THE CONTESTED ROLE OF TURKISH CONSTITUTIONAL COURT BETWEEN LAW AND POLITICS

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by

Engin ŞAHİN

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To my mother and father

APPROVAL PAGE

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This thesis was written to comply with the rules of scientific ethics; in the case benefits from the other studies have been referred in accordance with scientific norms. The data are not made any alteration and any part of this thesis is not used in another study in Fatih or another university.

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June, 2009

ABSTRACT

Engin ŞAHİN **June 2009**

THE CONTESTED ROLE OF TURKISH CONSTITUTIONAL COURT BETWEEN LAW AND POLITICS

The purpose of this study is to investigate the political and legal contest about the recent decisions of the Turkish Constitutional Court with the purpose of determining its role which falls in an area between law and politics. This study consists of an Introduction, four chapters and conclusion. The introduction is a discussion about the aim and scope of the study. The first chapter comparatively explores the emergence and changeability of the duties and powers of the constitutional courts in the world. The second chapter examines the establishment of the Constitutional Court in Turkey. Some decisions based on the powers of the Constitutional Court according to 1961 and 1982 constitutions are explored. The third chapter analyses recent three decisions which caused the debates about the Constitutional Court in 2007 and 2008. The opinions of lawyers, politicians, academicians and journalists about these controversial decisions that are discussed for a long term in public opinion are included. The forth and the last chapter explores whether or not the Constitutional Court had political aims with these decisions?

This study aims to explain the purpose of the Constitutional Court decisions which lead the long-term discussions and be subjected to various claims.

Key words:

Constitutional jurisdiction, constitutional court, law and politics,

Center-periphery relations and hegemonic preservation

KISA ÖZET

Engin ŞAHİN **Haziran 2009**

TÜRK ANAYASA MAHKEMESİNİN HUKUK VE SİYASET ARASINDA TARTIŞILAN ROLÜ

Bu çalışmanın amacı, Türk Anayasa Mahkemesi'nin tarihindeki bazı kararlar ile birlikte olan son kararları ile tartışmalı hale gelen siyasi ve hukuki rolünü araştırmaktır. İddialar çerçevesinde Anayasa Mahkemesi'nin bu kararları alma amacını saptayarak, Mahkeme'nin siyaset ve hukuk arasındaki rolünü tartışmaktır. Çalışma, amacını ve kapsamını belirten giriş kısmının haricinde dört bölüm ve sonuç kısmından oluşmaktadır. Birinci bölümde dünyada anayasa mahkemelerinin ortaya çıkışı, görev ve yetkilerinin devletlere göre değişkenliği ele alınmıştır. İkinci bölümde anayasa mahkemesinin Türkiye'de kurulması incelenmiştir. 1961 ve 1982 anayasalarına göre anayasa mahkemesinin yetkileri ve bu yetkiler çerçevesinde almış olduğu bazı tartışmalı kararlar analiz edilmiştir. Üçüncü bölümde, Anayasa Mahkemesi ile ilgili tartışmaların yeniden ortaya çıkmasına neden olan üç karar üzerinde durulmuştur. Kamuoyunda uzun dönem gündemde kalan bu kararlar hakkında hukukçuların, siyasilerin, akademisyenlerin, gazetecilerin ve köşe yazarlarının görüşlerine genişçe yer verilmiştir. Dördüncü ve son bölümde anayasa mahkemesinin iddia edildiği gibi hukuk normları dışında farklı siyasi hedefler için kararlar alıp almadığı araştırılmıştır.

Bu çalışma uzun dönem tartışma konusu olan ve çeşitli iddialara maruz kalan Türk Anayasa Mahkemesi'nin 2007 ve 2008 yıllarındaki kararları almasındaki amacı açıklamaya yöneliktir.

Anahtar Kelimeler

Anayasa yargısı, anayasa mahkemesi, siyaset ve hukuk ilişkisi, merkez-çevre ilişkisi ve hegemonik koruma

LIST OF CONTENTS

LIST OF ABBREVIATIONS

F. U.	Fatih University
I. S. S.	Institute of Social Science
M. A.	Master of Arts
AKP	Adalet ve Kalkınma Partisi
AÜHFD	Ankara Üniversitesi Hukuk Fakültesi Dergisi
AÜSBF	Ankara Üniversitesi Siyasal Bilgiler Fakültesi
AÜSBFD	Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi
CHP	Cumhuriyet Halk Partisi
İÜHF	İstanbul Üniversitesi Hukuk Fakültesi
İÜHFD	İstanbul Üniversitesi Hukuk Fakültesi Dergisi
MGK	Milli Güvenlik Konseyi
TGNA	Turkish Grand National Assembly

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PREFACE

Turkish Constitutional Court that was established in parallel to the constitutional development in the world held a significant place in Turkish political-legal system. However, somehow, the Court has been subjected to discussions and allegations. As a student of political science, the discussions especially in recent years made me to study about this matter.

Turkish Constitutional Court is supposed to control politics by virtue of its legal powers. Therefore, analyzing it only within the technically legal framework can cause missing the political dimension of the Constitutional Court. I think the decisions of the Constitutional Court should be studied with a political perspective beside the legal dimension, since the allegations related to the Court are political. Consequently, the Court decisions contain the political repercussions.

I have analyzed not only the debates in recent years but also the verdicts on the judicial review of the Court in the period before 1980. I agree with the idea that; the study of these verdicts can shed light on the present. I hope this study will reach the goal and political dimension of the Turkish Constitutional Court will be enlightened.

INTRODUCTION

The constitutional jurisdiction for the first time emerged in the United States of America in 1803. The constitutional jurisdiction as a protector of the state of law has been adopted by many states and become the protector of not only the state of law but also the democracy since the Second World War. Particularly, uncontrolled use of force led to the violation of human rights. The constitutional jurisdiction has found scope of application to limit the state against the probable human right violations.

Constitutional courts are the fundamental implementing institutions of judicial review. Their two basic duties are intended on the establishment of constitutional courts. First, to provide the remaining authorities to the constitutional provisions which determine the structure of the state. Second, the constitutional courts have guaranteed the fundamental rights and freedoms against the state and authorities. The human rights are assured by international agreements on international platforms in 1950s, then, they found sphere and are secured by constitutions at national level. In addition to these basic duties, the constitutional courts have been given special tasks afterwards. Constitutional justice, the cases of closing the political parties, Supreme Court applications, final decision of disputes between high courts, financial control of political parties has increased the significance of the constitutional courts.

Expansion of functions and powers of the constitutional courts has entailed the role of courts between law and politics debatable and highly controversial. The courts have started to be criticized because of some verdicts with political implication. The compulsion of the legal institutions beside their independency becomes the center of discussions on new duties and powers that are given to the constitutional courts.

In democratic constitutional states, constitutional provinces limit all the state institutions. The state institutions can not exercise any authority which lacks constitutional basis. This rule is inclusive of the constitutional courts. They are the legal institutions which owe their existence to, and their powers are determined and limited by the constitutions.

Turkish Constitutional Court was first established by the 1961 Constitution. Establishment and the presence of Court has never been topic of discussion, however, political and legal authorities have criticized the Court for its approach to some decisions. Many of the duties and powers of the Constitutional Court in 1961 constitution have continued in 1982 constitution. The Constitutional Court has the power of last decision for important political and legal issues and there is no possibility to plea to the decisions.

In 2007 and 2008, some verdicts of the Turkish Constitutional Court were criticized and had a broad repercussion in press and public opinion. At the beginning of these decisions are the acceptance of indictment for the dissolution of Justice and Development Party without removing the name of President of Republic by the Court, decision on need for a quorum of 367

deputies for the presidential election and judicial review of constitutional amendments articles 10 and 42 of 1982 Constitution in substance. Therefore, there are claims about the Turkish Constitutional Court that; these decisions of the Court are lack of constitutional basis and that it interpreted the constitutional provisions for subjective political aims. In this context, Turkish Constitutional Court is alleged that it is shifted from its constitutional role.

The purpose of this study is to analyze the allegations about the recent decisions in the context of its decisions in history, to explore and discuss the possible intention of the Court by these decisions within the scope of the claims.

In the first chapter, the emergence of constitutional jurisdiction as well as the constitutional courts in the world is explored. The duties, powers and in this context the roles of the constitutional courts which has emerged in U.S.A. and has been applied in the European States after the Second World War are examined. The U.S.A, Austria, Germany and France Constitutional law organs are given as illustrations for comparison.

In the second chapter, the establishment, duties and powers of Turkish Constitutional Court during the 1961 Constitution, the era after the 1971 constitutional amendments and 1982 Constitution are explained. Especially, the political debates derived by the decisions on the judicial review of constitutional amendments are handled. The constitutional amendments which were made to become the duties and powers of Constitutional Court more specific and determined are analyzed.

In the third chapter, I focused on three decisions which have caused the reappearance of the debates about the Turkish Constitutional Court. These decisions remained on the agenda for a long time and the opinions of the lawyers, politicians, academicians, journalists are given a broad place.

In the forth and the last chapter, I investigate the purpose of the Court decisions in the context of center-periphery relation. Alleged political aims of the Constitutional Court decisions and some central values compose the last part of this study.

CHAPTER I

Politics and the Rise of Constitutional Court

The constitutional judgment began in the USA in the 18th century, however, since the Second World War; it has swelled over most of states in the world. The constitutional judgment expresses in strict sense whether the laws and other acts are constitutional or not, in broader sense, it expresses to provide all judicial activities constitutional or to solve the problems of constitutional law critically.

According to Carl Friedrich, as generally accepted in the Western constitutional history, the individuals are valuable and it is necessary to protect them against the rulers' arbitrary behaviors and interventions. Historical experiments prove that the authorities can be liable to arbitrariness, effortlessly. In order to prevent the abuse of power, the idea of restraining the political authority was asserted. This idea is defined as *'Constitutionalism'.*[1]

In the world, the constitutional courts are the lawful institutions to implement the constitutional judiciary. Particularly, in European countries after the Second World War, established constitutional courts by new constitutions became authorized institutions with different duties and powers beside the constitutional jurisdiction. The duties and powers entailed an extraordinary role between the law and politics for the courts.

[1] Friedrich, C. J. (1963), *Man and His Government*, New York, McGraw-Hill, p. 271

In this section, I will explain the constitutional courts as legal entity's as a result of the idea of limitations to authorities, the duties and powers with the examples from different countries.

Constitutionalism accepts the law as a primary principle and rules which determine the political systems. In this circumstance, the means of constitutions are to do the officially authorized framework of politics. However, legal dimension of politics causes to extend effects of courts and judges against the politicians.[2]

It is inevitably necessary that legal rules should be functional in order to provide peace between people and the concept of the rule of law adopted by states. The law that is composed by certain rules provides the coherent society for individuals to sustain.

It is a fact that the rules can be functional based on the power of sanctions. If there is not criminal sanction of rules, they will be only written texts and will not bee applicable in practice.

Law enforcement is required not only among individuals but also between states and individuals in the process and all actions and transactions of state institutions as well. It also led a sense of balance mechanism between legislative, executive and judicial powers. Montesquieu was the first suggested modern idea of separation of powers. According to him, if legislative and executive powers are given to the same person,

[2] Erdoğan, Mustafa (2005), "Anayasa Mahkemeleri Önemli midir?" (Are the Constitutional Courts important?), AÜHFD, Volume:3, p.1

community or civil servants, there would not have freedom. He remarks importance of the separation of powers.[3]

Severance of the judiciary from legislative and executive branches exposed the requirements of the different institutions to enforce since both the legislative and judicial powers given to the same institutions can lead to weakness of rising balance mechanism between state powers. For that reason, independent courts are the judicial process mechanisms in the modern state system where the rule of law is applied.

The constitutional jurisdiction aims to limit states' proceedings and transactions within the frame determined by certain rules and protect the fundamental rights and freedoms against the state. The essential principle of constitutionalism and constitutional judgment is to guarantee and secure the individual's rights and freedoms against authority that holds the power. As Mehmet Turhan points out; the constitutionalism depends on mistrust to government. Constitutionalism tries to avoid abuse of power by governments and it does not have any aim to counteract the government while restricting the power of it.[4]

Even though there are many reasons to make the constitutional jurisdiction qualify, the last point of constitutional development that has become what it is today is very significant. The reason is the constitutional jurisdiction that is a sanction of all activities in order to effort to reach 'good

[3] Montesquieu (2001), *The Spirit of Laws,* Ontario; translated by Thomas Nugent, Batoche.
[4] Turhan, Mehmet (2005), *Anayasal Devlet* (The Constitutional Satete), Ankara; Naturel, p.85

management'. Here is the basic question: reaching the restricted government can be provided by constitutions, however, who adhere to the Constitution, or which method of power can provide it? The answer to this question, at least, among the most effective enforcement mechanism is 'constitutional jurisdiction'. Then, the second question can be asked: the rule of law can be accepted, thus, rulers can not abuse their powers. But, who can guarantee to conform to the constitution in which the most fundamental legal rule in the judicial system is? The answer to this question is also 'constitutional jurisdiction'. The constitutional jurisdiction is imperative necessity in a constitutional state where the fundamental rights and freedoms are assured and the rulers respect the laws like the citizens.[5]

In fact, there are many examples which prove the abuse of power by rulers. In this case, the basic concern of constitutionalism is restricting the organization and functioning of political power without arbitrary usage. Undoubtedly, the safest way is the rule of law.[6] With another expression "...in democratic regimes, the governments can tend to despotism. The measures which can prevent despotism are constitutional jurisdiction, human rights and state governed by the rule of law. In other words, constitutional state can prevent despotism."[7]

Mehmet Turhan expresses the necessity and importance of constitutional state with these words:

[5] Ergül, Ozan (2007), *Türk Anayasa Mahkemesi ve Demokrasi* (Turkish Constitutional Court and Democracy), Ankara; Adalet, p.70
[6] Ibid, p.72
[7] Turhan,(2005), p.2

> It is clear that by using the 'constitution' and 'government', people aim at two different elements. Why is there a separation of these two terms? The constitution is not a possession of government; it is a possession of nation which establishes the state. The government without constitution is unjust government.[8]

According to Friedrich Hayek; free societies, regardless of the current specific objectives, need sustainable instruments to limit the political government[9].

Ergun Özbudun remarks a different dimension of the constitutional jurisdiction. Until recently, the rule of law is basically expressed the judicial review of executive branch activities in order to ensure the adherence to law. It was not thought before that the legislative power could violate the individual rights, because, the effect of common will understand which were indivisible, untransferable and infallible. Therefore, the idea of protection of fundamental rights against not only the executive but also legislative power was not considered. Though the written and hard constitutions emerged in the late of 18th century, when the United States aside, judicial review of laws remained until the middle of the 20th century.[10]

There are two models of constitutional jurisdiction in the world defined as "American Model" and "European Model". The constitutional jurisdiction has firstly emerged in the United States; the federal governments in its domestic legislative, executive and judicial bodies act autonomously.

[8] Ibid, p.111
[9] Hayek, Friedrich (1976)*, The Constitution of Liberty*, New York; Rougledge, p.181
[10] Özbudun, Ergun (2005), *Türk Anayasa Hukuku* (Turkish Constitutional Law), Ankara; Yetkin, p.367

However, external relations are obliged to act with federal authority. In the United States, the starting point of constitutional jurisdiction is to have a decision about the disagreements between the states and the federal government and to ensure to provide the coherence of states activities with the federal constitution.

In the European model of constitutional jurisdiction, the European States have accepted the centralized constitutionalism. States adopted the constitution at the top among the legal hierarchy and they seek to provide judicial review of constitutionality of all other legislative actions.

Initially, thought to exceed the execution of constitutional powers of the judiciary branch, later, the constitutional jurisdiction brought judicial review of legislative branch activities. This model, called as a 'centralized constitutional jurisdiction' or 'special court', is a logical result of Hans Kelsen who was an Austrian lawyer. According to Kelsen all legal norms can gain validity only if they are not against paramount rules. Hence, laws and acts can be valid only if they are not unconstitutional. The meaning of this rule will be in compliance with the constitution.[11]

The constitutional judgment is a result of the application of constitutions and constitutional law. In a sense, a new institution was needed to impose constitutional judgment to ensure and control the restrictions of powers which determined in the constitution. Otherwise, as Erdoğan Teziç

[11] Tunç, Hasan (1997), *Karşılaştırmalı Anayasa Yargısı* (Comparative Constitutional Jurisdiction), Ankara; Yetkin, p.117

states; "…there is no constitution in a society where the rights are not preserved and separation of powers is not determined. This political lineament separates the *constitutional state* from *the state with constitution*".[12]

I have prearranged the reasons that entail the appearance of constitution and constitutional jurisdiction. After the rise of the constitutional jurisdiction the main problem is which institution or court should be the enforcement mechanism. The constitutions take place at the critical level of hierarchy in domestic law system in the states that have hard constitutions. Consequently, there must be compatibility between superior rules and inferior rules. Therefore, it is indispensable to provide coherence between laws and constitution. Moreover, a predicted mechanism in the constitution can satisfy that coherence.[13]

As to Kay, the constitutional solution is foundation of a new institution against risk of disobedience to rule of law. That institution should have its own authority and should not aim political interests. Such an institution can control the acts of other state institutions whether or not they are regarding constitutional limits. It is quite obvious that definition describes the judicial organ.[14]

In some parliamentary regimes, different political parties have chance to be power successively and requirement of separation of powers

[12] Teziç, Erdoğan (2003*), Anayasa Hukuku* (Constitutional Law), İstanbul; Beta, p.228
[13] Turhan,(2005), p.103
[14] Kay, Richard S. (1998*), American Constitutionalism, in Constitutionalism*, Larry Alexander (ed), Cambridge, Cambridge University Press, p.41

decreases. However, on the contrary, if a political party becomes a government for a long time, separation of power loses its activity. For this reason, constitution makers need to found the impartial power that has a duty to protect the constitution. This power can be a president whose authorities are limited or can be the constitutional court. Absolutely, the most significant power is constitutional court.[15]

Mustafa Erdoğan states that: "if a system does not have a mechanism which provides the state organs to respect the constitutional limits, no assurance is to prevent dictatorship tendencies. Constitutional courts are the institutions that are fully able to serve this vital purpose."[16] Ergun Özbudun defines the constitutional jurisdiction as ultimate and most important point of constitutional law and rule of law."[17]

The courts apply the rules; and the institutions for constitutional judgment are the constitutional courts. Particularly, after the Second World War in most of the Western States, the constitutional courts were established to enforce constitutional law. Although the need for a Constitutional Court was never questioned, the status of constitutional courts has been a moot point since their inception.

The basic aim and duty of constitutional courts are the constitutional jurisdiction and the judicial review of laws. Moreover, the political systems have given the various duties and powers to the constitutional courts.

[15] Turhan,(2005), p.101
[16] Erdoğan, (2005) p.3
[17] Özbudun, (2005), p.367

Therefore, the interaction between the political systems and the constitutional courts can vary in different states. As I mentioned above the constitutions determine the political structure of states and according to these structures the constitutional courts have very important role between politics and the law.

