assembly (Turkish Parliament) to make a new constitution was questioned, on the other hand, the people also questioned the authority of a group of law professors to draft this new constitution. In Spain, if there was a lack of consensus on some issues, the uncertainty made possible a debate and an agreement at the end. However, in Turkey, uncertainty had a very negative effect on the process and the political situation and left no room for compromise. Ultimately, it might be said that the Spanish process that was recommended and attempted to be emulated made it impossible for Turkey to proceed successfully. However, similar features that the Turkish example had, such as the delegation of drafting the new constitution to a group of seven drafters coupled with ambiguity led to a successful parliamentary constitution making process in Spain.

The other constitution-making process which was discussed in Turkey was the South African constitution making process. It has been discussed not only by people who have been debating that only the first newly elected Parliament might be considered as a constituent assembly but also by other people who focused on the possibility of establishing a new Parliament as a constituent assembly. However there are other factors that led to a democratic constitution making process in South Africa. Let me briefly shed light on the key aspects of the South African process that might serve as a more realistic comparison and serve as an example for

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30 Rosenfeld, supra note 105, at 1914.
31 Id.
Turkey to maintain a democratic constitution making process in the future while keeping the historical and social differences in mind.

The social and political conditions in South Africa before an agreement was reached on holding an election and before constitutional negotiations did not provide for a very peaceful transition like in Spain. There was disagreement between the government and the banned African National Congress (ANC), about political executions, pluralism, and more importantly violence.\(^{33}\) However, all these circumstances did not discourage the ANC from asking the government to first lift the ban on political organizations and end political executions and the state of emergency and later to establish a transitional government, and call for multiparty talks and elections for the first democratically elected Parliament to draft the new constitution of the country.\(^{34}\) Indeed, even though there were some breakdowns in negotiations at some stages - mostly because of the violent attacks - both sides of the debates reached an agreement on the essential issues.\(^{35}\)

The outcome of the negotiations might be summarized as follows: In multiparty talks,\(^{36}\) an interim constitution which would arrange the process of drafting the new constitution would be negotiated. This interim constitution would be enforced after the elections. The newly elected Parliament, with all members in both houses, would serve as a constituent assembly and its draft would conform to the principles agreed to in the multiparty talks. Finally the draft would be affirmed by the Constitutional Court’s approval.\(^{37}\)


\(^{35}\) Klug, supra note 34, at 273-75.


\(^{37}\) Murray, supra note 33, at 813-14.
The first democratic elections took place in 1994 and put the interim constitution, which was adopted in 1993, into force. This transitional constitution was not only regulating the process of adopting the new constitution, but also providing the tools that would come into play if the process reached a dead end. Thus, it required a two-thirds majority for adopting the constitution and if the required majority was not provided within two years, there would be a new election. Moreover, if the draft constitution was accepted by the required majority of the Parliament, but not certified by the Constitutional Court because it was not compatible with the agreed upon principles, it would be possible to make changes and then submit it to the Constitutional Court again.38

It could be said that, like the Spanish example, the South African process also had uncertainty at some point and, like in Spain, uncertainty did not block the process from proceeding by means of consensus like Spain. In South Africa, because of the constitutional principles, which were set up during the negotiations, and multiparty talks, and more importantly, because of the commitment to enforce these principles, ambiguity did not lead to a failure although both sides of the debate sometimes had different interpretations of the principles.39

Besides the agreed-upon principles, the South African Parliament, which also worked as a constituent assembly expanded its work with two other mechanisms that would enable society to be engaged in the process.40 The Parliament established a public participation program and a political discussion program.41 All of these efforts were intended to enable the people to reflect on the constitution, in particular through instruments of media such as radio, TV, and the press. There were newsletters, radio and TV programs hosting talks about the Constitution and the process and other campaign mechanisms such as statistics showing

38 Klug, supra note 34, at 276, Murray, supra note 33, at 814.
39 Murray, supra note 33, at 823.
41 Murray, supra note 33, 816-23.
the public's view on the issue. This was not of the only way civil society was engaged in the process. A majority of civil society, including non-governmental organizations, had a chance to follow the work of the committees, which prepared the first draft of the Constitution, very closely since they were able to attend the sessions and even the committee workshops.

Ultimately, the draft Constitution prepared by the Parliament was not approved by the Constitutional Court, which issued a ruling stating that the draft constitution was incompatible with the constitutional principles. Thereafter, it was amended by Parliament and resubmitted to the Court and certified by the Court in 1996. The Constitution finally entered into force in 1997 with the President’s signature.

III. The Constitution of 1982 before the Amendments

The process of constitution making in the current constitution, the 1982 Constitution, reflects its authoritarian nature. Its content is equally authoritarian. It is not a surprise that an undemocratic constitution making process would have a significant influence on the authoritarian and restrictive substance of a constitution. Since I am focusing on the process rather than the content of the constitution, I will analyze only the essential features of the current constitution that demonstrate such substance.

