DEMOCRACY, POLITICS AND CONSTITUTIONAL REVIEW WITHIN THE FRAMEWORK OF THE POLITICAL QUESTION DOCTRINE

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ABSTRACT

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The term "political question" appeared in the practice of the American constitutional law when the Supreme Court refrained itself from deciding a case. The practice of constitutional review has inherently its roots in the liberal theory of state and the 19th century's rule of law. Theoretically, one of the functions of the judiciary, as a separate organ under the system of the separation of power and judicial review, is to check acts and action of the other governmental organs. However, the political question doctrine like its ancestors as "raison d'etat" and "acts of government", implies unchecked acts of state. Although the practices of the "political question" doctrine do not refer to the crisis in a political system, they indicate a breakdown, problem within the system. The evolution of the doctrine of political question in the United States of America and of the similar practice in Turkey primarily denotes to the fact that the practice of the liberal state is not always consistent with its theory.

Key Words: Political Question Doctrine, Discretion of Legislative Organ, Judicial Self-Restraint, Constitutional Review, Liberal Theory of State.

ÖZ

SİYASİ SORUN DOKTRİNİ ÇERÇEVESİNDE DEMOKRASİ, SİYASET VE ANAYASA YARGISI

Asrak Hasdemir, Tuğba
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"Siyasi sorun" terimi, Amerikan anayasa yargısı uygulamasında Yüksek Mahkeme'nin bir davayı karara bağlarken kendisini sınırlamasıyla ortaya çıkmıştır. Anayasa yargısı uygulamasının kökleri içkin biçimde, liberal devlet teorisi ve 19. yy. hukuk devleti anlayışındadır. Kuramsal olarak, kuvvetler ayrılığı ve yargısal denetim sisteminde, ayrı bir organ olarak yer alan yargının işlevlerinden birisi, hükümetin diğer organlarının eylem ve işlemlerini denetlemektir. Bununla birlikte, siyasi sorun doktrini, öncülleri olan hikmet-i hükümet ve hükümet tasarrufları gibi, devletin denetim dışında kalan işlemlerini ifade etmektedir. Siyasi sorun doktrinin uygulamaları, her ne kadar siyasi sistemdeki krize karşılık gelmese de, sistem içindeki bir bozukluğu, sorunu işaret etmektedir. Siyasi sorun doktrininin Amerika Birleşik Devletleri'ndeki ve benzer uygulamanın Türkiye'deki gelişimi, liberal devlet kuramı ile uygulamasının her zaman tutarlı olmadığını göstermektedir.

Anahtar Sözcükler: Siyasi Sorun Doktrini, Yasama Organının Takdiri, Yargının Kendi Alanını Sınırlaması, Anayasa Yargısı, Liberal Devlet Teorisi.

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I have already told that I wrote this thesis with my family – with my whole family. My dear mother Gülseren Asrak was with me as she has been in

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CHAPTER I

INTRODUCTION

The term "political question" appeared in the practice of American constitutional law when the Supreme Court refrained itself from deciding a case. In the cases related with the Political Question Doctrine (PQD), the Court argues that the power to give this kind of decision involved was constitutionally delegated to one of the "political" branches of the federal government, these are the legislative or the executive branches. With the use of "political question", the judiciary wants to ignore its prescribed function and prefers to be treated as a "non-political" institution and restrains itself with reference to the principle of separation of powers and the distinctive nature of the political and judicial issues.

When analyzing the Political Question Doctrine in this study, it is proposed that law is affected by the social, economic and social conditions in which it emerges. Although law has own language and legal techniques through which it seems neutral, and also it has a relative autonomy, law in general and judicial decisions in particular, are formed within the political, economic and social processes. Within a given conjuncture, law and politics interact with each other. The evolution of the Political Question Doctrine is one of the examples of this interaction. The interaction between politics and law as a constitutive feature of the liberal state, i.e., modern state began to crystallize

in the classical liberal thought of the 17th and 18th centuries. Historically, the classical liberal thought and practice have provided some principles and mechanisms to secure the abolition of monolithic power structure of the absolutist state. Also basic tenets of the classical liberalism and the wave of constitutionalism have contributed to the theory and practice of the constitutional review. Although the practice of constitutional review is not inherently involved in the classical liberal theory and it can not be institutionalized until the second half of the 19th century, the liberal theory of state has laid the foundation of the constitutional review with the notion of "limited state", the theory of social contract and the principle of separation of powers. Also the principle of separation of powers is very important in the evolution of the Political Question Doctrine since the judiciary legitimized its self-restraint policy in relation to this principle in the history of PQD.

Liberalism and liberal democratic theory establishes the basis of the constitutional review; the notion of the limited state, certain principles of law, whether they are in written form or not, which limits the political authority, the doctrine of separation of powers, rule of law etc. are whole an ensemble which ensures the abolition of the monolithic power structure and of arbitrary use of power by the monarch and the dominant class, aristocracy and secure the rights of bourgeoisie, which have been generalized as rights of individuals. The constitutional review was founded on this basis; because of that, it can be meaningful to elaborate liberalism and its principles and institutions, especially the separation of powers and rule of law, to understand the constitutional review and its position in the matrix of liberal state and society. However, this

elaboration can not serve convenient means to understand the Political Question Doctrine since liberalism assumed that politics, economy and law are distinct and autonomous spheres and each one has its own mechanism. The capitalist mode of production with its exchange relation in the market makes available the governance of the economy by its own rules, in other words, without necessitating the political intervention to the market. In that model, the function of the state is to secure the operation of the mechanism of the market. Law becomes a mediator between two distinct spheres, state and civil society, but it is assumed that law also has its own autonomy. However, PQD denotes the corollary relation between politics and law and also society, in that sense liberal theory could not provide tools of analysis for this issue. Beside this, Political Question (PQ) can not be handled in the framework of the rule of law. The understanding of "rule of law" creates a norm, as all acts of political authority should be in conformity with the law. In other words, the rule of law purported that the law conditions all "acts of government". As we can see the best example of this understanding in German Rechstaat, the state becomes identified with the law. But PQD and Acts of Government and also Raison d'Etat remind us that certain acts of political authority could be outside juridical domain. Either "acts of government" or of PQ refers to the certain acts of government outside the boundaries of the law. The studies on this issue either have approved this nature of Acts of Government-PQ and attempted to create certain criteria to legitimize them, or it was stated that "political questions are matters not soluble by the judicial process; matters not soluble by the judicial process are political questions". As it can be seen this is a

tautological definition as Strum indicated that it is similar to say "violin are small cellos, and cellos are large violins" (cf. Strum, 1974:1). This problem is related with the attempts to explain political questions in so called "autonomous" sphere of law, more specifically, in the judicial process exclusively, by abstracting the judicial process from the political process. Miller can affirm this conclusion since he purported that PQ could be analyzed and solved by political scientists rather than by lawyers.

The political nature of the constitutional review was analyzed in some studies. One of the well-established and detailed studies on this subject (we will review this study later) is on Turkish Constitutional Court and analyzes the decisions of this Court with the tools of "system theory". However this theory has certain inadequacies; it does not regard conflicting nature of politics, which stems from antagonistic nature of social classes in the society as it is described by Marxist theorists, or from the antagonistic nature of relation between "foe and friend" as it is described by Schmidt. As a result, system theory does not include systemic crisis. As we have mentioned before the underlying conditions of PQ did not correspond to a situation of crisis but it denotes a problem, an accident in the juridico- political process of the capitalist state. Due to this fact, the analysis of PQD needs an approach that goes beyond liberal theory or system theory. Marxist studies which include "conflict" and "crisis" in their own theory and then analyze the relation between law and politics by regarding the conflicting nature of the process and indicating the hand in hand relation of legality and illegality in the capitalist society can establish a convenient framework for the study of PQD, despite the fact that

they have problem of making the issue concrete, being too abstract in the issues of law. Our study focuses on the meaning of PQD for the liberal system and tries to understand the position of the doctrine in this system with reference to the certain notions and principles of the liberal state. Although we do not employ whole concepts of the Marxist perspective on this issue, its different approach to the function of law in a political system could help us to detect the inconsistencies or some deficiencies in the theory and the practice of the liberal state. Therefore we will shortly deal with the basic perspectives on the position of law in the modern/capitalist state in Chapter 2.

In checking the legislative acts, the constitutional review became an important tool especially, regardless of whether the court making constitutional review is law making or law judging organ. Although the position of the judiciary in a democratic society is continuously debated, especially in relation with the superiority of the "appointed" on the "elected" in some respects, it is widely accepted that the judiciary serves for the purpose of establishing the law abiding state. But sometimes, there can be some attempts to limit the scope of the constitutional review. These attempts can be emanating outside or inside, i.e., from the court itself. The first one, the limitations from outside, is out of the border of this thesis, but the second one establishes the core of the study.

Within the context of liberal democratic theory and the notion of the limited state, the power of the judiciary or the power of the judicial review is important in the governmental system. Political Question Doctrine (PQD) consists some cases which judicial organ abstain to make judicial review of the acts made by other two bodies, executive and legislative organ in the

government. In that sense this doctrine is one of the issues through which the position of the judiciary and also the relation among the main powers of the government, i.e., legislative, executive, judicial ones, were being elaborated. Judicial review is a tool to determine the constitutionality of a governmental action. It was practiced before the case Marbury v. Madison of the U.S. Supreme Court[1]. But with that case, it became institutionalized (details of this case will be given in Chapter 4). It is interesting to note that this case can be given as an example of the practice of judicial activism and in that sense, it has been the origin of the discussion about how the Supreme Court should exercise its own power. On this issue, there are two main lines of arguments: Some have argued for the policy of judicial self-restraint whereas others have argued that the Court should be guided by the policy of judicial activism.

Judicial activism and judicial self-restraint are generally presented as two different patterns of decision making process of the judges. Judicial activism is taken in the sense of judges modifying the law what it previously was or was stated in the existing legal sources. In that sense, some critiques of judicial activism call attention to the fact of the substitution of decision of the elective representative bodies by the decisions of the appointed judges. Judicial

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[1] "The case(1803)... in which the Supreme Court of the United States first elaborated the principle of judicial review. William Marbury applied directly to the Supreme Court, as provided by the Judiciary Act of 1789, for a writ of mandamus to compel Secretary of state James Madison to deliver a commission as justice of the peace for the District of Columbia which had been signed and sealed by the previous Secretary of State. The court through Chief Justice Marshall declared that under Art. III. Sec.2 of the Constitution it could issue a writ of mandamus only when exercising appellate jurisdiction; hence the provision of the Judiciary Act authorizing the writ of mandamus in original jurisdiction, on which Marbury had relied, was void. The Constitution, said the court, was the fundamental law; and in cases of conflict between it and a statute, the judges were bound by their oaths to uphold

self-restraint is characterized by the caution of the judges in the interpretation of the law and the constitution (legal documents in general), and the forbearance of judges in stating any legal entitlement. Despite the differences and discussions within each camp, in general, the advocates of the policy of judicial self restraint purport that the Court should refrain from ruling on constitutional questions. In other words, only if there is a clear violation of the provisions of the Constitution, can the Court declare unconstitutionality of the governmental action and then strike down it. Otherwise, the Court should respect the decisions of the legislative and executive organs since these are the organs of the government, which are politically responsible to the people. On the other hand, the judicial activists defend that the Court should not avoid constitutional issues. On the contrary, it should play an active, creative role in shaping the policies. The Court should apply the constitution to the important problems of the social and political life. It can interpret its main tool, the Constitution, more freely. The Supreme Court sometimes made the supporters of the judicial self-restraint content and sometimes has satisfied the advocates of judicial activism. Its decisions related with the fundamental rights and freedom can be a good example of the later whereas the decisions that formed PQD can be an example of the former, i.e., and judicial self-restraint.

The Political Question Doctrine refers to the self-restraint action of the court. The court sometimes feels a case not in the domain of the judiciary, but in the domain of the political organs, and refuse to give decision about this

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the Constitution and disregard the statute." **Dictionary of American Politics**, Barnes and

case, and exclude it from the judicial process. In that sequence, the meaning of "political" or "judicial" becomes important. What we mean by political, if there are certain criteria for differentiating "political" from "judicial", political decisions from judicial decisions totally, are important. There were efforts to dichotomize political decisions-judicial decisions and sometimes politics-administration. However, there is no sole criterion upon which everybody is agreed. Let the consensus on this issue be aside, there is no criteria effectively working for differentiating political decisions-judicial decisions and politics-law. Before PQD, French "Le Conseil d'Etat" tried to set certain principles in this issue and found the concept "acts of government". Like Supreme Court of the United States, this Court excluded certain cases from the judicial domain by labeling them as "acts of government". How political decisions could be differentiated from the judicial ones was the core problem of the Court. The Court and also academicians tried to develop certain criteria to discern this differentiation, but at the end, it was accepted that the criteria satisfying the need could not be found and the problem was solved partially by listing which acts were treated as "acts of government". As time went on, the longitude of the list became shortened, i.e. the jurisdiction of the Court became widened. The history of PQD has certain resemblance with "acts of government". As it can be understood, PQD is related with unjusticiability of the some governmental actions. This doctrine has existed since the earliest practices of the judicial review. For example, in Marbury v. Madison, Chief Justice Marshall reported that "[q]uestions in their nature political, or which are, by the

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Noble Inc., 6th printing, USA, 1957.

constitution and laws, submitted to executive, can never be made in this court." (Marbury v. Madison, 1803). In the 1940s, a federal court defined political questions as "such as have been entrusted by the sovereign for decision to the so called political departments of government, as distinguished from the questions which the sovereign has set to be decided by the courts". However, two months later, the same court declared that "It would be difficult to draw a clear line demarcation between political and nonpolitical questions..."(cf. Strum, 1974:1). Until the 1960s, the case of Baker v. Carr, the Supreme Court has not fully elaborated political questions.

The PQD contains different issues, but I deal with the cases related with the reapportionment, since the most exciting political question's case is related with this issue. It is exciting because the final decision of this case has been reversed sixteen years later. According to 1911 Reapportionment Act which was made by the Congress, the electoral district shall be reapportioned due to the change in the population. Colegrove v. Green case reached The Supreme Court in 1946. In this case, the Court declared that it would not consider reapportionment cases because to do so would be to violate the boundary between the Court and the Congress, i.e., the judicial and the political organ. But in 1962, The Supreme Court reversed this decision in the case Baker v. Carr. Whereas the Court had treated reapportionment as a political issue and then refused to decide in 1946, the same court accepted that the reapportionment case was in its own jurisdiction, it could be justifiable. With this case, the content of the political question was changed. Supreme Court tried to differentiate the political rights, some political matters from the

political question and by doing this, it limited the scope of the political questions. With this case, the Court attempted to describe political questions systematically and identify some characteristics of cases deemed political questions which will be treated in Chapter 4.

Until 1962, the Court described "political" as a function of institutions and it excluded this function from its sphere by referring constitutional principles, the principle of separation of powers. Beside this, it is not a dynamic definition, it lacks of analysis of the political process and its relation with judicial decisions. However, the evolution of the doctrine of the political questions itself indicated that the relation between politics and law, political decisions and judicial decisions were not static in nature. This relation bears resemblance to movements within a hourglass, regardless of a society not being a closed environment. In the history of PQD, the Court enlarged its own field due to changes in the political and societal climax. For example, election, representation and the principle of one man-one vote became more important in the climax of the 1960s, in relation to this development; the Court felt itself to be able to decide on cases related with the election, the reapportionment. In that sense, to understand the reciprocal relation of the judiciary with the society provides us to analyze the relation between politics and law, judiciary and other organs. Whereas in USA, the judicial domain was enlarged in the course of the time, in the example of Turkey this was not the case.

Nowadays, the principles and institutions of the representative democracy are severely criticized and some other forms of democracy as participatory democracy, radical democracy, direct democracy etc. are favored.

But the representative democracy is still alive with its principles and institutions. Especially in the context of Turkey, it is an almost unique form of a democracy. In that sense, the elaboration of some concepts related with the liberal democratic state is still important. The judicial review of governmental action is an important step taken in the way to control the state and in that sense, is one of the main tools for the survival of the notion and practice of the limited state. As we have seen above, the Court reviewing governmental actions sometimes refrains itself and due to this fact, the governmental arena that was unchecked became enlarged. This practice had certain consequences for the liberal democratic system as well as for the principle of the rule of law, which is inherent in this system. The analysis of PQD in general and also in certain country examples provides us to detect the flow and ebb of the tide in the decisions of the law-practicing organ, the judiciary and also to understand its reasons. Beside this, the political nature of judiciary and judicial decisions are intensively discussed in Turkey as well as in other countries. The Doctrine of Political Question can provide us to analyze this nature of the judiciary and also the position of judiciary in a certain political and social structure.

Turkey can serve a favorable condition for the analysis of the courts making constitutional review. At the beginning, it should be reminded that there is no doctrine labeled as PQ in Turkey. However, the Turkish Constitutional Court gave certain decisions that had resemblance with the cases of PQD in the United States of America. The decisions of the Constitutional Court, which were related with electoral threshold, can be important examples in that respect. The history of Constitutional Court is not too long when it is

compared with US Supreme Court or similar courts in the Continent of Europe. But it seems that this period would be enough for the Court to reverse its decisions. The example of Turkey also make available to elaborate different variables as changes in the composition of the Court, changes in the text of the Constitution etc. and whether they affect the decisions of the Court. Beside this, the political nature of the decisions of Constitutional Court is an issue that provoked fiery discussions, but was not analyzed systematically. In Turkey, there are some studies about the Constitutional Court, but most of them are descriptive in nature. One study, which was made by Artun Ünsal, tries to analyze the position of the Court in a social and political environment. In his study, Ünsal declares his aim as analyzing Turkish Constitutional Court (TCC) in the context of the system theory. The author analyzes the decisions of TCC by considering this court as an essential part of the political system and then affected by and also affecting this system. Ünsal's aim is to examine the decisions in the dynamic process of the politics by excluding the judicial interpretation of these decisions.

The author asks two important questions: Is Easton's system model useful to understand the reality of TCC? When considering the relationship of TCC with the political power and also the role acted by this court in the political system, does TCC perform its functions described in a democratic political order and the system of the rule of law as checking the political power and protecting essential values of the political regime? Ünsal replies these questions in an affirmative manner. The Eastonian model could be an analytical tool to examine the position of TCC in the main political system.

Certain concepts of this model like input, output, feedback, clarify the interactive nature of the relation of the court with the society. Ünsal concludes that the decisions of the Court are shaped within the dynamic of the society. The social origin of the members of the Court has less effect on the decisions of the Court than the dynamic of the society. The Court, as the authority producing input within the main political system, came in conflict with other authorities like the legislative organ. But these conflicts were not harmful to the main political system and problems could be solved in the border of the system. TCC acted in conformity with the expectations of the social state governed by the rule of law. The Court has harmonized the demands of the political power with the individual rights and liberties. Especially demands related with economic and social rights and duties are respected within the border of the political regime. The Court has relieved the tensions in the society and harmonized the conflicted interests so that it was/is a safety-valve for the system. Beside this, the Court became successful to check the political power in Turkey. TCC has respected the reaction of the political authority and also responded to public opinion. In conclusion, it has contributed to the stability and confidence in the society according to Ünsal.

In general, PQD will be a key to analyze the position of the judiciary within a political system, more precisely, within a democratic representative system. It also serves for elaborating the old but not odd question about the distinctive nature of politics and law, political decisions and judicial decisions. Since the decisions of the court reviewing governmental action could be evaluated through the distinction/relation between judicial and political,

judicial organs and political organs. More precisely the policies of judicial activism, judicial self-restraint and PQD, which is an important example of judicial self-restraint, are closely related with the hourglass like transitions between the judicial and political domain. When the point of issue is policy of judicial activism, the judicial domain seems to be enlarged at the expense of the political domain. It is true that the Court has wider jurisdiction in the era of judicial activism than that of judicial self-restraint. But this widening could not be expense of the political in the sense that the policy reproduction, if not creation, practices of the Court can be detected more easily during this era. In other words, judicial domain becomes enlarged in favor of the political domain by the transformation of the judicial decisions into political decisions. In that respect, the analysis of the policy of judicial activism and judicial self-restraint provide us certain tools to understand the nature of the relation between political-judicial and the position of the judiciary within governmental structure.

In the thesis, I will deal with the policy of judicial activism and judicial self restraint respectively, but focus on the judicial self limitation/restraint and handle the concept of the judicial activism in the extent of its clarifying power for defining the adverse side of the coin i.e., judicial self restraint. One further limitation of the thesis is related with the sorts of the techniques of self-restraint. There are different techniques or doctrines of judicial self-restraint, but we deal with one of the substantive techniques by which the scope of the judicial review is limited: The Political Question Doctrine.

Until now, in the different studies, PQD was elaborated with reference to a governmental structure which was pictured by the doctrine of the separation of power. This elaboration has been descriptive and static in nature. As in the similar doctrines or practices preceding PQD, such as "acts of government" or "raison d'etat", "political question was taken as a legal category described by itemization rather than generalization. In this study, I will generally deal with the attempts to categorize the issues consisting PQD. However, my effort is directed to reach certain conclusions with the studies of these categories. In other words, I want to attain certain generalizations on the relationship between law and politics. The examples of PQD will offer possibilities to have certain conclusions on this issue. I prefer to analyze PQD and the position of the judiciary within political and social processes and understand the nature of the relation between politics-law, political decisions-judicial decisions in the light of the reciprocal relation between them. As mentioned earlier. PQD was elaborated and described by itemization, but not yet explained. There is bewilderment on this issue. The reason of this bewilderment is closely related with the method of the studies: most of the studies attempted to define the category of the political question as a function of the political institutions. But it should be studied in the context of the political process, in the struggle to obtain and retain power. Also social and ideological dimensions fostering this struggle should not be neglected. In that sense, I will elaborate PQD in terms of the variables of the political and social processes as well as describe this issue within the cases constituting the category of the political question.

Neutrality or characteristic of being exempted from the political is most common characteristics attributed to the judiciary in general and judicial review in particular. Whether they are certain myths about the judiciary or not is one of the issues which will be handled in the study, but at the beginning it can be proposed that judiciary as an organ of government and especially the court reviewing the governmental action by using the Constitution as its main tool, could not be exempted from the politics and remain neutral. For the Constitution itself infuses certain political understanding. Beside this, the constitutional review requires to apply the abstract provisions of the Constitution to the concrete, specific cases, in that sense it requires reasoning this process could not be isolated from the mental construction of political and social practices. Because of that, the decisions of the Court making constitutional review should be evaluated in a social and political climax in which the decisions were given. I suppose this climax becomes more determinant on the decisions than other variables as political preferences or other characteristics of the judges, or changes in the constitutional and legal text etc.

Within the context described above, the aim of the study is to analyze and understand,

i. The nature of the relation between political-judicial and the position of the judiciary in the example of judicial review in liberal democratic system;

ii. The main motives behind the policies of judicial activism and judicial self restraint and more particularly the Political Question Doctrine;

iii. The mechanisms through which these policies were shaped.

Even though the principles and nature of law have distinctive characteristics from principles guiding and characterizing politics, there are close relation between them and they are connected with each other with unbroken ties. The concept of legality, the notion of the state limited with certain legal norms, independent judiciary etc. were aroused out from the struggles for political power and they became important tools to manage and direct the society. For that reason, in this study, the relation between politics and law, political decisions and judicial ones will be analyzed in its totality rather than being dichotomized. In this context additional propositions are as follows:

i. There is a corollary relation between political decisions and judicial ones as well as same type of relation can be seen between societal change and judicial decisions, they affect each other.

ii. Although there is criticism toward judiciary and judicial decisions in the way that decisions of "appointed" substitutes the decisions of "elected" and in turn, this could be harmful for the principles of a democratic system, it is seen that judicial decisions can enrich and strengthen these principles. The evolution and results of PQD serves an example for this function of the judiciary.

iii. The PQD is not the immediate result of the differentiation in the techniques of adjudication and not determined by the characteristics or political preferences of the judges, but rather it is affected by the societal climax and existence of new tendencies in the political arena.

The main question in the study is how we can describe the Doctrine of the Political Question. In general, this doctrine can be defined as follows: sometimes the judicial organs have excluded certain issues from the domain of the judiciary. These issues were seen as questions which can be solved by the political departments of the government. But, as time went on, these questions have gained the statute to be decided by the judicial organs. Our second question can be asked at that sequence: What is the reason of this change? Which factors affect the judiciary to change its decision on which issues are justifiable? These questions give birth to another questions: What are the tools of the judiciary to decide the cases? Legally, it is expected that judges resolve a case by regarding constitution, laws in force, jurisprudence and other legal regulations. The third question is exactly related with this issue: Which factors affect the judges in the process of interpreting these legal documents? These factors can be listed as follows:

1. Dominant political, economic and social policies-preferences at a given time. It entails the relation between law and politics at a given time.

2. Reaction of the society to the decisions given by the judiciary or expectations of the society related with the cases before the court. It refers to the relation between law and society and also is related with the dimension of legitimacy and internalization.

3. Individual preferences of the judges.

4. Tendency or decisions of the makers of the constitution or other legal documents (in our examples, although there were no legal changes related with

the cases constituting PQD, similar cases were decided differently at a different time. In that sense, can we say the tendency embodied in any kinds of the regulations, whether as changes in the constitution or laws and other regulations, could be interpreted differently in relation to the changes in the social, political , economic, ideological climax?

5. Judicial activism and judicial self-restraint are two key words to categorize the decisions of the US Supreme Court on the cases of PQD. What is the criterion to define these terms? An activist court can restrain itself in times or in relation to the nature of the issues. What is the reason of this change in the behavior of the Court?

In the context described above, the classical liberal theory and its practice by which the idea of the limited state and the control of the state acts were inspired will be elaborated. Doctrines of social contracts and the principles of the separation of powers, are the main themes in this elaboration. This analysis is accompanied with a brief historical sketch and it includes the period of transition from absolutist state to liberal one. "Raison d'Etat" as an antecedent of PQD will be elaborated with reference to the understanding of absolutist state The limits of the state and the growth of the idea of separating functions of the state and related with this, the existence of independent judiciary are traced back in this sequence. The origin of the constitutional review is backed up by this analysis on the one hand and by referring to the constitutional history of the United States of America on the other, since the U.S. Supreme Court was the initiator of the constitutional review with the case Marbury vs. Madison. Also Kelsen's views, especially his norm theory which

has contributed to the development of the constitutional review will be elaborated in this chapter. Beside this, Rousseau and his concept "popular sovereignty" will be included to discuss the limits of constitutional review and elaborate the self-restraint policy of the judiciary within this perspective.

The following chapter is devoted to the "acts of government". Like "raison d'etat", the practice of "acts of government is the antecedent of PQD. Hence analyzing this practice can give some clues about the characteristics of PQD.

The development of the constitutional review in the United States of America will be given in detail in Chapter 4 and PQD will be analyzed with its characteristics in the course of the time and within the climax of the beginning of the 20th century to 1990s. The 1960s are also important in the history of the doctrine in the sense that the act of the Supreme Court has begun to change in the social and political climax of the 1960s.

The development and experiences of the Turkish Constitutional Court will follow this chapter. Although the decisions of the Court were not totally the same with the decisions of the Supreme Court and were not called as PQD, the decisions of these two courts have shared some common characteristics. Also regarding the different judicial and political structures in Turkey and in the United States, similar decisions of the Constitutional Court will be elaborated and PQD will be an analytical tool to understand Turkish experiences.

In general the source materials, the compilation of the decisions of the Supreme Court and Turkish Constitutional Court will be reviewed. This review aims to describe the main characteristics of PQD and then this doctrine becomes an analytical tool to understand the position of the judiciary in a liberal democratic system in general and in particular country examples. Beside this, this analysis make us understand the nature of the relationship between politics and law, political and judicial.

CHAPTER II

LAW, POLITICS AND LIBERAL STATE

Law becomes an inherent part of the modern state as soon as it establishes the mechanism through which the state becomes legitimate. The legitimacy of the state is closely related with the certain understanding and the forms of law, which have existed in the 19th century. Different philosophers with distinctive perspectives have accentuated the significance of law for the modern/capitalist state since each state has the problem of legitimacy. Weber stated that rational- legal legitimacy rather than traditional or charismatic one is convenient for the modern state.

Law with the characteristics of being neutral, general and universal serves as a language of the modern state. With law, the state seems to be a neutral apparatus, i.e., the characteristics of the law enable the state to pass over the fragmented nature of society and become a symbol of unity. The individuals are freed of their diverse interests by the abstraction of law and become "free and equal" individuals. Whereas Weber treated law as the basis of the rational-legal legitimacy some Marxist scholars have insisted on the different functions of law in the capitalist society. According to one of the eminent Marxist philosophers, Nicos Poulantzas, the principal function of any ideology is to establish "a relatively coherent universe" which consists not only of a men's real relation but also of "imaginary relations":

> The status of the ideological derives from the fact that it reflects the manner in which the agents of a formation, the bearers of its structures, live their conditions of existence, i.e., it reflects their relation to these conditions as it is 'lived' by them. Ideology is present to such an extent in all the agents' activities that it becomes indistinguishable from their *lived experience* (Poulantzas, 1975:206-7).

Ideology, at least in the case of the dominant ideology, serves to mask the real contradictions and social dynamic of the world (1975:206-10). While the dominant ideology in slave holding societies was moral and philosophical ideology and religious ideology in feudal societies, capitalist societies are dominated by juridico-political ideology. To elaborate the economic and political functions of the law make us to understand the ideological functions of the law in the capitalist society more easily. Beside the function of law in relation to state intervention in the economic region, relations of production and exploitation, the sphere of circulation, the law has affected the economic class struggle. The law treats the agents of production as individual juridical subjects rather than as members of antagonistic classes. This means that the agents of production do not experience capitalist relations as a class relation but as relations of competition among isolated individuals. This "isolation effect" has marks on the economic relations as well as on the other social relations. At the political level, the "isolation effect" in the private sphere has its counterpart. The capitalist state unifies those who have been disunified as free and equal legal subjects firstly, i.e., the abstract nature of legal subjects makes it possible to present the capitalist state itself as a public unity of the people-nation. The nature of law and the assumption of rational-legal administration in which bureaucracy presents itself as an impersonal, neutral institution embodying general interest and operates according to a

hierarchically structured and centrally coordinated system of formal, general, universal and codified rational-legal norms. Although the capitalist state ,in this context, is seen as a neutral body and society as an embodiment of being classless it has a dual political task: on the side of the dominated classes, it must prevent any political organization of these classes that would threaten to end their "economic isolation and social fracturing"; on the side of the dominant classes it should work on the dominant class fractions/classes to cancel their economic isolation and secure the unity of the power bloc and its hegemony (Poulantzas, 1975:136-7, 140-1, 188-9, 284-5, 287-9). Also juridico-political ideology establishes the framework of the isolation effect and of an unified, classless people-nation. Also representative democratic institutions with universal suffrage and competing political parties facilitate the organic regulation and reorganization of the 'unstable equlibria of compromise' in the power bloc as well as between this bloc and the popular masses. In short, these institutions serve for the survival of the capitalist state at normal times, in the conjunctures in which the bourgeois hegemony is stable and secure. The significance of law and juridico-political ideology for the capitalist state and the class struggles of this society can be discerned in Poulantzas' analysis of 'normal' and 'exceptional state', which corresponds to conjunctures of hegemonic crisis. Although we need not to elaborate 'exceptional state' in our study, the distinction between normal and exceptional state can give some clues about Poulantzas' formulation on the relation of the law with the state. Despite the close relation between law (juridical structures) and state (political structures), each has its own relative autonomy and their

mode of articulation can be understandable in the concrete social formation. Beside this, the role and place of the state in capitalist societies spread beyond law and judicial repression. In that sense, it can escape its activities from juridical regulation and also transgresses its own legality and allows for a certain role of violation. Therefore it can be concluded that the state is a functional unity of legality and illegality. This evaluation of Poulantzas reminds us Hirsch's definition of the state as legality plus illegality. According to Hirsch, the bourgeois state, on the one hand, codifies the norms of commodity exchange and monetary relations, and ensures their clarity, stability and calculability", but on the other hand it "constantly breaches the rule of law through its resort to executive measures to secure specific material conditions reluired for capital accumulation". Beside this, for the possibility of the proletariat threat towards the foundations of the capitalist order, the state can use the force outside the framework of law to secure bourgeois rule. In that sense, Hirsch purported that "freedom, equality and the rule of law are only one side of bourgeois rule: its other side raison d'etat, class bias and open violence. Both facets are essential for the reproduction of bourgeois society and neither should be neglected" (cf. Jessop, 1990:57-5). In the issues of "acts of government", with which PQD has a significant similarity, the cases related with the proclamation of martial law or with problems of nationality the sign of defeating threat to the existing order can be discerned. In that sense some issues which have the potentiality of being harmful to the system have been excluded from the juridical domain. These cases establish one section of "acts of government" or, but on the other side, the cases related with the election, for

example, are another part of PQD; at the face it did not include an open threat to the existing system but it refers to the demands of citizens in relation to being represented equally. In the example of American Supreme Court, these cases were omitted as if they did not belong to the judicial domain in the 1940s. But in the 1960s, with the necessity of the inclusion of interests and demands of middle and lower classes, the borders of the system were changed as it can include these classes and in turn the domain of the judiciary was enlarged and became able to adjudicate problems related with the election in the representative democracy.

2.1. Absolutist State, Raison d'Etat and Liberal State

Absolutist states or absolutist monarchies were precursor of the liberal state in the sense that some characteristics of the later had been inherited from the practices of the first ones. Some changes in the structure of the absolutist state had provided a base on which the liberal state emerged. According to Anderson, "A centralized state bureaucracy, taxation system, a regular standing army and unified sovereignty over a clearly demarcated territory" had been established in the era of absolutist states (1986:2). Absolutism was the key element in the transition from feudalism to capitalism, from the feudal state with fragmented structure to liberal constitutional state with a centralized body politics. He additionally stated that "some absolutist monarchies were forerunners of the liberal states which first emerged, in England for instance, in the 17th and 18th centuries"(1986:2). It is closely related with the facilities served by these states for the growth of capitalism, although they helped

perpetuate feudalism, enabled feudal aristocracy to prolong their political and social domination (Poggi, 1990:33).

Urban economies and merchant capitalism had developed in the time of the absolutist states in Western Europe. The centralized state was developed along with a progressive reduction of the political power of estates, that is, the polity of estates was eroded by the development of the centralized state and political power was concentrated in the hands of the ruler. Although concentration of the power in a sovereign monarch had some negative effects on the development of capitalism and for new emerging class, burghers (this issue will be elaborated with the notion of raison d'etat), this concentration enabled the monarch to rule in a comprehensive and uniform manner over the whole territory. In this way, law and order could be maintained over the whole country and this situation facilitated the growth of capitalism. Like Anderson, Poggi remarked favorable conditions created by the absolutist state for the development of capitalism (1990:33). Law gained importance and played important role in this development. Specifically the revival of Roman law advanced the interests of the burghers. In Roman civil law the private property was the fundamental concept and had an unconditional nature. The conceptualization of private property in this manner was quietly distinctive from the conditional nature of medieval land grants. With the contribution of the law, urban commerce was protected from arbitrary interference of political power. These changes provided convenient conditions for the development of the capitalist relations(Anderson and Hall, 1986:29-37). In general, it can be said that the centralized form of the state and changes in the concept of law

with respect to private property were important contributions of absolutist states for the theory and practice of the liberal state. However the liberal states which centered on the interests and rights of individuals had distinctive characteristics from the absolutist states.