1.1. The rise and spread of constitutional courts in the World

In the world, the states have given the constitutional jurisdiction to constitutional courts. Therefore, they are equipped with extensive powers. Constitutional courts, in terms of the duties, dates back to the 18th century they gained the corporate identity after 1920.

The first judicial review of constitutionality of laws was enforced in the United States in 1803 even though it was not legislated in the constitution. Marbury v. Madison was the first to be declared something 'unconstitutional' by the Supreme Court in Marbury v. Madison case; Federal Supreme Court firstly examined constitutionality of laws. Per Judge John Marshall has stated the following about the cases:

> It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each…So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules

> governs the case. This is of the very essence of judicial duty. If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply. Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount laws that are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law [e.g., the statute or treaty]. This doctrine would subvert the very foundation of all written constitutions[18]

This case is accepted as a beginning of the constitutional jurisdiction. Then, the use of constitutional jurisdiction has expanded through the other states. However, European states began to use constitutional jurisdiction a century after this date. In particular, the European model of constitutional justice found application spheres in European countries after the First World War.

At first, Czechoslovakia as a European state began the judicial review of constitutionality of laws on 9 March 1920 and the high court was equipped with exclusive authority. Czechoslovakia established the constitutional court in order to dispute resolution. Austria followed Czechoslovakia and established the Supreme Constitutional Court as the first contemporary example of a specific constitutional jurisdiction on 1 October 1920. Then, by the Constitution dated 9th December 1931 in Spain and by the Constitution dated 1st July 1937 in Ireland, the constitutional courts were established. However, these countries exposed the political crisis before the Second

[18] Conner, O. Karen and Sabato, Larry (2006), *Essentials Of American Government: continuity and change,* New York; Pearson, p. 305, for Turkish, see Turhan, (2005), p.108

World War. So, fascism in Europe did not facilitate the functioning of control mechanisms.

The problems encountered between the First and Second World War and uncontrolled authorities have proved the requirements of the state of law. Therefore, after the Second World War, constitutional courts swiftly spread and were reestablished in 1945 in Austria, in 1948 in Italy, in 1949 in Germany, in 1960 in Cyprus, in 1961 in Turkey, in 1976 in Portugal, in 1978 in Spain. After the dissolution of Union of Soviet Socialist Republics, almost all formation of judicial organs which were founded in Central and Eastern European countries were based on the same model. As understood, the European model of constitutional jurisdiction is fairly new in the world.[19]

The most important reason for the emergence of constitutional jurisdiction is authoritarian government applications, which were not determined and limited by rule of law, during the period between the First and Second World War. In particular, during the Second World War, fascist governments in Germany and Italy revealed what the unlimited authorities' power was. For that reason, the features of the modern state are the limits set by constitutions and legal control by the constitutional court.

The states have different political systems and the constitutions determine them like federal or unitary states, presidential system or parliamentary system. In parallel, judicial mechanisms have been formed such as the political systems. The constitutional courts are the top of judicial

[19] Tunç, (1997), p.118

power where the states accepted the constitutional justice and the courts vary from structures, functions, and powers in different political systems.

1.2. Varying political functions of constitutional courts

The fundamental function and duty of the Constitutional Courts are judicial review of constitutionality of laws. However, the constitutional courts differ in terms of duties, structures, institution objectives and foundation years. Especially, through the political consequences of their decisions, the constitutional courts were in predicament between law and politics.

There is a possibility of judicial activism to scratch other political actors of the democratic process. As Stephen Holmes points; interference of constitutional courts can cause the threat for the institutional legitimacy and the authority of national parliaments in the new democracies.[20]

The role of constitutional courts in Europe and in United States of America can vary.[21] Especially, the discussions derived from some decisions of constitutional courts have made the role contestable and debatable. In this section, the establishment, structures, functions and powers of the constitutional court in United States, France, Austria and Germany will be examined. I have considered the establishment years of the constitutional courts during the arrangement of states. Moreover, that will be beneficial to

[20] Holmes, Stephen (1993), "Back to the Drawing Board", *East European Constitutional Review* 2, No. 1, pp. 21-25

[21] For the comparative constitutional study see Dorsen, Norman; Michel R., Andras S., Susanne B. (2003), *Comparative Constitutionalism*; St. Paul, West Group

analyze the constitutional courts of different states which have federal and unitary political systems.

1.2.1. U.S.A.

I should explore the United States, because the first constitutional system and the constitutional jurisdiction emerged in the United States in 1803 by the Madison case. [22]

The constitutional jurisdiction that started, presently conducted, is done by all the federal courts. That is the fundamental difference that separates American model of constitutional justice from the European model of constitutional justice. In the European model of constitutional justice, while a single judicial high court is empowered for constitutional jurisdiction, in that of American model, all federal courts are empowered.

In the United States, the last authority for constitutional jurisdiction is the Federal Supreme Court which is the only court that envisaged in the American constitution.

Federal Supreme Court has nine members. Members are appointed among persons presented to the Senate by the American president. The balance mechanism between the legislative and judicial branches is seen on election of the members of the high court in the United States. Thus, the American President presents the candidates of the Supreme Court judges to

[22] Conner, (2006), pp:305-306 ; about the judicial review of the Constitutional Court see Cummings C. Milton and Wise David (1985), *Democracy Under Pressure,* Florida; Harcourt Brace Jovanovich, pp: 520-524

the Senate. The president appoints the members among the candidates who are affirmed by the Senate. In short, the members of the high court which control the legislative power are undergoing legislative approval.[23]

The Judges, both of the Supreme and Inferior Courts, shall hold their Offices during good behavior, and shall, at stated times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.[24] This situation is not a very common attitude. Therefore, for the Supreme Court judges *"do not resign, and rarely ever die"*[25] statement is used. Some problems can arise, because members of the court stay in office for a long time and can not be unseated. For example, despite many years, some Court judges did not retire in order not to be assigned new judges by the President who is close to their opinions.[26] The High Court judges remain in office without any age and tenure till death. In this case, the judges who are appointed by president who is a political wing, remain so for long-term.[27] Moreover, the Court judges do not need to have legal identity and can also be elected among recognized honest people accepted from community.

[23] See Gerhardt, J. Michael (2000), *The Federal Appointments Process*, Durham and London; Duke University Press and Mayer, Martin (2007), *The Judges*, New York; ST. Martin's, pp.255-390
[24] American Constitution Article III / 1
[25] Özçelik, Selçuk (1994), *Anayasa Hukuku* (Constitutional law), Konya; Mimoza, p. 152
[26] 83 year old judge H. Blackmun stated that "I do not retire until former president G. Bush will appoint new judge who is against abortion"
[27] For instance, although John Adams had been president for four years, the Judge who was appointed by him was on duty thirty four years.

In the United States, the constitutional jurisdiction is done in three ways; compliance of federal government laws with the federal state constitution, compliance of federal government laws with the federal constitution and the compliance of federal laws with the federal constitution.

In the United States, where all courts have the power to examine judicial review of constitutionality, while the federal state courts review the constitutionality of laws, the Supreme Court reviews the constitutionality of federal laws to federal constitution. Furthermore, the Supreme Court is the authority to appeal for federal courts.

In the United States, the court which reviews the constitutionality of law has no authority to cancel the law. Its application affects outcome of the current case. The final decision is taken by The Supreme Court about the laws whether or not they are constitutional. The duties of Federal Supreme Court are indicated in the article 3 of the United State Constitution.[28]

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[28] "The judicial Power of the United States shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good behaviors, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed. Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court. The

The discrepancy is asserted between the democracy and presence of the constitutional courts in U.S.A. Some academicians support that; the presence of constitutional courts is against the soul of democracy. The court board comprised of nine judges can not cancel the act of parliament that represents the national will.[29] However, it is because of the nature of the constitutional jurisdiction that law is supposed to restrain the power of legislative and executive organs.

1.2.2. Austria

The system where the constitutional jurisdiction was given to The Constitutional Court for the legislative process depends on legal theory of Kelsen, Merkls and Weyrs in Vienna School and Cappaletti defines that model as "Austria Model".[30]

The Constitutional Court of Austria was established on 1 November 1920 and it was the first model of European constitutional jurisdiction. According to the Austrian Constitution, the Court consists of 14 regular and 6 substitute members. The Constitutional Court consists of a President, a Vice-President, twelve additional members, and six substitute members.[31] The President, the Vice-President, six additional members, and three substitute

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Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." American Constitution Article III

[29] Raskin B, Jamin (2003), *Overruling Democracy*, New York; Rourlegde Publication

[30] Korinek K.(2000), *"Die tatsachenermittlung im verfassungsgerichtlichen Verfahren*", in Grundrechte und Verfassungsgerichtsbarkeit, Springer Verlag, Wien New York, p.291 cited by Kanadoğlu, Korkut (2004), *Anayasa Mahkemesi* (The Constitutional Court), İstanbul; Beta, p.50

[31] Austria Constitution article 147/1

members are appointed by the Federal President on the recommendation of the Federal Government; these members shall be elected among judges, administrative officials, and professors holding a chair in law. The remaining six members and three substitute members are appointed by the Federal President on the basis of recommendations listing three candidates for each vacancy, the House of Representatives submitting those for three members and two substitute members and the Senate those for three members and one substitute member. Three members and two substitute members must have their domicile outside the Federal capital, Vienna. Administrative officials who are appointed members of the Constitutional Court shall, in so far and for as long as they are not superannuated, be freed from all official duties.[32]

According to the Austrian constitution, the political parties are crucial and have decisive role in the election of Constitutional Court members. In fact, the institutions that choose the members are two major political parties. However, this significant role of political parties on the election of the Constitutional Court judges lead to some reservations. Korkut Kanadoğlu states that;

> In Austria, 1929 constitutional amendments led to more politicization. Executive and the legislature has strengthened against minorities...the government based on the majority in at least one of national or federal parliament can be determinant on electing the judges of the Constitutional Court if it does not consist of coalition.

[32] Ibid, article 147/2

In addition, the governments can channelize the court due to its desires.[33]

On the other hand, Kanadoğlu claims that in the election of Constitutional Court judges, if the judges are appointed by different bodies of state that causes the balance of different opinions between them.[34]

It is claimed that the Austrian Constitutional Court is politicized. Particularly, nominated candidates by the political institutions cause this politization. In Austria, the candidates of political party that has majority in the parliament are appointed by the President as a member of Court. The ruling party can present for the eight judges to be Constitutional Court member when the government does not consist of coalition. This condition can result with disappearance of balance between executive and judiciary powers. On the other hand, the Constitutional Court can increase legitimacy in this way. Because, the citizens vote for the politicians, politicians offer the candidates for being a member of the Constitutional Court.

1.2.3. Germany

Federal Constitutional Court is one of the most characteristic examples in European model that is newer than the American model. After the Second World War to which Germany joined, it was intended to prevent a possible majority of fascism in order to protect the individual freedom and the fundamental rights.

[33] Kanadoğlu, Korkut (2004), *Anayasa Mahkemesi* (The Constitutional Court), İstanbul; Beta, p.52
[34] Ibid, p.54

In Germany, after the Second World War, for the first time dedicated courts were established for constitutional jurisdiction. German Federal Constitutional Court is very considerable in terms of the emergence process and authority. German Federal Constitutional Court was established in 1949.

The court consists of two boards called the Senate and since 1963; these boards consist of eight judges. Federal Constitutional Court has been defined as 'Twin Court' because; both of these boards carry the name 'Constitutional Court'.[35]

The Federal Constitutional Court consists of Federal judges and other members. Half of the members of the Federal Constitutional Court are elected by the Bundestag[36] and half by the Bundesrat.[37] They may not belong to the Bundestag, the Bundesrat, the Federal Government or the corresponding organs of a Land.[38] Federal High Constitutional Court judges may serve 12 years; they can not be re-elected and shall retire when they are 68 years old. Although there is no provision about how to be a member of the Court in the Constitution, the law-makers have decided to elect the judges among the lawyers to provide the Court stay in the legal framework.

After all, the constitutional court is the constitutional law institution and the decisions should be limited by the law. As mentioned above, the

[35] Hassemer, Winfried (2004), "Almanya Raporu" (Germany Report), Anayasa Yargısı 21, Anayasa Mahkemesi Publication, Ankara, pp.27
[36] It is the parliament of Germany established by 1949 Constitution.
[37] The Bundesrat is one of the five constitutional bodies in Germany. The federal states participate through the Bundesrat in the legislation and administration of the Federation. http://www.bundesrat.de/EN/Home/homepage__node.html (07.05.2009)
[38] German Constitution article 94/1

boards which led to the definition of the Court as 'Twin Court', examine different cases. The first board has been auditing compliance with the constitution for purpose of protection of fundamental rights. The second board functions as the Supreme Court. Besides, it examines the cases about closing the political parties and objections to the elections. In addition, there are committees as sub-units of boards and consist of three judges. A duty of the Committee is to review the cases brought to the court.

The duties and powers of the Federal Constitutional Court are listed in the constitution as follows; decides on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme Federal organ or of other parties concerned who have been endowed with independent rights by this basic law or by rules of procedure of a supreme Federal organ[39], in case of differences of opinion or doubts on the formal and material compatibility of Federal law or Land law with this Basic law, or on the compatibility of Land law with other Federal law, at the request of the Federal Government, of a Land government or of one-third of the Bundestag members[40], in case of differences of opinion on the rights and duties of the Federation and the Laender, particularly in the execution of Federal law by the Laender and in the exercise of Federal supervision[41] on other disputes of public law between the Federation and the Laender between different Laender or within a Land, unless recourse to another court

[39] Ibid, article 93/1
[40] Ibid, article 93/2
[41] Ibid, article 93/3

exists; on complaints of unconstitutionality, which may be entered by any person who claims that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103, or 104 has been violated by public authority on complaints of unconstitutionality entered by communes or associations of communes on the ground that their right to self-government under Article 28 has been violated by a statute other than a Land statute open to complaint to the respective Land constitutional court[42], in the other cases provided for in this Basic Law, The Federal Constitutional Court shall also act in such cases as are otherwise assigned to it by Federal law.[43]

1.2.4. France

France is an important state among modern Western States in terms of the Constitutional jurisdiction. France is also led by Turkey in the sphere of legal issues. Although France has adopted the European model of constitutional jurisdiction, the institutions that have the power of constitutional justice, have special structures and working procedures.

In France, according to the constitution that was established by the V. Republic dated 4 October 1958, constitutional institution which has authority of constitutional jurisdiction is the Constitutional Council. (Conseil

[42] Ibid, article 93/4
[43] Ibid, article 93/5

Constitutionnel) The Constitutional Council is regulated in the section VII of the French Constitution in detail.[44]

> The Constitutional Council shall comprise nine members, each of whom shall hold office for a non-renewable term of nine years. One third of the membership of the Constitutional Council shall be renewed every three years. Three of its members shall be appointed by the President of the Republic, three by the President of the National Assembly and three by the President of the Senate. The procedure provided for in the last paragraph of article 13 shall be applied to these appointments. The appointments made by the President of each House shall be submitted for consultation only to the relevant standing committee in that House. In addition to the nine members provided for above, former Presidents of the Republic shall be ex officio life members of the Constitutional Council. The President shall be appointed by the President of the Republic. He shall have a casting vote in the event of a tie.[45]

Even though the Constitutional Council reviews the constitutional law, it is accepted as a political institution due to the nature and function. In the European model of constitutional justice, while the concrete norm control is predicted, in France, abstract norm control is adopted. Abstract norm control means initial inspection. Thus, after a rule has been approved in the parliament but before enforcement by the president, the Constitutional Council reviews the constitutionality of laws. The judgments of the Constitutional Council shall be final. At this point, it differs from the United States model of constitutional justice.

In the United States, while States' constitutional control of the courts is effective only on specific cases, in France, the decisions of the

[44] France Constitution part VII / articles 56-63
[45] Ibid, article 56.

Constitutional Council concern all cases. In this regard, article 62 of the French Constitution refers "a provision declared unconstitutional on the basis of article 61 shall be neither promulgated nor implemented". In this sense, the power of the parliamentary is reduced to half by the Council.

However, the decisions of legislative power which has the sovereignty of the unitary authority are subject to the permission of council decisions. İbrahim Kaboğlu defines this control as 'a priori control' or 'controle anterieur'.[46] In this sense, France is the unique model in states that have adopted the European model of constitutional justice. Furthermore, the Constitutional Council refused to supervise the laws which have been adopted by referendum through to determine its own powers. The referendum laws which are a reflection of national will, are excluded from the constitutional judiciary. These laws are accepted as superior to the constitution law. If the referendum laws are unconstitutional, that is accepted as a constitutional amendment and the provisions are amended according to referendum results.[47]

For the judicial review of laws, there must be an application to the Constitutional Council in order to have constitutional judgment. The Council

[46] Kaboğlu, İbrahim (2000), *Anayasa Yargısı* (The Constitutional Jurisdiction), Ankara; İmge, p. 42

[47] Çağlar, Bekir (1986), "Anayasa Yargısında Yorum Problemi" (The Interpretation Problem In Constitutional Jurisdiction), Anayasa Yargısı 2, Anayasa Mahkemesi Publication, Ankara, p.177

can have constitutional judgment upon the applications of competent authorities.[48]

The constitutional jurisdiction, founded in 1958 by the French constitution, was considered as a measure to abuse the parliament's powers. Important powers of the Constitutional Council are the control of elections and a referendum and preventive norm control. Since 1970, the members of the Council have been appointed among the lawyers even though Council members are not required to be lawyers.

As a result, in France, the constitutional justice is similar to the European model of constitutional justice; however, it has different system as preventive norm control. A draft laws adopted in parliament are reviewed by the Constitutional Council if there is an appeal. If the law is constitutional it is published, if not it can not be published.

The role of constitutional justice between law and politics is obviously seen in France. The abstract review of norms of Constitutional Council before the confrontation of troubles in application is essential. The Council has to take the political results into account. Consequently, the law and politics are discussed on Constitutional Council decisions in France.

[48] "If the Constitutional Council, on a referral from the President of the Republic, from the Prime Minister, from the President of one or the other Houses, or from sixty Members of the National Assembly or sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution." France Constitution article 54.

In this section, I have explained the emergence of the constitutional courts. According to the constitutions of USA, Austria, Germany and France, the structures, duties and powers of the Court have been mentioned.

CHAPTER II

Political Conflicts and the Constitutional Court in Turkey

In this chapter, over all structure of Turkish Constitutional Court, organization, duties and powers within the context of political developments are analyzed. The importance of the role that was given to the Constitutional Court by the 1961 and 1982 Constitutions are explained. Moreover, while analyzing the change of duties and powers of the Court, the Constitutional Court powers will be reviewed according to the 1961 Constitution and after 1971 Constitutional amendments.

Finally, I will focus on how the duties and powers of the Court were defined in the 1982 Constitution. This chapter will main focus in debates about the decisions which were accused as out of the legal dimensions. Between 1961 and 1980, subject to the same indictment with the Court's decisions is significant in this context.