One of the key elements reflected in the Constitution is the military committee's lessening distrust of civilians and the nation's will as compared to 1961. In my opinion, distrust affected the substance, but the will of the

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43 Murray, supra note 33, 816-23.
44 Murray, supra note 33, 823.
45 Klug, supra note 34, at 276, Murray, supra note 33, at 835-36.
46 Murray, supra note 33, at 837.
48 Ergun Özbudun, Türkiye'de Devlet Sekinleri ve Demokratik Siyaset Kultur in Türkiye'de
military to keep its influence on the political system was a more determinative feature because the military did not use this lack of trust to establish a more democratic constitution which protected human rights as the basis for the existence of the state, rule of law and judiciary, and the parliamentary regime. The conditions generated by the military committee severely damaged the relationship between European Community and Turkey and decreased the hope for democratization.\textsuperscript{49} Moreover, in some way, this committee worked on the ways to keep its control on the system. Indeed the 1982 Constitution, especially before the amendments, not only provided several tools for the military to keep its influence, but also ensured the military committee, that pursued the coup, would not be held responsible even after the constitution was adopted. For instance, “every allegation of responsibility and application to be filed with a court was forbidden” by the provisional Article 15 of the 1982 Constitution.\textsuperscript{50} Also, under Article 125, the decisions of the Supreme Military Council (Yuksek Askeri Sura) which decides on the promotion of military officers and revisions and comments on the Chief of General Staff (Genelkurmay Baskanligi) were not subject to judicial review.\textsuperscript{51}

The President was given broader powers than a parliamentary regime normally gives such as appointment of the president of the universities, some members of the Higher Education Council, the Constitutional Court and Supreme Council of Judges and Public Prosecutors (Article 104). As regards to fundamental rights and freedoms, the Constitution took the approach that rights were the exception and restrictions were


\textsuperscript{50} For the original text of the provisional article 15, please see supra note 58. This provision was repealed by 2010 amendments, "Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinde Degisiklik Yapılması Hakkında Kanun", No. 5982, May 7, 2010, (April 5, 2011, 5:05 PM), http://www.tbmm.gov.tr/kanunlar/k5982.html.

\textsuperscript{51} The principle of exemption from the judicial review was kept in general even in the 2010 amendments; only the provision of "recourse to judicial review shall be available against all decisions taken by the Supreme Military Council regarding expulsion from the Armed Forces" was added to the article of 125 of the Constitution, supra note 46, at 42.
the core feature and also provided weakened fundamental rights and freedoms. For instance, until 2010 public officers and other public employees did not have the right to conclude collective agreements (Article 53). Even though the Constitution emphasized on political parties as one of the essential elements of the democratic political system, it made it very easy to ban political parties, which were also forbidden from interacting with any association, union or foundation.52 More importantly, the Constitution had a cumulative restriction system that included grounds to restrict all rights and freedoms without requiring a specific reason. In fact, this system was kept until 2001.53

IV. Amendments to the Constitution of 1982

The 1982 Constitution faced 17 amendments and 6 referendums. The first amendment took place in 1987.54 The most important changes in this amendment package were the modification of the age of voting which was reduced from 21 to 20 and of the numbers of members in Parliament which was increased from 400 to 450. The President was given power to submit the constitutional amendments, which would have to be adopted by a two-thirds majority of the Parliament without sending it back to the referendum. This constitutional amendment


54 Article 13 of the Constitution, regulating restriction of fundamental rights and freedoms, was amended in 2001. Before 2001 amendments, the general grounds for restriction all fundamental rights and freedoms were stated by the article 13/1: "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". Article 13/3 also regulated that "the general grounds for restriction set forth in this article shall apply for all fundamental rights and freedoms", supra note 58, at 9-10. After 2001 amendments, article 13 stated that fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles; please see English text of the Constitution of 1982 as amended to Law No. 5375 of 2-9-2008 4-5 (1982), available at (February 4, 2011, 12:32 AM), http://heinonline.org.ezp-prod1.hul.harvard.edu/HOL/Page?handle=hein.cow/zztr0001&collection=cow.

package was adopted by the referendum on September 6, 1987. The other amendments, in 1993, amended Article 133 of the Constitution and allowed corporate bodies to run radio and television stations. The later amendment package consisted of the 1995 amendments. With this amendment package, the age for voting was decreased to 18 (Article 67/3) and the number of members in Parliament was increased from 450 to 550 (Article 75). Faculty members and students were allowed to become members of political parties (Article 68) and the provision that prohibited political parties from opening women and youth branches was abolished. The other provision that was abolished was the rule that changing political affiliations meant losing parliamentary membership. Moreover, even though before the amendments only statutes and the program of a political party might be subject to a ban, the 1995 amendments added another element to the list - the political party's activities. It was stated that political parties' activities should not be in conflict with the grounds mentioned in the constitution such as "the independence of the state and its indivisible integrity with its territory and nation". The next two amendments were made in 1999. The most important change was to recognize international arbitration in settling disputes involving foreign entities (Article 125).

The other two amendment packages were adopted in 2001 as one of the most comprehensive amendments. These changes illustrated not only an amendment package compatible with European regulations but also a follow up at the democratization attempt. As mentioned above, the most important change was the abolishment of a cumulative restriction system for fundamental rights and freedoms and the requirement for restrictions to be in conformity with the reasons mentioned in the relevant articles (Article 13). Furthermore, where offences were cumula-

56 Article 68/4 of the 1982 Constitution, supra note 46, at 21.
tive, the maximum period to arrest and detain a person was reduced from 15 to 4 days (Article 19/5). As regards to the right to privacy, the exception clause that reserved prosecution and judicial inquiry was abolished. It was also required that an authorized officer’s order to search and seize should be submitted to a judge’s approval within 24 hours (Article 20/2). Everyone’s right to form associations, affiliations with associations and resignations were guaranteed (Article 33) and the principle of a fair trial was added to Article 36 as the other compatible change with the European Convention on Human Rights.