The conceptualization of sovereignty in the absolutist state provides monarchs a domain lying outside constraints of morality and law. This understanding had been crystallized in the concept of raison d'etat which has important corollaries with the doctrine of the political question. Arguments for sovereignty in the absolutist era and their relations with raison d'etat helped illuminate the distinctive nature of law in the absolutist states and provided some clues to understand the doctrine of the political question. Sancar reminds us that the understanding of raison d'etat could not be peculiar characteristic of a particular era. Although it had been a product of certain historical condition, this understanding may have universal characteristic. For example, some remnants of raison d'etat can be detected in Nazi conception of law: "if law weaken the strength of the state it could not be obeyed" (Sancar, 2000:24). If we make generalization, the key argument for sovereignty in the era of absolutist states was that law and order can be maintained on the condition that only one power possesses a "distinct prerogative", this power may be conceived as the power "to make or unmake law (Bodin), or as the exclusive control over coercive force (Hobbes)". (Poggi, 1990:44). The result of this argument was that "sovereignty should be enjoyed by a center of power qualitatively different from all other social forces". This difference is related with the argument that this center of power is "exclusively concerned with a

distinctive set of interests and of a specifically political nature" (Poggi,1990:44). The argument on sovereignty was complemented by the argument of raison d'etat. According to Poggi, two aspects of the argument of raison d'etat are relevant with the argument on sovereignty in the absolutist states. The first aspect is related with the negative content of raison d'etat. The pursuit of some political interests like "those concerning the acquiring and securing of power within 'principalities', to use Machiavelli's expression, and their territorial expansion" should not be constrained by morality and law. In the pursuits of these interests, "unrestrained force and premeditated deceit" can be employed legitimately. Second aspect of raison d'etat relates the first aspect to distinctive characteristics of rulers and also distinctive nature of the tasks of rulers: the actions of rulers "should indeed be rational, that is, controlled by effectiveness, and should be in fact oriented to a specific, overriding set of interests. Only emphatically public nature of rule, the fact that its concern with internal order and external might gives it paramount significance with respect to all other social interests, authorizes the powers responsible for it to violate moral dictates applicable to everybody else and to all other pursuits" (Poggi, 1990:44). On the occasion that order and security would be in jeopardy, the ruler may override the rules that he has made. Similarly Vincent relates the concept of raison d'etat to divine right of the king to rule. When the king is seen as the sole authority emanating from the God he can be able to rule without bounding any rules. But we can find implicit and explicit boundaries on the power of the ruler in Poggi's analysis. Implicit one is related with the question when the ruler can override the law: if order and security is in

jeopardy, the rules can be overrode by their maker. Beside this the law in question is only public law, that is, the rules concerning the exercise of political powers. Putting difference between public law and private law gives us explicit boundaries on the ruler's power, although the questions who decides and how can be decided which law is related with the exercise of political power remain unanswered. It is purported that public law should not disturb the private interests of the individuals. This is related with differing "imperium" from "dominium". When "imperium" is concentrated in the monarch, "dominium", i.e., property and possession are dispersed among the subjects. Imperium holder should concern "the preservation of the inequalities of economic power and of social standing resulting from *dominium*" (Poggi, 1990:45). This difference between dominium and imperium refers to another boundary on the ruler's power and also presents a basis on which understanding of the liberal state can be grown.

2.2. Nature and Characteristics of Liberal State

New emerging class, bourgeoisie had usually accepted the political prerogatives of the ruler since the ruler's power has not endangered its economic interests. On the contrary, centralized system of power had politically safeguard these interests in general. However some economic policies of the absolutist era, specifically, the policies of mercantilism had tendency to put restraints on market and property. The notion of absoluteness, understanding of absolute sovereignty and of unrestrained power of the ruler became potentially threats to the interests of the bourgeoisie. The rights and

interests of the bourgeoisie was increasingly in jeopardy because the process in which the ruler with absolute sovereignty became sole, unrestrained holder of political power, created policies based upon understanding what was good for the subjects. But these policies may not be compatible with the understanding, need and interests of the bourgeoisie. In other words, the society, more specifically, as a new emerging power in the society, the bourgeoisie intended being regulated in accordance with what was good for its interests rather than being regulated from above and with the reason of "state". According to Anderson, the relationship between the state and its subjects became to change and was "modeled on the business contract in commercial life. The rising bourgeoisie created the 'contractual state' in its own image, bolstered by economic doctrine of *laissez* faire which held the 'wealth nations' was increased by free market and minimal state involvement in the economy"(1986:6). As we will see later, the main role of the liberal state was to guarantee the 'liberties' of the individuals who created, in theory, its own state by the contract among them. This change was pictured by some liberal thinkers like Locke who was the most eminent and a primary liberal theorist. He is also taking guide by the contemporary liberal thinkers.

Vincent purported that "absolutism established the centralized and territorially unified political order on which constitutional theories developed" (1994:77). According to him, "the central feature of the constitutional theory... is that it is a theory first and foremost of limitation". But he additionally remarked that constitutionalism and limits on the State are not "something 'attached to a State... A constitution is not an addendum *to* a State. The

limitations are intrinsically part of and identifying features of that [liberal] theory" (1994:77-78). We can say that absolutism gave birth to the liberal state and its theory, in that sense there was transition from the absolutist state to the liberal one. However the liberal state is qualitatively different from the absolutist one. It did not exist as a result of the quantitative changes in the absolutist state, but it is outcome of great transformation in the society and of changes in the class relation, in the state-society relation within the society. The society was no more an object of political management by the state, the state became more and more an instrumentality of the society's autonomous development. The activities of the state should be directed to find the ways through which this development was beginning to unfold according to its own logic rather than being directed by the state's own ends. The reversal of the relationship between state and society required that the state power should be constrained. In the 18th and 19th centuries the wave of constitutionalism provided notions and mechanism to characterize and manage this new relationship. Societies which had autonomous economic and cultural growth and capacity for development and self-regulation and in which the bourgeoisie as the dynamo of this development became laboratories of this new experience. Although different societies had different experiences, we can talk about two main tenets of the ideology of constitutionalism embodied by England in the late 17th and 18th centuries and by latter French experience: the security of rights and the separation of powers. In the Declaration of the Rights of Man and Citizen of 1789 it was claimed: "A society where the safeguard of rights is not insured and where the separation of powers is not has no constitution"

(Declaration des Droits de l'Homme et du Citoyen du 26 août 1789, 1992:18). Safeguarding the rights requires that law be independent of and superior to government. This is also an essential aspect of the notion of the rule of law. Beside this, various state powers should be separated and they should check and balance one another. This refers to the notion of the separation of powers, which was evolving from the notions and experiences like "the division of powers", "the balanced constitution (government) etc. The separation of power was a tendency countering the characteristics of absolutism, which was based on the concentration of all power in the ruler. We will deal with the issues of security of rights and separation of powers later, but now I continue to elaborate the conditions that gave birth to the liberal state and importance of law within it.

The history of the attempts to limit the political power is very long. But with the liberal [democratic] thought, these attempts have become more consistent in nature. Challenging the powers of "despotic monarchies" and their claim to divine support, liberalism sought to restrict the powers of the state and to create a sphere ornamented with the rights and liberties for the individuals. In that sense, liberalism has two main corps within itself. On the one hand, it is an attempt to create a limited state and related with this, on the other hand, it become associated with the notion of individuals with inalienable natural rights. Whereas the idea of law, the notion of legality serves for the concept of the state as an impersonal, legally circumscribed structure of power, the notion of the individual with certain rights and liberties establishes the content of the understanding of the limited state. The central problem of the

liberal theory is to reconcile the idea of the state with the rights, liberties and duties of the individuals. Historically, at the beginning, the attempts to limit and control the state action by law and certain legal procedures were in consistency with the needs of the new emerging social class, i.e., bourgeoisie. The notion of legality has secured the predictability of the social and political life and became an important blow to the arbitrary use of the political power, i.e., arbitrary power of the monarchs. The principle of limited state is also closely related with social contract theories. According to social contract theories, consent of individuals is the basis of state. In other words, contract, whether real or imaginary, among individuals is the source of political power. Anderson purported that relationship between state and its subjects became to change and its model was the business contract in commercial life (1986:6). With the rise of bourgeoisie, "contractual state" became main form of state. In that sense, the principle of limited state holds that state is not all powerful, it may do only certain things that individuals have empowered it to do with contract made between individuals and ruler. This principle is other side of the coin of popular sovereignty that sees the people as basis of political power: the people are the only source of political authority, and state has only that authority the people have given to it. In sum, it can be said that a state can govern only with the consent of the governed. In general the consent of the individuals, in particular rights of the individuals determine the manner of using political power. Certain rights endowed to the individuals by Nature are cores of certain limitations on political power. Despite the fact that the basic rights of individuals had taken place in certain document like Magna Carta

(1215), these rights were systematically written down during the period of constitutionalism. The movement of constitutionalism has also marked certain principles like rule of law, separation of powers, checks and balances. In connection with the rule of law, the concept of limited state can be expressed in another way: political power must obey the law, government should be conducted according to constitutional principles. Government and its officers are always subject to the law, never above the law. In that sense the state becomes the association of the law. Ionescu purported that

> The initial purpose of the American and French Revolutions was to ensure the people's freedom through a constitution – and already the dominant preoccupation was with rights, namely, how to 'protect' or 'guarantee' them by law. As the constitutional pattern gradually established itself, it became evident that the 'guarantee' of the sphere of autonomy of the citizen was its principal object; and that the means of fulfilling this essential condition consisted, on the one hand, of the structures and functions of political representation of individuals, and, on the other, of the separation of powers between the legislative, the executive and the judiciary (Ionescu, 1988:35).

State with a written constitution functioned to set out the rights and obligations of individuals. Also some principles for governmental structure like separation of powers, checks and balances were required to watch over the proper functioning of state on behalf of individual citizens. Separation of powers refers to the allocation of law-making, law-enforcing and law-interpreting functions of government to different bodies. Montesquieu as the most famous theorist dealing with this principles gives the reason of this separation as to preserve liberty from tyranny thought to result from combining legislative, executive and judicial powers in the same hands. The earliest versions of this principle based on a two-fold division of governmental functions, this is the separation between executive and legislative functions. Judicial function was

seen as an intrinsic part of both executive and legislative functions. Since the mid eighteenth century, the threefold division has been generally accepted as the basic necessity for constitutional government. Vile treats this division as the "continuing elements in liberal democratic theory":

> The growth of three separate branches of the government system in Britain reflected in part the needs of the division of labor and specialization, and partly the demand for different sets of values to be embodied in the procedures of the different agencies, and in the representation of varying interests in the separate branches. This aspect of the doctrine... is clearly central to the whole pattern of Western constitutionalism. (Vile, 1967:15).

The separation of legislative, executive and judicial powers became a convenient medium for establishing a check and balance system within the government. This system aims to protect each of them against the others by requiring the approval of certain acts of another by one of the department.

Historically, the principle of separation of powers provided some mechanisms to secure the abolition of the monolithic power structure and divide the political power among certain social classes. Whereas the monarch and the noble classes had the executive power in general, the legislative organ became the main depository of the bourgeoisie. At the beginning, the law with the characteristics of being general, objective and impersonal, and the legislative organ as the law-making organ, were important weapons against the arbitrary use of the power. In that sequence, legislative organs with its law making function were treated as organs checking executive organs and securing the limited state. The idea of the supremacy of the parliament was the child of this era. Locke was one of the most impressive theorist defended the

supremacy of the legislative organ. Vile asserted that Locke was making "two distinct points" when he insisted on the supremacy of the parliament:

> "First, the legislative function is prior to the executive, and the latter must be exercised according to the rules which result from the exercise of the former. This is , of course, an essential part of the doctrine of the separation of powers. Second, Locke was saying that there is a clear in which the executive branch must be subordinate to the legislature."(Vile, 1967:63).

But in the process, the necessity to control the action of the legislative body and also check the suitability of the state acts to the law arose. In relation to this necessity, judicial function and judiciary gained importance. Before judicial review of legislative acts was institutionalized we can talk about certain rules or principles that legislative organ should consider and certain characteristics that a positive law should bear. Idea of natural law, system of common law, understanding of higher law or law of reason etc define limitations that law-making organ should obey. As we will see in details later, Locke listed four bounds in the use of legislative power. The most important one for our purposes is that "the legislative, or supreme authority, cannot assume to itself a power to rule by extemporary decrees, but is bound to dispense justice, and decide the rights of the subject by promulgated standing laws, and known authorized Judges." (Locke, 1948:70.)

2.3. Constitutional Review and Liberal Thought

The theory of social contract and principles of separation of powers are the constituent part of the liberal theory of state. Although the practice of constitutional review is not inherently involved in the classical liberal theory and comparatively it can be treated as a new practice in the governmental

structure, the liberal theory of state has laid the foundation of the constitutional review. As in other theories of state, the main objective of the liberal state is to set up some principles for political power, establish relation between political power and society and then provide a basis on which political power could be legitimized.

The basic tenets of liberalism have contributed to the theory and practice of the constitutional review. With liberalism, the basis of the political power has been purified from supernatural idea or object. From now on, the state is neither God-given nor divinely ordained entity, but it is a body politic constructing by human beings and existing for the benefit of each and every individual. The state becomes a political body governed by law of reason rather than that of God (Böckenförde, 1991:49). Beside this, the objects and functions of the state are restricted to the liberty and security of the person and of property, i.e., to safeguarding individual liberty and facilitating individual self-fulfillment. In other terms, the state ordained by law of reason, which is derived from law of nature, exist for well being of individuals who construct society and state. This kind of conceptualization of state has hallmarks of the Enlightenment and establishes the cornerstone of the rule of law. In that sense, the liberal theory of state has been nurtured by the ideas of the Enlightenment. With the era of the Enlightenment, human mind has become basic tool to make sense of the world, calculate regularities and predict the future. Hence, individuals, individuals mind have been taken as constituent elements in the process of construction of society and state. The individual and its mind rather than God and supernatural ideas serve as frame of references in building

political body. The liberals insisted that intelligent justifications in social and political life must be available, in principle to everyone; society and state could be understood by the individual mind not by the tradition. The social contract theories satisfied the need for justification of the social world and political power. The individual who can grasp the regularities in the world and in the society is able to build its community. The individual is described as free, equal and independent. Therefore it is impossible that this individual is subjected to political power without her/his consent. According to Waldron, "liberalism is a theory about what makes political action –and in particular the enforcement and maintenance of a social and political order- morally legitimate" (1987:140). In that sense, legitimacy of a political and social order lies in the consent of those governed. Also the consent of those people makes permissible to enforce this order against them. In other words, the basis of legitimacy for the political power and the basis of the obedience of the people to the political power are the consent of the people governed. Whereas people limit themselves by consenting to the political power, the execution of the political power is conditioned by the requirement of being consented by the people governed. Historically, in its challenges with "the powers of 'despotic monarchies' and their claim to 'divine support' liberalism sought to restrict the powers of the state and to define a uniquely private sphere independent of state action"(Held, 1987:41). In the political context, liberalism is an attempt to create a limited state. Liberalism become associated with the doctrine that individual should be free to pursue his or her own preferences in religious, economic and political affairs. Despite different 'variants' of liberalism and

different interpretation liberal thought was united around the advocacy of a constitutional state, private property and competitive market economy as the central mechanisms for coordinating individuals' interests. In the earliest liberal doctrines, it was important to stress that individuals were conceived as 'free and equal' with natural rights, that is, with alienable rights endowed upon them at birth. The reconciliation of the concept of the state as impersonal legally circumscribed structure of power with rights, duties and obligations of subjects is main problem of the liberal political theory. In other words, it is problem of reconciliation of sovereign state with sovereign people. While the state must have monopoly of coercive power to provide a secure basis upon which 'free trade, business and family life' can prosper, its capacity and capability to regulate and coerce must be limited, so agents of the state do not interfere with the political and social freedoms of individual citizens, with the pursuit of their particular interest in competitive relations with each other (Held, 1987:42).

In the works of some classical liberal theorists these theme are clearly seen. Whereas writings of Hobbes have certain marks of transition from absolutist state to the limited state Locke signals the clear beginning of the liberal constitutionalist state.

2.3.1. The Lockean State and Constitutional Review

Locke's writings best serve to our purposes in describing basic tenets of liberalism contributed to theory and practice of the constitutional review and in understanding the relation of law with politics. The Social Contract theories

have an important role to conceptualize political structure and its relation with the (civil) society. 1688 Revolution and political changes and the settlement of this Revolution imposed some constitutional limits on the authority of the monarch. These changes made an important impact on Locke's thought. Vincent stated that the unity of liberalism and constitutionalism date back to the 1600s (1994:117). In this era the word "liberal" did not exist but Locke is seen as "primary liberal thinker" by many thinkers in our times. According to Locke, the institution of government should be conceived as an instrument for the defense of "life, liberty and estate". The characteristics of the foundation on which institutions of government are based are derived from the state of nature. In the state of nature, individuals are endowed with natural rights and they are governed by the law of nature, and show respect to each other. The signs of the thought of the Enlightenment can be detected in Locke's concept, state of nature. Besides being treated as the primary liberal thinker, Locke is also regarded as important for the reason that he differentiated rational constitutionalism from the ancient constitutional understanding. Individual reasons make them capable of being rational and of following the law of nature. They enjoy natural rights such as right to "life, liberty and estate". With the respect for the law of nature, state of nature is not a state of war unlike in the theory of Hobbes. For Locke, political society is based on the natural rights of the individuals. So, political society can be understandable along with the state of nature and also with certain rights being effective in the state of nature. In the state of nature, individuals live under freedom, without adherence to another's will. Human being with a common characteristics and advantages

originating from being member of same species are equal. Among individuals there is "mutual love" endowed by the nature and then this love enables individuals to live in justice and happiness. At this sequence, it is inevitable to pose a question: Why did individuals leave the state of nature and decide to form a political society? The answer to this question is related with certain "inconveniences" existed in the state of nature. First of all, in the state of nature, not all individuals fully respect the rights of others. Beside this, when enforcement of law of nature is left to each individual there are too many judges, conflicting interpretations about the meaning of the law. And also in the state of nature, the individuals are vulnerable to aggression from abroad since they are loosely organized. In sum, there is inadequate regulation of property in its broadest sense; the right to "life, liberty and estate" is in danger in the state of nature. Due to these inconveniences, people make contract with each other to create, at first an independent society and then a political society/government. There are two distinct agreements in Locke's theory. The reason of this distinction can be interpreted as follows: The individuals bestowed an authority on government, and now government should pursue the ends of the governed, but if these ends fail to be represented adequately, the final judges are the people who bestowed the authority on government. In that sense, when those who govern act against the terms of the contract, execute some tyrannical policies, right to rebellion can be enjoyed by the people governed and they could form a new government, this act may not only be unavoidable but also justified. As seen, Locke stated the right to rebellion but he did not describe in detail the conditions of the act of rebellion and did not

indicate through which mechanisms this rebellion is acted. However, the right to rebellion signs that the forming the state does not mean the transfer of all rights of subjects to the state. The rights of law making and enforcement (legislative and executive rights respectively) are transferred, but the state is conditioned: It should preserve "life, liberty and estate". Sovereign power, sovereignty remains ultimately with the people.

Locke contributed to the development of the central tenets of liberalism. According to him, the state exists to safeguard the rights and liberties of citizens/subjects who are ultimately the best judges of their own interests. Beside this, the state must be restricted in scope and constrained in practice in order to endure the maximum freedom of citizens. In his theory preservation of the right to "life, liberty and estate" is basic condition on the activities of the state. The rights of individuals circumscribe the political power. The content and class nature of these rights may be debated but it should not be missed that that the rule of law is inspired by this understanding. With addition of the principles of separation of powers to this catalogue, a scheme of a constitutional state in which public power is legally circumscribed and divided was drawn. In that sense, Locke's vision of the state is quite different from the absolutist conception of the state. The original contract and right-claims of the individuals delimit the state in Locke. According to Vincent "the Lockean State" is an association regulating general conditions in which individual could survive and exercise their liberty in pursuing their individual interests(1994:117). Beside liberalism, Locke contributed to the constitutional

model of the state with his concepts like natural law, natural rights, contract and consent.

The contract theory and the conception of the state delimited by the rights of the individuals became known at the eve of the Glorious Revolution. Although Locke's famous book "Treatises on Civil Government" did not appear in print until 1690, his ideas on government had been formulated some years before. Historically, the monarch began to share political power with the Parliament before 1688 Revolution. Although the position of the monarch was strengthened during the period of Restoration the existence of the Parliament was accepted. However the King saved his prerogatives and had veto power making him, at least, a part of the Parliament. Despite everything, with the end of 17th century, the supremacy of the parliament was accepted. The Revolution of 1688 and The Revolution Settlement "determined that in the future authority *in government* should not lie with the monarch alone or with judges or any other officials the king appointed but in the two houses of Parliament..." (Sosin, 1989:116).

For Locke, the legislative power is the supreme power in a constitutional commonwealth; the other branches of government must be subordinate to this power. However the legislature could be checked by the people in whom there remained a supreme power to remove the legislature if it violates the natural rights of the individuals and transgresses beyond the set for it. But this is an exceptional situation. Normally, every individual who entered civil society has quitted her/his power "to preserve his property –that is his life, liberty and estate- against the injuries and attempts of other men" and " power

to judge and punish the breaches of that law [the law of nature]..." (Locke, 1948:43) to "the men having authority from the community" (1948:44). This is an important distinction between the state of nature where there are no other men than the individual herself/himself had these powers, and political society. In other words, the power to execute laws and to judge and punish offences are left to the authority established within the community in the political society while these power were handled individually in the state of nature, i.e., the utilization of these powers has gained public nature.

Before analyzing the nature and characteristics of law, the position of the legislative power in Locke's theory, we will deal with the distribution of political power within the agencies of the state. Locke defines three distinctive powers: legislative, executive and federative power. It is stated that the individuals left their power that they had in the state of nature, to the commonwealth. Now they expect to be governed by the law being made in accordance to the law of nature. This function, making law, is essentially performed by the legislative organ: "The legislative power is that which has a right to direct how the force of the commonwealth shall be employed for preserving the community and the members of it" (Locke, 1948:73). Although the legislative power is so important that it directs the force of commonwealth "there is no need that the legislative should be always in being, not having always business to do. Because making law takes little time while it is constantly executed and its "force is always to continue" (1948:73), i.e., "...there is not always need of new laws to be made, but always need of execution of the laws that are made" (1948:77). This is one of the reasons for

the separation of the legislative power from the executive one. But there is crucial reason for this separation. Like Montesquieu Locke stated that the legislative and the executive power should be handled by different persons:

> And because it may be too great a temptation to human frailty, apt to grasp at power, for the same persons, who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of community, contrary to the end of society and government...(Locke, 1948:73).

As a supreme power in the commonwealth, the legislative organ consists of "several persons" (Locke, 1948:77), and its whole or a part of it is "made of representatives... chosen by the people" (1948:78). Unlike executive power, the legislative power can not be handled by a single person. It is due to this fact, its "constant frequent meetings and long continuations of their assemblies, without necessary occasion, could not but be burdensome to the people, and must necessarily in time produce more dangerous inconveniences..." (1948:73). The legislative organ sits and makes laws in times settled for these purposes. Between the period of convention, the executive organ is entrusted of the execution of laws. As we have dealt with before, the executive power should be separated from the legislative power. However Locke stated that the person who holds the executive power existed in the legislative organ: "... the executive is vested in a single person, who has also a share in the legislative..." (1948:76). The person who executes laws is not supreme power since he does not make law but "because he has in him the supreme execution, from whom all inferior magistrates derive all their several subordinate powers" and also he has some power related with the work of legislative organ, first of all, he has

veto power: "there being no law to be made without his consent" (1948:76) and also he "may have the prerogative of convoking and dissolving such conventions of the legislative, yet it is not thereby superior to it" (1948:79). In that sense this person has the key position in the mechanism and process of government, but he derives his power from the law, from the will of society declared in the laws:

> "nor can claim it otherwise than as the public person vested with the power of the law, and so is to be considered as the image, phantom, or representative of the commonwealth, acted by the will of the society, declared in its law; and thus he has no will, no power, but that of the law..." (Locke, 1948:76).

About the supremacy of the legislative power, there are two points that should be concerned here. Firstly, Locke stated that function of legislation is prior to the executive one, i.e., the executive function "must be exercised according to the rules which result from the exercise of the former [legislative function]. This is, of course, an essential part of democratic theory" (Vile, 1967:63). That is the supremacy of law that constitutes an important part of the theory of the separation of powers. Secondly Locke mentioned the subordinate position of the executive branch. But it does not mean that the executive is "a mere office boy", he is subordinate to the laws in which the will of the society is declared rather than being completely subordinate to the legislative branch. Again here Locke emphasized the supremacy of law which limited the executive. However the prerogatives which the monarch has, survive. Whenever necessary the monarch uses the "power to act according to discretion" (1948:82) but it should be used for "the public good".

Although Locke insisted on the supremacy of the legislative power there are also some limits on it. It may be supreme, but not arbitrary and unlimited:

> "First, it is not nor can possibly be absolutely arbitrary over the lives and fortunes of the people.
>
> ...
>
> Secondly, the legislative, or supreme authority, can not assume to itself a power to rule by extemporary decrees, but is bound to dispense justice and decide the rights of the subject by promulgated standing laws, and known authorized judges.
>
> ...
>
> Thirdly, The supreme power cannot take from any man any part of his property without his own consent.
>
> ...
>
> Fourthly, the legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others" (Locke, 1948:69-72).

These four limits on legislative authority seem as a forerunner of the principles of the rule of law. Especially, in the second one, the concrete form of the principles of the rule of law can be detected. Locke dealt with the need for "known and authorized judges" beside the need of the "promulgated standing laws". But he did not list the judiciary as a separate power in the government. When Locke mentioned inconveniences that have made necessary to leave the state of nature he gave impression about making threefold classification of the functions of the government as legislation, judicature and execution. However he remained faithful to the "old" twofold classification in the greater part of his book. While the function of making law belongs to the legislative power the extent of the executive power is enlarged to consist of the power of judging and punishing. In that sense, Locke was faithful to the old view stating that the

primary characteristic of the state is to make judgement and distribute justice. For this reason, although he dealt with the existence of the independent judges and a distinct judicial action he did not describe a separate judicial power.

Locke described a federative power as the third power in the government. This power is, at a great extent, related with the issues within the international relations: "This... contains the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth..." (1948:74). The federative and executive power are distinct in themselves, but "they are hardly to be separated and placed at the same time in the hands of distinct persons", since both of them require "the force of society for their exercise". Separating the execution of these powers, with the words of Locke, making "the force of the public... under different commands" may cause disorder and ruin and also placing "the force of commonwealth in distinct and not subordinate hands" is also "impracticable". (1948:75). While Locke separated federative power from executive one he did not intend to give these power in distinct hands. But he gave more importance to the federative power than the executive:

> And though this federative power in the well or ill management of it be of great moment to the commonwealth, yet it is much less capable to be directed by antecedent, standing, positive laws than the executive; and so must necessarily be left to the prudence and wisdom of these whose hands it is in, to be managed for the public good (Locke, 1948:74).

The federative power is important for analyzing the doctrine of the political question, since an important part of the doctrine refers to the issues in the boundaries of international relations. Also Locke contributed to the new design

of the state and had an effect on mechanism and process of government in general as well as in some countries like United States of America.

Locke's another contribution is to develop understanding of law based on interests of individuals rather than the supernatural ideas or objectives that became main and important principle for acts of government. Law that is calculable and changeable was not only an instrument in the attempt to determine boundaries of political power but also an instrument through which political power is legitimized. With these double characteristics law serves as a governing principle in the political domain.

2.3.2. Montesquieu and the Spirit of the Laws

Montesquieu's great contribution as a political scientist is to analyze governments and derive from historical observations a system of politics. In his book "The Spirit of the Laws" Montesquieu as the main political thinker sought to reconcile freedom and coercion, right and might, law and power (politics). As we dealt with before, with the emergence of capitalism we encounter the modern state, which provides a secure basis on which trade and commerce may flourish. However modern state claimed the monopoly of coercive power to regulate society, market relations. Like political thinkers of that era Montesquieu tried to reconcile the sovereign power of the state with the rights of the individuals. In consequence, while justifying the sovereign power of the state he sought to justify limits upon the coercive power. From his analysis the most remarkable of his discoveries is separation of powers which can be

conceived as the instrument of securing political liberty. In that respect his way coincides with the wave of constitutionalism.

His general method and aim are explained in Books XI and XII especially. These books focus on the theme of moderate government in which liberty can best prevail. This theme and its relationship with liberty can remind us the general problematic as the reconciliation between might and right. Law plays crucial role to establish this reconciliation in society. At the beginning of Spirit of Laws, Montesquieu defined laws generally as "the necessary relations resulting from the nature of things"(1949:1). And then he makes distinction between laws of nature and positive laws. In a state of nature human beings live in accordance with laws of nature. Peace is the first law of nature: "In this state every man, instead of being sensible of his equality, would fancy himself inferior. There would, therefore, be no danger of their attaching one another; peace would be the first law of nature" (1949:4). However, human beings have "the desire of living in society" as the fourth of law of nature. Then they enter into a state of society. But in this state, "he [man] loses the sense of weakness; equality ceases, and then commences the state of war" (1949:5). In that sense Montesquieu is pessimistic about the position of human beings living in society, a state of society equals with the state of war. With the entry into the society human beings feel themselves strong and this strength produces conflict within the state and between states. Positive laws came into scene and regulate these conflicts in the state of society. Law is important for Montesquieu, so he defines liberty (right) in relation with law:

> It is true that in democracies the people seem to act as they please: but political liberty does not consist in an unlimited freedom. In governments, that is, in societies directed by laws, liberty can consist only in power of doing what we ought to will, and in not being constrained to do what we ought not to will"(Montesquieu, 1949:150, Book XI).

According to him "liberty is a right of doing whatever the laws permit". Montesquieu reminds us not to confuse "independence" with "liberty". If a citizen could do what the laws forbid, she/he would no longer be possessed of liberty because all other citizens would have the same power (1949:150). He rejects unrestrained liberty; he emphasizes on restraints by law. In the society liberty is the freedom to act in the manner of law in other words a citizen can act freely unless her/his act is prohibited by law. Law is so important that the character of laws is in the center of his theory.

2.3.3. Law and Separation of Powers

Laws are made by governments, specifically by the legislative branch of government. Each government has three powers: a legislative power, and executive power "in respect to things that dependent upon the civil law (Montesquieu, 1949:151,Book XI) Here we see dual separation of power of government as legislative and executive one, which reminds us practices of seventeen century and before. But then we see the term "judicial" as the administration of criminal and civil law. Legislative power is related with making and unmaking of temporary and perpetual laws when executive power entails with the public security and the conduct of foreign relations, the declaration of war and peace. Here, Montesquieu uses the term "executive" in respect to foreign relations (problems among nations), which is similar with

Locke's federative power. Judicial power is interested with solving the problems within the nation. But later he deals with executive power as "the power of executing public resolutions" i.e., executive power is interested with foreign relations as well as the issues within the nation, and judicial power is limited with the power "of trying the causes of individuals" (Montesquieu, 1949:152).

The relations among three powers can be change in accordance with the nature and the principle of government. There are three species of government: republic, which comprises democracy (government by the people) and aristocracy (government by a part of people); monarchy and despotic government (1949:8, Book II). In the despotic government, the whole power is united in one body. Despite the fact that aristocracy is moderate government three powers are not exactly separated. Legislative and executive powers are held by the same body.

In the Book VIII, under the heading of "of the Corruption of the Principles of Democracy" he deals with problems arising from the unity of three powers: "then the people, incapable of bearing the very power they have delegated, want to manage everything themselves, to debate for the senate, to execute for the magistrate, and to decide for the judges" (1949:109). These words can be interpreted in the way that three powers should be separated for the survival of democracy. In general Montesquieu defended separation of three powers for the safety of liberty, but it does not mean that these three powers should be possessed by three different bodies.

According to him if "the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty" (Montesquieu, 1949:151, Book XI,). Also if the judicial power is not separated from the legislative and executive powers the same result arises. At the worst, when these three powers are possessed by "the same man or same body, whether of the nobles or of the people..." it would be "an end of everything" (1949:152). Without using the term separation of powers, Montesquieu defends that powers should be separated for the survival of liberty. However we can find some examples of some species of government, which are countering his general argument about the relation between liberty and separation of powers. For example, in the aristocratic government, is favored and listed as a form of moderate government by Montesquieu, the legislative and executive power are in the hands of same man. Also there is no evidence that three powers are separated from each other in the monarchy. On the contrary, he states that "the prince is the source of all power" in the monarchial government and the intermediate powers (such as power of nobility, the ecclesiastic power) are "subordinate and dependent powers" (1949:15-16, Book II). Beside these intermediate powers, "there must be also a depository of the laws. This depository can only be the judges of the supreme court of justice...". These two elements prevent the monarchy to turn into despotic government. In general, according to Montesquieu in order to form a moderate government "it is necessary to combine the several powers; to regulate, temper and set them in motion; to give, as it were, ballast to one, in order to enable it counterpose the other. This is a masterpiece of legislation, rarely produced by hazard, and

seldom attained by prudence" (Montesquieu, 1949:62, Book V). We can say that the term "power" has different meanings in Montesquieu writings. Sometimes it refers to power of a social class in the society; sometimes it is different functions of political power, as legislative, executive, judicial power. But Montesquieu defends to check a power with another power, whether it is a function political power or constitutes a social class in the society. Because

> ... constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go... to prevent this abuse, it is necessary from the very nature of things that power should be a check to power (Montesquieu, 1949:150, Book XI).

In this sequence, we can say that Montesquieu favored checking a power with another power for survival of liberty. For this reason he defended the separation of powers, at least, that these powers should not be possessed by same men or body. Although these powers are united in the personality of prince in the monarchy, existence of intermediate powers and government with law are important factors serving for the liberty and these factors differentiate the monarchical government from the despotic government. In this framework, it can be said that species of government should be evaluated by different criteria beside the separation of powers. On the other hand, it should be reminded that Montesquieu, as a method, presented some ideal types in relation to systems of government. He constructed the ideal types from analyze of actual government and by making historical observation. And he dealt with the ideal form and actual form of government or historical observations in the same text, i.e.; they were placed side by side. To discern the differences between two different levels of analysis is left to the reader. This situation

creates some problems and he was severely criticized because of the contradictions in his text. In the Book XI, the text with the heading "Of the Constitution of England" is one of the most criticized sections. Since facts given about the form of government are not consistent with the actual form of government in England. It is due to fact that Montesquieu attempted to draw a basic structure of government serving for the liberty by taking into account different powers and their relationship. Although he mentioned different practices of several government in Europe and also in Asia (as Ottoman Empire), England, here, is a "fictional" / "imaginary" country according to Mirkine-Guetzvitch (cf. Vile, 1967:84-85). Montesquieu gave elements of an ideal type under this heading.

According to Montesquieu, "in a country of liberty... the legislative power should reside in the whole body of the people" (1949:154, Book XI). But it is impossible in large states. Also in the small ones, there can be some inconveniences (its reason not stated by him), so the people exercise this power through their representatives. The representatives have a great advantages which the people could have; this is "their capacity of discussing public affairs" (1949:154). The Duty of the representative body is to enact laws or" to see whether the laws in being are duly executed". This body can interfere "the executive part of government"(1949:155).

The legislative power is composed of the body of the nobles and the representatives of the people. The dual structure of legislative power stems from the facts that

> In such a state there are always persons distinguished by their birth, riches or honors: but were they to be confounded with the common people, and to have only the weight of a single vote like the rest, the common liberty would be their slavery, and they would have no interest in supporting it, as most of the popular resolutions would be against them. The share they have, therefore, in the legislature ought to be proportioned to their advantages in the state..." (Montesquieu, 1949:155).

Beside this, this structure of legislative power composed of two bodies makes convenient one body checked by another one. To him executive power should be "in the hands of a monarch, because this branch of government, having need of dispatch, is better administered by one than many. The judicial power "should be exercised by persons taken from the body of people at certain times of the year, and consistently with a form and manner prescribed by law, in order to erect a tribunal that should last only so long as necessity requires" (Montesquieu, 1949:153). But Montesquieu did not favor the judiciary in this system: "... the national judges are no more than the mouth that pronounces the words of the law, near passive beings, incapable of moderating either its force or rigor" (1949:159). Even he qualified the judicial power as "nothing": "of the three powers above-mentioned the judiciary is in some measure next to nothing: there remain, therefore, only two". Of these two powers (legislative and executive), the body of nobility which is a part of legislative, serves as a "regulating power to moderate them -executive and legislative power- " (1949:156). It is also this body rather than the judges has the "supreme authority to moderate the law in favor of law itself, by mitigating something" (p.159). Beside these, the nobles are judged by this body, not by ordinary tribunals, As Althusser stated that Montesquieu related three powers to social classes. Monarch who has the executive power represented different social

interests from those of legislature, the legislature composed of two houses represented the aristocracy and bourgeoisie respectively, but judiciary as "nothing" represented everybody and hence nobody because they should be only magistrates. According to Althusser (1972), Montesquieu established the distribution of powers rather than the separation of powers and his distribution presupposes the unity of the state rather than the constitutional separation of the various spheres of the state. Here, conception of separation of powers refers to the relations of social classes in struggle within the framework of the transition period. Montesquieu has given seats to the bourgeoisie as a rising class in lower chamber, but the dominant power is nobility seating in the upper chamber (Chp.5). Also Poulantzas shared similar views with Althusser. He purported that the capitalist state functions as "a centralized unity" and the distinction between legislation and the executive "is not a simple juridical distinction:"

> it corresponds both to the precise relations of political forces and to real differences in the functioning of state institutions. However, the important point at the moment is to emphasize that contrary to conception of a multi-centered, balanced share-out of the state's internal power, we can always decipher the characteristic dominance of one of these powers, i.e., that one which constitutes the principle instance of state unity"(Poulantzas, 1975:303).

Poulantzas mentioned the distinction between the legislative and the executive organs, by excluding judiciary since he, like Althusser, relates these two powers to the social classes. Unity of powers is maintained when the executive and legislative organs are controlled by the same hegemonic class. If these organs are shared by different classes/fractions the result will not change in reality since the unity of institutionalized power survived "by being

concentrated around the dominant place where the hegemonic class or fraction is reflected" (Poulantzas, 1975:305).