The 1924 Constitution has been abolished as a result of military intervention on 27 May 1960 in Turkey. Preparations for the new constitution were assigned to the Constituent Assembly and it was planned to be prepared the new constitution as soon as possible. After the preparation of a new constitution it was submitted and accepted by referendum on 9 July 1961.

Military interventions mean shelving or abolishing the democracies. 1960 Coup in Turkey caused destruction of a democracy and pave the way for new understanding of the democracy. Ozan Ergül defines this situation as follows: "Turkey by May 27, shifted from the majority of Westminster type of democracy, to the understanding of democracy which is 'balanced' and 'framed.' "[49]

National Union Committee that came to the power as a result of the Military intervention appointed a board chaired by Ord. Prof. Dr. Sıddık Sami Onar to prepare a new constitution. The political developments between the years 1950-1960 had shown itself during the preparation of new constitution. The importance of lack of constitutional mechanism to supervise the ruling party which had majority in the parliament was taken issue into consideration. Indeed, the first report of the committee mandated to prepare the constitution on 28 May 1960, it was highlighted that the Democratic Party lost the legitimacy power by unlawful implementations.

The 1961 Constitution was prepared in light of all these developments; to ensure the limitation of ruling power and make it stay in a specific framework. Some new constitutional organs were established. The first one was called the 'Senate' as a second assembly and the second one was the 'Constitutional Court' as the highest law institutions. The Constitutional Court is an institution as a balance mechanism against the majority, at the same time; it was protector of some values placed on the

[49] Ergül, (2007), p.185

constitution.[50] According to another opinion of the Constitutional Court, "the Court would work as the third council beyond the Parliament, would give final decision and be an institution that has its own political and judicial function next."[51] According to Erdoğan Teziç the political status of constitutions determine the limits of the government whereas juridical status of constitution determines status of state.[52]

In Turkey, The Constitutional Court, which has the judicial review of constitutionality, was established by 1961 Constitution. Turkish citizens accepted the 1961 Constitution by referendum instead of 1924 Constitution after the military intervention on 27th May 1960.[53]

By the emergence of Constitutional Courts, different discussions have appeared about the constitutional jurisdiction. In the sense of the constitutional jurisdiction and democracy, the constitutional court judges have to consider the norms which are established in the constitution without their individual opinions. According to this view, the constitutional courts should consider the constitution while judicial review of constitutionality in order not to lose their legitimacy. As Kemal Gözler points;

> The Constitutional Courts lose their legitimacy in case they have decisions according to some abstract concepts which do not have positive bases, like justice, social solidarity or superior principles and general principles of law instead of constitution.[54]

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[50] Ibid, p.208

[51] Ünsal, Artun (1980), *Siyaset ve Anayasa Mahkemesi* (The Politics and Constitutional Court), AÜSBF Publication, Ankara, p.131

[52] Teziç, Erdoğan (2003), *Anayasa Hukuku* (The Constitutional Law), İstanbul; Beta, p.4

[53] 1961 Constitution was accepted by the %61,5 of voters on 9 July, 1961

[54] Gözler, Kemal (2000), *Türk Anayasa Hukuku* (Turkish Constitutional Law), Bursa; Ekin, p. 862

Incidentally, the duties and powers of the Constitutional Court are very important in 1961 and 1982 Constitutions in the Turkish Legal History. The Constitutional Court should not exceed the powers which are given to him by the constitution. In other words, The Constitutional Court should not make decisions by thinking of the political consequences. Indeed, the law can not be enforced considering the political consequences of decisions. It is so regular that the decisions of the Constitutional Court can result with the political reflections by virtue of the powers like judgment of the President of the Republic or close of the political parties. However, these decisions are required to be stated within the framework of the powers given to him by the constitution. Otherwise, the Court makes policy as a political party.

In Turkey, the sources of the Constitutional Court are the Constitution and Constitutional Court Law on the Establishment and Trial Procedures number 2949. Now, I will consider general structure, functions and powers of the constitutional court according to 1961, 1971 and 1982 Constitutions. In particular, I will emphasize the restrictions for the powers of the Court in consequence of the decisions causing political results.[55]

[55] In the next sections, the constitutional articles are taken from the Turkish Constitutions (1961-1982) to indicate the powers of the Constitutional Court.

2.1. The structure and functions of Constitutional Court in 1961 Constitution

Basic features of the 1961 Constitution are shifting from the democracy of majority to the pluralist democracy, the expansion and protection of basic rights and freedoms and the principle of social state.[56]

Some legal and political difficulties experienced in the past were aimed to be resolved during the preparation of the 1961 Constitution. In this respect, the 1961 Constitution especially focused on the supremacy of the constitution. The establishment of the constitutional court and constitutional jurisdiction prove the importance of this supremacy. During the period of the 1924 constitution, there was an article containing *'the law can not be unconstitutional'*[57] however; the 1924 Constitution did not establish constitutional institution for the implementation of this rule. Therefore, it is difficult to claim that the 1924 Constitution performed the principle of supremacy of the constitution in real terms.[58]

The constitutional jurisdiction was not the only power and duty of the Constitutional Court founded by 1961 Constitution. Furthermore, the powers which were given to the Court can cause interventions to the political life and the Court has been the moot point because of these powers. Also, since the establishment of the Constitutional Court, some decisions initiated the

[56] Ergül, (2007), p.190
[57] Turkish Constitution (1924), article 103.
[58] Özbudun, (2005), p.39

discussions. I will explore the establishment, member election, the duties and powers of the Turkish Constitutional Court before debates about the 1961 Constitution.

First, I need to focus on the 1961 Constitution built upon the principle of supremacy of the constitution. In the Constitution, there was a rule as "Laws shall not be in conflict with the constitution. The provision of the constitution shall be the fundamental legal principles binding the legislative, executive and judicial organs, administrative authorities and individuals."[59] The principle of supremacy of the Constitution treated not only as theoretical but also the Constitutional Court was established for judicial review of laws. In the 1961 Constitution, the Constitutional Court was formed between 145 and 152 articles.

The Constitutional Court consists of fifteen regular and five alternate members. Four regular members are elected by the Court of Cassation, three by the General Assembly of the Council of State from among its own Chairmen, members the Chief Prosecutor and the Chief Attorney by the absolute majority of its plenary session and by secret ballot; one member is elected by the Court of Accounts out of its own Chairman and members according to the above procedure. The National Assembly elects three, and the Senate of the Republic two members the president of Republic elects two members.[60]

[59] Turkish Constitution (1961), article 8.
[60] Ibid, article 145/1.

The legislative bodies shall elect these members from outside the Turkish Grand National Assembly by a two thirds majority of their plenary session and by secret ballot. If this majority is not obtained in the first two balloting, then an absolute majority shall suffice.[61] As seen, the elections of the constitutional court members are similar with European countries. In European countries such as France, Austria and Germany, political mechanisms are effective in the election of the Constitutional Court members.

A regular or alternate member of the Constitutional Court shall have completed his forth year and shall have served as Chairman, member, Chief Prosecutor or Chief Attorney in the Court of Cassation or the Council of State or the Military Court of Cassation, or the Court of Accounts; or he shall have served on the teaching staffs of the Scholl of laws, economics, or political sciences of the universities for at least five years; or he shall have practiced law for fifteen years.[62] It is remarkable that to be a judge of the Constitutional Court, the candidates should be among lawyers. The Constitutional Court is a constitutional institution; therefore, electing the members from lawyers is an extremely accurate. The Constitutional Court elects a Chairmen and Vise-Chairmen by secret ballot and two-third majority for four years, from among its own members; re-election is permissible.

The Constitutional Court shall review the constitutionality of laws and the By-laws of the Turkish Grand National Assembly. The

[61] Ibid, article 145/2.
[62] Ibid, article 145/3.

> Constitutional Court shall try as a High Council the President of the Republic, the Members of the Council of the Ministers, the Chairmen and the members of the Court of the Cassation, the Council of State, The Military Court of Cassation, the Supreme Council of Judges and the Court of Accounts, the Chief Prosecutor of the Republic, the Chief Attorney, the Chief Prosecutor of the Military Court of Cassation, as well as its own members for offenses connected with their duties; and its discharges such other duties as prescribed by the Constitution.[63]

The focus of discussions about the Constitutional Court is whether or not the Court exceeds the powers given by the constitution. At this stage, beside the constitutionality of laws, the Constitutional Court reviewed the constitutionality of constitutional amendments. The Constitutional Court recognized the constitutionality of constitutional amendments in the line of power and judicial scope. According to 1961 Constitution, the power of making, amending and cancelling the law is given to the Turkish Grand National Assembly. This authorization reflects the national will. However, the Constitutional Court became an institution over the Parliament by the decisions in 1970. Therefore, the Court constituted the power not empowered by the constitution for itself and violates the province of parliament. Carre de Malberg defines the national will as:

> …the legislative power should review the constitutionality of laws while making law process. The parliament is a judge of the laws, because it uses the sovereignty. Hence, the courts can not comment on the constitution; at least they do not have an authority against the legislative power.[64]

[63] Ibid, article 147.
[64] Malberg, Raymond (1931), Carre de, La loi expression de la volente generale, Paris, Sirey cited by Ergül, (2007), p.177

It is difficult to agree with these opinions through the separation of powers. Thus, the legislative organ makes the rules and if the same organ controls the compatibility with constitution of these rules, it can damage the separation of powers principle. However, Malberg points the importance of parliament that reflects the national will.

Constitutional Court's decisions bind on all the constitutional organs. In other words, ruling the constitutional court is final and appealing against the decision is closed. Therefore, the Court takes the decisions which have vital importance. Turkish Constitutional Court is a key point of this feature. In Turkey, as in the World, the fundamental power of constitutional court is reviewing the constitutionality of laws. But, it is claimed that the court has placed its status between law and politics by some decisions and also became the protecting organ of constituent power ideology.

The duties of the Constitutional Court have been identified as listed above. However, the Court expanded its own authority without constitutional amendment and declared that; it can review the constitutionality of constitutional amendments.[65] The first decision at which the Constitutional Court empowered itself to review formal and substantial regularity of constitutional amendments was taken on 16 June 1970. The Court asserted that the legislative organ can use the legislative power only if the laws are compatible with spirit of the constitution. Although, the constitution has given the authority of legislative power only to the parliament, the Court

[65] Decision of June 16, 1970, No. 1970/31: 24, 40-41, 65

produces the authority without any constitutional base. There was not a rule about this issue in the constitution evidently, but, that does not mean the Court should use this clearance in favor of it him and produce an authority. Indeed, the parliament made constitutional amendment on article 147 that regulates the duties and powers of the constitutional court after these decisions in 1970.

The Constitutional Court is a constitutional lawful institution and restricted by duties and powers by constitution. The Constitution Court has no authority to make a decision over the constitution. The Court, in accordance with the principle of the rule of law, should review constitutionality of laws and protect the fundamental rights and freedoms and should not make a decision according to the political criteria and conjuncture. As a result, the decisions have led to many discussions between politics and law.

Tuncer Karamustafaoğlu defines the debates about the constitutional courts as follows: "...the conflicts about the constitutional law derive from political problems. Furthermore, other name of the constitutional law is a political law. In that case, necessarily, political problems become the issue of the constitutional court when they are brought to the trial."[66] Yet, the discussions about the status that Constitutional Court have reached today and how it will be analyzed in next chapter in detail.

[66] Karamustafaoğlu, Tuncer (1968), "Anayasa Yargısının Önemli Sorunları" (The Important Problems of Constitutional jurisdiction), AÜHFD, Volume:3 pp. 91-100

2.2. Constitutional amendment limiting the power of the Constitutional Court in 1971

Because the 1961 Constitution regulated the functions and powers of the Court in a detailed manner, any attempt to limit the powers of the Constitutional Court could be done by constitutional amendments even though there was a rule about the establishment and structure of the Constitutional Court. Moreover, for the legislative power, the Constitutional Court is so significant that; it has regulated the Court in extensive and detailed manner.

As I mentioned above, in the 1961 Turkish Constitution, before the 1971 amendment, there was no special provision on the judicial review of constitutionality of constitutional amendments. During this period, however, the Turkish Constitutional Court declared itself as competent to review the constitutionality of constitutional amendments and reviewed the formal regularity of constitutional amendments. Hence, in 1971, the constitutional amendment was made on 147 article of the constitution. Before the amendment the article had been "The Constitutional Court shall review the constitutionality of laws and the by-laws of the Turkish Grand National Assembly". Article 147 of the 1961 Turkish Constitution, as amended in 1971, stipulated that the Turkish Constitutional Court can review the formal regularity of constitutional amendments. In a sense, this amendment limited

the powers of the Court. Mehmet Ali Aybar points out about this amendment that;

> There is no need to be afraid of this constitutional review. Because, there is a hierarchy between the articles of the constitution and the rules concerning the application must be in accordance with the principles rules of the constitution.[67]

Mehmet Turhan's opinions on this issue were:

> It is seen that our Constitutional Court adopts the hierarchy between the constitution rules. In my opinion, the hierarchy between rules is impossible to be accepted. The provision of the constitution specifies the rights and the provision limiting it has the same legal value.[68]

According to Cem Eroğlu, in the written constitutions, all rules can be changed depending on its own form that has been determined the changing rules and also the substance of rule is not imperative. In addition, the presence of hierarchy between constitution rules can not be claimed.[69] Cem Eroğlu supports that idea in the following sentences:

> The Constitutions organize the fundamental institution of states. These basic rules must be adapted to new requirements. The regularity rules of the constitution are not superior to the other rules. Because of the forms, there are equal legal status between the regularity rules and other rules. Both of them are constitutional rules. Moreover, the rules of the constitution which determine the form of constitutional amendment, other rules and the new rules that legislated by following the procedure are legally equal values. In these circumstances, changing the former rule by making new one and even changing the rule of the constitution which determine the form of constitutional amendment would be impossible. Besides, all

[67] Turhan, Mehmet (1976), "Anayasaya Aykırı Anayasa Değişiklikleri" (Unconstitutional Constitutional Amendments), AÜHFD, Volume: 1, p. 87
[68] Ibid, ,p.99
[69] Eroğlu, Cem (1974), "Anayasayı Değiştirme Sorunu" (The Problem of Constitutional Amendments), AÜSBFD, p.16

> constitutional rules are equal whether they are based on original constituent power or secondary constituent power.[70]

The suggestion about the presence of hierarchy between the Constitutional provisions is quite wrong. Hierarchy between the constitutional provisions indicates that; some constitutional provisions are more important than others. The 1961 Constitution has enforced the parliament to change the constitution and the required conditions have been defined in the constitution. Hierarchy between the constitutional provisions can cause problems too difficult to be solved. For instance, are the constitutional rules being changed according to their importance? How can any rule be more important than other rules? How can the importance of rules be assessed? At that point, the hierarchy between constitutional rules can not be claimed. It is difficult to settle on the order of importance of rules.

In 1971, by the constitutional amendment, it was provided for the parliament which represents the national will, to have power for constitutional amendments. Otherwise, the Constitutional Court would have the power of competent to formal and substantial review of constitutionality of constitutional amendments. The laws are open to changes in order to be compatible with life conditions. At that point, the parliament had an authority of constitutional amendments. The judicial review of the Constitutional Court, in a sense, hypothecates enactments of the parliament. If a constitution recognizes the constitutional amendment, with the exception of prohibits, it

[70] Ibid, pp.25-26

is not based on the positive basis to claim some rules can not be changed. As Erdoğan Teziç mentioned; "the constituent power has clearly ruled the possibility of constitutional amendments. The exception of this rule is determined in the constitution and there is no opportunity to expand this exception."[71] I agree with this opinion, there are not unchangeable rules in the constitution exception of clearly determined as "unchangeable".

As I mentioned above, in 1971, amendment of article 147 of the 1961 Turkish Constitution, The Constitutional Court shall examine the constitutionality, in respect to both form and substance of laws, decrees the power of law, and the Rules of Procedure of the Turkish Grand National Assembly. Constitutional amendments shall be examined and verified only with regard to their form. However, "form" was not expressed in the constitution. The Constitutional Court, like the period before 1971, used this loophole to expand its own authority. The Court reviewed the constitutional amendments as substance regarding to unchangeable article 9 of constitution. Article 9 of the 1961 Constitution indicates "The provision of the Constitution establishing the form of the state as a republic shall not be amended nor shall any motion therefore be made."[72] This article was based on the fact that the constitutional court used the authority which is not expressly given to it. In a sense, the parliament reacquired its own esteem and authority by the 1971 constitutional amendment. However, the

[71] Teziç, Erdoğan (1972), "Türkiye'de 1961 Anayasasına Göre Kanun Kavramı" (The Concept of 'LAW' According to 1961 Constitution in Turkey), İstanbul; İÜHF Publication, p.134
[72] Turkish Constitution (1961), article 9.

Constitutional Court broadly interpreted the 'review in respect to form' between 1971 and 1980. That will be emphasized in the next section.

The most essential point here is that there are no limits for the interpretation of the Constitutional Court judgments. According to some views; that is against to superiority of judiciary and judicial review, such an authority and powers are given to the Courts, they can dominate the other state organs. Indeed, even if interpretation, construction and implementation powers of laws are given to judiciary, the power of the judiciary exceeds the power of the legitimacy. Moreover, there are constitutional mechanisms like the elections or courts to control the legislative and executive organs whether they exceed their authority; however, there is no control mechanism of judicial organs as to if they expand their powers by interpretation. That is a dilemma about how to successfully constrain judicial organs and protect against the judicial abuse.[73] Thus, the decisions of the Constitutional Court are final.[74]

Expanding the authorities of the constitutional court judges within the scope of their ideology is prejudicial. In this regard, Tuncer Karamustafaoğlu states that:

> …the Constitutional judges have to interpret the constitution as a whole and various aspects of the text and catch on the meaning and significance. There is no objection to review the political-legal problems. Actually, the partisanship must be afraid of. Because, the thing that is not compatible with the constitutional jurisdiction is not

[73] Also another problem is legtimacy of the constitutional courts. "its members are unelected and serve 'during good behavior'" Terri Jennings, Peretti (1999), *In Defence of Political Court*, New Jersey; Princeton University Press, p. 21

[74] Karamustafaoğlu, (1968), pp. 91-100

> the political issues but the partisanship. In all areas of public administration, the partisanship is awful and dangerous. However, partisanship in judiciary is the worst of the other partisanships. In this case, the constitutional judges, regardless of their political opinion, must not use the ideas as a measure on decisions. Likewise, the constitutional court can not replace its own political views and opinions instead of the legislative organ. The judge Stone's words; the judges should not violate the legislative function. Furthermore, the judges have to enforce the laws even if they believe the rules are illegitimate.[75]

In order to understand the role of the Constitutional Court, it will be useful to pay attention to Mehmet Turhan's opinion about a decision of Court in 1976;[76]

> …the decision of the court has showed that how the court can be obstacle to political power aiming at the fundamental changes on political and social structure by interpretation of the Court. This judicial review is very dangerous; because, the authority of the parliament established by the public vote can be disappeared. The fifteen judges in the Constitutional Court, interpret the fundamental principles of the Republic and all constitutional amendments which are not thought as incompatible with their ideas can be cancelled. Therefore, the parliament can not use the authority of constitutional amendment. The substantial review of the constitutional amendments by the constitutional court has not been possible after 1971 amendment. However, the Court exceeds that limitation by

[75] Karamustafaoğlu, (1968), p. 97

[76] "Article 38 of the 1961 Constitution was amended on September 20, 1971...It is argued that the new version of Article 38 of the 1961 Constitution violates the prohibition to amend the republican form of state. The Turkish Constitutional Court, in its decision of March 23, 1976, rejected this argument and ruled, in an eight-to-seven vote, that the amended version of Article 38 is not contrary to the prohibition to amend the republican form of state. But, six months later, the Constitutional Court, in its de cession of October 12, 1976, reversed the holding in an eight to seven vote. In its judgment, the Court invalidated the amended version of Article 38 for the reason that the calculation of the compensation for expropriation on the basis of the fiscal value affects the "core" of the property right, protected by Article 36. Consequently pursuant to Article 9, the rule of law principle as provided in Article 2 and which is a component of the republican form of state (Article 1), cannot be changed by a constitutional amendment." In Gözler, Kemal, (2008), "Juridical Review of Constitutional Amendments", Bursa; Ekin, p. 48

interpreting the amendments against the 'basic principles of the Republic'. This is the acceptance of 'substance' as a 'form'.[77]

Before the 1971 amendment, the Turkish Constitutional Court defined itself as competent to review both substance and procedural of the constitutional amendments. After the 1971 amendment, the Court interpreted the article 9 of the constitution as the aim of substantive limit of the constitution is determining the regime of the state as 'Republic' and it recognized itself to review all constitutional regarding this article.