The later amendment in 2002 added new mid-term elections as a provision of Article 78, by stating that a mid-term election would be held if a city or region did not have a representative in Parliament. The 2004 amendment was another important amendment that completely abolished the death penalty. It also guaranteed gender equality with an affirmative action provision which states that men and women have equal rights and guarantees the state’s responsibility to put such equality into practice (Article 10). In addition, the principle of the supremacy of international agreements related to fundamental rights and freedoms was added to Article 90 of the Constitution. Thus, if there is a conflict between these international agreements and national law, international agreements shall prevail (Article 90/5). After some minor changes in 2005, the age of being elected was reduced from 30 to 25 with amendments adopted in 2006 (Article 76/1).

In 2007, there was an important change that was shaped by the social and political circumstances but which also shaped the social and political circumstances in turn. There were attempts to make a new constitution, and the constitutional crisis played a significant role in amending the constitution. In 2007, at the end of the President Sezer’s presidential term, the Justice and Development Party (Adalet ve Kalkınma Partisi/JDP) presented its candidate but he was not elected. Article 102, before the amendment, stated that if a two-thirds majority could not

58 This provision made possible for Prime Minister Recep Tayyip Erdogan who could not run for the national elections because of his past conviction to be elected from Siirt, see Tanor, Yuzbasioglu, supra note 55, at 50.
be obtained in first two rounds, there would be a third round to obtain an absolute majority and if this majority could not be obtained there would be a fourth round which again required a majority of the votes.\textsuperscript{59}

In 2007, it seemed at first that since JDP, as the majority party, had one third of the majority for the opening session, the Party would be able to elect its candidate at least in the third or fourth round, but later this almost turned into a crisis. After the first round, the major opposition majority party, Republican People’s Party (Cumhuriyet Halk Partisi/RPP), did not even attend the sessions and brought suit against the parliamentary decision related to the election before the Constitutional Court. At that time, RPP’s argument was that a two thirds majority was not only for the election as a decisonal quorum but also for opening the session as a meeting quorum.\textsuperscript{60} The Constitutional Court accepted the motion to stay and ended the process of the election.

On the one hand, the Court’s ruling raised a big debate because the first paragraph of Article 102, which stated that the President shall be elected by a two thirds majority of the members of the Parliament clearly did not require a two thirds majority for the opening session. Moreover, this majority was never considered as quorum for the opening session. On the other hand, there was also another discussion based on the constitution itself. The argument was that the ambiguous nature of the constitutional provisions was causing different interpretations.\textsuperscript{61} In my opinion, these arguments, considered separately, might not give the explanation of the crisis and thus should be considered together. As social and political circumstances of the time were impacting the crisis, the Constitution itself was not helping to resolve the situation and was

\textsuperscript{59} If the President could not be elected in the fourth round, article 102, before the amendment, required new national elections for the Turkish Parliament, see article 102 of the 1982 Constitution as amended in 1987, The Constitution of Republic of Turkey as amended in 1987, (Published in the (supplement) Official Gazette No: 17863, dated 9 November 1982), No. 2709, Nov. 7, 1982, 46, 47 (1987).


instead making it easy to reach a deadlock. Therefore, it is clear that the 2007 crisis was an apt example of how the 1982 Constitution could lead to a constitutional crisis.

After the crisis, the country faced a national election and then a constitutional amendment package. The constitutional amendment package brought a popular election system for the President. Furthermore, it changed the legislative period from 5 to 4 years and the president’s term in office from 7 to 5 years for a maximum of two terms (Article 101). Also, with the influence of the crisis, one third of the majority was accepted as the quorum for the opening session, unless otherwise mentioned in the Constitution (Article 96).

The 2008 amendments were the next amendments to be overturned by the Constitutional Court.\(^{62}\) The amendments were basically based on the JDP’s attempt at lifting the ban on the headscarf and support of one of the major opposition parties’ called Nationalist Movement Party/Milîyetci Hareket Partisi.\(^{63}\) Article 10 of the Constitution which regulates the principle of equality was changed. The provision “in the use of all kinds of public services”\(^{64}\) was added to the last paragraph of the article. Therefore, it required state organs and administrative authorities to act in accordance with the principle of equality in all their proceedings and in all kinds of public service. Also, a paragraph was added to Article 42, which stated that “no one shall be deprived of his or her right to higher education unless there is reason clearly specified by the law. The restrictions on the exercise of the right shall be determined by the law.”\(^{65}\) By


\(^{65}\) See article 2 of the Law Amending Some Articles of the Constitution of Republic of Turkey, supra note 46.
this time, it was mentioned several times that the aim was not only to let female students wear the headscarf in universities but also to lift the ban in general. However, such statements could not prevent this amendment package from becoming one of the most debated and influential amendments in the political history of the country.

The amendment package, which was challenged by the opposition party before the Constitutional Court, meant to prohibit any restrictions on the right to higher education unless regulated by the law. Thus, if it had passed, it would have become unconstitutional to keep the headscarf ban without finding justification in a particular law. The main argument of the major opposition party, the RPP, was that the constitutional amendment package went against non amendable articles of the Constitution, particularly the principle of secularism and article 24 of the Constitution guaranteeing freedom of religion and conscience because it could have compelled other people to reveal their religious beliefs and convictions, and it would step on someone’s right not to cover if they were being pressured to cover, which could be a likely consequence of lifting the ban. As a result, the amendments were overturned by the Constitutional Court in June 5, 2008. The Court basically agreed with the arguments of the opposition party. Indeed, even though the 1982 Constitution restricts the Constitutional Court’s authority to reviewing the constitutionality of constitutional amendments with the procedural review, the Court examined not only whether the amendment fulfilled the procedural requirements such as adoption by the qualified majority, but also whether