Althusser and Poulantzas stressed on the class nature of Montesquieu's separation of powers. Indeed Montesquieu separated/divided/shared various functions of the state within the social classes/groups and he favored the nobility in the functioning of the state. However he could not neglect the importance and position of the bourgeoisie. The relation among the royalty and the nobility and the bourgeoisie were reflected in the conception of the separation of powers. Despite the dominance of the one class which provides the unity of the state according to Althusser and Poulantzas, he insisted in checking of one power by power. In other words Montesquieu demanded the separation of power because he believed that he could enable a counter-power to check power so the liberty could be assured through this mechanism. This view is quite different from the conception of the unity of the state in the absolutist theory, which depends on the absolute sovereignty of the ruler and gives way to the "raison d'etat". Montesquieu's conception of separation of powers serves as a tool to limit the political power. In that sense it has affected modern constitutionalism very much. The constitutional doctrine, emerging from the theories of Montesquieu and the liberal theories of Locke and later combine with different variants of liberalism led to the different conception about the state. At the first it did not only reintroduce the conception of the limits of the state but also provided some mechanisms for this aim. Excluding the debate about whether the political power is separated/divided or unified in the hands of dominant class, the constitutional doctrine contributed by

Montesquieu has certain consequences. We only deal with some of these: 1- Power should be checked by the counter power for the safe of liberty. 2- Of the three powers, the legislation is the depository of rules for social life. 3- Legislation performs its function to rule the enactment of fixed, abstract and general rules. 4- although the position of judiciary changes in accordance with the forms of government and judiciary is inferior to other powers, it has an entity in the structure of government. The general, fixed and abstract characteristic of law satisfied the need for precision in the act of political power and provided the maximum calculability. These are important characteristics helped to the development of capitalism and systematize in the conception of the rule of law. Also giving place the judiciary in the structure of state as the third power has contributed to the conception of the independence of judiciary. And with the later development, the judiciary became the leading agent checking the acts and actions of the state, and of the other three powers. But this function of the judiciary depends closely on the nature of the dominant ideology. As we will see in the next chapter, when undemocratic feature of the ideology prevails the judiciary abstains from checking the acts and actions of the legislative/executive organs and acts as a dependent agent. As in the 1960s when the masses clashes for the political power and the dominant ideology enlarges to cover the demands of these classes, the judiciary can act as an independent agent and control other organs of the government.

2.4. Development of Constitutional Review and its Limits

2.4.1. Development of Constitutional Review in Theory and Practice

Foundations of Constitutional Review can be found in liberal state theory and practice. Within this framework, two elements are prominent: The concept of political power constrained by the individual's rights and, related to this, the extent to which acts and activities of the political power are in agreement with a higher norm; the principle of separation powers which aims to prevent the concentration of political power at a single body and which is based on the basis that powers should balance and check one another so that "liberty" can exit. ... Leaving aside the class character of the above-mentioned principle and concepts and the fact that the judicial body does not have a function as to check power in a period when classical liberal theory emerges and develops, we can argue that liberal state concept supported by the movement of constitutionalism represents a break from the concept of absolute sovereignty-absolutist state. Yet, within classical liberal thought and the concept of liberal state, there does not exist a concretization and institutionalization of the concept of constitutional review. However, in general, the concept of restraining the political power forms the basis for an institution that checks the acts and action basically of the legislation – and, as in the case of the USA, of the executive. Within liberal state theory and practice, the judicial body does not hold a priority role, as do executive and especially the legislative. Yet, in time the judicial has come to occupy the third position.

In the 17th-18th centuries, when classical liberalism emerged and modern state came to be formed, the aim of newly-developing and revolutionist bourgeoisie was to obtain a share in the government and to secure a place within political judgement. In this period, this new class which was represented at one wing of the legislative body, aimed to prevent the arbitrary government procedures of the monarch or the government that held the executive body under its own control. The concept of a constrained state, the principle of separation of powers, are both tools that serve to this purpose. It may be that classical liberalism can hold the concept of an individual that has him own autonomy, that is self-sufficient and intelligent, that is, in a way, educated and informed; yet, in a period when bourgeoisie emerged and rose as a new class, this new class formed the majority within society by receiving support from lower classes thanks to its leadership feature. Although bourgeoisie revolutions have varying developmental routes and models in accordance with the country and period within which they emerge, 1789 French Revolution is a basic model for how bourgeoisie took the government by receiving support from other classes and sections of the society. Consequently, it could not be expected that a class that secured support from society should fear from the majority and that it should constitute intellectual and institutional tools in order to check the law which was alleged to be voicing be will of this majority. However, in later periods, at a stage when bourgeoisie failed to provide control as a result of social developments and their effects on the political strata, bourgeoisie, having lost its revolutionist features, may have felt it necessary to implement a mechanism through which rules that laws are expected to bear should be

checked – even though it still held the government. In the 20th century, improvements brought about by an industrial society and the emergence of an organised working class that constituted a threat against the socio-economic and political sovereignty of bourgeoisie, resulted in the emergence of "elitist" characteristic of that class and also the emergence of the fear felt in the face of the "uninformed majority" (Bellamy, 1987: 28-29). In a period when masses become a social force and bear the potentials of being effective in the legislative body, the institutional mechanism formed by selective, "appointed", upper level, educated individuals can have the function of reducing the fear felt against the majority. For example, Beard, studying the formation of the American government system, takes into consideration the socio-economic of those who took part in the process of the formation of the constitution and concludes that participants became members of the property owning class(es) either from birth or by means of marriage. Consequently, it is stated that during the formation of the constitution these people suggested various mechanism in order to protect their own [class] benefits, that some of these suggestions came to be represented in the constitution and, in general, a system formed to protect the property owning minority and their rights against the sovereign majority emerged. Although it is not stated overtly and in detail in the constitution, those points of judicial check in general and judicial review of constitutionality of laws in particular, came to be discussed within this framework and became institutionalized (Beard, 1986: 154-163). Both general courts and courts in charge of constitutional review, serve to reconcile – to numb, pacify the heat of disputes over interests – clashing interests in society, as they are viewed within

the created argument and field as "neutral" institutions. Like other courts, those courts in charge of constitutional review do not have a single form of action. As in the United State of America in the 1940s and in Turkey in the 1980s, as in the cases of political problem and similar doctrines, these courts, even in those periods when they abandon their duty of checking laws upon their own consent, fulfil their task and "numb" the issue. Yet, on the opposite side, in cases when pressure from society is too great to be ignored, the very same courts take into consideration the fact that environmental conditions are to their benefit and as a result of this (as in the 1960s, when masses possessed a considerable share in economic, social and political fields and when this contribution was supported by state policies, when an ideology with dominant democratic elements were concerned) they may declare verdicts that will enlarge the political field.

In the development of constitutional review, the fear felt by the 20th century liberalism against "despotism of majority" has a prominent place. Together with this, constitutional review can be considered as a reaction against a regime where, as in Nazi period, some systemic processes were prevented by an oppressing government and where there is a distinction of legality and lawfulness. As a matter of fact, Constitutional Courts of the Kelsen Model displayed real progress after the Second World War. Classical liberal state doctrine has constituted a basis for constitutional review concept, especially by means of mechanisms it has presented in order that political power can be restrained. Yet, it cannot be argued that within the classical liberal thought there concretely exists the concept of checking the

appropriateness of a law to an upper norm. Even if we assume that this task is given to judges, it is rather difficult that the system should work. Because, while there are principles of a higher abstraction level such as "principle of justice", "equity", "freedom", etc, that courts need to observe on the one side, on the other side there are positive laws that are easier to comprehend and whose aims and subjects are more or less evident. It is very difficult for an individual to reach to a judgement when there are rules belonging to two distinct planes (Cappelleti, 1971: 32). As a matter of fact, constitutional review earned an institutional character in the 19th century with the Marbury v.Madison Case, when American Supreme Court found it suitable that the court itself should check whether laws were in agreement with the constitution. After this date, two important distinctions appeared in the form of constitutional review's becoming institutionalized (Cappeletti, 1971: 46-47). The first one, in agreement with "common law" concept, is the style in which the check for appropriateness can be made by any court, the practice of which is the American Constitutional Review; the other one is the system where there is a court founded for the purposes of check for appropriateness to the constitution, the practice of which is the Austrian Constitutional Court, the creation of Kelsen. The second form was created in the 1920s, but it did not gain widespread use until after the Second World War. The reason for this development which Kaboğlu calls as the "second and strong wave" in the development of constitutional review is, according to the author, "simple and political": "Providing for minority rights", "hindering the pressure of numerical majority" and "keeping basic rights out of the range of attacks" (Kaboğlu,

1953: 383). At this stage, we can analyze Kelsen's views that inspired the basis for the European type of constitutional review.

Supporting the view that there is an inter-relation between norms, Kelsen holds that norm is not what "is" but what "should be". Through norms, one is ordered what to do and what not to do. Norms are not necessarily made by an organ or by an institution (Kelsen, 1946: 35-36). Traditions and customs that govern the individual's acts and tell what should or should not be done are also norms in a general sense. It is because of this fact that those bodies that put laws into application, especially courts, put into application not only those laws designed by the legislative but also norms which are formed by traditions and customs (Kelsen, 1946: 103).

The norm that determines how a norm is created is a higher norm. The norm that is created according to principles determined by the higher norm is the lower norm. The legal order of a state possesses a hierarchical structure. In national legal order, the "constitution" is structured upon a hypothetical elementary norm and is at the highest level. Kelsen states that what he means here by the term "constitution" is not the constitution in a form but constitution as a material body. As a form, the constitution corresponds to a document whose creation and alteration call for procedures other than those used for ordinary laws, while as a material body the constitution is a whole of those rules that regulate the creation of general norms (Kelsen, 1946: 124-125).

Kelsen tells the formation of norms, in a general sense, by referring to those bodies that constitute the government and the principle of separation of powers. Yet, while mentioning the three powers of the state, Kelsen argues that

the power in this context should be considered as "function" and that there are not three functions but two: the legislative corresponds to the creation of laws; the application of these laws is realized by the executive and the judiciary (Kelsen, 1946: 255-256). General norms are basically formed by the legislative. Yet, in some cases either the executive or the judiciary may be the source of these norms (1946:257). However, this is an exceptional case. Those norms created by the executive or the judiciary are "individual norms" which usually expire upon a single use (1946:38). In other words, the main task of the jurisdiction and the executive is to constitute individual norms by bearing upon general norms and to put corresponding sanctions into practice (1946:258).

According to Kelsen, the principle of separation of powers does not agree with reality: As we have already mentioned, there are not three but simply two functions. Moreover, it is not possible to appoint the task of legislation to one body and exclude the others (Kelsen, 1946: 269-270). To illustrate some cases where the functions act simultaneously; as far as the executive-legislative relation is concerned, in such cases as a war, a riot, or financial crisis, the person in the highest rank of the executive may well bring about some regulations in those fields that have not been regulated by the legislative. Also, the authority for veto rights (absolute or delaying) is a negative legislative procedure exercised by the executive. On the other hand, courts deem those laws against the constitution as invalid and thus, by means of holding that a regulation is against the constitution, etc., they interfere the functions of the judiciary. Also, in cases where jurisprudence is concerned, that is, when a decision given by the court has obliging effects on a similar case,

this means that courts have a function of creating a general norm, as in the case of the legislative (1946:271-272). When we take all these interventions into consideration, it is very difficult to argue that there is a separation of functions. At this point, Kelsen states that the theory aim at preventing power from becoming intensified rather than aiming at bringing about a separation among functions, and that the historical significance of the principle of separation of powers lies at this point (1946:282).

Yet another fact that Kelsen states as being historical is the judicial check upon the legislative. It is argued that the roots of this check lies in the constitutional monarch period and that the judiciary is the most successful one among all bodies as far as restraining the power of absolute monarchy is concerned. As a result of this success, while monarch can interfere with the legislative, the jurisdiction managed to alienate itself from monarch and thus remain independent. The historically-established status of the jurisdiction has earned this body the authority to check the legislative and the administration (Kelsen, 1946: 281). That the jurisdiction is able to sustain this authority in democracies as well can be explained by means of not the features of democracy but this historical reason. Because, according to Kelsen, democracy calls for not a case in which the judiciary checks the legislative and the administration but a case in which the legislative checks the judiciary and the administration. When representative system is taken as the basis, the legislative represents the public; those that constitute that legislative are people elected by the public. Within this framework, Kelsen's theory democracy and norm theory are different from each other as far as their outcome is concerned. Yet, Kelsen,

who is a member of juridical positivism school, has contributed greatly to the development of constitutional review with his norm theory. Kelsen, the father of the Austrian Constitutional Court, was one of the pioneers in constituting a check mechanism that would determine the whether norms were in agreement or in disagreement "as a logical result of the law system" that he formed (Kaboğlu, 1994: 9). The European constitutional model, too, benefited from Kelsen's ideas.

According to some authors, today, as a result of a change in relations among governmental bodies, especially the legislative and the executive, there is a change as well in the body that is subject to constitutional review. According to Kaboğlu, today the executive has an increasing influence over the legislative, so much so that it is in a position where it monopolizes the task of initiating the law-making process. With this characteristic, the legislative "does not monopolize the formation of general will" and "the concept that the legislative is the work of the Parliament has today have been surpassed." (Kaboğlu, 1993: 399). While speaking of these transformations that classical liberalism went through, Bellamy too emphasizes that the generally accepted concept of classical [liberal] separation of powers, as well as inter-relations between the bodies have gone through a change. Today, there is a executive body that commands a passive majority at the legislative and the executive is influential at the law-making process (Bellamy, 1987: 30). In this respect, constitutional courts check actually, not the legislative but those acts and actions in the formation of which the executive is the determining force.

2.4.2. The Limits of Constitutional Review and Popular Sovereignty

The position of constitutional review within the democratic process is questioned in varying forms. According to Habermas, constitutional court is "a body devoid of democratic legitimacy" and in order for those courts whose task it is to fulfil constitutional review not to become "an authoritarian office", "it is essential that constitutional review is constrained by a level to which the running of democratic process is straightforward". That is, courts in question "should be considered as legitimate by courts on condition that they do not violate specific constitutional guarantees" and also that they fulfil a "procedural" check, not "a check that is based on material criteria". (cf. Sancar, 2001-2002: 25-26). The problem of legitimacy of constitutional courts is a problem of today. Yet, the intellectual data which enable us to question the level legitimacy can be found in Rousseau's "Popular Sovereignty" concept. We will analyze related views of Rousseau, who opposes the classical liberal thought which is erected upon a concept of classical individual rights and negative freedom and who is considered to be the father of republicanism where political rights gain importance.

Historically, it is viewed that with the shift from absolute monarchies to constitutional monarchies, there emerges the legislative that shares political power. Of all those thinkers we have considered, this position of the legislative finds its extreme limits with Rousseau and is truly expressed in the 1793 French Constitution. Although the legislative is accepted as the supreme power in Locke's analysis as well, Locke brings about certain criteria that restrain this body. In this context, while the sovereignty of the legislative recedes to be

absolute, for Rousseau, legislative power is of a feature that cannot be transferred, nor can it be represented. Compared with liberal thinkers and their approach, Rousseau has a different approach toward the individual, individual's position within the political society.

One of the thinkers of the social contract concept, J. J. Rousseau too displays the separation between the natural and the founded. According to Rousseau, "... social order is a sacred right which serves as a foundation for all others". But this right "does not come from nature. It is therefore based on conventions" (Rousseau, 1974a: 7). Taking this as the starting point, it is argued that not one person has "a natural authority" upon another and that the foundation of any kind of authorities present among people is contracts. Why it is that man needed social contract? Because in natural living conditions people faced obstacles to their self-protection and survival and, in order to overcome these obstacles, they chose to unite their power. Yet, such a unity this is that while one person unites with everybody, he remains under his own command and thus is bound to no-one. Also, because each person in society unites himself to this society with all his rights, the situation is the same for everybody. From this point of view, equity and freedom that Locke too views as important features existent in political society, are provided for in social order. Moreover, in accordance with the purpose for which social contract was formulated, with the formation of a society each individual gains more power to protect whatever they possess. (Rousseau, 1974a:21-33). Yet, different from what Locke thinks, Rousseau tells that equity is not a feature brought about from the natural circumstances, that people have surpassed the "physical

inequality" present among people in nature by means of the contract they have made and "they all become equal by convention and legal right" (Rousseau, 1974a:37).

In society, the common thing between different interests that constitute social bond correspond to general will. For Rousseau, what is important is not the individual with his specific rights, but the individual-citizen who contributes to social-political life and thus becomes a part of it. General will is formed as a result of this contribution and public deliberation (Rousseau, 1974b: 258). Individuals' freedom is not external to the society; on the contrary, this freedom is social freedom that exists within society.

That the subtitle for Rousseau' book titled as *Social Contract* is "Principles of Political Right", is, within this framework, meaningful (Shereover, 1974: x). As distinct from the concept of negative freedom of liberalism, Rousseau gives importance to political rights and participation. As we have mentioned above, general will, one of the basic concepts of Rousseau, can only be formed by means of this and only this way can it reflect the approval and will of the society as a whole. When will is general as such, it constitutes law and law, for its part, should be general and observe not the specific but the common, since general will takes common interest into consideration and it is aimed at social benefits (Rousseau, 1974a: 41-45). Only when a regulation possesses these characteristics can then it be called a law.

The predecessor of law in social condition is "universal justice". Because "laws of justice", whose source in reason, do not have the power of natural execution, contracts and laws were found to be necessary. Law should be made by the whole of public; in other words, it should be the product of a sovereign entity; it should reflect general will and the subject of a law that possesses all of these characteristics should be general. Having stated the most elementary conditions of law as such, Rousseau makes a distinction between the legislator and the legislative. The legislative is the sovereign entity and it is the choice of public; yet, law is a task that shares no common feature with sovereignty. The answer to the question "Why was this distinction necessary?" is that the public can be deceived. People want goodness at all times, but at times they may fail to see where goodness lies. Then, it is the legislator who guides the will of the public in general – general will – into the path it is after and who prevents it from being influenced by private interests. Even though it is not certain how law has come to gain the capacity of guidance, one thing is certain: laws in a general sense need to be regulations that observe not the private interest but common interest (Rousseau, 1974a: 57-69).

Having mentioned those features that laws should bear in an abstract way, Rousseau does not present any clues of an institution that will check whether laws do bear these features. Stating that decisions should be formed through public participation to the political process and through deliberation and claiming that this way laws will reflect the general will and the general will is of a feature that cannot be restrained, Rousseau is unlikely to have been the source of inspiration for a system where laws – those reflections of the general

will – will be checked by a group of judges. On the contrary, Rousseau's principle of popular sovereignty can form the basis for a concept which is against laws' – which are products of the general will formed through deliberation in political field – being checked. In between the idea that defends a constitutional review with a broad authority and the idea that argues that constitutional review is against the idea of democracy, lies the problem of the limits of constitutional review. The Political Problem Doctrine emerged when those courts founded with the purpose of constitutional review tended to restrain their own field of operations. While restraining their own field, courts make references especially to the principle of separation powers and differences between legal and political fields and their very features.

As we will se later in discussion concerning judicial activism – judicial self-restraint, courts and some authors claim that some problems brought before the judicial body should be solved not by the judicial body itself, but by the political bodies that consist of individuals elected by the public. Within this framework, Rousseau's idea are, theoretically, nutrients for the political problem doctrine and discussions centering around this doctrine.

CHAPTER III

AN ATTEMPT TO DEFINE THE POLITICAL QUESTION DOCTRINE WITH A COUNTERPART: ACTS OF GOVERNMENT

The U.S. Supreme Court has brought about one of the solutions suggested for the question of the limits of constitutional review with "political question doctrine". This solution runs parallel to ""acts of government doctrine" suggested by French Council of State (Conseil d'Etat) as a response to the question of the limits of administrative trial in the field of administrative trial (Çağlar1986:162).

Since it is difficult to bring a legal definition to "acts of government", it appears easier to describe and exemplify, rather than define. Government and administration have such acts that it is impossible for these acts to conform to pre-determined rules. Acts as such constitute a field with its own law and rules, a field where law has not yet set pace (Onar, 1939:441). The most common example given in this aspect is international agreements. Such acts are exempted from jurisdiction supervision and cases against these acts are declined even before the merits is considered on the grounds that they fail to bear procedural requirement.

According to the Constitution and some laws, certain actions are deemed as being exempted from administrative trial field, to inspection. These commands, being an exception to Article 125 of the 1982 Constitution are also apparent in various acts in the Constitution. For example, in Articles 105/2, 160/1 and 159/4 of the Constitution, judicial restraints that are present under the title of "judicial constraint" in the doctrine, can be found.[2] On the other hand, those administrative actions that are defined as "acts of government" do not bear their basis for being exempted from judicial review on the fact that they are explicit in laws. They have been given immunity to judicial review by judicial bodies due to historical developments, the conjuncture, and the relation between judiciary and executive.

This aspect of the "acts of government" doctrine is similar to political question doctrine. Certain topics, which are given immunity to inspection by constitutional review, appear owing to the fact that the judicial body restricts its own jurisdiction field. While "acts of government" doctrine came into view with the Laffitte judgement of 1882 by French Council of State, the rise and development of political question doctrine has been thanks to judgements by the U.S. Supreme Court. In other words, both "acts of government" doctrine and political question doctrine are products of "jurisprudence".

The "acts of government" doctrine was born and developed in France. In its outset, French Council of State, whose power was limited only to presenting its judicial decisions to the Government for appraisal, stated that no

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[2] For an evaluation of legislative restraints in the system of the rule of law, see. Alpar, 1994.

case could be opened against judgements equipped "with political motive" and thereby set the limits of judicial field with Laffitte judgement, approving that certain acts are political acts.

"Acts of government" is a product of a practice that led to certain legal acts' being exempted from judicial review. There is a paradoxical relation between such acts and the concept of the rule of law. There exists the perception that certain acts cannot be framed within the boundaries of legal rules and that, as an extension of that, these acts should be exempted from the inspection sphere of judicial bodies that are entitled to make legality judgements. The rise and development of act of state concept that rests on this perception is closely related with the development of the rule of law concept. It is impossible to mention of act of state practice in a period when the ruling power has not been registered with known, pre-determined rules. Because, in a period when the ruling power exercises its authority without being committed to any rules or by binding to rules that the ruling power itself determines and recognises and that are open to amendments any moment, each and every act is partly or wholly a act of state. In a police state it is not possible to separate act of state from other acts, because material foundations, the totality of rules the act is bound to are non-existent (Onar, 1939:275-7). Mignon, too, sees the principle of legality as one of the bases that limit the acts of the State in a state governed by the rule of law. The principle of legality has two elements: that the decisions should comply with arrangements of general and objective character, and that judiciary act should comply with superior rules. The attempt to constitute a system in which judiciary is at the focal point and one through

which this compliance can be checked, is likely to meet certain difficulties. On the one hand, it can be claimed that, judging from existence of the principle of separation of powers, judicial review of judgements reached by the separate entities of the legislation and the executive is wrong; on the other hand, it can be claimed that the idea of sovereignty assumes the lack of responsibility on the part of the state. Yet, depending on the development of the concept of legality, owing to the efforts administrative trial that is itself a product of separation of powers in the long term, "acts of government" are subjected – apart from political inspection – to judicial review exercised by judicial bodies (Mignon, 1951:30-31). Having emphasized the relation between the rule of law and "acts of government", we can now deal with the definition of act of state and the criteria that will separate these acts from others.

In France, the birthplace of "acts of government", initially the "political motive" criteria was used to separate act of state from other acts. Accordingly, an act is called act of state if it is exercised by the Government (Administration) with a political motive. That is, that the motive present at the time of the performance of the act is political makes an administrative act an "act of state" and exempts it from judicial review. With the preliminary acceptance that judicial bodies perform not political inspection but the inspection of legality, this result is comprehensible. Yet, what is to be understood from the term "political motive" or what it is that is not political, is open to discussion. Professor Bahri Savcı explains the "political question theory" that was defended by some authors in the mid-19th century as such:

> ... "acts of government" that the administration performs by acting as an authority resulting from the power endowed by the constitutional order, rest on a political reason aimed at protecting the regime, providing internal and external security and at maintaining its continuity. In a representative government, if the Ministers are taking some measures that violate personal rights, this means that this is performed due simply to the political obligation we have mentioned. Therefore, only before a political power can these measures that depend on [a] political reason and purpose be defended ... if such deeds that are performed due to such a grand broad obligation as internal and external considerations of the regime are subjected to a judicial control as well as the political control, then we will be obstructing the deed." (Savcı, 1953:290)

Here "a grand broad obligation" is mentioned and it is stressed that the circumstances and motive in which those deeds and activities that have been performed with a political reason and that fall within this scope should not be subjected to judicial review. It is known that public law does not have arrangements that differ from those of private law. It is stated that this aspect of public law stems from the requirement that the field of operation of institutions and officials working for the public should not be restricted and that decision given on behalf of the public should remain as adaptable to changing times and conditions. Yet, this does not mean that public agents do and can make decisions in void; it is simply to do with the level of generality and objectivity of the arrangements. In addition to written rules such as the constitution and law, a mention can be made of these texts' general principles of filling in the gaps (Erkut, 1996:15-16). It cannot be argued that a management that claims to be a state governed by the rule of law will perform acts that are arbitrary and that have not been proved with legal rules. On a system when supremacy of law is debated and when attempts are made to draw the limitations of the political power through legal principles, the framework for deeds and procedures to be fulfilled during emergency periods will already have been set.

Thus, in a period when "obligation" is stressed, there are rules to which rulers and the citizens will be subjected and these rules are initially recognized. In short, emergency regime is not a regime of illegality.[3]

Yet another problem the institution will determine is whether the motive is political. In German example, it is up to the court that will decide whether the act is political or not. In the period that follows the acceptance of 1949 Bonn Constitution, it is viewed as impossible that "acts of government" should be exempted from judicial review. According to Giritli, "... as a result of the acceptance of general authority in administrative justice in particular, [there is] no possibility that "acts of government" should be exempted from judicial supervision due to their political features" (1958:61).

If it is determined by the government itself whether the motive is political or not, there may be applications that will harm the principle of fidelity to law on the part of the state. Consequently, what is political is an unknown point in law. Also, if the state determines that the motive is political, this may lead to arbitrary practices. In short, not only does the concept of political motive lack any legal value, but also it embodies the danger of providing means for moving towards illegality as far as acts are concerned. In France too have these insufficiencies and drawbacks of the "political motive" criteria that bears parallelisms to the older Governmental Wisdom concept

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[3] For a similar view on relation between "acts of government" and extraordinary regime, see. Onar, 1966 and also Gemalmaz, 1991.

been seen and it has been abandoned, especially after the 1875 Prince Napoleon judgement (Virally, 1952:335; Giritli, 1958:17-18).

One other criteria that separates "acts of government" from other legal acts is based on the attempt to separate administration from government, and administration function from government function. According to Onar, "... writers have started to try and derive criterion for "acts of government" not from such a subjective basis as the government's intention and motive, but from the content of the act itself" (1966:444). Continual and daily practicing of laws, acts that are essential for orderly operation of public services, administrative acts, "providing the continuity of public services", "principal acts applied to maintain external and internal security" are named as "acts of government" (Onar, p. 444). However, the difficulty here arises from the fact that there is no "material and organic" criteria – other than those methods mentioned above – through which government and administration practices can be separated. Because, both the government and the administration are within the body and functions of the executive. Both Onar and Giritli defend similar points on this subject. According to Onar, these two functions "are seen in and performed by acts that include the same topic and bear the same structure" (Onar, 1966:445). Sarıca, on the other hand, as distinct from both Onar and Giritli, tells that administration and government function can easily be separated and that, however, this separation can be "not in terms of legality but in terms of their aims and purposes". According to Sarıca, the executive body either aims to protect the supreme and exceptional interests of the nation, or ensues the purpose of providing daily and ordinary necessities for the public".

These, respectively, correspond to government function and administration function. Having mentioned that experts like Tersner and Hauriou too believe the same way, Sarıca refers to a simile Serreigny brings:

> ... executive body is like a person on a steps of a flight of stairs. When this person is standing on the bottom of the stairs, this is named 'administration'; on the contrary, when the same person ascends to the top of the stairs we call this 'government'" (Sarıca, 1942:460).

In my opinion, one of the problems of separating government and administration in terms of their "aims and purposes" is that it is difficult to legally define "the supreme and exceptional interests of the nation" and separate them from the "daily and ordinary necessities". In administrative law, is the general purpose practices and procedures not to provide "public interest"? According to which criteria can the "exceptionality" and "being ordinary" of this interest be determined? Here, a subjective rather than an objective criteria can be at play. This can also be seen in the staircase example given to illustrate the government-administration distinction. Lower steps belong to administration and upper ones to government; yet, what is it that will determine the entrance of change that Alice too has gone through.

According to Onar, administration function and government function "can only be separated from each other empirically and politically; then, that means that this criteria too behaves out of a political source" (1966:445). While he confirms the efforts to develop criteria on the bases on government-administration separation because they emanate not from the act motive but from act "content", he nevertheless mentions that this separation too is dependent upon a political evaluation and that it is similar to the motive criteria

in this respect. As a result of the second criteria's being based on a political foundation rather than a legal one, "acts of government" have been determined and defined by means of not a criteria but jurisprudence and thus a list has been formed under the title of "acts of government". In France –the birthplace of "acts of government" doctrine and practice– such acts have been determined through grouping the acts by taking Council of State's and the Jurisdictional Conflict Court's jurisprudence as the basis (Giritli, 1958:19-20). The list formed through grouping method can be divided into two main titles of acts at national level and acts to be considered at international levels:

3.1. Acts of Government at National Level

Under this grouping are acts concerning relations between government and the parliament, the capacity of amnesty of the President, acts exercised in emergency periods.

3.1.1. Acts Concerning Relations Between Government and Parliament

Some of these acts consist of judgements the government makes by basing itself on the constitutions and that will influence the parliament, and the others consist of those that require the co-operation of the government with the parliament so that the power of the executive can be utilized.

As it can be easily estimated, those acts of the former type are concerned with calling the parliament for emergency hearing, adjourning the hearing and determining the date for parliamentary elections.

French Council of State, consistently, states that the authority to determine whether the acts within this group conform to the law belongs to legislature, thereby viewing these acts as being outside its scope of inspection. While putting this view forward, the Council asserts that this approach stems from a belief in separation of powers and that it considers itself as unauthorized "not because the legislative body too is authorized in the inspection of these acts, but because only the legislative body is authorized (cf. Giritli, 1958:32). Onar, on the other hand, does not view these acts concerned with legislature sessions and activities as being different "from administrative judgements that are to do with city or town council activities", as far as their "legal structure" is concerned, and claims, therefore, that they should be subject to judicial review. Onar states that some authors explain the fact that these acts are not subject to judicial review as a result of "the parliament's possessing the power of defending itself against the government with stronger instruments and therefore being able to do without help from the Council of State"; though, he adds, this belief is correct from the point of view of the parliament, this practice fails to explain the resultant circumstances in which a member of parliament or an elector cannot apply the court against a decision of this sort (Onar,1966:446-7).

Those acts that require government-parliament co-operation and that are treated in the second section, on the other hand, are judgements made when a bill or a proposed act by the government is withdrawn, and also judgements to do with proclamation of emergency.

Except for the case of proclamation of emergency, in all other cases "French Council of State declares that 'acts that are related with relations

between the Executive Body and the Parliament cannot be judicially a matter of dispute', by almost always using the same formula" (Giritli, 1958:33). Sarıca, on the other hand, states that because courts abstain from falling into "a state of diminution and conflict" with the legislative, they leave certain acts outside their own scope of inspection, and, for such acts, gives "the publishing and proclaiming by the government of laws approved by the legislative body, and declaration of martial law by the government" as examples (Sarıca, 1942:462). Actually, especially the former example is a act that brings not the court and the parliament, but the court and the government [the executive] face to face[4]. As a result, it would not be wrong to say that the court abstains from a dispute not only with the legislative but also with the executive. Considering the fact that the execution of judicial decisions is largely up to the executive, the reasons why the court abstains from such disputes can be understood.

At present, while some of the above-mentioned acts – such as the decision to declare martial law – are subjected to judicial review, some others are treated under the title of mixed act (*acte mixte*) rather than of "acts of government", thereby being left outside of the scope of judicial review. That the act gains the quality of "mixed" is related with its being a matter of interest both for the government and such a second authority as the parliament or the state.

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[4] As for the latter example, considering the fact that the decision of martial law of the government is approved by the parliament, in the case of this practice being made the subject of a lawsuit, this may lead to a conflict between these two institutions when the court evaluated the decision of the parliament.

Directing important criticism on the concept of mixed act, Virally states that these acts are not – other than a few exceptions – different from other administrative acts both in material and in form. Depending on this analysis, Virally tells that mixed acts cannot be subject to a special legal regime and that this concept cannot be based on a law theory (Virally, 1952:338). Viewing the term mixed act as an attempt to base "acts of government" on a criteria, Giritli states that the decision to declare martial law – which is structurally a mixed act – has, over time, been subjected to judicial review by French Council of State (1958:21-2).

Mignon too, contrary to general acceptance, tell that the decree for martial law is subject to judicial review whenever required. The Cheron judgement of 1875 reveals that the Court examined the decree for martial law declaration in Rhone alongside with the main case of request for nullity of the instruction for the closure of "Republican France". It is seen that in Hückel judgement of 1953, too, the decree for martial law declaration was subjected to judicial inspection (cf. Giritli, 1958:39-40).

3.1.2.The Amnesty Capacity of the President

For a period, French Council of State approved that acts related with the authority of amnesty of the President were exempted from judicial review. Depending on two judgements given by the Court in the beginning of the 1890s, it was considered that the authority of amnesty of the President fell into the "acts of government" category. However, with the 1947 Gombert judgement, the Council has abandoned that view. In Gombert judgement the

Council, while stating that amnesty acts are not "acts of government", declined the case on the assertion that the act bears a judicial quality (Onar, 1939: 448-9)[5]. Valine, on the other hand, emphasises the human life dimension of the topic and questions to which judicial authority one should apply for the inspection of certain judgements which, while declining the request for amnesty, display incongruity in authority and form (cf. Giritli, 1958: 43).

At the same time, Celier states that authority to pardon has nothing to do with the execution of the sentence and consequently this subject cannot be placed under the review of judicial organ. Whether to execute the authority of amnesty is an administrative decision and it is the responsibility of the Council of State to inspect this decision (Virally, 1952:331). Following the Gombert judgement, those amnesty decisions given by the President are no longer viewed under the "acts of government" category. Yet, this development has not resulted in these decisions being inspected by the Council of State; the Court simply stated that the case was of a judicial quality, thereby leaving it outside of its scope of inspection.

3.1.3.Security Measures Exercised in Emergency Periods

Periods of emergency experienced due to war, riot, natural disasters, epidemics and the like are also subjected to a legal regime. However, sometimes, instead of exercising those laws peculiar to this period,

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[5] The Court decision was that the President "did not act as an administrative authority" while executing the amnesty power (cf. Giritli, 1958:42). In this decision, the connection of the power of amnesty with the sentence is emphasised and it is pointed out that the amnesty is

governments take unlawful measures and try to legalize them, bearing upon the difficulties faced. At the same time, the concept of "acts of government" helps governments by providing means for keeping those decisions taken during this period outside the scope of judicial review. That the acts within this period are defined as act of state is attributed by Sarıca to the desire to "present the government broad and exact freedom" (Sarıca, 1942:463). However, the point not to be overlooked is that in emergency periods the legal regime in question already provides the government with the freedom for means and rules in exercising its authority. Not being contented with this and leaving the acts in this period outside the scope of judicial review – especially by the courts – in the name of "presenting exact freedom" will bring about the fact that those arrangement peculiar to this period will also become ineffective. One result of this ineffectiveness is the depreciation and even termination of the concept of legality. According to Onar, when one acts according to the motive criteria, it is likely that emergency measures taken will remain outside the scope of judicial review. However, what with the motive criteria ceasing to survive, the French Council of State has started to show a tendency to view such measures as being outside the "acts of government" category (Onar, 1966:449).

We have already mentioned that "acts of government" have a dimension related with international relations, as well as the national dimension; we will now study these acts.

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an extension of the sentence, and consequently the decision to whether to exercise the power of amnesty is not seen as being outside the scope of jurisdictional inspection.

3.2.The Place of "Acts of Government" in Decisions of International Characteristics

In this category are those acts related with international agreements, war incidents (*let faits de guerre*), measures taken towards foreigners during national defence, and decisions related with international sovereignty of the state.