2.3. The structure and functions of Constitutional Court in 1982 Constitution

The coup of September 12, 1980 was carried out by the Turkish Military Forces in order to provide the national unity, to protect the state integrity, to prevent possible civil war and to establish the justice and state authority.[78] All political activities were banned, political parties were closed down and leaders were arrested. The military commanders established the National Security Council (Milli Güvenlik Konseyi, MGK), which consisted of the commanders of the Army, Air Force, Navy, and Gendarmerie, and presided by the General Chief of Staff, General Kenan Evren, who also became the Head of State.

National Security Council that seized the state control by the military intervention began to make a constitution on June 29, 1981 by the law of

[77] Turhan, (1976), p.100
[78] Özbudun, (2005), p.50

Constituent Assembly. According to the law, the Constitution Assembly consists of National Security Assembly and Council. Prepared constitution draft was accepted on November 7, 1982 by referendum.[79] 1982 Constitution, such as the 1961 Constitution, was prepared after the military coup. According to Fatih Öztürk "Historically, all Turkish States were created by Turkish militaries. Thus, the Turkish Armed Forces inherently see themselves as the founder and protector of the country."[80]

The Constitution Assemblies prepares the constitutions by considering the adverse condition of the periods. Thus, in the 1961 Constitution, the political and legal problems before the 1961, in the 1982 Constitution, the legal and political problems between 1960-1980 were tried to be resolved. In this regard, the 1982 Constitution dealt with the discussions and problems of the Turkish Constitutional Court that I have explained in the previous section. I will not analyze the features of the 1982 Constitution in details, the establishment, powers and the duties of the Constitutional Court will be reviewed within the frame of the contested discussion as mentioned above.

In the 1982 Constitution, the Constitutional Court regulated between the articles 146 and 153 in detail. In particular, the constitutional provisions that consists the Court's duties and powers are clarified.

The Constitutional Court shall be composed of eleven regular and four substitute members. The President of the Republic shall appoint two regular

[79] 1982 Constitution was accepted by %91,4 of voters.
[80] Öztürk, Fatih (2008), *Constitutional Law Readings For Turkey*, İstanbul, Filiz, p.175

and two substitute members from the High Court of Appeals, two regular and one substitute member from the Council of State, and one member each from the Military High Court of Appeals, the High Military Administrative Court and the Audit Court, three candidates being nominated for each vacant office by the Plenary Assemblies of each court from among their respective presidents and members, by an absolute majority of the total number of members; the President of the Republic shall also appoint one member from a list of three candidates nominated by the Higher Education Council out of members of the teaching staff of institutions of higher education who are not members of the Council, and three members and one substitute member from among senior administrative officers and lawyers. To qualify for appointments as regular or substitute members of the Constitutional Court, members of the teaching staff of institutions of higher education, senior administrative officers and lawyers shall be required to be over the age of forty and to have completed their higher education, or to have served at least fifteen years as a member of the teaching staff of institutions of higher education or to have actually worked at least fifteen years in public service or to have practiced as a lawyer for at least fifteen years.[81] The determination of the judges of the Court is different from that of the 1961 Constitution. In the 1982 Constitution the judges can be elected among wide range of the candidate's whereas before they were elected among the lawyers.

[81] Turkish Constitution (1982), article 146.

The Constitutional Court shall convene with its president and ten members, and shall take decisions by absolute majority. Decision of annulment of Constitutional amendments and closure in the cases of the political parties shall be taken by three-fifths majority. The Constitutional Court shall give priority to the consideration of and to decisions on, applications for annulment on the grounds of defect in form.

The organization and trial procedures of the Constitutional Court shall be determined by law; its method of work and the division of labors among its members shall be regulated by the Rules of Procedure made by the Court.[82] Decisions of annulment cannot be made public without a written statement of reasons. In the course of annulling the whole, or a provision, of laws or decrees having the force of law, the Constitutional Court shall not act as a law-maker and pass judgment leading to new implementation.[83]

The Turkish 1982 Constitution specifically regulates the judicial review of constitutional amendments. The Constitutional Court shall examine the constitutionality, in respect to both form and substance of laws, decrees having the force of law, and the by-law of the Turkish Grand National Assembly. Constitutional amendments shall be examined and verified only with regard to their form. However, no action shall be brought before the Constitutional Court alleging unconstitutionality as to the form or substance of decrees having the force of law issued during a state of emergency,

[82] Turkish Constitution (1982), article 149.
[83] Ibid, article 153.

martial law or in time of war. The verification of laws as to form shall be restricted to consideration whether the requisite majority was obtained in the last ballot; the verification of constitutional amendments shall be restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under urgent procedure was complied with. Verification as to form may be requested by the President of the Republic or by one-fifth of the members of the Turkish Grand National Assembly. Applications for annulment on the grounds of defect in form shall not be made more than ten days after the date on which the law was promulgated; nor shall objection be raised. The President of the Republic, members of the Council of Ministers, presidents and members of the Constitutional Court, of the High Court of Appeals, of the Council of State, of the Military High Court of Appeals, of the High Military Administrative Court of Appeals, their Chief Public Prosecutors, Deputy Public Prosecutors of the Republic, and the presidents and members of the Supreme Council of Judges and Public Prosecutors, and of the Audit Court shall be tried for offences related to their functions by the Constitutional Court in its capacity as the Supreme Court. The Chief Public Prosecutor of the Republic or Deputy Chief Public Prosecutor of the Republic shall act as public prosecutor in the Supreme Court. The judgments of the Supreme Court shall be final. The Constitutional Court shall also perform the other functions given to it by the Constitution.[84]

[84] Ibid, article 148.

The reason for existence and the basic duty of the Constitutional Court is constitutional jurisdiction in both 1961 and 1982 Constitutions. The Court was established to concrete review of norms. When the duties and powers of the Court are analyzed, it is clearly understood that the objective of the constitution to end up the legal debates which were derived from the decisions in the periods of 1961-1970 and 1971-1980. Before the 1971, there was no special provision on the question of the constitutionality of constitutional amendments. During this period, however, the Turkish Constitutional Court declared it competent to review the constitutionality of constitutional amendments and reviewed the formal regularity of constitutional amendments. Article 147 of the 1961 Turkish Constitution was amended in 1971, stipulated that the Turkish Constitutional Court can review the formal regularity of constitutional amendments. However, the Turkish Constitutional Court held that the prohibition to amend the republican form of state is a condition of form, and not a condition of substance. Therefore, the 1982 Constitution specifically regulates that the Constitutional Court can not review the substance of constitutional amendments. In addition to this and taking the lessons learned from the Constitutional Court's misinterpretation of the concept 'formal regularity' during the 1970's, the framers of the 1982 Constitution, in Article 148(2), defined the scope of the term "review in respect of form."[85] According to this article, the review of the formal regularity of constitutional amendments "shall be restricted to

[85] Gözler, (2008), p.48

consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under urgent procedure was complied with."[86] The objective here is to maintain the Court stay in the limits of power that determined by the constitution.

Mustafa Erdoğan states that the decisions of the Constitutional Courts can lead to political consequences within the scope of the duties and powers. However, he also emphasizes if the Court has political-ideological decisions by transcending the 'judicial review of constitutionality', it deviates from the purpose of the establishment. This aspect can derive from the acceptance of the constitutional judges themselves as political actors. According to Erdoğan this is the 'politicization of judiciary' and it can cause to damage the legitimacy of the Constitutional Court.[87]

According to Stephan Holmes there is a conflict between the constitutional courts and democratic regimes. To Holmes, the constitutional courts are not to measure up the foundation of the democracies. If a constitutional court cancels the laws which are enacted by the parliament frequently, most likely, this damages the legislative power and legitimacy of democratic majority. Putting the strong judiciary branch in the constitution, correspondingly, constitutional courts' excessive interventions to the policy making process damage the democracies. Additionally, Holmes states that

[86] Turkish Constitution (1982), article 148/2.
[87] Erdoğan, (2005),p.18

the new democracies do not need the constitutional courts and constitutional jurisdiction; at first they need settled parliamentarians.[88]

Throughout this section, the establishment, the duties and powers of the Constitutional Court in Turkey are explained. Particularly, the judicial reviews of the constitutional amendments of the Constitutional Court were analyzed. That is discussed whether or not the Constitutional Court, as a constitutional lawful institution, restricted the powers of the legislative organ by the judicial review of constitutionality. By including different opinions, the role of the constitutional court between the years 1960 and 1980 is examined.

In the 1982 Constitution, there is definitive rule about the judicial review of the constitutional amendments; therefore, the Court had not been made a disputable decision until 2007. But, the role of the Court has been discussed because of the some decisions in 2007 and 2008. In the next chapter, these decisions will be examined in detail.

[88] Holmes, Stephan (1993), "Back to the Drawing Board", East Europe Constitutional Review 2, No:1, pp.21-25

CHAPTER III

The Controversy over the Last Decisions of the Turkish Constitutional Court

Turkish Constitutional Court has swelled into a highly controversial establishment recently. The detonating reasons for these controversies are some certain decisions adopted by the Court in the years 2007 and 2008. The allegations regarding that the Court has exceeded its legal bounds that are obviously written in the constitution and has taken resolutions by envisaging the political yields of them were thrown out for consideration. This chapter is to probe three disputable verdicts delivered by the court; "ambiguity on the trial of the President of Republic", "decision on the need for a quorum of 367 deputies for the Presidential Election" and "judicial review of constitutional amendments (article 10 and 42)". Any possible clarifications are to be strived for especially the claims concerning that the Court introduced new powers for itself other than the ones prescribed in the Constitution and went beyond its stipulated limits.

In the constitutional states all of the state organs and administrative authorities have to act in compliance with the restrictions stipulated in the Constitution. In other words, all the institutions of state are bounded by the Constitution. The legislative, executive and judicial organs of state implement the most basic requirement of a constitutional state by complying with the law. Accordingly, the Constitutional Court is a legal establishment whose

powers determined by the Constitution itself. "The constitutional courts decide upon the constitution. It is so normal that decisions have political and *de facto* impacts on spheres of other constitutional organs."[89]

The fundamental characteristic of the Constitutional Court which distinguishes it from other courts is that its decisions bind all institutions and bear some political outcomes as well. As Mehmet Turhan states;

> The position and function of the Constitutional Court before other political authorities and courts should be approached in line with the definite powers prescribed in the Constitution. Likewise, constitutional judgment does not imply infringing the principle of separation of powers; like other courts the Constitutional Court is bounded to this principle embodied in the Constitution. However, in terms of the principle of separation of powers, the Constitutional Court has a nature distinct from other constitutional organs: the Constitutional Court adjudges the restrictions of not only other organs but also of its own [90]

Courts are necessary to be both independent and impartial. Within their decisions they have to act in conformity with the legal criteria and norms stipulated by codes of the law. It turns out to be impossible to address the existence of legal independence if any external effect, interference or compulsion has a determining effect on the Court's decisions. The establishment of law in a country is not supplied solely by carrying out the rules imposed by legislative organs. In addition, the verdicts of judges and their interpretations equally contribute to the improvement of law. In this respect, whether or not the judges are independent and impartial with

[89] Schlaich K. and Korioth S. (2001), Das Bundesverfassungsgericht, München; C. H. Beck'sche Verlagsbechhandlung, cited by Kanadoğlu, (2004), p.8

[90] Hoffe O. (1996), "Das Grundgesetz nur auslegen- Wievel Politik ist dem Verfassungsgericht erlaubt? Cited by Kanadoğlu, (2004), p.7

their judgments becomes of utmost importance. Mehmet Turhan notes about the issue as:

> If judges continuously pronounce decisions on behalf of execution and legislation, the expected respect to the law terminates. Courts can only develop provided that they are not affiliated with legislation and execution. Yet, it is necessary to look at the judgments taken by courts in order to be acquainted with the law in a country. That is to say, the law arises from court decisions. It is no go knowing about the law in a country without that the judicial organs are independent.[91]

As Sartori alludes; if judges accept themselves as the ones not encountering but creating the law, then the management of judges might be more destructive than the legislators. To this effect, independence of the judiciary shall be regarded as 'not another course to engaging in politics but a way of being apart from politics'.[92]

Under the light of all these assessments, constitutional courts have a distinguished importance in terms of their positions and roles. Since the decisions they adopt are final and the recourse of appealing is closed, the courts' decisions sometimes cause high controversies. Not restricting the duties of constitutional court to only constitutional judgment caused these controversies to extend to broader areas. Contrary to the views that these courts should only be restricted to the codes of the law, also some fully opposite contentions are put forth appertaining to function and position of the Constitutional Courts. As to these interpretations,

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[91] Turhan,(2005), p. 93

[92] Sartori, Giovanni (1993), *Demokrasi Teorisine Geri Dönüş* (Back to the Democracy Theory)*,* Ankara; TDV, (translated by T. Karamustafaoğlu & M. Turhan)

> It should be put an end to questioning the legitimated function and scope of the constitutional judgment towards political process. For instance, rather than a legal judgment a political one shall be arbitrated in case of a conflict between the protection of the youth and the freedom of disseminating personal thoughts. Hence the constitutional verdicts may sometimes be political.[93]

Apart from this, there is also another view arguing that constitutional courts have the capacity of passive legislation. "It is set forth that the constitutional court should be recognized as an administrative authority which has a partial autonomy and that it overtook the stand of 'pre-legislature, legislature positive or at least co-legislature' which consummates the law by means of the different interpretation techniques composed by the constitutional judge."[94]

The claim that the Constitutional Court broke its bonds by forcing the Constitution and even the law came to order again after its decisions in 2007 and 2008 whereupon it was subject to the perennial critiques by jurists, academics, intelligentsia, journalists and also politicians. Explicitly it is impossible by scrutinizing only its powers to cognize the questions why the decisions of the Constitutional Court can be controversial, to what extent these decisions influence on political process and how this influence is perceived by public. One way or another, the Court stretched its powers by discretions in the courses of decision processes in past years. Therefore,

[93] Dichgans H. (1974), "Recht und politik. In der Judikatur des Bundesverfassungsgerichts" in; Menschenwürde und freiheitliche Rechtsordnung, Festschrift für W. Geiger, Mohr (Paul Siebeck), Tübingen, cited by Kanadoğlu, (2004), p.8
[94] Kaboğlu, (2000), p.177

canvassing the Court decisions shall be instrumental in order to understand its fuzzy role.

In this part, the moot judgments of the Constitutional Court are to be handled. The opinions of law connoisseurs on the issue will be undertaken in detail.

3.1. Ambiguity on the trial of the President of Republic

It is fundamental principle that, like the citizens, public officials have to be related to laws in democratic states governed by the rule of law. Therefore, whoever does unlawful behavior has been stand trial in the dock. Several various law institutions are nominated about judgment process in the world. The judgment of courts duty can change according to position and careers of individuals. Top-level rulers are being tried at particular foundations because of their alleged unlawful behaviors or decisions. One of these foundations, commonly in the world, is the constitutional court.

The constitutional courts have an authority of judgment for The Presidents, The Prime Ministers, The Ministers, top-level judiciary branch and top-level rulers through their alleged unlawful behaviors and decisions. In Turkey in respect of 1982 Constitution, The Constitutional Court has judgment authority as "High Court".

The development of the judgment of top-level rulers depends on "Impeachment Enforcement" in England. Impeachment is the consequence

of independence struggle by parliamentary against to the King.[95] Subsequently, Impeachment became the judgment of legislative on executive and judiciary authorities.

Murat Yanık defines the impeachment as denunciation and trial of the most senior officers serving in legislative, executive and judicial organs by a legal or political foundation.[96]

Impeachment that was inherited by 1787 Constitution in USA has still been enforced.[97] However, the foundation has been altered. Thus, its duty became political responsibility mechanism based on removing from duty for rulers. From the past to present, it must be noticed on the changes of impeachment. Therefore, in the past, while the legislative power had an authority of judgment, now, the judgment is given to law foundation like courts. Besides, by the principle of separation of power, the judgment of rulers became the duty of jurisdiction. Judgment is done by courts and commonly in the world, the Impeachment enforcement is given to the constitutional courts as 'High or Supreme Court'.

As I mentioned above, in Turkey, the constitutional court is named as "High Court" during the judgment of rulers. The High Court was begun to be enforced by 1876 Constitution. In this respect, approximately, it has

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[95] Güriz, Adnan (1955), "İngiltere'de İcra Vekillerinin Mesuliyeti" (The Responsibility of Ministers in England), *AÜHFD*, Volume:3, pp.139-155

[96] Yanık, Murat (2008), *Yüce Divan* (High Court), İstanbul; Derin, p.9

[97] (2) In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

historical background of one hundred and thirty years. The High Court is the one dimension of constitutional court and I explore the development of High Court in chronological order.