67 Article 4 of the 1982 Constitution states that “the provision of Article 1 of the Constitution establishing the form of the State as a Republic, the provisions 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”, supra note 46, at 4.
68 Secularism is one of the characteristics of the state under the article 2 of the Constitution and according to the Article 4 of the Constitution, it cannot be amended and its amended cannot be even proposed.
70 Article 148/1 of the 1982 Constitution, supra note 1, at 51.
its content was inconsistent with the non amendable articles of the Constitution. Its argument was that the Court's authority to review included reviewing the substance of the amendment if the constitutional amendment was accepted by the required majority.\textsuperscript{71} The Court stated that the substance of the amendment package was inconsistent with the principle of secularism, which was incorporated by the article 2 as a fundamental characteristic of the state; accordingly, the package was held to go against article 4 of the Constitution, which prohibits amending and proposing to amend article 2 of the 1982 Constitution.\textsuperscript{72}

There have been debates over what some felt was an authoritarian interpretation by the Constitutional Court and criticisms that the Constitutional Court abused its power and authority of constitutional review by reviewing the substance of the amendment.\textsuperscript{73} Concerns have arisen that the Court's decision has made it impossible to achieve the necessary democratic changes without fundamentally changing the structure of the current Constitution.\textsuperscript{74} More challenges were created when the changes proposed by this amendment package were later presented as evidence in the JDP's closure case. The Chief Prosecutor, in 2008, argued that the majority party should have been closed because of its anti-secularist activities.\textsuperscript{75} He stated that the JDP intended to lift the headscarf ban in institutions of higher education and that such an initiative could be seen as going against the principle of secularism.\textsuperscript{76} In response, the majority party alleged that the claims of the Chief Prosecutor and the case brought before the Court were politically motivated and that the case could not withstand international standards of political party closures.\textsuperscript{77} The case

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item Ozbudun, Genckaya, supra note 48, at 108.
\item Ozbudun, Genckaya, supra note 48, at 109.
\item Case Number: 2008/1 (Party Closure), Respondent: The Justice and Development
\end{enumerate}
\end{footnotesize}
was dismissed by the Constitutional Court in 2008 and the JDP remained open by a 6-5 vote.\textsuperscript{78}

Overall, it might be said that the failure of the amendment also caused a constitutional crisis like the President's election in 2007, and it again brought about debate concerning making a new constitution which would respond society's needs.

One of the most comprehensive and broad amendments was made in 2010.\textsuperscript{79} The most important changes brought about by this amendment package were, for the first time, regulating the protection of personal data (Article 20) and adding children's rights to the Constitution (Article 41). Article 23/2 of the Constitution, which restricted the freedom to leave the country\textsuperscript{80} was changed and it was stated that "a citizen's freedom to leave the country may be restricted only by a court decision based on criminal investigation or prosecution" (Article 23/3). Public officers and public employees have been given right to conclude collective agreements (Article 53), the amendment has made the procedure of banning political parties more difficult (Article 69). The institution of the ombudsman was established and the right to obtain information and appeal to the ombudsman was guaranteed.

Besides these positive changes, there were highly controversial amendments such as the amendment made to the Articles 146-149 of

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\textsuperscript{78} Ak Parti Kapatılmasına Karar Cıktı (March 17, 2011, 2:58 AM), http://www.milliyet.com.tr/Siyaset/SonDakika.aspx?aType=SonDakika&Kategori=siyaset&ArticleID=972729&Date=30.07.2008&b=Karar%20bug%F%F%F%F%F%20%E7%FDklanacak?.

\textsuperscript{79} Constitution of Republic of Turkey, see supra note 65; for the Turkish version of the amendment please also see the Law Amending Some Articles of the Constitution of Republic of Turkey, No. 5982, May 7, 2010, (April 5, 2011, 6:17 PM), http://www.tbmm.gov.tr/kanunlar/k5982.html; Levent Gonenc, 2010 Proposed Constitutional Amendments to the 1982 Constitution of Turkey 2-6 (2010).

the Constitution. The structure of the Constitutional Court has been changed and the Parliament has been given the power to elect some members of the Constitutional Court and the Court has been given authority to decide on individual applications (Article 148/1). The amendment also changed the structure of the Supreme Council of Judges and Public Prosecutors. It increased the number of members, kept the Minister of Justice as the president and his undersecretary as the ex-officio member of the Council which caused a lot of discussions even among judges and prosecutors for a long time.\footnote{Danistay Baskan'indan Degisiklik Paketine Elestiri, March 19, 2010, (April 5, 2011, 6:22 PM), http://www.hurriyet.com.tr/gundem/14158631.asp; Bassavci Anayasa Degisiklik Paketini Elestirdi, April 9, 2010, (April 5, 2011, 6:23 PM), http://www.hurriyet.com.tr/gundem/14370317.asp.}

At this point, it is important to mention the European institutions' view on the recent constitutional amendments since progress towards EU membership has been one of the most important reasons for the adoption of previous changes and the most recent ones as well. Elaborating briefly on European perspective will provide an idea of the context within which the amendments were undertaken and will also provide a better understanding of why reaching consensus and allowing society's participation have been formidable challenges for Turkey and instituted constitutional amendments which failed to address the real issues and serve as genuine reforms.