3.2.1.International Agreement

The field where the concept of "acts of government" is used intensively consists of decisions reached and agreements made by the government within the framework of international relations. In general, the French Council of State does not view itself as authorized as far as those conflicts dealt within the framework of international relations organized by international law are concerned. According to Sarıca, this attitude of the courts arises from the fact that they "abstain from bringing the government to face certain difficulties and hardships in diplomatic field" (cf. Onar, 1966:461). Yet, nor does the French Council of State absolutely exercise the "acts of government" category in diplomatic field. One exception is "detachable acts" (*les actes detachables*). Depending on the government's behaving more or less independently within the framework of its international obligations while exercising the disputed acts, one can speak of "detachable acts" (Giritli, 1958:4; Virally, 1952:346-7). In such cases judicial courts can inspect the disputed act of the government. As well as decree provisions that approve of an agreement but do not conform to the agreement, decisions taken by French authorities during the Second World

War upon demands by the occupant powers, and protection of French citizen abroad by French foreign representatives without harming international relations, are all subject to judicial review (Giritli, 1958:53; Mignon, 1951:38-39, 43). Also, provided that an approved and proclaimed agreement is of the force of law – albeit its being against certain French laws – then the French Council of State puts these international agreements brought forward by the parties concerned into practise in its decisions and an infringement of these agreements is considered a basis for an assent to lawsuit against the administration. Here, what is also exercised in Turkish law is that there is the existence of an agreement –suitably approved – within the sources of internal law and it is natural that a court inspecting whether the acts conform to laws as well as to other arrangements, should consider agreements of the power of law as a source of reference.

3.2.2.War Incidents

Digging trench during war, occupying a land, and similar activities are identified as war incidents. War incidents are not a legal act – simply a conduct. The French Council of State classifies war incidents into two categories, depending on whether they occur within the national borders, and considers those outside the national borders as being outside the scope of inspection. For those conducts within the national borders it is possible to file not a suit of nullity but a action for damages. Up until 1914, the Council assented the case, considering the conduct forming the subject-matter of the action for damages as not being a government function. With a legal

amendment made in 1914, despite the fact that the State's responsibility in war damages is mentioned, parallel to the former practice of the Council, no mention is made of those war damages outside the national borders. Consequently, the Council of State continues to leave such damages outside its scope of inspection, while hearing cases related with reparation of damages within national borders (Mignon, 1951:37-9; Onar, 1966:453-4).

3.2.3.Security Measures Directed towards Foreigners during National Defense

In order that acts within this group are called act of state and left outside the scope of judicial review, certain conditions are required to be met. In case such security measures are taken during wartime, they are aimed at not the citizens but foreigners and they are police measures taken simply to maintain the material order of the society, then it is possible for them to be considered as act of state. One example of the list of "acts of government" getting shorter is those acts under this heading and such administrative actions are today subjected to judicial review.

3.2.4.Problems Concerning International Sovereignty of the State

In general, problems that fall into the international law category – for example, "the problem of whether [state debts] will be loaded onto the general public; problems stemming from the presence of certain sovereignties over a nation" – are called act of state (Onar, 1966:454). As a result of changes in jurisprudence and doctrine, acts in this field have started to be considered

under the heading of mixed acts, as have disputes between the parliament and the executive. This development, in conclusion, is not different from "acts of government"; because, acts that are under this name are also exempted from judicial review. Because acts under this name are also exempt from judicial review.

Judging from development of "acts of government" concept in France, it can be said that the category in question bears a characteristic of being product of jurisprudence, that rather than restricting the scope of judicial review instead of laws it restricts its own scope of inspection and that such acts cannot be defined through generally accepted criterion, but rather, empirically, it may be possible to make a listing by means of taking jurisprudence into consideration.

CHAPTER IV

AMERICAN SUPREME COURT AND THE POLITICAL QUESTION DOCTRINE

4.1. Constitutional Review and American Supreme Court

In the first chapter of the section one, we studied the function of the law within a system dominated by the market relations and organized according to the essentials of liberalism in the 18th and 19th centuries.. We also attempted to form the framework of constitutional review by presenting views of thinkers, whose views were influential in the 19th and 20th centuries and whose contributions for the law to be recognized were undeniable.

In the present chapter, we will continue a similar study within the specific domain the United States of America. We will take a closer look at the emergence of constitutional review concept in America –the country which presented the first practice of constitutional review– and the position of the American Supreme Court within this context.

The idea of constitutional review that rests on the basis of inspecting the appropriateness of laws to a higher norm, is not unfamiliar to American Law as it is within the system of "common law". Although the idea of constitutional review is not compatible with the concept of the supremacy of the parliament in England, the birthplace of "common law", Judge Coke held

that a declaration of norms that "contradict" with higher rules of law as being invalid was one of the important functions of judiciary Yet, it was out of the question that this function should be carried out by a higher court and thus made institutionalized. An exception to this was that the Privy Council inspected legislation activities in colonies. In America, a colony of England, functions of legislation bodies were inspected in terms of compatibility with higher rules of law by the Privy Council in the "Motherland England" and it was declared as invalid if an incompatibility was detected. Since America was a colony, those legislation bodies within this country were then to take the Council's decisions into consideration and avoid making any regulations that might cause contradiction (Cappelletti, 1971:39-41).

After the establishment of the United States of America, in addition to already existent provincial courts, a Supreme Court at the level of federation and lower courts were founded. Article 3 of the United States Constitution that came into force in 1787 is to do with the power of judiciary. In Section 1 of the Article, it is stated that the judicial power in the United States will be used by a Supreme Court and lower courts to be founded by the Congress should the needs arise. According to Article 3 Section 2, what constitutes the scope of judicial power are lawsuits and equity suits to be filed by bearing upon the Constitution, laws and conditions treaties made/to be made; lawsuits related with ambassadors, foreign representatives or consulates; disputes in which the United States is a side; disputes between states, between the citizens of a state and the citizens of another state, between citizens of states, between a state or the citizens of a state and foreign states or their citizens.

On the other hand, of these cases, the Supreme Court hears as the first rank court those cases related with ambassadors, foreign representatives and consulates, and those in which a state is a side. In cases other than these, the Supreme Court acts as a higher court (cf. Rotunda, 1989:LXVII).

It can be seen that the 1787 Constitutions set up he Supreme Court and formed its scope of authority as stated above. However, the inspection of appropriateness to the law was not mentioned in the list of authorities the Court had. Also, the judicial power of which the Supreme Court is part was regulated in Article 3. That is, it follows those items that included regulations concerning the Congress and the President. According to one view, this sequence of the institutions can be interpreted as the precedence not being given to judicial organ (Beard and Beard, 1930:109), or even as its being the third among equals. It is important to know the views of the makers of the Constitution in order that this issue can be clarified.

Although minutes for discussions during the preparation of the Constitution were not held, main points were later compiled under the title of *The Federalists* papers. In order to understand both the position of judiciary within the political system and especially whether the authority for constitutional review is possible, it will worthwhile to look at the essays in *The Federalist.*

4.1.1. Federalists' Views

In his essay numbered 39, Madison mentions judicial organ while defining the republican characteristic of the government. According to

Madison, in order for the "form of government" to be "republican", it is sufficient that "persons administering it be appointed either directly or indirectly, by the people" and that "they hold their appointments by either of the tenures just specified". Judges, too, like "all other officers of the Union" will be elected by the people through rather indirect ways and they "retain their offices by the firm tenure of good behavior". In other words, their duty is uninterrupted so long as this requirement is met (Madison, 1937: 244-245).

In his essay numbered 51, Madison (or Hamilton) sheds more light on this issue: "In order to lay a due foundation for that separate and distinct exercise of the different powers of government" that is "essential to the preservation of liberty", as a general principle, "each body should have a will of its own" and a realization of this depends on each body's minimum interference into "the appointment of the members of others" (1937:336). Madison (or Hamilton) tells that certain deviations from this principle can be possible, because its realization will stir certain difficulties and cause additional expenses. According to Madison (or Hamilton), this fact is especially true for "judicial department":

> Some deviations... from the principle must be admitted... first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department must soon destroy all sense of dependence on the authority conferring them (Madison/Hamilton, 1937:336).

Yet another guarantee the judges are provided with so that they can remain independent is that they are not too much dependent on other institutions for the salary they get. According to Madison (or Hamilton), in order for the

independence of the judges to be of genuine value, it is a must that they are independent from the legislative organ as well: "Were the executive magistrates, or the judges not independent of the legislature in this particular, their independence in every other would be merely nominal" (1937:337).

In his essay numbered 39, Madison mentions the necessity for the establishment of federal courts. When a dispute arises about issues that have been left to states via federal authority, the problem should be solved by a court "to be established under the general government" (1937:249). The federal court is essential so that the union formed among states can be maintained.

Hamilton, in his essay numbered 82, states that the judicial power at federal level can be used by lower courts that the Supreme Court and the Congress will determine and then present his views as to how to determine the scope of authority between state courts and federal courts and what the authority for lower courts at federal level can be (Hamilton, 1937b: 535-538). Yet, clues for the view that the Supreme Court can carry out judicial review of constitutionality of laws are present in his essay numbered 78. In this essay, after he claims that judicial power cannot be limitless -such as laws that regulate the cases when a person is sentences to capital punishment or charged with treason (bills of attainder) without a court trial and laws that act retrospectively cannot be made- Hamilton holds that it can only be the courts that will put restraints as such and the like into practice. He states that this practice, that is, that the courts "pronounce legislative acts void", will suggest that judiciary has a superiority over the legislature (Hamilton, 1937a:505). However, according to Hamilton, this does alter the fact that laws will be

interpreted by the courts only and that the Constitution is an elementary law that needs to be carefully considered by the judges. It is the judges who will explain and clarify the meaning of the Constitution, as they explain the meaning of a law, and in case there is a conflict, not the law itself but the Constitution, not the intent of the representatives but the intent of the people will be preferred (1937a:505-506).

Bearing upon the idea that the legislative can/must have its own restraints, Hamilton grants the judiciary the authority to determine the meaning of the Constitution that sets the basic principles for formation and to declare those laws that are unconstitutional as void. According to McClouskey, the understanding that considers the judiciary as authorized in relations in America between the legislature and the judiciary, as well as in determining and rendering invalid of regulations which are unconstitutional includes a duality: the basic law, the concept of supreme law and sovereignty of people (McClouskey, 1962:12-15). On the one side there are higher norms that limit the political power and that people who hold the political power should respect; on the other, there is will of the people and the legislative organ in which this will is expressed.

What must be understood from this first set of concepts is that the domain of the ruling power is normally surrounded by higher norms, and that it is surrounded by the Constitution when a legal system is concerned. The second one, on the other hand, reminds supremacy of will of the people and the idea of supremacy of the legislative organ by which this will is expressed. According to McClouskey, it is possible that this duality is reduced to one.

This can be possible by stating that the Constitution and the restraints it brings about have been realized through will of the people. Thus, limiting will of the people becomes possible through will of the people. However, in the United States, instead of following an approach as such, the principal issue has been the embodiment of these two different views in two separate institutions and while it is assumed that will of the people is realized essentially in the legislature, the judiciary has been commissioned to pick those regulations that are unconstitutional, which determines the limits of the ruling power.

According to some authors, an explanation to the very existence of this duality and the duty of the judiciary to ensure that the limits are not exceeded, can be that the makers of the Constitution and the dominant view of the time did not trust the majority with no property or goods and that they considered judges, who are generally educated and outstanding persons, as a safeguard for their own existence (cf. Feyzioğlu, 1951:175). This view can be said to be meaningful, considering the fact that people most effective in the drafting of the Constitution were, generally, wealthy. However, at this point one might ask why the issue of the judiciary being authorized to review the appropriateness of laws to the Constitution is not mentioned in the Constitution itself, and why Federalists –save for Hamilton– do not mention this issue in their essays a lot. There are some answers that state that the authority of constitutional review was already in use by the courts even before the 1787 Constitution existed and it would be meaningless to re-emphasize it, that this issue was overlooked during the drafting of the Constitution, etc. Yet, as Feyzioğlu states, the most sensible explanation is that as in other issues, in this issue too they did not go

into details in order not to create a new area of dispute and preferred a short constitution (Feyzioğlu,1951:175). This way, the authority of the judiciary of reviewing unconstitutionality of laws was not made a part of positive law and was left to be solved over time. Everything was ready for Marbury-Madison Case to emerge.

4.1.2. Marbury-Madison Case and Its Consequences

Relations between federal state and states and the issue of distribution of power were a matter of debates both during and aftermath of attempts to found the United States of America. In the beginning of the 19th century, Republicans – who supported the idea that states should be stronger before federal states – replace Federalists who supported centralization and stressed the importance of "federal" state. As a result of the election held in the year 1800, Jefferson was elected the President. Yet, Republicans were not able to take over before March 1801. In that period President Adams, himself a Federalist, used his authority for appointing and appointed John Marshall to the post of the Supreme Court Chief Judge which had been vacant since the beginning of the election in order to maintain his influence in the judicial field against Republicans. Efforts Federalists spent in order to maintain their effect in judiciary were not confined to this appointment. In 1801, by means of the law to do with the organization of courts the power and number of judicial places was increased and new courts were founded. Also, new judges were appointed to some courts (McClouskey, 1962:38ff). One of them was William Marbury appointed as the Justice of Peace in the District of Columbia. In

Jefferson term that started in March 1801, some of the appointment decisions were not notified to the people concerned. Marbury too, together with several colleagues, applied the Supreme Court – basing his claim on section 13 of Judiciary Act of 1789 – and asked the Court post an order (writ of mandamus)[6] to Secretary of State Madison to put appointment decisions into effect (Marbury v. Madison, 1803).

Madison was sent the claims and a reply was expected. However, the Secretary of State told that he would not give a reply as he had been informed too late and that he was leaving the decision to the Court. The Court resolved that this issue should be decided in the following sitting.

Marbury-Madison case, which was not an ordinary case from the very beginning and which had political implications as well, witnessed important developments during the period of time between these two sessions by the Court.

When the suit was filed it was demanded an order should be posted to the authorities to put the appointment orders into effect, reaction against Federalists who had made regulations in their last day in office in order to strengthen their own standing, increased. In the meantime, the place and power of the Supreme Court in this "case" came to be discussed.

One of the concrete results of such discussions is that the act Federalists passed in the final days 1801 for the regulation of courts was abolished and

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[6] Writ of mandamus is an order sent by the federal court to authorities, persons or institutions so that they must fulfil their appointed duty.

those judges that were appointed with that period were temporarily removed from office. With another regulation, frequency of session of the Supreme Court was changed. Thus, the Supreme Court – having decided to hear Marbury-Madison Case in the coming meeting to be held in June 1802, was able to hear the case only in February 1803.

The Court initially discussed what rights the suitor had how the damage could be prevented likely to occur unless these rights were not used. It was stated that formal conditions for the appointment decision had been met and appointment had been completed. It was decided that the President of the United States held an important political power and therefore would have responsibilities towards his country and his own conscience only while utilizing his authority for discretion; further, it was stated that the decisions of those authorities who were in a position to carry out the decisions given by the President would also bear the a political quality. Yet, failing to fulfil a task determined by the law and violating an individual's rights could not be legalized by any one or all of these elements. If an individual has been harmed as a result of such an operation, it was stated, then no one can prevent the individual from making use of the laws of the country to have the harm removed.

In the second phase is considered the characteristic of the order to be posted so that the appointment can be realized and the authority of the Court in this matter. According to the Article dating from 1789 which gained validity with the abolishment of the Article from 1801, the Supreme Court can hear this case. In other words, Marbury's application to the Supreme Court without first

applying to a lower court is correct in nature. Yet, here, according to Judge Marshall, there is something that is incorrect. The Article in question and the Section 2 of Article 3 of the Constitution conflict. As we have already mentioned, those cases that the Court is authorized to hear have been stated through nomination and the list is rather limited. Marbury Case is not among those cases the Court is required to hear as the first rank court. In it at this point that the Court mentions the order of rules between law and constitution; the Court resolves that in cases when the lower norm conflicts with the higher norm, i.e., when a law conflicts with the Constitution, this can be determined by the Supreme Court.

As a result, although the Court views Marbury's demands as appropriate, it has stated that the authority to be applied is not the Court itself. However, the real important result of this case is that Judge Marshall, with the decision he drafted, claimed in the name of the Supreme Court the supervision of constitutionality of laws (Feyzioğlu, 1951:164-171). Here we can analyze those claims the decision brings about the authority for constitutional review.

According to Marshall, not only the bodies in the United States were established, but also those limits beyond which these bodies could not reach were also set. In the meantime, the power of the legislative was defined and determined. Moreover, these limits were determined in a written constitution. If these limits could be passed by the power they were meant to limit, then there would be no reason for setting up limits and presenting them in a written form. The Constitution is either a supreme law that cannot be amended by ordinary laws, or it is an ordinary law that is not different from any other law

and that can be amended by them. If the former case is true, a legislative process that is unconstitutional is not lawful; if the second case is true, then limiting a power which is endless due to its nature, by means of a written constitution is a meaningless undertaking (Marbury v. Madison, 1803). In other words, having a written constitution on the one hand and claiming that this constitution can be amended by ordinary laws on the other are not compatible. The fact that it is a written documents enables it for the Constitution reach a higher level of a basic and supreme law and, naturally, an ordinary law that is unconstitutional bears no amendment power and is in fact invalid. The problem at this point is which body will determine the situation of being unconstitutional. Marshall's solution reminds one of the famous utterance from Judge Coke: It is the judges that tell what the law is about. It is the judges that decide which of the two conflicting laws will be applied. In the case of a similar situation arising between a law and the Constitution, it is again the judges that should be active (Marbury v. Madison, 1803).

In order to support his view, Judge Marshall uses the Constitution of the United States. The judicial power of the United States includes any case to be filed by bearing upon the sentence of the Constitution. This statement is present in Section 2 of Article 3 that regulated judicial power. As an another proof, what is reminded is the oath taken at the outset of the profession and the fact that judges need to guard the Constitution according to this oath they gave. Marshall, pointing out the sentence in this oath which holds that the person concerned shall serve in harmony with the Constitution and laws, claims that the fact that the word Constitution in this oath is written separate and before

other laws is another proof of its being considered an elementary and supreme court (Marbury v. Madison, 1803).

While Judge Marshall rests his concept of constitutional review on such general rationalisations as the meaning and consequences of an constitution's being in written form, as the legislative being restrained by "the supreme law of the land", the least of which being that laws do not act retrospectively, he also uses certain statements that correspond to certain articles in the 1787 Constitution. One of them is Article 3 we have just mentioned; another one is Article 6 which deals with the issue of the supreme law of the land and places the Constitution the first place, and which is in harmony with Marshall's view that the Constitution is the most basic and supreme law. Yet, there is problem concerned. The article in question was drafted to address judges in states. Yet, for the Supreme Court which was founded at federal level, which also acted as the appellate court and which thus included the judges in states as well, it was be commented that this article is valid as *argumentum a fortiori* only.

Yet another proof to be questioned is to do with the oath the judges take. It is true that judges will be liable to guard the Constitution as a consequence of the promise they make. However, it does not follow that the task/authority of guarding and realizing the Constitutions falls on judges only. Because not only the judges but also other civil servants at federal and state level take an oath (Gunther, 1986:189). Yet another fact to be mentioned is that those proofs that indicate that constitutional review should be under the scope of judicial power does not mean that this power is to be used especially by the Supreme Court. In this respect, Marbury-Madison Case has been a major step

for the institutionalisation of constitutional review in the United States of America – even though the second step could only be taken half a century later, when the Court gave a decision of unconstitutionality for Dred Scott Case in 1856. However, in the years that followed Marbury-Madison Case, the efforts gained pace and the position of the Court became more clear.

4.1.3. In Conclusion

Viewed generally, the concept that holds that the Constitution is a law over other laws, that the legislative is restricted – alongside with universal law – by the Constitution which is an higher norm and yet that those regulations made in harmony with the Constitution will bear a sentence, has formed the basis of the concept of constitutional review in America.

Hamilton, in his essay number 78, views the judiciary as being authorized for dealing with those operations by the legislative that are unconstitutional and grants the judiciary the mission of protecting individual rights before the state; these views have strengthened the basis on which constitutional review rests.

Even though there is not a manifest sentence in the Constitution, the Supreme Court viewed itself as being authorized to determined the constitutionality of laws, as demonstrated by the decision Judge Marshall gave for Marbury-Madison Case in 1803. Although the decision rests upon general law principles, themes present in Federalists' essays and sentences in the Constitution, the Court handled this authority as being *de facto* (Gunther, 1986:21)and supported more diligently in years to come.

4.2. Political Question Doctrine

Despite its having changed in due process, political question doctrine depends on the concept that the judiciary narrows its own scope before the legislative and executive bodies. The doctrine serves to the narrowing down of the scope in question in terms of material space – as being different from procedural techniques through which the judiciary restrains itself.

4.2.1. Judicial Activism versus Self-Restraint by the Judiciary

The terms judicial activism and judicial restraint appear in many studies where the position of the Court within the administrative structure is analyzed and where higher court decisions are studied. In order for the political question doctrine – one of the major techniques through which the scope of the judiciary can be restricted – to be thoroughly understood, it is important that these terms are clarified.

The problem of the limits of the scope of judiciary began to be argued after 1803, when Marshall resolved Marbury-Madison Case. The decision by Judge Marshall, who is recognized as the first "Activist" –led to various arguments. According to those who support the view that the judiciary should act in a restraint domain, Marshall claims an authority which does not exist in the Constitution. As a result of Marbury-Madison Case, the Constitution of the United States of America came to be amended by a court decision, in a way not anticipated in the written text (McClenaghan, 1990:65-67). A decision that initiated the practice of constitutional review also brought about, in a constitutional system, the position of the judiciary being questioned. One of the

views that is against judicial activism took as its basis the comparison of the number of words used to define the legislative, executive and judiciary in the constitution and the result of this comparison reveals that it is the judiciary that suffers as it covers far less space in the constitution than the legislative or the executive (Halpern and Lamb, 1984:1).

The doctrine of separation of powers too is used to support the view that the judiciary should act in a limited domain. An almost "pure" concept of separation of powers is considered and – as a safeguard for the continuation of the system – that each body is responsible for fulfilling its own function and that it should not interfere the domain of another is emphasized. In this respect, of the concept of separation of powers which aims to prevent the power being used for the evil and arbitrarily, the form which support a negative interrelation between the powers is highlighted. Yet the point overlooked at this stage is that even though it is agreed – when bodies and functions and those persons to fulfil these functions are considered – that the presidential system is closer to the ideal form of the theory than the parliamentary system is, the concept of equilibrium and inspection is also a part of this system. The system of equilibrium and inspection, which was originated by Montesquieu and which makes a "positive" inspection between the bodies possible, attributes a form to the relation between the judicial organs with other organs, a form which is quite different from the "negative" approach.

One of the frequently used arguments that stand before judicial activism is that within the system there is a power that is opposed to majority. Bickel, one of the leaders of this view, cites Hamilton to state that he does not agree

with the idea that what constitutes the basis for judicial review is not the command of the legislative body but of the public, the Constitution that reflects this command. According to Bickel, when the Supreme Court declares a law or a procedure from an executive body formed through election as being invalid, this means that the Court deviated the command of people's representatives and the Court does this not for the benefit of the existing majority but against it. In this respect, judicial review is not "democratic". Stating that he is aware of such problems as that people's command is distorted during the process of the election of representatives, that people's command cannot be fully reflected and that those elected transfer the duties to those non-elected, etc., Bickel tells that what is meant by the word democracy is not directly democracy itself, but something more complex. Bickel adds that he is aware of the complexity of the American democratic system but that this will not mean that judicial review should be "an abnormal institution" of American democracy (Bickel, 1986:17). Bickel views with suspicion those views which hold that judicial review can be realized within certain restrictions (1986:16-18). As an outsider analyzing the system in the United States of America, Lambert too calls the practices of the Supreme Court in the 1920's as "government by judiciary". In his study, Lambert tells that the judges are not contented with doing only a technical inspection of the laws; they also question the reason of the act in its inspection that aims to orient the legislation policies of elected assemblies in the direction of their own economic and social perception. (cf. Çağlar, 1987:149) As it can be seen, both Bickel and Lambert mention the elected-appointed conflict and

hold that judges go beyond their scope of operation and attempt to "administer".

As we remember, in the 1930s, when the Supreme Court contradicted and oriented Roosevelt's policies, judicial activism reached its peak. Researchers who calculated the number of laws that the Supreme Court considered to be unconstitutional between 1800 and 1973 did not observe a marked tendency for an increase in judicial activism up until "the Civil War"; however, they observed that, in the post-war period, there was a great increase in the number of laws declared as being invalid by the Court. In this respect, the activist attitude of the Court gained continuity (Calderia and McCrone, 1984:111-113). Yet, in order to understand the position of the Court within the system, it is essential to consider the point from the opposite direction as well.

In his study aimed to clarify the concept of judicial restraint, Lamb claims that this concept has six notions. First, the judges should try to understand the intention of those who designed the laws and the constitution, both of which are the main tools that the judges make use of while examining a case, and that they should be loyal to this intention. Judges should not expect to see their personal preferences in the law in question or in the constitution text. Second, the judges should respect decisions from legislative and executive bodies of both federal and states and that they should rarely declare these decisions as being invalid on "lawful" grounds. The third notion is that as far as it is possible, the judges should form their decisions not by commenting on the Constitution but on the law itself. Fourth, in the cases when the lawsuit is to do with current problems, the judges should decide by constraining themselves

within the scope of the subject of dispute only. The fifth and sixth ones are that the judges should not state their views as advisories, that they should not be concerned with political matters and leave any question to do with politics unanswered (Lamb, 1984:8). In the history of the Supreme Court, there are different forms of examples of judicial restraint that conform to these domains. One famous judge supporting the idea of restraint was Felix Frankfurter who was appointed by Franklin D. Roosevelt and served between 1939-1962 (Rotunda, p.LVI). It is stated that Frankfurter is the prototype of those judges who support restraint. According to Frankfurter, who supports that the legislative body should be permitted the freedom of making mistakes, an adjournment in constitutional matters provides time essential to solve the problem through appropriate and competent channels (cf. Champagne and Nagel, 1984:310-316). In this respect, it can be said that Frankfurter supports the view that the legislative body should correct its own mistakes, rather than that decisions by the legislative should be inspected by the judiciary.

According to the advocates of constraint, one of whom is Frankfurter, formation of judicial policy contradicts with the core of a democratic society. Such undertakings that will harm the intention of elected representatives will yield results contrary to people's views and feelings. For the supporters of constraint, who hold the view that courts should undertake an inactive role, the legislative body and the process of legislation are very important. Considered to be the process of reaching democratic decisions, the process of legislation provides for the command of a majority to be formed in all its reality. On the other hand, the Supreme Court may act as an institution that is not democratic,

that has an oligarchic structure, without any political responsibilities. Members of the Supreme Court enjoy the luxury of remaining in this post as far as they present good conduct. Sharing these views, Frankfurter adds that the fact that debates in Court sessions are kept confidential enables the judges to feel free from democratic pressure.

The idea that the process of legislation is democratic, whereas the attempts by the Supreme Court which lacks these attributes to solve problems are far from comprehending the intention of the makers of the constitution and the laws and tend to divert people's command, has met with various criticisms. One of them is directed toward the claim that whenever they need to make an interpretation, courts commissioned to carry out judicial review should take into consideration the intention of the makers of the constitution and the law in making the regulation and that they should be constrained within this domain. There are two fundamental points that the criticism focuses on: Firstly, the argument that people to whose intention the courts should be loyal is highlighted and it is asked who the makers of the Constitution are: Are they those 39 people who signed the Constitution, of the representatives in the states who ratified the Constitution? Even if a common means to determine the makers of the Constitution is found, it may not be always possible to comprehend the "intention" in full. And when all these difficulties or even impossibilities are overcome to arrive at a solution, the intention of a text drafted more than two centuries ago may fail to need the demands of today's society, if not contradict it. In this context, judges are among the leading

persons who will guide the Constitution – one of the major tools they use in judicial review – into keeping up with the times (Lamb, 1984:15-16).

Pointing at the dynamic structure of the Constitution, Miller states that the Constitution is a text which is constant under formation and which is constantly updated to meet the requirements. Taking the intention of the makers of the Constitution as a criterion for making interpretations "is nothing but a childish interest in antiques". It is inevitable that the Constitution should be updated through interpretation. Judges of the Supreme Court, just like any other officials in other bodies, give decisions by interpreting the Constitution. Miller, citing the statement "whether it be written or not, any law requires interpretation" by Hobbes, tells that this idea is already put into effect by people in all stages of administration. According to Miller, the problem that is treated together with judicial activism appears when officials in any of the three bodies present different interpretations and then the Supreme Court is placed to the core of the problem (Miller, 1984:168-170).

One other point to be mentioned is that not making any judicial interpretation or making use of a restricted interpretation technique in order that judiciary can remain outside the process of policy formation, always results in judiciary being restrained. In the United States v. Budler Case that was concluded in 1936, Judge Owen J. Roberts, while announcing the court decision to which a majority joined, stated that the Court has no authority to decide either to accept the legislation's policy or to declare it as being unusable, that the delicate and hard task of the Court is to inspect and declare whether the law is appropriate or incongruous to the sentences of the

Constitution and its task will have been completed as soon as this is done (cf. Rotunda, 1989:179-182 and cf. Lamb, 1984:18) In this case, Agricultural Adaptation Act passed by New Deal Congress in 1933 was found to be unconstitutional. In this respect, Robert's view that holds that legislative policy should not be interfered and that the law needs to be interpreted at a limited way so that this can achieved, looks ironical when the result of the case in taken into consideration. The Judge uses his view of restrained trial by means of reaching activism (Lamb, 1984:18).

Robert, who is in a position that is close to the mechanical concept that present a definition of judiciary which has no other function than depicting the text and which Montesquieu partly supports, can be included in the Blackstonist view that sees judiciary as the warehouse of the law.

Now we can deal with those claims that hold that the Supreme Court is not democratic, that its efforts to solve the problems and form policies will result in diverting the command of the public. Miller, making reference to McIlwain's definition of constitutionalism that rests upon restraining arbitrary law by means of law and the rulers having complete political responsibility toward the ruled, supports that it is impossible to put these two into effect without the presence of the Supreme Court (Miller, 1984:167). According to Miller, there is no point in telling that the Supreme Court that undertakes such a function is *not* democratic unless we can tell that together with the congress and the institution of presidency, state administrations *are* democratic. Miller, trying to correct things with his views, states that these institutions which claim to be representing people's desire and/or national interests, and interests of the

public are under the influence of views of pressure groups and experts and that these views are reflected in their decisions. In this respect, what is represented is not the public but the groups (Miller, 1984:170-171).

In our present day where a direct democracy does not appear to be at all possible, elections as a means for representative democracy have gained importance. Yet, the idea that any elected government represents the command of the public is not true. What elections can provide is simply that the views of the majority will be reflected on the administration. Also, if, after the election, mechanisms for enabling the rulers to be sensitive to the demands of the ruled have not been set up or do not function properly, it is obvious that there will be a gap between the ruler and the ruled. In this respect, it cannot be argued that every elected government will possess "democratic" characteristics and will maintain these characteristics.

Miller, on the other hand, reached a similar conclusion by approaching the point from a different perspective and views the Supreme Court as one of the mechanisms that will maintain the relation between the ruler and the ruled and put the responsibility of the rulers towards the ruled into effect. Miller states that the Court is an "external" body and, perhaps because of this characteristic, possesses the ability of warning if the government exceeds the limits of lawfulness (Miller, 1984:172-173).

Yet, that the Court is an external institution does not mean that it is an institution outside the system with ideal characteristics. On the contrary, it can be argued that Miller does not display an optimistic view either for the administrative system or for the Supreme Court within this system as the

sequencing of not what the Supreme Court will do but what it will not do suggests – in a period when there is a prevalent governing crisis, when the multi-membered legislative body fails to govern, when the idea of a supreme president and democracy goes to the fore; a period what Miller calls the period of the institution of inspection (Miller, p. 186-187). But it is important to note that even in this period of crisis, what is attempted is to define the function of the Supreme Court.

Halpern suggests that it is essential to analyze the position and function of the Supreme Court within the framework of social change, and of the change and interrelation of other bodies. Basing his studies of his foundation, Halpern claims that those who speak of the administration of judges and of an empire of judiciary and so on fail to comprehend the position of the Supreme Court within the political system and its operation in the long term. Just as the authorities, functions and structures of the Congress and federal bureaucracy change, so should those of the Court. It is not meaningful to criticize the Court for participating in the process of policy formation by taking a certain period of time into consideration, rather than comprehend the process of change. Because, within the process of change and interrelations, the Court cannot fulfil the function it was given two centuries before. The Court is also in the process of formation and this formation comprises of those influences thatform the Court, the role the judges see fit to it, and the domain the political order determine. In fact, those constraining forces over the Court do not stem from the Constitution or any judicial obligation, but are influenced by political authority (Halpern, 1984:238-241). In this context, it does not seem sufficient

to define the Supreme Court activism as interference to political process, and efforts towards restraint as withdrawal from the judicial domain.

The concepts of judicial activism and restraint, the position of the Supreme Court within the administrative structure, and the importance of the case the Court hears for political and social structure, are tools that need to be treated and used with caution.

4.2.2. Is It Possible to Develop Certain Criteria for "Political Question" ?

Both jurists dealing with the matter specifically, and the judges of the Supreme Court had trouble with defining "political questions" It is difficult to say that at the current level there is a common consensus over the criteria for the doctrine of the "political questions".

The term "political questions" appears in the practice of American constitutional law when the Supreme Court refrains itself from deciding a case. In the cases related with PQD, the Court argues that the power to give this kind of decision involved was constitutionally delegated to one of the "political branches of the federal government, these are the legislative or the executive branches.

The concept of the "political branches" is important here. Theoretically, one of the functions of the judiciary, as a separate organ under the system of the separation of power and judicial review, is to check acts and action of other governmental bodies, i.e., the legislative and executive ones. With the use of "political questions", the judiciary wants to ignore its actual function. The

judiciary labels the legislative and executive organs as "political branches" and prefers to differentiate itself from these organs. According to Strum, this situation, to some extent, reflects American's understanding of the "political": for American "politics" means "election and because there no "apparent relation between the election and polling places", it can be concluded that the courts are "apolitical" (1974:2). Indeed, as Williams pointed out that each decision of the Supreme Court affects the distribution of the political power; each solution in a case before the Court is a new distribution of power (1992:20). However, the Court prefers to be treated as a "non-political institution" and therefore to be not involved in political debates.

In general, the robe of neutrality and independence of the judges enables them to remain above the tensions of the political process. The image of the courts as an impartial bodies also serve to this purpose. The neutral image of the judges and the courts contribute to the judicial prestige. Justice Frankfurter dealt with this issue in the context of the position of the Supreme Court in American political life when he said in a case, that "the Court has traditionally held aloof from immediate and active relations with party contests" (Colegrove v. Green Case, 1946). With the image of being neutral and independent, judges and courts are seen as a confident arbiter in a controversy before them. Strum marks the relation between the image of independence of the judges and the legitimacy function of courts: "Pupils learn that the independence of the judges enables them to remain above the corrupting tensions of the political process. The lesson further states that instead of making their decisions on the basis of party or personal interest,

judges rely upon an inanimate and impartial body of precedents, which may sometimes be misinterpreted but which can never be manipulated... Popular belief in an independent judiciary enables the court to place a final stamp of legitimacy upon all governmental acts, including those which might otherwise come under direct attack in the form of disobedience." (Strum, 1974:3). This image also serves some useful social purposes like the maintenance of cohesion and stability in a society. Miller insists on the related function of the judiciary in a contemporary society. He purported that "[t]he task of the judiciary in any modern industrial society is to be part of governmental order and thereby to underpin the stability of the system and protect the system by resisting truly serious attempts to alter it." (1985:216). We can say that robes of neutrality and independence strengthen the position of the judiciary in any society whereas maintaining respect for law and protecting stability through this respect. The popular belief in the independence of the judges also enables them to remain above the corrupting tensions of the political process. Although a governmental system composed of three branches is a common model in modern constitutions, citizens seem to visualize their government as an entity composed of two bodies, legislative and executive organs, and judiciary is seen as a disinterested and unconnected body. Even the judiciary sometimes is treated as an entity isolated from temporal affairs. A famous American President, Franklin Roosevelt indicated that "the veneration felt by American for their judges can be so great and so irrational as to approach the mystical, and it undoubtedly stems from the common belief that only the justices possess the key to those universal truths whose existence is the underlying supposition

of American democracy." (cf. Strum, 1974:3). The use of PQ by the American Supreme Court is closely related with the imaginary or "mystical" qualities attributed to the judiciary and the judges. The respect for the judiciary as a disinterested and independent body is highly important for its jobs of legitimization. The formula of PQ makes it possible that the Supreme Court, as an important part of the American Judicial system, stay above the clashes of interests and political tensions. With the tool of PQ, the Supreme Court has chosen not to be included in the game of power and taken a harmless road: The Court purported that the power to decide the case was delegated elsewhere by the Constitution. Professor Post sees the term "political questions" as a "magical formula which has the practical result of relieving a court of the necessity of thinking further about a particular problem. It is a device of transferring the responsibility for decision of questions to another branch of the government; and it may sometimes operate to leave a problem in mid-air so that no branch decides it." (cf. Frank, 1977:37).