The 1786 Constitution that brought many changes and newness to the Turkish Legal System is also provided the establishment of High Court. (Divan-ı Ali) The High Court was composed between articles of 92-95 in the 1876 constitution.[98]

According to 1921 Constitution, the assembly enforced not only judgment but also the executive and legislative power. Therefore, there were not separation of powers and independence of judgment as a separated branch was not enforced.[99]

1924 Constitution that was prepared after the declaration of The Republic contains High Court foundation. If it is necessary, The High Court is convened by Turkish Grand National Assembly decision in order to judge of members of the cabinet, members of the Council of State, the Attorney General, and members of the Court of Appeals. The High Court is composed between articles of 61-67 in the 1924 Constitution;

> A High Court shall be constituted, the jurisdiction of which shall include the trial of members of the Cabinet, members of the Council of State, the Attorney General, and members of the Court of Appeals in all questions pertaining to the performance of their duties. The High Court shall be composed of twenty-one members, eleven of whom are chosen from among the members of the Court of Appeals and ten from among the members of the Council of

[98] Gözübüyük, Şeref (2007), *Türk Anayasaları 1876, 1921, 1924, 1961, 1982* (Turkish Constitutions), Ankara; Der, pp. 21-22
[99] Gözler, (2000), p.19

> State. The said members are elected by secret ballot by the plenary assemblies of each of these bodies. The members of the High Court elect by the same procedure a president and a vice-president. Trials shall be conducted by fourteen members and the president of the High Court, which shall reach its decision by majority vote. The remaining six members shall be considered as alternates, to be chosen by ballot, three from the Court of Appeals and three from the Council of State. The president and vice-president may not be chosen as alternates. The office of prosecutor-general of the High Court is filled by the Attorney General of the Republic. The decisions of the High Court are subject neither to appeal nor to annulment. The High Court shall apply only the provisions of existing laws in the examination of cases which are pleaded before it and in the judgments which it pronounces. The High Court is constituted when necessary by the Grand National Assembly of Turkey.[100]

The new era was opened with 1961 Constitution for High Court. Although the 1961 Constitution was enforced during the twenty years, it had significant changes and newness about judiciary power. The High Court which had been gathering for special conditions became duty and authority of The Constitutional Court which was founded by 1961 Constitution. In 1961 Constitution;

> The Constitutional Court shall review the constitutionality of laws and the By-laws of the Turkish Grand National Assembly. The Constitutional Court shall try as a High Council, the President of the Republic, the Members of the Council of Ministers, the Chairmen and members of the Court of Cassation, the Council of State, the Military Court of Cassation, the Supreme Council of Judges and the Court of Accounts, the Chief Prosecutor of the Republic, the Chief Attorney, the Chief Prosecutor of the Military Court of Cassation, as well as its own members for offenses connected with their duties; and it discharges such other duties as prescribed by the Constitution. In case the Constitutional Court sits as a High Council, the duty of public prosecutor shall be discharged by the Chief Prosecutor of Republic.[101]

[100] Turkish Constitution (1924), article: 61-67 (for English Mead E., Edward, (1925), *"The New Constitution of Turkey"*, Volume 40, Issue 1, p:96) and available from http://www.bilkent.edu.tr/~genckaya/1924constitution.pdf (12.03.2009)
[101] Turkish Constitution (1961), article: 147.

On the proclamation of the adoption by referendum of the Constitution on November 7, 1982, the prescribed Supreme Court started to function with its all instruments. 1982 Constitution drastically preserved the Supreme Court system of 1961 Constitution. One of the most outstanding differences between them is, contrary to the conception of modern constitutionalism, that the power of electing the Court members is derogated from the Turkish Grand National Assembly as of 1982. In the latter system the Court members whose number diminished to 15 from 20 are directly or indirectly appointed by the President.[102] According to 1982 Constitution the Constitutional Court has the authority as Supreme Court.

> The President of the Republic, members of the Council of Ministers, presidents and members of the Constitutional Court, of the High Court of Appeals, of the Council of State, of the Military High Court of Appeals, of the High Military Administrative Court of Appeals, their Chief Public Prosecutors, Deputy Public Prosecutors of the Republic, and the presidents and members of the Supreme Council of Judges and Public Prosecutors, and of the Audit Court shall be tried for offences relating to their functions by the Constitutional Court in its capacity as the Supreme Court. The Chief Public Prosecutor of the Republic or Deputy Chief Public Prosecutor of the Republic shall act as public prosecutor in the Supreme Court.[103]

As seen, The High Court enforcement depends on previous date in Turkish Legal System. The High Court with fundamental history became the significant duty of Constitutional Court.

[102] Yanık, (2008), p.35
[103] Turkish Constitution(1982) Article: 148.

However according to Murat Yanık the duty of being High Court for the Constitutional Court is a tool of political aims. During the 1982 Constitution, it has been seen that the ministers who were committed for trial to High Court, usually were the members of former governments. However, most of these Ministers were acquitted on appeal. In 2004, the Prime Minister and seven Ministers were committed for trial and most of them acquitted from the case except Cumhur Ersümer. Furthermore, Cengiz Altinkaya and Sefa Giray had been also acquitted in 1993.[104]

The constitutional courts have to be forensic on decision since, it has the authority to judge the top-ruler, The President of Republic. The Court can not exceed the Court's power which were denoted and given by the constitution. In this context, in 2007, there were the name of Abdullah Gül who has been the President of Republic with other 70 politicians in allegation as a proof to close The Justice and Development Party (*Adalet ve Kalkınma Partisi-AKP*). While the acceptance of the case, The Constitutional Court did not exclude the President even though his trial is determined clearly in the 1982 Constitution.[105] According to claims the Constitutional Court exceeded its authority limited by constitution and infringed the article 105 of 1982 Constitution.

[104] Yanık, (2008), p.38

[105] 1982 constitution article 105; "No appeal shall be made to any legal authority, including the Constitutional Court, against the decisions and orders signed by the President of the Republic on his or her own initiative. The President of the Republic may be impeached for high treason on the proposal of at least one-third of the total number of members of the Turkish Grand National Assembly, and by the decision of at least three-fourths of the total number of members."

The Constitutional Court accepted to debate the indictment by the Chief Public Prosecutor of the Republic related to the dissolution of the AK Party without removing the name of the President of Republic from it. In conformity with the Article 69 of 1982 Constitution, any member causing the dissolution of his or her party shall be forfeited of politics for five years. However, the Presidency is above politics and the question what would be about him if the party dissolved was on the agenda? The Court ended up the case while not dissolving the AK Party. The 71 people included in the indictment were not deprived of politics; instead the concerned party was made devoid of State aid.

If the AK Party was dissolved, 70 people other than the President included in the indictment would be deprived of politics during five years. Whereas, the situation of the President stayed ambiguous since the Court did not dispose a decision of dissolution. Whether his capacity as President would be recovered by depriving him of politics just like other persons or his deprivation of politics would begin after the end of his post; these questions stayed unanswered. Although Teziç states "…the President shall not be prosecuted due to personal offenses"[106], the Constitutional Court did not distinguished the President in the acceptance of the indictment and made his situation subject to the case in the course of judging.

[106] Teziç, Erdoğan (1992), *Cumhurbaşkanının Sorumluluğu* (The Responsibility of President of Republic), İstanbul; İstanbul Bar Association, p.278

3.2. Decision on the need for a quorum of 367 deputies for the Presidential Election

Another decision that caused the role of the Constitutional Court to be polemical is the one which determined the meeting quorum as at least 367, during the election of 11th president in 2007, and went down in history as "367 decision". The debate was triggered, while the incumbent president Ahmet Necdet Sezer was in his post, by the former Chief Prosecutor of the High Court of Appeals Sabih Kanadoğlu who asserted that the presence of at least 367 deputies was compulsory in order a new president to be elected.

The historical happenings before the inurnment of the 1982 Constitution are of significant importance in this connection. As is known, the 7th president could not be elected before the military coup of 1982 because the qualified majority was not obtained even though 119 rounds for balloting had been held. The 1961 Constitution foresaw no sanction on failing to elect a new president. So it was not licit to abolish the parliament on the basis of the constitution and it enabled the continuity of balloting rounds until a new president has been elected. The 1980 Coup d'état toppled the related verdict of the 1961 Constitution. The new 1982 Constitution replacing it brought about some sanctions regarding presidential elections in an attempt to learn from past mistakes. It foresaw to solve any crisis related presidential election by abolishing the parliament and making a new general election required if the parliament fails to elect president in the first four balloting rounds.

In the period of 1982 Constitution, there has been no controversy in the elections of the presidents; Kenan Evren, Turgut Özal, Süleyman Demirel and Ahmet Necdet Sezer.[107] However, the elections of 11th president for which AKP proposed Abdullah GÜL as their candidate turned to be a political-legal crisis.

The legal discussions surrounding presidential elections were detonated by Sabih Kanadoğlu, retired but honorary Chief Prosecutor, with the statement "AKP votes won't suffice" he made for the newspaper Cumhuriyet on December 26, 2006. Kanadoğlu adduced that a qualified majority is necessary for holding a parliamentary session in order to be able to elect a new president and this requires a quorum of at least 367 in the first round. This is because the 1982 Constitution has the verdict that the candidate who secures 367 ballots in the first two rounds can be elected as president. This is not only the quorum for decision but also for the first meeting of the parliament.[108]

1982 Constitution regulates election of the President in the Article 102. Accordingly, at most four ballots are envisaged in order the President to be elected. In the first two rounds, the candidate managing to get a two thirds majority of total number of deputies, i.e. 367 votes, shall be elected as the President of the Republic. However, the candidate failing to attain that qualified majority shall be elected in third or fourth ballot if he or she takes

[107] Turgur Özal was elected by 263 votes in Parliament convened by 285 deputies, Süleyman Demirel was elected by 234 votes in Parliament convened by 431 and Ahmet Necdet Sezer was elected by 330 votes in parliament convened 533 deputies.
[108] Kanadoğlu, Sabih "AKP oyları yetmez", *Cumhuriyet*, (26.12.2006)

the votes of 276 deputies which is the absolute majority. The fourth ballot is held between the two candidates who receive the greatest number of votes in the third ballot. Despite all ballots if the president cannot be elected by an absolute majority and elections cannot be completed in twenty days, the Constitution foresees a new general election for the Turkish Grand National Assembly immediately. The Article 96 of the Constitution prescribes about the quorums required for convening sessions and decisions that: "Unless otherwise stipulated in the Constitution, the Turkish Grand National Assembly shall convene with at least, one-third of the total number of members and shall take decisions by an absolute majority of those present; however, the quorum for decisions can, under no circumstances, be less than a quarter plus one of the total number of members." In line with this article, the TGNA can convene with at least 184 deputies and take decisions with a minimum of 139 votes.

As can be seen the 1982 Constitution determines an exact solution in presidential election. It is crystal clear that this sanction is a measure for preventing the repeat of the crisis occurring in the presidential election tours before 1980 Military coup. The Constitution orders to elect the President anyhow; and it prescribes that any assembly which cannot achieve this is compulsory to hold new elections.

To lay by these recognitions, the TGNA convened in order to elect the 11th President on 27 April 2007. On the basis of that 367 deputies did not take part in the Assembly in the first meeting and balloting, the CHP alleged

that the session was impossible to be held and applied to the Constitutional Court with the argument that the election was a violation of by-laws. With the decision numbered E.2007/45, K.2007/54 and dated 01.05.2007 the Constitutional Court interpreted the decision of the Turkish Grand National Assembly upon the quorum of convening session necessary to hold the election of the 11th President as a de facto amendment of by-laws. The Court also construed that this decision changed the Article 121 of the by-laws by infringing upon the articles of 96 and 102 in the Constitution and finally gave the judgment of annulling it. The decision of the Court together with its justifications was published in the Official Gazette numbered 26565 and dated 27.06.2007 and was put into effect thereby.

The controversies on the issue lasted not only before the decision of the Court but also in the months following. Jurisconsults and politicians disputed the 367 claim at some length. Two different judicious out of the jurisprudence were broached related to this subject.

For the former judicium, at least 367 deputies need to be present in the Assembly in order the President to be elected. The Constitution stipulates a minimum of 367 deputies as not only a quorum for decision but also for meeting session. The opinions of the legists favoring this judicium are as following.

The question of 367 was firstly given voice by Sabih Kanadoğlu into public opinion. Kanadoğlu asserted that:

> The Constitution dictums clearly determine that presidential elections could only be held provided at least 367 deputies that correspond two-thirds of the total members would be present and vote in the first convening session of the Assembly. Kanadoğlu, by citing the Article 102 of the Constitution prescribing that the President of the Republic shall be elected by a two-thirds majority of the total number of members of the Turkish Grand National Assembly and by secret ballot, set forth that the stipulated quorum of decision was also the necessary number for meeting session and underlined that in case of not being thrown at least 367 votes to polling box not any results could be supplied and in no way continuing into the second balloting tour would be possible. Getting no results in twenty day period from the beginning naturally necessitates the renewal of the Assembly by holding new general elections. Kanadoğlu also claimed that the AK Party could not elect the President without any contribution from the opposition parties and under these circumstances the opposition parties could make it possible to renew the general elections. In spite of the definite arbitraments prescribed in the Constitution, if the AKP continued to election the Court would possibly annul the election.[109]

Another defender of the quorum of convening session in the presidential election was Süheyl Batum who is a constitutional lawyer. According to Batum;

> Through the regulation in the Article 96 of 1982 Constitution unless otherwise stipulated in the Constitution itself the meeting sessions and taking decisions were eased. The quorum of convening sessions and that of decisions are bound to each other. If otherwise is stipulated in the Constitution both of these quorums bounded to each other change. Accordingly the Article 102 of the Constitution prescribes an otherwise arbitrament against the Article 96. Thus, the quorum of meeting session ought to be more than that of decisions.[110]

Necmi Yüzbaşioğlu was a 367 assertor, too. For Yüzbaşıoğlu;

[109] Kanadoğlu, *Cumhuriyet*, (26.12.2006)
[110] Batum, Süheyl "Cumhurbaşkanlığı seçiminde Yeni Boyut", *Vatan*, (27.12.2006)

> The statement 'unless otherwise stipulated in the Constitution' in the Article 96 of 1982 Constitution, as different from that of 1961, precedes the quorum of convening session. So this statement is valid for both meeting session and decisions. Also when a general rule contradicts with a special rule, the special rule is applied, so Article 96 cannot be carried out since the Article 102 is a special one. Moreover the discretions should be in compliance with the purposes and in the presidential elections reconciliation should be aimed. Hence, the Article 102 ought to be interpreted in this regard.[111]

Fazıl Sağlam also took part in the 367 discussion by giving support to the decision of the Constitutional Court. As to Sağlam;

> The statement 'The President of the Republic shall be elected by a two-thirds majority of the total number of members of the Turkish Grand National Assembly' embodied in the first paragraph of Article 102 of the Constitution requires that at least 367 members plus assembly speaker need to be present in the first three ballots. Otherwise a binding rule of the Constitution is bypassed. In other words that means getting round the constitutional regulations.[112]

Apart from these, jurisconsults and lawyers such as Erdoğan Teziç, Ülkü Azrak and İbrahim Kaboğlu wrote articles pleading the 367 decision in some newspapers.[113]

As for the latter judicium in the jurisprudence, the Constitution does not foresee a distinct quorum for convening session. The basic argument for the ones seizing on this judicium is the quorums of meeting and decision

[111] Yüzbaşıoğlu, Necmi (2007), "Cumhuriyet ve Cumhurbaşkanlığı" (The Republic and Presidency) in İstanbul Bar Association,, İstanbul pp.38-42

[112] Sağlam, Fazıl (2007),"Cumhuriyet ve Cumhurbaşkanlığı" (The Republic and Presidency) in İstanbul Bar Association,, İstanbul , p.13

[113] The jurisconsults who support the 367 decision announced their views in the newspaper "Cumhuriyet". Prof. Dr. Erdoğan Teziç, Prof. Dr. Ülkü Azrak, *Cumhuriyet*, (27-28-29.12.2006), Prof. Dr. İbrahim Kaboğlu, "Cumhurbaşkanlığı Seçimi I, II) *Birgün*, (3-10.01.2007), Akad, Mehmet and Dinçkol, Abdullah (2007), *1982 Anayasası ve Anayasa Mahkemesi Kararları* (The 1982 Constitution and The Decisions of Constitutional Court), Ankara; Der, p. 594

stipulated in the Article 96 of the Constitution. The 1982 Constitution regards these two quorums different from each other and cites them independently. If the 367 number referred to both the quorum for convening and decision, the Constitution naturally would cite them separately. However in the Article 102 that regulates the presidential election no such a separation is at issue. As prescribed in the Article 96 "Unless otherwise stipulated in the Constitution, the Turkish Grand National Assembly shall convene with at least, one-third of the total number of members and shall take decisions by an absolute majority of those present; however, the quorum for decisions can, under no circumstances, be less than a quarter plus one of the total number of members. Although the Constitution foresees a special or qualified majority as a quorum for decision in various provisions, it does not embody an otherwise provision that brings an exception for a quorum of convening session. Since an otherwise provision does not exist in the Constitution, it is clear that in any subject including the presidential election the provision of Article 96 shall be applied, that means the TGNA can convene with 184 members which is the least one third of the total number.[114]

The number of the ones supporting the latter judicium is more than that of others. According to them, applying the 367 quorum in presidential elections is compelling the law and means interpreting the articles of the Constitution for different aims. On this subject, Yüksel Metin states that the

[114] Özbudun, Ergun (2007), "Cumhurbaşkanı Seçimi ve anayasa", *Zaman*, 17.01.2007; Gözler, Kemal, "Hukun siyasetle imtihanı: Kim sınıfta kaldı?", *Türkiye Günlüğü*, Volume. 89, Summer: p.5; Göztepe, Ece (2007), "Sevilmeyen anayasayı kim korumak ister?", Birikim, Volume. 218, p.71; Can, Osman "Cumhurbaşkanlığı Seçimi", *Radikal*, (31.12.2006)

Constitutional Court made a teleological construal. The Court acted according to the aim of the Constitution in addition to the texts of the articles 96 and 102 while attaining this decision. For the Court, wording manner of the Article 96 implies a qualified majority for the quorum of convening and the two thirds majority included in the Article 102 constitutes the exception envisaged by the Article 96. In order to strengthen this construction, the Court benefited from teleological interpretation method.[115]

Kemal Gözler censures the 367 decision. As to him, the number 367 stated in the Article 102 of the Constitution which regulates the presidential election refers to the quorum of decision. It is no way to accept this number as the quorum of meeting.[116] Besides, Gözler asserts that the Constitutional Court has no power to supervise the presidential elections. This is because presidential election is not a law but a parliament decision and parliament decisions cannot be reviewed by the Constitutional Court apart from three exceptions.[117] The Constitutional Court made a validation as in the nature of "by-laws regulation"; however, this case-law is off the beam.[118]

Mustafa Erdoğan designated the 367 decision as a fantasy. In his opinion:

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[115] Metin, Yüksel (2008), *Anayasanın Yorumlanması* (The Interpretation of Constitution), Ankara; Asil, p.201

[116] Gözler, Kemal (2007), "Cumhurbaşkanının Seçimi Konusunda Bir Açıklama" (An Explanation About The Presidency Election), *Türkiye Günlüğü,* Volume.89, Summer: pp.17-23

[117] These three exceptions are decisions on the by-laws of the TGNA, the abolishment of Parliamnetary immunity and the loss of membership of a deputy.