The most recent annual report of the European Commission on Turkey's progress toward EU membership was published in November 2010.\footnote{Commission Staff Working Document: Turkey 2010 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2010-2011, European Commission, 9 November 2010, SEC (2010) 1327 8 (2010).} In this report, the European Commission stated that the latest amendments could be evaluated as progress, particularly in the area of the judicial system, fundamental rights and freedoms, and public administration such as the establishment of an ombudsman.\footnote{Id. at 8-14.} However, the report also highlighted two challenging features of these amendments.
and, accordingly, the whole process with which they were undertaken. According to the European Commission, some key issues such as political party disclosure were only addressed in the draft amendments but not adopted because they did not receive enough support in Parliament. Moreover some key issues, such as parliamentary immunities, were not even mentioned in the amendments. The Commission emphasized that the process lacked broad discussion between political parties and civil society. It also pointed out that this engagement would be necessary for implementation and to achieve enhanced support for constitutional reforms.  

The failure of maintaining a process that enables every segment of society to be engaged has been a never-ending challenge for Turkey. Why is this such a significant failure for the Turkish constitution making process? Because it has been a challenge not only in the attempts to draft a new constitution in Turkey, but even in the amendment processes - as mentioned several times by the European Commission. The Commission was not the only institution that emphasized the processes' lack of consensus and broad discussion and inadequate context of constitutional amendments which failed to address democratic needs.

The Venice Commission, which advises the Council of Europe on constitutional issues and particularly constitutional design, also closely examined the latest amendments at the request of the Turkish government. Although the Venice Commission was particularly focused on the amendments to the judicial system - one of the most debated issues - it also analyzed the current circumstances as regards the need for a new constitution. Like the European Commission, the Venice Commission stated that there were positive partial amendments but the need for a new constitution was still present and therefore, a constitutional reform should still be kept on the agenda. Even though the changes to the judi-

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84 Id.
ciary, which basically changed the composition of the High Council for Judges and Prosecutors in Turkey, were considered as part of progress, it was said that these institutional changes should lead to more substantial changes to the judiciary.\(^7\)

The European Commission’s concerns as stated in the Progressive Report about the amendments in general and the Venice Commission’s concerns as stated in the interim opinion on the draft law on the High Council for Judges and Prosecutors were pointing to the same hesitation: there have been positive institutional changes but substantive reform should follow this progress. This reaction from the European institutions was neither a surprise nor coincidence. Let me briefly explain why the unsatisfactory nature of the partial amendments was so glaring by giving a specific example that was also mentioned by the Venice Commission.

The Commission was emphasizing that the organizational framework of the High Council for Judges and Prosecutors, which supervises and controls the judges and prosecutors, was amended to change the number of members in the Council and a secretary general affiliated with the Council was established.\(^8\) However, the substantive powers of the Council were kept same. The High Council still has extensive discretionary control over the judiciary by way of its authority over the admission of judges and public prosecutors and the imposition of disciplinary penalties and removal from office. Indeed, these powers are broader than most of European examples. Moreover, there is always a concern of political influence in this Council since it has members from the executive branch.\(^9\)

Overall, the European institutions support the progress that was made by the constitutional amendments, but they also point out the need for a general democratic constitutional reform that would bring real

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\(^7\) Id. at 11.

\(^8\) Article 159 of the 1982 Constitution, supra note 46, at 56-58.

progress rather than mere organizational modifications, and the importance of democratic process to achieve this goal.90

In addition to this outside look, it might be worth mentioning the Turkish society's concern about these amendments and the Constitution's structure but only briefly since this paper is not about the constitutional amendments, but about drafting a new constitution.

In Turkey, there has always been concern regarding partial amendments that could not eliminate the statist spirit and limits of the Constitution and, more importantly, which did not satisfy the society's democratic needs - mostly because they were not made by careful consideration of all constitutional structure. These concerns increased even more after the Constitutional Court struck down the amendments to Article 10 and 24 aimed at lifting the headscarf ban at public.

The case, which was brought by the opposition party and resulted in a Constitutional Court decision overturning the change and keeping the headscarf ban as it was: this was a major moment for Turkey in understanding that constitutional amendments and their review provide an open door for a fight between the majority and opposition.91 It serves political actors well to block a constitutional change introduced by another political party by bringing it to the Constitutional Court and claiming its unconstitutionality.

Indeed, this concern might be related to the main purpose of a constitutional amendment - the origin of the word amend being the Latin word emendere, which means to correct.92 However, the current Con-

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91 Ozbudun, Gençkaya, supra note 48, at 109.

92 Walter Murphy, Constitutions, Constitutionalism, and Democracy, in Constitutionalism and Democracy: Transitions in the Contemporary World 3, 14 (Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, Steven C. Wheatley eds., 1993).
stitution does not even allocate these corrections, which are necessary to satisfy the people’s democratic expectations, within the limits of the current structure. Particularly, the presence of non-amendable articles in the Constitution’s structure has served as the main ground for invalidation of constitutional changes by the Constitutional Court. Having non-amendable articles is not something which is unique to Turkey’s Constitution. German Basic Law, for instance, states that (1) changes to the division of the Federation, (2) to the legislature which is bound by the constitution, (3) to the executive and judiciary, which are bound by law and justice, and (4) to the principle of human dignity shall not be allowed (Article 79/3). The problem is that in Turkey, constitutional amendments, which are supposed to endorse democratic changes within the limit of the current Constitution, have become an instrument for facilitating political fights between the main political parties.

It is important to note that these fights were not limited to the party-level: as seen after the amendments to Article 10 and 42 overturned by the Court, there was much societal conflict as well and this contributed to the real problem of maintaining full enjoyment of fundamental rights and freedoms. Thus, not surprisingly, the statist structure of the Constitution and an authoritarian interpretation of the restrictions have a negative impact on the people’s democratic needs. This authoritarian spirit has left almost every situation related to fundamental rights with fewer guarantees and more restrictions. It has also created a deadlock where issues related to the governmental system, which should be solved under democratic principles, are considered.