There are similar definition of the "political questions", which insist on the preference of the Court as loading the burden of responsibility on some others. In an article of the 1920s– which is one of the first and the most important written over the subject – after a study of three examples related with the subject, there is an attempt to form certain hypotheses: "...when a tribunal approaches a question, where on one horn of the dilemma is the trained moral sentiment of the judge, and on the other the 'hypersensitive nerve of public opinion', it will 'shy off' and throw the burden of the decision on other shoulder. We hope to show that this is, on the whole, a wholesome instinct

among judges." (Finkelstein, 1923-1924:339). Yet another effort to define the "political questions" came from a federal court in 1940. The court defined the political questions as "such as have been entrusted by the sovereign for decision to the so-called political departments of governments, as distinguished from questions which the sovereign has set to be decided by the courts". Two months later, the same court stated that it was difficult to make a clear distinction between "political and nonpolitical questions" (cf. Strum, 1974:p.1).

We can ask some questions on this preference and behavior of not deciding a case before it. If practice and ideology of the judicial review are accepted in a political system governed by the idea of supremacy of law, can a court abstain to review any governmental acts and actions? The answer is "yes" in the cases constituting PQD. The question of how "political questions" become justifiable is answered by Strum in the following way: "The political question device is justifiable because it preserves the Court by enabling it to withdraw from unequal contests and thus permits it to eliminate the inevitably harmful effects of such combat." (1974:142). Post and Strum treated "political question" as a "device" or a "formula" making it possible for the Court not to take responsibility in the decision of some questions. To some extent, PQD serves as a self-saving mechanism of the Court. In the cases constituting PQD, the Court temporarily does not perform its task of validation by proposing that the matter involves a "political question". But it does not mean that the Court acts contrary to the legal guidelines and procedures. Although the political and social climate of the country has certain reflections of the adjudication of constitutional questions including the "political questions"; legal techniques

which ensure stability and continuity are employed. The reliance on the legal techniques and procedures make it available to cool the political and social tensions in the society. In the cases of PQ, the Supreme Court has recourse to the separation of powers, which is one of the main principles in the Constitution of the United States. With the principle of the separation of powers, it finds an excuse for not deciding an issue it does not wish to touch. The general acceptance that the judiciary is not related with politics and that it is a neutral and independent institution outside government, is one of the main sources that maintains the political question doctrine. Taking this into consideration, the Court makes use of the political question doctrine with an instinct that is congruent with Finkelstein's supposition, in points where it believes that the decisions it gives will create disturbance within and structure of administration and will therefore not be put into effect, and will be contrary to social consensus.

We have mentioned that courts have the task of legitimization in a political system and the judicial process provides a certain degree of stability and continuity in a society. However, in the cases of PQD the Supreme Court refrains to act and transfer its responsibility to another branches of government. With this decision, does it fail to perform its tasks? According to Strum "paradoxically, the self-restraining political question technique adds to the Court's ultimate strength by preserving the myth of neutrality."(1974:143). Also Professor Frank has shared the view of Strum on the usefulness of the PQ, but he has a reservation: "it seems to me that the basic objective of a plan of government ought to be to put the responsibility for the decision of questions

some place, and that the political question doctrine is useful when it operates to put the responsibility at the best place, and is harmful when it puts the decision no place." (1977:46). Frank treats PQD harmful when he was particularly concerned with the reapportionment problem, since this problem had not received a legislative or a judicial solution when he wrote his article on PQD. We will deal this problem in the case Baker v. Carr, but now, let us continue to sketch PQD.

Although the constitution has a governing structure of three divisions, the two bodies of the government become prominent and judiciary resembles the judicial power which Montesquieu designed especially for a republican administration and which functions as a machine that is loyal to the law text and that depict the law. Two centuries after Montesquieu developed under the influence of the thinkers of his period, the "mechanical judiciary" still survives, though in different forms. However, it is very difficult to give decisions mechanically, by excluding social and political influences, for a court which uses the Constitution as an elementary tool and which needs to make interpretations in order to apply this document to the abstract incident it deals with, since the constitutions rise on the basis of a certain political idea and which has political as well as judicial aspects

Analyzing different notions of the word "political" and studying them in the context of decisions reached by the Supreme Court in cases concerning abortion, Williams claims that the Court is "political" at six different levels. The first one is "purely definitional, in the sense that the Supreme Court, as an appellate court of last resort inevitably authoritatively allocates values"

(1992:1), that Easton, as the representative of the system approach, uses when defining "a political unit"(Easton,1965:50).[7] Also, the Supreme Court can be defined as "political" in an empirical sense, in so far as litigants use the Court to reach their political aims, and systemic, in the context of the fact that the Court decisions create different consequences for the other sections of the American political system. The other three notions are related with the process of decision making within the Supreme Court. The court is "political, because of the existence of influential, pragmatic and partisan tendencies present during the process of giving decisions." (Williams, 1992:3-20).

Similar to Williams, Strum has qualified every decisions of the Supreme Court as "political in their effects", since all decisions of the Court "affect the distribution of power –political, economic, social- but in most cases popular opinion is already agreed or is willing to agree that a particular power configuration is beneficial to society. The political question appears before that agreement has had a chance to come into existence; and until such a consensus is either achieved or foreseeable, it would be insufferable for the judiciary to force one" (1974:142). Although Strum insists on the lack of social consensus as the main reason of the self-restraining act of the Court in the cases constituting PQD, he indicates two factors, which the Court considers to decide the cases of PQ. These are, at first, "executive enforcement of judicial decisions", and secondly, "the existence of a societal consensus". He adds that "the court's own view of political policy will be a major factor in the

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[7] For a similar study on Turkish Constitutional Court, see Artun Ünsal (1980), **Siyaset ve**

determination of what it says; but we are concerned here with the situations in which the Court can not make policy decisions because these would be ignored" (Strum, 1974:4). According to Strum, executive enforcement is so important that the Court hesitates to make any decisions contrary to the will of the executive organ. Unenforcement of the Court's decree may result in the loss of the prestige of the Court and be harmful to its function of legitimization. If "political" branches, particularly the executive branch do not enforce the Court's decisions, it will become "a meaningless piece paper": "If one decree is ignored, the Court loses some of its immense prestige, and each unendorsed decisions increases the possibility that the next will also go unheeded. Proportionately to the ineffectiveness to its rulings, the operational validity of the Court disappears, and it can eventually cease to exist as means that it fails in its job of legitimization... And so it is an axiom of constitutional justice which the Court thinks will not be enforced will probably not be made" (1974:3-4). Strum mentions about two factors creating PQD, but he also sees close relation between the enforcement problem and lack of social consensus for the decision of the Court (1974:10). In the cases of PQD, the Court does not encounter danger of unenforcement or being not supported by the society and take a harmless road and admit that the power to decide the case was delegated to other branches of government. "Political questions" can be justified as well: its use can frequently enable the court to restrain itself from precipitating impossible situations which might tear the always delicate social fabric. Thus no rules are forced upon a country not yet ready for them; on the contrary at

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large is permitted to work out its own rules which can be translated into judicial fiat" (Strum, 1974:142). As we have seen before, Strum points out two factors which make the Court restrain itself to decide the case, as the possibility of unenforcement of the Court's decree and lack of social consensus about the Court's decision. But he does not specify main motives behind these factors. At that moment, we can ask some questions: who enforces The Court's decrees, why does a decree of the Court remain unenforced? In general, the executive branch of the government is responsible to enforce the decisions of the Court. If the decree of the Court clashes with the preferences/policies of the executive, it will remain unenforced. How does the executive branch determine these policies? The interests of the ruling class/classes shape the policies of the government including the executive's ones, so the decisions of the Court contrary to the interests of the ruling class/classes can not be enforced. In this case, the court restrains itself. If these classes are ideologically dominant, social consensus is determined by the ideology of these classes. Then the decisions of the Court contrary to the dominant ideology, social consensus, can not be enforced. In that case, the Court who perceives the possibility of enforcement of its decree abstains to declare any decisions, to make any policy. In that sequence, "political question" is the main tool in the hands of the court to be not ignored. The decisions of the Court about reapportionment are the best example of this situation. As in the cases constituting "acts of government", "political questions" is "a legal category more amenable to description by infinite itemization than by generalization" (Frank, 1977:36). The Courts of Appeals for the District of Columbia listed ten major sub-

categories of the "political questions": the recognition of foreign governments and republican form of governmental issues; conditions of peace or war; the beginning and end of war; whether aliens shall be excluded or expelled; government title to or jurisdiction over territory; status of Indian tribes; enforcement of treaties; existence of treaties and constitutional powers of representative of foreign nations. (cf. Strum, 1974:11-139). Some of these items are in the locus of international relations, so we will not elaborate them in detail. We will especially focus on the cases related with reapportionment, since they not only dente the fact about the position of the Supreme court in the governmental system and in a social, political, economic complex, but also perfectly resemble the relative nature of the "political questions". Beside these factors, the famous Baker v. Carr Case, through which the Supreme Court has decided certain criteria to discern political questions, is in the category of the cases of reapportionment.

Colegrove v. Green was the most important "political question" case of the first half of the 20th century. Primarily, it has led to different questions and conflicting interpretations about the boundary between the Court and the Congress. Also the questions of why the Court would not decide the cases and what it was the Court said are frequently asked in relation to this case. Thirdly, it was reversed sixteen years later by the decision given in another famous case Baker v. Carr. As we have known that the Supreme Court achieved to develop certain criteria to discern "political questions" from "non-political" ones in the Baker v. Carr. Let us see the history of this process.

The subject of determining electoral districts is important in that it displays the relative quality of political question doctrine. Until 1962, when Baker v. Carr Case was resolved, the Court did not accept malapportionment and made use of those principles decided in Colegrove v. Green Case in 1946. According to Judge Frankfurter, the supervision of those processes through which the members of the Congress are elected falls into the domain of the responsibility of the Congress itself. Yet, in Baker v. Carr Case, it was decided that the matter of regulating electoral districts by reference to the clause of equal protection of the law, present in Article 14 of the Constitution, was within the scope of review by the Court and that it could be reviewed. We need to study the case in order to understand the change in the Court's point of view about political question and its consequences.

According to constitutions of the states, it was essential that electoral districts were determined anew following each census. However, in 1942, it was observed that this practice had been put into effect by ten states since 1930, by seven states since 1920, and by five states since 1901. It was especially the representatives from rural areas who did not want electoral districts to be re-organized. Because, it the last years there had been a migration from rural areas to cities and a re-organization could mean that these representative would have to lose their standing.

A researcher from Illinois –where Colegrove v. Green Case originated– states that "if the legislative finds a way through which both the order given by the Constitution is obeyed and each representative keeps his position, this will be supported unanimously" (Strum, 1974:41). Because the legislative does not

have supernatural powers and because these events are not a part of a tale are but pure reality, it was not possible to find a solution as such.

In Illinois the situation was critical because it is the first mid-west state where more than half of the population lives in cities. In 1940, only 22.5% of the population lived in rural areas (Strum, 1974:41-42). In Illinois, with the legislative body – where those representatives from rural areas were the majority – following such an approach, the only body to find a solution was the courts. Yet, judges did not want to fall into a conflict with the legislative. For example, in 1926, Illinois Supreme Court had rejected posting a writ of mandamus which would assure reorganization of electoral districts, on the grounds that the judiciary would not be able to impel the legislative (Strum,1974:42). Other undertakings similar to that one did not yield any fruitful results and desperate citizens of Illinois had to choice but turn to federal courts. The case was presented before the Supreme Court in 1946. An interesting thing occurred at the stage of forming a decision. The members of the Supreme Court had difficulty in reaching an opinion given by the majority. Judge Frankfurter announced the opinion to which both Judge Reed and Judge Burton agreed. This opinion entered the Court records not the common opinion of the Court but the opinion of Judge Frankfurter.[8] Citing a previous case in the decision, Judge Frankfurter repeated the idea that the law passed by the

[8] Judge Stone's views could not asked as he had passed away in April. Judge Jackson was not present at the session. Judge Ruthledge expressed an opinion that could be classified neither as opposing or favoring. Of the other three judges, Black expressed a contradictory view and was joined by Douglas and Murphy. In this context, Judge Ruthledge's attitude became important in the making of the decision.

Congress in 1929, concerned with the re-organization of electoral districts, did not constitute a problem as far as "equality" was concerned and stated that there was no reason in reaching to a decision that would be completely different from the decision reached in the previous case. Going further from this point, Judge Frankfurter added that determining electoral districts was not within the domain of responsibility of the Court. He said that this was a case of political characteristics and that judicial designation would not be appropriate.

It can be understood that it was important for Judge Frankfurter that a decision given by the federal court and the Supreme Court were to be put into effect by other bodies. Frankfurter stated that if the matter were to be heard by the Court, the Supreme Court –expected to maintain its placidity and neutrality by tradition– would be included in the struggle between the two sides. He added that interference by the Court to the process of "policy" formation was an antagonism against the democratic system. However, 16 years later, this decision of the Court was amended in Baker v. Carr Case.

In the 1960s, unequal representation between urban and rural districts continued to increase, it was due to the fact that individuals moved to the cities from the rural areas. The rural population became diminished while the population in the cities was increasing. However, the number of the representatives of the rural and urban areas remained the same, since the rurally dominated legislatures did not have a tendency to change the states' constitutions in accordance with the shift of the population between the rural and urban areas. The representatives in the legislative organs in various cities refused to make amendments providing reapportionment and equal

representation of the cities and rural areas. In general, the conservative and Republican farmers were happy to limit the influence of more liberal and largely Democratic city dwellers. Beside these, in the Southern areas, black people who were concentrated in the cities, were affected by the unequal representation of the cities. Immigrant groups were in the same situation. But legislative organs dominated by the rural representatives enjoyed their powers for their own electors and discriminated against various groups lived in the cities (Baker, 1960:63-68).

Tennessee had also problem of apportionment because it had last been reapportioned in 1901, when its population was 2,020,616 and of this population, there were 487,380 voters. But, in 1960, according to the Federal Census, the State's population was 3,567,089, of whom 2,092,891 were voters, in other words, the number of the voters were approximately four times more than that of the 1901's. However, the 1901 Apportionment act continued to be applied to this enlarged and shifted voting population. In relation to this fact, the unequal representation between the rural and urban areas was seen in Tennessee. Regarding this situation, a group of urban voters including Baker decided to appeal to court. They claimed that their votes were debased and this debasement constituted denial of **the equal protection of the laws** guaranteed by the 14th Amendment of the Constitution of the United States. They asked the Federal District Court to declare the existing Reapportionment Act of 1901 unconstitutional. Secondly, the District Court was asked for an injunction restraining the defendant officials of election from holding an election under this Act. And lastly, for a decree reapportioning the legislature, based on the

latest Federal Census' figures or in the alternative, for an order that the next election be held at large (cf. Baker v. Carr, 1962).

Article II Section 4 of the Tennessee Constitution required the decennial apportionment of representatives and senators among counties and districts according to their respective numbers but the legislature had failed to make such a reapportionment since 1901 (cf. Baker v. Carr, 1962). Because of population changes and shifts in the past Sixty years, the votes of the appellants had been unconstitutionally debased. The Section 1 of the 14th Amendment of the Constitution of the United States, including the equal protection clause, declares that

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws. (cf. McClenaghan, 1990:749).

The Equal Protection Clause forbids a State and its local governments to discriminate against persons and to make unreasonable distinctions between them. The appellants stated that the debasement of their votes had been unconstitutional since the Equal Protection Clause has forbidden arbitrary and unreasonable apportionment of legislative seats. The starting point for measuring an apportionment against this prohibition is "*per capita* equality of representation" and departures from that standard must rest on a rational foundation. The complaint had been dismissed by the District Court on the grounds that it "lacked jurisdiction of the subject matter" and that the

complaint failed to state a "claim upon which relief could be granted" (Baker v. Carr, 1962). The Supreme Court stated that the dismissal was error:

> the District Court had jurisdiction of the subject matter of the federal constitutional claim asserted in the complaint... appellants had standing to maintain this suit... the complaint's allegations of a denial of equal protection presented a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision (Baker v. Carr, 1962).

Therefore the cause was remanded (returned) for trial and decision. The judgement was attended by six separate opinions: three concurrences and two dissents in addition to the opinion of the Court delivered by Justice Brennan. It should be stated that the Supreme Court did not offer any standards by which the decision should be reached and any clues about the remedy that might be appropriate if the plaintiffs prevailed. According to Justice Brennan there is no need to state "what remedy would be most appropriate" since the subject matter are judged under the Equal Protection Clause and "[j]udicial standards under the Equal Protection Clause are well developed and familiar" (Baker v. Carr, 1962). But, whether the Court decided on the merits of the case might not be important as Strum indicated that "the effect of the combined opinions was to indicate to the lower court what decision should be" (1974:60).

In the Justice Brennan's majority opinion, the first question was related with whether federal courts were banned from treating such a suit. In this context, the Supreme Court treated the issues of lack of jurisdiction and of lack of standing. These are issues related with the constitutional and statutory authorization and of standing. As "the cause of action" arose under the Constitution (the 14th amendment) and the District Court had not deemed it "unsubstantial", the Supreme Court had jurisdiction (Baker v. Carr, 1962). The

he discussed the question of standing and cited previous decisions in which the Court had recognized state impairment of votes as a violation of a right guaranteed by the constitution. It did not mean that the plaintiffs were entitled to relief from the Court, but they have standing to seek it. The Justice Brennan began to elaborate the problem of justiciability. At that sequence "political question" came to the scene. The Court discussed whether the cause, in the light of the Court's precedents and traditions, should be regarded as a "political" question. The dialogue between the majority and the dissenters firstly focused on this issue. Justice Brennan, as the voice of the majority, was more concerned with the nature of a political question. Depending on the record, he said that a question has been recognized as political and therefore non-justiciable only when it involved the problem of separation of powers: "the relationship between the judiciary and the coordinate branches of the Federal government... The nonjusticiability of a political question is primarily a function of the separation of powers". The second important standard for detecting whether a cause contains a political question is "a lack of judicially discoverable and manageable standards for resolving it". The Justice Brennan defined political question:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or an unusual need for unquestioning adherence to a political decision already made, or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. (Baker v. Carr, 1962)

Dr. Strum does not agree with Justice Brennan on the effectiveness of the criteria for "political question": "Any student of the Court can demolish this list by pointing out cases in which all of these criteria have been present, and that were nonetheless decided by the Court". Then he deals with relative nature of the criteria and indicates that Justice Brennan himself was aware of the inapplicability of his definition in general since he offered "case-by-case inquiry" for labeling a cause as political question (1974:63). Another argument opposing Brennan's definition of PQ came from the bench. In his sixty-four pages dissent, Justice Frankfurter, as a firm believer in judicial tradition and stability of legal rules, did not approve the Court's "massive repudiation" of many previous decisions. He thought that the Court's intervention "in the essentially political conflict of forces" might "impair" its position since the Court is seen as a detached legal body whose authority lies in "sustained public confidence": "The Court's authority –possessed neither of the purse nor the sword- ultimately rests on sustained public confidence in its moral sanction" (Baker v. Carr, 1962). The survival of this confidence depends on the manner of the Court as staying out of "political entanglements". According to him, the Court should abstain "from injecting itself into the clash of political forces in political settlements" (Baker v. Carr, 1962). Although Justice Frankfurter did not reject the fact that courts were necessarily involved in the clash of political forces, he preferred that the Court should not intervene in the direct clashes of these forces, in other words, meeting of these forces in the electoral process. As Strum has reminded us, "politics" means "elections" for Americans (1974:2). Recognizing this fact, Frankfurter advised the Court not to intervene in the

political process by deciding cases related with elections. Strum questions this advice: "His [Frankfurter's] concern with public confidence is interesting. Does it reflect an attempt to retain the nineteenth-century of mystique of judicial neutrality?" and he added "Or is it an attempt to be realistic, predicated on the belief that the public would not accept judicial action in the area of apportionment?"(Strum, 1974:. Then he decided that he misjudged the public feeling on the role of the Court and reapportionment decisions. It can be said that Justice Frankfurter may not notice the changes in the political, social and economic conjuncture. When he delivered the opinion of the Court in Colegrove v. Green of 1946, the view of the country had been quite different from that of the 1960s in which Baker v. Carr was decided. In the 1960s, rural landowners had less influence on the national policies than that they had had in

extent, this policy has mirrored the feeling that these matters are too "high" to be treated by the judicial organs (Finkelstein, 1924:338, 345). Beside these, these problems can be seen as too power-oriented and too explosive for judicial control. Since such problems are judicially ungovernable, the court could not find any standards political problems involving reapportionment issues. These are basic reasons for the policy of self-limitation of the courts and basic premises in the dissenting opinions in Baker v. Carr.

As Justice Frankfurter defended that political problems could not be solved in judicial process and that there could not be judicial standards for political matters, it is interesting to note that judicial standards were not detailed in the opinion of the Court in Baker v. Carr. One sentence was seen sufficient:

structure of the proposed government, if one looked to the text, gave no ground for inferring that the decisions of the Supreme Court... were to be authoritative upon the Executive and Legislature..." (cf. Wechsler, 1959:2). Judge Hand also added, since the judicial power "is not a logical deduction from the structure of the Constitution but only a practical condition upon its successful operation, it need not be exercised whenever a court sees, or thinks that it sees, an invasion of the Constitution" (cf. Wechsler, 1959:5). Then Prof. Wechsler attempted to prove that both the duty and the limits of judicial intervention were predetermined by the Constitution, especially by the Article VI including supremacy clause and Article III, as well as basic laws. Also the function of the judicial review is implicit in the concept of a written constitution (Wechsler, 1959:3). Wechsler treated the discretionary power of the Court to abstain implied in the doctrine of political questions is illusory. But a justiciable basis can be found for PQD. This basis can be constitutional commitment of the subject to the constitutional branches. Even he defended the function of the judicial review, he remarked that the Court should make its judgment on the basis of "neutral principles". This is a special way of saying that the court should work only with standards meet for judicial judgment. As Baker v. Carr has shown, the question of whether such standards are discernible is not easily answered. In Baker v. Carr, one of "the dominant considerations" in "determining whether a question falls within [the political question] category" is "the lack of satisfactory criteria for a judicial determination" (the other one is "the appropriateness under our system of government of attributing finality to the action of the political departments") (Baker v. Carr, 1962). As we have

remembered that Justice Brennan did not mention in details which satisfactory criteria was to be found in Baker v. Carr to judge the cause, except he dealt with the 14th Amendment. The question of how judicial criteria is to be discerned from the political one was implicitly discussed in Baker v. Carr. According to Justice Frankfurter, the Court's authority rests on the public confidence. This confidence basically depends on the idea that what the political branches contribute. As many people, Justice Frankfurter saw the Court as "the ultimate organ of 'the supreme Law of the Land'" and the people did not want to see the Court as another legislature according to him. (Baker v. Carr, 1962). It can be said that Justice Frankfurter's basis of the thought on the Supreme Court is only "differentiation of function":

For present purposes the relevant point is the supposition that the Court works with decision standards that are really, not just rhetorically, distinguishable from those a legislature characteristically applies. The distinction is elusive, and no single word can quite express it. "Impartial," "disinterested," "impersonal," "general" –which Mr. Wechsler tells us he considered- will not quite serve... Wechsler himself comes closer to the crux of the matter when he says that judicial criteria should be capable of being "framed and tested as an exercise of reason and not merely as an act of willfulness or will". But even this formulation must be taken with the understanding that it involves "a matter of degree". Legislators are not always strangers to the reasoning process; judges cannot always eliminate all quality of fiat from their decisions. (McCloskey, 1962:67)

Justice Frankfurter insisted on the "neutral" characteristic of judicial decisions since he thought that the authority of the Court mainly stemmed from this characteristic. Frankfurter as the symbol of lawyers or laymen believed in "neutrality of judiciary", did not seem to consider the argument that the justice adopts a political philosophy while she/he is applying to the constitution as a tool in the judicial process. This argument is based on the fact that the Constitution of the United States, like other constitutions, includes a political philosophy and all of them reflect certain political preferences. Beside this, Frankfurter advocated that the Court should stay out election cases and utilize the "political question" category to do so since he was presumably an advocate of legislative supremacy. He defended the judiciary's acceptance of legislative policies because legislatures represent the majority will. However, reapportionment cases denoted the fact that the majority was underrepresented because governmental agencies did not reapportion the districts by regarding the change and shift of the population.

Although Frankfurter was conscious of underrepresentation of the urban population or overrepresentation of the rural population he defended that the existing system the election should be respected by the judiciary. Where a decision of the Court will affect a shift in power, "shift in political influence among the groups composing a society", this decision which can be defined as a "political policy" should not be made. Frankfurter defended this argument. In reapportionment cases, the Court was asked to decide which theory of representation was better than another. According to Frankfurter, this means that the court was "ultimately" choosing "among competing theories of

political philosophy" (Baker v. Carr, 1962). Because of this, he preferred to use PQD. However, with this preference, he and other advocates of PQD in Baker v. Carr and other reapportionment cases, consciously or unconsciously supported the rural interests. Also "one man–one vote" is one of the basic premises of the democracy in the 20th century. But Justice Frankfurter and another dissenter, Justice Harlan refused to define this premise. Especially Justice Harlan attached an appendix to his opinion, purporting to indicate the impossibility of establishing an adequate arithmetical formula for election. He declared that the distribution of the districts in the election in Tennessee was not "capricious", on the contrary, the protection of the agricultural interests from "the sheer weight of numbers" of urbanities was completely rational (Baker v. Carr, 1962). Equality of voting strength was not deeply elaborated in Baker v. Carr. But, in another reapportionment cases following Baker v. Carr, this issue was discussed by relating the terms of "equal protection" with "right to vote.[9] Baker v. Carr opened a way for the discussion of "one man-one vote" principle. Theoretically, this principle is accepted as one of the basic premises of the liberal democracy. But Baker v. Carr Case showed that "equality of votes" is a debatable issue and realities of the democracy differs from the theory. Nevertheless Baker v. Carr and other reapportionment cases following this case, contributed much or less to remove the distance between the theory

[9] Strum indicated that "the idea of sectional interests should be guaranteed representation in the halls of government, although occasionally antithetical to the philosophy of numerical equality, remained a strong current in American thought" (1974:83).

and the practice. Kurland defined the reapportionment cases as "revolutionary":

> The reapportionment cases are the most interesting, both theoretically and practically: theoretically, because their disposition purports to be based on a classic concept of egalitarianism – one man, one vote; practically, because they are as revolutionary in the political area as the desegregation cases have been in the social area (Kurland, 1964:149).

Yet another point to be stressed is the relation the Court forms between the political question and separation of powers: That political question cannot be tried is presented as a consequence of separation of powers. However, the Court goes on to add that reaching to a decision in matters concerned with which issue is left by the Constitution to another body of the administration and whether this body has exceeded the authority granted to it requires that the Constitution is interpreted and that this is within the domain of responsibility of the Court, the ultimate interpreter of the Constitution. The first half of this idea can be seen as being positive by those who criticize the activist decisions by the Court, by using the pure form of separation of powers which excludes the existence of those mechanisms through which the bodies within separation of powers will interact to supervise and influence each other. Yet, that the Court appoints itself as the arbitrator in division of labor between bodies in separation

of powers, is of a quality that is likely to scare those thinkers who point to the danger of "government by judiciary".[10]

The criteria above are also criticized, as is political question doctrine. On the one hand, it is emphasized that these criteria are not objective and that it is wrong to depend on them without first questioning a previously given decision, (Hillebrecht, 1987:668-669) and on the other hand, that the political question doctrine is in contrast with the concept of constitutionalism in America, the tendency for supervising and strengthening the system of law through judicial review and that constraining the domain of jurisdiction will result in other bodies, especially the executive, getting stronger (Henkin, 1987:529-530). Another view that asserts that the relation between the political domain and the judicial domain has undergone great changes over time, points to the need for re-evaluating the doctrine within the framework of this change (Nagel, 1989a:664-668).

According to Strum, the reason why the decision arrived at by the Court in Baker v. Carr Case is different from that in Colegrove v. Green Case is because the Court was aware that the circumstances were suitable for the decision to be put into effect. The support by the President who saw that, in the 1960s, a majority of the voters comprised of city-dwellers and that his future lay there, and by the American public who recognized the importance of cities, was important (Strum, 1974:64-65). Another specialist that claims that the

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[10] See Raul Berger (1977), **Government by Judiciary**, Harvard University Press. Cambridge.

ideological mood changed in the 1960s and that this influenced the Court into taking an active role, is Schick. Together with the rise of the "Grand Society" view and the concept of social activism, the jurisdiction came to include this issues that were previously described as unjusticiable into its own domain (Schick, 1984:42).

4.3. Concluding Remarks

In the history of the United States, the problem of reapportionment was closely related with the urbanization. Schattschneider stated that "Baker v. Carr is best treated as an episode in the urbanization of the American community" (cf. Strum, 1974:64). In the 1940s, the courts did hesitate to elaborate the reapportionment issue. The decision of the Supreme Court in Colegrove v. Green was the best example. Labeling the separation of powers as a "myth", Miller claimed that "[o]ne is hard pressed to identify *any* Court decision upholding personal freedoms when *important* societal matters are at stake... during World War II, for instance, the pattern of suppression was even more clear: The Supreme Court became in effect a part of the 'executive juggernaut'" (1985:9). Also the legislatures dominated by land proprietors naturally did not act to solve the problem generated by the urbanization since the existing system was favorable for them. It was the rural sections which controlled governments in the states and therefore urban dwellers did not find any solution than looking to the federal government as the only authority to

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Alexander M. Bickel (1987), **The Least Dangerous Branch**, Second Edition. Yale University Press, New Haven.

solve their problem. The appeal of the urban people became a concerted one and it was seen that they had strength in presidential elections. The urban voters discovered the fact that they constituted a national majority and with this majority they would affect the result of the presidential election. Not only the urban people but also the President became aware of this fact. Then the president became the spokesman for the urban dwellers whose votes could reelect him and his colleagues. Also the urban people became conscious of their interests, including equal representation in election (Strum, 1974:143). Participants of the new social movements, especially organized in the cities, began to fight for their rights. They also provided a basis on which new solution could be found for the old problem, the problem of reapportionment. At the macro level, the 1960s were the years, the laissez faire philosophy and practice were renounced for that of welfare state. The policies of the welfare state have also given the people the convenience of formulating solutions to new social problems – the felt necessities of newly growing groups.

In this climate, the Supreme Court has decided Baker v. Carr and changed its precedent enduring approximately thirty years. The decision in this Case was so impressive that "1962 will appear to historians of the Supreme Court as the Year of the *Reapportionment* Case" (McClouskey, 1962:56). McClouskey added, "...no development since the *Segregation* Cases has so focused the public eye on the doings of the Court" (1962:56). This decision has had immediate and significant effects on the practical course of events. Baker v. Carr has prepared the ground for other cases related with reapportionment, election process as well as cases which courts had abstained to decide. The

response to Baker v. Carr enhanced the strength and prestige of the Court in particular and courts in general.

While the changes in the social and political conjuncture were affecting the decision of the Supreme Court, as detected in Baker v. Carr, the decision of the Court in this Case had certain effects on the political and social processes. First of all, the decision in Baker v. Carr encouraged the people to appeal for the cause of reapportionment and also encouraged the courts at different level to decide these cases. The reapportionment decisions "as a whole represented a triumph... for judicial activism" (Strum, 1974:96) With the reapportionment cases, the policy of judicial activism has marked the decisions of the Supreme Court. Beside the courts, the legislatures all over the country faced with the necessity to leave the reluctance to act. The legislative reluctance at the past had opened the way for an activist court. Then, the decision of the Supreme Court forced the legislative organs to act: "Legislatures... have bidden to redistrict or to face the prospect of having judiciary do the job for them" (McClouskey, 1962:58). The seismic effects of Baker v. Carr have provided the possibility to evaluate certain principles of the governmental structure, like the principle of separation of powers. It was seen that "pure" form of the separation of powers was renounced when the conjuncture was convenient for new policies and principles. During approximately twenty years the Supreme Court had been rejecting to decide the cases related with reapportionment issues on the basis of the principle of separation of powers. The courts had claimed that the legislative organs, not the judicial organs, should cure the reapportionment problem. Also the Supreme Court had refused even to discuss

the problems of reapportionment. Justice Frankfurter's opinion in Colegrove v. Green in the name of the Court, and his dissenting opinion in Baker v. Carr are two important and well-written examples of the policy of the self-restraint on the basis of the principle of separation of powers. However, putting the objection on basis of the separation of powers aside, the majority of the Court in Baker v. Carr had willingness to deal with the problems the societal changes brought with them. On the side of the Court, the policy of nonintervention was replaced by the policy of activism and the Supreme Court has produced a policy for the problem of reapportionment.

Another principle questioned by the decision in Baker v. Carr was the principle of representation:

> It is quite true, as Justice Frankfurter reminds us, that neither our past nor our present political institutions have treated numbers as the "basic" principle of representation. But institutions sometimes lag behind opinion, and it may be most Americans have come to think of some version of the majority principle as at least the presumptive democratic standard... and the decision [in Baker v. Carr], even without further adumbration, may precipitate a train of events that will alter profoundly the nature of representation in American politics (McClouskey, 1962:59).

According to McClouskey, the decision in Baker v. Carr had important effects in the society. It might create "a latent consensus" on the principle and nature of representation. As we have shown before, different aspects of the liberal democracy, like equality of votes, representation of sectional interests, majority principle etc. were discussed in the changed climate with the decision of Baker v. Carr. The change in the precedent and attitude of the Court was considered in the society. Strum indicated that the people accepted the Court's "new political face":

> That the "new look" of the Court was radical is beyond question, for its essential component was a claim that the judiciary exists –at least in part- to remedy all wrongs suffered by the citizenry, when no other instrument of reform is available (Strum, 1974:94)

In Baker v. Carr, the Supreme Court pointed out that courts are not "mouth pronouncing only the law" depicted by Montesquieu in relation to the position of judiciary in republican form of government. They can create policies and activate other organs of the government when there is a convenient conjuncture for the enforcement of their decisions. Baker v. Carr has provided possibilities to question the nature of the different terms of liberal democracy. One of them is separation of powers. With the decision of Baker v. Carr, the Supreme Court intentionally or unintentionally displayed the relative, if not illusory, nature of this principle.

CHAPTER V

THE CONSTITUTIONAL COURT IN TURKEY AND DISCRETION OF THE LEGISLATIVE ASSEMBLY

5.1. Development of Constitutional Review in Turkey

An analysis of Turkish constitutional history reveals that as far as inspecting constitutionality of laws is concerned Kanuni Esasi (the Constitution) was subjected to an inspection made by Ayan Meclisi (the Upper House). 1921 and 1924 constitutions, however, do not include any sentence about the judicial review of constitutionality of laws. In the period when the 1924 Constitution was effective, this problem caused widespread debates. Citing the grounds presented by Judge Marshall in Marbury-Madison Case, those who favored judicial review held that concrete norm inspection would be possible. Those who were opposed to the idea based on their criticism on Article 52 of the constitution to claim that the judges had not been authorized to inspect whether charters were congruent with laws, let alone have the authority to inspect whether laws were constitutional. As pointed out in the statement of reasons of the 1961 Constitution, the gap in this matter could only be closed with the foundation of the Constitutional Court "in our country where unconstitutional laws have for many years been a source for complaints". Yet, it could have been possible for local courts to inspect whether laws were

constitutional and carry out a sort of norm inspection even before this regulation. Yet, this means was closed at the time by jurisprudence of the Supreme Court (Özbudun, 1988a:347ff; cf. Öztürk, 1966:3706- 3708).

An inspection of constitutionality of laws can either be made by a political inspection mechanism as in Kanuni Esasi, or by contention of unconstitutionality before common courts as in the USA, or by specifically founded courts which, in Europe, function according to the system brought about in accordance with constitutional review. The foundation, election of the members, the form of presenting the problems before the court, and the content and results of the decisions vary from country to country. Here we can have a quick look at the general characteristics of Turkish Constitutional Court.

Following the Marbury-Madison Case decided in 1803, two different types developed in the institutionalization process of Constitutional Review. The first one, in harmony with "common law" conception, is the style in which the inspection for constitutionality can be made by courts at any level and whose prototype is made up of American Constitutional Review; the other one is that in which a court established specially for the purpose of the judicial review of constitutionality of law and whose prototype is the system consisting of the Austrian Constitutional Court, set up by Kelsen. The latter type was created in the 1920s, but it had to wait until the end of the Second World War in order to become widespread.

When the constitutional Court was established in 1961, the examples of some post-World War II European constitutions and their system of constitutional review were followed by the framers of the Constitution. Unlike

the system in the United States, providing the power of constitutional review to the general courts beside the Supreme Court, the 1961 constitution established a special court for the judicial review of the constitutionality of laws. However, in exceptional cases, general courts had been empowered to make constitutional review in the system of the 1961 Constitution, but the 1982 Constitution did not grant this power to the general courts.