[118] Gözler, (2007), pp. 5-16

> To bring any exception for a general rule is not legally possible or justifiable, because exception is a special case which requires deviating from a common rule, so it must be clear-cut. Also expanding the scope of an exception is also contradictory to its own logic. This is because in order that an exception keeps as an "exception", it is necessary to comply with the general rule unless the definite cases happen.[119]

On the other hand, Zühtü Arslan thinks that the Court interpreted the Article 102 as teleological in the 367 decision. It is certain that the framers of the Constitution aimed at that the President would be elected with a qualified majority just like the president of the assembly. However, according to him, if the Article 102 is examined with the method of teleological interpretation, it is understood that the only aim of the article is not that. Its legal ground also indicates that this article purposes to prevent the presidential election from being obstinate. Reconciliation is not a pre-condition to elect the President. The long and the short of it, it will be in line with the technique of textual and teleological interpretation if the Article 102 is commented as: "the President should be elected, if possible, with a two thirds majority in first two ballots; if not, with absolute majority in the next two ballots. Hereby it is clear that election needs the quorum of decision. It is not feasible to derive a conclusion from the Article 102 textually or teleologically, such that it includes also a quorum of convening session other than a quorum of decision.[120]

[119] Erdoğan, Mustafa " 367 Fantaziden başka bir şey değil", *Zaman*, (27.04.2007)
[120] Arslan, Zühtü "Gerekçeli 367 kararının düşündürdükleri", *Zaman*, 28.06.2007

Ozan Ergül is another lawyer alleging that the quorum of meeting session for presidential election is 184. Ergül states that the ones claiming that the quorum of convening should be 367 bases this claim on that the President has to be elected as a consequent of reconciliation among all sections of the nation. And this consonance is solely possible if the quorum of convening is 367. It is expected that this reconciliation arises as a result of the fact that the parties represented in the assembly attain a common contention. He denominates that reconciliation can only emerge by reason of a political desire or expectation. It is certain that a legal problem cannot be solved with political desires.[121] Ergun Özbudun conveys that legal principles should not be circumvented for the sake of political targets.[122] Also the parties which are in minority in the parliament but anyhow expect reconciliation would not accept any candidate who is not being elected in accordance with their wills. This is coercion by minority over majority. Consonance is a political concept. Any quorum of convening that will provide politicians with taking common decisions is not stipulated in the Constitution.[123] Furthermore, while regulating the different details about decision quorums, no provisions for convening quorums are specified. In

[121] Ergül, (2007), pp.285-294

[122] Özbudun, *Zaman*, (17.01.2007), and also for the same opinion; Selçuk, Sami (2008*), 2007'nin Hukuk Olayı, Anayasa Mahkemesinin 367 Kararı* (The Legal Event in 2007: The '367' Decision of the Constitutional Court), Ankara; Cedit Neşriyat, p.63

[123] There is no special provision about quorums of meetings not only in the Constitution of Turkish Republic but also in those of many other countries. For detail look at; Gözler, Kemal (2007), "Cumhurbaşkanlarının Seçimi: Karşılaştırmalı Anayasa Hukuku İncelemesi" (The Presidency Election: Comparative Constitutional Law Review), *Terazi:* Year: 2, Volume: 9, May, pp.19-29

some articles of the Constitution there exist provisions specifying the qualified majority, but these articles are for decision quorums. No particular provision exists there concerning meeting quorum.[124] As a matter of fact, in the Article of the Constitution which explains the course to the presidential election a regulation is made for just the quorum of decision.[125]

Another allegation set forth by the legists that support the 367 condition in presidential election is the statement "The President of the Republic shall be elected by a two-thirds majority of the total number of members of the Turkish Grand National Assembly and by secret ballot" in the Article 102. According to the claims the number 367 which is necessary to elect the President also refers to the quorum for convening session. However, the Article does not include the word "convene", it just embodies the word "elect". In this regard, to elect the President the number 367 is compulsory but no specific majority is stated for the quorum of convening. Ergun Özbudun's opinions on the issue are important; "If the framers of the Constitution really wanted to attain an extensive reconciliation for the presidential election, they would not let it go at third and fourth ballots."[126]

Sami Selçuk accepts the crisis emerging during the election process of the 11th president in 2007 as a legal problem. The deep motive of the

[124] As in Article 87, three fifths majority requires for the proclamation of amnesties and pardons of the Constitution. By the Article 105 three fourths majority requires for impeachment of the President on high treason. By the Article 175, three fisths or two thirds majority needs for constitutionaş amendment. But all these regulations state "majority" as on quorum of decision.
[125] Ergül, (2007), p.277-283
[126] Özbudun, Ergun "Anayasa Mahkemesi ve Demokrasi", *Zaman*, (03.05.2007)

question is the distinct interpretation of the Constitution articles. The construal of the Court on the Article 102 is much different than many lawyers. Nevertheless, the final decision on the issue belongs to the Court. Naturally the results would be political, but these results would be none of the Court's business, because judges take decisions not in comply with the political results of the Court's decisions but with the written law.[127]

According to Sami Selçuk, the Constitutional Court gave fallen decisions with *exces de pauvoir* by creating powers for itself referring to some inconsistent pegs.[128] Moreover, the Court ignored the historical interpretation and thoughts by this decision.[129]

Another dimension of the issue is that in the past four presidential elections no such controversies or disputes have happened, although they were made in line with the Article 102 of the Constitution. Therefore, the Constitutional Court put the legitimacy of the previous four presidents in shade.[130]

The decisions of the Constitutional Court are final and recourse to judicial review for them is closed. The election of the new president by the parliament in 2007 was banned by attaching the condition of the meeting quorum of 367. Participation in management which is a due of democracy was averted. We are not possible to admit this decision a gain in the name of democracy. It can be said that democracy which means people's rule is

[127] Selçuk, (2008), p. 15
[128] Ibid, p.27
[129] Ibid, p.49
[130] Ibid, p.59

damaged by this decision taken by judges. In short, this decision is an achievement not for democracy but for juristocracy (the rule of judges) and the running out of democracy."[131]

Ali Rıza Çoban contributes to the discussions by arguing that this decision of the Court is to produce a political principle;

> In this way the Court yields a power which is not prescribed in the Constitution: "the election of the president by reconciliation". It is quite controversial that the Court created a political principle by interpretation in terms of democracy. Because the Constitutional Court does not frame constitution but act in framework of the Constitution in force and which was created democratically.[132]

This decision adopted by the Constitutional Court was criticized not only by jurists but also by politicians. Recep Tayyip Erdoğan, the Prime Minister of Turkey, criticized the Court with the words;

> This 367 decision has not finished yet. It will be spoken much more. This is a black sheep for the law. The elections of Özal, Demirel and Sezer are still in mind. Where were these political parties then? And where were these legal institutions? This decision has been given by eternal imposition.[133]

The Constitutional Court interpreted the Article 102 with the 367 decision in such a manner that has never arisen before. The Court construed by this decision that the presidential election cannot be initiated unless 367 deputies are present in the first meeting session.

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[131] Ibid, p.68

[132] Çoban, A. Rıza "Anayasa Mahkemesi Anayasal Demokrasinin Güvencesidir" http://www.hurfikirler.com/hurfikir.php?name=Yazilar&file=article&sid=4447 (13.03.2009)

[133] The speech of the Prime Minister on NTV 29.05.2007 and in press (30.05.2007)

Many jurists and also I are on the side of the thought that no provision regarding 367 as the quorum of meeting in the Article 102 of the Constitution is embodied. The Constitutional Court gave this decision by interpreting the related article differently. However, it is clear that this decision is far away from a legal basis. In this regard, the question why the Court gave such a judgment recurs to the mind. The Court is naturally a constitutional institution and is also bounded to the Constitution itself. Since it is not proper to interpret the legal rules for discrepant purposes, this 367 judgment involves some question marks in it about the role that a constitutional court should lay on in a constitutional democratic republic.

During the 11th presidential election the party which had most deputies in the parliament and was in the power was the AK Party. It is inevitable that the candidate proposed by the party in power is elected as the President. Nonetheless, the opposition parties among which the CHP was in front perceived the AK Party's candidate as an imposition on them and strived for blocking the elections. The allegation thrown out by Sabih Kanadoğlu such that 367 deputies should be present in the parliament as a quorum for the first convening session in order the President to be elected developed into a solution attached by the opposition parties and some fence straddles. This claim which was away from democracy and legal basis found acceptance by the Constitutional Court and the presidential election was, so to speak, sabotaged by the decision of the Court.

As mentioned in the former chapters, the Constitutional Court which gave similar decisions in past years gave judgment which is contrary to democracy by trying to protect some status quo values. Ozan Ergül criticizes this attitude by the words:

> The Constitutional Court which was contemplated as a hegemonic protective institution which tries to eliminate all kinds of threats possibly coming from the majorities who are against status quo has continued to become an important tutelage foundation of the democracy that is peculiar to us sometimes by sticking to the understanding of the militant democracy and sometimes by erecting dams against the majorities who want to use their freedoms indefinitely.[134]

The Constitutional Court made use of the 367 decision in order to reach certain political targets. This political target is to prevent Abdullah Gül who is the candidate for the 11th president proposed by the AK Party from being elected and to enable the TGNA to take decision for early elections. Naturally this attitude of the Court turned out to be suspicious between politics and law. The Constitutional Court whose equivalents in the world try to keep freedoms unfortunately acted as if it was a security guard for status quo in Turkey.[135]

On the other hand, the manifesto given out by the General Staff on the day before the day on which the Court would reveal its decision and named by public as "e-memorandum" is thought to have an effect on the decision of the Constitutional Court. It is thought provoking for a state

[134] Ergül, (2007), p.227
[135] For this definition see Erdoğan, Mustafa "Anayasa Mahkemesi Neye Yarar?", *Radikal*, (13.05.2003)

governed by the rule of law that the military staffs who are the defense force for the state declared an opinion about such a legal issue and more ironically a decision which is parallel to this opinion was given out by a constitutional court.[136]

Since the Constitutional Court is a foundation which has the function of constitutional law, it may be natural for it to be something like a brake mechanism against parliaments or majorities. However, it is incorrect for it to give out decisions assuming that some threats would come from periphery to center. Ozan Ergül assesses this attitude with that the Court was established by the 1961 Constitution. This characteristic of the Constitutional Court can be observed in its approach as a balance mechanism in protecting the minorities in the parliament against the present majorities. [137]

The controversies on the Constitutional Court are not restricted to the 367 decision. Also, it became another controversial point for the Court to declare the "reasoned statement". According to the Article 153 of the Constitution the decisions of the Constitutional Court have to be declared with their justifications. The Constitutional Court clearly infringed this article several times by announcing the decisions via press or notice. Although the judgment on the quorum of 367 deputies was given out on 1st May 2007,

[136] Ozan Ergül claims that the last ally of the Court on this issue is TSK (Turkish Armed Forces) in order to protect central values. Ergül, (2007), p.296
[137] Ibid, p.249

the reasoned statement was published in the Official Gazette on 27th June 2007.[138]

In this part, the decision on the quorum of 367 deputies for the first convening session of the TGNA given out by the Constitutional Court was examined. The thoughts of the different jurisconsults, lawyers and politicians were widely included. It was brushed that the Constitutional Court did not give out a legal decision but interpreted the Article 102 of the Constitution differently for a political purpose.

3.3. Judicial review of constitutional amendments (article 10 and 42)

Another point in the focus of the disputes regarding Turkish Constitutional Court is whether the Court has the power to examine the constitutional amendments. In the previous chapter, the constitutional amendments and the decisions taken by the Court on these amendments in the period between 1960 and 1980 were handled. The effect of the historical experiences concerning the Constitutional Court on the parts of the 1982 Constitution which regulates the Court's functioning was explicated.

The 1961 Constitution kept quiet about examining the constitutional amendments while regulating the duties and powers of the Constitutional Court. Later, this vacancy was expanded by the Court and it gave to itself the power to supervise the constitutional amendments in some decisions.

[138] See the official gazette for the decision of the Constitutional Court numbered E.2007/145, K.2007/4. (27 Haziran 2007)

Just because of this, by the constitutional amendment made in 1971, the Court was given the power to examine and verify the constitutional amendments only with regard to their form. However, the Constitutional Court interpreted the form examination as substance examination by expanding its powers in the decisions taken in between 1971 and 1980. We mentioned in previous chapters that it was a wrong application that the power of examining the constitutional amendments with regard to their substance without clearly stipulated in the Constitution was overtaken by the Constitutional Court.

Turkish Constitutional Court once again went under controversies at the time of constitutional amendments held in 2008. The reason is the cogitated amendments in the articles of 10 and 42 of the Constitution. The AK Party which was in power together with the MHP supporting it in this issue purveyed amendments in the articles 10 and 42. This amendment was ratified with 411 votes out of 550 members of the Parliament and publicized by the President. However, the CHP carried the amendment again to the Constitutional Court with a request of nullifying it. The Constitutional Court gave the related decision on "Act No 5735 of 9 February 2008 on the amendments in some articles of the Constitution of the Turkish Republic" and annulled the constitutional amendment by examining it with regard to substance. However, the reasoned statement of the annulment decision was

published in the Official Gazette on 22 October 2008 after 5 months from its decision.[139]

The aim of the constitutional amendment was to abolish the prohibition of headscarf and to expand the boundaries of educational freedoms. For this purpose the AK Party and the MHP initiated a combined action to make the amendment. This amendment was also disputed very much in public. Especially the claims emerged such that the constitutional amendment was in conflict with the principle of secularism embodied in the Article 2 of the Constitution and protected from amendment and even any proposal for amendment by the provision of the Article 4. Nevermore, the Constitutional Court swelled into a very polemical institution after nullifying the related amendments. As to allegations, the Constitutional Court can examine the constitutional amendments only with regard to form not to substance. In spite of this, the Court fabricated new powers which not stipulated in the Constitution for itself by examining the substance of the amendments.

Rather than legally inquiring this decision the important thing is the role that the Constitutional Court overtook via this decision. Why the Court gave such a decision? With what kind of constitutional justifications it gave the power for itself to verify the constitutional amendments as to substance? Striving to answer these questions will contribute to acquirements on the role of the Court between the law and politics.

[139] Official gazette, E.2008/16 K.2008/116 (22.10.2008)

Before all else, the Constitutional Court's power to examine is regulated in the 1982 Constitution as: "The Constitutional Court shall verify the constitutionality, in respect of both form and substance, of laws, decrees having the force of law, and the Rules of Procedure of the Turkish Grand National Assembly. Constitutional amendments shall be examined and verified only with regard to their form". [140]

As it is clear cut in this article, the Constitutional Court is given power to examine the constitutional amendments only with regard to their form. In addition, what is meant by form is clearly and explained in detail in the following paragraphs of the article. Despite these all, the Court annulled the constitutional amendment by examining it in terms of substance.

The prohibition of headscarf in universities is a polemical issue over many years with the context of both educational freedom and secularism in Turkey. Therefore, the constitutional amendment concerning the headscarf freedom and its annulment are equally disputed in long run and occupied the vox populi. Lawyers, politicians, journalists, columnists and even the members of the Constitutional Court announced many opinions on this issue. Mentioning about how the various sides evaluated the issue will be beneficial in understanding the polemics on the Court.

The decision of nullity of the Constitutional Court which was given by examining it as to substance took 9 affirmative and 2 privative votes from the members of the Court. Haşim Kılıç who is the head of the Constitutional

[140] Turkish Constitution (1982), Article 148.

Court and Sacit Adalı who is one of the members of the Court casted privative votes, and also stressed that the Court has no statutory power to verify the constitutional amendments in substance. According to statements lodged by Haşim Kılıç for newspapers:

> In the Article 6 of the Constitution it is embodied that no person or agency can exercise any state authority which does not emanate from the Constitution and in the Article 11 that the provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals. In these articles the Constitutional Court is exempted from the institutions which should obey the Constitution. The Court who has to examine as to form made verification in substance by reproducing some authorities and new powers for itself. ....only a constituting power can restrict the authorities of a constituting power. However, it is inevitable that if the Constitutional Court exceeds the legal boundaries stipulated by the constituting power it replaces the constituting power.[141]

According to majority, the Constitutional Court itself actually disabled the irrevocable provisions by removing the possibility of meeting the needs of the posterity. Kılıç who emphasized that the Court members while nullifying the amendments reproduced a rule which does not emanate from the Constitution recorded that the political processing was bounded to legal custody by means of this annulment decision.[142]

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[141] Mahkeme hukuksal sınırların dışına çıktı", *Yeni Şafak*, (23.10.2008), Mahkeme Meclisin Yetkilerini Tırpanladı", *Star*, (22.10.2008)

[142] Also Haşim Kılıç revealed these statements: "The Constitutional amendments can always be introduced in order to string along with the dynamism of the social and political life. If the irrevocable rules are not dynamized any interference out of democracy becomes inevitable. It is not right to devise some decisions by making interpretations on the distrust towards the TGNA through exemplifying some excessive assumptions, even though introducing new constitutional amendments requires just the necessary majority in the Parliament. It is unavoidable that the balance among legislative, executive and judicial powers destabilizes if it is made possible to examine the constitutional amendments with regard to substance in order to keep the constitutional values. The related amendment

As well, the other member, Sacit Adali, who gave privative vote for annulment request notified as following:

> The interpretation that the amendment runs contrary to the Constitution's principle of secularism is a forced interpretation. With this decision of the court, which has the quality of setting a precedent for future cases, Parliament will never even suggest or even think of proposing or drafting constitutional amendments, fearing that the court might interpret any change in a different manner. The legislator will come up against the three unchangeable provisions of the Constitution in every constitutional amendment planned, let alone when drafting a new constitution.[143]

Mehmet Turhan agreed with what Chief Justice Haşim Kılıç and Constitutional Court judge Sacit Adali, both of whom dissented, said: "It was a violation of students' right to education based on an abstract threat of Islamic fundamentalism…In a state regime where the nation has sovereignty, there can be no room for divine will based on Godly orders….The court made a ruling by taking possibilities and assumptions into consideration. It engaged in sort of a mind-reading activity. It restricted freedoms relying on assumptions. If pressure is imposed on women who do not cover their heads in the case of headscarf freedom, universities have the authority to prevent such pressure. They can take measures."[144]

It is quite interesting that the head of the Court and a member criticized the decision and announced their views on the issue. It will be wrong to expect that all the Court members have a common opinion for a

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refers to not other than reifying the principle of equality which one of the universal principles of the Constitution. Universities are not military posts. "The Court scythed the powers of the Parliament.", *Star*, (22.10.2008)

[143] "Mahkeme Meclisin Yetkilerini Tırpanladı", *Star*, (22.10.2008)

[144] "Top court decision cripples Parliament", *Zaman*, (23.10.2008)

decision. Some of the 11 regular members may think differently. Nonetheless, there is a distinguished point in the annulment decision of the constitution article stipulated. The members themselves clearly criticize the decisions of the Court. What is more they accused the Court of violating the Constitution.

The decision of nullity by the Constitutional Court of the constitutional amendments got reactions by political side as well. Bekir Bozdağ, head of the AK Party's parliamentary group, said the reasoned decision had set a precedent, making any future constitutional amendment difficult. "We respect the decision. The decision is binding but the reasoned decision is crossing into the territory of legislation. The court's reasoned opinion was a step backward, a mistake that would be nearly impossible to correct, asserting that with this opinion, the Constitutional Court has drawn red lines around Parliament's legislative powers…With this decision, Parliament's authority to change the Constitution and draft a new constitution will be subject to approval of the Constitutional Court. The decision is an intervention in legislation. Parliament's legislative powers have been dealt a major blow, if not completely taken away." According to Sadullah Ergin who is the deputy chairman of the AK Party Group in the Parliament, this is a decision which compelling the principle of separation of powers and taking the TGNA under custody.