V. The Attempts to Draft a New Constitution

Before analyzing the majority party’s, JDP’s attempt to make a new constitution which has served as grounds for serious discussion on making a new constitution that still continues, I should briefly mention in-


stances of some drafts of a new constitution that were prepared by several different institutions and scholars. In 1992, a draft of a new constitution named "for a new constitution" was prepared by 9 legal scholars at the request of the Turkish Industry and Business Association (TUSIAD). Later, again at the request of TUSIAD, Prof. Tanor prepared two drafts. The first one, in 1997, was prepared under the name of Democratization Perspectives in Turkey which was revised and updated in 2006 and the other one, in 1999, was prepared under the name of the Increase of Democratic Standards in Turkey. In 2000, the Union of Chambers and Commodity Exchanges of Turkey requested a draft constitution from a group of scholars.

By 2007, after the draft which was prepared at the request of the governing party, was made public, the number of the drafts prepared by scholars and civil-society organizations has greatly increased. In fact, the way chosen by the groups to show their demand, support or even disagreements was to prepare their own drafts. For instance, as a reaction, a group called Constitutional Platform which included hundreds of members as representatives of more than 80 civil-society organizations announced its work in 2007 and called people to join to the group. Also, the Turkish Bar Association requested a draft constitution from a group of law professors.

95 Seray Yavuz, Yeni Bir Anayasa Hazırlığı ve Türkiye: Sıkıntılıktan Toplum Sözlesmesine 3-5 (2009).
99 Yazıcı, supra note 95, at 4.
101 Yavuz, supra note 50, at 5.
Why did all efforts and more importantly the governing party’s attempt to adopt a new constitution fail, even though almost every segment of society has criticized the 1982 Constitution and agreed that a new democratic constitution is a significant priority for Turkey? In 2007, at the request of JDP, a group of law professors prepared a draft. Prof. Ozbudun, the chief of the drafting group stated that "the drafting committee presented its draft to the JDP leadership on 29 August 2007, and on 14-16 September a joint meeting between the committee members and eleven leading JDP ministers and parliamentarians took place in Sapanca, where some minor modifications were made on the draft". Even though the draft was not the only draft constitution at the time, it led to a huge debate after it was proposed to the public. People were not arguing about the content of the draft, but about the governing party’s request and the legitimacy of the process of drafting this new constitution.

The only positive thing that has come out of these debates is that the society has been exposed to the issue of constitution-making. There might be many reasons of why this drafting process in particular and not others had such a great impact on the issue. The draft was the first draft constitution that was prepared at the request of a governing party which had around 340 seats out of 550 in Parliament. Therefore, it was possible for JDP to even bring the matter to Parliament if it was supported by the people. However, it was criticized because the draft was opened up for debate to the public after its preparation by a group of law professors and subsequent modification by the majority party. Also, in my opinion, since people were questioning even the authority of the Turkish Parliament, it would not have been realistic to expect not to get any criticism regarding the authority of the group of law professors to draft this new constitution and open it up for debate to the public.

It was important whether people would support the draft because the Constitution of 1982 did not have any clause on making a new con-

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102 Ozbudun, Genclaya, supra note 48, at 104.
103 Yuksel, supra note 32, at 120.
104 Article 175 of the 1982 Constitution regulates the procedure of the amendment of the Constitution.
stitution. Thus, it might be said that it would not be that easy to present the draft to the Parliament as a formal amendment proposal as stated in “the original declared intention of the JDP”.105 Finally after these criticisms, the draft was no longer discussed even by the JDP and it became moot. Did the substance of the draft have any impact on this failure? If so, the question then arises whether the result would be different if the substance of the draft were different? This question might be extended to other drafts as well, but as mentioned above, none of them had quite the milestone effect in Turkish constitutional debates as this one. Therefore, I will briefly try to elaborate its main features in order to shed light on whether any factors played a role in this breakdown in addition to the failure of the process.

Some articles of the draft presented to the majority party by the group of law professors proposed more than one alternative provisions. In drafting the provisions that had more than one alternative formulation, such as the provision on the prohibition of abuse of fundamental rights and freedoms, one of these alternatives almost mirrored the 1982 constitution’s formulation. After this draft was received by the public, it was explained that these alternatives were provided so the majority party could evaluate different formulations.106 It might be said that this framework would be helpful at least in generating a discussion. However, it is important to mention that since an exchange of ideas on the substance of these alternatives did not occur at any stage of the debate, this framework could not function in the desired way.

On one hand, it can fairly be said that the draft has many progressive provisions. For instance, it proposed for the first time, the protection of personal data.107 It made political party disclosure more difficult in or-

105 Ozbudun, Genckaya, supra note 48, at 105.
107 Yeni Anayasa Taslagni (Tam Metin 1), September 13, 2007, (March 11, 2011, 8:58 PM), http://arsiv.ntvsnbc.com/news/419856.asp. Protection of personal data and the right of being informed of, having access to and requesting the correction and deletion of
der to eliminate the aim of depoliticizing followed by previous Turkish constitutions. According to the draft, if a political party’s statute and program violate the Constitution, the political party shall first receive notice and time to cure the defect. If it cannot fulfill its obligation of correcting the defect, it will be subject to a closure case under the Constitutional Court’s jurisdiction. Under Article 69 of the current Constitution, such a political party shall be subject to a closure case and its statute, program and activities could be grounds for a permanent dissolution of the party. The draft kept parliamentary immunities, but it narrowed them. It eliminated the need for Parliamentary approval for revoking immunity in cases where a parliamentary member committed a certain crime. It also regulated the waiver of immunity by a parliamentary member. Under the 1982 Constitution, however, parliamentary immunity “shall not be applied only in cases where a member is caught in the act of committing a crime punishable by a heavy penalty and in cases subject to article 14 of the Constitution if an investigation has been initiated before the election” (Article 83/2). Moreover, a parliamentarian cannot waive immunity by himself or herself.