The 1961 Constitution grants the Constitutional Court the status of being a special court, as well as the status of a special constitutional body both because of its being a supreme court and because of exceptional characteristics provided. Any amendment in the status of the Constitutional Court is required to be made through constitutional amendment only. The Court's operational principles and division of labor among its members can be organized through the bylaw the Court will be forming itself; thus, the Constitutional Court is provided with "procedural independence". The binding power of decision reached by the Constitutional Court over the legislative, executive and judicial organs and administrative offices, natural persons and legal entities is absolute. In the general budget, the Constitutional Court is administered through its own budget. It again falls onto the decision by the Constitutional Court whether any judge of the Constitutional Court should e subjected to legal inquiry due to crimes that stem from mission and committed while in mission. In case of a discord between other courts and the Constitutional Court, the Constitutional Court's decision is considered the fundamental (Özbudun, 1988a:352-353). This and similar privileges indicate that the Constitutional Court is not only a higher court, that its special position stems not only from its status but also

from the quality of the task it fulfils and the fact that the matter it deals with are highly related with politics. Accordingly, this view was expressed during the drafting of the 1961 Constitution in Constitution Draft with the Statement of Reason of the Faculty of Political Sciences, Institute of Administrative Sciences, as follows:

> Although constitutions are law texts, the form of operation they contain essentially pertains to matter of political content. Therefore, solving conflicts over the Constitution requires that a certain political side is largely defended. On the other hand, because constitutional texts are short, general and flexible, they leave the practicing body much larger room for interpretation than do other laws. Making a choice of a certain form of attitude within this space for interpretation is subjected to political, financial and philosophical tendencies, rather than judicial. While, from the point of view of law only, the judicial body that will interpret and apply the sentence of the Constitution is commissioned to determine the border between lawful and unlawful, the content of the question makes this a difficult task to fulfil. Also, because conflicts over the constitutions often brings higher (!) political forces of the country into conflict, those concerned often hold that the process of finding a solution to these conflicts includes taking sides with one political view. Because of all these reasons, the judicial authority appointed to solve conflicts over the constitution is not only a judicial body, but also an institution with political influence powers.(cf. Öztürk, 1966:422)

These views that were important factors in the founding of the Constitutional Court are important in explaining views for and against political question doctrine. This special status of the Constitutional Court is put forward as an argument against political problem doctrine in some of its decisions.[11]

Similar views were debated as far as the election process of members for the Constitutional Court was concerned. It was stated that some members of

the Constitutional Court were elected by judicial bodies, some by political bodies. The reason why some members were elected by political bodies was that a link could be formed between the inspection mechanism and basic preferences of the public: because it was normal for the majority in political bodies to have people sharing their political views elected for membership, it would thus be possible to prevent –to a large extent– the danger of the judicial review imposing a power 'over the parliament'. On the other hand, having some of the members elected by the judicial bodies meant that the inspection mechanism could act 'independently' and not according to the preference of those institutions that elected him (Soysal, 1986:372-373).

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[11] **Anayasa Mahkemesi Kararlar Dergisi** 20, 1985, p. 205-215. Gerekçe of dissent on decision Number 1984/1 by the Member Nahit Saçlıoğlu. When asked, "Does giving the Constitutional Court such broad power for interpretation not mean that it is held over the power of the public and does this not contradict with the principles of National Sovereignty?", Saçlıoğlu replied, "I think ... it does not place the Constitutional Court over National Sovereignty, either; on the contrary, it serves for the power of the public to be realised to a large extent."

With the regulation made in the 1982 Constitution, the President selects all of the members –some directly, some from among candidates designated.[12] It can be said that the balance intended to be set by the 1961 Constitution has been changed in favor of the political question doctrine.

In this section, we have tried to emphasize those aspects which have been influential in the foundation of the Constitutional Court and which are considered to be meaningful in terms of the political question doctrine. Now we can study the practice of "acts of government" as the antecedents of the political question doctrine and similar practice in Turkey, and also some decisions and principles within 35 years of Turkish constitutional review which will shed light on the political question doctrine.

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[12] According to the 1982 Constitution, "of the members of the Constitutional Court – 11 regular and 4 alternate– three regular members and one alternate member are elected directly by the President from among upper rank administrators and lawyers. The remaining eight regular and three alternate members are elected as follows: The general councils of the Supreme Court, the Council of State, the Military High Court of Appeal, the High Military Administrative Court and the Audit Court elect with absolute majority three candidates for each vacant post from among their own president and members.Of those candidates, the President elects two regular and two alternate members from the High Court of Appeal, two regular and one alternate member from the Council of State, one regular member from the the Military High Court of Appeal, the High Military Administrative Court and the Audit Court; he elects one regular member from among three candidates designated by the Higher Education Board from among non-member scholars." **Gerekçeli Anayasa** (1984), Değişim Yayınları, Ankara, p. 189. Both in the initial form of Article 145 of the 1961 Constitutions that regulates the election principles of the Constitutional Court members and in its form following the amendment in 1971, the number of members to be elected for the Constitutional Court – which consists of 15 regular and 5 alternate members – by the President is two, and one of these two members could be elected from among three candidates designated by the General Council of the Military Supreme Court. Prof. Dr. Suna Kili and Prof. Dr. A. Şeref Gözübüyük (1985), **Türk Anayasa Metinleri**, Türkiye İş Bankası Kültür Yayınları, Ankara, p. 220.

5.2. Acts of Government in Turkey

The concept of "acts of government" in Turkey was formed largely through jurisprudence of the Council of State in a way parallel to that in France. In the 1924 Constitution era, attempts were made to exempt certain subject matters from judicial review by means of both provisions in various laws and interpretations by the Turkish Grand National Assembly.

In the 1961 Constitution era, on the other hand, it was contracted by means of Constitutional Act 114 that "under no condition can any action or procedure of the administration be exempted from inspection by judicial bodies". An analysis of the statement for this act reveals that this is a reaction to certain actions and procedures being exempted from judicial review in the 1924 Constitution era:

> It is a known fact that, in many of our laws, means for jurisdictional application against administrative resolutions related with the law in question are denied. Although it is evident that provisions as such are contrary to the concept of the rule of law, some courts have tended, after certain hesitancy, to decline cases filed. Henceforth in order that such exercises of the past should not occur under any condition, it has been regarded as necessary to annul this act in the new Constitution" (Türkiye Cumhuriyeti Anayasası, 1966:3152).

During hearings when this act was discussed in the House of Representatives, the subject of "acts of government" was also raised. The question of whether "acts of government" should be subjected to judicial review was replied by Turan Güneş, the Spokesman for the Constitution Commission: "Act of state has nearly been extinct in the army. Those individuals in question express that nothing is existent via "acts of government". Scientifically, means judicial review will not be denied"

(1966:3154). We can conclude from this reply that the act in question was meant to exempt certain administrative acts from judicial review by means of legal arrangements and to prevent the act of state practice that occurred through jurisprudence. Indeed, this shift in perception as well as the shift's being concretized in a Constitutional Act has prevented practices of the 1924 Constitution era from re-occurring and greatly hampered the concept of act of state. When the act in question was amended through a constitutional amendment made in 1971 as "Jurisdiction means concerning any type of administrative action and procedure is available," the result was not at all different as far as "acts of government" was concerned. Yet, the 1982 Constitution has, as a forerunner of judicial review exceptions, contracted that "no other authority can be applied to" against decisions of the Supreme Council of Judges and the Supreme Council of Prosecutors. In 1973, similar amendments were made in the Council of State Law. However, the Constitutional Court quashed these amendments with its two decisions in eight months. In either of its decisions, the Court regarded the statement of "no other authority can be applied to" against the decisions of the councils in question as contradicting act which states that "the act that the form of Government is constitutional cannot be amended and no amendment can be proposed" (Anayasa Mahkemesi Dergisi, No. 15:119, 458).

Today we see that certain practices related with the Constitution and laws are exempt from the scope of judiciary. In 1982 Constitution, Act 125 Clause 1, while it is stated that "[r]ecourse to judicial review shall be open against all actions and acts of the administration", both in the rest of this act

and in provisions elsewhere (105/2, 160/1, 159/4) an attempt is made to restrict the scope of judicial review. Yet, "acts of government" is different from such constraints that are treated under the name of judicial restraint in the doctrine. Administration actions defined as "acts of government" do not found the basis of their being exempt from judicial review on the fact that they exist in writing in laws. They have been exempted from judicial review by judicial bodies, as a result of historical developments, the conjuncture, and relations between the judiciary and the executive.

However, unlike developments in France, attempt has been made to include "acts of government" category in the Council of State law itself. In 1938, when major amendments were brought upon the 1925 Council of State Law, there was an attempt to include in the law the statement that "practices exercised in order to protect internal and external policy of the country by bearing upon the authority given by law and management issues left to the discretion of the government by the same law cannot be subjected to administrative lawsuit." This statement present in the Item 24 of the government bill was accepted without modification. This subject is explained in the statement of reasons of the law as that: "because it will detrimental to file administrative lawsuits against the government on the grounds of protecting internal and external policies of the country by bearing upon the authority given by law and of management issues left to the discretion of the government by the same law, as in other countries where the establishment of Council of State exists, it has been considered as essential to keep these issues exempt from administrative lawsuit and to this purpose an item to the bill" has

been added. Also, in Item 24 of the Judicial Committee, it is stated that "Government practices exercised as a consequence of political affairs cannot be subjected to administrative lawsuit..." (TBMM Zabıt Ceridesi, Devre V, İçtima 4, 11. İnikad, Cilt 28). Yet, during the hearings of the law in the Parliament, the item concerning state acts was extracted on the grounds that it was considered that "the need no longer existed". It is not clear why such a statement was initially found essential and yet was later found inessential; but, consequently, the concept of state acts was excluded from the law and this change in the concept was realized solely by Council of State jurisprudence. Here, we can examine jurisprudence that earned state acts their content.

State acts within the framework of the Council of State decisions can be grouped under five headings:[13]

1. Decisions related with Reprisal,

2. Decisions related with the Body of Settlement Laws,

3. Decisions related with Nationality,

4. Decisions related with Denaturalization,

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[13] Giritli groups government acts under four headings: reprisal, decisions related with the body of settlement laws, decisions related with nationality and decisions related with deporting of foreigners, while Onar mentions the first three titles Giritli treats and makes no mention of the fourth one. Sarıca, on the other hand, takes the first two ones as they are and yet treats decisions related with nationality under the three titles of "decisions related with foreign citizenship only of foreigners", "decisions with those Turkish citizens who claim themselves to be foreigners" and "decisions to do with the application of Article 1041", and thus forms five separate groups. In the present study, both the foreign citizenship of foreigners and Turkish citizenship of a person who claims to be a foreigner will be treated under the title of decisions related with nationality and Article 1041 will studied as a separate item as it is related with denaturalisation. As a result, we consider decisions related with government acts under five titles.

5. Decisions related with Deporting of Foreigners.

5.2.1. Decisions Related with Reprisal

Reprisal is a form of act that comes into existence in international disputes. In international disputes that cannot be solved through peaceful means, the state is provided with certain "force and pressure" means other than war. This subject was regulated by Article 1062 of 28 March 1927. According to item number 1 of this act, "lawful ownership of those foreign citizens who reside in Turkey and whose native country partly or wholly threatens lawful ownership of Turkish citizens by means of administrative decisions or extraordinary or exceptional laws, can be subjected to partial or whole threat or pledge by the Government upon the decision of the Cabinet, as a reprisal" The law does not include any statement that states what will be done in case a dispute arises as a result of such acts. In other words, the law has not made a regulation to keep these acts exempt from judicial review.[14] However, the Council of State considers decisions related with reprisal as state acts and has refused to hear those cases related with this issue. The course of the first case the Council of State dealt with is as follows: In 1932, Turkish Government applied reprisal in accordance with Article 1062 and seized the possessions of a person who originated from Belarus and the Russia under the Tsar regime. This person claimed that he had previously made an application to be accepted to Turkish citizenship and that his application was about to be accepted, and thus

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[14] For a different view on this subject, see. Giritli, 1958, p. 91.

filed a suit at the Council of State for an annulment of the decision concerned. The public prosecutor stated that the issue should be considered as a state act and the Department Number One of the Council of State, conforming to this opinion, decided that the suit should be rejected. In the decision, it is stated that:

> "because of the fact the act brought upon the property of the petitioner who states to be a citizen of Belarus and the old Czar's regime is understood to have been exercised through an apprehension in the form of reprisal in accordance with judgements in Article 1062 and that acts as such happen to be a part of the operational policies of the State and do not fall within the scope of administrative procedure, the case .... is ... rejected" (cf. Giritli, 1958:92 and Sarıca, 1942:464).

The second case four years after the first case and decision reached is as follows: In 1935 a company imported form Romania oil, worth 200,000 TL, and asked from the Directorate of Exchange foreign currency equivalent to this sum so that they could pay the price. The Directorate of Exchange, on the other hand, decided that instead of a total payment of foreign currency equivalent to 200,000 TL, the company should be given each day the foreign currency equivalent to 3,000-4,000 TL so that the company could pay its dept to Romania in installments. While the payment was being made in installments, acting against the trade treaty made with Turkey, Romania stopped sending the payments for the goods bought from Turkey. Upon this development, Turkish government used reprisal and detained those Romanian goods whose price had not yet been paid. This decision was expanded to include the company, which had brought oil from Romania previously, and the company was not given foreign currency after this. The company, however, claimed that they had been given permission prior to reprisal to receive foreign currency equivalent to

200,000 TL and that the decision should not be expanded to include the company and filed a suit at the Council of State, asking for the decision to be annulled. Upon this application the case was considered by the Department Number One of the Council of State was, again, rejected on the grounds that the issue was related with the "state policies of a higher rank": "Proscription of reprisal measurements by the State against foreign states and those disputes that arise due to the means for application of them ... are related with the state policies of a higher rank and thus cannot be subjected to inspection by administrative judicial authorities" (Kararlar Mecmuası, No. 6:125-6).

In both cases the Council of State states that the matter is to do with the policy followed by the State and that the act is not an administrative procedure, and therefore claims that it cannot be within the scope of inspection administrative jurisdiction. Whereas Article 1062 is referred to in the first case, this is not the case in the latter one as the issue is not within the scope of this law. In the latter case, no situation that "partly or wholly threatens lawful ownership of Turkish citizens" is existent; there is a dispute that arises because an international agreement has been violated and a reprisal has been put into practice. With this decision, the Council of State considers not only decisions within the scope of Article 1062 but also all decisions of reprisal as being state acts and thus is able to keep them exempt from the inspection of administrative jurisdiction. Giritli criticizes this decision of the Council of State by saying that "... there is the possibility of removing the right for applying to courts of not only foreigners but also Turkish citizens even when their freedom of trade and liberties have been totally crushed in return for violating a whole body of

Administrative Law and the General Principles of Law", and suggests that practices related with reprisal decisions should be inspected by being regarded within the scope of the authority of discretion (Giritli,1958:54). There exist two decisions given by the Council of State that differ from the two samples presented above. In the first one, a Turkish citizen who was harmed by a practice of a foreign state asked that the Government should act in accordance with Article 1062 so that the losses could be compensated, and made an application to the Council of State when this demand was bot met. The Council of State, on the other hand, stated that Article 1062 was no longer effective following a decision by the Cabinet, dated 27 May 1935; yet, the case was rejected not primarily but ultimately. In the second case, the subject matter is an inheritance of properties of Russian citizen by people who are not Russian citizens. Revenue Office seized these properties due to the fact that the person who left the inheritance was a Russian citizen. Then the heirs first applied to the general court and the court's decision was the annulment of the practice on behalf of the heirs. Yet, when this verdict was reversed by the Court of Appeals "as far as jurisdictional authority is concerned", heirs applied to the Council of State. The prosecutor asked the case to be rejected by bringing about claims similar to those brought about in cases of reprisal, by referring to Article 1062. Yet, the Plenary Assembly of the Council of State did not agree with this view and decided that the exercise of seizure was annulled. In the verdict, it is stated that the seizure of properties due to reprisal cannot be automatic, since the activation of the law can be by the resolution of the Cabinet, it is not possible to esteem that such properties can be considered automatically being

transferred to the State. Together with this assessment, it was further emphasized that the fact that the person who left the inheritance was a Russian citizen did not constitute a reason for the seizure of the properties, and it was decided that "the current application with no ground should be annulled (Kararlar Mecmuası, No. 19:56). In this verdict, the Council of State acted differently from previous cases and heard the case; in other words, the Council of State did not primarily reject the case by regarding it as a state act, and consequently decided that it should be annulled. Giritli tells that the Council of State has shown with this verdict that not even measures related with the application of the reprisal decision taken within the framework of Article 1062 can be viewed neither as a state act nor the authority of discretion and that the lawfulness of such an application can be inspected in terms of both subject-matter and the cause (Giritli, p. 95). As it will be seen later, in due process, the list of state acts tends to narrow and some of the acts that were previously in the list are considered within the framework of the authority of discretion and primarily rejected; also, depending on developments as far as the authority of discretion is concerned, these acts can even be subjected to jurisdictional inspection in terms of the causal matter.

5.2.2. Decisions Related with the Body of Settlement Laws

The Council of State considered settlement changes made by the government in the 1930's in accordance with Article 2510 and later 2848 that modified the former one, as state acts. These laws state that the government can force its people to migrate due to health, military, political, financial,

disciplinary and cultural grounds. Related to this issue, there exist three samples the court dealt with. In the first case, people who settled in the village on Biskinci in Tokat and who were given land and property were sent by the government to separate places in groups of five to ten households. The villagers filed a suit and asked that this decision was annulled. In the verdict of 1934, the Council of State rejected the case without any hearing, stating that,

> It is essential that attempts and activities of the Government of the Republic put into effect in order to establish a compact state built upon a cultural unity should not be subjected to administrative cases. The exercise in question bears such a characteristic" (Kararlar Mecmuası, No. 16:123).

In the second case, it was decided that people living in those areas of Kars close to the border should be transferred to other cities on "security" grounds. Upon this decision, people concerned filed a suit at the Council of State but the Court primarily rejected the case, on the ground that "such activities of the Government of the Republic put into effect in order to protect the higher interests of the country cannot be subjected to administrative cases" (cf. Giritli, 1958:98-9; Sarıca, 1942:467).

In a third case mentioned only by Giritli, there is the problem of someone from Georgian Hamış family being forced to change settlement. This person, being transferred to the West, filed a suit against the decision. Department Number Five of the Council of State, taking into consideration the view of the prosecutor stressing the link between state acts and the concept of Governmental Wisdom, primarily rejected the case (cf.. Giritli, 1958:99).

Except for these three cases, settlement decisions have to a large extent been subjected to judicial review. Indeed, Article 5098 of 1947 brought upon

great changes in the issue of settlement and the grounds for authority given to the government for settlement changes were narrowed and it was decided that such changes could be possible on the grounds of "geological events and natural disasters" only. These grounds are more objective than previous ones (military, political, disciplinary, cultural, etc.) and do increase the possibility of judicial review.

5.2.3. Decisions Related with Nationality

We will treat decisions related with nationality into two and initially we will consider the cases where foreigners do not accept their won nationality and apply to the court claiming to belong to another nationality.

For a period of time, whether those disputes to do with the nationality of foreigners were within the scope of authority of the Council of State was a matter fierce discussion. During these discussions initiated when the Government asked for the interpretation of the Parliament after a certain situation, two differing views emerged. One of these views, voiced by the Minister of Internal Affairs Şükrü Kaya and some other parliament members, held that since disputes related with nationality were to do with international politics, certain political problems were likely to emerge and it would be "infringement of higher interests of the country" if they were treated by the Council of State, and that therefore such issues should be called "acts of government" and be exempt from the inspection of the Council of State, as in other countries. As a reaction to this view, some members of parliament stated that the law of the Council of State did not prevent the Court from doing this

inspection, that the Court was liable to hear any case presented to it unless instructed by law to do the contrary, that otherwise a status of "denial of justice"[15] would emerge, that there was no reason why applications related with foreign nationality should not be subjected to judicial review and that such applications were not "acts of government" but administrative application. In the clause of decision of the Government record accepted without modification after discussion, it is stated that

> it has been decided that the Council of State is not essentially authorized to examine issues related with the nationality of foreigners, that as stated above such issues cannot be considered as a part of administrative decisions written in Item 19 of the law of the Council of State, and that the Supreme Parliament should be informed that no point has been found to necessitate interpretation in this issue" (TBMM Zabıt Ceridesi, Devre V, İçtima 1, Cilt 7:148-154).

This decision can be analyzed from different points: By taking into consideration the discussions at the Parliament as well, it can be said that the declaration that decisions related with nationality "cannot be considered as a part of administrative decisions" has included these decisions into the scope of "acts of government". As we mentioned while reporting attempts to form criteria for "acts of government", "acts of government" are attempted to be explained by means of the distinction between state and administration; and, sometimes a definition negative in nature is used and it is stated that what is not "administrative", that which does not correspond to administrative function, should be treated within the framework of "governing", government

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[15] ilhak-ı haktan imtina (denial of justice, deni de justice): Rejection of a lawfully acceptable petition or a demand without a reason or, when a case has been found to be ready for trying and when it is to be tried, refusing the hearing of the case due to unacceptable excuses and

function. In this decision too, this point may have been implied, though not explicitly stated.

Stating that issues related with nationality are not considered as "acts of government", Giritli, on the other hand, claims that such issues can be dealt with by the judicial authorities on the grounds that these issues do not bear administrative characteristics (Giritli, 1958:111-2). Lütfü Duran, too, tells that disputes over nationality fall into the scope of authority of judicial courts according to Civil law regulations and general principles of the law, that a law is required so that judicial courts can be authorized and that judicial courts will hear cases related with nationality even when this law is absent (cf. Giritli, 1958:111). Both the applications, regulations and teachings in France, and practices in Turkey seem to support this view. On this issue, we can consider sample cases the Council of State dealt with. In 1942, in the case of Şark Gaz Şirketi (Orient Gas Company) the Council of State's verdict was that

> It has been decided that the subject of the case consists of an objection to include the property of the suitor Company (Orient Gas Company), considered to be of French nationality, despite its being in Syrian nationality, according to the Second item of the protocol contracted between Turkish and French Governments and certified by Article 3658; that a solution to the issue is related with an inspection of the problem of nationality of the Company and yet that because an inspection of decisions given by the Government about the nationality status of foreigners whose Turkish nationality is not the subject-matter is outside the scope of responsibility of the Council of State as understood from the decision number 921 of 23/12/1935 by the Grand National Assembly and because the Council of State cannot be applied for against such cases; that the case petition be rejected by lack of jurisdiction (cf. Giritli, 1958:113).

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with foul intentions, which necessitates that the judge should be liable to compensation. Similar to ihka-haktan istinkaf. (Türk Hukuk Lugati, 1944, p. 150).

In 1943, the Fifth Department of the Council of State reached a similar conclusion: "It has been decided that the case be rejected because a solution to the case in question that conspires of the objection to the registry on behalf of the Treasury of the share related with ***Caferiye*** of the suitor's client upon being considered Belarussian, depends on inspecting and determining whether the client is of Iranian or Russian nationality and, as such, an inspection of decisions given by the Government about the nationality status of foreigners whose Turkish nationality is not the subject-matter is outside the scope of responsibility of the Council of State as understood from the decision number 921 by the Grand National Assembly." (cf. Giritli, 1958:112-3).

In either case, the Council of State refused to hear the case by referring to decision number 921 by the Grand National Assembly. In the decision of 1942, the Court considered itself as not being responsible to hear the case and thus rejected the case. In the case, once again the Court rejected to hear the case – however, this time, on the ground of "without having authority". Yet, in neither case is present any indication pointing that the issue was evaluation within the category of "acts of government". In other words, no condition prevails that will prevent such nationality cases from being subject to judicial review.

The problem in the second group we intend to mention as being related with nationality, is that a person claimed to be of foreign nationality is considered by the government as being a Turkish national. In the case that was the subject matter of the General Council of Lawsuit Departments of the Council of State in 1940, Turkish government resolved that persons who lived

in Turkey but claimed to be Yugoslav were Turkish. Upon this resolution, these persons filed a suit at the Council of State for the annulment of the government resolution which they considered to be incongruous to treaties and the body of laws, stating that they were not Turkish and that they had not even applied to be accepted for Turkish citizenship. The Council of State, on the other hand, rejected to hear the case, on the ground that judicial authorities cannot inspect an issue, which matters two governments, and that the issue should be solved through diplomacy (Kararlar Mecmuası, No. 15, p. 48-51). According to the comment Giritli brings, the Court could have considered the claim the suitors that state to be of Yugoslav nationality by bearing upon the decisions of 1914 Istanbul Treaty and put the decisions of this treaty into effect as the force of law (Giritli, 1958:105).

In a second case the State Court dealt with, a person who told to be of Syrian nationality was claimed to Turkish. Yet again, the Council of State, in the decision of 1950, listed the reasons given above and rejected to hear the case (Kararlar Mecmuası, No. 46-49:83.84).

Different from these two cases is a third one that the Council of State did not ultimately reject and decided in 1945. The Government resolved that certain persons who claimed to be Greek were Turkish and treated their property accordingly. In the lawsuit the Council of State heard the case by deciding that "the Parliament decision of Article 921 does not prevent examinations concerned with determining the nationality in issues related with Turkish citizenship" and yet rejected the case on the grounds of lapse of time.

With the Council of State reaching different conclusions in similar issues, upon the request of the prosecutor, a reconciliation of contradicting opinions was followed; the decision of 1952 is as follows:

> With the Article 921 of the date 23/12/1935 of the Grand National Assembly stating that disputes related with two foreign state nationalities cannot be examined by the Council of State, because this does not include any decision that will prevent the Council of State from examining disputes related with Turkish citizenship, it was resolved unanimously in date of 25/1/1952, as a two thirds majority was not reached in the date of 12/1/1952, that in cases consisting of whether Turkish Government should consider any person as being a Turkish national need to be inspected by the Council of State and that the jurisprudence should be joined as such (cf. Giritli, 1958:106).

This decision reveals that the Council of State is authorized to hear cases where Turkish nationality – notwithstanding whether it is claimed by the suitor or the defendant – is concerned.

5.2.4. Decisions Related with Denaturalization

The cases under this title stem from the application of Article 1041. Item Number 1 of the law titled "About Denaturalization from Turkish Citizenship of Ottoman Citizens That Do Not Meet Certain Conditions," "the Cabinet [is authorized] for the denaturalization from Turkish citizenship of Ottoman nationals who remained outside Turkey during the National War by not participating in the national struggle and who have not arrived in Turkey between the dates of 24 July 1923 and the date of issue of the present law" (cf. Giritli, 1958:102; Sarıca, 1942:468). Since the law in dated 23 May 1927, the matter covers the denaturalization from Turkish citizenship of Ottoman nationals who have not returned to Turkey since the date of 24 July 1923, upon

the decision of the Cabinet of Minister. Bearing upon this law, the Council of State primarily rejected all three cases it dealt with.

In the case for which the decision was given in 1934, the process was as follows: A Jewish citizen who had left Turkey before the First World War and who had not returned to Turkey was denaturalized in accordance with Article 1041. This person filed a suit at the Council of State against the verdict, stating that he had abandoned Ottoman citizenship and entered Turkish citizenship, that he had applied at Turkish consulate every year, that he had regularly renewed related documents, that the law spoke of "Ottoman citizens" but that he was a Turkish citizen. The Council of State, on the other hand, rejected to hear the case, telling that "the content of the practices exercised by bearing upon Article 1041 is completely special and extraordinary ... This issue arising from the application of the aforementioned law cannot form the basis for an administrative lawsuit" (Kararlar Mecmuası, No. 6:124-5). In its decision of 1938 of a similar case, the Council of State rejected to hear the case, stating "[that] acts related with the application of Article 1041 are within the scope of political acts ... and [that] therefore cases as such cannot be subjected to administrative lawsuit" (Kararlar Mecmuası, No. 9, p. 63-5).

In these cases, taking as our starting point the decision by the Council of State that such issues cannot be subjected to administrative lawsuit due to the special quality of the application and taking into consideration the above-mentioned comment that judicial courts are authorized to determine the nationality, it can be claimed that in such issues judicial review is partly open. However, the obstacle here is that the Council of State describes such acts as

"[their] content [being] special and extraordinary" or that considers them as "of an exceptional content formed with the purpose of protecting the political existence of Turkish Republic" and therefore views them as being outside the scope of its own inspection. As such, although it is not stated that these acts will be wholly and in any form exempt from judicial review, the resultant practice happens to be this way.

In the third case related with this issue, the Council of State insists upon its verdict. In this decision of 1939, the Court overtly mentions the statement of reasons for refusal that was implied in the previous two cases, and states that "Article 1041 bears an exceptional content formed with the purpose of protecting the political existence of Turkish Republic" and that "the Government operations related with the application of this subject fall into the category of "acts of government". The Council of State, using the term "acts of government" overtly "for the first time", did – as expected – reject to hear the case (cf. Sarica, 1942:470). Yet, the decision the Fifth Department of the Council of State reached about five months later, in 6 November 1939, is of a characteristic likely to modify the jurisprudence. When the decision stated that inspection of denaturalization applications carried out in accordance with Article 1041 were within the scope of duty of the Court, a reconciliation of contradicting opinions was followed. In the related request, the prosecutor stated that according to Article 1041, conditions for denaturalization were "not participating in the national struggle by remaining abroad," "nor having returned to Turkey between the dates of 1923 and 1927", and "having acquired

Turkish citizenship through means other than current treaties". The prosecutor went on to say that

> What we really call 'Political Act' and 'Act of State' are generally acts that have previously been bound to certain conditions and that are not subjected to regulations by law. However, Article 1041 determines the conditions and situations that require the decision of denaturalization. When the lawmakers point out the motive or the reason for an act, it is most natural that it requires that the decision resolved by the management should be borne upon this motive or this reason" and added that this inspection too should be made by the Court (cf. Sarıca, 1942:468).

The General Council of Lawsuit Departments of the Council of State followed the request and in the decision of 1943, it was resolved that the authority for denaturalization Article 1041 grants upon the Cabinet "is not, in its content, an act of state and therefore the jurisprudence has been regulated that this is an administrative act subject to supervision by the Council of State" and thus a reconciliation of contradicting opinions was followed (Kararlar Mecmuası, No. 25:49). Thus, the Council of State considered those denaturalization decisions within the content of Article 1041 as being within its scope of inspection and not only did the Council exclude the issue from the list of "acts of government", it also made it difficult for the Court itself to narrow its own range of jurisdiction in a case where there are legal regulations and principles by using the term "acts of government".

5.2.5. Decisions Related with Deporting of Foreigners

The subject of deporting of foreigners was regulated by Article 3529 of 29 June 1938 and this law granted the Ministry of Internal Affairs the power to deport foreigners "whose presence within the country is considered to be detrimental for general security, political and administrative requirements" in

case they failed to leave Turkey within the period of time set. In its decision of 12 February 1943, the Council of State by lack of jurisdiction rejected a case "on the ground that deporting of a foreigner due to his political views falls into the category of "acts of government" and that the principles of the Council of State require that such acts cannot be subjected to administrative lawsuit" (cf.Giritli, 1958:115). Stating that even though Article 3529 was superseded by Article 5638 in 1950 the above mentioned item was restated in the new law as well, Giritli tells that is still within the list of "acts of government" as no other decision was present at the time of the study. Citing the sample of the French Council of State's excluding administrative procedures in similar issues from the category of "acts of government" and including them into its own authority for discretion, Giritli suggests that a similar approach is followed in Turkey. Considering the decision for reconciliation of contradicting opinions of the Council of State as far as denaturalization decisions are concerned, the fact that the issue has been regulated by a law as in the above mentioned case, may be of an inciting effect for the Court to exercise judicial review. Article 3529 holds that a foreigner can be deported provided that certain reasons are present. However, the fact that these reasons are "general security" and "political and administrative requirements" make it difficult to determine the presence of these reasons and constitutes one of the samples that lies in the borderline that separates inspection of the authority of discretion from inspection of presence (Waline, 1977:106-7). When we consider those court decisions that fall into the category of "acts of government" both in France and in Turkey, we can say that the scope of "acts of government" has narrowed over time. Four tendencies can

be viewed in this shortening of the list of "acts of government": The first of these is that a subject, which was initially in, the list of "acts of government" stays out of the list due to legal regulations. However, when we focus on the characteristic of "acts of government" as the product of jurisprudence, this tendency does not display great significance for us. A second tendency is that some acts that are subjected to "acts of government" have started to be considered within the framework of the concept of "mixed act". Yet, when we consider the fact that operations present under this title are not subject to judicial review, it becomes evident that what we have here is an operation that will not modify the end result. Yet another change has occurred through "detachable act" but not only has the change here remained formal, but also the act – as far as its structure permits – has been split into pieces that are "open to trial" and "closed to trial" and as a result it has been subjected to judicial review, partial as it may be. The fourth tendency that has enabled the list to shorten is that "acts of government" is attempted to be dissolved within the authority of discretion. This heading is supported by views of researchers rather than by court decisions. Judging from the point that it is not acceptable within the concept of the rule of law to keep certain acts exempt from judicial review, some thinkers, while stressing the need that the government should be permitted a certain area of activity on certain issues, hold that the solution should be to evaluate the issue within the scope of the authority of discretion and thus to make it subjected to judicial review (for example Mignon, Virally, Onar, Savcı, Giritli). Yet, what is meant by judicial review of the authority of discretion is another problem area. According to Onar, while the inspection is

made for the authority of discretion that may also include "acts of government", the court can only carry out an inquiry as far as elements of subject and authority are concerned; Savcı defends a similar view. However, the current state is that, as in "acts of government", in the issue of inspecting the authority of discretion the scope of judicial review can be said to have expanded. It is stated that this authority, certain elements of which have already been studied, can also be inspected in terms of elements of cause and intention. Moreover, even when the cause for the administrative operation is not explicitly stated, the court attempts to determine whether the act in question rests on a "reasonable" reason, thereby including the element of "reason" in its inspection and expanding its scope of judicial review.

5.3. Constitutional Review and Electoral Laws in Turkey

We will study decision number 1968/15, 1984/1, 1986/17 and 1988/14 by the Constitutional Court on electoral laws and analyze the Court's perspective of political question doctrine, criteria it uses and the change in its decisions in the long run.[16]

Turkish Labor Party (TİP) Parliament Group claimed that Article 1036 of 20.03.1968 about some additions to the Representative Electoral Law was incongruent with Article 2, 11, 55, 56, 57, 84, 85 and 89 of the constitution and

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[16] In its decisions, the Constitutional Court does not use the term "political question" and prefers "discretion of the legislative", "discretion of the legislation body," etc. Yet, when we examine the decisions, we can say that the distinction made in administrative law between "acts of government" and the discretion of the administration is not the point, and that the terms used by the Turkish Constitutional Court are similar to the term "political question doctrine" by the Supreme Court of the United States of America.

demanded that it should be annulled. The article in question brought "d'Hondt system with quota" (Anayasa Mahkemesi Kararlar Dergisi 6, 1992:125-198)

The 1961 Constitution (and similarly the 1982 Constitution) did not include any sentence or regulation about electoral systems. 1961 Constituent Assembly accepted d'Hondt system for the National Assembly and majority system for the Senate. With the Electoral Law passed in 1964, in the election for the Senate, d'Hondt system with quota was applied. With the amendment made in 1965, "National Remainder System" was adopted, thereby making it smaller parties to be represented; as a matter of fact, TİP was represented in the National Assembly with 15 members.

Finally, "d'Hondt System with Quota" was accepted for both councils with Article 1036 in 23.03.1968. This system provides larger parties with an advantage over smaller ones.

Section 32 Clause 4 of the law in question stated that political parties or independent representative candidates who receive a smaller number of votes than the number obtained by dividing the number of valid ballots in an electoral district by the number of representatives to be elected from this district, are not allotted any representatives. In such cases, there representatives are divided according to the clause stated above among the remaining parties and independent candidates, regardless of the number of votes received by those political parties or independent candidates that fail to get any representation.

The party that demanded the annulment based its demand upon the following reasons: the Constitution of the Republic of Turkey considers the multi-party system an indispensable element of democracy; in the Constitution, the principle that all currents of thought are reflected in state administration and the idea that financially weaker ones should play an active role in the political arena through their own parties, have been assumed. d'Hondt system brought about with the law in question is not only against he points mentioned above, but also harms the essence of the right of suffrage and being elected, aims at keeping the Justice Party (AP) in power as the sole party and discharge smaller parties in general. As such, the newly passed electoral law is likely to damage the essence of multi-party political system (Anayasa Mahkemesi Kararlar Dergisi 6, 1992:132).

AP Senate Group Presidency rested its written opinion on the following reasons in decision number 1966/1 by the Constitutional Court: Article 55 of the Constitution of the Republic of Turkey that regulates the right of suffrage and being elected and basic rules that need to be put into effect in elections is of a clarity and certainty that leave no room for hesitation or misunderstanding. This article regulates that elections should be carried out according to free, equal, secret, direct, universal suffrage and public counting of the votes and leaves all the remaining conditions and principles **to the discretion of the legislative** (emphasis mine). Then, provided that principles of free, equal, secret, direct, universal suffrage and public counting of votes are met, an electoral system that the legislative considers appropriate for either of the councils is acceptable for the Constitution as well. Had the drafters of the

Constitution anticipated bringing about a rule about such an important issue as the electoral system, it would never have been done indirectly or by making reference to any law, but this rule would have been included in the text directly (Anayasa Mahkemesi Kararlar Dergisi 6, 1992:138).