On the other hand, Mehmet Ali Şahin, the Minister of Justice, criticized the decision as "the question whether the legislative organ can introduce constitutional amendment with its free and independent will from now onward came on the Turkey's agenda. This is an issue which will be argued long time by legists. Mehmet Şandir who is the deputy chairman of the MHP assessed the issue as**:** "This decision of the Constitutional Court will cause irritation in the conscience of the nation. We respect the decisions of the judiciary but we find this decision to be overwhelming. Secularism has to be the guarantee of our citizens' freedom of religion. Freedom of religion is a fundamental human right. It is guaranteed under international law. We do not find this decision -- which excludes our people who were deprived of their right of education because of their headscarves and turns them against the state, regime and social order -- useful in any sense" [145]

Köksal Toptan, the President of the TGNA, criticized the Constitutional Court as to the news in Hürriyet with these words:

> The boundaries of every power or authority that are inalienable for our democratic system are stipulated in the Constitution or in the relevant codes of the law. The separation of powers requires not an order of precedence among the organs of state, not any interference among them but functioning them in harmony. No power can replace another power while exercising the authorities emanating from the Constitution and in no way exercise any right which is not prescribed in the Constitution, too. It cannot be expected that our Parliament shares its powers emanating from the Constitution with other organs. Unfortunately, there have emerged some serious

[145] These speeches are taken from Taraf; "Yeni bir anayasaya kadar kapalıdır", *Taraf*, (23.10.2008)

> concerns recently about the functioning of the separation of powers which establishes the basis of our democratic system.[146]

According to Justice Minister Mehmet Ali Şahin the reasoned decision rendered Parliament powerless. "The legislative organ has been turned into a position where it cannot make constitutional changes independently. The AK Party does not think of changing the Constitution's unamendable articles or giving up on them. To the contrary, we care about how we can strengthen the fundamental principles of the republic, how we can develop sincere commitment of our people to the regime. What are we going to do? Give up all these and do what? Go back to the sultanate?"[147]

In addition to the politicians which criticize the nullity decision of the Constitutional Court, there are also some others who ratify it. The CHP parliamentary group chairman Hakkı Süha Okay states: "In a democratic country, the legislative [branch] does not have the right to do everything. There is no such thing as the legislature being able to do whatever it wants without boundaries."[148]

Necati Ceylan, secretary general of the Association of International Lawyers, argued that "No constitutional amendment shall be introduced from now onward. The Judicial power overtook the duties of the legislature. Thus the voice will not belong to the nation but to the judicial power from this

[146] "Toptan'dan Anayasa Mahkemesine Eleştiri", *Hürriyet,* (27.10.2008)
[147] "Top court decision cripples Parliament", *Zaman*, (23.10.2008)
[148]"Top court decision cripples Parliament", *Zaman*, (23.10.2008),"Yeni bir anayasaya kadar kapalıdır", *Taraf*, (23.10.2008)

time on. Ahmet Gündel, a retired prosecutor of High Court, alleged that the annulment decision of the Court and its justification is incompatible with the Constitution. He demanded that the powers of the Court shall be regulated de novo and told that this fact will obstruct Turkey's path.[149]

As mentioned above this verdict of the Court had been discussed heaps of time. The columnists of newspapers also intervened in these discussions. Taha Akyol asserts that the decision of the Constitutional Court is not legal but political and the Court seizure the powers of the legislative organ. He sets forth that in the decisions of the Court the ideological factors are so dominant that 70 percent of the cases for the purpose of expanding the fundamental rights and freedoms presented to the Court have been rejected and just 30 percent of them have been verified. On the contrary, for the cases concerning the provisions in the Preamble of the Constitution and the characteristics of the Republic which are abstract, philosophical and constructive the Constitutional Court annulled them with a percentage of 60%. Ad namely, the Constitutional Court can nullify any constitutional amendment as to its ideology by assuming it as "relating". Although, by this amendment, even a comma in the provisions of the Article 2 of the Constitution was not changed, the Court adjudged that it was "relating" to the characteristics of the Republic and annulled the tenure of the TGNA to

[149] "Mahkeme hukuksal sınırların dışına çıktı", *Yeni Şafak*, (23.10.2008)

make constitutional amendments. This decision is upon the political understanding of the honorable members of the Court.[150]

Engin Ardıç, as another columnist criticizing the Court's decision, says that the Constitutional Court can take decisions against the Constitution itself. That is to say, the Court itself transgresses the Constitution and in some sort prevents the assembly from fulfilling one its duties.[151]

Oktay Ekşi is one of the columnists that give support to the Constitutional Court about the decision. Ekşi alleges by addressing the parties which amended the articles 10 and 42 such that "If you do not force the Constitutional Court assuming that everybody is goofy, I mean your attempt to move the keystones of the Constitution of which amendment shall not be proposed, you will not confront to such a restriction."[152] Similarly, Rıza Türmen gives support to the court by asserting that the Court is legislature negative. The Court stayed between the concepts of sovereignty and legal state. Sovereignty is not vested solely in the Parliament. All constitutional institutions have the authority to utilize that sovereignty:

> It does not comply with the essence of the Constitution to amend the principles of which amendment shall not be proposed through amending the articles which are proposed to be amended. However, the power to construe the Constitution belongs to the Constitutional Court and while exercising this power the Court naturally makes interpretations according to the aim of the Constitution. [153]

[150] Akyol, Taha "Yetki Gaspı", *Milliyet*, (23.10.2008)
[151] Ardıç, Engin "Sistem Kilitlenmiştir", *Sabah*, (25.10.2008)
[152] Ekşi, Oktay "Anlamayana anlatırlar", *Hürriyet*, (23.10.2008)
[153] Türmen, Rıza "Anayasa Mahkemes'nin kararı: Egemenlik ve Hukuk Devleti" *Milliyet*, (27.10.2008)

The decision of the Constitutional Court got reactions also by lawyers. They come together in a common opinion that the decision is illegal. Ergun Özbudun as a constitutional lawyer asserted that this decision of the Constitutional Court triggered the juristocracy over democracy in the article which he wrote just after the announcement of the justification. This decision legally has no justification at all. Other than that, in the similar cases in 1987 and 2007 the Court made true interpretations of the provision in the Article 148 and announced that it had no such a power. Nevertheless, it examined the constitutional amendments with regard to substance in contradiction with itself.[154] Yavuz Atar puts forth that the Constitution was violated and the right of equality was transgressed. The Constitutional Court can examine the constitutional amendments only with regard to their forms. This is specified clearly in the related articles of the Constitution. Here is authority enforcement. Secularism is being construed as a style of life. This is a profoundly problematic construal which has no legal ground. The rights of the students were derogated by insensible assumptions. The principle of equality was treaded once more. They intervened in the scope of the

[154] Özbudun, Ergun "Yeni Anayasa şart oldu", *Zaman*, (23.10.2008) and Özbudun also states that "The justification made by the Court never satisfied me at all. It does not comply with the fundamental principles of the law interms of both form and content. It was certain anyway after the annulment decision that they would arrange such a justification. It was not surprising for me because as you make your bed, so you must lie in it. I do not regard this assessment as just. We have a justification which is arranged only with assumptions. If we take road with prejudices and assumptions, every thing can be evaluated as possible in the law. The content of the law has never been emptied lthis much." "Top court decision cripples Parliament", *Zaman*, (23.10.2008)

legislative organ. With this justification, many provisions of the Constitution including secularism were infracted.

Zühtü Arslan, an expert on the Constitution, said the court evidently violated the Constitution by overstepping its authority with the headscarf ruling. "The paradigms of national sovereignty were made upside down. The right to change the Constitution belongs to Parliament, but the court joined Parliament to use this authority with its scarf ruling, the reform package to lift the headscarf ban received a record vote from Parliament with 411 deputies of the 550-seat Parliament voting in favor."[155]

Hikmet Sami Türk averts that the Constitutional Court reproduced a new principle just as in the 1961 Constitution. According to him:

> In the decisions of the Court before 1982 the form and the substance were being intermixed to each other. The 1982 Constitution clarified this confusion. This constitution introduced proposals, quorum of decisions and two ballots for legislation. However, the Constitutional Court handled the regulation for headscarf not only within regard to its content but also to the articles of the Constitution whose amendments are not proposed.[156]

[155] "Top court decision cripples Parliament", Zaman, (23.10.2008) and the interwiev was made by Bekir Berat Özipek with Zühtü Arslan about this decision in Anlayış, (2008), July, pp:28-32

[156] "Top court decision cripples Parliament", Zaman, (23.10.2008)

Apart from these opinions, many non-governmental organizations from civil society called down the decision of the Court and averted that the Court took the decision by envisaging the political results of it.[157]

As is seen the decision of the Court about examining the constitutional amendments caused many discussions. People who were for or against this decision announced their opinions in public long time. These opinions were widely laid place.

The Constitutional Court is a constitutional legal foundation and its restrictions and duties are prescribed in the 1982 Constitution. The Court shall not and should not exceed these boundaries. Otherwise it acts in conflict with the Constitution from which its legitimacy emanates. The 1982 Constitution introduces the Court with examining the constitutional amendments only with regard to their forms. Discontented with this, it clarifies the power to examine constitutional amendments in form based on

[157] Hülya Şekerci, head of the rights' group Freedom Association (Özgür-Der) : "the Constitutional Court's headscarf decision was a crime committed against fundamental rights and freedoms." Neslihan Akbulut, the secretary-general of the Women's Rights Association against Discrimination (AK-DER), a religious-minded women's organization: "I do not see what part of the amendment was a violation of the principle of secularism. Which of these changes violates secularism? Having all citizens make use of state services equally? Or treating headscarved citizens or citizens of other religions equally?", Association of Human Rights and Solidarity for Oppressed Peoples (MAZLUM-DER) head Ömer Faruk Gergerlioğlu: "the reasoned statement was not a legal declaration but a political one. They really had to push it to find legal evidence. It is really nearly impossible and a great achievement to refer to this as being against secularism. However, this was what we expected", Human Rights Association (İHD) President Hüsnü Öndül: "We announced our principled stance on the headscarf earlier. This is a decision against human rights. The power to change the Constitution, which is normally held only by the legislative organ, has been taken away from it with this decision of the Constitutional Court." "Top court decision cripples Parliament", Zaman, (23.10.2008)

past experiences. Naturally it is no way possible for the Court to examine anything other than this authority.

Despite all mentioned provisions of the Constitution, the Constitutional Court annulled the constitutional amendments proposed in 2008 by justifying the decision with some abstract concepts such as the essence or spirit of the Constitution. This decision which is clearly a wrong one is out of the boundaries of the Court. The Court reproduced new powers for itself by taking such a decision. Because the decisions taken by the Court are final and the recourse to appeal is closed. The constituting framers supply the assembly, through the Constitution, with the power to make amendments in all articles other than the first three articles provided that the majority of the parliament members approve those amendments. Any amendments made within these boundaries can be annulled by any foundations in no way. The Parliament can bring some reforms for the Constitution according to the changing conditions in life and the needs of the society. Compelling a kind of hypothecation on this right and restricting the powers of the assembly is a course to the juristocracy. Democracy sustains injuries by these decisions.

Does the Constitutional Court have the authority to examine and verify the constitutional amendments? This may only be the case if specified in the constitutions. The boundaries of this verification are drawn by the constitution. If the Constitution stipulates clearly whether the Constitutional Court can examine the constitutional amendments as to form or substance,

any action out of this restriction evidently means violation of the Constitution. As the Article 6 of the 1982 Constitution notifies that no person or agency shall exercise any state authority which does not emanate from the Constitution, the Constitutional Court by exercising a state authority which it is not given by the Constitution obviously commits a constitutional offence. The Constitutional Court which is the safeguard of the constitutional democracy damages its legitimacy by acting as such.

CHAPTER IV

Center-Periphery Relations and Hegemonic Preservation of Turkish Constitutional Court

In this chapter of the study, answers to the question as to why the Turkish Constitutional Court gave the verdicts explained in the third chapter is going to be sought. The role played by the Constitutional Court in taking these decisions that have allegated as no legal basis and are criticized by many lawyers and political scientists is going to be analyzed.

Federalism, division of powers, economic benefits, protection of rights, constitutional jurisdiction, democracy, and hegemonic preservation are some of the approaches asserted for the reasons of the establishments of the constitutional courts in the world.[158] Mehmet Turhan defined the reason for the establishment of the constitutional courts as "The aim of constitutional state is implementation of human rights in the world."[159] The limitation of the government powers and taking the basic rights and liberties under protection are the very basic factors in the emergence of the Constitutional Courts. Therefore constitutional courts are structured differently and are rigged with larger authorities from the other judicial institutions.

While constitutional courts carry out their duties, they are limited with the powers given to them by the constitution. However, differences in interpreting the constitutional articles may occur on some conditions. These

[158] Ergül, (2007), pp. 99-121
[159] Turhan, (2005), p. 7

differences have a great effect on the decisions given by Courts. Constitution articles are legally binding texts and thus all the state institutions including the constitutional courts are obliged to enact in accordance with them. Concordantly, I tried to state the arguments and assertions originated from diverse interpretations of the constitution articles.

It is obvious that the constitutions arranged in details causes problems about the duty and the power of the constitutional courts. Court members have tendency to enlarge these authorities by interpreting. While constitutional court judges fulfill their duties, by constitutional jurisdiction's very nature, they restrict the political organs claiming that they take the basic rights and the liberties under preservation. Hence, a political issue becomes a judicial matter and the solution of it is left to the judiciary. Politics' judicialization accounts for the explanation of this process. However, that the organ to solve the matter is the constitutional court does not change the fact that the matter bears a political impair. As a matter of fact, it may also be possible for judiciary to become politicized in this process.[160] Constitutional judges are the ones that interpret the Constitution articles. As it is stated by Charles Evan Hughes, an American Constitutional Court Judge; 'we are dependent on a constitution, however, the constitutional articles are

[160] Ergül, (2007), p.124

what the constitutional judges say'.[161] This is very interesting in how large is the authority the court members bestow on themselves.

What is important in interpreting the constitution articles is to which aim the interpretation is done. In accordance with its purpose of establishment, in context of basic rights and liberties, they must do right-based interpretations. While interpreting the constitutional articles, to extend their field of power and even to be effective interferingly to the legislation and enforcement shatter the Constitutional Court's role in the constitutional system. Likewise, constitutional court which adopts ideological-based approach crumples its own legitimacy.[162]

Constitutional courts are not a fourth power beyond legislation, execution and judiciary. Constitutional courts gain its legacy and authority not by joining the political administration of the government but by having the role of a guarantor of it based on the constitution. Korkut Kanadoğlu states the drawbacks of the efforts of expanding the rights of the constitutional courts as such:

> It is an extreme and wrong manner to increase the process of Constitutional jurisdiction by a 'majority' comprehension... Whatever the conditions are, Constitutional Courts must not interfere the arrangement field of the legislative organ. Constitutional Courts can not take political verdicts instead of other organs; can not issue a law rule itself except the exceptions like temporary precautions or can not notify the other organs about the content of what they should arrange.... Such a condition will lead to politics not fulfill its inevitable

[161] Cited by D.G. Barnum (1993), "The Supreme Court and American Democracy", New York, St. Martin's Press, p. vii
[162] Arslan, Zühtü (2005), *Anayasa Teorisi* (The Constitutional Theory), Ankara; Seçkin, p. 53

> function in democratic structure, and threat of moving constitutional democratic structure instead of government of judges. [163]

Many questions and arguments were aroused from the decisions of Turkish Constitutional Court during the 1961 Constitution as well as the 1982 Constitution period. I mentioned these controversial issues in the second and third chapters. In the democratic constitutional states, it is the constituent power to decide the constitutional borders of the constitutional court. Accordingly, no organ can practice the power that is not explicitly given to it and in no way with any interpretation can go beyond the authority bestowed to them by the constituent power. At this point, it is important to call our attention to how the constituent power positioned constitutional court in Turkish political-legal structure while determining the role of the Constitutional Court. While 1982 Constitution was prepared, the constitution brought forth different legal reforms about the authority of the Constitutional Court. The main of these legal reforms is originated from the Constitutional Court verdicts during the 1961 Constitution. Yet, Constitutional Court's effort to extend its power in this period and forming many field of authority by exceeding its constitutional authority are taken into consideration during the period of 1982 Constitution preparation. Namely, after its verdicts that the Court can analyze constitutional changes by form and substance,[164] that it

[163] Kanadoğlu, Korkut, (2004), p. 13
[164] AMK., 1970/1, K. 1970/31, Kt.16.6.1970, AMKD., S.8,s.323; AMK., 1973/13, K.1975/87, Kt.15.4.1975, AMKD., S.13 s.431

has become a *cofounder power and sub power* can be said. Constitutional Court must not extend its field of duty and authority by interpretation and implementation through the authority which is not bestowed to it clearly. As a matter of fact, article 6 of 1982 Constitution clearly banned such a condition no person or agency shall exercise any state authority which does not emanate from the Constitution. Despite all these, the Constitutional Court's use of an authority which is not given to it clearly by the constitution meant a usurpation of an authority.[165]

As a reaction to the verdicts in the past, 1982 Constitution added the principle "in the course of annulling the whole, or a provision, of laws or decrees having the force of law, the Constitutional Court shall not act as a law-maker and pass judgment leading to new implementation"[166] to the articles forming the Constitutional Court legally. This is evidence like quality that it requires a more restricted Constitutional Court.[167] Furthermore, in one of the decisions given by the Constitutional Court "constitutional court's task is not to debate whether appropriate or not but find if against the constitution. As long as they are not against the constitution, laws can not be cancelled asserting that they are not the most appropriate".[168] However,

[165] Yanık, (2008), p. 85
[166] Turkish Constitution (1982), article 153/2
[167] Yanık, (2008), p. 72
[168] AYM. E. 1994/82 K.1995/9 KT. 15.2.1995, AYMKD. Issue.31/2 p. 512

interestingly, though the Constitutional Court admitted that it has no such authority, it has continued to increase its authority.[169]

Whether, the Constitutional Court, as a constitutional institution, should be in the characteristic of a court as a law in a whole and great extend; or in accordance with its condition, act like a political actor producing politics to reach political targets? What is intended by giving decisions with no legal basis mentioned in the previous chapters and efforts to extend its authority? Why does Constitutional Court practice the authority not given to it by constitution obviously?

4.1. Center-Periphery Relation

Turkey has completely changed the administrative system inherited from the Ottomans and turned into a Republic ruled by democracy. People in democratic states elect the people to govern them and authorizes representatives to give decisions about of them. This authority in Turkey was used by a single party until 1946. Those who were in power during the single party period accepted Turkey's establishment ideologies and they injected a 'Kemalist ideology' to spread it to all the layers of the society. While establishment ideology was accepted by some communities, it was not accepted by a greater majority i.e. a conservative community. Perhaps the first reason for this matter is that the supporters of the ideology could not

[169] Yanık, (2008), p. 72

understand the need of the conservatives well. At this point, a distinction of opinion emerged between the community and the state.