One the other hand, the draft left some issues untouched and could not avoid receiving the criticism, during the procedural debates, that the draft had followed the political interest of the majority party to not to go too far and keep its popularity by taking no risk. For example, the draft’s proposed provision on the right to education did not offer a progressive solution for people who wear headscarves. The draft proposed almost the same formulation that exists under the current Constitution yet

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personal data and to be informed whether these are used in consistency with envisaged objectives, later with the 2010 amendments, were added to the Constitution, article 20/3 of the 1982 Constitution, see supra note 46, at 8.


110 Article 42 of the 1982 Constitution states that “no one should be deprived of the right to higher education due to any reason not explicitly written in the law. Limitations on the exercise this right shall be determined by the law”, supra note 46, at 15.
stating that no one should be deprived of the right to a higher education due to his or her dress.\textsuperscript{111} However, it is clear that this formulation, which does not take the whole statist structure of the Constitution into consideration and simply adjusts existing institutions, has not been adequate to guarantee the right to higher education in the context of Turkey's social and political circumstances.\textsuperscript{112} There were also some shortcomings that kept society's democratic needs from being satisfied. For example, the draft placed women in the same group as children and disabled populations and mentioned that measures taken for this category of people, who require special measures, shall not be construed as contrary to the principle of equality.\textsuperscript{113} It could be said that this formulation remained even behind the current Constitution, which adopted (1) gender equality, (2) declared the state's responsibility to put this equality into practice in 2004, and (3) declared that the principle guaranteeing that measures taken to ensure equality shall not be interpreted as contrary to the principle of equality in 2010 (Article 10/2).\textsuperscript{114}

Beyond that the draft constitution did not contain any provision stating guarantees of women's equal rights and the state's responsibility adopted by the current Constitution in 2004.\textsuperscript{115} Furthermore, it seems that the draft Constitution was not designed to ensure gender equality in social life and in politics. Even though it kept the 1982 Constitution's detailed formulation related to the organization of political parties and


\textsuperscript{112} The constitutional amendments on the article 10 and 42 which intended to lift headscarf ban which overturned by the Court might be considered as an example. The authoritarian spirit of the 1982 Constitution which is also reflected in the non amendable and even non proposeable articles including the article on the characteristics of the Republic, has almost always provided the ground to limit the constitutional guarantees, see E. 2008/16, K. 2008/116, June 5, 2008, Official Gazette No. 27032 – Oct. 22, 2008, (April 5, 2011, 5:49 PM), http://www.anayasa.gov.tr/index.php?=manage_karar&kara=show&nameaction=karar&idd=2608&content=.


\textsuperscript{114} Supra note 46, at 5.

\textsuperscript{115} Article 9 of the draft Constitution, Yeni Anayasa Taslagı (Tam Metin 1), September 13, 2007, (March 14, 2011, 12:50 PM), http://arsiv.nvmsnb.com/news/419856.asp.
principles that should be followed by them, it did not mention these political parties’ duty to ensure gender equality while establishing their branches.\textsuperscript{116} It also did not mention the state’s responsibility in guaranteeing such equality as regards placement in public service.\textsuperscript{117} It is important to note that most of these shortcomings were raised by several civil society groups, particularly women’s associations. Indeed, around 200 women’s associations formed a coalition, Anayasa Kadın Platformu, in order to inform the draft Constitution and generally announce women’s democratic needs and expectations from a new Constitution.\textsuperscript{118}

These women’s associations were basically declaring that women’s needs did not consist of only the headscarf issue. Even though this would be an important aspect of reform, the principle of equality - in particular gender equality - should also have a genuine guarantee in the new Constitution. Guaranteeing such equality in the Constitution and putting it into practice are not only national expectations, but also obligations that Turkey is bound to by international law.\textsuperscript{119} For example, Turkey is one of the parties of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),\textsuperscript{120} which it ratified in 1985.\textsuperscript{121} Turkey, as a state party which “agreed on pursuing all appropriate means and without delay a policy of eliminating discrimination against women”,\textsuperscript{122}

\textsuperscript{116} Article 38 of the draft Constitution, Yeni Anayasa Taslagn (Tam Metin 2) (September 13, 2007), (March 14, 2011, 1:28 PM), http://arxiv.nvmsnbc.com/news/419859.asp.