In its analysis on the basics, the Constitutional Court described clause 4 of item 32 as a regulation which is undemocratic and which bears legal drawback, one, which is not lawful and explained the views in the way that these sentences are of a character which will prevent these political parties and independent candidates that have failed to obtain enough number of votes to have representatives in each electoral district – in other words, those that failed to pass the barrier – from being represented in the parliament and, on the other hand, which will lead to the situation where a political party that has obtained enough number of votes to have one representative only will have all the representatives within the electoral district in question and where only this party is represented in the National Assembly. Not only is the system unjust but also, as it will be explained below, it includes various legal drawbacks and has the potential of leading the political structure of the country towards an undemocratic order (Anayasa Mahkemesi Kararlar Dergisi 6, 1992: 149).

The following sentence from the Constitutional Court expresses that electoral system with threshold is not congruent with the principle of democratic rule of law mentioned in Article 2 of the Constitution:

> The legislative is bound to take into consideration this principle of the Constitution in any law that is especially closely related with the political regime, and to ensure that the parliament formed through the electoral system the legislative sets up is a democratic one. If the electoral system set up by the law is of a quality that will bring an undemocratic command in power, putting a system as

> such is against the Constitution (Anayasa Mahkemesi Kararlar Dergisi 6, 1992:149).

The Constitutional Court found the law demanded to be annulled on grounds of Article 55/1 of the Constitution that regulated rights of suffrage and being elected, using the term "an artificial obstacle" and deeming it to be unconstitutional. The court state that each citizen possesses the right to suffrage and being elected according to the Constitution, the law will regulate how this right is to be used provided that it remains within the limits of the Constitution. However, this authority may lead to the right being completely removed under the cover of regulation. With the sole discretion of the legislative and not as a natural consequence of election activities, the number of artificial obstacles have been increased and it has decided that those ballots that fall under this number will not be taken into consideration. Without doubt, it is inconceivable that each ballot will bring about a representative or that all persons who obtained votes will be elected representative. However, the point to be focused on is that the votes should not be set as ineffective simply because of an artificial obstacle set up due to reasons that rest upon discretion only. ... it is obvious that the order of "election obstacle" anticipated in the fourth clause amends ordinary election conditions by means of an artificial intervention and that it bears a legal characteristic that harms the right of suffrage and being elected stated in Article 55 of the Constitution (Anayasa Mahkemesi Kararlar Dergisi 6, 1992:150-151).

The demand for annulment was also evaluated in terms of the principle of freedom stated in Article 55/2 of the Constitution.

> ... In this case the voter is informed in advanced that unless those votes cast in the same direction with his own vote reach a certain number these votes as a whole will not be taken into consideration and thus the voter is brought under a psychological pressure at the outset and led to hesitation. This is an intervention and regardless of its being present in the law, it is an illegal intervention." (Anayasa Mahkemesi Kararlar Dergisi 6, 1992:151).

The Constitutional Court considered the law in question as being an intervention to principle of multi-party political life and freedom of political activity of political parties and maintained that the sentence mentioned in the law lead to certain parties becoming indispensable elements of political life (Anayasa Mahkemesi Kararlar Dergisi 6, 1992:151).

An interesting point to note is that, in the statement of reasons, the Constitutional Court included a section titled "the meaning and content of the decision" to explain indirectly that this decision was not political and that it did not mean the Court intervening the will of the nation. "In this decision, a sign that reveals the Constitutional Court's view on "national balance electoral system" or the abolishment of this system should not be sought. Because, during debates concerning the law and in the decision reached, the points of discussion have not been those sentences those Article 1036 removes, but those sentences that have been brought about. On the other hand, the Constitutional Court is not in a position to inculcate in or bring a certain electoral system." (Anayasa Mahkemesi Kararlar Dergisi 6, 1992:153).

Statements of dissension on decision number 1968/15 are as follows: The basic support for the statements of dissent was, to a large extent, the views of "intervention into the discretion of the legislative" and "maintenance of stability in state administration.". It was stated that the only system that

provides a perfect equality of representation, that is, one which ensures that each ballot is effective, is the proportional representative system which, currently, is not in application anywhere. The Court continued as follows:

> Therefore, when the remote and particular possibility on which the majority rests is taken into consideration, it can be concluded that the legislative can only adopt the proportional representative system in our country so that this is not realized, which means that in this case the electoral system will have been petrified. Not only may this not the appropriate for political and social conditions that are likely to a arise in our country in the future, but also it means an intervention into the aim of Article 55 of the Constitution described above and into the discretion of the legislative body. ... It is not legitimate to consider the sentence of "Obstacle" that was passed in order to maintain stability in state administration, provided that it is put into effect in an election that is held in equal conditions. It cannot be claimed that this situation is not congruent with the concept of rule of law that covers the meaning that the rulers are subject to law and judicial review." (Anayasa Mahkemesi Kararlar Dergisi 6,1992:159).

"The right of suffrage and being elected have been regulated neutrally and objectively by the legislative. It is equally possible for each candidate to gain success, that is, to pass the threshold in the election. This obstacle is not an intervention into the right of suffrage and being elected, but it rests upon the authority for discretion that Article 55 clause 1 of the Constitution grants the legislative, and is therefore legitimate." (Anayasa Mahkemesi Kararlar Dergisi 6, 1992:160).

Those members who voted in dissent argued that the principles that political parties are indispensable elements of political life do not mean that all political parties have to be represented in the parliament, and that those regulations that are likely to provoke instability that may stem from over-representation of parties (Anayasa Mahkemesi Kararlar Dergisi 6, 1992:161).

Hakkı KETENOĞLU, the dissenting member, claiming that they were careful that in the electoral system the votes were distributed rightly among groups and gained validity and that the principles of stability were maintained in administration; that it was not possible for each political party to be represented in the parliament as far as political realities were concerned; that it would be more fitting that these powers in the parliament would be gathered within certain main groupings that would provide majority, and asserted that the sentences annulled were not against the Constitution or democracy, but that this was an inevitable solution to obtain a strong government that the country needed (Anayasa Mahkemesi Kararlar Dergisi 6, 1992:168-170).

We observe that the same topic was brought before the Court in order that various electoral laws would be inspected in terms of their being constitutional.

The Turkish Grand National Assembly Group of People's Party demanded that certain items of Article 2972 of 18.01.1984 regulating the Election of Local Governments and Chief Aldermen and Board of Aldermen, on grounds that the law was against the Constitution as being incongruent with Article 2, 10, 13, 31, 67/1-2, 68/2 and 91/1-2. This law brought the grade system that was used in representative elections, by amending the proportional representative system in which one-tenth reduced threshold_was applied for elections of members of General Council of the Province and City Council (Anayasa Mahkemesi Kararlar Dergisi 20, 1985:161-254).

However, in time, the 1982 Constitution had been put into effect because of the political conjuncture and its reflections over the Parliament and

the Constitutional Court and because of compositional change in the council of justices in the Constitutional Court, in decision number 1984/1, the situation had changed in favor of political question doctrine. In Article 153 clause 2 that bears the title "Decisions of the Constitutional Court", the sentence that states that "while annulling whole or part of a law or a decree, the Constitutional cannot act as the legislative body and constitute a sentence through a means to result in a new practice," can be considered as a reaction to the decisions given by the Constitutional Court prior to 1980, in which the above mentioned decisions about the electoral laws are prominent.[17*] Those opinions that formed majority in 1965/14 decision now used the same arguments to state their dissent to decision number 1984/1, while the opponents of the precious decision rejected the demand for annulment on the same grounds. Although same arguments are used, it is observed that the legislative body's authority for discretion is clearly set. For example, such statements as "... the legislative possesses the right to determine an electoral system that it finds appropriate for the country's political and social circumstances, realities and benefit," or "... the legislative is free to adopt an electoral system that is considers as appropriate" are observed (Anayasa Mahkemesi Kararlar Dergisi 20, 1985:184).

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[17] For an assessment from within the Court itself on this topic, see Yekta Güngör Özden (1986), "Anayasa Mahkemesi Kanun Koyucu Gibi Hareketle Yeni Bir uygulamaya Yol Açacak Biçimde Hüküm Tesis Edemez" Kuralına Nasıl Gelindi? Bu Kural Nedir, Ne Değildir?, **Anayasa Yargısı 2**, p. 41-90.

It was claimed that the electoral system brought about by the law which was demanded to be annulled was put into practice so that "political stability" would be maintained at the parliament level, whereas in local councils formed through proportional representation such inconsistencies were not observed; in its inspection and reason over the basics, the Court asks "was an electoral system as such necessary?" and replies the demand for annulment by stating that the objection "... directed towards a debate over the extent to which the Legislative body's preference related with this body's discretion is appropriate, and therefore it is obvious that it does not bear any importance as far as being constitutional is concerned." (Anayasa Mahkemesi Kararlar Dergisi 20, 1985:185).

The Court improved its views on the basics as that each electoral system stems from a different political view, that "representation and justice" from the point of view of proportional representation system and "stability" from the point of view of majority system are rightful reasons, that it is not proper to judge electoral systems, which are a matter of political choice, in terms of the principle of equality, provided that it is congruent with other sentences of the Constitution, and to arrive at a conclusion. That an electoral system gives priority to the principles of equality and justice may not only result in inconsistency, but also its giving priority to consistency may harm equality and justice. Thus, at the point reached, the problem of which electoral system is useful or detrimental becomes prominent, and deciding on this is at the legislative body's discretion. Deciding on any electoral system that will not obstruct the means through which the public can express its free will, that will

not leave political life to the hands of a single party, that will not remove multi-party system, is at the discretion of the legislative body (Anayasa Mahkemesi Kararlar Dergisi 20, 1985:188-189). With this decision, the Court recognizes and even determines the foundations for political question doctrine. With this decisions, criteria for political question doctrine are brought about. The criteria is as follows:

- The Constitution has not set an imposing rule for electoral systems. The higher norm provides the legislative body with a vast space of activities.
- Those regulations adopted by the legislative body are not of a nature that will harm the essence of rights.
- An intervention to the preference of the legislative body means an inspection of constitutionality, a matter which, as far as being constitutional is concerned, does not concern the Court.

A matter similar in character to the electoral law was brought before the Court in 1986. This time, the Court considered the regulation by the legislative body as an "intervention to the essence of rights" and displayed the negative criteria for political question doctrine.

The Turkish Grand National Assembly Group of Social Democrat People's Party demanded that Political Parties Act, Act on Basic Principles of Election and Elector Registration Logs, and certain items of Article 3270 of 28.03.1986 amending and adding to some items of Representative Electoral Act, on grounds that the law was against the Constitution as being incongruent

with the introduction section of the Constitution and Article 5, 10, 13, 36, 67, 68, 69 and 133 (Anayasa Mahkemesi Kararlar Dergisi 23, 1989a:208-264). Item 8 of the law required that in order for political parties to participate in elections it was essential that they should have become organized in at least two thirds of the cities and for a party to be considered to have organized in a city, it was essential that the party should have completed its organization in the city center as well the two thirds of this city's districts; thus, conditions for participation in the elections was made difficult.

The Court considered the item 8 of the law in question as being incongruent with Article 13 and 67 of the Constitution that regulate rights for suffrage and being elected, and Article 68 that views political parties as indispensable elements of democratic political life. The criteria utilized in statement of reasons for annulment has been "harming the essence of rights" and "regulations that harm the essence of rights". The Court asserted that those regulations that harm the essence of rights will remove a truly practiced right for suffrage and being elected, that it is not appropriate to bring the power of organization as the sole condition for participation in an election, that there are constitutional principles on which the legislative body cannot used its discretion, and that one of such constitutional principles that must be obeyed is the "... requirements of a democratic social order" expressed in Article 13 of the Constitution; among views also expressed were those that excessively restricting the participation to the election of a political would harm the essence of the right for being elected, that it was a requirement in a democratic state governed by the rule of law that political parties were not restricted with

extraordinary obstacles, that if political parties are really an indispensable element of democratic political life, then they must enter the election, a tool through which they can maintain and improve their existence to the best, and they must not be prevented from presenting their proposals and criticism to the approval of the public (Anayasa Mahkemesi Kararlar Dergisi 23, 1989a:222-223).

The Turkish Grand National Assembly Group of Social Democrat People's Party demanded that Act on Basic Principles of Election and Elector Registration Logs, and certain items of Article 3420 of 31.03.1988 amending and adding to some items of Representative Electoral Act, Election to Local Administrations, Local Aldermen and Aldermen Councils, on grounds that the law was against the Constitution as being incongruent with the introduction section of the Constitution and Article 2, 5, 6, 7, 10, 11, 13, 67, 68, 78, 87, 127 and interim 8 and 10 (Anayasa Mahkemesi Kararlar Dergisi 23, 1989a:208-264).

The law in question brought about a barrier to the number of cities and districts in which political parties needed to have organized in order to be able to participate in Local Elections. In its examining and statement of reasons for the basics, the Court stated that those regulations that do not harm the principles of the Constitution will not influence the right for suffrage and being elected in a negative way, that those restriction within "reasonable" and "acceptable" limits cannot be unconstitutional, that because the regulation brought about here was aimed to provide stability by preventing the votes from being divided too much, it neither harms the essence of rights, nor is it against

the requirements of democratic social order. As far as Article 68 of the Constitution is concerned, it was asserted that the restrictions brought about were reasonable and acceptable, thereby rejecting the demand for annulment (Anayasa Mahkemesi Kararlar Dergisi 23, 1989a: 208-264).

It is observed that in its decisions the Constitutional Court improved some criteria as far as political question doctrine is concerned and these criteria gained stability over practice. In Turkish Constitutional Review, political question doctrine has been expressed in terms of the concept of the discretionary power of the legislative body and those views and criteria that are sufficient for making a distinctive between the two have not been set. Indeed, it may be asserted that these two concepts are not separate. In Turkish Constitutional Review, political question doctrine has been, as in the USA, in the agenda thanks to electoral laws. From those decisions studied above, it is possible to compile certain criteria about political question doctrine. We can summarize these criteria as follows:

It has been possible by means of the following attributes for the Court to reject a demand for an inspection into constitutionality of a law, in order that the Court can refrain from intervening the authority for discretion of the legislative body:

It is essential that the regulation the legislative body made by making use of its authority for discretion "does not harm the principles of the Constitution" and "is not against the requirement of democratic social order". For this criteria, Article 13 of the Constitution is used as a norm. ...

An another criterion is "not to touch the essence of the right". The legislative body cannot, by making use of its authority for discretion, bring regulations that harm the essence of the right, that constitute an artificial intervention, an artificial obstacle over the right, that remove the right completely.

As it can be seen, the criteria exercised are not wholly objective. As a matter of fact, the criteria for the essence of the right has been used in the same decision both by members who voted for annulment and by members who voted against annulment; on the one hand it has been asserted that the regulation does harm the essence of the right, and on the other hand that it does not.

5.4. An Assessment on the Experience of the Constitutional Court in Turkey

Important changes occurred in the decision of the Constitutional Court, related with the cause of election, in the process. The Court was restrained by itself and it abstained to decide the cases relates with the electoral system in the 1980s, whereas the same Court had reviewed the related cases and made decisions contributed to the democratic life in Turkey in the 1960s. The change in the behavior of the Constitutional Court is not related with the change in the legislation since the 1982 Constitution, like the 1961 Constitution, does not contain any specific regulation on the system of election. The ingredients of the articles on the election are similar in both constitutions. According to these articles, elections shall be held in accordance with the principles of free, equal,

secret and direct, universal suffrage, and public counting of the votes. Both constitutions indicate that the exercise of the rights in election shall be regulated by law. In that sense, the change in the decision of the Court in relation to the cause of election in the1980s is not due to the changes in the text of the Constitution despite the fact that the 1982 Constitution has an authoritarian pattern in general. But this change can be explained by changes in the conditions, in which the 1982 Constitution was drafted, in relation to this, by the change in the political philosophy of the Constitution.

First of all, the economic policy of the 1960s and 1970s was different from that of the 1980s. According to Boratav and Yalman, "the mode of regulating the economy "during these years had three important characteristics:

> (i)... an active and determining role by the state within the process of resource allocation as a major producing and regulating agent; (ii)... an internal-oriented ('import substituting') development pattern particularly with respect to investment decisions; and (iii)... a 'populist' compromise or consensus between dominant political parties and popular classes with respect to the policies regulating or influencing income distribution (Boratav and Yalman, 1989:4).

The policy of import substitution aimed at increasing national product and in relation to this, enlarging the internal market by which the national product can be consumed . In that sense, the "populist" pattern of distributional process was feasible in this policy. Boratav and Yalman stated that there was "almost uninterrupted increase in real wage levels and –roughly speaking- stable wage shares within industrial value added". Also "social legislation" was favorable for "labor in general". The rate of unionization was significantly higher than unionization rates in many Western countries (1989:5). Keyder, too, indicated that many important regulations were made in relation to the working

conditions and rights of the workers, in the 1960s: "The new constitution and subsequent laws which specified the mode of unionisation and collective bargaining allowed workers to negotiate their wages through channels which had been established in Western democracies after centuries of struggle" (Keyder, 1987:148). Trade unions and workers became important actors of the economic as well as political life. The policy of distribution positively affected the workers as well as other wage earners. Economic policies as a whole were suitable for applying the policies of the social state. Socio-political framework of the country gave significant sections of the society the convenience of having and practicing the essential democratic rights. The political arena was enlarged with the contributions of different sections of the society. The 1961 constitution established suitable juridico-political and institutional framework for these developments. Unlike the constitutional practice in the past (and also in the future as in the 1982 constitution), the 1961 Constitution did not prefer to concentrate the political power in one organ. In the theory behind the 1924 Constitution, the parliament was the core of the power and in practice, the executive organ stemmed from this parliament and backed by the political party in power, exercised the political power (Tanör, 1986:22). The 1961 Constitution aimed at the separation, instead of the concentration, of political power and created an effective system of checks and balances. One of the products of this aim was the introduction of judicial review of constitutionality of laws. The establishment of the Constitutional Court institutionalized the practice of constitutional review as we have dealt with before. As a libertarian constitution, the 1961 Constitution had a broad catalogue of rights and

freedoms. According to this Constitution "expanded civil liberties and granted extensive social rights" (1988b:19). Beside the classical rights and freedoms, the 1961 constitution guaranteed social rights, which were newly introduced and political rights, especially related with the political parties, with different mechanisms. Judicial review of the acts of the state by the Constitutional Court is one of them (Tanör, 1986:27).

Social, political and economic conditions and the related policies changed in the 1980s. The mode of regulating economy during the 1980s was quite different from that of the 1960s and 1970s. According to Boratav and Yalman, model of regulation in the 1980s was totally or partially rejection of the main pillars of the previous model:

> (i) There was a fanatical commitment to the so-called "market solution" accompanied by a strong anti-etatist rhetoric in the official discourse and a definite attempt to reduce the role of the state as a *producing* agent although a parallel scrapping of the government's regulating functions could not –or would not- take place fully. (ii) Export orientation became not only the means for realizing particular policy goals, but was transformed into a goal *per se*. (iii) The preceding "populist" compromise was rejected by fundamentally changing the institutional and policy parameters affecting distributional processes in a definitely anti-labor direction (Boratav and Yalman, 1989:4).

The change in the economic policy was presented as a response to continuing foreign trade bottlenecks and accelerated inflation. "Stabilization" policies were initiated in January 1980. Solving foreign payment problem and reducing the rate of inflation were shot run aims of these policies. These policies also aimed at changing the development strategy of Turkey, from the "import substituting" development pattern to the pattern of the "export-led growth". The export-oriented policy was built on restraining domestic national demand, i.e., restricting the internal market. Consumer subsidies and subsidies made to

different sections of the society were eliminated or greatly reduced (Kepenek, 1987:2-4). Also the wages were deteriorated in "absolute and relative terms" during the 1980s (Boratav and Yalman, 1989:9). These are the main components of the new policies. The stabilization program was accompanied by a structural adjustment program. Boratav and Yalman claimed that this transition from import substituting development pattern to export oriented pattern and the military regime established by the coup d'etat of September 1980 were "means through which the ruling classes expected to overcome the crisis situation" of the late 1970s (1989:3). Keyder stated that the new economic measures were only protested by the smaller manufacturers and merchants especially in relation to "the privileges accorded to large firms, but the bourgeoisie as a whole seemed to weigh political gains against economic losses and made the choice for restricted democracy, ideological hegemony, and a disciplined labour force" (1987:224). Accompanied by the change in the economic policy, the military regime aimed at reshaping the political structure and this aim was reflected in the 1982 Constitution. Before 1980, different political parties and individuals had criticized the 1961 Constitution. One of the significant criticism directed to this Constitution, had been made by Bayar. In general his criticism had been based on the necessity for "strong state". He had criticized the system of rights and freedoms in the 1961 Constitution and he had directed his criticism especially to social rights and the system of social state in this constitution. Bayar had stated that the 1961 Constitution was "too large a dress" for us (cf. Tanör, 1986:63). Bayar's criticism is important since he represented the interests of certain fractions of the bourgeoisie. And also it

is interesting to note that this metaphor was frequently used by different persons including the head of the National Security Council for criticizing the past and defending the new Constitution after 1980. Unlike the 1961 Constitution, the 1982 Constitution has an authoritarian mode. It has a detailed list of rights and freedoms, but each right and freedom is followed by a detailed restriction. For this reason, this Constitution was called as "**Ama**yasa" instead of "Anayasa" by many authors (Parla, 1991:38). According to Boratav and Yalman, "... a major operation aimed at re-shaping the constitution and the politico-institutional framework of the country on a definitely more authoritarian pattern curtailing the essential democratic rights for significant sections of the society with special emphasis on restricting trade unions and non-conformist left-wing movements" (1989:47). Stating the similarity of the experience of Turkey to the "bureaucratic-authoritarian regimes" in Latin America, Keyder indicated that the programme of the military regime depended on "an effective dismantling of the constitutional framework and the redistributive institutions of the previous period. All this could only be achieved under the political and social conditions of a military regime and 'restricted democracy'" (1987:228). The restrictive nature of the Constitution still survived after the military rule since no major change was made in the 1982 Constitution. This is the peculiar nature of "the Turkish 'transition to democracy'..." (Boratav and Yalman, 1989:47). 1980s were the years in which social movements could not play a significant role, there was important pressure on the opposition. Especially "wage-earners in general and "unionized workers in particular" were the main groups sharply affected by the economic

policies and the expressive regulation of the 1980s (Boratav and Yalman, 1989:48). Beside transitional measures introduced during the military regime, the highly restrictive provisions on political activities of trade unions and associations had been embedded in the Constitution. The political links between such organizations and parties had been broken. Also some activities of the political parties, like organizing in foreign countries, creating women's and youth organizations and establishing foundation had been also banned. Tünay emphasized the distinctive characteristic of the 1980 coup d'etat as follows:

> Unlike the previous ones, the 1980 military takeover ambitiously aimed at inducing societal transformations... Between 1980 and 1983 the military regime... implemented certain reforms, such as the reorganization of the political system, the establishment of new labor relations based on the restriction of wage increase, and the strengthening of the security forces for the purpose of maintaining law and order (Tünay, 1993:19-20).

The theme of the necessity of maintaining "law and order" was an important part of the ideological discourse of the time. Beside different regulations and practices restricting social and political activities, electoral system was designed to favor the largest single party. A new electoral law drafted during the military regime had introduced "d'Hondt" version of proportional representation with some important modifications. Originally, the classical version of the d'Hondt system favors larger parties (Rose, 1983:37). With the modifications to the d'Hondt system, the electoral system made such effect of

the classical version much stronger[18]. After the formal end of the military regime in 1983 with the general election, this situation did not change. Some changes were made in the electoral system after 1983, but nearly all of them aimed at favoring the largest party. This aim is consistent with the preference of "the strong state", particularly with the strengthening of the executive organ. During drafting the 1982 Constitution, the coalition government of the past had been severely criticized. The government form as coalition had been seen as one of the major causes contributed to the crisis in the 1970s. On various occasions, the ruling National Security Council had indicated that it had preferred an electoral system preventing coalition government and also a party system with only two or three parties, ensuring stable parliamentary majorities. This stability in parliament would also have served to support the political party in power more strongly. Until the election held in 1991, the electoral system had yielded the expected result.

The Constitutional Court has decided the cases related with the election in this environment and it abstained to create any changes in the electoral system. Unlike the Constitutional Court of the 1960s, it did not prefer to ameliorate the unfair conditions of the political competition on the basis of premises of democracy.

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[18] For further information see Tuba Asrak Hasdemir, 1980 Sonrası Türkiye'de Seçim Sistemi – Kimi Saptamalar, **Prof. Dr. Gündüz Ökçün'e Armağan,** A.Ü. S.B.F. Dergisi, Cilt 47, Sayı 1-2, Ocak-Haziran, 1992.

CHAPTER VI

CONCLUSION

The analysis of the Political Question Doctrine (PQD) has indicated the interaction between law and politics in the evolution of the liberal state in general. In particular, this analysis has remarked the political nature of the constitutional review and certain limitations on this review within the liberal system. The Political Question Doctrine has evolved in the practice of the American Constitutional law when the Supreme Court refrained itself from deciding a case with reference to the principle of separation of powers and the distinctive nature of law and politics. The Supreme Court as a main judicial organ in the American political system wanted to ignore its prescribed function and preferred to be treated as a "non-political" institution by arguing that the power to give this kind of a decision involved was constitutionally delegated to one of the "political" branches of the federal government, i.e., the legislative or the executive branches.

In the history of the administrative and constitutional law in Turkey, the courts made some decisions resembling the cases constituting PQD in the United States of America although there was no doctrine called as "political question" in Turkey and also Turkey and the United States have different systems of government. The decisions of the Constitutional Court in Turkey, related with the electoral system in the 1960s and 1980s have certain

resemblance with the decisions of the Supreme Court on elections in the 1940s and 1960s. As in the example of cases consisting of "political question" in the 1940s in the United States, the Constitutional Court abstained from deciding the cases on the electoral system in Turkey of the 1980s in relation to the principle of the separation of powers and the distinctive nature of the political and judicial issues. In these cases, the Constitutional Court preferred to use the term "the discretionary power of the legislative assembly" or "the discretion of the legislature" and so on. This practice of the Court is not the sole practice of the self-restraint policy of the judiciary in Turkish history. "Acts of government" is the antecedent of the noninterventionist policy of the judiciary in Turkey as well as in the United States. The term of "acts of government" was originated by the practice of the French "Le Conseil d'Etat" in the administrative law. Like the Supreme Court of the United States and the Constitutional Court of Turkey, this Court had abstained from deciding some cases. The court had excluded certain cases from the judicial domain on the basis of the distinctive nature of the political and judicial decisions. The Court and academicians had attempted to find certain criteria to discern judicial issues from political issues. However these criteria could not be found and the problem had been solved partially by listing which acts would be treated as "acts of government". As time went on, the longitude of the list became shortened and the jurisdiction of the Court became widened since the authoritarian nature of the political power got amalgamated with the democratic gains in process. The idea of checking acts of political power has gained strength in favor of enlarging judicial domain. This can be a general

development in relation to the nature of political power. But the practice of the particular countries like Turkey can show that the process of democratization of political power has an **uneven** development. The authoritarian nature of thestate can come into scene in different times. Historically, the unity of state and the concept and practice of political power lying outside constraints of morality and law belongs to the conceptualization of sovereignty in the era of the Absolutist State. This understanding was crystallized in the concept of "raison d'etat". An author relates the concept of raison d'etat to the divine right of the king to rule. The king as the sole authority emanating from God can be able to rule without bounding any rules. His power could not by circumscribed by any rules and checked by any organs. The immunity of some acts or actions of the rulers from constraints of morality and law in the understanding of raison d'etat has important corollaries with the self-restraint policy of the judiciary in the United States as well as in Turkey.

The principle of separation of power and the idea of political power circumscribed by natural rights of individuals and then by supreme law of the land represented a tendency countering the main characteristics of absolutism, which was based on the concentration of all power in a sovereign ruler. These two main tenets of liberalism accompanied with the wave of constitutionalism aimed to produce a structure in which political power was limited and checked. Even though these principles are products of certain historical era, they have universal characteristic. They have taken place in the constitutions of different countries. In the 1787 Constitution of the United States, and the 1961 and 1982 constitutions of Turkey, we have detected the traces of these principles.

However the history of PQD and of the similar cases in Turkey proved that the practice of the liberal state is not consistent with its theory. Certain concepts of the liberal theory could serve to different intent in the practice. Although basic premises of the liberal state have laid the foundation of constitutional review, certain concepts of the liberal theory have served to exclude some acts and actions of state from the domain of judicial control. In the famous Colegrove v. Green Case in 1946, the Supreme Court abstained from deciding the case with reference to an important constitutional principle, the principle of separation of powers. In other words, the principle of separation of powers served as a basis of self-restraint policy of the court. With the employment of this concept, certain acts of the state remained unchecked judicially, and the practice of the election related with reapportionment, which was contrary to the Constitution of the particular state and also to the federal constitution, still survived. Whereas the notion of the rule of law as a part of the theory of the limited state takes suitability of every act and actions of state to law as a normative principle, either the doctrine of raison d'etat and "acts of government or the doctrine of political question corresponded to certain extra-legal "acts of government". As well as proving the inconsistent nature of the practice of liberal state, the evolution of PQD remarked the dynamic relation between law and politics. The changes in the decision of the Court in relation to the cases of reapportionment were closely related with the changes in the political, economic, ideological and societal climax in the 1960s. At the country level, the 1960s were the years when the laissez faire philosophy and practice were replaced by the policies of the welfare state. The practice of the welfare state

provided people a convenient basis on which old problems as well as new ones could be solved. The participants of the new social movements activated especially in the cities and fought for their rights including equal representation. The Supreme Court decided Baker v. Carr and changed its precedent for the reapportionment in this climate. While the change in the conjuncture were affecting the decision of Supreme Court as in the Baker v. Carr case, the decision of the Court in this Case had certain effects on the political and social processes. This decision encouraged people to fight for their rights in general and also to appeal for the cause of reapportionment in particular. By this decision, the courts at different level were also encouraged to decide the related cases as the legislatures all over the country were forced to act. The snowballing effect of Baker v. Carr made it possible to evaluate certain principles of the governmental structure, like the separation of powers.

The Supreme Court had been rejecting to decide the cases of reapportionment with reference to the principle of separation of powers. The courts at different levels had claimed that the legislative organ as a "political" body, not judicial organ, should solve the problem of reapportionment. But, in the 1960s, the Supreme Court, placing the objection on the basis of separation of powers aside, decided to solve the problems the societal changes brought with them, like the problem of reapportionment. The policy of non-intervention/self-restraint was renounced by the policy of activism and the Supreme Court has produced a policy for reapportionment. The evolution of reapportionment cases remarked the unity of powers, of legislative, executive and judicial organs, rather than the separation of powers in a certain

conjuncture like the 1940s in the United States of America. In Baker v. Carr, the Supreme Court showed that the judicial organ could create policies and activate other organs of government where conjuncture is available for the enforcement of judicial decisions. With this decision, one of the main principles of liberal state, i.e., the principle of separation of powers was questioned and the relative, if not illusory, nature of this principle was detected. The decision in Baker v. Carr also served to discuss the principle of representation. Equality of votes is one of the premises of the representative democracy but Baker v. Carr showed that this principle was not practiced in the actual political life in the 1940s. Different concepts of liberal democracy were discussed in the changing climate of the 1960s at the bench as well as in the society. The Supreme Court as a judicial organ contributed to establish favorable conditions for the practice of equal representation. The evolution of PQD has remarked the interaction of the judiciary and the legislative, executive organs in particular, as well as the interaction of the judicial, political and social levels in general.

Those cases that constitute the political question doctrine displayed the dynamic characteristic of law. While the courts in the 1940s considered that giving a decision on regulating elections was outside their domain, this situation changed in the 1960s and it was resolved that the subject or re-organization of electoral districts could be tried. In an era when there were attempts to revive the "Grand Society" ideal, when the importance of social action was emphasized, a problem concerned with the electoral process through which the public would determine its representatives was not left

unsolved. Although legal facts and processes have a peculiar logic and structure of their own, it should be borne in mind that political, economic and social variables, too, do play a role in shaping this logic and structure. It is not possible to fully understand law as an entity disconnected from these processes. Judiciary and its policies could be understood with the analysis of the peculiar condition in which they are shaped.

The concept of "judicial activism" and "judicial restraint", and "political question" triggered debates because of relative characteristics. It is difficult to comprehend these terms when approached with the view that the law is a stable, definite, objective entity. Courts as a part of governmental structure decide the cases within the setting of interaction among legal, political and social processes. The requirements of the conjuncture in which the decisions are shaped are more influential than the preferences of judges. Like the concept of political question, it would not be appropriate to consider the concepts of judicial activism and restraint –our tools for analysis– as an absolute, unchanging category. The practices by Burger Court, one of which is known as a proponent of restraints, are a good example for this. The Court – four members of which were appointed by Nixon, who held the view that he judiciary should function within a restrained domain– did not hesitate to bring extensive comments to the clauses of the Constitution in the famous abortion cases in the 1970s, by taking into consideration the developments of the time. In those years when, among other things, values to do with family, sex, the position of women in society, etc. were under discussion, similar decisions were given in other countries as well as in the United States. Roe v. Wade is

the famous example of these cases. Roe v. Wade and similar cases denoted to the fact that changes in social, economic and political conditions have affected the content of law, more specifically, the judicial decisions. During the 1960s and 1970s, the arena of politics became enlarged, political and social environments were favorable for social movements to raise their demands. The policies of welfare state provided an environment in which demands of the masses could be realized.

In the history of PQD, the Court enlarged its own field due to changes in the political and societal climax. But this enlargement was not against the field of politics. Contrarily, the Court contributed to political life with its decisions on the issue of election, representation. For example, the principle of one man-one vote gained strength when the Court had decided the cases related with the election, the reapportionment in the 1960s. With these decisions the Court has enriched the principle of equal representation and contributed to the democratic life in the United States of America.

In Turkey, the decisions of the Constitutional Court, which were related with electoral system, bear important resemblance with the cases of reapportionment decided by the Supreme Court in the 1960s. In 1968, the Constitutional Court evaluated the electoral threshold as harmful for a democratic system in the light of the principles described in the Constitution, whereas the Court in the 1980s could not make this evaluation and self limited itself. Despite similar text of 1961 and 1982 constitutions on the issue of election and the principles of a democratic system, the Court of the 1980s gave different decisions. In that sense, the change in the decision of the Court in

relation to the cause of election in the 1980s is not due to the changes in the text of the Constitution despite the fact that the 1982 Constitution has an authoritarian pattern in general. But this change can be explained by the changing political and social climax following 1980 coup d'etat, i.e., changes in the conditions in which the 1982 Constitution was drafted and then practiced, in relation to this, by the change in the political philosophy of the Constitution. In the conjuncture of the 1980s, the Constitutional Court has changed its precedent on the system of election. The Court was restrained by itself and it abstained to decide the cases relates with the electoral system in the 1980s, whereas the same Court had reviewed the related cases and made decisions contributed to the democratic life in Turkey in the 1960s.

The evolution of the Doctrine of Political Question in the United States of America and of the similar cases in Turkey primarily denotes to the fact that the practice of the liberal state is not always consistent with its theory. The related practice of the Supreme Court in the 1940s and of the Constitutional Court in the 1980s remarked the unity of powers rather than the separation of powers in relation to the conditions offered by the conjuncture in which the decision were made. Poulantzas (1975) reminds us that capitalist state functions as " a centralized unity" rather than a "multi-centered" body despite the principles of separation of powers. Poulantzas' analysis may contribute to understand the position of the Supreme Court in the 1940s and the Constitutional Court in the 1980s, with an addition of the judiciary to his scheme. In the 1940s, the land proprietors dominated governments in the States, prevented the solution of the problem related with reapportionment

since the existing practice was favorable for them. In line with the interests of the land proprietors the Supreme Court had abstained from deciding the cases related with reapportionment by using the tool of "political question". It means that the Supreme Court did not intend to check and correct the acts of the government. Similar position of the Constitutional court was detected in Turkey in the 1980s. As Boratav and Yalman (1989) stated that the Turkish bourgeoisie faced a serious crisis in the late 1970s. The 1980 coup d'etat was welcomed by the representatives of the same class to provide solution to the political and economic crisis. The idea and practice of "strong state" is one of the main tools to control the social and political arena. Other mechanisms and principles which had restrictive nature and were embedded in the 1982 Constitution also served to the purpose of controlling the society. In this climate, the Constitutional Court has changed its precedent on the electoral system in the 1980s. While the Court had ameliorated the unfair condition of election and contributed to the representation of the broad sections of the society at the political level in the 1960s, it abstained from making the same decision in the 1980s. Like the Supreme Court of 1940 in the United States of America, it founded its reason on the distinctive nature of politics and law.