That Democratic Party was elected as the party in power in 1950 and its policies were for the need of the people received a great support from the society. The successful election one after another showed that the Democratic Party politics were adopted by people. However, a polarization between the bureaucratic center which was placed around the establishment ideology of the state and the portion of the community known as periphery came to the middle. At this point, Kemalist ideology, which established the Republic of Turkey, accepted itself as the owner of the state and with the motto of '*for the citizens despite the citizens'* which should not be in democratic states, interfered the politics of the elected politicians.

This polarization accounts for the underlying fact under the military coup of 1961, military note of 1971, military coup of 1982 and intervention of military wing to the political life, which was named as post-modern military coup in 1997. Center-periphery[170] distinctions forestalled the adoption of administration type that is state and the public at the same pivotal state. When the central bureaucratic 'elites' saw that their hegemonies were under threats, they accepted to shelter under the wings of the military and supported the temporary postponement of the democracy. At this point, public interest and need does not bear any significance for them. As

[170] For the term and opinion see Mardin, Şerif (1975), "Center-Periphery Relations: A Key To Turkish Politics", Political Particiation in Turkey by Akarlı, Engin and Ben-dor, Gabriel (ed.), İstanbul, Boğaziçi Publication, pp. 7-31

mentioned by Gramsci, state governs the public by an ideology expressed as tacitly covered. In other words, state is not equipment only for a restrainment. Along with the aspect of restrainment and the sovereignty that it maintains through political power, the state has also hegemony through its cultural power and is not possible to be neglected.[171] While defining the state as a whole in unity Louis Althusser, classified it into two categories as State Restraining Devices (SRD-government, police, gendarme, military, jurisdiction) and State Ideological Devices (SID-literature, art, cultural activities, radio and television, educational institutions). Whereas SRDs bear violence to process restrainment phenomenon, SIDs are ideological instruments that provides power to sovereign class and makes it hegemonic.[172] In other words, SRDs are the institutions that form legal basis for the SIDs. They are the mechanisms that describe the rightfulness of the things done or to be done. While describing the military coups as to which aim they served in Turkish political life, Nur Vergin touches upon:

> No doubt the accomplices of the 12 September military coup were not having the aim of causing Turkish bourgeoisies a hegemonic class. The logic of the military coup, most probably, was to stipulate and fortify the predominance of the state which had been crumpled since the transmission to the multi party period.[173]

All these international exchanges in the 21st century led to various national and international factors emerged to prevent the military

[171] Vergin, Nur (2008), *Siyasetin Sosyolojisi* (The Sociology of Politics), İstanbul;Doğan, p. 88
[172] Althusser, Louis, (1978), translated by Yusuf A. And Mahmet Ö., *İdeololi ve Devletin İdeolojik Aygıtları* (The Ideology and Ideological Aids of State), İstanbul; Birikim, pp. 21-78
[173] Vergin, (2008), p. 90

interventions in Turkish political life between 1950 and 2000 that postponed democracies. First factor is on national grounds and it is the problem that a likely military attempt is adopted as legal by the community. As one can remember, left-right conflicts, economical crisis, claims about the secularism which is the fundamental principles of the constitution, is damaged and threats of religious reaction before 1961, 1971, 1980 and 1997 interferences of military to the politics legitimated these interventions to some extend before the public. Moreover, in some periods, especially before 1980s, military was seen as rescuer. However, economical and political stability since 2000 prevented military from any intervention. Central bureaucratic class can be said not to dare to intervene the power that came by the elections, which is an inevitable principles of democracy. There have been no clashes or conflicts that required the help and interventions of military as it was the case in the past. I believe that a political power which people voted for various reasons and a military intervention that might affect its policies may cause a greater crisis in the society. It is a kind of break mechanism for non democratic intentions.

International closer is another factor in front of the military intervention that is anticipated for strengthening the center hegemony in Turkish political life. Globalizing world affected the relationships between the countries. In a global system where economic and military cooperation's are common, the states see the outside intervention to their inner conflicts as legal. Turkey's European Union membership process and economic as well as

legal reforms accordingly and politics and developments in this adaptation process are observed by Europe. In addition, comments and opinions of European Union authorities on political, economic and military developments in Turkey are significant for Turkey. Hence, a military intervention from the center to the democracy would not be approved by other countries and a power to be formed after a military coup would not be considered as legal. If the state economies which are mainly dependent on import and export are taken into consideration, the likely condition of an illegal and unrecognized power is important. How long-termed would be closed economy which is dependent on a market only within its borders is doubtful. The reaction that the other countries would have against a non-democratic intervention to Turkish political life by central bureaucracy is obvious. Hence, the center could not attempt to continue its hegemony by using an intervention like a military coup.

Well, then, how would the center administrate its own hegemony and 'the state that it owns' away from the wills of the community and parallel to their ideology? If the military interferences since 1960 can not be done, how can the center sustain its force?

4.2. Hegemonic Preservation

Central bureaucratic class sustains its hegemony by law organs recently. In the third chapter of the study, Constitutional Court, whose authority and verdicts have led to controversies, was mentioned. It is

stressed on the fact in details that some of the verdicts issued in 2007 and 2008 were in favor of the center. Many lawyers stated that these verdicts had no legal basis and that the Court was in effort of reaching political targets.

I am of the opinion that 'Hegemonic Preservation Thesis' suggested by Ran HIRSCHL recently is the approach that shows Constitutional Court's role between the politics and the law. Hirschl raised a thesis to explain the transformation of constitutional courts into a powerful actor in political systems. In his thesis which came out as a result of the research conducted in Israel, Canada, New Zealand and South Africa, Hirschl asserts that though the establishment purpose of the constitutional courts seem to be 'the preservation of fundamental rights', in fact it is the need for establishing a constitutional organ to take them under guarantee in a conscious way for the political and economic elites under threat and constraints against the 'surrounding' groups pressure from beneath. Hereunder, constitutional courts which are given power to use disproportionate force in law against the threat coming from the periphery, have become a guaranteeing institution. HIRSCHL asserts that sustenance of the jurisdiction is a conscious and strategic conduct of the center against threats likely to come from the periphery.[174]

[174]Hırschl, Ran (2001),"The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons From Four Constitutional Revolutions", Law and Social Inquiry, Vol. 25, pp. 315-335

To HIRSCHL, the constitutional courts to emerge as a result of this disproportionate force of intervention will pave the way for 'Juristocracy'.

I believe that 'Hegemonic Preservation Thesis' is beneficial to explore recent decisions of Turkish Constitutional Court and explaining its undertaken function. Center-Periphery conflict and center's need for constitutional jurisdiction for protecting itself thus having the need for Constitutional Court pave the way for the verdicts that might result in lawlessness and serve for different aims.

Since Constitutional Court's entrance to Turkish legal system is by the 1961 Constitutions, the way to constitution must be utilized well. 1961 Constitution was prepared after the 1960 Military coup. 1960 Military coup was considered as bureaucratic center's intervention to political field by military wings. In this respect, Hirschl's hegemonic preservation thesis is justified as an accepted starting point from Turkish Constitutional Court's establishment perspective. Ozan Ergül evaluates this condition as such:

> Liberal democracy is the aim of 1961 constitution that is prepared after the 1960 military intervention. However, besides this, there is also will to strengthen the place of the center that has hegemony. Concordantly, constitutional engineering was benefitted from, while rights were constitutional zed, a barrier was tried to put in front of the majority democracy. This barrier should be both reliable and should not have any problem with the issue of legacy. In addition, no doubt should be sensed about this organ's loyalty to the values mentioned in the constitution and even on defining itself as center institution. Such an institution can only be the Constitutional Court.[175]

[175] Ergül, (2007), p. 126. Furthermore, the author by the 1961 constitution attracts our attention to the indication of Constitutional Court's establishment as a precaution to the affect of periphery in democracy and threats against the values of the center as a result of

In addition to this, Ergül asserts that it is too early to say that center-periphery distinctions in Turkish political system came to an end. To Ergül, the center is moving to the periphery gradually. An important reason to that is a new middle-class bureaucratic center, which is more and more strengthening in economy and is formed in provinces and city centers, breaking its power in great extend. Thus, we face Constitutional Court, which is assigned to supervise the accordance with constitution, trying to preserve the central values processed by the constitution. Constitutional Court is a supervising organ against the majority and finds itself in constitutional norms, and by law a preserver of the center surrounded with a fashionable expression 'red lines'.[176]

An interesting improvement was experienced about role of Turkish Constitutional Court played in the structure of the Turkish political-legal structure in the past. The Constitutional Court published a notification through the press about the will of Virtue Party i.e. constitutional change on the article 69 for making it more difficult to abolish a party. This notification was defined as "constitutional/postmodern note". "By the intended change on the article 69 of the Constitution, two third of the vote of the Constitutional Court members was required for the abolishment of political parties i.e. 8 out of 11. It is clear that this was not appropriate for the

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the political events after 1950. Under the circumstances, Constitutional Court had its place in law system as an anti-majoritarian institution. Moreover, constitutional court is ligated to a 'way' determined historical and has to serve to this way. Ergül, (2007), p. 128

[176] Ibid, p. 224

preservation and maintenance of the equilibrium between the party restrictions of Constitutional Court and liberty of political organization". These statements may prove that the Constitutional Court openly interferes politics.[177] Furthermore, Mustafa Bumin, then president of the Constitutional Court, had a very interesting expression saying that their aim was not to give ultimatum but to fulfill their responsibility before the history.[178]

Turkey has been a stage to the efforts of central bureaucratic class to protect their own hegemony in different periods by various means since the declaration of the Republic. Among the leading means are military coups, party abolishment punishments, political restrictions and recent Constitutional Court decisions. While issuing "367 decision", Constitutional Court asserted that a common ground must be formed in the parliament. However, the claims that the main aim was to prevent the Justice and Development Party Presidency candidate Abdullah Gül from becoming a President were realized. That Abdullah Gül's wife wears headscarf is not accepted by some communities and they have been opposing by saying that; "first lady can not be wearing a headscarf." As a matter of fact, a year after this verdict, a change was made in the 10th and 42nd articles of the constitution. The aim of this change was to end the headscarf ban in universities. According to many lawyers; Constitutional Court cancelled this change with no authority and reacted against headscarf once again. Besides,

[177] "Postmodern Muhtıra", *Milliyet*, (23.01.2001); "Hukuk Delik Deşik", *Radikal*, (24.01.2001); "Anayasa Çıkmazı", *Radikal*, (23.01.2001)
[178] "Bizi Kapatırlar", *Sabah*, (24.01.2001)

since no democratic success was gained against Justice and Development Party which has become more and more powerful by each election, a case of Party ban was prepared. Abdullah Gül, who was the President then, was on top of the list of people who were asked to be banned politically. Presidency is an above political institution and jurisdiction is stated in the constitution. Despite this, the Constitutional Court did not remove the name Abdullah Gül from the case and thus maintained its probability during the case. As a result, because of the lack of evidence JD Party as not banned and concordantly the possibility that Abdullah Gül might have received a political ban was also removed. These decisions strengthened the claims that Constitutional Court has become politicized. According to Tülay Tuğcu, former Chief of Constitutional Court, the Court has become politicized to some extend.[179] İhsan Dağı assessed the facts lying under these decisions between democracy-secularism dilemmas. İhsan Dağı emphasized 'democracy's threat to secularism' as the common denominator. To Dağı;

> This logic leads constitutional committee to the point that 'liberty is against secularism; hence liberty can not be tolerated'. As a matter of fact it does... Therefore, the matter was not the secularism; it was neither then nor now. Secularism was used as a simple political and legal tool to ostracize massive communities from the system. Now Constitutional Court is using secularism to ostracize large publics from the system and declaring them as outlaws in the system... Constitutional Court members as well as the great majority of the society know that the problem is not the secularism; but the

[179] "If they let it free, the judiciary will get rid of politicization. However, it does not meet the freedom. If we are to mention Constitutional Court, to some extend it is possible to mention from the politicization of Constitutional Court today. It is not possible not be politicized after annulling a political party and cancelling a law.", Tuğcu, Tülay, "Yüksek Mahkeme bir ölçüde siyasallaştı", *Zaman*, (12.07.2008); About the politicization of the Court, you can also see Kanadoğlu, Korkut (2004), p. 34

> rise of conservative/democratic people in politics, business and academics that they can not prevent ...[180]

Consequently, Constitutional Courts are the guarantee for the superiority of law and restriction of the party in power in the constitutional states. They are responsible for preserving fundamental rights and liberties against the party in power. That they are embellished with special authorities does not give them authority to act against the constitution. In accordance with the separation of powers, the duty and authorities of the legislation, enforcement and jurisdiction institutions are determined by the constituent power in the constitution. It is extremely wrong for constitutional institutions struggle or goes beyond these restrictions. In the constitutional democratic systems, Constitutional Courts must open the ways for individuals and have a preserver role on conditions when the rights of the individuals are under a threat. Having central values or ideology, undertaking caretaker role in case of likely threat perception harms the nature of the Courts. As a matter of fact, the courts must not give verdicts according to the laws that must be but to the laws available.

[180] Dağı, İhsan "Kemalistlerin laiklik oyunu", *Zaman*, (28.10.2008)

CONCLUSION

The powers and the limitations of the power that the ruling parties had were questioned after the Second World War. After the authorities that the ruling parties had especially in the period between the First World War and the Second World War, they had arbitrary and illegal practices. These developments pave the way for the formation and application of different law fields. Pronunciation of human rights and agreements signed in international platforms accordingly, and appearance of constitutional law jurisdiction against the arbitrary practices of the government are some of the examples to the newly formed law branches. Though the history of Constitutional law jurisdiction goes back to the 19th century, its area of implementation and spreading took place after the Second World War.

There are two aims in general in the formation of the Constitutional law jurisdiction. First, limiting the government power against illegal practices that are likely to happen, secondly, take the fundamental rights and liberties of the people that might be victimized under the protection. In this respect the responsibilities that the constitutional jurisdiction bear is highly significant; history has witnessed the dictatorships and the effect of the unlimited government powers on the communities many times.

That the constitutional jurisdiction appeared led to the questioning of the law institutions available in the constitutional states. While courts were available to give decisions in areas such as code of civil law, criminal law,

there was no clarity on the constitutional jurisdiction. Thus, there was an exigency for the institution to implement the constitutional jurisdiction and inspect the compulsory implementation of them by the government. Otherwise, constitutional law would be restricted with only theory and remain as branch of law with no field of application. This institution that would do inspection could be a political or legal one. However, that the institution to inspect the legislation and the execution of the law should be a law institution formed from the judicial mechanism that is the third power in accordance with a need for the division of the powers in understanding of the modern state is the most truthful decision. Accordingly, constitutional courts were established in the world to implement the constitutional jurisdiction.

Constitutional courts are first established to maintain the legislative practices remain within the constitutional boundaries. Constitutional jurisdiction was brought to the legislative activities of the people who were elected to rule themselves. Later, this inspection expanded and executive activities were also taken in constitutional jurisdiction. Naturally, the function and authority of the constitutional courts were increased. In addition to the constitutional jurisdiction, this increase includes activities such as the cases of the dismissal of the political parties, supreme council of state practices, and financial inspection of the political parties.

The decisions taken by the constitutional courts are absolute decisions and are not open to objections. The principle of the superiority of the law in

the modern constitutional states is strengthened by this application. However, this condition brings some drawbacks with it. To begin with, that the constitutional court is the place for the final decisions and some of the decisions made the courts subject to disputes. Constitutional jurisdiction's place on a thin line between the politics and law, and that the decisions are law originated but their political reflections lave led this decision to be debated on for a long time.

The other circumstance that makes Constitutional courts disputable is that the courts had activities in such a way that they tend to involve in political life. By giving different interpretations to their own decisions, the constitutional courts established to inspect the legislation and execution according to the constitution acted against the constitutional articles which are the reasons for their very existence. This condition harms the constitutional legacy of the constitutional courts.

Constitutional Court in Turkey was established by 1961 Constitution. The principle of being rule of law state and protecting the constitutional limits of the legislative and executive activities were effective on the formation. However, there have been conflicts about the Constitutional Court since its establishment. Especially, some of the decisions in the inspections of whether these decisions were in accordance with the constitution paved the way for the increase of these conflicts and questioned the existence of the court.

In this study, Turkish Constitutional Court's role between the politics and law is explained. Judicial review of constitutional amendments made by the Court is mentioned during the 1961 Constitution period. The claims that the Court has given decisions that have no constitutional basis and its effort to expand its own authorities have been researched. The constitutional amendments made after these decisions and efforts and the attempts to limit the range of the duties and authorities by constitutional changes are emphasized on. It has been emphasized on the facts which made the 2007 and 2008 decisions that made the role of the Turkish Constitutional Court within the boundaries drawn by the 1982 Constitution a topic of dispute. Different opinions created by these decisions stated by the public are given place.

No doubt, constitutional courts are inevitable constitutional institutions in constitutional democratic countries. That I am against the opinion asserted in some countries that the constitutional courts should completely be removed must be mentioned here. Constitutional courts have a guaranteeing site for protecting and expanding the basic rights and liberties and the principle of the superiority of law. Complete removal of such institution would harm the principle of law. However, Constitutional courts, for various political aims, should not exceed beyond the duties and responsibilities given to them by the constitutions. As a matter of fact, the courts are institutions of law and are limited with the constitution. Law institutions do not involve in politics and they should not.

The general public consensus on the decisions such as "367 decision", "judicial review of constitutional amendments (article 10 and 42)" and "not removing the name of the President from the case of the annulment indictment of the Justice and Development Party" of the Turkish Constitutional Court are believed to be interpreted in favor of the political intends by constraining the law. These verdicts and political intends are aforementioned in details. Besides, I tried to explain why the Constitutional Court has such a decision by "Hegemonic Preservation Thesis" approach. It has intervened democratic civil life during different periods in order to carry out the hegemony of central bureaucratic class in Turkey. These interventions were time to time made by military coups or notes while they were also done by law institutions at other times. This type of interventions that harms the democratic improvements in a great extent and which has no place in democratic states cause damage not only to the democracy but also to the legacy of the institutions that attempts to the interventions.

It is not in accordance with the nature of Constitutional Court to interfere the decisions of the parliaments, which has right to use the authority of the public, with no constitutional basis. The interpretations of the constitutional articles by the Constitutional Court, which is an institution to guarantee of the superiority of the law, by constraining the law, formed an impression of institution acting against the will of people.

As a result, constitutional courts must not be an instrument to any political target. Constitutional courts are neither a second parliament nor a

political institution. Thus, it is extremely wrong for them to attempt to affect the political life by acting like a founder party in power. Constitutional courts whose main aim is to protect the individuals against the state have no task of protecting the state and state ideology against the individuals and various desires of the public. Such manner of conducts cause constitutional courts play the role that they are not supposed to.

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