\textsuperscript{117} Article 39 of the draft Constitution, Yeni Anayasa Taslagn (Tam Metin 2) (September 13, 2007), (March 14, 2011, 1:26 PM), http://arxiv.nvmsnbc.com/news/419859.asp.


is obliged "to adopt necessary measures at the national level"123 in order to achieve "the full realization of the rights" mentioned in the Convention.124 Thus, the organization called Anayasa Kadin Platformu had a legitimate expectation in arguing that the new Constitution, as a fundamental source and superior national law, needed to ensure gender equality in every segment of social life. And, this new Constitution should have done more than what was already in existence; if anything, it definitely should not have eliminated any existing principle of gender equality. It should have instead guaranteed comprehensive application of such equality in all its forms.125

It is hard to argue that the process chosen was the only issue that overshadowed the real discussion on the substance of the draft. On one hand, since civil society had already been exposed to the issue of constitution making at that time and some of the civil society groups made valuable comments, such as women's associations' contributions; perhaps a successful democratic process, including genuine attempts on exchanging the ideas based on the draft and taking criticisms and comments into consideration, might have prevented the failure that resulted. On the other hand, the content of the draft, which did not meet the expectations of society and which was merely an adjustment to the already existing system, could also be considered as one of the reasons why it was not adopted - even in principle. Therefore, the draft might be considered both a success and failure for its great impact on livening up the debate but its shortcomings in the process of drafting and its substance. In my opinion, even though two features of the draft constitution – its drafting process and content – contributed to its failure, the greater effect was caused by the process, which was inaccessible for most of society and which failed to provide comprehensive debate.

After missing this opportunity to make a new democratic constitution, in 2008, former Parliamentary speaker Toptan called the political

123 Article 24 of CEDAW, see supra note 122.
124 Id.
parties’ leaders to discuss making a new constitution and even establishing a senate in addition to the Parliament\textsuperscript{126} but his call was rejected by major opposition parties. Later, in 2010, Prime Minister Erdogan stated that even though the JDP has been working on constitutional changes since 2007 and its work has been impeded, there might be some partial amendments rather than a comprehensive change.\textsuperscript{127}

Following social and political developments, Parliamentary Speaker announced that he would call political parties’ leaders to discuss the issue and establish a constitutional commission\textsuperscript{128} but not much progress has been made. The constitutional amendment package mentioned above was approved on September 12, 2010 by 58 percent of voters in the referendum.\textsuperscript{129}

In terms of drafting a new constitution, lack of consensus, the policy of the opposition to be closed to any negotiations related to the issue and more importantly the process which has been inaccessible to the public have all contributed to its failure.

Apparently, it was possible to observe the circumstances that led to this failure not only within the country but also outside the country,
particularly within Europe. As mentioned above, the Venice Commission in its report, and the European Commission in the Turkey 2010 Progress Report, clearly stated that the process of drafting and adopting constitutional reforms in Turkey was not pursued in a manner to that would provide an exchange of views between political parties and civil society.\textsuperscript{130}

After the constitutional referendum in September 2010 and the national elections in June 2011, Turkish society has been increasingly exposed to the issue of constitution making and the demand for a new constitution has grown accordingly: There are even reports that there is an agreement to make and adopt a new constitution. The question then is whether there is an agreement between on the process between the political elites – an agreement that includes all sides of the debate. It is believed that political parties in the Parliament could undertake a task of agreeing on the process.

VI. Conclusion

Unlike the 2007 process, in the 2011 process, the major debate is not focused on whether or not a newly elected Parliament has the power to make a new Constitution. The major issues are whether every side of the debate can reach a consensus on contentious issues and whether political parties can make a genuine effort to enable extensive participation by the public. Today, the legitimacy of the new constitution is not being questioned – a major difference from the 2011 process.

The current process can be summarized as follows:

\begin{itemize}
  \item As an initial step, these political parties have agreed to establish a Conciliation Commission which would include an equal number of members from each political party. They have declared that this Commission will discuss every matter
\end{itemize}

related to the process. Considering this, one might think that a proper parliamentary constitution making process has been initiated and the political parties have reached a consensus on the process. However, certain political developments have made people think that uncertainty may again play a large role in determining the process. This belief is largely a result of occurrences such as: (1) the name of the Commission has already been changed to “the Commission to Preparatory New Constitution” and (2) it has been announced that task of the Preparatory Commission will be to determine the procedure and the method regarding the preparation of the new constitution, rather than to deal with every issue of constitution making as previously announced. The Commission will, however, still prepare the first draft of the Constitution. Following these developments, four parties in Parliament nominated three representatives each to the Commission at the request of the Parliamentary Speaker.

- December 31, 2011 was the last day for universities and civil society organizations to submit their comments and thoughts on the new constitution. The Parliamentary Speaker asked every law school to submit comments on the constitutional content. People could also share their opinions online through a website.

- It was found acceptable for the meetings of the Commission to be closed to the public with, however, the official records of the meetings being made public. Consensus among members of the Commission is required at every stage of the process. However, no provision has been made for how to proceed in the absence of consensus. According to the Guidelines of the Commission, there will be four steps in preparation of the Draft: (1) to collect comments of civil society; (2) to determine fundamental principles and prepare the first draft; (3) to submit the first draft to the public for an open discussion; and (4) to finalize the draft and present it to the Parliament. The
Commission is required to complete the first step by April 2012.

- Although the parliamentary constitution making process has officially been chosen for the 2011 process, there is concern that not all members of Parliament will engage in the process. This time around, every step of the process is crucial because the failure of the 2007 process occasioned mistrust in political leaders. Therefore, it is not enough to provide consensus and participation in only one step of the process.

It is a widely held belief that the risk of another failure might be unavoidable if the same type of process that isolates the public is used and if the focus is on terminological issues such as making a new “civilian” constitution rather than on real contentious issues. This time the people of Turkey do not want to just be presented with and vote for a final version of a new constitution. This time people want to see their will, not the will of political parties, as the determinative feature of the process. They are also demanding to be part of a process which is accessible to them. They want to be engaged in every step of the creation of a new constitution, including its drafting.