As a concluding remark, it can be said that courts, as one of the major actors of this study, do not decide in a vacuum. The judges form their decisions within the complex of economic, political, social and ideological structures and changes in these structures. In relation to the cases constituting the Doctrine of Political Question in the United States of America and the similar cases in Turkey, the changes in the decisions of the Supreme Court and the

Constitutional Court can be an example of interaction between legal, political, economic and social processes. In the history of the United State and Turkey, the courts sometimes performed the function given to them in the system of rule of law, but sometimes the same courts refrained to act in relation to the changes in conjuncture. Although the rule of law, which brings law and state together, is normative principle of liberal democratic state, it can not explain all aspects of the relation between law and state, e.g., exceptional cases like "acts of government", "political question". Certain acts of political power have been excluded from the judicial domain by being labeled as "raison d'etat", "acts of government", "political question" etc. However, paradoxically, judicial organs has taken the task to label these acts as being not judicial but then to explain and find criteria and then legitimize these "extra-legal" acts. The duality of politics and law was used to legitimize the self-restraint policy of judiciary. But history of the doctrine of political question and similar doctrine in Turkey demonstrated that this is a "devised" duality and can be used to protect the authoritarian core of the state from any control in a certain conjuncture.

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APPENDIX A

SUMMARY IN TURKISH

Anayasa yargısının kökleri içkin biçimde, liberal devlet kuramında ve 19. yüzyıl hukuk devleti uygulamalarında bulunabilir. Liberal devletin ilkelerini oluşturan kuvvetler ayrılığı, toplum sözleşmesi anlayışı ve doğal hukuk- pozitif hukuk ilişkisi de genelde modern devletin oluşumuna, özelde ise anayasa yargısının gelişimine katkıda bulunmuştur. Bunun yanısıra., devlet tasarruflarının, her koşulda hukuka uygun olması konusunda bir norm koyan hukuk devleti anlayışı da, yargısal denetim uygulamasını besleyen başlıca kaynaklardan birisidir. . Ama gerek "raison d'etat" ve "hükümet tasarrufları" anlayışının gerekse "siyasi sorun" doktrininin gelişimi, devletin bazı tasarruflarının hukuki sürecin dışında kalmasına ilişkindir. Bu konuda yapılan değerlendirmelerde de ya bu hukuk dışılığı, devletin egemenliğiyle ilişkilendir meşrulaştırmak için bir takım kriterler oluşturulmaya çalışılmakta ya da meselenin ancak "hukuki süreçte çözülemeyen sorunlar siyasi sorunlardır; siyasi sorunlar ise hukuki süreçte çözülemeyen sorunlardır" biçiminde, yani totolojik biçimde, tanımlanabildiği görülmektedir. Bu çözümsüzlüğün nedeni, siyasi sorunu ve onu önceleyen uygulamaları, mutlaka hukuki süreçte anlamlandırmaya çalışmak, bir başka deyişle, hukuki süreci, devletten ve siyasi süreçten bağımsız bir şekilde tanımlamaya çalışmak olabilir. Hukuk ile siyaseti bir araya getiren hukuk devleti anlayışı, liberal demokratik devletin

normatif bir ilkesi olmakla birlikte, devlet-hukuk ilişkisinin tüm yönlerini açıklama gücünden yoksundur. Devlet bazı işlem ve eylemlerini, "hikmet-i hükümet", "hükümet tasarrufları", "siyasi sorun" gibi benzer içeriğe sahip farklı etiketlerle, hukuki denetimin dışına çıkarmaya çalışmaktadır. Ancak, paradoksal olarak, bu tür tasarrufları dile getirmek, açıklamak ve bu yolla devletin hukuk hukuk dışı eylem ve işlemlerini meşrulaştırmak hukukçulara ve mahkemelere düşmektedir.

"Siyasi sorun" doktrinini oluşturan kararların anlaşılması için hukuk-devlet ilişkisinin yanı sıra bunların toplumla olan ilişkileri de anlaşılmalıdır. Anayasa yargısını, bu ilişkileri göz önüne alarak örneğin sistem teorisi çerçevesinde ele alan çalışmalar vardır. Ancak sistem teorisi, siyasal olanı tanımlarken, Schmitt'in değindiği "düşman-dost" arasındaki, Marksist çerçevedeki "egemen-ezilen sınıflar" arasındaki çatışmayı dikkate almamakta ve bu çatışmaların ürünü olan kopmaları, krizleri dışlamaktadır. Siyasi sorun doktrini ise, her ne kadar bir krize denk düşmese de normal süreç içindeki bir arızaya, soruna işaret etmektedir. Siyasi Sorun Doktrini, liberal demokratik ilkelere göre oluşturulduğu varsayılan ve hukuk devletini esas alan bir devlet düzeninde, hukuk-siyaset arasındaki gerilimli ilişkiyi örneklemektedir. Doktrin, hukuki kararların, sosyoekonomik ve siyasi konjonktüre bağlı olarak nasıl şekillendiğini, değiştiğini göstermektedir. Daha önce de belirttiğimiz gibi, Siyasi Sorun Doktrini, kendisini önceleyen Hikmet-i Hükümet (Raison d'Etat) ve Hükümet Tasarrufları uygulamalarına benzer biçimde, devlet tasarruflarının her koşulda hukuka uygun olması ve hukukilik denetiminin yapılması esasına dayanan hukuk devleti anlayışından bir sapmadır.

Siyasi Sorun Doktrini ile Hükümet Tasarrufları uygulaması paralellikler göstermektedir. Örneğin, Hükümet Tasarruflarına hukuki bir tanım vermenin zorluğu karşısında, tanım yerine örnek göstermek daha kolay gözükmektedir. Hükümet ve idarenin öyle tasarrufları vardır ki, bu tasarrufların önceden konmuş kurallara uymalarına olanak yoktur. Bu konuda en çok ileri sürülen örnek, devletler arası antlaşmalardır. Bu tür tasarruflar yargı denetimi dışında tutulmakta ve bu tasarruflara karşı açılacak davalar esasa girilmeksizin usule ilişkin koşulları taşımadığı gerekçesi ile reddedilmektedir.

Anayasa ve yasalarla, bir kısım işlemler idari yargı alanının dışında, denetim dışı tutulmuşlardır. 1982 Anayasası'nın 125. maddesinin istisnası niteliğindeki bu hükümler yine anayasamızın değişik maddelerine yerleştirilmiştir. Örneğin Anayasa'nın 105/2, 160/1, 159/4 maddelerinde öğretide "yasama kısıntısı" başlığı altında yer alan, yargı kısıtlamalarına rastlanmaktadır. Ancak hükümet tasarrufları olarak nitelenen idari işlemler, yargı denetimi dışında tutulmalarının dayanağını, yasalarda yazılı olmalarında bulmazlar. Bunlar tarihi gelişim, siyasi konjonktür, yargı-yürütme arasındaki ilişkilere bağlı olarak, yargı organlarınca yargı denetimi dışına çıkarılmışlardır.

"Hükümet tasarrufları" doktrininin bu özelliği, siyasi sorun doktrini ile benzeşmektedir. Anayasa yargısının denetim dışı tuttuğu kimi konular, yargı organının kendi yargı alanını sınırlaması sonucu ortaya çıkmaktadır. hükümet tasarrufları doktrini Fransız Danıştayı'nın 1822 yılındaki Laffitte kararı ile gündeme gelirken, siyasi sorun doktrininin doğuşu ve gelişmesi A.B.D. Yüksek Mahkeme kararlarıyla olmuştur. Bir başka değişle gerek hükümet tasarrufları doktrini ve gerekse siyasi sorun doktrini "içtihadi"dir.

Hükümet tasarrufları doktrini Fransa'da doğmuş ve gelişmiştir. Kuruluşu ilk aşamalarında Fransa Danıştay'ı, gücü henüz yargısal kararlarını hükümetin takdirine bir görüş olarak sunmaktan ibaretken, kuvvetli hükümetlerle çatışmaktan kaçınmak amacıyla "siyasi saik ile" donatılmış kararlar aleyhine dava açılamayacağını bildirmiş, Lafitte kararı ile yargı alanına, bir kısım tasarrufların siyasi tasarruflar olduğunu kabul ederek sınır çizmiştir.

Hükümet tasarrufları, bazı hukuki tasarrufların yargı denetimi dışında kalması sonucunu doğuran bir uygulamanın ürünüdür. Söz konusu tasarruflar ile hukuk devleti anlayışı arasında paradoksal bir ilişki vardır. Bazı tasarrufların hukuki kurallarla çerçevelenemeyeceği ve bunun uzantısı olarak, bu tasarrufların, hukuka uygunluk denetimi yapma yetkisine sahip yargı organlarının denetim alanı dışında kalması gerektiği yolunda bir anlayış söz konusudur. Bu anlayış üzerine oturan hükümet tasarrufu kavramının ortaya çıkışı ve gelişimi, hukuk devleti anlayışının gelişimi ile yakından ilişkilidir. İktidarın önceden bilinen, önceden açıklanmış kurallarla kayıtlanmadığı bir dönemde hükümet tasarrufu uygulamasından bahsetmek olanaksızdır. Çünkü iktidarın yetkilerini kuralsız veya yalnızca kendisinin belirlediği ve bildiği, her an değiştirebileceği kurallara bağlı olarak kullandığı bir dönemde, her tasarruf biraz/tam olarak hükümet tasarrufudur. Bir polis devletinde, hükümet tasarrufunu diğer tasarruflardan ayırmak olanaklı değildir; çünkü böyle bir ayrımın yapılmasını sağlayacak maddi temeller, tasarrufun bağlı olduğu kurallar bütünü söz konusu değildir (Onar,1939). Mignon da, hukuk devletinde, devletin eylemini sınırlayan esaslardan birisi olarak yasallık ilkesini

görmektedir. Yasallık ilkesinin iki öğesi vardır: Kararların, genel ve nesnel nitelikteki düzenlemelere uygun olması ve yargısal tasarrufun kendi üstünde yer alan kurallara uygunluğu. Bu uygunluğu denetlemek için yargının odakta yer aldığı bir sistem oluşturma çabası çeşitli güçlüklerle karşılaşılabilir. Bir yandan kuvvetler ayrılığı ilkesine dayanılarak, ayrı ve bağımsız organlar olarak yasama ve yürütmenin kararlarının yargısal denetiminin yanlış olduğu savlanabilir; diğer yandan, egemenlik düşüncesinin devletin sorumsuzluğunu varsaydığı ileri sürülebilir. Ancak yasallık kavramının gelişimine bağlı olarak, kuvvetler ayrılığının uzun dönemdeki ürünü olan idari yargılamanın çabalarıyla, devlet tasarrufları, siyasi denetim haricinde, yargı organları tarafından yerine getirilen yargısal denetime tabi olmaktadır (Mignon, 1951). Hukuk devleti-hükümet tasarrufları arasındaki bağlantıyı vurguladıktan sonra hükümet tasarrufunun tanımına ve bu tasarrufları diğerlerinden ayıracak ölçütlerin saptanmasına geçebiliriz.

Hükümet tasarruflarının doğum yeri olan Fransa'da ilk başlarda hükümet tasarrufunu diğer idari tasarruflardan ayırmak için "siyasi saik" ölçütü kullanılmıştır. Buna göre, bir tasarruf Hükümet (İdare) tarafından siyasi bir saikle yapılmışsa hükümet tasarrufu olarak adlandırılır. Yani tasarrufu yaparken sözkonusu olan saikin "siyasi" olması, bir idari tasarrufu "hükümet tasarrufu" haline getirir ve yargı denetimi dışında bıraktırır. Yargı organlarının siyasi denetim değil, hukukilik denetimi yaptıkları ön kabulü çereçevesinde bu sonuç anlaşılabilir. Ancak "siyasi saik"ten ne anlaşılması gerektiği veya neyin siyasi olmadığı konusu tartışmaya açıktır. Kamu hukukunun özel hukuktan farklı olarak ayrıntılı düzenlemelere sahip olmadığı bilinmektedir. Kamu

hukukunun bu özelliğinin, kamu adına çalışan kurumların ve görevlilerin hareket alanını daraltmamak, kamu adına verilen kararların değişen zaman ve koşullara uyum sağlaması ortadan kaldırmamak amacından kaynaklandığı belirtilmektedir. Ancak bu durum, kamu ajanlarının boşlukta karar verdiği, verebileceği anlamına gelmemektedir; sadece düzenlemelerin genellik ve objektiflik düzeyi ile ilgilidir. Anayasa, yasa gibi yazılı kuralların yanı sıra, bu metinlerdeki boşlukların doldurulması yolundaki genel prensiplerden söz edilebilir (Erkut, 1996). Hukuk devleti olma iddiasına sahip bir yönetimin tasarruflarının keyfi, hukuki kurallarla kayıtlanmamış tasarruflarda bulunabileceği söylenemez. Hukukun üstünlüğünün savunulduğu, iktidarın sınırının hukuki esaslarla çizilmeye çalşıldığı bir sistemde, olağanüstü dönemlerde yapılacak eylem ve işlemlerin de çerçevesi belirlenmiştir. "Zaruret"e vurgu yapılan bir dönemde de yöneticilerin ve vatandaşların tabi olacağı kurallar vardır ve önceden bilinmektedir. Kısacası, olağanüstü rejim hukuksuzluk rejimi değildir.

Saikin siyasi olup olmadığını hangi organın, kurumun saptayacağı da bir başka sorundur. Almanya'daki uygulamada, tasarrufun siyasi olup olmadığı konusunda takdir mahkemenindir. 1949 Bonn Anayasası'nın kabülünden sonraki dönemde hükümet tasarruflarının yargısal denetim dışında kalması mümkün görünmemektedir.

Saikin siyasi olup olmadığını bizzat hükümetin saptaması durumunda devletin hukuka bağlılığı ilkesini zedeleyecek uygulamalar olabilir. Hükümet elindeki bu olanakla yaptığı tüm tasarrufları hükümet tasarrufları olarak niteleyebilir ve böylelikle tasarruflarının yargısal denetim dışında kalmasını

sağlayabilir. Sonuçta neyin siyasi olduğu hukuk tarafından bilinemez bir noktadır. Bunun yanısıra saikin siyasi olduğunun hükümet tarafından belirlenmesi de keyfi uygulamalara yol açabilir. Kısacası, siyasi saik anlayışının hukuki bir değeri olmaması yanısıra tasarruflar bakımından hukukun dışına çıkmaya olanak sağlamak gibi bir tehlikeyi barındırmaktadır. Fransa'da da, eski Hikmet-i Hükümet anlayışıyla da paralellikleri bulunan "siyasi saik" ölçütünün yetersizliği ve sakıncaları görülmüş ve özellikle 1875 tarihli Prince Napeleon kararından itibaren kullanılmamaya başlanmıştır (Virally, 1952; Giritli, 1958).

Hükümet tasarruflarını, diğer hukuki tasarruflardan ayırt etmek için kullanılan bir başka ölçüt de idare ile hükümet, idare işlevi ile hükümet işlevi birbirinden ayrıştırma çabasına dayanmaktadır. Yasaların süreğen ve günlük uygulaması, kamu hizmetlerinin düzenli bir şekilde devamı için yapılması gerekli tasarruflar, idari tasarrufları; "amme hizmetlerinin ifasını temin", "dış ve iç emniyeti korumak için yapılan esaslı tasarruflar" hükümet tasarrufları olarak adlandırılmıştır(Onar, 1966). Ancak buradaki zorluk da, hükümet ile idarenin işlevlerinin birbirinden ayırdedilebilmesi için yukarıdaki sayma yöntemi dışında, "maddi ve uzvi" bir ölçüt bulunamamasıdır. Zira hükümet de idare de yürütme organı ve işlevi içinde yer almaktadır. Bu konuda Onar da Giritli de benzer düşünceyi savunmaktadır. Sarıca ise Onar ve Giritli'den farklı olarak , idare ile hükümet işlevinin birbirinden rahatlıkla ayrılabileceğini, ancak bu ayrımın "hukuki bakımdan değil de; ancak gayeleri ve maksatları yönünden" olabileceğini söylemektedir. Kanımca, hükümet ile idareyi "gayeleri ve maksatları" itibariyle ayırma çabasının sorunlarından birisi,

"milletin yüksek, fevkalade menfaatlerini"n tanımlanması ve "günlük alelade ihtiyaçlar"dan ayırdedilmesinin hukuken saptanmasındaki zorluktur. İdare hukukunda, işlem ve eylemlerin genel maksadı "amme yararı"nı sağlamak değil midir? Bu yararın "fevkalade" veya "alelade"liği neye göre belirlenmektedir? Burada objektif bir ölçütten çok subjektif bir değerlendirmeden söz edilebilir.

Onar, hükümet-idare ayrımını esas alarak girişilen ölçüt geliştirme çabalarını, tasarrufun saiki yerine "mahiyeti"nden hareket ettiği için olumlamakla birlikte bu ayrımın yapılmasının da siyasi bir değerlendirmeye bağlı olduğu ve bu açıdan saik ölçütü ile benzeştiğini belirtmektedir. İkinci ölçütün de hukuki değil siyasi bir tabana dayanması sonucu hükümet tasarruflarını, bir ölçüt yerine içtihatların yardımıyla saptamak ve tanımlamak yoluna gidilmiştir ve bu şekilde hükümet tasarrufları başlığı altında sıralanan bir liste oluşturulmuştur. Hükümet tasarrufları doktrini ve uygulamasının ana vatanı olan Fransa'da, Devlet Şurası ve Uyuşmazlık Mahkemesi içtihatları esas alınarak bu tür tasarruflar, sayma yoluyla belirtilmiştir(Giritli, 1958).

Gerek Fransa'daki gerekse Türkiye'deki hükümet tasarrufları kategorisini oluşturan mahkeme kararlarını ele aldığımızda, hükümet tasarrufları alanının zaman içinde daraldığını söyleyebiliriz. Hükümet tasarrufları listesinin kısalmasında dört eğilim saptanabilir. Bunlardan birincisi, daha önceden hükümet tasarrufları kategorisinde yer alan konunun, yapılan yasal düzenleme ile kategori dışı kalmasıdır. Ancak hükümet tasarruflarının içtihadi niteliği üzerinde durduğumuzdan bu eğilim bizim için fazla bir önemi yoktur. İkinci bir eğilim, hükümet tasarruflarına konu olan bazı tasarrufların

"acte mixte" kavramı çerçevesinde değerlendirilmeye başlanmasıdır. Ancak bu başlık altında yer alan işlemlerin de yargısal denetime tabi olmadığı düşünülürse, sonucu değiştirmeyen bir uygulamadan söz edildiği anlaşılabilir. Bir başka etiket değişimi de "acte detachable" ile gerçekleşmiştir ama buradaki değişim biçimsel olarak kalmamış, tasarruf bünyesinin olanak vermesi halinde- "yargılanabilir"- "yargılanamaz" parçalarına ayrılmış ve bunun sonucunda kısmi de olsa yargısal denetime tabi kılınmıştır. Listenin kısalmasını sağlayan dördüncü eğilim ise hükümet tasarruflarının takdir yetkisi içinde eritilmeye çalışılmasıdır. Bu başlık mahkemelerin kararlarından ziyade bu konuda düşünce üreten araştırmacıların görüşleri ile beslenmektedir. Hukuk devleti anlayışı içinde, idarenin bazı tasarruflarının yargısal denetim dışı tutulmasının kabul edilemez olduğu noktasından hareket eden düşünürler, her ne kadar bazı konularda hükümete hareket edebileceği bir alan kalması gerektiğini vurgulasalar da, çözümü konunun takdir yetkisi içinde değerlendirilmesi ve böylece yargısal denetime tabi kılınmasında görmektedirler (örneğin Mignon, Virally, Onar, Savcı, Giritli). Fakat takdir yetkisinin yargısal denetiminden ne anlaşılması gerektiği de sorunlu bir konudur. Onar'a göre, hükümet tasarruflarının içinde yer alabileceği takdir yetkisinin denetimi yapılırken mahkeme yalnızca konu ve yetki unsurları bakımından inceleme yapabilir; Savcı da benzer görüşü paylaşmaktadır. Ancak bugün gelinen noktada, hükümet tasarruflarında olduğu gibi takdir yetkisinin denetimi konusunda da yargısal denetim alanının genişlediği söylenebilir. Daha önce belli unsurları yönünden incelenen bu yetkinin sebep ve maksat unsurları yönünden dahi denetlenebileceği belirtilmektedir. Hatta yapılan idari işlemin sebebinin açıkça

belirtilmemesi durumunda bile mahkeme söz konusu tasarrufun "makul" bir sebebe dayanıp dayanmadığını saptamaya çalışarak yaptığı denetime "sebep" unsurunu da dahil etmekte ve böylece yargısal denetim alanı genişlemektedir.

Hükümet Tasaruflarının tanımında olduğu gibi Siyasi Sorun Doktrininin tanımlanması da, gerek konuyla ilgilenen hukukçuları ve yazarları gerekse de yargıçları fazlasıyla meşgul etmiştir. Gelinen noktada da, doktrinin ölçütleri üzerinde bir görüş birliğinden sözetmek zordur. Siyasi Sorun Doktrininin uygulamasında, ilgili mahkeme, davanın konusuna bakarak, sorunu çözecek kararın, hükümetin yasama veya yürütme gibi "siyasi" bölümlerinden birisi tarafından verilmesi gerektiğini söyleyerek karar vermekten kaçınır. Böylece sorun, yargı alanının dışında bırakılır. Işleyen süreç meşrudur. Ama davanın esasını oluşturan belli unsurlar, ilgili mahkemeyi karar vermekten alıkoymaktadır. Strum'a (1974) göre, Siyasi Sorun Doktrininde anahtar sözcük "siyasi" bölümlerdir ve sorun, siyasi olduğu savlanıp, yargı alanının dışında tutulduğu sürece, kuvvetler ayrılığı sisteminin ve yargısal denetimin varlığına rağmen, yargının gerçek işlevinin reddedilmesi sözkonusudur.

Yargının siyasetle ilgisinin olmadığı ve yönetim dışınsa, tarafsız ve bağlantısız bir kurum olduğu genel kabulü, doktrini besleyen ana kaynaklardan birisidir. Bunu dikkate alan yargı organı, verdiği kararların yönetim yapısı içinde rahatsızlık yaratacağını, toplumsal dengeleri değştireceğini düşündüğü noktalarda, Siyasi Sorun Doktrinine başvurmaktadır.

"Siyasi" kelimesinin değişik anlamlarını ele alan Williams (1992), Yüksek Mahkeme'nin farklı düzeylerde "siyasi" olduğunu belirtmektedir. Ayrıca, hukuki yönü yanında siyasi özelliği de bulunan temel bir belge olan

anayasayı bir araç olarak kullanan ve genel ilkeleri içeren bu belgeyi, önüne gelen somut soruna uygulamak için yorum yapması gereken anayasa yargısıyla görevli bir mahkemenin, toplumsal ve siyasal etkilere kapalı kalarak karar alması olanaklı değildir. Bu çerçevede, doktrinin yaratıcısı olan Yükse Mahkeme'nin siyaset-hukuk ikilemini yansıtan Siyasi Sorun Doktrininin anlaşılması için belli ölçütler oluşturulmaya çalışılmıştır.

Seçim bölgelerinin yeniden belirlenmesi konusu, hem bu ölçütleri sunması hem de doktrinin göreli niteliğini göstermesi bakımından önemlidir. Baker-Carr Davası'nın karara bağlandığı 1962 yılına kadar Yüksek Mahkeme, hatalı bölgelemeyi kabul etmemekte ve 1946 yılında kendi alanını daraltmayı seçerek karara bağladığı Colegrove-Green Davası'ndaki ilkeleri kullanmaktaydı. Ancak Baker- Carr Davası'yla, Anayasa'nın 14. Değişikliği'nde yer alan, yasaların eşit himayesi hükmüne gönderme yapılarak seçim bölgelerinin düzenlenmesi konusunun, mahkemelerin yargılama alanı içinde olduğu ve konunun yargılanabilir nitelik taşıdığına karar verildi. Yüksek Mahkeme, 1962 yılında, Baker-Carr davası'nda, 1946da karara bağladığı Colegrove-Green Davası'nın aksine, yeniden bölgelendirme ve seçimle igili konuların yargı alanına girdiğine karar vermiştir. Bu dava dolayısıyla Yüksek Mahkeme, "siyasi sorun" terimine de açıklık getirmeye, önüne gelen bir konunun "siyasi" olup olmadığını saptayacak ölçütler geliştirmeye çalışmıştır. Sözkonusu ölçütler şöyle sıralanabilir: Anayasa'da siyasi bir birimin faaliyet alanına girdiği kabul edilen konular; sorunu çözmek için gereken yargısal değerlendirme ölçütlerinin olmaması; temel bir siyaset belirlemesi yapılmaksızın karar verilemeyecek olması, siyasal birimin alanına tecavüz

etmeksizin karar verilemeyecek olması; zaten alınmış bir siyasal karara müdahalenin gereksiz olması; aynı ihtilaf ile ilgili olarak, farklı bölümlerin farklı kararlar vermesi olasılığının bulunması. Mahkeme, önüne gelen bir davada, bu ölçütlerden birini veya birkaçını saptaması durumunda, konunu siyasi bir sorunu içerdiğini savlayarak "yargılanamaz" olduğuna hükmedecektir. Bu ölçütler de, Siyasi Sorun Doktrini gibi eleştirilere uğramaktadır. Bir yandan, ölçütlerin objektif olmadığı vurgulanmaktadır. Diğer yandan, doktrinin Amerikan anayasacılık anlayışına, hukuk düzeninin yargısal denetimle gözlenmesi ve güçlendirilmesi eğilimine ters düştüğü ifade edilmektedir. Yargının alanının sınırlanmasının, diğer organların, özellikle yürütmenin güçlenmesiyle sonuçlanacağı savlanarak doktrine karşı çıkılmaktadır. Siyasi alanla hukuki alanın ilişkisinin, zaman içinde büyük değişikliklere uğradığını savlayan bir diğer görüş de, doktrinin bu değişme çerçevesinde gözden geçirilmesi gerekliliğine işaret etmektedir. Strum'a (1974) göre, Mahkeme'nin 1960'larda, 1940'lardakinden farklı davranmasını nedeni, aldığı kararın uygulanma koşullarını görmesinden kaynaklanmaktadır. 1960'larda, ideolojik havanın değiştiğini ve bunun da mahkemeyi aktif davranmak yönünde etkilediğini bir başka uzman, Schick de (1984) ileri sürmektedir. "büyük Toplu" anlayışının yükselmeye başlaması ve toplumsal eylem kavramını öne çıkmasıyla birlikte, yargı daha önce "yargılanamaz" dediği konuları kendi alanına almaya, yargılamaya başlamıştır.

Türkiye'deki Anayasa Mahkemesi'nin de Siyasi Sorun Doktrinini hatırlatan uygulamaları olagelmektedir ve seçimlerde uygulanan barajlar bu uygulamaların konusunu oluşturmaktadır. Anayasa Mahkemesi'nin seçim

yasalarına ilişkin olarak süreç içinde siyasi sorun doktrinine bakışını, kullandığı ölçütleri ve kararlarını değiştirmiştir. Öncelikle belirtmek gerekir ki Anayasa Mahkemesi, söz konusu kararlarında, "siyasi sorun" terimini kullanmamakta, "kanun koyucunun taktiri", "yasama organının takdiri" vb. terimlerini yeğlemektedir. Ancak kararlar okunduğunda, idare hukukunda hükümet tasarrufları-idarenin takdir yetkisi arasında yapılmaya çalışılan ayrımın, burada söz konusu olmadığını, Türk Anayasa Mahkemesi terimlerinin A.B.D. Yüksek Mahkemesi'nin "siyasi sorun doktrini" terimiyle benzer özelliklere sahip olduğunu söyleyebiliriz.

Türkiye'deki ilgili uygulama, Türkiye İşçi Partisi (TİP) Millet Meclisi Grubu'nun, Milletvekili Seçimi Kanunu'na bazı maddeler eklenmesi hakkındaki 20.3.1968 gün ve 1036 sayılı yasanın Anayasa'ya aykırı olduğunu ileri sürerek yasanın iptalini istemesiyle başlamıştır, denilebilir. Bu yasayla "Barajlı d'Hondt" sistemi getirilmekteydi.

1961 (aynı şekilde 1982 Anayasası) Anayasası seçim sistemleri hakkında bir hükme ve düzenlemeye yer vermemiştir. 1961 Kurucu Meclisi, Millet Meclisi için d'Hondt sistemini, Senato için ise çoğunluk sistemini kabul etmiştir. 1964 yılında çıkarılan Seçim Kanunu ile Cumhuriyet Senatosu seçimlerinde de d'Hondt sistemi uygulanmıştır. 1965 yılında yapılan değişiklikle "Ulusal Artık Sistemi"ne geçilmiş, bu sistem küçük partilerin temsil edilmelerine olanak tanımış, nitekim TİP 15 milletvekili ile Meclis'e girmiştir.

Nihayet 23.3.1968 tarih ve 1036 sayılı Yasa ile her iki Meclis için "Barajlı d'hondt Sistemi" kabul edilmiştir. Bu sistem, büyük partilere küçük partiler aleyhine olarak avantaj sağlamaktadır.

İptali talep eden taraf esas bakımından şu gerekçelere dayanmaktadır: T.C. Anayasası çok partili siyasi hayatı demokrasinin vazgeçilmez unsuru saymaktadır, Anayasada bütün fikir akımlarının devlet yönetimine yansıması ilkesi ve ekonomik yönden güçsüz olanların siyasi alanda kendi partileri aracılığıyla aktif rol oynamaları düşüncesi benimsenmiştir. İptali istenen yasa ile getirilen barajlı d'Hondt sistemi yukarıda belirtilen düşüncelere aykırı olduğu gibi, seçme ve seçilme haklarının özünü zedelemekte, Adalet Partisi'ni (AP) tek başına iktidarda tutmayı hedeflemekte TİP'ni ve genellikle küçük partileri tasfiye etmeyi amaçlamaktadır. Bu haliyle kabul edilen yeni seçim kanunu çok partili siyasi hayatın özünü tahribe yönelmiştir.

Anayasa Mahkemesi de esasa ilişkin incelemesinde, 32. maddenin 4. fikrasını adaletten uzak hukuki sakıncaları olan ve demokrasi dışı bir düzenleme olarak nitelemiştir

Anayasa Mahkemesi barajlı seçim sisteminin, Anayasa'nın 2. maddesinde yer alan demokratik hukuk devleti ilkesiyle bağdaşmadığını da belirtmektedir.

Anayasa Mahkemesi, Anayasa'nın 55/1. maddesinde yer alan seçme ve seçilme hakkı bakımından iptali istenen yasayı, "suni bir engel" kavramı ile Anayasa'ya aykırı bulmuştur. İptal istemi Anayasa'nın 55/2. maddesinde yer alan serbestlik ilkesi açısından da değerlendirilmiştir. Mahkeme, iptali istenen

yasayı, çok partili siyasi hayat ve siyasi partilerin serbestçe faaliyette bulunmaları ilkelerine de dolaylı bir müdahale saymış, yasanın anılan hükmü ile bir bölüm siyasi partilerin, siyasi hayatın vazgeçilebilir unsurları olduğu sonucunu doğuracağını savunmuştur.

Aynı konunun, çeşitli seçim yasalarını anayasaya uygunluğunun denetlenmesi bakımından Mahkeme önüne getirildiğini görmekteyiz.

Ancak bu süreç içinde 1982 Anayasası'nın yürürlüğe girmesi siyasi konjonktürün ve bunun Yasama Meclisi ile Anayasa Mahkemesi'ne yansıması sonucu olarak 1984/1 Esas Sayılı kararda durum siyasi sorun doktrini lehine gelişmiştir. "Anayasa Mahkemesinin kararları" başlığını taşıyan 153. maddenin 2. fikrasındaki "Anayasa Mahkemesi bir kanun veya kanun hükmünde kararnamenin tamamını veya bir bölümünü iptal ederken, kanun koyucu gibi hareketle, yeni bir uygulamaya yol açacak biçimde hüküm tesis edemez" hükmü de Anayasa Mahkemesi'nin 1980 öncesi verdiği, içinde sözünü ettiğimiz seçim yasasına ilişkin kararında önemli bir yer tuttuğu kararlara bir tepki olarak düşünülebilir. 1968 yılındaki kararda çoğunluğu oluşturan görüş, bu kez aynı argümanları kullanarak sözkonusu karara karşı oy yazarken, önceki kararın muhalifleri görüşleri aynı görüşlerle iptal istemini reddetmiştir. Kullanılan argümanlar aynı olmakla birlikte yasa koyucunun takdir yetkisinin açık seçik dile getirildiği görülmektedir.

Mahkeme, iptali istenen 2972 sayılı yasa ile getirilen seçim sisteminin parlamento düzeyinde "siyasal istikrarı" sağlama amacına yönelik olarak uygulandığını oysa bu güne kadar nisbi temsile göre oluşturulan mahalli meclislerde bu türden bir istikrarsızlığın görülmediği, söz konusu sistemin

getirilmesine gerek olmadığı ileri sürülmüştür. Mahkeme esas hakkındaki görüşlerini, her seçim sisteminin farklı siyasi görüşlerden kaynaklandığını, nisbi temsil sistemi yönünden "temsil ve adalet", çoğunluk sistemi yönünden de "istikrar"ın haklı neden olduğunu, siyasi tercih konusu olan seçim sistemlerini, Anayasa'nın diğer hükümlerine uygun olmak koşuluyla eşitlik ilkesi yönünden yargılayıp, sonuca varmanın doğru olmadığı şeklinde geliştirmiştir. Bir seçim sisteminin eşitliğe ve adalet ilkesine ağırlık vermesi istikrarsızlığa neden olacağı gibi, istikrara ağırlık verilmesi de eşitliği ve adaleti zedeleyebilir. Böylece sorun seçim sistemlerinin hangisinin faydalı ya da sakıncalı olduğu tartışmasına ulaşır ki, bunun takdiri yasa koyucuya ait olacaktır. Halkın serbest iradesini açıklama yollarını kapamayan, siyasi hayatı tek partinin tekeline bırakmayan, çok partili sistemi yok etmeyen herhangi bir seçim sistemi için karar vermek yasama organının takdirindedir. Bu karar ile siyasi sorun doktrinini tanımakta, hatta geniş ölçüde temellendirmektedir. Bu kararda siyasi sorun doktrinine ölçütler getirilmektedir. Bu ölçütler şunlardır:

i. Anayasa seçim sistemleri için buyurucu bir kural koymamıştır. Üst norm yasa koyucuya serbest bir alan tanımaktadır.

ii. Yasa koyucunun düzenlemesi hakkın özünü zedeler nitelikte değildir.

iii. Yasa koyucunun tercihine müdahale yerindelik denetimi anlamını taşır ki, anayasaya uygunluk denetimi bakımında bu husus mahkemeyi ilgilendirmemektedir.

Mahkeme, 1988 yılında da benzer bir karar vermiştir. İptali istenen 3420 sayılı yasa ile, mahalli seçimlere katılabilme koşulu olarak partilerin

örgütlenmek zorunda oldukları il sayısı ve ilçe sayısı barajı getirilmiştir. Mahkeme esasın incelenmesi sırasında ve gerekçesinde, Anayasa ilkelerini zedelemeyen, demokratik toplum düzeninin gereklerine aykırı olmayan, hakkın özüne dokunmayan düzenlemelerin, seçme ve seçilme hakkını olumsuz biçimde etkilemeyeceğini, "makul" ve "kabul edilebilir" ölçüyü aşmayan sınırlamaların Anayasa'ya aykırılığının söz konusu olamayacağını, burada getirilen düzenlemenin oyların gereğinden fazla bölünmesini önleyerek istikrar sağlamaya yönelik olduğundan hakların özüne dokunmadığı gibi demokratik toplum düzeninin gereklerine aykırı bulunmadığı belirtilmiştir. Anayasa'nın 68. maddesi yönünden ise, getirilen barajların makul ve kabul edilebilir bir sınırlama olduğu savunularak iptal istemi red edilmiştir.

Anayasa Mahkemesi kararlarında, siyasi sorun doktrini bakımından bazı ölçütlerin geliştirildiği ve bunların uygulamada istikrar kazandığı görülmektedir. Türk Anayasa Yargısı'nda siyasi sorun doktrini yasama organının takdir hakkı kavramı ile ifade edilmiş, ikisi arasında bir ayırım geliştirmeye yeterli ölçüt ve görüşler konmamıştır. Esasen bu iki kavramın, ayrı olmadığı da ileri sürülebilir. Türk Anayasa Yargısı'nda da Siyasi Sorun Doktrini, Amerika Birleşik Devletleri'ndeki doktrine benzer şekilde, seçim yasaları nedeniyle gündeme gelmiş ve işlenmiştir. Bunun yanısıra her iki ülkede de, ilgili mahkemelerin değişen konjonktüre bağlı olarak iki ana hareket biçimine sahip olduğu söylenebilir: Yargısal alanı daraltarak denetim yapmaktan ve sorunu çözmekten kaçınmak veya sorunu üstlenip çözerek siyasal yaşama olumlu yönde katkıda bulunmak.

VITA

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